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Date: **23 January 2024**

THE APPEALS CHAMBER

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF
THE PROSECUTOR V. BOSCO NTAGANDA

Public

Public Redacted Version of "Response on behalf of Mr Ntaganda to the Appeal Brief of the Common Legal Representative of the Victims of the Attacks against the "Addendum to the Reparations Order of 8 March 2021, ICC-01/04-02/06-2659"", ICC-01/04-02/06-2889-Conf, dated 2 January 2024

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

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Further to the Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled "Reparations Order" rendered on 12 September 2022 ("Appeals Judgment"),[1] the Addendum to the Reparations Order of 8 March 2021 issued by Trial Chamber II on 14 July 2023 ("14 July Addendum")[2] and the Appeal Brief of the Common Legal Representative of the Victims of the Attacks ("CLR2") against the 14 July Addendum on 30 October 2023 ("CLR2 Appeal Brief"),[3] Counsel representing Mr Ntaganda ("Defence" or "Convicted Person") 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 "Addendum to the Reparations Order of 8 March 2021, ICC-01/04-02/06-2659"

("Response to CLR2 Appeal Brief")

INTRODUCTION

1. The CLR2 submits three grounds of appeal in support of his appeal against the 14 July Addendum. The Defence opposes the CLR2's First and Third grounds of appeal. As for the CLR2's Second ground of appeal, it comprises three sub-grounds, which are also opposed. In respect of sub-ground 2.2 however, the Defence concurs that Trial Chamber II committed reversible errors when determining the reparations award for victims of the attacks, albeit different from the errors alleged by the CLR2.

2. The CLR2's First ground of appeal is directed at Trial Chamber II's estimation of the number of direct and indirect victims of the attacks in the case, *i.e.* 7,500.[4] The Defence takes the view that despite the way Trial Chamber II estimated

[1] Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled "Reparations Order,"12 September 2022, ICC-01/04-02/06-2782 ("Appeals Judgment").
[2] Addendum to the Reparations Order of 8 March 2021, ICC-01/04-02/06-2659, 14 July 2023, ICC-01/04-02/06-2858 ("14 July Addendum").
[3] Appeal Brief of the Common Legal Representative of the Victims of the Attacks against the "Addendum to the Reparations Order of 8 March 2021, ICC-01/04-02/06-2659", 30 October 2023, ICC-01/04-02/06-2875 ("CLR2 Appeal Brief").
[4] CLR2 Appeal Brief, paras.39-86.

the number of victims of the attacks in the case, which was complex, contentious, and time-consuming, and although Trial Chamber II committed errors in the process, its estimate of 7,500 victims of the attacks in the case was as concrete as possible in the circumstances, as well as based on sufficiently strong evidence.

3. The CLR2's Second ground of appeal is directed at Trial Chamber II's determination of the reparations award for victims of the attack.[5] The Defence takes the view that relying on its estimation of 7,500 victims of the attacks in the case, Trial Chamber II followed the correct procedure to determine the cost to repair the harm suffered by victims of the attacks. However, Trial Chamber committed errors and abused its discretion in the process.

4. The CLR2's Third ground of appeal is directed at Trial Chamber II's determination of the eligibility of victims in the sample.[6] This ground of appeal is closely related to the Fourth and Fifth grounds of appeal of the Defence appeal against the 14 July Addendum, more particularly at certain eligibility criteria and Trial Chamber II's determination of the non-eligibility of certain victims of the attacks who suffered harm in the woods or bush. The Defence takes the view that Trial Chamber II correctly determined the non-eligibility of these victims.

5. Despite submitting that the CLR2's three grounds of appeal should be denied, the Defence submits that Trial Chamber II committed errors and abused its discretion when determining the reparations award for victims of the attacks, which invalidate the cost to repair the harm suffered by these victims determined by Trial Chamber II. Although the Defence did not appeal the reparations award determined by Trial Chamber II, the fact that Trial Chamber II erred in this regard was

[5] CLR2 Appeal Brief, paras.87-106.
[6] CLR2 Appeal Brief, paras.107-123.

mentioned in the Notice of appeal submitted on behalf of the Convicted Person.[7] The Defence deems it appropriate to underscore in this regard, that the errors committed by Trial Chamber II are related to the sample assembled by the Registry pursuant to Trial Chamber II's instructions, which was not representative.

6. The Defence takes the opportunity to highlight the fact that the Appeals Chamber has yet to adjudicate on the requests for suspensive effect submitted by the CLR2[8] and the Defence[9] as part of their respective notices of appeal in accordance with the applicable case law. Considering that the Registry is likely to be ready to commence the conduct of eligibility determinations,[10] the Defence respectfully submits that ruling on these requests at this time is in the interest of victims as well as in the interest of justice.

7. Lastly, the Defence also takes this opportunity to underscore that the CLR2 and the Defence appeals against the 14 July Addendum raise complex legal and procedural issues, the adjudication of which could be facilitated by the scheduling of oral arguments before the Appeals Chamber. Moreover, the Defence respectfully submits that the adjudication of certain legal issues such as for example the IHL civilian status presumption, could benefit from *amicus curiae* submissions.

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[7] Defence Notice of Appeal against the 14 July Addendum to the Reparations Order of 8 March 2021, 16 August 2023, ICC-01/04-02/06-2863, para.5.

[8] Notice of Appeal of the Common Legal Representative of the Victims of the Attacks against the "Addendum to the Reparations Order of 8 March 2021, ICC-01/04-02/06-2659, and Request for Suspensive Effect in relation to Trial Chamber II's Decision on the eligibility of Victims a/01636/13, a/00212/13, a/00199/13 and a/00215/13, 16 August 2023, ICC-01/04-02/06-2862 ("CLR2 Notice of Appeal against the Addendum"), paras.37-43.

[9] Request for the Defence appeal against the Addendum issued by Trial Chamber II on 14 July 2023 to be given suspensive effect, 16 August 2023, ICC-01/04-02/06-2864; Defence Notice of Appeal.

[10] *See for instance,* First Decision on the Trust Fund for Victims' Draft Implementation Plan for Reparations, 11 August 2023, ICC-01/04-02/06-2860, para.187.

CONFIDENTIALITY

8. Pursuant to regulation 23bis (1) and (2) of the Regulations of the Court, this Response to CLR2 Appeal Brief is classified confidential as it refers to documents bearing the same classification. A public redacted version will be prepared and filed at the earliest opportunity.

SUBMISSIONS

I. CLR2's First ground of appeal

Trial Chamber II's estimation of 7,500 victims of the attacks in the case is, in the particular circumstances of this case, as concrete as possible, as well as based on sufficiently strong evidential basis

9. The CLR2's submissions in support of his First ground of appeal are presented in two sub-grounds, which can be summarized as follows.

10. In the First sub-ground, the CLR2 submits that Trial Chamber II erred in law, fact and in the exercise of its discretion by failing to provide an estimate of the number of potential victims of the attacks in the case that is as concrete as possible and based upon a sufficiently strong evidential basis.[11] More particularly, he posits that Trial Chamber II erred by: (i) disregarding concrete and corroborative figures provided by the Registry and the CLR2, obtained from different, independent and identifiable sources; (ii) disregarding its own prior findings; and (iii) choosing to rely on the unsupported submissions of the TFV and the Defence.[12]

[11] CLR2 Appeal Brief, para.43.
[12] *See* CLR2 Appeal Brief, para.62.

11. Then, the CLR2 submits in his Second sub-ground, that Trial Chamber II committed errors of fact amounting to an abuse of the Trial Chamber's discretion.[13] More specifically, he avers that Trial Chamber II erred by (i) taking into account irrelevant information, namely unsubstantiated estimates and projections provided by the TFV; and (ii) failing to take into account relevant information, namely information, facts, and evidence provided by the Registry and the CLR2.[14]

12. In clear, the CLR2 submits that Trial Chamber II's conclusion, that

> "[…] the approximate number of direct and indirect […] (ii) victims of the attacks in the case, as referred to in Counts 1, 2, 3, 4, 5, 7, 8, 10, 11, 12, 13, 17, and 18 of the Conviction Judgment, would amount to approximately 7,500 individuals in total."[15]

does not constitute an estimate of the number of potential victims of the attacks in the case that is *as concrete as possible* and *based upon a sufficiently strong evidential basis.*[16]

13. The Defence opposes the CLR2's First ground of appeal. In the particular circumstances of this case and based on the facts and information before it, Trial Chamber II's estimation of 7,500 direct and indirect victims of the attacks in the case constitutes an estimate *that is as concrete as possible*, although it amounts to an absolute maximum.[17] Moreover, even though the Defence takes the view that Trial Chamber II erred when approving the sample assembled by the Registry, which was

[13] CLR2 Appeal Brief, para.85.
[14] *See* CLR2 Appeal Brief, para.85.
[15] 14 July Addendum, para.320.
[16] *See* CLR2 Appeal Brief, para.43.
[17] The Defence takes the view that the actual total number of victims of the attacks in the case, likely to come forward, is between 2,276 and an absolute maximum of 7,500.

not a representative sample,[18] this did not materially impact its *estimation* of the number of victims of the attacks in the case.

14. The CLR2's First ground of appeal focuses on the assumption that Trial Chamber II could and should have used the population size of the affected villages to estimate the number of potential beneficiaries of reparations, and Trial Chamber II's consideration of (i) figures publicly available in this regard; (ii) the related information obtained by the Registry; and (iii) the estimates provided by the TFV relied upon by Trial Chamber II. In response, the Defence submits that Trial Chamber II appropriately considered but did not rely on the population size method; correctly considered all the information available, including documents referred to by the CLR2, information obtained by the Registry and estimates provided by the TFV; neither erred in law or in fact nor abused its discretion in doing so; and that its estimation of the number of potential victims of the attacks in the case, meets the *as concrete as possible* and *based upon a sufficiently strong evidential basis* standard.

15. Considering the similarity of the CLR2 submissions for sub-grounds 1 and 2, the Defence will address the substantive arguments advanced by the CLR2 for both sub-grounds together, leading to the conclusion that Trial Chamber II's estimation of 7,500 direct and indirect victims of the attacks in the case met the as concrete as possible and based upon a sufficiently strong evidential basis and that the CLR2 failed to demonstrate that Trial Chamber II abused its discretion in reaching this estimation.

[18] Submissions on behalf of the Convicted Person on the procedure for the constitution of the sample established by the Implementation Order, 9 November 2022, ICC-01/04-02/06-2791, paras.16-36; Defence further submissions on transgenerational harm and the estimated total number of potential beneficiaries, 30 January 2023, ICC-01/04-02/06-2823, paras.55-58; Defence Notice of Appeal against the 14 July Addendum to the Reparations Order of 8 March 2021, 16 august 2023, ICC-01/04-02/06-2863, para.3.

The population size method suggested by the CLR2

16. The CLR2 submits that "the most efficient and pragmatic method for the Chamber to estimate the number of potential beneficiaries of reparations eligible as direct victims was to rely on the population size of the affected villages at the time the crimes were committed"[19] and that the Chamber "erred in the exercise of its judicial discretion by entirely disregarding the Legal Representative's submissions supported by several corroborative sources"[20] and the Registry's 2023 figures.[21] Both submissions are incorrect.

17. First, as the CLR2 acknowledges,[22] he previously argued on many occasions that the population size of the affected villages at the time the crimes were committed is the most efficient and easiest way to determine the number of potential beneficiaries of reparations.[23] Notably, on 9 November 2020, the CLR2 officially requested Trial Chamber VI to order the Registry to collect such information.[24] In its response to the CLR2 request, the Registry recalled that "following its mapping exercise, it estimated that there may be at least approximately 1,100 new potential applicants - victims of the attacks […]" which "represents an estimate of the minimum number of individuals for which the Registry was fairly confident, based

[19] CLR2 Appeal Brief, para.45.
[20] CLR2 Appeal Brief, para.62.
[21] CLR2 Appeal Brief, par.64.
[22] CLR2 Appeal Brief, para.44.
[23] Submissions by the Common Legal Representative of the Victims of the At tacks on Reparations, 28 February 2020, ICC-01/04-02/06-2477, paras.71-72; 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, 21 April 2020, ICC-01/04-02/06-2518, paras.15-16; Final Observations on Reparations of the Common Legal Representative of the Victims of the Attacks, 18 December 2020, ICC-01/04-02/06-2633, paras.112-115; Request of the Common Legal Representative of the Victims of the Attacks for an Order to the Registry to collect information pertaining to reparations, 9 November 2020, ICC-01/04-02/06-2624 ("CLR2 Request for an Order"), paras.17- 30; CLR2 Appeal Brief against the 8 March Reparation Order, paras.60,64-73,77,81-82; Submissions by the Common Legal Representative of the Victims of the Attacks pursuant to the 25 October 2022 Order and 25 November 2022 Decision, 30 January 2023, ICC-01/04-02/06-2820, para.45.
[24] Request of the Common Legal Representative of the Victims of the Attacks for an Order to the Registry to collect information pertaining to reparations, 9 November 2020, ICC-01/04-02/06-2624.

on data collected thus far as part of its mapping exercise."[25] Significantly, the Registry added that "[i]n the course of its mapping exercise, the Registry sought to obtain approximate figures and basic information regarding the pre-war population in the Case locations […]. However, the authorities consulted during this exercise at the time were not in a position to link any more individuals to the crimes for which Mr Ntaganda was convicted based on the information available to them then, nor did they have information as to the current situation and whereabouts of any individuals or groups beyond those included in the Registry mapping exercise"[26] and that although "[t]he Registry considers that there may be more potential applicants coming forward during the registration process […] it does not anticipate the number to be exponentially higher than the one established thus far during the mapping exercise."[27] The Single Judge of Trial Chamber VI denied the CLR2 request recalling *inter alia,* that "[t]he number of victims at the time when the crimes were committed *may be a starting point*, but other parameters for determining what reparations are appropriate include considerations about the reparation measures envisaged and the number of victims that are likely to come forward and benefit from reparations, 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'"[28]

[25] Registry's Observations on the "Request of the Common Legal Representative of the Victims of the Attacks for an Order to the Registry to collect information pertaining to reparations" of 9 November 2020, ICC-01/04-02/06-2624, 18 November 2020, ICC-01/04-02/06-2627 ("Registry Observation on CLR2 Request for an Order"), para.17

[26] Registry Observation on CLR2 Request for an Order, para.18.

[27] *Idem*. *See* also Defence response to "Request of the Common Legal Representative of the Victims of the Attacks for an Order to the Registry to collect information pertaining to reparations", 9 November 2020, ICC-01/04-02/06-2624, 20 November 2020, ICC-01/04-02/06-2628, opposing the CLR2 request.

[28] 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 2020, ICC-01/04-02/06-2631 ("Decision on CLR2 Request for an Order"), para.17, referring to *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-Red, para.89 (emphasis added).

18. When the CLR2 reiterated the same arguments in Ground 1 of his appeal against the 8 March Reparations Order,[29] the Defence opposed his submissions based on the absence of "official information available regarding the size of the population in the various villages of Ituri"[30] confirmed, *inter alia,* 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"[31] and the CLR2's omission to consider the numerous and significant population movements in Ituri between 2001 and 2003.[32] More importantly, the Defence submitted that the main defect in the CLR2's argument is the "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 […]; (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."[33]

19. Hence, in determining the number of potential beneficiaries of reparations, figures regarding the population size of the affected villages – ***if available*** - may be a **starting point** providing that these figures accurately reflect the number of individuals: (i) present within the specific geographical boundaries of the village; (ii) present in the village at the very beginning of the commission of the crime directed at or in the village as found in the Conviction Judgment; (iii) who qualified as

[29] Appeal Brief of the common Legal Representative of the Victims of the Attacks against the Reparations Order", ICC-01/04-02/06-2674 ("CLR2 Appeal Brief against the 8 March Reparation Order"), 7 June 2021, paras.60,64-73,77,81-82.
[30] 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", 9 August 2021, ICC-01/04-02/06-2702 ("Defence Response to CLR2 Appeal Brief against the 8 March Reparation Order"), para.26.
[31] **P-0453**: DRC-OTP-2084-0523, pp.0556-0557.
[32] Defence Response to CLR2 Appeal Brief against the 8 March Reparation Order, para.26.
[33] Defence Response to CLR2 Appeal Brief against the 8 March Reparation Order, para.27.

protected persons at the time because they were not taking an active part in the hostilities; and (iv) who suffered harm specifically as a result of the violation. From this starting point, other parameters are also relevant, such as "the number of victims that are likely to come forward and benefit from reparations, 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'".[34]

Figures publicly available and the CLR2's related submissions

20. Regarding the population size of the affected 13 villages *at the time* the crimes were committed, raised yet again by the CLR2, Trial Chamber II correctly noted that "it was not proven at trial that Mr Ntaganda was liable for crimes committed against the entirety of the 13 communities included in the conviction"[35] and "[a]ccordingly, the methodology for calculating the total number of victims of the attacks proposed by the CLR2 cannot be relied upon in relation to all 13 villages included in the conviction, as this would include individuals that cannot be considered victims of the crimes for which Mr Ntaganda was convicted."[36]

21. Indeed, as underscored by Trial Chamber II on numerous occasions, "[…] in order to be entitled to reparations in the Ntaganda case, victims must have suffered harm as a result of a crime for which Mr Ntaganda has been convicted. As stressed by the Appeals Chamber, 'reparation orders are intrinsically linked to the individual whose criminal liability is established in the conviction […].'"[37] Notably, Mr Ntaganda was *not* found guilty of the crimes referred to by the CLR2 as mass crimes

[34] Decision on CLR2 Request for an Order, para.17, referring to *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-Red, para.89.
[35] 14 July Addendum, para.300.
[36] 14 July Addendum, para.301
[37] *See* Decision on issues raised in the Registry's First Report on Reparations, 15 December 2020, ICC-01/04-02/06-2630 ("15 December Clarification Decision"), para.11.

- namely Count 3 (attacks directed at civilians) or Counts 12 and 13 (forcible transfer / ordering the displacement of civilians) — for five of the thirteen locations.[38] Moreover, Trial Chamber II rightly considered the distinction between official figures and the number of persons present "at the time of the crimes at the different villages."[39] This number is impacted in at least two ways: (i) inhabitants of a village may have left before the beginning of the commission of the crimes, which stresses the need for population figures reflecting the situation precisely at that time; and (ii) persons taking an active part in the hostilities must be excluded from the population figures. For example, evidence adduced at trial establishes the presence of many persons taking an active part in the hostilities in affected villages when the second operation began, including *inter alia*, 3,000 Lendu combatants in Bambu.[40] Regarding the latter, as argued in Ground 4 of the Defence appeal against the 14 July Addendum,[41] persons taking an active part in the hostilities do not qualify as potential victims of crimes against civilians, *i.e.* Counts 3, 12 and 13. The CLR2's argument in this regard is wrong.[42] As for the former, notably, the ethnic conflict in Ituri, which gave rise to the events in this case, began as early as 1999 and population movements during the period from 1999 to 2003 were numerous and regular.[43] This was particularly the case in 2002 and 2003 before and after operations launched by various militias. For example, evidence adduced at trial establishes that Lendu combatants coming from many different places, including Lipri, Kpandroma, Fataki and Djugu attacked and occupied Sayo at various times in the preceding 12 months, chasing out the Hema and mistreating the population, including by cutting

[38] Nzebi, Kilo, Sangi, Nyangaray and Gola. Although positive findings for persecution were entered in the Conviction Judgment for these villages, these relate to the underlying acts referred to.
[39] 14 July addendum. para.301
[40] **P-0127**: T-140,12:21-24; DRC-OTP-1033-0222,06:34-06:50. *See also* **P-0863**: T-181, p.58:2-5.
[41] *See* Defence Appellant Brief against the 14 July Addendum to the Reparations Order of 8 March 2021, 30 October 2023, ICC-01/04-02/06-2876, paras.97-105.
[42] CLR2 Appeal Brief, para.61.
[43] There were many attacks directed at Mongbwalu and Sayo by various militias before and after the first operation and the composition of the population of Mongwalu often changed as a result. See **P-800**: T-69-CONF-ENG, pp.67-68.

ears and practicing cannibalism.[44] As regards Mongwalu, Prosecution witness P-0907, whom Trial Chamber VI found to be credible,[45] agreed that members of the Hema ethnic group were chased out in 2002, that they started to leave before July and that the majority started to move from the month of July.[46]

22. Regarding the LRV2's submission, based on a UN report and the internet link to the World Gazetteer, that the population of Mongbwalu shrunk from 80,000 in 2002 to 26,176 in 2004, Trial Chamber II correctly held that it "cannot conclude that the population in Mongbwalu shrunk between 2002 and 2004 or rely on these figures for Mongbwalu to project estimations as to the total number of beneficiaries of reparations in the case."[47] First, Trial Chamber II underscored the low probative value of UN reports in general, and observed yet again that the UN report referred to by the CLR2 itself has low probative value because it "does not cite any source or reference to the affirmation that the population in Mongbwalu amounted to around 80,000 people in 2002."[48] Second, Trial Chamber II appropriately noted that the World Gazetteer, "apart from not containing any reference in support to the source of information on the estimate it includes for the year 2004, does not contain data from previous census for Mongbwalu."[49]

23. It is noteworthy in this regard that even if it was possible to establish that the population of Mongbwalu changed from 80,000 in 2002 to 26,176 in 2004, these figures would not be of assistance in determining with any degree of precision, the population of Mongbwalu at the beginning of the first operation or how many inhabitants departed from Mongbwalu, and when, as a result of the first operation.

[44] **P-907:** T-91-CONF-ENG, p.31; **P-886**: T-39-CONF-ENG, pp.25-30,54.
[45] Judgment, 8 July 2019, ICC-01/04-02/06-2359, paras.223-224.
[46] **P-0907**: T-89: p.12, ll.20-25; **P-0907:** T-91: p.28
[47] 14 July Addendum, para.302.
[48] *Idem*.
[49] *Idem.*

For population size figures to be relevant and probative, they must be much more precise.

24. As for the LRV2's submission - based on the same UN report having low probative value - that around 60,000 persons were displaced in the *shika na mukono* operation,[50] Trial Chamber II correctly concluded that "this estimate cannot be relied upon by the Chamber"[51] for two reasons: (i) because this affirmation is not supported by any reference to the source of information; and, more importantly (ii) because "Mr Ntaganda was not convicted for the crimes committed within the context of the entire *shika na mukono* operation."[52] It is noteworthy in this regard that Trial Chamber VI did not make any findings concerning the geographical, material or temporal scope of the so-called *shika na mukono* operation in the Conviction Judgment.

25. Regarding the CLR2's argument that the UN Report referred to should have been "assessed at the relevant standard of proof – *i.e.* on the balance of probabilities, which is a lower threshold […] to determine the population size of the affected localities,"[53] it is incorrect. The probative value of a document is determined to a significant extent by its reliability.[54] A document having low probative value because it does not cite any source or reference, and as such is not reliable, should not be relied upon, particularly in the absence of other evidence, and even more so if it is of no assistance in resolving the issue at hand. The probative value of a document does not change depending on the standard of proof.

[50] CLR2 Appeal Brief, para.47.
[51] 14 July Addendum, para.302.
[52] *Idem*.
[53] CLR2 Appeal Brief, para.73
[54] *See The Prosecutor v. Germain Katanga*, Decision on the Prosecutor's Bar Table Motions, 12 May 2011, ICC-01/04-01/07-2635, paras.20-21.

Information obtained by the Registry

26. The CLR2 then refers to figures obtained and provided by the Registry in 2020 and 2023 and submits that all of these were inappropriately disregarded.[55] This is incorrect. Trial Chamber II carefully considered the figures provided by the Registry both in 2020 and 2023 and concluded that it was "unable to rely on the recent numbers provided by the Registry to project estimations as to the total number of beneficiaries of reparations in the case."[56]

27. Concerning the figures provided in 2020, Trial Chamber II referred to the figures provided in the Registry's observations,[57] noting *inter alia* that "[…] the Registry reported that (i) 'just before the conflict, roughly 8,000 people lived in Kobu'; (ii) regarding Bambu 'just before the conflict roughly 5,000 people lived in the area and [...] roughly 6,000 people in the Yalala *groupement* suffered from the conflict and remain in the area.'"[58]

28. Significantly, the identity of the sources of this information was not disclosed to the Defence, which in and of itself, is problematic. Moreover, reference is made by the sources who provided this information to: (i) Kobu – 8,000 people who lived *in the area* before the 'conflict' (as opposed to 'attack' or 'operation') and that many had come from other villages, without more;[59] (ii) Bambu: before the conflict (as opposed to 'attack' or 'operation'), roughly 5,000 people lived *in the area* and many worked in the Kilo-moto mining company, which ended its activities long before;[60] and (iii) Yalala: roughly 6,000 people in the Yalala groupement (which appears to be the

[55] CLR2 Appeal Brief, para.64.
[56] 14 July Addendum, para.307.
[57] Annex II to Registry's Observations on Reparations, 28 February 2020, ICC-01/04-02/06-2475-Conf-AnxII-Red ("Registry 2020 Figures").
[58] 14 July Addendum, para.303.
[59] Registry 2020 Figures, p.12.
[60] Registry 2020 Figures, p.13.

same as Bambu), suffered from the conflict (as opposed to 'attack' or 'operation').[61] The sole positive finding referring to Yalala mentions Camp Yalala, the exact location of which is unknown. On its face, and even before considering the contradictions noted by Trial Chamber II between these figures and those obtained by the Registry in 2023, in some cases by the same source,[62] the limited information provided is of little assistance, if any, to establish the population size of these villages, at the relevant time, and even less so to be used as a starting point in determining the number of potential victims of the attacks in the case.

29. As for the figures obtained by the Registry *in extremis* in January 2023, Trial Chamber II noted with surprise that in its most recent filing "[…] the Registry sharply deviates from its prior consistent submissions, indicating that those estimates were 'conservative' and collected in the context of a 'limited and carefully targeted approach aimed at identifying individuals […] for whom it could be said with a relative degree of certainty – still based only on secondary sources consulted – that they suffered harm as a result of at least one of the crimes subject to conviction'.[63]

30. Proceeding to analyze the information provided by the Registry in January 2023 - without disclosing the identity of the sources thereof to the Defence - Trial Chamber II appropriately observed: "when submitting the results of the preliminary mapping exercise in 2020, the Registry clearly identified the sources of information for each location";[64] "the information providers referred to in the 2020 mapping report do not appear to be only 'secondary sources', as they are now referred to by the Registry, but individuals who were mostly present during the conflict and had

[61] *Idem.*
[62] 14 July Addendum, para.305.
[63] 14 July Addendum, para.304.
[64] *Idem*.

experienced it";[65] "[a]s to the latest numbers […] regarding the population purportedly living in the localities before the attacks, the Chamber notes that, when compared to the information also provided by the Registry as a result of the preliminary mapping exercise in 2020: (i) the sources of information consulted in 2023 seem to be markedly less (only four individuals, compared to 19 who seem to have been consulted in 2020) and only limited and vague information is provided about them; (ii) the grouping of population made in order to provide estimates in 2023 seem to include villages/locations excluded from the conviction or in relation to which the conviction is limited to specific acts only; (iii) there are considerable (unexplained) differences regarding the only two locations for which concrete numbers were provided in 2020. In effect, for Kobu the numbers went up from 'roughly 8,000 people' to 'between 15,000 to 18,000', with the source of information in 2020 appearing to be more related to the facts than those referred to in 2023. For Bambu the numbers went up from 'roughly 5,000 people' to 'between 12,000 to 13,000', with the source of information appearing to have been exactly the same."[66]

31. The Defence was also astonished by the information provided by the Registry in January 2023,[67] leading it to immediately submit a request before Trial Chamber II seeking leave to make additional submissions related to the *new* Registry approach and information.[68] The issues raised in the Defence request, which underscored concerns like that of Trial Chamber II and more, are incorporated herein by reference. Notably, the CLR2 opposed the Defence request,[69] which was denied by

[65] *Idem*.
[66] 14 July Addendum, para.305.
[67] Registry Submission in compliance with the "Order for the implementation of the Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled 'Reparations Order'" (ICC-01/04-02/06-2786), 30 January 2023, ICC-01/04-02/06-2822 ("Registry 30 January 2023 Submissions").
[68] Defence request for leave to file further submissions regarding the Registry 30 January submissions in compliance with the Trial Chamber's Implementation Order and 25 November Decision, 6 February 2023, ICC-01/04-02/06-2826.
[69] Response of the Common Legal Representative of the Victims of the Attacks to the "Defence request for leave to file further submissions regarding the Registry 30 January submissions in compliance

Trial Chamber II on the basis that the procedure in place did not call for responses, and without considering the merits thereof.[70] The Defence takes the view that Trial Chamber II erred in doing so but opted not to appeal this decision considering Trial Chamber II's analysis of the Registry 30 January 2023 Submissions.

32. It is also noteworthy, as further noted by Trial Chamber II, "[…] that, precisely in response to a request from the CLR2 for the Registry to obtain further information on the numbers of victims, the Registry affirmed in November 2020 that (i) in the course of the mapping exercise, it had sought to obtain approximate figures and basic information regarding the pre-war population in the case locations, as well as the linkage between relevant individuals and groups of crimes for which Mr Ntaganda was convicted; (ii) it consulted authorities during the exercise, who '*were not in a position to link any more individuals to the crimes for which Mr Ntaganda was convicted*'; and (iii) although more applicants may come forward later '*it [did] not anticipate the number to be exponentially higher* than the one established thus far during the mapping exercise'."[71]

33. In addition, although the Registry attempted to obtain information regarding the population size of affected villages at the relevant time from the DRC Government *proprio motu* by way of a *note verbale*[72] - without informing Trial Chamber II or the parties, which the Defence avers is problematic - no such information was obtained.

34. Lastly, regarding the population size issue, the CLR2 submits that Trial Chamber II disregarded or misapplied its previous findings related to an additional

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with the Trial Chamber's Implementation Order and 25 November Decision", 8 February 2023, ICC-01/04-02/06-2828.

[70] Decision on the Defence Request for leave to file further submissions regarding the Registry 30 January submissions in compliance with the Trial Chamber's Implementation Order and 25 November Decision, 15 February 2023, ICC-01/04-02/06-2831.

[71] 14 July Addendum, para.306.

[72] Registry 30 January 2023 Submissions, para.22.

category of potentially eligible *direct victims* […] namely, the victims originating from any other location, provided they suffered harm in the forest or bush surrounding the affected localities under "*positive findings*" at the time of the events.[73] The Defence takes issue with the CLR2's submission, which is the object the CLR2's Third ground of appeal to which the Defence responds below.[74] The CLR2 misunderstands the decision issued by Trial Chamber VI on 15 December 2020 and his submission on this point fails.

35. In sum, regarding the population size issue, the CLR2 noted that Trial Chamber II "[…] assessed the weight of the Legal Representative's and the Registry's information, but ultimately rejected them as being unreliable, contradictory and/or not based on concrete sources."[75] Nonetheless, the CLR2 submits that "[t]he fact that the crimes for which Mr Ntaganda was convicted affected 13 entire villages, coupled with the UPC/FPLC's predetermined aim to drive out all the Lendu from the localities targeted and resulting in large-scale victimisation, provided sufficient objective reasons for the Chamber to rely on the population sizes of the affected localities for the purpose of estimating the number of potential beneficiaries of reparations."[76] This is incorrect.

36. Although Trial Chamber II held that it could not rely on the information obtained by the Registry regarding the population size of some of the affected villages, Trial Chamber II attached significant weight to information provided by the Registry regarding potential participating victims and *new* potential victims.[77] However, Trial Chamber II found that the documents referred to by the CLR2 and the information provided by the Registry concerning the population size of certain villages were unreliable, contradictory and had low probative value. Accordingly,

[73] CLR2 Appeal Brief, paras.50-51.
[74] *Infra,* paras.103-135.
[75] CLR2 Appeal Brief, para.83.
[76] *Idem.*
[77] 14 July Addendum, paras.303-306.

Trial Chamber II held that it could not rely on this information in estimating the number of potential beneficiaries of reparations. Contrary to the CLR2's submission,[78] no objective reason can justify relying on information having low probative value and/or which is not reliable. To do so would amount to an abuse of judicial discretion. Moreover, even if these documents and information were reliable, they would have been no more than the starting point of the detailed factual inquiry required in the circumstances.

37. Considering the foregoing, Trial Chamber II rightly concluded that it "[…] cannot agree with the CLR2's submission that that the total number of potential beneficiaries should be roughly estimated by the Chamber as at least 100,000 people 'based on the evidence available on the record', since, as detailed above, the evidence on the record does not support such a conclusion."[79]

Information and estimates provided by the TFV

38. Consequently, having discounted the possibility of relying on the most recent estimates provided by the parties and the Registry, the Chamber proceeded to assess the calculations provided by the TFV, considering the rest of the evidence and information available in the case file.[80]

39. The CLR2 takes issue with Trial Chamber II's reliance on the figures submitted by the TFV concerning the number of potential victims of the attacks in the case. Noting that Trial Chamber II itself acknowledged that "[…] the estimated number of victims is *"based on projections with an* uncertain basis", while the TFV indicated that it was in "*no position to provide an estimate*", and that the "*figures provided are therefore not estimates* [but] *numbers that the Trust Fund currently considers*

[78] *See* CLR2 Appeal Brief, para.73.
[79] 14 July Addendum, para.307.
[80] 14 July Addendum, paras.310-319.

that it is capable of accommodating within the amount of liability set by the Trial Chamber",[81] the CLR2 "[…] ***questions*** whether the Chamber's decision to rely on a figure corresponding to the TFV's minimum estimate of only 7,500 direct victims of attacks which was further limited by the Chamber to include both direct and indirect victims, is a reasonable use of its discretionary decision making."[82]

40. The Defence concurs *in part* with the deficiencies associated with the TFV figures, which affect their probative value. The Defence previously observed that these figures reflected the number of victims the TFV considered it was capable of accommodating within the 30 million-award in the 8 March Reparations Order as opposed to an estimate of the Number of potential beneficiaries in the case.[83] In its submissions in support of Grounds 1, 2 and 3 of its appeal against the 14 July Addendum, the Defence also highlighted the inappropriate reliance of Trial Chamber II on the TFV Updated Implementation Plan as a result of its failure to issue a new order for reparations as it was instructed to do. Significantly, however, Trial Chamber II did not only rely on the figures provided by the TFV but also considered other relevant and probative information in the TFV 30 January submissions. More importantly, Trial Chamber validated the estimate provided by the TFV using information and figures provided by the Registry and provided sufficient reasons in this regard.[84]

41. Notably, although the CLR2 noted many deficiencies associated with the figures provided by the TFV, all of these were acknowledged by Trial Chamber II, which took them into consideration in weighing the information provided by the TFV, both in its Updated Implementation Plan and in its 30 January 2023, submissions related to the number of potential beneficiaries of reparations in the

[81] CLR2 Appeal Brief, para.75 (footnotes omitted).
[82] *Idem* (footnotes omitted and emphasis added).
[83] Observations on behalf of the convicted person on the Trust Fund for Victims' Updated Draft Implementation Plan, 18 May 2022, ICC-01/04-02/06-2765, para.45.
[84] 14 July Addendum, paras.312-318.

case.[85] For example, the Chamber acknowledged that "[…] the TFV was '*cautious in noting that the calculations were imprecise*'"[86] and noted that "[…] '*its calculations were not exact estimations*', and that the TFV had applied a '*very conservative approach.*'"[87] Trial Chamber II also recalled that "[…] the TFV specified that its calculations were not exact estimations, qualifying them as an 'educated guess.'"[88] However, Trial Chamber II noted that "[…] the TFV projected them considering the need to work with concrete numbers for the DIP's purposes, and elaborated the plan taking into account the information obtained during its consultations with various sources and stakeholders […]"[89]

42. Regarding the absence of a list of identifiable sources for the information provided by the TFV, Trial Chamber II agreed with the CLR2 that it would have been preferable for the TFV to provide to provide additional information as to the sources it consulted.[90] The Chamber noted however "[…] that the TFV held consultations and meetings with different individuals, which served to inform its projections as to the number of victims."[91]

43. Then, noting that Trial Chamber II decided not to rely on "*the full 21,500 potential victims of the attacks projected by the TFV, but only on the projection of 7,500 direct and indirect victims that would have suffered psychological, physical and material harm,*"[92] the CLR2 submitted that "[…] it appears that the Chamber decided to pick a figure between the TFV's conservative estimation and the Defence's estimation of the number of potential beneficiaries of reparations, and decided that 7,500 would be sufficient to accommodate both the TFV's minimum possible estimation and the

[85] For instance, the Chamber "took into account that the TFV itself acknowledged that its projections were not objective estimates but simple calculations."
[86] 14 July Addendum, para.311.
[87] 14 July Addendum, para.310.
[88] *Idem.*
[89] *Idem.*
[90] 14 July Addendum, para.312.
[91] *Idem*.
[92] 14 July Addendum, para.311.

Defence's opposition to the maximum 21,500 estimation provided by the TFV."[93] This is incorrect and the CLR2 has shown no error in this regard.

44. Indeed, Trial Chamber II explained why it decided not to "[…] consider any further the TFV's estimation at least 14,000 indirect victims who would have suffered primarily psychological harm would qualify as victims having suffered transgenerational harm," as it did in relation to child soldiers[94] for whom the TFV estimated that "[…] approximately 3,000 victims suffered material, psychological and often physical harm as a result of crimes against child soldiers, and that, in addition, at least 6,000 indirect victims would have suffered transgenerational harm."[95]

45. Regarding the TFV's additional estimate that at least 6,000 indirect victims would require psychological treatment because of transgenerational harm, Trial Chamber II explained that "[…] the Chamber has clearly indicated that only children of direct victims may qualify as beneficiaries of reparations when claiming to have suffered transgenerational harm. As such, these victims would be already included in the previous calculation of the TFV which referred to 3,000 direct and indirect victims of these crimes. Consequently, the Chamber does not consider such estimate to require further consideration."[96]

46. Significantly, Trial Chamber II validated its reliance on the TFV estimate of 7,500 direct and indirect victims of the attacks in the case using information provided by the Registry based on its preliminary mapping exercise. First, Trial Chamber II referred to known figures, *i.e*. the total number of participating victims of the attacks in the case (1,837) from which it subtracted the number of participating victims of the attack previously considered by the Registry as being beyond the

[93] CLR2 Appeal Brief, para.68.
[94] 14 July Addendum, para.319.
[95] 14 July Addendum, para.289.
[96] 14 July Addendum, para.298.

geographical scope of the case based on the positive findings in the Conviction Judgment. The resulting figure (1,176) represents the total number of participating victims of the attacks in the case.[97]

47. Trial Chamber II then considered the number of additional victims of the attacks likely to come forward during the implementation phase, based on the mapping exercise conducted by the Registry, *i.e.* 1,100.[98] This figure is corroborated by the further field work conducted by the Registry in 2022 during which 780 new victims were identified, whom the Registry considers are largely included in the 1,100 potential victims likely to come forward.[99]

48. Trial Chamber II completed its inquiry by considering the Registry's submission, based on information obtained in January 2023, that the figure of 2,276 direct and indirect victims of the attacks (participating and additional victims of the attacks likely to come forward – 1,176 + 1,100) did not consider the members of the population present in the affected villages at the relevant time, who departed from the affected villages at various times and who have yet to return.[100] In other words, the figure of 2,276 does not consider potential victims who could have but did not submit a request to participate in the proceedings because they were away.[101]

49. Based on the information obtained in January 2023,[102] 70% of the population residing in the area at the time had not yet returned when the Registry conducted its mapping exercise. Hence, Trial Chamber II concluded that the number of 2,276 direct and indirect victims of the attacks was the result of 30% of the population having had the possibility to come forward, and that it was appropriate to extrapolate this

[97] *See* 14 July Addendum, paras.316-317.
[98] 14 July Addendum, paras.316-317.
[99] Registry Observations on Updated DIP, 18 May 2022, ICC-01/04-02/06-2766, para.19.
[100] 14 July Addendum, para.17.
[101] *Idem*.
[102] Registry 30 January 2023 Submissions, para.19.

figure to account for 70% of the population, who have not yet had the possibility to come forward.[103]

50. On this basis, Trial Chamber II concluded that 5,311 additional potential victims of the attack need to be considered, *i.e.* 5,311, yielding a total result of 7,587 potential victims of the attacks in the case.[104]

51. On the one hand, the figure obtained validates[105] Trial Chamber II's reliance on the TFV estimate of 7,500 direct and indirect victims of the attacks, even though there is no relationship between the two methods.

52. On the other hand, the figure obtained can be challenged from many angles, including, *inter alia*, the reliability of the information obtained by the Registry that 70% of the population has yet to return; whether the 70% of the population which has yet to return departed from the affected villages as opposed to from the area; and how many members of the population - considering that submitting a claim for reparations is voluntary - will actually submit a claim.

53. Then again, it is necessary to recall that the aim at this stage is for Trial Chamber II to determine an estimate of the total number of potential victims in the case, as concrete as possible of course,[106] so that the implementation of reparations can proceed without delay.

54. The reliability of the information obtained by the Registry is a serious issue. Based on Trial Chamber II's assessment of the way this information was obtained, including the reliability of the sources of this information – unknown to the Defence unfortunately – the weight that can be accorded to this information appears at best

[103] 14 July Addendum, para.17.
[104] *Idem*.
[105] 14 July Addendum, para.318.
[106] *See* Appeals Judgment, para.165.

limited. Although the Convicted Person accepts and agrees with the assumption that members of the population in the area departed at various times and did not have an opportunity to come forward, the Defence respectfully submits that there is merit in validating the 70% figure through further consultations in the field with independent sources not prone to, or affected by, any conflict of interest.

55. Notably, as part of its submissions on the number of potential victims in the case, the TFV submitted that it "[…] learned from consultations with leaders of certain affected localities that around the time of the two attacks, a very high number of persons lived in the affected areas. The number given at the time was above 100,000 and included persons from all different grouips living in Ituri (e.g. Hema, Lendu, etc)."[107] However, "[a]t the time the attacks took place, most of the inhabitants had already left the relevant areas and, thus, do not appear therefore to necessarily fall in the scope of the conviction."[108] Thus, "[…] given the very limited geographical and temporal scope of the conviction in particular for the crimes of forcible transfer and deportation the Trust Fund considers that those victims who had already left cannot be considered eligible for these crimes."[109]

56. Consequently, taking the above into account and considering the various reasons why potential victims may not come forward, the Defence submits that the *estimate* of 7,500 potential direct and indirect victims of the attacks in the case is certainly the maximum. Thus, the actual number of potential victims of the attacks who will come forward in the end, will be between 2,276 and 7500.

57. This will depend largely on the eligibility criteria adopted as well as on the conduct of the eligibility determination assessments by the Registry. For the

[107] Trust Fund for Victims' Submission pursuant to Trial Chamber II's decisions on the implementation of the Appeals Chamber Judgment against the Reparations Order, 30 January 2023, ICC-01/04-02/06-2819, para.45.
[108] *Idem*.
[109] *Idem*.

Convicted Person, this remains the priority, *i.e.* ensuring that only genuine victims benefit from reparations, and that the implementation of reparations in the DRC does not cause more harm than good.[110]

58. Turning to the submissions of the CLR2, the Defence submits that Trial Chamber II's estimation of the total number of potential victims of the attack in the case meets the appliable test, namely it is '*as concrete as possible*' as well as '*based upon a sufficiently strong evidential basis'*.[111] The CLR2 has demonstrated no error on the part of Trial Chamber II; nor did he succeed in showing that the estimate of 7,500 direct and indirect potential victims of the attacks in the case amounts to an abuse of Trial Chamber II's discretion.

Trial Chamber II's errors related to the sample

59. The Appeals Chamber partially reversed the 8 March Reparations Order, finding that Trial Chamber VI failed to "make any appropriate determination in the relation to the number of potentially eligible or actual victims of the award [and] provide an appropriate calculation, or set out sufficient reasoning, for the amount of the monetary award against Mr Ntaganda […]."[112]

60. The Appeals Chamber took the view that "[…] in the instant case, the Trial Chamber ought to have examined at least a sample of applications from victims prior to arriving at its determinations on those matters […]"[113] and concluded that

[110] *See* Defence Appellant Brief against the 14 July Addendum to the Reparations Order of 8 March 2021, 30 October 2023, ICC-01/04-02/06-2876 ("Defence Appellant Brief against the 14 July Addendum"), Ground 4.
[111] *See* Appeals Judgment, para.165.
[112] Appeals Judgment, p.11.
[113] Appeals Judgment, para.342.

the Trial Chamber "[…] erred by failing to rule on at least a sample of applications and that this error necessarily materially affected the Impugned Decision."[114]

61. Although taking the view that Trial Chamber II's estimation of 7,500 direct and indirect potential victims of the attacks in the case constitutes an estimate *as concrete as possible* in the particular circumstances of this case, as well as *based on a sufficiently strong evidential basis*, the Defence submits that Trial Chamber II committed errors of law and procedure by failing to implement the Appeals Chamber's instructions concerning the sample.

62. The Appeals Chamber further held that "[…] the information contained in the sample of applications for reparations may be essential to a determination of the types of harm and the cost to repair the harm with respect to all beneficiaries, including those who come forward only at the implementation stage of the proceedings. Ruling on applications from a sample, which must be a representative one, may allow a trial chamber to extrapolate the makeup of the entire group of beneficiaries, according to the types of harm suffered by victims from each sub-group. This, in turn, is relevant to the ultimate determination of the amount of the award."[115]

63. Trial Chamber II failed to assemble a *representative* sample. Consequently, the sample was of little to no assistance to Trial Chamber II in estimating the number of potential victims of the attacks in the case. Moreover, statistics drawn from the sample by Trial Chamber II are erroneous because the sample was neither representative of victims who participated at trial, nor of the makeup of the entire group of beneficiaries who wish to receive reparations in the case.

[114] Appeals Judgment, para.345.
[115] Appeals Judgment, para.341.

64. Following Trial Chamber II's instructions in the Implementation Order,[116] the Defence submitted detailed observations on the proposed procedure to assemble a sample of victims' dossiers.[117] The observations comprised summary conclusions provided by an expert *actuary* in the field of statistics applied to the assessment of harm and the calculation of the cost of repair, including in the context of judicial proceedings. In sum, the Defence submitted that:

> "[…] the procedure for the constitution of the sample is flawed, and that as a result, the sample envisioned by the Chamber would not be representative, whether from a quantitative or qualitative point of view. More importantly, for the reasons set out below, the Defence respectfully submits that the sample sought to be assembled by the Chamber would not cure the defects of the Reparations Order as it is of no assistance in determining the total number of potential victims or in providing an appropriate calculation for the amount of the monetary award against the Convicted Person.[118]

65. More particularly, the Defence submitted, *inter alia,* that: (i) victims already determined by the TFV to be eligible for reparations in the context of the IDIP should not be included in the sample; (ii) victims already determined by the Registry as being beyond the scope of the positive findings in the Conviction Judgment should not be included in the sample; (iii) the number of dossiers of non-participating victims in the sample was insufficient; and (iv) the size of the sample was to small, and as such, not a representative sample. These, and additional detailed submissions

[116] Order for the implementation of the Judgment on the appeals against the decision on Trial Chamber VI of 8 March 2021 entitled "Reparations Order", 25 October 2022, ICC-01/04-02/06-2886 ("Implementation Order"), para.34, Dispositions.
[117] Submissions on behalf of the Convicted Person on the procedure for the constitution of the sample established by the Implementation Order, 9 November 2022, ICC-01/04-02/06-2791 ("Defence 9 November Submissions"), paras.16-46.
[118] Defence 9 November Submissions, para.8.

supported by the expert *actuary*, in the Defence 9 November Submissions are incorporated herein by reference.[119]

66. Trial Chamber II rejected the Defence submissions, and proceeded to approve the sample assembled by the Registry pursuant to its instructions.[120] Trial Chamber II also rejected[121] the Defence request seeking leave to appeal Trial Chamber II's decision on the sample.[122] It is noteworthy that Trial Chamber II denied the Defence leave to appeal request mainly on the basis that the Defence did not seek leave to appeal the Implementation Order,[123] in which the Trial Chamber invited submissions from the parties and the TFV on the procedure to assemble the sample. The Defence submits that Trial Chamber II erred in this regard.

67. As expected, based on the Defence 9 November Submissions,[124] the sample assembled and ruled upon by Trial Chamber II proved to be of no assistance in determining the total number of victims of the attacks in the case. As a result, the estimation of the number of victims of the attacks in the case by Trial Chamber II was much more complex, contentious and time-consuming. The result, although as concrete as possible in the circumstances, lacks a scientific foundation.

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[119] Defence 9 November Submissions, paras.16-46, with its Annex, 9 November 2022, ICC-01/04-02/06-2791-AnxI.
[120] Decision on the Registry submission in compliance with the "Order for the implementation of the Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled 'Reparations Order'", 25 November 2022, ICC-01/04-02/06-2794 ("25 November Decision").
[121] Decision on the Application on behalf of Mr Bosco Ntaganda seeking leave to appeal Decision on the Registry submission in compliance with the "Order for the implementation of the Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled 'Reparations Order'", 21 December 2022, ICC-01/04-02/06-2805 ("Decision on Defence Request Leave to Appeal").
[122] Application on behalf of Mr Bosco Ntaganda seeking leave to appeal Decision on the Registry submission in compliance with the "Order for the implementation of the Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled 'Reparations Order'", 2 December 2022, ICC-01/04-02/06-2797.
[123] *See* Decision on Defence Request Leave to Appeal, paras.19,27.
[124] *See* Defence 9 November Submissions, para.8,16,42-46.

68. More importantly, whereas Trial Chamber II referred to statistics drawn from the results of its determinations of the eligibility of victims in the sample to determine the number of child soldier victims in the case – even though it is not raised in this appeal -, these statistics are impacted by the non-representativeness of the sample. To provide but one example, according to Annex III to the 14 July Addendum,[125] there are no indirect child soldiers victims in the sample. Other mistakes are identifiable in Annex III, which impacts, *inter alia*, the calculation regarding the cost to repair for different types of harm, and consequently the reparations award.

69. In its Fourth and Fifth Grounds of appeal against the 14 July Addendum, the Defence submitted that Trial Chamber II erred: (i) in respect of the eligibility criteria and procedure adopted by Trial Chamber II based on its determination of the eligibility of the victims in the sample;[126] (ii) by failing to provide the Defence with a meaningful opportunity to make submissions on the victims' dossiers in the sample.[127] The appropriate relief requested is for the Appeals Chamber to pronounce on eligibility criteria able to guide the Registry in determining the eligibility of potential victims during the implementing phase and for the Defence to be provided with all information required to be able to effectively assess the eligibility of victims in the sample. Granting the relied sought would provide the opportunity to alter the composition of the sample and ensure that it is genuinely representative.

[125] Annex III to 14 July Addendum, 14 July 2023, ICC-01/04-02/06-2858-AnxIII, p.2.
[126] Defence Appellant Brief against the 14 July Addendum, Ground 4.
[127] Defence Appellant Brief against the 14 July Addendum, Ground 5.

II. CLR2's Second ground of appeal

Trial Chamber II followed the correct procedure to determine the cost to repair the harm suffered by victims of the attacks but nonetheless committed errors and abused its discretion in the process.

70. In his Second ground of appeal, the CLR2 submits that Trial Chamber II committed a combination of errors of law, fact and procedure in determining the cost to repair for the victims of the attacks.

71. The CLR2's Second ground of appeal comprises three sub-grounds. The Defence opposes sub-grounds 2.1 and 2.3. As for the sub-ground 2.2, the Defence opposes in part the CLR2's submissions but concurs that Trial Chamber II committed errors when establishing the cost to repair the harm caused to victims of the attack.

72. In this regard, the Defence recalls mentioning in the Notice of appeal submitted on behalf of the Convicted Person, that Trial Chamber II committed errors when determining the monetary award to be paid by the Convicted Person but that it was not appealing this error.[128] Considering the CLR2's Second ground of appeal, the Defence takes the view that Trial Chamber did commit errors in determining the reparations award, which are different from the errors alleged by the CLR2.

CLR2's sub-ground 2.1

73. In this sub-ground, the CLR2 submits that "in determining the cost to repair for the victims of the attacks, the Chamber relied on a speculative total estimate of 7,500 direct *and* indirect potentially eligible victims of the attacks, rather than on estimates "*as concrete as possible and based upon a sufficiently strong evidential basis*", as

[128] Defence Notice of Appeal against the 14 July Addendum to the Reparations Order of 8 March 2021, 16 August 2023, ICC-01/04-02/06-2863, para.5.

required by the Appeals Chamber."[129] The CLR2 avers that "[i]n effect, the Chamber determined the maximum possible amount of the cost to address the harms suffered by all the victims of the attacks in the present case"[130] and submits that the fundamental issue under this sub-ground "[…] is that the allocated maximum possible amount of the cost to repair will only be capable of comprehensively addressing the harms suffered by the maximum of 7,500 victims of the attacks, being as previously submitted, a purely speculative figure […]."[131]

74. Significantly, the CLR2 acknowledges that "[t]he errors under Ground 2 are closely linked to, and result from the Chamber's errors identified under Ground 1 […]"[132] Indeed, this sub-ground is not only closely linked to the CLR2's First ground of appeal, but it also actually repeats arguments therein. On this basis alone, this sub-ground must fail.

75. The CLR2 posits that "[…] if more than 7,500 eligible victims of the attacks will come forward to obtain reparations, this will inevitably reduce the average per capita amount for the victims of the attacks […]"[133], which does not demonstrate any error committed by Trial Chamber II regarding the determination of the cost to repair the harm caused to victims of the attacks likely to come forward corresponding to its estimate of 7,500 direct and indirect victims of the attacks, in the case.

76. Whether the overall award will be adequate and whether this is discernible, are not the issues. The issue is rather whether Trial Chamber II properly determined the reparations award commensurate its estimate of 7,500 direct and indirect victims of the attacks in the case.

[129] CLR2 Appeal Brief, para.87.
[130] CLR2 Appeal Brief, para.89.
[131] CLR2 Appeal Brief, para.90.
[132] CLR2 Appeal Brief, para.87
[133] CLR2 Appeal Brief, para.90.

77. In addition, the Defence refers to its submissions in response to the CLR2's First ground of appeal that Trial Chamber II's estimate amounts to an absolute maximum and that it is more than likely that less than 7,500 victims of the attacks will come forward.[134]

78. Thus, sub-ground 2.1 must fail. As for the other submissions of the CLR2 in this sub-ground, no response is required as they are not related to the alleged error(s).

CLR2's sub-ground 2.2

79. In this sub-ground, the CLR2 submits that Trial Chamber II erred in fact and procedure by establishing the cost to repair the harm caused to victims of the attacks based on the TFV's projections related to former child soldiers.[135]

80. The Defence opposes in part the CLR2's submissions in support of this sub-ground but nonetheless takes the view that Trial Chamber II committed errors of fact as well as errors in the exercise of its discretion in establishing the cost to repair the harm caused to victims of the attack.

81. The Appeals Chamber partially reversed the 8 March Reparations Order, finding that Trial Chamber VI erred by setting the reparations award without reference to any concrete estimate of the number of victims whose harm it was intended to repair, and erred by not providing any specific information, calculations, or other reasoning as to how it reached the amount of 30 million USD.[136] Moreover,

[134] *Supra,* para.13.
[135] CLR2 Appeal Brief, paras.93-100.
[136] *See* Appeals Judgment, paras.251-252,256,746.

the Appeals Chamber concluded that it was not discernible, how it was intended to apportion that amount between the different groups of victims.[137]

82. In the 14 July Addendum, Trial Chamber II estimated the number of direct and indirect victims of the attacks in the case at 7,500,[138] which resolves the first of the above errors. Trial Chamber II then proceeded to determine the reparations award, separately for both groups of victims, explaining its methodology and providing detailed figures and calculations.[139] This resolves, *prima facie*, the second and third errors above. Thus, the issue at hand is whether Trial Chamber II committed errors in the process.

83. The CLR2 submits that Trial Chamber II erred by establishing the cost to repair the harm caused to victims of the attacks based on the TFV's projections for the former child soldier victims in the *Lubanga* case.[140]

84. First, Trial Chamber II recalled the direct relationship between the *Lubanga* and the *Ntaganda* cases. Trial Chamber II also recalled[141] that in October 2022, when the implementation of the reparations programme in the *Lubanga* case commenced, it instructed the TFV to provide updated information as to the actual costs of running the rehabilitation programmes approved in the *Lubanga* case.[142] "In particular, the Chamber requested information regarding the number of victims that can be included in the programmes, the types of services that the different categories of victims require, the overall costs per year, and any other information relevant for the estimation of the monetary award in the case."[143]

[137] Appeals Judgment, paras.253-256.
[138] 14 July Addendum, para.318, Disposition.
[139] 14 July Addendum, paras.337-360.
[140] *See* CLR2 Appeal Brief, para.93.
[141] 14 July Addendum, para.327.
[142] Implementation Order, para.38.
[143] 14 July Addendum, para.327, referring to Implementation Order, para.38.

85. Second, regarding the basis to be used to calculate the cost to repair the harms suffered by the victims of the attacks, Trial Chamber II noted that "[…] having assessed the different estimations submitted throughout the reparations proceedings, it considers that the most reliable estimates, at this stage of the proceedings, are the calculations recently provided by the TFV regarding the *Lubanga* case. In particular, the Chamber considers these estimates to be a reliable basis for the calculations as they are based on the actual costs of a reparations programme that has been designed to repair the harms of victims that although not of the same crimes they are all victims from the same region and were affected by the same armed conflict."[144]

86. Third, considering the information provided by Trial Chamber II about the *Lubanga* case, and he discussed some of the characteristics of the *Lubanga* case in his submissions,[145] the CLR2 failed to demonstrate how or why the facts and figures provided by the TFV regarding the *Lubanga* case were not reliable for the purpose of calculating the cost to repair the harms suffered by the victims of the attacks. Consequently, this part of the sub-ground must fail.

87. The CLR2 then submits that it would have been preferable for Trial Chamber II to use and refer to the *Katanga* case to determine the cost to repair the harms suffered by the victims of the attacks, due mostly to the similarity between the crimes committed during that case and the crimes for which Mr Ntaganda was convicted in this case.[146] While he raises some relevant issues, the CLR2 neither discusses the detailed figures provided by Trial Chamber II regarding the types of harm suffered by victims of the attacks or the relationship between statistics drawn from the *Lubanga* case and the sample in this case. More importantly, he does not explain how the cost to repair the harm suffered by the victims of the attacks would

[144] 14 July Addendum, para.342.
[145] CLR2 Appeal Brief, paras.93-95.
[146] CLR2 Appeal Brief, paras.96-100.

have been different if Trial Chamber II had used estimates and figures from the *Katanga* case. Consequently, this part of the sub-ground must also fail. Where the submissions of the CLR2 have merit lies elsewhere.

88. Indeed, when describing the estimates and information obtained from the *Lubanga* case, Trial Chamber II explained regarding the costs required to cover measures directed at providing physical care of victims of the attacks and the costs required to cover measures directed at providing mental care to victims of the attacks, that it was provided with figures concerning the average cost per type of care in the *Lubanga* case as well as the percentage of victims that required each type of care in the *Lubanga* case.[147] Based on these figures, used in conjunction with the sample, Trial Chamber II was able to calculate the cost of repair for 7,500 victims of the attacks under these headings. However, when addressing costs required to cover measures directed at socio-economic support of victims of the attacks, Trial Chamber II explained that it was provided with average costs but that the TFV *did not provide statistics* as to the number of beneficiaries that have benefited from this component of the service-based reparations programme in the *Lubanga* case.[148]

89. In the absence of *statistics* on the number of beneficiaries that have benefited from this component of the service-based reparations programme in the *Lubanga* case, Trial Chamber II was not able to calculate the costs required to cover measures directed at socio-economic support of victims of the attacks like it did for the costs required to cover measures directed at providing physical care of victims of the attacks and the costs required to cover measures directed at providing mental care to victims of the attacks mental and physical harm.

90. To palliate this difficulty, Trial Chamber II made some unsupported assumptions. First, not having other parameters allowing the Chamber to estimate

[147] 14 July Addendum, paras.344-349.
[148] 14 July Addendum, para.350.

with more certainty how many beneficiaries would qualify to receive support for schooling, the Chamber decided to estimate for the purposes of calculations that *all indirect victims would likely qualify to receive schooling support*.[149] Then, regarding vocational training and income generating activities ('IGA'), the Chamber considered that it was fair to estimate that *all victims that have suffered material harm* would likely require to benefit from vocational training and IGA activities.[150] As a result, based on these assumptions, Trial Chamber II decided to include in its calculations, the costs associated with 2,070 victims of the attacks receiving schooling support ($ 1000) and the costs associated with 5,738 victims of the attacks benefiting from vocational training and IGA activities ($ 1335), for a total of $ 9,730,230.[151]

91. In making these unsupported assumptions, without explaining on what basis they were made, Trial Chamber II abused its discretion. Trial Chamber II also erred by failing to request the TFV to provide the missing information or to seek an alternative way to obtain probative information. Moreover, particularly considering the amounts involved, which constitute a significant portion of the reparations award determined for victims of the attacks, Trial Chamber II's errors materially affected the 14 July Addendum.

92. Lastly, as mentioned in the response to the CLR2's First ground of appeal, the sample assembled by Trial Chamber II was not representative and as a result, the statistics drawn from the sample are erroneous and not reliable.[152] The appropriate relief in the circumstances is to assemble a new and representative sample and to proceed with this sample in accordance with the Appeals Chamber's guidance, in a new order for reparations.

[149] 14 July Addendum, para.352.
[150] 14 July Addendum, para.353.
[151] 14 July Addendum, para.355.
[152] *Supra,* paras.59-69.

CLR2's sub-ground 2.3

93. In this sub-ground, the CLR2 submits that Trial Chamber II erred in law, fact and/or procedure by failing to explain how and to what extent the cost to repair harm suffered by victims of the attacks are 'fair' and 'appropriate.'[153]

94. This sub-ground is directly related to the First sub-ground. It is also, like the First sub-ground, closely linked to the CLR2 First ground of appeal. For similar reasons, this sub-ground is opposed and must also fail.

95. The Chamber concluded that "setting the amount of Mr Ntaganda's liability for reparations at the total of USD 31,300,000 is fair, equitable, and appropriate and takes into account the rights of the victims and those of the convicted person."[154] This amount includes USD 19,003,585 earmarked to repair the harms suffered by victims of the attacks.

96. The CLR2 submits that this amount "will only be capable of comprehensively addressing the harms suffered by a maximum of 7,500 victims of the attacks, being a purely speculative figure which does not properly reflect the realistic number of potentially eligible victims of the attacks […]."[155] The CLR2 adds that "[…] a cost to repair cannot be '*appropriate*' if it corresponds to the lowest possible number of potential beneficiaries of reparations"[156] and that "[a]n award cannot be '*fair*' when the lowest number of potentially eligible victims is taken as a basis for its estimation […]."[157] He avers that Trial Chamber II "did not explain whether and to what extent

[153] CLR2 Appeal Brief, paras.101-106.
[154] 14 July Addendum, para.360 (foonote omitted).
[155] CLR2 Appeal Brief, para.102.
[156] CLR2 Appeal Brief, para.103.
[157] *Idem.*

the maximum cost to repair it established will be "fair and appropriate" in the scenario where more than 7,500 eligible victims of the attacks will come forward."[158]

97. First, the estimation of 7,500 victims of the attacks is not a purely speculative figure, but rather Trial Chamber II's estimation, as concrete as possible, based upon a sufficiently strong evidential basis. As for the amount of USD 19,003,585, it is the reparations award determined by Trial Chamber II based on its estimation of the number of victims of the attacks in the case and all information before it regarding the costs to repair the harms suffered by victims of the attacks, including the parameters underlined by the TFV when projecting the cost to repair the harms caused to the victims of the crimes for which Mr Ntaganda was convicted based on the costs of the Lubanga programme.

98. Thus, the reparations award for victims of the attacks is neither a maximum *per se* nor is it based the lowest possible number of potential beneficiaries of reparations. Indeed, as stressed by Trial Chamber II, "[…] although the amount of liability set by the Chamber is indeed the maximum limit of resources that can be used for the purposes of repairing the harm caused to the victims of the crimes for which Mr Ntaganda was convicted, neither the estimations as to the number of victims provided by the Chamber in the present decision is a limit as to the maximum number of individuals that may come forward and be able to benefit from the award, nor is the TFV obliged to fully complement the award."[159]

99. Moreover, in determining the reparations award, Trial Chamber II was "mindful that, in general terms, programmes are not designed per capita and that, in the context of the Ntaganda reparations, general costs can be lower due to (i) savings in launching and readjustments for child soldiers victims integrated in the Lubanga programme; (ii) budgetary efficiencies in new projects due to the experience gained

[158] CLR2 Appeal Brief, para.105.
[159] 14 July Addendum, para.314.

implementing reparations in the DRC; (iii) the family dimension that may bring further savings in relation to the victims of the attacks; and (iv) the specificity of the individual harms suffered by the Ntaganda victims."[160]

100. The CLR2 finally posits that Trial Chamber II's error in failing to provide reasons to its approach to 'fair' and 'appropriate' reparations is demonstrated by its "failure to anticipate, account and budget for the very likely situation in which more than the currently estimated figure of 7,500 direct and indirect potential beneficiaries of reparations will come forward during the implementation phase."[161] This is incorrect.

101. Trial Chamber II had no obligation anticipate, account and budget for hypothetical scenarios, particularly for situations that are not very likely. Indeed, as submitted in response to the CLR2's First ground of appeal, that Trial Chamber II's estimation of 7500 victims of the attacks in the case is an absolute maximum in the circumstances.[162] Moreover, Trial Chamber II underscored that "[…] the estimations considered in the Addendum for the purposes of making conclusions as to the number of potential victims and the monetary award against Mr Ntaganda are only estimates and shall not be understood as limiting the TFV's flexibility to distribute and reallocate funds in the most efficient manner possible"[163] and that "[a]s stressed in the Addendum, the estimations as to the number of victims do not limit the number of individuals who may come forward and be able to benefit from the award."[164]

102. Considering the foregoing, Sub-ground 2.3 must fail

[160] 14 July Addendum, para.359.
[161] CLR2 Appeal Brief, para.106.
[162] *Supra,* para.13.
[163] First Decision on the Trust Fund for Victims' Draft Implementation Plan for Reparations, 11 August 2023, ICC-01/04-02/06-2860, para.130.
[164] *Idem.*

III. CLR2's Third ground of appeal

Trial Chamber II correctly determined the non-eligibility of certain victims of the attacks who suffered harm in the woods or bush The Trial Chamber's conclusion is entirely compatible with prior decisions

Overview

103. A convicted person's liability for reparations "is founded on, and confined to the harm caused by the crimes of which the said person was convicted".[165] It is the conviction itself which provides the legal basis for the reparations award. The scope of reparations is set out, and circumscribed by, the conviction itself. For this reason, the Appeals Chamber has been clear, that when rendering a reparations order, "a trial chamber must remain within the confines of the conviction".[166]

104. Applying these fundamental principles in the present case, the Trial Chamber has previously held that "in order to be entitled to reparations in the *Ntaganda* case, victims must have suffered harm as a result of a crime for which Mr Ntaganda has been convicted [...] Accordingly, the assessment as to whether a person may be entitled to reparations in the *Ntaganda* case shall be based exclusively on the conviction and not on the Chamber's prior decisions regarding the scope of the case brought to trial or the requirements for victims' participation during the trial proceedings." [167]

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[165] *The Prosecutor v. Germain Katanga*, Order for Reparations pursuant to Article 75 of the Statute, 24 March 2017, ICC-01/04-01/07-3728-tENG, p.18, citing *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012, 3 March 2015, ICC-01/04-01/06-3129, para.65.
[166] *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-Red ("2019 Lubanga Appeals Judgment"), para.311.
[167] 15 December Clarification Decision, para.11.

105. The arguments advanced in Ground 3 of the CLR2 appeal are incompatible with these fundamental principles. Ground 3 is aimed at securing reparations for alleged victims who were not present during the attacks or events for which Mr Ntaganda was convicted, and who did not flee from areas where these crimes occurred. Rather, these victims were alleged to have been "in the forest or bush surrounding the villages for which positive findings were entered in the judgment".[168] The CLR2 takes the position that if Mr Ntaganda was convicted of a crime, for example persecution, which took place in the village of Buli, then reparations are also payable to victims who can establish that they suffered harm in the bush or forest surrounding Buli, regardless of their village of origin, and regardless of their motivation for fleeing to the surrounding bush/forest. The CLR2 argues that by not expanding reparations to all victims in surrounding forests or bush areas, "the Chamber committed an error of law and in the exercise of its discretion".[169] He submits that the Chamber "has created legal uncertainty as to the eligibility of the victims who suffered harm in the forest or bush surrounding the villages for which positive findings were entered."[170] In reality, no such uncertainty exists. The position has been and remains entirely clear.

106. The relevant decisions and filings demonstrate that the scope of reparations was never intended to be expanded in the manner now being attempted by the CLR2. From the outset, the Trial Chamber has been alive to the reality of harm occurring not only ***within*** villages in Ituri, but also in the forest or bush areas surrounding these villages. The Trial Chamber repeatedly acknowledged that the scope of potential beneficiaries was not necessarily limited to individuals located **in villages**, as opposed to the surrounding areas, and that eligibility criteria for victims to receive reparations would be unrelated to their official place of residence at the

[168] CLR2 Appeal Brief, para.107.
[169] CLR2 Appeal Brief, para.107.
[170] CLR2 Appeal Brief, para.128.

time of the crimes.[171] However, this acknowledgement did not serve to dramatically expand the geographical scope of reparations to encompass all alleged harm alleged to have occurred in the bush and forest surrounding all villages in which a crime was found to occur. Rather, the Trial Chamber properly reasoned that reparations may be payable to those victims who suffered harm in the surrounding bush or forest "where the Chamber **entered convictions based on underlying acts having occurred in the forest or bush surrounding those locations**.[172] In other words, where crimes **had occurred** in the forest or bush, and a positive finding was made in that regard, then victims alleging to have suffered harm in the forest or bush may be eligible for reparations.[173]

107. As such, there is no basis for the CLR2 to assert that the scope of reparations encompasses anyone who suffered harm in the forest or bush surrounding the villages for which positive findings were entered, regardless of the location or village from which they fled. Nor is this compatible with basic principles for reparations repeatedly set down and reiterated by the Court. The Defence accordingly opposes Ground 3 of the CLR2 appeal on this basis, and submits that the Chamber's findings should be maintained.

108. The Defence notes, however, the link between the arguments advanced by the CLR2 under this Ground 3, and the Ground 1 of the appeal submitted on behalf of Mr Ntaganda. Namely, that the opening for the CLR2's claims of uncertainty and confusion is a direct result of the Trial Chamber's overarching error of refusing to issue a new reparations order as required by the Appeals Chamber, and instead issuing an Addendum, without elaborating or explaining the interaction of this new

[171] Reparations Order, 8 March 2021, ICC-01/04-02/06-2659 ("8 March Reparations Order"), para.107.
[172] 8 March Reparations Order, para.107.
[173] 15 December Clarification Decision, para.19(f) : "Moreover, the Chamber considers it important to clarify that victims alleging to have suffered harm in the forest or bush surrounding locations for which positive findings were included in the Judgment may be eligible for reparations for any of the crimes for which the Chamber entered convictions on the basis of the relevant corresponding conduct having occurred in the forest or bush surrounding those locations."

Addendum with the other concurrently operative decisions and implementation plans. The purported uncertainty cited by the CLR2 arises directly from the Trial Chamber's failure to implement the Appeals Chamber's order, thereby complicating and compromising the reparations process for those who seek to implement it, or benefit from it. This Ground 3 of the CLR2 appeal is therefore illustrative of the prejudice identified in Ground 1 of the Defence appeal, and reinforces the arguments presented by the Defence under that ground of appeal.

The Trial Chamber's conclusion is entirely compatible with prior decisions

109. In support of his submission that the Trial Chamber introduced a "sudden restrictive approach to the territorial scope of the reparations",[174] the CLR2 cites to a finding which is at the centre of the present ground of appeal. Namely, the Trial Chamber's finding that:[175]

> "victims alleging to have suffered harm in the forest or bush surrounding locations for which positive findings were included in the Judgment may be eligible for reparations for any of the crimes for which the Chamber entered convictions on the basis of the relevant corresponding conduct having occurred in the forest or bush surrounding those locations".

The CLR2 then relies on a passage from the 8 March 2020 reparations order, where the Trial Chamber correctly held that "the eligibility criteria for victims to receive reparations is unrelated to their official place of residence at the time the crimes were committed, as long they can demonstrate that they suffered harm as a result of a crime for which Mr Ntaganda was convicted".[176]

110. The CLR2 relies on these statements to submit that whenever there is a positive finding of a crime having occurred in a specific village, any and all victims

[174] CLR2 Appeal Brief, para.121.
[175] CLR2 Appeal Brief, para.108, citing 15 December Clarification Decision, para.19(f).
[176] CLR2 Appeal Brief, para.108, citing 8 March Reparations Order, para.107.

who suffered harm in the surrounding bush or forest around this village are also eligible for reparations.[177] The CLR2 is explicit that "[h]is understanding of the above findings is that victims alleging to have suffered harm in the forest or bush surrounding the localities for which positive findings were made in the Judgment on account of the crimes of persecution, forcible transfer, deportation, and/or displacement (namely Mongbwalu, Nzebi, Sayo, Kilo, Kobu, Sangi, Bambu, Jitchu, Buli, Nyangaray, Lipri, Tsili and Gola), **may be eligible for reparations on the basis of the relevant corresponding conduct having occurred in the forest or bush surrounding those locations."**[178]

111. This is not an understanding that can reasonably be reached from a review of the relevant findings. Firstly, the Trial Chamber's reference to eligibility being unrelated to formal place of residence at the time of the events, does not then extend eligibility to all victims who suffered harm in the vicinity of the crimes for which Mr Ntaganda was convicted. The Defence agrees with the Trial Chamber that what matters is not the place where the applicant formally resided, but rather the place where they suffered harm. However, the Trial Chamber's enunciation of this logical premise does not serve to extend reparations to all individuals who suffered harm in the bush or forest surrounding localities for which positive findings were made. In order to be eligible, an applicant must have suffered harm as a result of corresponding conduct having occurred in the forest or bush where they had fled. A statement from the Trial Chamber that formal residence is not a determining factor does not circumvent this pre-requisite condition.

112. Secondly, rather than extending reparations to all victims alleging to have suffered harm in the forest or bush surrounding locations for which positive findings were included in the Judgment, in the passages cited by the CLR2, the Trial

[177] CLR2 Appeal Brief, paras.109-110.
[178] CLR2 Appeal Brief, para.110.

Chamber carefully and correctly limited reparations to victims where "the relevant corresponding conduct **occurred in the forest or bush surrounding those locations**".[179] In other words, a pre-requisite for an applicant to be eligible for reparations, is a positive finding as regards a **conduct occurring in the bush or forest itself**. A positive finding in a nearby locality or village is insufficient. The Trial Chamber neither stated nor implied that if there is a positive finding for persecution in Buli, for example, then this finding automatically extends to the bush or forest surrounding Buli and anyone who arrived there. The Trial Chamber's plain language requires, instead, a positive finding that the relevant corresponding conduct **"occurred in the forest or bush surrounding those locations**".[180]

113. The CLR2 claims that his position is supported by the fact that the TFV also took the same view, as evidenced in its Fourth Report.[181] The CLR2 then cites to the TFV's "Established Eligibility Criteria", which included the following:

> "[REDACTED] – [REDACTED], [REDACTED]."[182]

114. In its submissions on the Fourth Report, the Defence directly addressed this language from the TFV, noting that "[a]s concerning the territorial scope, the Defence notes that the TFV's language with regard to the crime of persecution and victims' references to the bush/forest is at times unclear." The Defence submitted that while the TFV had held that "when a victim refers to any of the crimes having taken place in the bush or forest surrounding a location for which a positive finding is reached, the victim is eligible", as explained by Trial Chamber VI, "**a positive finding referring to a location is insufficient to consider the bush or forest around**

[179] 15 December Clarification Decision, para.19(f).
[180] 15 December Clarification Decision, para.19(f).
[181] CLR2 Appeal Brief, para.111.
[182] CLR2 Appeal Brief, para.111, citing Annex 1 to Trust Fund for Victims' Fourth Update Report on the Implementation of the Initial Draft Implementation Plan", 25 March 2022, ICC-01/04-02/06-2751-Conf-Anx1, para.31.

it as relevant for purposes of eligibility." The Defence then noted that in specific instances identified in the Judgment, the TFV was entitled to "consider facts which took place in the bush or forest around a given location, in light of the fact that **'the Chamber entered convictions on the basis of the relevant corresponding conduct having occurred in the forest or bush surrounding these locations.'"**[183]

115. The Trial Chamber then agreed with the Defence. In its Decision on the Fourth Report, the Chamber held that: "[r]egarding victims alleging having suffered harm in the forest or bush surrounding locations, victims 'may be eligible for reparations for any of the crimes for which the Chamber entered convictions on the basis of the relevant corresponding conduct having occurred in the forest or bush surrounding those locations' […] Accordingly, the TFV is instructed to ensure that the above and indeed all clarifications included in the Decision on the Registry's First Report are correctly applied by the relevant examiner when assessing eligibility."[184] As such, even if the CLR2 is correct in asserting that the TFV's language in the Fourth Report supports his present position, which is not accepted, the position was clarified by the Defence and then the Trial Chamber immediately thereafter.

116. Against this backdrop, the CLR2 is wrong to assert that the Chamber has applied a new and "restrictive approach to the territorial scope of the reparations".[185] He is also wrong to allege that the Chamber disregarded Trial Chamber IV's previous findings or the TFV's Established Eligibility Criteria. Rather, the Trial Chamber had never indicated that anyone who suffered harm in the bush/forest vicinity of a crime for which Mr Ntaganda had been convicted would be entitled to

[183] Defence observations on the Trust Fund for Victims' Fourth Update Report on the Implementation of the Initial Draft Implementation Plan, 7 April 2022, ICC-01/04-02/06-2755, paras.37-39 (emphasis added).
[184] Decision on the TFV's Fourth Update Report on the Implementation of the Initial Draft Implementation Plan, 12 May 2022, ICC-01/04-02/06-2761, paras.25-26.
[185] CLR2 Appeal Brief, para.112.

reparations. The position had always been very clear. In some specific identified instances, the Chamber's positive findings extended to conduct having occurred in the forest or bush surrounding named locations. In others, they did not. The CLR2 can point to no universal blanket finding that reparations can be awarded to everyone suffering harm within the vicinity of a demonstrated crime. The CLR2's claims of a "departure" from previous findings cannot be sustained.[186]

117. To address a specific example, the CLR2 challenges the Trial Chamber's dismissal of 10 applicants claiming reparations for persecution, who had fled from various villages to the bush or forest surrounding [REDACTED].[187] The Chamber had dismissed these applications on the basis that it had "[REDACTED]".[188] The applicants in question had not fled to the bush from [REDACTED], but from various other villages.

118. Relevantly, in the Judgment convicting Mr Ntaganda, the Trial Chamber held:[189]

> "At the start of the Second Operation, the UPC/FPLC took control over Nyangaray. The population fled and hid in the bush, where they stayed in difficult conditions."

119. CLR2 argues that limiting claims for reparations only to "inhabitants of [REDACTED]", is unfair or unreasonable, given that "victims who originated from Bunde or Sindani or from the villages in the Banyali-Kilo collectivité who took refuge in the Walendu-Djatsi collectivité, and suffered harm and/or stayed in difficult conditions in the forest or bush surrounding [REDACTED], together with

[186] CLR2 Appeal Brief, para.112.
[187] CLR2 Appeal Brief, para.113(a).
[188] CLR2 Appeal Brief, para.113(a), citing Annex I to the 14 July Addendum, 14 July 2023, ICC-01/04-02/06-2858-AnxI, paras.30,104,158,249,290,299,584,601,632,774.
[189] Judgment, 8 July 2019, ICC-01/04-02/06-2359 ("Judgment"), para.1000..

the inhabitants of [REDACTED]".[190] Firstly, there is nothing to indicate that the Trial Chamber limited reparations to **inhabitants** of [REDACTED]. As per its consistent approach, the place of formal residence of victims was considered irrelevant; what matters is not the village of formal residence, but the place from which the victims fled at the time of the relevant conduct. Victims who fled from [REDACTED] in the relevant period, where the crime of persecution was found to have been committed, would potentially be eligible, regardless of where they lived.

120. Secondly, the CLR2's claim that it is "unfair and unreasonable" not to open the door for reparations for victims fleeing from Bunde or Sindani or any other villages to the bush or forest area surrounding [REDACTED], ignores the fundamental principle at the centre of the reparations phase; that reparations are awarded on the basis of positive findings of crimes, in particular areas at particular times. Here, the relevant legal finding is persecution having been committed in [REDACTED]. This limited and specific conviction, based on the evidence heard in the case, does not throw open the door for reparations anyone who suffered harm in nearby villages or who ultimately sheltered together after the fact. As is clear from the Trial Chamber's other findings, victims who fled from [REDACTED] (regardless of whether they were resident there), and who suffered from persecution in the surrounding bush, were rightly found to be eligible.[191] This is not "unfair or unreasonable", it is entirely consistent with the Court's approach to repairing harm to victims of the cases heard before it.

The Trial Chamber's approach is sufficiently reasoned

121. Among other errors discussed further below, the CLR2 claims that the Trial Chamber "failed to provide a reasoned opinion on this matter".[192] A review of each

[190] CLR2 Appeal Brief, para.117.
[191] *See*, e.g. a/20221/14.
[192] CLR2 Appeal Brief, para.121.

of the impugned assessments demonstrates that the Chamber provide a reasoned opinion on each, basing its conclusions on its prior decisions and the Judgment.

122. By way of example, applicant a/00136/13 submitted that he [REDACTED], [REDACTED]. The CLR2 submitted that this applicant (i) [REDACTED]; (ii) [REDACTED]; and (iii) [REDACTED]. Importantly, according to the CLR2, although [REDACTED], "[REDACTED]."[193]

123. Having considered the CLR2 submissions, particularly the submission that [REDACTED], the Chamber recalled that it had found that "Mr Ntaganda is individually criminally responsible for persecution in [REDACTED] in the context of the Second Operation", and had "[REDACTED], [REDACTED]." The Chamber then reiterated that in relation to persecution in the villages around [REDACTED], "[REDACTED], [REDACTED]."[194]

124. This reasoning was sufficient, and correct. The Trial Chamber's finding that persecution was committed in [REDACTED] does not open the path for reparations for those people who fled to the bush or forest surrounding [REDACTED] from other villages such as [REDACTED], despite the CLR2's claim that it is "[REDACTED]".[195] To expand reparations to other villages not covered by Mr Ntaganda's convictions, as the CLR2 is now attempting, would sever the link between the reparations and the convictions. This is impermissible. There is accordingly no basis for the Appeals Chamber to intervene in the Trial Chamber's assessments of these applicants' eligibility, and dramatically expand the scope of eligible victims, as is being urged by the CLR2.

[193] Annex II to the 14 July Addendum, 14 July 2023, ICC-01/04-02/06-2858-AnxII ("Annex II to 14 July Addendum"), paras.61-62.
[194] Annex II to 14 July Addendum, para.65.
[195] CLR2 Appeal Brief, para.121.

The Trial Chamber's conclusion is compatible with fundamental principles of reparations

125. As outlined above, the Appeals Chamber has been clear, that when rendering a reparations order, "a trial chamber must remain within the confines of the conviction".[196] In acknowledging this starting point in the 8 March Reparations Order, the Trial Chamber stressed that "the approach of clearly defining the harms that result from the crimes for which Mr Ntaganda was convicted aims at protecting the rights of the convicted person and the rights of the victims of these crimes. It ensures that reparations are not awarded to remedy harms beyond the crimes for which Mr Ntaganda was convicted."[197]

126. Despite being convicted of 18 counts of war crimes and crimes against humanity, the scope of Mr Ntaganda's conviction did not entirely align with the charges, particularly in terms of specific crimes and locations. As such, as early as September 2019, the Registry noted that while the scope of the case remained relatively unchanged for the former child soldiers, "the status of the victims of the attacks appears to have been significantly impacted with the removal of specific crimes and village locations in the Judgment. Accordingly, the number of certified reparation beneficiaries emanating from the list of participating victims (particularly the victims of the attacks) is likely to be reduced".[198] With this in mind, the CLR2's claim in 2023 of the "sudden restrictive approach to the territorial scope of the reparations",[199] is difficult to accept. Importantly, as a result of the reduced scope, the VPRS offered to "proceed with an assessment of how many of the 2,132

[196] *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-Red, para.311.
[197] 8 March Reparations Order, para.130.
[198] Registry's Preliminary Observations on Reparations, 6 September 2019, ICC-01/04-02/06-2391-Anx1, para.6.
[199] CLR2 Appeal Brief, para.121.

participating victims have been impacted by the reduced scope of the Case following the Judgment", if ordered to do so. [200]

127. The Defence responded, noting the VPRS acknowledgement that "the status of the victims of the attacks appears to have been significantly impacted with the removal of specific crimes and village locations in the Judgement". The Defence submitted that it necessarily follows that the number of potential beneficiaries being drawn from the participating victims of the attacks was likely to be reduced, and that "the need to perform this assessment should be included in any subsequent order issued by the Single Judge as a preliminary step." [201] It was only one year later, on 30 September 2020, that the VPRS requested the Chamber's guidance on issues related to the scope of the reparations, but did not ask for specific clarification concerning applicants located in the bush or forest surrounding the locations for where crime were found to have occurred.

128. As such, from September 2019, the CLR2 has been aware not only of the removal of specific crimes and village locations, but that the number of beneficiaries from the list of participating victims of the attacks was likely to be reduced. The Trial Chamber then made it absolutely plain that reparations would only be awarded to victims claiming harm in the surrounding bush/forest areas where the corresponding **conduct actually occurred in the forest or bush surrounding named locations.**

129. In this context, the Defence is extremely concerned by the CLR2's submissions that the application of these consistently-enumerated parameters "is very likely to cause stress, anxiety and concern to the victims of the attacks who suffered harm in the forest or bush surrounding the villages for which positive findings were made –

[200] Registry's Preliminary Observations on Reparations, 6 September 2019, ICC-01/04-02/06-2391-Anx1, para.15.
[201] Response on behalf of Mr. Ntaganda to Registry's preliminary observations on reparations, 3 October 2019, ICC-01/04-02/06-2431, para.15.

particularly as the concerned victims were informed about their likely eligibility for reparations".[202] If indeed victims from surrounding forest or bush areas were told they were likely eligible despite not suffering harm as a result of a crime for which Mr Ntaganda was convicted in a particular locality, this is of extreme concern. Particularly when the anxiety and stress and concern which the Defence agrees would arise will likely be directed against Mr Ntaganda, his lawyers, and potentially the Court and its staff. While extremely regrettable, the gap between what has been told to victims and the proper scope of reparations cannot be relied upon to then expand the latter.

130. The CLR2 also submits that the Chamber's findings on eligibility of the victims in the surrounding bush or forest are "inconsistent with the nature of the crimes committed" on the basis that the crimes resulted in the "local population's mass escape" and the "ensuing harm suffered by the victims in their respective localities and in the forest or bush when hiding and/or fleeing the violence". According to the CLR2, "the crimes of forcible transfer, deportation, displacement and persecution for which Mr Ntaganda was convicted, caused harm to the victims of a continuous nature. The harm suffered by the victims include being forced to flee their respective villages in order to escape the violence and conflict, but also the harm suffered by the victims when in the forest or bush, while the victims continued to be persecuted and/or stayed in difficult conditions." [203]

131. The CLR2's use of the term "local population's mass escape" here is telling. The approach being advocated for would improperly extend reparations in the Ntaganda case to an undefined "local population" who were displaced *en mass* by the conflict and were placed in difficult conditions in the bush or forest, regardless of their origin and the underlying act which caused their displacement. Reparations

[202] CLR2 Appeal Brief, para.122.
[203] CLR2 Appeal Brief, paras.114-115.

must have realistic and sensible limits. The ICC has consistently held that these limits are put in place by the conviction itself; crimes for which findings were entered. Where situations of conflict cause the mass displacement of local populations, this does not extend eligibility these entire populations. There must be an underlying crime which matches up with the harm alleged. The CLR2's approach circumvents the limits put in place by the Trial Chamber, and would extend the reparations in this case beyond any reasonable or fair limits.

132. The Trial Chamber never indicated that it would support such a broad and unlimited approach to eligibility. Even where, for example, the Trial Chamber accepted that a margin of appreciation would be required to determine the scope of eligible victims based on location, limits were always set. For example, the judgment convicting Mr Ntaganda made factual findings as to houses burning down 'in or around Kobu' and 'in or around Sangi'. Rather than throwing the scope of eligibility wide open, the Trial Chamber set a five-kilometre radius within which those victims who had houses burnt down could apply for reparations.[204] Nothing in the Trial Chamber's prior decisions can reasonably support the broad approach now being advocated by the CLR2

Conclusion

133. The CLR2 has framed the alleged errors raised in Ground 3, as "a combination of an error of law and in the exercise of its discretion by failing to properly apply or disregarding its own findings". In terms of the abuse of discretion, the LRV argues that "since the outcome is so unfair or unreasonable, the only conclusion that can be reached is that the Chamber failed to exercise its discretion judiciously."[205]

[204] 15 December Clarification Decision, para.20.
[205] CLR2 Appeal Brief, paras.107,121.

134. Taking these alleged errors one by one; Firstly, no specific error of law has been identified. The CLR2 has failed to identify where the Trial Chamber misinterpreted a legal principle, or demonstrated how this alleged error materially affected the impugned decision, requiring the intervention of the Appeals Chamber.[206] Turning then to the alleged abuse of discretion, the CLR2 must demonstrate that the Trial Chamber's decision as regards the victims in the bush/forest was so unfair or unreasonable as to "force the conclusion that the Chamber failed to exercise its discretion judiciously".[207] This high standard has not been met. The Trial Chamber set clear parameters, in line with fundamental principles of reparations, and applied them to the convictions entered. There is no abuse of discretion warranting the intervention of the Appeals Chamber. Moreover, for the reasons set out above, the CLR2's claim of an alleged "failure to provide a reasoned opinion on this matter"[208] should also be dismissed as not having been substantiated. Nor could any claim be supported, the Trial Chamber's approach was transparent, consistent, and reasoned.

135. It is undoubtedly the reality that accepting CLR2's submissions under this Ground 3 would dramatically expand the scope of eligible victims in this case, and would allow applications from any members of an undefined "local population" who suffered harm in forests or bushes surrounding identified villages during the time period in question, regardless of why or from where they fled. To do so would obliterate the parameters set by the Trial Chamber and the links between the convictions and the harm suffered. There is no appealable error here. The Trial Chamber's approach was consistent and correct. For all the above reasons, the Defence submits that the arguments put forward by CLR2 in support of this Ground 3 cannot justify the Appeals Chamber's intervention to dramatically expand the scope of eligible victims.

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[206] 2019 Lubanga Appeals Judgment, para.28.
[207] 2019 Lubanga Appeals Judgment, para.32.
[208] CLR2 Appeal Brief, para.121.

REFLIEF SOUGHT

136. In light of the foregoing, the Defence respectfully requests the Appeals Chamber to:

CONSIDER this Response to CLR2 Appeal Brief;

CONSIDER scheduling oral hearings;

CONSIDER calling upon *amicus curiae* submissions;

DISMISS the CLR2's three grounds of appeal;

FIND that Trial Chamber II committed errors and abused its discretion when determining the reparations award for victims of the attacks; and

TAKE the required corrective actions in conjunction with the adjudication of the Defence appeal against the 14 July Addendum

RESPECTFULLY SUBMITTED ON THIS 23rd DAY OF JANUARY 2024

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

The Hague, The Netherlands