



Original: **English**

No.: **ICC-01/04-02/06**

Date: **21 August 2023**

**THE APPEALS CHAMBER**

**Before:**

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

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO**

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

**Public**

**Public Redacted Version of "Defence Notice of Appeal against the 14 July Addendum to the Reparations Order of 8 March 2021", dated 16 August 2023, ICC-01/04-02/06-2863-Conf**

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

**Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:**

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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”)<sup>1</sup> and the Addendum to the Reparations Order of 8 March 2021 issued by Trial Chamber II on 14 July 2023 (“14 July Addendum” or “Impugned Decision”)<sup>2</sup>, Counsel for Mr Ntaganda (“Convicted Person”, “Defence” or “Appellant”) hereby submits this:

**Defence Notice of Appeal against the 14 July Addendum  
to the Reparations Order of 8 March 2021**

**“Defence Notice of Appeal”**

**INTRODUCTION**

1. Mr Ntaganda acknowledges that the convictions entered against him are now final. He also recognizes that the obligation to repair the harm caused to the victims is undisputed. Nonetheless, it is important for the Convicted Person that only genuine victims, duly found eligible, be awarded reparations. The Convicted Person further acknowledges that the events which gave rise to the convictions entered against him took place more than 20 years ago and that the genuine victims of these crimes have been waiting for reparations for a very long time, which is most unfortunate.

2. However, despite the Appellant's repeated calls to contribute and play a meaningful role in the reparations process dating as far back as 25 July 2019,<sup>3</sup> Trial Chamber VI and Trial Chamber II continue to issue decisions precluding him from doing so, thereby impeding his rights, and delaying the granting of reparations to genuine victims. Indeed, despite the Appeals Judgment, identifying fundamental errors in the Reparations Order rendered by Trial Chamber VI on 8 March 2021, Trial Chamber II: (i) failed to issue a new reparations order, rendering instead an incomplete Addendum to the 8 March Reparations Order reversed by the Appeals Chamber; (ii) allowed the implementation of the Trust Fund for Victims (“TFV”)’s Initial Draft Implementation Plan (“IDIP”) to proceed unabated, erroneously holding that it remained fully operational;<sup>4</sup> and (iii) failed to include compulsory provisions in the Impugned Decision and [REDACTED] based on the 8 March 2021 Reparations Order materially affected by the

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<sup>1</sup> 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”).

<sup>2</sup> 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”).

<sup>3</sup> Order for preliminary information on reparations, 25 July 2019, ICC-01/04-02/06-2366.

<sup>4</sup> Decision on the TFV’s Sixth and Seventh Update Reports on the Implementation of the Initial Draft Implementation Plan, 16 November 2022, ICC-01/04-02/06-2792, paras.15-24.

cumulative errors identified therein.<sup>5</sup> Notably, Trial Chamber II's decision [REDACTED], thereby preventing the parties from submitting observations, and, more importantly, appealing these provisions as of right.

3. What is more, despite the Appeals Chamber's finding that Trial Chamber VI failed to assess and rule upon victims' applications for reparations<sup>6</sup> and to lay out at least the most fundamental parameters of a procedure for the TFV to carry out the eligibility assessment of potential victims,<sup>7</sup> Trial Chamber II: (i) assembled a sample of potential victims *not* representative of the universe of potential victims in the case; (ii) erred by not providing the Defence with a meaningful opportunity to assess and make submissions on the 171 victims' dossiers in the sample; and, (iii) having itself assessed the eligibility of the 171 victims, failed yet again, to set out criteria and instructions capable of properly guiding the *verification body* in carrying out a meaningful eligibility assessment of potential victims.

4. Furthermore, despite clear findings and instructions in the Appeals Judgment, Trial Chamber II failed to request submissions on transgenerational harm from anyone other than the parties; failed to make the necessary findings on the operation of transgenerational harm; and failed to require a medical assessment for claims of transgenerational harm. Trial Chamber II also erred in law regarding the Sayo Health Center by making additional findings outside the confines of the Conviction and Sentencing Judgments; erroneously entering new factual findings; relying yet again on the Second Expert Report, despite being unable to properly assess its credibility, reliability and the basis for its findings; and failing to address the issue of breaks in the chain of causality.

5. Trial Chamber II also erred by failing to properly estimate the total number of potential victims in the case without any statistical or scientific basis; by determining the monetary award to be paid by the Convicted person, in the absence of a reliable estimate of the total number of potential victims in the case. Notably, the Convicted Person is not appealing these two errors. His focus is rather on the eligibility determination of potential victims, which is in his view is more important.

6. Taking into consideration the nature of the errors committed by Trial Chamber II highlighted herein, their impact on the reparations process and the fact that this is Trial Chamber II's second attempt to issue a valid reparations order, the Defence respectfully

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<sup>5</sup> [REDACTED].

<sup>6</sup> Appeals Judgment, para.345,747

<sup>7</sup> Appeals Judgment, para.23,747.

submits that only one relief is available in the circumstances. The Appeals Chamber must take over the reparations process, issue *proprio motu* a new or amended order for reparations and remand the matter to Trial Chamber II, solely for the purpose of exercising judicial oversight over the implementation of reparations.

7. More importantly, the Defence respectfully requests the Appeals Chamber to order suspensive effect of the 14 July Addendum as allowing Trial Chamber II to proceed with the implementation of reparations unabated, until the Appeals Chamber adjudicates this appeal would create irreversible prejudice as much to the potential victims as to the Convicted Person.

## **CONFIDENTIALITY**

8. Pursuant to regulation 23bis (1) and (2) of the Regulations of the Court, this Defence Notice of Appeal 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.

## **NOTICE OF APPEAL REQUIREMENTS**

9. The Convicted Person submits this Notice of Appeal pursuant to Article 82(4) of the Statute, Rule 150(1) of the Rules of Procedure and Evidence (“Rules”) and Regulation 57 of the Regulations of the Court (“RoC”) against the Addendum to the Reparations Order of 8 March 2021, ICC-01/04-02/06-2659 issued by Trial Chamber II on 14 July 2023 in the *Situation in the Democratic Republic of Congo*, in the Case of *The Prosecutor v. Bosco Ntaganda*, ICC-01/04-01/06-2858 (“14 July Addendum” or “Impugned Decision”). The Appeal is directed against the entire decision.

10. The Defence Appeal comprises 13 grounds of appeal raising errors of law and fact as well as procedural errors committed by Trial Chamber II, which invalidate the 14 July Addendum in its entirety. The Appellant respectfully requests the Appeals Chamber to reverse the 14 July Addendum, issue *proprio motu* a new or amended order for reparations and remand the matter to Trial Chamber II to exercise judicial oversight the implementation of reparations.

## **REQUEST FOR SUSPENSIVE EFFECT**

11. The Defence respectfully requests that this appeal, submitted pursuant to article 82(4) of the Statute, be given suspensive effect pursuant to article 82(3) of the Statute and rule 156(5).

12. The Appeals Chamber previously found that article 82(3) of the Statute and rule 156(5) govern requests for suspensive effect of reparation orders that are impugned on appeal<sup>8</sup> and that a request for suspensive effect of a reparation order must be made in the notice of appeal.<sup>9</sup>

13. The Appeals Chamber also held that, “[...] when deciding on requests for suspensive effect, has considered whether the implementation of the decision under appeal (i) ‘would create an irreversible situation that could not be corrected, even if the Appeals Chamber were to find in favour of the appellant’ (ii) ‘would lead to consequences that would be very difficult to correct and may be irreversible’, or (iii) ‘could potentially defeat the purpose of the [...] appeal’.”<sup>10</sup>

14. The Defence acknowledges that the above criteria are of a demanding nature and should be rigorously applied in view of the overriding importance of delivering reparations to victims following the convictions entered against the Convicted Person, which are now final.<sup>11</sup> Nonetheless, as argued in the Request for the Defence appeal against the Addendum to be given suspensive effect, submitted concurrently with this Notice of Appeal,<sup>12</sup> the Defence submits that in the circumstances of this case, these criteria are met. The immediate suspension of the Addendum is the only available avenue to avoid irremediable prejudice, both to the victims and the Convicted person as well as to steer the reparations process back in the right direction.

## PROCEDURAL BACKGROUND

15. On 8 March 2019, Trial Chamber VI issued its Reparations Order.<sup>13</sup>

16. On 8 April 2019, the LRV2 and the Defence submitted notices of appeal against the 8 March Reparations Order.<sup>14</sup>

<sup>8</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the admissibility of the appeals against Trial Chamber I's Decision establishing the principles and procedures to be applied to reparations" and directions on the further conduct of proceedings, 14 December 2012, ICC-01/04-01/06-2953, para.80.

<sup>9</sup> Decision on the Defence request for suspensive effect, 2 July 2021, ICC-01/04-02/06-2691 (“AC Decision on Defence Request for Suspensive Effect”), para.21.

<sup>10</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the admissibility of the appeals against Trial Chamber I's Decision establishing the principles and procedures to be applied to reparations" and directions on the further conduct of proceedings, 14 December 2012, ICC-01/04-01/06-2953, fn.196.

<sup>11</sup> AC Decision on Defence Request for Suspensive Effect, para.21.

<sup>12</sup> Request for the Defence appeal against the Addendum issued by Trial Chamber II on 14 July 2023 to be given suspensive effect, submitted on 16 August 2023.

<sup>13</sup> Reparations Order, 8 March 2021, ICC-01/04-02/06-2659 (“Reparations Order”).

<sup>14</sup> Notice of Appeal of the Common Legal Representative of the Victims of the Attacks against the Reparations Order, 8 April 2021, ICC-01/04-02/06-2668; Defence Notice of Appeal against the Reparations Order, ICC-01/04-02/06-2659, 8 April 2021, ICC-01/04-02/06-2669.

17. On 12 September 2022, the Appeals Judgment was delivered, partially reversing the 8 March Reparations Order and remanding the matter to Trial Chamber II, to issue a new order for reparations.

18. On 14 July 2023, Trial Chamber II issued its Addendum to the Reparations Order of 8 March 2021, ICC-01/04-02/06-2659, followed on 11 August 2023, [REDACTED].<sup>15</sup>

## **GROUND OF APPEAL**

19. The Appellant intends to raise the following 13 grounds of appeal:

**GROUND 1.** Trial Chamber II committed an error of procedure by failing to render a new reparations order.

20. Trial Chamber II was directed by the Appeals Chamber “to issue a new order for reparations”.<sup>16</sup> This direction was based on the Appeals Chamber’s conclusion that the significance of the remand, and the changes required, in essence would necessarily mean that any new decision would constitute a new “order for reparations” within the meaning of Article 82(4) of the Statute.<sup>17</sup>

21. The Trial Chamber did not issue a new reparations order. Instead, it issued what it has called an “Addendum to the Reparations Order of 8 March 2021”. Where seized with an alleged error in a first instance decision, the Appeals Chamber can confirm, reverse, or amend the decision.<sup>18</sup> Where the decision is reversed, the Appeals Chamber can decide the issue itself, or remand the matter for the Trial Chamber to issue a new decision. The Trial Chamber does not have a choice as to whether it issues a new decision, or files an addendum to the original erroneous decision.

22. This ground of appeal will therefore explain the prejudice caused by the Trial Chamber’s refusal to issue a new decision. In particular, while some of the Trial Chamber’s errors were discrete, others were global errors which impact the entire fabric of the Reparations Order. The Trial Chamber’s overall approach to eligibility, was wrong.<sup>19</sup> The way the Trial Chamber viewed and assessed victim applications, was wrong.<sup>20</sup> These are not discrete errors.

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<sup>15</sup> [REDACTED]

<sup>16</sup> Appeals Judgment, para.759.

<sup>17</sup> Appeals Judgment, para.758.

<sup>18</sup> Rule 153 of the Rules of Procedure and Evidence.

<sup>19</sup> Appeals Judgment, paras.172-174.

<sup>20</sup> Appeals Judgment, para.61.

They informed the Chamber's entire approach to reparations and the formulation of the award, meaning they cannot be extracted, fixed, and reinserted back into the remainder of the decision.

**GROUND 2.** Trial Chamber II committed an error of law and procedure by holding that the Initial Draft Implementation Plan submitted by the TFV on 24 March 2022 remained fully operational further to the Appeals Judgment.

23. The error identified in Ground 1, being the Trial Chamber's mistaken refusal to issue a new reparations order, is not the first occasion on which Trial Chamber II has sought to circumvent the Appeals Judgment of 12 September 2022. Despite the wide-ranging and central errors identified on appeal, in November 2022, Trial Chamber II found that the Initial Draft Implementation Plan ("IDIP")<sup>21</sup> continued to be "fully operational, as it has not been affected by the Appeals Judgment" and that the TFV could continue determining the eligibility of IDIP victims despite the Appeals Chamber reversing the 8 March Reparations Order.<sup>22</sup> As previously and repeatedly argued by the Defence,<sup>23</sup> this was an error.

24. The IDIP does not exist independently from the original Reparations Order, which was overturned in significant part on appeal. By its very nature, the IDIP exists as one of the implementing vessels for the Reparations Order, which defines its scope and its modalities. As such, where the Trial Chamber was directed by the Appeals Chamber "to issue a new order for reparations"<sup>24</sup> to comply with the terms of the Appeals Judgment, the IDIP itself was no longer operational, given that it draws its authority from the Reparations Order. As such, by failing to issue a new reparations order, the Trial Chamber is erroneously proceeding with the implementation of a IDIP that is not only without a legal basis, but is grounded firmly in its previous and numerous errors, as identified by the Appeals Chamber

25. This ground of appeal will accordingly discuss the prejudice arising from this attempt by the Trial Chamber to circumvent the Appeals Judgment.

**GROUND 3.** Trial Chamber II committed an error of law and procedure by failing to include compulsory provisions in the Impugned Decision and [REDACTED] on the 8

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<sup>21</sup> Initial Draft Implementation Plan with focus on Priority Victims, 8 June 2021, ICC-01/04-02/06-2676-AnxA-Corr-Red ('IDIP').

<sup>22</sup> Decision on the TFV's Sixth and Seventh Update Reports on the Implementation of the Initial Draft Implementation Plan, 16 November 2022, ICC-01/04-02/06-2792, paras.8-10.

<sup>23</sup> Observations on behalf of the convicted person on the Trust Fund for Victims' Seventh Update Report on the Implementation of the Initial Draft Implementation Plan, 7 October 2022, ICC-01/04-02/06-2785, paras.1-7,11-17; 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.12-15.

<sup>24</sup> Appeals Judgment, para.759.



March 2021 Reparations Order materially affected by the cumulative errors identified in the Appeals Judgment.

26. In the Appeals Judgment, Trial Chamber II was instructed to include in the future order for reparations, provisions for the specific judicial approval of administrative screenings that find beneficiaries eligible to benefit from reparations; and the possibility for those who are found not to be eligible to challenge the TFV's findings before the Trial Chamber.<sup>25</sup> Trial Chamber II failed to do so in the Impugned Decision. Neither did Trial Chamber II identified in the 14 July Addendum *inter alia*, the entity that would be responsible to conduct the eligibility determination of potential victims. Trial Chamber II [REDACTED],<sup>26</sup> thereby depriving the Convicted Person of his right to appeal, as of right, fundamental characteristics of the judicial reparations process in this case.

27. Trial Chamber II's material procedural error is compounded by its erroneous refusal identified in the first ground of appeal, to issue a new reparations order, which has a significant knock-on effect. Namely, it also undermines entirely the Trial Chamber's decision<sup>27</sup> to [REDACTED], based on the flawed 8 March 2021 Reparations Order before the Appeals Judgment was rendered.<sup>28</sup>

28. The 24 March 2022 DIP submitted by the TFV does not exist independently from the original Reparations Order, which was overturned in significant part on appeal. By its very nature, the DIP exists as one of the implementing vessels for the Reparations Order, which defines its scope and its modalities. As such, where the Appeals Chamber has ordered that Trial Chamber II must produce **a new reparations order**, to comply with the terms of the Appeal Judgment, the DIP itself is no longer operational, given that it draws its authority from the Reparations Order. As such, by failing to issue a new reparations order, the Trial Chamber is erroneously [REDACTED] that is not only without a legal basis but is grounded firmly in its previous and numerous errors, as identified by the Appeals Chamber.

29. This ground of appeal will accordingly discuss the prejudice arising from this attempt by the Trial Chamber to again, circumvent the Appeals Judgment, as it did when proceeding with the IDIP. Had the Trial Chamber complied with the Appeals Chamber's direction and issued a new reparations order, the next step would have been for the TFV to submit a new

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<sup>25</sup> Appeals Judgment para.387.

<sup>26</sup> See *inter alia* [REDACTED]

<sup>27</sup> [REDACTED]

<sup>28</sup> Trust Fund for Victims' second submission of Draft Implementation Plan, 24 March 2022, ICC-01/04-02/06-2750, with Annex 1 ("DIP").

Draft Implementation Plan, following which the Defence and LRVs would have been given an opportunity to make submissions. However, having issued the Addendum, the Trial Chamber [REDACTED], which was filed before the Appeal Judgment, based on the initial reparations order and the submissions of the parties at the time, which were neither ruled nor considered by the Trial Chamber, and without allowing the parties to update their submissions based on the Addendum.

**GROUND 4.** Trial Chamber II erred in law by failing to include in the Impugned Decision parameters, criteria and instructions capable of properly guiding the *verification body* in carrying out a meaningful eligibility assessment of potential victims pursuant to the balance of probabilities standard of proof applicable in reparations proceedings.

30. This ground of appeal rests on the Appeals Chamber’s finding that Trial Chamber VI failed to assess and rule upon victims’ applications for reparations and failed to lay out at least the most fundamental parameters of a procedure for the Trust Fund for Victims to carry out the eligibility assessment.

31. Notably, leading up to the 14 July Addendum, the Registry assembled a sample of potential victims and Trial Chamber II proceeded to conduct its own assessment of the facts alleged in the 171 victims’ dossiers contained therein. Trial Chamber II also considered the parties submissions on the sample, the additional information provided by the potential victims as well as the Court’s previous jurisprudence on the matter, particularly in the Lubanga and the Katanga cases.

32. Although the Impugned Decision includes no less than 123 paragraphs dealing with the sample of victims’ and the procedure for carrying out the eligibility of victims at the implementation stage,<sup>29</sup> the result is that the guidance provided therein contains numerous errors such that it is *not* capable of properly guiding the *verification body* in carrying out a meaningful eligibility assessment of potential victims. These errors relate to, *inter alia*, (i) the assessment of victims’ dossiers containing little or no supporting documents, without justification, even when certain documents are or can be made available;<sup>30</sup> (ii) the assessment of victims’ dossiers presenting discrepancies in the information provided on different

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<sup>29</sup> 14 July Addendum, paras.25-148.

<sup>30</sup> 14 July Addendum, paras.53-59.

occasions;<sup>31</sup> (iii) the assessment of child soldier victims' dossiers including the name of only one commander, or one training camp, even when the training camp referred to is not mentioned in the Judgment;<sup>32</sup> (iv) the assessment of victims' dossiers where the date(s) provided differ from the findings in the Judgment and the standard of 'sufficiently close in time to the relevant time frames' referred to by the Trial Chamber;<sup>33</sup> (v) the assessment of victims' dossiers containing no information concerning the occupation of the victims (or their immediate family members) at the time of alleged crimes, bearing in mind the presumption of civilian status under IHL;<sup>34</sup> and (vi) the assessment of the causal link between the harm and the crimes in victims' dossiers.<sup>35</sup>

33. As evidenced by Trial Chamber II's own assessment of the eligibility of the 171 potential victims in the sample, the parameters, criteria and instructions conveyed to the verification body in the Impugned Decision are such that as long as the information provided by a victim matches the geographical and material scope set out by Trial Chamber II in Annex I to the Impugned Decision or in the Trial Chamber VI's 15 December 2020 decision,<sup>36</sup> the verification body will necessarily conclude on the eligibility of the victim. Indeed, whereas Trial Chamber II found 39 potential victims not eligible, its conclusion is based on the account of the victims not matching the geographical and material scope of the crimes for which the Convicted Person was convicted. This ground of appeal will address both the failure of Trial Chamber II to provide proper guidelines and the resulting prejudice.

**GROUND 5.** Trial Chamber II erred in law by failing to provide the Defence with a meaningful opportunity to assess and make submissions on the victims' dossiers in the sample.

34. This ground of appeal rests on the Appeals Chamber finding that the Trial Chamber erred in failing to rule on at least a sample of applications for reparations and that, as a result, the Defence was unable to participate in the assessment of the eligibility of victims to benefit from reparations, which the Trial Chamber ought to have carried out as part of its review of the above-mentioned sample.<sup>37</sup>

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<sup>31</sup> 14 July Addendum, para.61.

<sup>32</sup> 14 July Addendum, paras.80-82.

<sup>33</sup> 14 July Addendum, paras.97-98.

<sup>34</sup> 14 July Addendum, paras.108-112.

<sup>35</sup> 14 July Addendum, paras.131-134.

<sup>36</sup> Decision on issues raised in the Registry's First Report on Reparations, 15 December 2020, ICC-01/04-02/06-2630.

<sup>37</sup> Appeals Judgment, para.363.

35. Notably, despite repeated Defence requests<sup>38</sup> for access to, at a minimum, the participating victims' dossiers from the moment the reparations process in this case was triggered, Trial Chamber VI systematically rejected these requests. The finding in the Appeals Judgment is the sole reason why at the eleventh hour, the Defence was finally given access to the dossiers of the victims in the sample and no more. So much time and energy were wasted as a result of the position of both Trial Chambers on this issue, that it is paramount to recall this violation of the Convicted Person's rights here.

36. Whereas the Defence was given access to the 171 victims' dossiers in the sample, Trial Chamber II put in place a redaction regime,<sup>39</sup> which deprived the Defence of a meaningful opportunity to assess the information provided by the victims. This ground will address the procedure leading to Trial Chamber refusing to order the lifting of the slightest redaction in violation of the rights of the Convicted Person.<sup>40</sup>

37. What is more, having ordered the TFV to provide the Defence with the information and documents considered to determine the eligibility of IDIP victims,<sup>41</sup> Trial Chamber II rejected the Defence request for its own order addressed to the TFV, to be enforced when the TFV refused to provide the relevant information.<sup>42</sup> Although the Defence underscored the need to have access to one specific category of document considered by the TFV, namely the questionnaire completed by the victim when referred to the TFV. Trial Chamber II acknowledged that documents were supposed to be communicated to the Defence by the TFV. Nonetheless, Trial Chamber II rejected the Defence request, holding that the Defence did not

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<sup>38</sup> See for instance, Defence submissions on reparations, 28 February 2020, ICC-01/04-02/06-2479, para.9; Defence Observations on the Registry First Report on Reparations, 30 October 2020, ICC-01/04-02/06-2622, para.64.

<sup>39</sup> 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 October 2022, ICC-01/04-02/06-2750, paras.35-36; 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, paras.25-30.

<sup>40</sup> Decision on the Request on behalf of the Convicted Person seeking communication of material by the Trust Fund for Victims and the lifting of redactions applied by the Registry and the Legal Representatives of Victims to the victims' dossiers, 20 April 2023, ICC-01/04-02/06-2847.

<sup>41</sup> 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, para.34(f).

<sup>42</sup> Decision on the Request on behalf of the Convicted Person seeking communication of material by the Trust Fund for Victims and the lifting of redactions applied by the Registry and the Legal Representatives of Victims to the victims' dossiers, 20 April 2023, ICC-01/04-02/06-2847.

need the information contained in these documents,<sup>43</sup> in clear violation of the rights of the Convicted Person.

38. As a result of these violations, the Defence was unable to meaningfully assess the victims' dossiers as envisaged by the Appeals Chamber.

**GROUND 6.** Trial Chamber II committed a procedural error by failing to request submissions on transgenerational harm.

39. If upheld, the Ntaganda case will be the first proceedings in which reparations are awarded for harm that has been transmitted across generations. In its first attempt at doing so, overturned on appeal, the Trial Chamber relied only on (i) the submissions of the parties, and (ii) the Appointed Experts, who had no expertise in transgenerational harm.<sup>44</sup>

40. The Appeals Chamber called for caution. Noting that the Trial Chamber had not made findings on transgenerational harm at the trial phase,<sup>45</sup> the Appeals Chamber held that it would have expected the Trial Chamber to have fully considered the issue at the reparations stage, "on the basis of clear submissions, having sought any necessary clarifications, expert evidence and, in particular, applications for reparations in respect of this type of harm by particular victims".<sup>46</sup> As such, the Appeals Chamber concluded that it "considers it appropriate for the Trial Chamber to request submissions from the parties and, e.g., experts."<sup>47</sup>

41. The Trial Chamber sought no new submissions from anyone other than the parties. This was an error. Having reviewed the available material, Appeals Chamber considered that the Trial Chamber was not in a position, on the material before it, to make reasoned findings on the appropriateness of awarding reparations for transgenerational harm. Accordingly, this ground of appeal will explore the prejudice arising from this error, which again undermines the Trial Chamber's second attempt to ground its reasoning on transgenerational harm on non-expert opinions and submissions from other cases.

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<sup>43</sup> Decision on the Request on behalf of the Convicted Person seeking communication of material by the Trust Fund for Victims and the lifting of redactions applied by the Registry and the Legal Representatives of Victims to the victims' dossiers, 20 April 2023, ICC-01/04-02/06-2847, para.15.

<sup>44</sup> Defence further submissions on transgenerational harm and the estimated total number of potential beneficiaries, 30 January 2023, ICC-01/04-02/06-2823, para.9, fn.17.

<sup>45</sup> Appeals Judgment, paras.482-483.

<sup>46</sup> Appeals Judgment, para.484.

<sup>47</sup> Appeals Judgment, para.497.

**GROUND 7.** Having failed to consider expert evidence, Trial Chamber II committed a procedural error by failing to make necessary findings on the operation of transgenerational harm.

42. Without any additional expert evidence or guidance, the Trial Chamber was left to try to define and determine what is meant by this novel and evolving concept, and how it is transmitted from parent to child. Recognising the two central schools of thought on how trauma is transmitted generationally; one being epigenic and the other through social transmission, the Trial Chamber made no finding on where the research currently stands, but rather stopped at concluding that the concept of transgenerational harm exists, and is a scientific certainty.<sup>48</sup> Essentially, therefore, finding that reparations can be awarded on the basis of harm where there is no finding, let alone consistent understanding, of how it is transmitted and occurs.

43. In doing so, the Trial Chamber relied on the fact that “the most recent studies suggest” that the two competing schools of thought “mutually reinforce and feed into each other”, citing to two articles.<sup>49</sup> The Trial Chamber gave no basis for selecting these specific articles as the “most recent studies” (despite one of them being over two years old), nor any basis to conclude why these two articles are capable of reliance. The Trial Chamber does not have this expertise. Perhaps more problematic, is that the Chamber’s conclusion that the two theories are mutually reinforcing, is undermined by the limited “expert” evidence in front of it. The Second Expert Report characterises transgenerational harm as being “**psychologically** transmitted from one generation to the next”.<sup>50</sup> The First Experts Report, which itself cites to the Second Expert Report defines transgenerational harm as “**psychological** and material harm suffered by children born out of rape”.<sup>51</sup> This ground of appeal will firstly address this error.

44. Moreover, even if the Trial Chamber was satisfied that the concept of transgenerational harm was a medical certainty, the Appeals Chamber explicitly directed **the Trial Chamber** to assess “whether Mr Ntaganda is liable to repair such harm in the specific context of the crimes of which he has been convicted and taking into consideration, if any, that the protracted armed conflict in the DRC may have as to the **possibility** of establishing that the trauma associated with transgenerational harm was caused by Mr Ntaganda”.<sup>52</sup> This was not done. Instead, the

<sup>48</sup> 14 July Addendum, paras.176-177.

<sup>49</sup> 14 July Addendum, para.176.

<sup>50</sup> Annex 2 to the Registry Transmission of the Appointed Experts’ Reports”, 3 November 2020, ICC-01/04-02/06-2623-Anx2-Red3 (“Second Expert Report”), para.53.

<sup>51</sup> Annex 2 to the Registry Transmission of the Appointed Experts’ Reports”, 3 November 2020, ICC-01/04-02/06-2623-Anx2-Red3 (“First Expert Report”), para.83, fn.129.

<sup>52</sup> Appeals Judgment, para.494 (emphasis added).

Chamber erroneously characterised this as “a matter of evidence”, which could be referred to the “authority making the assessment” to assess.<sup>53</sup> The Trial Chamber therefore failed to address whether the situation in the DRC made it possible, or impossible, to establish that any trauma associated with transgenerational harm arises from the conviction. The prejudice arising from this error will also be explained in this ground.

**GROUND 8.** Trial Chamber II erred in law by failing to require a medical assessment for claims of transgenerational harm.

45. It remains unclear who will be responsible for assessing whether alleged victims are suffering from transgenerational harm. The Addendum refers to “the authority making the assessment”.<sup>54</sup> What is clear from the wealth of literature cited by the Trial Chamber, is that this is not an assessment that a layperson is able to make. This is a matter for experts, who themselves disagree on many central aspects of this form of harm.

46. Despite this, the Trial Chamber took the position that the “authority” will be able to assess whether an individual, whom they have presumably never examined nor spoken with, is suffering from transgenerational harm. As such, the Trial Chamber held that “victims **should not** be required to obtain psychological expertise in order to prove the harm”.<sup>55</sup> This conclusion, illogical on its face, is undermined by several errors in reasoning.

47. By circumventing any medical or expert assessment of victim applications, and refusing to solicit any expert evidence or reports, the Trial Chamber had no option but to rely on the parties’ opinions of how transgenerational harm should be assessed. In deciding how this harm should be established, the Trial Chamber relies **solely** on the submissions of CLR2.<sup>56</sup> The outcome being, the first time that reparations are awarded for a novel and controversial form of harm, they will be assessed by an “authority” with no relevant expertise, on the basis of a test suggested by the legal representative of the victims themselves, with no relevant medical or expert evidence having been admitted. This is an error, further undermined by the numerous errors of reasoning which will be identified in this ground of appeal.

**GROUND 9.** Trial Chamber II committed an error of law by making additional findings outside the confines of the Conviction and Sentencing Decisions.

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<sup>53</sup> 14 July Addendum, para.193.

<sup>54</sup> 14 July Addendum, para.190.

<sup>55</sup> 14 July Addendum, para.189 (emphasis added).

<sup>56</sup> 14 July Addendum, para.190, fn.468.

48. In awarding reparations, “a trial chamber must remain within the confines of the conviction and sentencing decisions”.<sup>57</sup> As regards the Sayo Health Centre, the Sentencing Decision states that it is “**not clear**” whether the centre was damaged as a result of the crime.<sup>58</sup> As such, in order to find Mr Ntaganda liable for reparations in relation to the Sayo Health Centre, the Trial Chamber impermissibly made additional findings that fall outside the Conviction and Sentencing Decisions.

49. On the basis of a purported distinction between a “conduct” crime and a “results” crime, discussed in Ground 10 below, the Chamber concluded that “it is not prevented from making findings at the reparation stage of the proceedings, to the extent that the actual infliction of harm is proven at the applicable standard of proof of balance of probabilities.”<sup>59</sup>

50. In essence, therefore, the Trial Chamber has created a procedure whereby the parties can expend additional resources and time to investigate and bring additional reparations-specific evidence,<sup>60</sup> to bolster evidence which was considered insufficient at trial, to support new findings which can be relied upon to expand the scope of the conviction and sentence on the basis of the lower standard of proof. The unfairness of this procedure to the convicted person, who then has no mechanism to challenge this new category of adverse factual findings, is significant.

51. Accordingly, this ground of appeal will explore the prejudice arising from the Trial Chamber’s erroneous reliance on new evidence, unchallenged by the parties, to create a new creature of “reparations specific” factual findings, to the detriment of the convicted person, and without the safeguard of appellate review.

**GROUND 10.** Trial Chamber II erred in law by relying on a distinction between “conduct” crimes and “results” crimes to erroneously enter new factual findings.

52. In order to justify the expansion of the scope of Mr Ntaganda’s conviction and sentence, the Trial Chamber reasoned that the war crime of attack against protected objects in article

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<sup>57</sup> *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.31.

<sup>58</sup> Sentencing Judgment, 7 November 2019, ICC-01/04-02/06-2442 (“Sentencing Judgment”), para.153.

<sup>59</sup> 14 July Addendum, para.226.

<sup>60</sup> *See, e.g.*, Submissions by the Common Legal Representative of the Victims of the Attacks on the harm caused as a result of the attack on the health centre in Sayo, 22 February 2023, ICC-01/04-02/06-2834 LRV, with its three annexes.



8(2)(e)(iv) of the Statute “is a conduct crime, not a results crime”.<sup>61</sup> As such, the Trial Chamber reasoned that was not **required** to make any determination beyond a reasonable doubt for the purposes of the conviction or sentence as to whether any harm was actually inflicted for as a consequence of the crime.<sup>62</sup> On this basis, the Trial Chamber held that “it is not prevented from making findings at the reparation stage of the proceedings, to the extent that the actual infliction of harm is proven at the applicable standard of proof of balance of probabilities”.<sup>63</sup>

53. The Trial Chamber is correct that it was not **required** to make a finding as to the harm inflicted at the trial stage. The problem is, that it did. The Chamber held that “[i]t is [...] not clear whether the centre was damaged as a result of the crime”.<sup>64</sup> To just ignore this finding, apparently on the basis that it was not required to make it, is disingenuous, and a flagrant error of reasoning. This ground of appeal will explore the prejudice arising from this error.

**GROUND 11.** Trial Chamber II committed a procedural error by relying on the Second Expert Report, despite being unable to assess its credibility, reliability, and the basis for its findings.

54. The report of Dr Gilmore remains at the centre of the findings on Mr Ntaganda’s liability for reparations in relation to the Sayo Health Centre.<sup>65</sup> The Appeals Chamber found that the Trial Chamber’s error in relation to causation and harm to the Sayo Health Centre was premised on its failure to properly assess the credibility and reliability of Dr Gilmore’s report, and the basis for its findings.<sup>66</sup>

55. In light of the Appeals Chamber’s findings, the Defence sought access to the underlying material and information relied upon by Dr Gilmore in her analysis.<sup>67</sup> Not only was Dr Gilmore unwilling to provide such information to the Defence,<sup>68</sup> she revealed that she had [REDACTED] upon submitting her report, and [REDACTED], long before the end of her mandate.<sup>69</sup>

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<sup>61</sup> 14 July Addendum, para.226.

<sup>62</sup> 14 July Addendum, para.226.

<sup>63</sup> 14 July Addendum, para.226.

<sup>64</sup> Sentencing Judgment, para.153.

<sup>65</sup> 14 July Addendum, paras.241-244

<sup>66</sup> Appeals Judgment, para.548.

<sup>67</sup> [REDACTED]; Request on behalf of Mr Ntaganda for disclosure of material relied upon in the Gilmore Expert Report, 16 January 2023, ICC-01/04-02/06-2812-Conf.

<sup>68</sup> Annex to the Transmission of Appointed Expert Sunneva Gilmore’s views on the Defence Request to disclose material relied upon in her Report (ICC-01/04-02/06-2812-Conf), 30 January 2023, ICC-01/04-02/06- 2818-Conf-Anx, p.1.

<sup>69</sup> [REDACTED].

56. Her actions make it impossible for the Trial Chamber to remedy its failure to properly assess the credibility and reliability of Dr Gilmore’s report, and the basis for its findings. Nor can the Defence analyse, respond to, or challenge this underlying material. Unsurprisingly, therefore, the Trial Chamber has done nothing more in the Addendum than state that “it **did** assess the credibility, reliability, and basis for the [report]”, and reiterate that it considers the expert credible and her report generally reliable,<sup>70</sup> before reiterating its first conclusion that Mr Ntaganda caused “damage to the health centre in Sayo”,<sup>71</sup> contradicting the Sentencing Decision.<sup>72</sup> This ground of appeal will accordingly examine the prejudice arising from the Trial Chamber’s repeated reliance on information which is incapable of sufficient scrutiny.

**GROUND 12.** Trial Chamber II erred in law by failing to address the question of breaks in the chain of causation in relation to the Sayo Health Centre.

57. The Sentencing Decision states that “**[i]t is [...] not clear whether the [Sayo Health Centre] was damaged as a result of the crime**”.<sup>73</sup> The Trial Chamber then concluded, for the purpose of reparations, that “but for the attack, the harm would not have occurred”,<sup>74</sup> and that “it was established that the crime for which Mr Ntaganda was convicted is the proximate cause of the harm caused as a direct consequence of the attack”.<sup>75</sup>

58. Harm cannot be attributed to a convicted person “if a break in the chain of causation is established in a particular case.”<sup>76</sup> The Defence set out the evidentiary basis for the demonstrated break in the chain of causation between Mr Ntaganda and damage inflicted on the Sayo Health Centre.<sup>77</sup> The Appeals Chamber **directed** the Trial Chamber to take any break in the chain of causation into account.<sup>78</sup>

59. Rather than fulfilling its “obligation to ensure that the chain of causation was established” and provide a “properly reasoned decision as to the chain of causation establishing that Mr Ntaganda is responsible for the harm caused to the health centre in Sayo,”<sup>79</sup> the Trial Chamber simply circumvented the issue, and concluded that “Mr Ntaganda’s liability is limited

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<sup>70</sup> 14 July Addendum, para.233.

<sup>71</sup> 14 July Addendum, para.234 (emphasis added).

<sup>72</sup> Sentencing Judgment, para.153.

<sup>73</sup> Sentencing Judgment, para.153 (emphasis added).

<sup>74</sup> 14 July Addendum, para.237.

<sup>75</sup> 14 July Addendum, para.237.

<sup>76</sup> Appeals Judgment, para.15.

<sup>77</sup> Defence further submissions on issues related to the Sayo Health Centre, 22 February 2023, ICC-01/04-02/06-2833, paras.53-60.

<sup>78</sup> Appeals Judgment, paras.580-581.

<sup>79</sup> Appeals Judgment, para.581.

to the harm cause as a direct consequences of the crimes for which he was convicted.”<sup>80</sup> Specifically, because “no further incidents other than those indicated were taken into account... the Chamber considers the Defence submissions about an alleged break in the chain of causation misplaced”.<sup>81</sup>

60. This ground of appeal will accordingly address prejudice arising from the Trial Chamber’s error in failing to address this issue, as directed by the Appeals Chamber.

**GROUND 13.** Trial Chamber II erred in law during the implementation of the IDIP by failing to order the TFV to provide information to the Defence in relation to the use of a questionnaire designed to obtain information from priority victims. Trial Chamber II also erred in law and in fact by rejecting arguments raised by the Defence during the implementation of the TFV IDIP concerning the application of the *do no harm* principle to the eligibility determination of priority victims.

61. As submitted in the second Ground of appeal, Trial Chamber II erroneously held that the Appeals Judgment did not impact the TFV IDIP submitted on 8 June 2021, which remained fully operational.<sup>82</sup> Notably, the litigation as well as the implementation of the TFV IDIP during which Trial Chamber II rendered many rulings relevant for the eligibility determination of potential victims in this case was never scrutinized by the Appeals Chamber.<sup>83</sup>

62. This ground addresses two issues in particular, which arose during the implementation of the IDIP and the resulting prejudice to the Convicted Person, namely: (i) the use of the questionnaire developed by the TFV to obtain information from priority victims referred by the LRVs;<sup>84</sup> and (ii) Trial Chamber II’s consideration of Defence arguments<sup>85</sup> related to the

<sup>80</sup> 14 July Addendum, para.238.

<sup>81</sup> 14 July Addendum, para.238.

<sup>82</sup> Decision on the TFV’s Sixth and Seventh Update Reports on the Implementation of the Initial Draft Implementation Plan, 16 November 2022, ICC-01/04-02/06-2792, paras.15-24.

<sup>83</sup> See *inter alia* 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.

<sup>84</sup> See *inter alia* Annex 1 to Trust Fund for Victims’ Third Update Report on the Implementation of the Initial Draft Implementation Plan, 24 January 2022, ICC-01/04-02/06-2741-Conf-Anx1; Defence observations on the Trust Fund for Victims’ Third Update Report on the Implementation of the Initial Draft Implementation Plan, 4 February 2022, ICC-01/04-02/06-2744-Conf, paras.17-21; Annex 1 to Trust Fund for Victims’ Fourth Update Report on the Implementation of the Initial Draft Implementation Plan, 24 March 2022, ICC-01/04-02/06-2751-Conf-Anx1, pp.16-18; 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, para.48.

<sup>85</sup> See *inter alia* Defence observations on the Trust Fund for Victims’ Ninth Update Report on the Implementation of the Initial Draft Implementation Plan, 10 February 2023, ICC-01/04-02/06-2829, paras.15-19; Defence observations on the Trust Fund for Victims’ Eleventh Update Report on the Implementation of the Initial Draft Implementation Plan, 12 June 2023, CC-01/04-02/06-2855, paras.13-14.

application of the *do no harm* principle in relation to the eligibility determination of potential victims.

63. Regarding the former, Trial Chamber II erred by failing to order the TFV to provide information to the Defence on the use of the so-called questionnaire. As concerned the latter, Trial Chamber II erred by rejecting Defence arguments put forward despite the information available on this issue.<sup>86</sup> This includes Trial Chamber II's omission to address observations submitted by the Defence on three periodic update reports submitted by the TFV.

64. Although Trial Chamber II's consideration of the *do no harm* principle was an issue addressed in the Appeals Judgment,<sup>87</sup> the rapidly deteriorating security situation in Ituri and the developments which took place during the last 26 months, justify the Defence raising this issue in this appeal.

## RELIEF SOUGHT

65. In light of the foregoing and as a result of Trial Chamber II's errors of law, fact and procedure, set out in this Defence Notice of Appeal, the Defence respectfully requests the Appeals Chamber to:

- (A) **REVERSE** the 14 July Addendum;
- (B) **ISSUE** a new Reparations Order; and
- (C) **REMAND** the matter to Trial Chamber II thereafter to exercise judicial oversight over the implementation of reparations awarded in this case.

**RESPECTFULLY SUBMITTED ON THIS 21<sup>st</sup> DAY OF AUGUST 2023**



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<sup>86</sup> See *inter alia* Decision on the TFV's Eighth Update Report on the Implementation of the Initial Draft Implementation Plan, 13 January 2023, ICC-01/04-02/06-2811, paras.9-18.

<sup>87</sup> Appeals Judgment, paras.420-456.