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No.: **ICC-01/04-02/06**
Date: **5 December 2023**

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 "Defence Appellant Brief against the 14 July Addendum to the Reparations Order of 8 March 2021", dated 30 October 2023, ICC-01/04-02/06-2876-Conf

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

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

Legal Representatives of Victims
Ms Sarah Pellet
Mr Tars Van Litsenborgh

Mr Dmytro Suprun
Ms Cherine Luzaisu
Ms Fiona Lau

Counsel for the Defence
Me Stéphane Bourgon, *Ad.E.*
Ms Kate Gibson
Mr Benjamin Willame

The Office of Public Counsel for Victims
Ms Paolina Massidda

The Office of the Prosecutor
Mr Karim A. Khan
Ms Nicole Samson

States' Representatives
Democratic Republic of Congo

Amicus Curiae

REGISTRY

Registrar
Mr Osvaldo Zavala Giler

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section
Mr Philipp Ambach

Trust Fund for Victims
Ms Deborah Ruiz Verduzco

Others
Appointed Experts

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" or "Impugned Decision")[2] and the Defence Notice of Appeal against the 14 July Addendum to Reparations Order of 8 March 2021 ("Defence Notice of Appeal"),[3] and pursuant to Regulation 58 of the Regulations of the Court, Counsel for Mr Ntaganda ("Convicted Person", "Defence" or "Appellant") hereby submits this:

Defence Appellant Brief against the 14 July Addendum to the Reparations Order of 8 March 2021

"Defence Appellant Brief"

INTRODUCTION

1. The Defence hereby submits its Defence Appellant Brief in support of the Defence Notice of Appeal submitted on 16 August 2023.

2. The Defence Appellant Brief comprises 13 grounds of appeal. With a view to facilitating adjudication of the Defence submissions, Grounds 1, 2 and 3 have been joined, addressing together all errors alleged in the Defence Notice of Appeal, which arise from Trial Chamber II issuing an *addendum* to the 8 March Reparations Order, as opposed to a new order for reparations as directed. Grounds 9 and 10 have also been argued together. Lastly, the alleged failure of Trial Chamber II 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, mentioned in the first part of Ground 13 in the Defence Notice of Appeal, is not argued herein. The Defence no longer intends to pursue this alleged error, which is addressed in part in Ground 5 directed at the alleged failure of Trial Chamber II to provide the Defence with a meaningful opportunity to review the 171 victims' dossiers in the sample.

3. As set out in the Defence Notice of Appeal and argued in detail herein, the Defence submits that Trial Chamber II erred by refusing to issue a new order for reparations, attempting rather to salvage the 8 March Reparations Order through the issuance of the 14 July Addendum. This error in and of itself requires the reversal of the 14 July Addendum, and for

[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] 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 ("Defence Notice of Appeal ").

the Appeals Chamber to issue a new order for reparations, as it did in *Lubanga*[4] to ensure that the implementation of reparations in this case can proceed on a sound legal basis, as swiftly as possible, for the benefit of the genuine victims in this case.

4. Beyond the procedural errors committed by Trial Chamber II, the eligibility determinations of potential victims during the implementation stage constitutes the main thrust of the Defence appeal, which is addressed in Grounds 4, 5, 6, 7, 8, 9 – 10, 11, 12 and 13. As a result of these errors, a new order for reparations should be issued by the Appeals Chamber including *inter alia*, new criteria and guidelines for the benefit of the authority responsible for making the assessments, which was not identified in the 14 July Addendum. Ground 13 also addresses the importance of adhering to the *do no harm* principle with the aim of ensuring that the implementation of reparations, in the unique and specific circumstances of this case, can proceed swiftly for the benefit of the victims of the crimes for which Mr Ntaganda was convicted, and also of the population of Ituri.

5. The Defence acknowledges that the relief requested as a result of the errors committed by Trial Chamber II, *i.e.* a new order for reparations including specific provisions for the benefit of priority victims, is likely to delay the reparations proceedings in this case, at least temporarily. The Convicted Person, who neither disputes the convictions entered against him in the Trial Judgment *nor* his liability to repair the harm caused to legitimate victims, deplores such a delay. Nonetheless, the Defence takes the view that issuing a new order for reparations is not only appropriate, it is the only way to ensure that the reparations proceedings in this case can proceed on a sound legal basis, as expeditiously as possible, thereafter.

6. Lastly, the Defence notes that as of the filing of the Defence Appellant Brief, the Appeals Chamber has not yet issued a decision on the Defence request for suspensive effect submitted together with the Defence Notice of Appeal.[5] In this regard, the Defence deems it appropriate to underscore, in light of the nature of the grounds of appeal and the relief sought, that the potential prejudice to victims if the proceedings are authorized to proceed until the Appeals Chamber issues its judgment on the merits, far outweighs the temporary delay of the implementation phase, which would possibly result if suspensive effect is granted by the Appeals Chamber.

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[4] *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 ("2015 Lubanga Appeals Judgment on Reparations"), with its Annex A, Amended Order for Reparations, ICC-01/04-01/06-3129-AnxA ("Lubanga Amended Reparations Order").

[5] 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.

CONFIDENTIALITY

7. Pursuant to regulation 23*bis* (1) and (2) of the Regulations of the Court, this Defence Appellant 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.

GROUNDS 1, 2 and 3. Trial Chamber II committed errors of law and procedure by failing to render a new reparations order; by holding that the Initial Draft Implementation Plan submitted by the TFV on 24 March 2022 remained fully operational further to the Appeals Judgment; by failing to include compulsory provisions in the Impugned Decision; and by failing to consider that the Updated Draft Implementation Plan submitted by the TFV in March 2022 was also impacted by the cumulative errors identified in the Appeals Judgment.

8. Trial Chamber II erred in law and procedure by issuing the 14 July Addendum as opposed to a new order for reparations; by holding that the Initial Draft Implementation Plan ("IDIP") submitted by the Trust Fund for Victims ("TFV") on 8 June 2021[6] remained fully operational following the Appeals Judgment;[7] and by failing to consider that the Updated Draft Implementation Plan submitted the TFV on 24 March 2022[8] needed to be modified as a result of the Appeals Judgment.

9. The three errors committed by Trial Chamber II are intertwined, and stem from one overarching error. Namely, Trial Chamber II's error in deciding - despite the terms of the Appeals Judgment - that the 8 March Reparations Order remained in force, and that it "[…] shall be considered an integral part of the Reparations Order, to be read in conjunction with it, and be understood as complementing and replacing therefrom only the specific issues that are dealt with hereafter."[9]

[6] Report on Trust Fund's Preparation for Draft Implementation Plan, 8 June 2021, ICC-01/04-02/06- 2676-Conf, with Annex A, Initial Draft Implementation Plan with focus on Priority Victims, ICC-01/04-02/06- 2676-Conf-AnxA ('IDIP').
[7] 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-01/02/06-2786 ("Implementation Order)", para.17; 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 ("Decision on the TFV Sixth and Seventh Update Reports"), paras.8-10.
[8] Trust Fund for Victims' second submission of Draft Implementation Plan, 24 March 2022, ICC-01/04-02/06-2750 ("Trust Fund for Victims' second submission of Draft Implementation Plan"), with Annex 1, ICC-01/04-02/06-2750-Anx1-Red-Corr ('Updated DIP').
[9] 14 July Addendum, para.15.

10. By issuing the 14 July Addendum to the 8 March Reparations Order instead of issuing a new order for reparations as it was directed to do by the Appeals Chamber,[10] Trial Chamber II not only circumvented the Appeals Judgment, but is also derailing the entire reparations process in this case.

11. Once again, Trial Chamber II inappropriately prioritized the expeditious conduct of the reparations proceedings over basic legal provisions, due process requirements and the rights of both the victims and the Convicted Person.[11]

12. The importance attached by Trial Chamber II to expediting the reparations proceedings, delayed largely by its own decisions throughout this process, is understandable. Everyone, including the CLRs, the Convicted Person,[12] the TFV and the Registry would like to speed up awarding reparations to genuine victims, some twenty years after the events which gave rise to Mr Ntaganda's liability to repair the harm caused. Nonetheless, the decisions issued by Trial Chamber II with a view to expediting the reparations proceedings are grounded in error. In reality, by issuing the 14 July Addendum instead of a new order for reparations, Trial Chamber II's lack of deference for the Appeals Chamber's rulings and guidance is likely to result in further delays detrimental mostly to the victims. Again,[13] Trial Chamber II failed to take into consideration that "[r]eparations proceedings are judicial proceedings, resulting in a judicial order fixing a monetary award for which the Convicted Person is liable."[14]

13. The Appeals Chamber found significant legal errors impacting the most important features in the 8 March Reparations Order, including *inter alia*, the role of the Trial Chamber during the reparations phase;[15] the substantial information which the Trial Chamber was missing in respect of many fundamental issues when issuing the Reparations Order because it failed to assess any victims' applications;[16] the violation of the rights of the Convicted Person to have access to victims' applications and to make observations on their eligibility;[17] the absence of the most fundamental parameters of a procedure guiding the Trust Fund for Victims to carry out the eligibility assessment;[18] the requirement for judicial overview of eligibility

[10] Appeals Judgment, para.759.
[11] Defence Appellant Brief against the 8 March Reparations Order, 7 June 2021, ICC-01/04-02/06-2675 ("Defence Appellant Brief against the Reparations Order"), paras.5,42; Appeals Judgment, paras.732,743
[12] Defence Notice of Appeal, para.1.
[13] *See* Defence Notice of Appeal against the Reparations Order, ICC-01/04-02/06-2659, 8 April 2021, ICC-01/04-02/06-2669, para.45.
[14] Appeals Judgment, para.5.
[15] Appeals Judgment, paras.23,341-346,363-369,747.
[16] Appeals Judgment, paras.343,346.
[17] Appeals Judgment, para.363.
[18] Appeals Judgment, paras.387,747.

determinations made by the TFV;[19] the absence of reasons in relation to the concept of transgenerational harm,[20] the absence of meaningful evidentiary guidance regarding the establishment of transgenerational harm,[21] the assessment of harm concerning the health centre in Sayo,[22] breaks in the chain of causality when establishing such harm,[23] and the presumption of physical harm for victims of the attacks;[24] the calculation of the actual or estimated number of potential victims in the case;[25] and the amount of the Convicted Person's liability to repair the harm caused to victims.[26]

14. Considering the cumulative effect of the numerous and far-reaching errors, identified within the Appeals Judgment, which materially affect the 8 March Reparations Order, and the significant scope of the corrective actions required, the Appeals Chamber remanded *the matter* to Trial Chamber II, which was *directed to* issue a new order for reparations, taking into account the terms of the Appeals Judgment.[27] A new order for reparations was required because the errors identified in the Appeals Judgment and the corrective actions required impacted every aspect of the reparations process and the 8 March Reparations Order. In fact, due to the nature of the errors found by the Appeals Chamber and their impact on the entire reparations process, no individual section or paragraphs of the 8 March Reparations Order could be salvaged, other than by incorporating them in a new order for reparations.

15. Yet, Trial Chamber II decided that the 8 March Reparations Order remained the *operative* order for reparations, along with the 14 July Addendum[28] as a complement. Notably, the 14 July Addendum is comprised, in respect of many issues, of lengthy explanations as to why Trial Chamber II had taken the original and erroneous decisions,[29] before then arriving at the same conclusion.[30] This Ground of Appeal accordingly addresses the consequences and the prejudice arising from Trial Chamber II's continued reliance on the 8 March Reparations Order as the operative order for reparations, despite the Appeals Judgment, thereby endangering the reparations process in this case.

[19] Appeals Judgment, paras.387,414,419.
[20] Appeals Judgment, paras.23,492-497,748.
[21] Appeals Judgment, paras.23,494-497,748.
[22] Appeals Judgment, paras.23,548-549,748.
[23] Appeals Judgment, paras.23,548-549,748.
[24] Appeals Judgment, paras.23,704-705,748.
[25] Appeals Judgment, paras.23,265,746.
[26] Appeals Judgment, paras.23,492-495,748.
[27] Appeals Judgment, p.11 and paras.749-750.
[28] 14 July Addendum, para.15.
[29] *See, inter alia,* 14 July Addendum, paras.174-195,225-243,321-324.
[30] *See, inter alia,* 14 July Addendum, paras.196-197,244-24,360.

16. The Appeals Chamber was faced with a similar situation in *Lubanga*, after finding errors in Trial Chamber I's Decision establishing the principles and procedures to be applied to reparations,[31] even though the errors identified were not as substantial as in the present case. In *Lubanga*, the Appeals Chamber considered it appropriate to amend the impugned decision and to issue a new order for reparations,[32] which guided the reparations process from that moment on. The Appeals Chamber noted that following its Judgment, the TFV would be seized of the amended order for reparations for purposes of implementation[33] and submission of a draft implementation plan for the approval of a newly constituted Chamber. Although the Appeals Chamber's issuance of a new reparations order in *Lubanga* resulted in delays,[34] the reparations proceedings in that case were then able to proceed on a sound legal basis, guided by the new order for reparations.[35]

17. In this case, the consequences of Trial Chamber II's decision to continue relying on the 8 March Reparations Order despite the Appeals Judgment are far reaching, as they bring into play Trial Chamber II's continued and inappropriate reliance on both the Initial Draft Implementation Plan submitted by the TFV on 8 June 2021 ("IDIP")[36] as well as the Updated Draft Implementation Plan submitted by the TFV on 24 March 2022 ("Updated DIP").[37]

18. As elaborated below, the submission, approval and implementation of the IDIP was – and continues to be - impacted by the same errors the Appeals Chamber found in the 8 March Reparations Order. Contrary to Trial Chamber II's erroneous decision, the IDIP was no longer in force or operative.[38] As for the Updated DIP, it was designed and submitted on the basis of the 8 March Reparations Order and assumptions drawn from the 8 March Reparations Order,[39] but had not yet been approved by Trial Chamber II when the Appeals Judgment was rendered. At a minimum, the Updated DIP required significant modifications, taking into account

[31] *The Prosecutor v. Thomas Lubanga Dyilo,* Decision establishing the principles and procedures to be applied to reparations, 7 August 2012, ICC-01/04-01/06-2904 ("Lubanga Decision on Reparations").
[32] 2015 Lubanga Appeals Judgment on Reparations, with its Annex A, Amended Order for Reparations, ICC-01/04-01/06-3129-AnxA ("Lubanga Amended Reparations Order").
[33] 2015 Lubanga Appeals Judgment on Reparations, para.240.
[34] The Lubanga Decision on Reparations was issued on 7 August 2012. The 2015 Lubanga Appeals Judgment on Reparations (and Amended Reparations Order) was then rendered on 3 March 2015. Following this, Trial Chamber II issued its Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable on 21 December 2014, whereas the subsequent Appeals Judgment thereon was issued on 18 July 2019.
[35] Lubanga Amended Reparations Order.
[36] Report on Trust Fund's Preparation for Draft Implementation Plan, 8 June 2021, ICC-01/04-02/06- 2676-Conf, with Annex A, Initial Draft Implementation Plan with focus on Priority Victims, ICC-01/04-02/06- 2676-Conf-AnxA ('IDIP').
[37] Trust Fund for Victims' second submission of Draft Implementation Plan, 24 March 2022, ICC-01/04-02/06-2750 ("Trust Fund for Victims' second submission of Draft Implementation Plan"), with Annex 1, ICC-01/04-02/06-2750-Anx1-Red-Corr ('Updated DIP').
[38] *Infra,* paras.45-63.
[39] The Updated DIP contains no less than 116 references to the 8 March Reparations Order.

observations by the parties, to bring it in line with the evolving situation, including the Appeals Judgment and the new order for reparations Trial Chamber II was directed to issue.[40]

19. Regarding the IDIP, Trial Chamber II could have requested the TFV to submit a new or updated version, taking into consideration the impact of the errors found by the Appeals Chamber in the 8 March Reparations Order, without causing any significant delay. Even better, Trial Chamber II could have included specific provisions in the new order for reparations to ensure that priority victims would not be prejudiced, and their eligibility and urgency requirements assessed without delay. Instead, Trial Chamber II opted to allow the TFV to continue implementing the IDIP which was impacted by fundamental errors, thereby circumventing the Appeals Judgment.[41]

20. As for the Updated DIP, had Trial Chamber II issued a new order for reparations as was directed, it could have instructed the TFV to submit a new, amended or updated DIP based on the new order for reparations, necessarily drawing new assumptions therefrom. Again, bearing in mind the calendar subsequently announced by Trial Chamber II for the beginning of the eligibility process,[42] this would have been possible without causing any significant delay; while allowing the parties to make observations on the new, amended or updated DIP, in accordance with due process requirements. Again, the consequences of Trial Chamber II deciding on a different course of action imperil the timely implementation of reparations in this case.

21. The sole remedy in the present situation, with a view to ensuring that the reparations process proceeds expeditiously, as well as on a sound legal basis, for the benefit of the genuine victims in this case, is for the Appeals Chamber to find that Trial Chamber II erred by issuing the 14 July Addendum, reverse the 14 July Addendum, and to issue *proprio motu* a new order for reparations including *inter alia*, specific guidance for the award of reparations to priority victims

[40] *Infra*, paras.64-75.
[41] Implementation Order, para.17; Decision on the TFV Sixth and Seventh Update Reports, paras.8-10.
[42] First Decision on the Trust Fund for Victims' Draft Implementation Plan for Reparations, 11 August 2023, ICC-01/04-02/06-2860 ("First Decision on DIP"), para.187: "The Chamber considers it reasonable to expect that the Registry will be able to make the necessary preparations and arrangements to start the process by 1 January 2024, at the latest. The VPRS should inform the Chamber accordingly."

Issuing the 14 July Addendum was an error.

22. Trial Chamber II was directed by the Appeals Chamber "to issue a new order for reparations".[43] This direction was based on the Appeals Chamber's conclusion that the significance of the remand, and the changes required, would essentially mean that any new decision would constitute a new order for reparations within the meaning of Article 82(4) of the Statute.[44] As such, the Appeals Chamber was explicit that the Trial Chamber should rectify the errors identified, and "issue a new order". [45]

23. The Trial Chamber did not issue a new order for reparations. Instead, it issued what it has called an "Addendum to the Reparations Order of 8 March 2021". In deciding to issue an Addendum to the 8 March Reparations Order, rather than a new order for reparations, Trial Chamber II first selectively quoted from the Appeals Judgment, circumventing the operative part of the Appeals Chamber's orders in paragraphs 750 and 759. Specifically, Trial Chamber II relied on the following:[46]

> "...para.750, stressing that the Appeals Chamber deemed 'appropriate to *reverse the findings* of the Trial Chamber on the *aforementioned matters'* [emphasis added]; para. 757, noting that '[i]n light of the findings of the Appeals Chamber that require *fundamental aspects* of the Impugned Decision to be reversed, the objective at this stage of the proceedings must be to *correct the errors identified* in a way that both enables the order for reparations to be based upon an appropriately solid foundation and that causes *minimum disruption* to the overall reparation process.' [emphasis added]; para. 759, noting that the Reparations Order was '*partially reversed'* [emphasis added]."[47]

24. Trial Chamber II therefore deliberately circumvented those parts of the very same paragraphs in which the Appeals Chamber ordered it "to issue a new reparations order taking into account the terms of this judgment,"[48] meaning that the Appeal Chamber's intention is not accurately represented in the Addendum. In doing so, Trial Chamber II appears to be asserting that because the Appeals Chamber did not reverse the **entire** Reparations Order and every single aspect therein, Trial Chamber II could carve out those parts which, *in its view*, had not been affected by the Appeals Judgment, consider these sections as still being operative, and

[43] Appeals Judgment, paras.750,759. *See also* Appeals Judgment, p.1: "(2) The matter is therefore remanded to Trial Chamber II, which is directed to issue a new order for reparations, taking into account the terms of this Judgment."
[44] Appeals Judgment, para.758.
[45] Appeals Judgment, para.750,759.
[46] Appeals Judgment, paras.750,759. *See also* Appeals Judgment, p.1: "(2) The matter is therefore remanded to Trial Chamber II, which is directed to issue a new order for reparations, taking into account the terms of this Judgment."
[47] 14 July Addendum, fn.31.
[48] Appeals Judgment, paras.750,759.

issue an addendum to correct the rest. This cannot be reconciled with the Appeals Chamber's plain language, which explicitly referenced a new order.

25. Next, Trial Chamber II said it was "following previous practice".[49] The only practice cited is an addendum issued in the *Abd-Al-Rahman* case.[50] This was an addendum, which modified the Directions Order for the Conduct of Proceedings to set out the procedure for an upcoming "Motion for Acquittal" process. This *Abd-Al-Rahman* addendum was issued *proprio motu* by the Trial Chamber in that case. It did not result from an Appeals Chamber decision, which found the original order to be erroneous in several key respects. It was, a genuine "addendum", meaning information that is "added" to an existing document in order to clarify or supplement the original content. More importantly, the *Abd-Al-Rahman* Trial Chamber informed the parties in advance that the addendum would be issued, and the Defence welcomed its issuance.[51] For these reasons, the *Abd-Al-Rahman* addendum certainly does not constitute "previous practice" that can support in any way the 14 July Addendum issued by Trial Chamber II in the *Ntaganda* case. Notably, while Trial Chamber II's citation reads: "See, ***inter alia***, Trial Chamber I, *Prosecutor v. Ali Muhammad Abd-Al-Rahman*, Addendum to Directions on the Conduct of Proceedings Motion for Acquittal, 24 January 2023",[52] no other prior practice was cited, nor can any relevant precedent by located by the Defence.

26. It is appropriate to recall here that when the Appeals Chamber found errors in the order for reparations issued by Trial Chamber I in *Lubanga*, it decided to issue an amended reparations order, which guided the reparations process from then on, in that case.

27. Trial Chamber II then explicitly dismissed the Appeals Chamber's reference to a "new order" for reparations, holding that the Appeals Chamber had linked the need for a new order to guarantee the parties' right to appeal pursuant to article 84(2) of the Statute, and that the parties will have a fresh right of appeal regardless.[53] In the paragraphs cited by Trial Chamber II, the Appeals Chamber was indeed concerned with each party having a fresh right of appeal. Although Trial Chamber II held that the right of appeal of the parties was a consideration when deciding to issue the 14 July Addendum, it stated that "the parties will indeed have a fresh right to appeal the present Addendum as an integral part of the Reparations Order, directly before the

[49] 14 July Addendum, para.16.
[50] *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman*, Addendum to Directions on the Conduct of Proceedings Motion for Acquittal, 24 January 2023, ICC-02/05-1/20-855.
[51] *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman,* 24 January 2023, ICC-02/05-01/20-T-108-Red-ENG CT WT 24-01-2023, p.71, ln.9.
[52] 14 July Addendum, fn.32 (emphasis added).
[53] 14 July Addendum, para.16.

Appeals Chamber"[54] which, as further explained below, is very different from the ability to appeal the new order for reparations it was directed to issue.

28. What is more, the Appeals Chamber's direction to Trial Chamber II to issue a new order for reparations was evidently linked to other issues, including "the significance of the remand, and the changes required".[55] Thus, issuing anything other than a new order for reparations was not an option available to Trial Chamber II. Furthermore, by issuing the 14 July Addendum instead, Trial Chamber II has created *inter alia* the following problems.

29. The initial prejudice resulting from Trial Chamber II's refusal to issue a new order as directed by the Appeals Chamber, and rather to issue an addendum as a complement to the 8 March Reparations Order is, and continues to be, the creation of a patchwork of concurrently operative decisions and implementation plans, thereby complicating and compromising the reparations process for those who seek to implement it, or benefit from it.

30. Firstly, there is no mention in the 14 July Addendum as to which body will be responsible for the eligibility determinations of the many thousands of potential victims in this case. Whereas the 8 March Reparations Order assigned this responsibility to the TFV, the 14 July Addendum refers to "the authority making the assessment"[56] without more. The identity of the so-called authority making the assessment, and the reasons why this body was considered competent, should have been included in the new order for reparations.[57] Whatever body is ultimately assigned to determine eligibility, this authority should be able to understand the precise parameters of the reparations award in the present case, in order to assess eligibility. Moreover, the TFV as the agency responsible to implement the reparations awarded, the relevant staff within the Registry, including the VPRS, and any implementing partners contracted by the TFV, should be able to understand and implement the reparations award in the present case. Similarly, the Common Legal Representatives of participating potential victims, the Convicted Person, and members of his Defence team, should also be able to understand, communicate, and adhere to relevant aspects of the reparations award. Furthermore, the affected communities in the DRC, and members of the public interested in reparations, should be able to understand the scope and operation of the reparations award. By issuing the 14 July Addendum rather than a new order for reparations, Trial Chamber II has made this impossible.

[54] 14 July Addendum, para.16.
[55] Appeals Judgment, para.758.
[56] 14 July Addendum, paras.189-190,192,197.
[57] *Infra*, para.65.

31. The 14 July Addendum in this case is 157 pages long, with over 70 headings and subheadings. Within those 157 pages is an analysis of the errors identified by the Appeals Chamber, the parties' submissions thereon, and the Trial Chamber's reasoning and ultimate findings. A person seeking to understand the reparations framework in the present case would firstly need to read and reconcile (i) the 14 July Addendum (157 pages); which should be read together with (ii) the 8 March Reparations Order (97 pages); (iii) the 15 December 2020 Decision;[58] (iv) the Decision approving the TFV Initial Draft Implementation Plan submitted on 8 June 2021 (which did not include any mechanism for the eligibility determination of priority victims, 21 pages);[59] and (v) the Decision on the TFV Fourth Updated Report on the implementation of the Initial Draft Implementation Plan, approving the proposed substantive criteria for the determination of the eligibility of priority victims (issued before the Appeals Judgment, which found fundamental errors in the 8 March Reparations Order, was delivered, 14 pages),[60] as modified by subsequent decisions issued by Trial Chamber II on further update reports submitted by the TFV, impacting the eligibility determination of priority victims.[61]

32. Following the issuance of the 14 July Addendum, each of these concurrently operative decisions now make up the framework of the reparations process in this case. This is untenable. What is more, the present situation has further evolved and become even more complex following the decision issued by Trial Chamber II on 11 August 2023,[62] approving the Updated DIP submitted by the TFV on 24 March 2022. The problem is, that the Updated DIP is based on the 8 March Reparations Order and assumptions drawn therefrom, **before** the Appeals Judgment identifying major errors was delivered, and without the benefit of observations from

[58] Decision on issues raised in the Registry's First Report on Reparations, 15 December 2020, ICC-01/04-02/06-2630 ("15 December 2020 Decision").
[59] Decision on the TFV's initial draft implementation plan with focus on priority victims, 23 July 2021, ICC-01/04-02/06-2696 ("Decision on IDIP"); Notably, the Defence sought leave to appeal this Decision arguing that it was premature and wrong to approve an Initital Draft Imlementation Plan which did not contain the required information for the determination of the eligibility of priority victims and which, in the eyes of the parties was incomplete. This request was denied. *See* Application on behalf of Mr Bosco Ntaganda seeking leave to appeal Decision on the TFV's initial draft implementation plan with focus on priority victims, 2 August 2021, ICC-01/04-02/06-2698; Decision on the Application on behalf of Mr Bosco Ntaganda seeking leave to appeal the Decision on the TFV's initial draft implementation plan with focus on priority victims, 17 August 2021, ICC-01/04-02/06-2704.
[60] 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 ("Decision on the TFV Fourth Update Report").
[61] *See* particularly, *inter alia,* Decision on the TFV Sixth and Seventh Update Reports and Decision on the TFV's Ninth to Twelfth Update Reports on the Implementation of the Initial Draft Implementation Plan, 30 August 2023, ICC-01/04-02/06-2868 ("Decision on the TFV Ninth to Twelfth Update Reports").
[62] First Decision on DIP.

the parties. Unsurprisingly, Trial Chamber II is now seeking for further input from the TFV and the VPRS to provide missing information in the Updated DIP.[63]

33. Importantly, there is no indication from Trial Chamber II, which parts of the 8 March Reparations Order are still operative, and which have been modified or rendered inoperative by the 14 July Addendum. The structure and labelling of the two documents are different, requiring the reader to attempt to deduce which sections of the 14 July Addendum correspond to which sections of the 8 March Reparations Order, and then read the two together to see which parts have been carved out and remain in place, and which have been overturned.

34. The way the 14 July Addendum has been drafted renders this an impossible task. Taking, for example, the section on "Calculation of the monetary award against Mr Ntaganda",[64] which appears to replace, at least in part, the section on "Amount of Mr Ntaganda's financial liability" in the Reparations Order.[65] Rather than saying "this section of the Addendum replaces paragraphs 226-247 of the Reparations Order", Trial Chamber II instead draws directly from the prior paragraphs, and appears to incorporate parts of them by reference. To add to the confusion, Trial Chamber II opens the section in the 14 July Addendum with two pages of recounting what it previously held in the 8 March Reparations Order, and why this was reasonable, with language like "the Chamber decided to set the total reparations award for which Mr Ntaganda is liable to 30,000,000. The Chamber considered this amount to be fair and appropriate, in light of the circumstances of the case",[66] before turning to summarising why the Appeals Chamber did not agree. The Reparations Order also summarises at length the TFV's preliminary estimates on costs to repair harm, and the Appointed Experts' analysis of comparative practice, which also appear to still be relevant,[67] and incorporated by reference into the Chamber's determination in the 14 July Addendum.[68]

35. The problem is, none of this is clear. The victims, the implementing partners, the "authority making the assessment", the Convicted Person, the CLRs, and the relevant Registry staff, are entitled to a document that sets out clearly the reparations regime in the *Ntaganda* case. Instead, they are left to negotiate between no less than four overlapping and concurrently operative documents, to try to discern what they should be doing, and why.

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[63] First Decision on DIP, Dispositions.
[64] 14 July Addendum, paras.321-360.
[65] Reparations Order, 8 March 2021, ICC-01/04-02/06-2659 ("8 March Reparations Order"), paras.226-247.
[66] 14 July Addendum, para.323.
[67] 8 March Reparations Order, paras.236-241.
[68] 14 July Addendum, para.336.

36. This is particularly problematic regarding the determination of the eligibility of potential victims, which constitutes a most important aspect of the implementation of reparations in this case. As a result of Trial Chamber II's refusal to issue a new order for reparations, the authority making the assessment is called upon to conduct this critical exercise based on the 14 July Addendum, the 8 March Reparations Order, the Decision on the TFV Fourth Update Report and the 15 December 2020 Decision on Registry Issues, all of which are operational. This is entirely unsustainable.

37. A useful example is CLR2's Ground 3 addressing Trial Chamber II's alleged error concerning the eligibility requirement for reparations to the victims who suffered harm in the forest or bush surrounding the villages for which positive findings were entered.[69] Based on the above four decisions issued by Trial Chamber II, the CLR2 submits that:

> "[…] by disregarding or misapplying its own findings on the territorial scope of the reparations and the previously established eligibility criteria – which the Legal Representative understood to be based on its literal meaning and conveyed to his clients accordingly – 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." [70]

38. This is an example of the concrete prejudice stemming from the Trial Chamber's refusal to implement the Appeals Chamber's direction to issue a new order for reparations order.

39. Prejudice also stems from the fact that the errors identified by the Appeals Chamber were global errors which impacted the entire fabric of the Reparations Order. Considering *inter alia*, the significant weight attached to applications for reparations in the Statute and the Rules,[71] Trial Chamber VI's overall approach to reparations was wrong: (i) by refusing to allow the Defence to participate in the assessment of the eligibility of victims to benefit from reparations,[72] failing to even address the Defence's submissions on its involvement in the assessment of applications for reparations and to provide a reasoned opinion in this regard;[73] and (ii) by failing to examine at least a sample of applications from potential victims, even though this would have been particularly relevant in the present case, given the type of

[69] 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.30-32,36.
[70] CLR2 Notice of Appeal against the Addendum, para.36.
[71] Appeals Judgment, para.331.
[72] Appeals Judgment, para.363.
[73] Appeals Judgment, para.364.

reparations it was awarding – collective reparations with individualised components,[74] and even though it had the opportunity to examine such a sample.[75] The related failure of Trial Chamber VI to lay out at least the most fundamental parameters of a procedure for the TFV to carry out the eligibility of potential victims was also wrong.[76] Had the Trial Chamber ruled on a sample, it would have had to set the eligibility criteria for victims to be identified at the implementation stage.[77] These are not discrete errors. 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.

40. To give a concrete example, concerning the failure of Trial Chamber VI to assess any of the applications for reparations, the Appeals Chamber held that while there may be instances where it is appropriate to proceed without ruling on any applications, a Trial Chamber will be "required to rule on applications for reparations" where, for example, the evidential basis other than that contained in the applications is insufficient. The Appeals Chamber explained that, in addition, "the information gleaned from those applications may represent the strongest and most direct available evidence on which to base, in particular, a monetary award."[78] It also observed that victims' applications "may provide potentially crucial information in relation to the number of victims who wish to receive reparations, which, in turn, may form a sound basis for the calculation of the award" and most importantly, that "the information contained in applications can assist a trial chamber *in making findings as to harm*".[79]

41. Consequently, the Appeals Chamber ordered Trial Chamber II to go back to the drawing board, assess at least a sample of victims' applications, allow the Defence to have access to victims' applications and to make observations on the same, and "issue a new order for reparations". In general terms, the Appeals Chamber held that "the Trial Chamber erred in issuing the [8 March Reparations Order] without having assessed and ruled upon victims' applications for reparations".[80] Importantly, the Appeals Chamber made this order, after explaining all the different aspects of the decision-making process that would be impacted by the Trial Chamber having looked at, at least, a sample of the applications themselves. The review of the victims' applications was not simply limited to informing the correction of the Trial Chamber's errors concerning the Sayo Health Centre, or transgenerational harm, or the

[74] Appeals Judgment, para.343.
[75] Appeals Judgment, para.344.
[76] Appeals Judgment, paras.387,747.
[77] Appeals Judgment, para.368.
[78] Appeals Judgment, paras.338-339.
[79] Appeals Judgment, para.341 (emphasis added).
[80] Appeals Judgment, para.747.

number of eligible victims. Rather, the victims' applications were intended to inform the Trial Chamber's entire approach to reparations, including assisting the Trial Chamber in making findings as to harm, more globally.[81] By carving out sections and issuing an "Addendum" relevant only to those, Trial Chamber II has missed that opportunity.

42. In reality, the 8 March Reparations Order was drafted without Trial Chamber VI having, *inter alia*, viewed a single victim application, set the eligibility criteria for victims to be identified at the implementation stage and benefited from input by the Defence. In these circumstances, neither the 8 March Reparations Order *nor* any individual section or paragraphs therein – noting particularly that Trial Chamber II has not identified any specifically - can be held to remain operative, other than by including the same in the new order for reparations Trial Chamber II was directed to issue.

43. For these reasons, the Defence submits that the appropriate remedy is for these errors to be rectified through a new, unified, order for reparations issued by the Appeals Chamber

The prejudice resulting from Trial Chamber II issuing the 14 July Addendum as opposed to a new order for reparations is compounded by its ruling that the IDIP remained fully operational following the Appeals Judgment.

44. The failure of Trial Chamber II to issue a new order for reparations has additional consequences. The Appeals Judgment was rendered in September 2022. Two months later, in November 2022, Trial Chamber II held that the Initial Draft Implementation Plan ("IDIP")[82] 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.[83] This was an error.

45. The IDIP does not exist independently from the 8 March Reparations Order. The IDIP was but an implementing vessel for the 8 March Reparations Order, which defined its scope and its modalities. The two documents are inextricably intertwined. As a starting point, the IDIP contains over 35 references to the Reparations Order in its footnotes. As such, where Trial Chamber II was directed by the Appeals Chamber "to issue a new order for reparations"[84] 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.

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[81] Appeals Judgment, para.341.
[82] Report on Trust Fund's Preparation for Draft Implementation Plan, 8 June 2021, ICC-01/04-02/06- 2676-Conf, with Annex A, Initial Draft Implementation Plan with focus on Priority Victims, ICC-01/04-02/06- 2676-Conf-AnxA ('IDIP').
[83] Implementation Order, para.17; Decision on the TFV Sixth and Seventh Update Reports, paras.8-10.
[84] Appeals Judgment, para.759.

46. Notably, when the TFV submitted the IDIP, significant compulsory information was missing therein. That critical information was missing from the IDIP submitted for approval was generally agreed upon.[85] Nonetheless, Trial Chamber II approved the IDIP even though it neither included a procedure nor any substantive criteria for the determination of the eligibility of priority victims.[86] The Defence sought leave to appeal Trial Chamber II's decision[87] but this request was denied.[88] Some eight months passed before such a procedure and criteria were ultimately submitted by the TFV in its Fourth Updated Report on the IDIP on 24 March 2022.[89] It then took more than six weeks for them to be approved by Trial Chamber II on 12 May 2022,[90] being four months **before** the Appeals Judgment, and despite objections raised by the Defence.[91]

47. Importantly, the criteria used by the TFV to determine the eligibility of priority victims pursuant to the IDIP were developed and approved on the basis of the 8 March Reparations Order,[92] in which the Appeals Chamber found numerous fundamental errors.[93] Thus, like the 8 March Reparations Order remanded to Trial Chamber II to issue a new order for reparations, the IDIP was submitted and approved by Trial Chamber II, *inter alia*: (i) without having examined at least a sample of applications from potential victims, even though this would have been particularly relevant in the present case,[94] and even though it had the opportunity to

[85] Observations of the Common Legal Representative of the Victims of the Attacks on the Trust Fund for Victims' Draft Initial Implementation Plan, 23 June 2021, ICC-01/04-02/06-2680, paras.2,48-49; Response of the Common Legal Representative of the Former Child Soldiers to the TFV Initial Draft Implementation Plan with focus on Priority Victims, 23 June 2021, ICC-01/04-02/06-2681, paras.4,13,42; Defence Observations on the TFV initial draft implementation plan, 23 June 2021, ICC-01/04-02/06-2682, paras.7-10,71; Registry Observations on the Trust Fund for Victims' Initial Draft Implementation Plan, 23 June 2021, ICC-01/04-02/06-2683, para.20.
[86] Decision on IDIP, Dispositions.
[87] Application on behalf of Mr Bosco Ntaganda seeking leave to appeal Decision on the TFV's initial draft implementation plan with focus on priority victims, 2 August 2021, ICC-01/04-02/06-2698.
[88] Decision on the Application on behalf of Mr Bosco Ntaganda seeking leave to appeal the Decision on the TFV's initial draft implementation plan with focus on priority victims, 17 August 2021, ICC-01/04-02/06-2704.
[89] 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 ("TFV Fourth Update Report"), with its Annex 1, ICC-01/04-02/06-2751-Conf-Anx1.
[90] Decision on the TFV Fourth Update Report.
[91] 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 ("Defence Observations on the TFV Fourth Update Report").
[92] IDIP; The Trust Fund first progress report on the implementation of the Initial Draft Implementation Plan and Notification of Board of Director's decision pursuant to regulation 56 of the Regulations of the Trust Fund, 23 September 2021, ICC-01/04-02/06-2710 ("TFV First Update Report"); Trust Fund's Second Update report on the Implementation of the Initial Draft Implementation Plan, 23 November 2021, ICC-01/04-02/06-2723 ("TFV Second Update Report"); 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 ("TFV Third Update Report"); and the TFV Fourth Update Report containing no less than 76 references to the 8 March Reparations Order.
[93] *Supra,* para.13.
[94] Appeals Judgment, para.343.

examine such a sample;[95] (ii) without having allowed the Defence to participate in the assessment of the eligibility of victims to benefit from reparations;[96] (iii) without having addressed the submissions of the Defence on its involvement in the assessment of applications for reparations and to provide a reasoned opinion in this regard;[97] (iv) without having ruled on a sample of potential victims, which would have allowed it to gain valuable information as described by the Appeals Chamber;[98] and (v) without laying out at least the most fundamental parameters of a procedure for the TFV to carry out the eligibility of potential victims.[99]

48. As such, the submission of the IDIP by the TFV, its approval by Trial Chamber II and its implementation by the TFV were impacted by the same errors, identified by the Appeals Chamber, which led to the 8 March Reparations Order being remanded to Trial Chamber II. Thus, contrary to Trial Chamber II's holding, the IDIP was indeed affected by the Appeals Judgment.

49. To justify its finding that the IDIP remained fully operational, Trial Chamber II again cited selectively to the Appeals Judgement. The Defence had submitted that the continued operation of the IDIP was based on a flawed premise, because "the IDIP and the measures taken in its implementation stem directly from the Reparations Order, which has been reversed."[100] In response, Trial Chamber II stated that "[t]he Appeals Chamber itself acknowledged that the Reparations Order:

> "represented the start of the implementation process of the award for reparations, rather than an aspect of the proceedings that has remained static and unchanged since that decision was issued. The TFV has already undertaken steps in relation to the implementation of the order for reparations; and the parties are able to make submissions in relation to those further developments during the course of the implementation process. **Those developments are outside the scope of the present appeal [...]**"[101]

50. What is critically important, is what comes next. What the Appeals Chamber actually said, is that "[t]hose developments are outside the scope of the present appeal **as they have occurred since the Impugned Decision was issued**. However, the Appeals Chamber bears in mind that the reality is that the Trial Chamber will have extensive knowledge of them; and that

[95] Appeals Judgment, para.344.
[96] Appeals Judgment, para.363.
[97] Appeals Judgment, para.364.
[98] Appeals Judgment, paras.343,346.
[99] Appeals Judgment, paras.387,747.
[100] 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.14-17.
[101] Decision on the TFV Sixth and Seventh Update Reports, para.9, citing Appeals Judgment, para.755.

they are likely to be of relevance when the Trial Chamber has to reconsider the questions being remanded now."[102]

51. After selectively cutting this citation in half, Trial Chamber II then went on to submit that the Appeals Chamber remanded the Reparations Order "for the Chamber to address specific issues, which do not include the IDIP".[103] This is a misrepresentation of the Appeals Judgment. The Appeals Chamber did not place any limits on the revision of the IDIP. To the contrary, the Appeals Chamber noted that the developments on implementation were outside the scope of the present appeal, given that they occurred later in time, but that they were likely "to be of relevance when the Trial Chamber has to reconsider the questions being remanded now."[104] Namely, that Trial Chamber II would indeed need to address the developments surrounding implementation, which includes the IDIP.

52. This is reinforced by the Appeals Chamber's step-by-step directions to Trial Chamber II, finding that "the Trial Chamber will need, *inter alia*, to take the following steps:

> "assemble and rule upon a proper representative sample of applications for reparations," "(e)nsure […] that the Defence is able to challenge to this information by means of reviewing the applications and making representations thereon *prior* to issuing the new order for reparations;" and "[s]**et out at least the most fundamental parameters of a procedure** for the TFV to carry out the administrative screenings of eligibility of applicants seeking to benefit from reparations, providing for the requirement of a judicial approval of the outcome of any such administrative screenings of eligibility […]"[105]

53. It defies logic that the IDIP submitted by TFV in June 2021, including the eligibility procedure in its Fourth Updated Report, could continue uninterrupted, when the 8 March Reparations Order on which it was based was remanded and required a complete overhaul in September 2022.

54. Amazingly, in addition to erroneously holding that the IDIP continued to be "fully operational, as it has not been affected by the Appeals Judgment," Trial Chamber II again circumvented the Appeals Judgment. Trial Chamber II considered it appropriate, as late as 16 November 2022, for the TFV to continue applying the same eligibility assessment and urgent screening which had been approved **before** the Appeals Judgment.[106] Yet, Trial Chamber II was

[102] Appeals Judgment, para.755.
[103] Decision on the TFV Sixth and Seventh Update Reports, para.9.
[104] Appeals Judgment, para.755.
[105] Appeals Judgment, fn.1672.
[106] Decision on the TFV Sixth and Seventh Update Reports, para.21. *See* also Decision on the TFV's First Progress Report on the implementation of the Initial Draft Implementation Plan and Notification of Board of Directors'

aware that these eligibility criteria were no longer effective, noting that "the exact details of the methodology applied when assessing and ruling upon the sample assembled for the purpose of setting Mr Ntaganda's liability will be detailed by the Chamber when ruling on the sample"[107] and attempting to salvage the criteria previously approved by instructing the TFV, "until otherwise decided, not to include for the IDIP purposes any victims claiming to have suffered *only* (i) transgenerational harm; or (ii) harm as a result of the destruction of the health centre in Sayo"[108] as well as to "not rely on the Reparations Order's presumption of physical harm for victims of the attacks."[109]

55. In the same Decision,[110] Trial Chamber II attempted to justify circumventing the Appeals Judgment and instructing the TFV to use criteria in the IDIP impacted by the same errors as those found by the Appeals Chamber in the 8 March Reparations Order, on the basis that the IDIP is an interim and emergency measure aimed at addressing the most urgent needs of vulnerable victims requiring urgent assistance. This attempt is misplaced.

56. Trial Chamber VI's instruction to the TFV in the 8 March Reparations Order to submit "an initial draft implementation […] addressing the most urgent needs of victims that require priority treatment"[111] is a laudable, yet unprecedented initiative.[112] It does not justify however, particularly in the context of judicial proceedings, disregarding basic legal provisions, due process requirements and the rights of the both the victims and the Convicted Person.

57. When the Appeals Judgment was rendered, 31 priority victims had been assessed as eligible by the TFV.[113] In its observations on the TFV Seventh Update Report reporting that 69 priority victims had now been determined to be eligible,[114] the Defence submitted that the TFV submissions were based on a flawed premise, given that the IDIP was no longer effective following the Appeals Judgment. Nonetheless, to avoid further prejudice in accordance with the *do no harm* principle, the Defence also submitted that the 69 priority victims determined to be eligible, should continue to benefit from reparations pursuant to the TFV's assistance mandate,

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decision pursuant to regulation 56 of the Regulations of the Trust Fund, 28 October 2021, ICC-01/04-02/06-2718; Decision on the TFV Fourth Update Report.

[107] Decision on the TFV Sixth and Seventh Update Reports, para.21.

[108] Decision on the TFV Sixth and Seventh Update Reports, para.21.

[109] Decision on the TFV Sixth and Seventh Update Reports, para.21.

[110] Decision on the TFV Sixth and Seventh Update Reports, para.21.

[111] 8 March Reparations Order, para.252.

[112] Application on behalf of Mr Bosco Ntaganda seeking leave to appeal Decision on the TFV's initial draft implementation plan with focus on priority victims, 2 August 2021, ICC-01/04-02/06-2698, para.1.

[113] Trust Fund for Victims' Sixth Update Report on the Implementation of the Initial Draft Implementation Plan, 25 July 2022, ICC-01/04-02/06-2775 ("TFV Sixth Update Report"), para.30.

[114] Trust Fund for Victims' Seventh Update Report on the Implementation of the Initial Draft Implementation Plan, 26 September 2023, ICC-01/04-02/06-2783 ("TFV Seventh Update Report"), para.21.

until the delivery of the new order for operations by Trial Chamber II.[115] This was actually the solution proposed by the TFV[116] when opposing the Defence request for suspensive action submitted as part of its Appellant Brief.[117]

58. Trial Chamber II opted however, to find that the IDIP remained fully operational and to instruct the TFV to continue determining the eligibility of priority victims based on the criteria impacted by the fundamental errors identified in the Appeals Judgment. Had Trial Chamber II issued a new order for operations as directed, it could have included therein specific provisions concerning reparations for priority victims, thereby avoiding unnecessary delays.

59. By the time the 14 July Addendum was issued, 69 priority victims had thus been determined by the TFV to be eligible based on the eligibility assessment and urgent screening criteria *previously* approved by Trial Chamber II, before the Appeals Judgment. Although Trial Chamber II included 67[118] of these potential victims in the sample of victims' applications it reviewed pursuant to its 25 October 2022 Implementation Order[119] and its 25 November Decision,[120] Trial Chamber II's determinations on the eligibility and urgency requirement of these 67 priority victims[121] are incomplete and must be re-examined because (i) Trial Chamber II neither reviewed nor ruled on the urgency screening assessment conducted by the TFV (Defence 4th Ground of Appeal); and (ii) the Defence was not provided with a meaningful opportunity to assess and make submissions on the victims' dossiers (Defence 5th and 13th Grounds of Appeal). Regarding the former, it must be recalled that the assessment of the urgency requirement of priority victims was to be made by applying the same standard and burden of proof as for the assessment of their eligibility.[122]

60. Since the 14 July Addendum was issued, the TFV [REDACTED], [REDACTED], before the Appeals Judgment.[123] In accordance with the Decision on the TFV Sixth and Seventh

[115] Defence Observations on the TFV Seventh Update Report, paras.30-32.
[116] Observations on the Defence Request for Suspensive Effect And Request under rule 103 of the Rules of Procedure and Evidence, 22 June 2021, ICC-01/04-02/06-2679, para.29.
[117] Defence Appellant Brief against the 8 March Reparations Order, paras.260-272.
[118] Pursuant to the Decision on the Trust Fund for Victims' submission of information on certain victims selected in Trial Chamber II's approved sample issued on 9 January 2023 (ICC-01/04-02/06-2808), two of these victims have been excluded from the sample, as they had already been recognized as victims in the *Lubanga* case.
[119] Implementation Order, para.20.
[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"), paras.9,15.
[121] 59 victims found eligible, four victims found provisionally eligible and four victims found not eligible
[122] Decision on IDIP, para.32.
[123] Trust Fund for Victims' Thirteenth Update Report on the Implementation of the Initial Draft Implementation Plan, 9 October 2023, ICC-01/04-02/06-2873 ("TFV Thirteenth Update Report"), para.11; The eligibility of one priority victim was possibly assessed based on the criteria in the 14 July Addendum, *see* Trust Fund for Victims'

Update Reports, Trial Chamber II has reviewed and endorsed the TFV eligibility determination of one priority victim[124] [REDACTED].[125]

61. Notably, Trial Chamber II held for the first time on 31 August 2023, in its Decision on the TFV Ninth to Twelfth Updat IDIP Reports, that the eligibility determination of priority victims was to be conducted using the criteria in the 14 July Addendum.[126]

62. Hence, by failing to issue a new reparations order as directed, Trial Chamber II erroneously proceeded with the implementation of an IDIP that is not only without a legal basis but is grounded firmly in its previous errors. Again, the proper remedy is the issuance of a new, unified, reparations order issued by the Appeals Chamber, including specific provisions to ensure priority victims are not prejudiced the errors committed by Trial Chamber II.

The prejudice resulting from Trial Chamber II issuing the 14 July Addendum as opposed to a new order for reparations is further compounded by its failure to consider that the Updated Draft Implementation Plan submitted the TFV on 24 March 2022[127] required substantial modifications further to the Appeals Judgment

63. Trial Chamber II's reliance on the Updated DIP to attempt to remedy the prejudice resulting from its refusal to issue a new order for reparations, as directed by the Appeals Chamber, makes the Updated DIP a relevant issue in this appeal.

64. When issuing the 14 July Addendum, Trial Chamber II erred by not including therein certain compulsory provisions including *inter alia*; (i) the identity of the authority responsible for conducting the eligibility assessments (ii) the requirement of a judicial approval of the outcome of administrative screenings of eligibility; (iii) the possibility for those who are found not to be eligible by the authority responsible for conducting the eligibility assessments to appeal this ruling before the Chamber; and (iv) the fact that during the implementation phase, the Defence will be precluded from any involvement in the eligibility assessment of potential victims nor in any appeals on admissibility before the trial chamber. This is not an exhaustive list of the information that is missing from the 14 July Addendum.[128]

Twelfth Update Report on the Implementation of the Initial Draft Implementation Plan, 31 July 2023, ICC-01/04-02/06-2859 ("TFV Twelfth Update Report"), para.8.
[124] Decision on the TFV Ninth to Twelfth Update Reports, para.26.
[125] TFV Thirteenth Update Report, para.11.
[126] Decision on the TFV Ninth to Twelfth Update Reports, para.27.
[127] Trust Fund for Victims' second submission of Draft Implementation Plan, 24 March 2022, ICC-01/04-02/06-2750, with Annex 1, ICC-01/04-02/06-2750-Anx1-Red-Corr ('Updated DIP').
[128] *See inter alia* First Decision on DIP, paras.127,131,136,144,154,159,160,184.

65. The identity of the authority responsible for conducting the eligibility assessments of potential victims is basic information, which must be provided in the order for reparations to ensure that the Defence is on notice as to how a trial chamber intends to assess the information contained in, *inter alia*, applications for reparations.[129] In *Lubanga*,[130] *Katanga*[131] and *Al Mahdi*,[132] the responsible authority was identified. In the 8 March Reparations Order, it was understood that the TFV would be conducting the eligibility assessments during the implementation phase.[133] Yet, in the 14 July Addendum, Trial Chamber II modified the *modus operandi*, referring to the "authority responsible for conducting the eligibility assessments" without identifying which body Trial Chamber II had in mind. That was an error, which demonstrates yet again that Trial Chamber II erred by issuing the 14 July Addendum as opposed to a new order for reparations which included all necessary information for the reparations process to proceed.

66. Concerning the requirement of a judicial approval of the outcome of administrative screenings of eligibility, the Appeals Chamber recalled that Trial Chamber II would need to include this requirement in the new order it was directed to issue.[134] The same applies to the ability of those found ineligible to challenge this finding before Trial Chamber II.[135] This information was not provided in the 8 March Reparations Order, it remains missing from the 14 July Addendum.

67. Regarding the fact that during the implementation phase, the Defence will be precluded from any involvement in the eligibility assessment of potential victims, the Appeals Chamber found that the Defence had "not demonstrated an error in the Trial Chamber's approach to the Defence's involvement in the eligibility of victims, which was intended to be conducted at the implementation stage."[136] The Appeals Chamber reasoned that, at the implementation stage, the rights of the Convicted Person are safeguarded by his or her ability to challenge those criteria in an appeal against the reparations order.[137] This finding was made before Trial Chamber II circumvented the Appeals Judgment and issued the 14 July Addendum, rather than a new order for reparations, in which Trial Chamber II failed *inter alia*, (i) to ensure that the Defence was

[129] Appeals Judgment, para.363.
[130] Lubanga Amended Reparations Order, para.66. *See* also Lubanga Decision on Reparations, paras.283,285.
[131] *The Prosecutor v. Germain Katanga,* Order for Reparations pursuant to Article 75 of the Statute, 24 March 2017, ICC-01/04-01/07-3728, para.64.
[132] *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Reparations Order, 17 July 2017, ICC-01/12-01/15-236, para.146.
[133] 8 March Reparations Order, para.253.
[134] Appeals Judgment, paras.387,419, fn.1672.
[135] Appeals Judgment, paras.387,419, fn.1672.
[136] Appeals Judgment, para.369.
[137] Appeals Judgment, para.368.

able to assess the victims' dossiers in the sample and to make meaningful representations (Ground 5);[138] and (ii) to set appropriate eligibility criteria for victims to be identified at the implementation stage (Ground 4). Consequently, the Defence's ability to be involved in the eligibility determinations during the implementation stage is an issue the Defence considered raising in this appeal. However, the Defence is precluded from doing so in the absence of the relevant finding in the 14 July Addendum.

68. On 11 August 2023, after issuing the 14 July Addendum but before the submission of notices of appeal by the CLR2 and the Defence, Trial Chamber II issued its First Decision on DIP in which it provided the above information.[139] Providing this information in the First Decision on DIP, does not cure Trial Chamber II's failure to issue a new reparations order including this very information. Rather, this approach gives rise to additional prejudice, for the following reasons. First, by providing this information in its First Decision on DIP, Trial Chamber II deprived the parties of the ability to appeal, as of right, fundamental aspects of the reparations process in this case. Second, Trial Chamber II erred by including this information in the 24 March 2022 Updated DIP, which requires a significant overhaul following the Appeals Judgment, and deprived the parties of their ability to file observations in advance

69. The Updated DIP was submitted by the TFV on 24 March 2022, prior to the issuance of both the Appeals Judgment and the 14 July Addendum. The Updated DIP was the result of a long process, drawing on many submissions by the parties, and encountering significant delays. The Updated DIP was based on the 8 March Reparations Order, including directions issued by Trial Chamber VI, and fundamental assumptions regarding the number of potential witnesses and the amount of the Convicted Person's liability determined by Trial Chamber VI. In fact, the Updated DIP contains 116 references to the 8 March Reparations Order, and the parties' observations on the Updated DIP contain 99.

70. The Appeals Chamber found numerous fundamental errors in the 8 March Reparations Order and remanded the matter to Trial Chamber II to issue a new order for operations taking into account the terms of the Appeals Judgment.[140] Trial Chamber II refused. The Trial Chamber's error by issuing the 14 July Addendum thereby continuing to consider the 8 March Reparations Order as being operative, is compounded by its continued reliance on the IDIP, and the Updated DIP, without having given the parties an opportunity to make submissions or

[138] Defence Notice of Appeal, paras.34-38.
[139] First Decision on DIP, paras.185-186.
[140] Appeals Judgment, p.11 and para.750.

modifying the Updated DIP to take into account the terms of the Appeals Judgment, let alone its own 14 July Addendum. The parties and, importantly, the TFV were well aware that many findings in the 8 March Reparations Order had been challenged by the CLR2 and the Defence on appeal, and that depending on the forthcoming Appeals Chamber judgment, the Updated DIP would need to be adjusted as a result.

71. The TFV stated: "[i]n this context and as previously submitted and as correctly pointed out by the parties, the Trust Fund underlines that the Reparations Order is currently under appeal. Upon issuance of the appeals judgment and with the sanction of the Trial Chamber, the Trust Fund is prepared to analyse that judgement's impact on the DIP and submit a next version swiftly thereafter"[141] and "[…] the Trust Fund stands ready to submit a third version upon issuance of the Appeals Chamber's judgment on the appeals pending before it. The Trust Fund avers that a careful analysis of the appeals judgment will be required prior to setting a timeline for the submission of such a third version."[142]

72. Despite this common understanding of the parties and the TFV, Trial Chamber II did not call upon the TFV or the parties to assist in bringing the Updated DIP in line with the Appeals Judgment or even the 14 July Addendum, let alone requesting the TFV to submit a new DIP on the basis of a new order for reparations which Trial Chamber II had been directed to issue.

73. Whereas Trial Chamber II's errors, which all stem from its refusal to issue a new order for reparations, may be examined in the light of its aim to expedite the reparations proceedings, they cannot be reconciled with the requirements of, and the reality that a "[r]eparations proceedings are judicial proceedings, resulting in a judicial order fixing a monetary award for which the Convicted Person is liable."[143] Regrettably, Trial Chamber II's handing of the reparations process further to the Appeals Judgment is very likely to result in further litigation and further delays, prejudicial mostly to the genuine victims in this case, and which could have been avoided.

74. The proper remedy in these circumstances is for the Appeals Chamber to hold that Trial Chamber II erred by issuing the 14 July Addendum as opposed to a new order for operations; to follow the precedent set in *Lubanga* by issuing a new order for reparations; and to include therein specific provisions to ensure that priority victims are not prejudiced and that their

[141] Trust Fund for Victims' second submission of Draft Implementation Plan, para.26.
[142] Updated DIP, para.30.
[143] Appeals Judgment, para.5.

eligibility determinations are conducted without delay, including both their eligibility and their urgency requirements; and to call upon the TFV to submit a new or modified DIP.

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.

75. The Appeals Chamber concluded that Trial Chamber II erred by failing to rule on at least a sample of applications, and that this error necessarily materially affected the impugned decision.[144] As a result of this error, the Defence was unable to participate in the assessment of the eligibility of victims to benefit from reparations.[145] The Appeals Chamber also found that Trial Chamber II erred by failing to lay out the most fundamental parameters of a procedure for the TFV to carry out the eligibility assessment.[146] Indeed, had Trial Chamber II ruled on a sample, it would have had to set the eligibility criteria for victims to be identified at the implementation stage.[147]

76. Leading up to the delivery of the 14 July Addendum, Trial Chamber II assembled a sample of victims' applications and proceeded to set eligibility criteria, as well as to assess the eligibility of the potential victims in the sample. The aim of this exercise was twofold. First, to allow Trial Chamber II to gain invaluable information from these victims' applications, as dictated by the Appeals Chamber, for the purpose of issuing a new order for reparations.[148] Second, to set eligibility criteria for the purpose of guiding the authority making the assessments in performing its function during the implementation stage.[149]

77. Trial Chamber II assessed 171 potential victims' applications in the sample, including 137 victims of the attacks and 34 child soldiers victims. It found that 132 victims had established on a balance of probabilities their eligibility as victims - direct or indirect - of the crimes for which Mr Ntaganda was convicted, and accordingly, were entitled to benefit from reparations in the present case.[150] Trial Chamber II noted that "the above total of 132 victims that have established their eligibility includes 10 victims deemed to be provisionally eligible

[144] Appeals Judgment, paras.23,343,345, 363.
[145] Appeals Judgment, para.363.
[146] Appeals Judgment, paras.387,747.
[147] Appeals Judgment, para.368.
[148] Appeals Judgment, para.341
[149] Appeals Judgement, paras.387,689.
[150] 14 July Addendum, para.144.

pending the submission of a legible identification document, or the confirmation by the Registry of the relevant distance between the victims' village and the place for which positive findings were made in the Conviction Judgment."[151] Thus, Trial Chamber II concluded that "39 out of the 171 victims in the Sample have not established on a balance of probabilities their eligibility as direct or indirect victims of the crimes for which Mr Ntaganda was convicted and are therefore not entitled to benefit from reparations in the present case."[152]

78. Trial Chamber II's analysis of each dossier was conducted on the basis of the criteria and methodology set out in paragraphs 25 to 148 of the 14 July Addendum,[153] also taking into account the Court's previous jurisprudence, particularly in the *Lubanga* and *Katanga* cases.[154]

79. As a preliminary matter, the Defence notes that it was not provided with a meaningful opportunity to assess and make submissions on the victims' dossiers in the sample (Ground 5).[155]

80. Secondly, although the results of the assessment of the 171 victims' dossiers in the sample is not challenged *per se,* due to the demanding nature of the applicable standard of review on appeal, the Defence respectfully submits that Trial Chamber II's assessment was incomplete regarding the 67 IDIP victims included in the sample.. Indeed, the eligibility of priority victims depends on two requirements being established, namely (i) a determination of the eligibility of the priority victim to benefit from reparations on the basis of the scope of the Trial Judgment, and the applicable criteria developed by Trial Chamber II for this purpose; and (ii) a determination that the priority victim fulfils the urgency requirement as defined by Trial Chamber II.[156] Trial Chamber II defined a priority victim as a victim requiring priority treatment and currently in this situation, in which they need to receive immediate physical and/or psychological medical care, and/or support due to financial hardship that endangers his/her life.[157] Trial Chamber II further established that the urgency screening should be made by applying the same standard and burden of proof as established in the reparations order.[158] In this case, Trial Chamber II limited its examination of the 67 priority victims' dossiers in the sample to the first requirement. Consequently, to meet the requirement of judicial review of

[151] 14 July Addendum, para.145.
[152] 14 July Addendum, para.146.
[153] 14 July Addendum, paras.25-148.
[154] 14 July Addendum, para.30.
[155] Defence Notice of Appeal, paras.34-38. *Infra,* paras.118-154.
[156] Decision on IDIP, para.32.
[157] Decision on IDIP, para.32.
[158] Decision on IDIP, para.32.

administrative eligibility determination decisions,[159] the screening test performed by the TFV for these 67 priority victims' dossiers in the sample must still be reviewed and approved by Trial Chamber II, after giving the Defence an opportunity to assess the relevant material and make observations.

81. Notably, when a priority victim was referred to the TFV by one of the CLRs in the context of the IDIP, the TFV first proceeded to communicate this information to one of its implementing partners for the purpose of contacting the potential victim and obtaining information regarding, *inter alia,* his/her urgent needs, using a questionnaire developed for this purpose and approved by Trial Chamber II.[160] It is noteworthy that the Defence never received any of the questionnaires completed by the priority victims with the assistance of one of the implementing partners and transmitted to the TFV.[161]

82. In the 14 July Addendum, Trial Chamber II spelled out a number of eligibility criteria for a potential victim to benefit from reparations by reference to the territorial, temporal and subject matter scope of the crimes for which Mr Ntaganda was convicted. The importance of these criteria cannot be underestimated as they represent the blueprint based on which the authority making the assessment - including persons who are not judges; who may not be lawyers or qualified jurists; and who may not have detailed knowledge of the evidence admitted during the proceedings - will determine the eligibility of thousands of applicants, without any input from the Convicted Person or anyone having a vested interest in ensuring that only genuine victims benefit from reparations. Moreover, whereas a potential victim found *not* to be eligible will have the ability to seek judicial review of this determination,[162] with professional assistance being provided,[163] no victim determined *to be eligible* will ever be challenged. Furthermore, even though eligibility determinations by the TFV are referred to as administrative decisions, such eligibility determinations must nonetheless be conducted in accordance with applicable legal standards and requirements.

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[159] Appeals Judgment, paras.387,419.
[160] *See* for instance TFV Thirteenth Update Report, para.24. *See* also Decision on the TFV Fourth Update Report.
[161] Defence request for a limited extension of the time limit set to make submissions on the dossiers of the victims included in the sample, 20 March 2023, ICC-01/04-02/06-2837, para.7; 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, 29 March 2023, ICC-01/04-02/06-2838 ("Defence 29 March 2023 Request"), paras.4-10; 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 ("Decision on Defence 29 March 2023 Request"), paras.12-15; *Infra,* paras.137-152.
[162] Trial Chamber II erred by failing to include this requirement in the 14 July Addendum, *supra*, para.165. *See,* Appeals Judgment, paras.387,419, fn.1672.
[163] First Decision on DIP, para.185.

83. In this case, Trial Chamber set the eligibility criteria, giving interpretative guidelines for only some of the criteria. The Defence acknowledges that some of these criteria resemble individual eligibility criteria previously developed and judicially approved in other cases.[164] As argued herein however, there are significant differences between this case and previous cases, particularly regarding potential victims of the attacks. Accordingly, the application of certain eligibility determination criteria to potential victims in this case must take into consideration the specificities of this case.

84. In addition to challenging three individual eligibility criteria, this Ground 4 is primarily directed at the overall blueprint provided to the authority making the assessment. The Defence contends that Trial Chamber II erred when setting out the eligibility determination criteria such that the authority making the assessment would be incapable of properly assessing the victims' dossiers, using these criteria.

85. Although Trial Chamber II reiterates that the determination of the eligibility of potential victims to benefit from reparations in this case is to be made pursuant to the balance of probabilities standard, taking into account the totality of the information in the potential victims' dossiers,[165] the authority making the assessment will necessarily be guided by the following parameters, which stem from the applicable criteria, as set out by Trial Chamber II in paragraphs 25 to 148:

1. The assessment to be conducted regarding the eligibility of a potential victim of the attacks is qualitative rather than quantitative, meaning it does *not* require a set number of criteria to be met.[166]

2. Attention must be paid to the information provided in the victim's dossier to verify the date of the event, village/town, description of events as pertaining to the various types of crimes, and perpetrators correspond to the Chamber's findings in its Judgment regarding the crimes for which Mr Ntaganda was found guilty, in light of the clarifications provided in its decision from 15 December 2020.[167]

[164] *See* for instance, 14 July Addendum, paras.85-86 as regards indirect victims. *See* also, 14 July Addendum, para.30.
[165] *See* for instance, 14 July Addendum, para.61.
[166] 14 July Addendum, para.91.
[167] 14 July Addendum, para.91

3. Not all victims who suffered harm during the first or second operation are eligible for reparations. Positive and negative findings as to Mr Ntaganda's criminal responsibility, as included in the Judgment, must be taken into account, in light of the aspects further clarified in the December 2020 Decision.[168]

4. When assessing the account of a potential victim, attention must be paid to its intrinsic coherence and credibility and whether it is consistent with other witnesses' accounts, in respect of facts alleged;[169]

5. When assessing the account provided by a potential victim, close attention must be paid to the information provided by the victims, which should not be assessed without making inferences as to possible crimes;[170]

6. A person may be found eligible for reparations, even when he/she has not supplied any documentation.[171] In light of the time elapsed since the commission of the crimes, the resurgence of the conflict and the continuous displacement of the potential victims, it is extremely difficult, if not impossible, for the potential victims to obtain additional documentary evidence in the current circumstances.[172] In this regard, potential victims have amply explained the reasons for their inability to produce additional documents, which, is corroborated by multiple sources.[173]

7. Regarding the date(s) provided by a potential victim in his/her dossier when referring to an event or recalling the timing of harm suffered, as long as such dates are sufficiently close in time to the relevant time frame(s), this does not exclude the potential witness from his or her eligibility to benefit from reparations;[174] and the victim's application should be assessed on a case by case basis, focusing on the intrinsic consistency and reliability of his/her account and without limiting their eligibility it to a strict three-day window.[175] Inconsistencies, contradictions and particularly inaccuracies as to dates, including reference to events such as the *Shika Mukono* operation, the dates of

[168] 14 July Addendum, para.96.
[169] 14 July Addendum, para.103.
[170] 14 July Addendum, para.102.
[171] 14 July Addendum para.44, referring to the Appeals Judgment, para.513.
[172] 14 July Addendum, para.58.
[173] 14 July Addendum, para.59.
[174] 15 December 2020 Decision, paras.38,43,47.
[175] 15 December 2020 Decision, paras.38,43,47.

which are not established, also do not exclude the potential witness from his or her eligibility to benefit from reparations.[176]

8. In the event the information comprised in a potential victim's dossier was obtained on one or more occasions, includes inconsistencies and contradictions, this may not necessarily cast doubt on the victims' credibility.[177] For example, if a victim initially stated that his/her house was pillaged,[178] and then, ten years later, stated that in fact his/her house was destroyed,[179] this is nothing more than a slight discrepancy.[180]

9. Where a potential victim names the UPC/FPLC soldiers as being responsible for their suffering, that might, depending on the circumstances, suffice to establish that the victim suffered crimes at the hand of the UPC/FPLC.[181]

10. Where a potential victim names Hema civilians as being responsible for their suffering, in the case of pillaging in Mongbwalu, that might, depending on the circumstances, suffice to establish that the victim suffered crimes at the hand of the UPC/FPLC.[182]

11. In light of the positive findings made in the Conviction Judgment, it is more likely than not, if the victims' applications concern the killing of people in Kobu and Sayo, that the direct victims were civilians not actively taking part in hostilities or otherwise persons hors de combat;[183]

12. In application of the general presumption of civilian status under IHL and that, in case of doubt, a person shall be considered to be a civilian, the absence of information in a potential victim's application, concerning the occupation of the victim (or immediate family members), at the time of the alleged murder, does not preclude a finding that the victims are entitled to reparations; in this regard,

[176] 14 July Addendum, paras.97-98.
[177] 14 July Addendum, para.61.
[178] Annex 2 to Registry Transmission of 173 Unredacted Victims' Dossiers to the Chamber and the Legal Representatives of Victims, 28 November 2022, ICC-01/04-02/06-2795-Conf-Exp-Anx2-Red.
[179] Annex 2 to CLR2 Submissions on the victims' dossiers, 3 March 2023, ICC-01/04-02/06-2836-Conf-Anx2-Red.
[180] Annex II to the 14 July Addendum, 14 July 2023, ICC-01/04-02/06-2858-Conf-AnxII, para.950. *See* also, Annex A to Submissions on behalf of the convicted person on the dossiers of the victims included in the sample, 1 May 2023, ICC-01/04-02/06-2851-Conf-AnxA, p.3.
[181] 14 July Addendum, para.92.
[182] 14 July Addendum, para.92.
[183] 14 July Addendum, para.108.

whether the applications actually fall within the scope of the positive findings in the Conviction Judgment for Kobu, and Sayo will depend on the assessment of the victim's account as well as on its coherence, credibility and consistency;[184]

13. In light of the findings made in the Conviction Judgment and taking into account the presumption of civilian status under IHL, the Chamber considers that the absence of information concerning the occupation of the potential victim (or of their immediate family members) in the victim's dossier claiming to be a victim of Mongbwalu, Sayo, Jitchu, and Buli, does not preclude a finding that the victim is entitled to reparations;[185]

14. As long as a potential victim's status as a direct or indirect victim of the crimes for which Mr Ntaganda was convicted is established, and on that basis that the harm is presumed or established, the causal link between the harm and the crimes for which Mr Ntaganda was convicted is also established. It is thus not necessary to assess the causal link or the possibility of a break in the chain of causality.[186]

15. With respect to indirect victims, the same criteria are applicable to prove their victim status, with the caveat that the same level of detail cannot be required as for direct victims;[187]

16. With respect to victims of the attacks who may also have suffered rape and/or sexual slavery for which Mr Ntaganda was convicted, or be children born out of these crimes, the victim's coherent and credible account shall be accepted as sufficient evidence to establish their eligibility;[188]

17. The assessment to be conducted regarding the eligibility of a potential child soldier victim is qualitative rather than quantitative, meaning it does *not* require a set number of criteria to be met.[189]

[184] 14 July Addendum, para.109.
[185] 14 July Addendum, para.112.
[186] 14 July Addendum, para.134.
[187] 14 July Addendum, paras.106-107.
[188] 14 July Addendum, para.104.
[189] 14 July Addendum, para.75.

18. Where a potential child soldier victim names at least *one* training camp – whether or not this training camp is mentioned in the evidence, or exists at all - this may suffice to establish that the victim did belong to the UPC/FPLC.[190]

19. Where a potential child soldier victim names at least *one* commander – whether or not this information can be verified or is even true - this may suffice to establish that the victim did belong to the UPC/FPLC.[191]

86. It stems from the application of the above criteria and guidelines, considered objectively, that it suffices for a potential victim to be determined eligible to benefit from reparations, to refer to harm suffered in relation to an event falling within the subject matter and geographical scope of positive findings in the Trial Judgment. This conclusion is first evidenced by Trial Chamber II's conclusion in paragraph 90 of the 14 July Addendum stating that: "[a]ccordingly, the Chamber will verify (i) whether the victims' account corresponds to the Chamber's findings as to the crimes for which Mr Ntaganda was convicted; and (ii) the coherence and credibility of the victims' account, and whether it is consistent with other victims' account."[192] This conclusion is further evidenced by Trial Chamber II's analysis of the 171 potential victims' dossiers. Indeed, all 39 negative eligibility determinations by Trial Chamber II result from potential victims referring to events that do not fall within the subject matter or geographical scope of positive findings in the Trial Judgment.[193] This is not a coincidence. All other considerations are systematically set aside based on the balance of probabilities standard, in application of the above criteria or not weighed or mentioned at all by Trial Chamber II including *inter alia*, inconsistencies and contradictions;[194] absence of supporting documents;[195] reference generally to UPC soldiers or Hema civilians without more

[190] 14 July Addendum, paras.74-75.
[191] 14 July Addendum, paras.74-75.
[192] 14 July Addendum, para.90.
[193] *See* a/00072/13, a/00115/13, a/00136/13, a/00412/13, a/00486/13, a/00494/13, a/00653/13, a/00914/13, a/00973/13, a/01013/13, a/01193/13, a/01215/13, a/01224/13, a/01250/13, a/01283/13, a/01469/13, a/01572/13, a/01585/13, a/01594/13, a/01599/13, a/01605/13, a/01677/13, a/20029/14, a/20109/14, a/20127/14, a/20160/14, a/20194/14, a/30087/15, a/30285/15, a/30309/15, a/30406/15, a/30411/15, a/30433/15, a/00199/13, a/00212/13, a/00215/13, a/01128/13, a/01116/13 and a/01636/13.
[194] Submissions on behalf of the convicted person on the dossiers of the victims included in the sample, 1 May 2023, ICC-01/04-02/06-2851 ("Defence Submissions on the Victims' Dossiers"), para.47; *See* a/00119/13, a/01269/13, a/20011/14, a/20221/14, a/30003/15, a/00021/13, a/00075/13, a/00096/13, a/00140/13, a/00438/13, a/00795/13, a/00824/13, a/00891/13, a/01566/13, a/01659/13, a/01678/13, a/01679/13, a/20224/14, a/30248/15, a/30275/15, a/30280/15, a/30282/15, a/30286/15, a/00218/13 and a/30059/13.
[195] Defence Submissions on the victims' dossiers, para.38; *See* particularly a/00004/13; a/00119/13; a/00126/13; a/00137/13; a/00198/13; a/00244/13; a/00547/13; a/00552/13;a/00559/13; a/00759/13; a/00828/13; a/00894/13; a/00916/13; a/01017/13; a/01025/13; a/a/01467/13; a/01497/13; a/01530/13; a/01640/13; a/01650/13; a/01654/13; a/20011/14; a/20027/14; a/20043/14; a/20059/14; a/20062/14; a/20068/14; a/20069/14; a/20133/14; a/20207/14; a/20215/14; a/30003/15; a/30065/15; a/30067/15; a/30068/15; a/30069/15; a/30075/15; a/30128/15; a/30318/20; a/40005/21; a/00021/13; a/00075/13; a/00094/13; a/00096/13; a/00140/13; a/00438/13; a/00795/13 a/00811/13;

including the fact that potential victims were not present when their possession was looted;[196] inconsistencies, contradictions and inaccuracies as to dates;[197] absence of description of facts / events alleged, allowing to match a positive finding in the Trial Judgment;[198] and information regarding the status of potential victims persons not taking part in the hostilities,[199] and inconsistencies with claims made by other witnesses.[200] Regarding the absence of supporting documents, no consideration is made of the need for statements or other type of document, which can easily be obtained, to corroborate alleged facts and events.[201] No consideration is given to requesting further information from potential witnesses when insufficient information is provided.[202]

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a/00824/13; a/00847/13; a/00891/13; a/01248/13; a/01566/13; a/01635/13; a/01646/13; a/01659/13; a/01678/13; a/01679/13; a/30384/15; a/30446/15; a/00218/13; a/00627/13; a/00634/13; a/00709/13; a/00724/13; a/00738/13; a/00741/13; a/00743/13; a/00746/13; a/00747/13; a/00749/13; a/01323/13; a/01324/13; a/30047/13; a/30059/13; a/30227/15; a/30228/15; a/30232/15; a/30369/15; a/30370/15; a/30408/20; a/30415/20; a/30438/20 and a/30057/20.

[196] Defence Submissions on the victims' dossiers, para.40; *See* particularly a/00119/13; a/00137/13; a/00244/13; a/00552/13; a/00759/13; a/00828/13; a/00894/13; a/00907/13; a/01025/13; a/01478/13; a/01530/13; a/01640/13; a/01650/13; a/01654/13; a/20068/14; a/20069/14; a/30068/15; a/30069/15; a/30128/15; a/40042/21; a/00094/13; a/00096/13; a/00116/13; a/00140/13; a/00811/13; a/00824/13; a/00847/13; a/01489/1; a/01678/13; a/01679/13; a/30248/15; a/30275/15; a/30384/15.

[197] a/00053/13, a/00119/13, a/00126/13, a/00137/13, a/00198/13, a/00547/13, a/00916/13, a/00952/13, a/01200/13, a/01269/13, a/01478/13, a/30003/15, a/30067/15, a/30075/15, a/30128/15, a/40042/21, a/00021/13, a/00094/13, a/01248/13, a/30255/15, a/30282/15, a/30286/15 and a/30446/15.

[198] Defence Submissions on the victims' dossiers, paras.37,39-40; *See* particularly a/00004/13; a/00119/13; a/00126/13; a/00137/13; a/00198/13; a/00244/13; a/00547/13; a/00552/13;a/00559/13; a/00759/13; a/00828/13; a/00894/13; a/00907/13; a/00916/13; a/01017/13; a/01025/13; a/01095/13; a/01269/13a/01467/13; a/01478/13; a/01497/13; a/01530/13; a/01640/13; a/01650/13; a/01654/13; a/20011/14; a/20027/14; a/20043/14; a/20059/14; a/20062/14; a/20068/14; a/20069/14; a/20133/14; a/20207/14; a/20215/14; a/20221/14; a/30003/15; a/30065/15; a/30067/15; a/30068/15; a/30069/15; a/30075/15; a/30128/15; a/30318/20; a/40005/21; a/40042/21; a/00021/13; a/00075/13; a/00094/13; a/00096/13; a/00140/13; a/00438/13; a/00795/13 a/00811/13; a/00824/13; a/00847/13; a/00891/13; a/01248/13; a/01370/13; a/01566/13; a/01635/13; a/01646/13; a/01659/13; a/01678/13; a/01679/13; a/30107/15; a/30286/15; a/30384/15; a/30446/15; a/00218/13; a/00627/13; a/00634/13; a/00687/13; a/00709/13; a/00724/13; a/00738/13; a/00741/13; a/00743/13; a/00746/13; a/00747/13; a/00749/13; a/01323/13; a/01324/13; a/30047/13; a/30059/13; a/30227/15; a/30228/15; a/30232/15; a/30369/15; a/30370/15; a/30408/20; a/30415/20; a/30438/20; a/30057/20 and a/20224/14.

[199] Defence Submissions on the victims' dossiers, paras.40; Annex A to the Defence Submissions on the Victims' Dossiers, 1 May 2023, ICC-01/04-02/06-2851-Conf-AnxA.; *See* particularly a/00004/13; a/00053/13; a/00059/13; a/00004/13; a/00053/13; a/00059/13; a/00119/13; a/00126/13; a/00137/13; a/00198/13; a/00547/13; a/00552/13; a/00559/13; a/00759/13; a/00828/13; a/00894/13; a/00907/13; a/00916/13; a/00952/13; a/00004/13; a/00053/13; a/00059/13; a/00119/13; a/00126/13; a/00137/13; a/00198/13; a/00547/13; a/00552/13; a/00559/13; a/00759/13; a/00828/13; a/00894/13; a/00907/13; a/00916/13; a/00952/13; a/01017/13; a/01025/13; a/01095/13; a/01187/13; a/01467/13; a/01478/13; a/01497/13; a/01530/13; a/01640/13; a/01650/13; a/01654/13; a/20011/14; a/20062/14; a/20068/14; a/20125/14; a/20133/14; a/20207/14; a/30003/15; a/30065/15; a/30067/15; a/30068/15; a/30069/15; a/30075/15; a/30128/15; a/30201/15; a/00075/13; a/30003/15; a/30065/15; a/30067/15; a/30068/15; a/30069/15; a/30075/15; a/30128/15; a/30201/15; a/00075/13; a/00077/13; a/00094/13; a/00096/13; a/00116/13a/00140/13; a/00438/13; a/00847/13; a/01248/13; a/01566/13; a/01659/13; a/01679/13; a/20224/14; a/30123/15; a/30255/15; a/30275/15; a/30278/15; a/30280/15; a/30384/15 and a/30446/15.

[200] *See* for example, a/00119/13, a/00746/13 and a/01323/13.

[201] 14 July Addendum, paras.53-59; Defence Submissions on the Victims' Dossiers, para.38.

[202] Defence Submissions on the Victims' Dossiers, para.3; *See* also, Annex A to the Defence Submissions on the Victims' Dossiers, 1 May 2023, ICC-01/04-02/06-2851-Conf-AnxA.

87. Overall, the criteria set by Trial Chamber II do not allow for a proper assessment of the potential victims' dossiers based on the balance of probabilities standard. Rather, the criteria set by Trial Chamber II would only allow the authority making the assessment to determine whether potential victims' dossiers meet, *prima facie*, the subject matter and geographical scope of the positive findings in the Trial Judgment, without a proper assessment of the plausibility, credibility or sufficiency of the information provided. Lastly, the assessment of the causal link and/or possible breaks in the chain of causality is erroneously set aside entirely.

88. During trial as well as in its observations on the 171 potential victims' dossiers, the Defence suggested more precise and practical criteria and guidelines with a view to assisting the authority making the assessment in determining the eligibility of potential victims.[203] Although Trial Chamber II referred to some of these suggestions, they were not retained as part of the determinations made by Trial Chamber II. This was an error. Reference to and reliance on the Decision rendered by Trial Chamber VI on 15 December 2020, as guidance to be followed by the authority making the assessment, is also problematic. First, this decision was issued in response to queries put forward by the Registry (VPRS), tasked to determine how many of the 2,132 participating victims should still be considered as potential victims based on the scope of the Judgment.[204] This was not meant to be an eligibility assessment. Second, certain issues in the 15 December 2020 Decision have since been modified, for example by the Appeals Chamber, without any caveat being mentioned by Trial Chamber II in its criteria and guidelines.[205] Lastly, criteria and guidelines in the 15 December 2020 Decision should have been included in a new order for reparations as Trial Chamber II was directed to issue, instead of by reference to yet another order to be considered, thereby complicating and confusing the eligibility determinations of potential victims, during implementation.[206]

89. Another very important consideration regarding the assessment of the victims' dossiers is Trial Chamber II's decision to consider requests submitted for the purpose of being authorized to participate in the proceedings as requests for reparations pursuant to Rule 94(1) of the Rules of Procedure and Evidence.[207] The latter would have made it possible to obtain additional information from participating potential victims, whereas the former are much more general in nature, thereby making the eligibility determination assessment much more complex.

[203] Defence Submissions on the Victims' Dossiers, paras.27-49.
[204] First Decision on Reparations Process, 26 June 2020, ICC-01/04-02/06-2547, para.8.
[205] 15 December Decision 2020, para.55; Appeals Judgment, paras.626-630.
[206] 14 July Addendum, paras.91,96,99,103.
[207] Rule 94(1) of the Rules of Procedure and Evidence.

This is particularly the case considering the general and incomplete nature of the criteria and guidelines provided and the errors therein.

90. In addition to the above faulty eligibility criteria and guidelines, this Ground 4 challenges more specifically, the 'sufficiently close in time' criterion, the erroneous application of the presumption of civilian status in IHL and the erroneous application of the causal link requirement.

91. **The '*sufficiently close in time*' criterion**. This criterion was incorporated by Trial Chamber VI in the 15 December 2020 Decision.[208] The purpose of that decision was to respond to queries from the VPRS, which had been tasked with assessing how many participating victims in the case may potentially be eligible for reparations, taking into consideration the Trial Judgment in which positive findings were made for specific locations (geographical scope) and crimes (subject matter scope).[209] The sufficiently close in time criterion was first applied in this case to approve potential victims' requests to participate in the proceedings, *i.e.* a determination made pursuant to the *prima facie* standard of proof.[210] Victims were authorized to participate in the trial proceedings on the basis that they submitted having suffered harm allegedly caused by the UPC/FPLC soldiers: (i) sufficiently close in time to the relevant timeframes specified in the charges; and (ii) in locations sufficiently proximate to those listed in the Confirmation Decision.[211] The VPRS requested clarification and/or guidance *inter alia* as to whether the *sufficiently close in time* criterion continued to apply during the reparations phase, during which the balance of probabilities standard applies as opposed to the *prima facie* standard. The VPRS expressed the view that the criterion *sufficiently close in time* "can more clearly be defined as a three-day window on either side of the timeframes in the Judgement"[212] and suggested to apply such a three-day window.[213]

92. Regarding the timeframes in the Trial Judgment, the Registry noted that "the temporal scope of the First Operation in the Banyali-Kilo locations remains between 'on or about' 20 November 2002 and 'on or about' 6 December 2002,"[214] and that the temporal scope of the Second Operation in the Walendu-Djatsi collectivité "appears to have commenced on or about

[208] 15 December 2020 decision, paras.38,43,47.
[209] First Decision on Reparations Process, 26 June 2020, ICC-01/04-02/06-2547, para.8.
[210] Second Decision on Participation, 16 June 2015, ICC-01/04-02/06-650, para.22.
[211] 15 December 2020 decision, para.21.
[212] 15 December 2020 decision, para.35.
[213] Registry First Report on Reparations, 1 November 2020, ICC-01/04-02/06-2602-Conf-AnxI ("Registry First Report"), para.32.
[214] 15 December 2020 decision, para.35, referring to Registry First Report, para.11.

18 February 2003 and concluded in early March 2003, at least for Lipri."[215] Moreover, regarding the Second Operation, the Registry asked the Chamber "whether general descriptions provided by victims, such as during '*shikha na mukono*', or the '*pacification meeting*', or '*in February 2003'*, or '*around February 2003'*, or '*in February/March'*, '*the beginning of March*' or '*March*' would be acceptable to assess an application within the scope of the Judgment.[216]

93. Trial Chamber VI noted the timeframes mentioned by the Registry but did not confirm these dates. Nonetheless, the following dates, very close to the dates advanced by the Registry are well established in the Trial Judgment, *i.e.* 'on or about' 9 November to 'on or about' 6 December for the First Operation,[217] and from 'on or about' 17 February to 'on or about' 1 March 2003 for the Second Operation.[218]

94. Taking the pacification meeting as an example, Trial Chamber VI recalled that witnesses had difficulties remembering dates, as noted in the Trial Judgment and that there were certain discrepancies in the various witnesses' testimony concerning the pacification meeting.[219] Trial Chamber VI also considered the time elapsed since the relevant events, the likely impact of the events on the witnesses' ability to remember specific dates or weekdays, as well as the fact that some witnesses had been living in very difficult conditions in the bush for some time prior the 'pacification meeting,' which could also affect their perception of time. The Chamber considered that these inconsistencies do not affect *its overall finding on the date of the 'pacification meeting'* or the credibility and reliability of the witnesses' accounts. On this basis, however, Trial Chamber VI held in the 15 December 2020 Decision that: "[t]he Registry shall continue applying the '*sufficiently close in time to the relevant timeframes' standard*, assessing victims' applications on a case-by-case basis and depending on the victim's personal circumstances, focusing on the intrinsic consistency and reliability of their accounts and without limiting their eligibility it to a strict three-day window."[220] This was an error.

95. First, taking into consideration the length of the time periods covered by the applicable timeframes in the Judgment; the numerous memory refreshing facts and happenings in the

[215] 15 December 2020 decision, para.39, referring to Registry First Report, para.12.
[216] 15 December 2020 decision, para.39, referring to Registry First Report, para.12.

[217] With references to, *inter alia*, the failed attempt on Mongbwalu, Mongbwalu, Sayo, Nzebi and Kilo: Judgment, 8 July 2019, ICC-01/04-02/06-2359 ("Trial Judgment") paras.475,486,500,509,539.
[218] With references *inter alia*, to Lipri, Kobu, Bambu, the pacification meeting, Sangui, Buli, Gola, Gutsi, Jitchu, the 25-26 February events, Nyangaray and Bunia: Trial Judgment, paras. 567,572,584,595,603,613,615,617,620,640,647.
[219] 15 December 2020 decision, para.39, referring to Registry First Report, para.42, referring to Trial Judgment, fn.1832.
[220] 15 December 2020 decision, para.43.

timeframes for both operations, including *inter alia*, events, places, actions, incidents, and people; the seriousness of these facts and happening for the potential victims, as well as the time and opportunities available for potential victims to recall relevant dates, the *sufficiently close in time* criterion is too vague.[221] Second, whereas the *sufficiently close in time* criterion was appropriate for witnesses to be authorized to participate in the proceedings pursuant to the *prima facie* standard,[222] it is not appropriate for eligibility determination purposes pursuant to the balance of probabilities standard, which is necessarily more demanding.[223] Third the ability of a potential victim to place an event in the correct timeframe, considering particularly the long time covered by the events and the other criteria set out by Trial Chamber II, is a determining factor to assess the credibility of the potential victim as well as the plausibility and coherence of his/her account.

96. To be authorized to participate in the proceedings, it was sufficient for a potential victim to allege having suffered harm allegedly caused by the UPC/FPLC in a location sufficiently proximate to those listed in the Confirmation Decision; yet, to be eligible to benefit from reparations, a potential victim must establish, pursuant to the balance of probabilities standard, having suffered harm caused by the UPC/FPLC, in a location that is specifically the object of a positive finding in the Trial Judgment, which the authority making the assessment must strictly take into account. The situation is no different regarding the timeframes established in the Trial Judgment. To be authorized to participate in the proceedings, it was sufficient for a potential victim to submit having suffered harm allegedly caused by the UPC/FPLC sufficiently close in time to the relevant timeframes specified in the charges. However, to be eligible to benefit from reparations, a potential victim must establish, pursuant to the balance of probabilities standard, having suffered harm caused by the UPC/FPLC, *within* the timeframes established in the Trial Judgment. In this regard, the timeframes established in the Trial Judgment constitute an element of the eligibility of a potential victim to benefit from reparations and there are no cogent reasons to depart from this element because witnesses had difficulty remembering dates with precision at trial. In this regard, it is noteworthy that the timeframes provided in Annex I of the Addendum, should be as precise as the geographical locations pursuant to the Trial Judgment. They are not.[224] Consequently, to instruct the

[221] Defence Submissions on the Victims' Dossiers, para.27.
[222] The standard of proof is prima facie, credible grounds to believe that the applicant has suffered harm as a result of a crime committed within the jurisdiction of the court: *The Prosecutor v. Thomas Lubanga*, Decision on Victims' Participation, 18 January 2008, ICC-01/04-01/06-1119, para.99.
[223] Defence Submissions on the Victims' Dossiers, para.27.
[224] *See* for example Annex I to the 14 July Addendum, 14 July 2023, ICC-01/04-02/06-2858-AnxI, para.5.

authority responsible for making assessments to consider victims' claims *sufficiently close in time* to the time frames established in the Trial Judgment, amounts to a legal error.

97. **The status of potential victims and the presumption of civilian status under IHL.** The status of a potential witness as person not taking an active part in the hostilities at the relevant time is a paramount consideration in determining the eligibility of a victim of a crime for which Mr Ntaganda was convicted to benefit from reparations, *particularly in this case*. Indeed, a person taking an active part in the hostilities at the relevant time has lost his/her status as a protected person and therefore cannot qualify as a direct victim of certain crimes for which Mr Ntaganda was convicted, including murder and attempted murder as a crime against humanity and as a war crime (Counts 1 and 2), intentionally attacking civilians as a war crime (Count 3), forcible transfer of population as a crime against humanity (Count 12) and Ordering the displacement of the civilian population as a war crime (Count 13). Also, no person can qualify as an indirect victim pursuant to Counts 1, 2, 3, 12 and 13 in respect of a person taking an active part in the hostilities at the relevant time. Notably, this is unrelated to Trial Chamber VI's findings of guilt against Mr Ntaganda for Counts 1, 2, 3, 12 and 13, which are not disputed. This is an issue of status and the eligibility determination of persons claiming to be victims in this case.

98. The proceedings against Mr Ntaganda stand in sharp contrast to previous cases and the reparations proceedings in those cases. Indeed, evidence adduced in this case and findings made by Trial Chamber VI establish the following about members of the Lendu ethnic group, which make up the majority of the potential victims of the attacks: (i) the Lendu militiamen did not wear any particular uniform but they recognized each other; they did not wear anything distinctive, they just covered themselves with leaves;[225] (ii) Lendu fighters were in Kobu;[226] (iii) Lendu militias including young people, adults - both male and female[227] - and older individuals who had taken up weapons to defend their village were in Mongbwalu;[228] (iv) In Mongbwalu, Lendu combatants integrated or infiltrated everywhere amongst the population, they were just living amongst the population;[229] (v) Lendu combatants were not in camps, they were not organized like soldiers;[230] (v) Lendu combatants had traditional weapons such as

[225] **P-0887**: T-94, p.42:18-20; **P-0105**: T-135, p.10:22-25; **P-0863**: T-180, p.19:8-12; **P-0113**: T-119, p.54:2; **P-0790**: T-53, p.42:23; **P-805**: T-26, p.40:11-20. *See* also Trial Judgment, paras.472,568; **P-0127**: T-139, p.4,81, and T-140, pp.11-12. *See also,* **P-0317**: T-192, p.98.
[226] Trial Judgment, para.549,572,575; **P-0805**:T-25bis, p.34:20-23; **P-0963:**T-79, p.40-41.
[227] Trial Judgment, para.494.
[228] **P-805**: T-26, p.40:11-20.
[229] Trial Judgment, para.473; **P-0887:** T-94, p.42:7-17. *See* also **P-0012**: DRC-OTP-2054-0073, p.34.
[230] **P-0887:** T-94, p.42:10-13.

machetes, spears, bow and arrows but also firearms;[231] (vi) Prior to the assault, Lendu fighters were also present in Kilo and had a camp on a hill;[232] (vii) young people from the entire region would come together in Kobu, amongst other places to defend the local people against possible attacks;[233] (viii) young Lendus put up resistance in Wdaza, which is a locality close to Kobu where the church and the Paradiso Hotel are located;[234] (ix) there was fighting between UPC attackers and young Lendu people who were trying to protect the population;[235] (x) in Lipri, there were Lendu combatants fighting from positions inside the town;[236] (xi) In Gutsi, there were not only Lendu combatants,[237] [REDACTED];[238] (xii) Lipri, Kobu and Bambu [REDACTED] the Lendu commanders;[239] (xiii) in Bambu, most of the young boys were combatants and at least some of them were very well armed;[240] (xiv) when there was fighting (in Kobu), everybody went, the civilians went there. But there was no way to distinguish the combatants. All those who were fighting were called combatants. [REDACTED];[241] (xv) almost no one on the Lendu side wore military uniforms;[242] (xvi) the clashes against the Lendu [REDACTED]. So [REDACTED];[243] (xvii) Lendu combatants did not hesitate to use women and children to fight with them;[244] (xviii) among the Lendu combatants there were also women combatants;[245] (xix) when the Lendu fought, everybody was fighting;[246] (xx) all Lendu [REDACTED].[247]

99. Regarding the status of victims, Trial Chamber II held - for the benefit of the authority making the assessments - that "[i]n light of the positive findings made in the Conviction Judgment, the Chamber considers that, on a balance of probabilities, it is more likely than not that, if the victims' applications concern the killing of people in Kobu and Sayo, that the direct

[231] Trial Judgment, para.473; **P-0887:** T-94, p.42:21-24. *See* also, **P-0894**: DRC-OTP-2076-0194-R02, para.24.
[232] Trial Judgment, para.537.
[233] **P-0790:** T-54: p.67:10-23.
[234] **P-0790:** T-54: p.67-68.
[235] **P-0790:** T-54: p.68:21-25.
[236] **P-0317:** T-191: pp.97-98. *See* also, Trial Judgment, para.568; **P-0105:** T-135: pp.10-11; **P-0127:** T-139; pp.83-84; **P-0300:** T-166: p.35.
[237] Trial Judgment, para.549.
[238] P-**0857:** T-194: p.16.
[239] **P-0901**: T-29, p.17:4-6. *See* also, Trial Judgment, paras.549,585.
[240] **P-0863**: T-181, p.58:2-5
[241] **P-0857**: T-193, p.89:13-19. *See* also **P-0301**: T-149, p.28-29. *See* also Trial Judgment, para.472; **P-0887**: T-94: p.52; **P-0901**: T-30: p.45; **P-0012**: DRC-OTP-2054-0073, p.34; **P-0886**: T-39: p.25.
[242] **P-0105**: T-135, p.10:22-25; **P-0863**: T-180, p.19:8-12; **P-0113:** T-119, p.54:2; **P-0790**: T-53,p.42:23; **P-805:** T-26, p.40:11-20.
[243] **P-0901**: T-29, p.16:12-14.
[244] **P-0907**: T-91,pp.29-30. *See* also, Trial Judgment, para.473,494; **P-0887**: T-94, p.48.
[245] **P-0800**: T-69, p.48:11-19. *See* also, Trial Judgment, para.473; **P-0887**: T-94, p.48; and **P-0907**: T-91, pp.29-30.
[246] **P-0800**: T-69, p.48:11-19; **P-0016**: DRC-OTP-0126-0422-R03, **P-0863**: T-181, p.58:2-5; para.140.
[247] **P-800**: T-69: p.48:17-22.

victims were civilians not actively taking part in the hostilities or otherwise persons *hors de combat*."[248] This was an error.

100. Whether a person claiming to be a victim was taking an active part in the hostilities at the relevant time - and thus does not qualify as a victim of crimes for which Mr Ntaganda was convicted pursuant to Counts 1, 2, 3, 12 and 13 – is a determination to be made by the authority making the assessment based on the information included in his/her victim's dossier. The balance of probabilities standard is to be applied to the information in the victim's dossiers and certainly not beforehand as a blanket criterion. Trial Chamber cannot pre-judge the eligibility determination that will be made by the authority making the assessments.

101. Trial Chamber II recalled the general presumption of civilian status under IHL and that, in case of doubt, a person shall be considered to be a civilian. It then held, on this basis, that "[t]he Chamber therefore does not consider that the absence of information in the applications, concerning the occupation of the victims (or of their immediate family members) at the time of the alleged murder, precludes it from finding on a balance of probabilities that the victims are entitled to reparations."[249] In doing so, Trial Chamber II erred in law. The same error is repeated in paragraph 112 in relation to Count 3.

102. First, the general presumption of civilian status under IHL was neither adopted nor designed for the purpose of administrative decision making. The aim of this well-known and crucially important presumption is to ensure that soldiers / commanders / military units / armed forces involved in any armed conflict will conduct their operations taking into account that in case of doubt, persons / adversaries will (shall) be considered as civilians.[250] The general civilian status presumption serves both as a precautionary measure - ensuring that military personnel, commanders and units will, in accordance with the distinction principle, plan, conduct and direct their operations on military objectives and persons taking an active part in the hostilities – as well as a repression measure - allowing to determine whether the use of force by soldiers / commanders / military units / armed forces was legitimate or not in the circumstances. This is entirely different from the issue at hand, *i.e.* whether a person claiming to be a victim in this case, was taking an active part in the hostilities at the relevant time.

[248] 14 July Addendum, para.108.
[249] 14 July Addendum, para.109.
[250] *See* Additional Protocol to the Geneva Conventions ("AP") I, article 50 and APII, article 13. *See also,* Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (1986), paras.1989-1991,4789.

103. This case involves members of the Lendu community comprising (i) civilians not taking an active part in the hostilities; and (ii) fighters, including civilians, of all ages, men and women, not wearing uniforms, who took an active part in the hostilities at the relevant times and who could not be distinguished from the Lendu civilians not taking an active part in the hostilities. In these circumstances, the general civilian status presumption is of no assistance in determining whether a potential victim is eligible to benefit from reparations. This is an evidentiary issue to be determined on a case-by-case basis, taking into account the totality of the information in the victims' dossiers.

104. The Defence has previously insisted on the need for the TFV, then assigned as the authority making the assessments, to include questions in the TFV questionnaire directed at obtaining additional information from potential victims concerning their activities, and that of their immediate family members, at the relevant times.[251] By holding at this stage that the absence of such information in the victims' dossiers, does not preclude a finding that the victim is entitled to reparations, Trial Chamber II erred in law, as this finding implies that there is no need for the authority making the assessments to obtain such information. Evidently, in the circumstances of this case, there is a need to inquire about the activities of potential victims, and that of their immediate family members, at the relevant time.

105. The appropriate relief in the circumstances in twofold. First, regarding the potential victims yet to be assessed by the authority making the assessments, the Defence respectfully requests the Appeals Chamber to issue a new order for reparations including eligibility determination criteria that take into account the status of potential victims as persons not taking part in the hostilities and calling upon the authority making the assessments to obtain the necessary information. The Defence has already made observations regarding the type of information that would assist in the circumstances.[252] Second, regarding the potential victims in the sample whose eligibility has already been determined *in part* by Trial Chamber II, the Defence respectfully requests the Appeals Chamber to instruct the authority making the assessments to obtain the required information from the potential victims and to provide the same to the Defence for the purpose of making observations on the victims' dossiers, before proceeding to determine their eligibility ahead of the required judicial review.

[251] *See, inter alia,* Defence observations on the TFV Second Progress Report on the implementation of the Initial Draft Implementation Plan, 6 December 2021, ICC-01/04-02/06-2726, paras.6-7; 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.11.
[252] 14 July Addendum, para.52; Defence Submissions on the Victims' Dossiers, paras.38-40.

106. **Causal link**. For a potential victim to be determined eligible to benefit from reparations in this case, Trial Chamber II correctly identified the establishment, on a balance of probabilities, of the causal link between the alleged harm and the crimes for which Mr Ntaganda was convicted, as a formal requirement However, Trial Chamber II concluded at paragraph 134 of the 14 July Addendum that:

> "134. As such, the Chamber concludes that as long as the victims demonstrate their status as direct and indirect victims and whether, on that basis, their harm is presumed, or it has been established in the manner detailed above, the causal link between the harm and the crimes of which Mr Ntaganda was convicted is also established."[253]

107. Trial Chamber II's circular reasoning in this paragraph fails to attach the required importance to the establishment of the causal link as a formal requirement to determine the eligibility of a potential victim. Even more so, it disregards entirely the need to assess whether breaks in the chain of causality impact the eligibility determination of the potential victim.

108. According to Trial Chamber II, once a victim has established his/her status as a direct or indirect victim, and the harm is either presumed or established, then the causal link requirement is also established and that is the end of the inquiry. This amounts to an error.

109. In its appeal against the 8 March Reparations Order, the Defence argued that Trial Chamber II "erred in finding that the issue of breaks in the chain of causation does not arise, "*as long as* the relevant victims fall within the scope of the conviction and meet the applicable evidentiary standard"."[254] Although the Appeals Chamber found no error in this regard, its reasoning is paramount. The Appeals Chamber first noted that "[t]o the extent that this could be read as stating that breaks in the chain of causation are irrelevant, *it would be incorrect*"[255] but then added "[h]owever, in this context, the Appeals Chamber notes that the Trial Chamber, in the sentence immediately preceding this, clearly stated that breaks in the chain of causation must be taken into account."[256]

110. This is not the case here. Paragraph 61 of the 14 July Addendum provides: "[t]he Chamber details below its reasoning as to the required information regarding each of the conditions of eligibility and the application of the relevant standard of balance of

[253] 14 July Addendum, para.134.
[254] Defence Appellant Brief against the 8 March Reparations Order, para.140, referring to the 8 March Reparations Order, para.134.
[255] Appeals Judgment, para.570.
[256] Appeals Judgment, para.570.

probabilities."[257] Yet, in the paragraphs that follow, there is no mention of any requirement that the applicant shall provide sufficient proof of the causal link between the crime and the harm suffered, based on the specific circumstances of the case. Nor is there any mention or reference to the fact attention should be paid to potential breaks in the chain of causation or to the Defence submissions in this regard.

111. Whereas in reaching this conclusion Trial Chamber II relied on a similar approach in *Lubanga*, this was before the Appeals Judgment in this case. Moreover, whereas the *Lubanga* case dealt solely with child soldier victims having to establish that they were child soldiers enlisted *into* the UPC /FPLC at the relevant time, this case is concerned with additional and different victims, the status of whom has a bearing on the existence of the required causal link.

112. Evidently, Trial Chamber II proceeded to analyze the victims' dossiers in the sample considering that the causal link is established, without more, once a potential victim has demonstrated his/her status as a direct or indirect victim, and their harm is presumed or established. More importantly, in reaching this conclusion, Trial Chamber II is instructing the authority responsible for making the assessment that once it finds that a potential victim has demonstrated his/her status and the harm is presumed (that is, in most cases considering the applicable presumptions in this case) or established, there is no need to look for any evidence provided by the potential victim establishing the causal link requirement, let alone to consider the possibility of breaks in the chain of causality. This error materially impacts the criteria set out by Trial Chamber II for the benefit of the authority making the assessment.

113. **Relief sought**. Considering the foregoing, the Defence respectfully requests that the Appeals Chamber find that Trial Chamber II erred by issuing eligibility determination criteria and guidelines materially affected by errors, which materially impact its determination of the eligibility of potential victims in the sample; and which are incapable of correctly assisting the authority making the assessments in determine the eligibility of potential victims during the implementation stage. New criteria and guidelines must be incorporated in a new order for reparations to be issued by the Appeals Chamber.

[257] 14 July Addendum, para.61.

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.

114. This Ground of appeal addresses Trial Chamber II's failure to provide the Defence with a meaningful opportunity to assess and make submissions on the victims' dossiers in the sample.

115. The Appeals Chamber found that Trial Chamber II "erred in failing to rule on at least a sample of applications for reparations" and that "[a]s a result of this error, the Defence was unable to participate in the assessment of the eligibility of victims to benefit from reparations."[258] The Appeals Chamber also found that "since the amount of the award for reparations in this case should be based on information contained in, among other sources, at least a sample of applications for reparations, the Defence must be able to challenge this information by means of reviewing the applications and making representations thereon" and that "[t]he Defence must also be on notice as to the manner in which the Trial Chamber intends to assess the information."[259]

116. First, Trial Chamber II erred by failing to strike an appropriate balance between the rights of the Convicted Person to have access to information required to challenge the eligibility of potential victims to benefit from reparations in this case and the need to provide for an appropriate measure of protection for the victims, as set forth in article 68(1) of the Statute, and rejecting the Defence request for the lifting of redactions applied to such information Second, Trial Chamber II erred by dismissing the Defence request for disclosure of information in the possession of the TFV, in application of orders issued by Trial Chamber II to that effect.

117. Both errors stem from and are the result of numerous submissions and formal electronic correspondence involving the Defence, the CLRs, the TFV and the Registry and orders issued by Trial Chamber II, culminating in Trial Chamber II rejecting both prongs of 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" ("Defence 29 March 2023 Request").[260] A review of all submissions, formal correspondence and orders leading to Trial Chamber II's Decision on the

[258] Appeals Judgment, para.363.
[259] Appeals Judgment, para.363.
[260] Defence 29 March 2023 Request.

Defence 29 March 2023 Request[261] is both enlightening and necessary to understand the errors underpinning this ground.[262]

Trial Chamber II's errors related to redactions

118. Following the Appeals Judgment, Trial Chamber II decided to assemble a sample of victims' dossiers, including the victims already determined eligible by the TFV, and held that it would rule on the victims' dossiers in the sample, after giving the LRVs the opportunity to supplement them and the Defence the opportunity to make submissions thereon.[263]

119. The transmission of 171 victims' dossiers to the Defence was completed by 6 February 2023.[264] Supplementary information obtained by the CLRs was communicated to the Defence by 3 March 2023.[265] In response to a Defence request for a limited extension of 30 days to file

[261] Decision on Defence 29 March 2023 Request.
[262] Implementation Order, paras.34-35; 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 Submissions on the Sample"), paras.47-55; 25 November Decision, paras.35-30,34; Email from the Defence to the VPRS on 2 March 2023 at 19:10, requesting the lifting of certain redactions applied to the victims' dossiers ("Defence email to the VPRS requesting the lifting of redactions"); Email from the Defence to CLR2 on 9 March 2023 at 15:09, requesting the lifting of certain redactions applied to the CLR2's on the dossiers of the victims included in the Sample ("Defence email to the CLR2 requesting the lifting of redactions"); Email from the Defence to CLR1 on 9 March 2023 at 16:24, requesting the lifting of certain redactions applied to the CLR1's submissions on the 34 applications constituting the sample ("Defence Email to the CLR1 requesting the lifting of redactions"); Email from CLR2 to the Defence on 10 March 2023 at 15:40, responding to the Defence email to the CLR2 requesting the lifting of redactions ("CLR2 Response Email"); Email from CLR1 to the Defence on 13 March 2023 at 17:45, responding to the Defence email to the CLR2 requesting the lifting of redactions ("CLR1 Response Email"); Email from the VPRS to the Defence on 21 March 2023 at 20:25, responding to the Defence email to the VPRS requesting the lifting of redactions as regards victims of the attacks ("VPRS First Response Email"); Email from the VPRS to the Defence on 23 March 2023 at 10:14, responding to the Defence email to the VPRS requesting the lifting of redactions as regards former child soldiers ("VPRS Second Response Email"); Defence 29 March 2023 Request, paras.11-24; Response of the Common Legal Representative of the Victims of the Attacks to 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", 11 April 2023, ICC-01/04-02/06-2840 ("CLR2 Response to the Defence 29 March 2023 Request"); Response of the Common Legal Representative of the Former Child Soldiers to 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" (ICC-01/04-02/06-2838), 11 April 2023, ICC-01/04-02/06-2841 ("CLR1 Response to the Defence 29 March 2023 Request"); Registry Observations on Defence Request (ICC-01/04-02/06-2838), 11 April 2023, ICC-01/04-02/06-2842 ("Registry Observations on the Defence 29 March 2023 Request"); Decision on Defence 29 March 2023 Request, paras.16-22.
[263] Implementation Order, para.34.
[264] First Transmission to the Defence of 28 Redacted Victim Dossiers pursuant to Trial Chamber II Decision ICC-01/04-02/06-2794, 11 January 2023, ICC-01/04-02/06-2809; Second Transmission to the Defence of 50 Redacted Victim Dossiers pursuant to Trial Chamber II's Decision ICC-01/04-02/06-2794, 20 January 2023, ICC-01/04-02/06-2814; Third Transmission to the Defence of 92 Redacted Victim Dossiers pursuant to Trial Chamber II's Decision ICC-01/04-02/06-2794, 27 January 2023, ICC-01/04-02/06-2816; Transmission to the Defence of One Redacted Victim Dossier pursuant to Trial Chamber II's Decision ICC-01/04-02/06-2813, 6 February 2023, ICC-01/04-02/06-2825.
[265] Common Legal Representative of the Former Child Soldiers' submissions on the 34 applications constituting the sample, 3 March 2023, ICC-01/04-02/06-2835; Submissions by the Common Legal Representative of the Victims of the Attacks on the dossiers of the victims included in the Sample, 3 March 2023, ICC-01/04-02/06-

its submissions, Trial Chamber II granted a 25 days extension, and the Defence submissions were filed on 1 May 2023. In the 14 July Addendum, Trial Chamber II noted that in its submissions on the sample, the Defence took issue with the amount of time allocated to conduct the review and analysis of the 171 victims' dossiers, adding that:

> "nothing precluded the Defence from submitting a subsequent request for an extension of the time limit, if, in its opinion, additional time was require to complete its review and analysis of the 171 victims' dossiers to the required standard. Having failed to do so, the Chamber considers the Defence complaint, at this stage, is moot."[266]

120. First, while the Defence did actively raise the question of the time allocated to conduct a review and analysis of the 171 victims' dossiers, this is not the main thrust of this ground.

121. Second, although Trial Chamber II quoted in part paragraph 24 of the Defence Submissions on the Victims' Dossiers, this missed the point. The Defence was referring to the fact that from the beginning of the reparations proceedings as early as 28 February 2020 (three years earlier), the Defence had sought access to the participating victims' dossiers,[267] which was systematically refused by Trial Chamber II,[268] until it was ordered to do so by the Appeals Chamber.[269] Had Trial Chamber II granted the Defence access to the participating victims' dossiers when requested by the Defence, time would not have been an issue.

122. At paragraph 121 of the 14 July Addendum, Trial Chamber II noted that "in accordance with the Appeals Judgment, the Defence has received all the victims' dossiers included in the Sample, with the appropriate redactions, and has had the opportunity to make submissions and comment on them."[270] This is incorrect.

123. When instructing the VPRS to transmit the 171 victims' dossiers to the Defence, Trial Chamber II recalled[271] the Appeals Chamber's instruction "in granting the Defence access to the victims' applications, the necessary redactions shall be made to protect the victims' safety, physical and psychological wellbeing, dignity and privacy, pursuant to article 68 of the

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2836.
[266] 14 July Addendum, para.32.
[267] 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. *See* Appeals Judgment, para.363,
[268] *See* First Decision on Reparations Process, 26 June 2020, ICC-01/04-02/06-2547; 15 December 2020 Decision and 8 March Reparations Order.
[269] Appeals Judgment, para.363.
[270] Appeals judgment, para.121.
[271] Implementation Order, para.35.

Statute."[272] On this basis, Trial Chamber II instructed the Registry "to redact any identifying information from the victims' dossiers before transmitting them to the parties",[273] noting however "that any information relating to the description of the harm suffered, the events that caused the harm, and the link between such harm and the crimes of which Mr Ntaganda has been convicted, should not be redacted, except for information that might reveal the identities of victims, current residence or other contact information that may be used to locate the victims."[274] Trial Chamber II added that "[s]hould there be any issues related to redactions, the parties and the Registry are instructed to bring it to the Chamber's attention at the time they make their submissions on the procedure for the sample."[275]

124. In its Defence Submissions on the Sample, the Defence addressed the redactions instructions, highlighting in particular the difference with instructions issued in the *Lubanga* case when the Defence in that case was given access to the victims' dossiers and, *inter alia,* the fact that the redaction of the identity of the victims in the sample was not necessary at the reparations stage,[276] all the more if the victims consented to their identity being disclosed. The Defence also noted the importance of *not* redacting the identity to be able to make meaningful submissions[277] and requested Trial Chamber II to provide a clear dispute settlement mechanism for redactions.[278]

125. As a result, in is 25 November Decision, Trial Chamber II held that it "does not, in principle, disagree with the Defence receiving *such information* for as long as the victims have consented to their identities being disclosed to the Defence."[279] Trial Chamber II proceeded to instruct the CLRs to consult with the victims as to whether they would consent to have their identity disclosed to the Defence,[280] and established two different redactions regimes. If the victims consented, the registry was "to redact from the victims' dossiers only the information that might reveal the current residence or other contact information that may be used to locate the victims",[281] otherwise the Registry was to redact any "information that ***might*** reveal the

[272] Appeals Judgment, para.689.
[273] Implementation Order, para.35.
[274] Implementation Order, para.36.
[275] Implementation Order, para.36.
[276] Defence Submissions on the Sample, para.49.
[277] Defence Submissions on the Sample, paras.52-54.
[278] Defence Submissions on the Sample, para.55.
[279] 25 November Decision, para.29 (emphasis added).
[280] 25 November Decision, para.29.
[281] 25 November Decision, paras.29-30.

identities of victims, current residence or other contact information that may be used to locate the victims."[282]

126. As for the dispute settlement mechanism, Trial Chamber II directed "the Defence to raise any challenge it may have to the redactions applied directly with the VPRS, *seizing the Chamber only exceptionally* when no agreement can be reached"[283], resulting in a time consuming and hindering burden for the Defence.[284]

127. Significantly, CLR1 and CLR2 were able to consult with [REDACTED] participating victims in the sample, all of whom, refused to have their identity disclosed to the Defence, a marked departure from the *Lubanga* case in which most of the victims consented.[285] Notably, the CLRs were unable to reach [REDACTED] participating victims in the sample, who have been their client for years, despite the information in their possession and the significant resources available to them for this purpose. It is noteworthy that in these circumstances, even if redactions were lifted and information, which might reveal the identity of the victims, was disclosed to the Defence, the safety, physical and psychological wellbeing, dignity and privacy of these [REDACTED] victims was *de facto* ensured.

128. The main basis advanced by the CLR1, CLR2 and the VPRS in refusing to lift the redactions is related to the Chamber's instruction to redact "information that *might* reveal the identities of victims, current residence or other contact information that may be used to locate the victims." CLR1, CLR2 and the VPRS systematically argued that redactions applied to victims' dossiers remained necessary as the redacted information might reveal the identity of the victims. Pushing the issue further, CLR1, CLR2 and the VPRS argued that:

> "while certain redacted information in some victims' dossiers, assessed in isolation, would not necessarily lead to the identification or location of an individual, they

[282] 25 November Decision, para.30 (emphasis added).
[283] 25 November Decision, para.30.
[284] Indeed, the Defence first requested the VPRS to lift redactions in the victims' dossiers (Defence email to the VPRS requesting the lifting of redactions, 2 March 2023), followed by the VPRS consulting with the CLR1 and CLR2. Then, upon receiving the supplementary information on the victims' dossiers, the Defence requested CLR1 and CLR2 to lift redactions applied thereto (Defence emails to the CLR1 and CLR2 requesting the lifting of redactions, 9 March 2023). Having received responses from CLR1, CLR2 (CLR2 Response Email, 10 March 2013; CLR1 Response Email, 13 March 2023) and the VPRS (VPRS First Response Email, 21 March 2023; VPRS Second Response Email, 23 March 2023), globally rejecting most requests, the Defence submitted its Defence 29 March 2023 Request, seeking Trial Chamber II to lift redactions. In every request addressed to the VPRS, CLR1, CLR2 and the Chamber, the Defence provided detailed information on the redactions to be lifted and the reasons why this information was necessary for the Defence to be able to make meaningful submissions on the victims' dossiers.
[285] Corrected version of the "Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable", 21 December 2017, ICC-01/04-01/06-3379-Red-Corr-tENG, para.58.

> however do lead to the identification and/or reveal the location of the victim if they are connected to other (unredacted) pieces of information in the specific context."[286]

129. What is more, CLR1 and CLR2 argued that the lifting of redactions was not necessary "given in particular that the reparations in the present case are collective in nature and thus no specific scrutiny of the multidimensional harm suffered by the victims is required."[287]

130. In its Defence 29 March 2023 Request, in light of the foregoing, the Defence submitted, *inter alia,* that:

> "[a] balancing exercise is required between, on the one hand, the minimum information required to enable the Defence to meaningfully challenge the victims' eligibility and ensure that only victims having suffered harm as a result of the crimes for which Mr Ntaganda was convicted are entitled to receive reparations, and the measures required to protect the victims"[288]

131. Adjudicating the Defence 29 March 2023 Request, Trial Chamber II committed multiple errors, including:

> (i) Trial Chamber II erred by putting in place a redactions dispute settlement mechanism, instructing the parties to seize *the Chamber only exceptionally* when no agreement can be reached,[289] thereby significantly hampering the review of the 171 dossiers by the Defence, having to submit multiple requests and correspondence, not advancing the matter. Had Trial Chamber II being inclined to address redaction issues from the beginning, significant time and resources could have been spared and issues timely resolved on the merits;
>
> (ii) Trial Chamber II erred by failing to consider that the safety, physical and psychological wellbeing, dignity and privacy of the [REDACTED] participating victims who could not be reached by the CLRs was *de facto* ensured,[290] and accordingly, failing to strike a balance between the minimum information required to enable the Defence to meaningfully challenge the victims' eligibility and the measures required to protect the victims pursuant to article 68(1) of the Statute, and to lift redactions which *might* reveal their identity;

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[286] Registry Observations on the Defence 29 March 2023 Request, para.12. *See* also, CLR1 Response to the Defence 29 March 2023 Request, para.17; CLR2 Response to the Defence 29 March 2023 Request, para.25.
[287] CLR2 Response to the Defence 29 March 2023 Request, para.26. *See* also CLR1 Response to the Defence 29 March 2023 Request, para.19.
[288] Defence 29 March 2023 Request, para.14.
[289] 25 November Decision, para.30 (emphasis added).
[290] *See* Defence 29 March 2023 Request, paras.13-14; Defence Submissions on the Victims' Dossiers, para.25.

(iii) Trial Chamber II erred by not engaging the parties on the parameters of the redactions regime put in place as to what constitutes information that *might* reveal the identity of victims, and the limits thereof.[291] This includes, *inter alia,* Trial Chamber II's failure to engage the CLR1, CLR2 and the VPRS arguments concerning certain redacted information in some victims' dossiers, which assessed in isolation would not necessarily lead to the identification or location of an individual, but which might reveal the identity or location of a victim if connected to other (unredacted) pieces of information;[292]

(iv) Trial Chamber II erred by failing to address the erroneous CLR1, CLR2 and VPRS arguments that the lifting of redactions sought by the Defence was not necessary considering that (i) the reparations ordered in the present case are collective in nature;[293] and that (ii) the "role is more limited than the one of the Chamber, which will objectively decide on the credibility of dossiers based on all details contained therein."[294];

(v) Trial Chamber II erred by failing: (i) to consider on the merits any of the Defence requests for the lifting of redactions; (ii) to rule on the merits of the Defence requests for the lifting of redactions; and (iii) to provide reasons for rejecting any of the Defence requests on the merits; and

(vi) Trial Chamber II erred by finding that the Defence "has not demonstrated how its ability to review and comment on the victims' Sample is effectively affected by the redactions maintained in the victims' dossiers."[295] The Defence did submit detailed observations on the necessity of lifting the redactions, including how it affected its ability to make meaningful observations regarding the eligibility of the victims in the sample.[296] Had Trial Chamber II considered and reviewed on the merits these detailed submissions, it could have not made this finding

132. At paragraph 65 of the 14 July Addendum, Trial Chamber II held that "notwithstanding the redactions, the Defence has been able to make meaningful submissions on the victims' eligibility."[297] Trial Chamber II's conclusion in this regard is entirely incorrect. The Defence

[291] 25 November Decision, para.30
[292] Registry Observations on the Defence 29 March 2023 Request, para.12. *See* also, CLR1 Response to the Defence 29 March 2023 Request, para.17; CLR2 Response to the Defence 29 March 2023 Request, para.25.
[293] CLR2 Response to the Defence 29 March 2023 Request, para.26. *See* also CLR1 Response to the Defence 29 March 2023 Request, para.19.
[294] CLR1 Response to the Defence 29 March 2023 Request, para.19.
[295] Decision on Defence 29 March 2023 Request, para.22.
[296] Defence 29 March 2023 Request, paras.16-21; Defence Submissions on the Victims' Dossiers, paras.24-25.
[297] 14 July Addendum, para.65.

acknowledges having made lengthy submissions on the 171 victims' dossiers. These submissions were based on the limited information available to the Defence. Notably, most of the Defence submissions were either rejected or not considered by Trial Chamber II. Had Trial Chamber II lifted the redactions as requested, the Defence submissions would have been much more detailed and meaningful. To provide but one example, had the redactions of the names of commanders mentioned in the participating child soldiers victims been lifted, it would have been possible for the Defence to address and make submissions on the plausibility, reliability, credibility and veracity of the information provided by these potential victims. This was all the more important considering the erroneous criteria adopted by Trial Chamber II regarding the provision of only one commander's name.[298] Whereas Trial Chamber II may not be able to verify if a certain commander was in fact part of the UPC/FPLC's hierarchy,[299] the Defence could have assisted in this regard.

Trial Chamber II's errors related to information in the possession of the TFV

133. In the 8 March Reparations Order, the TFV was tasked to submit an initial draft implementation plan[300] and a draft implementation plan.[301] The TFV was also assigned the responsibility to determine the eligibility of potential victims in this case.[302]

134. It is undisputed that the TFV determined the eligibility of 67 priority victims, who were subsequently included in the sample assembled at the request of Trial Chamber II following the Appeals Judgment.[303] It is also undisputed that for the purpose of determining the eligibility of the 67 priority victims included in the sample, the TFV obtained information provided by priority victims from the VPRS and the CLRs (victims' dossiers) as well as from implementing partners.[304] Regarding the latter, the issue of the questionnaire designed and used by the TFV to obtain information from priority victims is well documented in many submissions, reports, orders and decisions.[305] The TFV's purpose in obtaining additional information from priority

[298] 14 July Addendum, para.74.
[299] 14 July Addendum, para.75.
[300] 8 March Reparations Order, para.252.
[301] 8 March Reparations Order, para.249.
[302] 8 March Reparations Order, para.253.
[303] *See* for example, 25 November Decision, para.9.
[304] As regards the procedure, *see* TFV thirteenth Update Report, para.24.
[305] *See* for instance, 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 the TFV Fourth Update Report, 24 March 2022, ICC-01/04-02/06-2751-Conf-Anx1, pp.16-18; Defence Observations on the TFV Fourth Update Report, para.48; Implementation Order, para.34(h); 25 November Decision, para.34(f).

victims *via* its implementing partners, such as [REDACTED], was to supplement the victims' dossiers ahead of the determination of their eligibility.

135. In its 25 November Decision, Trial Chamber II:

> **"INSTRUCTS** the TFV to provide the Chamber and the parties with any relevant information or documentation taken into account when reaching the administrative decision on the 69 victims already found eligible for the IDIP purposes, within thirty days from the last transmission of the victims' dossiers to the Defence, at the latest."[306]

136. Also in the 25 November Decision, Trial Chamber II:

> "**INSTRUCTS** the VPRS […] and transmit the redacted victims' dossiers to the Defence, on a rolling basis and within thirty days from the date it receives the information about the victims' consent, at the latest";
> and
>
> **"INSTRUCTS** the LRVs to make any submissions and complement the victims' dossiers appending any additional supporting documentation within the meaning of rule 94(1)(g) of the Rules, attesting in particular the extent of the harm suffered and the causal link between the alleged harm and the crime committed, to the extent possible and necessary, within thirty days from the last transmission of the victims' dossiers to the Defence, at the latest."[307]

137. As of 6 February 2023, the transmission of the 171 victims' dossiers to the Defence was completed.[308] Submissions and complementary information from the CLRs were received on 3 March 2023.[309] Notably, by 3 March 2023, no information has been received by the TFV pursuant to the above instruction issued by Trial Chamber II, even though the Defence was scheduled to file its submissions on the 171 victims' dossiers on 5 April 2023.

138. Consequently, on 20 March 2023, being involved in the lifting of redactions process and awaiting responses from the VPRS, and not having received any information from the TFV pursuant to the 25 November Decision, the Defence requested a limited extension of time of 30 days to file its submissions on the victims' dossiers.[310] .[311] Regarding the material to be provided by the TFV, the Defence underscored that "such information and documentation is a

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[306] 25 November Decision, Disposition. See also, 25 November Decision, para.34
[307] 25 November Decision, Disposition. See also, 25 November Decision, para.34
[308] Transmission to the Defence of One Redacted Victim Dossier pursuant to Trial Chamber II's Decision ICC-01/04-02/06-2813, 6 February 2023, ICC-01/04-02/06-2825.
[309] Common Legal Representative of the Former Child Soldiers' submissions on the 34 applications constituting the sample, 3 March 2023, ICC-01/04-02/06-2835; Submissions by the Common Legal Representative of the Victims of the Attacks on the dossiers of the victims included in the Sample, 3 March 2023, ICC-01/04-02/06-2836.
[310] Defence request for a limited extension of the time limit set to make submissions on the dossiers of the victims included in the sample, 20 March 2023, ICC-01/04-02/06-2837, para.14.
[311] Defence request for a limited extension of the time limit set to make submissions on the dossiers of the victims included in the sample, 20 March 2023, ICC-01/04-02/06-2837, para.14.

critical component of the material required by the Defence for the purpose of making submissions on the victims' dossiers. In particular, the questionnaires completed by the applicants - which were provided to the TFV by the implementing partners – are essential."[312]

139. On the same day, Trial Chamber II requested the parties, the VPRS and the TFV, by electronic correspondence, to file observations on the Defence request.[313] On 22 March 2023, the CLRs jointly responded, also by electronic correspondence.[314] On the same day, the TFV also responded by electronic correspondence, informing Trial Chamber II that [REDACTED],[315] without providing any information regarding the information due to be transmitted to the Defence pursuant to the 25 November Decision.

140. On 24 March 2023, Trial Chamber II granted an extension of 25 days, also by electronic correspondence.[316] In its decision, Trial Chamber II did not address in any way the information due to be transmitted to the Defence by the TFV pursuant to its own 25 November Decision.

141. Consequently, on 29 March 2023, the Defence submitted its Defence 29 March 2023 Request: (i) seeking the lifting of redactions;[317] and (ii) moving Trial Chamber II to ensure that the TFV transmits to the Defence without delay, any relevant information or documentation taken into account when reaching the administrative decision on the 69 victims already found eligible for the IDIP purposes,[318] as previously instructed to do so by the Chamber in the 25 November Decision.[319]

142. The Defence was taken completely by surprise by the TFV response, which amounted to non-compliance with an order from the Trial Chamber. As such, on 12 April 2023, being required to file its submissions on the 171 victims' dossiers by 1 May 2023, the Defence submitted a request for leave to reply, submitting that if leave was granted, it would address four issues "leading to the conclusion that the TFV's response to the Defence Request is untenable" and requiring "the Chamber to intervene for the purpose of ensuring that the Defence is provided with the information and documentation necessary to assess the victims'

[312] Defence request for a limited extension of the time limit set to make submissions on the dossiers of the victims included in the sample, 20 March 2023, ICC-01/04-02/06-2837, para.7.
[313] Email from Trial Chamber II to the parties on 20 March 2023 at 17:29.
[314] Email from the CLRs to Trial Chamber II and the parties on 22 March 2023 at 13:43.
[315] Email from the TFV to Trial Chamber II and the parties on 22 March 2023 at 16:57.
[316] Email from Trial Chamber II to the parties on 24 March 2023 at 08:27.
[317] Defence 29 March 2023 Request, paras.11-23.
[318] Defence 29 March 2023 Request, paras.4-10.
[319] 25 November Decision, para.34(f).

dossiers, particularly the dossiers of the 69 victims already found eligible by the TFV for the IDIP."[320]

143. On 20 April 2023, Trial Chamber II ruled on the Defence 29 March 2023 request. Trial Chamber II found that the TFV "[…] did not comply with the Chamber clear instructions or clarified earlier that it had proceeded otherwise providing the information and documentation to the VPRS, for it to transmit it to the Defence with the necessary redactions." Trial Chamber added that the TFV's non-compliance "[…] is unhelpful to the proceedings and ultimately to the victims, as it create unnecessary delays and litigation. The Chamber disapproves such practice."[321]

144. However, Trial Chamber II added:

> "Notwithstanding the above, having reviewed the victims' dossiers transmitted to the Defence and the ex-parte annexes referred to by the TFV, the Chamber is satisfied that the Defence has received all available information and documentation required for it to assess and make meaningful submissions on the victims' dossiers."[322]

145. This is incorrect. In footnote 35, Trial Chamber II describes the content of the two *ex parte* annexes, transmitted to the Chamber on 8 November 2022 along with 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'"[323], which "[…] only contain lists of victims and details of the victims' information as compiled in the Registry's databases but no additional documentation."[324] It is thus evident that either (i) the TFV did not transmit all information and documentation available concerning the eligibility to the IDIP of all victims found eligible to benefit from the programme to the VPRS in purported 31 October and 1 November 2022 emails; or (ii) the VPRS did not include the information and documentation available received from the TFV concerning the eligibility to the IDIP of all victims found eligible to benefit from the programme in the two *ex parte* annexes transmitted to the Chamber on 8 November 2022. Thus, evidently, Trial Chamber II did not receive all information and documentation available the TFV concerning the eligibility

[320] Defence request for leave to reply to the "Observations of the Trust Fund for Victims on the Defence Request of 29 March 2023", 12 April 2023, ICC-01/04-02/06-2846, para.9.
[321] Decision on Defence 29 March 2023 Request, para.14.
[322] Decision on Defence 29 March 2023 Request, para.15.
[323] 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), 8 November 2022, ICC-01/04-02/06-2788, With two confidential ex parte annexes only available to the Registry.
[324] Decision on Defence 29 March 2023 Request, fn.35.

to the IDIP of all victims found eligible to benefit from the programme. In any event, the Defence certainly did not have access to this information.

146. In light of the foregoing, the Defence submits that Trial Chamber II committed multiple errors when adjudicating on the 29 March 2023 Request, including:

(i) Trial Chamber II erred by failing - upon being made aware, *via* the Defence request for an extension of time, that the TFV was not complying with its own instructions pursuant to the 25 November Decision[325] - to engage the TFV on its non-compliance with the 25 November Decision, despite the tight schedule for the Defence to file its submissions on the 171 victims' dossiers;

(ii) Trial Chamber II erred by failing – upon being made aware that TFV did not intend to respond to the Defence request for an extension of time[326] - to engage the TFV on its non-compliance with the 25 November Decision, despite the tight schedule for the Defence to file its submissions on the 171 victims' dossiers;

(iii) Having found that the TFV "did not comply with the Chamber clear instructions",[327] Trial Chamber II erred by finding that it was "satisfied that the Defence has received all available information and documentation required for it to assess and make meaningful submissions on the victims' dossiers"[328];

(iv) Trial Chamber II erred by finding that "the Defence's Request for communication of relevant information or documentation taken into account by the TFV when reaching the administrative decision on the victims already found eligible for the IDIP purposes is dismissed as moot"[329]; and

(v) Trial Chamber II erred by failing to provide reasons as to why the information received by the Defence was sufficient to assess and make meaningful submissions on the victims' dossiers.

Conclusion

147. Trial Chamber II erred by failing to strike an appropriate balance between the rights of the Convicted Person to have access to information required to challenge the eligibility of potential victims to benefit from reparations in this case and the need to provide for an

[325] Defence request for a limited extension of the time limit set to make submissions on the dossiers of the victims included in the sample, 20 March 2023, ICC-01/04-02/06-2837, para.7.
[326] Email from the TFV to Trial Chamber II and the parties on 22 March 2023 at 16:57.
[327] Decision on Defence 29 March 2023 Request, para.14.
[328] Decision on Defence 29 March 2023 Request, para.15.
[329] Decision on Defence 29 March 2023 Request, para.15.

appropriate measure of protection for the victims, as set forth in Article 68(1) of the Statute. Trial Chamber II also erred by dismissing the Defence request for disclosure of information in the possession of the TFV, in application of orders issued by Trial Chamber II to that effect.

148. Consequently, Trial Chamber II erred by failing to provide the Defence with a meaningful opportunity to assess and make submissions on the 171 victims' dossiers in the sample. The applicable remedy is for the Defence to be provided with complete dossiers for the 171 potential victims in the sample, with the proper level of redactions, as well as with an opportunity to make meaningful observations on the victims' dossiers.

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

149. The Appeals Chamber recognised in September 2022 that the concept of transgenerational harm is novel and evolving.[330] As submitted previously by the Defence, the concept remains unsettled from a scientific and medical perspective. Medical and psychological literature reveals the nascent state of understanding and research on transgenerational harm and trauma, and the scepticism and uncertainty about its scope, transmission and even existence, among experts in the field.[331]

150. Importantly, there is no prior practice of transgenerational harm as a basis for reparations at the International Criminal Court.[332] Reparations for transgenerational harm were not ordered either by the Trial Chamber or Appeals Chamber in *Lubanga*, despite the direct association with the present case. As such, if upheld, the *Ntaganda* case will be the first in which reparations are awarded for harm that has been transmitted across generations.

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[330] Appeals Judgment, para.490.
[331] See, e.g., S. G. Matthews, D. I. W. Phillips, Minireview: Transgenerational Inheritance of the Stress Response: A New Frontier in Stress Research, *Endocrinology*, January 2010, 151(1); C.S.M. Cowan, B.L. Callaghan, J.M. Kan, R. Richardson, The lasting impact of early-life adversity on individuals and their descendants: potential mechanisms and hope for intervention, *Genes, Brain and Behaviour*, January 2016, 15(1); S. Alhassen et al., Intergenerational trauma transmission is associated with brain metabotranscriptome remodeling and mitochondrial dysfunction, *Communications Biology*, 2021, 4; J. Svorcova, Transgenerational Epigenetic Inheritance of Traumatic Experience in Mammals, Genes, 2023, 14(1); B. Horsthemke, A critical view on transgenerational epigenetic inheritance in humans, Nature Communications, 30 July 2018, 9; M. Fargas-Malet, K. Dillenburger, Intergenerational Transmission of Conflict-Related Trauma in Northern Ireland: A Behavior Analytic Approach, Journal of Aggression, Maltreatment & Trauma, 20 March 2016, 25(4); U. Iyengar et al., Unresolved trauma in mothers: intergenerational effects and the role of reorganization, Frontiers in Psychology, September 2014, 5(966); P. Fossion et al., Transgenerational transmission of trauma in families of Holocaust survivors: The consequences of extreme family functioning on resilience, Sense of Coherence, anxiety and depression, Journal of Affective Disorders, January 2015, 171; S. Ridhuan et al., Advocating for a Collaborative Research Approach on Transgenerational Transmission of Trauma, Journal of Child and Adolescent Trauma, 3 June 2021, 14.
[332] Appeals Judgment, para.478.

151. In the Reparations Order, the Trial Chamber relied on (i) the submissions of the parties, and (ii) the reports of the Appointed Experts, to conclude that reparations could be awarded for transgenerational harm.[333] The Appointed Experts are not experts in transgenerational harm. They had not held themselves out as having any expertise in transgenerational harm or trauma.[334] Nor were they recognised by the Trial Chamber as having this expertise when appointed.[335] As such, the Trial Chamber's findings on this novel and complex area, did not draw on any specific expertise. Regardless, the Trial Chamber concluded that transgenerational harm could form part of the basis for a reparations award against Mr Ntaganda.

152. The Appeals Chamber called for caution. Noting that the Trial Chamber had not made any findings on transgenerational harm at the trial phase,[336] 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".[337]

153. Noting the questionable practice of the Trial Chamber inviting the Appointed Experts to draw on expertise provided in ***other*** cases before the Court, the Appeals Chamber then highlighted the centrality of the *Lubanga* Expert Report to the sources relied on by the Trial Chamber (a report which had neither been admitted nor tested in *Ntaganda*),[338] before questioning how the *Lubanga* TFV submissions relied on by the Trial Chamber could possibly be persuasive on issues in the *Ntaganda* case.[339] As such, the Appeals Chamber concluded that it "also considers it appropriate for the Trial Chamber to request submissions from the parties **and, e.g., experts**."[340] Given the number of outstanding questions that remained, and having reviewed the material available in the case record, and the parties' submissions thereon, the

[333] 8 March Reparations Order, para.71.
[334] *See, e.g.*, Defence further submissions on transgenerational harm and the estimated total number of potential beneficiaries, 30 January 2023, ICC-01/04-02/06-2823-Conf ("Defence further submissions on transgenerational harm"), para.9, fn.17, citing Annex 4 to Registry List of Proposed Experts on Reparations Pursuant to Trial Chamber VI's Order of 5 December 2019, 19 February 2020, ICC-01/04-02/06-2472-Conf-Anx4; Annex 14 to Registry List of Proposed Experts on Reparations Pursuant to Trial Chamber VI's Order of 5 December 2019, 19 February 2020, ICC-01/04-02/06-2472-Conf-Anx14; Annex 27 to Registry List of Proposed Experts on Reparations Pursuant to Trial Chamber VI's Order of 5 December 2019, 19 February 2020, ICC-01/04-02/06-2472-Conf-Anx27; Annex 34 to Registry List of Proposed Experts on Reparations Pursuant to Trial Chamber VI's Order of 5 December 2019, 19 February 2020, ICC-01/04-02/06-2472-Conf-Anx34; Experts Report on Reparations, 2 November 2020, ICC-01/04-02/06-2623-Conf-Anx1-Red, paras.6-8.
[335] Defence further submissions on transgenerational harm, para.9, fn.18, citing Decision appointing experts on reparations, 14 May 2020, ICC-01/04-02/06-2528-Conf.
[336] Appeals Judgment, paras.482-483.
[337] Appeals Judgment, para.484.
[338] Appeals Judgement, paras.485-489.
[339] Appeals Judgment, para.489.
[340] Appeals Judgment, para.497.

Appeals Chamber considered it necessary for the Trial Chamber to solicit and consider additional expert submissions. The Appeals Chamber accordingly reversed the Trial Chamber's findings on transgenerational harm.[341]

154. After it appeared that the Trial Chamber had not invited any new expert evidence, the Defence then made submissions reinforcing this need. Namely, recalling necessity of the Trial Chamber seeking **expert evidence** on transgenerational harm, noting the lack of expert evidence admitted in the *Ntaganda* case, and the risks in relying on non-expert opinions.[342] The Defence submitted that with no expert evidence, and no new material in the record of the case, the parties and participants' additional submissions on transgenerational harm – which the Trial Chamber had sought[343] – would be limited to a reiteration or reframing of their prior filings, in an attempt to provide answers to the Appeals Chamber's questions.[344] The problem in relying on non-expert opinions, the Defence noted, was apparent from the fact that the parties, Appointed Experts, and former trial chamber(s) all had very different and often conflicting understandings of what was meant by transgenerational harm, its scientific basis, and how it can be demonstrated. The Defence noted that the TFV, for example, had been unwilling to even put forward its understanding of the eligibility criteria for transgenerational harm applications.[345] As such, the Defence submitted that without any new expert information, the Trial Chamber remained without a sufficiently reliable basis to make findings on questions that the Appeals Chamber held needed to be addressed.

155. The Trial Chamber received 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 transgenerational harm. Despite the Defence submissions on the need to solicit new expert guidance and information, and the risks of not doing so,[346] the Trial Chamber justified its refusal to seek submissions from experts in one paragraph, by accused the Defence of "misapprehending" the Appeals Judgment findings. The Trial Chamber held that:[347]

> "[…] the use of the wording 'e.g.,' (for example) when referring to experts on this matter, makes it clear that the Appeals Chamber presented the Chamber with an option to be resorted upon at the Chamber's discretion".

[341] Appeals Judgment, para.493.
[342] Defence further submissions on transgenerational harm, paras.7-12.
[343] Implementation Order, para.40, Disposition.
[344] Defence further submissions on transgenerational harm, para.11, citing Appeals Judgment, para.495.
[345] Defence observations on the TFV Fourth Update Report, para.42.
[346] Defence further submissions on transgenerational harm, paras.7-12.
[347] 14 July Addendum, para.194.

156. The Trial Chamber was directed to seek submissions from the parties "**and**, e.g., experts". On a plain reading, this requires the Trial Chamber to seek submissions from the parties "**and**" others who can include, for example, experts. The use of "e.g." did not make consultations optional. It was used to make clear that the Trial Chamber was not limited to consulting experts, but that this was an obvious category of people from whom it should seek submissions. This conclusion is reinforced by the Appeals Chamber's earlier finding that it would have expected the Trial Chamber to have fully considered the issue of transgenerational harm at the reparations stage based on, *inter alia*, **expert evidence**.[348] No reasonable Trial Chamber could have read the Appeal Judgment, and formed the view that seeking expert guidance on transgenerational harm was optional.

157. The Trial Chamber did not address the substance of the Defence submissions as to why it would be dangerous to proceed without soliciting new expert evidence, meaning that it again failed to consider the Defence submissions on transgenerational harm.[349] The Appeals Chamber has previously held that "in a case such as this, where the concept of transgenerational harm is indeed novel and evolving, it was incumbent upon the Trial Chamber to demonstrate that it had properly and fairly taken the parties' submissions into account."[350] By dismissing the Defence reasoning as to why expertise was necessary on the basis that it misapprehended the Appeal Judgment, the Trial Chamber again failed to explain why and how it rejected the Defence submissions.

158. The prejudice arises from the Trial Chamber, for the second time, ordering the award of reparations for transgenerational harm in the *Ntaganda* case, without the necessary information or expertise to inform this decision. The Trial Chamber is relying on nothing more than the submissions from non-experts on a complicated and uncertain scientific concept. This gives rise to a concrete risk that it has made an award that is inconsistent with the emerging scientific thinking. Without expert guidance as to when, how (and if) harm can be transferred through generations, the authority making the assessment has insufficient information to be able to assess eligibility, which risks exposing Mr Ntaganda to an award which is not sufficiently grounded in the conviction against him, and underpinned by error.

159. The Trial Chamber's second attempt to make an award encompassing transgenerational harm was based on nothing more than its first. Namely, non-expert opinions and submissions

[348] Appeals Judgment, para.484.
[349] Appeals Judgment, para.492.
[350] Appeals Judgment, para.491.

from other cases. In doing so, the Trial Chamber disregarded an appellate direction to seek submissions from the parties **and**, for example, experts. This was an error which itself undermines all findings in the Addendum on transgenerational harm. The findings are also affected by other errors, discussed below.

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

160. Without any expert evidence or guidance, the Trial Chamber was left to define and determine what is meant by transgenerational harm. It is beyond dispute that this is a "novel and evolving" concept.[351] As such, the Appeals Chamber had directed the Trial Chamber to consider, firstly, "the issue of scientific certainty as to the concept of transgenerational harm and **whether it is appropriate** to award reparations therefor at this Court."[352]

161. This direction, was based on the Appeals Chamber's concern that in discussing the issue of transgenerational harm in the Reparations Order, the Trial Chamber did not refer to the scientific uncertainty surrounding this concept, "nor to the **potential limitations** to the concept of transgenerational harm. Rather, it simply set out, in more general terms, what it understood the phenomenon to be."[353] As such, the Trial Chamber was held to have provided insufficient reasoning, and insufficient guidance.[354] Specifically, the Appeals Chamber ordered the Trial Chamber to turn its mind to the question of whether, given the scientific uncertainty at play, it was even appropriate for the International Criminal Court to be relying on this phenomenon as a basis of a reparations award.

162. In response to the errors identified by the Appeals Chamber, the Trial Chamber began by compiling a footnote, which span several pages, of what appears to be a list of all academic and scientific research cited by the parties or judges before the ICC, as well as those issued by other international jurisdictions. No analysis of this literature was offered. Rather, it is used to support the Trial Chamber's conclusion that science has advanced **different** explanations as to the way transgenerational harm is transmitted. The Trial Chamber then identified the two central schools of thought on how trauma moves generationally; one being epigenetic and the other through social transmission. The epigenetic theory focuses on parent-to-child

[351] Appeals Judgment, para.491.
[352] Appeals Judgment, para.494.
[353] Appeals Judgment, para.474.
[354] Appeals Judgment, para.473.

transmission of epigenetic marks which retain a memory of traumatic events. The social transmission theory focuses on the impact of upbringing and emotional learning on the child's emotional development.[355] On their face, these theories appear to be two contradictory understandings of how harm can be transmitted from parent to child. In simple terms, they represent the "scientific uncertainty" in question.

163. The Trial Chamber made no finding as to where the weight of the research currently stands. Nor did it indicate which of the two theories it considered as being more correct, or which enjoyed the more widespread support among experts. Rather, it stopped at concluding that there is agreement on the existence of a "phenomenon" whereby social violence is passed generationally.[356]

164. In order to do 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".[357] In other words, while scientists and psychologists cannot agree on how harm transmits through generations, the Trial Chamber considered that the "ongoing scientific debate on the mechanisms of transmission simply reinforces the very existence of the phenomenon".[358] This allowed the Trial Chamber to reach the conclusion that there was general agreement among experts from different disciplines, on the **existence** of a phenomenon, whereby social violence is passed on.[359] From this, the Trial Chamber appears to have considered that it had done enough. Namely, that it had complied with the Appeals Chamber's order to "consider the issue of scientific certainty of the concept of transgenerational harm".[360] There are several problems here.

165. Firstly, the Appeals Chamber did not ask the Trial Chamber to consider whether the concept of transgenerational harm **exists**, or otherwise.[361] The Trial Chamber was asked to consider "the issue of scientific certainty as to the concept of transgenerational harm and **whether it is appropriate** to award reparations therefor at this Court".[362] Namely, to turn its mind to whether, given the scientific uncertainty which the Trial Chamber acknowledges, it was nonetheless appropriate to incorporate this uncertain concept into a reparations order, and require Mr Ntaganda to be financially liable for a form of harm which is not universally

[355] 14 July Addendum, para.176.
[356] 14 July Addendum, paras.176-177.
[357] 14 July Addendum, para.177.
[358] 14 July Addendum, para.177.
[359] 14 July Addendum, paras.176-177.
[360] Appeals Judgment, para.494.
[361] 14 July Addendum, paras.174-175.
[362] Appeals Judgment, para.494.

understood. The Trial Chamber never took this step and considered "whether it is appropriate to award reparations therefor at this Court". It stopped after finding that experts from different disciplines agree that transgenerational harm exists as a phenomenon.

166. Secondly, the Appeals Chamber was concerned by the Trial Chamber's failure in the Reparations Order to consider any "**potential limitations** to the concept of transgenerational harm".[363] This concern should remain. The Trial Chamber compiled pages of academic and scientific articles into a footnote, and concluded that experts agree on the existence of the phenomenon, but without considering, for example, the many who do not. And who dismiss the concept as implausible, or based on insufficient evidence.[364] As such, the Trial Chamber again made no reference to any potential limitations to the concept.

167. Thirdly, the Trial Chamber found that "most recent studies" demonstrated that the two competing theories are mutually reinforcing. In support, it cited to two articles.[365] The Trial Chamber gave no basis for selecting these two articles as the "most recent studies", despite one of them being over two years old. Nor did the Trial Chamber give any basis to conclude why these two articles were capable of reliance, or should be relied upon over any conflicting literature. The Trial Chamber does not have this expertise. It has no ability to reach a conclusion on which parts of the literature are reliable without assistance from experts, rather than its own open-source research. The finding that transgenerational harm exists as a concept is undermined by these errors in the Trial Chamber's approach. More importantly, this was not the question that the Appeals Chamber directed the Trial Chamber to answer. The Appeals Chamber was concerned about the ***appropriateness*** of this concept, and not its ***existence.***

168. Next, even if the Trial Chamber had properly turned its mind to whether it was appropriate to award reparations for transgenerational harm given the underlying scientific uncertainty, the Appeals Chamber then 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

[363] Appeals Judgment, para.474.
[364] *See, for isntace*. Horsthemke, Bernhard, A critical view on transgenerational epigenetic inheritance in humans, *Nature Communications,* 30 July 2018, 9(2973); Heard, Edith, Martienssen, Robert A., Transgenerational Epigenetic Inheritance: myths and mechanisms, *Cells,* 27 March 2014, 157(1); McKenna, Claire, Kevin Mitchell, *BJPsych Bulletin,* 2020, 44(2). *See also,* Carey, Benedict, Can we really inherit trauma?, *The New York times,* 10 December 2018; Birney, Ewan, Why I'm Skeptical about the idea of genetically inherited trauma, *The Guardian, 22 September 2015.*
[365] 14 July Addendum, para.176, fn.427.

> 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".[366]

169. This was not done. The Trial Chamber did not turn its mind to this question, and consider whether the situation in the DRC meant that Mr Ntaganda could be liable to repair such harm in the specific context of the crimes for which he had been convicted. Instead, the Chamber erroneously characterised this as "a matter of evidence", which could be referred to the "authority making the assessment" to assess.[367] The Trial Chamber therefore failed to address whether the protracted conflict in the DRC made it possible, or impossible, to establish that any trauma associated with transgenerational harm arises from the conviction.

170. In doing so, the Trial Chamber again ignored the Defence submissions.[368] Following the Appeals Judgment, the Defence filed several pages of submissions on this question, reviewing the prior practice in *Katanga*, where the Trial Chamber had indeed considered the cycles of violence in the DRC. Having considered the context of the protracted armed conflict in Ituri, the Trial Chamber in *Katanga* concluded, for example, that the farther the date of birth of the applicant from the date of the relevant attack, the more likely that intervening events would have contributed to their suffering. As such, the Defence submissions noted that the applicants "in the *Ntaganda* case, by virtue of being in Ituri province, have suffered through one of the worst and most protracted conflicts of modern times" which "necessarily gives rise to intervening factors and events".[369] The Defence recalled the wealth of evidence and detailed submissions on the length, severity and constant threats posed by this ongoing conflict, before assessing the temporal period of the crimes for which Mr Ntaganda was convicted, as against other notable periods of extreme violence in the same region, citing to figures, dates, and relying on relevant evidence.[370] The Defence explained how, in this context (which may not be known to the authority tasked with assessing eligibility), it is "impossible to accept that an applicant was a victim of the crimes for which Mr Ntaganda was convicted, but has otherwise lived a life free from trauma, displacement, stress or actual violence". On this basis, the Defence asserted that "[i]n these circumstances, assessing transgenerational harm, a novel and uncertain head of damage, becomes an even more difficult and imprecise task".[371]

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[366] Appeals Judgment, para.494 (emphasis added).
[367] 14 July Addendum, para.193.
[368] Defence further submissions on transgenerational harm, paras.36-43.
[369] Defence further submissions on transgenerational harm, para. 37.
[370] Defence further submissions on transgenerational harm, paras.38-40.
[371] Defence further submissions on transgenerational harm, para.41.

171. The Trial Chamber did not engage with these submissions, which are briefly summarised in a paragraph.[372] Despite having been directed by the Appeals Chamber to consider whether it was even possible to establish that the trauma associated with transgenerational harm was caused by Mr Ntaganda in the context of cycles of ongoing violence in Ituri, the Trial Chamber failed to engage with relevant submissions directed exactly at this question, before delegating the task to the "authority" to be decided on a "case by case basis".[373] Importantly, the Appeals Chamber presumably wanted the Trial Chamber to turn its mind to this question **before** resources are expended, or the expectations of victim applicants are raised. In pushing this assessment further down into the eligibility assessment process itself, the Trial Chamber has not simply failed to comply with an order of the Appeals Chamber, but potentially acted in contravention of its own principle of "do no harm".[374]

172. The Appeals Chamber was very careful not to deprive the Trial Chamber of its discretion to award reparations on the basis of transgenerational harm. However, after quashing the original order, the Appeals Chamber listed a serious of factors that the Trial Chamber was directed to consider before making such an order in the future. Firstly, the Trial Chamber was directed to consider "the issue of scientific uncertainty as to the concept of transgenerational harm, and whether it was appropriate to award reparations therefor at this Court". Then, only "if there is sufficient scientific certainty as to the concept of transgenerational harm", the Trial Chamber was then directed to consider the issue of Mr Ntaganda's liability, in the context of the protracted armed conflict. The Trial Chamber failed to do so. Instead, the Trial Chamber found that experts from different disciplines agreed on the ***existence*** of the phenomenon of social violence passing generationally, and then delegated the impact of the protracted conflict in the DRC to the authority making the assessment.

173. As such, the safeguards carefully put in place by the Appeals Chamber were ignored, in favour of a repetition of the earlier Reparations Order with little additional reasoning or consideration. This means, that the same errors also subsist. The award for reparations for transgenerational harm is based on insufficient reasoning, the improper dismissal of the Defence submissions without sufficient or any explanation, and a failure to consider the indicators required by the Appeals Chamber. Without further expert submissions and a far greater understanding of this phenomenon, transgenerational harm is not an appropriate basis for an award of reparations in this case.

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[372] 14 July Addendum, para.66.
[373] 14 July Addendum, para.193.
[374] *See, for instance,* 8 March Reparations Order, paras.50-52.

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

174. The Trial Chamber has never claimed to have a view on how transgenerational trauma is transferred between parent, to child. It considers that "transgenerational harm may not only be psychological",[375] but expressly exempted itself from drawing any conclusions related to its transmission.[376] It accepted, however, that that "the causal nexus between the alleged harm and the crime for which the defendant was convicted needs to be established."[377]

175. The problem that arises with such a vague and evolving form of harm, and particularly in the context of the lives of the victim applicants in this case, is that it remains manifestly unclear how this causal nexus can be established even to a balance of probabilities, and how other causes of potential harm can ever be ruled out. This was, of course, the problem in *Katanga*, where the Defence argued that the towns in question, Bogoro and Kasenyi, "have been the object of several attacks before and after the 24 February 2003 attack".[378] The Trial Chamber agreed, and considered that: "the causal nexus between the harm and the attack on Bogoro had not been demonstrated to the standard of proof of a balance of probabilities".[379]

176. This is where medical examinations come in. In the *Katanga* case, a neuropsychiatrist examined an applicant claiming reparations based on transgenerational harm. During the medical examination, "the neuropsychiatrist found that a multifaceted etiology of the Applicant's emotional disorder could not be ruled out. In other words, the causes of the pathology in question involve several factors". As such, the *Katanga* Trial Chamber recalled "the principles applicable to causal nexus, in particular the proximate cause standard, which is that the crime must be sufficiently related to the harm to be considered the cause of that harm".[380] The medical assessment was central to this process. Without the examination from an expert, the Trial Chamber would only have been left with an allegation that social violence had passed in some manner from a parent to the child applicant, but nothing more.

[375] 14 July Addendum, para.188.
[376] 14 July Addendum, para.177.
[377] 14 July Addendum, para.181, citing 8 March Reparations Order, para.75.
[378] Defence Response to the OPCV and Legal Representative of Victims' Documents in Support of Appeal Against the Reparation Order, 5 September 2017, ICC-01/04-01/07-3758-Red2, para.42.
[379] *The Prosecutor v. Germain Katanga*, Decision on the Matter of the Transgenerational Harm Alleged by Some Applicants for Reparations Remanded by the Appeals Chamber in its Judgment of 8 March 2018, 19 July 2018, ICC-01/04-01/07-3804-Red-tENG ("Katanga Transgenerational Harm Decision") paras.78-79,120,140.
[380] Katanga Transgenerational Harm Decision, para.30.

177. As such, and having considered the Defence submissions concerning the prior practice in *Katanga*, Appeals Chamber held that the Trial Chamber in *Ntaganda* should consider "the need, if any, for a psychological examination of applicants and parents".[381] Again, unwilling to move from the Reparations Order, the Trial Chamber held that "victims **should not** be required to obtain psychological expertise in order to prove the harm".[382]

178. The first question then becomes, what is the alternative? How will the causal nexus be demonstrated between the crimes for which Mr Ntaganda has been charged, and the alleged trauma which has travelled from parent to child? What does the Trial Chamber propose will be done in the present case? The first obstacle being, that 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".[383] What is clear from the wealth of literature cited by the Trial Chamber, and the practice in *Katanga*, 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.

179. 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. While emphasising that victims should not be **required** to obtain psychological expertise,[384] the Trial Panel also stated that "the need for a psychological assessment of the direct victim (parent) and/or the indirect victim (child) claiming transgenerational harm, shall be determined on a case-by-case basis, depending on whether any of the general presumptions of harm apply for the child and/or the parent and the type of harm claimed".[385] As an instruction, this is insufficient and unclear. Even if the direct victim (parent) benefits from a presumption of harm, how does this relate to whether or not the child received this trauma transgenerationally, regardless of the method of transmission, which remains unknown. Which categories of harm does the Trial Chamber think would be more likely to require a medical assessment, and which would not? Without clearer and more detailed instructions, the Trial Chamber's delegation of this process to the authority will be impossible to implement, particularly without the requisite expertise.

[381] Appeals Judgment, para.495.
[382] 14 July Addendum, para.189 (emphasis added).
[383] 14 July Addendum, para.190.
[384] 14 July Addendum, para.189 (emphasis added).
[385] 14 July Addendum, para.189.

180. Also erroneous is the Trial Chamber's circumvention of the prior practice in *Katanga* of producing medical certificates and an expert report. The Trial Chamber reasoned that in *Katanga*, "it was the legal representative of victims in that case who considered it necessary to be provided with the assistance of an expert and, it was at his request that an expert was appointed by the Registry".[386] On this basis, the Trial Chamber dismissed the Defence's submission of prior practice requiring medical diagnosis, presumably because an order to produce a medical report did not come from a Trial Chamber. The Trial Chamber in *Ntaganda* was not bound to follow the practice of another Trial Chamber. However, its reason for not doing so, is insufficiently reasoned. Particularly given that, when the alleged victims of transgenerational harm were examined in *Katanga*, this medical examination revealed that the causal link could not be established. Accordingly, it was the medical examination that assisted the *Katanga* Trial Chamber in framing a legitimate and credible reparations order, regardless of the fact the medical examination had been at the instigation of the LRV.

181. The reparations award for transgenerational harm in the Reparations Order was quashed by the Appeals Chamber, for many reasons. Insufficiently reasoned, having ignored central Defence submissions, the Trial Chamber had rushed to embrace this novel basis of harm, without even considering whether its scientific uncertainties made its application appropriate, and whether it was ever going to be possible to draw the requisite links between the harm and the victim applicant given the context of the protracted armed conflict in Ituri. The same mistakes have been made again. Despite the inclusion of an extensive footnote listing scientific and academic commentary, the reasoning in the Addendum is based again on the submissions of the parties, evidence admitted in *Lubanga*, and expert reports with no relevant expertise, without proper consideration of whether reliance on this novel form of harm is appropriate, or whether the causal links can be made. Defence submissions have again been ignored.

182. Given that the Trial Chamber has not fixed the errors which led to the reversal of its original award for transgenerational harm, there is little reason to think that they would be fixed on the third attempt. As such, this ground of appeal provides further justification for the appropriate remedy being the issuance of a new, unified, reparations order issued by the Appeals Chamber.

[386] 14 July Addendum, para.187.

GROUNDS 9 and 10. Trial Chamber II committed an error of law by making additional findings outside the confines of the Conviction and Sentencing Decisions, and by relying on a distinction between "conduct" crimes and "results" crimes in order to do so

183. 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".[387] It is the conviction itself which provides both the framework and legal basis for the reparations award against the convicted person. The scope of the conviction is set out, and circumscribed by, the conviction and sentencing decisions. 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 and sentencing decisions**".[388]

184. This is reinforced by the fact that the Trial Chambers are "empowered to hear the evidence of victims and permit questioning by their legal representative in respect of reparations **during trial proceeding**".[389] Regulation 56 of the Regulations of the Court provides that the Trial Chamber may hear the witnesses and examine the evidence for the purposes of a decision on reparations at the same time as for the purposes of trial. As such, the reparations process is not a new evidential process in itself. Rather, the Trial Chamber is confined to the factual findings in the conviction and sentencing decisions, which rely on evidence that has been tested by the parties at trial, and deemed capable by the Trial Chamber of reliance.

185. The requirement that "a trial chamber must remain within the confines of the conviction and sentencing decisions", was first set down by the Appeals Chamber in *Lubanga,* and arose from an attempt by the convicted person to have the Trial Chamber rely on evidence which fell outside the conviction and sentencing decisions in that case. On appeal from the reparations order, Mr Lubanga argued that he had made efforts to demobilise children, and that the evidence at trial showed that, far from being indifferent to the fate of the minors involved in the hostilities, on numerous occasions he tried to address it. Mr Lubanga submitted on appeal that

[387] *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 2015 Lubanga Appeals Judgment, para.65.
[388] *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 Judgement"), para.311.
[389] *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman*, Judgment on the appeal of Mr Ali Muhammad Ali Abd-Al-Rahman against the decision of Pre-Trial Chamber II of 18 August 2020 entitled 'Decision on the Defence request and observations on reparations pursuant to article 75(1) of the Rome Statute', 18 December 2020, ICC-02/05-01/20-237, para.15.

the Trial Chamber erred in not taking this evidence into account in determining his liability for reparations. The Appeals Chamber considered these arguments and, noting that Mr Lubanga was relying on his own closing submissions and evidence that was presented at that stage of proceedings, it rejected his submission that the Trial Chamber erred in not taking it into account. It did so on the basis that "in awarding reparations, a trial chamber must remain within the confines of the conviction and sentencing decisions",[390] and could not make other findings to supplement those that fell within their four corners.

186. As regards the Sayo Health Centre, in the Sentencing Judgment the Trial Chamber concluded that it is **"not clear"** whether the centre was damaged as a result of the crime.[391] Regardless, in the original Reparations Order, the Trial Chamber nonetheless awarded reparations for "damage to the health centre in Sayo and loss of adequate healthcare provision to the community that benefited from it".[392] In addressing this error, the Appeals Chamber first noted that in the Sentencing Judgement, the Trial Chamber had found as follows:[393]

> "153. With regards to the attack on the Sayo health centre, while the Chamber recalls that it found that more than one projectile was fired at the health centre, and that the centre was intentionally made the object of the attack, it is not clear on the basis of the evidence whether the weapon used destroyed the health centre in full or merely damaged it. *It is therefore not clear whether the centre was damaged as a result of the crime, and this matter is not considered in aggravation*."

187. The Appeals Chamber then considered that although Mr Ntaganda was convicted under count 17, of the crime of intentionally directing attacks against protected objects as a war crime, namely, against the health centre in Sayo, "neither the Conviction Judgment nor the Sentencing Judgement finds that, as a result of that crime, damage was caused to the health centre".[394] The Appeals Chamber recalled that "in awarding convictions, a trial chamber must remain within the confines of the conviction and sentencing decision", and noted the Trial Chamber's failure to even consider the Sentencing Judgement's finding that it was "not clear" whether the centre was damaged as a result of a crime.[395] The Appeals Chamber also recalled the Defence submissions that "the Trial Chamber could not establish the exact extent of the destruction caused by the UPC/FPLC", and recognised that the Trial Chamber had not

[390] 2019 Lubanga Appeals Judgement, paras.310-312.
[391] Sentencing Judgment, 7 November 2019, ICC-01/04-02/06-2442 ("Sentencing Judgment"), para.153.
[392] 8 March Reparations Order, para.183(a)(x).
[393] Appeals Judgment, para.538 (emphasis in the original).
[394] Appeals Judgment, para.539.
[395] Appeals Judgment, para.540.

addressed it.[396] The Trial Chamber's findings were held by the Appeals Chamber to be inadequate, and were reversed.[397]

188. In the Addendum, these same findings are brought back to life. The Trial Chamber concluded in the Addendum that the "evidence clearly demonstrates" that the Sayo health centre was damaged by the shelling, and "reaffirm[ed] its findings in the Reparations Order that the attack to the health centre caused damage to the health centre in Sayo and loss of adequate healthcare provision to the community that benefited from it."[398] As such, the Trial Chamber appears to simply override its finding in the Sentencing Judgment that it is "not clear whether the centre was damaged as a result of the crime",[399] with a new finding that "the attack to the health centre caused damage to the health centre".[400] In doing so, the Trial Chamber impermissibly made additional findings that fall outside the conviction and sentencing decisions.

189. Importantly, the Trial Chamber does not assert that the finding of damage to the Sayo health centre can be found in either the conviction or the sentencing decision. There is no dispute that the Trial Chamber made a **new** finding at the reparations phase. The Trial Chamber qualifies this as a "finding at the reparations stage of the proceedings".[401] The question the Trial Chamber asks, and then answers, is "whether the harm resulting from a conviction for the crime of attack against protected objections under article 8(2)(e)(iv) of the Statute can be included in the Reparations Order, **without** it having been proven and quantified at trial?"[402] As such, there is no doubt that the Trial Chamber is knowingly expanding the scope of Mr Ntaganda's conviction and sentence through the reparations process.

190. In order to justify this expansion, the Trial Chamber reasoned that "the lack of findings regarding possible damage to the centre or the community in the Conviction and Sentencing Judgments, is explained by the nature of the crime under analysis." The Trial Chamber reasoned that the war crime of attack against protected objects in article 8(2)(e)(iv) of the Statute "is a conduct crime, not a results crime".[403] As such, the Trial Chamber held that it was not **required** to make any determination beyond a reasonable doubt for the purposes of the conviction or sentence whether any harm was actually inflicted for as a consequence of the

[396] Appeals Judgment, para.541.
[397] Appeals Judgment, para.549.
[398] 14 July Addendum, para.234.
[399] Sentencing Judgment, para.153.
[400] 14 July Addendum, para.234.
[401] 14 July Addendum, para.226.
[402] 14 July Addendum, p.91 (emphasis added).
[403] 14 July Addendum, para.226.

crime.[404] 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".[405]

191. 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".[406] 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. It would have been different if, at trial, the Trial Chamber had recognised that there was evidence relevant to the question of damage of the Sayo health centre, but then expressly declined to make a finding on the basis that it was not required. Instead, the Trial Chamber considered all the relevant evidence, and found that it was **not clear** whether the health centre was damaged as a result. Thereby unambiguously making the finding from which it now seeks to retreat.

192. The prohibition on making new findings at the reparations phase seeks to avoid the manifest prejudice which would arise from a procedure whereby new, and "reparations specific" factual findings could follow the conviction and sentence, which would be unchallenged by the parties, and without the safeguard of appellate review. The parties would presumably need to expend additional resources and time to investigate and bring additional reparations-specific evidence,[407] 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.

193. Such a procedure would also run counter to the Appeals Chamber findings on reparations in other cases, including that reparations must not be awarded "to remedy harms that are not the result of the crimes for which he or she was convicted".[408] It is also incompatible with the ruling in *Lubanga* that in making a reparations order, a trial chamber

[404] 14 July Addendum, para.226.
[405] 14 July Addendum, para.226.
[406] Sentencing Judgment, para.153.
[407] *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.
[408] 2015 Lubanga Appeals Judgment, para.184. *See also, The Prosecutor v. Germain Katanga,* Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled "Order for Reparations pursuant to Article 75 of the Statute", 8 March 2018, ICC-01/04-01/07-3778, fn.158.

"must ensure that the convicted person is adequately on notice as to the information on which it will rely in making its order, so that he or she has a meaningful opportunity to make representations thereon".[409] In this case, Mr Ntaganda is learning for the first time, in the Addendum, the evidence that the Trial Chamber is seeking to rely on the evidence cited to support the Sayo health centre findings. Meaning that he is deprived of the information on which the Trial Chamber will rely on to make an order, and has no meaningful opportunity to challenge this.

194. Importantly, the Trial Chamber's expansion of Mr Ntaganda's conviction goes expressly against the Appeals Chamber's instructions in relation to the Sayo health centre. After reversing the Trial Chamber's findings, the Appeals Chamber remanded the matter back to the Trial Chamber "for it to address the matter again, taking into account the submissions by the parties, addressing the issue of disclosure to the Defence of relevant information, and addressing the overall liability of Mr Ntaganda for repair in this respect".[410] There was no suggestion that the Trial Chamber was entitled to solicit, consider and weigh **new** evidence to make **new** findings; essentially conducting a mini re-trial on the question of the health centre.

195. Reparations must be based on the conviction and sentence. The Trial Chamber's determination to extend the award to include the Sayo health centre rest on an erroneous work-around to a fundamental principle of reparations, and operates to the detriment of the convicted person. Reparations must be based on the findings in the conviction and sentencing decisions, and the Trial Chamber is bound by them. This aspect of the award should, again, be reversed

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

196. In the Reparations Order, the Trial Chamber found that the attack on the Sayo health centre "caused harm to its service provision and exacerbated the vulnerability and suffering of the civilian population".[411] This language was lifted directly from Dr Gilmore's report, which remains at the centre of the findings on Mr Ntaganda's liability for reparations in relation to the Sayo health centre.[412]

[409] 2019 Lubanga Appeals Judgment, para.3.
[410] Appeals Judgment, para.549.
[411] 8 March Reparations Order, para.159.
[412] 14 July Addendum, paras.241-244.

197. In order to compile her report, Dr Gilmore gathered information from two unknown individuals in relation to the Sayo health centre; a healthcare practitioner [REDACTED], and an individual referred to as an "intermediary". Concerning damage to the centre, no useful information was included in the report, apart from the "intermediary" stating that "a number of property repairs have been carried out, such as to the operating theatre and post-operative recovery ward".[413] No information is provided as to what precisely was repaired, when, why, or by whom, or whether the repairs had anything to do with the events of November 2002, or otherwise.

198. Dr Gilmore also referred to information gathered by the VPRS, [REDACTED] repairs in 2005,[414] as well as an article by MSF dated 5 June 2020. As the Appeals Chamber found, these sources do not demonstrate that any material damage was caused to the centre at the relevant time.[415] In light of the lack of information available, and consistent with the Trial Chamber's findings in the Sentencing Judgment,[416] Dr Gilmore concluded that "[g]iven that the Chamber was unable to determine whether the Saïo heath centre was destroyed or damaged by the UPC/FPLC it would be inappropriate and disproportionate for Mr Ntaganda to be liable for the full cost of a new health centre".[417]

199. With this evidence at its centre, it is therefore unsurprising that both the Defence and the Appeals Chamber identified flaws and contradictions in Dr Gilmore's report, and errors in the Trial Chamber's reliance thereon. For example, the Appeals Chamber accepted the Defence concerns that Dr Gilmore had undermined her own conclusions on damage to the health centre in Sayo by stating that, although the centre stopped activities after the attack, it resumed shortly thereafter.[418] The Appeals Chamber also criticised the Trial Chamber's finding that, according to Dr Gilmore's report, the attack on the health centre at Sayo "exacerbated the vulnerability and suffering of the civilian population".[419] In fact, the report did not give a view on this. A closer reading of Dr Gilmore's report revealed that she had footnoted a report by MSF in 2020, regarding an attack in Ituri that same year, and concluded that "broader patterns of attacks on healthcare that exacerbate the vulnerability and suffering of the civilian population".[420] Not the

[413] Registry Transmission of Appointed Experts' Reports, 30 October 2020, ICC-01/04-02/06-2623, with Annex 2, Expert Report on Reparations for Victims of Rape, Sexual Slavery and Attacks on Healthcare, ICC-01/04-02/06-2623-Anx2-Red4 ("Second Expert Report"), fn.668.
[414] Second Expert Report, fn. 663.
[415] Appeals Judgment, paras.547-548.
[416] Sentencing Judgment, para.153.
[417] Second Expert Report, para.168.
[418] Appeals Judgment, para.547.
[419] Appeals Judgment, para.547.
[420] Second Expert Report, para.160.

Sayo health centre attack specifically. As such, the Appeals Chamber concluded that the Trial Chamber had failed to properly assess the credibility and reliability of Dr Gilmore's report, and the basis for its findings, and erred again in failing to explain how it reached its findings as to causation and harm to the centre.[421]

200. 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.[422] On 16 January 2023, the Defence seized the Trial Chamber with a request seeking: (i) the disclosure of certain material relied upon by the Appointed Expert in her Report, which were relevant to her conclusions as to the damage to the Sayo health centre. These included, '[REDACTED]', '[REDACTED]', 'interview 37', and information provided by '[REDACTED] health care provider' and collected by an 'intermediary'. Dr Gilmore was contacted, and indicated that she was unwilling to provide this information to the Defence.[423] She also revealed [REDACTED], [REDACTED].[424] On 2 February 2023, following instructions from the Chamber for the VPRS to seek further clarifications from Dr Gilmore, she indeed clarified that (i) [REDACTED], (ii) [REDACTED]; and (iii) [REDACTED].[425] Dr Gilmore's 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.

201. Unsurprisingly, therefore, the Trial Chamber has done nothing more in the Addendum than insist that "it **did** assess the credibility, reliability, and basis" of Dr Gilmore's report, and reiterate that it considers the expert credible and her report generally reliable.[426] The Trial Chamber found, "taking into account Dr Gilmore's expertise and the details provided about her sources and methodology in the report, within its discretion, the Chamber considered the expert report credible, and her report **generally** reliable".[427] The problem being, that apart from one error discussed directly below, the Trial Chamber did not address the concerns raised by the

[421] Appeals Judgment, para.549.
[422] Request on behalf of Mr Ntaganda seeking the lifting of redactions applied to the Appointed Experts' reports, 29 December 2020, ICC-01/04-02/06-2636-Conf, para.17; 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.
[423] 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.
[424] Annex 1 to the Decision on Request on behalf of Mr Ntaganda for disclosure of material relied upon in the Gilmore Expert Report, 6 February 2023, ICC-01/04-02/06-2824-Conf-Anx1.
[425] Annex 1 to the Decision on Request on behalf of Mr Ntaganda for disclosure of material relied upon in the Gilmore Expert Report, 6 February 2023, ICC-01/04-02/06-2824-Conf-Anx1.
[426] 14 July Addendum, para.233.
[427] 14 July Addendum, para.233.

Defence and shared by the Appeals Chamber. It simply reiterated that the report was generally reliable, despite having no new information about the credibility and reliability of the underlying material, which was the Appeals Chamber's concern.

202. The Trial Chamber is also silent on the fact that it was unable to "properly assess" the basis for Dr Gilmore's findings, as directed by the Appeals Chamber,[428] because the underlying information [REDACTED]. This issue was litigated,[429] and had been the subject of additional submissions from the Defence, which had argued that "in the absence of the recordings of the interviews made by Dr Gilmore, and the unavailability of her notes, it is not possible to assess the credibility of her sources, or the reliability and probative value that can be accorded to her report."[430] The Trial Chamber's failure to engage with this relevant issue was an error, again rendering its conclusion insufficiently reasoned.

203. As to the Appeals Chamber's concern that the Trial Chamber had relied solely on Dr Gilmore to conclude that the attack "caused harm to its service provision and exacerbated the vulnerability and suffering of the civilian population", when in fact Dr Gilmore's report had not given a view in relation to the Sayo health centre, the Trial Chamber attempted to rectify this. According to the Trial Chamber, although it had relied on the specific wording of Dr Gilmore to note in the Reparations Order that the attack "caused harm to its service provision and exacerbated the vulnerability and suffering of the civilian population", in fact, the conclusion was supported by the "evidence as a whole". As such, the Trial Chamber rejected the Defence submission that Dr Gilmore's statement was based on present day information, as inapposite.[431]

204. The problem being, that the Trial Chamber does not say what this other evidence is. Remembering that in November 2019, the Trial Chamber could not conclude that the Sayo health centre had been physically harmed, and that even Dr Gilmore accepts that the health centre was back up and running "shortly thereafter"; what is the evidence that demonstrates that the attack on the health centre exacerbated the vulnerability and suffering of the civilian population in Sayo? The only person who has ever said this, is Dr Gilmore. And she did not

[428] Appeals Judgment, para.548.
[429] 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.
[430] Defence further submissions on issues related to the Sayo Health Centre, 22 February 2023, ICC-01/04-02/06-2833 ("Defence further submissions on Sayo"), para.25; Email from the Chamber's Legal Officer, 17 January 2023, 12:40, in which the Trial Chamber instructed the Registry to seek the views of the Appointed Expert regarding the disclosure with necessary redactions of the Requested Material; 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; Decision on Request on behalf of Mr Ntaganda for disclosure of material relied upon in the Gilmore Expert Report, 6 February 2023, ICC-01/04-02/06-2824-Conf.
[431] 14 July Addendum, para.232.

even say it in relation to the Sayo attack specifically, she was referencing broader patterns and relying on a 2020 attack. This reasoning is still manifestly insufficient.

205. Even if the Trial Chamber is referring to the evidence it cites earlier in paragraph 231 of the Addendum, which is not clear, this is still problematic. The Trial Chamber has again ignored extensive Defence submissions on this very question. The Trial Chamber concludes in paragraph 231, that the centre was "abandoned" during the attack, and that "once abandoned, the centre ceased providing medical services". It cites to two additional statements, secured by the CLR2 in January 2023 from: (i) [REDACTED]; and (ii) [REDACTED].[432] Relying on these two additional statements, the Trial Chamber found established to a balance of probabilities that as a consequence of the attack, the medical care for persons in need within the community of Sayo and its surrounding areas was severely disrupted.[433]

206. There are three problems here; firstly it must be considered whether it is fair to a convicted person to re-open the evidentiary proceedings in order to secure evidence that would allow a Trial Chamber to expand the scope of the conviction and reparations award, particularly in a situation where the scope for any meaningful Defence investigations is so limited. Secondly, the Defence first received this additional evidence, now relied upon by the Trial Chamber to Mr Ntaganda's detriment, as annexes to the CLR2 filing on 22 February

[432] 14 July Addendum, para.231, fn.600, citing Annex 1 to 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-Conf-Anx1, p. 3: «Après l'attaque et en l'absence du personnel, le Centre de santé était entièrement fermé pendant à peu près six mois. Après la réouverture du Centre de santé, la population de Sayo venait quand même au Centre pour des soins primaires mais pour d'autres soins faute de matériel et à cause du manque des médecins spécialistes les habitants étaient obligés d'être référés à l'hôpital général de référence de Mongbwalu. Les habitants de Sayo ne pouvaient plus bénéficier de l'entièreté des soins à partir du Centre de santé de Sayo.En ce qui concerne les interventions chirurgicales, par exemple, avant l'attaque sur le Centre de santé par la milice de Bosco, les interventions chirurgicales se faisaient dans le Centre même mais à la suite du pillage et à cause du manque du matériel et des médecins spécialistes, il fallait nécessairement envoyer les malades à Mongbwalu car les capacités du Centre étaient très limitées. Mais même après la réhabilitation partielle en 2005 et jusqu'à ce jour les capacités du Centre de santé de Sayo sont limitées à cause du manque du matériel et des médecins spécialistes. Beaucoup de malades sont toujours référés à Mongbwalu. Actuellement le village de Sayo compte plus ou moins 20.000 habitants alors qu'en 2002 la population avoisinait 7000, ce qui fait que le besoin de l'agrandissement des capacités du Centre est pressant. » ICC-01/04-02/06-2834-Anx2-Red, p. 2 : « **Je n'étais plus présente au moment où le Centre de santé avait été attaqué**. Plus tard, j'avais appris que le Centre de santé de Sayo avait été attaqué et que les malades qui étaient restés au Centre avaient été tués par les éléments de Bosco, parmi lesquels Maman [REDACTED] avec son enfant. Je ne me souviens pas des noms des autres malades. **Pendant l'attaque sur Sayo, j'avais fui vers le village [REDACTED] qui se trouve à 30 km de Sayo et j'y étais restée pendant 4 à 5 mois**. A mon retour à Sayo, j'avais trouvé le Centre de santé fermé et tous les biens du Centre pillés et saccagés. Que ce soit les chaises ou le matériel médical, tout a été pillé. A mon retour, [REDACTED] qui avait lui-aussi fui n'avait pas encore regagné Sayo, et c'est ainsi que le Centre était entièrement fermé pendant près de 6 mois. Pendant la période de fermeture du Centre, la population ne pouvait plus se faire soigner à Sayo, elle se voyait obliger d'aller jusqu'à Mongbwalu pour recevoir des soins. Après sa réouverture, les capacités du Centre étaient très limitées faute du materiel et à cause du manque du personnel. Dans ces conditions, il était difficile [REDACTED] des soins complets aux malades, et en conséquence plusieurs malades étaient systématiquement référés à l'hôpital de Mongbwalu. »

[433] 14 July Addendum, para.231.

2023, the same date the Defence filed its additional submissions on the Sayo health centre. As such, the Defence had no opportunity to test or challenge this evidence, which already falls outside the case record.

207. This is particularly important given that - although this is ignored by the Trial Chamber – [REDACTED] states that she was **not in Sayo** during the attack in question, she had fled and remained away from Sayo **for 4-5 months**.[434] As for [REDACTED], [REDACTED] Sayo in March 2003, the building had not been destroyed. On the contrary, the only visible damage was to the doors[435] and the windows.[436] Indeed, [REDACTED] it was not the health centre that had been hit by rocket launcher, but another building in the area.[437] This is also confirmed by the testimony of P-815, who stated that when he returned to Sayo in March 2003, "the dispensary remained intact",[438] and by the testimony of Mr. Ntaganda, who stated that when he arrived in Sayo, he observed where the two B-10 projectiles he fired from the *apartaments* had landed, well away from the health centre.[439] No reasonable Trial Chamber could have assessed the new evidence presented by the CLR2 in February 2023, and reached a conclusion that it supported Dr. Gilmore's claims about the exacerbation of the vulnerability of the population, or that the medical care for residents was "severely disrupted".

208. Thirdly, and most significant, in relying on this evidence, the Trial Chamber does not engage with the Defence submissions on this question, and the evidence cited in support.[440] The Defence set out in detail the evidence relevant to this question of the alleged suffering of the civilian population and exacerbation of vulnerability, with reference to the evidence given at trial by [REDACTED], P-886, P-907, and the information collected by Dr Gilmore herself, demonstrating that claims of a significant interruption of services for a considerable period after the attack, is entirely unsupported by any existing or new evidence.[441]

209. This evidence is ignored by the Trial Chamber, and the Defence submissions are summarised,[442] but not addressed. Again, this is insufficient and undermines the Trial Chamber's conclusions that Mr Ntaganda is liable to repair harm caused by damage to the

[434] Annex 2 to 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-Conf-Anx2, p. 2
[435] [REDACTED].
[436] [REDACTED].
[437] [REDACTED].
[438] **P-815:** T-76, p.60.
[439] **D-300:** T-217, pp.50-51.
[440] Defence further submissions on Sayo, paras.47-52.
[441] Defence further submissions on Sayo, paras.47-52.
[442] 14 July Addendum, para.219.

health centre and the loss of adequate healthcare provision to the community that benefited from it. The Appeals Chamber directed the Trial Chamber to engage, properly, with the lack of evidence generally and the flaws in Dr Gilmore's report more specifically. Its failure to do so again warrants the removal of the Sayo health centre from any eventual reparations award.

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.

210. The Sentencing Decision states that it is "not clear whether the Sayo health centre was damaged as a result of the crime.[443] The Trial Chamber then concluded, for the purpose of reparations, that "but for the attack, the harm would not have occurred",[444] 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".[445] The utter incoherence of these findings, and the manner in which they side-step the evidence (and lack of evidence) about what actually happened on the ground in Sayo and at the health centre, is the starting point for this ground of appeal.

211. Whether an intervening event breaks the causal link between harm suffered and the crimes for which an accused has been convicted, this is relevant to the scope of reparations which can be awarded. Harm cannot be attributed to a convicted person "if a break in the chain of causation is established in a particular case."[446] The Appeals Chamber noted that the Trial Chamber generally explained the need for proof of a chain of causation, and that breaks in the chain of causation should be taken into account.[447] However, the Appeals Chamber also found that the Trial Chamber "**did not consider the issue specifically** when addressing harm to the health centre in Sayo".[448]

212. As such, the Appeals Chamber held that the Trial Chamber "had an obligation to ensure that the chain of causation was established" and that "the Trial Chamber erred in failing to properly reason its decision as to the chain of causation establishing that Mr Ntaganda is responsible for the harm caused to the health centre in Sayo".[449] Accordingly, the Appeals

[443] Sentencing Judgment, para.153 (emphasis added).
[444] 14 July Addendum, para.237.
[445] 14 July Addendum, para.237.
[446] Appeals Judgment, para.15.
[447] Appeals Judgment, para.580.
[448] Appeals Judgment, para.580.
[449] Appeals Judgment, para.581.

Chamber remanded the matter to the Trial Chamber.[450] It also **directed** the Trial Chamber to take any break in the chain of causation into account.[451]

213. As such, in an additional filing dedicated to this question, 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.[452] The starting point for the Defence submissions, was the absence of evidence as to the harm caused to the health centre in Sayo, or to individual civilians or the community as a whole. In any event, the Defence submitted that any responsibility that could be imputed to Mr Ntaganda would be significantly limited by the evidence of the break in the chain of causality.[453] The Defence noted that the evidence admitted at trial establishes that:

> (i) the UPC / FPLC was present in Mongbwalu and Sayo from the beginning of the First Operation in November 2002 until early March 2003;[454]
>
> (ii) the UPC / FPLC was present in Bunia from, on or about 6 August 2002 until 6 March 2003;[455]
>
> (iii) As a result of the fighting in Bunia between the UPC / FPLC on one hand and the Lendu combatants, APC and UPDF on the other hand, on 6 March 2003, the UPC / FPLC were chased from Bunia;[456]
>
> (iv) on the same day, the UPC / FPLC Chief of the General Staff, Floribert Kisembo, went to Bunia with the remaining elements of the UPC / FPLC to consolidate their position in Sayo and Mongbwalu;[457]
>
> (v) shortly thereafter, the UPDF along with the APC and Lendu Combatants launched an offensive on Mongbwalu and Sayo, chasing out the UPC / FPLC, Kisembo and any remaining UPC / FPLC elements from Mongbwalu and Sayo who went to Mamedi;[458]

[450] Appeals Judgment, para.581.
[451] Appeals Judgment, paras.580-581.
[452] Defence further submissions on Sayo, paras.53-60.
[453] Defence further submissions on Sayo, para. 55.
[454] Trial Judgment, paras.329,486-508; [REDACTED]; **D-0300**: T-221-CONF-FRA, p.41.
[455] Trial Judgment, paras.443-449,647-653.
[456] Trial Judgment, paras.647-653.
[457] **D-0300:** T-221-CONF-FRA, pp.38-39.
[458] **D-0300**: T-221-CONF-FRA, p.41; Trial Judgment, para.652; Déclaration de Kisembo, (transcription d'audition, 24 novembre 2005), DRC-OTP-0161-3087.

(vi) from that moment on, Sayo and Mongbwalu were occupied by Lendu Combatants, APC, UPDF and a little later by another armed group – supported by the UPDF – called FAPC;[459] and

(vii) despite an attempt to return to Mongbwalu in June 2003, the UPC / FPLC was never again present in Mongbwalu, let alone in Sayo.[460]

214. On this basis, the Defence submitted that in these circumstances, the UPC / FPLC having been chased out by force from Sayo and Mongbwalu, by other armed groups - including the UPDF from Uganda, the APC and Lendu Combatants – cannot be held accountable, from that moment on, for any harm caused to the health centre in Sayo, individual civilians and the community as a whole, as a result of the attack on the health centre in Sayo in November 2002.

215. 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,"[461] the Trial Chamber simply circumvented the issue. The Trial Chamber concluded that "Mr Ntaganda's liability is limited to the harm cause as a direct consequences of the crimes for which he was convicted."[462] Specifically, because "no further incidents other than those indicated were taken into account, and recalling that a finding beyond reasonable doubt as to the perpetration of the attack has already been made in the context of the Conviction Judgment, the Chamber considers the Defence submissions about an alleged break in the chain of causation misplaced".[463] The Trial Chamber then reiterated its previous findings in the Reparations Order regarding Mr Ntaganda's liability to repair the harm caused as a consequence of the attack on the Sayo health centre, which was estimated to be USD 130,000:[464]

> "As to the cost of repairing the health centre in Sayo, the Second Expert Report notes that the centre is operational today as repairs were made through the NGO Mediar in 2005, with money raised locally. It recalls that the TFV estimated the cost of a new health care facility to be USD 50,000. In the view of the Expert, Dr Gilmore, to focus only on rebuilding infrastructure 'does not correspond to the harm caused or the level of service provision', as the centre ceased services following the attack, but soon after regained functionality at a reduced capacity and there is lack of skilled personnel. Focusing on the costs of reinstating the level of healthcare provision, Dr Gilmore attempts to quantify the appropriate total cost for repair the attack on the

[459] [REDACTED]; **D-300**: T-221-CONF-FRA, p.70.
[460] **D-300**: T-221-CONF-FRA, pp.69-72.
[461] Appeals Judgment, para.581.
[462] 14 July Addendum, para.238.
[463] 14 July Addendum, para.238.
[464] 8 March Reparations Order, para.242 (internal citations omitted).

> Sayo health centre, suggesting the total sum of USD 130,000. This would include the damage caused to the health centre (USD 5,000), large equipment (USD 40,000), transport (USD 5,000), maintenance for five years (USD 10,000), equipment and essential medications (USD 10,000), and the costs for one doctor and two nurses for five years (USD 60,000)."

216. The problem is that in 2019, the Trial Chamber could not find that the Sayo health centre had been harmed. Now, in 2023, it has found made a different finding, that the Sayo health centre "lost its doors and windows, and received impacts on the wall".[465] However, the evidence it relies on to make this finding, does not demonstrate that this (relatively limited) physical harm, occurred during the period of November 2002 until 6 March 2003.[466] [REDACTED] doors and windows [REDACTED].[467] However [REDACTED] Sayo only in March 2003.[468] This aspect of his evidence is confirmed by the testimony of P-815, who stated that when he returned to Sayo in March 2003, "the dispensary remained intact".[469] In fact, none of the evidence cited by the Trial Chamber links any of the harm described - broken doors, windows, and impact on the walls - as having occurred as a result of the November 2002 attack for which Mr Ntaganda was convicted, or even **before** 6 March 2003, when the UPC / FPLC were chased from Bunia.[470] This is why the chain of causality is important. The Trial Chamber's attempt to circumvent it by claiming to have only considered events in November to March 2002 does not assist. The evidence does not link the alleged harm to the November 2002 attack.

217. As such, the errors found to have been made by the Trial Chamber in relation to the Sayo health centre, continue to undermine the Trial Chamber's findings on Mr Ntaganda's liability for this attack. Again, this provides further justification for the appropriate remedy being the issuance of a new, unified, reparations issued by the Appeals Chamber.

[465] 14 July Addendum, para.230.
[466] 14 July Addendum, para.230, fn.598.
[467] 14 July Addendum, para.231, fn.598, citing [REDACTED].
[468] [REDACTED].
[469] **P-815,** T-76, p.60.
[470] Trial Judgment, paras.647-653.

GROUND 13. Trial Chamber II 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.

218. This Ground of appeal focuses on the catastrophic security situation in Ituri DRC[471] and addresses the imperative necessity of ensuring that the implementation of reparations in this context, fully adheres to the *do no harm* principle. More specifically, this ground is directed at Trial Chamber II's errors in rejecting Defence requests aimed at taking into consideration the dire security situation in Ituri and adhering to the *do no harm* principle during the reparations phase.

Background information

219. On 8 March 2021, Trial Chamber VI issued the reparations order in this case. 30 days later, both the CLR2 and the Defence submitted notices of appeal against the 8 March Reparations Order.[472] In Ground 3, the Defence submitted that Trial Chamber VI committed a mixed error of law and fact by adopting a new principle, *i.e. do no harm*, without taking into consideration the current security situation and the rising tensions among communities in Ituri.[473] Notably, the information known and available at that time concerning the implementation of reparations in this case was rather limited.

220. More than two years have passed since the Defence appeal against the 8 March Reparations Order. Between 8 March 2021 and the delivery of the Appeals Judgment, the security situation in Ituri has continued to deteriorate. Considerable supplementary information concerning the implementation of reparations in this case became available to the parties.[474]

221. In addition, during this period, the TFV submitted its IDIP on 8 June 2021,[475] which was approved by Trial Chamber II on 23 July 2021.[476] The TFV also submitted six periodic

[471] Democratic Republic of Congo / Ituri province where the events giving rise to the proceedings against Mr Ntaganda took place.
[472] Defence Notice of Appeal against the Reparations Order, ICC-01/04-02/06-2659, 8 April 2021, ICC-01/04-02/06-2669; 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.
[473] Defence Notice of Appeal against the Reparations Order, ICC-01/04-02/06-2659, 8 April 2021, ICC-01/04-02/06-2669, Ground 3.
[474] *See* for example, 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, paras.7-13.
[475] Report on Trust Fund's Preparation for Draft Implementation Plan, 8 June 2021, ICC-01/04-02/06- 2676-Conf, with Annex A, Initial Draft Implementation Plan with focus on Priority Victims, ICC-01/04-02/06-2676-Conf-AnxA ('IDIP').

reports on the implementation of the IDIP.[477] The Defence submitted[478] observations on the six periodic reports submitted by the TFV and Trial Chamber II issued decisions thereon.[479]

222. In the 12 September 2022 Appeals Judgment, the Appeals Chamber rejected the 3rd ground of appeal submitted by the Defence, finding that "the Defence has not demonstrated any error in the Trial Chamber's approach to the "do no harm" principle"[480] Nonetheless, the Appeals Chamber held that:

> (i) the Trial Chamber did not specifically state that the TFV should not implement a measure if it falls foul of the principle of "do no harm", "given that the Trial Chamber stated that the principle should be applied throughout the proceedings, it clearly meant that any measure not complying with that principle should be discarded"[481];
>
> (ii) As in the *Lubanga* case, "the Appeals Chamber considers that it is appropriate for the Board of Directors of the TFV to consider, in its discretion, the possibility of including victims belonging to other sides of the conflict, especially those who suffered harm caused by crimes of which Mr Ntaganda was not convicted in the assistance activities undertaken according to its mandate under regulation 50(a) of the Regulations of the TFV"[482];
>
> (iii) The Appeals Chamber also expects that "the TFV, pursuant to what it, and the Trial Chamber, have stated as to how the TFV should implement reparations in this case,

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[476] Decision on IDIP.
[477] TFV First Update Report; TFV Second Update Report; TFV Third Update Report; TFV Fourth Update Report; Trust Fund for Victims' Fifth Update Report on the Implementation of the Initial Draft Implementation Plan, 24 May 2022, ICC-01/04-02/06-2767; TFV Sixth Update Report.
[478] Defence observations on the TFV First Progress Report on the implementation of the Initial Draft Implementation Plan, 4 October 2021, ICC-01/04-02/06-2714; Defence observations on the TFV Second Progress Report on the implementation of the Initial Draft Implementation Plan, 6 December 2021, ICC-01/04-02/06-2726; 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; Defence Observations on the TFV Fourth Update Report; Defence observations on the Trust Fund for Victims' Fifth Update Report on the Implementation of the Initial Draft Implementation Plan, 6 June 2022, ICC-01/04-02/06-2769; Observations on behalf of the convicted person on the Trust Fund for Victims' Sixth Update Report on the Implementation of the Initial Draft Implementation Plan, 5 August 2022, ICC-01/04-02/06-2780.
[479] Decision on the TFV's First Progress Report on the implementation of the Initial Draft Implementation Plan and Notification of Board of Directors' decision pursuant to regulation 56 of the Regulations of the Trust Fund, 28 October 2021, ICC-01/04-02/06-2718; Decision on the TFV's Second Progress Report on the implementation of the Initial Draft Implementation Plan, 17 December 2021, ICC-01/04-02/06-2730; Decision on the TFV's Third Update Report on the Implementation of the Initial Draft Implementation Plan, 10 February 2022, ICC-01/04-02/06-2745; Decision on the TFV Fourth Update Report; Decision on the TFV's Fifth Update Report on the Implementation of the Initial Draft Implementation Plan, 6 July 2022, ICC-01/04-02/06-2772.
[480] Appeals Judgment, para.456.
[481] Appeals Judgment, para.452.
[482] Appeals judgment, para.455.

would take into account all relevant issues which could impact on the principle of "do no harm" when implementing its mandate"[483]; and

(iv) "ensuring application of the "do no harm" principle is of the utmost importance in the implementation of reparations"[484]

223. In the period between the delivery of the Appeals Judgment and the submission of the Defence Notice of Appeal against the 14 July Addendum on 16 August 2023, the TFV continued to submit bi-monthly periodic reports[485] in application of Trial Chamber II's Decision erroneously holding that the IDIP remained fully operational as it has not been affected by the Appeals Judgment.[486] The Defence submitted observations to all update reports[487] and Trial Chamber II issued decisions on the TFV Sixth and Seventh Update Reports, the TFV Eighth Update Report as well as on the TFV Ninth to Twelfth Update Reports.[488] The latter decision was issued on 31 August 2023, after the submission of the Defence Notice of Appeal. Again, the situation on the ground evolved significantly during this period and much more information became available to the parties.[489]

224. A review of the IDIP, Trial Chamber II's decision approving the IDIP, the 13 bi-monthly update reports submitted the TFV,[490] the observations submitted by the Defence and

[483] Appeals Judgment, para.455 (footnote omitted).
[484] Appeals Judgment, paras.12,455.
[485] Trust Fund for Victims' Seventh Update Report on the Implementation of the Initial Draft Implementation Plan, 26 September 2022, ICC-01/04-02/06-2783, Trust Fund for Victims' Eighth Update Report on the Implementation of the Initial Draft Implementation Plan, 28 November 2022, ICC-01/04-02/06-2796; Trust Fund for Victims' Ninth Update Report on the Implementation of the Initial Draft Implementation Plan, 30 January 2023, ICC-01/04-02/06-2817; Trust Fund for Victims' Tenth Update Report on the Implementation of the Initial Draft Implementation Plan, 30 March 2023, ICC-01/04-02/06-2839; Trust Fund for Victims' Eleventh Update Report on the Implementation of the Initial Draft Implementation Plan, 30 May 2023, ICC-01/04-02/06-2854; TFV Twelfth Update Report.
[486] *See* above Grounds 1-3.
[487] 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; Observations on behalf of the convicted person on the Trust Fund for Victims' Eighth Update Report on the Implementation of the Initial Draft Implementation Plan, 9 December 2022, ICC-01/04-02/06-2802; 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; Defence observations on the Trust Fund for Victims' Tenth Update Report on the Implementation of the Initial Draft Implementation Plan, 11 April 2023, ICC-01/04-02/06-2843; Defence observations on the Trust Fund for Victims' Eleventh Update Report on the Implementation of the Initial Draft Implementation Plan, 12 June 2023, ICC-01/04-02/06-2855; Defence observations on the Trust Fund for Victims' Twelfth Update Report on the Implementation of the Initial Draft Implementation Plan, 14 August 2023, ICC-01/04-02/06-2861.
[488] Decision on the TFV Sixth and Seventh Update Reports; 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; Decision on the TFV Ninth to Twelfth Update Reports.
[489] *See* for instance Annex A to Defence observations on the Trust Fund for Victims' Tenth Update Report on the Implementation of the Initial Draft Implementation Plan, 11 April 2023, ICC-01/04-02/06-2843-AnnA; Annex A to Defence observations on the Trust Fund for Victims' Eleventh Update Report on the Implementation of the Initial Draft Implementation Plan, 12 June 2023, ICC-01/04-02/06-2855-AnxA.
[490] The TFV Thirteenth Update Report was issued on 9 October 2023.

Trial Chamber II's decisions on the update reports is both enlightening and necessary for the adjudication of this ground.

225. Notably, the security situation in Ituri continued to evolve and to significantly impact the implementation of reparations. On 3 occasions, the Defence submitted along with its observations on the TFV Update Reports, information on multiple incidents involving *inter alia* the killing of civilians by armed militias, composed mainly of members of the Lendu community, in the form of media reports.[491] This information is also highly relevant and important for the adjudication of this ground.

226. Whereas the *do no harm* principle was previously addressed in Ground 3 of the Defence appeal against the 8 March Reparations Order, the submission of this Ground 13, also dealing with the *do no harm* principle, is justified by the significant developments taking place since the 8 March Reparations Order was issued and the decisions issued by Trial Chamber II on the updated reports submitted by the TFV.

Trial Chamber II's errors related to the *do no harm* principle

227. In its observations on the TFV Update Reports, the Defence was guided by the Appeals Chamber's findings that Trial Chamber II "clearly meant that any measure not complying with that principle should be discarded";[492] that it expects that the TFV "would take into account all relevant issues which could impact on the principle of "do no harm" when implementing its mandate";[493] and that "ensuring application of the "do no harm" principle is of the utmost importance in the implementation of reparations"[494] The Defence underscored the deteriorating and dire security situation in Ituri then and now,[495] argued that in this context the *do no harm* principle required the TFV to take specific actions to ensure the success of the reparations

[491] Annex A to 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-AnxA; Annex A to Defence observations on the Trust Fund for Victims' Tenth Update Report on the Implementation of the Initial Draft Implementation Plan, 11 April 2023, ICC-01/04-02/06-2843-AnxA; Annex A to Defence observations on the Trust Fund for Victims' Eleventh Update Report on the Implementation of the Initial Draft Implementation Plan, 12 June 2023, ICC-01/04-02/06-2855-AnxA.
[492] Appeals Judgment, para.452.
[493] Appeals Judgment, para.455.
[494] Appeals Judgment, paras.12,455.
[495] *See, inter alia,* Defence Observations on the TFV Second Update Report, para.6; Defence Observations on the TFV Fourth Update Report, paras.10-11; Defence Observations on the TFV Fifth Update Report, paras.22-23; Defence Observations on the TFV Eighth Update Report, para.10; Defence Observations on the TFV Ninth Update Report, paras.8,13,15; Defence Observations on the TFV Tenth Update Report, paras.7-8; Defence Observations on the TFV Eleventh Update Report, paras.7-12.

process,[496] highlighted certain risks associated with the failure to fully adhere to the *do no harm* principle when implementing reparations,[497] and requested Trial Chamber II to consider these risks and direct the TFV to take appropriate measures.[498] Trial Chamber II erred by failing to address the risks, and to take appropriate measures required in the circumstances.

228. More specifically, having noted "with great concern that multiple armed groups are currently active in the Ituri region and continue to have a devastating impact on the local civilian population"[499] Trial Chamber II erred by concluding that "[t]he Chamber is therefore satisfied that the programme implementation in the IDIP context continues to remain generally unaffected, and expects the TFV to continue to report to the Chamber on the impact of the security situation on the IDIP implementation, and any changes thereof."[500] Trial Chamber II also erred by directing:

> "the Defence to bring to the Chamber's and the TFV's immediate attention concrete and verifiable information about specific cases of victims deviating reparations funds to other activities. The Chamber also indicated that any other issue related to the groups involved in the current conflict situation should be brought to the attention of the Office of the Prosecutor and to the relevant local authorities."[501]

229. Consequently, the Defence respectfully requests the Appeals Chamber to issue a new order for reparations, setting out, *inter alia,* measures required to ensure application of the "do no harm" principle in the implementation of reparations.

230. **Security situation**. The security situation in Ituri is catastrophic. In addition to providing Trial Chamber II with detailed information in the form media reports, reporting multiple incidents involving the killing of civilians by members of various militias in the areas relevant to the reparations in this case, the Defence systematically provided[502] details of the

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[496] *See, inter alia,* Defence Observations on the TFV Third Update Report, paras.10-13; Defence Observations on the TFV Fourth Update Report, para.13; Defence Observations on the TFV Fifth Update Report, paras.25-29; Defence Observations on the TFV Eighth Update Report, paras.6,11-12; Defence Observations on the TFV Tenth Update Report, para.8; Defence Observations on the TFV Eleventh Update Report, para.13.
[497] *See, inter alia,* Defence Observations on the TFV Second Update Report, para.7; Defence Observations on the TFV Third Update Report, paras.9,13; Defence Observations on the TFV Fourth Update Report, paras.12-13; Defence Observations on the TFV Fifth Update Report, paras.26-27; Defence Observations on the TFV Eighth Update Report, paras.7-10; Defence Observations on the TFV Ninth Update Report, paras.14-19; Defence Observations on the TFV Eleventh Update Report, para.14.
[498] *See, inter alia* Defence Observations on the TFV Second Update Report, para.19; Defence Observations on the TFV Eighth Update Report, para.13; Defence Observations on the TFV Ninth Update Report, paras.11,20.
[499] Decision on the TFV Ninth to Twelfth Update Reports, para.20.
[500] Decision on the TFV Ninth to Twelfth Update Reports, para.20.
[501] Decision on the TFV Ninth to Twelfth Update Reports, para.21 (footnote omitted).
[502] *See, inter alia,* Defence Observations on the TFV Second Update Report, para.6; Defence Observations on the TFV Fourth Update Report, paras.10-11; Defence Observations on the TFV Fifth Update Report, paras.22-23; Defence Observations on the TFV Eighth Update Report, para.10; Defence Observations on the TFV Ninth Update Report, paras.8,13,15; Defence Observations on the TFV Tenth Update Report, paras.7-8; Defence

horrific consequences of the alarming security situation on the civilian population of Ituri. For example, in its observations on the Update DIP, the Defence provided the following overview of the current conflict in Ituri:[503]

> "36. As acknowledged by MONUSCO, the security situation in Ituri has dramatically worsened in the recent months: in the period between January and March 2022, more than 2,300 civilians have perished in Ituri and in North Kivu due to the current conflict, and more than 83.000 people are considered to be displaced. In order to improve the security situation, DRC authorities have established a State of Siege, which has not however led to the intended results. On the contrary, since its instauration over a year ago, deadly attacks have more than doubled.
>
> 37. One of the main reasons of this deterioration lies in the actions of the "Coopérative pour le développement du Congo" ("CODECO"), a Lendu based armed group, which has been conducting deadly attacks in the region since 2017. CODECO militiamen killed around 196 civilians between 1 December 2021 and 7 March 2022, and mostly target FARDC and specific ethnic groups. In this regard, the UN has claimed that the widespread or systematic attacks ("attaques généralisés ou systématiques") committed by CODECO, especially towards the Hema community, could constitute elements of crimes against humanity and war crimes. In addition, CODECO has recently targeted displaced persons and has been active in hostage taking. The armed group recently captured members of a special taskforce, such as Thomas Lubanga and Germain Katanga, sent by the Central Government to Ituri to promote peace and negotiate, inter alia, the end of the state of siege as well as the cessation of military operations in the area.
>
> 38. Several other armed groups present in Ituri also contribute to the deterioration of the security situation. This is the case of the "Front patriotique et intégrationniste du Congo" (FPIC), which often conducts attacks on civilians in coalition with CODECO. Another significant armed group involved in the region is the "Allied Democratic Forces" ("ADF"), an Islamist armed group, which killed around 160 civilians between 1 December 2021 and 7 March 2022. In order to confront ADF fighters, the DRC authorities have allowed the UPDF from Uganda, once again, to enter their territory and fight along the FARDC."

231. ***Do no harm* principle**. The *do no harm* principle has been the object of voluminous literature and continues to be. Its overarching aim, as explained by the UNICEF in the *Lubanga* case, supported by the TFV, is for humanitarian assistance and reparations to be conflict sensitive:

> "[t]his principle emphasizes that any action should avoid (a) exacerbating disparities; (b) discriminating between affected populations on the basis of the causes of the crisis;

Observations on the TFV Eleventh Update Report, paras.7-12. *See* also Annex A to Defence observations on the Trust Fund for Victims' Tenth Update Report on the Implementation of the Initial Draft Implementation Plan, 11 April 2023, ICC-01/04-02/06-2843-AnnA; Annex A to Defence observations on the Trust Fund for Victims' Eleventh Update Report on the Implementation of the Initial Draft Implementation Plan, 12 June 2023, ICC-01/04-02/06-2855-AnxA.

[503] 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, paras.36-38 (foonotes omitted).

> (c) creating or exacerbating conflict and insecurity for the affected populations […]. Any potential short or long-term adverse effect on the beneficiaries and their communities should be analyzed and taken into account when deciding on reparations. For example reparations should not fuel existing or latent tensions within the community […].”[504]

232. In its Observations on the Updated DIP, the Defence submitted that:

> "Unfortunately, this macro view of the do no harm principle is absent from the Updated DIP. The proper application of the principle requires the TFV to: (i) acquire a thorough understanding of the Lendu – Hema ethnic conflict and the related dynamics; and (ii) implement measures to ensure that no beneficiary of reparations is a member of - and/or associated or affiliated with - Lendu combatants at the time of the events, or to CODECO or other similar militia in recent years. This should be a priority with a view to avoiding fueling an Ituri wide conflict, which could have devastating consequences not only for potential beneficiaries in this case but for the entire population of Ituri ."[505]

233. In essence, in accordance with the *do no harm* principle, all measures should be taken to ensure that the implementation of reparations in this case do no do more harm than good to the population of Ituri.

234. **Risks associated with implementing reparations in the present context**. In its observations on the TFV Update Reports, the Defence has regularly highlighted[506] the main risks associated with the implementation of reparations without paying due heed to the *do no harm* principle, which stem mainly from (i) awarding reparations to persons, who took an active part in the hostilities as Lendu combatants or who were associated with Lendu combatant at the time of the events and/or persons who are involved in or associated with militias active in Ituri today;[507] and (ii) directly or indirectly financing militias active today in Ituri through the award of reparations.[508]

235. The Defence provided Trial Chamber II with detailed submissions about the real possibility of these risks materialising, thereby exacerbating tensions between the communities,

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[504] *The Prosecutor v. Thomas Lubanga*, Submission on the principles to be applied, and the procedure to be followed by the Chamber with regard to reparations, 10 May 2012, ICC-01/04-01/06-2878, paras.5-7.
[505] 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.29.
[506] *See, inter alia,* Defence Observations on the TFV Second Update Report, para.7; Defence Observations on the TFV Third Update Report, para.9; Defence Observations on the TFV Fourth Update Report, paras.12-13; Defence Observations on the TFV Fifth Update Report, para.27; Defence Observations on the TFV Eighth Update Report, paras.7-8; Defence Observations on the TFV Ninth Update Report, paras.14-19; Defence Observations on the TFV Eleventh Update Report, para.14.
[507] *See, inter alia,* Defence Observations on the TFV Third Update Report, para.9; Defence Observations on the TFV Fourth Update Report, para.13; Defence Observations on the TFV Fifth Update Report, para.26; Defence Observations on the TFV Eighth Update Report, paras.11-12; Defence Observations on the TFV Ninth Update Report, paras.11,15-16..
[508] *See, inter alia,* Defence Observations on the TFV Eighth Update Report, para.10; Defence Observations on the TFV Ninth Update Report, paras.14-15.

creating more harm than good for the population of Ituri and leading to more, rather than less, armed conflicts prejudicial to the civilian population.[509]

236. **Measures required for the implementation of reparations while adhering to the *do no harm* principle.** Again, in its observations on the TFV Update Reports, the Defence provided Trial Chamber II with detailed submissions on the measures required to implement reparations in this case while adhering to the *do no harm* principle. These measures can be regrouped under two main headings: (i) Obtaining relevant information allowing to gain a thorough understanding of the dynamics of the situation in each village / location as well as in Ituri at large, as well as looking into the composition, objectives, modus operandi, location and past actions of these armed groups;[510] and (ii) adopting a robust eligibility mechanism to ensure than only legitimate victims are awarded reparations.[511]

237. Regarding the former, the Defence requested Trial Chamber II to, *inter alia,* instruct the TFV to obtain and share with the Chamber and the parties, additional information on the ongoing fighting. Basic parameters, which need to be explored, include: (i) the organization and strength of the CODECO as well as its objectives and political agenda; (ii) the location of CODECO units and whether these areas are accessible generally; (iii) whether any participating victims of the attacks or purported beneficiaries are affiliated to or involved with the CODECO's ongoing attacks; (iv) the villages targeted by the CODECO; (v) the ethnic composition of the villages targeted by the CODECO; (vi) the ethnicity of the persons fleeing these villages; (vii) the destination of the persons fleeing the villages; and (viii) the identity and ethnicity of the persons who occupy the villages from which the population has fled.[512]

238. Concerning the latter, the Defence requested Trial Chamber II to adopt eligibility determination criteria that include looking into and engaging potential victims on their past and

[509] *See, inter alia,* Defence Observations on the TFV Eighth Update Report, paras.10-13; Defence Observations on the TFV Ninth Update Report, paras.15-20; Defence Observations on the TFV Eleventh Update Report, paras.11-14.
[510] *See, inter alia,* Defence Observations on the TFV Eighth Update Report, para.12; Defence Observations on the TFV Ninth Update Report, para.16; Defence Observations on the TFV Eleventh Update Report, para.14.
[511] *See, inter alia,* Defence Observations on the TFV Fifth Update Report, para.26; Defence Observations on the TFV Eighth Update Report, para.12; Defence Observations on the TFV Ninth Update Report, paras.16-17; Defence Observations on the TFV Eleventh Update Report, para.13.
[512] *See, inter alia,* Defence Observations on the TFV Third Update Report, para.11; Defence Observations on the TFV Fourth Update Report, para.13; Defence Observations on the TFV Eighth Update Report, para.11; Defence Observations on the TFV Ninth Update Report, para.20; Defence Observations on the TFV Eleventh Update Report, para.9.

current activities to ensure that they were not "[…] Lendu combatants at the relevant time, and/or are not members of, or associated with, active militias in Ituri […]."[513]

239. **Trial Chamber II's errors.** Trial Chamber II rejected the Defence requests for measures to be taken to ensure that the implementation of reparations in this case would adhere to the *do no harm* principle for the benefit of legitimate victims and the Ituri population. This was an error.

240. The stance taken by Trial Chamber II, concluding that it is "satisfied that the programme implementation in the IDIP context continues to remain generally unaffected"[514] ignoring the reality of the security situation on the ground; and ordering the Defence to "bring the Chamber's and the TFV's immediate attention concrete and verifiable information about specific cases of victims deviating reparations funds to other activities"[515] rather than taking preventive measures in this regard is in violation of the *do no harm* principle.

241. The proper remedy in this is case is for the Appeals Chamber to issue a new order for reparations, including appropriate instructions to ensure full respect for the *do no harm* principle

OVERALL RELIEF SOUGHT

242. Considering the errors committed by Trial Chamber II when issuing its 14 July Addendum rather a new order for reparations, as highlighted in the above 13 grounds of appeal, the Defence respectfully requests the Appeals Chamber to:

> **(A) FIND** that Trial Chamber II erred by issuing the 14 July Addendum as opposed to a new order for reparations as directed;
>
> **(B) REVERSE** the 14 July Addendum;
>
> **(C) ISSUE** a new order for reparations, including therein, *inter alia*, specific measures for the benefit of priority victims, new criteria and guidelines for the benefit of the authority making the assessments, and instructions to ensure respect for the *do no harm* principle;

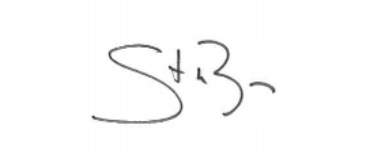
[513] Defence Observations on the TFV Eleventh Update Report, para.13.
[514] Decision on the TFV Ninth to Twelfth Update Reports, para.20.
[515] Decision on the TFV Ninth to Twelfth Update Reports, para.21.

(D) ENSURE that the Defence is provided with complete dossiers for the 171 potential victims in the sample with the proper level of redactions;

(E) ENSURE that the Defence is provided with an opportunity to make meaningful observations on the victims' dossiers in the sample; and

(F) 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 5th DAY OF DECEMBER 2023



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

The Hague, The Netherlands