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Date: 1 November 2024

THE APPEALS CHAMBER

Before: Judge Gocha Lordkipanidze, Presiding
Judge Tomoko Akane
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa
Judge Erdenebalsuren Damdin

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF THE PROSECUTOR v. BOSCO NTAGANDA

Public redacted

Judgment
on the appeals against the decision of Trial Chamber II of 14 July 2023 entitled "Addendum to the Reparations Order of 8 March 2021, ICC-01/04-02/06-2659"

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

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Trial Chamber II

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The Appeals Chamber of the International Criminal Court,

In the appeals of the common legal representative of the victims of the attacks (ICC-01/04-02/06-2875-Red) and the Defence of Mr Bosco Ntaganda (ICC-01/04-02/06-2876-Red) against the decision of Trial Chamber II entitled "Addendum to the Reparations Order of 8 March 2021, ICC-01/04-02/06-2659" of 14 July 2023 (ICC-01/04-02/06-2858-Red),

After deliberation,

Unanimously,

Delivers the following

JUDGMENT

1. The "Addendum to the Reparations Order of 8 March 2021, ICC-01/04-02/06-2659" is amended to the extent that it should be read as incorporating paragraphs 185-186 of the "First Decision on the Trust Fund for Victims' Draft Implementation Plan for Reparations" (ICC-01/04-02/06-2860-Red).

2. Save as aforesaid, the "Addendum to the Reparations Order of 8 March 2021, ICC-01/04-02/06-2659" is confirmed.

REASONS

I. KEY FINDINGS

1. In principle, all of the essential elements required to make up an order for reparations should be contained in a single, unified document. That is the ordinary and preferable course. However, there is no legal prohibition on having those elements contained in more than one document, particularly in circumstances such as the present one, in which there has been a partial reversal.

2. It is inherent in any situation in which redactions are authorised that the quality of the submissions of the party to whom the redactions apply may be impacted by the fact that information has been redacted. As a result, it is important that the correct

balance is achieved between the rights of the Defence and the protection of the victims, pursuant to article 68(1) of the Statute, whenever redactions are authorised.

3. The conviction and sentencing decisions define the parameters of the convicted person's liability to repair the harm. Thus, in awarding reparations, a trial chamber is restricted to relying upon evidence and making factual findings on the harm that is caused by the crimes of which the person is convicted, as set out in the conviction and sentencing decisions.

4. It is not "impermissible" in awarding reparations for a trial chamber to define the harms which resulted from the crimes of which the person was convicted, based upon evidence and findings that may not have been specified in either the conviction decision or the sentencing decision. Importantly, the introduction of such reparation-specific evidence and factual findings during the reparation process does not "expand the scope of the conviction and sentence on the basis of the lower standard of proof". Rather, it is the scope of the harm resulting from the crimes and not the scope of the conviction or the sentence already established in a conviction and sentencing decision, that may be impacted by the introduction of such evidence and findings. As such, in reparation proceedings it is the harm suffered and not the crimes of which the person has been convicted that is further defined or elaborated upon.

II. INTRODUCTION

5. On 8 July 2019, Mr Ntaganda was convicted of five counts of crimes against humanity and thirteen counts of war crimes as a high-level member of the UPC and its military wing, the FPLC, in events that took place in Ituri district of the DRC from on or about 6 August 2002 to on or about 31 December 2003.[1]

6. On 8 March 2021, the Trial Chamber issued an order for reparations[2] which was subsequently appealed. The Appeals Chamber, on 12 September 2022, partially reversed the order for reparations and remanded the matter to the Trial Chamber.[3] The Trial Chamber, on 14 July 2023, issued the "Addendum to the Reparations Order of 8 March

[1] Conviction Decision, paras 1, 32, 1199, pp. 526-530, 535-538. On 30 March 2021, the Appeals Chamber confirmed the Conviction Decision (*see* Appeals Chamber Judgment on Conviction, p. 13).
[2] 2021 Reparations Order.
[3] 2022 Appeals Chamber Judgment, p. 11.

2021, ICC-01/04-02/06-2659" – the Impugned Decision – as "an integral part" of the 2021 Reparations Order to address the issues on remand.[4]

7. This Appeals Chamber judgment concerns appeals filed by the Defence and by one of the two groups of victims in this case – Victims Group 2 – against the Impugned Decision.[5] In its appeal, the Defence raises thirteen grounds of appeal,[6] while Victims Group 2 raise three.[7]

8. The Defence challenges: (i) the Trial Chamber's alleged failure to issue a new order for reparations by issuing an 'Addendum', under its first to third grounds;[8] (ii) criteria used by the Trial Chamber for the assessment of the eligibility of victims in this case, under its fourth ground;[9] (iii) the Trial Chamber's alleged failure to provide the Defence with a meaningful opportunity to assess and make submissions on the dossiers of victims on whose eligibility the Trial Chamber ruled in the Impugned Decision, under its fifth ground;[10] (iv) the Trial Chamber's findings on transgenerational harm, under its sixth to eighth grounds;[11] (v) the Trial Chamber's findings in relation to the harm caused by the attack on the Sayo health centre, under its ninth to twelfth grounds;[12] and (vi) the Trial Chamber's alleged failure to respect the "do no harm" principle during the implementation of the IDIP, under its thirteenth ground.[13] The Defence requests the Appeals Chamber, *inter alia*, to reverse the Impugned Decision, issue a new order for reparations and thereafter remand the matter to the Trial Chamber for it to exercise judicial oversight over the implementation of the reparations awarded.[14]

9. In response to the Defence's appeal, Victims Group 2 oppose all thirteen grounds,[15] while Victims Group 1 oppose all grounds apart from the ninth to the twelfth

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[4] Impugned Decision, paras 15-16, 19, 24.
[5] *See generally* Defence Appeal Brief; Victims Group 2's Appeal Brief; Impugned Decision.
[6] Defence Appeal Brief, paras 8-241.
[7] Victims Group 2's Appeal Brief, paras 38-129.
[8] Defence Appeal Brief, paras 8-74.
[9] Defence Appeal Brief, paras 75-113.
[10] Defence Appeal Brief, paras 114-148.
[11] Defence Appeal Brief, paras 149-182.
[12] Defence Appeal Brief, paras 183-217.
[13] Defence Appeal Brief, paras 218-241.
[14] Defence Appeal Brief, para. 242.
[15] Victims Group 2's Response to the Defence Appeal Brief, paras 164-169.

grounds, on which they do not make any submissions on the basis that those latter grounds do not impact upon their interests.[16]

10. In their appeal, Victims Group 2 challenge: (i) the Trial Chamber's estimation of the number of potential beneficiaries of the award for reparations for victims of the attacks, under their first ground;[17] (ii) the Trial Chamber's determination of the cost to repair the harm for the victims of the attacks, under their second ground;[18] and (iii) the Trial Chamber's determination of the eligibility for reparations of victims of the attacks who suffered harm in the forest or bush surrounding certain villages, under their third ground.[19] Victims Group 2 request the Appeals Chamber, *inter alia*, to correct the alleged errors that they identify by amending the Impugned Decision without remanding it to the Trial Chamber.[20]

11. In response to Victims Group 2's appeal, the Defence opposes all three grounds.[21] Victims Group 1 do not make any submissions in relation to the appeal of Victims Group 2 on the basis that it does not impact upon their interests.[22]

12. The procedural history of the proceedings is set out in Annex A to this judgment.[23] Annex B contains a list of the materials cited and designations used in this judgment.[24]

III. STANDARD OF REVIEW

13. The present appeals raise questions of law, fact and procedure in addition to the exercise of the Trial Chamber's discretion. Such questions were also raised in the cases of *The Prosecutor v. Thomas Lubanga Dyilo* and *The Prosecutor v. Germain Katanga*, and were respectively addressed in the 2019 *Lubanga* Appeals Chamber Judgment and in the *Katanga* Appeals Chamber Judgment. They were also raised in, and addressed in the judgment on, the previous reparation appeals in the present case. The Appeals

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[16] Victims Group 1's Response to the Defence Appeal Brief, paras 2-3.
[17] Victims Group 2's Appeal Brief, paras 39-86.
[18] Victims Group 2's Appeal Brief, paras 87-106.
[19] Victims Group 2's Appeal Brief, paras 107-123.
[20] Victims Group 2's Appeal Brief, para. 130.
[21] Defence Response to Victims Group 2's Appeal Brief, para. 1.
[22] Victims Group 1's Response to the Defence Appeal Brief, para. 2.
[23] *See* Annex A: Procedural History.
[24] *See* Annex B: Table of designations and cited materials.

Chamber finds it appropriate to apply the relevant standards of review set out in those judgments.[25]

A. Errors of Law

14. With respect to alleged legal errors:

> [T]he Appeals Chamber will not defer to the Trial Chamber's interpretation of the law. Rather, it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law. If the Trial Chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the Impugned Decision.
>
> [An Impugned Decision] is "materially affected by an error of law" if the Trial Chamber "would have rendered a [decision] that is substantially different from the decision that was affected by the error, if it had not made the error".[26]

B. Errors of Fact

15. With respect to alleged errors of fact:

> [The Appeals Chamber] will not interfere with factual findings of the first-instance Chamber unless it is shown that the Chamber committed a clear error, namely, misappreciated the facts, took into account irrelevant facts, or failed to take into account relevant facts. As to the "misappreciation of facts", the Appeals Chamber has also stated that it "will not disturb a Pre-Trial or Trial Chamber's evaluation of the facts just because the Appeals Chamber might have come to a different conclusion. It will interfere only in the case where it cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it".[27]

16. In relation to the standard of review regarding errors of fact, the Appeals Chamber underlines that factual findings in a decision under article 74 of the Statute are entered in light of a standard of proof ("beyond reasonable doubt" in accordance with article 66(3) of the Statute) that is different from that applicable to decisions under article 75 of the Statute ("balance of probabilities"), which applies to reparation proceedings. That is why a different standard of review is applied in relation to alleged errors of fact

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[25] 2019 *Lubanga* Appeals Chamber Judgment, paras 27-33; *Katanga* Appeals Chamber Judgment, paras 38-45; 2022 Appeals Chamber Judgment, paras 29-31, 33-35.

[26] 2022 Appeals Chamber Judgment, para. 29, *referring to* 2019 *Lubanga* Appeals Chamber Judgment, para. 28, *referring to* *Katanga* Appeals Chamber Judgment, para. 39, *quoting* *Lubanga* A5 Appeals Chamber Judgment on Conviction, paras 18-19 (footnotes omitted).

[27] 2022 Appeals Chamber Judgment, para. 30, *referring to* 2019 *Lubanga* Appeals Chamber Judgment, para. 30, *referring to* *Katanga* Appeals Chamber Judgment, para. 41, *quoting* *Lubanga* A5 Appeals Chamber Judgment on Conviction, para. 21.

in appeals against orders for reparations from that which applies to errors of fact in final appeals against decisions under article 74 of the Statute.[28]

C. Procedural Errors

17. With respect to alleged procedural errors:

> such errors may occur in the proceedings leading up to an impugned decision. […] However, as with errors of law, the Appeals Chamber will only reverse [the Impugned Decision] if it is materially affected by the procedural error. In that respect, the appellant needs to demonstrate that, in the absence of the procedural error, the [Impugned Decision] would have substantially differed from the one rendered.[29]

D. Errors in discretionary decisions

18. With respect to alleged errors in discretionary decisions:

> The Appeals Chamber recalls that it will not interfere with a Chamber's exercise of discretion merely because the Appeals Chamber, if it had the power, might have made a different ruling. The Appeals Chamber will only disturb the exercise of a Chamber's discretion where it is shown that an error of law, fact or procedure was made. In this context, the Appeals Chamber has held that it will interfere with a discretionary decision only under limited conditions and has referred to standards of other courts to further elaborate that it will correct an exercise of discretion in the following broad circumstances, namely where (i) it is based upon an erroneous interpretation of the law; (ii) it is based upon a patently incorrect conclusion of fact; or (iii) the decision amounts to an abuse of discretion. Furthermore, once it is established that the discretion was erroneously exercised, the Appeals Chamber has to be satisfied that the improper exercise of discretion materially affected the impugned decision.[30]

19. In respect of the abuse of discretion, the Appeals Chamber has stated:

> [T]he Appeals Chamber may interfere with a discretionary decision [when it] amounts to an abuse of discretion. Even if an error of law or of fact has not been identified, an abuse of discretion will occur when the decision is so unfair or unreasonable as to "force the conclusion that the Chamber failed to exercise its discretion judiciously". The Appeals Chamber will also consider whether the first instance Chamber gave weight to extraneous or irrelevant considerations or failed

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[28] 2022 Appeals Chamber Judgment, para. 31.
[29] 2022 Appeals Chamber Judgment, para. 33, *referring to* 2019 *Lubanga* Appeals Chamber Judgment, para. 29, *referring to* *Katanga* Appeals Chamber Judgment, para. 40, *quoting* *Lubanga* A5 Appeals Chamber Judgment on Conviction, para. 20.
[30] 2022 Appeals Chamber Judgment, para. 34, *referring to* 2019 *Lubanga* Appeals Chamber Judgment, para. 31, *referring to* *Katanga* Appeals Chamber Judgment, para. 43, *quoting* *Kenyatta* OA5 Appeal Judgment, para. 22, *referring to* *Kony et al.* OA3 Appeal Judgment, paras 79-80; *Banda* OA5 Appeal Judgment, para. 30; *Ongwen* OA3 Appeal Judgment, para. 35.

to give weight or sufficient weight to relevant considerations in exercising its discretion. The degree of discretion afforded to a Chamber may depend upon the nature of the decision in question.[31]

E. Substantiation of arguments

20. As to the issue of substantiation of arguments, the Appeals Chamber notes that regulation 58(2) of the Regulations requires the appellant to refer to "the relevant part of the record or any other document or source of information as regards any factual issue" and "to any relevant article, rule, regulation or other applicable law, and any authority cited in support thereof" as regards any legal issue. It also stipulates that the appellant must, where applicable, identify the finding or ruling challenged in the decision with specific reference to the page and paragraph number.

21. In addition to these formal requirements, an appellant is obliged to present cogent arguments that set out the alleged error and explain how the trial chamber erred.[32] In alleging that a factual finding is unreasonable, an appellant must explain why this is the case, for example, by showing that it was contrary to logic, common sense, scientific knowledge and experience. In their submissions on appeal, it will be for the parties and participants to draw the attention of the Appeals Chamber to all the relevant aspects of the record or evidence in support of their respective submissions relating to the impugned factual finding. Furthermore, an appellant is required to demonstrate how the error materially affected the impugned decision. Whether an error or the material effect of that error has been sufficiently substantiated will be determined on a case-by-case basis.[33]

22. The Appeals Chamber further recalls that "the appellant is required to set out arguments on appeal in the appeal brief" and that it is therefore inappropriate to make "[m]ere references to arguments developed by the appellant in other filings".[34] The

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[31] 2022 Appeals Chamber Judgment, para. 35, *referring to* 2019 *Lubanga* Appeals Chamber Judgment, para. 32, *referring to* *Katanga* Appeals Chamber Judgment, para. 44, *quoting* *Kenyatta* OA5 Appeal Judgment, para. 25.
[32] 2022 Appeals Chamber Judgment, para. 37, *referring to* *Lubanga* A5 Appeals Chamber Judgment on Conviction, para. 30; *Kony et al.* OA3 Appeal Judgment, para. 48.
[33] 2022 Appeals Chamber Judgment, para. 37, *referring to* *Gbagbo and Blé Goudé* A Appeals Chamber Judgment, para. 74; Appeals Chamber Judgment on Conviction, para. 48; Appeals Chamber Judgment on Sentencing, para. 33; *Lubanga* A5 Appeals Chamber Judgment on Conviction, para. 31.
[34] *Ongwen* A Appeals Chamber Judgment on Conviction, para. 92; *see also* paras 93-97.

Appeals Chamber notes that in this case it has already dismissed a number of arguments of the Defence made in this inappropriate manner.[35]

IV. APPEAL OF THE DEFENCE

A. Ground of appeal 1: Alleged error in issuing the Impugned Decision

23. Under its first three grounds of appeal, the Defence submits that the Trial Chamber erred by issuing the Impugned Decision rather than a new order for reparations, which, it avers, would have been the only way to ensure that the proceedings could continue on "a sound legal basis".[36] The Defence requests the Appeals Chamber to reverse the Impugned Decision and issue a new order for reparations, which should include specific guidance for awarding reparations to priority victims.[37]

24. The Defence avers that it has joined grounds one, two and three, "[w]ith a view to facilitating adjudication of the Defence submissions", so as to address together all of the errors that it alleges were caused by the Trial Chamber issuing an addendum as opposed to a new order for reparations.[38] Nevertheless, in the interests of clarity and a proper determination of the arguments raised, the Appeals Chamber deems it appropriate to consider individually each of the three headings used by the Defence in making its submissions in its appeal brief.[39] Those headings generally correspond to the first, second and third grounds as set out in the Defence Notice of Appeal.[40] This section of the Judgment will therefore address the Defence's first ground of appeal, with the second and third grounds being considered in the two sections that follow.

25. Under its first ground of appeal, the Defence submits that, in issuing the Impugned Decision, the Trial Chamber erred in law and procedure by failing to comply with the direction of the Appeals Chamber that it should issue "a new order for reparations".[41]

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[35] Appeals Chamber Judgment on Conviction, para. 354.
[36] Defence Appeal Brief, paras 3, 5; *see generally* paras 8-74.
[37] Defence Appeal Brief, paras 21, 43, 62, 74, 242.
[38] Defence Appeal Brief, para. 2.
[39] *See* the headings used in the Defence Appeal Brief, pp. 10, 17, 23.
[40] *See* Defence Notice of Appeal, pp. 7-9, paras 20-29.
[41] Defence Appeal Brief, paras 8, 22-24; *see generally* paras 22-43.

1. Relevant procedural background

26. The Appeals Chamber sets out below the context in which the Impugned Decision was issued.

a. Previous findings of the Appeals Chamber

27. In the 2022 Appeals Chamber Judgment, the Appeals Chamber found as follows:

> 1) The "Reparations Order" is partially reversed to the extent that Trial Chamber VI failed to (i) make any appropriate determination in relation to the number of potentially eligible or actual victims of the award and/or to provide a reasoned decision in relation to its conclusion about that number; (ii) provide an appropriate calculation, or set out sufficient reasoning, for the amount of the monetary award against Mr Ntaganda; (iii) assess and rule upon victims' applications for reparations; (iv) lay out at least the most fundamental parameters of a procedure for the Trust Fund for Victims to carry out the eligibility assessment; and (v) provide reasons in relation to the concept of transgenerational harm and the evidentiary guidance to establish such harm, the assessment of harm concerning the health centre in Sayo and the breaks in the chain of causation when establishing harm caused by the destruction of that health centre, and the presumption of physical harm for victims of the attacks.
>
> 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.
>
> 3) The remainder of the arguments of the Defence and Victims Group 2 are rejected.[42]

28. Within the "appropriate relief" section, the Appeals Chamber found, *inter alia*, as follows:

> On an appeal pursuant to article 82(4) of the Statute against a reparations order, the Appeals Chamber may confirm, reverse or amend the reparation order appealed (rule 153(1) of the Rules). In light of the above, the Appeals Chamber deems it appropriate to reverse the findings of the Trial Chamber on the aforementioned matters and to remand them for the Trial Chamber to issue a new reparations order taking into account the terms of this judgment.
>
> […]
>
> What is imperative is that the reparation process proceeds as expeditiously as possible and is conducted with full respect for the rights of both the victims and the Defence. In that latter connection, the Appeals Chamber emphasises that each party will have a fresh right to appeal against the new decision of the Trial

[42] 2022 Appeals Chamber Judgment, p. 11.

> Chamber which will, given the significance of the remand, and the changes required, in essence constitute a new "order for reparations" within the meaning of article 82(4) of the Statute in the circumstances of this case.
>
> For all of the above reasons, the Impugned Decision is partially reversed and remanded. Trial Chamber II is directed to issue a new order for reparations, taking into account the terms of this judgment.[43]

b. The Impugned Decision

29. In the introduction to the Impugned Decision, the Trial Chamber explained its status and how the Trial Chamber understood the reference of the Appeals Chamber to a 'new order for reparations' as follows:

> At the outset, the Chamber recalls that the Appeals Judgment only partially reversed the Reparations Order and remanded it for the Chamber to address five specific issues. Accordingly, and following previous practice, the present Addendum 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.
>
> As to the Appeals Judgment's reference to a 'new order for reparations', the Chamber notes that it was linked to the need to guarantee the parties' right to appeal pursuant to article 82(4) of the Statute. The Chamber underlines 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 Appeals Chamber pursuant to rules 150 to 153 of the Rules.[44]

30. At the end of its introductory part, the Trial Chamber outlined the issues that would be addressed in the remainder of the Impugned Decision in light of the remand.[45]

2. Summary of the submissions

a. Defence's submissions

31. The Defence submits that the Trial Chamber circumvented the direction of the Appeals Chamber to issue "a new order for reparations",[46] contesting the reasons given

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[43] 2022 Appeals Chamber Judgment, paras 750, 758-759. The Appeals Chamber gave further directions within the "appropriate relief" section (*see generally* 2022 Appeals Chamber Judgment, paras 751-757) which are addressed, where relevant, as part of its determination of this ground of appeal below.
[44] Impugned Decision, paras 15-16 (footnotes omitted).
[45] *See* Impugned Decision, para. 24: "In light of the issues on remand, the Chamber hereafter addresses the following topics: a) sample of victims' dossiers and procedure for carrying out the eligibility assessment of victims at the implementation stage; b) issues related to transgenerational harm; c) issues related to the health centre in Sayo; d) presumption of physical harm for the victims of the attacks; e) number of potentially eligible victims; f) calculation of the monetary award against Mr Ntaganda; and g) implementation of reparations".
[46] Defence Appeal Brief, paras 22-24; *see also* para. 28.

by the Trial Chamber for issuing the Impugned Decision,[47] including its consideration that it was following previous practice,[48] and that it was sufficient for the parties to be able to appeal the Impugned Decision as opposed to a new order for reparations.[49] It avers that, in the *Lubanga* case, further to its finding of errors, the Appeals Chamber itself issued an amended order for reparations "which guided the reparations process from then on",[50] resulting in the proceedings thereafter continuing on a "sound legal basis, guided by the new order for reparations".[51]

32. The Defence argues that the Trial Chamber's failure to issue a new order for reparations has caused prejudice, making it necessary to rely upon several concurrently operative decisions, which complicates and compromises the reparation process and is untenable.[52] It avers that the Impugned Decision does not indicate which parts of the 2021 Reparations Order remain operative and which have been modified or overturned,[53] referring to the section addressing the amount of the award as an example of it being impossible to read those two decisions together.[54] The Defence submits that it is unsustainable that the eligibility assessment of potential victims is now based upon four decisions,[55] referring to the third ground of Victims Group 2's appeal in this context as an example of the "concrete prejudice" of the failure to issue a new order for reparations.[56]

33. The Defence contends that the errors identified by the Appeals Chamber were global in nature and could not therefore be corrected and inserted back into the original order for reparations, using the previous failure of the Trial Chamber to examine at least a sample of applications as an example.[57] The Defence argues that the Trial Chamber could not find any paragraphs of the 2021 Reparations Order to be operative unless they

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[47] Defence Appeal Brief, paras 23-24.
[48] Defence Appeal Brief, para. 25.
[49] Defence Appeal Brief, paras 27-28.
[50] Defence Appeal Brief, para. 26.
[51] Defence Appeal Brief, para. 16.
[52] Defence Appeal Brief, paras 29-33, 35, *referring to* the need to read and reconcile the following: Impugned Decision; 2021 Reparations Order; Decision of 15 December 2020; Decision on the TFV's IDIP; Decision on the TFV's Fourth Update Report; Decision on the TFV's Sixth and Seventh Update Reports; Decision on the TFV's Ninth to Twelfth Update Reports; First Decision on Implementation.
[53] Defence Appeal Brief, para. 33.
[54] Defence Appeal Brief, para. 34.
[55] Defence Appeal Brief, paras 35-36, *referring to* the following: Impugned Decision; 2021 Reparations Order; Decision on the TFV's Fourth Update Report; Decision of 15 December 2020.
[56] Defence Appeal Brief, paras 37-38.
[57] Defence Appeal Brief, paras 39-41.

were included in a new order for reparations; and it requests the Appeals Chamber to correct this error by issuing "a new, unified, order for reparations".[58]

b. Victims Group 1's submissions

34. Victims Group 1 submit that the Trial Chamber did not err in law or procedure by issuing the Impugned Decision,[59] but instead proceeded in line with the instructions of the Appeals Chamber and the need to ensure the fair and expeditious conduct of the reparation proceedings.[60] They aver that the Impugned Decision addressed only the five issues remanded by the Appeals Chamber, with the rest of the 2021 Reparations Order remaining valid as it was only partially reversed; and that the Trial Chamber was entitled to exercise its discretion by proceeding in that way, thereby also avoiding the delays caused by the procedures that were adopted in the *Lubanga* case.[61]

c. Victims Group 2's submissions

35. Victims Group 2 submit that the Defence fails to demonstrate that the Trial Chamber "committed any discernible error which materially affected the Impugned Decision" under this ground of appeal.[62] They argue that, in partially reversing and remanding the 2021 Reparations Order, the Appeals Chamber's conclusion that the new decision of the Trial Chamber would in essence constitute a new 'order for reparations' resulted out of its concern to ensure that each party would have a fresh right to appeal.[63] They aver that the Appeals Chamber did not direct the Trial Chamber to revise findings in the 2021 Reparations Order that fell outside the scope of the remand and/or the scope of the appeals that had been brought against it – and that it would have been wrong to have done so.[64]

36. Victims Group 2 submit that the Trial Chamber complied in substance with the instructions of the Appeals Chamber, addressing all issues remanded to it, issuing a new decision which could be appealed under article 82(4) of the Statute and finding that the Impugned Decision was an integral part of the 2021 Reparations Order.[65] They contend

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[58] Defence Appeal Brief, paras 42-43.
[59] Victims Group 1's Response to the Defence Appeal Brief, paras 26-27.
[60] Victims Group 1's Response to the Defence Appeal Brief, para. 27.
[61] Victims Group 1's Response to the Defence Appeal Brief, paras 28-30.
[62] Victims Group 2's Response to the Defence Appeal Brief, para. 40; *see also* para. 39.
[63] Victims Group 2's Response to the Defence Appeal Brief, para. 34.
[64] Victims Group 2's Response to the Defence Appeal Brief, para. 35; *see also* paras 36, 39.
[65] Victims Group 2's Response to the Defence Appeal Brief, para. 36.

that the Defence fails to demonstrate that it has suffered any prejudice from the existence of concurrently operative decisions and that issuing "a new single reparations order" would be procedurally incorrect and would cause lengthy delays.[66]

3. Determination by the Appeals Chamber

37. The Defence submits that the Trial Chamber erred in law and procedure in issuing the Impugned Decision. For the reasons that follow, the Appeals Chamber does not find any error in this regard. Judge Ibáñez Carranza disagrees in this regard and finds that the Trial Chamber erred in law and procedure when it issued an "Addendum" as opposed to a new order for reparations which, in her view, caused uncertainty, unfairness and unreliability. The reasons are set out in full in her separate opinion.[67]

a. The alleged failure to issue a "new order for reparations"

38. The Appeals Chamber recalls at the outset the "overarching error" that the Defence describes as underpinning the first three grounds of its appeal when it submits, in the following terms:

> The three errors committed by [the Trial Chamber] are intertwined, and stem from one overarching error. Namely, [the Trial Chamber's] error in deciding – despite the terms of the [2022 Appeals Chamber Judgment] – that the [2021 Reparations Order] remained in force, and that it [the Impugned Decision] "[…] shall be considered an integral part of the [2021 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."[68]

39. However, the Appeals Chamber observes that the 2021 Reparations Order was only *partially* reversed by the 2022 Appeals Chamber Judgment.[69] Parts of the 2021 Reparations Order that were not reversed remained unaffected by that Judgment, whether as a result of having not been addressed in the appeals against the 2021 Reparations Order;[70] or having been appealed by the Defence but with the arguments

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[66] Victims Group 2's Response to the Defence Appeal Brief, paras 37-39.
[67] Separate Opinion of Judge Luz Del Carmen Ibáñez Carranza, 1 November 2024, ICC-01/04-02/06-2908-OPI (hereinafter: "Separate Opinion of Judge Luz Del Carmen Ibáñez Carranza").
[68] Defence Appeal Brief, para. 9, *referring to* Impugned Decision, para. 15.
[69] 2022 Appeals Chamber Judgment, p. 11, para. 1; para. 759.
[70] *See*, *for example*, 2021 Reparations Order, paras 23-27 (setting out the elements of an order for reparations and the scope of the case), paras 28-62, 78-103 (setting out "Principles on Reparations", which the Trial Chamber described as being of general application and having been adopted from principles established by different chambers of the Court in previous cases (paras 28-30), and including sections on matters such as treating victims fairly and adopting a victim-centred, gender-inclusive and sensitive approach to reparations (paras 31-62), defining the types and modalities of reparations and general

raised in those parts of its appeal having been rejected by the Appeals Chamber.[71] Furthermore, contrary to the argument of the Defence that "there is no indication" as to which parts of the 2021 Reparations Order are still operative,[72] the Trial Chamber, during the course of the Impugned Decision, also made specific reference to parts of the 2021 Reparations Order that remained valid.[73]

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principles relating thereto (paras 78-95) and general principles relating, *inter alia*, to the liability of the convicted person and the rights of the Defence (paras 96-103)).

[71] *See*, *for example*, 2022 Appeals Chamber Judgment, paras 394-404 (the Appeals Chamber rejected Defence arguments that the Trial Chamber had erred by failing to identify adequately the modalities of reparations and found no error in the Trial Chamber's direction to the TFV to design an implementation plan on the basis of the identified modalities of reparations, in consultation with the victims, footnoting to 2021 Reparations Order, paras 82-88, 199-203, 206-208, 212); para. 456 (the Appeals Chamber found that the Defence had not demonstrated any error in the Trial Chamber's approach to the 'do no harm' principle); paras 564, 569-570 (the Appeals Chamber found no error in respect of various Defence arguments about the requisite standard for breaks in the chain of causation in reparation proceedings set out at paras 131-135 of the 2021 Reparations Order); paras 584, 608-640 (the Appeals Chamber rejected Defence arguments that the Trial Chamber erred in law by finding, at para. 127 of the 2021 Reparations Order, that an individual may be entitled to reparations if they suffered harm as a result of the commission of a crime against a person who was of significant importance in their lives); paras 652, 661 (the Appeals Chamber found no error in respect of the Trial Chamber's finding, at para. 122 of the 2021 Reparations Order, that children born out of rape and sexual slavery may qualify as direct victims); paras 682-694 (the Appeals Chamber rejected Defence arguments that the Trial Chamber erred in its approach to adopting presumptions at paras 145-147 of the 2021 Reparations Order); paras 706-708 (the Appeals Chamber rejected Defence arguments that the Trial Chamber erred, at para. 147 of the 2021 Reparations Order, in creating a presumption of psychological harm for victims who lost their home or material assets with a significant impact on their lives); paras 709-717 (the Appeals Chamber rejected Defence arguments in relation to the Trial Chamber having allegedly erred by lowering the burden of proof by adopting presumptions in relation to victims of sexual crimes, confirming findings in that regard at paras 136, 139, 143 and 145 of the 2021 Reparations Order).

[72] Defence Appeal Brief, para. 33.

[73] *See*, *for example*, Impugned Decision, para. 19, in which the Trial Chamber underscores that the 2021 Reparations Order, of which the Impugned Decision is an integral part, "provides the general framework and guidance for the implementation by the TFV of the collective reparations with individualised components awarded to the victims of the case", *referring to* 2021 Reparations Order, paras 186-194; Impugned Decision, para. 20, in which the Trial Chamber refers to the victims' harms being satisfactorily addressed by a combination of different modalities of reparations, *referring to* 2021 Reparations Order, paras 198-211; Impugned Decision, para. 21, in which the Trial Chamber refers to Mr Ntaganda's conviction and the implications of his indigence, *referring to* 2021 Reparations Order, paras 97, 223, 254, 257; Impugned Decision, paras 34-36, in which the Trial Chamber sets out principles relating to evidentiary criteria and the standard of proof, *referring to* 2021 Reparations Order, paras 132-133, 136-137; Impugned Decision, paras 38-40, 86-87, 129, in which the Trial Chamber refers to the four categories of indirect victims that it had recognised and their need to establish that they had personally suffered harm, *referring to* 2021 Reparations Order, paras 36-38, 124-128, 145; Impugned Decision, para. 55, in which the Trial Chamber refers to the challenges that the victims may face in producing documentary evidence, *referring to* 2021 Reparations Order, para. 138; Impugned Decision, para. 104, in which the Trial Chamber refers to the acceptance of a coherent and credible account as sufficient evidence to establish the eligibility of a victim of rape and/or sexual slavery, *referring to* 2021 Reparations Order, para. 139; Impugned Decision, para. 114, in which the Trial Chamber recalls that it had previously defined the different types of harm caused to direct and indirect victims of crimes, *referring to* 2021 Reparations Order, paras 148-183; Impugned Decision, paras 115, 122, 125, 182, in which the Trial Chamber, with one exception, maintains the presumptions it had adopted, *referring to* 2021 Reparations Order, paras 143-147; Impugned Decision, para. 136, in which the Trial Chamber recalls its finding in relation

40. Moreover, the Trial Chamber, in explaining how the Impugned Decision was to be considered, recalled at the outset that the 2022 Appeals Chamber Judgment "only partially reversed the Reparations Order and remanded it for the [Trial Chamber] to address five specific issues".[74] In the accompanying footnote to that sentence, the Trial Chamber referred to and placed in emphasis the overall finding of the Appeals Chamber that the 2021 Reparations Order was "partially reversed",[75] referring to the specific matters that were remanded to it,[76] as well as to the following statement of the Appeals Chamber in the appropriate relief section of its judgment:

> In light of the findings of the Appeals Chamber that require *fundamental aspects* of the [2021 Reparations Order] 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.[77]

41. As such, the Trial Chamber did not err in its overall reasoning that the parts of the 2021 Reparations Order that had been reversed related to the specific issues that had been remanded to it by the Appeals Chamber – and that, conversely, other parts of the 2021 Reparations Order had not been overturned and that the Impugned Decision could therefore be read in conjunction with it.[78]

42. It is in the above context that the Defence's arguments that the Trial Chamber was obliged to issue a "new order for reparations" must be addressed. The Defence submits that the Appeals Chamber directed the Trial Chamber to issue a "new order for reparations" as a result of its conclusion that the significance of the remand and the changes required would mean that any new decision would essentially constitute a new

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to a victim who died prior to receiving reparations, *referring to* 2021 Reparations Order, para. 40; Impugned Decision, para. 290, in which the Trial Chamber refers to the make-up of the group of child soldier victims, *referring to* 2021 Reparations Order, paras 118-128.

[74] Impugned Decision, para. 15, fn 31.

[75] Impugned Decision, para. 15, fn 31, *referring to* 2022 Appeals Chamber Judgment, p. 11, para. 1; para. 759.

[76] Impugned Decision, para. 15, fn 31, *referring to* 2022 Appeals Chamber Judgment, p. 11, para. 1; para. 750.

[77] Impugned Decision, para. 15, fn 31 (emphasis in original), *referring to* 2022 Appeals Chamber Judgment, para. 757.

[78] Impugned Decision, para. 15.

order for reparations.[79] The Defence argues that the Trial Chamber circumvented that direction, instead issuing an "Addendum" to the 2021 Reparations Order.[80]

43. In that regard, the Appeals Chamber notes that the references in the 2022 Appeals Chamber Judgment to the issuance of a new order for reparations[81] must be seen in context.

44. First, in both the operative part of the 2022 Appeals Chamber Judgment and within the section on appropriate relief in which this concept was further explained, the Appeals Chamber directed the Trial Chamber "to issue a new order for reparations, *taking into account the terms of this judgment*".[82] The terms of the 2022 Appeals Chamber Judgment necessarily included the fact that, as set out above, this was a *partial* reversal, in which five specific issues were remanded.[83]

45. Second, the manner in which the Appeals Chamber expressed itself at the end of the 2022 Appeals Chamber Judgment is of particular note. The Appeals Chamber stated that it

> […] emphasises that each party will have a fresh right to appeal against the new decision of the Trial Chamber which will, given the significance of the remand, and the changes required, in essence constitute a new "order for reparations" within the meaning of article 82(4) of the Statute in the circumstances of this case.[84]

46. It is clear from the above that the Appeals Chamber stated that the "new decision" that the Trial Chamber was directed to issue would "*in essence constitute* a new 'order for reparations'".[85] In so doing, as referenced by the Trial Chamber in the Impugned Decision,[86] the Appeals Chamber was ensuring that each party would have a renewed right to appeal the "new decision" of the Trial Chamber, as that is the right provided for

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[79] Defence Appeal Brief, para. 22, *referring to* 2022 Appeals Chamber Judgment, p.11, para. 2; paras 750, 758-759; *see also* Defence Appeal Brief, para. 28.
[80] Defence Appeal Brief, paras 23-24, *referring to* Impugned Decision, para. 15, fn 31; *see also* Defence Appeal Brief, para. 27.
[81] *See* 2022 Appeals Chamber Judgment , p. 11, para. 2; paras 365, 750, 759; para. 757, fn 1672. It is also noted that, at para. 387, reference was made to "the future order for reparations" in relation to the later adoption of a procedure for verification of eligibility.
[82] 2022 Appeals Chamber Judgment, p. 11, para. 2; paras 750, 759.
[83] 2022 Appeals Chamber Judgment, p. 11, para. 2; paras 750, 759.
[84] 2022 Appeals Chamber Judgment, para. 758.
[85] 2022 Appeals Chamber Judgment, para. 758 (emphasis added).
[86] Impugned Decision, para. 16.

in article 82(4) of the Statute.[87] The Appeals Chamber was thereby making clear that the new *decision* was to be *treated as an order for reparations*, so as to safeguard each party's right to appeal the new decision under article 82(4) of the Statute. In this regard, the Defence has indeed availed itself of the opportunity to file this detailed appeal against the Impugned Decision.

47. Third, it is of note that the Appeals Chamber granted the Trial Chamber additional directions and discretion in relation to how it would conduct its proceedings further to the 2022 Appeals Chamber Judgment. The Appeals Chamber referred, in the appropriate relief section, to being aware that reversing and remanding issues at that stage of the proceedings "needs to take account of the nature of the [2021 Reparations Order], because of the particular circumstances that apply to reparation proceedings";[88] reference was made to "the overall objective of ensuring that reparations in this case are awarded to victims as expeditiously as possible" and ensuring "that the reparation process can continue as expeditiously as possible";[89] and that the objective at that stage of the proceedings had to be to correct the errors identified "in a manner that causes minimum disruption to the overall reparation process".[90] Those directions were given in the specific context of this case in which the 2022 Appeals Chamber Judgment was being issued two decades after the commission of the crimes of which Mr Ntaganda had been convicted.[91]

48. The decision of the Trial Chamber to issue the Impugned Decision must be seen against the above background. By issuing a decision addressing the five issues remanded, which was to be considered an integral part of the 2021 Reparations Order and read in conjunction with it, the Trial Chamber exercised its discretion in a manner that was not inconsistent with the directions of the Appeals Chamber.[92]

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[87] Article 82(4) of the Statute provides: "A legal representative of the victims, the convicted person or a bona fide owner of property adversely affected by an order under article 75 may appeal against the order for reparations, as provided in the Rules of Procedure and Evidence".
[88] 2022 Appeals Chamber Judgment, para. 754.
[89] 2022 Appeals Chamber Judgment, para. 756.
[90] 2022 Appeals Chamber Judgment, para. 757.
[91] *See also* in this regard 2021 Decision on the Defence Request for Suspensive Effect, para. 25; 2024 Decision on Suspensive Effect and other Procedural Issues, para. 46.
[92] In this context, the Appeals Chamber notes that, a few paragraphs after the Trial Chamber outlined its decision to issue the Impugned Decision further to the partial reversal of the 2021 Reparations Order, it "further underline[d] that it should strike a balance and ensure that safeguarding the rights of a convicted

49. The Appeals Chamber observes that, in principle, all of the essential elements required to make up an order for reparations should be contained in a single, unified document. That is the ordinary and preferable course. However, there is no legal prohibition on having those elements contained in more than one document, particularly in circumstances such as the present one, in which there has been a partial reversal.

50. As noted by the Defence, the Trial Chamber did not refer to any previous practice in the specific context of reparations when it considered the Impugned Decision to be an integral part of the 2021 Reparations Order, that could be read in conjunction with it and be understood to complement and replace from it only the specific issues that the Impugned Decision addressed.[93] However, the absence of previous practice does not, in itself, signify that the Trial Chamber erred in its approach in light of the directions of the Appeals Chamber on the specific facts of this case. In any event, the submissions of the Defence in this regard are unpersuasive, given that, contrary to its arguments, there is a relevant precedent in the context of reparations.

51. In the specific circumstances of the *Lubanga* case, the Appeals Chamber decided that an essential feature of the order for reparations – namely the amount of the liability of the convicted person – was to be determined by the trial chamber in that case during the implementation stage and after the amended order for reparations had been issued.[94]

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person is not made at the cost of impairing the legitimate right of victims to obtain reparations without delay. Within this context, the [Trial Chamber] will continue striving to advance these reparation proceedings in the most efficient and effective manner possible, protecting the rights of the convicted person while ensuring that the victims of his crimes receive the reparations they are entitled to, and for which they have waited for more than two decades, without further delay" (Impugned Decision, para. 22).

[93] Defence Appeal Brief, para. 25, *referring to* Impugned Decision, para. 15 and its reference to *Abd-Al-Rahman* Addendum to Directions.

[94] In the present reparation proceedings, at paragraph 751 of the 2022 Appeals Chamber Judgment, the Appeals Chamber recollected, as a part of the appropriate relief section recalling that it was permissible for a newly constituted chamber to oversee the implementation stage of the reparation proceedings, that, "in the *Lubanga* case, albeit in different circumstances as a result of the amount of the award having not been determined in the initial order for reparations, the Appeals Chamber left it to the newly constituted trial chamber to determine an essential element of the order for reparations, namely the size of the award", expressly referencing the 2015 *Lubanga* Appeals Chamber Judgment, paras 237-243. In those latter paragraphs, and as also cited at paragraph 752, footnote 1670 of the 2022 Appeals Chamber Judgment, the Appeals Chamber stressed that, "the imposition of liability on a convicted person, including the precise scope of that liability, should be done by the Trial Chamber in the order for reparations": *see* 2015 *Lubanga* Appeals Chamber Judgment, para. 237. The Appeals Chamber proceeded to determine that, notwithstanding that it had issued an amended order for reparations, in the particular circumstances of that case, it was appropriate for a trial chamber to determine the scope of Mr Lubanga's liability for reparations after the amended order for reparations had been issued, both because a trial chamber was better placed to do so and so as to preserve the parties' right to appeal that determination: *see* 2015 *Lubanga* Appeals Chamber Judgment, paras 237-239. The Appeals Chamber further determined that, in light of those

The subsequent decision of the trial chamber determining the amount of the award was therefore issued separately.[95] At the time that it issued the amended order for reparations, the Appeals Chamber made clear that the determination of the amount of Mr Lubanga's liability that the trial chamber in that case would make thereafter "constitutes a part of the order for reparations within the meaning of article 75 (2) of the Statute and is therefore appealable, pursuant to article 82 (4) of the Statute".[96]

52. The Appeals Chamber recognises that the circumstances of the *Lubanga* case were different given that the amount of the award, in that case, had not been determined in the initial order for reparations and that the present case concerns parts of the order for reparations that were reversed and remanded. However, the underlying principle that an initial order for reparations can be supplemented by, and read together with, a further and subsequent decision is the same. Furthermore, the considerations that the trial chamber is better placed to issue the new decision and that acting in that manner also preserves the parties' subsequent right to appeal underpin the relevant determinations in both *Lubanga* and the present case.[97] It is also noted that, by issuing a new decision dealing only with the specific matters referred to it, the subject-matter of the new appeal thereafter is appropriately and clearly limited to the specific matters that had either not previously been determined (in *Lubanga*) or that had been remanded for reconsideration (in the present case), rather than potentially opening up for appeal matters contained within the initial order for reparations that were final.

53. It is therefore apparent from previous practice in reparation proceedings that, in certain circumstances, essential elements of the order for reparations can be contained in supplementary documents. It follows that the mere fact that all of the essential

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considerations, it was appropriate exceptionally to request the TFV to provide, in the draft implementation plan to be submitted subsequently, the anticipated monetary amount that it considered necessary to remedy the harms caused by the crimes of which Mr Lubanga was convicted; and that the trial chamber should thereafter determine the amount of Mr Lubanga's liability for the award for reparations, having received submissions from the parties: *see* 2015 *Lubanga* Appeals Chamber Judgment, paras 240-243. Thereafter, a newly constituted trial chamber issued a decision, the primary purpose of which was to determine the size of the award for reparations for which Mr Lubanga was liable, expressly stating that, by so doing, the amended order for reparations was made complete and that its decision could be appealed in accordance with article 82(4) of the Statute: *see* *Lubanga* Decision Setting the Size of the Reparations Award, paras 21, 26. That decision was subsequently appealed and resulted in the 2019 *Lubanga* Appeals Chamber Judgment.

[95] *See* *Lubanga* Decision Setting the Size of the Reparations Award.

[96] 2015 *Lubanga* Appeals Chamber Judgment, para. 242.

[97] *See* 2015 *Lubanga* Appeals Chamber Judgment, paras 237-243; 2022 Appeals Chamber Judgment, paras 752-758.

elements of the order for reparations in the present case were contained in more than one document is not, in itself, a reason to find that the Trial Chamber erred by proceeding as it did, including by means of issuing a new decision which dealt exclusively with those matters that had been remanded to it by the Appeals Chamber.

b. The alleged prejudice caused by the issuance of the Impugned Decision

54. The Appeals Chamber therefore turns to the arguments that the Defence raises about the prejudice that it avers was caused by the issuance of the Impugned Decision.[98] For the reasons that follow, the Appeals Chamber finds that the Defence has failed to substantiate that any prejudice has been caused. Judge Ibáñez Carranza disagrees with this conclusion, finding that the Trial Chamber's failure to issue a new order for reparations amounts to legal and procedural errors. Although these errors had no material effect on the Impugned Decision, they caused uncertainty, unfairness and unreliability. She concludes that even if a full and self-contained order for reparations had been issued, there would have been no "substantial" changes as to the five elements remanded and therefore the errors identified have no material effect. However, in her view, the uncertainty, unfairness and unreliability is outweighed, upon a careful balance of the rights involved, by the victims' right to receive timely reparations. The reasons are set out in full in her separate opinion.[99]

55. In finding that the Defence has failed to substantiate that any prejudice has been caused, the Appeals Chamber observes that, importantly, there is no doubt that the Trial Chamber complied with the directions of the Appeals Chamber to reconsider those issues that were reversed in the 2022 Appeals Chamber Judgment. In that context, it is recalled that the Impugned Decision, over 157 pages, addresses each of the issues that the Appeals Chamber remanded.[100] There is also, *inter alia*, a 561-page confidential annex, which comprises the Trial Chamber's findings on the 171 victims' dossiers that it analysed in compliance with the direction of the Appeals Chamber for it to obtain and

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[98] Defence Appeal Brief, paras 29-42.

[99] Separate Opinion of Judge Luz Del Carmen Ibáñez Carranza.

[100] The possible exception is the procedure for the judicial approval of administrative screenings that find beneficiaries eligible to benefit from reparations and for the possibility for those who are found not to be eligible to be able to challenge those findings before the Trial Chamber, which is addressed in the First Decision on Implementation and is examined further below under the third ground of the Defence's appeal.

rule upon a sample of victims in this case.[101] Indeed, it is of note that, subject only to arguments that it raises and that will be addressed under its third ground of appeal below, the Defence in this ground is not alleging that the Trial Chamber did not, in substance, address what the Appeals Chamber had remanded to it. Its contention is rather that it was not appropriate to do so in the form of the Impugned Decision because what was required, in its view, was an entirely "new order for reparations".

56. Furthermore, the Defence has failed to substantiate that any substantive finding in the Impugned Decision would have been different had it been placed within what the Defence terms "a new order for reparations". It has also not substantiated that there are specific parts of the 2021 Reparations Order or the Impugned Decision that are clearly contradictory or impossible to understand when read together. Indeed, in arguing that prejudice was caused by the issuance of the Impugned Decision, the Defence gives few examples of specific prejudice. The Appeals Chamber is unpersuaded by those occasions on which the Defence is more specific.

57. In this regard, the Defence, as part of its overall argument that the issuance of the Impugned Decision creates a "patchwork of concurrently operative decisions and implementation plans" which complicates and compromises the process for those seeking to implement or benefit from it,[102] contends that the Impugned Decision fails to identify the body responsible for conducting the eligibility assessment during the implementation stage.[103] It submits that this body, along with the reasons for its selection, should have been specified in a new order for reparations.[104] However, the Appeals Chamber notes that the Trial Chamber made the identity of that body – and the reasons for choosing it – clear in the First Decision on Implementation, as well as explaining therein why it chose the Registry to be the organ responsible for matters

[101] The fact that the Trial Chamber addressed each of the matters remanded to it is clear when comparing what was decided in the Impugned Decision and its aforementioned annex with what the Appeals Chamber remanded to the Trial Chamber, whether by reference to either: (i) the five issues listed in the "Judgment" and the "Summary of Conclusions" section of the 2022 Appeals Chamber Judgment (*see* 2022 Appeals Chamber Judgment, p. 11, para. 1; paras 744-749); or (ii) the long footnote in the "appropriate relief" section of that judgment which, in effect, set out the steps that the Trial Chamber would need to take to address the matters that were being remanded to it (*see* 2022 Appeals Chamber Judgment, para. 757, fn 1672).
[102] Defence Appeal Brief, para. 29.
[103] Defence Appeal Brief, para. 30.
[104] Defence Appeal Brief, para. 30.

regarding the eligibility process.[105] There is therefore no lack of clarity in this regard. Whether the Trial Chamber erred in failing to address those matters in the Impugned Decision is addressed further below under the Defence's third ground of appeal.[106]

58. The Defence also refers "for example" to the section of the Impugned Decision dealing with the monetary award to argue that it is impossible to determine which parts of the 2021 Reparations Order remain operative and which have been modified or overturned by the Impugned Decision.[107] It avers that, rather than stating that the paragraphs of the 2021 Reparations Order which addressed the amount of the award had been replaced by that section of the Impugned Decision, it instead appeared to incorporate parts of those paragraphs by reference; and that it caused confusion by the manner in which it set out its findings more generally.[108] For the reasons that follow, the Appeals Chamber is unpersuaded by these arguments.

59. The section of the Impugned Decision to which the Defence refers in fact demonstrates that the Trial Chamber set out its findings in relation to the amount of the award, with appropriate reference, where necessary, to passages of, or submissions obtained prior to, the 2021 Reparations Order.[109] The Trial Chamber did not cause confusion by summarising the relevant parts of the 2021 Reparations Order and the 2022 Appeals Chamber Judgment. In fact, in so doing, it made clear the issue that had been remanded, namely the need for the Trial Chamber to assess and explain the amount of the award for reparations.[110] The Trial Chamber then proceeded to set out the steps that it had taken to obtain, and a summary of the observations containing, updated information relevant to the estimation of the monetary award,[111] having previously referred to the Appeals Chamber's direction for it to assess and explain the award "taking

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[105] First Decision on Implementation, paras 179-181, 183-185.
[106] Similarly, the Defence refers, within this ground, to the situation having become more complicated further to the First Decision on Implementation which approved the Updated DIP (Defence Appeal Brief, para. 32). Yet it develops its arguments in that regard within its third ground of appeal (*see* Defence Appeal Brief, paras 68-72). It is therefore under the Defence's third ground of appeal that these arguments are considered below.
[107] Defence Appeal Brief, paras 33-35.
[108] Defence Appeal Brief, para. 34.
[109] *See generally* Impugned Decision, paras 321-360.
[110] *See* Impugned Decision, paras 321-326.
[111] Impugned Decision, paras 327-335.

into account all known circumstances at the date of that assessment".[112] Thereafter, the Trial Chamber set out its reasoning for the assessment that it made, with the breakdown of the total amount of the award of USD 31,300,000 being explained.[113] The basis for, and amount of, the award is therefore clear from the section of the Impugned Decision to which the Defence refers to argue to the contrary. The Defence has failed to demonstrate any prejudice.

60. The Appeals Chamber is also not persuaded by the Defence's argument that Victims Group 2's third ground of appeal is "an example of the concrete prejudice" of the lack of clarity caused by having to have regard to four decisions when determining the eligibility of potential victims.[114] The allegation in that ground of appeal is that the criteria applied and the conclusion of the Trial Chamber in relation to certain victims that it found to be ineligible was incorrect and resulted from the Trial Chamber having disregarded or misapplied its previous findings in relation to the eligibility of those victims.[115] The issue raised, as argued by Victims Group 2, is one of substance, not form.[116] The Defence has not substantiated that the finding that is now challenged on appeal would have been any different whether stated in a "new order for reparations" or, as is currently the case, in the Impugned Decision. Furthermore, in determining that ground of appeal below, the Appeals Chamber finds that the four decisions to which the Defence refers coincide with each other.[117] The Defence has failed to establish any prejudice.

61. The Appeals Chamber notes the Defence's further argument that prejudice arises from the errors identified by the Appeals Chamber being "global errors" impacting the 2021 Reparations Order as a whole.[118] The Defence submits that "a concrete example"

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[112] Impugned Decision, para. 326, *referring to* 2022 Appeals Chamber Judgment, para. 265. The Appeals Chamber further recalls, in this context, its references to it being appropriate for the Trial Chamber to reconsider the issues that were being remanded in light of all of the information that it had before it, including matters that had come to its attention after the 2021 Reparations Order had been issued, ensuring that "the Trial Chamber comes to its decision based upon the most updated information that is available to it", and that the Trial Chamber "may wish […] to obtain further updated submissions from the parties and participants on the relevant issues, as it deems appropriate, before providing its revised ruling": *see* 2022 Appeals Chamber Judgment, paras 756-757.
[113] Impugned Decision, paras 336-360.
[114] Defence Appeal Brief, paras 35-38. *See also* Defence Response to Victims Group 2's Appeal Brief, para. 108.
[115] Victims Group 2's Appeal Brief, para. 107; *see generally* paras 107-123.
[116] Victims Group 2's Response to the Defence Appeal Brief, para. 38.
[117] *See* paragraph 525 below.
[118] Defence Appeal Brief, para. 39.

of this concerns the Trial Chamber's failure to rule upon at least a sample of applications for reparations, further to, *inter alia*, the involvement of the Defence, prior to issuing the 2021 Reparations Order, which it should have used to inform its entire approach to reparations.[119] It avers that, in those circumstances, no individual section or paragraph of the 2021 Reparations Order can be held to remain operative unless included in "the new order for reparations" that the Appeals Chamber directed the Trial Chamber to issue.[120]

62. However, further to the 2022 Appeals Chamber Judgment, it is apparent from the Impugned Decision that the Trial Chamber did use the sample of applications to inform its approach to reparations, including issues of victims' eligibility,[121] the number of potentially eligible victims[122] and the amount of the award.[123] The Appeals Chamber further observes that Annex III to the Impugned Decision specifically sets out, in two separate tables, the results of the Trial Chamber's analysis of the sample of applications upon which it had ruled.[124] The first table presents the results of the analysis of the Sample in relation to the eligibility of the applicants,[125] with the second setting out the analysis, *inter alia*, in relation to the type of harm suffered by the applicants.[126] The Defence has not substantiated that the conclusions that the Trial Chamber drew from its use of the Sample would have been any different had it issued a 'new order for reparations' as opposed to the Impugned Decision. Once again, the Defence has therefore failed to establish any prejudice arising out of the issuance of the Impugned Decision as opposed to a 'new order for reparations'.

63. Finally, the Appeals Chamber has not been persuaded by the Defence's general assertion that other actors in the process will not be able to understand the award for reparations because aspects of it are contained in more than one decision.[127] The parties have legal representation – and it is of particular note that both groups of victims oppose this ground of the Defence's appeal, while other actors, such as the TFV and the VPRS,

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[119] Defence Appeal Brief, paras 39-42.
[120] Defence Appeal Brief, para. 42; *see also* para. 14.
[121] Impugned Decision, para. 29; *see generally* paras 25-148.
[122] Impugned Decision, paras 288, 296.
[123] Impugned Decision, paras 343-344, 347, 350, 352-353.
[124] Annex III to Impugned Decision.
[125] Annex III to Impugned Decision, p. 2.
[126] Annex III to Impugned Decision, p. 3.
[127] Defence Appeal Brief, paras 29-30; *see generally* paras 29-33, 35.

have specific expertise in their areas of responsibility. Moreover, the Trial Chamber is overseeing the implementation process and can therefore be seized should there be a need for clarification of any specific aspect of the process. Lastly, there is no reason why the affected communities and the broader public will be any less able to understand such matters as a result of them being contained in more than one document rather than a 'new order for reparations', including in light of the subsequent specific reference made by the Trial Chamber to the outreach campaign to be conducted by the Registry.[128]

4. *Overall conclusion*

64. For the above reasons, the Appeals Chamber finds that the Trial Chamber did not err in law or procedure in issuing the Impugned Decision and that, in any event, the Defence has failed to substantiate that any prejudice has been caused by the Trial Chamber proceeding in that manner. For all of the reasons that are set out in her separate opinion,[129] Judge Ibáñez Carranza respectfully disagrees with her colleagues in this regard. She finds that the Trial Chamber did err in law and procedure when it issued an "Addendum" as opposed to a new order for reparations. Nonetheless, she concludes that even if a full and self-contained order for reparations had been issued, there would have been no "substantial" changes as to the five elements remanded and therefore the errors identified have no material effect. Moreover, in her view, any unfairness, uncertainty and unreliability, upon a careful balance of the rights involved, is outweighed by the victims' right to receive timely reparations. Therefore, the Appeals Chamber unanimously rejects the Defence's first ground of appeal.

B. Ground of appeal 2: Alleged prejudice resulting from issuing the Impugned Decision and the validity of the IDIP

65. Under its second ground of appeal, the Defence submits that the prejudice from the failure to issue a new order for reparations is compounded by the Trial Chamber's error in finding that the IDIP remained fully operational and unaffected by the 2022 Appeals Chamber Judgment.[130]

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[128] *See* First Decision on Implementation, para. 184(a).
[129] Separate Opinion of Judge Luz Del Carmen Ibáñez Carranza.
[130] Defence Appeal Brief, para. 44; *see generally*, paras 8-9, 17-19, 21, 44-62.

1. *Relevant procedural background*

a. Trial Chamber proceedings prior to the 2022 Appeals Chamber Judgment

66. In the 2021 Reparations Order, the Trial Chamber instructed the TFV to submit, within three months, "an initial draft implementation plan focused exclusively on the options for addressing the most urgent needs of victims that require priority treatment".[131]

67. The IDIP was submitted by the TFV on 8 June 2021,[132] further to which the Trial Chamber issued its Decision on the TFV's IDIP on 23 July 2021.[133] The Trial Chamber approved the IDIP subject to certain amendments and the provision of additional information by the TFV.[134]

b. The 2022 Appeals Chamber Judgment

68. The 2022 Appeals Chamber Judgment partially reversed and remanded the 2021 Reparations Order in the manner set out earlier in this judgment.[135] The validity of the IDIP was not one of the matters remanded to the Trial Chamber.

69. In the "appropriate relief" section of the 2022 Appeals Chamber Judgment the Appeals Chamber observed, *inter alia*, that the 2021 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"; that the TFV had already taken steps in relation to its implementation; that the parties were able to make submissions in relation to those further developments during the implementation process; and that those developments were outside the scope of the appeals then before the Appeals Chamber as they had occurred since the 2021 Reparations Order had been issued.[136]

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[131] 2021 Reparations Order, para. 252; *see also* p. 97.
[132] *See* Report on IDIP; Annex A to Report on IDIP.
[133] Decision on the TFV's IDIP.
[134] Decision on the TFV's IDIP, p. 20.
[135] *See* paragraph 27 above.
[136] 2022 Appeals Chamber Judgment, para. 755.

c. Trial Chamber proceedings further to the 2022 Appeals Chamber Judgment

70. In its Order of 25 October 2022, the Trial Chamber recalled that the IDIP had been approved subject to certain amendments and was "now fully operational and has not been affected by the [2022 Appeals Chamber Judgment]".[137] The Trial Chamber further stated that all issues that had been remanded by the Appeals Chamber would also be addressed in the IDIP context;[138] and, *inter alia*, considered it appropriate for the sample of applications to be assessed and ruled upon to include all 69 victims who had by that time been found eligible to benefit from the IDIP by the TFV.[139] The Trial Chamber found that those victims should continue to benefit from the IDIP programmes unless otherwise decided by the Trial Chamber.[140] In its Decision on the TFV's Sixth and Seventh Update Reports, the Trial Chamber reiterated, *inter alia*, its finding that the IDIP continued to be fully operational.[141] The Trial Chamber reasoned that the 2022 Appeals Chamber Judgment only partially reversed the 2021 Reparations Order and that it was remanded for specific issues to be addressed, which did not include the IDIP.[142] The Trial Chamber stated that the 2022 Appeals Chamber Judgment had itself acknowledged that developments during the implementation process were "*outside the scope of the present appeal*".[143]

d. The Impugned Decision

71. In the Impugned Decision, the Trial Chamber considered the matters remanded to it by the Appeals Chamber. The Trial Chamber ruled, *inter alia*, on the eligibility for reparations of each of the (by then) 67 IDIP victims included in the Sample.[144]

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[137] Order of 25 October 2022, para. 17 (footnote omitted).
[138] Order of 25 October 2022, para. 19. *See further* Decision on the TFV's Sixth and Seventh Update Reports, paras 20-21, 23-24; Decision of 9 January 2023, para. 8.
[139] Order of 25 October 2022, para. 20. *See further* Decision on the TFV's Sixth and Seventh Update Reports, paras 8, 10; Decision of 9 January 2023, para. 8.
[140] Order of 25 October 2022, para. 21.
[141] Decision on the TFV's Sixth and Seventh Update Reports, para. 8, *referring to* Order of 25 October 2022, para. 17.
[142] Decision on the TFV's Sixth and Seventh Update Reports, para. 9, *referring to* 2022 Appeals Chamber Judgment, p. 11, para. 1.
[143] Decision on the TFV's Sixth and Seventh Update Reports, para. 9, *referring to* 2022 Appeals Chamber Judgment, para. 755 (emphasis in original).
[144] Impugned Decision, paras 142-143, 147; Confidential Annex II to the Impugned Decision.

2. *Summary of the submissions*

a. Defence's submissions

72. The Defence submits that the Trial Chamber erred in finding that the IDIP remained fully operational notwithstanding the 2022 Appeals Chamber Judgment.[145] It avers that the IDIP did not exist independently of the 2021 Reparations Order, but was "inextricably intertwined" with it and drew its authority from it.[146] The Defence contends that the IDIP was therefore impacted by the same errors that were found in respect of the 2021 Reparations Order; and that the Trial Chamber cited selectively from and circumvented the 2022 Appeals Chamber Judgment in finding that the IDIP remained operational.[147] It avers that the Trial Chamber should instead have permitted the 69 priority victims to benefit from reparations under the TFV's assistance mandate until such time as the Trial Chamber issued a new order for reparations.[148] It further avers that the Trial Chamber's determinations of the eligibility of the IDIP victims in the Impugned Decision are incomplete for reasons that it addresses in subsequent grounds of appeal;[149] and that the Trial Chamber held for the first time in a decision on 31 August 2023 that the eligibility determination of priority victims was to be based upon the criteria set out in the Impugned Decision.[150]

73. The Defence submits that "by failing to issue a new reparations order" the Trial Chamber erred by proceeding to implement an IDIP that had no legal basis and was underpinned by errors.[151] It requests the Appeals Chamber to issue "a new, unified, reparations order" including specific provisions so that priority victims are not prejudiced by the Trial Chamber's errors.[152]

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[145] Defence Appeal Brief, para. 44, *referring to* Order of 25 October 2022, para. 17; Decision on the TFV's Sixth and Seventh Update Reports, paras 8-10. *See generally* Defence Appeal Brief, paras 8-9, 17-19, 21, 44-62.
[146] Defence Appeal Brief, para. 45.
[147] Defence Appeal Brief, paras 47-56.
[148] Defence Appeal Brief, paras 57-58.
[149] Defence Appeal Brief, para. 59.
[150] Defence Appeal Brief, para. 61, *referring to* Decision on the TFV's Ninth to Twelfth Update Reports; *see also* para. 60.
[151] Defence Appeal Brief, para. 62.
[152] Defence Appeal Brief, para. 62.

b. Victims Group 1's submissions

74. Victims Group 1 argue that the first, second and third grounds of the Defence appeal should be dismissed[153] and refer generally to paragraphs of the Defence Appeal Brief that relate to the second ground of appeal,[154] but do not make any specific submissions in that regard.

c. Victims Group 2's submissions

75. Victims Group 2 submit that this ground of appeal should be dismissed on the basis that the Defence is attempting to re-litigate matters that have already been determined in previous decisions of the Trial Chamber and that do not arise out of the Impugned Decision.[155]

76. Victims Group 2 submit that, in challenging the validity of the IDIP further to the 2022 Appeals Chamber Judgment, the Defence is relying upon arguments that it previously raised before the Trial Chamber and upon which the Trial Chamber ruled.[156] They contend that matters that were not remanded by the 2022 Appeals Chamber Judgment remained valid, including the IDIP;[157] that the Trial Chamber was neither required to, nor did, address its validity in the Impugned Decision;[158] and that this matter therefore does not arise out of the Impugned Decision and cannot be raised by the Defence on appeal.[159] They further argue that the Defence did not seek leave to appeal the decisions of the Trial Chamber ruling upon previous submissions of the Defence concerning the validity of the IDIP – and that the Defence has thereby forfeited its right to appeal that issue now.[160]

3. Determination by the Appeals Chamber

77. The Appeals Chamber must first determine whether the issue raised by the Defence in its second ground of appeal, namely the validity of the IDIP further to the 2022 Appeals Chamber Judgment, arises out of the Impugned Decision.

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[153] Victims Group 1's Response to the Defence Appeal Brief, para. 35.
[154] Victims Group 1's Response to the Defence Appeal Brief, para. 31, fn 65; para. 32, fn 74.
[155] Victims Group 2's Response to the Defence Appeal Brief, para. 49; *see generally* paras 41-49.
[156] Victims Group 2's Response to the Defence Appeal Brief, paras 42-45.
[157] Victims Group 2's Response to the Defence Appeal Brief, paras 45-46, *referring to* 2022 Appeals Chamber Judgment, para. 755.
[158] Victims Group 2's Response to the Defence Appeal Brief, paras 46-47.
[159] Victims Group 2's Response to the Defence Appeal Brief, para. 47.
[160] Victims Group 2's Response to the Defence Appeal Brief, para. 48.

78. For the reasons that follow, the Appeals Chamber finds, with Judge Ibáñez Carranza disagreeing on this matter, that this issue does not arise out of the Impugned Decision and therefore dismisses this ground of appeal *in limine*.

79. The Appeals Chamber notes that the ruling that is challenged by the Defence – namely that the IDIP remained "fully operational" as it had not been affected by the 2022 Appeals Chamber Judgment – was made in the Order of 25 October 2022 and reiterated and further explained in the Decision on the TFV's Sixth and Seventh Update Reports of 16 November 2022.[161] It was not made in the Impugned Decision.

80. The Appeals Chamber further observes that the question of whether the IDIP remained operational is not addressed in the Impugned Decision. The validity of the IDIP was not one of the matters remanded to the Trial Chamber as it was not an issue that was considered in the 2022 Appeals Chamber Judgment. Indeed, in that judgment, the Appeals Chamber noted that the implementation process was outside the scope of the appeal as any developments in that regard had occurred since the 2021 Reparations Order (the impugned decision in that appeal) was issued.[162] The 2021 Reparations Order was issued on 8 March 2021. It was that order for reparations that was under consideration by the Appeals Chamber in the 2022 Appeals Chamber Judgment – and not matters that had occurred subsequent to its issuance.[163]

81. Having noted that developments during the course of the implementation process were outside the scope of the appeal, the Appeals Chamber proceeded to state that those developments "are likely to be of relevance when the Trial Chamber has to reconsider the questions being remanded now".[164] That statement was made in the context of the Appeals Chamber observing that it would be appropriate for the Trial Chamber to reconsider the issues being remanded to it on the basis of all of the information available to it, including matters that had come to its attention since the impugned decision in that

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[161] Order of 25 October 2022, para. 17; Decision on the TFV's Sixth and Seventh Update Reports, paras 8-9.
[162] 2022 Appeals Chamber Judgment, para. 755.
[163] It is recalled, in that regard, that the 2021 Reparations Order instructed the TFV to submit an initial draft implementation plan within three months of its issuance: *see* 2021 Reparations Order, para. 252, p. 97. The TFV complied with that instruction on 8 June 2021; and it was only thereafter, on 23 July 2021, that the Trial Chamber approved the IDIP.
[164] 2022 Appeals Chamber Judgment, para. 755.

appeal had been issued.[165] Of significance for this ground of appeal is that that was for the purpose of reconsidering the errors that had been identified by the Appeals Chamber in the 2021 Reparations Order. The validity of the subsequent IDIP was neither addressed in, nor constituted one of the issues remanded to the Trial Chamber by, the 2022 Appeals Chamber Judgment. It is for that reason that its validity is not considered in the Impugned Decision. The issue of the validity of the IDIP therefore does not arise out of the Impugned Decision and, as a result, cannot be raised in this appeal.

4. *Overall conclusion*

82. For the above reasons, the Appeals Chamber dismisses *in limine* the Defence's second ground of appeal.

83. Judge Ibáñez Carranza respectfully disagrees that the issue being raised does not arise out of the Impugned Decision and that this ground of appeal should therefore be dismissed *in limine*. She would reject the ground on its merits.

84. Judge Ibáñez Carranza notes that the issue that arises is the validity of the IDIP pursuant to the 2022 Appeals Chamber Judgment. Judge Ibáñez Carranza observes that there is an inherent link between the effect of the 2022 Appeals Chamber Judgment upon the 2021 Reparations Order, which was addressed in the Impugned Decision, and upon the IDIP. This is apparent from the Trial Chamber's statement, having found that the IDIP was fully operational, that it would nevertheless ensure that all issues on remand further to the 2022 Appeals Chamber Judgment would also be addressed in the IDIP context;[166] and from its inclusion of each of the victims in the IDIP within the Sample that was assessed and ruled upon in the Impugned Decision.[167] She therefore considers it appropriate to address this ground on its merits, also not finding any other reason to preclude the Defence from raising the issue that arises.

85. In respect of the merits, Judge Ibáñez Carranza finds that the Trial Chamber did not err. She rejects the Defence's submissions that the IDIP was no longer operational as it drew its authority from the 2021 Reparations Order.[168] In her view, the IDIP did not

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[165] 2022 Appeals Chamber Judgment, paras 756-757.
[166] *See* Order of 25 October 2022, paras 17, 19. *See also* Decision on the TFV's Sixth and Seventh Update Reports, paras 20-21, 23-24; Decision of 9 January 2023, para. 8.
[167] *See* Order of 25 October 2022, para. 20; Decision on the TFV's Sixth and Seventh Update Reports, paras 8, 10; Decision of 9 January 2023, para. 8; Impugned Decision, paras 142-143, 147.
[168] Defence Appeal Brief, para. 45; *see generally* paras 17-19, 44-62.

automatically become invalid as a result of a *partial* reversal of the 2021 Reparations Order. Judge Ibáñez Carranza finds that it was not an abuse of the discretion of the Trial Chamber for it to have proceeded on the basis that the IDIP remained operational so as to meet the most urgent needs of vulnerable victims while taking into account the 2022 Appeals Chamber Judgment in determining how it would proceed.[169] This is particularly the case in light of the Trial Chamber's finding that it would "ensure that all issues on remand for which the Appeals Chamber found errors in the [2021 Reparations Order], are also addressed in the IDIP context".[170]

86. In this regard, Judge Ibáñez Carranza observes that the Trial Chamber: (i) introduced a procedure for judicial approval of the TFV's determination that IDIP victims were eligible to benefit from reparations as a result of the Appeals Chamber's finding of an error in that respect;[171] (ii) instructed the TFV not to include for IDIP purposes any victims claiming to have suffered only from certain types of harm that had been remanded, and not to rely upon the presumption of physical harm for victims of the attacks, which had also been remanded;[172] and (iii) noted that "the reason to include within the sample to be assessed and ruled upon by the Chamber all victims already found eligible for the IDIP, was directed at ensuring that all issues on remand for which the Appeals Chamber found errors in the [2021 Reparations Order] were also addressed in the IDIP context".[173]

87. Judge Ibáñez Carranza further finds that, in any event, the Defence has failed to demonstrate the material effect of any alleged error. She observes that the ultimate assessment of the eligibility of the IDIP victims for reparations has now been made by the Trial Chamber in the Impugned Decision.[174] Given that the Impugned Decision addressed each of the matters that had been reversed and remanded to the Trial Chamber by the 2022 Appeals Chamber Judgment, the eligibility of the IDIP victims was necessarily determined in light of that Judgment. Furthermore, Judge Ibáñez Carranza

[169] In this context, Judge Ibáñez Carranza notes, *inter alia*, the finding of the Appeals Chamber in the appropriate relief section of the 2022 Appeals Chamber Judgment that "the objective at this stage of the proceedings must be to correct the errors identified in a way that […] causes minimum disruption to the overall reparation process" (*see* 2022 Appeals Chamber Judgment, para. 757).
[170] Order of 25 October 2022, para. 19.
[171] *See* Order of 25 October 2022, para. 19; Decision on the TFV's Sixth and Seventh Update Reports, paras 23-24.
[172] *See* Decision on the TFV's Sixth and Seventh Update Reports, para. 21.
[173] *See* Decision of 9 January 2023, para. 8, *referring to* Order of 25 October 2022, paras 19-20.
[174] *See* Impugned Decision, para. 143.

observes that, even if the Defence is correct to argue that the Trial Chamber "held for the first time on 31 August 2023" that the eligibility assessments made by the TFV and/or the VPRS for IDIP purposes were to be made using the criteria set out in the Impugned Decision,[175] any such assessments are subject to the approval of the Trial Chamber.[176] Approvals post-dating the Impugned Decision will necessarily be made by the Trial Chamber based upon the eligibility criteria set out therein. Judge Ibáñez Carranza therefore finds that the Defence has again failed to demonstrate any prejudice.[177]

88. For the above reasons, Judge Ibáñez Carranza would reject the Defence's second ground of appeal on its merits.

C. Ground of appeal 3: Alleged failure to include compulsory provisions in the Impugned Decision and to consider that modifications were required to the Updated DIP

89. Under its third ground of appeal, the Defence submits that the Trial Chamber erred by not including certain compulsory provisions in the Impugned Decision and by failing to request the TFV or the parties to assist in bringing the Updated DIP in line with the 2022 Appeals Chamber Judgment or the Impugned Decision; or to request the TFV to submit a new DIP on the basis of a new order for reparations.[178]

[175] *See* Defence Appeal Brief, paras 60-61, *referring to* Decision on the TFV's Ninth to Twelfth Update Reports, para. 27.
[176] *See* Decision on the TFV's Sixth and Seventh Update Reports, para. 23.
[177] Judge Ibáñez Carranza also notes the lack of any material effect in respect of the Defence's argument that the Trial Chamber should have permitted the 67 victims determined to be eligible for the IDIP to benefit from reparations under the TFV's assistance mandate until such time as the Trial Chamber issued a new order for reparations (*see* Defence Appeal Brief, paras 57-58; *see also* para. 56). She observes that, in the Impugned Decision, the Trial Chamber held that the reparations that had been received by the four IDIP victims found to be ineligible for reparations should be considered, for administrative and budgetary purposes, as having been received in the context of the TFV's assistance mandate (59 IDIP victims were found to be eligible for reparations, with four being provisionally eligible): *see* Impugned Decision, para. 143.
[178] Defence Appeal Brief, paras 64, 72; *see generally* paras 17-18, 20-21, 63-74.

1. Relevant procedural background

a. Trial Chamber proceedings prior to the 2022 Appeals Chamber Judgment

90. In the 2021 Reparations Order, the Trial Chamber ordered the TFV to prepare a draft implementation plan and submit it within six months for approval by the Trial Chamber.[179]

91. On 24 March 2022, the TFV submitted the Updated DIP,[180] having previously submitted the first version of the draft implementation plan on 17 December 2021.[181]

92. Observations on the Updated DIP were received between 6 May 2022 and 1 August 2022 from the DRC, Victims Group 1, Victims Group 2, the Defence, the Registry and the TFV.[182]

b. The 2022 Appeals Chamber Judgment

93. On 12 September 2022, the Appeals Chamber partially reversed the 2021 Reparations Order to the extent that the Trial Chamber, *inter alia*, failed to "(iv) lay out at least the most fundamental parameters of a procedure for the [TFV] to carry out the eligibility assessment".[183] The matter was remanded to the Trial Chamber.[184]

c. The Impugned Decision

94. Towards the end of the Impugned Decision, under the heading "Implementation", the Trial Chamber stated as follows:

> In line with the Chamber's approach to these proceedings, following [the Impugned Decision] the Chamber will rule on all aspects of the Draft Implementation Plan that do not require further submissions from the TFV or the parties, including the procedural aspects of the mechanism for the determination of the victims' eligibility.[185]

d. The First Decision on Implementation

95. In the First Decision on Implementation, issued just under a month after the Impugned Decision, the Trial Chamber stated that the Impugned Decision had "detailed

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[179] 2021 Reparations Order, para. 249, p. 97.
[180] Submission of Updated DIP; Updated DIP.
[181] Submission of First DIP; First DIP.
[182] *See* First Decision on Implementation, paras 3-7.
[183] 2022 Appeals Chamber Judgment, p. 11, para. 1; *see also* paras 387, 414, 419, 757, fn 1672.
[184] 2022 Appeals Chamber Judgment, p. 11, para. 2.
[185] Impugned Decision, para. 362.

the substantive aspects of the procedure for carrying out the eligibility assessment of victims at the implementation stage and indicated that the procedural aspects of the mechanisms for the determination of eligibility would be dealt with when ruling on the DIP".[186]

96. The Trial Chamber proceeded to deal, *inter alia*, with the procedural aspects of the eligibility assessment in the First Decision on Implementation,[187] including specifically setting out steps within the eligibility assessment providing for the VPRS to carry out the assessment, for prospective beneficiaries found not to be eligible to be able to appeal that finding to the Trial Chamber and for the Trial Chamber to approve those found to be eligible.[188] In relation to the involvement of the Defence in eligibility determinations at the implementation stage, the Trial Chamber found that "no intervention of the Defence is required as Mr Ntaganda's interests at this stage of the proceedings are limited", holding that, having set the amount of his liability, the eligibility process will not impact his rights.[189]

2. *Summary of the submissions*

a. Defence's submissions

97. The Defence submits that the Updated DIP is "a relevant issue in this appeal" because the Trial Chamber attempted to rely upon it to remedy the prejudice caused by its failure to issue a new order for reparations.[190] The Defence submits that the Trial Chamber erred by not including "certain compulsory provisions" in the Impugned Decision in relation to, *inter alia*, the procedure for the eligibility assessment of potential victims at the implementation stage.[191] The Defence further avers that the Trial Chamber erred by its continued reliance upon the Updated DIP, which, it submits, required substantial modification, while not enabling the parties or the TFV to make further submissions thereon or otherwise assist in bringing it in line with the 2022 Appeals

[186] First Decision on Implementation, para. 9, *referring to* Impugned Decision, paras 34-148, 362.
[187] *See generally* First Decision on Implementation, paras 179-188.
[188] First Decision on Implementation, para. 185.
[189] First Decision on Implementation, para. 186, *referring to*, *inter alia*, 2022 Appeals Chamber Judgment, paras 367-368, 757, fn 1672.
[190] Defence Appeal Brief, para. 63.
[191] Defence Appeal Brief, paras 64-68.

Chamber Judgment or the Impugned Decision; and that it also failed to request the TFV to submit a draft implementation plan on the basis of a new order for reparations.[192]

98. The Defence submits that the Trial Chamber's errors "all stem from its refusal to issue a new order for reparations";[193] and that the Appeals Chamber should, *inter alia*, itself issue such an order and direct the TFV to submit a new or modified DIP.[194]

b. Victims Group 1's submissions

99. Victims Group 1 submit that the 2022 Appeals Chamber Judgment did not include any specific reference to the Updated DIP.[195] They emphasise that the Trial Chamber took the parties' submissions on the Updated DIP into account in the Impugned Decision, as well as stating that it would subsequently rule on the procedural aspects of the eligibility assessment, which it did immediately after issuing the Impugned Decision.[196] They contend that, in the First Decision on Implementation, the Trial Chamber gave comprehensive instructions on the Updated DIP and requested the relevant actors to provide further information, on which the parties were able to make observations.[197] Victims Group 1 further argue that the Defence cannot appeal issues that were not set out in the Impugned Decision, chose not to seek leave to appeal the First Decision on Implementation and has thereby relinquished its right to do so.[198]

100. Victims Group 1 submit that the third ground of the Defence appeal should therefore be dismissed.[199]

c. Victims Group 2's submissions

101. Victims Group 2 submit that the Trial Chamber was only required to address specific matters that were remanded to it;[200] and that the validity of the Updated DIP and other matters raised by the Defence under this ground were not addressed in the Impugned Decision and therefore cannot be raised on appeal.[201] They argue that the

[192] Defence Appeal Brief, paras 63, 68-72; *see also* paras 8, 17-18, 20.
[193] Defence Appeal Brief, para. 73.
[194] Defence Appeal Brief, para. 74.
[195] Victims Group 1's Response to the Defence Appeal Brief, para. 31.
[196] Victims Group 1's Response to the Defence Appeal Brief, para. 31.
[197] Victims Group 1's Response to the Defence Appeal Brief, para. 31.
[198] Victims Group 1's Response to the Defence Appeal Brief, paras 32-33.
[199] Victims Group 1's Response to the Defence Appeal Brief, para. 35.
[200] Victims Group 2's Response to the Defence Appeal Brief, para. 52.
[201] Victims Group 2's Response to the Defence Appeal Brief, para. 53.

issues raised by the Defence were addressed in the First Decision on Implementation.[202] Having not sought leave to appeal that decision, they contend that the Defence cannot now raise these issues in this appeal.[203] Victims Group 2 further argue that, in the Impugned Decision, the Trial Chamber put the Defence on notice that it intended to rule upon all aspects of the Updated DIP without first obtaining further submissions from the TFV or the parties; and that the Defence thereby had the opportunity to challenge the validity of the Updated DIP but failed to do so.[204]

102. Victims Group 2 submit that the third ground of the Defence appeal should therefore be dismissed.[205]

3. Determination by the Appeals Chamber

a. Whether the Trial Chamber erred by failing to include compulsory provisions in the Impugned Decision

103. The Defence submits that the Trial Chamber erred by failing to include certain "compulsory provisions" in the Impugned Decision, "including *inter alia*" four matters that it sets out prior to averring that "[t]his is not an exhaustive list of the information that is missing from the [Impugned Decision]".[206] Insofar as the Defence fails expressly to set out any specific 'compulsory provisions' beyond the four matters that it particularises, its submissions are unsubstantiated and rejected for that reason. The Appeals Chamber cannot consider whether 'compulsory provisions' should have been included in the Impugned Decision that the Defence does not expressly set out and in relation to which it does not put forward any submissions.[207]

104. The Appeals Chamber will therefore proceed to address the four "compulsory provisions" that the Defence does set out. The Defence argues that the Trial Chamber erred by not including in the Impugned Decision: (i) the identity of the authority

[202] Victims Group 2's Response to the Defence Appeal Brief, para. 53.
[203] Victims Group 2's Response to the Defence Appeal Brief, para. 53.
[204] Victims Group 2's Response to the Defence Appeal Brief, para. 53.
[205] Victims Group 2's Response to the Defence Appeal Brief, para. 54.
[206] Defence Appeal Brief, para. 64.
[207] It is noted that, in a footnote to the relevant paragraph of its appeal brief, the Defence simply refers to the numbers of eight paragraphs of the First Decision on Implementation. However, it does not set out the precise "compulsory provisions" that it apparently wishes to aver were missing from the Impugned Decision that were specified in those paragraphs, nor put forward any arguments as to why any such provisions should have been included: *see* Defence Appeal Brief, para. 64, fn 128.

responsible for conducting the eligibility assessments;[208] (ii) provision for judicial approval of the outcome of administrative eligibility screenings;[209] (iii) provision for those found ineligible by the authority responsible for conducting the assessments to be able to appeal to the Trial Chamber;[210] and (iv) that the Defence will be precluded from involvement in the eligibility assessment of potential victims or any appeals before the Trial Chamber during the implementation stage of the proceedings.[211]

105. The Appeals Chamber recalls that the 2022 Appeals Chamber Judgment instructed the Trial Chamber, "[i]n the future order for reparations […] to provide for specific judicial approval of administrative screenings that find beneficiaries eligible to benefit from reparations; and for the possibility for those who are found not to be eligible to challenge the TFV's findings before the Trial Chamber".[212] Earlier in the same paragraph the Appeals Chamber had stated, *inter alia*, that the Trial Chamber did not "lay out a procedure for verification of eligibility"; that, even if it would adopt one at a later stage based upon the proposal submitted by the TFV in the draft implementation plan, it "ought already to have set out at least the most fundamental parameters of this procedure in the [2021 Reparations Order]"; that the outcome of [an administrative screening of eligibility carried out by the TFV] must be judicially approved by the Trial Chamber"; that "[t]hose who the TFV finds not to be eligible should be able to challenge the TFV's findings before the Trial Chamber"; and that "[t]he Trial Chamber's failure to indicate these parameters of the future procedure for the eligibility assessment amounts to an error".[213] The Appeals Chamber found that this error materially affected the 2021 Reparations Order and therefore reversed it in that respect.[214]

106. The Appeals Chamber further found, in the context of considering when the Defence may be able to challenge the applicability of a presumption of harm, that the Defence would be able to do so when the Trial Chamber assessed the Sample and may

[208] Defence Appeal Brief, paras 64-65.
[209] Defence Appeal Brief, paras 64, 66.
[210] Defence Appeal Brief, paras 64, 66.
[211] Defence Appeal Brief, paras 64, 67.
[212] 2022 Appeals Chamber Judgment, para. 387.
[213] 2022 Appeals Chamber Judgment, para. 387; *see also* paras 414, 419.
[214] 2022 Appeals Chamber Judgment, para. 387.

be able to do so, "if the Trial Chamber so determines", during the procedure that it would adopt for the eligibility screening at the implementation stage.[215]

107. Within the appropriate relief section of the 2022 Appeals Chamber Judgment, the Appeals Chamber reiterated the need for the Trial Chamber to provide for judicial approval of the outcome of the TFV's eligibility assessment and for the opportunity for those found ineligible to be able to challenge that finding before the Trial Chamber.[216]

108. The above elements of the procedure were contained in the First Decision on Implementation, which was issued subsequently to the Impugned Decision.[217] The Trial Chamber therefore did not follow the direction of the Appeals Chamber to include this in "the future order for reparations".[218]

109. In light of the above, the Appeals Chamber finds that the Trial Chamber erred in not including the procedure for the verification of eligibility assessments in the Impugned Decision. Given that the 2021 Reparations Order had provided for the administrative eligibility assessment to be carried out by the TFV,[219] any change in that regard should also have been set out in the Impugned Decision as a part of the relevant procedure. Yet the Impugned Decision referred only to "the authority" making the assessment,[220] without specifying the identity of that authority. The fact that the VPRS would carry out the assessment moving forward was set out in the First Decision on Implementation.[221] Similarly, the fact that the Trial Chamber determined that the Defence was not to be involved in eligibility assessments at the implementation phase, as set out in the First Decision on Implementation,[222] was also a part of the procedure that should have been included within the Impugned Decision.[223]

110. The Appeals Chamber further finds that the above errors materially affected the Impugned Decision for the same reason that it set out in the 2022 Appeals Chamber Judgment, namely that the Impugned Decision would have been different in that it would

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[215] 2022 Appeals Chamber Judgment, para. 715, *referring to* para. 387.
[216] 2022 Appeals Chamber Judgment, para. 757, fn 1672.
[217] *See* First Decision on Implementation, para. 185.
[218] *See* 2022 Appeals Chamber Judgment, para. 387.
[219] 2021 Reparations Order, para. 253.
[220] *See* Impugned Decision, paras 189-190, 192, 197.
[221] *See*, *for example*, First Decision on Implementation, para. 185.
[222] First Decision on Implementation, para. 186.
[223] *See* 2022 Appeals Chamber Judgment, para. 715, *referring to* para. 387.

have set out the above parameters.[224] That would have had the additional consequence, as argued by the Defence,[225] that the parties would have had an automatic right to appeal those parameters, had they been contained within the Impugned Decision, pursuant to article 82(4) of the Statute.

111. The Appeals Chamber must therefore address the appropriate relief for the above errors of the Trial Chamber that materially affected the Impugned Decision. For the reasons that follow, the Appeals Chamber determines that the errors identified should be corrected by means of the Appeals Chamber itself amending the Impugned Decision, thereby necessarily resulting in the corrections made being final and not subject to a further appeal by the parties.

112. While the Trial Chamber should have set out the procedural aspects of the administrative eligibility assessment in the Impugned Decision, it in fact set out those steps less than one month later in the First Decision on Implementation.[226] It is clear from the relevant paragraphs of that decision that: (i) the VPRS will be responsible for carrying out the administrative eligibility assessment;[227] (ii) a procedure is established for prospective beneficiaries found to be ineligible to appeal to the Trial Chamber;[228] (iii) provision is made for the Trial Chamber judicially to approve determinations of eligibility;[229] and (iv) the Trial Chamber decided that the Defence does not need to be involved in the eligibility determinations and any possible eligibility appeals, as Mr Ntaganda's interests at the implementation phase are limited given that the amount of his financial liability has now been determined and the results of the eligibility process will not affect his rights.[230]

113. The Appeals Chamber observes that the First Decision on Implementation was issued before both the Defence's Notice of Appeal and its appeal brief were filed in the

[224] *See* 2022 Appeals Chamber Judgment, para. 387.
[225] Defence Appeal Brief, para. 68.
[226] *See* First Decision on Implementation, paras 185-186.
[227] First Decision on Implementation, para. 185(a).
[228] First Decision on Implementation, paras 185(b)-(d).
[229] First Decision on Implementation, para. 185(f).
[230] First Decision on Implementation, para. 186.

present appeals.[231] In its appeal brief,[232] the Defence refers to the paragraph of the 2022 Appeals Chamber Judgment in which it was stated that

> […] to the extent that a trial chamber sets out eligibility criteria with respect to those potential beneficiaries upon whose applications it has not ruled and whose eligibility is to be assessed subsequently 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.[233]

114. The Defence argues that the above statement

> was made before [the Trial Chamber] circumvented the [2022 Appeals Chamber Judgment] and issued the [Impugned Decision], rather than a new order for reparations, in which [the Trial Chamber] failed *inter alia*, (i) to ensure that the Defence was able to assess the victims' dossiers in the sample and to make meaningful representations (Ground 5); 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 [Impugned Decision].[234]

115. Contrary to the submissions of the Defence, the Appeals Chamber has found, with Judge Ibáñez Carranza disagreeing on this issue, that the Trial Chamber did not circumvent the 2022 Appeals Chamber Judgment when it issued the Impugned Decision.[235] Furthermore, the Appeals Chamber finds the remainder of the above contention of the Defence to be misplaced. The Defence is arguing that the Trial Chamber made errors that it elaborates in grounds four and five of this appeal and that, "consequently", the Defence's ability to be involved in the eligibility assessment at the implementation stage is an issue it "considered raising".[236] However, the interests of the Defence in respect of those alleged errors in this case are safeguarded by permitting the Defence to bring this appeal against them. The Defence has been able to – and does – raise the errors it alleges in its fourth and fifth grounds of this appeal. Those alleged errors will be addressed under those grounds of appeal below. In the circumstances of

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[231] The First Decision on Implementation was issued on 11 August 2023; the Defence Notice of Appeal was filed on 16 August 2023; and the Defence Appeal Brief was filed on 30 October 2023.
[232] Defence Appeal Brief, para. 67.
[233] 2022 Appeals Chamber Judgment, para. 368, *referring to* 2015 *Lubanga* Appeals Chamber Judgment, para. 166.
[234] Defence Appeal Brief, para. 67 (footnote omitted).
[235] *See generally* paragraphs 37-64 above.
[236] Defence Appeal Brief, para. 67 (footnote omitted).

the present case, it is the ability of the Defence to raise those issues now, by means of this appeal against the Impugned Decision, that safeguards its interests in this regard. This appeal ensures that any such errors, if established, will be corrected.

116. In respect of the other three procedural steps that are set out in the First Decision on Implementation (the VPRS carrying out the eligibility assessment and the provision for both judicial approval of eligible victims and appeals from ineligible victims), the Defence does not raise any specific issue in respect of which it would wish to appeal; neither group of victims has expressed a desire to contest those findings and indeed submit that this ground of appeal should be rejected; and the Appeals Chamber regards those procedural steps to be appropriate.

117. The Appeals Chamber further observes that part of the relief requested by the Defence is for the Appeals Chamber itself to issue a new order for reparations[237] which, if undertaken, would automatically mean that the parties do not have a right to appeal any findings made therein.

118. In all of the above circumstances, so as to correct the aforementioned errors of the Trial Chamber, the Appeals Chamber deems it appropriate to amend the Impugned Decision,[238] so that paragraphs 185-186 of the First Decision on Implementation should be read to be incorporated within it. Noting that it has now been over one year since the above procedure was established, the Appeals Chamber does not deem it necessary for the Impugned Decision to be physically amended. This judgment is sufficient to enable all parties and participants in these proceedings clearly to understand that it is the procedure set out in paragraphs 185-186 of the First Decision on Implementation that apply in this case.[239] Equally, for the reasons set out above, the Appeals Chamber does

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[237] *See*, *for example*, Defence Appeal Brief, para. 74.
[238] Rule 153(1) of the Rules provides for the Appeals Chamber to confirm, reverse or amend a reparation order made under article 75 of the Statute.
[239] Paragraphs 185-186 of the First Decision on Implementation read as follows (with their footnotes omitted):
"185. The Eligibility Assessment:
a. The Registry, through the VPRS, will be responsible for carrying out the administrative eligibility assessment, using the substantive criteria and eligibility mechanism established by the Chamber in the Addendum;
b. If a potential beneficiary is found not to be eligible, the VPRS will notify the potential beneficiary and the OPCV, to explain that the person has 30 days from the date of the decision, or the date the person was contacted, to provide supplementary information;

not regard any prejudice to arise to any party by the fact that the amendment of the Impugned Decision to this limited extent results in them not being able to appeal these specific findings. The role of the Appeals Chamber is to guarantee the fairness of the proceedings as a whole and by proceeding in this manner it is ensured that the errors raised by this part of this ground are corrected in a fair and proportionate manner.

b. Whether the Trial Chamber erred by not enabling the parties or the TFV to file observations on the Updated DIP after the Impugned Decision was issued

119. The Defence proceeds to submit that the Trial Chamber also erred by "including [the procedural information addressed directly above] in the [Updated DIP], which requires a significant overhaul following the [2022 Appeals Chamber Judgment], and deprived the parties of their ability to file observations in advance".[240] It argues that the Updated DIP was based upon the 2021 Reparations Order with which the Appeals Chamber "found numerous fundamental errors".[241] The Defence contends that

> [the Trial Chamber] did not call upon the TFV or the parties to assist in bringing the Updated DIP in line with the [2022 Appeals Chamber Judgment] or even the [Impugned Decision], let alone requesting the TFV to submit a new DIP on the

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c. Within a reasonable time after having received additional information, the VPRS will review the eligibility determination based on the supplementary information received. The VPRS should inform the Chamber as to the chosen time-frame for initial review of eligibility determinations, as this should be determined in advance [of] the commencement of the eligibility process;
d. If a prospective beneficiary, after providing additional information, is still found not to be eligible, the VPRS will notify the prospective beneficiary and the OPCV to explain that the person will have 30 days from the date of the decision, or the date the person was contacted, to appeal the VPRS's decision. The Chamber considers that — consistent with the administrative nature of the implementation stage of reparations — it would be appropriate for such appeals to be before the Registrar, as the principal administrative officer of the Court. However, in view of the Appeals Chamber's directions in the present case, to avoid further litigation and proceed in the most expeditious manner possible, any negative eligibility determination may be appealed before the Chamber;
e. Update reports on the results of the administrative eligibility assessment, providing statistics about the positive and negative eligibility determinations, shall be provided to the Chamber by the VPRS;
f. Consistent with the [Appeals] Chamber's directions for the Chamber to retain oversight over the administrative screening — and notwithstanding the administrative nature of the implementation stage of reparations — eligibility determinations will be judicially approved by the Chamber;
Once a person is found to be eligible to benefit from reparations, the TFV shall then contact the person within 30 days to provide the beneficiary with sufficient information as to the steps to follow and the expected time-line for the implementation of reparations.
186. As to the Defence's involvement in the process of eligibility determinations and possible appeals, consistent with the Appeals Chamber's views, the Chamber considers that no intervention of the Defence is required as Mr Ntaganda's interests at this stage of the proceedings are limited. In effect, the Chamber has already set the convicted person's monetary liability and, as such, the results of the eligibility process will have no impact on his rights".
[240] Defence Appeal Brief, para. 68.
[241] Defence Appeal Brief, paras 69-70.

> basis of a new order for reparations which [the Trial Chamber] had been directed to issue.[242]

120. The Appeals Chamber observes that at the end of the Impugned Decision, under the heading "Implementation", the Trial Chamber stated, *inter alia*, that, "following this [Impugned Decision] the Chamber will rule on all aspects of the Draft Implementation Plan that do not require further submissions from the TFV or the parties [...]".[243] Thereafter, in the introductory section of the First Decision on Implementation, the Trial Chamber stated, *inter alia*, that "its judicial role after issuing the reparations order includes deciding on the TFV's DIP [...]";[244] and that "this Decision addresses the Updated DIP proposed by the TFV and the parties' submissions [thereon]".[245]

121. The Appeals Chamber therefore finds that the Defence's arguments under this ground of appeal that relate to information included in the Updated DIP at the time that it was ruled upon in the First Decision on Implementation, or its alleged inability to file observations on the Updated DIP after the Impugned Decision was issued,[246] do not arise out of the Impugned Decision. Those events relate to matters that post-date the Impugned Decision. For that reason, the Defence's arguments under this part of its third ground of appeal are dismissed *in limine*.

4. *Overall conclusion*

122. For the above reasons, the Appeals Chamber finds that the Trial Chamber erred in not including the procedure for the verification of eligibility assessments in the Impugned Decision. By way of relief, the Appeals Chamber deems it appropriate to amend the Impugned Decision so that paragraphs 185-186 of the First Decision on Implementation should be read to be incorporated within it. The remainder of the Defence's third ground of appeal is dismissed *in limine*.

D. Ground of appeal 4: Alleged errors in the criteria for the eligibility assessment

123. Under its fourth ground of appeal, the Defence submits that the Trial Chamber erred in law by: (i) making an incomplete assessment with respect to the IDIP victims

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[242] Defence Appeal Brief, para. 72; *see also* paras 17, 18, 20, 69-73.
[243] Impugned Decision, para. 362.
[244] First Decision on Implementation, para. 16.
[245] First Decision on Implementation, para. 17.
[246] *See generally* Defence Appeal Brief, paras 68-72.

included in the Sample;[247] (ii) "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";[248] (iii) setting out the criterion of "sufficiently close in time" which is not appropriate for assessment under the standard of the balance of probabilities;[249] (iv) relying upon the presumption of civilian status in the absence of information about the occupation of the victims at the time of the relevant crimes;[250] and (v) failing to require proof of the causal link between the crime and the harm suffered.[251]

1. *Alleged incomplete assessment of priority victims*

a. Relevant procedural background

124. As indicated earlier in this judgment,[252] in the 2021 Reparations Order, the Trial Chamber directed that the initial draft implementation plan was to "[focus] exclusively on the options for addressing the most urgent needs of victims that require priority treatment".[253]

125. In its Decision on the TFV's IDIP, the Trial Chamber indicated that, in addition to an administrative assessment of eligibility, "a further screening as to the urgent needs of victims […] needs to be conducted".[254]

126. In the TFV's Fourth Update Report, the TFV provided an update on, *inter alia*, the eligibility and urgency screening.[255] Annex 1 to this report includes a form used to evaluate such urgency.[256] In its Decision on the TFV's Fourth Update Report, the Trial Chamber "welcome[d] the information provided by the TFV" with regard to "the substantive criteria applied to assess eligibility and urgent needs".[257]

127. In the 2022 Appeals Chamber Judgment, the Appeals Chamber held that "[i]n considering the matter of the number of beneficiaries and the amount of the award anew,

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[247] Defence Appeal Brief, paras 80-81.
[248] Defence Appeal Brief, paras 82-89.
[249] Defence Appeal Brief, paras 91-96.
[250] Defence Appeal Brief, paras 97-105.
[251] Defence Appeal Brief, paras 106-112.
[252] *See* paragraph 66 above.
[253] 2021 Reparations Order, para. 252.
[254] Decision on the TFV's IDIP, paras 31-32.
[255] TFV's Fourth Update Report, paras 12-25.
[256] Confidential Annex 1 to the TFV's Fourth Update Report, pp. 16-18.
[257] Decision on the TFV's Fourth Update Report, para. 19.

the Trial Chamber should […] take at least a sample of applications into account".[258] The Appeals Chamber instructed the Trial Chamber to include in a future procedure for the eligibility assessment the requirement of judicial approval of administrative screenings.[259]

128. As indicated earlier in this judgment,[260] in its Order of 25 October 2022, the Trial Chamber considered it appropriate for the sample of applications to be assessed and ruled upon to include all 69 victims who had by that time been found eligible to benefit from the IDIP by the TFV.[261]

129. In the Decision of 25 November 2022, the Trial Chamber, *inter alia*, considered the parties' submissions on the composition of the Sample and approved the Sample "as sufficiently representative of the universe of potential victims in the case".[262]

130. In the Impugned Decision, the Trial Chamber ruled upon the applications of the (by then) 67 IDIP victims included in the Sample.[263]

b. Summary of the submissions

131. The Defence submits that the Trial Chamber's assessment with respect to the 67 IDIP victims included in the Sample was incomplete, as the Trial Chamber only examined the general eligibility of those victims, whereas the requirement of urgency must also be examined.[264] The Defence argues that the screening test performed by the TFV with respect to the dossiers of those 67 victims "must still be reviewed and approved" by the Trial Chamber, after giving the Defence an opportunity to make observations.[265] The Defence also avers that it did not receive any of the questionnaires completed by the priority victims.[266]

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[258] 2022 Appeals Chamber Judgment, para. 346.
[259] 2022 Appeals Chamber Judgment, para. 387; *see also* para. 419.
[260] *See* paragraph 70 above.
[261] Order of 25 October 2022, paras 19-20.
[262] Decision of 25 November 2022, paras 9-24, p. 23.
[263] Impugned Decision, paras 143, 147. *See also* paragraph 71 above.
[264] Defence Appeal Brief, para. 80.
[265] Defence Appeal Brief, para. 80.
[266] Defence Appeal Brief, para. 81.

132. Victims Group 1 submit that this argument of the Defence "do[es] not seem to go to the essence of this ground of appeal as defined by the Defence itself" and merely expresses disagreement.[267]

133. Referring to the 2022 Appeals Chamber Judgment, Victims Group 2 submit that, contrary to the Defence's argument, the Trial Chamber was not required to make an assessment of urgency with respect to the 67 IDIP victims.[268]

c. Determination by the Appeals Chamber

134. The Defence submits that the Trial Chamber's assessment of the eligibility of the 67 IDIP priority victims was incomplete.[269] The Appeals Chamber notes in this regard that in the Impugned Decision the Trial Chamber ruled on the eligibility of those victims to benefit from reparations.[270] It did so after having enabled the parties, including the Defence, to make submissions on the eligibility of those victims.[271] Regarding the determination of the urgency of the victims' needs, the Trial Chamber specifically directed the TFV to conduct a screening to this effect.[272] The TFV provided updates on that screening to the Trial Chamber.[273] The Trial Chamber thus supervised the process by reviewing the TFV's update reports.

135. Regarding the Defence's argument that the Trial Chamber ought to have reviewed and approved the TFV's assessment of urgency,[274] the Appeals Chamber recalls that in the 2022 Appeals Chamber Judgment, it emphasised the need for "specific judicial approval of administrative screenings that find beneficiaries eligible to benefit from reparations".[275] This ruling of the Appeals Chamber does not refer to the urgency screening conducted by the TFV. It is also not apparent that such urgency screening would result in findings as to a victim's eligibility to benefit from reparations.

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[267] Victims Group 1's Response to the Defence Appeal Brief, para. 39.
[268] Victims Group 2's Response to the Defence Appeal Brief, para. 75, *referring to* 2022 Appeals Chamber Judgment, para. 341.
[269] Defence Appeal Brief, para. 80.
[270] Impugned Decision, paras 143, 147.
[271] Impugned Decision, paras 140-142.
[272] Decision on the TFV's IDIP, para. 32.
[273] *See, for example*, TFV's Fourth Update Report, paras 12-25; Confidential Annex 1 to the TFV's Fourth Update Report, paras 49-53.
[274] Defence Appeal Brief, para. 80.
[275] 2022 Appeals Chamber Judgment, para. 387; *see also* para. 419.

136. The Appeals Chamber also notes that the urgency screening and, in general, the inclusion of victims in the IDIP, based upon such screening, did not affect Mr Ntaganda's interests. Indeed, the Trial Chamber emphasised that "the inclusion of any additional victim into the IDIP will have no impact on the total amount of the liability award".[276]

137. Furthermore, when the inclusion of victims in the IDIP became potentially relevant to the amount of the award of reparations, in that it affected the composition of the Sample, the relevant criterion for the victims' inclusion was no longer the urgency of their needs, but their representativeness. The Appeals Chamber recalls that the applications of the IDIP victims were included in the Sample alongside applications of other victims.[277] This was not foreshadowed in the 2021 Reparations Order, which did not rely upon a sample of victims' dossiers. Pursuant to that order, the main goal of the screening of the urgency of the victims' needs was to determine whether they would be treated with priority. However, after the Trial Chamber's Order of 25 October 2022, the main question concerning the IDIP victims was whether they would be included in the Sample and whether the Sample would be representative. In this respect, the Trial Chamber, prompted by the Defence, assessed whether the inclusion of the IDIP victims in the Sample would affect its representativeness.[278] Having considered the Defence's submissions, the Trial Chamber approved the inclusion of the IDIP victims in the Sample.

138. Turning to the Defence's argument that it did not receive any questionnaires containing information about victims' urgent needs,[279] the Appeals Chamber notes that, as will be discussed in detail under the fifth ground of the Defence's appeal, the Defence does not substantiate why it was essential for it to have access to such questionnaires in order to be able to make meaningful submissions on the eligibility of the victims in the Sample,[280] particularly since in its analysis of the Sample in the Impugned Decision, the Trial Chamber ruled upon the eligibility of these victims, not their urgent needs or prioritisation.

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[276] Decision on the TFV's Sixth and Seventh Update Reports, para. 19.
[277] Order of 25 October 2022, paras 20, 34(a).
[278] Decision of 25 November 2022, para. 15.
[279] Defence Appeal Brief, para. 81.
[280] *See* paragraph 274 below.

139. In light of the foregoing, the Appeals Chamber rejects the Defence's arguments concerning the Trial Chamber's assessment of the eligibility of the priority victims.

2. *Alleged inadequate criteria for the eligibility assessment*

a. Summary of the submissions

140. The Defence submits that the Trial Chamber erred by setting out the eligibility criteria "such that the authority making the assessment would be incapable of properly assessing the victims' dossiers, using these criteria".[281] The Defence contends that if these criteria are followed, the assessment of eligibility will be made "without a proper assessment of the plausibility, credibility or sufficiency of the information provided", only allowing for a *prima facie* determination rather than one based upon the balance of probabilities standard.[282] The Defence lists a number of considerations which, in its view, "are systematically set aside […] or not weighed or mentioned at all" by the Trial Chamber, in application of the aforementioned criteria.[283] The Defence submits that the Trial Chamber erred by not retaining in its determinations the "more precise and practical criteria and guidelines" proposed by the Defence.[284] It argues that it was "problematic" for the Trial Chamber to rely upon the Decision of 15 December 2020 as guidance for the authority making assessments.[285] The Defence submits that the Trial Chamber considered requests for authorisation to participate in the proceedings as requests for reparations, despite their different nature.[286]

141. Victims Group 1 submit that the Defence's arguments concerning the eligibility criteria contradict its own acknowledgment that the Trial Chamber's analysis of victims' dossiers was conducted on the basis of set criteria.[287] Victims Group 1 contend that these arguments of the Defence constitute a mere disagreement, which does not meet "the criteria of a valid ground of appeal".[288] Victims Group 1 aver that "the relevant implementing body seemed to be satisfied with the criteria and methodology" set out by the Trial Chamber.[289] They argue that this is the second time that the Defence expresses

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[281] Defence Appeal Brief, para. 84; *see also* paras 82-83, 85.
[282] Defence Appeal Brief, para. 87.
[283] Defence Appeal Brief, para. 86.
[284] Defence Appeal Brief, para. 88.
[285] Defence Appeal Brief, para. 88.
[286] Defence Appeal Brief, para. 89.
[287] Victims Group 1's Response to the Defence Appeal Brief, paras 38, 42.
[288] Victims Group 1's Response to the Defence Appeal Brief, paras 38-39.
[289] Victims Group 1's Response to the Defence Appeal Brief, para. 38.

disagreement with the eligibility procedure adopted by the Trial Chamber and that the continuing litigation on these matters contributes to the vulnerability of the victims.[290]

142. Victims Group 2 submit that, contrary to the Defence's argument, the Trial Chamber did include in the Impugned Decision the relevant criteria and instructions capable of properly guiding the body conducting assessments.[291] Victims Group 2 aver that the Defence itself acknowledged that the Trial Chamber spelled out a number of eligibility criteria,[292] and that the Defence's assumption that the assessing authority will not be able to conduct the eligibility assessment based upon these criteria is "speculative".[293] Victims Group 2 submit that there is no indication that the VPRS, which is responsible for conducting the administrative eligibility assessment, will not be able to apply the criteria set out by the Trial Chamber and, in addition, the VPRS's determinations will be approved by the Trial Chamber.[294] They argue that, even if the Trial Chamber erred in its assessment of the eligibility of some of the victims included in the Sample, "this will not necessarily have a bearing on the eligibility assessment of any new potential beneficiaries".[295] Regarding the references in the Impugned Decision to the Decision of 15 December 2020, Victims Group 2 submit that the Trial Chamber was not required to revise any findings made in that decision, as they were not appealed, and that the issue which the Defence raises in this regard does not arise out of the Impugned Decision.[296]

b. Determination by the Appeals Chamber

143. The Defence alleges errors in the criteria which the Trial Chamber set out for the assessment of eligibility to be carried out at the implementation stage.[297] The Defence refers to a number of considerations, which, it submits, the Trial Chamber "set aside […] or [did] not [weigh] or [did not] [mention] at all".[298] In support of its argument, the Defence makes reference to the Defence Submissions on the Sample, which it filed before the Trial Chamber, and to its observations on specific victims' dossiers, annexed

[290] Victims Group 1's Response to the Defence Appeal Brief, para. 40.
[291] Victims Group 2's Response to the Defence Appeal Brief, paras 55-70, 72.
[292] Victims Group 2's Response to the Defence Appeal Brief, para. 71.
[293] Victims Group 2's Response to the Defence Appeal Brief, paras 71-72.
[294] Victims Group 2's Response to the Defence Appeal Brief, para. 72.
[295] Victims Group 2's Response to the Defence Appeal Brief, para. 72.
[296] Victims Group 2's Response to the Defence Appeal Brief, para. 74.
[297] Defence Appeal Brief, para. 84; *see also* paras 82-83, 85.
[298] Defence Appeal Brief, para. 86.

to those submissions.[299] The Appeals Chamber notes, however, that the arguments set out in the Defence Appeal Brief are limited to merely listing the considerations to which, in the Defence's view, the Trial Chamber failed to give due weight. The actual arguments with respect to those considerations are only developed in the Defence Submissions on the Sample and Annex A thereto. The Appeals Chamber recalls that it is inappropriate for the appellant to make mere references to arguments developed in other filings.[300]

144. Furthermore, the Appeals Chamber notes that the Defence does not specify which of the listed considerations were "not […] mentioned at all" by the Trial Chamber and which specific findings of the Trial Chamber show that it allegedly set aside or gave insufficient weight to other listed considerations.[301] The Appeals Chamber recalls that the appellant must identify the finding or ruling challenged in the decision with specific reference to the page and paragraph number.[302]

145. As the Defence has failed to identify in its appeal brief the alleged errors and any findings of the Trial Chamber allegedly affected by such errors, the Appeals Chamber cannot further consider these arguments of the Defence and dismisses this part of this ground *in limine*.

146. The Defence also takes issue with the Trial Chamber's reliance on the Decision of 15 December 2020, which, it argues, "was not meant to be an eligibility assessment".[303] The Appeals Chamber notes in this respect Victims Group 2's submission that this issue does not arise out of the Impugned Decision.[304] However, as the Defence challenges the Trial Chamber's reference to and reliance upon the Decision of 15 December 2020 in the Impugned Decision, and not any findings made in the Decision of 15 December 2020 itself, the Appeals Chamber is not persuaded that the Defence is precluded from presenting these arguments in its appeal against the Impugned Decision.

147. The Appeals Chamber notes that the Trial Chamber relied upon the Decision of 15 December 2020 in the following context. When discussing the issue of "[w]hether

[299] Defence Appeal Brief, para. 86, fns 194-202, *referring to* Defence Submissions on the Sample; Confidential Annex A to the Defence Submissions on the Sample.
[300] *See* paragraph 22 above.
[301] *See* Defence Appeal Brief, para. 86.
[302] *See* paragraph 20 above.
[303] Defence Appeal Brief, para. 88.
[304] Victims Group 2's Response to the Defence Appeal Brief, para. 74.

the victims' account corresponds to the Chamber's findings as to crimes for which Mr Ntaganda was convicted",[305] the Trial Chamber indicated that it would "verify whether the date of the event, village/town, description of events […], and perpetrators [provided in the victims' dossiers] correspond to the Chamber's findings in [the Conviction Decision], in light of the clarifications provided in [the Decision of 15 December 2020]".[306]

148. The Defence argues that the Trial Chamber's reliance upon the Decision of 15 December 2020 is "problematic" because that decision "was not meant to be an eligibility assessment".[307] The Appeals Chamber notes in this regard that the Decision of 15 December 2020 mainly contains guidelines to the Registry on the interpretation of the scope of the Conviction Decision.[308] It is also clear from the Impugned Decision that the Trial Chamber intended to rely upon the Decision of 15 December 2020 to the extent that that decision concerned the scope of the conviction. Irrespective of whether the Decision of 15 December 2020 was "meant to be an eligibility assessment" or not, as suggested by the Defence,[309] the clarifications contained therein remain relevant to both the assessment of eligibility conducted by the Trial Chamber and the assessment to be conducted at the implementation stage. The Appeals Chamber therefore rejects the Defence's argument that the Trial Chamber's reliance on the Decision of 15 December 2020 is inapposite due to that decision's different purpose.

149. Furthermore, the Defence submits that the Decision of 15 December 2020 cannot be relied upon, as some of the findings made therein were modified in light of the 2022 Appeals Chamber Judgment.[310] The Appeals Chamber notes in this respect that the Appeals Chamber's findings to which the Defence refers concerned the issue of "[w]hether persons to whom a direct victim was of significant importance may qualify as indirect victims".[311] While the Decision of 15 December 2020 contains the Trial Chamber's clarifications on this issue, the Impugned Decision does not appear to refer to those clarifications. Rather, and as explained above, the Impugned Decision's

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[305] Impugned Decision, p. 40, heading 1.
[306] Impugned Decision, para. 91, *referring to* Decision of 15 December 2020; *see also* Impugned Decision, paras 96, 99, 103.
[307] Defence Appeal Brief, para. 88.
[308] Decision of 15 December 2020, paras 13-47, 57-63.
[309] Defence Appeal Brief, para. 88.
[310] Defence Appeal Brief, para. 88.
[311] 2022 Appeals Chamber Judgment, p. 249, heading (a), paras 608-640.

references to the Decision of 15 December 2020 which the Defence challenges here only relate to the scope of Mr Ntaganda's conviction. The Appeals Chamber therefore rejects the Defence's argument that the Trial Chamber's reliance upon the Decision of 15 December 2020 is inapposite for that reason.

150. Finally, the Appeals Chamber notes that the Defence argues that the guidelines set out in the Decision of 15 December 2020 should have been included in a new order for reparations, rather than being referred to in the Impugned Decision.[312] As the argument that a new order for reparations was required is also made under the first ground of the Defence's appeal,[313] the Appeals Chamber will not address it under this ground. It has addressed this argument under the first ground.[314]

151. Regarding the Defence's argument concerning the Trial Chamber's decision to rely, in the reparation proceedings, upon requests for authorisation to participate in the trial proceedings,[315] the Appeals Chamber notes that the Defence makes no reference to any finding of the Impugned Decision which in its view is affected by this alleged error. As indicated earlier in this judgment, this is inappropriate.[316] Furthermore, the Defence argues that the Trial Chamber's reliance upon requests for authorisation to participate in the proceedings, which are "more general in nature", made it impossible to obtain additional information from participating victims.[317] However, the Appeals Chamber notes that the legal representatives of victims in fact succeeded in obtaining additional information from a number of victims, and that their inability to do so with respect to other victims was due to "the resurgence of the conflict, the insecurity, and the resulting large displacement of the population",[318] and not because the relevant forms were "more general in nature", as argued by the Defence.[319]

152. For the foregoing reasons, the Appeals Chamber rejects the Defence's arguments concerning the allegedly insufficient eligibility criteria and guidelines.

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[312] Defence Appeal Brief, para. 88.
[313] Defence Appeal Brief, para. 36.
[314] *See* paragraph 60 above.
[315] Defence Appeal Brief, para. 89.
[316] *See* paragraph 20 above.
[317] Defence Appeal Brief, para. 89.
[318] Impugned Decision, paras 47-48.
[319] Defence Appeal Brief, para. 89.

3. *The allegedly inappropriate criterion of "sufficiently close in time"*

a. Summary of the submissions

153. The Defence submits that the Trial Chamber erred in adopting, in the Decision of 15 December 2020, the standard of "sufficiently close in time" for the assessment of whether the dates of events resulting in the harm suffered by certain victims correspond to the timeframes specified in the charges.[320] The Defence argues that this standard is not appropriate in light of "the numerous memory refreshing facts and happenings", the seriousness of these facts for the victims, as well as the opportunities available to victims to recall relevant dates.[321] The Defence contends that the "sufficiently close in time" standard is appropriate for the authorisation of victims to participate in the proceedings, pursuant to the *prima facie* standard, but not for eligibility assessments, pursuant to the standard of the balance of probabilities.[322] The Defence avers that a victim's ability to place an event in the correct timeframe is "a determining factor to assess the credibility" of that victim.[323]

154. Victims Group 1 argue that the Defence merely expresses disagreement with the approach taken by the Trial Chamber.[324]

155. Victims Group 2 submit that the correctness of the "sufficiently close in time" criterion does not arise out of the Impugned Decision, as that criterion was set out in the Decision of 15 December 2020, and the Defence did not seek leave to appeal that decision.[325]

b. Determination by the Appeals Chamber

156. The Defence challenges the Trial Chamber's adoption of the standard of "sufficiently close in time" for the assessment of whether the dates of the relevant events provided by victims correspond to the timeframes specified in the charges.[326] At the outset, the Appeals Chamber takes note of Victims Group 2's submission that the correctness of the criterion of "sufficiently close in time" does not arise out of the

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[320] Defence Appeal Brief, paras 91-94.
[321] Defence Appeal Brief, para. 95.
[322] Defence Appeal Brief, paras 95-96.
[323] Defence Appeal Brief, para. 95.
[324] Victims Group 1's Response to the Defence Appeal Brief, para. 37.
[325] Victims Group 2's Response to the Defence Appeal Brief, paras 76-77.
[326] Defence Appeal Brief, paras 91-94.

Impugned Decision.[327] The Appeals Chamber is not persuaded by this submission. While it is true that the Trial Chamber already communicated its adoption of the "sufficiently close in time" criterion in the Decision of 15 December 2020,[328] the Trial Chamber addressed this issue in the Impugned Decision. It considered the Defence's argument regarding the suitability of the "sufficiently close in time" criterion for the standard of the balance of probabilities.[329] The Trial Chamber held that "inaccuracies as to dates […] do not automatically exclude victims from their eligibility to reparations, and the assessment should be made on a case-by-case basis, depending on the victim's personal circumstances, and taking into account all aspects of [the] victims' dossiers".[330] The Trial Chamber also referred to this criterion when assessing the eligibility of the victims in the Sample.[331] Therefore, this issue does arise out of the Impugned Decision and the Defence is not precluded from raising it in its appeal against that decision.

157. Relying upon, *inter alia*, "memory refreshing facts and happenings", the Defence argues that the criterion of "sufficiently close in time" is not suitable under the balance of probabilities standard.[332] The Appeals Chamber notes that the Trial Chamber provided the following reasons for the adoption of its approach to the accuracy of victims' accounts with respect to dates. It reiterated its findings made in the Conviction Decision and in the Decision of 15 December 2020 that "in light of 'the time elapsed since the relevant events took place, as well the likely impact of the events on the witnesses' ability to remember specific dates', it did not rely on their testimonies to establish the precise dates of the attacks".[333] Rather than denying eligibility to victims who were unable to provide "precise dates", the Trial Chamber decided to make its assessments "on a case-by-case basis", taking into account "the victim's personal circumstances" in light of "all aspects of [the] victims' dossiers".[334]

158. The Appeals Chamber is not persuaded that the alleged "numerous memory refreshing facts and happenings" or "opportunities available for potential victims to

[327] Victims Group 2's Response to the Defence Appeal Brief, para. 77.
[328] Decision of 15 December 2020, paras 37-38, 43.
[329] Impugned Decision, para. 97.
[330] Impugned Decision, para. 98.
[331] *See*, *for example*, Confidential Annex II to the Impugned Decision, paras 83-84, 226-227, 950-951.
[332] Defence Appeal Brief, paras 95-96.
[333] Impugned Decision, para. 98, *referring to* Conviction Decision, para. 486, fn 1391; Decision of 15 December 2020, paras 37, 42.
[334] Impugned Decision, para. 98.

recall relevant dates", to which the Defence refers,[335] are factors which undercut the Trial Chamber's findings. To the contrary, such factors appear to fall within the scope of a victim's personal circumstances, which, as mentioned above, the Trial Chamber found relevant to its assessment.[336] The Defence does not seem to argue that it was unable to raise those factors in its observations on the dossiers of the victims in the Sample.

159. Furthermore, the Defence does not explain why, in its view, the "sufficiently close in time" criterion is "too vague".[337] It also does not point to any eligibility findings of the Trial Chamber or guidelines to the body assessing eligibility which, in its view, would have been different, had the Trial Chamber adopted a stricter standard. It is therefore unclear how this alleged error would have materially affected the Impugned Decision. The Appeals Chamber therefore rejects the Defence's arguments with respect to the "sufficiently close in time" criterion.

4. *The alleged erroneous reliance on the presumption of civilian status*

a. **Relevant procedural background**

160. In the Conviction Decision, the Trial Chamber addressed the presumption of protection under IHL as follows:

> Article 50(1) of Additional Protocol I […] provides, in relation to the expected conduct of a member of the military, that '[i]n case of doubt whether a person is a civilian, that person shall be considered to be a civilian'. This general presumption of protection under IHL also applies during non-international armed conflicts. However, in the context of a criminal trial, the burden is on the Prosecution to establish the status of the victim as someone taking no active part in the hostilities.[338]

161. In the Impugned Decision, the Trial Chamber made the following findings with respect to victims who suffered harm in relation to the crime of murder (counts 1 and 2):

> The Chamber recalls that in its [Conviction Decision], it found beyond reasonable doubt that people protected under [IHL] were killed in Kobu and Sayo. In light of the positive findings made in the [Conviction Decision], 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 victims

[335] Defence Appeal Brief, para. 95.
[336] Impugned Decision, para. 98.
[337] Defence Appeal Brief, para. 95.
[338] Conviction Decision, para. 883 (footnotes omitted).

> were civilians not actively taking part in hostilities or otherwise persons *hors de combat*.
>
> The Chamber further recalls the general presumption of civilian status under IHL and that, in case of doubt, a person shall be considered to be a civilian. The present proceedings do not concern the determination of guilt of an accused beyond reasonable doubt, for which findings were already made in the [Conviction Decision]. The 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. In this regard, whether the applications actually fall within the scope of the positive findings made in the [Conviction Decision] for Kobu and Sayo will ultimately depend on the Chamber's assessment of the victims' account, as well as their coherence, credibility, and consistency.[339]

162. Regarding victims claiming to have suffered harm as a result of the crime of intentionally directing attacks against civilians (count 3), the Trial Chamber found:

> With regard to Mongbwalu and Sayo, the Chamber notes that the [Conviction Decision] found beyond reasonable doubt that the UPC/FPLC indiscriminately attacked all Lendu, civilians and fighters alike. It also recalled that the incidents under Count 3 relate to the intended object of the attacks and not to who was actually killed as a result of armed force, and as such found that the UPC/FPLC directed an attack against civilians. Similarly, the Chamber found that the UPC/FPLC soldiers fired indiscriminately against civilians in Bambu, and that no reasonable person could have believed that the civilians shot at during the assaults on Jitchu and Buli were directly participating in hostilities.
>
> In light of the findings made in the [Conviction Decision] and taking into account the presumption of civilian status under IHL, the Chamber considers that the account of persons claiming to be victims of Mongbwalu, Sayo, Bambu, Jitchu, and Buli shall be assessed on a case-by-case basis in order to determine whether they are persons protected under IHL. Consequently, the Chamber does not consider that the absence of information concerning the occupation of the victims (or of their immediate family members) in their dossiers precludes a finding, on a balance of probabilities, that the victims are entitled to reparations.[340]

b. Summary of the submissions

163. The Defence submits that the Trial Chamber erred in finding that, on a balance of probabilities, direct victims of the killing of people in Kobu and Sayo, were civilians not actively taking part in the hostilities or otherwise persons *hors de combat*.[341] The

[339] Impugned Decision, paras 108-109 (footnotes omitted).
[340] Impugned Decision, paras 111-112 (footnotes omitted).
[341] Defence Appeal Brief, paras 97-99, *referring to* Impugned Decision, para. 108.

Defence argues that a determination of the status of the victims concerned must be based upon the information contained in their dossiers, rather than being prejudged.[342] The Defence contends that the Trial Chamber erred in law by relying on the general presumption of civilian status under IHL to find that it did not consider that the absence of information about the occupation of the victims at the time of the alleged murder precludes a finding of eligibility.[343] The Defence requests the Appeals Chamber to issue a new order for reparations which, *inter alia*, sets out the requirement of obtaining information about the activities of the victims at the relevant times.[344]

164. Victims Group 1 argue that the Defence merely expresses disagreement with the approach taken by the Trial Chamber.[345]

165. Victims Group 2 submit that the Appeals Chamber should dismiss the Defence's arguments concerning the civilian status of victims, as the Defence previously litigated this issue and it has been adjudicated upon.[346] Victims Group 2 aver that, contrary to the Defence's contention, there is "nothing in the Chamber's findings which indicates that the victims' dossiers will not be assessed on a 'case by case basis in order to determine whether they are persons protected under IHL'".[347] Victims Group 2 submit that the Trial Chamber struck the right balance between the victims' difficulties in obtaining the relevant information and the convicted person's right to due process.[348] Referring to "the large extent of the victimisation" in the present case, Victims Group 2 disagree with the Defence's "rhetorical assessment" of the relevance of the presumption of civilian status, and submit that this presumption assists in the eligibility assessment.[349]

c. Determination by the Appeals Chamber

166. The Defence's main argument under this heading is that the Trial Chamber erred in law by relying upon the presumption of civilian status to find that victims may be found eligible even if they provide no information to demonstrate their occupation at the relevant time.[350] The Appeals Chamber is not persuaded by the Defence's arguments.

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[342] Defence Appeal Brief, paras 100, 103; *see also* para. 86.
[343] Defence Appeal Brief, paras 101-104, *referring to* Impugned Decision, para. 109.
[344] Defence Appeal Brief, para. 105.
[345] Victims Group 1's Response to the Defence Appeal Brief, para. 37.
[346] Victims Group 2's Response to the Defence Appeal Brief, paras 78-80.
[347] Victims Group 2's Response to the Defence Appeal Brief, para. 81 (emphasis in original omitted).
[348] Victims Group 2's Response to the Defence Appeal Brief, para. 82.
[349] Victims Group 2's Response to the Defence Appeal Brief, paras 83-84.
[350] Defence Appeal Brief, paras 101-103.

The Trial Chamber stated that it "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".[351] This ruling was primarily informed by the Trial Chamber's observation that "[t]he present proceedings do not concern the determination of guilt of an accused beyond reasonable doubt, for which findings were already made in the Conviction Judgment".[352] Indeed, in the present reparation proceedings, the Trial Chamber adopted "the 'balance of probabilities' test" and emphasised that it is "a less exacting standard of proof than trial proceedings".[353] Consistent with this less exacting standard, the Trial Chamber allowed for the possibility of also granting eligibility to victims whose applications do not provide information about "the occupation of the victims (or of their immediate family members) at the time of the alleged murder".[354]

167. It is in this context that the Trial Chamber referred to the presumption of civilian status. The Trial Chamber relied in this respect upon the Conviction Decision, in which the Trial Chamber recalled this presumption and concluded that "in the context of a criminal trial, the burden is on the Prosecution to establish the status of the victim as someone taking no active part in the hostilities".[355] By referring to this presumption in the Impugned Decision, the Trial Chamber thus emphasised the difference between the trial proceedings and the reparation proceedings. Unlike in the trial proceedings, in which the Prosecutor bore the burden of demonstrating the status of the victim as a person taking no active part in the hostilities, in the reparation proceedings, the Trial Chamber held that victims may be found eligible even if they provide no information to demonstrate their occupation at the relevant time.[356]

168. For these reasons, the Appeals Chamber finds that, contrary to the Defence's contention,[357] the Trial Chamber was mindful of the purpose of the presumption of civilian status. It was also mindful of the different standards of proof applicable to trial

[351] Impugned Decision, para. 109; *see also* para. 112.
[352] Impugned Decision, para. 109.
[353] Impugned Decision, para. 35.
[354] Impugned Decision, para. 109.
[355] Conviction Decision, para. 883.
[356] Impugned Decision, para. 109.
[357] Defence Appeal Brief, paras 101-103.

and reparation proceedings. While it is not entirely clear from the Impugned Decision whether the Trial Chamber considered the presumption of civilian status to be of relevance to the present reparation proceedings and, if so, why, the Appeals Chamber notes that, as will be discussed in more detail below, the Trial Chamber in any event concluded that each application would be assessed on a case-by-case basis.[358]

169. The Appeals Chamber also takes note of the Defence's argument that, rather than being prejudged, a determination that a person was not taking an active part in the hostilities at the relevant time should "be made […] based on the information included in his or her victim's dossier".[359] To the extent that the Defence suggests that the Trial Chamber failed to make a ruling to this effect, the Defence misrepresents the Impugned Decision. As rightly noted by Victims Group 2,[360] the Impugned Decision clearly expresses that a determination of eligibility in this regard will "depend on the Chamber's assessment of the victims' account, as well as their coherence, credibility, and consistency",[361] and that the victims' accounts "shall be assessed on a case-by-case basis in order to determine whether [the victims] are persons protected under IHL".[362] The Appeals Chamber therefore rejects this argument of the Defence.

170. To the extent that the Defence argues that the Trial Chamber ought to have required the authority assessing eligibility to obtain information about the victims' occupation at the time of the crimes,[363] the Appeals Chamber finds that, in view of the foregoing considerations, the Defence has not shown that the Trial Chamber's guidelines in this regard are not adequate. The Trial Chamber addressed the Defence's submissions in this respect and recalled the relevant findings in the Conviction Decision concerning the significance of the status and occupation of the victims.[364] Moreover, the Trial Chamber clearly indicated that the victims' accounts will be assessed on a case-by-case basis.[365] The body assessing eligibility at the implementation stage is thus sufficiently informed as regards the relevance of the victims' occupation at the time of the crimes to

[358] Impugned Decision, para. 112.
[359] Defence Appeal Brief, para. 100.
[360] Victims Group 2's Response to the Defence Appeal Brief, para. 81.
[361] Impugned Decision, para. 109.
[362] Impugned Decision, para. 112.
[363] Defence Appeal Brief, paras 104-105.
[364] Impugned Decision, paras 109-112.
[365] Impugned Decision, paras 109, 112.

a determination of eligibility and it is not precluded from seeking additional information if necessary and practicable.

171. For these reasons, the Appeals Chamber rejects the Defence's arguments regarding the status of victims under IHL.

5. *The alleged failure to require proof of the causal link*

a. Relevant procedural background

172. In the 2022 Appeals Chamber Judgment, the Appeals Chamber examined the Defence's allegation of an error in the Trial Chamber's findings on issues related to causation. It found no error in those findings, noting that, "[c]ontrary to the Defence's submissions, […] the Trial Chamber did refer to the proximate cause standard" and held that "breaks in the chain of causation […] should be taken into account".[366]

173. The Appeals Chamber also considered the Defence's argument that the Trial Chamber "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'".[367] The Appeals Chamber held that

> [t]o the extent that this [finding of the Trial Chamber] could be read as stating that breaks in the chain of causation are irrelevant, it would be incorrect. However, 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. This sentence must be read in that light: that is, that the issue will not arise if an applicant falls within the scope of the [Conviction Decision], meets the evidentiary threshold, and provides sufficient proof of the causal link, with any alleged breaks in the chain of causation having been assessed. In this regard, the Trial Chamber explicitly stressed that the applicant shall provide sufficient proof of the causal link.[368]

174. In the Impugned Decision, the Trial Chamber recalled that "victims eligible for reparations must provide sufficient proof of identity, of the harm suffered, and of the causal link between the crime and the harm".[369] It found that

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[366] 2022 Appeals Chamber Judgment, para. 569.
[367] 2022 Appeals Chamber Judgment, para. 570 (emphasis in original), *referring to* 2021 Reparations Order, para. 134.
[368] 2022 Appeals Chamber Judgment, para. 570, *referring to* 2021 Reparations Order, para. 135.
[369] Impugned Decision, para. 34; *see also* regarding child soldiers, para. 38(iv); regarding child soldiers who are also victims of sexual or gender-based crimes, children born out of rape or sexual slavery, and indirect victims of these crimes, para. 39(iv); regarding victims of attacks, para. 40(iv).

> 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 [elsewhere in the Impugned Decision], the causal link between the harm and the crimes of which Mr Ntaganda was convicted is also established.[370]

b. Summary of the submissions

175. The Defence submits that the Trial Chamber erred by holding that "once a person demonstrates [his or her] status as a direct or indirect victim, and the harm is either presumed or established, then the causal link requirement is also established".[371] The Defence argues that this "circular reasoning" disregards the importance of establishing the causal link and the need to assess whether breaks in the chain of causation affect the determination of eligibility.[372] The Defence avers that the part of the Impugned Decision detailing "the required information regarding each of the conditions of eligibility" does not mention any requirement to provide proof of the causal link between the crime and the harm suffered, nor any potential breaks in the chain of causation.[373]

176. Victims Group 1 argue that the Defence merely expresses disagreement with the approach taken by the Trial Chamber.[374]

177. Victims Group 2 submit that the Defence presents a mere disagreement with the Impugned Decision and attempts to relitigate the issue of the causal link, whereas the Appeals Chamber already ruled that the Trial Chamber had committed no error in this regard in the 2021 Reparations Order.[375]

c. Determination by the Appeals Chamber

178. The Defence argues that the Trial Chamber disregarded the importance of establishing the causal link and the need to assess whether breaks in the chain of causation affect the determination of eligibility by holding that, once a person demonstrates his or her status as a victim, and harm to that person is presumed or established, the causal link is also established.[376]

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[370] Impugned Decision, para. 134.
[371] Defence Appeal Brief, paras 106-108, 112.
[372] Defence Appeal Brief, para. 107; *see also* para. 87.
[373] Defence Appeal Brief, para. 110.
[374] Victims Group 1's Response to the Defence Appeal Brief, para. 37.
[375] Victims Group 2's Response to the Defence Appeal Brief, paras 86-88.
[376] Defence Appeal Brief, paras 106-108, 112; *see also* para. 87.

179. The Appeals Chamber recalls that the Defence raised a similar issue in its appeal against the 2021 Reparations Order and that the Appeals Chamber found no error in the Trial Chamber's findings in this respect.[377] The Appeals Chamber interpreted the Trial Chamber's findings as follows: "the issue will not arise if an applicant falls within the scope of the [Conviction Decision], meets the evidentiary threshold, and provides sufficient proof of the causal link, with any alleged breaks in the chain of causation having been assessed".[378] Contrary to the Defence's contention, the Impugned Decision does not differ in this respect from the 2021 Reparations Order.

180. In the Impugned Decision, the Trial Chamber held that "the causal link between the harm and the crimes of which Mr Ntaganda was convicted is […] established", "as long as the victims demonstrate their status as direct and indirect victims" and where, "on that basis, their harm is presumed, or it has been established" in accordance with the guidelines set out in the Impugned Decision.[379] However, contrary to the Defence's argument that "that is the end of the inquiry",[380] the Trial Chamber clearly indicated that "victims eligible for reparations must provide sufficient proof of […] the causal link between the crime and the harm".[381]

181. The Appeals Chamber therefore considers that the Defence misrepresents the Impugned Decision by arguing that "in the paragraphs that follow [the aforementioned finding], 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".[382] As mentioned above, this requirement is clearly set out, albeit in a different part of the Impugned Decision.[383] The inclusion of this requirement in the general section of the Impugned Decision on "Evidentiary criteria and standard of proof" is certainly not indicative of a failure "to attach the required importance to the establishment of the causal link", as the Defence suggests.[384]

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[377] 2022 Appeals Chamber Judgment, para. 569.
[378] 2022 Appeals Chamber Judgment, para. 570, *referring to* 2021 Reparations Order, para. 135.
[379] Impugned Decision, para. 134.
[380] Defence Appeal Brief, paras 108, 110.
[381] Impugned Decision, para. 34; *see also* regarding child soldiers, para. 38(iv); regarding child soldiers who are also victims of sexual or gender-based crimes, children born out of rape or sexual slavery, and indirect victims of these crimes, para. 39(iv); regarding victims of attacks, para. 40(iv).
[382] Defence Appeal Brief, para. 110.
[383] Impugned Decision, para. 34; *see also* para. 36.
[384] Defence Appeal Brief, para. 107.

182. Furthermore, the Trial Chamber also addressed the issue of potential breaks in the chain of causation. For instance, when discussing the evidentiary criteria to prove transgenerational harm, the Trial Chamber indicated that it considered "relevant to take into account whether, after having suffered the crimes, the direct victim(s) lived and had a child in a relatively safe area or not, in order to account for the possible breaks in the chain of causation".[385] Similarly, in its determination of a causal nexus between the harm resulting from the attack on the Sayo health centre and Mr Ntaganda's liability, the Trial Chamber addressed and rejected the Defence's submissions regarding the alleged breaks in the chain of causation.[386] It is therefore not the case that the Trial Chamber's findings "[disregard] entirely the need to assess whether breaks in the chain of causality impact the eligibility determination".[387]

183. Similarly, in light of the aforementioned findings of the Trial Chamber, the Appeals Chamber cannot agree with the Defence's contention that the Trial Chamber "is instructing the authority responsible for making the assessment that once it finds that a potential victim has demonstrated his or her status and the harm is presumed […] or established, there is no need to look for any evidence provided by the potential victim establishing the causal link requirement".[388]

184. In view of the foregoing, the Appeals Chamber rejects the Defence's arguments regarding the causal link.

6. *Overall conclusion*

185. For the above reasons, the Appeals Chamber rejects the Defence's fourth ground of appeal.

E. Ground of appeal 5: Alleged failure to provide the Defence with a meaningful opportunity to assess and make submissions on the dossiers of the victims in the Sample

186. Under its fifth ground of appeal, the Defence submits that the Trial Chamber erred by failing to provide the Defence with a meaningful opportunity to assess and make

[385] Impugned Decision, para. 190.
[386] Impugned Decision, paras 220, 238.
[387] Defence Appeal Brief, para. 107.
[388] Defence Appeal Brief, para. 112.

submissions on the dossiers of the victims in the Sample.[389] It alleges two specific categories of error in this regard. First, that the Trial Chamber erred in rejecting the Defence's request for redactions to be lifted from information provided by victims in the Sample.[390] Second, that the Trial Chamber erred by dismissing the Defence's request for disclosure of information in the possession of the TFV.[391]

1. Relevant procedural background

a. The 2022 Appeals Chamber Judgment

187. In the 2022 Appeals Chamber Judgment, the Appeals Chamber held that, in the 2021 Reparations Order, the Trial Chamber had erred by failing to rule on at least a sample of applications from victims for reparations.[392] It further held that the Trial Chamber should therefore take at least a sample of applications into account when considering the matter of the number of beneficiaries and the amount of the award anew.[393]

188. The Appeals Chamber found that, as a result of the above error, the Defence had been unable to participate in the assessment of the "eligibility of victims to benefit from reparations", which the Trial Chamber should have undertaken as part of its review of a sample.[394] The Appeals Chamber proceeded to find that, since the amount of the award for reparations should be based, *inter alia*, on at least a sample of applications, the Defence must: (i) be "able to challenge this information by means of reviewing the applications and making representations thereon"; and (ii) be "on notice as to the manner in which the Trial Chamber intends to assess the information".[395] In the context of considering that the Defence would need to be provided with a reasonable opportunity to rebut presumptions at the time when the Trial Chamber assessed a sample of applications, the Appeals Chamber observed that, "in granting the Defence access to the victims' applications, the necessary redactions shall be made to protect the victims'

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[389] Defence Appeal Brief, para. 114; *see generally* paras 79, 114-148.
[390] Defence Appeal Brief, paras 116-132, 147-148.
[391] Defence Appeal Brief, paras 116-117, 133-148.
[392] 2022 Appeals Chamber Judgment, para. 345.
[393] 2022 Appeals Chamber Judgment, para. 346.
[394] 2022 Appeals Chamber Judgment, para. 363.
[395] 2022 Appeals Chamber Judgment, para. 363 (footnote omitted); *see also* para. 361, para. 757, fn 1672.

safety, physical and psychological well-being, dignity and privacy, pursuant to article 68 of the Statute".[396]

b. Trial Chamber proceedings further to the 2022 Appeals Chamber Judgment

189. Pursuant to the 2022 Appeals Chamber Judgment, the Trial Chamber issued a number of decisions that addressed the question of redactions, as well as information that it initially requested – and that the Defence continued to seek – from the TFV.[397]

190. These decisions are elaborated further below as a part of the Appeals Chamber's determination of the merits. Of particular relevance for the issues that arise in this ground is the redactions regime that was established by the Order of 25 October 2022 and the Decision of 25 November 2022, in which the Trial Chamber held that, where victims did not consent to their identities being disclosed to the Defence, only information that might reveal their identities, current residence or other contact information that may be used to locate the victims should be redacted; and that if the victims were to consent to their identities being disclosed to the Defence, only information that might reveal their current residence or other contact information that could be used to locate them should be redacted.[398] The Trial Chamber subsequently rejected a request by the Defence to lift certain redactions that had been applied further to the above regime, holding that the relevant balance had been struck between enabling the Defence to make meaningful submissions on the victims' eligibility and the protection of the victims.[399] In the Impugned Decision, in response to further submissions from the Defence taking issue with the redactions that had been applied to the victims' dossiers, the Trial Chamber reiterated that the redactions implemented struck the necessary balance required by article 68(1) of the Statute and that, notwithstanding the redactions, the Defence had been able to make meaningful submissions.[400]

191. In relation to the issues that arise in this ground related to the provision of information by the TFV, in the Decision of 25 November 2022 the Trial Chamber

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[396] 2022 Appeals Chamber Judgment, para. 689, *referring to* 2019 *Lubanga* Appeals Chamber Judgment, paras 249-254, 256.
[397] *See* Order of 25 October 2022; Decision of 25 November 2022; Decision on the Defence Request of 29 March 2023; Impugned Decision.
[398] Decision of 25 November 2022, para. 30.
[399] Decision on the Defence Request of 29 March 2023, para. 22.
[400] Impugned Decision, paras 63, 65.

instructed the TFV to provide the Trial Chamber and the parties with any relevant information or documentation that it had taken into account when reaching the administrative decision on the 69 victims already found eligible for the IDIP.[401] Averring that it had not received any such information,[402] the Defence subsequently requested the Trial Chamber to order the TFV to communicate that information to the Trial Chamber and to the parties.[403] The Trial Chamber rejected that request on the basis that the Defence had received all available information and documentation required to assess and make meaningful submissions on the victims' dossiers.[404] In the Impugned Decision, in response to further submissions from the Defence on this issue, the Trial Chamber stated that, in ruling on eligibility, it had relied upon the victims' dossiers, the parties' submissions on the Sample and any additional information that they had provided; and that the Defence had had access "to all the relevant information" in redacted form.[405]

2. *Summary of the submissions*

a. Defence's submissions

192. First, by reference to various parts of the proceedings before the Trial Chamber, including submissions that it made, the Defence avers that the Trial Chamber made errors relating to redactions.[406] In this regard, it refers to, *inter alia*, findings in the Impugned Decision in relation to the time allocated to the Defence to analyse the 171 dossiers of the victims;[407] and challenges findings in the Impugned Decision: (i) that the Defence had received victims' dossiers with appropriate redactions on which it had been able to make submissions;[408] and (ii) that, notwithstanding the redactions, the Defence had been able to make meaningful submissions on the eligibility of the victims.[409] In that latter regard, the Defence argues that its submissions "would have been much more detailed and meaningful" had the Trial Chamber lifted the redactions that it requested, referring to the redactions of the names of commanders as an example.[410] The Defence submits that the Trial Chamber made "multiple errors" in its

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[401] Decision of 25 November 2022, para. 34(f), p. 23.
[402] Defence Request of 29 March 2023, para. 6.
[403] Defence Request of 29 March 2023, paras 1, 4-10, 24.
[404] Decision on the Defence Request of 29 March 2023, para. 15.
[405] Impugned Decision, paras 140, 142.
[406] Defence Appeal Brief, paras 116-132, 147-148.
[407] Defence Appeal Brief, paras 119-121, *referring to* Impugned Decision, para. 32.
[408] Defence Appeal Brief, para. 122, *referring to* Impugned Decision, para. 121.
[409] Defence Appeal Brief, para. 132, *referring to* Impugned Decision, para. 65.
[410] Defence Appeal Brief, para. 132.

Decision on the Defence Request of 29 March 2023 in relation to redactions, setting out six specific alleged errors.[411]

193. Second, the Defence argues that the Trial Chamber, contrary to its previous instructions in its Decision of 25 November 2022, erred by dismissing the requests of the Defence for the disclosure of information in the possession of the TFV.[412] By reference to various parts of the proceedings before the Trial Chamber,[413] including submissions that it made,[414] the Defence argues that, in its Decision on the Defence Request of 29 March 2023, the Trial Chamber erred in finding that the Defence had "received all available information and documentation required for it to assess and make meaningful submissions on the victims' dossiers";[415] and that neither the Trial Chamber nor the Defence received all information and documentation that was available to the TFV in determining the eligibility of all victims found eligible to benefit from the IDIP programme.[416] The Defence submits that the Trial Chamber made "multiple errors" in its Decision on the Defence Request of 29 March 2023 in relation to the provision of material in the possession of the TFV, setting out five specific alleged errors.[417]

b. Victims Group 1's submissions

194. Victims Group 1 argue that the Defence's contention that it was not given a meaningful opportunity to make observations on the victims' dossiers "is plainly incorrect and misleading".[418] They submit that the Defence was able to provide a 19-page filing accompanied by an annex of 171 pages, containing a detailed assessment of each of the victims' dossiers, which the Trial Chamber took into account.[419] They further submit that the Defence's arguments that redactions put in place to protect victims were unnecessary are contrary to its own submissions about the volatile security situation in Ituri and the formation of new militias.[420]

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[411] Defence Appeal Brief, para. 131.
[412] Defence Appeal Brief, paras 116-117, 133-148.
[413] Defence Appeal Brief, paras 133-145.
[414] Defence Appeal Brief, paras 138, 141-142.
[415] Defence Appeal Brief, paras 144-145.
[416] Defence Appeal Brief, para. 145.
[417] Defence Appeal Brief, para. 146.
[418] Victims Group 1's Response to the Defence Appeal Brief, para. 45; *see also* para. 47.
[419] Victims Group 1's Response to the Defence Appeal Brief, paras 44, 46, *referring to* Defence Submissions on the Sample; Confidential Annex A to the Defence Submissions on the Sample; *see also* para. 48.
[420] Victims Group 1's Response to the Defence Appeal Brief, para. 48.

195. Victims Group 1 submit that the Defence relinquished its right to seek leave to appeal the Decision on the Defence Request of 29 March 2023, in which issues relating to redactions were addressed, and that those issues do not arise out of the Impugned Decision, which renders this ground of appeal moot.[421] They contend that the Defence's arguments in relation to information in the possession of the TFV were also adjudicated in the Decision on the Defence Request of 29 March 2023, which the Defence did not appeal and cannot now raise because they do not arise out of the Impugned Decision.[422] They further contend that "it would appear that this ground of appeal is now moot" in light of "the recent declaration made by Mr Ntaganda".[423]

196. Victims Group 1 submit that the fifth ground of the Defence appeal should therefore be dismissed.[424]

c. Victims Group 2's submissions

197. Victims Group 2 argue that the issues the Defence raises under this ground of appeal were previously addressed by the Trial Chamber in decisions that the Defence did not seek leave to appeal.[425] As such, they aver that the issues do not arise out of the Impugned Decision.[426] Victims Group 2 submit that, in its Decision of 25 November 2022, the Trial Chamber set out a procedure for dossiers of victims to be transmitted to the Defence with redactions based upon whether the victims consented to their identities being disclosed, as well as a procedure whereby the Defence could challenge redactions that had been applied.[427] They further submit that, in its Decision on the Defence Request of 29 March 2023, the Trial Chamber rejected the Defence's arguments in relation to redactions,[428] as well as its request for information in the possession of the TFV.[429]

198. Victims Group 2 submit that the fifth ground of the Defence appeal should therefore be dismissed.[430]

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[421] Victims Group 1's Response to the Defence Appeal Brief, para. 48.
[422] Victims Group 1's Response to the Defence Appeal Brief, para. 49.
[423] Victims Group 1's Response to the Defence Appeal Brief, para. 50.
[424] Victims Group 1's Response to the Defence Appeal Brief, para. 51.
[425] Victims Group 2's Response to the Defence Appeal Brief, paras 90, 95-96.
[426] Victims Group 2's Response to the Defence Appeal Brief, paras 90, 95-96.
[427] Victims Group 2's Response to the Defence Appeal Brief, para. 91, *referring to* Decision of 25 November 2022, para. 30.
[428] Victims Group 2's Response to the Defence Appeal Brief, paras 92-93.
[429] Victims Group 2's Response to the Defence Appeal Brief, para. 94.
[430] Victims Group 2's Response to the Defence Appeal Brief, para. 96.

3. Determination by the Appeals Chamber

a. Preliminary issues

i. Whether the Defence is entitled to raise this ground of appeal

199. The Appeals Chamber notes that, without reference to any authority or to the findings in the Impugned Decision in relation to redactions and information within the possession of the TFV, both groups of victims contend that this ground of appeal should be rejected on the basis that it arises out of decisions of the Trial Chamber for which leave to appeal was not sought at the time and in relation to which the Defence has therefore relinquished its right to appeal; and that the issues do not arise out of the Impugned Decision.[431]

200. The Appeals Chamber observes that the Defence, *inter alia*, alleges "multiple errors" arising out of the Decision on the Defence Request of 29 March 2023, relating to both redactions and information within the possession of the TFV.[432] The Defence did not seek leave to appeal that decision pursuant to article 82(1)(d) of the Statute at the time that it was issued.

201. In that regard, the Appeals Chamber recalls that, in the 2022 Appeals Chamber Judgment, it observed that article 82(1)(d) of the Statute "does not require parties to seek leave in the circumstances described in that provision, but provides that they '*may*' do so".[433] Furthermore, the Appeals Chamber reiterated that it had found that, "not seeking leave to appeal a matter arising in the proceedings leading up to another decision subsequently impugned on appeal does not necessarily preclude the appellant from bringing that matter in the appeal",[434] citing, *inter alia*, to its previous finding in an appeal under article 82(1)(a) of the Statute that

> an appellant is not precluded from raising in an appeal [...] errors which arise out of a decision issued in the proceedings leading up to the decision impugned on

[431] Victims Group 1's Response to the Defence Appeal Brief, paras 48-49, 51; Victims Group 2's Response to the Defence Appeal Brief, paras 90, 95-96.
[432] *See*, *in particular*, Defence Appeal Brief, paras 131, 146.
[433] 2022 Appeals Chamber Judgment, para. 738 (footnote omitted).
[434] 2022 Appeals Chamber Judgment, para. 738 (footnote omitted).

appeal and which 'may be germane to the legal correctness or procedural fairness of the Chamber's decision [impugned on appeal]'.[435]

202. The Appeals Chamber further observed that, while it "may determine that a party was expected to seek leave to appeal a matter decided in the course of the proceedings, this depends on the circumstances of each case".[436] More generally in that regard, the Appeals Chamber observes that it may be advantageous to a party to seek leave to appeal under article 82(1)(d) of the Statute at the time that the issue arises, which also contributes to ensuring that issues are potentially resolved at the earliest opportunity. The purpose of article 82(1)(d) of the Statute is to resolve such procedural issues that would significantly affect the fairness and expeditiousness of proceedings or the outcome of a trial at an early stage, particularly when this is appreciable at the time that the parties have the possibility to request leave to appeal.

203. In determining whether the Defence's failure to seek leave to appeal in the present case deprives it of the ability to appeal now, the Appeals Chamber recalls that similar arguments to those raised by both groups of victims were addressed in the 2019 *Lubanga* Appeals Chamber Judgment. In that judgment it was held that the fact that the trial chamber in that case had ruled on the issue of redactions during the course of the reparation proceedings did not preclude Mr Lubanga from raising that issue in his final appeal, "as any decisions thereon were procedural decisions prior to, and leading up to, [the] issuance of the [impugned decision in that case]".[437]

204. The same is true in the present case. The Trial Chamber's rulings, during the course of the reparation proceedings, on redactions and access to information concerning the victims in the Sample were procedural decisions prior to, and leading up to, the Impugned Decision. It was in the Impugned Decision that the Trial Chamber ruled upon the eligibility of the victims in the Sample, based upon information contained within their dossiers to which the arguments of the Defence under this ground of appeal relate. Decisions taken during the course of the proceedings that related to information that had been redacted from, or not supplied as a part of, the information contained within the

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[435] 2022 Appeals Chamber Judgment, para. 738, fn 1650, *referring to*, *inter alia*, *Kony et al.* OA3 Appeal Judgment, para. 46.
[436] 2022 Appeals Chamber Judgment, para. 738 (footnote omitted).
[437] 2019 *Lubanga* Appeals Chamber Judgment, para. 245 (footnote omitted); *see also* para. 243.

dossiers of those victims are therefore germane to the legal correctness or procedural fairness of the Impugned Decision in the circumstances of the present case.

205. Furthermore, the Appeals Chamber observes that the Trial Chamber referred to the issues which form the subject matter of the present ground of appeal in the Impugned Decision. Indeed, as noted above,[438] the Defence expressly challenges findings in the Impugned Decision that: (i) "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";[439] and that (ii) "notwithstanding the redactions, the Defence has been able to make meaningful submissions on the victims' eligibility".[440]

206. Moreover, in challenging the Trial Chamber's above conclusion, the Defence argues that specific subsequent findings in the Impugned Decision demonstrate that its submissions would have been more meaningful had the redaction of the names of commanders mentioned by child soldier victims in the Sample been lifted.[441] The Defence is thereby using specific findings in the Impugned Decision to demonstrate what it alleges was the prejudice that it experienced from the rejection of its earlier request to have certain redactions lifted.

207. The Appeals Chamber further notes that, in response to the Defence Submissions on the Sample – which were filed after the Decision on the Defence Request of 29 March 2023 – the Trial Chamber, in the Impugned Decision, reiterated "that the redactions implemented […] to the victims' dossiers, including information that might reveal their identity, strikes the necessary balance required by article 68(1) of the Statute".[442]

208. Similarly, in response to further submissions in the Defence Submissions on the Sample that the Defence had not received information in the possession of the TFV, the Trial Chamber found, in the Impugned Decision, that the Defence "had access to all the relevant information".[443]

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[438] *See* paragraph 192 above.
[439] Impugned Decision, para. 121. *See* Defence Appeal Brief, para. 122.
[440] Impugned Decision, para. 65. *See* Defence Appeal Brief, para. 132.
[441] Defence Appeal Brief, para. 132, *referring to* Impugned Decision, paras 74-75.
[442] Impugned Decision, paras 63, 65.
[443] Impugned Decision, paras 140, 142.

209. The Appeals Chamber therefore finds that the issues raised by the Defence in this ground of appeal arise out of the Impugned Decision and that the Defence is not precluded from alleging that errors were committed in the Decision on the Defence Request of 29 March 2023, notwithstanding that it did not seek leave to appeal that decision. It therefore rejects the arguments raised by both groups of victims in this regard.

ii. Whether this ground of appeal is moot

210. The Appeals Chamber is not persuaded by Victims Group 1's submissions that this ground of appeal is moot in light of "the recent declaration made by Mr Ntaganda himself" in which, they argue, he concluded that: "*it was time for me to stand down and to trust the Court for the implementation of reparations. […] I intend to stand down and refrain from making further submissions*".[444]

211. The Appeals Chamber observes that Victims Group 1 have omitted a relevant part of the quoted statement, which, read as a whole, cannot be understood to mean that Mr Ntaganda does not intend to pursue the arguments raised within the fifth ground of this appeal.[445]

212. The submissions of Victims Group 1 that this ground of appeal now appears moot are therefore without merit and are rejected.

iii. Conclusion on the preliminary issues

213. In light of its above findings on the preliminary issues, the Appeals Chamber will proceed to consider this ground of appeal on its merits.

b. Merits

214. The Defence submits that that the Trial Chamber failed to provide it with a meaningful opportunity to assess and make submissions on the dossiers of the victims

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[444] Victims Group 1's Response to the Defence Appeal Brief, para. 50 (emphasis in original), *referring to* Statement of Mr Ntaganda, pp. 1, 3.
[445] "As for the reparations process – **other than the ongoing appeal, which I have instructed my Counsel to continue because I believe it is important to ensure that only genuine victims receive reparations** – I intend to stand down and refrain from making further submissions" (Statement of Mr Ntaganda, pp. 2-3 (emphasis added)).

in the Sample.[446] It divides its submissions into two categories of error, which the Appeals Chamber will consider in turn.

i. Alleged errors relating to redactions

215. The Defence contends that two findings in the Impugned Decision in relation to redactions and the Defence's ability to make meaningful submissions on the eligibility of victims in the Sample were incorrect,[447] as well as submitting that the Trial Chamber made "multiple errors" in the Decision on the Defence Request of 29 March 2023 in relation to redactions.[448]

216. In addition, the Appeals Chamber notes at the outset that the Defence refers to a finding in the Impugned Decision in relation to the time that the Defence had been afforded to review and analyse the Sample.[449] However, the Defence states that "this is not the main thrust of this ground"[450] and does not specifically allege an error in this regard, nor put forward any arguments that would be capable of substantiating either an error or its alleged material effect on the Impugned Decision. The Appeals Chamber will therefore not further consider this issue. Insofar as the Defence may have intended to allege any error in this regard, its arguments are dismissed *in limine*.

217. In order to address the errors alleged by the Defence in relation to redactions, the Appeals Chamber will first set out the applicable law, prior to elaborating the manner in which the Trial Chamber addressed the question of redactions during the proceedings. It will thereafter address the six specific errors alleged by the Defence in relation to the Decision on the Defence Request of 29 March 2023 and the Defence's additional argument concerning the Defence's ability to make meaningful submissions.

(a) Previous determinations by the Appeals Chamber on redactions in reparation proceedings

218. In the 2022 Appeals Chamber Judgment, in considering the Defence's involvement in the eligibility assessment of victims in this case, the Appeals Chamber,

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[446] Defence Appeal Brief, para. 114; *see generally* paras 79, 114-148.
[447] Defence Appeal Brief, paras 122, 132.
[448] Defence Appeal Brief, para. 131.
[449] Defence Appeal Brief, paras 119-121, *referring to* Impugned Decision, para. 32.
[450] Defence Appeal Brief, para. 120.

having noted article 75(3) of the Statute and rule 94(2) of the Rules,[451] recalled that "[t]he convicted person must be given a sufficient opportunity to make submissions".[452]

219. In further observing that necessary redactions pursuant to article 68 of the Statute would need to be made when the Defence was granted access to the applications of victims, the Appeals Chamber cited to its previous jurisprudence in relation to the issue of redactions in the reparation context.[453] The principles stated therein are reiterated below.

220. In the 2019 *Lubanga* Appeals Chamber Judgment, it was held that, subject to certain conditions below being met, "any [victims'] dossiers should […] be notified to the convicted person in a timely manner allowing him or her to have adequate time to make representations thereon".[454]

221. The Appeals Chamber noted that rule 97(3) of the Rules provides that, "[i]n all cases, the Court shall respect the rights of victims and the convicted person"; that the right to a fair and impartial trial in this context must be understood to be the right of a convicted person to fair and impartial reparation proceedings; that the Appeals Chamber would be guided by human rights jurisprudence, including the principle of equality of arms in an adversarial proceeding which, in principle, is the same in both civil and criminal cases and upon which the Appeals Chamber elaborated; but that reparation "proceedings before this Court are *sui generis* and, therefore, the principles set out above apply to the [reparation] proceedings where appropriate and in accordance with how they are being conducted in each case".[455]

222. The Appeals Chamber proceeded to consider the possible limitations that may be made to the provision of information to the convicted person as follows:

> [I]n notifying requests for reparations, rule 94(2) of the Rules provides for notification to be 'subject to any protective measures'. Protective measures are addressed in article 68(1) of the Statute, which provides that '[t]he Court shall take appropriate measures to protect the safety, physical and psychological well-being,

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[451] 2022 Appeals Chamber Judgment, paras 359-360.
[452] 2022 Appeals Chamber Judgment, para. 361, *referring to* 2019 *Lubanga* Appeals Chamber Judgment, para. 90.
[453] 2022 Appeals Chamber Judgment, para. 689, *referring to* 2019 *Lubanga* Appeals Chamber Judgment, paras 249-254, 256.
[454] 2019 *Lubanga* Appeals Chamber Judgment, para. 247.
[455] 2019 *Lubanga* Appeals Chamber Judgment, para. 248.

> dignity and privacy of victims. […]. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial'.[456]

223. The Appeals Chamber continued by noting how the issue of withholding information from the convicted person at the reparation stage of proceedings had been addressed in its judgment in the *Al Mahdi* case,[457] referring to the different factual situation that arose in that case when compared with *Lubanga*.[458] In the quoted parts of the *Al Mahdi* Appeals Chamber Judgment, the Appeals Chamber had reiterated its previous findings, made in the context of criminal proceedings, that "a chamber should apply the principle of proportionality […], taking into account the 'various interests involved'",[459] and referred to "appropriate factors" which a chamber should take into consideration and balance, namely:

> a thorough consideration of the danger that the disclosure of the identity of the person may cause; the necessity of the protective measure, including whether it is the least intrusive measure necessary to protect the person concerned; and the fact that any protective measures taken shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.[460]

224. In the 2019 *Lubanga* Appeals Chamber Judgment, the Appeals Chamber recognised that "the right to receive information in proceedings at this Court may be limited in certain circumstances".[461] In particular, the Appeals Chamber noted that

> the guiding principle for trial chambers must be to ensure that the convicted person, as a party to the litigation, has a meaningful opportunity to challenge the information on the basis of which a chamber will make an award against him or her. In reaching a decision on redactions to any information that is before it, trial chambers should apply the principles recalled in the *Al Mahdi* case above, weighing the different interests at stake. In doing so, the Appeals Chamber considers that in [reparation] proceedings, a trial chamber should also take into account the relevance of the information at issue and the purpose for which it will be relied upon, including whether, in reality, its non-disclosure affects the convicted person's rights. For example, if the information in the requests is considered with a view to deciding on collective reparations but not with a view

[456] 2019 *Lubanga* Appeals Chamber Judgment, para. 249.
[457] *Al Mahdi* Appeals Chamber Judgment.
[458] 2019 *Lubanga* Appeals Chamber Judgment, paras 250-252.
[459] 2019 *Lubanga* Appeals Chamber Judgment, para. 253, *quoting* *Al Mahdi* Appeals Chamber Judgment, para. 90.
[460] 2019 *Lubanga* Appeals Chamber Judgment, para. 253, *quoting* *Al Mahdi* Appeals Chamber Judgment, para. 90, *referring to* *Katanga and Ngudjolo* OA5 Appeal Judgment, para. 35.
[461] 2019 *Lubanga* Appeals Chamber Judgment, para. 254.

to deciding on the merits of the individual requests, this may also be taken into account. What this means will depend on the circumstances of each case.[462]

(b) Relevant Trial Chamber proceedings

225. In its Order of 25 October 2022, the Trial Chamber noted the observation of the Appeals Chamber that, in granting the Defence access to the applications, necessary redactions shall be made to protect victims pursuant to article 68 of the Statute.[463] In light of this observation and in accordance with the redactions protocol[464] adopted in the case, the Trial Chamber proceeded to state that:

> [W]ith a view to safeguard[ing] the rights of the Defence while providing for an appropriate measure of protection for the victims, as set forth in article 68(1) of the Statute, the Registry is instructed to redact any identifying information from the victims' dossiers before transmitting them to the parties […].
>
> The Chamber notes, 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. Should 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 […].[465]

226. In its Decision of 25 November 2022, the Trial Chamber ruled on submissions of the Defence that, *inter alia*, the redactions procedure should be as it was in the *Lubanga* case, in which identities were not redacted if the victims concerned had consented to their disclosure to the Defence; and that provision should be made for a clear dispute settlement mechanism for redactions.[466] The Trial Chamber stated that the security concerns of the victims "are always paramount", but that it did not disagree in principle with the identities of victims in the Sample being disclosed to the Defence if the victims consented to that course.[467] It therefore instructed the legal representatives of the victims to consult with the victims about whether they would consent to their identities being

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[462] 2019 *Lubanga* Appeals Chamber Judgment, para. 256.
[463] Order of 25 October 2022, para. 35, *referring to* 2022 Appeals Chamber Judgment, para. 689.
[464] Order of 25 October 2022, para. 35, *referring to* Decision Establishing Principles on the Victims' Application Process, paras 42-43 which state, *inter alia*, that the redaction of information is the exception to the principle of full disclosure, that there should be limited redactions of only identifying information of the victim whenever a need for protection is detected by the VPRS or an applicant did not wish his or her identity to be disclosed and that any redaction should abide by the principle of proportionality.
[465] Order of 25 October 2022, paras 35-36 (footnote omitted).
[466] Decision of 25 November 2022, paras 28-30, *referring to* Defence Submissions on the Procedure for the Constitution of the Sample, paras 47-55.
[467] Decision of 25 November 2022, para. 29.

disclosed; and to inform the VPRS of the outcome so that it could implement redactions in accordance with the criteria set out by the Trial Chamber and transmit the redacted victims' dossiers to the Defence on a rolling basis.[468] The Trial Chamber ruled that:

> In order to strike a balance between the need to provide for an appropriate measure of protection for the victims, as set forth in article 68(1) of the Statute, and safeguarding the rights of the Defence, the Chamber established in its [Order of 25 October 2022] a fair redactions procedure whereby *only* the information that might reveal the identities of victims, current residence or other contact information that may be used to locate the victims should be redacted, and *not* 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. […] [I]f the victims consent to their identities being disclosed to the Defence, the Registry should proceed 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. These provisions confer the appropriate protection for the [victims] while enabling 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. In light of the above, the Chamber reiterates its instruction to the Registry, as supported by [the legal representatives of the victims] to only apply uniformly to all victims' dossiers the limited redactions as detailed in the [Order of 25 October 2022] and in the present Decision.[469]

227. Specifically in terms of the mechanism for resolving disputes related to redactions, the Trial Chamber further 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".[470]

228. In four separate filings from 11 January to 6 February 2023, the VPRS transmitted a total of 171 redacted dossiers of victims to the Defence and the relevant legal representative of victims.[471] In those filings, the VPRS reported that the legal representatives of the victims had informed the VPRS that: (i) none of a total of 94 victims who had been consulted had consented to the disclosure of their identity to

[468] Decision of 25 November 2022, paras 29, 34(b)-(d), p. 23.
[469] Decision of 25 November 2022, para. 30, *referring to* Order of 25 October 2022, para. 36.
[470] Decision of 25 November 2022, para. 30, p. 23.
[471] *See* Registry's First Transmission to the Defence of 28 Redacted Victim Dossiers, para. 9; Registry's Second Transmission to the Defence of 50 Redacted Victim Dossiers, para. 10; Registry's Third Transmission to the Defence of 92 Redacted Victim Dossiers, para. 12; Registry's Transmission to the Defence of One Redacted Victim Dossier, para. 15.

the Defence;[472] (ii) it had not been possible to consult with 68 victims;[473] and (iii) the identities of 10 victims should not be redacted as they were already known to the Defence.[474]

229. In its Decision on the Defence Request of 29 March 2023, the Trial Chamber ruled upon the Defence's request for the Trial Chamber to review and order the lifting of certain redactions, referring to the Defence's submissions that the redactions lacked objective justification, impeded its ability meaningfully to challenge the eligibility of the victims in the Sample and went beyond the redaction procedure that had been set out,[475] as well as referring to the arguments of both groups of victims and observations of the Registry in response.[476] The Trial Chamber recalled that, in setting out the procedure for redactions to the dossiers of the victims, it had taken into account the jurisprudence of the Appeals Chamber and had established a procedure based upon whether or not the victims consented to their identities being disclosed to the Defence, so as to safeguard its rights while providing an appropriate measure of protection for the victims.[477] In rejecting the Defence's request, the Trial Chamber concluded as follows:

> The Chamber is of the view that, in light of the dire security situation in Ituri, the victims' security concerns [are] genuine and objective. The Chamber also considers 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. Accordingly, the Chamber maintains that the redactions regime as previously established strikes the relevant balance required by article 68(1) of the Statute, enabling the Defence to make meaningful submissions on the victims' eligibility.[478]

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[472] *See* Registry's First Transmission to the Defence of 28 Redacted Victim Dossiers, para. 6 (none of 29 victims consulted had consented); Registry's Second Transmission to the Defence of 50 Redacted Victim Dossiers, para. 6 (none of 50 victims consulted had consented); Registry's Third Transmission to the Defence of 92 Redacted Victim Dossiers, paras 6-7 (none of 14 victims consulted had consented); Registry's Transmission to the Defence of One Redacted Victim Dossier, para. 12 (the victim which this filing concerned did not consent). Victims Group 1 subsequently confirmed that the actual total figure was 93 victims, given that two victims that were initially contacted were later excluded from the Sample, with one further victim being added: *see* CLR1's 3 March 2023 Submissions, para. 5, fn 11.
[473] *See* Registry's Third Transmission to the Defence of 92 Redacted Victim Dossiers, paras 6-7 (the 68 victims comprising of 13 within Victims Group 1 and 55 within Victims Group 2).
[474] *See* Registry's Third Transmission to the Defence of 92 Redacted Victim Dossiers, para. 7. *See also* CLR2's 3 March 2023 Submissions, para. 9.
[475] Decision on the Defence Request of 29 March 2023, paras 7, 16-17.
[476] Decision on the Defence Request of 29 March 2023, paras 18-20.
[477] Decision on the Defence Request of 29 March 2023, para. 21, *referring to* 2022 Appeals Chamber Judgment, para. 689; 2019 *Lubanga* Appeals Chamber Judgment, paras 249-254, 256; Order of 25 October 2022, paras 35-36; Decision of 25 November 2022, paras 27-29.
[478] Decision on the Defence Request of 29 March 2023, para. 22.

230. In the Impugned Decision, the Trial Chamber referred to arguments that the Defence had made in its submissions on the Sample, disputing the redactions that had been applied to the dossiers of the victims.[479] In ruling upon the submission of the Defence that the lack of consent of the victims to have their identity disclosed was the only factor justifying continued extensive redactions, yet that not all victims had been reached to express their preference, the Trial Chamber found as follows:

> [T]he [Trial Chamber] notes the [legal representatives of victims'] submissions on the impossibility to reach 68 victims due to the current security situation in Ituri, which is characterised by the resurgence of the conflict and large displacement of the population. The Chamber further recalls that all the other victims that refused to have their identity disclosed to the Defence did so precisely out of concern for their security, and the dire security situation in Ituri, which the Chamber previously found to be genuine and objective. In light of the above, the Chamber reiterates that the redactions implemented by the [legal representatives of victims] to the victims' dossiers, including information that might reveal their identity, strikes the necessary balance required by article 68(1) of the Statute. In addition, as will be elaborated further below, the Chamber considers that, notwithstanding the redactions, the Defence has been able to make meaningful submissions on the victims' eligibility.[480]

231. Elsewhere in the Impugned Decision, the Trial Chamber observed that it was satisfied that the right of the Defence to make meaningful submissions had been "fully safeguarded", having reviewed the Defence Submissions on the Sample and its confidential annex, which included "extensive submissions on a victim-by-victim basis".[481] The Trial Chamber further held that, in accordance with the 2022 Appeals Chamber Judgment, the Defence had received appropriately redacted versions of all of the dossiers of the victims in the Sample and had had the opportunity to make submissions and comment on them.[482]

(c) The errors alleged by the Defence

232. In its appeal brief, the Defence avers that the finding of the Trial Chamber in the Impugned Decision that the Defence had received the victims' dossiers with appropriate redactions and had had the opportunity to make submissions on them was incorrect,[483]

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[479] Impugned Decision, para. 63, *referring to* Defence Submissions on the Sample, paras 24-25.
[480] Impugned Decision, para. 65, *referring to* CLR1's 3 March 2023 Submissions, para. 16; CLR2's 3 March 2023 Submissions, paras 25-26, 29; Decision on the Defence Request of 29 March 2023, paras 18-20, 22.
[481] Impugned Decision, para. 32.
[482] Impugned Decision, para. 121.
[483] Defence Appeal Brief, para. 122, *referring to* Impugned Decision, para. 121. *See generally* Defence Appeal Brief, paras 116-119, 123-130, 147-148.

alleging six specific errors in relation to the rejection of the Defence request for redactions to be lifted in the Decision on the Defence Request of 29 March 2023.[484]

233. Insofar as the Defence does not particularise errors – referring to the Trial Chamber having committed multiple errors "including" six that it particularises[485] – the Appeals Chamber rejects that part of its submissions as unsubstantiated. The Appeals Chamber cannot address errors that are not expressly identified. For the reasons that follow, the Appeals Chamber finds that the Defence has not established any of the six specific errors that it alleges.

234. The Appeals Chamber notes the Defence's argument that the Trial Chamber erred by failing to consider that the safety, physical and psychological well-being, dignity and privacy of the 68 victims who could not be reached by their legal representatives "was *de facto* ensured"; and that the Trial Chamber therefore failed to strike an appropriate balance and lift redactions which might reveal their identity.[486] The Defence refers in two different places within its appeal brief to the protection of those victims being "*de facto* ensured".

235. First, the Defence asserts that this was the case as a result of their legal representatives having been unable to contact them despite those victims having been their client for years, the information that they had about them and the significant resources available to those representatives to make contact.[487] The Appeals Chamber regards this argument as speculative and unsubstantiated. The fact that their legal representatives could not contact certain victims at a particular point in time does not, in itself, guarantee their safety if their identities were to be revealed to the Defence.

236. Second, the Defence asserts – in the paragraph of its appeal brief in which it alleges the six errors – that those victims' safety was "*de facto* ensured", footnoting to submissions that it made before the Trial Chamber, but without elaborating the contents of those submissions in its appeal brief.[488] As recalled above, the Appeals Chamber will

[484] Defence Appeal Brief, para. 131.
[485] Defence Appeal Brief, para. 131.
[486] Defence Appeal Brief, para. 131(ii).
[487] Defence Appeal Brief, para. 127.
[488] Defence Appeal Brief, para. 131(ii).

not permit a party to incorporate by reference submissions that it has made in other filings.[489]

237. However, the Appeals Chamber observes that, in its Decision on the Defence Request of 29 March 2023, the Trial Chamber summarised the Defence's submissions that the victims' lack of consent was the sole factor precluding the disclosure of their identity to the Defence, as opposed to objective justification.[490] Nevertheless, the Trial Chamber found, having also summarised the submissions of the legal representatives of victims and the Registry,[491] that, in light of the dire security situation in Ituri, the victims' security concerns were genuine and objective.[492]

238. Furthermore, in the Impugned Decision, the Trial Chamber addressed further arguments made in this regard in the Defence Submissions on the Sample.[493] The Trial Chamber noted the submissions made by the legal representatives of victims that it had been impossible for them to contact 68 of their clients so as to consult them about whether they consented to their identity being disclosed to the Defence because of "the current security situation in Ituri, which is characterised by the resurgence of the conflict and large displacement of the population".[494] The Trial Chamber also recalled its findings that the security concerns of all of the other victims who had refused to disclose their identities to the Defence because of the "concern for their security, and the dire security situation in Ituri" were genuine and objective.[495]

239. The Appeals Chamber notes, in particular, the Trial Chamber's reference, in the Decision on the Defence Request of 29 March 2023, to the submissions of Victims Group 1 that the genuine and objective nature of the security concerns of the victims was demonstrated by the dire security situation in Ituri and by the fact that none of the victims consulted had consented to the disclosure of their identity to the Defence.[496] In the relevant paragraph of those submissions, Victims Group 1 referred, *inter alia*, to

[489] *See* paragraph 22 above.
[490] Decision on the Defence Request of 29 March 2023, paras 16-17.
[491] Decision on the Defence Request of 29 March 2023, paras 18-20.
[492] Decision on the Defence Request of 29 March 2023, para. 22.
[493] Impugned Decision, para. 63, *referring to* Defence Submissions on the Sample, paras 24-25.
[494] Impugned Decision, para. 65, *referring to* CLR1's 3 March 2023 Submissions, para. 16; CLR2's 3 March 2023 Submissions, paras 25-26, 29. *See also* Impugned Decision, para. 63.
[495] Impugned Decision, para. 65, *referring to* Decision on the Defence Request of 29 March 2023, paras 18-20, 22. Paras 18-20 summarise the submissions of, *inter alia*, Victims Group 1.
[496] Decision on the Defence Request of 29 March 2023, para. 18.

paragraphs of the TFV's Tenth Update Report that referenced the security situation in eastern DRC being "volatile and unpredictable", with a noticeable increase in violence between different armed groups, the displacement of large numbers of people, and increasing and persistent attacks against civilians, including the killing of 32 civilians in Ituri.[497] Victims Group 1 also referred to paragraphs of a report that had recently been filed by the TFV in the *Lubanga* case in relation to the implementation of reparations, in which it was stated, *inter alia*, that: the Court's assessment of the security situation in Ituri was that it remained "volatile and unpredictable"; armed groups continued to carry out deadly and increased attacks against the armed forces of the DRC and the civilian population; and that the United Nations Humanitarian Air Service had suspended flights in Congo's North Kivu and Ituri provinces following a recent attack on one of the service's helicopters.[498]

240. The Appeals Chamber further observes that the legal representative of Victims Group 1 [REDACTED].[499]

241. In light of the above, the Appeals Chamber finds that the Defence has not established that it was unreasonable for the Trial Chamber to conclude that the security concerns of the victims in this case were genuine and objective. Nor has the Defence in any other way substantiated its argument that the safety of victims who could not be contacted by their legal representatives was "*de facto* ensured". The Appeals Chamber therefore further rejects the argument of the Defence that, "accordingly", the Trial Chamber failed to strike the balance required by article 68(1) of the Statute and by failing to lift redactions which might reveal the identity of those victims.[500]

242. The Defence also argues that the Trial Chamber erred by instructing the parties to seize the Trial Chamber only exceptionally, when no agreement could be reached, if there were disputes about redactions.[501] It avers that system hindered the Defence in its review of the dossiers, forcing it to "submit multiple requests and correspondence, not

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[497] CLR1's Response to Defence Request of 29 March 2023, para. 15, *referring to* TFV's Tenth Update Report, paras 11-13.
[498] CLR1's Response to Defence Request of 29 March 2023, para. 15, *referring to* *Lubanga* Twentieth Progress Report on Collective Reparations, paras 15-18.
[499] CLR1's Response to Defence Request of 29 March 2023, para. 15, *referring to* TFV's Ninth Update Report, para. 36.
[500] Defence Appeal Brief, para. 131(ii).
[501] Defence Appeal Brief, para. 131(i).

advancing the matter"; and that "significant time and resources would have been spared" had the Trial Chamber been inclined to address redaction issues from the outset.[502] The Defence does not provide any further details of this argument, neither explaining whether it at any point tried to seize the Trial Chamber and was prevented from doing so, nor in any way averring what it alleges the material effect would have been on the Impugned Decision had a different system been in place. The argument is therefore rejected as unsubstantiated.

243. Also unsubstantiated is the Defence's argument that the Trial Chamber 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".[503] The Defence avers that this includes the Trial Chamber's failure to engage arguments of the legal representatives of victims and the VPRS that "certain redacted information in some victims' dossiers", while not necessarily identifying in isolation, might reveal the identity or location of a victim when connected with other unredacted information.[504] The Defence does not further elaborate what it alleges the Trial Chamber should have done. In particular, in its appeal brief the Defence has not referred to any specific information in this context, nor to any argument raised in relation to it, and therefore also necessarily has not demonstrated in respect of which exact information it alleges there to have been an error, nor what the material effect on the Impugned Decision would have been had it been addressed.

244. The Defence further avers that the Trial Chamber erred by failing to address two arguments raised by the legal representatives of the victims and the VPRS that it alleges were erroneous, namely that the lifting of the redactions sought by the Defence was unnecessary in light of: (i) the collective nature of the reparations in this case, which did not warrant close scrutiny of the harm suffered by the victims; and (ii) the role of the Defence being more limited than that of the Trial Chamber, which would objectively decide on the credibility of the dossiers.[505] However, while the provision of sufficient reasoning is important, a trial chamber is not necessarily required to address each

[502] Defence Appeal Brief, para. 131(i).
[503] Defence Appeal Brief, para. 131(iii).
[504] Defence Appeal Brief, para. 131(iii).
[505] Defence Appeal Brief, para. 131(iv), *referring to* CLR1's Response to Defence Request of 29 March 2023, para. 19; CLR2's Response to Defence Request of 29 March 2023, para. 26.

argument that a party raises;[506] and the Defence has not argued why it was that the Trial Chamber needed to address the two above arguments in the present circumstances, given that the Defence itself finds them to be erroneous. It is therefore unclear why, in the view of the Defence, the Trial Chamber erred in failing to address these arguments. Nor has the Defence argued what it alleges the material effect would have been on the Impugned Decision had the Trial Chamber ruled upon them.

245. In the above circumstances, the Appeals Chamber does not find it established that the Trial Chamber erred in not addressing two arguments upon which it did not rely in stating its conclusions. This argument of the Defence is therefore rejected as unsubstantiated.

246. The final two specific allegations of error by the Defence appear to relate to the Trial Chamber's finding in the Decision on the Defence Request of 29 March 2023 that the Defence had "not demonstrated how its ability to review and comment on the victims' Sample is effectively affected by the redactions maintained in the victims' dossiers".[507] The Defence avers that the Trial Chamber could not have made that finding had it reviewed on the merits the detailed observations that it had made on the necessity of lifting redactions and how they affected its ability to make meaningful observations.[508] However, recalling, once again, that a party cannot incorporate by reference arguments that are not expressly set out in its appeal brief,[509] the Appeals Chamber notes that the Defence does not provide any example within its appeal brief of an observation that it made in that regard, nor has it therefore demonstrated how any such observation would have led the Trial Chamber to come to a different conclusion. The Defence's arguments are therefore unsubstantiated.

247. The Appeals Chamber assumes that the Defence's argument that the Trial Chamber erred by failing to consider or rule upon the merits in relation to the Defence requests for the lifting of redactions, or to provide reasons for rejecting any such requests,[510] relates to the same finding of the Trial Chamber as set out in the previous

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[506] *See*, *for example*, 2022 Appeals Chamber Judgment, para. 58; *see also* paras 59-60.
[507] Defence Appeal Brief, para. 131(vi), *referring to* Decision on the Defence Request of 29 March 2023, para. 22; *see also* Defence Appeal Brief, para. 131(v).
[508] Defence Appeal Brief, para. 131(vi).
[509] *See* paragraph 22 above.
[510] Defence Appeal Brief, para. 131(v).

paragraph. However, once the Trial Chamber had found that the Defence had failed to demonstrate how its ability to comment on the Sample was affected by the redactions, it was not required to rule further on the merits of the requests. This argument of the Defence is therefore rejected on that basis.

248. The Appeals Chamber turns finally to the argument of the Defence that the Trial Chamber erred when it found in the Impugned Decision that the Defence had been able to make meaningful submissions on the eligibility of the victims notwithstanding the redactions.[511] The Defence avers that, while it made lengthy submissions, they were based upon limited information and were largely rejected or not considered by the Trial Chamber.[512] The Defence contends that, had the Trial Chamber lifted the redactions, the Defence submissions would have been "much more detailed and meaningful".[513]

249. The Appeals Chamber recalls that, in its decisions related to redactions, the Trial Chamber specifically considered the need for the Defence to be able to make meaningful submissions when weighing that against the interest of the victims to be provided with appropriate protection.[514] The Trial Chamber was further satisfied, both prior to and in the Impugned Decision, that the Defence had access to all relevant material, albeit in redacted form, and was able to make meaningful submissions on the eligibility of the victims.[515] Indeed, in ruling on further Defence submissions in relation to the redactions that had been applied, the Trial Chamber, in the Impugned Decision, reiterated that the redactions implemented struck the necessary balance required by article 68(1) of the Statute and that the Defence had been able to make meaningful submissions.[516] The Appeals Chamber further observes that the Defence made extensive submissions on the Sample in a 19-page filing[517] accompanied by a 171-page confidential annex containing its submissions on a victim-by-victim basis[518] – and that its submissions were referenced

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[511] Defence Appeal Brief, para. 132.
[512] Defence Appeal Brief, para. 132.
[513] Defence Appeal Brief, para. 132.
[514] *See* Decision of 25 November 2022, para. 30; Decision on the Defence Request of 29 March 2023, paras 21-22; Impugned Decision, para. 65.
[515] *See* Decision on the Defence Request of 29 March 2023, para. 15; Impugned Decision, paras 65, 142.
[516] Impugned Decision, paras 63, 65, *referring to* Defence Submissions on the Sample, paras 24-25.
[517] Defence Submissions on the Sample.
[518] Confidential Annex A to the Defence Submissions on the Sample.

in the relevant part of the Impugned Decision,[519] as well as considered, per victim, in confidential Annex II to the Impugned Decision.

250. In the above circumstances, the Defence has not substantiated its broad assertion that the Trial Chamber erred in holding that it was able to make meaningful submissions in spite of the redactions. It is not sufficient to assert, in general terms, that its submissions would have been "much more detailed and meaningful" had the redactions been lifted without providing specific arguments to demonstrate that the Trial Chamber committed an error and the material effect thereof. It is inherent in any situation in which redactions are authorised that the quality of the submissions of the party to whom the redactions apply may be impacted by the fact that information has been redacted. As a result, it is important that the correct balance is achieved between the rights of the Defence and the protection of the victims, pursuant to article 68(1) of the Statute, whenever redactions are authorised. In the instant case, it has not been demonstrated that the Trial Chamber committed any error in authorising the redactions. The Defence has also failed to raise any argument that establishes that it was not able to make meaningful submissions, even if they were not of the same nature as they might have been had redactions not been in place.

251. In that regard, the Appeals Chamber notes that the Defence provides "but one example", submitting that it would have been possible for it to make submissions "on the plausibility, reliability, credibility and veracity" of information provided by potential child soldier victims had the names of commanders mentioned by them been lifted.[520] The Defence avers that this was "all the more important considering the erroneous criteria adopted by [the Trial Chamber] regarding the provision of only one commander's name"; and that the Defence would have been able to assist in verifying whether a commander was in fact a part of the UPC/FPLC's hierarchy, even if the Trial Chamber was not in a position to do so.[521]

252. The Appeals Chamber observes that the Trial Chamber permitted the withholding of the names of commanders as a part of the balancing exercise that it performed in

[519] *See* Impugned Decision, paras 51-52, 60, 73, 77, 78, 95-97, 100-101, 108, 110-111, 119-120, 122, 135, 140, 142.
[520] Defence Appeal Brief, para. 132.
[521] Defence Appeal Brief, para. 132, *referring to* Impugned Decision, paras 74-75.

providing for redactions to be made to information that might identify the victims, in respect of which no error has been established.

253. Furthermore, the Appeals Chamber notes that Defence submissions challenging the child soldier status of victims in the Sample were expressly considered in the Impugned Decision, including its submission that "the information provided in their dossiers does not provide sufficient information regarding the victim's commanders and unit within the UPC/FPLC".[522]

254. In determining this issue, the Trial Chamber considered, also by reference to the approach that was taken in the *Lubanga* case, that, "where a direct victim names at least one commander, or one of the training camps, that, *depending on the circumstances*, may suffice to establish that the victim did belong to the UPC/FPLC".[523] The Trial Chamber stated that its assessment of this matter would be "qualitative rather than quantitative", with eligibility being determined "having regard to the quality of all the evidence the victim provides, assessed according to the relevant standard".[524] Immediately thereafter, the Trial Chamber underlined that it was "not in a position to verify the veracity of the information provided, as it is not in a position to check if a certain commander was in fact part of the UPC/FPLC's hierarchy, as some may have been mentioned during the case by their nickname or not even mentioned".[525]

255. The Trial Chamber therefore expressly considered that factor in light of the Defence's submissions and in the specific context of its finding that, where a direct victim names, *inter alia*, at least one commander, the determination of eligibility would be based upon the assessment of the quality of all of the evidence that the victim provides. The Appeals Chamber further notes that, in its submissions on appeal, the Defence does not point to any instance on which the Trial Chamber determined a child soldier victim to be eligible solely based upon the provision of only the name of one commander whose membership of the UPC/FPLC's hierarchy it had been unable to verify. The Defence has therefore not demonstrated that it was unable to make

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[522] Impugned Decision, para. 73. At fns 177-178, the Trial Chamber referenced the submissions that the Defence had made in this regard in respect of the child soldier victims in the Sample in confidential Annex A to the Defence Submissions on the Sample.
[523] Impugned Decision, para. 74 (emphasis added).
[524] Impugned Decision, para. 75.
[525] Impugned Decision, para. 75.

meaningful submissions on this aspect of the case, notwithstanding the redactions that were in place as a part of the balancing exercise that was required by article 68(1) of the Statute. It has therefore not established any error.

256. For the above reasons, the Defence's allegations of errors in relation to redactions are rejected.

ii. Alleged errors relating to information in the possession of the TFV

257. The Defence submits that the Trial Chamber erred by dismissing the Defence's request for the disclosure of information in the possession of the TFV.[526] In order to address this issue, the Appeals Chamber will first set out the relevant Trial Chamber proceedings prior to reaching its determination.

258. In its Decision of 25 November 2022, the Trial Chamber instructed the VPRS to transmit the unredacted dossiers of the victims included in the Sample to their legal representatives and to the Trial Chamber by 28 November 2022.[527] The VPRS was also instructed to transmit redacted versions of victims' dossiers to the Defence on a rolling basis and within 30 days of the victims indicating whether they consented to their identities being revealed.[528] The Trial Chamber further instructed the legal representatives of the victims to make any submissions and complement the victims' dossiers, appending any supporting documentation, "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 30 days of the last transmission of the dossiers of the victims to the Defence.[529]

259. In the same decision, the Trial Chamber also instructed the TFV to provide the Trial Chamber and the parties "with any relevant information or documentation taken into account when reaching the administrative decision on the 69 victims already found

[526] Defence Appeal Brief, para. 116; *see generally* paras 116-117, 133-148.
[527] Decision of 25 November 2022, para. 34(a), p. 23. The Registry transmitted the unredacted versions of the dossiers of 173 victims to the Trial Chamber on 28 November 2022: *see* Registry's Transmission of 173 Unredacted Victims' Dossiers, paras 1, 4, 6-7.
[528] Decision of 25 November 2022, para. 34(d), p. 23.
[529] Decision of 25 November 2022, para. 34(e), p. 23. On 3 March 2023, both groups of victims provided supplementary information collected from victims with whom they had been able to consult: *see* CLR2's 3 March 2023 Submissions, paras 16, 17, 23: Victims Group 2 attached 42 annexes to that filing containing supplementary information. *See also* CLR1's 3 March 2023 Submissions, para. 18.

eligible for the IDIP purposes", within 30 days of the transmission of the last of the victims' dossiers to the Defence.[530]

260. On 20 March 2023, in its request for a limited extension of the time limit to make submissions on the Sample, the Defence pointed out, *inter alia*, that it had not received any information or documentation from the TFV.[531] Thereafter, on 29 March 2023, the Defence requested the Trial Chamber to ensure that the TFV transmitted the information or documentation that it had been instructed to provide in the Decision of 25 November 2022.[532]

261. In the Decision on the Defence Request of 29 March 2023 the Trial Chamber referred to submissions of the TFV that it had transmitted all available information and documentation to the VPRS in two emails of 31 October and 1 November 2022; that the TFV "understands" that the information had been transmitted to the Trial Chamber by the Registry in a confidential *ex parte* transmission on 8 November 2022 to which it did not have access; and that it was not privy to the final form and content of the dossiers shared with the Trial Chamber and the Defence.[533] The Trial Chamber observed that its Decision of 25 November 2022 had instructed the TFV to transmit the information to the Trial Chamber and, with necessary redactions, to the Defence; that the TFV's failure to comply with those instructions or to have "clarified earlier that it had proceeded otherwise" was "unhelpful to the proceedings and ultimately to the victims, as it creates unnecessary delays and litigation"; and that it "disapproves such practice".[534]

262. The Trial Chamber proceeded to find as follows:

> 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. Accordingly, the Defence's Request for communication of relevant information or documentation taken into account by the TFV when

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[530] Decision of 25 November 2022, para. 34(f), p. 23.
[531] Defence Request for a Limited Extension of Time, para. 7.
[532] Defence Request of 29 March 2023, paras 1, 4-10.
[533] Decision on the Defence Request of 29 March 2023, para. 13, *referring to* TFV's Observations on the Defence Request of 29 March 2023, paras 14-17.
[534] Decision on the Defence Request of 29 March 2023, para. 14.

reaching the administrative decision on the victims already found eligible for the IDIP purposes is dismissed as moot.[535]

263. In a footnote to the above paragraph in relation to "the *ex-parte* annexes", the Trial Chamber referred to the two annexes concerned and noted that they "only contain lists of victims and details of the victims' information as compiled in the Registry's databases but no additional documentation".[536]

264. The Defence appears to interpret the above finding to mean that the Trial Chamber was of the view that its request was "moot" because the Defence had already received all information and documentation available to the TFV, which the Trial Chamber assumed was reflected within the two *ex parte* annexes to which it referred.[537] The Defence proceeds to aver that, "[i]n light of the foregoing" the Trial Chamber committed multiple errors, which it thereafter sets out.[538]

265. The Appeals Chamber notes, however, that the finding of the Trial Chamber is ambiguous and that it would have been preferable for it to have been more fully reasoned. The Trial Chamber can also be understood to be finding that it was satisfied that the Defence had received all available information and documentation *"required for it to assess and make meaningful submissions on the victims' dossiers*",[539] even if it had not received further information that may have been in the possession of the TFV. It came to that conclusion *"having reviewed the victims' dossiers transmitted to the Defence and the* ex-parte *annexes*"; and having noted that the latter did not contain any additional documentation.[540]

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[535] Decision on the Defence Request of 29 March 2023, para. 15.
[536] Decision on the Defence Request of 29 March 2023, para. 15, fn 35.
[537] *See* Defence Appeal Brief, paras 144-145: Having set out the first sentence of the above-cited Decision on the Defence Request of 29 March 2023, para. 15, the Defence avers that "[t]his is incorrect", arguing that it is evident from the footnote to which the Trial Chamber refers that either the TFV did not transmit all information and documentation available to the VPRS or the VPRS did not include that information in the *ex parte* annexes that it transmitted to the Trial Chamber. It submits that, "[t]hus, evidently, [the Trial Chamber] did not receive all information and documentation available [to] the TFV concerning the eligibility 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".
[538] Defence Appeal Brief, para. 146.
[539] Decision on the Defence Request of 29 March 2023, para. 15 (emphasis added).
[540] Decision on the Defence Request of 29 March 2023, para. 15 (emphasis added). It is recalled, in that regard, that the Trial Chamber would not have reviewed the dossiers transmitted to the Defence at the time that it originally instructed the TFV to provide the Trial Chamber and the parties with any relevant information or documentation that it took into account for IDIP purposes in its Decision of 25 November

266. In any event, in the Impugned Decision, the Trial Chamber summarised subsequent submissions that the Defence made on the Sample, in which the Defence reiterated its contentions that it had never received the materials that the TFV had been ordered to submit, arguing that it remained "in the dark as to the materials relied upon and the assessments conducted by the TFV" and contending that if the TFV obtained additional information from the victims that was not provided to the Defence – in particular the TFV questionnaire – "then the opportunity given to the Defence to assess the victims' dossiers amounts to an ill-conceived procedure".[541] The Trial Chamber responded to those submissions, finding that it had

> ruled on the 171 victims in the Sample, including the 67 IDIP victims. As indicated above, in ruling on the eligibility of these victims, the Chamber relied on the victims' dossiers, the parties' submissions on the sample, and any additional information they provided. The Chamber notes that, contrary to the Defence's submission that it was 'kept in the dark', the Defence had access to all the relevant information – with the necessary redactions in accordance with article 68(1) of the Statute.[542]

267. In reiterating that the Defence had access "to all the relevant information", the Trial Chamber thereby necessarily rejected the Defence's arguments that it required further information from the TFV. The Appeals Chamber notes that it does not know the exact parameters of any additional information that the TFV may have had that was not transmitted to the Trial Chamber or to the Defence. However, the Appeals Chamber does not find the Defence to have established any error for the reasons that follow.

268. The relevant finding of the Trial Chamber that is in question is that the Defence had received all available information and documentation that it required for it to make meaningful submissions on the dossiers of the victims.[543] That must be seen in the context of the subsequent finding in the Impugned Decision that the Defence had had

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2022 (*see* Decision of 25 November 2022, para. 34(f), p. 23). Indeed, the Trial Chamber could not have done so as it was only in that decision that the Trial Chamber instructed the VPRS to transmit the unredacted dossiers of the victims in the Sample to it (*see* Decision of 25 November 2022, para. 34(a), p. 23: the Registry transmitted the unredacted versions of the dossiers of 173 victims to the Trial Chamber on 28 November 2022: *see* Registry's Transmission of 173 Unredacted Victims' Dossiers, paras 1, 4, 6-7); and it was only thereafter that the redacted versions of the dossiers were transmitted to the Defence (as referenced at paragraph 228 above, the VPRS transmitted a total of 171 redacted dossiers of victims to the Defence in four separate filings between 11 January and 6 February 2023).

[541] *See* Defence Submissions on the Sample, para. 26; Impugned Decision, para. 140.

[542] Impugned Decision, para. 142 (footnote omitted).

[543] Decision on the Defence Request of 29 March 2023, para. 15.

access to all relevant information, with necessary redactions.[544] The Defence has not demonstrated that there was anything unreasonable – far less anything that could amount to an abuse of discretion – about the decision of the Trial Chamber to rely upon the victims' dossiers, supplemented by the submissions and additional information provided in relation to them by their legal representatives.[545]

269. Having received the victims' dossiers containing their requests for reparations, the type and amount of additional information upon which the Trial Chamber deemed it appropriate to rely in ruling upon the Sample fell within its discretion. The Appeals Chamber observes that, in exercising that discretion, the Trial Chamber initially sought any relevant information or documentation taken into account by the TFV for IDIP purposes.[546] However, having thereafter had access to all of the victims' dossiers, which were also subsequently transmitted to the Defence in redacted form, and to updated information and submissions in relation thereto from the legal representatives of those victims, as well as material provided by the VPRS, the Defence has not substantiated that there was anything unreasonable about proceeding on the basis of that information. The Appeals Chamber underlines that the Trial Chamber expressly noted that the Defence had access to all relevant information upon which the Trial Chamber relied in ruling upon the Sample, albeit in redacted form.[547] In particular, there is no indication that the Trial Chamber received or took into account any additional information from the TFV, further to the Decision of 25 November 2022, that was not disclosed to the Defence.

270. In coming to the above conclusion the Appeals Chamber recalls that, as referenced by the Defence, as a result of the 2021 Reparations Order, it was the TFV that was responsible for drawing up an initial draft implementation plan, and it was the TFV that had initially determined the eligibility of the IDIP victims who were included in the Sample.[548] However, further to the 2022 Appeals Chamber Judgment, and by the time

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[544] Impugned Decision, para. 142.
[545] Impugned Decision, para. 142. Earlier in the Impugned Decision, the Trial Chamber explained that it assessed each of the dossiers of the 171 victims, "conducting its own assessment of the facts alleged by the victims, while taking into account the parties' submissions on the Sample, and the additional information they provided": *see* Impugned Decision, para. 29, *referring to* CLR1's 3 March 2023 Submissions, CLR2's 3 March 2023 Submissions, Defence Submissions on the Sample and their annexes.
[546] Decision of 25 November 2022, para. 34(f), p. 23.
[547] Impugned Decision, para. 142.
[548] Defence Appeal Brief, paras 133-134.

of the Decision on the Defence Request of 29 March 2023 and the Impugned Decision, it was now the Trial Chamber, rather than the TFV, that was to determine the eligibility of the victims included in the Sample for reparations. The Trial Chamber was to make that determination *de novo*, and it did so based upon all of the relevant information that the Appeals Chamber has set out in the previous paragraph. The Defence has not substantiated on appeal that it was necessary for it to be provided with, or for the Trial Chamber to consider, any further information to be able, respectively, to make submissions on, or to determine, the eligibility of the victims for reparations. This part of its fifth ground of appeal can therefore be rejected for the above reasons alone. The Appeals Chamber will nevertheless also proceed to consider the specific arguments that the Defence raises in relation to further information that may have been available to the TFV.

271. The Appeals Chamber observes that, in its submissions on appeal, the Defence avers that, in addition to the information and victims' dossiers made available to it by the VPRS and the legal representatives of the victims, the TFV also obtained information from its implementing partners in determining the eligibility of the 67 victims in the IDIP programme who were included in the Sample.[549] It footnotes, "as regards the procedure", to the TFV's Thirteenth Update Report.[550] In that regard, the Defence refers to the use of a questionnaire to obtain information from priority victims so as to supplement their dossiers prior to the TFV's eligibility determination,[551] footnoting to filings that the Defence states document its use.[552] The Defence further submits that, "[r]egarding the material to be provided by the TFV", it had underscored, in its request for an extension of the time limit to make submissions on the Sample, "that 'such information and documentation is a 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'".[553]

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[549] Defence Appeal Brief, para. 134.
[550] Defence Appeal Brief, para. 134, *referring to* TFV's Thirteenth Update Report, para. 24.
[551] Defence Appeal Brief, para. 134.
[552] Defence Appeal Brief, para. 134, fn 305.
[553] Defence Appeal Brief, para. 138, *referring to* Defence Request for a Limited Extension of Time, para. 7.

272. From the footnotes cited by the Defence that are referred to in the previous paragraph above, it appears that the information obtained by the TFV's implementing partners, and the questionnaire, was related to the *urgency screening* that was undertaken by the TFV to determine whether a victim had priority needs and should therefore be included in the IDIP programme. The information provided by the TFV in the paragraph of its Thirteenth Update Report to which the Defence refers describes "how the information *on the urgency needs* is collected by the implementing partner", explaining, *inter alia*, that the information is collected by the implementing partner interviewing the victims "based on *the TFV urgency questionnaire* submitted to the Trial Chamber".[554] The footnotes cited by the Defence in relation to the questionnaire to obtain information from priority victims also relate to the *urgency screening*.[555]

273. The Appeals Chamber recalls that, in the Decision on the TFV's IDIP, the Trial Chamber determined that, to identify victims eligible for the IDIP programme, it was necessary to determine not only that they qualified to benefit from reparations in the case,[556] but also that "a *further* screening as to the urgent needs of victims (the 'urgency screening') needs to be conducted".[557] That was "in order to ensure that the victims

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[554] TFV's Thirteenth Update Report, para. 24 (emphasis added). The paragraph as a whole reads as follows: "In its 31 August 2023 Decision, the Trial Chamber requested the TFV to provide more clarity on how the information on the urgency needs is collected by the implementing partner. The TFV has two implementing partners for the purposes of the IDIP, [REDACTED] (for the victims of the attacks) and [REDACTED] (for former child soldiers). The collection of information on the urgency of the needs takes place based on the following steps: (i) the TFV transmits lists of priority victims whom their [legal representative] was able to contact; (ii) the implementing partner contacts the relevant victims by telephone to identify them and establish their exact current location; (iii) the identified victims meet with the implementing partners' field operators, who interview them based on the TFV urgency questionnaire submitted to the Trial Chamber; (iv) the questionnaires, filled in by the implementing partners, usually together with the victims, are transmitted to the TFV" (footnote omitted).

[555] *See* Defence Appeal Brief, para. 134, fn 305. The Defence refers to paragraphs of two sets of submissions that it made to the Trial Chamber in which it refers to the questionnaire in the context of the urgency screening to be carried out by the TFV: *see* Defence Observations on the TFV's Third Update Report, paras 17-18; Defence Observations on the TFV's Fourth Update Report, para. 48. The Defence further refers to the questionnaire itself in two confidential annexes to the TFV's Third and Fourth Update Reports: *see* Confidential Annex 1 to the TFV's Third Update Report; Confidential Annex 1 to the TFV's Fourth Update Report, pp. 16-18. [REDACTED]. *See also* TFV's Third Update Report, para. 15 which describes, in a public document, the purpose of the questionnaire and which reads, in relevant part: "*For the purpose of evaluating the urgency of the needs of the victims, the Trust Fund has prepared a questionnaire, to be administered to the victims by the implementing partner under the overall supervision of the Trust Fund. The questionnaire has been designed by the Trust Fund in order to capture factual elements relevant to the evaluation of the urgency of the needs of the victims, in accordance with the criteria set out by the Trial Chamber*. In order to address the Trial Chamber's instruction to provide more information as to the substantive criteria used to conduct the eligibility and urgency screening, the Trust Fund attaches the questionnaire as annex 1 to the present report. […]" (emphasis added).

[556] Decision on the TFV's IDIP, para. 31.

[557] Decision on the TFV's IDIP, para. 32. *See also* paragraph 125 above.

participating [in the IDIP programme] qualify to have their urgent needs addressed first as an emergency response".[558]

274. However, further to the 2022 Appeals Chamber Judgment, the Trial Chamber's purpose in ruling upon the victims' dossiers in the Impugned Decision was to determine whether they were *eligible for reparations*.[559] It was not to rule upon whether any of those potentially eligible victims had urgent needs and should therefore be included within the IDIP programme. That latter issue concerns which victims should receive reparations first during the course of the implementation process. It does not affect the rights of the Defence for present purposes.[560] Mr Ntaganda has been found liable to repair harm suffered by thousands of victims, of whom the 67 IDIP victims in the Sample were the first victims to receive reparations as a result of their urgent need. It was their eligibility for reparations which was the issue at stake in the Impugned Decision and which was therefore of relevance for the Defence – not the question of whether they should receive any reparations for which they were eligible as a matter of priority. As such, the Defence has not substantiated in its appeal brief why it was essential for it to have access to any questionnaires that may have been in the possession of the TFV in order to be able to make meaningful submissions on the eligibility of the victims in the Sample.

275. The Defence has therefore not established that the Trial Chamber committed "multiple errors" in its Decision on the Defence Request of 29 March 2023.[561] Insofar as the Defence does not particularise errors – referring to the Trial Chamber having committed multiple errors "including" five that it particularises[562] – the Appeals Chamber rejects that part of its submissions as unsubstantiated. The Appeals Chamber cannot address errors that are not expressly identified. In relation to the five specific alleged errors that the Defence does set out, the Appeals Chamber finds, in light of the above, that the Defence has not established any error: (i) in relation to the Trial Chamber not engaging further with the TFV about its non-compliance with the Decision of 25 November 2022 either (a) at the time of, or (b) upon being made aware that the TFV

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[558] Decision on the TFV's IDIP, para. 32.
[559] *See*, *inter alia*, 2022 Appeals Chamber Judgment, para. 363.
[560] *See* paragraph 136 above. *See also* Decision on the TFV's Sixth and Seventh Update Reports, paras 18-19.
[561] Defence Appeal Brief, para. 146.
[562] Defence Appeal Brief, para. 146.

did not intend to respond to, the Defence Request for a Limited Extension of Time;[563] (ii) in the Trial Chamber's finding that the Defence had received all of the information that it required for it to assess and make meaningful submissions on the victims' dossiers;[564] (iii) in dismissing the Defence Request of 29 March 2023 as moot;[565] and (iv) in relation to its reasoning as to why the information received by the Defence was sufficient to assess and make meaningful submissions on the victims' dossiers.[566]

4. *Overall conclusion*

276. For the above reasons, the Appeals Chamber rejects the Defence's fifth ground of appeal.

F. Grounds of appeal 6-8: Alleged errors concerning the Trial Chamber's findings on transgenerational harm

277. Under its sixth, seventh and eighth grounds of appeal, the Defence submits that the Trial Chamber failed to assess and properly reason the concept of transgenerational harm and the evidentiary criteria to prove such harm, disregarding the Appeals Chamber's directions set out in the 2022 Appeals Chamber Judgment.[567] The Appeals Chamber notes that the Defence's arguments under these three grounds of appeal relate to the question of whether the Trial Chamber committed the same errors as those that led to the reversal of its original award for reparations for transgenerational harm. In the interests of clarity and a proper determination of the arguments raised, the Appeals Chamber deems it appropriate to consider these grounds of appeal together.

1. *Relevant procedural background*

a. The Decision Appointing Experts on Reparations

278. On 14 May 2020, "[h]aving considered the background and indicated areas of expertise of the persons listed in the proposed list of experts and the benefits of having a multidisciplinary team of experts, including knowledge of the local context to ensure the production of a comprehensive report", the Trial Chamber appointed four experts in

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[563] Defence Appeal Brief, paras 146(i)-(ii).
[564] Defence Appeal Brief, para. 146(iii).
[565] Defence Appeal Brief, para. 146(iv).
[566] Defence Appeal Brief, para. 146(v).
[567] Defence Appeal Brief, paras 159, 173, 181-182.

the present case (hereinafter: "Appointed Experts").[568] It instructed the Appointed Experts to submit their report on the following issues:

> (i) the scope of liability of the convicted person; (ii) the scope, extent, and evolution of the harm suffered by both direct and indirect victims, including the long-term consequences of the crimes on the affected communities and including the potential cost of repair; (iii) appropriate modalities of reparations; (iv) sexual violence, in particular sexual slavery, and the consequences thereof on direct and indirect victims […].[569]

b. The 2021 Reparations Order

279. In the 2021 Reparations Order, with respect to the concept of transgenerational harm, the Trial Chamber, in footnotes, referred to the Defence Final Submissions, the TFV's 28 February 2020 Submissions, the CLR1's 28 February 2020 Submissions, the CLR2's Final Submissions, the Appointed Experts' reports, the *Katanga* Decision on Transgenerational Harm, the *Katanga* Reparations Order and the relevant jurisprudence of the IACtHR, and found as follows:

> Transgenerational harm refers to a phenomenon, whereby social violence is passed on from ascendants to descendants with traumatic consequences for the latter. It is characterised by the existence of an intergenerational cycle of dysfunction that traumatised parents set in motion, handing-down trauma by acting as violent and neglectful caretakers deforming the psyche and impacting the next generation. Traumatised parents, who live in constant and unresolved fear, unconsciously adopt a frightening behaviour. This affects their children's emotional behaviour, attachment, and well-being, increasing the risk that they will suffer post-traumatic stress disorders, mood disorders, and anxiety issues. It is argued that the noxious effects of trauma may be transmitted from one generation to the next, with a potential impact on the structure and mental health of families across generations.[570]

280. The Trial Chamber found that the harms suffered by indirect victims as a result of the crimes committed by Mr Ntaganda include "[t]ransgenerational harm of children of direct victims",[571] and provided that:

> Regarding transgenerational harm, the Chamber considers that given the short and long-term consequences of certain crimes, […] children of the direct victims may have suffered transgenerational trauma regardless of the date when they were born, if they can show that their harm is a result of the crimes for which Mr Ntaganda was found guilty. In addition, the Chamber highlights that although children born

[568] Decision Appointing Experts on Reparations, para. 9, p. 10.
[569] Decision Appointing Experts on Reparations, paras 1, 11, p. 10.
[570] 2021 Reparations Order, para. 73 (footnotes omitted).
[571] 2021 Reparations Order, para. 183(d)(vi).

out of rape are considered direct victims, they may have also suffered transgenerational harm as indirect victims.[572]

281. More generally, the Trial Chamber noted that "[w]hen assessing the extent of harm suffered by victims, the Court must take into account that various permutations and combinations of different layers of the […] types of harm are possible, which can be manifested, *inter alia*, in […] transgenerational harm";[573] for the purposes of reparations, the harm manifested in the form of transgenerational trauma "shall be personally suffered by the victim";[574] and that "the causal nexus between the alleged harm and the crime for which the defendant was convicted needs to be established".[575] Referring to the *Katanga* Decision on Transgenerational Harm, the Trial Chamber emphasised that the "proximate cause" is "legally sufficient to result in liability, assessing, *inter alia*, whether it was reasonably foreseeable that the acts and conduct underlying the conviction would cause the resulting harm".[576]

c. The 2022 Appeals Chamber Judgment

282. In the 2022 Appeals Chamber Judgment, having identified a number of shortcomings in the Trial Chamber's findings in relation to transgenerational harm,[577] and noting the Trial Chamber's failure to address the Defence's substantial submissions concerning, *inter alia*, the reliability of the experts' findings on transgenerational harm,[578] the Appeals Chamber found that, in the 2021 Reparations Order, the Trial Chamber failed to provide sufficient reasoning regarding the concept of transgenerational harm and the evidentiary criteria to prove such harm.[579]

283. Accordingly, the Appeals Chamber considered it appropriate to reverse and remand the matter to the Trial Chamber.[580] In particular, the Appeals Chamber directed the Trial Chamber to: (i) consider the issue of scientific certainty of the concept of transgenerational harm, whether it is appropriate to award reparations therefor at this Court and the evidentiary requirements to establish such harm; and (ii) assess whether

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[572] 2021 Reparations Order, para. 182 (footnotes omitted).
[573] 2021 Reparations Order, para. 71.
[574] 2021 Reparations Order, para. 75.
[575] 2021 Reparations Order, para. 75.
[576] 2021 Reparations Order, para. 133, *referring to*, *inter alia*, *Katanga* Decision on Transgenerational Harm, para. 17.
[577] *See* 2022 Appeals Chamber Judgment, paras 473-481, 485-492.
[578] *See* 2022 Appeals Chamber Judgment, paras 474-480, 485, 491-492.
[579] 2022 Appeals Chamber Judgment, paras 471-473, 492.
[580] 2022 Appeals Chamber Judgment, para. 493; *see also* p. 11.

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 the impact of the protracted armed conflict in the DRC.[581] The Appeals Chamber further considered it appropriate for the Trial Chamber to: (i) "consider whether it needs to address such issues as: the matter of the basis for the concept of transgenerational harm; […] the need, if any, for a psychological examination of applicants and parents; […]"; and (ii) "request submissions from the parties and, *e.g.*, experts".[582]

d. The Impugned Decision

284. In the Impugned Decision, the Trial Chamber stated that, "[i]n light of the issues on remand", it provided its reasoning as to both the concept of transgenerational harm and the evidentiary criteria to prove such harm.[583]

285. With respect to the scientific certainty as to the concept of transgenerational harm, the Trial Chamber concluded that "within the current stage of advance in the academic and scientific research, experts from different disciplines agree on the *existence* of 'a phenomenon, whereby social violence is passed on from ascendants to descendants with traumatic consequences for the latter'".[584] The Trial Chamber also found that the existence of this phenomenon is reinforced by "the ongoing scientific debate on the mechanisms of transmission".[585]

286. In respect of the evidentiary requirements to establish transgenerational harm, the Trial Chamber noted that the general factual presumptions adopted in the 2021 Reparations Order applied, to the extent that they were not affected by the 2022 Appeals Chamber Judgment.[586] It underlined in this regard that no family members other than the children of direct victims suffered transgenerational harm and are entitled to reparations on that basis in the present case.[587]

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[581] 2022 Appeals Chamber Judgment, para. 494.
[582] 2022 Appeals Chamber Judgment, paras 495, 497.
[583] Impugned Decision, para. 173.
[584] Impugned Decision, para. 174 (emphasis in original); *see also* para. 175.
[585] Impugned Decision, para. 177.
[586] Impugned Decision, para. 186.
[587] Impugned Decision, para. 183.

2. *Summary of the submissions*

a. Defence's submissions

287. Under its sixth ground of appeal, the Defence submits that the Trial Chamber committed a procedural error by failing to request new submissions on transgenerational harm from experts;[588] and to explain its rejection of the Defence's submissions on the need to solicit new expert evidence.[589] In support, the Defence argues that it was an error for the Trial Chamber to disregard the Appeals Chamber's "direction to seek submissions from the parties and, for example, experts",[590] since "[n]o reasonable [t]rial [c]hamber" could have interpreted this direction as "optional".[591] The Defence submits that, as a result, the Trial Chamber relies "on nothing more than [...] non-expert opinions and submissions from other cases" with respect to "a complicated and uncertain scientific concept".[592]

288. Under its seventh ground of appeal, the Defence submits that the Trial Chamber committed a procedural error by failing to consider the Appeals Chamber's directions,[593] and by not making necessary findings with respect to: (i) the academic and scientific research concerning the transmission of transgenerational harm;[594] (ii) whether it is appropriate to award reparations for transgenerational harm at this Court;[595] (iii) any potential limitations to the concept of transgenerational harm;[596] and (iv) whether Mr Ntaganda is liable to repair such harm in the specific context of the present case.[597] It further contends that the Trial Chamber failed to engage with relevant submissions of the Defence.[598]

289. Under its eighth ground of appeal, the Defence submits that the Trial Chamber "erred in law by failing to require a medical assessment for claims of transgenerational harm",[599] and in finding that "[t]he need for a psychological assessment of the direct

[588] Defence Appeal Brief, p. 58, paras 155-156, 158-159.
[589] Defence Appeal Brief, paras 155, 157.
[590] Defence Appeal Brief, para. 159 (emphasis in original omitted).
[591] Defence Appeal Brief, para. 156.
[592] Defence Appeal Brief, paras 158-159; *see also* paras 149-151.
[593] Defence Appeal Brief, para. 173; *see also* para. 171.
[594] Defence Appeal Brief, paras 162-163, 167.
[595] Defence Appeal Brief, paras 160-161, 165.
[596] Defence Appeal Brief, para. 166.
[597] Defence Appeal Brief, paras 168-169.
[598] Defence Appeal Brief, paras 170-171, 173.
[599] Defence Appeal Brief, p. 67; *see also* para. 177.

victim (parent) and/or the indirect victim (child) claiming transgenerational harm shall be determined on a case-by-case basis".[600] According to the Defence, it remains unclear how the causal nexus can be established and how other causes of potential harm can be ruled out,[601] and "[w]ithout clearer and more detailed instructions", the implementing authority will be unable to conduct this assessment.[602] The Defence further avers that the Trial Chamber erred by failing to provide sufficient reasons for its "circumvention of the prior practice in *Katanga* of producing medical certificates and an expert report".[603]

b. Victims Group 1's submissions

290. Victims Group 1 submit that the Defence's sixth, seventh and eighth grounds of appeal should be dismissed as unfounded.[604]

291. Regarding the Defence's sixth ground of appeal, Victims Group 1 contend that the Trial Chamber, which had discretion in relation to how to implement the Appeals Chamber's guidance, carefully considered all of the submissions made by the parties, the participants and various experts and chambers on the issues related to transgenerational harm.[605] They add that the arguments under this ground of appeal constitute "renewed disagreements" with the Trial Chamber, and that the Defence had failed to advance new relevant material on transgenerational harm in its submissions prior to the issuance of the Impugned Decision.[606]

292. Concerning the Defence's seventh ground of appeal, Victims Group 1 argue that the Defence's arguments should be dismissed as they are "mere disagreements" with the Trial Chamber's interpretation of the Appeals Chamber's guidance concerning the scientific research and the potential limitations of the concept of transgenerational harm.[607]

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[600] Defence Appeal Brief, paras 175-180, *referring to* Impugned Decision, para. 189.
[601] Defence Appeal Brief, para. 175.
[602] Defence Appeal Brief, para. 179; *see also* para. 178.
[603] Defence Appeal Brief, paras 176, 180.
[604] Victims Group 1's Response to the Defence Appeal Brief, para. 62; *see also* paras 56, 58, 61.
[605] Victims Group 1's Response to the Defence Appeal Brief, paras 54-55.
[606] Victims Group 1's Response to the Defence Appeal Brief, para. 54.
[607] Victims Group 1's Response to the Defence Appeal Brief, para. 57.

293. As regards the Defence's eighth ground of appeal, Victims Group 1 aver that the Defence misrepresents the Impugned Decision, since the Trial Chamber did not rule out the possibility that the authority in charge of the eligibility assessment may require, on a case-by-case basis, a psychological assessment.[608] They further contend that the previous practice in the *Katanga* case needs to be viewed in its proper context and, notably, in light of a much lower number of victims in that case.[609]

c. Victims Group 2's submissions

294. With respect to the Defence's sixth ground of appeal, Victims Group 2 submit that the Defence fails to demonstrate that the Trial Chamber committed an error by not calling any experts on transgenerational harm.[610] In support, they argue that it was within the Trial Chamber's discretion to consider whether seeking additional submissions from experts on the matter was appropriate, and that there was no need to call experts on transgenerational harm, given the scope of the issues which the Trial Chamber was required to address.[611]

295. Concerning the Defence's seventh ground of appeal, Victims Group 2 submit that the Defence's arguments amount to a mere disagreement with the Impugned Decision.[612] They argue that, contrary to the Defence's submissions, the Trial Chamber, in accordance with the 2022 Appeals Chamber Judgment: (i) sought and considered further submissions from the parties and the participants;[613] (ii) provided in footnotes summaries of the referenced sources, which, together with the main body of the Impugned Decision, constitute an analysis;[614] and (iii) properly addressed and reached correct conclusions on the issues relating to transgenerational harm within the scope of the remand.[615]

296. Regarding the Defence's eighth ground of appeal, Victims Group 2 submit that the Defence puts forward the same arguments as those already advanced in its previous submissions, without demonstrating that the Trial Chamber committed any error.[616]

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[608] Victims Group 1's Response to the Defence Appeal Brief, para. 59 (emphasis in original omitted).
[609] Victims Group 1's Response to the Defence Appeal Brief, para. 60.
[610] Victims Group 2's Response to the Defence Appeal Brief, paras 97, 101.
[611] Victims Group 2's Response to the Defence Appeal Brief, para. 100.
[612] Victims Group 2's Response to the Defence Appeal Brief, para. 102.
[613] Victims Group 2's Response to the Defence Appeal Brief, para. 104 (footnote omitted).
[614] Victims Group 2's Response to the Defence Appeal Brief, para. 110; *see also* para. 111.
[615] Victims Group 2's Response to the Defence Appeal Brief, para. 104; *see also* paras 105, 107-108, 111.
[616] Victims Group 2's Response to the Defence Appeal Brief, paras 119-120.

They aver that the Trial Chamber's approach in this regard is: (i) "justified and reasonable", as it set out "objectively justifiable criteria" to be taken into consideration by the authority conducting the eligibility assessment when determining the existence of the causal link between the crimes of which Mr Ntaganda has been convicted and the claimed transgenerational harm;[617] and (ii) consistent with the standard of proof applicable to reparation proceedings.[618]

3. Determination by the Appeals Chamber

297. Under its sixth, seventh and eighth grounds of appeal, the Defence submits that the Trial Chamber disregarded the Appeals Chamber's directions and committed the same errors which led to the reversal of its original award for transgenerational harm.[619] In support of its submission, the Defence first argues that the Trial Chamber failed to request new expert evidence on transgenerational harm,[620] and to provide sufficient reasoning for its rejection of the Defence's submissions in this regard.[621] Second, it contends that the Trial Chamber failed to make necessary findings and provide sufficient reasoning in respect of: (i) the scientific certainty as to the concept of transgenerational harm and whether it is appropriate to award reparations therefor at this Court;[622] (ii) the potential limitations to the concept of transgenerational harm;[623] (iii) whether Mr Ntaganda is liable to repair such harm in the context of the crimes of which he has been convicted and taking into consideration the protracted armed conflict in the DRC;[624] and (iv) the need for a psychological examination of applicants and parents in the assessment of the causal link between the crimes of which Mr Ntaganda has been convicted and the alleged transgenerational harm.[625] The Appeals Chamber will address these arguments in turn.

a. Preliminary issue

298. Victims Group 2 "[reiterate] in full by reference" their submissions on transgenerational harm previously made before the Trial Chamber, and request the

[617] Victims Group 2's Response to the Defence Appeal Brief, para. 117.
[618] Victims Group 2's Response to the Defence Appeal Brief, para. 118.
[619] Defence Appeal Brief, paras 159, 173, 181-182.
[620] Defence Appeal Brief, p. 57, paras 155-156, 158-159.
[621] Defence Appeal Brief, paras 155, 157.
[622] Defence Appeal Brief, paras 162-165, 167, 173.
[623] Defence Appeal Brief, para. 166.
[624] Defence Appeal Brief, paras 169-172.
[625] Defence Appeal Brief, paras 175-180.

Appeals Chamber to take them into consideration for the purpose of its determination on the Defence's seventh and eighth grounds of appeal.[626] As recalled above, the Appeals Chamber will not permit a party to incorporate by reference submissions that it has made in other filings.[627] Accordingly, the Appeals Chamber rejects the request of Victims Group 2, and will consider only the arguments set out in their response to the Defence's Appeal Brief.

b. Alleged errors relating to expert evidence

299. The Defence submits that the Trial Chamber erred by failing to solicit and receive any additional expert evidence, despite the Appeals Chamber's direction to seek submissions from the parties "and, *e.g.*, experts".[628] The Defence argues that, since the Appointed Experts "are not experts in transgenerational harm",[629] the Trial Chamber's findings on transgenerational harm are based upon "nothing more than […] non-expert opinions and submissions from other cases".[630] It avers that, "[w]ithout expert guidance as to when, how (and if) harm can be transferred through generations", the authority conducting the eligibility assessment has "insufficient information", thereby "exposing Mr Ntaganda to an award which is not sufficiently grounded in the conviction against him".[631]

300. The Appeals Chamber notes at the outset that the Defence misrepresents the Impugned Decision in contending that the Trial Chamber failed to consider the Defence's submissions on the need to solicit new expert evidence.[632] Contrary to the Defence's allegation, the Trial Chamber explicitly addressed the Defence's submission that "the [2022 Appeals Chamber Judgment] mandatorily directed the Chamber to solicit and consider additional expert evidence", and found that the Defence misapprehended the relevant findings of that judgment.[633] The Trial Chamber noted in this respect that "the use of the wording 'e.g.,' (for example) when referring to experts on this matter,

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[626] Victims Group 2's Response to the Defence Appeal Brief, paras 111, 116, *referring to* CLR2's 30 January 2023 Submissions, paras 9-43.
[627] *See* paragraph 22 above.
[628] Defence Appeal Brief, paras 155-156, *referring to* 2022 Appeals Chamber Judgment, para. 497.
[629] Defence Appeal Brief, para. 151.
[630] Defence Appeal Brief, paras 158-159.
[631] Defence Appeal Brief, para. 158.
[632] *See* Defence Appeal Brief, paras 155, 157.
[633] Impugned Decision, para. 194.

makes it clear that the Appeals Chamber presented the Chamber with an option to be resorted upon at the Chamber's discretion".[634]

301. Regarding the Defence's argument that the Trial Chamber erred by failing to seek additional expert evidence,[635] the Appeals Chamber notes that its guidance, in the 2022 Appeals Chamber Judgment, for the Trial Chamber "to request submissions from the parties and, *e.g.*, experts"[636] must be read together with its other findings in relation to transgenerational harm. In particular, the Appeals Chamber found that the Trial Chamber failed to provide sufficient reasoning on the matter of transgenerational harm, noting that it had not: (i) referred to the potential scientific uncertainties and limitations to the concept of transgenerational harm;[637] and (ii) "elaborate[d] […] how this harm must be proven, and [specified] the type of evidence that must be submitted or enquiry that should be carried out".[638] The Appeals Chamber found that "in order to find Mr Ntaganda liable for this type of harm", the Trial Chamber could be expected to consider the matter "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, or findings from the [Conviction Decision] or [Sentencing Decision]".[639] Consequently, the Appeals Chamber reversed and remanded the matter to the Trial Chamber "for it to assess and properly reason the matter based on submissions sought from the parties and having assessed the credibility and reliability of the expert evidence on the record and addressed the issue of evidentiary guidance on this issue".[640]

302. The Appeals Chamber thus primarily focused upon the Trial Chamber's failure to provide a reasoned opinion on the scientific basis for the concept of transgenerational harm and the evidentiary requirements to provide such harm – matters which the Trial Chamber ought "to have fully considered",[641] based upon, *inter alia*, submissions and expert evidence.[642] It is in this context that the Appeals Chamber considered it

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[634] Impugned Decision, para. 194 (footnote omitted).
[635] Defence Appeal Brief, para. 156.
[636] 2022 Appeals Chamber Judgment, para. 497.
[637] 2022 Appeals Chamber Judgment, para. 474.
[638] 2022 Appeals Chamber Judgment, para. 481; *see also* para. 473.
[639] 2022 Appeals Chamber Judgment, para. 484 (footnote omitted).
[640] 2022 Appeals Chamber Judgment, para. 493.
[641] 2022 Appeals Chamber Judgment, para. 484.
[642] 2022 Appeals Chamber Judgment, para. 493.

appropriate for the Trial Chamber to "request submissions from the parties and, *e.g.*, experts".[643] Requesting further expert evidence was thus only one of the possible ways in which the Trial Chamber could address the shortcomings identified by the Appeals Chamber. It is clear from these findings of the Appeals Chamber that the Trial Chamber had discretion in relation to relying upon "the expert evidence on the record",[644] as long as it would "[assess] the credibility and reliability" of that evidence[645] and "fully [consider]"[646] the aforementioned matters on that basis.

303. Therefore, contrary to the Defence's contention that it was mandatory for the Trial Chamber to seek additional submissions from experts, the Trial Chamber had discretion over whether to request further expert evidence in relation to the scientific certainty as to the concept of transgenerational harm and the related evidentiary issues. Accordingly, the Appeals Chamber rejects the Defence's arguments in this regard.

304. The Appeals Chamber also notes that the Defence misrepresents the Impugned Decision in arguing that the Trial Chamber did not request any new expert evidence.[647] As the Trial Chamber recalled in the Impugned Decision, following the 2022 Appeals Chamber Judgment, it instructed, in the Order of 25 October 2022, "the parties and participants, including the VPRS and the TFV and, if available, the Appointed Experts, to provide further submissions on":

> (i) the scientific basis for the concept of transgenerational harm; (ii) the evidence needed to establish it; (iii) what the evidentiary requirements are for an applicant to prove this type of harm; (iv) the need, if any, for a psychological examination of children and parents; (v) the need, if any, to exercise caution in assessing applications based on transgenerational harm; and (vi) whether Mr Ntaganda is liable to repair such harm in the specific context of the crimes of which he has been convicted, taking into consideration the impact, if any, that the protracted armed conflict in the DRC may have on the assessment as to whether the trauma associated with transgenerational harm was caused by Mr Ntaganda.[648]

305. Despite the Trial Chamber's instruction, the Appointed Experts did not provide further submissions, indicating that they were not in a position to do so.[649] In these

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[643] 2022 Appeals Chamber Judgment, para. 497.
[644] 2022 Appeals Chamber Judgment, para. 493.
[645] 2022 Appeals Chamber Judgment, para. 493; *see also* paras 485, 492.
[646] 2022 Appeals Chamber Judgment, para. 484.
[647] *See* Defence Appeal Brief, paras 155-156.
[648] Impugned Decision, para. 153, *referring to* Order of 25 October 2022, para. 40.
[649] Impugned Decision, para. 154.

circumstances, the Appeals Chamber considers that it was not unreasonable for the Trial Chamber to rely upon the expert evidence which was already on the record. Furthermore, in its consideration of the concept of transgenerational harm, the Trial Chamber also relied upon sources other than the expert evidence on the record. For instance, the Trial Chamber relied upon the submissions of the parties and the participants, the scientific and academic literature referred to by the parties and the participants, relevant reports and testimony provided by experts in the cases of *Lubanga*, *Bemba* and *Katanga*, as well as the case law of the IACtHR, the ECCC and the KSC.[650]

306. Lastly, in relation to the Defence's contentions regarding the area of expertise of the Appointed Experts,[651] the Appeals Chamber recalls that with respect to expert evidence, it has found that:

> It is for the trial chamber to decide whether the person qualifies as an expert, and, just as for any other evidence presented, to assess the reliability and probative value of any report prepared by the expert and his or her testimony. Furthermore, it is for the trial chamber to accept or reject, in whole or in part, the testimony of an expert witness, provided that the reasons for its decision are reasonable.[652]

307. As indicated above, in the 2022 Appeals Chamber Judgment, the Appeals Chamber directed the Trial Chamber to consider the matter of transgenerational harm after "having assessed the credibility and reliability of the expert evidence on the record".[653] In relation to this direction of the Appeals Chamber, the Trial Chamber provided that "[i]n determining that the Appointed Experts' reports were credible and their evidence reliable", it assessed "factors such as the established competence of the particular witness in his or her field of expertise, the methodologies used, the extent to which the expert's findings were consistent with other evidence on the trial record, and the general reliability of the expert's evidence".[654] The Trial Chamber, in concluding that it "was satisfied that [the Appointed Experts' Reports] were sufficiently substantiated and adequate, taken together with the jurisprudence of other international jurisdictions, to support the definition provided for in the *Katanga* case", carefully considered "their expertise, the details provided about their sources and methodology,

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[650] Impugned Decision, para. 175, fns 419-423.
[651] Defence Appeal Brief, paras 151, 158-159.
[652] *Ongwen* A Appeals Chamber Judgment on Conviction, para. 1588 (footnotes omitted) and relevant jurisprudence cited therein.
[653] 2022 Appeals Chamber Judgment, para. 493.
[654] Impugned Decision, para. 180 (footnotes omitted).

and [...] that in their reports the experts clearly indicated their reliance on the academic and scientific opinions of other experts on the issue as the source of their submissions".[655] The Trial Chamber added that "as with any other evidence in the case", it "proceeded with caution, relying on the reports to the extent that they were consistent with the Chamber's holistic assessment of the evidence and information regarding transgenerational harm".[656] Lastly, the Appeals Chamber notes that the Defence had an opportunity to challenge the expertise of the Appointed Experts and that the Trial Chamber addressed the Defence's concerns in this regard.[657]

308. Accordingly, the Appeals Chamber finds that the Trial Chamber duly considered the credibility and reliability of the expert evidence upon which it relied. Therefore, to the extent that the Defence argues that the Trial Chamber failed to assess the expertise of the experts upon whose evidence it relied, the Defence's argument is rejected.

c. Alleged failure to make necessary findings and provide sufficient reasoning

309. For the reasons set out below, the Appeals Chamber considers that the Defence misrepresents the Impugned Decision in its submissions that the Trial Chamber failed to make necessary findings and/or provide sufficient reasoning concerning: (i) the "scientific certainty as to the concept of transgenerational harm and whether it is appropriate to award reparations therefor at this Court";[658] (ii) any "potential limitations to the concept of transgenerational harm";[659] (iii) whether "Mr Ntaganda could be liable to repair such harm in the specific context of the crimes" of which he has been convicted and "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";[660] and (iv) its instruction that victims should not be required to obtain psychological expertise.[661]

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[655] Impugned Decision, para. 180.
[656] Impugned Decision, para. 180.
[657] Impugned Decision, paras 162-163, 180.
[658] *See* Defence Appeal Brief, paras 162-165, 167 (emphasis in original omitted).
[659] *See* Defence Appeal Brief, para. 166 (emphasis in original omitted).
[660] *See* Defence Appeal Brief, paras 168-172.
[661] *See* Defence Appeal Brief, paras 175-179.

i. Scientific certainty as to the concept of transgenerational harm and whether it is appropriate to award reparations therefor at this Court

310. The Defence submits that, contrary to the Appeals Chamber's directions set out in the 2022 Appeals Chamber Judgment, the Trial Chamber made no findings as to: (i) which of the "two contradictory understandings" on how harm can be transmitted from parent to child it considered to be more correct or to enjoy more support among experts;[662] and (ii) the basis upon which it selected and found reliable the "most recent studies" concerning the transmission of transgenerational harm.[663] The Defence argues that these errors undermine the Trial Chamber's findings on the scientific certainty as to the concept of transgenerational harm,[664] and that, having "stopped after finding that experts from different disciplines agree that transgenerational harm exists as a phenomenon",[665] the Trial Chamber "never [...] considered 'whether it is appropriate to award reparations [for transgenerational harm] at this Court'".[666]

311. The Appeals Chamber recalls that, in the 2022 Appeals Chamber Judgment, it found that the Trial Chamber failed to provide a reasoned opinion by failing to properly assess the existence and characteristics of transgenerational harm and to consider the Defence's submissions in this regard.[667] Consequently, the Appeals Chamber directed the Trial Chamber to consider the matter of "whether it is appropriate to award reparations [for transgenerational harm] at this Court", having "consider[ed] the issue of scientific certainty as to the concept of transgenerational harm".[668] The Appeals Chamber also found it appropriate for the Trial Chamber to consider whether it needs to address, *inter alia*, "the matter of the basis for the concept of [such] harm".[669]

312. In the Impugned Decision, the Trial Chamber concluded that "within the current stage of advance in the academic and scientific research", "experts from different disciplines agree on the existence of the phenomenon of transgenerational harm".[670] To

[662] Defence Appeal Brief, paras 162-164; *see also* para. 178.
[663] Defence Appeal Brief, para. 167.
[664] Defence Appeal Brief, para. 167.
[665] Defence Appeal Brief, para. 165; *see also* para. 163.
[666] Defence Appeal Brief, para. 166; *see also* para. 163.
[667] 2022 Appeals Chamber Judgment, para. 492; *see also* para. 472.
[668] 2022 Appeals Chamber Judgment, para. 494.
[669] 2022 Appeals Chamber Judgment, para. 495.
[670] Impugned Decision, paras 174-175 (emphasis in original omitted).

arrive at this conclusion, the Trial Chamber assessed, *inter alia*, the findings of the chambers at this Court, as well as other international courts, related to the concept of transgenerational harm,[671] and the scientific and academic literature referred to by the parties and the participants.[672] The Trial Chamber also considered "the two leading schools of thought" as detailed in the *Katanga* Decision on Transgenerational Harm,[673] "most recent studies"[674] and "the current state of the scientific debate" concerning the transmission of transgenerational harm.[675] Noting that, in its view, the 2022 Appeals Chamber Judgment "was clear that the Chamber should 'consider the issue of scientific certainty as to the concept of transgenerational harm', not about its transmission",[676] the Trial Chamber found that "the concept of transgenerational harm […] is rooted in the common understanding of the notion and scope of the phenomenon by the scientific and academic community", and that "the ongoing scientific debate on the mechanisms of transmission simply reinforces the very existence of the phenomenon".[677]

313. The Appeals Chamber is not persuaded by the Defence's argument that the Trial Chamber failed to provide any analysis in reaching its conclusion that "experts from different disciplines agree on the existence of the phenomenon of transgenerational harm".[678] The Appeals Chamber recalls that "a trial chamber, in setting out its reasoning, is not required to refer to every aspect of a party's submissions on the issue on which it is deciding", as long as "it indicates with sufficient clarity the basis of the decision".[679] Similarly, "[w]hile in principle the essential reasoning of a decision must be stated in the body of the decision itself", to determine how a chamber reasoned, one may read the reasoning "together with the references contained in the footnotes of the decision".[680] The Appeals Chamber notes in this respect that, in footnotes to the Impugned Decision, the Trial Chamber referred to a number of sources relevant to its reasoning. In particular,

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[671] *See* Impugned Decision, para. 175, *referring to*, *among other authorities*, *Katanga* Reparations Order, para. 132; *Katanga* Decision on Transgenerational Harm, paras 10-14.
[672] Impugned Decision, para. 175, fns 419-421.
[673] Impugned Decision, para. 176, *referring to* *Katanga* Decision on Transgenerational Harm, paras 11-14.
[674] Impugned Decision, para. 176, *referring to* Švorcová; Ridhuan.
[675] Impugned Decision, para. 176.
[676] Impugned Decision, para. 177 (emphasis in original omitted).
[677] Impugned Decision, para. 177.
[678] *See* Defence Appeal Brief, paras 162-164, 167, *referring to* Impugned Decision, para. 175 (emphasis in original omitted).
[679] 2022 Appeals Chamber Judgment, paras 59, 609, *referring to* *Lubanga* OA5 Appeal Judgment, para. 20; *Bemba* A Appeals Chamber Judgment, para. 53.
[680] *Said* OA Appeal Judgment, para. 52.

as regards the academic and scientific literature referred to in the Defence Further Submissions on Transgenerational Harm,[681] the CLR1's 30 January 2023 Submissions and the CLR2's 30 January 2023 Submissions,[682] as well as in the TFV's 30 January 2023 Submission,[683] the Trial Chamber demonstrated the basis for its conclusion by providing succinct summaries and noting the relevant findings upon which it relied.[684] The Appeals Chamber observes that the Trial Chamber addressed not only the consensus among the experts as to the existence of the phenomenon of transgenerational harm, but also the debate with respect to the processes of social and/or epigenetic transmission. The Appeals Chamber is therefore satisfied that the Trial Chamber indicated with sufficient clarity the basis for its conclusion about the existence of transgenerational harm.

314. The Appeals Chamber further observes that the Trial Chamber, in a footnote, referred to the finding of the ECCC international co-investigating judge that "mass crimes perpetrated against groups or large portions of the population in a widespread manner […] may even affect people born *after* the facts, for instance through accounts told by direct or indirect victims".[685] The Appeals Chamber notes that the international co-investigating judge, in support of this finding, referred to the *Katanga* Decision on Transgenerational Harm,[686] and that he pointed out that this finding was made within "the different framework of victim participation before the ECCC" and "at the investigation stage" where "there is no need to make such a strict determination of causality yet".[687] This authority thus had a limited significance to the Trial Chamber's findings. However, the Appeals Chamber observes that the Trial Chamber, in the same

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[681] Defence Further Submissions on Transgenerational Harm, para. 7, fn 11, *referring to* Matthews and Phillips; Cowan *et al.*; Alhassen *et al.*; Švorcová; Hortsthemke; Fargas-Malet and Dillienburger; Iyengar *et al.*; Fossion *et al.*; Ridhuan.
[682] CLR1's 30 January 2023 Submissions, para. 17, fn 18, CLR2's 30 January 2023 Submissions, para. 11, fn 19, *both referring to* Danieli *et al.*; Yehuda *et al.*, "Relationship of parental trauma exposure and PTSD to PTSD, depressive and anxiety disorders in offspring"; Yehuda *et al.*, "Holocaust Exposure Induced Intergenerational Effects on *FKBP5* Methylation".
[683] TFV's 30 January 2023 Submission, para. 27, fn 16, *referring to Dozio et al.*.
[684] *See* Impugned Decision, para. 175, fns 419-421.
[685] Impugned Decision, para. 175, fn 423, *referring to Case 003* Order on Admissibility of Civil Party Applications, para. 32 (emphasis in original), fn 47; *Case 004* Order on Admissibility of Civil Party Applications, para. 33 (emphasis in original), fn 49.
[686] *Case 003* Order on Admissibility of Civil Party Applications, para. 32, fn 47; *Case 004* Order on Admissibility of Civil Party Applications, para. 33, fn 49, *referring to Katanga* Decision on Transgenerational Harm, para. 10.
[687] *Case 003* Order on Admissibility of Civil Party Applications, para. 32, fn 47; *Case 004* Order on Admissibility of Civil Party Applications, para. 33, fn 49.

footnote, also noted the expert opinion presented before the IACtHR[688] and the findings of the KSC Trial Panel[689] which concerned the concept of transgenerational harm. Therefore, the Appeals Chamber considers that these references provide general support for the Trial Chamber's finding that its assessment of "decisions issued by other international jurisdictions […] [led] it to conclude that experts from different disciplines agree on the existence of the phenomenon of transgenerational harm".[690]

315. The Appeals Chamber notes that, as correctly observed by the Trial Chamber, the aforementioned "two leading schools of thought" and the "most recent studies" do not dispute the existence of the phenomenon of transgenerational harm. The Appeals Chamber considers that, for the purposes of its determination of the matter, it was not unreasonable for the Trial Chamber to refrain from expressing a preference for either of the two "schools of thought". Indeed, the Trial Chamber had a sufficient basis to assume that the disagreement in respect of the mechanisms of its transmission has no bearing on the conclusion that transgenerational harm is a type of harm which the victims in the instant case may have suffered and for which they may thus be awarded reparations at this Court, provided that they meet the evidentiary requirements set out by the Trial Chamber. The Defence has not demonstrated that in order to consider the issue of scientific certainty in relation to the concept of transgenerational harm, as directed by the Appeals Chamber,[691] the Trial Chamber ought to have indicated which of the two theories was "more correct".[692] The Appeals Chamber considers that the Trial Chamber's finding on the scientific certainty of the existence of the concept of transgenerational harm is sufficient for the Trial Chamber's general assessment of

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[688] Impugned Decision, para. 175, fn 423, *referring to* *Rochac Hernández et al. v. El Salvador*, para. 114 ("The Court […] takes note of the expert opinion […], according to which forced disappearance can produce transgenerational repercussions. The expert witness […] affirmed that '[w]hen the concept of trauma and (family) ties are combined, we can formulate a principle – which is the principle of systematic and transgenerational psychological trauma – whereby a mother who has suffered trauma and has not healed inevitably transmits that experience to her son or daughter in one way or another. Therefore, a traumatic experience continues to have effects on the next generations'").

[689] Impugned Decision, para. 175, fn 423, *referring to* *Mustafa* KSC Reparations Order, paras 92 ("The Panel is […] of the view that harm may be transgenerational, *i.e.*, when social violence is passed on from ascendants to descendants with traumatic consequences for the latter"), 187 ("[T]he pain and suffering experienced by the family members of the Murder Victim also had an impact on this family's next generation").

[690] *See* Impugned Decision, para. 175 (emphasis in original omitted).

[691] 2022 Appeals Chamber Judgment, para. 494.

[692] Defence Appeal Brief, para. 163.

whether reparations for transgenerational harm may be awarded at this Court. Therefore, the Appeals Chamber rejects the Defence's arguments in this regard.

ii. Potential limitations to the concept of transgenerational harm

316. The Defence submits that the Trial Chamber failed to consider any potential limitations to the concept of transgenerational harm, since it "concluded that experts agree on the existence of the phenomenon […] without considering […] the many who do not" and "who dismiss the concept as implausible, or based on insufficient evidence".[693] In this regard, the Defence refers to two academic articles and two media articles.[694]

317. The Appeals Chamber notes that, when addressing "the two leading schools of thought", "most recent studies" and "the current state of the scientific debate" concerning the transmission of transgenerational harm,[695] the Trial Chamber specifically examined one of the academic articles referred to by the Defence in its appeal brief, noting that it is a "study that does not focus on the intergenerational transmission of trauma but on the transmission of epigenetic information across generations in general, arguing that cultural inheritance cannot be excluded".[696] The Appeals Chamber further notes that, in its submissions before the Trial Chamber, the Defence did not rely upon any of the other three articles referred to in its appeal brief and thus did not enable the Trial Chamber to consider the views of those who, according to the Defence, dismiss the concept of transgenerational harm.[697] Rather, the Defence relied upon a number of other articles which the Trial Chamber duly considered in the Impugned Decision.[698] Furthermore, the Defence does not explain how these four articles would have altered the Trial Chamber's conclusion. Nor is that apparent from these articles themselves. The Appeals Chamber therefore finds that the Defence has not demonstrated that the Trial Chamber failed to duly consider the sceptical views on the matter. The Appeals Chamber rejects the Defence's present argument.

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[693] Defence Appeal Brief, para. 166.
[694] Defence Appeal Brief, para. 166, fn 364, *referring to* Hortsthemke; Heard *et al.*; Carey; Birney.
[695] Impugned Decision, para. 176.
[696] Impugned Decision, para. 175, fn 419, *referring to*, *inter alia*, Hortsthemke.
[697] *See* Defence Further Submissions on Transgenerational Harm, para. 7, fn 11.
[698] Impugned Decision, para. 175, fn 419.

iii. *The evidentiary criteria to prove transgenerational harm*

(a) Whether Mr Ntaganda is liable to repair transgenerational harm

318. The Defence submits that the Trial Chamber ignored its relevant submissions and failed to make necessary findings regarding the issue of whether Mr Ntaganda should be liable to repair transgenerational harm in the specific context of the crimes of which he has been convicted and taking into account the impact of the protracted armed conflict in the DRC.[699] In this regard, the Appeals Chamber recalls that, in the 2022 Appeals Chamber Judgment, the relevant direction to the Trial Chamber was

> to consider whether it needs to address such issues as: […] 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 the impact, if any, that the protracted armed conflict in the DRC may have as to the possibility of establishing that the trauma associated with transgenerational harm was caused by Mr Ntaganda.[700]

319. The Appeals Chamber notes that, when addressing this direction, the Trial Chamber reiterated that "sufficient safeguards to the rights of the convicted person are included" in the 2021 Reparations Order and that "no factual presumption for transgenerational harm has been recognised […] as claimed by the Defence".[701] Contrary to the Defence's argument,[702] the Trial Chamber did address the Defence's relevant submissions, and emphasised that, while any potential award based upon transgenerational harm requires sufficient proof that the crimes of which Mr Ntaganda has been convicted are the "proximate cause" of the harm alleged by victims,[703] "[n]evertheless, […] the harm caused by a traumatic experience makes a person far more vulnerable to suffering from any subsequent trauma, and the outcomes for the person would be worse because of the previous trauma".[704]

320. On the basis of "all relevant information at its disposal", the Trial Chamber found that "the record of the case is abundant in evidence demonstrating: (i) the mass victimisation and extreme violence suffered by the victims of the crimes included in the conviction; and (ii) that the victims received no support or treatment alleviating their

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[699] Defence Appeal Brief, paras 169-172.
[700] 2022 Appeals Chamber Judgment, para. 495.
[701] Impugned Decision, para. 193.
[702] Defence Appeal Brief, para. 171.
[703] Impugned Decision, para. 193, *referring to* 2021 Reparations Order, para. 132.
[704] Impugned Decision, para. 193; *see also* para. 166.

suffering as they carried on with their lives".[705] The Trial Chamber concluded that, on a balance of probabilities, "it [is] more likely than not that the children of direct victims of the crimes for which Mr Ntaganda was convicted suffered from transgenerational harm".[706]

321. Moreover, the Trial Chamber found that "the issue of the impact of the protracted armed conflict in the DRC is a matter of evidence that has to be decided on a case-by-case basis as part of the eligibility assessments", and that "[c]aution should certainly be exercised when assessing whether victims who claim transgenerational harm are eligible to benefit from reparations".[707] It is therefore not the case, as the Defence suggests,[708] that the Trial Chamber "failed to address" the matter. Indeed, in relation to the possible breaks in the chain of causation, the Trial Chamber found that "[c]onsistent with the approach taken in the *Katanga* case, the closer the date of the child's birth to the crimes for which Mr Ntaganda was convicted, the higher the likelihood that the parent's trauma was transmitted to the child", and that it is "relevant to take into account whether, after having suffered the crimes, the direct victim(s) lived and had a child in a relatively safe area or not, in order to account for the possible breaks in the chain of causation".[709] Accordingly, the Appeals Chamber rejects the Defence's arguments in this regard.

(b) The need for a psychological examination of applicants and parents in the assessment of the causal link

322. The Defence submits that the Trial Chamber's instructions that "victims should not be required to obtain psychological expertise in order to prove the harm" and that "the need for a psychological assessment […] shall be determined on a case-by-case basis" are "insufficient and unclear", because medical assessment is central to the process of establishing the causal nexus between the alleged harm and the crime of which Mr Ntaganda was convicted.[710]

323. The Appeals Chamber notes that the Defence misrepresents the Impugned Decision in arguing that the Trial Chamber, "unwilling to move from the [2021

[705] Impugned Decision, para. 192.
[706] Impugned Decision, para. 192, *referring to* 2021 Reparations Order, para. 183(d)(vi).
[707] Impugned Decision, para. 193.
[708] Defence Appeal Brief, para. 169.
[709] Impugned Decision, para. 190.
[710] Defence Appeal Brief, para. 179; *see also* paras 175-178, *referring to* Impugned Decision, para. 189.

Reparations Order]", "held that 'victims should not be required to obtain psychological expertise in order to prove the harm'".[711] The Appeals Chamber considers that the challenged finding must be read and understood in its context. In the 2022 Appeals Chamber Judgment, the Appeals Chamber considered it appropriate for the Trial Chamber to "consider *whether it needs* to address […] *the need*, *if any*, for a psychological examination of applicants and parents".[712] In this regard, the Trial Chamber, in the Impugned Decision, noted that "no victim included in the [S]ample claimed to have suffered transgenerational harm" and found that "the decision as to whether any examination will be required as part of the further victims' eligibility assessment […] shall be taken on a case-by-case basis", "depending on whether any of the general presumptions of harm apply for the child and/or the parent(s) and the type of harm claimed".[713] Taking into account the submissions of the Registry and the TFV relating to the difficulties in terms of cost and time for each victim to obtain medical certificates and/or psychological expertise, given the magnitude of the present case,[714] the Trial Chamber emphasised that victims should not be required to obtain psychological expertise to prove transgenerational harm that they claim to have suffered, and "in the event" that the authority responsible for conducting the eligibility assessment determines that a psychological evaluation may be required, it shall ensure that the victims concerned have access to such evaluation.[715] Furthermore, the Trial Chamber set out, in detail, the criteria to assess the causal link between the crimes of which Mr Ntaganda has been convicted and the claimed transgenerational harm to be relied upon by the authority responsible for conducting the eligibility assessment.[716]

324. Similarly, the Appeals Chamber notes the Defence's contention that the Trial Chamber did not specify how the causal nexus will be demonstrated, especially given that "it remains unclear" who will conduct the eligibility assessment, whereas "this is a matter for experts", rather than for a layperson.[717] The Appeals Chamber notes in this respect that the Defence speculates that the authority in charge will assess the eligibility

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[711] Defence Appeal Brief, para. 177 (emphasis in original omitted).
[712] 2022 Appeals Chamber Judgment, para. 495 (emphasis added).
[713] Impugned Decision, para. 189.
[714] Impugned Decision, para. 189, *referring to* Registry's 30 January 2023 Submission, para. 15; TFV's 30 January 2023 Submission, para. 38.
[715] Impugned Decision, para. 189.
[716] *See* Impugned Decision, paras 185-186, 190.
[717] Defence Appeal Brief, para. 178.

to benefit from reparations for transgenerational harm with respect to individuals whom that authority has "presumably never examined nor spoken with".[718] Furthermore, in support of its submission, the Defence merely refers to "the wealth of literature cited by the Trial Chamber, and the practice in *Katanga*",[719] without providing any reference to the relevant documents or otherwise substantiating its assertion that only experts are able to assess the eligibility of victims claiming to have suffered transgenerational harm. Accordingly, the Appeals Chamber dismisses the present argument.

325. Moreover, the Appeals Chamber is not persuaded by the Defence's contention that the Trial Chamber failed to provide clear instructions by finding that "[v]ictims claiming to have suffered from transgenerational harm shall be assessed on a case-by-case basis by the authority in charge of conducting the eligibility assessment".[720] Contrary to the Defence's argument that "the Trial Chamber's delegation of this process to the authority will be impossible to implement",[721] the Appeals Chamber notes that the Trial Chamber provided detailed instructions as to the evidentiary criteria to prove transgenerational harm as follows:

> In concrete terms, a child of a direct victim claiming to have suffered transgenerational harm […] would generally need to prove (i) that a direct victim suffered harm as a result of a crime for which Mr Ntaganda was convicted; (ii) that the child of the direct victim suffered harm; (iii) that the child's harm arises out of the harm suffered by the direct victim, *i.e.*, the causal-link; and (iv) a parent-child relationship. As to the evidence required to prove the elements above, the Chamber considers that the same evidentiary criteria applicable in order to prove identity, the harm suffered, and the causal link between the crime and the harm, as for any other victims in the case, applies to victims claiming transgenerational harm.[722]

326. In particular, as regards the requirements of "harm of the direct victim and harm of the direct victim's child", the Trial Chamber considered that "although no presumption of transgenerational harm applies", "once direct victim status has been proven",

> (i) children of former child soldiers and of victims of rape and sexual slavery benefit from the presumption of material, physical, and psychological harm in relation to them (as close family members) and in relation to their parents (as direct

[718] Defence Appeal Brief, para. 179.
[719] Defence Appeal Brief, para. 178.
[720] *See* Defence Appeal Brief, paras 178-179, *referring to* Impugned Decision, para. 192.
[721] Defence Appeal Brief, para. 179; *see also* para. 178.
[722] Impugned Decision, para. 185; *see also* para. 197.

victims); (ii) children of direct victims of attempted murder and of direct victims of crimes committed during the attacks who personally experienced the attacks, benefit from the presumption of psychological harm in relation to their parents (as direct victims); and (iii) children of direct victims who lost their home or material assets with a significant effect on their daily life, benefit from the presumption of psychological harm in relation to their parents (as direct victims).[723]

327. As noted above, with respect to the requirement of the causal link between the crime of which Mr Ntaganda was convicted and the alleged transgenerational harm, the Trial Chamber found that the authority in charge of the eligibility assessment would determine on "a case-by-case basis" whether the crimes suffered by the parent(s) and of which Mr Ntaganda has been convicted are the "proximate cause" of a harm suffered by the child, "assessing whether the crime is 'closely connected' and 'significant enough' to have caused the harm".[724] Contrary to the Defence's argument that "it remains manifestly unclear how [the] causal nexus can be established" and "how other causes of potential harm can […] be ruled out",[725] the Appeals Chamber notes that the Trial Chamber set out, in detail, the criteria to assess the causal link to be relied upon by the authority in charge of the eligibility assessment as follows: (i) it "should be determined at the time of the eligibility assessment by the authority responsible for conducting the assessment"; (ii) "[i]t will need to be established whether it is more likely than not that the direct victim passed the trauma to his or her child, based on objectively justifiable criteria such as the nature, intensity, extent and duration of the suffering of both, the direct and the indirect victim"; (iii) "[t]his evaluation should be made considering the evidence as a whole"; and that (iv) "the date of birth of the child and the security situation in the area where the direct victim lived after the events, would be key elements to consider".[726]

328. Turning to the Defence's submissions relating to the prior practice in the *Katanga* case, the Appeals Chamber notes that the Defence misrepresents the Impugned Decision in arguing that the Trial Chamber dismissed its submissions in this regard and provided insufficient reasoning.[727] The Appeals Chamber notes that, in respect of the Defence's contention that consistent prior practice of the Court requires a medical diagnosis, the

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[723] Impugned Decision, para. 186 (footnotes omitted).
[724] Impugned Decision, para. 190.
[725] Defence Appeal Brief, para. 175.
[726] Impugned Decision, para. 190.
[727] Defence Appeal Brief, para. 180.

Trial Chamber carefully explained that the trial chamber in the *Katanga* case relied upon medical certificates "not because they are the generally required documents to prove this type of harm", but because those were the supporting documents submitted by the legal representative of victims who had requested the assistance of an expert.[728] Therefore, the Appeals Chamber considers that the Trial Chamber duly provided its reasons for dismissing the Defence's argument in this regard.

329. In the same vein, the Appeals Chamber notes that the Trial Chamber explicitly addressed the Defence's assertion that "a diagnosis of psychological harm for the parents should always exist and be reassessed", and dismissed it as "selective and taken out of context".[729] To arrive at its conclusion, the Trial Chamber "reassessed" the testimony given in the cases of *Bemba* and *Lubanga* upon which the Defence relied and noted that in the case at hand, "for most parents no psychological examination is required", since "most direct victims who are former child soldiers, victims of rape and sexual slavery, victims of attempted murder, victims who personally experienced the attacks, or victims who lost their homes or material assets with a significant effect on their daily life, may be entitled to benefit from the presumption of psychological harm established in the [2021 Reparations Order]".[730] In this context, the Trial Chamber further considered that "transgenerational harm may not only be psychological and should, therefore, be holistically assessed and addressed, depending on the victims' harm, through the different rehabilitation measures to be included within the individualised components of the collective reparations granted in this case".[731]

330. In light of the above, the Appeals Chamber rejects the Defence's arguments relating to the need for a psychological evaluation of applicants and parents.

4. *Overall conclusion*

331. For the above reasons, the Appeals Chamber rejects the Defence's sixth, seventh and eighth grounds of appeal.

[728] Impugned Decision, para. 187, *referring to*, *inter alia*, *Katanga* Rapport d'Expertise, paras 5-7.
[729] Impugned Decision, para. 188.
[730] Impugned Decision, para. 188.
[731] Impugned Decision, para. 188.

G. Grounds of appeal 9-10: Alleged errors related to the Trial Chamber's finding of damage caused by the attack on the Sayo health centre

332. Under its ninth and tenth grounds of appeal, the Defence submits that the Trial Chamber committed an error of law by "impermissibly" making "additional/new findings" outside the Conviction Decision and the Sentencing Decision (collectively: "Conviction and Sentencing Decisions").[732]

1. *Relevant procedural background*

333. In the Conviction Decision, Mr Ntaganda was convicted as an indirect co-perpetrator under count 17 of intentionally directing attacks against protected objects as a war crime, namely, against the health centre in Sayo, in the context of the First Operation.[733] In the Sentencing Decision, the Trial Chamber considered that by launching an attack against the health centre, the "perpetrators accepted the consequential severe impact on the welfare and/or lives of any patients" present at the centre at the relevant time and that the UPC/FPLC thus "disrupted the medical care for persons in need".[734] More specifically, when considering factors in aggravation of sentence, the Trial Chamber found:

> 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.*[735]

334. In the 2021 Reparations Order, the Trial Chamber found that reparations could be awarded to direct victims who showed they had suffered harm as a result of the crime of which Mr Ntaganda had been convicted in relation to the health centre.[736] The Trial Chamber defined one form of material harm suffered by direct victims of the attacks as "[d]amage to the health centre in Sayo and loss of adequate healthcare provision to the community that benefitted from it".[737]

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[732] Defence Appeal Brief, paras 188-190, *referring to* Impugned Decision, para. 234.
[733] Conviction Decision, paras 1144-1147, pp. 504-505.
[734] Sentencing Decision, para. 144.
[735] Sentencing Decision, para. 153 (emphasis added).
[736] 2021 Reparations Order, para. 116.
[737] 2021 Reparations Order, para. 183.

335. On appeal against the 2021 Reparations Order, the Defence contested the evidence relied upon by the Trial Chamber: (i) to establish the extent of the damage caused to the health centre leading to the disruption of medical services to the community; and (ii) to establish a causal nexus between the crime and any damage caused by the UPC/FPLC.[738]

336. In the 2022 Appeals Chamber Judgment, the 2021 Reparations Order was partially reversed to the extent, *inter alia*, that the Trial Chamber failed to provide reasons in relation to the "assessment of harm concerning the health centre in Sayo and the breaks in the chain of causation when establishing harm caused by the destruction of that health centre".[739] In particular, the Appeals Chamber found that neither the Conviction Decision nor the Sentencing Decision found that, as a result of the crime of which Mr Ntaganda was convicted, damage was caused to the health centre.[740]

337. In the Impugned Decision, the Trial Chamber explained that the lack of findings in the Conviction and Sentencing Decisions on the possible damage sustained by the health centre and the community because of the crime of which Mr Ntaganda was convicted is due to "the nature of the crime under analysis".[741] The Trial Chamber found that not only was actual harm inflicted on the health centre as a result of the attack but that the provision of medical services for persons in the community was "severely disrupted".[742] The Trial Chamber therefore reaffirmed its finding in the 2021 Reparations Order that the attack caused "damage to the health centre in Sayo and loss of adequate healthcare provision to the community that benefitted from it".[743]

2. *Summary of the submissions*

a. Defence's submissions

338. The Defence argues that the Trial Chamber exceeded the scope of the Conviction and Sentencing Decisions when it entered a new finding during the reparation phase.[744] The Defence asserts that this finding – that the attack caused "damage to the health centre in Sayo and loss of adequate healthcare provision to the community that benefitted from

[738] 2021 Defence Appeal Brief, paras 135-138.
[739] 2022 Appeals Chamber Judgment, p. 11, para. 1.
[740] 2022 Appeals Chamber Judgment, paras 535, 539.
[741] Impugned Decision, para. 226.
[742] Impugned Decision, paras 227-231.
[743] Impugned Decision, para. 234.
[744] Defence Appeal Brief, para. 188.

it" – is new as it cannot be found in the Conviction and Sentencing Decisions.[745] By issuing this new finding, the Defence submits that the Trial Chamber "appears to simply override" its finding in the Sentencing Decision that it is "not clear whether the centre was damaged as a result of the crime".[746]

339. The Defence further submits that the prohibition against making new findings at the reparation phase seeks to avoid the prejudice that would arise out of "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".[747]

340. Lastly, the Defence submits that the Trial Chamber's expansion of Mr Ntaganda's conviction goes expressly against the Appeals Chamber's instructions in relation to the health centre in the 2022 Appeals Chamber Judgment. The Defence argues that "there was no suggestion [by the Appeals Chamber] 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".[748]

b. Victims Group 2's submissions

341. Victims Group 2 submit that the Defence fails to demonstrate any discernible error in the Trial Chamber's determination of the harm caused by the attack on the Sayo health centre.[749] They further submit that the Trial Chamber's approach to the finding of damage was not only consistent with the very nature of the crime under article 8(2)(e)(iv) of the Statute but also remained within the confines of the Conviction and Sentencing Decisions and did not amount to a "new" finding at the reparation phase.[750]

342. Furthermore, Victims Group 2 submit that by substantiating its claim only on the basis that the Sentencing Decision found that the damage to the health centre was "unclear", the Defence "ignores the fact that the harm caused to the Sayo health centre as a protected building goes far beyond the centre's physical structure".[751] In their view,

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[745] Defence Appeal Brief, para. 189.
[746] Defence Appeal Brief, para. 188.
[747] Defence Appeal Brief, para. 192.
[748] Defence Appeal Brief, para. 194 (emphasis in original).
[749] Victims Group 2's Response to the Defence Appeal Brief, para. 134.
[750] Victims Group 2's Response to the Defence Appeal Brief, para. 127.
[751] Victims Group 2's Response to the Defence Appeal Brief, para. 130.

the Defence demonstrates nothing more than mere disagreement with the Trial Chamber's findings.[752]

3. *Determination by the Appeals Chamber*

343. Under these grounds of appeal, the Appeals Chamber understands the Defence to be generally disputing the lawfulness of "new evidence" being examined and "new findings" being made on the harm inflicted at the reparation stage that was not specified in either a conviction decision or a sentencing decision.[753] More specifically, the Defence alleges that the Trial Chamber erred in law by entering additional findings on the damage caused to the health centre in Sayo and the affected community thereby exceeding the scope of the Conviction and Sentencing Decisions.[754] The Appeals Chamber will address these issues in turn.

a. The introduction, generally, of new evidence and new findings in reparation proceedings

344. The Appeals Chamber notes that central to the Defence's arguments in relation to this issue is the principle, first espoused by the Appeals Chamber in the 2019 *Lubanga* Appeals Chamber Judgment, that "in awarding reparations a trial chamber must remain within the confines of the conviction and sentencing decisions".[755]

345. In the Defence's view, by virtue of this principle "the reparations process is not a new evidential process in itself" and as such a 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 [t]rial [c]hamber of reliance".[756] In support of this argument, the Defence submits that, pursuant to regulation 56 of the Regulations, trial chambers "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".[757] In addition, the Defence cites to a finding in the *Abd-Al-Rahman* OA4 Appeal Judgment, in which the Appeals Chamber held that "the Court is empowered to hear the evidence

[752] Victims Group 2's Response to the Defence Appeal Brief, para. 130.
[753] Defence Appeal Brief, paras 183-184, 188.
[754] Defence Appeal Brief, para. 188.
[755] 2019 *Lubanga* Appeals Chamber Judgment, para. 311.
[756] Defence Appeal Brief, para. 184.
[757] Defence Appeal Brief, para. 184.

of victims and permit questioning by their legal representative in respect of reparations during trial proceedings”.[758]

346. First, the Appeals Chamber notes that regulation 56 of the Regulations does not *require* a trial chamber to hear evidence pertaining to reparations during the trial. In addition, the provision does not preclude, in and of itself, the hearing of witnesses and the examination of evidence during the reparation proceedings. Second, in relation to the Appeals Chamber’s holding in the *Abd-Al-Rahman* OA4 Appeal Judgment, the Appeals Chamber referred to rule 91(4) of the Rules and regulation 56 of the Regulations to buttress its conclusion that a pre-trial chamber has competence to address issues related to reparations even at that early stage of the proceedings.[759] In so doing, the Appeals Chamber also clearly stated, with reference to rule 97 of the Rules, that “the final decision on the scope of damage and the determination of modalities for reparations takes place after the trial is concluded”.[760] Accordingly, the Appeals Chamber finds that the Defence is not assisted by its reliance on regulation 56 of the Regulations or the *Abd-Al-Rahman* OA4 Appeal Judgment, to support its argument that “the reparations process is not a new evidential process in itself” and as such a trial chamber “is confined to the factual findings in the conviction and sentencing decisions”.[761] These arguments are therefore rejected.

347. Likewise, the Defence submits that, by virtue of the principle that “in awarding reparations a trial chamber must remain within the confines of the conviction and sentencing decisions”, trial chambers are precluded during the reparation process from making additional findings to “supplement” findings on the harm inflicted that were already made in the Conviction and Sentencing Decisions.[762]

348. In support of this argument, the Defence refers to the 2019 *Lubanga* Appeals Chamber Judgment, in respect of which Mr Lubanga had argued that his efforts to demobilise children and various items of evidence that showed his concern and attempts to remedy the situation, were considered during the trial in the assessment of his degree

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[758] *Abd-Al-Rahman* OA4 Appeal Judgment, para. 15.
[759] *Abd-Al-Rahman* OA4 Appeal Judgment, paras 14-15.
[760] *Abd-Al-Rahman* OA4 Appeal Judgment, para. 20.
[761] Defence Appeal Brief, para. 184.
[762] Defence Appeal Brief, para. 185.

of participation in the commission of the crimes and his criminal intent.[763] However, he averred that they were not considered by the trial chamber in its assessment of his liability for reparations.[764]

349. The Appeals Chamber addressed these arguments by first stating that "in awarding reparations, a trial chamber must remain within the confines of the conviction and sentencing decisions".[765] It then proceeded to reject Mr Lubanga's arguments,[766] noting that he had only raised these issues at the trial stage and not during the reparation stage.[767] Furthermore, it found that he had failed to demonstrate "how his alleged demobilisation efforts mitigated or reduced the harm" or "how his alleged concerns or attempts had any impact on the harm the victims suffered".[768] Rather than bar Mr Lubanga from raising these issues or the trial chamber from considering them during the reparation proceedings, the Appeals Chamber found that these issues may have been relevant to the trial chamber's assessment of the overall harm suffered if only Mr Lubanga had "clearly substantiated" how his actions could have had an impact upon the cost to repair the harm.[769] In the present appeal, the Appeals Chamber considers that the Defence is not assisted by its reliance upon the findings in the 2019 *Lubanga* Appeals Chamber Judgment, to show that Mr Lubanga's arguments were rejected because they "fell outside the conviction and sentencing decisions in that case" or because, in awarding reparations, a trial chamber "could not make other findings to supplement those that fell within their four corners".[770] The argument is therefore rejected.

350. In light of the foregoing, the Appeals Chamber finds that the Defence is misdirected in its interpretation of the principle that "in awarding reparations, a trial chamber must remain within the confines of the conviction and sentencing decisions".[771] The Appeals Chamber considers that the import of this principle is based upon the understanding that "reparation orders are intrinsically linked to the individual whose criminal liability is established in a conviction and whose culpability for those criminal

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[763] 2019 *Lubanga* Appeals Chamber Judgment, para. 310.
[764] Defence Appeal Brief, para. 185.
[765] 2019 *Lubanga* Appeals Chamber Judgment, para. 311.
[766] 2019 *Lubanga* Appeals Chamber Judgment, para. 312.
[767] 2019 *Lubanga* Appeals Chamber Judgment, para. 311.
[768] 2019 *Lubanga* Appeals Chamber Judgment, paras 311-312.
[769] 2019 *Lubanga* Appeals Chamber Judgment, para. 312.
[770] Defence Appeal Brief, para. 185.
[771] Defence Appeal Brief, para. 185.

acts is determined in a sentence".[772] Put differently, the conviction and sentencing decisions define the parameters of the convicted person's liability to repair the harm. Thus, in awarding reparations, a trial chamber is restricted to relying upon evidence and making factual findings on the harm that is caused by the crimes of which the person is convicted, as set out in the conviction and sentencing decisions.[773]

351. That said, the Appeals Chamber considers that this limitation on a trial chamber's factual findings in defining or identifying the harm does not preclude the introduction of evidence or other factual findings that were not considered for the purposes of the conviction and sentencing decisions. This is because, in awarding reparations, article 75(1) of the Statute requires a trial chamber to determine "the scope and extent of any damage, loss and injury to, or in respect of victims". In making this determination, a trial chamber must have recourse to all the relevant information as it pertains to the crimes for which the person was convicted. As set out in the 2015 *Lubanga* Appeals Chamber Judgment,[774] this information includes: (i) findings of harm that were made in the context of the trial proceedings; (ii) evidence presented during the trial for the purposes of reparations (regulation 56 of the Regulations); (iii) evidence received at a reparation hearing, in written submissions from the parties and participants (article 75(3) of the Statute) or from experts who were engaged for the purpose of providing such evidence (rule 97(2) of the Rules); and (iv) evidence contained in a request for reparations that identifies a harm that is not mentioned in the decisions on conviction and sentence (rule 94 of the Rules).

352. Against this legal framework of the Court, the Appeals Chamber finds that it is not "impermissible" in awarding reparations for a trial chamber to define the harms which resulted from the crimes of which the person was convicted, based upon evidence and findings that may not have been specified in either the conviction decision or the sentencing decision. Importantly, and contrary to the Defence's argument, the introduction of such reparation-specific evidence and factual findings during the reparation process does not "expand the scope of the conviction and sentence on the

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[772] 2015 *Lubanga* Appeals Chamber Judgment, para. 65.
[773] The Appeals Chamber underlines in this regard that the crimes of which a person was convicted must be the "'proximate cause' of the harm for which reparations are sought", *see* 2022 Appeals Chamber Judgment, para. 566, *referring to* 2019 *Lubanga* Appeals Chamber Judgment, para. 59.
[774] 2015 *Lubanga* Appeals Chamber Judgment, paras 185-187.

basis of the lower standard of proof".[775] Rather, it is the scope of the *harm* resulting from the crimes and not the scope of the conviction or the sentence already established in a conviction and sentencing decision that may be impacted by the introduction of such evidence and findings. As such, in reparation proceedings it is the harm suffered and not the crimes of which the person has been convicted that is further defined or elaborated upon.

353. Finally, the Appeals Chamber notes the Defence's submission that permitting a trial chamber to enter new findings at the reparation stage would be prejudicial as such findings would be "unchallenged by the parties and without the safeguard of appellate review".[776] The Defence submits further that the parties would presumably have to expend resources and time to investigate and bring reparation-specific evidence to "bolster evidence" and "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".[777] For the reasons that follow, the Appeals Chamber rejects the Defence's arguments.

354. The Appeals Chamber notes that under the Court's legal framework a convicted person is guaranteed the right to fair and impartial reparation proceedings.[778] In particular, rule 97(3) of the Rules provides that "[i]n all cases, the Court shall respect the rights of victims and the convicted person". In keeping with this directive, the Appeals Chamber has previously held that "[e]ach party must be given the opportunity to have knowledge of and comment on the observations filed or evidence adduced by the other party" and "that the guiding principle for trial chambers must be to ensure that the convicted person, as a party to the litigation, has a meaningful opportunity to challenge the information on the basis of which a chamber will make an award against him or her".[779] Importantly, the Statute also provides an opportunity pursuant to article 82(4) for the parties to challenge an order for reparations on appeal, an opportunity of which the Defence has twice availed itself in this case.

355. Furthermore, as to the contention that the parties would likely have to expend resources and time to investigate reparation-specific evidence, the Appeals Chamber

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[775] Defence Appeal Brief, paras 189, 192.
[776] Defence Appeal Brief, para. 192.
[777] Defence Appeal Brief, para. 192.
[778] 2019 *Lubanga* Appeals Chamber Judgment, para. 248.
[779] 2019 *Lubanga* Appeals Chamber Judgment, paras 248, 256.

considers this argument to be speculative and to ignore the primary purpose of reparation proceedings, namely, to repair the harm caused to victims who have suffered as a result of the crimes of which the person has been convicted. The argument is therefore rejected.

b. Whether the Trial Chamber was precluded from making findings at the reparation stage on the actual infliction of harm

356. In the Sentencing Decision, the Trial Chamber found, *inter alia*, that as a result of the crime of which Mr Ntaganda had been convicted in relation to the health centre it was "*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*".[780]

357. In the 2021 Reparations Order, the Trial Chamber found that reparations could be awarded to direct victims of this crime and defined the harm as "[d]amage to the health centre in Sayo and loss of adequate healthcare provision to the community that benefitted from it".[781]

358. In the 2022 Appeals Chamber Judgment, the Appeals Chamber reversed the Trial Chamber's findings in relation to the health centre and remanded the matter for the Trial Chamber to address once more. In doing so, the Appeals Chamber held that it

> again recalls that neither the [Conviction Decision] nor the [Sentencing Decision] finds that, as a result of Mr Ntaganda's crime of intentionally directing attacks against protected objects, namely the health centre in Sayo, damage was caused to the health centre or loss of adequate healthcare provision was caused to the community. Therefore, to make such findings in these [reparation] proceedings, evidence would need to have been presented, establishing to the appropriate standard of proof, that the damage exists, that there is a causal nexus between that damage and Mr Ntaganda's crimes and that, as a result, Mr Ntaganda's liability to pay for repair to this centre has been established. The Appeals Chamber finds that the [2021 Reparations Order] is unclear in this regard. It simply adopts conclusions presented in the Second Expert Report without assessing its reliability or the credibility of the expert.
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> In light of these considerations, the Appeals Chamber considers that the Trial Chamber's findings, in the [2021 Reparations Order], regarding the issue of the health centre in Sayo are inadequate. Without further reasoning, it is impossible for the Appeals Chamber to assess their accuracy. It thus finds that the Trial Chamber failed to meet the requirement to provide a reasoned opinion on the matter. Accordingly, the Appeals Chamber considers it appropriate to reverse the

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[780] Sentencing Decision, para. 153 (emphasis added).
[781] 2021 Reparations Order, para. 183.

> Trial Chamber's findings in relation to the health centre in Sayo and to remand the matter to the Trial Chamber for it to address the matter again, taking into account 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.[782]

359. In the Impugned Decision, the Trial Chamber explained that the lack of findings in the Conviction and Sentencing Decisions, on the possible damage sustained by the health centre or the community because of the crime of which Mr Ntaganda was convicted, is due to "the nature of the crime under analysis".[783] The Trial Chamber further explained that:

> As determined in the [Conviction Decision], following prior jurisprudence, 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. Conduct crimes, do not require a result in terms of infliction of any harm or damage. The crime is committed, and a person can be found liable, for as long as the attack is launched against a protected object. Accordingly, the Prosecutor did not need to prove, and the Chamber was not required to make any determination beyond reasonable doubt for the purposes of conviction or sentence as to whether any harm was actually inflicted as a consequence of the crime. In this context, the Chamber 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.[784]

360. The Trial Chamber then proceeded to find, with respect to whether the damage caused to the health centre actually falls within the scope of the Sentencing Decision, that:

> The Chamber also found beyond reasonable doubt in the [Sentencing Decision] that although more than one projectile was fired at the centre, and the centre was intentionally made the object of the attack, it was not clear whether the weapon destroyed the centre in full or merely damaged it. Consistent with the findings above, having reassessed the evidence as a whole, the Chamber finds that the evidence clearly demonstrates that, although the centre may not have been fully destroyed by the shelling, it lost its doors and windows, and received impacts on its walls, provoking such fear in its personnel that they fled, essentially abandoning the building, as well as patients that could not even run on their own.[785]

361. The Defence takes issue with the Trial Chamber's approach to its finding that damage was inflicted on the health centre and the affected community as a result of the

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[782] 2022 Appeals Chamber Judgment, paras 548-549.
[783] Impugned Decision, para. 226.
[784] Impugned Decision, para. 226 (footnotes omitted).
[785] Impugned Decision, para. 230.

crime of which Mr Ntaganda was convicted. While reserving its challenge on the reliability of the finding for consideration under the eleventh and twelfth grounds of its appeal, the Defence contends that the Trial Chamber erred when it ignored a finding in the Sentencing Decision which found that it was "not clear whether the centre was damaged as a result of the crime" and replaced it with a new finding that "the attack [on] the health centre caused damage to the health centre".[786] In the Defence's submission, this approach amounts to "impermissibly" making "additional findings that fall outside the [Conviction and Sentencing Decisions]".[787]

362. The Appeals Chamber notes that the Defence's argument is premised on the understanding that the finding in the Sentencing Decision, namely, that the damage to the health centre was "unclear", amounted to a finding, beyond reasonable doubt, that no harm was actually inflicted on the health centre as a result of the crime of which Mr Ntaganda was convicted. Consequently, the Defence maintains that the Trial Chamber was prohibited, during the reparation stage, from finding that the centre had been damaged. For the reasons that follow, the Appeals Chamber finds the premise of the Defence's argument to be misplaced.

363. The Appeals Chamber recalls that, in the 2022 Appeals Chamber Judgment, it noted that, in awarding reparations, the Trial Chamber had not considered the fact that the Sentencing Decision states that "[i]t is […] not clear whether the centre was damaged as a result of the crime".[788] Thus, the Appeals Chamber remanded the matter for the Trial Chamber to, *inter alia*, address the issue of whether damage caused to the health centre falls within the scope of the Conviction and Sentencing Decisions.[789]

364. Contrary to the Defence's argument, the Appeals Chamber remanded this matter to the Trial Chamber because it did not consider the relevant finding in the Sentencing Decision to amount to a finding, beyond reasonable doubt, that the health centre had *not* been damaged. In the absence of a finding, beyond reasonable doubt, at the trial stage concerning the actual harm caused as a result of the crime of which Mr Ntaganda had been convicted, the Trial Chamber was not precluded from establishing during the

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[786] Defence Appeal Brief, paras 188, 190-191.
[787] Defence Appeal Brief, para. 188.
[788] 2022 Appeals Chamber Judgment, para. 540.
[789] 2022 Appeals Chamber Judgment, paras 548-549.

reparation stage, on the basis of all of the evidence before it that, on a balance of probabilities, "the attack [on] the health centre caused damage to the health centre".[790] As discussed in the preceding section of this ground of appeal, under the Court's legal framework it is not "impermissible" in awarding reparations for a trial chamber to define the harms which resulted from the crimes of which the person was convicted, based upon evidence and findings that may not have been specified in either the conviction decision or the sentencing decision.[791] Thus, the Trial Chamber was not prohibited from defining the harm caused at the reparation stage by making further findings based upon the presentation of relevant evidence.

365. Moreover, the Appeals Chamber further considers that had the Trial Chamber made findings in the Conviction or Sentencing Decisions that proved the damage to the health centre and to the affected community beyond reasonable doubt, there would have been no need for the Trial Chamber to provide further reasoning or make additional findings establishing the damage when awarding reparations. However, in the absence of such findings, either in the Conviction or Sentencing Decisions, the basis for the findings must be clearly set out in the award for reparations.

366. While the issue of whether the Trial Chamber erred in finding that the health centre was damaged as a result of the crime still remains to be determined under the eleventh and twelfth grounds of the Defence's appeal, the Appeals Chamber, at this juncture, finds no error in the Trial Chamber's approach that led to its conclusion. Contrary to the Defence's argument, the Trial Chamber did not deviate from the Appeals Chamber's instructions when it "solicit[ed], consider[ed] and weigh[ed] new evidence to make new findings" in relation to the issue of damage to the health centre.[792]

367. Accordingly, the Appeals Chamber finds that the Trial Chamber did not misinterpret the law when it concluded that it is "not prevented from making findings at the reparation stage of the proceedings, to the extent that the actual infliction of harm is proven at the applicable standard of proof of balance of probabilities" without the "harm having been proven and quantified at trial".[793] In this respect, the Appeals Chamber

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[790] Defence Appeal Brief, paras 188, 190-191.
[791] *See* paragraph 352 above.
[792] Defence Appeal Brief, para. 194.
[793] Impugned Decision, para. 226.

notes that, while the Trial Chamber's reliance on the distinction between "conduct crimes" and "results crimes" to support its conclusion may explain the lack of findings regarding possible damage to the health centre and to the affected community in the Conviction Decision, it was, however, not determinative for addressing the issue at hand. The arguments of the Defence are therefore rejected.

4. *Overall conclusion*

368. For the above reasons, the Appeals Chamber rejects the Defence's ninth and tenth grounds of appeal.

H. Ground of appeal 11: Alleged errors in the Trial Chamber's reliance upon Dr Gilmore's report and other evidence for its findings of harm caused to the Sayo health centre and the community

369. Under its eleventh ground of appeal, the Defence challenges the reliability of the Trial Chamber's finding that the attack on the Sayo health centre "*caused harm to its service provision and exacerbated the vulnerability and suffering of the civilian population*".[794] The Appeals Chamber notes that for this finding the Trial Chamber drew on the specific wording used by Dr Gilmore, an expert relied upon by the Trial Chamber in the 2021 Reparations Order,[795] to find Mr Ntaganda liable for reparations in relation to the Sayo health centre. In this context, the Defence takes issue with the Trial Chamber's: (i) assessment of the credibility and reliability of Dr Gilmore's Report;[796] and (ii) reliance upon two additional statements, presented by Victims Group 2 in the reparation phase, to support its finding.[797] In the Defence's view, the alleged errors "warrant the removal of the Sayo health centre from any eventual reparations award".[798]

1. *Relevant procedural background*

370. In the 2022 Appeals Chamber Judgment, the Appeals Chamber found that the Trial Chamber had "erred in failing to properly assess the credibility and reliability of [Dr Gilmore's] Report and the basis for its findings, and that it erred in failing to explain how it reached its findings as to causation and harm to the centre".[799] Specifically, the

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[794] Impugned Decision, para. 196 (emphasis added).
[795] 2021 Reparations Order, para. 159, *referring to* Dr Gilmore's Report, paras 160, 161, 168, 169.
[796] Defence Appeal Brief, paras 200-204.
[797] Defence Appeal Brief, paras 205-209.
[798] Defence Appeal Brief, para. 209.
[799] 2022 Appeals Chamber Judgment, para. 548.

Appeals Chamber found that the 2021 Reparations Order was "unclear" and "simply adopt[ed] conclusions presented in [Dr Gilmore's Report] without assessing its reliability or the credibility of the expert".[800]

371. In the Impugned Decision, the Trial Chamber addressed the Appeals Chamber's concerns about Dr Gilmore's Report by asserting that it did assess the credibility, reliability and the basis for the reports of all appointed experts and that it found "[Dr Gilmore] credible and her report generally reliable".[801] The Trial Chamber also reaffirmed its finding in the 2021 Reparations Order, "that the attack [on] the health centre caused 'damage to the health centre in Sayo and loss of adequate healthcare provision to the community that benefitted from it'".[802] The Trial Chamber based this finding on Dr Gilmore's Report as well as the "evidence assessed as a whole" that established the harm on a balance of probabilities.[803]

2. *Summary of the submissions*

a. Defence's submissions

372. The Defence submits that the Trial Chamber erred in its assessment of Dr Gilmore's credibility and the reliability of her report. The Defence contends that, due to the destruction of the underlying information supporting Dr Gilmore's findings, the Trial Chamber had "no new information" before it and thus was unable to "properly assess" the basis for her findings as directed by the Appeals Chamber.[804] In addition, the Defence argues that by failing to engage with this issue, the Trial Chamber rendered a conclusion that was "insufficiently reasoned".[805]

373. Furthermore, the Defence avers that the Trial Chamber erred in failing to identify what "other evidence" it relied upon for its conclusion that the attack "caused harm to its service provision and exacerbated the vulnerability and suffering of the civilian population".[806] The Defence further contends that assuming the Trial Chamber was referring to the two additional statements introduced by Victims Group 2 to support its

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[800] 2022 Appeals Chamber Judgment, para. 548.
[801] Impugned Decision, para. 233.
[802] Impugned Decision, para. 234.
[803] Impugned Decision, para. 232.
[804] Defence Appeal Brief, paras 200-202.
[805] Defence Appeal Brief, para. 202.
[806] Defence Appeal Brief, paras 203-204.

conclusion, this is still "problematic".[807] First, the Defence submits that the Trial Chamber's reliance upon this evidence is unfair to the convicted person as it re-opens "the evidentiary proceedings in order to secure evidence that would allow a Trial Chamber to expand the scope of the conviction and reparations award".[808] Second, the Defence submits that this additional evidence, which was annexed to Victims Group 2's filing, submitted pursuant to the Order of 25 October 2022,[809] was only received by the Defence on the same date that the Defence had filed its additional submissions on the health centre.[810] The Defence argues that, as a result, it had no opportunity to challenge this evidence, which falls outside the case record.[811] Furthermore, the Defence alleges inconsistencies in the additional evidence that call into question the reliability of such evidence.[812] Third, the Defence argues that the Trial Chamber ignored its submissions and the evidence cited in support that were relevant to the finding of significant interruption of services for a considerable period after the attack. In this regard, the Defence contends that its submissions, the evidence it referenced, and the information collected by Dr Gilmore demonstrated that no existing or new evidence could have supported the Trial Chamber's finding.[813]

b. Victims Group 2's submissions

374. Victims Group 2 submit that, contrary to the Defence's argument, the Trial Chamber did assess the credibility, reliability, and the basis of Dr Gilmore's Report together with the concerns raised by the Defence in this regard.[814] They further submit that, for the purposes of the Trial Chamber's assessment, it was not required to "scrutinise the underlying material and information relied upon by Dr Gilmore".[815] In their view, the Defence's argument demonstrates mere disagreement with the Trial Chamber's approach without showing any error.[816]

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[807] Defence Appeal Brief, para. 205.
[808] Defence Appeal Brief, para. 206.
[809] *See* CLR2's 22 February 2023 Submissions; Annex 1 to CLR2's 22 February 2023 Submissions; Annex 2 to CLR2's 22 February 2023 Submissions.
[810] Defence Appeal Brief, para. 206.
[811] Defence Appeal Brief, para. 206.
[812] Defence Appeal Brief, para. 207.
[813] Defence Appeal Brief, para. 208.
[814] Victims Group 2's Response to the Defence Appeal Brief, paras 137-139, *referring to* Impugned Decision, paras 180, 233.
[815] Victims Group 2's Response to the Defence Appeal Brief, para. 139.
[816] Victims Group 2's Response to the Defence Appeal Brief, para. 139.

375. As to the Defence's contention that the Trial Chamber relied "solely" upon the wording of Dr Gilmore's Report for its conclusion, Victims Group 2 submit that the Trial Chamber was clear that its finding was based upon the expert's report and the evidence as a whole.[817] They further submit that, in finding that the attack on the health centre "caused harm to its service provision and exacerbated the vulnerability and suffering of the civilian population", the Trial Chamber "remained within the confines of the [Conviction Decision] and the [Sentencing Decision]".[818] In addition, they contend that the Trial Chamber relied upon the additional evidence presented, and therefore even assuming the Trial Chamber erred in relying upon Dr Gilmore's Report, this would not have materially affected the Impugned Decision.[819]

376. Finally, Victims Group 2 submit that, contrary to the Defence's argument,[820] the Trial Chamber's conclusion that the "Sayo health centre was abandoned during the attack was based not only upon the additional evidence presented by the Legal Representative", but also upon findings made in the Conviction Decision according to which "the medical personnel fled the Sayo health centre to protect their lives and had to abandon the patients to their fate".[821]

3. *Determination by the Appeals Chamber*

a. The Trial Chamber's credibility and reliability assessment in relation to Dr Gilmore's expertise and her report

377. The Defence submits that the Trial Chamber committed a procedural error by relying upon Dr Gilmore's Report, despite being unable to properly assess its credibility, reliability, and the basis for its findings.[822] In this respect, the Defence points to the fact that all of the underlying material and information relied upon by Dr Gilmore [REDACTED] consequently making it "impossible" for the Trial Chamber to conduct its credibility and reliability assessment.[823] In the Defence's view, this meant that the

[817] Victims Group 2's Response to the Defence Appeal Brief, para. 140, *referring to* Impugned Decision, para. 232.
[818] Victims Group 2's Response to the Defence Appeal Brief, para. 140, *referring to* Impugned Decision, para. 232.
[819] Victims Group 2's Response to the Defence Appeal Brief, para. 142.
[820] Defence Appeal Brief, para. 205.
[821] Victims Group 2's Response to the Defence Appeal Brief, para. 143.
[822] Defence Appeal Brief, p. 73, paras 200-202.
[823] Defence Appeal Brief, para. 200, *referring to* [REDACTED].

Trial Chamber had "no new information about the credibility and reliability of the underlying material, which was the Appeals Chamber's concern".[824]

378. In the 2022 Appeals Chamber Judgment, the Trial Chamber was directed, *inter alia*, to assess, again, Dr Gilmore's credibility and the reliability of the findings in her report.[825] In remanding the entirety of the matter, the Appeals Chamber considered that the Trial Chamber should take 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".[826] Contrary to the Defence's argument, the Appeals Chamber did not require the Trial Chamber to consider "new information" *per se* to determine the "credibility and reliability of the underlying material" which formed the basis of Dr Gilmore's findings. The Appeals Chamber considers that the Defence misapprehends its directions in this regard. Furthermore, the Appeals Chamber notes that, in addressing the issue of the unavailability of the underlying material relied upon by Dr Gilmore, the Trial Chamber noted the submissions of the Defence and clarifications obtained from Dr Gilmore whereby she stated that "all pertinent information from the interviews she carried out [was] contained in the Report".[827] Consequently, the Trial Chamber found that it

> cannot but conclude that all information [Dr Gilmore] collected to inform her views [was] already included in the Report and there is no additional information that could be subject to disclosure.[828]

379. The Appeals Chamber finds that, in the circumstances, the Trial Chamber's approach to this issue was reasonable. Contrary to the Defence's argument, the unavailability of the underlying material relied upon by Dr Gilmore did not render the Trial Chamber's ability to assess her credibility and the reliability of her report "impossible".[829] Given Dr Gilmore's indication that all pertinent information was contained in her report, it was not necessary for the Trial Chamber to scrutinise the underlying material (which consisted largely of recordings of interviews and interview notes)[830] in order to "properly assess" her credibility and the reliability of her report. As

[824] Defence Appeal Brief, para. 201.
[825] 2022 Appeals Chamber Judgment, para. 548.
[826] 2022 Appeals Chamber Judgment, para. 549.
[827] Decision on Request for Disclosure of Material in Dr Gilmore's Report, para. 13.
[828] Decision on Request for Disclosure of Material in Dr Gilmore's Report, para. 14.
[829] Defence Appeal Brief, para. 200.
[830] Decision on Request for Disclosure of Material in Dr Gilmore's Report, para. 13.

evidenced from the finding of the Trial Chamber mentioned in the paragraph above, the Trial Chamber was neither "silent", nor did it fail to "engage" with the issue concerning the destroyed underlying material.[831] The Defence's argument in this respect is therefore rejected.

380. Notwithstanding the above, the Appeals Chamber notes that in conducting the assessment, the Trial Chamber explained that it examined the credibility of the Appointed Experts, which included Dr Gilmore,[832] and the reliability of their reports by examining "factors such as the established competence of the particular witness in his or her field of expertise, the methodologies used, the extent to which the expert's findings were consistent with other evidence on the trial record, and the general reliability of the expert's evidence".[833] The Trial Chamber, in concluding that it "was satisfied that [the Appointed Experts' Reports] were sufficiently substantiated and adequate, taken together with the jurisprudence of other international jurisdictions, to support the definition provided for in the *Katanga* case", carefully considered "their expertise, the details provided about their sources and methodology, and […] that in their reports the experts clearly indicated their reliance on the academic and scientific opinions of other experts on the issue as the source of their submissions".[834] Specifically, with respect to Dr Gilmore, the Trial Chamber, having considered the Defence's challenges to her credibility and the reliability of her report, found that "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 credible and her report generally reliable".[835] Moreover, the Trial Chamber emphasised that:

> However, as with any other evidence in the case, the Chamber proceeded with caution, relying on the report only to the extent that it is consistent with the Chamber's holistic assessment of the evidence regarding the harm caused as a consequence of the attack to the Sayo health centre.[836]

381. Considering the aforementioned findings and the Trial Chamber's cautious approach with respect to its reliance upon Dr Gilmore's Report, the Appeals Chamber

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[831] Defence Appeal Brief, para. 202.
[832] Decision Appointing Experts on Reparations, para. 9.
[833] Impugned Decision, para. 180 (footnotes omitted).
[834] Impugned Decision, para. 180. *See also* paragraph 307 above.
[835] Impugned Decision, para. 233.
[836] Impugned Decision, para. 233.

finds that the Trial Chamber did not err in the exercise of its discretion when it concluded that Dr Gilmore was credible and her report reliable.[837] Accordingly, the Defence's arguments in this regard are rejected.

b. The Trial Chamber's reliance upon additional evidence in support of its finding

382. The Defence takes issue with the Trial Chamber's findings in relation to whether the attack on the health centre caused harm to the civilian population of Sayo and the surrounding community, and the evidence relied upon for its findings.[838] In particular, the Defence argues that the Trial Chamber does not indicate what evidence it assessed as a whole, and disputes more specifically two additional statements that were introduced and subsequently relied upon by the Trial Chamber.[839] To address the Defence's arguments, the Appeals Chamber will first examine the Trial Chamber's assessment of the evidence and its related findings and thereafter look at the new evidence that it relied upon to support some of its findings, in relation to the harm inflicted on the civilian population of Sayo and the surrounding community.

i. The Trial Chamber's assessment of the evidence and its related findings

383. Before turning to the mainstay of the Defence's arguments under this section, the Appeals Chamber deems it appropriate to first examine its finding, in the 2022 Appeals Chamber Judgment, on the Trial Chamber's determination that the attack on the health centre "also caused harm to its service provision and exacerbated the vulnerability and suffering of the civilian population".[840] In reversing this determination, the Appeals Chamber noted that Dr Gilmore's Report stated:

> Mr Ntaganda was convicted of Count 17, attacks on a protected object. Although the attack on Saïo represents a small part of the victimisation in this case, it speaks to broader patterns of attacks on healthcare that exacerbate the vulnerability and suffering of the civilian population. Moreover, it highlights the way in which reparations can also serve an expressive function to promote certain values, especially in light of ongoing attacks on healthcare in Ituri.

[837] *See* paragraph 308 above.
[838] Defence Appeal Brief, paras 203-209.
[839] Defence Appeal Brief, paras 204-205.
[840] 2022 Appeals Chamber Judgment, para. 547.

384. In this regard, the Trial Chamber "stated that according to [Dr Gilmore's Report], the attack on the health centre in Sayo 'exacerbated the vulnerability and suffering of the civilian population'".[841] However, the Appeals Chamber further noted that, in fact, Dr Gilmore's Report "did not give a view specifically in relation to the health centre in Sayo".[842] Rather Dr Gilmore's Report footnoted to a report by MSF in 2020, regarding an attack in Ituri that year.[843]

385. In addressing these findings of the Appeals Chamber, the Trial Chamber stated that:

> Although the Chamber relied on the specific wording of Dr Gilmore to note in the [2021 Reparations Order] that the attack 'caused harm to [the health centre's] service provision and exacerbated the vulnerability and suffering of the civilian population', as noted above, such determination *is not only supported by the expert's report*, but it is a conclusion that, on a balance of probabilities, is supported by the evidence assessed as a whole. Accordingly, the Chamber rejects the Defence submission that the expert statement was based on present day information, as inapposite.[844]

386. While the Trial Chamber correctly states that it relied upon the specific wording of Dr Gilmore's Report for its finding, the Appeals Chamber notes, however, that the Trial Chamber still maintains, in part, that this finding is "*supported by the expert's report*" and that the Defence's submission – that Dr Gilmore based this statement upon present day information – is "inapposite".[845] The Appeals Chamber further notes that the Trial Chamber does not support this determination with any reasoning that explains how Dr Gilmore's statement specifically supported a conclusion that the attack on the health centre in Sayo "exacerbated the vulnerability and suffering of the civilian population" especially given the Appeals Chamber's finding on this matter, in the 2022 Appeals Chamber Judgment. The Appeals Chamber finds the Trial Chamber's lack of reasoning in this regard to be erroneous.[846] However, the Appeals Chamber does not consider the Trial Chamber's error to materially affect the Impugned Decision, given the Trial Chamber's reference to other evidence that it assessed in support of its determination.

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[841] 2022 Appeals Chamber Judgment, para. 547.
[842] 2022 Appeals Chamber Judgment, para. 547.
[843] 2022 Appeals Chamber Judgment, para. 547.
[844] Impugned Decision, para. 232 (footnotes omitted; emphasis added).
[845] Impugned Decision, para. 232.
[846] 2022 Appeals Chamber Judgment, para. 58, *referring to Lubanga* OA5 Appeal Judgment, para. 20.

387. Turning to the other evidence cited by the Trial Chamber, the Appeals Chamber notes the Defence's argument that the Trial Chamber does not explicitly state what "evidence it assessed as a whole" that supports its conclusion that the attack on the health centre "caused harm to its service provision and exacerbated the vulnerability and suffering of the civilian population".[847] For the reasons that follow, the Appeals Chamber finds no merit in this argument.

388. The Appeals Chamber observes that under the heading "[w]hether harm resulting from the attack on the Sayo health centre is sufficiently proven for the purposes of reparations", the Trial Chamber set out its findings and the evidence upon which it relied.[848] First, the Trial Chamber explained that before the attack, "the centre was a medical facility of a small size" that "actively supported the community of Sayo and its surroundings, taking care, on a daily basis, of the sick and wounded and of mothers and babies during delivery".[849]

389. Second, in response to a Defence argument that the community of Sayo did not suffer harm, as prior to the attack the health centre was mainly used to treat wounded combatants, the Trial Chamber recalled the findings beyond reasonable doubt in the Conviction Decision indicating that "members of the population, [...] were still present when the attack started and subsequently fled".[850]

390. Third, the Trial Chamber recalled that, in the Conviction Decision, it found beyond reasonable doubt that "all persons present at the time of the attack [on] the health centre fled, leaving behind the sick and wounded who could not flee – three seriously injured men, a woman and her baby – and at least the woman was killed by UPC/FPLC forces".[851] Furthermore, the Trial Chamber recalled that, in the Sentencing Decision, it had found beyond reasonable doubt that "although more than one projectile was fired at the centre, and the centre was intentionally made the object of the attack, it was not clear

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[847] Defence Appeal Brief, paras 203-204.
[848] Impugned Decision, paras 227-234.
[849] Impugned Decision, para. 228, *referring to* Conviction Decision, paras 476, 495, which in turn refer to the health centre in Sayo receiving injured individuals wounded during the failed assault on Mongbwalu on or about 9 November 2002, and to a number of people wounded during the assault on Mongbwalu on or about 20 November 2002 having sought medical help at the health centre in Sayo; [REDACTED].
[850] Impugned Decision, para. 229, *referring to* Conviction Decision, para. 504, fn 1465.
[851] Impugned Decision, para. 230, *referring to* Conviction Decision, para. 506.

whether the weapon destroyed the centre in full or merely damaged it".[852] Consistent with these findings, the Trial Chamber stated that, "having reassessed the evidence as a whole", the "evidence clearly demonstrates that, although the centre may not have been fully destroyed by the shelling, it lost its doors and windows, and received impacts on its walls, provoking such fear in its personnel that they fled, essentially abandoning the building, as well as patients that could not even run on their own".[853]

391. Fourth, the Trial Chamber noted that in the Sentencing Decision it was found beyond reasonable doubt that "by launching an attack against the health centre, a facility that cares for patients, the perpetrators accepted the consequential *severe impact on the welfare and/or lives of any patients present at the centre and disrupted the medical care for persons in need*".[854]

392. Fifth, the Trial Chamber noted that having its doors and windows destroyed, the health centre was abandoned during the attack and that the "evidence further demonstrates that, once abandoned, the centre ceased providing medical services".[855] In addition, the Trial Chamber found that after the attack, "all its belongings were pillaged by unknown individuals, and dead bodies and blood stains were discovered in the centre some months after the attack when the population returned to Sayo".[856]

393. Based upon these findings and the evidence cited in support thereof, the Trial Chamber concluded that it found "established on 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".[857] The Trial Chamber further found that its assessment of the evidence reaffirmed the findings in the Sentencing Decision and in the 2021 Reparations Order.[858] Accordingly, it found that "the attack

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[852] Impugned Decision, para. 230, *referring to* Sentencing Decision, para. 153.
[853] Impugned Decision, para. 230, *referring to* [REDACTED]; Transcript of P-0815, 4 April 2016, ICC-01/04-02/06-T-76-Red2-ENG, p. 60, lines 2-17; Annex 1 to CLR2's 22 February 2023 Submissions, pp. 2-3; Annex 2 to CLR2's 22 February 2023 Submissions, p. 2.
[854] Impugned Decision, para. 231 (emphasis in original), *referring to* Sentencing Decision, para. 144.
[855] Impugned Decision, para. 231, *referring to* Annex 1 to CLR2's 22 February 2023 Submissions, p. 3; Annex 2 to CLR2's 22 February 2023 Submissions, p. 2.
[856] Impugned Decision, para. 231, *referring to*, *inter alia*, [REDACTED].
[857] Impugned Decision, para. 231.
[858] Impugned Decision, para. 232.

[on] the health centre caused damage to the health centre in Sayo and loss of adequate healthcare provision to the community that benefitted from it".[859]

394. The Appeals Chamber notes that, with the exception of the Trial Chamber's reliance upon Dr Gilmore's Report, which it stated supported its conclusion, the Trial Chamber, nevertheless, arrived at its conclusion by assessing: (i) submissions from the parties and the Prosecutor;[860] (ii) evidence already in the case record and some that had been recently obtained;[861] and (iii) findings from the Conviction Decision and the Sentencing Decision that had been established beyond reasonable doubt. In doing so, the Trial Chamber linked each finding with the related evidence by referring to it in the footnotes. It is clear that the Trial Chamber assessed this evidence holistically and concluded on a balance of probabilities that "the attack [on] the health centre caused damage to the health centre in Sayo and loss of adequate healthcare provision to the community that benefitted from it".[862] In so far as the Defence argues that the Trial Chamber failed to indicate upon what evidence it relied for its conclusion, the Appeals Chamber rejects this argument.

ii. The new evidence relied upon by the Trial Chamber

395. The Defence further disputes the Trial Chamber's reliance upon "two additional statements", introduced by Victims Group 2, for the finding that "the health centre was abandoned during the attack and that the 'evidence further demonstrates that, once abandoned, the centre ceased providing medical services'".[863]

396. First, the Defence argues that the Trial Chamber's reliance upon this evidence is unfair to the convicted person as it re-opens "the evidentiary proceedings in order to secure evidence that would allow a [t]rial [chamber] to expand the scope of the conviction and reparations award".[864] As already addressed under the Defence's ninth and tenth grounds of appeal, the Appeals Chamber has found that under the Court's legal framework it is not "impermissible" in awarding reparations for a trial chamber to define the harms which resulted from the crimes of which the person was convicted, based upon

[859] Impugned Decision, para. 234.
[860] Impugned Decision, para. 228.
[861] Impugned Decision, paras 227-228.
[862] Impugned Decision, para. 234.
[863] Impugned Decision, para. 231.
[864] Defence Appeal Brief, para. 206.

evidence and findings that may not have been specified in either the conviction decision or the sentencing decision.[865] As such, reliance by a trial chamber upon "new evidence" pertaining to an assessment of the harm caused, does not "expand the scope of the conviction" as suggested by the Defence.[866] The argument is therefore rejected.

397. Moreover, the Appeals Chamber finds no merit in the Defence's argument that it had no opportunity to challenge this evidence, which, in its view, falls outside the case record.[867] In this respect, the Appeals Chamber also notes similar arguments made under the ninth and tenth grounds of appeal, in which the Defence contended that because the additional statements were introduced at the same time that it had put forward its submissions, "[Mr Ntaganda] is deprived of the information on which the Trial Chamber will rely […] to make an order, and have no meaningful opportunity to challenge this".[868] However, the Defence does not explain what prevented it from challenging the evidence submitted by Victims Group 2 or seeking leave to do so, despite receiving notice of that evidence almost five months before the issuance of the Impugned Decision. It is noted that the Defence was clearly able to make submissions on other substantive matters in that period of time.[869] Furthermore, the Appeals Chamber considers that, apart from the possibility of being able to challenge this evidence before the Trial Chamber (regulation 24 of the Regulations), prior to the issuance of the Impugned Decision, the Defence also has the right to appeal an order for reparations pursuant to article 82(4) of the Statute. The Appeals Chamber observes that this is a right of which the Defence is availing itself in these appeal proceedings, and, in fact, the Defence is challenging the issue concerning the additional statements that were introduced and relied upon by the Trial Chamber in awarding reparations. The argument is therefore rejected.

398. Second, the Defence refers to aspects of the additional statements that it suggests render them unreliable. To this end, the Defence submits that "[n]o reasonable Trial Chamber could have assessed the new evidence […] and reached a conclusion that it

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[865] *See* paragraph 352 above.
[866] Defence Appeal Brief, para. 206.
[867] Defence Appeal Brief, para. 206.
[868] Defence Appeal Brief, para. 193.
[869] *See*, *for example*, Defence Request for a Limited Extension of Time; Defence Submissions on the Sample.

supported Dr Gilmore's claims about the exacerbation of the vulnerability of the population, or that medical care for residents was 'severely disrupted'".[870]

399. At the outset, the Appeals Chamber notes that the additional statements in question were obtained from [REDACTED] (a witness who testified at trial) and [REDACTED].[871] The Defence argues with respect to the [REDACTED] statement, that she was not in Sayo during the attack and only returned four to five months later.[872] In the additional statement, the legal representative summarised her statement as follows:

> [B]efore the attack, the Sayo health centre was staffed with six professional[s] and […] when it was attacked, all the medical personnel fled, [REDACTED]. When she returned to Sayo, four to five months after the attack, the health centre was closed and remained closed for approximately six months after the attack. During this period of interruption of services the population had to go to a bigger facility to receive medical care in Mongbwalu and this continued to be the case even after the health centre was reopened, because of its limited capacities.[873]

400. With respect to [REDACTED], the Defence submits that "[REDACTED] Sayo in March 2003, the building had not been destroyed and the only visible damage was to the doors and windows".[874] In addition, the Defence submits that "[REDACTED] clarified that it was not the health centre that had been hit by [a] rocket launcher but another building in the area".[875] This evidence, the Defence avers, was corroborated by P-0815 and Mr Ntaganda's testimony.[876] In [REDACTED] additional statement, the legal representative summarised his statement as follows:

> [A]s a result of the attack, the Sayo health centre was not operational for about six months, due to the looting of all material and the fleeing of all medical personnel, [REDACTED]. Subsequently, the health centre resumed activity but at very reduced capacities in only providing primary care as only two out of the previously six staff members returned. Accordingly, patients had to be referred to a bigger facility to receive medical care (the Mongbwalu hospital), which contrasts with the situation before the attack, where a quite comprehensive package of medical care could be provided in Sayo. About two years later (in 2005), the Sayo health

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[870] Defence Appeal Brief, para. 207.
[871] *See* CLR2's 22 February 2023 Submissions; Annex 1 to CLR2's 22 February 2023 Submissions; Annex 2 to CLR2's 22 February 2023 Submissions.
[872] Defence Appeal Brief, para. 207.
[873] *See* CLR2's 22 February 2023 Submissions, para. 18; Annex 2 to CLR2's 22 February 2023 Submissions, p. 1.
[874] Defence Appeal Brief, para. 207.
[875] Defence Appeal Brief, para. 207.
[876] Defence Appeal Brief, para. 207.

centre was rehabilitated by an NGO but only partially. The Sayo health centre's capacities remain reduced until today.[877]

401. The Appeals Chamber notes that the Trial Chamber relied upon the additional statements with respect to the following conclusions: (i) that during the attack the centre was abandoned; (ii) once abandoned, the centre ceased providing medical services; (iii) afterwards, all its belongings were pillaged by unknown individuals; (iv) the centre remained closed and only resumed limited activities about six months after the attack; and (v) the centre was only partly rehabilitated when a new building was constructed by an NGO in 2005.[878] The Appeals Chamber notes that except for the finding that "during the attack the centre was abandoned", all remaining findings listed were further supported by other evidence already in the case record.[879] Based on a holistic assessment of the evidence and drawing upon these conclusions the Trial Chamber found, on a balance of probabilities, that "the attack had a *severe impact on the welfare and lives of the patients present at the centre and disrupted the medical care for persons in need*".[880]

402. The Appeals Chamber considers that the Defence fails to show any error in the Trial Chamber's reliance upon the additional statements or in its assessment of this evidence. The Defence does not demonstrate that the information in the [REDACTED] statement was unreliable because she was not present during the attack but had fled Sayo once the attack had started. Likewise, with respect to [REDACTED] testimony that, upon his return to Sayo in March 2003 the building had not been destroyed and the only visible damage was to the doors and windows, the Defence does not demonstrate inconsistencies in his testimony or in his additional statement that would render his evidence unreliable. As mentioned above, the Trial Chamber relied upon the additional statements, alone, only with respect to the finding that "during the attack the centre was abandoned". Given their respective statements coupled with their [REDACTED] with the health centre, the Appeals Chamber considers that it was not unreasonable for the Trial Chamber to rely upon their statements for its particular finding. Consequently, the

[877] *See* CLR2's 22 February 2023 Submissions, para. 17; Annex 1 to CLR2's 22 February 2023 Submissions, p. 2.
[878] Impugned Decision, para. 231.
[879] *See* Impugned Decision, para. 231, fn 601 (*referring to* Conviction Decision, para. 526, fn. 1563, relying upon the evidence of P-0886 and P-0800; Annex 1 to CLR2's 22 February 2023 Submissions, p. 2; Annex 2 to CLR2's 22 February 2023 Submissions, p. 2; Transcript of P-0815, 4 April 2016, ICC-01/04-02/06-T-76-Red2-ENG, p. 60, lines 2-21; DRC-OTP-2062-2260 at 2265, para. 26), para. 231, fn 603 (*referring to*, *inter alia*, [REDACTED].
[880] Impugned Decision, para. 232 (emphasis in original).

Appeals Chamber finds that the Defence fails to show that their evidence is in any way incompatible with the Trial Chamber's conclusion that, as a result of the attack on the health centre, the provision of health care was disrupted. The Defence's arguments, in this regard, lack substantiation and are therefore rejected.

403. Finally, the Defence submits that the Trial Chamber ignored its submissions and evidence that it put forward on the "alleged suffering of the civilian population and exacerbation of vulnerability" that, in its view, "demonstrate[ed] that claims of a significant interruption of services for a considerable period after the attack, is entirely unsupported by any existing or new evidence".[881] The Appeals Chamber has previously held, in relation to the requirement that a trial chamber provide a reasoned opinion, that "[t]o fulfil its obligation to provide a reasoned opinion, a trial chamber is not required to address all the arguments raised by the parties, or every item of evidence relevant to a particular factual finding, provided that it indicates with sufficient clarity the basis for its decision".[882] Thus, a trial chamber has a degree of discretion as to what to address and what not to address in its reasoning.

404. In the case at hand, the Appeals Chamber notes that the Trial Chamber did address part of the Defence's arguments at paragraph 229 of the Impugned Decision. The Trial Chamber then went on to reason the basis for its decision "that the attack had a severe impact on the welfare and lives of the patients present at the centre and disrupted the medical care for persons in need", by analysing all the relevant evidence and findings in support of its conclusion.[883] In these circumstances, the Appeals Chamber finds no error in the manner in which the Trial Chamber addressed the Defence's submissions. The argument is therefore rejected.

4. *Overall conclusion*

405. For the above reasons, the Appeals Chamber rejects the Defence's eleventh ground of appeal.

[881] Defence Appeal Brief, paras 208-209.
[882] 2022 Appeals Chamber Judgment, paras 59, 239, 609, 688.
[883] Impugned Decision, para. 231.

I. Ground of appeal 12: Alleged failure to address the question of breaks in the chain of causation in relation to the Sayo health centre

406. Under its twelfth ground of appeal, the Defence submits that the Trial Chamber erred in law by finding that the causal nexus between the harm resulting from the attack on the health centre in Sayo and Mr Ntaganda's liability was established.[884] Specifically, the Defence claims that "none of the evidence cited by the Trial Chamber links any of the harm described […] 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".[885]

1. Relevant procedural background

407. In the 2022 Appeals Chamber Judgment, the Appeals Chamber found that the Trial Chamber had "erred in failing to explain how it reached its findings as to causation and harm to the centre".[886] In remanding this issue for the Trial Chamber to reconsider, the Appeals Chamber considered that in order for the Trial Chamber to make such findings at the reparation stage, "evidence would need to have been presented, establishing to the appropriate standard of proof, that the damage exists, that there is a causal nexus between that damage and Mr Ntaganda's crimes and that, as a result, Mr Ntaganda's liability to pay for repair to this centre has been established".[887] The Appeals Chamber cautioned that "[h]arm cannot be attributed to a convicted person if a break in the chain of causation is established in a particular case. If this break is shown, based on the circumstances of the protracted armed conflict, then causation will not have been established".[888]

408. Following the 2022 Appeals Chamber Judgment, the Trial Chamber issued the Order of 25 October 2022, directing the parties, including the Prosecutor, the DRC and the Appointed Experts, "to provide further submissions and possible evidence, on issues relevant to the assessment of the actual damage and harm caused to the health centre in

[884] Defence Appeal Brief, paras 214-217.
[885] Defence Appeal Brief, para. 216 (emphasis in original).
[886] 2022 Appeals Chamber Judgment, para. 548.
[887] 2022 Appeals Chamber Judgment, para. 548.
[888] 2022 Appeals Chamber Judgment, paras 15, 571.

Sayo".[889] Specifically, the Trial Chamber instructed them to refer, *inter alia*, to the issue of the causal nexus between any harm and the crime.[890]

409. In the Defence's 22 February 2023 Submissions, it submitted, *inter alia*, that: (i) based upon the information available to the Trial Chamber at that time, Mr Ntaganda cannot be found liable for any material damage to the health centre;[891] (ii) "no evidence or information currently available supports a finding of harm suffered by the community as a whole";[892] and (iii) regardless of the Trial Chamber's findings on actual harm suffered by the health centre and the community, "the offensive operation launched by the UPDF, APC and Lendu Combatants in March 2003 [to drive out the UPC/FPLC], breaks the chain of causality in respect of the November attack on the health centre in Sayo".[893]

410. In the Impugned Decision, the Trial Chamber found that the standard of causation was met based primarily upon findings in the Conviction and Sentencing Decisions that established Mr Ntaganda's responsibility, beyond reasonable doubt, for the attack on the health centre and the consequential impact upon the provision of health care services to the community.[894] The Trial Chamber further noted that its conclusions can be "derived from the evidence as reassessed at the current stage of the proceedings".[895] It thus concluded, that "but for the attack, the harm [to the health centre] would not have occurred" and thus "the crime of attack against a protected object for which Mr Ntaganda was convicted is the proximate cause of the harm caused to the centre, individual victims and the community of Sayo and surroundings as a whole".[896]

411. In addressing the Defence's submissions on an alleged break in the chain of causation, the Trial Chamber stated that: (i) "it did not consider the current situation of the health centre in order to determine the extent of the harm";[897] (ii) "it assessed the evidence […] at the time of the attack and the immediate aftermath", namely, the period

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[889] Order of 25 October 2022, para. 42. *See also* Impugned Decision, para. 205.
[890] Order of 25 October 2022, para. 42. S*ee also* Impugned Decision, para. 205.
[891] Defence's 22 February 2023 Submissions, para. 41.
[892] Defence's 22 February 2023 Submissions, para. 52.
[893] Defence's 22 February 2023 Submissions, para. 58.
[894] Impugned Decision, para. 236.
[895] Impugned Decision, para. 237.
[896] Impugned Decision, para. 237.
[897] Impugned Decision, para. 238.

between November 2002 and March 2003;[898] and (iii) Mr Ntaganda was "not being held liable for reparations 'in relation to everything that happened in Ituri during the past 20 years'".[899] Finally, the Trial Chamber found that:

> Given that no further incidents other than those indicated above 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 Decision], the Chamber considers the Defence's submissions about an alleged break in the chain of causation misplaced.[900]

2. Summary of the submissions

412. The Defence disputes the Trial Chamber's finding that the health centre incurred damage as a result of the attack, through the loss of its doors and windows. In this respect, it submits that, in 2019, the Trial Chamber could not find that the centre had been harmed, however, in 2023, it has made a "different finding".[901] Moreover, the Defence contends that the evidence that the Trial Chamber relies upon to support this finding "does not demonstrate that this (relatively limited) physical harm, occurred during the period of November 2002 to 6 March 2003".[902]

413. Victims Group 2 submit that this ground of appeal should be dismissed as the Defence fails to show that the Trial Chamber committed any discernible error in its assessment of the chain of causation with respect to the Sayo health centre.[903] As to the Defence's contention that the Trial Chamber did not address the alleged breaks in the chain of causation, Victims Group 2 submit that the Trial Chamber did address the issue in accordance with the Appeals Chamber's directions, which established Mr Ntaganda's responsibility.[904] They further submit that the Defence's argument demonstrates mere disagreement with the Trial Chamber's finding without showing any error.[905]

3. Determination by the Appeals Chamber

414. The Appeals Chamber notes, in the first place, that the Defence reiterates its argument that the Trial Chamber erred when it disregarded a finding in the Sentencing

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[898] Impugned Decision, para. 238.
[899] Impugned Decision, para. 238.
[900] Impugned Decision, para. 238.
[901] Defence Appeal Brief, para. 216.
[902] Defence Appeal Brief, paras 210, 216.
[903] Victims Group 2's Response to the Defence Appeal Brief, para. 153.
[904] Victims Group 2's Response to the Defence Appeal Brief, para. 149.
[905] Victims Group 2's Response to the Defence Appeal Brief, para. 149.

Decision, namely, that "it is therefore not clear whether the centre was damaged as a result of the crime […]" and concluded in the Impugned Decision that, "but for the attack, the harm would not have occurred".[906]

415. The Appeals Chamber has addressed the Defence's arguments concerning the import of the disputed finding in the Sentencing Decision under the ninth and tenth grounds of its appeal.[907] In this regard, the Appeals Chamber has found that, when it remanded the issue of causation in relation to the health centre for the Trial Chamber to reconsider, it did so because it did not consider the relevant finding in the Sentencing Decision to amount to a finding, beyond reasonable doubt, that the health centre had *not* been damaged.[908] Consequently, in the Appeals Chamber's view, the Trial Chamber "was not precluded from establishing during the reparation stage, on the basis of all the evidence before it that, on a balance of probabilities, 'the attack [on] the health centre caused damage to the health centre'".[909] Thus, to the extent that the Defence argues that the Trial Chamber's findings on causation in relation to the health centre when contrasted with the finding in the Sentencing Decision, amounts to "utter incoherence", the Appeals Chamber rejects this argument.[910]

416. Furthermore, the Defence contends that the Trial Chamber found that the health centre had suffered harm as a result of the attack, namely, the loss of its doors and windows, despite the fact that the evidence it relied upon does not demonstrate that this physical harm had occurred "during the period of November 2002", when the attack of which Mr Ntaganda was convicted took place, "or even **before** 6 March 2003" when the UPC/FPLC were chased from Bunia.[911]

417. The Appeals Chamber understands the Defence to be arguing that a break in the chain of causation was caused by subsequent attacks during the protracted armed conflict that led to the ousting of the UPC/FPLC from Sayo and Mongbwalu, by other armed groups, including "the UPDF from Uganda, the APC and the Lendu Combatants".[912] As a result, the Defence submits that the evidence of [REDACTED], who only arrived in

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[906] Defence Appeal Brief, para. 210.
[907] *See* paragraphs 356-367 above.
[908] *See* paragraph 364 above.
[909] *See* paragraph 364 above, *referring to* Defence Appeal Brief, paras 188, 190-191.
[910] *See* Defence Appeal Brief, para. 210.
[911] Defence Appeal Brief, para. 216 (emphasis in original).
[912] Defence Appeal Brief, para. 214.

Sayo sometime in March 2003, cannot be relied upon to establish that the actual harm to the health centre (the loss of the centre's doors and windows) was caused by the UPC/FPLC "during the period of November 2002 until 6 March 2003".[913] For the reasons that follow the Appeals Chamber is not persuaded by this argument.

418. The Trial Chamber found that the standard of causation was met based upon findings in the Conviction and Sentencing Decisions that were established beyond reasonable doubt and a reassessment of the evidence at the current stage of the proceedings.[914] Specifically, the Trial Chamber found that

> it has been demonstrated, on a balance of probabilities, that, by launching the attack against the health centre, Mr Ntaganda could have reasonably foreseen that the building would be damaged, patients would be severely affected, and the provision of medical care would be suspended, either because of damage to the facilities, pillaging, or because of the staff fleeing or having been harmed. In the view of the Chamber, but for the attack, the harm would not have occurred; thus, the crime of attack against a protected object for which Mr Ntaganda was convicted is the proximate cause of the harm caused to the centre, individual victims, and the community of Sayo and surroundings as a whole.[915]

419. Notably, in addressing the Defence's submissions regarding the alleged breaks in the chain of causation, the Trial Chamber explained, *inter alia*, that it did not consider *the current situation of the health centre* in order to determine the extent of the harm and that it assessed the evidence to determine the extent of the harm *at the time of the attack and the immediate aftermath*.[916] Furthermore, the Trial Chamber held that "it is precisely the timeframe indicated by the Defence, *i.e.*, November 2002 to March 2003, which the Chamber considered most relevant to determine the extent of the harm caused to the health centre, individual victims, and the community as a whole".[917] Importantly, the Trial Chamber noted, with reference to an argument of the Defence, that Mr Ntaganda was "not being held liable for reparations 'in relation to everything that happened during the past 20 years'".[918] Noting further that "a finding beyond reasonable doubt as to the perpetration of the attack has already been made in the context of the [Conviction

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[913] Defence Appeal Brief, para. 216.
[914] Impugned Decision, para. 237.
[915] Impugned Decision, para. 237.
[916] Impugned Decision, para. 238 (emphasis added).
[917] Impugned Decision, para. 238.
[918] Impugned Decision, para. 238 *referring to* Defence's 22 February 2023 Submissions, para. 60.

Decision]", the Trial Chamber considered the Defence's submissions about an alleged break in the chain of causation to be "misplaced".[919]

420. The Appeals Chamber finds no discernible error in the Trial Chamber's approach to establishing a causal nexus between the harm resulting from the attack on the Sayo health centre and the crime of which Mr Ntaganda was convicted. The Defence's claim that the Trial Chamber ought to have found that the chain of causation was broken is unsubstantiated. The Appeals Chamber considers that there is no evidence on the record, nor has the Defence pointed to any, that demonstrates that other actors committed attacks that resulted in damage to the health centre during the relevant timeframe. In the absence of such a showing, the Appeals Chamber considers that it was not unreasonable for the Trial Chamber to rely upon [REDACTED] evidence to determine the extent of the damage caused by the attack that Mr Ntaganda was found to have perpetrated. The Defence's argument in this regard is therefore rejected.

4. Overall conclusion

421. For the above reasons, the Appeals Chamber rejects the Defence's twelfth ground of appeal.

J. Ground of appeal 13: Alleged errors in the application of the "do no harm" principle during the implementation of the IDIP

422. Under its thirteenth ground of appeal, the Defence submits that, in the context of the "deteriorating and dire security situation in Ituri", the Trial Chamber erred by rejecting its requests for measures to be taken to ensure that the implementation of reparations would adhere to the "do no harm" principle for the benefit of legitimate victims.[920] In particular, the Defence contends that the Trial Chamber was required to adopt eligibility criteria that would have examined, *inter alia*, the current and past activities of potential victims to ensure that they were not Lendu combatants at the relevant time and/or members of active militias in Ituri.[921]

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[919] Impugned Decision, para. 238.
[920] Defence Appeal Brief, paras 227, 239.
[921] Defence Appeal Brief, para. 238.

1. Relevant procedural background

423. In the 2021 Reparations Order, the Trial Chamber adopted the "do no harm" principle and described it, in relevant part, as "an internationally recognised principle that […] requires humanitarian actors to anticipate, monitor and address the potential or unintended negative effects of their actions".[922] In setting out the application of the principle in reparation proceedings, the Trial Chamber stated that:

> When deciding on the types and modalities of reparations the Court shall ensure that reparation measures themselves do no harm. At a minimum, this includes taking all steps necessary to ensure that access to justice and reparations by victims and affected communities does not lead to further or secondary victimisation, that *they do not create or exacerbate security concerns or tensions among communities* and that victims are not endangered or stigmatised as a result. The Court should ensure that particular attention is paid to victims belonging to groups that are more vulnerable.
>
> This principle should have particular application (i) when conducting victim identification and eligibility screening; (ii) when developing reparations orders and plans; and (iii) when carrying out the approved reparations measures. In addition, the observance of the "do no harm" principle should guide, to the extent possible, the application of the other relevant principles stated in the present order, as they interact with each other.[923]

424. In the 2022 Appeals Chamber Judgment, the Appeals Chamber held, *inter alia*, that even though the Trial Chamber "did not expressly analyse the submissions presented on the security situation, nor reach developed conclusions as to what they meant", it did specifically refer to the "unstable security situation on the ground" when deciding on the types and modalities of reparations.[924] In the Appeals Chamber's view, the language used by the Trial Chamber in this context reflected the principle of "do no harm" and the Trial Chamber's intention for the principle to require "ongoing consideration by the Trial Chamber itself, and the TFV, during the implementation process, in the identification and assessment of victims' applications, and in the decision as to particular reparation projects".[925]

425. In the period between the delivery of the 2022 Appeals Chamber Judgment and the issuance of the Impugned Decision, the Trial Chamber rendered its Decision on the

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[922] 2021 Reparations Order, para. 50.
[923] 2021 Reparations Order, paras 51-52 (emphasis added).
[924] 2022 Appeals Chamber Judgment, paras 445-446.
[925] 2022 Appeals Chamber Judgment, para. 448.

TFV's Sixth and Seventh Update Reports and its Decision on the TFV's Eighth Update Report.[926] In both these decisions, the Trial Chamber addressed the security situation in Ituri in relation to its impact on the implementation of the IDIP.[927]

2. *Summary of the submissions*

a. **Defence's submissions**

426. The Defence submits that, since its appeal against the 2021 Reparations Order, the security situation in Ituri "continued to evolve and to significantly impact the implementation of reparations".[928] Along with its observations on the TFV's update reports, the Defence avers that it submitted information before the Trial Chamber in the form of media reports, on "multiple incidents involving the killing of civilians by members of various militias in the areas relevant to the reparations in this case".[929] In addition, the Defence submits that it regularly highlighted the "main risks associated with implementing reparations without paying due heed to the '*do no harm*' principle".[930]

427. Moreover, the Defence submits that it provided the Trial Chamber with "detailed submissions on the measures required to implement reparations […] while adhering to the *do no harm* principle".[931] The Defence contends that the Trial Chamber erred in rejecting its requests for measures to be taken to ensure that the "*do no harm*" principle was adhered to.[932] In the Defence's view, by finding, in the course of the implementation process, that the IDIP programme "continues to remain generally unaffected", the Trial Chamber ignored the reality of the security situation.[933] Furthermore, it is contended that the Trial Chamber violated the principle of "do no harm" by directing the Defence to bring to the Trial Chamber's attention "concrete and verifiable information about specific cases of victims deviating reparation funds to other activities", instead of itself taking "preventative measures".[934] In light of these alleged errors, the Defence requests

[926] These decisions were issued on 16 November 2022 and 13 January 2023 respectively.
[927] Decision on the TFV's Sixth and Seventh Update Reports, para. 12; Decision on the TFV's Eighth Update Report, para. 9.
[928] Defence Appeal Brief, paras 220, 225.
[929] Defence Appeal Brief, paras 225, 230.
[930] Defence Appeal Brief, para. 234.
[931] Defence Appeal Brief, para. 236.
[932] Defence Appeal Brief, para. 239.
[933] Defence Appeal Brief, para. 240.
[934] Defence Appeal Brief, para. 240.

the Appeals Chamber to issue a new order for reparations setting out appropriate measures to ensure the application of the "do no harm" principle.[935]

b. Victims Group 1's submissions

428. Victims Group 1 submit that this ground of appeal represents a "complete repetition" of arguments raised in the Defence's first appeal against the 2021 Reparations Order which were rejected in full by the Appeals Chamber.[936] In their view, the Defence merely "advances assumptions and speculations" with respect to the risks it associates with the support being offered by the TFV.[937] Moreover, Victims Group 1 argue that the Defence has failed to present any concrete information to demonstrate that the eligibility mechanism is not "'*robust*' enough, and/or does not permit '*to ensure that only legitimate victims are awarded reparations*'".[938]

c. Victims Group 2's submissions

429. Victims Group 2 submit that the issue concerning the application of the "do no harm" principle to the eligibility determination of priority victims does not arise out of the Impugned Decision, and, for this reason alone, the thirteenth ground of appeal should be dismissed.[939] In addition, they argue that since the Trial Chamber rejected the Defence's arguments concerning the "do no harm" principle in its various decisions on the TFV's update reports, by raising the same issues the Defence seeks to "re-litigate" issues that have already been determined by the Appeals Chamber and the Trial Chamber.[940] Furthermore, Victims Group 2 aver that the Trial Chamber has continuously followed the developments in relation to the security situation in Ituri and in its assessment has not found there to be any impact on the implementation of the IDIP.[941]

3. *Determination by the Appeals Chamber*

430. The Appeals Chamber notes that the Defence challenges the Trial Chamber's finding, based upon the submissions of the TFV, that the implementation of the IDIP

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[935] Defence Appeal Brief, paras 229, 241.
[936] Victims Group 1's Response to the Defence Appeal Brief, para. 63.
[937] Victims Group 1's Response to the Defence Appeal Brief, para. 67.
[938] Victims Group 1's Response to the Defence Appeal Brief, para. 67.
[939] Victims Group 2's Response to the Defence Appeal Brief, para. 156.
[940] Victims Group 2's Response to the Defence Appeal Brief, paras 159-160.
[941] Victims Group 2's Response to the Defence Appeal Brief, para. 161.

"continues to remain generally unaffected" by the security situation in Ituri.[942] In this regard, the Appeals Chamber further notes Victims Group 2's submission that the application of the "do no harm" principle to the eligibility determination of priority victims was not amongst the issues remanded by the Appeals Chamber to the Trial Chamber for reconsideration. Accordingly, they submit that the Trial Chamber did not engage with this issue in the Impugned Decision and that, for this reason alone, this ground of appeal should therefore be dismissed.[943] In the circumstances, the Appeals Chamber considers it appropriate to first determine whether the issue raised under the Defence's thirteenth ground of appeal arises out of the Impugned Decision.

431. For the reasons that follow, the Appeals Chamber finds that the issue concerning the impact of the security situation in Ituri upon the implementation of the IDIP and the related application of the "do no harm" principle does not arise out of the Impugned Decision and therefore dismisses this ground of appeal *in limine*. The Appeals Chamber observes that, as argued by Victims Group 2,[944] the issue is not addressed in the Impugned Decision. Indeed, the impact of the security situation upon the implementation of the IDIP and the related application of the "do no harm" principle was not one of the "five specific issues" that were remanded to the Trial Chamber by the Appeals Chamber in the 2022 Appeals Chamber Judgment.[945] Notably, in that judgment, the Appeals Chamber rejected the Defence's arguments concerning an alleged error in the Trial Chamber's approach to the "do no harm" principle and found that "the Trial Chamber intended that the 'do no harm' principle required ongoing consideration by the Trial Chamber itself, and the TFV, during the implementation process".[946] Thus, the issue in question falls squarely within the context of the implementation process which was ongoing before and is continuing after the issuance of the Impugned Decision.

432. It is in this context that the Trial Chamber, in its various decisions on the TFV's update reports that pre-date as well as post-date the Impugned Decision, addressed the

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[942] Defence Appeal Brief, para. 228, *referring to* Decision on the TFV's Ninth to Twelfth Update Reports, para. 20.
[943] Victims Group 2's Response to the Defence Appeal Brief, paras 155-156.
[944] *See* Victims Group 2's Response to the Defence Appeal Brief, para. 156.
[945] Impugned Decision, para. 15 *referring to* 2022 Appeals Chamber Judgment, p. 11.
[946] 2022 Appeals Chamber Judgment, para. 448.

impact of the security situation in Ituri upon the implementation of the IDIP.[947] Indeed, the Appeals Chamber notes that the actual findings of the Trial Chamber with which the Defence specifically takes issue under this ground of appeal are made in the Decision on the TFV's Ninth to Twelfth Update Reports, which post-dates the Impugned Decision and therefore falls outside the scope of this appeal.[948]

433. Moreover, the Appeals Chamber observes that the Defence did not raise the issue of the impact of the security situation in Ituri and the related application of the "do no harm" principle when provided with an opportunity to do so prior to the Trial Chamber ruling, in the Impugned Decision, on the eligibility for reparations of the 67 IDIP victims included in the Sample.[949] In the Defence Submissions on the Sample, while the Defence raised several challenges to the criteria for the eligibility assessment, it did not make any submissions on the need for the assessment criteria to include measures that would adhere to the "do no harm" principle.[950] Instead, the Defence raised the issue during the separate implementation proceedings regarding the IDIP. Consequently, there was no ostensible cause warranting the Trial Chamber to address the matter when considering the criteria for the eligibility assessment of victims in the Impugned Decision.

434. For all of the above reasons, the Appeals Chamber considers that the issue concerning the impact of the security situation in Ituri upon the implementation of the IDIP and the related application of the "do no harm" principle, including the impugned findings, were neither the subject of, nor considered in, the Impugned Decision and therefore does not arise out of it. As a result, the issue cannot be raised in this appeal.

4. *Overall conclusion*

435. For the above reasons, the Appeals Chamber dismisses *in limine* the Defence's thirteenth ground of appeal.

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[947] *See*, *for example*, Decision on the TFV's Third Update Report, para. 10; Decision on the TFV's Sixth and Seventh Update Reports, para. 14; Decision on the TFV's Eighth Update Report, para. 13; Decision on the TFV's Ninth to Twelfth Update Reports, paras 20-21.

[948] Defence Appeal Brief, para. 228 *referring to* Decision on the TFV's Ninth to Twelfth Update Reports, paras 20-21.

[949] Impugned Decision, para. 140.

[950] *See* Defence Submissions on the Sample.

V. APPEAL OF VICTIMS GROUP 2

A. Ground of appeal 1: Alleged errors in the estimation of the number of potential beneficiaries of reparations amongst the victims of the attacks

436. Under their first ground of appeal, Victims Group 2 submit that the Trial Chamber erred in its estimation of the number of potential beneficiaries of reparations amongst the victims of the attacks.[951] Victims Group 2 request the Appeals Chamber to vacate the Trial Chamber's findings, correct the errors identified and amend the Impugned Decision without remanding the matters to the Trial Chamber.[952]

437. Victims Group 2 divide their first ground of appeal into two sub-grounds.[953] The Defence addresses the arguments raised under these two sub-grounds of appeal under one heading.[954] In the interests of clarity and a proper determination of the arguments raised, the Appeals Chamber deems it appropriate to consider the two sub-grounds of appeal together.

1. Relevant procedural background

438. The Appeals Chamber sets out below the context in which the Impugned Decision was issued.

439. In the 2021 Reparations Order the Trial Chamber addressed the estimated number of potential victims of the attacks, concluding that thousands of victims may be eligible.[955] It noted: (i) the substantially different estimates regarding the number of potential beneficiaries of reparations provided by the Registry (1,100 new potential victims of the attacks), the Appointed Experts (3,500 direct victims in general) and Victims Group 2 (at least 100,000 victims of the attacks across all locations);[956] (ii) the number of participating victims (2,121) and the Registry's estimations of those remaining within the scope of the conviction (1,460);[957] and (iii) that all victims recognised as beneficiaries in the *Lubanga* case (933 at the time) will also be eligible for

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[951] Victims Group 2's Appeal Brief, paras 39-76.
[952] Victims Group 2's Appeal Brief, para. 130.
[953] *See* the headings used in Victims Group 2's Appeal Brief, pp. 14, 31.
[954] *See* the heading used in the Defence Response to Victims Group 2's Appeal Brief, p. 6.
[955] 2021 Reparations Order, para. 246.
[956] 2021 Reparations Order, paras 232-233.
[957] 2021 Reparations Order, para. 234.

reparations in the *Ntaganda* case.[958] Noting that there was still a significant number of as yet unidentified potentially eligible victims, for which no reliable figures were available,[959] the Trial Chamber concluded that it was impossible to predict in advance how many victims may ultimately come forward to benefit from reparations, particularly considering the widespread, systematic and large-scale nature of the crimes of which Mr Ntaganda was convicted.[960] The Trial Chamber stated that the estimates varied greatly, ranging from approximately 1,100 to a minimum of 100,000.[961]

440. The 2021 Reparations Order was appealed by both the Defence[962] and Victims Group 2.[963] In relation to this issue, they contended in essence that the Trial Chamber erred in failing: (i) to determine appropriately the number, or a sufficiently accurate estimated range, of potentially eligible victims for reparations;[964] (ii) to provide a reasoned decision;[965] and (iii) to explain how it had resolved uncertainties in this regard in favour of the convicted person.[966]

441. In the 2022 Appeals Chamber Judgment it was found that

> the Trial Chamber [had] failed in its duty to establish an actual, or estimated, number of victims of the award that was as concrete as possible and based upon a sufficiently strong evidential basis.[967]

442. In this regard, the Appeals Chamber noted that the Trial Chamber did not elaborate upon whether the number of potential victims would be single thousands, tens of thousands or even potentially hundreds of thousands;[968] nor did it expressly state which of the figures within that range, if any, it endorsed.[969] Therefore, it reversed the findings of the Trial Chamber on these matters and remanded to it the issue for a new determination.[970]

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[958] 2021 Reparations Order, para. 235.
[959] 2021 Reparations Order, para. 246.
[960] 2021 Reparations Order, para. 246.
[961] 2021 Reparations Order, para. 246.
[962] *See* 2021 Defence Appeal Brief.
[963] *See* Victims Group 2's 2021 Appeal Brief.
[964] 2021 Defence Appeal Brief, paras 226-229; Victims Group 2's 2021 Appeal Brief, paras 43-63.
[965] 2021 Defence Appeal Brief, paras 77-78; Victims Group 2's 2021 Appeal Brief, paras 79-83.
[966] Victims Group 2's 2021 Appeal Brief, paras 110-115; 2021 Defence Response to Victims Group 2's Appeal Brief, para. 59.
[967] 2022 Appeals Chamber Judgment, para. 168.
[968] 2022 Appeals Chamber Judgment, para. 145.
[969] 2022 Appeals Chamber Judgment, para. 145.
[970] 2022 Appeals Chamber Judgment, para. 174.

443. The Trial Chamber conducted a series of procedural steps to implement the 2022 Appeals Chamber Judgment. This included instructing the parties, the TFV and the Registry to file submissions as to the estimated total number of potential beneficiaries for reparations, along with an explanation of the methodology used to provide such estimates.[971] These submissions were filed on 30 January 2023.[972]

444. In the Impugned Decision, the Trial Chamber considered all submissions received throughout the reparation proceedings, the information and the evidence in the case file and the conclusions it elicited from the analysis of the sample of victims.[973] The Trial Chamber concluded that the victims of the attacks would amount to approximately 7,500 individuals, as follows:

> [T]he approximate number of direct and indirect (i) victims of crimes against child soldiers in the case, as referred to in Counts 6, 9, 14, 15, and 16 of the [Conviction Decision], would amount to approximately 3,000 individuals in total; and (ii) victims of the attacks in the case, as referred to in Counts 1, 2, 3, 4, 5, 7, 8, 10, 11, 12, 13, 17, and 18 of the [Conviction Decision], would amount to approximately 7,500 individuals in total.[974]

2. Summary of the submissions

445. Victims Group 2 submit that the Trial Chamber's estimate of the number of potential beneficiaries of reparations amongst the victims of the attacks is not accurate. First, they submit that the Trial Chamber failed to provide an estimate that was as concrete as possible in relation to the number of beneficiaries[975] and, second, that it considered irrelevant information, failed to consider relevant information, facts and evidence and/or misappreciated relevant facts.[976]

446. The Defence submits that the estimate of 7,500 victims of the attacks is "as concrete as possible in the circumstances, as well as based upon sufficiently strong evidence".[977]

[971] Decision of 25 November 2022, para. 37.
[972] CLR1's Additional Submissions on Transgenerational Harm; CLR2's 30 January 2023 Submissions; Defence Further Submissions on Transgenerational Harm; TFV's 30 January 2023 Submission; Registry's 30 January 2023 Submission.
[973] Impugned Decision, para. 288.
[974] Impugned Decision, para. 320.
[975] Victims Group 2's Appeal Brief, paras 39-76.
[976] Victims Group 2's Appeal Brief, paras 77-86.
[977] Defence Response to Victims Group 2's Appeal Brief, paras 2, 58.

3. *Determination by the Appeals Chamber*

447. Victims Group 2 argue under their first ground of appeal that the Trial Chamber erred in law and in the exercise of its discretion by failing to provide estimates that were as concrete as possible[978] and that it committed a combination of errors of fact and procedure by taking into account irrelevant information, and by failing to take into account relevant information, facts and evidence and/or by misappreciating relevant facts.[979] The first ground of appeal actually raises three allegations, addressed in turn below, that the Trial Chamber: (i) disregarded the "population size method" to estimate the number of potential beneficiaries of reparations;[980] (ii) declined to rely upon different documents and submissions as to the relevant population sizes;[981] and (iii) erred in respect of its estimation of 7,500 victims.[982]

a. The "population size method"

448. Victims Group 2 submit that the Trial Chamber erred in disregarding what they understood to be the most efficient and pragmatic method to estimate the number of potential beneficiaries of reparations, namely to rely upon the "population size" of the affected villages at the time the crimes were committed.[983] In this context, they contend that Mr Ntaganda was convicted of, *inter alia*, mass crimes affecting 13 villages (hereinafter: "Main Villages").[984] According to Victims Group 2, the mass crimes of which Mr Ntaganda was convicted include directing attacks against civilians, persecution, forcible transfer of population and ordering the displacement of civilians which resulted in the inhabitants, mainly Lendu, being forced to flee from and being prevented from returning to the Main Villages.[985] Victims Group 2 argue that the Trial Chamber erred in the exercise of its discretion by disregarding: (i) their submissions, supported by several sources, which corroborate the population size method; and (ii) its own finding that the crimes of which Mr Ntaganda was convicted affected thousands of victims and entire communities, while relying upon the submissions of the Defence and

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[978] Victims Group 2's Appeal Brief, p. 14.
[979] Victims Group 2's Appeal Brief, p. 31.
[980] Victims Group 2's Appeal Brief, paras 45, 71.
[981] Victims Group 2's Appeal Brief, paras 47, 71-76.
[982] Victims Group 2's Appeal Brief, paras 45, 71.
[983] Victims Group 2's Appeal Brief, paras 45, 71.
[984] Victims Group 2's Appeal Brief, para. 46. The Appeals Chamber notes that the Main Villages are: Bambu, Buli, Gola, Jitchu, Kilo, Kobu, Lipri, Mongbwalu, Nyangaray, Nzebi, Sangi, Sayo, Tsili, (*see* Conviction Decision, paras 497, 505, 535-537, 549, 571, 573, 585-586, 603-604, 612, 615-617, 640).
[985] Victims Group 2's Appeal Brief, para. 46.

the TFV, "which do not reference any sources and nor are they corroborative".[986] According to Victims Group 2, if the estimation was based upon the size of the population at the relevant locations, the number of *direct* victims would have been assessed to be at least 100,000.[987]

449. The Appeals Chamber recalls that establishing the number of beneficiaries of reparations will often be a fundamental parameter in the determination of both the appropriate types of reparations and the amount of the award for reparations.[988] However, as previously determined by the Appeals Chamber, a trial chamber does not have to set out the precise number of beneficiaries in the order for reparations.[989] It may instead resort to estimates, in which case such estimates must be as concrete as possible and based upon a sufficiently strong evidential basis.[990]

450. In the Impugned Decision, the Trial Chamber re-assessed the number of potential beneficiaries for reparations properly implementing the guidance provided in the 2022 Appeals Chamber Judgment.[991] Unlike the 2021 Reparations Order, which reflected a range varying from 1,100 to a minimum of 100,000 potential beneficiaries, the Impugned Decision provides a more concrete estimate, setting out that approximately 7,500 individuals are considered to be direct and indirect victims of the attacks.[992] It moreover addresses the submissions presented by the Registry, the TFV and the parties, including Victims Group 2,[993] as discussed below.

451. The Trial Chamber discussed and rejected in the Impugned Decision Victims Group 2's submissions in support of the population size method.[994] The Trial Chamber indicated that it had not been proved at trial that Mr Ntaganda was liable for crimes committed against the entirety of the Main Villages included in the conviction.[995] It emphasised that reparation proceedings before the Court are "strictly limited in reach

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[986] Victims Group 2's Appeal Brief, paras 62, 64.
[987] Victims Group 2's Appeal Brief, para. 49.
[988] 2022 Appeals Chamber Judgment, para. 152.
[989] 2022 Appeals Chamber Judgment, para. 151.
[990] 2022 Appeals Chamber Judgment, paras 153-154, *referring* to 2019 *Lubanga* Appeals Chamber Judgment, paras 90, 223, 224; *see also* para. 155.
[991] 2022 Appeals Chamber Judgment, para. 168.
[992] Impugned Decision, para. 320.
[993] Impugned Decision, paras 299-320.
[994] Victims Group 2's Appeal Brief, paras 45, 71.
[995] Impugned Decision, para. 300.

and scope to the terms of the conviction", which ensures "realisation of the right of the direct and indirect victims included in the conviction to obtain reparative justice".[996] Consequently, it concluded that should it find, as proposed by Victims Group 2, the entire population of the Main Villages to be eligible for reparations, Mr Ntaganda would be ordered to repair harm for which he is not responsible.[997]

452. In finding that the methodology for calculating the total number of victims proposed by Victims Group 2 could not be relied upon, the Trial Chamber considered two arguments raised by the Defence and the TFV:[998] (i) that a distinction should be made between the population in the relevant localities and the number of persons not taking a direct part in hostilities;[999] and (ii) that most of the inhabitants had already left the relevant areas prior to the attacks and therefore did not necessarily fall within the scope of the conviction.[1000] Victims Group 2 object to these arguments, as analysed below.

453. First, Victims Group 2 argue that the Trial Chamber's distinction between population size and the number of persons not directly participating in hostilities is based upon an unsupported Defence statement, and that it contradicts the "presumption of civilian status" under IHL,[1001] acknowledged in the Conviction Decision.[1002]

454. The Appeals Chamber notes that the section of the Impugned Decision in which the challenged finding was made does not concern the type of determinations that are involved in the presumption of civilian status under IHL.[1003] The reference to persons not taking a direct part in hostilities had the sole purpose of making it clear that an overall figure setting out the population size would include, within the population, those individuals that had taken part in the hostilities.[1004] Indeed, the Trial Chamber referred in the Impugned Decision to the presumption of civilian status, as addressed in further

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[996] Impugned Decision, para. 17.
[997] Impugned Decision, para. 301.
[998] Impugned Decision, paras 300-301.
[999] Impugned Decision, para. 301.
[1000] Impugned Decision, para. 301, *referring to* TFV's 30 January 2023 Submission, para. 45.
[1001] Victims Group 2's Appeal Brief, para. 61, *referring to* Impugned Decision, para. 301.
[1002] Victims Group 2's Appeal Brief, para. 61, *referring to* Conviction Decision, para. 883. *See also* Impugned Decision, para. 109.
[1003] Impugned Decision, para. 301. The Trial Chamber developed the proceedings to carry out victims' eligibility assessments, discussing, *inter alia*, issues arising from the presumption of civilian status under IHL, in section III A of the Impugned Decision. *See* in particular Impugned Decision, para. 112.
[1004] Impugned Decision, paras 300-301.

detail above.[1005] Its ultimate conclusion as to the eligibility of victims for reparations was that the absence of information in the dossiers about the victim's status and occupation at the relevant time does not preclude, pursuant to the Impugned Decision, a finding that they are entitled to reparations. In any event, as the Trial Chamber determined, each account should be assessed and decided on a case-by-case basis.[1006] Therefore, the Appeals Chamber finds that the Trial Chamber accepted a distinction between the size of the population and the number of persons not taking a direct part in hostilities for purposes that neither concerned nor contradicted the presumption of civilian status under IHL.

455. Second, in respect of the Trial Chamber's reliance upon the TFV's argument that, at the time the attacks took place, most of the inhabitants had already left the relevant areas and these people did not necessarily fall within the scope of the conviction,[1007] Victims Group 2 contend that the Trial Chamber erred in the exercise of its discretion by relying upon the TFV's "simple statement with no reference to any source", while disregarding their submissions supported by "several corroborative sources".[1008]

456. The Appeals Chamber finds that Victims Group 2 misrepresent the submissions of the TFV and the Trial Chamber's determination in this regard. Indeed, the TFV's submissions are clear to the effect that they had been preceded by, and made on the basis of, consultations with community leaders.[1009] Whilst the Trial Chamber acknowledged, in line with Victims Group 2's argument on appeal,[1010] that it would have been preferable for the TFV to provide more detailed information setting out its sources,[1011] this does not invalidate the findings made in the Impugned Decision. Indeed, the Appeals Chamber notes that, although initially (in June 2021), the TFV had informed the Trial

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[1005] *See* paragraphs 167-168 above.
[1006] Impugned Decision, paras 108-112.
[1007] Victims Group 2's Appeal Brief, paras 59, 62, *referring to* Impugned Decision, para. 301.
[1008] Victims Group 2's Appeal Brief, para. 59.
[1009] The Appeals Chamber notes that the TFV's 30 January 2023 Submission was filed pursuant to the Trial Chamber's decisions on the implementation of the 2022 Appeals Chamber Judgment against the 2021 Reparations Order, requesting information to support a general estimate of the number of potential beneficiaries in order to determine the amount of liability (*see* Order of 25 October 2022; Decision of 25 November 2022). The TFV indicated that any number of potential beneficiaries would be an educated guess, made on the basis of various sources of information collected from various sources and stakeholders. The TFV stated that it undertook consultations to shed additional light on the number of beneficiaries in relation to the victims of the attacks, involving "community leaders" in those consultations (*see* TFV's 30 January 2023 Submission, para. 45).
[1010] Victims Group 2's Appeal Brief, paras 72, 74.
[1011] Impugned Decision, para. 312.

Chamber that it had not yet been able to talk to leaders of the communities of victims of the attacks,[1012] later (in December 2021 and March 2022), the TFV specified that it had held consultations with community leaders, and it outlined the information they provided regarding the situation at the time of the attacks.[1013] The TFV indeed reported that community leaders stated that although a very high number of persons lived in the affected areas around the time of the two attacks, most of the inhabitants had already left the relevant areas by that time and were therefore not directly affected by the attacks.[1014] The Trial Chamber also relied upon similar information previously provided by the Registry and the Appointed Experts, equally noting that this information had been obtained from different stakeholders, particularly leaders of the municipalities.[1015]

457. In light of the foregoing, the Appeals Chamber finds that it was not unreasonable for the Trial Chamber to rely upon the arguments outlined above and accordingly reject the population size method. Therefore, Victims Group 2's arguments in this regard are rejected.

b. The "population size figures"

458. The Appeals Chamber notes that, having determined that the population size method would not provide a reliable estimate, the Trial Chamber did not need to entertain the population size figures invoked by Victims Group 2. Indeed, the Appeals Chamber has found above that it was not unreasonable for the Trial Chamber to accept that most inhabitants had already left at the time of the attacks, and that not all were non-combatants.[1016] The Appeals Chamber observes that, nonetheless, the Trial Chamber still assessed the documents referred to by Victims Group 2 containing information about the number of individuals present in Mongbwalu at the time of the attacks,[1017] the number of people displaced by the *shika na mukono* operation in some of the affected villages and the estimates provided by the Registry as to the number of inhabitants at the relevant times in some other affected villages.[1018]

[1012] Report on IDIP, para. 30.
[1013] First DIP, para. 87; Updated DIP, para. 92.
[1014] First DIP, para. 87; Updated DIP, para. 92.
[1015] Impugned Decision, para. 316.
[1016] *See* paragraphs 456-457 above.
[1017] Impugned Decision, para. 302.
[1018] Impugned Decision, paras 302-307.

459. However, having rejected above Victims Group 2's submissions in support of the population size method,[1019] the Appeals Chamber finds that the documents relied upon by Victims Group 2 in support of the population size figures have no bearing upon the estimation of the number of beneficiaries in relation to the victims of the attacks. Therefore, the Appeals Chamber rejects Victims Group 2's arguments in this regard.

c. The estimate of 7,500 victims of the attacks

460. Victims Group 2 further submit that the Trial Chamber erred in law, fact, procedure and in the exercise of its discretion by relying upon the submissions of the TFV and the Defence, leading to the estimate that 7,500 individuals are potentially eligible beneficiaries as victims of the attacks.[1020] In particular, Victims Group 2 assert, *inter alia*, that the Trial Chamber used a simplistic mathematical approach based upon the Registry's 2019 preliminary mapping exercise.[1021] They also submit that the Trial Chamber failed to provide sufficient reasoning as to how and why it deemed the figure provided by the TFV to be reliable and reasonable.[1022] As such, in the view of Victims Group 2, it is not discernible why the TFV's submissions were given more weight than the figures provided by Victims Group 2 and those contained within the Registry's 30 January 2023 Submission.[1023]

461. The Defence, in its response, argues that the Trial Chamber's estimation of 7,500 victims of the attacks is as concrete as possible and is based upon a sufficiently strong evidential basis.[1024] While the Defence "concurs in part with the deficiencies associated with the TFV figures",[1025] it notes that the Trial Chamber, in "weighing the information provided by the TFV", acknowledged and took into account the fact that the figures contained certain deficiencies.[1026] According to the Defence, the Trial Chamber

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[1019] *See* paragraph 457 above.
[1020] Victims Group 2's Appeal Brief, paras 66-86.
[1021] Accordingly, 2,276 victims were identified in 30% of the population, and this figure was used to estimate the number of potential beneficiaries for reparations in the 70% of the population that remained displaced. Victims Group 2 contend that, instead, all or the majority of those in the 70% of the population that remain displaced should be considered as victims: *see* Victims Group 2's Appeal Brief, para. 78.
[1022] Victims Group 2's Appeal Brief, para. 78.
[1023] Victims Group 2's Appeal Brief, para. 74.
[1024] Defence Response to Victims Group 2's Appeal Brief, para. 13.
[1025] Defence Response to Victims Group 2's Appeal Brief, para. 40 (emphasis in original omitted).
[1026] Defence Response to Victims Group 2's Appeal Brief, paras 41-42.

validated the figures by taking additional information from the record and providing sufficient justification.[1027]

462. As recalled above, trial chambers need not set out the precise number of beneficiaries to be repaired in the reparations order.[1028] They may instead resort to estimates although, if they do, such estimates must be as concrete as possible and based upon a sufficiently strong evidential basis.[1029]

463. Contrary to Victims Group 2's submissions,[1030] the Appeals Chamber finds that the Trial Chamber's reasoning is set out clearly and its findings are not unreasonable. Rather than measuring the "population size", the Trial Chamber followed a methodology that involved mathematical projections from known information in the case file as well as from estimates that it found, within its discretion, to be reliable. First, it analysed the most concrete number of victims it could conceivably assess, namely the 1,176 victims participating in the case that fall within the scope of the conviction. Then, it looked into the number of potential victims likely to come forward later in the proceedings (which the Registry estimated as per its preliminary mapping exercise as "at least" 1,100 victims). Adding these two values together, the Trial Chamber calculated that the total estimated number of victims would amount to 2,276.[1031] The Trial Chamber then assessed the Registry's more recent submission concerning the challenges of identifying potential beneficiaries due to population displacements, in which it noted that over 70% of the pre-conflict population had not yet returned to their locality of origin.[1032] On that basis, the Trial Chamber considered that the estimates arising from the preliminary mapping exercise only account for about 30% of the total number of potential victims.[1033] Applying a projection based upon the figure of 2,276 victims representing 30% of the total number, the Trial Chamber added the remaining 70% (approximately

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[1027] Defence Response to Victims Group 2's Appeal Brief, paras 38-58.
[1028] 2022 Appeals Chamber Judgment, para. 151.
[1029] 2022 Appeals Chamber Judgment, para. 153, *referring to* 2019 *Lubanga* Appeals Chamber Judgment, paras 90, 223-224.
[1030] Victims Group 2's Appeal Brief, paras 66-86.
[1031] The Trial Chamber also took into account the estimations made by the Appointed Experts that at least 3,500 individuals were direct victims of the attacks and potentially eligible for reparations, while the number of indirect victims could not be ascertained by them: *see* Impugned Decision, para. 316, *referring to* First Experts Report, paras 29, 283, p. 107.
[1032] Impugned Decision, para. 317, *referring to* Registry's 30 January 2023 Submission, para. 19.
[1033] Impugned Decision, para. 317.

5,311 individuals),[1034] which resulted in the number of around 7,587 potential victims.[1035]

464. The estimate of 7,587 victims, made on the basis of the Registry's initial submissions, closely coincides with the TFV's conservative estimate of 7,500 victims.[1036] Victims Group 2 take issue with the TFV's estimate, and argue that, in relying upon the TFV's estimate, the Trial Chamber failed to exercise its discretion reasonably.[1037]

465. Victims Group 2 contend, quoting directly from the TFV's submissions, that rather than providing an estimate of the number of victims, the TFV's figure represented the number of victims that it anticipated could be accommodated within the amount of the award set by the Trial Chamber.[1038] The Trial Chamber shared "[t]o a certain extent the concerns" raised by Victims Group 2 and insisted that the TFV has no "discretion to limit reparations to available resources".[1039] The Trial Chamber ultimately relied upon the figures proposed by the TFV,[1040] which Victims Group 2 consider to have amounted to an abuse of discretion.[1041]

466. The Appeals Chamber reiterates, as noted above, that "an abuse of discretion will occur when the decision is so unfair or unreasonable as to force the conclusion that the relevant chamber failed to exercise its discretion judiciously".[1042] The Appeals Chamber has applied this standard to the considerations that the Trial Chamber took into account to rely upon the TFV's figures. First, the Trial Chamber observed that the estimate

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[1034] Victims Group 2 contend that the Trial Chamber should not have made a projection, but instead considered all or the majority of those in the 70% of the population that remain displaced to have been very likely to have suffered directly or indirectly from some of the crimes of which Mr Ntaganda has been convicted: *see* Victims Group 2's Appeal Brief, para. 79. The Appeals Chamber is unpersuaded by this argument. As noted above, Victims Group 2 fail to show an error in the Trial Chamber's distinction between the population in the relevant localities and the number of persons not taking a direct part in hostilities or the consideration that most of the inhabitants had already left the relevant areas and were therefore not directly affected by the attack. Thus, the Appeals Chamber concludes that it was not unreasonable for the Impugned Decision not to consider all those that were yet to return to the affected villages as potentially eligible victims in the case.
[1035] Impugned Decision, para. 317.
[1036] Impugned Decision, para. 318.
[1037] Victims Group 2's Appeal Brief, para. 75.
[1038] Victims Group 2's Appeal Brief, para. 75, *referring to* Updated DIP, para. 96.
[1039] Impugned Decision, para. 313.
[1040] Impugned Decision, para. 318.
[1041] Victims Group 2's Appeal Brief, para. 77.
[1042] *See*, *for example*, *Al Hassan* OA4 Appeal Judgment, para. 20.

proposed by the TFV not only contemplated the available resources but also "the information collected in consultations with different stakeholders as to the number of potential beneficiaries within the terms of the conviction".[1043] Second, the Trial Chamber was persuaded to set the potential number of victims at 7,500 individuals in light of the matching estimates proposed by the TFV and the initial submissions of the Registry.[1044]

467. The Appeals Chamber finds that, contrary to Victims Group 2's submissions, the Trial Chamber considered and addressed the concern as to the possible overlapping in the TFV's understanding of its role, making it clear that reparations cannot be limited to available resources.[1045] The Trial Chamber relied upon the TFV's projections taking into account various considerations, including in particular "information collected in consultations with different stakeholders as to the number of potential beneficiaries within the terms of the conviction".[1046] The Appeals Chamber therefore finds that Victims Group 2 have failed to demonstrate that reliance upon these figures was so unfair or unreasonable as to force the conclusion that the Trial Chamber failed to exercise its discretion judiciously.

468. Victims Group 2 further submit that the Trial Chamber should have ordered a new victims' mapping exercise,[1047] and sought further clarifications from the Registry.[1048] They contend that, instead, the Trial Chamber improperly took an "expedient route", deciding on the basis of material in the case record, namely, *inter alia*, the information provided by the Registry in 2020.[1049]

469. The Appeals Chamber notes that, when Victims Group 2 raised the need for a new victims' mapping exercise before the Trial Chamber the latter rejected it as "currently untenable",[1050] taking into account the extremely volatile and unpredictable security situation at the relevant time in Ituri; the heavily reduced capacity of ICC field operations

[1043] Impugned Decision, para. 314.
[1044] Impugned Decision, para. 316.
[1045] Impugned Decision, para. 313.
[1046] Impugned Decision, para. 314.
[1047] Victims Group 2's Appeal Brief, para. 86.
[1048] Victims Group 2's Appeal Brief, para. 64.
[1049] Victims Group 2's Appeal Brief, para. 64.
[1050] Impugned Decision, para. 315.

in the DRC;[1051] and the fact that victims have been awaiting reparations in this case for more than twenty years.[1052] Moreover, the Trial Chamber noted that the authorities consulted during the 2020 victims' mapping exercise informed that they "were not in a position to link any more individuals to the crimes for which Mr Ntaganda was convicted"; and underscored that they "[did] not anticipate the number [of applicants] to be exponentially higher than the one established thus far during the mapping exercise".[1053]

470. In those circumstances, the Appeals Chamber finds no error in the manner in which the Trial Chamber weighed the interests at stake and exercised its discretion, while remaining mindful that its estimates must be as concrete as possible and based upon a sufficiently strong evidential basis. It therefore acted reasonably in all of the circumstances of the case. The Appeals Chamber observes, in that context, that the Trial Chamber followed the direction of the Appeals Chamber by reconsidering the estimate of the number of beneficiaries by obtaining further submissions and ruling on the basis of all of the information that it had before it in arriving at its estimate. It also took reasonable factors into account in determining that it was "untenable" to carry out a further victims' mapping exercise, bearing in mind the security situation, the reduced capacity of the ICC field offices and the length of time for which victims in this case had been waiting for reparations.

471. For all of the above reasons, the Appeals Chamber determines that Victims Group 2 have failed to demonstrate that the Trial Chamber abused its discretion or committed any other error in estimating the number of victims in this case.

4. *Overall conclusion*

472. For the above reasons, the Appeals Chamber rejects Victims Group 2's first ground of appeal.

[1051] Impugned Decision, paras 308, 315.
[1052] Impugned Decision, paras 309, 315.
[1053] Impugned Decision, para. 306.

B. Ground of appeal 2: Alleged errors in determining the cost to repair for the victims of the attacks

473. Under their second ground of appeal, Victims Group 2 submit three sub-grounds. The Appeals Chamber will first set out the relevant procedural background to all three sub-grounds before determining those sub-grounds individually.

1. Relevant procedural background

474. The Trial Chamber decided, in the 2021 Reparations Order, to set the total reparations award for which Mr Ntaganda is liable at USD 30,000,000.[1054]

475. In the 2022 Appeals Chamber Judgment, the Appeals Chamber determined that the Trial Chamber had set the amount of the award without reference to any concrete estimate of the number of victims whose harm it was intended to repair.[1055] It moreover found that the Trial Chamber did not provide any specific information, calculation or other reasoning as to how it reached the amount of USD 30,000,000.[1056] It determined that this was an error.[1057] In particular, it stated:

> In the present case, however, it is not discernible how the Trial Chamber arrived at the amount of 30 million USD that it awarded. No calculations or explanations are provided, whether by reference to applications received or a sample of victims, a per victim cost, the overall cost of reparations programmes, submissions of the parties or any other basis.[1058]

476. The Appeals Chamber further found that the Trial Chamber should have elaborated upon why it considered the award to be "fair", in what way it was "appropriate", how it took "a conservative approach", and what "uncertainties" were resolved in favour of Mr Ntaganda.[1059] The Appeals Chamber thus reversed the 2021 Reparations Order in this regard and remanded the issue to the Trial Chamber for a new determination.[1060]

477. The Trial Chamber conducted a series of procedural steps to implement the 2022 Appeals Chamber Judgment. Upon the instruction of the Trial Chamber,[1061] the parties,

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[1054] 2021 Reparations Order, para. 247.
[1055] 2022 Appeals Chamber Judgment, para. 235.
[1056] 2022 Appeals Chamber Judgment, para. 243.
[1057] 2022 Appeals Chamber Judgment, para. 235.
[1058] 2022 Appeals Chamber Judgment, para. 252.
[1059] 2022 Appeals Chamber Judgment, paras 257-260.
[1060] 2022 Appeals Chamber Judgment, para. 265.
[1061] Decision of 25 November 2022, para. 37.

the TFV and the Registry filed submissions on 30 January 2023.[1062] In particular, the TFV filed submissions in relation to the costs to repair that had been incurred in the implementation of reparations in the *Lubanga* case.[1063]

478. In the Impugned Decision, the Trial Chamber estimated the total amount required to provide reparations to all victims of the crimes of which Mr Ntaganda was convicted to be approximately USD 31,229,905.[1064]

2. *Sub-ground of appeal 2.1: Alleged error of law and/or fact and procedure by failing to establish a proper basis for the approach to the cost to repair for the victims of the attacks*

a. Summary of the submissions

479. Victims Group 2 submit that the Trial Chamber's errors alleged under this ground of appeal are closely linked to the errors identified under their first ground of appeal.[1065] They argue that the Trial Chamber chose to proceed with a *per capita* calculation by multiplying the figure of 7,500 by the average cost allocated for each type of mental care, physical care, and socio-economic support (arriving at the figure of USD 19,003,585 as total costs).[1066] According to Victims Group 2, since the estimate of 7,500 potentially eligible victims of the attacks is incorrect, the calculation of the cost is necessarily incorrect.[1067] They submit that "[a] significantly greater number […] of victims of the attacks who are likely to come forward to benefit from reparations", will reduce the average *per capita* amount per victim,[1068] and the amount will be insufficient to address the harm comprehensively.[1069]

480. The Defence argues that regardless of whether it is correct that more than 7,500 victims will come forward to claim reparations in the case, this does not demonstrate any error committed in the determination of the cost to repair.[1070] It submits

[1062] CLR1's Additional Submissions on Transgenerational Harm; CLR2's 30 January 2023 Submissions; Defence Further Submissions on Transgenerational Harm; TFV's 30 January 2023 Submission; Registry's 30 January 2023 Submission.
[1063] TFV's 30 January 2023 Submission.
[1064] Impugned Decision, para. 358.
[1065] Victims Group 2's Appeal Brief, para. 87.
[1066] Victims Group 2's Appeal Brief, para. 88, *referring to* Impugned Decision, paras 346, 348, 349, 355-356.
[1067] Victims Group 2's Appeal Brief, paras 87-92.
[1068] Victims Group 2's Appeal Brief, para. 90.
[1069] Victims Group 2's Appeal Brief, paras 87-92.
[1070] Defence Response to Victims Group 2's Appeal Brief, para. 75.

that Victims Group 2 merely repeat arguments raised under their first ground of appeal and, for this reason alone, the present ground of appeal must fail.[1071]

b. Determination by the Appeals Chamber

481. At the outset, the Appeals Chamber notes that the Trial Chamber followed the directions issued by the Appeals Chamber.[1072] It considered submissions received in the reparation proceedings and the information and the evidence in the case file, and it elicited conclusions from the analysis of the Sample.[1073] As set out above, having estimated the number of potential victims of the attacks at around 7,500 individuals, the Trial Chamber calculated the costs required to cover measures directed at: (i) providing mental care to victims of the attacks; (ii) providing physical care to victims of the attacks; (iii) providing socio-economic support to victims of the attacks; and (iv) repairing the harm caused as a consequence of the attack on the Sayo health centre. It estimated the total amount required to provide reparations to all victims of the crimes of which Mr Ntaganda was convicted to be approximately USD 31,229,905.[1074]

482. The Appeals Chamber notes that both Victims Group 2 and the Defence submit that the present sub-ground of appeal is linked to Victims Group 2's first ground of appeal.

483. Victims Group 2 do not articulate, under the present sub-ground of appeal, any reasons to support their argument that the determination of the amount of the award for reparations is not accurate beyond those raised and already rejected in respect of the first ground of their appeal. Accordingly, the present sub-ground of appeal is also rejected.

3. *Sub-ground of appeal 2.2: Alleged error of fact and procedure by establishing the cost to repair for the victims of the attacks based upon the TFV's projections related to former child soldiers*

a. Summary of the submissions

484. Victims Group 2 argue that the Trial Chamber made an error of fact and procedure by using the TFV's projections in respect of the former child soldier victims in the *Lubanga* case to determine the cost to repair the harm suffered by the victims of the

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[1071] Defence Response to Victims Group 2's Appeal Brief, para. 74.
[1072] 2022 Appeals Chamber Judgment, paras 235, 243, 252, 257-260.
[1073] Impugned Decision, paras 288, 320.
[1074] Impugned Decision, paras 336-360.

attacks in the present case.[1075] They argue that these two groups of victims have suffered different types of harm and therefore the nature of support and assistance required to address their harm should be significantly different.[1076] Victims Group 2 contend that it is unclear why the Trial Chamber did not instead consider the *Katanga* reparation programme as a benchmark for comparison.[1077] They submit that the victims of the attacks suffered crimes that were of a more similar nature to those in the *Katanga* case than to the crimes suffered by the former child soldier victims in the *Lubanga* case.[1078]

485. In response to the arguments of Victims Group 2, the Defence submits that the Trial Chamber did not err in establishing the cost to repair the harm caused to the victims of the attacks based upon the TFV's projections in the *Lubanga* case.[1079] It avers that Victims Group 2 fail to demonstrate how or why the facts and figures provided by the TFV regarding the *Lubanga* case were unreliable for calculating the cost of repairing the harms suffered by the victims of the attacks.[1080] It further argues that Victims Group 2 fail to explain how the cost to repair harm suffered by the victims would have been different "if [the Trial Chamber] had used estimates and figures from the *Katanga* case".[1081]

486. Within its response, the Defence further argues that the Trial Chamber made errors in the calculation of the costs required to provide *socio-economic support* to the victims of the attacks. It submits that the Trial Chamber only provided average costs because the TFV failed to submit the statistical information required for the actual calculation of costs.[1082] It submits that, rather than making assumptions without a clear basis, the Trial Chamber should have requested the necessary information from the TFV or sought alternative sources of data.[1083] Moreover, the Defence argues that the Sample was not representative and as a result the statistics drawn from it are unreliable.[1084] The Defence

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[1075] Victims Group 2's Appeal Brief, para. 93.
[1076] Victims Group 2's Appeal Brief, para. 94.
[1077] Victims Group 2's Appeal Brief, para. 99.
[1078] Victims Group 2's Appeal Brief, paras 98-99.
[1079] Defence Response to Victims Group 2's Appeal Brief, para. 83, *referring to* Victims Group 2's Appeal Brief, para. 93.
[1080] Defence Response to Victims Group 2's Appeal Brief, para. 86.
[1081] Defence Response to Victims Group 2's Appeal Brief, para. 87.
[1082] Defence Response to Victims Group 2's Appeal Brief, para. 88, *referring to* Impugned Decision, para. 350.
[1083] Defence Response to Victims Group 2's Appeal Brief, para. 91.
[1084] Defence Response to Victims Group 2's Appeal Brief, para. 92.

submits that this was an error and that in these circumstances it is appropriate to collate "a new and representative sample" and to proceed with a new order for reparations in accordance with the Appeals Chamber's guidance.[1085]

b. Determination by the Appeals Chamber

487. The Appeals Chamber observes that, in its response to the appeal of Victims Group 2, the Defence attempts to raise new errors concerning the Impugned Decision, albeit setting out explicitly that it decided not to appeal in this respect.[1086] The parties are reminded that they are not allowed to present new grounds of appeal in their responses. Such a course contravenes the procedures set out in rule 150(1) of the Rules and regulations 57(e) and 58 of the Regulations. These submissions are therefore dismissed *in limine* and will not be entertained any further. The arguments properly raised by the Defence under its fourth ground of appeal have been addressed by the Appeals Chamber above.

488. According to Victims Group 2, the victims of the attacks and the former child soldiers in the *Lubanga* case, while suffering harm resulting from the same conflict in Ituri, may not need the same form of support or find certain other forms of assistance helpful.[1087] Victims Group 2 submit that, for example, rather than the mental and physical care recognised for the benefit of victims in the *Lubanga* case, the harm suffered by the victims of the attacks should be addressed by way of socio-economic measures.[1088]

489. The Appeals Chamber notes that, apart from the example specified above, Victims Group 2 do not explain what other forms of support the Trial Chamber ought to have adopted or rejected. It follows that Victims Group 2 have not substantiated this part of their argument. Therefore, to this extent, their contention is rejected.

[1085] Defence Response to Victims Group 2's Appeal Brief, para. 92.
[1086] Defence Response to Victims Group 2's Appeal Brief, para. 5; Defence Notice of Appeal, para. 5 ("[The Trial Chamber] also erred by failing to properly estimate the total number of potential victims in the case without any statistical or scientific basis; by determining the monetary award to be paid by the Convicted [P]erson, in the absence of a reliable estimate of the total number of potential victims in the case. Notably, the Convicted Person is not appealing these two errors. His focus is rather on the eligibility determination of potential victims, which […] in his view is more important").
[1087] Victims Group 2's Appeal Brief, para. 94.
[1088] Victims Group 2's Appeal Brief, para. 95.

490. Turning to the example Victims Group 2 do specify, the Appeals Chamber is unpersuaded by their submissions. According to Victims Group 2, "today – twenty years after the events – only a number of the victims of the attacks who suffered mental and physical harm would need mental support and physical care".[1089] Victims Group 2 propose that a more effective way to address the multidimensional harm suffered by the victims of the attacks is to implement socio-economic measures.[1090]

491. The Appeals Chamber notes that it was not in the Impugned Decision but in the 2021 Reparations Order that the Trial Chamber decided upon the types and modalities of reparations, after having found that the victims of the attacks had suffered physical and psychological harm.[1091] It determined that the most appropriate type of reparations in this case are collective reparations with individualized components,[1092] and that reparations should include rehabilitative measures to address physical and psychological harm.[1093] These findings were not overturned by the 2022 Appeals Chamber Judgment and accordingly were not part of the issues remanded for a new determination by the Trial Chamber.

492. This notwithstanding, the Appeals Chamber notes that the Sample analysed by the Trial Chamber reflects that 100% of the victims of the attacks who were found eligible suffered psychological harm and 43.95% suffered physical harm.[1094] In this regard, the Sample confirmed the Trial Chamber's findings in the 2021 Reparations Order. Therefore, it was not unreasonable for the Trial Chamber to consider psychological and physical suffering as part of the harm to be repaired and to include their cost within its calculation of the monetary award. Finally, the Appeals Chamber notes that, in the Impugned Decision, the Trial Chamber included the costs necessary to provide the very type of support claimed by Victims Group 2. Upon consideration of the submissions received in respect of the calculation of the monetary award against Mr Ntaganda,[1095] the Trial Chamber incorporated the costs applicable to socio-economic measures,

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[1089] Victims Group 2's Appeal Brief, para. 95.
[1090] Victims Group 2's Appeal Brief, para. 95.
[1091] 2021 Reparations Order, paras 183-214.
[1092] 2021 Reparations Order, para. 193.
[1093] 2021 Reparations Order, paras 203-206.
[1094] Impugned Decision, paras 344, 347.
[1095] Impugned Decision, para. 336.

including schooling support, vocational training and income generating activities and mental and physical care.[1096] For these reasons, this argument is rejected.

493. Second, Victims Group 2 submit that the victims of the attacks suffered crimes that were of a more similar nature to the victims in the *Katanga* case than to the crimes suffered by the former child soldier victims in the *Lubanga* case.[1097] Victims Group 2 contend that it is unclear why the Trial Chamber did not consider the *Katanga* reparation programme as a benchmark for comparison,[1098] which would have led to a more accurate calculation of the cost to repair.[1099]

494. The Appeals Chamber underlines that the cost to repair should be based upon the needs and interests of the specific victims in the case. The Impugned Decision provides the reasons underpinning the determination to rely upon the TFV's projections in the *Lubanga* case for the calculation of the cost to repair the harm caused to victims of the attacks.[1100] The Trial Chamber determined that although the victims in the *Lubanga* case and the victims of the attacks in the *Ntaganda* case did not suffer the same underlying crimes, the *Lubanga* projections were still the most reliable,[1101] compared with other estimates it requested, received and reviewed,[1102] including in the *Katanga* case.[1103] Moreover, the Trial Chamber observed that the monetary value of the harm suffered by victims in the *Lubanga* case was calculated taking into account the findings in the *Katanga* case.[1104] In other words, the findings in the *Katanga* case that Victims Group 2 argue were not considered, were in fact relevant to the calculations in the *Lubanga* case that the Trial Chamber ultimately considered as part of the calculation in the present case.

495. The Trial Chamber further noted that reliance upon the *Lubanga* reparation programme would allow the incorporation of the actual cost of an existing reparation programme, creating budgetary efficiencies. Namely, it considered how costs could be

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[1096] Impugned Decision, paras 350-355.
[1097] Victims Group 2's Appeal Brief, paras 98-99.
[1098] Victims Group 2's Appeal Brief, para. 99.
[1099] Victims Group 2's Appeal Brief, para. 100.
[1100] Impugned Decision, paras 342, 359.
[1101] Impugned Decision, para. 342.
[1102] Impugned Decision, para. 359.
[1103] 2021 Reparations Order, para. 243.
[1104] 2021 Reparations Order, para. 244, *referring to* *Lubanga* Decision Setting the Size of the Reparations Award, para. 259.

lowered due to: "(i) savings in launching and readjustments for child [soldier] victims integrated in the *Lubanga* programme; (ii) budgetary efficiencies in new projects due to the experience gained implementing reparations in the DRC; (iii) the family dimension that may bring further savings in relation to the victims of the attacks; and (iv) the specificity of the individual harms suffered by the *Ntaganda* victims".[1105] Considering that victims in the *Lubanga* case and in the present case are from the same region and were affected by the same armed conflict, the Trial Chamber concluded that making projections from the *Lubanga* reparation programme would ensure fair and equal treatment for all victims, in line with the principles of dignity, non-discrimination, and non-stigmatisation.[1106]

496. The Appeals Chamber finds that the Trial Chamber weighed pertinent factors and properly justified its decision. Considering these factors as a whole, it was not unreasonable for the Trial Chamber to calculate the award based upon cost estimates from the *Lubanga* case and therefore the present sub-ground of appeal is rejected.

4. *Sub-ground of appeal 2.3: Alleged error of law, fact and/or procedure by failing to explain how and to what extent the cost to repair for the victims of the attacks are "fair" and "appropriate"*

a. Summary of the submissions

497. Victims Group 2 contend that the cost to repair set in the Impugned Decision is neither "fair" nor "appropriate",[1107] as the number of victims of the attacks likely to come forward is significantly higher than the number of 7,500 individuals estimated by the Trial Chamber.[1108]

498. The Defence submits that the present sub-ground of appeal is directly related to Victims Group 2's first ground of appeal and the first sub-ground of their second ground of appeal.[1109] For similar reasons, it submits that this sub-ground must also be rejected.[1110]

[1105] Impugned Decision, para. 359.
[1106] Impugned Decision, para. 342.
[1107] Victims Group 2's Appeal Brief, para. 106.
[1108] Victims Group 2's Appeal Brief, para. 104.
[1109] Defence Response to Victims Group 2's Appeal Brief, para. 94.
[1110] Defence Response to Victims Group 2's Appeal Brief, para. 94.

b. Determination by the Appeals Chamber

499. As recalled above,[1111] in the 2022 Appeals Chamber Judgment, the Appeals Chamber reversed the 2021 Reparations Order, concluding that the award for reparations was set: (i) without having any concrete estimate as to the number of victims whose harm it was intended to repair;[1112] and (ii) without making it discernible how the amount was arrived at and, therefore, whether it is capable of appropriately repairing the harms suffered by the victims or fairly establishing the liability of Mr Ntaganda.[1113] The Appeals Chamber remanded the issue, directing the Trial Chamber to assess and explain fully what the appropriate award for reparations should be in the present case, taking into account all known circumstances at the date of that assessment.[1114]

500. The Impugned Decision sets out the procedure followed by the Trial Chamber, the information it received and the reasons for its decision in relation to the issues remanded by the Appeals Chamber. In the Impugned Decision[1115] the Trial Chamber set out the reasons why it considered it to be fair, equitable and appropriate (and to respect the rights of the victims and those of the convicted person), to set Mr Ntaganda's liability for reparations at USD 31,300,000.[1116] It is also discernible from the Impugned Decision how the Trial Chamber calculated the award for reparations for the estimated 7,500 victims of the attacks.[1117]

501. The Appeals Chamber notes that Victims Group 2 explicitly accept that the established cost to repair may be deemed "*fair and appropriate*" for 7,500 victims of the attacks when compared to the cost to repair for the former child soldiers.[1118] They aver, however, that it may potentially become unfair and inappropriate if a more significant number of eligible victims of the attacks come forward to benefit from reparations. They submit that such a situation would reduce the *per capita* award.[1119]

[1111] *See* paragraph 476 above.
[1112] 2022 Appeals Chamber Judgment, para. 235.
[1113] 2022 Appeals Chamber Judgment, para. 265.
[1114] 2022 Appeals Chamber Judgment, para. 265.
[1115] Impugned Decision, paras 336-360.
[1116] This figure includes not only the amount required to repair the harm caused to the victims of the attacks but also to the former child soldiers, as well as harm caused as a consequence of the attack on the Sayo health centre.
[1117] *See* paragraphs 460 to 471 above.
[1118] Victims Group 2's Appeal Brief, para. 104.
[1119] Victims Group 2's Appeal Brief, para. 104.

502. The Appeals Chamber finds that this argument is not different from the submission Victims Group 2 make under sub-ground 2.1 above, namely that if more than 7,500 victims come forward, the average *per capita* amount for the victims of the attacks would be lowered.[1120] The contention is based upon the submission, already discussed and rejected by the Appeals Chamber, that the Trial Chamber erred in its estimation of the number of potential beneficiaries among the victims of the attacks.[1121] Therefore, the present sub-ground of appeal is also rejected.

5. Overall conclusion

503. For the above reasons, the Appeals Chamber rejects Victims Group 2's second ground of appeal.

C. Ground of appeal 3: Alleged error of law and in the exercise of discretion by the Trial Chamber disregarding or misapplying its previous findings on the territorial scope of the reparations

504. Under their third ground of appeal, Victims Group 2 submit that the Trial Chamber committed an error of law and erred in the exercise of its discretion by disregarding or misapplying its previous findings regarding the territorial scope of the award for reparations.[1122] They aver that the Impugned Decision failed to properly apply the eligibility criteria to those victims who suffered harm in the forest or the bush surrounding the villages for which positive findings were entered in the Conviction Decision.[1123]

505. The Defence argues that the determinations of the Trial Chamber were correct and compatible with its prior decisions.[1124]

[1120] Victims Group 2's Appeal Brief, para. 105.
[1121] *See* paragraph 483 above.
[1122] Victims Group 2's Appeal Brief, para. 104.
[1123] Victims Group 2's Appeal Brief, para. 107.
[1124] Defence Response to Victims Group 2's Appeal Brief, p. 43.

1. *Relevant procedural background*

a. The Decision of 15 December 2020

506. In its Decision of 15 December 2020, upon a request from the Registry, the Trial Chamber provided guidance in respect of key legal and factual issues relevant to the victims' eligibility assessment.[1125]

507. Recalling the Appeals Chamber's jurisprudence that "reparation orders are intrinsically linked to the individual whose criminal liability is established in the conviction and whose culpability for those criminal acts is determined in a sentence",[1126] the Trial Chamber noted that victims are entitled to reparations if they have suffered harm as a result of a crime of which Mr Ntaganda has been convicted. Guided by this principle, the Trial Chamber analysed the territorial scope of the reparations.

508. The Trial Chamber addressed various paragraphs of the Conviction Decision referring to specific towns and villages and their surrounding locations,[1127] surrounding villages,[1128] locations around the villages,[1129] and the forest and the bush to which the victims fled.[1130] The Trial Chamber underlined that

> for victims who claim to have suffered a harm in a location surrounding an area or village to be potentially entitled to reparations, the Chamber must have made explicit findings in relation to these surrounding places and these findings must have served as a basis for convicting Mr Ntaganda.[1131]
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> […]
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> [V]ictims alleging to have suffered harm in the forest or the bush surrounding locations for which positive findings were included in the [Conviction Decision] may be eligible for reparations for any of the crimes for which the [Trial] Chamber

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[1125] Decision of 15 December 2020, para. 12.
[1126] Decision of 15 December 2020, para. 11, *referring to*, *inter alia*, 2015 *Lubanga* Appeals Chamber Judgment, para. 20.
[1127] Decision of 15 December 2020, para. 19(b) (footnotes omitted) discussing "Lipri" as referred to in paragraph 566 of the Conviction Decision.
[1128] Decision of 15 December 2020, para. 19(c) (footnotes omitted) discussing "Lipri" as referred to in paragraph 1054 of the Conviction Decision.
[1129] Decision of 15 December 2020, para. 19(e) (footnotes omitted) discussing "Kobu" as referred to in paragraph 578 of the Conviction Decision.
[1130] Decision of 15 December 2020, para. 61. The Trial Chamber referred to this previous finding when making its determination in Confidential Annex II to the Impugned Decision with respect to various applicants.
[1131] Decision of 15 December 2020, para. 18.

> entered convictions on the basis of the relevant corresponding conduct having occurred in the forest or the bush surrounding those locations.[1132]

b. The 2021 Reparations Order

509. In the 2021 Reparations Order, the Trial Chamber stressed that "the approach of clearly defining the harms that result from the crimes for which Mr Ntaganda was convicted aims at protecting the rights of the convicted person and the rights of the victims of these crimes. It ensures that reparations are not awarded to remedy harms beyond the crimes for which Mr Ntaganda was convicted".[1133]

510. Addressing general considerations regarding the scope of the conviction, under the section "Relevant Victims", the Trial Chamber recalled its findings in the Decision of 15 December 2020.[1134] It further noted that

> the eligibility criteria for victims to receive reparations is unrelated to their official place of residence at the time the crimes were committed, as long as they can demonstrate that they suffered harm as a result of a crime for which Mr Ntaganda was convicted.[1135]

511. In addition, the Trial Chamber noted that the victims who claim to have suffered harm in the forest or the bush surrounding locations for which findings were made in the Conviction Decision may be eligible for reparations, "where the Chamber entered convictions based on underlying acts having occurred in the forest or the bush surrounding those locations".[1136]

c. The Decision on the TFV's Fourth Update Report

512. On 12 May 2022, the Trial Chamber issued a decision on the TFV's Fourth Update Report on the IDIP's implementation.[1137] In this decision the Trial Chamber addressed, *inter alia*, the Defence's argument in its observations on the TFV's aforesaid report that the TFV's language with regard to the crime of persecution and victims' references to the bush/forest was at times "unclear".[1138] The Defence took issue in particular with the

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[1132] Decision of 15 December 2020, para. 19(f), *referring to*, *inter alia*, Conviction Decision, paras 898, 913-915, 959, 1005-1007, 1054, 1063.
[1133] 2021 Reparations Order, para. 130.
[1134] 2021 Reparations Order, para. 107, *referring to* Decision of 15 December 2020.
[1135] 2021 Reparations Order, para. 107.
[1136] 2021 Reparations Order, para. 107, *referring to* Decision of 15 December 2020, para. 19(f).
[1137] Decision on the TFV's Fourth Update Report. *See also* TFV's Fourth Update Report.
[1138] Decision on the TFV's Fourth Update Report, para. 25, *referring to* Defence Observations on the TFV's Fourth Update Report, paras 37-40.

TFV's statement, when addressing the "Eligibility criteria relevant to Victims of the Attacks", that "[w]hen [a] victim refers to any of the crimes having taken place in the bush or forest surrounding a location for which a positive finding is reached, the victim is eligible".[1139]

513. The Trial Chamber concluded as follows:

> [R]egarding the territorial scope of the case for the purposes of determining eligibility of the victims of the attacks, the Chamber reiterates that, as to the crime of persecution for each location, 'only victims of underlying acts that served as the basis for the Chamber to convict Mr Ntaganda for the crime of persecution are eligible for reparations'. Regarding victims alleging having suffered harm in the forest or the bush surrounding locations, victims 'may be eligible for reparations for any of the crimes for which the Chamber entered convictions on the basis of the relevant corresponding conduct having occurred in the forest or the bush surrounding those locations'.[1140]

514. Accordingly, the Trial Chamber instructed the TFV to ensure that all clarifications included in that decision and the Decision of 15 December 2020 were correctly applied when assessing eligibility.[1141]

d. The Impugned Decision

515. In the Impugned Decision, when providing general considerations on "[p]otentially eligible direct victims" of the attacks, the Trial Chamber noted that "it was not proven at trial that Mr Ntaganda was responsible for crimes committed against the entirety of the [Main Villages] included in the conviction".[1142] The Trial Chamber recalled that, "for the sake of clarity, it has detailed in Annex I to the [Impugned Decision] the specific crimes and locations for which Mr Ntaganda was convicted, particularly in relation to the victims of the attacks".[1143] On this point, it stated:

> [N]ot all victims who suffered harm during the First or Second Operations are eligible for reparations. In effect, the Chamber will strictly take into account its positive and negative findings as to Mr Ntaganda's criminal responsibility, as

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[1139] Defence Observations on the TFV's Fourth Update Report, para. 39.
[1140] Decision on the TFV's Fourth Update Report, para. 25, *referring to*, *inter alia*, Decision of 15 December 2020, paras 19(f), 60.
[1141] Decision on the TFV's Fourth Update Report, para. 26, *referring to*, *inter alia*, Decision of 15 December 2020, paras 19(f), 60.
[1142] Impugned Decision, para. 96.
[1143] Impugned Decision, para. 96.

included in the [Conviction Decision], in light of the aspects further clarified in the December 2020 Decision.[1144]

516. The Trial Chamber analysed the Sample (137 dossiers of victims of the attacks) and made the following conclusions as to their eligibility for the purpose of reparations:

> (i) 89 of them have established, on a balance of probabilities, their eligibility as direct victims of the attacks; (ii) 27 of them have established, on a balance of probabilities, their eligibility as indirect victims of the attacks; (iii) eight have provisionally established, on a balance of probabilities, their eligibility as direct victims of the attacks; and (iv) 39 victims have not established, on a balance of probabilities, their eligibility as direct or indirect victims of the attacks. […] As previously held, the victims assessed as not eligible will have the opportunity to supplement their dossiers and clarify their accounts at the implementation stage.[1145]

2. *Summary of the submissions*

517. Victims Group 2 submit that the Trial Chamber committed errors by disregarding or misapplying its previous findings regarding the territorial scope of reparations in the present case.[1146] In essence, Victims Group 2 argue that the Trial Chamber made errors in its eligibility assessments,[1147] leading to 31 victims of the attacks being found ineligible,[1148] including four victims already assessed to be eligible for the purposes of the IDIP.[1149] They aver that it would be "unfair and unreasonable" to deem ineligible persons who, despite originating from places other than the Main Villages involved in the Conviction Decision, suffered harm or endured difficult conditions in the forest or the bush alongside victims from those localities.[1150] They submit that the alleged errors

[1144] Impugned Decision, para. 96.
[1145] Impugned Decision, para. 113. *See also* Annex I to the Impugned Decision; Confidential Annex II to the Impugned Decision. Annex I specifies the crimes and underlying acts included in the conviction per location, as well as recalling the negative findings in relation to the underlying incidents and locations that, although included in the charges brought against Mr Ntaganda, were dismissed for lack of sufficient evidence. Annex II includes the Trial Chamber's analysis and conclusions regarding each of the victims in the Sample.
[1146] Victims Group 2's Appeal Brief, paras 107, 121.
[1147] Victims Group 2's Appeal Brief, paras 107, 110, *referring to* Decision of 15 December 2020, para. 19(f); 2021 Reparations Order, para. 107; Decision on the TFV's Fourth Update Report, para. 25.
[1148] Victims Group 2's Appeal Brief, para. 112. The victims concerned are a/00072/13, a/00412/13, a/00653/13, a/00973/13, a/01116/13, a/01128/13, a/20109/14, a/20127/14, a/20194/14, a/30309/15, a/00115/13, a/00136/13, a/01013/13, a/01193/13, a/01224/13, a/20029/14, a/30087/15, a/30433/15, a/01250/13, a/01585/13, a/01677/13, a/00215/13, a/00486/13, a/00494/13, a/00914/13, a/30285/15, a/01469/13, a/01605/13, a/00199/13, a/00212/13 and a/01636/13.
[1149] Victims Group 2's Appeal Brief, para. 112. The victims concerned are a/01636/13, a/00212/13, a/00199/13 and a/00215/13.
[1150] Victims Group 2's Appeal Brief, para. 110.

materially affected the Impugned Decision[1151] and created legal uncertainty.[1152] They therefore request the Appeals Chamber to vacate the relevant findings,[1153] and amend the Impugned Decision without remanding the matters to the Trial Chamber, in order to expedite the proceedings and avoid further delay.[1154]

518. The Defence submits that the Trial Chamber correctly determined the non-eligibility of certain victims of the attacks who suffered harm in the woods or the bush. It argues that the Trial Chamber's conclusion is entirely compatible with its prior decisions,[1155] there is no "uncertainty", and the Trial Chamber's position "has been and remains entirely clear".[1156] The Defence underlines that the Trial Chamber provided proper reasoning,[1157] not necessarily limiting reparations to individuals located in villages, as opposed to the surrounding areas, but taking into account whether the conviction was based upon underlying acts that occurred in the forest or the bush surrounding those locations.[1158] It submits that this conclusion is compatible with fundamental principles of reparations.[1159]

519. The Defence however notes that there is a link between the arguments advanced by Victims Group 2 under this ground of appeal, and its arguments raised under the first ground of its appeal.[1160] It submits that Victims Group 2's arguments are "a direct result of the Trial Chamber's overarching error of refusing to issue a new reparations order as required by the Appeals Chamber".[1161] Since the Appeals Chamber has already discussed these arguments in its determination of the first ground of the Defence's appeal above,[1162] they need not be entertained any further for the determination of the present ground of appeal.

[1151] Victims Group 2's Appeal Brief, para. 122.
[1152] Victims Group 2's Appeal Brief, para. 105.
[1153] Victims Group 2's Appeal Brief, para. 130.
[1154] Victims Group 2's Appeal Brief, para. 130.
[1155] Defence Response to Victims Group 2's Appeal Brief, paras 109-120.
[1156] Defence Response to Victims Group 2's Appeal Brief, para. 105.
[1157] Defence Response to Victims Group 2's Appeal Brief, paras 106, 111, 112, 121-124.
[1158] Defence Response to Victims Group 2's Appeal Brief, paras 106, 111, 112, 121-124.
[1159] Defence Response to Victims Group 2's Appeal Brief, paras 125, 132.
[1160] Defence Response to Victims Group 2's Appeal Brief, para. 108.
[1161] Defence Response to Victims Group 2's Appeal Brief, para. 108.
[1162] *See* paragraph 60 above; *see generally* paragraphs 38 to 64 above.

3. *Determination by the Appeals Chamber*

520. Victims Group 2 take issue with certain of the Trial Chamber's findings concerning the territorial scope of reparations in this case. They argue that the Conviction Decision entered positive findings in respect of the Main Villages, and that the Trial Chamber recognised as potentially eligible for reparations those victims alleging to have suffered harm in the forest or the bush surrounding those locations.[1163] Victims Group 2 submit that individuals who suffered harm in the forest should be eligible for reparations whether they originated from the Main Villages or "*from any village*".[1164] They aver that it would be "unfair and unreasonable" to find ineligible those originating from other villages who suffered violence in the forest or the bush alongside victims from the Main Villages.[1165] Victims Group 2 argue that the Trial Chamber made errors when it applied these criteria,[1166] leading to 31 victims of the attacks being found ineligible, including four victims who had already been assessed as eligible for the purposes of the IDIP.

521. The Appeals Chamber will first address the criteria set out by the Trial Chamber as to the territorial scope of the reparations in respect of those who suffered harm in the forest or the bush surrounding the Main Villages. Thereafter, the Appeals Chamber will analyse the application of these criteria to the victims in the Sample, assessing in particular the determinations challenged by Victims Group 2.

522. The Appeals Chamber notes that issues concerning the territorial scope of the reparations, particularly in relation to those individuals who suffered harm in the forest or the bush surrounding certain locations, were discussed from the initial phase of the reparation proceedings onwards. On 30 September 2020, upon the instruction of the Trial Chamber, [1167] the Registry filed observations and requested guidance on these matters.[1168] In October 2020, Victims Group 2 submitted observations contending that there should be an "inclusive approach" to the territorial scope of the reparations.[1169] The Defence, in turn, made observations based upon the principle that a victim's

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[1163] Victims Group 2's Appeal Brief, para. 110, *referring to* Decision of 15 December 2020, para. 19(f).
[1164] Victims Group 2's Appeal Brief, para. 110.
[1165] Victims Group 2's Appeal Brief, para. 110.
[1166] Victims Group 2's Appeal Brief, paras 107, 110, *referring to* Decision of 15 December 2020, para. 19(f); 2021 Reparations Order, para. 107; Decision on the TFV's Fourth Update Report, para. 25.
[1167] First Decision on Reparations Process, paras 43-44.
[1168] Registry's First Report, paras 6-13.
[1169] Victims Group 2's Observations on the Registry's First Report on Reparations, paras 17-28.

eligibility for reparations hinges upon whether the individual reported harm resulting from a crime of which Mr Ntaganda had been convicted.[1170] From that point in time, and throughout the reparation proceedings, the Trial Chamber addressed the eligibility criteria in respect of those who suffered harm in the areas surrounding the Main Villages.

523. In Annex I to the Impugned Decision, the Trial Chamber listed the locations and the specific crimes of which Mr Ntaganda was convicted in relation to the attacks. Its findings were based upon the Conviction Decision and the findings made in the Decision of 15 December 2020, which, as noted above, had addressed several issues related to the territorial scope of the reparations.[1171]

524. In its Decision of 15 December 2020, the Trial Chamber acknowledged that the scope of potential beneficiaries is not necessarily limited to individuals who suffered harm in the relevant villages, as opposed to their surrounding areas. The Trial Chamber considered the vague notion of "surrounding area(s)" and "surrounding villages" following the aforesaid request for clarification from the Registry,[1172] and determined that the five-kilometre radius proposed by the Registry was a reasonable standard for certain locations.[1173] Moreover, the Trial Chamber found that the eligibility criteria for victims to receive reparations are unrelated to their "official place of residence" at the time the crimes were committed.[1174] This same finding was made in the 2021 Reparations Order, and was not challenged on appeal.

525. Significantly, the Trial Chamber clarified in various decisions what it considered to be the territorial scope of the reparations applicable to those who suffered harm around the Main Villages. The Decision of 15 December 2020, the 2021 Reparations Order, the TFV's Fourth Update Report and the Impugned Decision all coincide in that victims must demonstrate that they suffered harm as a result of the crimes of which Mr Ntaganda was convicted and that those who claim to have suffered harm in the forest or the bush surrounding the Main Villages may be eligible for reparations, provided that the Trial Chamber entered convictions based upon underlying acts having occurred in the forest

[1170] Defence Observations on the Registry's First Report on Reparations, paras 2, 9-58.
[1171] Impugned Decision, para. 96, *referring to* Decision of 15 December 2020.
[1172] Registry's First Report, para. 7.
[1173] Decision of 15 December 2020, para. 20.
[1174] 2021 Reparations Order, para. 107.

or the bush surrounding those locations.[1175] The criteria developed in those decisions were applied to the victims' dossiers in the Sample analysed in confidential Annex II to the Impugned Decision, in which the Trial Chamber set out detailed conclusions regarding each of the victims.[1176]

526. Victims Group 2 submit that they have communicated with their clients on the basis of a broader understanding of the territorial scope, which they claim results from their understanding of the Decision of 15 December 2020 and the 2021 Reparations Order.[1177] They quote, in support of this approach, relevant parts of paragraph 107 and footnote 283 of the 2021 Reparations Order,[1178] which read as follows:

> [T]he eligibility criteria for victims to receive reparations is unrelated to their official place of residence at the time the crimes were committed,[283] as long as they can demonstrate that they suffered harm as a result of a crime for which Mr Ntaganda was convicted.
>
> Footnote 283: [referring to Victims Group 2's relevant submissions] arguing that *as a result of the UPC/FPLC taking control over the area, civilians massively fled throughout the Banyali-Kilo and Walendu-Djatsi collectivités, taking refuge in surrounding villages, hills, forests and bushes and that although originating from villages outside the scope of the conviction, they may have nonetheless suffered harm in the forest or bush surrounding locations for which the Judgment made findings* (emphasis added).

527. Victims Group 2 suggest that the findings above provided a sufficient basis for their understanding that the Trial Chamber did not confine the eligibility to victims

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[1175] Decision of 15 December 2020, paras 18 ("the Chamber must have made explicit findings in relation to these surrounding places and these findings must have served as a basis for convicting Mr Ntaganda"), 19(f) ("victims alleging to have suffered harm in the forest or bush surrounding locations for which positive findings were included in the [Conviction Decision] may be eligible for reparations for any of the crimes for which the Chamber entered convictions on the basis of the relevant corresponding conduct having occurred in the forest or bush surrounding those locations"); 2021 Reparations Order, para. 107 ("victims who claim to have suffered harm in the forest or bush surrounding locations for which findings were made in the [Conviction Decision], may be eligible for reparations", where the Trial Chamber has "entered convictions based on underlying acts having occurred in the forest or bush surrounding those locations"); Decision on the TFV's Fourth Update Report, para. 25 ("Regarding the territorial scope of the case for the purposes of determining eligibility of the victims of the attacks, the Chamber reiterates that, as to the crime of persecution for each location, 'only victims of underlying acts that served as the basis for the Chamber to convict Mr Ntaganda for the crime of persecution are eligible for reparations'. Regarding victims alleging having suffered harm in the forest or bush surrounding locations, victims 'may be eligible for reparations for any of the crimes for which the Chamber entered convictions on the basis of the relevant corresponding conduct having occurred in the forest or bush surrounding those locations'"); Impugned Decision, para. 96. *See*, *for example*, an application of this criterion in Confidential Annex II to the Impugned Decision, paras 30-32, 38-40.

[1176] Confidential Annex II to the Impugned Decision.

[1177] Victims Group 2's Appeal Brief, paras 108-109.

[1178] Victims Group 2's Appeal Brief, para. 108.

originating from villages for which positive findings were made.[1179] They aver that, accordingly, victims arriving from other places to the forest or the bush surrounding the Main Villages are also eligible for reparations.[1180]

528. The Appeals Chamber is unpersuaded by these submissions. The sentence in footnote 283 of the 2021 Reparations Order set out above cannot be read in isolation, in the manner proposed by Victims Group 2. Indeed, the Appeals Chamber observes that in footnote 283 the Trial Chamber merely noted the submission of Victims Group 2, which it then addressed in the main text, namely paragraph 107 of the 2021 Reparations Order. In that paragraph, the Trial Chamber reiterates the territorial scope of the reparations.[1181]

529. The Appeals Chamber considers that Victims Group 2 have misrepresented the decision of the Trial Chamber and they have quoted it selectively. In the same footnote 283 to paragraph 107 of the 2021 Reparations Order, referring to those who suffered harm in the hills, forests and bushes surrounding the Main Villages, the Trial Chamber added: "[i]n relation to that allegation *see* [Conviction Decision], paras 476, 497, 567, 568, 571-573, 583, 585, 603, 604, 617, 618, 640, 996, 1000, 1002, 1006, 1050, 1052, 1054".[1182] Those paragraphs of the Conviction Decision exclusively involve victims originating, at the time that the crimes were committed, from the Main Villages. As analysed below, they cannot be interpreted in any way as extending the territorial scope of the reparations to include persons arriving from other places.

530. In paragraph 476 of the Conviction Decision, addressing the attack in Mongbwalu, the Trial Chamber clearly refers to individuals fleeing from Mongbwalu (which is one of the Main Villages) to Sayo. Paragraph 476 reads: "[n]umerous inhabitants of Mongbwalu heard the sound of gunfire and fire from heavy weapons and began to flee, most in the direction of Sayo". Paragraph 497 of the Conviction Decision, also referring to the attack in Mongbwalu, equally involves individuals fleeing from Mongbwalu: "[w]hile some chose to stay, many persons who were present in the town as the assault unfolded fled Mongbwalu to the bush and to other places". Paragraph 996 of the

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[1179] Victims Group 2's Appeal Brief, para. 110.
[1180] Victims Group 2's Appeal Brief, paras 121-123.
[1181] 2021 Reparations Order, para. 107.
[1182] 2021 Reparations Order, para. 107, fn 283.

Conviction Decision, also addressing the attack in Mongbwalu, refers to "those who fled Mongbwalu". Paragraphs 1050 and 1052, also addressing Mongbwalu, describe the situation of individuals present in the town fleeing to the bush and other places and returning later. These paragraphs clearly do not include individuals fleeing to the bush surrounding Mongbwalu from villages other than Mongbwalu.

531. Similarly, paragraph 568 of the Conviction Decision addressing the villages of Lipri and Tsili,[1183] paragraph 573, addressing the attack in Kobu,[1184] paragraphs 583 to 585, referring to the attack in Bambu,[1185] paragraphs 603 and 604 setting out the attack to Buli,[1186] and paragraph 640 addressing Nyangaray,[1187] explicitly connect those chased, harmed or taking refuge in the forest or the bush with one of the Main Villages: "the population from these two villages", "the villagers", "the local population", "the persons present in the village" and "the population", respectively.

532. Paragraph 617 of the Conviction Decision, addressing the situation in Jitchu, underlines that "[f]ollowing the aforementioned UPC/FPLC assaults on Kobu and Bambu, individuals fled to, *inter alia*, Jitchu and hid in the bush surrounding the village. After the outbreak of violence at the 'pacification meeting' on or about 25 February 2003, villagers again fled to Jitchu and the surrounding forest, where the UPC/FPLC soldiers continued to chase them, and shot at them". Here again the Conviction Decision refers to individuals fleeing from Kobu and Bambu (both Main Villages) to the surrounding forest of Jitchu".

533. Paragraph 1000 of the Conviction Decision, addressing the attack in Nyangaray, refers to "the population". Paragraph 1002 notes that some inhabitants of Tsili were forcibly displaced, with some fleeing to the bush and nearby hills or towards Gutsi, Jitchu, and Buli, enduring harsh conditions with limited shelter and food. Paragraph

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[1183] Conviction Decision, para. 568 ("[o]nce the UPC/FPLC assault had commenced, the predominantly Lendu population of Lipri and Tsili, including the Lendu fighters, fled and sought refuge in the bushes. The population of Djuba, Katho, and Dyalo took refuge on hills nearby").
[1184] Conviction Decision, para. 573 underlines that "[t]he villagers who managed to flee were hiding on the hills and in the bushes in the area surrounding Kobu, including Buli".
[1185] Conviction Decision, para. 585 states "[w]hen they realised that Bambu was being attacked, most of the members of the local population fled from this locality, including to Buli".
[1186] Conviction Decision, para. 604 ("the UPC/FPLC advanced into Buli, shooting and firing heavy weapons, including at those present in the village, and chased individuals into the surrounding bush; the UPC/FPLC soldiers also fired their rifles at those fleeing").
[1187] Conviction Decision, para. 640 ("At the start of the Second Operation, the UPC/FPLC took control over Nyangaray. The population fled and hid in the bush, where they stayed in difficult conditions").

1006 mentions that some who fled the "pacification meeting" went to Jitchu and the surrounding forest, where the UPC/FPLC continued to chase and intentionally attack civilians. Paragraph 1054, referring to various localities, also focuses on the population and villagers fleeing as a result of the UPC/FPLC assaults.

534. Thus, contrary to Victims Group 2's submissions, the Trial Chamber did not expand reparations to all individuals who suffered harm or endured difficult conditions in the bush and forest alongside the victims in the case. The mere fact that individuals suffered harm in the forest or the bush surrounding locations for which findings were made in the Conviction Decision is not sufficient to find them eligible for reparations.[1188] The harm suffered by the victims must have arisen from the crimes of which Mr Ntaganda was convicted; in particular, it must be in line with the clarifications on the territorial scope made by the Trial Chamber.

535. In line with their understanding of the territorial scope, Victims Group 2 argue that when assessing the victims included in the Sample, the Trial Chamber adopted a restrictive approach in contradiction to its own findings.[1189] They aver that the Trial Chamber excluded several applicants who suffered harm in the forest or the bush surrounding villages for which positive findings were made.[1190] They submit that, as a result, and without providing reasoning, 31 applicants were found to be ineligible.[1191]

536. The Appeals Chamber finds that, when establishing criteria to determine the eligibility of victims and applying these criteria to requests for reparations, trial chambers must ensure that all victims of the crimes of which the person was convicted qualify as potential beneficiaries for reparations, while those outside the scope of the conviction cannot so qualify. The Appeals Chamber considers that the Impugned Decision properly followed this approach.

537. The Appeals Chamber notes that Victims Group 2 list, in support of their submissions, a number of paragraphs of the Conviction Decision, in which the Trial Chamber referred to victims fleeing, hiding and suffering in the forest or the bush

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[1188] *See* Impugned Decision, para. 96. *See also* Defence Response to Victims Group 2's Appeal Brief, paras 105, 107.
[1189] Victims Group 2's Appeal Brief, para. 112.
[1190] Victims Group 2's Appeal Brief, para. 112.
[1191] Victims Group 2's Appeal Brief, para. 112.

surrounding the villages.[1192] Victims Group 2 have not provided any explanation as to how these references contradict the decisions made by the Trial Chamber in respect of the eligibility criteria. Explanations were only submitted with respect to the analysis and conclusions applicable to the 31 victims that were found to be ineligible, about which Victims Group 2 provide references to specific paragraphs of the Conviction Decision.[1193] The Appeals Chamber finds that, apart from the instances which are specifically addressed below, Victims Group 2 have not substantiated their argument.

538. Turning to the instances that Victims Group 2 do specify, the Appeals Chamber notes that they concern the following locations: [REDACTED].

539. First, Victims Group 2 take issue with the Trial Chamber's decision to dismiss the applications of ten individuals who allege to have suffered harm in the surroundings of [REDACTED].[1194] Victims Group 2 suggest that the Trial Chamber limited reparations for the crime of persecution to "inhabitants" of that location.[1195] However, contrary to those submissions, nothing indicates that the Trial Chamber gave weight to the place of formal residence; rather, it considered whether the relevant individuals fled because of the UPC/FPLC taking control over the location and hid in the surrounding bush, where they stayed in difficult conditions.[1196]

540. The Appeals Chamber finds that it was not unreasonable for the Trial Chamber to reject these applications as, with one exception, none of these individuals claimed to have fled and hidden in the bush surrounding [REDACTED] because of the UPC/FPLC

[1192] Victims Group 2's Appeal Brief, para. 116.
[1193] Victims Group 2's Appeal Brief, paras 117-119.
[1194] Victims Group 2's Appeal Brief, paras 112, 113(a) and 117, *referring to* applicants a/00072/13, a/00412/13, a/00653/13, a/00973/13, a/01116/13, a/01128/13, a/20109/14, a/20127/14, a/20194/14 and a/30309/15.
[1195] Victims Group 2's Appeal Brief, para. 117.
[1196] *See* 2021 Reparations Order, para. 107; Decision of 15 December 2020, para. 61: "the Chamber clearly delimited the underlying acts that [led] to the conviction for persecution in that village as: '[a]t the start of the Second Operation, the UPC/FPLC took control over Nyangaray. The population fled and hid in the bush, where they stayed in difficult conditions'. The Chamber had previously noted that, although witnesses testified that killings had occurred in fields of or near Nyangaray, 'rape, sexual slavery, and murder have not been charged for Nyangaray'. The Chamber clearly stated that it 'cannot make any finding on the alleged killings and (potential) attempted killing. In addition, the Chamber recalls that as with the other incident, murder is not charged in relation to Nyangaray'. Accordingly, only victims of the underlying acts specifically referred to in the Chamber's positive findings that [led] to the conviction for persecution in Nyangaray, *i.e.* those that because of the UPC/FPLC taking control over Nyangaray resulted in individuals fleeing and hiding in the bush, where they stayed in difficult conditions, may be eligible for reparations in the *Ntaganda* case on the basis of this crime".

taking control over that location and committing the underlying acts. Those applications concern victims alleging to have fled to the bush from other villages.[1197] In relation to the one victim who Victims Group 2 claim had fled from the same location, the Trial Chamber determined that the applicant's eligibility could not be established on the balance of probabilities. Necessary information was unavailable and the person concerned could not be recontacted to provide additional data.[1198] The Appeals Chamber finds that this conclusion was not unreasonable.

541. Victims Group 2 submit that it would be unfair and unreasonable to deem ineligible for reparations victims who originated from other villages and suffered harm or stayed in difficult conditions in the forest or the bush together with the inhabitants of [REDACTED], while hiding and/or fleeing violence, on account of the UPC/FPLC taking control over the affected area.[1199] The Appeals Chamber finds no error in the Trial Chamber's approach and conclusions. Contrary to Victims Group 2's submission, the Trial Chamber's findings were consistent with the fundamental principle of repairing harm to victims of crimes *of which the accused person has been convicted*. In this respect, the Appeals Chamber recalls that "a trial chamber must remain within the confines of the conviction and sentencing decisions".[1200] To extend the scope of reparations beyond the confines of the conviction and sentencing decisions, as suggested by the Victims Group 2, would contravene this fundamental principle.

542. Contrary to the submission of Victims Group 2, the Appeals Chamber finds that, in the Impugned Decision, the Trial Chamber provided sufficient reasons for the dismissal of these ten applications.[1201] It explained on a case-by-case basis why it reached its conclusions, noting that the applicants could not establish on a balance of

[1197] Confidential Annex II to the Impugned Decision, *referring to* applicants a/00072/13, a/00412/13, a/00653/13, a/00973/13, a/01116/13, a/01128/13, a/20109/14, a/20194/14 and a/30309/15.
[1198] Confidential Annex II to the Impugned Decision, *referring to* applicant a/201237/14.
[1199] Victims Group 2's Appeal Brief, para. 117.
[1200] 2019 *Lubanga* Appeals Chamber Judgment, para. 311. *See* *Katanga* Reparations Order, para. 31(4), *referring to* 2015 *Lubanga* Appeals Chamber Judgment, para. 65. As noted in the 2022 Appeals Chamber Judgment, para. 571: "harm cannot be attributed to a convicted person if a break in the chain of causation is established in the particular case". *See also* paragraphs 343-349 above.
[1201] Victims Group 2's Appeal Brief, paras 112, 113(a), 117, *referring to* a/00072/13, a/00412/13, a/00653/13, a/00973/13, a/01116/13, a/01128/13, a/20109/14, a/20127/14, a/20194/14 and a/30309/15.

probabilities that they met the relevant criteria. That made them ineligible for reparations on the basis of the crime of persecution.[1202]

543. The Appeals Chamber further notes that the Trial Chamber made positive determinations in relation to individuals who fled from [REDACTED] to the forest when the village was attacked. [REDACTED].[1203]

544. Second, Victims Group 2 take issue with the Trial Chamber's decision to dismiss the applications of nine individuals who allege to have suffered harm in the surroundings of [REDACTED].[1204] Victims Group 2 suggest that the Trial Chamber limited reparations for the crime of persecution to "inhabitants" of [REDACTED].[1205] However, contrary to these submissions, nothing indicates that the Trial Chamber gave weight to the place of formal residence. Instead it recalled the Decision of 15 December 2020 which clarified that the Conviction Decision limited its finding of persecution and/or forcible transfer and displacement to [REDACTED] only, to the exclusion of surrounding villages unless express findings had been made about them.[1206] [REDACTED].[1207] The Appeals Chamber finds that the Impugned Decision properly applied the territorial parameters previously set out and provided sufficient reasons to dismiss these applications.[1208]

545. Victims Group 2 submit that it would be unfair and unreasonable to deem ineligible for reparations victims who originated from other villages and suffered harm or stayed in difficult conditions in the forest or the bush together with the inhabitants of [REDACTED], while hiding and/or fleeing violence, on account of the UPC/FPLC taking control over the affected area.[1209] For the reasons specified above when

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[1202] Decision of 15 December 2020, paras 60-61. The Trial Chamber relied on the latter paragraph to reach its conclusions in confidential Annex II to the Impugned Decision with respect to victims *referring to* a/00072/13, a/00412/13, a/00653/13, a/00973/13, a/01116/13, a/01128/13, a/20109/14, a/20127/14, a/20194/14 and a/30309/15.

[1203] Confidential Annex II to the Impugned Decision, paras 656, 659, *referring to* Conviction Decision, paras 1008, 1199.

[1204] Victims Group 2's Appeal Brief, paras 113(b), 113(g), 118, *referring to* a/00115/13, a/00136/13, a/01013/13, a/01193/13, a/01224/13, a/20029/14, a/30087/15, a/30433/15 and a/01469/13.

[1205] Victims Group 2's Appeal Brief, para. 118.

[1206] Confidential Annex II to the Impugned Decision.

[1207] Confidential Annex II to the Impugned Decision, *referring to* a/00115/13, a/00136/13, a/01013/13, a/01193/13, a/01224/13, a/20029/14, a/30087/15, a/30433/15 and a/01469/13.

[1208] Confidential Annex II to the Impugned Decision, *referring to* a/00115/13, a/00136/13, a/01013/13, a/01193/13, a/01224/13, a/20029/14, a/30087/15, a/30433/15 and a/01469/13.

[1209] Victims Group 2's Appeal Brief, para. 118.

addressing a similar claim in respect of [REDACTED],[1210] the Appeals Chamber finds no error in the Trial Chamber's approach and conclusions.

546. Third, Victims Group 2 take issue with the Trial Chamber's decision to dismiss the applications of six individuals who allege to have suffered harm in the forest or the bush surrounding [REDACTED].[1211] Victims Group 2 suggest that the "same considerations" apply to the eligibility of these victims and that, therefore, they should have been found eligible. The Appeals Chamber finds that the Trial Chamber, referring to the Conviction Decision, and in line with the territorial parameters previously set out, specified that the conviction limited the relevant scope of victims eligible for reparations to individuals who fled from [REDACTED],[1212] [REDACTED]. The Appeals Chamber finds, therefore, that it was not unreasonable for the Trial Chamber to reject these applications.

547. Fourth, Victims Group 2 take issue with the Trial Chamber's decision to dismiss the applications of individuals who allege to have suffered harm while escaping and hiding in the surrounding forest of [REDACTED] and [REDACTED], where they were persecuted and/or stayed in difficult conditions.[1213] Victims Group 2 contend that the Conviction Decision includes references to acts underlying the crime of persecution outside [REDACTED], although within a five-kilometre radius from it, that go beyond the burning of houses.[1214] However, the Trial Chamber noted that the Conviction Decision, in the "disposition", refers only to [REDACTED] in relation to counts 10 (persecution as a crime against humanity) and 18 (the war crime of destroying the adversary's property).[1215] The Trial Chamber considered that the basis for a positive legal finding regarding persecution as a crime against humanity around [REDACTED]

[1210] *See* paragraph 541 above.
[1211] Victims Group 2's Appeal Brief, para. 113(d), (e), (h), (i), (j), *referring to* a/00412/13, a/00486/13, a/00494/13, a/01605/13, a/00199/13 and a/00212/13.
[1212] Confidential Annex II to the Impugned Decision, para. 104, *referring to* Conviction Decision paras 1006, 1008. Confidential Annex II to the Impugned Decision, para. 119, *referring to* Conviction Decision, paras 1002, 1008. Confidential Annex II to the Impugned Decision, para. 449, *referring to* Conviction Decision paras 1002, 1051, 1054-1055, 1064, 1094, 1199; Confidential Annex II to the Impugned Decision para. 1056, *referring to* Conviction Decision, para. 1199; Confidential Annex II to the Impugned Decision, para. 1053, *referring to* Conviction Decision, para. 1199.
[1213] Victims Group 2's Appeal Brief, para. 120.
[1214] Victims Group 2's Appeal Brief, para. 120.
[1215] Decision of 15 December 2020, para. 19(e); Confidential Annex II to the Impugned Decision, *referring to* a/00136/13, a/01250/13, a/01585/13, a/01677/13 and a/00215/13.

was the factual finding that the UPC/FPLC had torched and burnt down some houses.[1216] Although victims of persecution at a radius of five kilometres around [REDACTED] may be entitled to reparations, this finding related only to those victims whose houses were burnt down.[1217] Given the above, the Appeals Chamber finds that it was not unreasonable for the Trial Chamber to reject the applications of individuals who were not claiming that their houses were burnt down "around [REDACTED]".

548. Indeed, the Trial Chamber found eligible victims who were in [REDACTED] and had to flee and hide in the nearby bush as a result of the attack. Victims who experienced the attack in [REDACTED] were found eligible whether or not they established that their houses were burnt. Equally, the Trial Chamber did not require victims to be "inhabitants" of [REDACTED]. [REDACTED]. When the war reached [REDACTED] they fled to hide in the bush.[1218] The Trial Chamber concluded that the applicant proved on a balance of probabilities to be a direct victim of persecution and forcible transfer and displacement in [REDACTED], reasoning as follows:

> [REDACTED]

549. Victims Group 2 argue that the crimes of forcible transfer, deportation, displacement and persecution caused harm to the victims which is of a "continuous nature".[1219] They argue that, accordingly, victims not only suffered at the time they were forced to flee but also while in the forest, where they stayed in difficult conditions and continued to be persecuted.[1220] The Appeals Chamber does not find anything to suggest that the Trial Chamber has not taken into account, in addition to the harm caused to victims when forced to flee their respective villages, the harm suffered while in the forest and the bush where they were forced to hide. Instead, what was determinative for the Trial Chamber was whether the convictions entered were based upon underlying acts having occurred in the forest or the bush surrounding the Main Villages.[1221] Harm that

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[1216] Decision of 15 December 2020, para. 19(e), *referring to* Conviction Decision, para. 578.
[1217] Decision of 15 December 2020, paras 19(e), 20. *See also*, *for example*, Confidential Annex II to the Impugned Decision, para. 65, fn 155.
[1218] Confidential Annex II to the Impugned Decision, para. 821.
[1219] Victims Group 2's Appeal Brief, para. 115.
[1220] Victims Group 2's Appeal Brief, para. 115.
[1221] 2021 Reparations Order, para. 107.

results from these events, provided that causation is established, is not precluded from consideration.

550. For the above reasons, the Appeals Chamber rejects Victims Group 2's contention that the Trial Chamber's "sudden restrictive approach" to the territorial scope of the reparations, if not corrected by the Appeals Chamber, "will result in the right to reparations being denied to a significant number of […] victims who suffered harm in the bush" which constitutes an error in the Trial Chamber's exercise of discretion.[1222] The Appeals Chamber reiterates that the reparation proceedings should ensure that the convicted person is not held liable for harms suffered by individuals that did not result from the crimes of which the person was found guilty.

551. In light of the above considerations, the Appeals Chamber finds that Victims Group 2 have failed to demonstrate that the Trial Chamber disregarded or departed from its previous findings regarding the territorial scope of the reparations or that it committed an abuse of discretion. To the contrary, the Appeals Chamber finds that the Trial Chamber was not unreasonable in its clarifications concerning the territorial parameters of the reparation proceedings and the application of those parameters in the Impugned Decision.

552. According to Victims Group 2, the Trial Chamber's departure from its determinations on the territorial scope of reparations in the case is "very likely to cause stress, anxiety and concern" to those victims, "particularly as the concerned victims were informed about their likely eligibility for reparations".[1223] The Appeals Chamber reiterates that ensuring the application of the "do no harm" principle is of the utmost importance in the implementation of reparations.[1224] As noted above, Victims Group 2 have failed to show any departure from the territorial scope of the reparations set out by the Trial Chamber. The Appeals Chamber recalls that, in order for a victim to be eligible to receive reparations, he or she will require specific approval from the Trial Chamber during the implementation process.[1225] Accordingly, it is incumbent upon the legal representatives of victims to display the utmost care in the manner in which they

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[1222] Victims Group 2's Appeal Brief, para. 121.
[1223] Victims Group 2's Appeal Brief, paras 121-122.
[1224] 2022 Appeals Chamber Judgment, para. 14.
[1225] *See* First Decision on Implementation, para. 185(f), *referring to* 2022 Appeals Chamber Judgment, paras 387, 419.

formulate and distribute messages among individuals who have applied, or are likely to apply, for reparations and ensure that expectations are managed while such approval is pending.

553. The Appeals Chamber notes that several of the victims concerned, although they submitted participation forms, could not be contacted to supplement their accounts. Victims who have not established their eligibility will have an opportunity to supplement their dossiers and clarify their accounts at the implementation stage.[1226] The victims concerned therefore retain an opportunity to submit the underlying information and establish that they fall within the territorial parameters of the present reparation proceedings.

554. The Trial Chamber addressed, in the Impugned Decision, the situation of the four victims who could not establish their eligibility (namely victims a/01636/13, a/00212/13, a/00199/13 and a/00215/13) but had already received reparations as part of the IDIP. As noted by the Trial Chamber, the reparations received within the IDIP by these four victims are to be considered, for administrative and budgetary purposes, as having been received in the context of the TFV's assistance mandate.[1227] The Appeals Chamber reiterates that the TFV may provide these four victims with any additional services needed under its assistance mandate.[1228]

555. Furthermore, the Appeals Chamber notes that, in the 2022 Appeals Chamber Judgment, it concluded as follows with regard to individuals who do not qualify for reparations in the case but may nevertheless be considered to fall within the assistance mandate of the TFV:

> [T]he 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. 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, would take into account all relevant issues which could impact on the principle of "do no harm" when implementing its mandate. Indeed, ensuring

[1226] Impugned Decision, para. 148.
[1227] Impugned Decision, para. 143.
[1228] 2024 Decision on Suspensive Effect and other Procedural Issues, para. 54.

application of the "do no harm" principle is of the utmost importance in the implementation of reparations.[1229]

556. Accordingly, the Appeals Chamber considers that the individuals contacted by Victims Group 2[1230] and found to be ineligible for reparations in the Impugned Decision[1231] could be considered by the TFV as potentially entitled to additional services under its assistance mandate. While recognising that the provision of services under the TFV's assistance mandate is ultimately at the discretion of its Board of Directors, the Appeals Chamber encourages the Board to provide additional services to these individuals, given their limited number and the unique circumstances surrounding these proceedings.

557. Furthermore, the Appeals Chamber observes that the inclusion of reparations within the ICC's statutory framework marks a significant advancement in international criminal justice and a recognition of victims' rights. However, the ICC must be viewed as part of a broader system. Not all victims of the Ituri conflict are entitled to receive reparations from Mr Ntaganda. The ICC functions within a wider framework that includes: (i) the distinct role of the TFV, which can provide assistance to other victims through its assistance mandate; (ii) the expectation that national legal systems may offer compensation to victims; and (iii) the role of local, regional and international organisations in implementing programmes to support victims of the conflict.

4. Overall conclusion

558. For the above reasons, the Appeals Chamber rejects Victims Group 2's third ground of appeal.

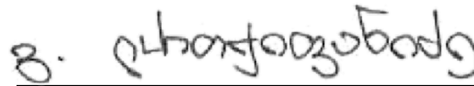
VI. APPROPRIATE RELIEF

559. On an appeal pursuant to article 82(4) of the Statute, the Appeals Chamber may confirm, reverse or amend a reparation order (rule 153(1) of the Rules). In the present case it is appropriate to amend the Impugned Decision to the extent that it should be read as incorporating paragraphs 185-186 of the First Decision on Implementation. Save as aforesaid, it is appropriate to confirm the Impugned Decision.

[1229] 2022 Appeals Chamber Judgment, para. 214.
[1230] Victims Group 2's Appeal Brief, paras 109, 113.
[1231] Impugned Decision, para. 146.

Judge Ibáñez Carranza appends a separate opinion to this Judgment.

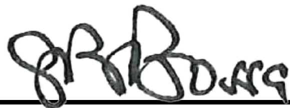
Done in both English and French, the English version being authoritative.



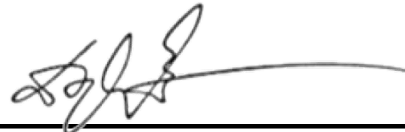
Judge Gocha Lordkipanidze
Presiding

Judge Tomoko Akane

Judge Luz del Carmen Ibáñez Carranza



Judge Solomy Balungi Bossa



Judge Erdenebalsuren Damdin

Dated this 1st day of November 2024

At The Hague, The Netherlands