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TRIAL CHAMBER VI

Before: **Judge Chang-ho Chung, Presiding Judge**
Judge Robert Fremr
Judge Olga Herrera Carbuccia

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF
THE PROSECUTOR V. BOSCO NTAGANDA

Public

Request on behalf of Mr. Ntaganda seeking reclassification of Annex II and III to the "Registry's Observations on Reparations"

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

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

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Further to the Trial Chamber VI Single Judge ("Chamber" and "Single Judge")'s "Order setting deadlines in relation to reparations" issued on 5 December 2019 ("5 December 2019 Order")[1] and the submission of the "Registry's Observations on Reparations" on 28 February 2020 ("Registry Observations"),[2] Counsel for Mr. Ntaganda ("Defence" or "Mr. Ntaganda") hereby submit this:

Request on behalf of Mr. Ntaganda seeking reclassification of Annex II and III to the "Registry's Observations on Reparations"

"Defence Request"

INTRODUCTION

1. The aim of this Defence Request is to respectfully request the Chamber to order the reclassification of annexes II and III to the Registry Observations.

2. In Annex 1 to the Registry's Preliminary Observations on Reparations submitted on 5 September 2019 ("Registry Preliminary Observations"),[3] the Victims Participation and Reparations Section ("VPRS") informed the Chamber that:

> Throughout the trial and particularly in the run-up to the issuance of the Judgment, the VPRS conducted a number of activities in the field to prepare for the various potential outcomes. Following the issuance of the Judgment, the relevant victim groups were well recognizable. In consulting with the community leaders, in all of the relevant Case locations, the VPRS took the opportunity to gather information per village within the remit of the Case on the available forms of documentation that could be used to support potential new beneficiaries' claims, as well as to estimate the number of potential additional reparations beneficiaries who have not yet been identified. **This information can be made available in the next Registry report should the Chamber consider it relevant to the proceedings**.

[1] Order setting deadlines in relation to reparations, 5 December 2019, ICC-01/04-02/06-2447 ("5 December 2019 Order").
[2] Registry's Observations on Reparations, 28 February 2020, ICC-01/04-02/06-2475 ("Registry Observations").
[3] Annex 1 to the Registry's Preliminary Observations on Reparations, 6 September 2019, ICC-01/04-02/06-2391-Anx1, para.8 (footnotes omitted, emphasis added) ("Registry Preliminary Observations").

3. The results of the VPRS preliminary mapping exercise have since been communicated to the Chamber, Legal Representatives of Victims ("LRVs"), Trust Fund for Victims ("TFV") and Registry in Annex II to the Registry Observations ("Annex II") but not to the Defence. Notably, Annex II contains information going beyond the results of the VPRS preliminary mapping exercise that is material to the ability of the Defence to represent the interests of Mr. Ntaganda and/or to play a meaningful role in the reparations process.

4. As for Annex III to the Registry Observations ("Annex III"), which contains basic information concerning the *Lubanga* reparations proceedings, it is essential - in light of VPRS' intention *inter alia,* to implement "a process whereby the beneficiaries identified in the *Lubanga* case would simply need to indicate whether or not they wish to be considered for reparations in the instant case, rather than undergo an additional registration process *de novo*" – that it be reclassified as confidential with a view to allowing the Defence a meaningful opportunity to challenge the information on the basis of which the Chamber will make an award against him.

5. Taking into consideration the Registry Observations and the observations submitted by the LRVs,[4] TFV[5] and the Defence[6] on the same day – which highlight marked differences regarding in particular the methodology to be applied in the reparations process – in conjunction with the VPRS' request *inter alia* for "clarifications from the Chamber with respect to how to determine and assess the eligibility of potential beneficiaries," it is crucial that Annex II and Annex III be

[4] Submissions by the Common Legal Representative of the Victims of the Attacks on Reparations, 28 February 2020, ICC-01/04-02/06-2477 ("28 February 2020 CLR2 Observations"); Submissions on Reparations on behalf of the Former Child Soldiers, 28 February 2020, ICC-01/04-02/06-2474 ("28 February 2020 CLR1 Observations").
[5] Trust Fund for Victims' observations relevant to reparations, 28 February 2020, ICC-01/04-20/06-2476 ("28 February TFV Observations").
[6] Defence submissions on reparations, 28 February 2020, ICC-01/04-02/06-2479 ("Defence 28 February 2020 Submissions").

reclassified as confidential – subject to the application of certain redactions if necessary – to allow the Defence to efficiently protect the rights of Mr. Ntaganda.

6. Notably, in addition to the materiality of the information contained in both annexes, the Registry through VPRS has not demonstrated the necessity to withhold the contents of Annex II and Annex III from the Defence. This is particularly the case concerning Annex II, which was made available to the LRVs even though they have the same status as the Defence, *i.e.* parties to the reparations proceedings.

PROCEDURAL BACKGROUND

7. On 25 July 2019, the Single Judge issued his "Order for preliminary information on reparations" ("Order for Preliminary Information")[7] in which he requested the Registry to provide:

> i. information on, and any proposed methodology for, the identification of victims (not yet participating);
> ii. observations on whether experts may be usefully appointed to assist the Chamber pursuant to Rule 97 of the Rules of Procedure and
> Evidence and, if so, submit a list of relevant experts available to assist the Chamber; and
> iii. an update on the security situation in the Democratic Republic of the Congo based on information currently available.

8. On 5 September 2019, as requested in the Order for Preliminary Information, the Registry submitted its Registry Preliminary Observations.[8]

9. On 3 October 2019, as also requested in the Order for Preliminary Information, the LRVs,[9] the TFV,[10] the Prosecution[11] and the Defence[12] submitted responses to the Registry Preliminary Observations.

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[7] Order for preliminary information on reparations, 25 July 2019, ICC-01/04-02/06-2366, para.4 ("Order for Preliminary Information").
[8] Registry Preliminary Observations.
[9] Joint Response of the Legal Representatives of Victims to the Registry's Observations on Reparations, 3 October 2019, ICC-01/04-02/06-2430.
[10] Trust Fund for Victims' response to the Registry's Preliminary Observations pursuant to the Order for Preliminary Information on Reparations, 3 October 2019, ICC-01/04-02/06-2428.

10. On 5 December 2019, the Single Judge issued his 5 December 2019 Order in which he instructed the Registry to *inter alia:*

> (i) continue to carry out its preliminary mapping of potential new beneficiaries of reparations; (ii) carry out an assessment of how many of the victims participating in the *Ntaganda* case may potentially be eligible for reparations given the scope of the Judgment; and (iii) carry out an assessment of how many of the victims eligible for reparations as direct victim beneficiaries in the case of *The Prosecutor v. Thomas Lubanga Dyilo* ('*Lubanga* case') are also potentially eligible for reparations in the *Ntaganda* case.[13]

11. In the same Order, the Single Judge instructed the parties, the Registry and the TFV to make submissions on the following issues:

> i. whether the principles on reparations established by the Appeals Chamber in the *Lubanga* case need to be amended or supplemented in light of the circumstances of the *Ntaganda* case;
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> ii. the criteria and the methodology to be applied in the determination and the assessment of: (i) the eligibility of victims; (ii) the relevant types and scope of harm; and (iii) the scope of liability of Mr Ntaganda, including the determination of the precise extent of the (monetary) obligations to be imposed on him;
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> iii. the types and modalities of reparations appropriate to address the types of harm relevant in the circumstances of the *Ntaganda* case, including factors relating to the appropriateness of awarding reparations on an individual basis, a collective basis, or both;
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> iv. for the parties and the TFV, any responses to the Registry's identification of potential experts; and
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> v. any other issue the parties, the Registry, and the TFV wish to bring to the attention of the Chamber.[14]

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[11] Prosecution Response to the Registry's Observations, pursuant to the Single Judge's "Order for Preliminary Observations on reparations" (ICC-01/04-02/06-2391-Anx1), 3 October 2019, ICC-01/04-02/06-2429.

[12] Response on behalf of Mr. Ntaganda to Registry's preliminary observations on reparations, 3 October 2019, ICC-01/04-02/06-2431 ("Defence Response").

[13] 5 December 2019 Order, para. 9(a).

[14] 5 December 2019 Order, para. 9(c).

12. On 28 February 2020, pursuant to the 5 December 2019 Order, the Registry submitted the Registry Observations while the LRVs,[15] TFV,[16] Prosecution[17] and Defence[18] filed their submissions on the issues raised therein by the Single Judge.

13. The Registry Observations comprise three annexes: Public Annex I; Confidential *ex parte* Annex II only available to the LRVs, TFV and Registry; and Confidential *ex parte* Annex III only available to the Registry.

SUBMISSIONS

14. Annex II and Annex III to the Registry Observations must be reclassified as confidential annexes on the basis that: (i) Annexes II and III are material to the ability of the Defence to protect the rights of Mr. Ntaganda and to play a meaningful role in the reparations process; (ii) the Registry has neither justified nor demonstrated the necessity for the *ex parte* classification of both annexes; (iii) there is no justification for Annex II to be available to one of the 'parties', *i.e.* the LRVs but not to the other, *i.e.* the Defence; and (iv) alternative solutions are available to the Registry to achieve its objective.

I. The law applicable to *ex parte* proceedings and/or submissions

15. As a preliminary matter, considering that reparations proceedings in this case are just beginning and with a view to avoiding future time consuming litigation, the Defence deems appropriate to reiterate earlier submissions concerning the recourse to *ex parte* proceedings and/or submissions, albeit during trial, which apply *mutatis mutandis* to reparations proceedings.

16. The Rome Statute of the International Criminal Court ("Statute") and Rules of Procedure and Evidence ("Rules") expressly authorise *ex parte* submissions in five

[15] 28 February 2020 CLR2 Observations; 28 February 2020 CLR1 Observations.
[16] 28 February 2020 TFV Observations.
[17] Prosecution's Observations on Reparations, 28 February 2020, ICC-01/04-02/06-2478.
[18] Defence 28 February 2020 Submissions.

situations.[19] Articles 63(1) and 67(2) of the Statute instruct that at all other stages of trial proceedings, the "accused shall be present." One of the statutory exceptions enshrined in the legal framework of the International Criminal Court ("ICC" or "Court") is Rule 81(2) of the Rules:

> Where material or information is in the possession or control of the Prosecutor, which must be disclosed in accordance with the Statute, but disclosure may prejudice further or ongoing investigations, the Prosecutor may apply to the Chamber dealing with the matter for a ruling as to whether the material or information must be disclosed to the defence. The matter shall be heard on an *ex parte* basis by the Chamber. However, the Prosecutor may not introduce such material or information into evidence during the confirmation hearing or the trial without adequate prior disclosure to the accused.

17. This Rule is not dissimilar from Rule 66(C) of the ICTY Rules of Procedure and Evidence which, as of the date of the adoption of the ICC Rules of Procedure and Evidence and today, provides:

> Where information is in the possession of the Prosecutor, the disclosure of which may prejudice further or ongoing investigations, or for any other reasons may be contrary to the public interest or affect the security interests of any State, the Prosecutor may apply to the Trial Chamber sitting in camera to be relieved from an obligation under the Rules to disclose that information. When making such application the Prosecutor shall provide the Trial Chamber (but only the Trial Chamber) with the information that is sought to be kept confidential.

18. The ICTY Appeals Chamber, addressing the circumstances in which an *ex parte* filing within this expressly defined exception could be justified, instructs that the party making the application must exercise "some care" in explaining why the information should be received *ex parte*, and rejected the possibility of not informing the other party of the existence of the application:

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[19] *See The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the procedures to be adopted for *ex parte* proceedings, 6 December 2007, ICC-01/04-01/06-1058, para.4 ("*Lubanga* Decision for *ex parte* proceedings").

> The fundamental principle in every case is that *ex parte* proceedings should be entertained only where it is thought to be necessary in the interests of justice to do so – that is, justice to *everyone* concerned – in circumstances where, for example, the disclosure to the other party or parties in the proceedings of the information conveyed by the application, or of the fact of the application itself, would be likely to prejudice unfairly either the party making the application or some person or persons involved in or related to that application. The party seeking relief on an *ex parte* basis in such a case must identify with some care why the disclosure of the fact of the application, or of its detail, to the other party to the proceedings would cause such unfair prejudice.[20]

19. The Pre-Trial Judge in *Lubanga*, recognising that *ex parte* submissions "constitute a restriction on the rights of the Defence," declared that such submissions in the context of Rule 81: shall only be permitted subject to the Prosecution showing in its application [to make such submissions] that:

> i. it serves a sufficiently important objective;
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> ii. it is necessary in the sense that no lesser measure could suffice to achieve a similar result; and
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> iii. the prejudice to the Defence interest in playing a more active

[20] *Prosecutor v. Dario Kordić & Mario Čerkez*, Case No.IT-95-14/2-A, Order to Prosecution to Re-file its Ex Parte Filing in Response to Motion by Kordić for Disclosure in Relation to Witness "AT", 31 March 2003, paras.4-5. *See Prosecutor v. Radoslav Brđanin & Momir Talić*, Case No:IT-99-36, Decision on Second Motion by Prosecution for Protective Measures, 27 October 2000, para.11 ("The possible conflict between those two decisions (*Blaškić* appearing to state that protective measures can *never* be sought *ex parte*, and *Simić* permitting such applications when the person to be protected would otherwise be identified) is somewhat reduced by the subsequent decision in the *Blaškić* case permitting such applications on an *ex parte* basis in certain circumstances. The Trial Chamber accepts the statement in the *Simić* Decision as the correct one, but it emphasises that that statement does not authorise *ex parte* applications, as opposed to *confidential* applications, for protective measures in *every* case. The statement must be understood in the light of the general principle stated in that case: 'The fundamental principle in every case is that *ex parte* proceedings should be entertained only where it is thought to be necessary in the interests of justice to do so – that is, justice to *everyone* concerned – in the circumstances already stated: where the disclosure to the other party or parties in the proceedings of the information conveyed by the application, or of the fact [of] the application itself, would be likely to prejudice unfairly either the party making the application or some person or persons involved in or related to that application.' It was also made clear in the *Simić* Decision that the party seeking relief on an *ex parte* basis must identify with some care why the disclosure of the detail of the application to the other party to proceedings would cause such unfair prejudice.")

> role in the proceedings must be proportional to the benefit derived from such a measure.[21]

20. Furthermore, the Pre-Trial Judge, as had the ICTY Appeals Chamber before her, required that the Defence must be informed of any request to make *ex parte* submissions, at least in respect of that particular rule.[22]

21. The Appeals Chamber subsequently held that the Pre-Trial Chamber had erred in categorically excluding the possibility that such applications could be kept secret from the other parties.[23] In so doing, the ICC Appeals Chamber departed from the guidance of the ICTY Appeals Chamber that the accused must be informed, at the least, of the existence of an application to make an *ex parte* filing.[24] The ICC Appeals Chamber did not, however, disapprove the Pre-Trial Judge's two-step approach, nor did it suggest any error in the test to be met as a prerequisite to

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[21] *The Prosecutor v. Thomas Lubanga Dyilo*, Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence, 19 May 2006, ICC-01/04-01/06-108-Corr, para.13 ("*Lubanga* Decision Establishing General Principles").

[22] *Lubanga* Decision Establishing General Principles, para.17 ("the Defence must: i. be informed of the existence and legal basis of any Prosecution *ex parte* application under rule 81 (2) or (4) of the Rules; ii. be allowed the opportunity to present submissions on (i) the general scope of the provisions that constitute the legal basis of the Prosecution's *ex parte* application; and (ii) any other general matter which in the view of the Defence could have an impact on the disposition of the Prosecution application; iii. be provided, at the very least, with a redacted version of any decision taken by the Chamber in any *ex parte* proceedings under rule 81 (2) or (4) of the Rules held in the absence of the Defence. ").

[23] *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence", 13 October 2006, ICC-01/04-01/06-568, para.67 ("The decision of the Pre-Trial Chamber that is the object of the third ground of appeal does not provide for any flexibility. The Pre-Trial Chamber's approach that the other participant has to be informed of the fact that an application for *ex parte* proceedings has been filed and of the legal basis for the application is, in principle, unobjectionable. Nevertheless, there may be cases where this approach would be inappropriate. Should it be submitted that such a case arises, any such application would need to be determined on its own specific facts and consistently with internationally recognized human rights standards, as required by article 21 (3) of the Statute. By making a decision that does not allow for any degree of flexibility, the Pre-Trial Chamber precluded proper handling of such cases.")

[24] It does not appear that the Appeals Chamber, in making this decision, was informed of the contrary jurisprudence at the ICTY.

receiving any such submissions.[25] Indeed, the Prosecution in other proceedings before this Court has previously acknowledged that this is the procedure that must be followed:

> A party making an *ex parte* application shall notify the other party or participants of the fact of that application and of the legal basis, unless to do so would prejudice the interests being protected by the *ex parte* nature of the application. And second, if the party making an *ex parte* application proposes not to notify the other party or the participants of the fact and/or the legal basis of that application, then the party should set out its reason for doing so in the application itself.[26]

22. An application to make *ex parte* submissions should be granted only within one of the statutory exceptions prescribed by the Statute or Rules and, even within those exceptions, should be permitted only to the extent strictly necessary and concretely justified. As recently stated by the Prosecution in another proceeding, such *ex parte* submissions "should only be allowed to the extent that they were absolutely necessary and limited."[27]

23. The policy reason underpinning this stringency is the damage to the actual and perceived fairness of the trial if one party is permitted to offer submissions, without the opportunity for prompt and direct response by the accused, that may influence the trier-of-fact's eventual assessment of the evidence. As explained by one adversarial appellate court dealing with the less prejudicial situation of *ex parte* submissions to a presiding judge who was not the trier-of-fact:

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[25] *Lubanga* Decision for *ex parte* proceedings, para.8 ("the Appeals Chamber [...] whilst not disagreeing with the judge's assessment of the limitations to be imposed on *ex parte* proceedings, reversed her decision that whenever an application is filed *ex parte* under Rule 81 the other participant must be made aware in an *inter partes* filing of the fact that such an application was filed as well as its legal basis [...].").

[26] ICC-01/04-01/06-T-52-ENG [2Oct2007 ET WT] 1-54 NB T, p.7.

[27] *See The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-T-372, p.30. *See also Id*. p.31 ("It's important to note that the *ex parte* submissions of the Prosecution were limited to what was strictly necessary for the legitimate purpose being pursued.").

> *Ex parte* proceedings "can only be justified and allowed by compelling state interests." [....] "An *ex parte* communication between a trial court and government counsel '[i]n addition to raising questions of due process ... involve[s] a breach of legal and judicial ethics. Regardless of the propriety of the court's motives in such a case [...] the practice should be discouraged since it undermines confidence in the impartiality of the court.' ("The value of a judicial proceeding, as against self-help by the police, is substantially diluted where the process is *ex parte* because the court does not have available the fundamental instrument of judicial judgment: an adversary proceeding in which both parties may participate."). Although there are circumstances where an *ex parte* communication might be "overlooked," "the burden of proving lack of prejudice is on the [government], and it is a heavy one."[28]

24. Called upon to adjudicate requests for reclassification during trial proceedings, albeit with regards to *ex parte* filings by the Prosecution, the Chamber acknowledged the law applicable to *ex parte* proceedings and/or submissions, holding that "recourse to *ex parte* submissions should, in principle, be exceptional, to be used only when 'truly necessary' and when no alternatives are available, and that resort to *ex parte* filings must be 'proportionate given the potential prejudice to the accused'.[29] The Chamber also considered that: "[…] the other party should be notified, and the legal basis for the *ex parte* filing should be explained, unless to do so is inappropriate, for example when providing information about the procedure would risk revealing the very thing that must be protected".[30]

II. Annexes II and III are material to the ability of the Defence to protect the rights of Mr. Ntaganda and to play a meaningful role in the reparations process

25. In Annex I to the Registry Preliminary Observations, VPRS provided an overview of its field activities during trial, particularly in the run-up to the issuance

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[28] United States, *US v. Minsky*, 963 F2d 870 (6th Cir 1992) p.874 (citations omitted).
[29] *Lubanga* Decision on *ex parte* proceedings, para.12; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Defence's Request for Access to Filings in Case, ICC-01/05-01/08-3630, 7 May 2018, para.12. *See also* Decision on Requests in Relation to D-0308, ICC-01/04-02/06-2387, 29 August 2019, para.12 ("Decision on Requests in Relation to D-0308").
[30] Decision on Requests in Relation to D-0308, para.12.

of the Judgment, to prepare for the various potential outcomes.[31] VPRS consulted with community leaders in all of the relevant Case locations; gathered information per village within the remit of the Case; and estimated the number of potential additional reparations beneficiaries. VPRS indicated that the information obtained as a result of these activities could be made available in the next Registry report.[32]

26. VPRS also highlighted the fact that "the status of the victims of the attacks appears to have been significantly impacted with the removal of specific crimes and village locations in the Judgment"[33] and informed the Single Judge, should he so order, that it will "proceed with an assessment of how many of the 2,132 participating victims have been impacted by the reduced scope of the Case following the Judgment".[34] While no order has been issued in this regard, it is unclear whether VPRS has undertaken to perform this assessment.

27. In the same Annex I, VPRS "proposed that the Chamber adopts a uniform system for the identification of potential new reparations beneficiaries that in essence mirrors the system adopted for participation at trial",[35] using a three-group approach whereby only Group C applications – Applications for whom VPRS could not make a clear determination for any reason – would be communicated to the Defence. Although the Chamber has yet to pronounce on the adoption of the proposed system, it appears from the Registry Observations that VPRS is proceeding on the basis that the Chamber will adopt the proposed system. This might explain why VPRS considers that making available Annex II and Annex III to the Defence is not necessary, which is both premature and erroneous.

28. Indeed, in its Response to the Registry Preliminary Observations, the Defence opposed in non-equivocal terms the adoption of the three-group approach proposed

[31] Registry's Preliminary Observations, para.8.
[32] *Id.*
[33] Registry's Preliminary Observations, para.6.
[34] *Id.*
[35] Registry's Preliminary Observations, paras.11-15.

by VPRS and explained why.[36] Moreover, while supporting the VPRS recommendation for the implementation of a form-based approach,[37] the Defence argued that "[…] it is imperative that the person convicted, through his counsel, be involved in the assessment of all requests for reparations submitted by each individual potential beneficiary, whether already a participating victim or a newly identified victim/potential beneficiary".[38]

29. On this basis, the Defence requested the Single Judge to order VPRS *inter alia*: "to perform an initial evaluation of the impact of the Trial Judgment on the number of participating victims of the attack in this case; and to communicate / disclose the results thereof" and "to communicate / disclose the results of its activities conducted in the field, including the information gathered per village within the remit of the Case; as well as its estimates regarding the number of potential additional reparations beneficiaries, who have not yet been identified".

30. Annex II contains much of the information requested by the Defence as well as highly relevant information at the core of the reparations proceedings, which are just beginning. Just like the LRVs, TFV and the Registry, the Defence must have access to this information.

31. The key findings of the VPRS preliminary mapping exercise presented in the Registry Observations[39] are insufficient to allow the Defence to fulfil its role. To provide but one example, the source of the information communicated to the Chamber concerning the purported deliberate destruction of document storage facilities by the UPC / FPLC – an allegation neither raised nor litigated at trial – is of high importance to the Defence.[40] Moreover, the aim of VPRS in providing the information concerning the types of documentation available per village to the

[36] Defence Response, para.32.
[37] Defence Response, para.38.
[38] Defence Response, para.25.
[39] Annex I to Registry Observations, paras.23-26,30,44.
[40] Annex I to Registry Observations, para.23.

Chamber also illustrates the relevance and importance of this information for the Defence.[41]

32. It is also crucial for the Defence to be informed of the methodology used by VPRS to estimate the approximate number of new potential applicants, per case location, relating to the First and Second Operations. This includes of course, whether or not this estimate takes into account "the reduced scope of the Case following the Judgment".[42] The identification of new potential applicants for reparations in relation to the attacks - further to the delivery of the Judgment, which spells out the details and factual circumstances of these attacks - is also of high interest to the Defence. Hence, the manner in which the preliminary mapping was conducted and the identity of the persons contacted and/or interviewed is material to the representation of Mr. Ntaganda in the reparations proceedings.

33. As for Annex III, considering the overlap between the *Lubanga* and *Ntaganda* cases and the intention of VPRS to *inter alia,* implement "a process whereby the beneficiaries identified in the *Lubanga* case would simply need to indicate whether or not they wish to be considered for reparations in the instant case, rather than undergo an additional registration process *de novo*",[43] the information provided to the Chamber therein, *i.e.* the latest information at the disposal of VPRS with respect to child soldier victims potentially eligible to receive reparations in the *Lubanga* case[44] is material to the ability of the Defence to protect Mr. Ntaganda's rights in these reparations proceedings.

34. Two further elements militate in favour of the necessity for the Defence to have access to this information. First, the fact that the Registry "considers that its role in screening the applicant forms of new potential applicants in the *Lubanga* case may

[41] Annex I to Registry Observations, paras.23-24.
[42] Registry's Preliminary Observations, para.6.
[43] Annex I to Registry Observations, para.38.
[44] Annex I to Registry Observations, para.26. *See* also para.37.

serve to facilitate the identification exercise in the *Ntaganda* case"[45] renders the information therein essential for the Defence. Moreover, the position adopted by the Registry regarding the possibility for certified 'child soldiers' beneficiaries in the *Lubanga* case to also receive reparations in this case, which in its view would not lead to over-compensation,[46] renders the information in Annex III highly relevant and material to the ability of the Defence to play a meaningful role in the reparations proceedings.

35. In light of the foregoing, the Defence posits that without access to the information contained in Annex II and Annex III, it will not be in a position to fulfil its role; to have a genuine opportunity to provide pertinent and significant observations to the Chamber as provided for in the 5 December 2019 Order;[47] to play a meaningful role in the reparations proceedings; and, more importantly, to protect the rights of Mr. Ntaganda.

III. The Registry has neither justified nor demonstrated the necessity for the *ex parte* classification of the annexes

36. The Registry submits that "annex II is filed as confidential, only available to the LRVs, the TFV and the Registry because it contains sensitive information that may impact the safety and physical well-being of victims, intermediaries and other third parties."[48]

37. *First*, the submission of Annex II *ex parte* – not available to the Defence – is not expressly authorized in the legal framework of the Court.

38. *Second*, as demonstrated above, the information contained in Annex II is material to the ability of the Defence to fulfil its role and protect the rights of

[45] Annex I to Registry Observations, para.26.
[46] Annex I to Registry Observations, paras.17-18,37-38.
[47] 5 December 2019 Order, para.9(f).
[48] Registry's Observations, para.9.

Mr. Ntaganda in these reparations proceedings. As such, the content of Annex II constitutes information, which must be disclosed in the context of reparations proceedings.

39. *Third*, the Registry, either on its own or through VPRS, has not submitted an application seeking authorization to submit Annex II *ex parte*, not available to the Defence.

40. By analogy, the submission of Annex II *ex parte*, not available to the Defence can be considered in the light of article 67 and 68 of the Statute and Rule 81 of the Rules. In this regard, it is insufficient without more, to submit that Annex II contains sensitive information that may impact the safety and physical well-being of victims, intermediaries and other third parties.

41. The submission of Annex II *ex parte* constitutes a restriction on the rights of the Defence. At this stage of the proceedings, Mr. Ntaganda has the right to be informed promptly and in detail of the nature, cause and content of the applications for reparations.[49]

42. The content of Annex II, in particular the information obtained from potential beneficiaries, either participating victims or potential new applicants, cannot be considered as internal work product pursuant to Rule 81(2). Moreover, the Registry failed to justify why or how giving the Defence access to this information *may* impact the safety and physical well being of victims, intermediaries and other third parties, especially at this stage of the proceedings.

43. While ensuring the safety and physical well-being of victims, intermediaries and possibly certain innocent third parties is in and of itself an important objective, the submission of Annex II *ex parte* is clearly out of proportion to the prejudice to the

[49] *The Prosecutor v. Thomas Lubanga Dyilo,* Judgment on the appeals against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable', 18 July 2019, ICC-01/04-01/06-3466-Red, para.248.

interest of the Defence in fulfilling its duty, playing an active role in the reparations proceedings and protecting the rights of Mr. Ntaganda.

44. The fact that at the participation phase, nearly all of the victims expressed security-related concerns with respect to ICC proceedings[50] does not justify the *ex parte* classification of Annex II and Annex III especially at this stage following the delivery of the Trial Judgment and the ongoing appeal proceedings. The Defence also deems appropriate to recall that Mr. Ntaganda and members of his Defence team are bound by the confidentiality of the information made available.

45. Significantly, information similar or akin to that contained in Annex II was disclosed in past reparations proceedings in other cases.[51]

46. As for Annex III, it contains "basic information relating to the Chamber's request in paragraph 9(a) of the 5 December 2019 Order",[52] including the latest information at the disposal of VPRS with respect to child soldier victims potentially eligible to receive reparations in the *Lubanga* case. As such, Annex III contains information material to the ability of the Defence to protect the rights of Mr. Ntaganda, which must be disclosed to the Defence. Attempting to justify the submission of Annex III *ex parte,* the Registry refers to the Confidential "*Ordonnance relative à la requête de la Section de la participation des victimes et des réparations du 21 janvier 2020*".[53]

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[50] Registry's Preliminary Observations, para.27, fn.45.

[51] *See inter alia The Prosecutor v. Jean-Pierre Bemba Gombo*, Registry's observations pursuant to Trial Chamber Order ICC-01/05-01/08-3410 of 22 July 2016, ICC-01/05-01/08-3460, para.2 and annexes; *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Registry's observations pursuant to Trial Chamber VIII's Decision ICC-01/12-01/15-172 of 29 September 2016, ICC-01/12-01/15-193-AnxI-Red, paras.1-16.

[52] Registry's Observations, para.2.

[53] *The Prosecutor v. Thomas Lubanga Dyilo,*"Ordonnance relative à la requête de la Section de la participation des victimes et des réparations du 21 janvier 2020", 4 February 2020, ICC-01/04-01/06-3472-Conf.

47. The 21 January 2020 Order referred to by the Registry is not available to the Defence and the Registry has failed to explain why this information should be received *ex parte*.

48. In the absence of appropriate justification demonstrating the need for the *ex parte* classification of Annex II and Annex III, both must be reclassified as confidential, thereby allowing the Defence to have access to the information therein.

IV. There is no justification for Annex II to be available to the LRVs but not to the Defence

49. Whereas the Registry and VPRS are considered as being neutral in the context of reparations proceedings, the same cannot be said of the LRVs. Indeed, in his 5 December 2019 Order, the Single Judge held that "for the purpose of the reparations proceedings, the parties are understood to be the Defence and the LRVs".[54]

50. The LRVs in their capacity as parties to the reparations proceedings are entitled, other than in respect of their own clients, to no more and no less information than the Defence.

51. Significantly, it stems from the Registry Preliminary Observations[55] and Registry Observations,[56] that VPRS considers and intends to handle its communications and relationship with the LRVs during reparations proceedings in a manner entirely different from its communications and relationship with the Defence. As underscored in the Defence Response[57] and Defence 28 February 2020 Submissions,[58] Mr. Ntaganda takes issue with the VPRS approach.

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[54] 5 December 2019 Order, fn.13.
[55] Registry Preliminary Observations, paras. 11, 12, 18, 22, 29, 31 (vii), fns. 31,32,34.
[56] Registry's Observations, para. 25, fn.79, para.30, fn.85, paras.51, 57.
[57] Defence Response, paras. 40, 41.
[58] Defence 28 February 2020 Submissions, paras. 83, 102.

52. There are in fact no justification for making Annex II available to the LRVs but not to the Defence. The fair conduct of reparations proceedings demands that the LRVs and the Defence, other than for matters concerning the LRVs' clients, be treated on an equal footing.

53. Reclassification of Annex II and Annex III as Confidential is a necessary first step in ensuring full respect for the rights of Mr. Ntaganda during reparations proceedings.

V. The *ex parte* classification of Annex II and Annex III is not necessary in light of the availability of lesser measures sufficient to achieve a similar result

54. During the reparations proceedings in the Lubanga case, the Trial Chamber noted that the principle of proportionality applied in the consideration of redactions to evidence submitted in the investigation and criminal trial and found that the same principles apply to the reparations phase.[59] The Appeals Chamber later held that the Trial Chamber in *Lubanga* correctly identified the relevant general considerations applicable to redactions to victims' requests for reparations.[60]

55. When the imposition of a lesser measure is sufficient to achieve an intended result, the principle of proportionality dictates that no stronger or more stringent measure must be applied.[61] The Trial Chamber in Lubanga thus stated that protective measures should: (i) restrict the rights of the suspect or accused only as far as necessary, and (ii) be put in place where they are the only sufficient and feasible measure.[62]

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[59] *The Prosecutor v. Thomas Lubanga Dyilo,* Decision on the Application of the Defence for Thomas Lubanga Dyilo of 24 April 2017 concerning Redactions in some of the Files of Potentially Eligible Victims, 5 June 2017, ICC-01/04-01/06-3328-tENG, paras.4-5.

[60] *Lubanga* Second Appeal Judgment, para.255.

[61] *The Prosecutor v. Thomas Lubanga Dyilo,* Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006, 14 December 2006, ICC-01/04-01/06-772.

[62] *Lubanga* Second Appeal Judgment, para.255, fn.524.

56. In this case, the *ex parte* classification of Annex II and Annex III was not necessary as lesser measures were evidently available to the Registry to achieve its objective such as the submission of confidential redacted versions of Annex II and Annex III and/or seeking to extend the application of certain protocols in force during trial subject to the necessary modifications.

57. Regarding the latter, protocols in force during trial proceedings concerning the handling of confidential information and/or contact with protected persons could be adapted and their application extended to reparations proceedings. The Registry and VPRS do not appear to have considered such an option.

58. Regarding the former, it appears evident from the content of Annex II and Annex III, as described in the Registry Observations, that the application of redactions would have been sufficient to achieve the Registry's stated aim, *i.e.* to protect "the safety and physical well-being of victims, intermediaries and other third parties".[63]

59. Redactions to Annex II and Annex III must however be applied by the Registry under judicial control as opposed to *proprio motu*. To provide but one example, in the *Lubanga* reparations proceedings the Trial Chamber issued an order dealing with the transmission of victims' files in which it set out the modalities regarding the application of redactions.[64] These modalities dealt with, *inter alia*: information pertaining to the current residence or other contact information that may be used to locate victims who may be eligible;[65] the identities of eligible victims, which should only be redacted for those who refused to disclose their identities to the Defence;[66] and any information relating strictly to the description of the harm

[63] Registry's Observations, para.9.
[64] *The Prosecutor v. Thomas Lubanga Dyilo,* Order for the Transmission of the Application Files of Victims who may be Eligible for Reparations to The Defence Team of Thomas Lubanga Dyilo, 22 February 2017, ICC-01/04-01/06-3275-tENG, para.13 ("*Lubanga* 22 February 2017 Order").
[65] *Lubanga* 22 February 2017 Order, para.14.
[66] *Lubanga* 22 February 2017 Order, paras.15-16.

suffered, the events that caused the harm, and the link between such harm and the crimes of which Mr. Lubanga has been convicted, which should not be redacted.[67]

60. Addressing the impact of the redactions applied by the Trial Chamber in the *Lubanga* reparations proceedings, the Appeals Chamber held 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".[68]

RELIEF SOUGHT

61. In light of the above, the Defence respectfully requests the Chamber to:

ORDER the Registry to reclassify Annex II and Annex III from *ex parte* to confidential; and

SET OUT the modalities applicable to the application of redactions to Annex II and Annex III, if required, in conformity with the guidelines identified by the Appeals Chamber.

RESPECTFULLY SUBMITTED ON THIS 23RD DAY OF MARCH 2020

Me Stéphane Bourgon, Counsel for Bosco Ntaganda
The Hague, The Netherlands

[67] *Lubanga* 22 February 2017 Order, para.18.
[68] *Lubanga* Second Appeal Judgment, para.256.