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TRIAL CHAMBER II

Before:

**Judge Chang-ho Chung, Presiding Judge
Judge Péter Kovacs
Judge Maria del Socorro Flores Liera**

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

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

**Public
With Public Annex I**

**Submissions on behalf of the Convicted Person on the procedure for the constitution of
the sample established by the Implementation Order**

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Further to the Appeals Chamber’s “Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled “Reparations Order””, on 12 September 2022 (“Appeals Judgment”)¹ and the “Order for the implementation of the Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled “Reparations Order””, issued by Trial Chamber II on 25 October 2022 (“Implementation Order”),² Counsel for the Convicted Person (“Convicted Person” or “Defence”) hereby submits this:

Submissions on behalf of the Convicted Person on the procedure for the constitution of the sample established by the Implementation Order

“Defence Submissions”

INTRODUCTION

1. On 12 September 2022, the Appeals Chamber issued the Appeal Judgment, holding that Trial Chamber VI committed many errors in the formulation of the Reparations Order in the Ntaganda case,³ which materially affected that decision. Consequently, the Appeals Chamber partially reversed the Reparations Order and remanded the same to Trial Chamber II to take the required corrective measures and issue a *new* Reparations Order,⁴ thereby guaranteeing the right of appeal of the parties.⁵

2. According to the Appeals Chamber, Trial Chamber VI failed *inter alia*, to make an appropriate determination of the number of potentially eligible or actual victims and failed to provide an appropriate calculation, or set out sufficient reasoning, for the amount of the monetary award against Mr Ntaganda.

3. The Appeals Chamber also found that Trial Chamber VI erred in issuing a decision without having assessed and ruled upon victims’ application forms for reparations and had failed to consider and assess even a sample of these forms. As a result of this error “the Defence was unable to participate in the assessment of the eligibility of victims to benefit from

¹ Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled “Reparations Order”, 12 September 2022, ICC-01/04-02/06-2782 (“Appeal Judgment”).

² Order for the implementation of the Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled “Reparations Order”, 25 October 2022, ICC-01/04-02/06-2786 (“Implementation Order”).

³ Reparations Order, 8 March 2021, ICC-01/04-02/06-2659 (“Reparations Order”).

⁴ Appeal Judgment, para.759.

⁵ Appeals Judgment, para.752.

reparations”.⁶ The Appeals Chamber held that “since the amount of the award for reparations in this case should be based on information contained in, among other sources, at least a sample of applications for reparations, the Defence must be able to challenge this information by means of reviewing the applications and making representations thereon.”⁷

4. Through the Implementation Order, Trial Chamber II sets out “[...] to commence the process of implementation of the Appeals Judgment [...]” and to address what it refers to as the “issues on remand”,⁸ by setting out the methodology to assemble a sample of victims’ applications, using primarily the information already available on the record of the case,⁹ on which it intends to rule after having given the LRVs and the Defence an opportunity to review and make submissions.¹⁰

5. The Implementation Order also invites the parties to make submissions, if any, on the procedure for the constitution of the sample established by the Implementation Order,¹¹ as well as to bring to the attention of the Chamber, any issues related to redactions of the victims’ applications.¹²

6. Accordingly, these submissions address both the procedure for the constitution of the sample - focussing primarily on the lack of representativity of the sample sought to be assembled – and issues related to the redactions to be applied to the victims’ applications and other material that would eventually be disclosed to the Defence, which constitute a marked departure from the procedure set in place in the previous Lubanga proceedings.

7. As a preliminary matter however, the Defence deems it appropriate to address the Trial Chamber’s finding, directly related to the procedure for the constitution of the sample and the contents thereof, that “[...] the Initial Draft Implementation Plan (‘IDIP’), was approved subject to certain amendments, is now fully operational and has not been affected by the Appeals Judgment.”¹³

⁶ Appeal Judgment, para.363.

⁷ *Ibidem*.

⁸ Implementation Order, para.3.

⁹ Implementation Order, para.4.

¹⁰ Implementation Order, para.9.

¹¹ Implementation Order, para.34(e), Disposition.

¹² Implementation Order, para.36.

¹³ Implementation Order, para.17.

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

9. Justification for the Defence position in this regard is provided by the summary conclusions of an expert actuary, appended to these Defence Submissions. Based on objective information drawn mostly from the Implementation Order, questions were put to the expert, Mr Claude Fergusson, who agreed to have his preliminary conclusions provided to the Chamber and the parties.

10. With respect to the redaction issues, the Defence respectfully submits that the Chamber's instructions ought to be reconsidered and that it is essential to have a clear mechanism put in place to address issues related to redactions applied to victims' applications disclosed to the Defence, directly involving the Chamber.

11. Lastly, these observations briefly address the calendar set by the Chamber for the parties to provide submissions - more particularly for Defence submissions on victims' applications after receiving the relevant material – which appear somewhat too optimistic.

SUBMISSIONS

I. The Trial Chamber's finding concerning the IDIP

12. The Trial Chamber held that the Initial Draft Implementation Plan ("IDIP") "is now fully operational and has not been affected by the Appeals Judgment."¹⁴ This position, despite undoubtedly smoothing the way for the uninterrupted continuation of the *Ntaganda* reparations process, simply cannot be reconciled with the plain wording of the Appeals Judgment and is entirely erroneous.

¹⁴ Implementation Order, para.17.

13. On 7 October 2022, the Defence filed its Observations on the Seventh TFCV Report.¹⁵ In these Observations, the Defence spent several pages explaining why the TFCV was wrong to assert that “the Trial Chamber’s determination in the Reparations Order in relation to the IDIP was not overturned on appeal.”¹⁶ Comprehensive reasoning was given as to why any implementation of the IDIP is without a legal basis, until Trial Chamber II issues a new order for reparations within the meaning of Article 82(4) of the Statute.

14. While these arguments will not be repeated in the present filing, the Defence hereby reiterates its position. Importantly, the Implementation Order asserts only that the IDIP continues to be operational, but without any reasoning given as to why this is the case. After announcing that the IDIP “is now fully operational and has not been affected by the Appeals Judgment”,¹⁷ the Trial Chamber states only in a footnote that “[t]he Chamber deems necessary [sic] to provide this clarification in light of a recent filing of the Defence of Mr Ntaganda.”¹⁸ No other discussion or reasoning is provided. Remarkably, the Trial Chamber cites only to “paras. 4-6” of the Defence Observations on the Seventh TFCV Report, being two paragraphs of its introduction. It thus appears as though the Trial Chamber did not consider the arguments set out paras 1-3, 5, and 14-17 of the Defence Observations of the Seventh TFCV Report, which explained why the IDIP simply cannot continue when it is undermined by the many errors that impacted its formulation.

15. The Trial Chamber accordingly circumvented reasoned Defence submissions on a central procedural question by stating a conclusion, framed as a “clarification”, and then referencing only part of the reasoned submissions in question. This amounts to an abdication of the Trial Chamber’s judicial function, as the Defence’s submissions on why IDIP is no longer operational, have been ignored. The Trial Chamber’s failure to address the Defence submissions, and render a reasoned decision, prevented the Defence from exercising its right of appeal against this central finding.¹⁹ This error should be corrected; the Trial Chamber should consider the substance of the Defence submissions on this point, and render a reasoned

¹⁵ Observations on behalf of the convicted person on the Trust Fund for Victims’ Seventh Update Report on the Implementation of the Initial Draft Implementation Plan, 7 October 2022, ICC-01/04-02/06-2785-Conf (“Defence Observations on the Seventh TFCV Report”).

¹⁶ Defence Observations on the Seventh TFCV Report, paras.1-5,14-17.

¹⁷ Implementation Order, para.17.

¹⁸ Implementation Order, fn.27.

¹⁹ ICTR, *Prosecutor v. Nchamihigo*, Judgment, 18 March 2010, ICTR-03-63-A, para.165: “[a] reasoned opinion ensures that the accused can exercise his right of appeal A reasoned opinion ensures that the accused can exercise his right of appeal”; ICTY, *Prosecutor v Limaj et al.*, IT-03-66-A, Judgment, 27 September 2007, para.81.

decision thereon. The continued operation of the IDIP is directly contrary to the Appeal Judgment. The Appeals Chamber ordered the Trial Chamber to produce a new reparations order, without which the TFV has no authority to continue implementing reparations under the IDIP. To the extent that the Trial Chamber meant that the 69 priority participating victims determined by the TFV to be eligible should continue to benefit from the IDIP programmes, without more, this should be made clear.

II. The procedure for the constitution of the sample

16. The Defence respectfully takes the view that the procedure for the constitution of the sample is flawed and that as a result, the sample aimed to be created would not be representative, whether from a quantitative or qualitative point of view. More importantly, even though the aim of the procedure set out by the Chamber is “[...] to commence the process of implementation of the Appeals Judgment [...]”,²⁰ the sample sought to be assembled would not cure the defects of the Reparations Order. In fact, it would neither be of assistance in determining the total number of potential victims nor in providing an appropriate calculation for the amount of the monetary award against the Convicted Person.

17. To be representative from a quantitative point of view, the sample must allow to draw conclusions with a sufficient degree of certainty as to how many potential victims in the Ntaganda case - potential victims of the attacks (Potential VATT) and potential child soldier victims (Potential CSV) - would be eligible for reparations.

18. To be representative from a qualitative point of view, the sample must include potential victims in the Ntaganda case representing at a minimum the characteristics likely to impact the cost of reparations, such as *inter alia* (i) the nature of the crimes committed against the potential victims based on the Trial Judgment; (ii) the locations in which these crimes were committed based on the Trial Judgment; and (iii) all types of harm suffered by the victims in the Ntaganda case.

19. The procedure adopted by the Chamber fails to yield a representative sample that would allow drawing conclusions with a sufficient degree of certainty, taking into account the multiple characteristics of the potential victims in this case. The Appeals Chamber stressed that the sample **must be a representative one**, covering the make-up of the entire group of

²⁰ Implementation Order, para.3.

beneficiaries, and taking into consideration the different types of harm suffered by different sub-groups of victims.²¹ The sample envisioned by the Trial Chamber falls short of this standard. Notably, the Appeals Chamber found that the Trial Chamber erred by failing to rule on at least a sample of applications,²² and that as a result of this error, the Defence was unable to participate in the assessment of the eligibility of victims to benefit from reparations.²³ The Appeals Chamber also held that “the Defence must be able to challenge this information by means of reviewing the applications and making representations thereon”.²⁴

20. Hence, with a view to giving effect to the right of the Defence to meaningfully participate in the eligibility determination process before a new reparations order is issued by the Chamber, it is necessary to assemble a sample that comprises a sufficiently high number of applications, covering the full spectrum of potential beneficiaries *in the case*.

21. Specific defects associated with the procedure set out by the Chamber and the resulting sample are addressed below. These include the composition of the sample for both potential victims of the attacks and potential child soldier victims (size and type), the proposed sampling method and used and the conclusions that can be drawn – both from a quantitative and qualitative point of view – concerning the totality of victims *in the case*.

22. Aiming to provide sufficient relevant and scientific justification for its position, the Defence deemed it appropriate to call upon the services of an actuary / expert in the field of statistics - applied to the assessment of harm and the calculation of the cost of repair – to provide a summary report on the proposed procedure for the constitution of the sample and the reliability of the conclusions that can be drawn from the sample envisioned by the Chamber. That said, taking into consideration the limited time available to submit these Defence Observations, it was neither possible nor feasible for the expert, Mr Claude Ferguson, to provide an exhaustive report. Consequently, the expert was provided with a copy of the Implementation Order along with a factual background – including an objective overview of the information available and a description of the procedure set out by the Chamber to assemble the sample - and he was asked to provide an executive summary of his observations in relation to specific questions. Needless to say, the expert stands ready to supplement his observations and to provide the Chamber with a more detailed report on request. At this stage, the expert

²¹ Appeals Judgment, paras.10,341,343,346.

²² Appeals Judgment, para.345.

²³ Appeals Judgment, para.363.

²⁴ *Ibidem*.

was not asked to offer any observations on the procedure to assess the possible global cost of reparations – his main field of expertise – which is not the object of the Implementation Order. The *curriculum vitae* of the expert, the material he was provided with, the questions he was asked to address, and his conclusions are enclosed in Annex I to these Defence Submissions.

A. The composition of the sample

23. The Defence understands from the Implementation Order that the Chamber aims to assemble two distinct sample(s), one for the potential victims of the attacks (Pot VATT) and one for the potential child soldier victims (Pot CSV). Notably, the universe of potential victims from which these samples are to be assembled is composed almost exclusively from potential victims who participated in the Ntaganda proceedings. In fact, a very small number of 92 *new* potential victims (NPV), *i.e.* potential victims who did not participate in the proceedings, and who were identified later completes the universe.²⁵ Moreover, the breakdown of these few NPV, *i.e.* the number of Pot VATT and the number of Pot CSV), is not known to the Defence. Remarkably, no figures are advanced regarding the actual or estimated total number of potential victims in this case.

24. This is highly significant as it constitutes a marked departure from the other cases referred to by the Trial Chamber, such as the Lubanga reparations proceedings – where the number of potential child soldier victims was estimated to be close to 3000 even though the actual number of applicants at the time was much lower²⁶ – and the class action against the estate Ferdinand Marcos, where the total number of potential victims of human rights violations for which the *Marcos regime* was considered responsible was assessed to be 9541.²⁷ Hence, in those cases, the size of the universe or population of potential victims from which a sample was established was known, contrary to the present situation.

25. Regarding the universe of potential victims of the attacks (Pot VATT), the removal from the *universe* of the 45 participating victims of the attacks (PVATT) determined by the TFV to be eligible and their inclusion directly in the sample is problematic. The weight of these

²⁵ Email from Trial Chamber II following VPRS request to add victims to the same of universe, 2 November 2022.

²⁶ *See for instance The Prosecutor v. Thomas Lubanga*, Corrected version of the “Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable”, 21 December 2017, ICC-01/04-01/06-3379, para.36.

²⁷ US Court of Appeals, Ninth Circuit, Maximo HILAO, Class Plaintiffs, Plaintiff-Appellee, v. ESTATE OF Ferdinand MARCOS, Defendant-Appellant, 17 December 1996, No. 95-15779, p.6. See also Implementation Order, para.29.

45 PVATT included directly in the sample to be assembled will be out of proportion to their representation and impact the quantitative conclusions that can be drawn from the sample. This conclusion is supported by the expert in Annex I.

26. In this regard and to the extent that “[...] unless decided by the Chamber, the 69 victims referred above should continue to benefit from the IDIP programmes”,²⁸ the Chamber’s intent to rule on the eligibility of the 69 victims previously determined to be eligible by the TFV is indeed appropriate for the purpose of addressing the error found by the Appeals Chamber concerning “[...] the lack of judicial approval of the outcome of the TFV’s administrative screening that finds victims eligible to benefit from reparations.”²⁹ However, the need to assess these 69 victims’ applications addresses a different error identified by the Appeals Chamber. It does not justify including these 69 victims directly in the sample. In order for the sample to be representative, the 69 victims found eligible by the TFV, more particularly the 45 PVATT, must remain in the universe from which a percentage of victims will be randomly selected.

27. The situation is akin to the 661 participating victims of the attacks (PVATT) previously determined *not to be eligible* for reparations by the Registry / VPRS as a result of the scope of the Trial Judgment.³⁰ Due to the high number of these PVATT, who represent some 35.5% of the total number of PVATT, the Defence takes the view that including them in the *universe* - regardless of the percentage that will be randomly selected to be in the sample - will necessarily impact the quantitative conclusions that can be drawn from the sample. Hence, it would be preferable for the Chamber to assess these 661 PVATT separately, solely on the basis of the scope of the Trial Judgment, and to include in the *universe* only those found to meet the ‘scope of the Trial Judgment’ criteria. That said, these 661 PVATT are not included directly in the sample and indeed should not. This conclusion is supported by the expert in Annex I.

28. Lastly with respect to the sample of Pot VATT, the Defence takes the view that the split between the *new* potential victims, *i.e.* Pot VATT and Pot CSV included in the universe must be disclosed. This is important as the number of Pot VATT added to the *universe* is a relevant consideration in determining the appropriate percentage of Pot VATT that must be randomly

²⁸ Implementation Order, para.21.

²⁹ Implementation Order, para.19.

³⁰ Annex I to “Registry’s Second Report on Reparations”, 15 January 2021, ICC-01/04-02/06-2639-Conf-AnxI, para.9.

selected to ensure that the sample of Pot VATT is indeed representative from a quantitative point of view.

29. Moving on to the universe of potential child soldier victims of the attacks (Pot CSV), and for the same reasons set out in paragraph 25 above, the Defence submits that the removal from the *universe*, of the 24 participating child soldier victims (PCSV) determined by the TFV to be eligible, and their inclusion directly in the sample, is problematic. This conclusion is supported by the expert in Annex I.

30. Another aspect of the Pot CSV universe is awkward, namely the victims who were also eligible for reparations in *The Prosecutor v. Thomas Lubanga Dyilo* (“Lubanga Case”), labelled as Category 2 victims, on the basis that the relevant Chamber already ruled on a sample of the applications.³¹ The difficulty here is that the 284 participating child soldier victims (PCSV) in Category 1 also include potential victims who qualify for reparations in the Lubanga case. This is evidenced by the fact when called upon to refer the names of priority participating victims to the TFV in the context of the IDIP, the LRV1 referred some 21 participating victims who were found to be beneficiaries of reparations in the Lubanga case.³² Indeed, from the total of 48 priority participating victims referred by the LRV1 to the TFV, 24 were determined to be eligible (exclusively Ntaganda child soldier victims) - and thus referred to the implementing partner for intake - while 21 found to be beneficiaries of reparations in the Lubanga case, were not referred to the implementing partner for intake.³³

31. This situation is further compounded by the fact that the number of participating child soldier victims who also qualify for reparations in Lubanga is not known to the Defence; even though this figure is known to VPRS and the LRV1. If only for transparency purposes, these figures must be disclosed. Moreover, the number of participating child soldier victims that *do not qualify* as victims in the Lubanga case is highly relevant as it reveals the size of the *universe* of potential child soldier victims, which is essential to determine the percentage of applications that must be randomly selected to ensure that the resulting sample is representative. This conclusion is supported by the expert in Annex I.

³¹ Implementation Order, para.24.

³² Trust Fund for Victims’ Seventh Update Report on the Implementation of the Initial Draft Implementation Plan, 26 September 2022, ICC-01/04-02/06-2783, Fn.27.

³³ *Ibidem*.

32. Lastly, with respect to the sample of Pot CSV, the Defence takes the view that the split between the *new* potential victims, *i.e.* Pot VATT and Pot CSV included in the universe must be disclosed. This is important as the number of Pot CSV added to the *universe* is also a relevant consideration in determining the appropriate percentage of Pot CSV that must be randomly selected to ensure that the sample of Pot CSV is indeed representative from a quantitative point of view.

B. The size of the sample

33. Pursuant to the Chamber's instructions, the samples of Pot VATT and Pot CSV are to be assembled by randomly selecting 5% of the applications from the universe of Pot VATT and the universe of Pot CSV, to which 45 participating victims of the attacks (PVATT) and 24 participating child soldier victims (PCSV) previously determined by the TFV to be eligible for reparations will be added.³⁴ First, reference is made to the above observations concerning the composition of both universes and the impact of adding the 45 + 24 participating victims directly in the sample. These will not be repeated here. Second, it is necessary to address the appropriate size of both samples from a quantitative as well as from a qualitative point of view.

34. From a quantitative point of view, whether both samples (Pot VATT and Pot CSV) are addressed separately or together as one large sample of potential victims, the Defence takes the view that drawing 5% of the victims' applications is insufficient for the purpose of assembling one or two representative samples, allowing to draw conclusions with a sufficient degree of certainty. This conclusion is supported by the expert in Annex I.

35. From a qualitative point of view, the situation is even more critical. Indeed, taking into consideration the number of important characteristics covering the entire group of potential beneficiaries, drawing 5% of the applications to assemble one or two samples, is definitely insufficient to be representative of all the characteristics found in both samples. This conclusion is also supported by the expert in Annex I.

36. Notably, giving the Defence an opportunity to analyse and make submissions in relation to a limited sample - composed of only 5% of the applications drawn from the universe - is insufficient to enforce the right of the Convicted Person to participate meaningfully in the eligibility determination process before a new reparations order is issued.

³⁴ Implementation Order, para.34(b).

C. The proposed sampling method

37. The Implementing Order highlights the measures taken by the Registry / VPRS as well as the methodology discussed with the parties to assemble a representative sample, including the basic presumptions, which allowed the Registry to develop the criteria for the selection of victims to be included in the sample.³⁵ The Registry followed up by preparing a sample matrix, using a stratified random sample method, based on crime location and crime type, and different *stratum* were used for each category of victims, depending on the information available.³⁶

38. Although the Defence did take issue with the use of vulnerability as an applicable stratum and did complain on numerous occasions on its lack of access to victims' applications,³⁷ the Defence neither opposed the SRS system in general nor the use of sub-groups from which to select applications randomly, to ensure that the sample was a representative one.

39. In fact, the Defence submits that the use of *stratum* or sub-groups is a very effective way to assemble a representative sample, as long as, however, the applications drawn from each *stratum* or sub-groups are selected randomly as opposed to manually, based on information found in specific applications.

40. Pursuant to the instructions issued by the Chamber in the Implementation Order, the Registry proposed stratified random selection (SRS) method has been set aside and replaced by a two-group only approach – *i.e.* potential victims of the attacks and potential child soldier victims – referred to as the simple random sampling method.³⁸ Even though this method can be advantageous - considering that the random selection of applications is automated and independent - it requires a larger sample in order to be truly representative, in particular if the number of characteristics is high. Indeed, as previously held by the UNCC, “the higher the degree of heterogeneity in the population, the larger must be the sample size to maximize the likelihood that the sample is representative of the population”.³⁹

³⁵ Implementation Order, para.30.

³⁶ Annex I to “Registry’s First Report on Reparations”, 30 September 2022, ICC-01/04-02/06-2602-Conf-AnxI, para.28.

³⁷ See for instance Defence Observations on the Registry First Report on Reparations, 30 October 2020, 2622, para.63.

³⁸ Implementation Order, para.33.

³⁹ UNCC, Report and Recommendations made by the Panel of Commissioners concerning the Fourth Instalment of Claims for Departure from Iraq or Kuwait, 12 October 1995, para.49.

41. Consequently, if the Chamber is inclined to maintain the proposed use of the simple random sampling method - applied to one sample of all potential victims or two samples comprising the two main categories of victims, *i.e.* Pot VATT and Pot CSV - it is essential to determine the appropriate size of the sample(s) by taking into account the number of potential victims who meet each of the characteristics or sub-group. In all likelihood, these figures probably already exist in the Registry / VPRS database. If not, these figures can be identified by the VPRS. That said, it is also essential that the characteristics or sub-groups used be selected on the basis of their impact on the determination of the cost to repair the harm caused.

D. Determination of the total number of actual or estimated number of potential victims

42. According to the Appeals Chamber, Trial Chamber VI failed *inter alia*, to make an appropriate determination of the number of potentially eligible or actual victims,⁴⁰ and failed to provide an appropriate calculation, or set out sufficient reasoning, for the monetary award against Mr Ntaganda.⁴¹

43. Whereas all errors identified in the Appeals Judgment are important and therefore must be addressed and corrected, the two errors above are at the heart of the Appeals Chamber decision to remand the matter to Trial Chamber II, directing it to issue a new order for reparations, taking into account the terms of the Appeals Judgment.⁴²

44. To this end, issuing instructions on the procedure to be followed to assemble a representative sample of potential victims' applications to be ruled upon, is certainly a laudable initiative. The problem, however, is that the procedure set out by the Chamber and the resulting sample envisaged are of little assistance to determine the number of potentially eligible or actual victims in the case.

45. Indeed, even if the alleged defects highlighted in these Defence Submissions were to be cured, the sample assembled would allow for nothing more than drawing conclusions in relation to the existing universe of potential victims at this stage, as opposed to the total number of potential victims in the case. This conclusion is supported by the expert in Annex I.

⁴⁰ Appeals Judgments, paras.23,155-174,745.

⁴¹ Appeals Judgment, paras.23,235-265,746.

⁴² Appeals Judgment, para.759.

46. Consequently, and with a view to continue bringing a positive contribution to the reparations process, the Defence respectfully submits that finding an appropriate and fair procedure to estimate the total number of potential victims in the case – based on hard and probative evidence, should be the priority at this stage.

III. Redaction of Information from the potential victims' applications / dossiers

47. The Implementation Order provides that the VPRS will apply redactions to the victims' dossiers selected to be in the sample,⁴³ which shall then be transmitted to the parties.⁴⁴ The Trial Chamber directed that, in accordance with the redactions protocol adopted in the present case,⁴⁵ VPRS should "redact any identifying information from the victims' dossiers before transmitting them to the parties".⁴⁶

48. The Trial Chamber then specified 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 have 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."⁴⁷

49. As a starting point, this position puts the *Ntaganda* reparations procedure at odds with the procedure at the same phase in *Lubanga*, where the redactions of potential recipients of reparations were limited to "current residence or other contact information that might disclose the location of the victims".⁴⁸ In *Lubanga*, Trial Chamber II recognised that "the names of victims who may be eligible and other identifying information about them **could be useful to the Defence** when it examines the eligibility of the said victims and the reliability of their claims".⁴⁹ As such, the Trial Chamber in that case was unequivocal that "the identities of victims who may be eligible **should not be redacted** if they have consented to the disclosure

⁴³ Implementation Order, para.34(f) defines "victims' dossiers" as "victims' applications, long and/or short forms, if selected, and all supporting documentation".

⁴⁴ Implementation Order, para.34(f).

⁴⁵ Implementation Order, fn 73, citing Decision Establishing Principles on the Victims' Application Process, 28 May 2013, ICC-01/04-02/06-67, paras. 42-43 ("Protocol").

⁴⁶ Implementation Order, para.35.

⁴⁷ Implementation Order, para.36 (emphasis added).

⁴⁸ *The Prosecutor v. Thomas Lubanga*, 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, paras.13-14.

⁴⁹ *The Prosecutor v. Thomas Lubanga*, 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, para.15.

of such information to the Defence.”⁵⁰ No explanation is given in the Implementation Order as to why the Chamber in the present case is departing from the Court’s prior practice, despite the obvious parallels between the two cases, and the overlap with the potential victims concerned.

50. Secondly, the Protocol to which the Trial Chamber refers, is nearly a decade old. It was rendered in May 2013, and it addresses redactions to application forms for participation in the proceedings, to be provided to the Defence for “observations which should focus exclusively on whether the victim applicants fulfil the criteria for victim status”.⁵¹ In rendering the Protocol and adjudicating disputes as to the extent of redactions, a Single Judge of the Pre-Trial Chamber relied on “the precarious security situation existing in Ituri, in particular in the locations included in the DCC, where former militia of the UPC/FPLC and supporters of both Thomas Lubanga Dyilo and Mr Ntaganda re concentrated.”⁵² As such, it is apparent that this Protocol was drafted at a different time, in a different phase of the case, and with a different goal and protection concerns in mind. As such, the Protocol does not provide a blanket prohibition on the provision of victims’ identities to the Defence in the reparations phase, in particular those who have consented to this information being disclosed.

51. The Defence therefore submits that the Protocol as applied to the current phase of the proceedings should permit the transmission of victims’ identities to the Defence, where the victims themselves have consented to this disclosure. Just as in the *Lubanga* case, the names of victims who may be eligible for reparations in the *Ntaganda* case, and other identifying information about them, could be useful to the Defence when it examines the eligibility of the victims and the reliability of their claims. Disclosing identities for consenting victims would accordingly align the procedure with the principle of proportionality enshrined in Article 68(1) of the Statute, and in a manner that is not prejudicial or inconsistent with the rights of the Defence.

52. As regards the remaining redactions to the “current residence or other contact information that may be used to locate the victims”, the Defence notes that in 2013 and 2014, the extent of redactions applied by VPRS to victims’ application forms was contentious. The Defence submitted to the Pre-Trial Chamber that the extent of the redactions being applied

⁵⁰*Ibidem.*

⁵¹ Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings, 15 January 2014, ICC-01/04-02/06-211, para.43.

⁵² Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings, 15 January 2014, ICC-01/04-02/06-211, para.44.

exceeded the scope of the Protocol, and undermined the Defence's ability to submit observations on whether the criteria for victim status had been fulfilled. In particular, the Defence submitted that it had only received:⁵³

heavily redacted forms containing extremely scarce information, which effectively made it impossible to provide substantial observations... the forms disclosed were excessively short, imprecise and vague, did not enclose any document in support, and often contained redactions as to the applicants' ethnicity, their age and place of birth, the harm they allegedly suffered, and the dates and places of relevant events. In this context, the Defence repeatedly observed that it was not in a position to provide submissions due to the insufficiency of information disclosed.

53. Against this backdrop, the Defence reiterates the Trial Chamber's direction that, unless it reveals the identity of the victim, current residence, or other contact information, "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 have been convicted, **should not be redacted**".⁵⁴

54. The Appeals Chamber recognised that it was an error on the part of the Trial Chamber not to give the Defence the opportunity to challenge the information relied on to formulate a reparations award, by means of "reviewing the applications and making representations thereon".⁵⁵ This review must accordingly be meaningful. Excessive redactions, particularly for victims who have not requested them, will prevent the Defence's meaningful review of the victims' dossiers, and its ability to assess whether the harm alleged falls within the scope of the conviction, and whether the claims can be considered credible. The identity of the victims, in many cases, will be central to this assessment. Also central to this review will the dates, locations, and times of incidents alleged, the harm alleged to have been suffered, and the link between this harm and the crimes for which Mr Ntaganda has been convicted.

55. The Implementation Order also states that "[s]hould there be any issues related to redactions, the parties and the Registry are instructed to bring it to the Chamber's attention at the time they make their submissions on the procedure for the sample", upon which the Chamber will rule.⁵⁶ In the event that the Defence considers that the extent of VPRS'

⁵³ As summarized in "Reply to LRV1 and LRV2 Responses to Mr Ntaganda's Appellant Brief", 30 September 2021, ICC-01/04-02/06-2712, para.4.

⁵⁴ Implementation Order, para.36 (emphasis added).

⁵⁵ Appeals Judgment, para.363.

⁵⁶ Implementation Order, para.38.

redactions exceed those necessary and interfere with the ability of the Defence to meaningfully review the victims' dossiers, the Defence is unclear whether it should direct its challenges to VPRS, and then seize the Trial Chamber only if an agreement cannot be reached. Or, whether the Defence is expected to raise the issue directly with the Trial Chamber in order for the Chamber to itself rule on these issues expeditiously. The Defence accordingly requests a clear mechanism for the resolution of disputes related to redactions, and its ability to seek the Trial Chamber's adjudication on these issues.

IV. Scheduling issues

56. Pursuant to the Implementation Order, and further to the submissions of the parties, if any, on the procedure for the constitution of the sample, the Defence understands that the Chamber intends to approve the list of individuals to be included in the sample. This will be followed by the application of redactions to the victims' applications and the transmission of the redacted victims' dossiers to the parties within 30 days. The LRVs will then have 30 days to make submissions and complement the victims' dossiers and the Defence will have an additional 30 days to make submissions on the victims' dossiers.

57. Taking into consideration the time that will be required by the Chamber to consider the parties' submissions on the constitution of the sample and approve the list of individuals to be included in the sample, it is unclear when the Defence can expect to receive the victims' dossiers from VPRS as well as the updated dossiers from the LRVs. Furthermore, as set out above, redaction disputes could also disrupt the time available to the Defence to analyse the dossiers and make submissions. Based on a similar process implemented in the Lubanga case, additional delays may also arise for other reasons.

58. In light of the foregoing, and considering the upcoming winter judicial recess, the Defence would like to ensure that it will be provided with sufficient time for the purpose of analysing the victims' dossiers, for the first time in most cases, and making submissions.

59. The same applies to the additional submissions to be filed by the Defence 60 days following the Implementation Order, *i.e.* on 28 December 2022. That said, these additional submissions to be filed before the Chamber are not the object of today's submissions and the Defence intends to address in a different filing.

60. Notwithstanding the above, and with the understanding that a new reparations order should be issued as soon as possible in the interest of the victims, the Defence hereby commits to fulfilling its responsibilities in a spirit of cooperation and to take the necessary measures to avoid undue delays.

CONCLUSION

61. In light of the foregoing, the Defence respectfully submits that a requirement exists to reconsider the procedure for the constitution of the sample to ensure that it is representative and fulfils its goal to correct the errors in the Reparations Order of March 2021. The Defence also invites the Chamber to reconsider the guidelines issued in relation to the redactions to be applied to the victims' dossiers.

RESPECTFULLY SUBMITTED ON THIS 9th DAY OF NOVEMBER 2022

A handwritten signature in dark ink, appearing to read 'S. Bourgon'.

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

The Hague, The Netherlands