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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 Redacted Version of Annex A and Public Redacted Version of Annex B

**Public Redacted Version of “Observations on behalf of the convicted person on the Trust Fund for Victims’ Updated Draft Implementation Plan”, dated 18 May 2022,
ICC-01/04-02/06-2765-Conf**

Source: Defence Team of Mr Bosco Ntaganda

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

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Further to the submission by the Trust Fund for Victims (“TFV”) of its Updated Draft Implementation Plan (“Updated DIP”) on 24 March 2022,¹ Counsel for Mr Ntaganda (“Defence”) hereby submits this:

**Observations on behalf of the convicted person on the Trust Fund for Victims’
Updated Draft Implementation Plan**

“Defence Observations”

INTRODUCTION AND OVERVIEW

1. Since the Trust Fund for Victims (‘TFV’) was first ordered in the 8 March 2021 Reparations Order to design a draft implementation plan (“DIP”) by 8 September 2021,² it was granted significant additional time and provided with ample opportunity to submit a comprehensive plan. In fact, the TFV only submitted its first DIP on 17 December 2021 (“First DIP”)³. Notably, at the instigation of the Parties – which raised no less than 49 issues requiring additional information or clarification – Trial Chamber II (“Chamber”) did not pronounce on the First DIP, but instead granted⁴ the TFV a further extension of time to address these issues and submit a new version of its DIP on 24 March 2022.

2. Despite certain modifications and additions brought by the TFV in this new version,⁵ the Updated DIP remains defective in many ways and is simply not ripe for approval by the Chamber. Moreover, despite the Chamber’s recent Decision on the TFV’s Fourth Update Report on the Implementation of the Initial Draft Implementation Plan (“Decision on Fourth Report”) - giving the TFV *carte blanche* to implement its Initial Draft Implementation Plan (‘IDIP’), without proper oversight - it is in the interests of the genuine victims, Parties and other stakeholders, to avoid a situation akin to what happened with the IDIP,⁶ which was approved

¹ Trust Fund for Victims’ second submission of Draft Implementation Plan, 24 March 2022, ICC-01/04-02/06-2750, with Annex 1, ICC-01/04-02/06-2750-Conf-Anx.

² Reparations Order, 8 March 2021, ICC-01/04-02/06-2659 (“Reparations Order”), Disposition.

³ Trust Fund for Victims’ submission of Draft Implementation Plan, 17 December 2021, ICC-01/04-02/06-2732, with Public redacted version of the Annex A to “Trust Fund for Victims’ submission of Draft Implementation Plan”, ICC-01/04-02/06-2732, dated 17 December 2021, ICC-01/04-02/06-2732-AnxA-Red.

⁴ Decision on the Trust Fund for Victims’ Request for Extension of Time to Submit Additional Information on Draft Implementation Plan, 24 February 2022, ICC-01/04-02/06-2749.

⁵ A version with track changes was provided by the TFV to the Parties on 25 March 2022.

⁶ Report on Trust Fund’s Preparation for Draft Implementation Plan With Annex A Initial Draft Implementation Plan with focus on Priority Victims, 8 June 2021, ICC-01/04-02/06-2676-Conf (“IDIP”).

by the Chamber⁷ despite evident deficiencies that have yet to be properly addressed and/or corrected more than 9 months later, despite the filing of four TFV update reports.

3. Notwithstanding the Decision on Fourth Report, these Defence Observations are submitted on behalf of the convicted person who has a legitimate interest in the outcome of the reparations process, which depends to a large extent on the approval of a sound, feasible and well-articulated implementation plan. Indeed, further, to being convicted of 18 counts of war crimes and crimes against humanity and sentenced to imprisonment for 30 years, Mr Ntaganda has been ordered to pay reparations in the amount of 30 million dollars, which is certainly not trite. True, Mr Ntaganda is indigent and the likelihood that he will have to disburse this money personally is at best remote. Nonetheless, the liability determined by Trial Chamber VI will remain a live issue for Mr Ntaganda until the entire sum has been raised by the TFV, if ever, and applied to reparations awarded to beneficiaries in this case.

4. Considering that the financial reparations liability of the convicted person is the result of a judicial process, Mr Ntaganda has a rightful interest in ensuring that reparations are awarded to verified victims of the crimes for which he was convicted; victims who were able to demonstrate the harm suffered and the causal link between such harm and these crimes, pursuant to the balance of probabilities standard.

5. This is even more important considering that since the beginning of the proceedings against him, relevant information on the identity of victims and their claims / narratives has been systematically withheld from Mr Ntaganda. Furthermore, Mr Ntaganda has appealed⁸ the liability of 30 million USD determined by Trial Chamber VI based *inter alia*, on alleged errors related to the *unknown* number or estimated number of victims.

6. Hence, while Mr Ntaganda is not so much concerned by the nuts and bolts of the implementation of the reparations process, he is deeply interested by the components of the Updated DIP that relate *inter alia* to the fairness of the reparations process. These include the determination of the number of potential beneficiaries, the thoroughness of the victims' eligibility assessment, both substantive and procedural, the risks associated with the modalities of the reparations process, the expected outcome(s) and prospects of success of the reparations process and the impact of the security situation in Ituri on the same, as well as the role of the TFV in the implementation of reparations and whether proper judicial oversight is exercised

⁷ Decision on the TFV's initial draft implementation plan with focus on priority victims, 23 July 2021, ICC-01/04-02/06-2696 ("Decision on IDIP").

⁸ Defence Appellant Brief against the 8 March Reparations Order, 7 June 2021, ICC-01/04-02/06-2675 ("Defence Appellant Brief"), paras.239-254.

over the TFCV's multi-faceted involvement therein. Accordingly, these are the issues on which these Defence Observations focus.

7. First, it would be premature to approve the Updated DIP in its present form (Section I), considering: (i) the absence of essential information such as a workable estimate of the number of potential beneficiaries and their location; (ii) the absence of sufficient information concerning the involvement of other humanitarian actors in the Democratic Republic of Congo ('DRC') such as UNOCHA and its numerous partners;⁹ and the impact of the International Court of Justice ('ICJ') Judgment on reparations against Uganda;¹⁰ (iii) the absence of other contextual information on the situation in Ituri, including the background of the Lendu - Hema ethnic conflict; (iv) the current security situation; (v) the pending appeals against the Reparations Order; (vi) the lack of available funds; and (vii) the slow pace of TFCV fundraising.

8. Second, while the Updated DIP refers to and relies on certain reparations principles, including *inter alia*, the adoption of a victim-centred approach, the principle of non-discrimination and the *do no harm* principle, the Updated DIP is impacted by the TFCV's misunderstanding of these principles and of the relationship between them (Section II).

9. Third, the *outcomes* as described by the TFCV in the Updated DIP must be modified as they go beyond what was envisioned by Trial Chamber VI in the Reparations Order.¹¹ While the first three outcomes are generally in line with the Chamber's instructions, the Defence takes issue with outcomes four and five, which depart from the Reparations Order (Section III).

10. Fourth, very importantly, the Updated DIP downplays the prevailing security situation in Ituri as well as its impact on the implementation of reparations in this case. Notably, in its Decision on TFCV Fourth Report,¹² the Chamber noted the submissions that the impact of the security situation on the IDIP's implementation *primarily* concerns the ability of the TFCV and its implementing partners to locate and contact victims and ultimately to provide them with services, and on this basis, the Chamber considered that it had received sufficient information

⁹ UNOCHA, Plan de Réponse Humanitaire – République Démocratique du Congo, Cycle de Programme Humanitaire 2022, January 2022 ("UNOCHA Plan de Réponse Humanitaire"), pp.47-48, available at https://www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/hrp_2022-janvier-v2-finale-web.pdf. Although insufficient, some information is provided in Attachment 1 of the Updated DIP, Section G.

¹⁰ International Court of Justice, Judgment of the Court on the reparations in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, 9 February 2022 ("ICJ Reparations Judgment").

¹¹ Updated DIP, para.137.

¹² Decision on the TFCV's Fourth Update Report on the Implementation of the Initial Draft Implementation Plan, 12 May 2022, ICC-01/04-02/06-2761-Conf ("Decision on Fourth Report").

and assurances as to the current impact of the security situation on the IDIP's implementation.¹³ The Defence takes issue with such a narrow and restricted view of the impact of the security situation (Section IV).

11. Fifth, with specific reference to the estimated number of potential beneficiaries and their location, which indisputably constitutes the backbone of the reparations process, the Updated DIP continues to rest on many unsupported assumptions and assertions (Section V). The Defence opposes the TFV's strategy to design reparations moving from the amount of liability set by Trial Chamber VI, instead of relying on accurate estimates of the number of potential beneficiaries.

12. Sixth, in the light of the TFV's reliance on these unsupported assumptions, it is necessary to address the consequences stemming from the absence of a reliable estimate of the number of potential beneficiaries and their location. It is also necessary to develop and propose an alternative strategy to this end and carry out a proper outreach campaign (Section VI).

13. Seventh, the information contained in the Updated DIP regarding the determination of the eligibility of potential beneficiaries poses several difficulties, which affect the fairness of the process and pave the way to reparations being awarded to non-deserving claimants. Despite the recent findings of the Chamber in its Decision on Fourth Report,¹⁴ this section addresses both the substantive and procedural aspects of the eligibility determination process, which depart from the Reparations Order and do not offer the required guarantees of due process (Section VII).

14. Eighth, although the modalities of the reparations process should not, in and of themselves, have the same importance for the convicted person, the fact that in this case the modalities envisaged in the Updated DIP depart markedly from the Reparations Order and give rise to serious risks, create a different situation that must be addressed (Section VIII).

15. Ninth, these Defence Observations address the multi-faceted role of the TFV in the implementation of reparations, as well as the absence of oversight exercised by the Chamber. Indeed, various provisions in the Updated DIP reveal that the TFV has taken the role of a party to the reparation proceedings at the expense of its independence and impartiality. In these circumstances, the sole conclusion available is that the Chamber's delegation of powers to the TFV – a non-judicial body, it is important to recall – must be accompanied by the exercise of

¹³ Decision on Fourth Report, para.28.

¹⁴ Decision on Fourth Report, para.27.

more robust oversight by the Chamber and a restrictive approach regarding the eligibility determination process (Section IX).

16. Lastly, these Defence Observations address the observations of the DRC authorities or *quasi* absence thereof on the Updated DIP.

SUBMISSIONS

I. It would be premature to approve the TFV Updated DIP in its present form

17. The TFV was ordered to prepare a draft implementation plan clearly specifying the objectives, outcomes, and activities identified as necessary to give effect to the Reparations Order.¹⁵ At a minimum, this required the TFV to validate findings and information provided in the Reparations Order and, in case of doubt, seek clarification from Trial Chamber VI or thereafter from the Chamber. Instead, the TFV focused on the liability of the convicted person, *i.e.* 30 million dollars, as determined by Trial Chamber VI, and designed programmes to spend this sum in the absence of the most basic information, *i.e.* the number or estimated number of potential beneficiaries.¹⁶ Notably, in so doing, the TFV downplayed available figures resulting from the work of VPRS,¹⁷ relying instead on figures advanced by the CLRs, parties to the reparation proceedings. The TFV thus developed its Updated DIP based on unsupported assumptions and unverified assertions, a summary review of which is provided in Annex A. To be sure, no proper implementation plan can be designed, let alone approved, before the TFV's assertions and assumptions are validated or negated.

18. In addition, to avoid planning the implementation of judicial reparations in a vacuum and without due consideration for the reality on the ground, it was necessary for the TFV to obtain significant contextual information in Ituri. Judicial reparations are different from other types of assistance provided by other humanitarian actors in Ituri, as well as different from assistance projects implemented by the TFV pursuant to rule 98(5) of the Rules of Procedure and Evidence. Consequently, it is imperative for the TFV to identify the other humanitarian actors operating in Ituri, the reasons for their presence in the DRC, as well as their strategic objectives, targeted beneficiaries and types of assistance provided. Judicial reparations should neither replace nor increase the assistance provided to the same beneficiaries. At a minimum, the Updated DIP must address the role of the United Nations Office of the Coordination of

¹⁵ Reparations Order, para.249.

¹⁶ Updated DIP, para.96.

¹⁷ Updated DIP, para.334.

Humanitarian Affairs (UNOCHA) and its very wide network of partners, with particular regard to its *Plan de réponse humanitaire*,¹⁸ and explain how judicial reparations will not exceed their limited *niche*. The same applies to ongoing TFV assistance projects. The genesis of these projects, the mode of selection and the generic identity of beneficiaries, the financial resources invested and the interplay between these projects and the present judicial reparations require further explanations.

19. The Updated DIP must also address the ICJ reparations award in the DRC v. Uganda Case. Uganda has been ordered to pay reparations in the amount of \$325,000,000, *i.e.* \$65,000,000 *per* year for the next five years, as a result of its responsibility arising from the same armed conflict in Ituri as the one during which the crimes for which Mr Ntaganda was found guilty were committed.¹⁹ The victims targeted are, at least in respect of the Lendu community, almost identical. Notably, DRC authorities have undertaken to distribute the reparations award to deserving beneficiaries.²⁰ It is thus paramount for the Updated DIP to explain the relationship between the one-sided reparations in this case and the DRC reparations programme that will be implemented, as well as how the TFV will avoid over-compensation to victims for the same harm.

20. The Updated DIP also lacks contextual information necessary to conceptualize a proper implementation plan. The most important factor to consider is the time lapse between the events which led to Mr Ntaganda's liability and the reparations process, *i.e.* 20 years. The implementation of reparations so long after these events cannot be improvised without a thorough understanding of what happened in Ituri since 2003. For instance, the ethnic conflict mainly between the Lendu and the Hema, which started as early as 1999,²¹ expanded over the years in various armed conflicts involving several militias, the DRC armed forces ('FARDC') and military units from other States. These armed conflicts resulted in a high number of casualties, vast population movements and a severe humanitarian crisis.²² The situation is such that one person out of six living in Ituri today is a displaced person.²³ Poverty in DRC has

¹⁸ UNOCHA Plan de Réponse Humanitaire.

¹⁹ ICJ Reparations Judgment, para.51.

²⁰ ICJ Reparations Judgment, para.408.

²¹ International Crisis Group, DR Congo: Ending the Cycle of Violence in Ituri, Africa Report No 292, 15 July 2020 ("International Crisis Group Report"), available at <https://www.crisisgroup.org/africa/central-africa/democratic-republic-congo/292-republique-democratique-du-congo-en-finir-avec-la-violence-cyclique-en-ituri>.

²² International Crisis Group Report.

²³ UNOCHA, République Démocratique du Congo: Personnes Déplacées Internes et Retournées.

reached astronomical levels.²⁴ More than 2,1 million children do not have access to education,²⁵ and more than two million children under the age of five suffer from malnutrition.²⁶ Attempting to determine what parts and/or how much of this catastrophic situation is the result of the crimes for which Mr Ntaganda was convicted cannot be accomplished in the abstract.

21. A proper understanding of the relevant context is even more important considering the one-sided nature of judicial reparations in this case. Contrary to the TFV's assertion,²⁷ neither the Prosecutor *nor* the Court have handled the situation in the DRC equally. While Mr Lubanga and Mr Ntaganda have been tried and convicted for numerous events taking place during a period of some 17 months, Mr Katanga was tried and convicted for a single attack, which lasted less than one day.²⁸ Yet, it is well documented that members of the Lendu community incorporated in or in association with various militias²⁹ committed multiple large-scale atrocities and massacres then³⁰ and have continued to do so since.³¹ The military activities of CODECO since 2017 are also well documented but absent from the Updated DIP.³² Notably, the number of Hema victims since the beginning of the ethnic conflict largely surpasses the

²⁴ UNOCHA Plan de Réponse Humanitaire, p.137.

²⁵ UNOCHA Plan de Réponse Humanitaire, Section 3.3. *See also*, Attachment 1 to Updated DIP, para.7.

²⁶ UNOCHA Plan de Réponse Humanitaire, Section 3.5. *See also*, Attachment 1 to Updated DIP, para.6.

²⁷ Updated DIP, para.11.

²⁸ *The Prosecutor v. Germain Katanga*, Judgment pursuant to article 74 of the Statute, 7 March 2014, ICC-01/04-01/07-3436-tENG, Disposition.

²⁹ Such as, for example, the "Rassemblement congolais pour la Démocratie Kisangani Mouvement de Liberation" (RCD/K-ML), the "Force de Résistance Patriotique de l'Ituri" (FRPI), and the "Front des Nationalistes et Intégrationnistes" (FNI).

³⁰ Human Right Watch, Ituri: "Couvert de Sang" - Violence ciblée sur certaines ethnies dans le Nord-Est de la RDC, 7 July 2003, Vol.15, No11(A), available at <https://www.hrw.org/fr/report/2003/07/07/ituri-couvert-de-sang/violence-ciblee-sur-certaines-ethnies-dans-le-nord-est-de-la>; MONUC, La MONUC enquête sur les atrocités à Drodoro en Ituri: au moins un millier de victimes selon les témoignages recueillis sur place, 6 April 2003, available at <https://reliefweb.int/report/democratic-republic-congo/la-monuc-enqu%C3%AAt-sur-les-atrocit%C3%A9s-%C3%A0-drodoro-en-ituri-au-moins-un>; Human Right Watch, R.D.C.: l'armée ne doit pas nommer des criminels de guerre, 13 January 2005, available at <https://www.hrw.org/fr/news/2005/01/13/rdc-larmee-ne-doit-pas-nommer-des-criminels-de-guerre>.

³¹ US Department of State, 2010 Country Reports on Human Rights Practices – Democratic Republic of the Congo, 8 April 2011, available at [Refworld | 2010 Country Reports on Human Rights Practices - Democratic Republic of the Congo](https://www.refworld.org/docid/4a5a5a5a.html); US Department of State, 2009 Country Reports on Human Rights Practices – Democratic Republic of the Congo, 11 March 2010, available at [Refworld | 2009 Country Reports on Human Rights Practices - Democratic Republic of the Congo](https://www.refworld.org/docid/4a5a5a5a.html); Radio Okapi, Ituri: plus de 10 000 déplacés à la suite des combats entre FARDC et FRPI, 10 June 2015, 10 June 2015, available at [Ituri: plus de 10 000 déplacés à la suite des combats entre FARDC et FRPI | Radio Okapi](https://www.radiookapi.net/actualites/ituri-plus-de-10-000-deplacés-a-la-suite-des-combats-entre-far-dc-et-fr-pi); The Defense Post, Dr Congo Militia Fighting Kills 11 in Ituri Province Despite Peace Deal, 2 October 2020, available at [DR Congo Militia Fighting Kills 11 in Ituri Province Despite Peace Deal \(thedefensepost.com\)](https://thedefensepost.com/news/2020/10/02/dr-congo-militia-fighting-kills-11-in-ituri-province-despite-peace-deal/).

³² United Nations Organization Stabilization Mission in the Democratic Republic of the Congo, Report of the Secretary-General, 21 March 2022, S/2022/252 ("UNSG Report"), available at [s_2022_252-en-march_2022.pdf \(unmissions.org\)](https://www.unmissions.org/sites/default/files/s_2022_252-en-march_2022.pdf); Bureau Conjoint des Nations Unies aux Droits de l'Homme HCDH – MONUSCO, Rapport public sur les conflits en territoire de Djugu, province de l'Ituri Décembre 2017 à septembre 2019, January 2020 ("HCDH-MONUSCO Report"), available at [RDCRapportpublicDjugu.pdf \(ohchr.org\)](https://www.hcdh.org/sites/default/files/2020-01/RDCRapportpublicDjugu.pdf); US Department of State, 2020 Country Reports on Human Rights Practices: Democratic Republic of the Congo, 30 March 2021, available at [Democratic Republic of the Congo - United States Department of State](https://www.state.gov/reports/2020-country-reports-on-human-rights-practices-democratic-republic-of-the-congo/).

number of victims from the Lendu community.³³ Yet, Hema victims of these attacks will not have access to judicial reparations, simply because Lendu leaders were not charged before the Court. This is the hidden face and danger of complementarity and the ironic nature of the ICC reparations process. It is thus of the utmost importance to bear this in mind when designing the implementation plan in these circumstances. Reparations handed out without a thorough and robust assessment of eligibility to potential beneficiaries belonging to or associated with Lendu militias responsible for protracted violence and atrocities, then and now, have the potential to ignite a more severe Ituri-wide conflict. It follows that the impact on the reparations process of the security situation in Ituri goes way beyond the possibility for the TFV to meet with potential beneficiaries.

22. Other reasons that justify the delay of the approval of the Updated DIP include the pending appeals against the Reparations Order. When rejecting the Defence request for suspensive effect, the Appeals Chamber held that “[...] in the interest of the victims, efforts to advance the reparations process should continue throughout the period in which it is examining the appeal briefs, taking into account the possibility that elements of this process may have to be revisited by the Trial Chamber or the TFV once the Appeals Chamber has made its determination.”³⁴ It is noteworthy that many provisions included in the Updated DIP are the object of the pending appeals.³⁵ The TFV acknowledges as much,³⁶ when it avers that “[...] a careful analysis of the Appeals Chamber’s judgement will be required [...] and strands ready to submit a third version at that time.”³⁷ The Defence posits that the Updated DIP requires much more work before it can be approved and that the TFV’s time would be better invested on obtaining necessary contextual information and working on organizational matters rather than proceeding on issues addressed in pending appeals.

23. Another important reason to delay the approval of the Updated DIP is simply that the TFV does not have the money to complement the 30 million USD award,³⁸ while its projections as to when such money can be obtained through fundraising are at best speculative.³⁹ Allowing

³³ HCDH-MONUSCO Report, paras.1,18,36-37,64,77-79.

³⁴ Decision on the Defence request for suspensive effect, 2 July 2021, ICC-01/04-02/06-2691, para.25.

³⁵ For instance: Transgenerational harm: Defence Appellant Brief, para.118-120; Role of the Defence: Defence Appellant Brief, paras.189-195; Number of victims: Defence Appellant Brief, paras.226-238; Delegation of the eligibility to the TFV: Defence Appellant Brief, paras.201-214.

³⁶ Updated DIP, para.30.

³⁷ Updated DIP, para.30.

³⁸ Updated DIP, paras.34,279-283.

³⁹ Updated DIP, para.281.

the TFV to proceed in the absence of accurate projections regarding the funds that can be obtained and the fundraising calendar, would unduly raise the expectations of the victims.

24. Lastly, the security situation in Ituri is also a very important reason to delay approval of the Updated DIP. The TFV acknowledges that “[i]deally, for the Trust Fund, its partners and in particular for the recovery of the victims, a reparations programme operates in a setting of peace, not of conflict”⁴⁰ and that it “will not be able, at least at the start, to embed its programme into the communities and within civil society in the same way as it would have done otherwise”.⁴¹ Yet, without providing any justification, the TFV takes the position that implementation should proceed nonetheless.⁴² For the reasons set out herein,⁴³ the impact of the security situation is much greater than the TFV believes it to be, and it is essential to delay the approval of the Updated DIP until the security situation is sorted out or, at a minimum, until reparations can be implemented with full knowledge of the relevant contextual information.

25. Significantly, according to the TFV, the implementation of reparations in this case will be a long process likely to last many years.⁴⁴ While this is certainly at odds with the need to repair the harm suffered by the victims two decades ago, it provides a workable timeframe to do things right and ensure that judicial reparations achieve their aim in full respect of the applicable principles. It is thus paramount to ensure that the very long anticipated reparations process is not further delayed by taking certain steps too quickly, such as approving an incomplete Updated DIP, resulting in the TFV having to start over again.

II. Reparations principles misconstrued by the TFV in the Updated DIP

26. In the Reparations Order, Trial Chamber VI adopted all principles set out by the Appeals Chamber in the *Lubanga* case and identified six new principles.⁴⁵ Three of these principles are of interest in relation to the Updated DIP, namely non-discrimination,⁴⁶ the victim-centred approach⁴⁷ and do no harm principle.⁴⁸ Regrettably, the TFV conflates and misapplies these principles in its Updated DIP.

⁴⁰ Updated DIP, para.26.

⁴¹ Updated DIP, para.28.

⁴² Updated DIP, para.141.

⁴³ Updated DIP, paras. 16-30, 52, 62-63, 65, 108, 141-145, 147-148, 156, 160, 202, 208, 227, 231, 235-236, 242, 246, 258, 291, 336, 340.

⁴⁴ Updated DIP, para.289 and Attachment “Programme Logical Framework”.

⁴⁵ Reparations Order, Footnote 79.

⁴⁶ Reparations Order, paras.41-44.

⁴⁷ Reparations Order, paras.45-49.

⁴⁸ Reparations Order, paras.50-52.

27. In particular, the TFV adopts an overly restrictive view of the *do no harm* principle, stating that “[c]oncretely, this means that the Trust Fund’s practices are such that they avoid re-traumatising victims in the process of being consulted or approached for potential intake into a reparations programme. By way of example, the Trust Fund has refrained from consulting unrepresented potential beneficiaries to not create undue expectations”.⁴⁹ While it is true that “[i]nteractions with victims should proceed with caution”,⁵⁰ this is certainly not the end, in and of itself, of the *do no harm* principle.

28. As held by Trial Chamber VI, “[t]he ‘do no harm’ principle stems from the field of international humanitarian assistance” and “[...] complements the humanitarian principles of humanity, impartiality, neutrality and independence.”⁵¹ The do no harm principle has been the object of voluminous literature and continues to be. Its overarching aim, supported by the TFV in previous pleadings, is for humanitarian assistance and reparations to be conflict sensitive:

“[t]his principle emphasizes that any action should avoid (a) exacerbating disparities; (b) discriminating between affected populations on the basis of the causes of the crisis; (c) creating or exacerbating conflict and insecurity for the affected populations [...]. Any potential short or long-term adverse effect on the beneficiaries and their communities should be analyzed and taken into account when deciding on reparations. For example reparations should not fuel existing or latent tensions within the community [...]”⁵²

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

30. Lastly, the ‘non-discrimination’ principle is also misconstrued by the TFV. All victims must indeed be treated fairly and equally during the reparations process, irrespective of whether they participated in the trial proceedings.⁵³ Hence, a victim who did not participate in the trial

⁴⁹ Updated DIP, para.68.

⁵⁰ Reparations Order, para.48.

⁵¹ Reparations Order, para.50.

⁵² *The Prosecutor v. Thomas Lubanga*, Submission on the principles to be applied, and the procedure to be followed by the Chamber with regard to reparations, 10 May 2012, ICC-01/04-01/06-2878, paras.5-7.

⁵³ Reparations Order, para.41.

proceedings but who opts to seek reparations at this stage must be treated in the same way as a victim who did participate in the trial proceedings. However, the ‘non- discrimination’ principle must be balanced with the voluntary nature of reparations: treating victims equally does not mean that all potential beneficiaries *must* obtain reparations, and thus it does not entail an obligation for the Court to contact and find every new potential beneficiary. The Court’s efforts in this sense can and should be reasonable, and thus can be safely limited both temporally and geographically. Indeed, considerable efforts and resources were invested by the Registry at the beginning of the case to inform potential victims of the possibility to participate in the proceedings and to seek reparations.⁵⁴ Further, reparations are entirely voluntary and there may very well be a reason why a potential victim may decide not to participate in the trial proceedings or in the reparations process. Finally, once new potential beneficiaries have had a reasonable opportunity to learn about the reparations process and request reparations, a cut-off date should be set by the Chamber to close the application period.

31. Fairness for the convicted person would be enhanced, the principle of ‘non-discrimination’ would be respected and preparations for the implementation of reparations would be much easier and expeditious.

III. The necessity to address the *outcomes* in the Tfv Updated DIP

32. Five *outcomes* are included in the Updated DIP,⁵⁵ the purpose of which is to achieve the Tfv’s overall goal of the reparations programme, *i.e.* that victim beneficiaries are enabled to overcome their harm and to achieve resilience in terms of mental, physical and socio-economic rehabilitation through access to quality and timely multi-sectoral services. However, the Defence takes issue with outcomes four and five of the Updated DIP, which go beyond the Reparations Order.

33. Indeed, the satisfaction of certified beneficiaries is not an objective that flows from the Reparations Order. While the Chamber envisioned certain satisfaction measures,⁵⁶ the Tfv puts excessive emphasis on the victims’ satisfaction, to a point where their wishes bear more importance than the Tfv’s strategic decisions.⁵⁷ Whether certified beneficiaries are satisfied of the reparations they received is relevant and important, but this cannot be, in and of itself, a

⁵⁴ Decision Establishing Principles on the Victims’ Application Process, 28 May 2013, ICC-01/04-02/06-67, paras.11-16.

⁵⁵ Updated DIP, para.137.

⁵⁶ Reparations Order, paras.88,207.

⁵⁷ *Infra*, para.93.

strategic objective driving the TFV's investment choices. Consequently, activities described in the Updated DIP, in relation to outcome 4, should at a minimum be reviewed.⁵⁸

34. The situation is the same in respect of outcome 5, which also exceeds and does not flow from the Reparations Order. Information concerning the judicial process, including the trial of Mr Ntaganda, has been and continues to be disseminated. This is related to the publicity of judicial proceedings, an important objective, but which is not a task incumbent on the TFV. As for information related to the severity of the crimes committed and the families and communities' acceptance of the reparations programme as an adequate response to the harm suffered, it also does not flow from the Reparations Order. Moreover, the risk of doing more harm than good by highlighting crimes by members of one of many militias in Ituri, is very high. Consequently, no resources should be invested by the TFV for these purposes and activities described in the Updated DIP, in relation to outcome 5,⁵⁹ should be deleted.

IV. The impact of the security situation in Ituri on the implementation of the Updated DIP

35. Both the Defence⁶⁰ and the Chamber⁶¹ previously requested the TFV to provide additional information with regard to the security situation in Ituri. Regrettably, what the TFV has provided in the DIP is not comprehensive enough, as many important issues remain substantially unaddressed. The TFV mainly stressed the fact that the situation has deteriorated in numerous places in Ituri,⁶² without providing a sufficient explanation as to the causes and consequences of the ongoing conflict, or any concrete mitigating strategy thereof. For the Chamber to be able to consider the impact of the security situation on reparations, the Defence hereby provides a brief overview of the current conflict in Ituri.

36. As acknowledged by MONUSCO,⁶³ the security situation in Ituri has dramatically worsened in the recent months: in the period between January and March 2022, more than 2,300

⁵⁸ Updated DIP, paras.219-246.

⁵⁹ Updated DIP, paras.219-246.

⁶⁰ Additional matters identified by the Defence in the Draft Implementation Plan that should be addressed by the Trust Fund for Victims, 24 January 2022, ICC-01/04-02/06-2740-Conf ("Defence Additional Matters"), para.7.

⁶¹ Decision on the TFV's Second Progress Report on the implementation of the Initial Draft Implementation Plan, 17 December 2021, ICC-01/04-02/06-2730-Conf ("Decision on Second Report"), para.9; Decision on the TFV's Third Update Report on the Implementation of the Initial Draft Implementation Plan, 10 February 2022, ICC-01/04-02/06-2745, para.10, Disposition.

⁶² Updated DIP, paras.17,20,340.

⁶³ UNSG Report.

civilians have perished in Ituri and in North Kivu due to the current conflict,⁶⁴ and more than 83.000 people are considered to be displaced.⁶⁵ In order to improve the security situation, DRC authorities have established a State of Siege, which has not however led to the intended results. On the contrary, since its instauration over a year ago, deadly attacks have more than doubled.⁶⁶

37. One of the main reasons of this deterioration lies in the actions of the “Coopérative pour le développement du Congo” (“CODECO”), a Lendu based armed group, which has been conducting deadly attacks in the region since 2017. CODECO militiamen killed around 196 civilians between 1 December 2021 and 7 March 2022,⁶⁷ and mostly target FARDC and specific ethnic groups.⁶⁸ In this regard, the UN has claimed that the widespread or systematic attacks (“attaques généralisés ou systématiques”) committed by CODECO, especially towards the Hema community, could constitute elements of crimes against humanity and war crimes.⁶⁹ In addition, CODECO has recently targeted displaced persons⁷⁰ and has been active in hostage taking. The armed group recently captured members of a special taskforce, such as Thomas Lubanga and Germain Katanga, sent by the Central Government to Ituri to promote peace and negotiate, *inter alia*, the end of the state of siege as well as the cessation of military operations in the area.⁷¹

⁶⁴ UN News, DR Congo: UN envoy calls for strategy to address root causes of conflict, 29 March 2022, available at [DR Congo: UN envoy calls for strategy to address root causes of conflict | UN News](https://www.un.org/news/story/2022/03/22032901); L’Obs, Des élus en colère en RDC: le nombre de morts a doublé en un an d’état de siège, 28 April 2022, available at <https://www.nouvelobs.com/monde/20220428.AFP0090/des-elus-en-colere-en-rdc-le-nombre-de-morts-a-double-en-un-an-d-etat-de-siege.html>.

⁶⁵ L’Obs, Des élus en colère en RDC: le nombre de morts a doublé en un an d’état de siège, 28 April 2022, available at <https://www.nouvelobs.com/monde/20220428.AFP0090/des-elus-en-colere-en-rdc-le-nombre-de-morts-a-double-en-un-an-d-etat-de-siege.html>.

⁶⁶ Radio Okapi, Des organisations dénoncent des violations de droits de l’homme au Nord-Kivu et en Ituri, 14 April 2022, available at <https://www.radiookapi.net/2022/04/14/actualite/societe/des-organisations-denoncent-des-violations-de-droits-de-lhomme-au-nord>; TV5 Monde, RDC : après un an d’état de siège, quel bilan à l’est du pays ?, 6 May 2022, available at <https://information.tv5monde.com/afrique/rdc-apres-un-d-etat-de-siege-quel-bilan-l-est-du-pays-455618>; L’Obs, Des élus en colère en RDC: le nombre de morts a doublé en un an d’état de siège, 28 April 2022, available at <https://www.nouvelobs.com/monde/20220428.AFP0090/des-elus-en-colere-en-rdc-le-nombre-de-morts-a-double-en-un-an-d-etat-de-siege.html>.

⁶⁷ UNSG Report.

⁶⁸ UNSG Report.

⁶⁹ HCDH-MONUSCO Report, stating: “Les enquêtes du BCNUDH ont permis de conclure que les atteintes aux droits de l’homme et les violences documentées dans ce rapport ont été commises dans la cadre d’attaques généralisés ou systématiques contre des civils, spécialement la population Hema, et pourraient de ce fait présenter des éléments constitutifs de crimes contre l’humanité notamment par meurtre, torture, viol et autres formes de violences sexuelles, pillages et persécution”; in the beginning of the report, they specified that alleged actors of the crimes committed by the Lendu are mainly part of CODECO

⁷⁰ Notably, on 1 February 2022 the armed group conducted a deadly attack on a camp for internally displaced persons, killing 62 civilians and injuring 34. See UNSG Report.

⁷¹ Jeune Afrique, RDC : Thomas Lubanga et Germain Katanga pris en otage, les miliciens posent leurs conditions, 22 February 2022, available at [RDC : Thomas Lubanga et Germain Katanga pris en otage, les miliciens posent leurs conditions – Jeune Afrique](https://www.jafr.com/rdc-thomas-lubanga-et-germain-katanga-pris-en-otage-les-miliciens-posent-leurs-conditions).

38. Several other armed groups present in Ituri also contribute to the deterioration of the security situation. This is the case of the “Front patriotique et intégrationniste du Congo” (FPIC), which often conducts attacks on civilians in coalition with CODECO.⁷² Another significant armed group involved in the region is the “Allied Democratic Forces” (“ADF”), an Islamist armed group, which killed around 160 civilians between 1 December 2021 and 7 March 2022.⁷³ In order to confront ADF fighters, the DRC authorities have allowed the UPDF from Uganda, once again, to enter their territory and fight along the FARDC.⁷⁴

39. It is thus clear that the security situation in the region remains complex, delicate and extremely volatile. Without a thorough understanding of these armed groups, as well as their location, strength, organisation, objectives, ethnic composition, and fighting practices, the TFV is in no position to assess the impact of the security situation on the implementation of the DIP. Without such information, it is hard to understand how the TFV could effectively propose strategies to mitigate possible security-related risks and in fact, it is not surprising that the Updated DIP is devoid of any such mechanism.

40. Furthermore, it is evident that the security situation has the potential to impact the implementation of reparations, far beyond access to potential beneficiaries.⁷⁵ Indeed, the opposite, *i.e.* that the implementation of reparations may impact the security situation, is also a concrete risk. Reparations implemented in this context could easily exacerbate the security situation, leading to new armed conflicts and violence detrimental to the genuine victims sought to be repaired, contrary to the do no harm principle as described above.⁷⁶

41. The TFV has already acknowledged this risk when stating that “[i]n Ituri Province, where recurrent violent conflict has taken place since over 20 years, the quasi-totality of its inhabitants have been victims in one form or another of crimes. Accordingly, there is a major risk that reparations for only a certain part of the community affected by such crimes are perceived as discriminatory and may be rejected by the communities, or, worse, fuel already

⁷² UNSG Report.

⁷³ UNSG Report; Radio Okapi, Ituri: 85 personnes tuées en 10 jours lors des incursions des rebelles (CRDH), 18 April 2022, available at [Ituri : 85 personnes tuées en 10 jours lors des incursions des rebelles \(CRDH\) | Radio Okapi](#); Radio Okapi, Ituri : 7 morts dans une attaque des ADF à Mukasila, 21 April 2022, available at [Ituri : 7 morts dans une attaque des ADF à Mukasila | Radio Okapi](#).

⁷⁴ Al Jazeera, Presence of Uganda troops in DR Congo temporary: Tshisekedi, 13 December 2021, available at <https://www.aljazeera.com/news/2021/12/13/presence-of-uganda-troops-in-dr-congo-temporary-tshisekedi>

⁷⁵ Defence observations on the Trust Fund for Victims’ Fourth Update Report on the Implementation of the Initial Draft Implementation Plan, 7 April 2022, ICC-01/04-02/06-2755-Conf (“Defence Observations on Fourth Report”), para.12; Defence observations on the TFV Second Progress Report on the implementation of the Initial Draft Implementation Plan, 6 December 2021, ICC-01/04-02/06-2726-Conf, para.7.

⁷⁶ *Supra*, paras.27-29.

existing tensions.”⁷⁷ This is why the TFV, in addition to active armed groups, should gain a better grasp of the historical relations between the different ethnic groups living in Ituri.⁷⁸ In this regard, it is surprising that throughout the DIP, the TFV seems unwilling or unable to provide any information on the territorial ethnic composition of Ituri, which undeniably bears utmost relevance for the implementation of reparations and stems at the heart of the do no harm principle. Only with such information can the TFV fully comprehend the impact of its own interventions on these inter-group relations.⁷⁹ Only then, the TFV would be able to propose concrete and effective strategies to mitigate risks and maximise positive impact.⁸⁰

42. One of the risks previously acknowledged⁸¹ by the TFV in this regard, is the affiliation of potential beneficiaries to CODECO or other armed groups involved in the conflict. Considering the strong link between some of these armed groups and the ethnic communities to which many potential beneficiaries belong, as well as the fact that these groups currently have full control of certain areas in Ituri,⁸² the risk of indirectly financing militias through reparations is a concrete one. Lessons from past experiences, and especially in Rwanda, have proven that this risk should not be underestimated.⁸³ Indeed, the TFV should implement a risk-mitigating strategy covering both the eligibility process and the implementation of reparations aimed at ensuring that (i) no reparation measure is afforded to victims who currently are – or have been – affiliated with an armed group; and (ii) the numerous cash transfers envisioned in the DIP will not be used to fuel the conflict by financing armed groups. This is required, at a minimum, by the do no harm principle.

43. For all these reasons, the Defence argues that the implementation of reparations cannot proceed in the current situation. Indeed, the TFV itself acknowledges the importance of operating in a different setting, once the security situation improves,⁸⁴ and the concrete risk that

⁷⁷ IDIP, para.80 (emphasis added).

⁷⁸ UNDP, A Principled Approach to Conflict Sensitive *Do No Harm* Programming in the context of Federal Iraq and the Kurdistan Region, 6 January 201, available at [conflict sensitive do no harm guidance.pdf \(reliefweb.int\)](https://reliefweb.int/conflict-sensitive-do-no-harm-guidance.pdf), as cited in Reparations Order, footnote 128.

⁷⁹ *Ibidem*.

⁸⁰ *Ibidem*.

⁸¹ Trust Fund for Victims’ Third Update Report on the Implementation of the Initial Draft Implementation Plan, 24 January 2022, ICC-01/04-02/06-2741-Conf, para.11.

⁸² International Crisis Group Report; Africa News, Two former warlords still held hostage by militia in DR Congo’s Ituri, 7 March 2022, available at [Two former warlords still held hostage by militia in DR Congo's Ituri | Africanews](https://www.africanews.com/2022/03/07/two-former-warlords-still-held-hostage-by-militia-in-dr-congos-ituri/); Updated DIP, paras.20,352.

⁸³ Abu Faisal Khaled, Do No Harm in refugee humanitarian aid: the case of the Rohingya humanitarian response, Journal of International Humanitarian Action 6(7), 8 March 2021, available at [Do No Harm in refugee humanitarian aid: the case of the Rohingya humanitarian response | Journal of International Humanitarian Action | Full Text \(springeropen.com\)](https://www.journalofinternationalhumanitarianaction.org/full-text/springeropen.com).

⁸⁴ Updated DIP, para.26.

many reparations activities might be potentially suspended or rendered inoperative by the security situation.⁸⁵ Despite this disastrous scenario, the TFV still considers that the implementation of reparations would still be “advantageous even in the situation of conflict,”⁸⁶ an assumption which, in the absence of a thorough analysis of the current conflict and potential related risks, seems to not rely on any risk/benefit ratio.

V. The absence of a reliable estimate of the number of potential beneficiaries and their location

44. The number of potential beneficiaries and ultimately of certified victims is at the heart of the entire reparations process. It directly impacts the rights and interests of Mr Ntaganda, as it represents the main factor in determining the extent of the harm caused and the consequent amount of financial liability ordered against him.⁸⁷ What is more, a reliable estimate of the total number of potential beneficiaries and their location is the starting point to be able to conceive and plan the implementation of judicial reparations and to submit a draft implementation plan as requested by Trial Chamber VI.

45. In the Updated DIP, the TFV recognises that neither the Parties, nor the Registry, nor Trial Chamber VI were able to provide an estimated number of victims.⁸⁸ Similarly, the TFV concedes that it is “equally in no position to provide an estimate”.⁸⁹ For this reason, the TFV clarifies that the figures provided are not estimates “in the sense that it is expected that this is the objective number of individuals having suffered from the crime for which Mr Ntaganda was convicted.”⁹⁰ The TFV adopted the opposite approach: moving from the total number of liability set by Trial Chamber VI, it designed its proposal with reference to the number of victims it believes can be accommodated within that amount of liability.⁹¹ Indeed, the TFV makes it clear that unlike other actors involved in the reparation proceedings, it is required to identify relevant services to be provided to the victims and to do so within the amount of liability set by the Trial Chamber. Hence, instead of reporting to Trial Chamber VI or to the Chamber the absence of reliable estimates, the TFV designed programmes to spend the amount of

⁸⁵ Updated DIP, para.202.

⁸⁶ Updated DIP, para.141.

⁸⁷ *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.89. In the present case, Trial Chamber VI set the amount of liability at 30.000.000 in the absence of a clear estimate of the number of victims. This determination was appealed both by the Defence and LRV2. See Defence Appellant Brief, paras.239-244 and LRV2 appeal, paras.102-109.

⁸⁸ Updated DIP, para.96.

⁸⁹ Updated DIP, para.96.

⁹⁰ Updated DIP, para.96.

⁹¹ Updated DIP, para.96.

liability, *i.e.* 30 million dollars, with the intention of later identifying the number of victims required to draw the services available from these programmes. Such reverse engineering is contrary to and defeats the ICC reparations process.

46. Regarding the victims' location, the TFV is equally relying on inaccurate assumptions. The Updated DIP is devoid of any real effort carried out – or planned – by the TFV to gather information in this regard. As further explained below,⁹² in particular if the mapping conducted by VPRS is ignored or set aside, it is imperative at this stage to conduct a comprehensive mapping exercise, which serves a two-fold purpose: (i) it is the first step to plan an efficient outreach strategy and eventually reach an accurate estimate on the number of potential beneficiaries; and (ii) it is a pre-requisite to eventually design programmes around the areas where most beneficiaries reside; to do otherwise would create a considerable risk that a high number of beneficiaries cannot partake in the programmes, thus undermining the main *raison d'être* of reparations.

47. The Defence thus opposes the TFV's approach in full and shares the LRV2's view that clear information regarding (i) the total number of potential beneficiaries / eligible victims; (ii) their identity; and (iii) their current location, is a pre-requisite to the development of any realistic plan for reparations programmes (including estimated costs) or eligibility assessment.⁹³

48. Regrettably, the TFV underestimates the risks associated with designing reparations in these circumstances. Its position that "sufficient information exists already to design a proposed programme, including with the flexibility necessary to adjust for victims who would find themselves in other locations",⁹⁴ is baseless. The TFV is acting based upon inaccurate estimates, which will inevitably lead to the need for a radical transformation of the programmes proposed and the related financial aspects.

49. Notably, a relevant process was initiated by the VPRS in 2020, when it was ordered by the Single Judge to gather information on the number of new potential beneficiaries and their location.⁹⁵ In January 2021, VPRS provided the "final" estimates of this preliminary

⁹² *Infra*, para.64.

⁹³ LRV2's internal submissions on the TFV preliminary proposal, paras.2-3, distributed to the TFV and the parties via email on 1 December 2021, at 16h10. See also Updated DIP, para.324.

⁹⁴ Updated DIP, para.324.

⁹⁵ Order setting deadlines in relation to reparations, 5 December 2019, ICC-01/04-02/06-2447, para.9(a). *See also*, Public redacted version of Annex I to Registry's First Report on Reparations, 1 October 2020, ICC-01/04-02/06-2602-AnxI-Red; Registry's Second Report on Reparations, ICC-01/04-02/06-2639 (With Confidential Annexes I-III); First Decision on Reparations Process, 16 June 2020, ICC-01/04-02/06-2547 ("First Decision on Reparations"), paras 43-44.

assessment, finding the number of new potential beneficiaries to be around 1,100, and began its efforts to map new potential beneficiaries.⁹⁶ Regrettably, shortly thereafter Trial Chamber VI issued the Reparations Order, deciding *inter alia* to abandon this exercise and shift the task of identifying and consulting with new potential beneficiaries to the TFV.⁹⁷ More than a year later, the TFV possesses no additional information on the number of potential beneficiaries and their location, other than unsupported figures brought to its attention by the CLR. Indeed, despite the TFV calling its estimates “conservative”,⁹⁸ most figures and conclusions in the DIP have no foundation whatsoever. They are discussed below in more detail.

Victims of the attack

50. With regard to Victims of the Attacks, the TFV admits that it is “impossible in advance to predict how many victims may ultimately come forward”,⁹⁹ adding that the consultations performed by the TFV “did not shed much more light”.¹⁰⁰ Nonetheless, without any citation or support, the TFV puts the potential number of direct victims as 7,500 at the very least,¹⁰¹ and the number of indirect victims as “beyond 14,000”, including persons who suffered transgenerational harm.¹⁰² These figures are clearly an attempt by the TFV to justify the planning of programmes worth 30 million USD.

51. Despite the Parties’ questions in this regard, the TFV is incapable of putting forward any basis for these figures.¹⁰³ The reality is that as of today, the TFV is only aware of 1,175 participating Victims of the Attacks who were positively pre-assessed by VPRS in January 2021,¹⁰⁴ and 53 additional individuals who filled in the VPRS consultation form before March 2021.¹⁰⁵ Besides these, the only figure available to the TFV is the estimate provided by VPRS that the number of unidentified victims of the attacks would not be higher than

⁹⁶ Annex I to the Registry’s Observations on Reparations, 28 February 2020, ICC-01/04-02/06-2475-AnxI, para. 25; Registry’s Observations on the “Request of the Common Legal Representatives of the Victims of the Attacks for an Order to the Registry to collect information pertaining to reparations” of 9 November 2020, ICC-01/04-02/06-2624, 18 November 2020, ICC-01/04-02/06-2627, para.17; Second Report, Public Redacted Version of Annex I (ICC-01/04-02/06-2639-Conf-AnxI) notified on 15 January 2021 of the Registry Second Report on Reparations, 10 February 2021, ICC-01/04-02/06-2639-AnxI-Red (“Annex I to Registry Second Report”), para. 39, 55-57. *See also*, First Decision on Reparations, para.32; Reparations Order, para.232. The VPRS maintained this estimate at least until September 2021. *See* Updated DIP, para.334 and fn.161.

⁹⁷ Reparations Order, paras.249-250.

⁹⁸ Updated DIP, para.93.

⁹⁹ Updated DIP, para.91.

¹⁰⁰ Updated DIP, para.92.

¹⁰¹ Updated DIP, para.93.

¹⁰² Updated DIP, para.94.

¹⁰³ Updated DIP, paras.96,148,161.

¹⁰⁴ Updated DIP, para.310; Annex I to Registry Second Report, para.9.

¹⁰⁵ Updated DIP, para.311,316.

[REDACTED].¹⁰⁶ As of 24 March 2021, the TFV remains unable to refer to any additional reliable information, which justifies departing from this figure.

52. Further, it must be underscored that the TFV should not consider in its estimates the 661 participating victims who were negatively pre-assessed by VPRS. Further to a clarification decision by Trial Chamber VI on the scope of the convicted charges,¹⁰⁷ VPRS concluded that these victims do not possess the requirements to obtain reparations.¹⁰⁸ In this regard, the Defence notes the TFV's intention to collect additional information from these participating victims and review their applications.¹⁰⁹ Yet, other than for CLR2's expressed interest to have these determinations reviewed, there are no reasons to second-guess the assessment conducted by VPRS based on Trial Chamber VI's decision. If such a review takes place, the Defence contends that the Chamber must be involved in this process and actively oversee the review.

53. In light of the above, the proposed figure of 21,500 Victims of the Attack is not only unsupported and speculative, it is completely detached from reality. The currently available figures point at a very limited number of Victims of the Attacks, which does not go beyond the number of 2,500.

Former Child Soldiers

54. Similarly, the TFV's estimates for Child Soldiers are largely baseless. The only precise numbers available to the TFV are 284 participating victims in *Ntaganda*, 1,455 victims recognized as beneficiaries in *Lubanga*, and 1,049 potential beneficiaries who applied before the *Lubanga* cut-off date of 1 October 2021.¹¹⁰ Notably these figures include both direct and indirect victims.

55. In this regard, although unspecified in the DIP, the 284 participating victims probably overlap with the 2,504 *Lubanga* victims.¹¹¹ What is more, the TFV avers that more than 1,000 additional direct and indirect victims who did not come forward before the cut-off date, are

¹⁰⁶ Updated DIP, para.334.

¹⁰⁷ Decision on issues raised in the Registry's First Report on Reparations, 15 December 2020, [ICC-01/04-02/06-2630](#).

¹⁰⁸ Annex I to Registry Second Report, paras.1-9.

¹⁰⁹ Updated DIP, para.401(c) and (d).

¹¹⁰ Updated DIP, para.108.

¹¹¹ In fact, the TFV has yet to see the application of a victim who would only fall within the temporal scope of *Ntaganda*. See Updated DIP, para.101.

expected to apply in the *Ntaganda* case,¹¹² which is inexplicable. The TFV is unable to provide any source or reference for this assertion, which – without more - must be disregarded.

56. Strikingly, in this context of uncertainty, and with a final figure for *Lubanga* victims which does not go beyond 2,504, the TFV assumes that the overall number should be around 9,000 victims, 6,000 of which are expected to be indirect victims of transgenerational harm.¹¹³ Considering the overlap between the *Lubanga* and *Ntaganda* child soldier victims, as well as the fact that the number of only *Ntaganda* child soldiers is expected to be minimal,¹¹⁴ the proposed estimate of 9,000 child soldiers victims in the present case is completely unrealistic.

Indirect victims of transgenerational harm

57. As indicated above, the TFV takes the view that over 6,000 applicants will claim to have suffered transgenerational harm.¹¹⁵ Not only is this assertion completely unsupported, it also underestimates the complexity of transgenerational harm, as further analysed below and on many occasions.¹¹⁶ Thus, the inner characteristics of transgenerational harm can only lead one to presume that the number of beneficiaries claiming this type of harm will be extremely limited. Indeed, the context of the IDIP provides a good example: as of 24 March 2022, [REDACTED].¹¹⁷ The Defence deems it appropriate to underscore that transgenerational harm was not assessed in *Lubanga*.

Unidentified victims

58. Further, the Defence takes issue with the TFV's approach to unidentified victims. Throughout the DIP, the TFV repeatedly argues that most of the victims have not yet come forward and that the number of unidentified beneficiaries is expected to be large.¹¹⁸ These claims are unfounded: not only is the TFV unable to provide any basis for this assertion, but the previous practice at the Court demonstrates the opposite. A striking example is the *Lubanga* case. Despite many years of relentless attempts by the CLRs to identify additional victims and

¹¹² Updated DIP, paras.101,278. the TFV then mentions that the LRV in the *Lubanga* case “know still of about 1,000 child soldier, direct and many indirect victims” who would need to be included in the *Ntaganda* case.

¹¹³ Updated DIP, paras.109-110.

¹¹⁴ Updated DIP, paras.101.

¹¹⁵ Updated DIP, paras.94,110.

¹¹⁶ *Infra*, para.76. Defence Appellant Brief, paras.131-133; Reply to LRV1 and LRV2 Responses to Mr Ntaganda's Appellant Brief, 30 September 2021, ICC-01/04-02/06-2712, Section V; Defence Additional Matters, para.8(x); Defence Observations on Fourth Report, para.42.

¹¹⁷ Annex 1 to the Trust Fund for Victims' Fourth Update Report on the Implementation of the Initial Draft Implementation Plan, 24 March 2022, ICC-01/04-02/06-2751-Conf-Anx1, para.33.

¹¹⁸ Updated DIP, paras.91,109,313,318,334.

extend the cut-off date to this end, the total count of direct and indirect *applicants* in *Lubanga* is 2,504, which falls far below the initially assumed figures of 3,000-5,938 beneficiaries.¹¹⁹ This is not only revealing; it makes it clear, contrary to the TFV's submissions,¹²⁰ that the beginning of implementation does not necessarily correspond to a boost in the number of applicants.

59. Further, the Defence is concerned by the TFV's assertion that "considering the security problems in the Djugu territory over the past many years, it can be assumed that the number of potential beneficiaries will be much higher".¹²¹ The Defence fails to see the relevance of the security problems in Djugu after the temporal scope of the case on the determination of the number of victims eligible for reparations.

The victims' location

60. While in the First DIP the TFV considered that "a rather high number" of beneficiaries lived outside of Ituri Province, *i.e.* in Uganda or other parts of the DRC,¹²² in the Updated DIP the wording was changed to "a percentage" of beneficiaries.¹²³ This is a consistent theme in the TFV, CLRs and VPRS submissions.¹²⁴ However, no explanation is provided as to *what* percentage of victims is estimated to reside outside of Ituri, and the DIP is devoid of any information on displacement relating specifically to beneficiaries in *Ntaganda*.

61. Indeed, despite ongoing consultations with the CLRs, the TFV is unable to provide an estimate of how many of the participating victims do not live in Ituri,¹²⁵ which would be the minimum knowledge required of the TFV. The only sources considered are UNOCHA and UNICEF statistics, which are of limited assistance: first, they are too general, as they refer only

¹¹⁹ *Prosecutor v. Thomas Lubanga Dyilo*, Redaction of Filing on Reparations and Draft Implementation Plan, 3 November 2015, ICC-01/04-01/06-3177-Red, para.253; *Prosecutor v. Thomas Lubanga Dyilo*, Corrected version of the "Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable", 21 December 2017, ICC-01/04-01/06-3379-Red-Corr-tENG, para.222.

¹²⁰ Updated DIP, para.318.

¹²¹ Updated DIP, para.298.

¹²² Updated DIP, para.90.

¹²³ Updated DIP, para.95,111.

¹²⁴ See *inter alia*, Public redacted version of "Trust Fund's Second Update report on the Implementation of the Initial Draft Implementation Plan", submitted on 23 November 2021, ICC-01/04-02/06-2723-Conf, 28 December 2021, [ICC-01/04-02/06-2723-Red](#), para.10; Public Redacted version of the "Response of the Common Legal Representative of the Former Child Soldiers to the Trust Fund's Second Update report on the Implementation of the Initial Draft Implementation Plan (ICC-01/04-02/06-2723-Conf)", 7 January 2022, [ICC-01/04-02/06-2725-Red](#), para.15; Public Redacted Version of the 'Response of the Common Legal Representative of the Victims of the Attacks to the "Trust Fund's Second Update report on the Implementation of the Initial Draft Implementation Plan"', ICC-01/04-02/06-2724-Conf, dated 6 December 2021, 7 January 2022, [ICC-01/04-02/06-2724-Red](#), para.17; Annex III to the Registry's Second Report on Reparations, 15 January 2021, [ICC-01/04-02/06-2639-Conf-AnxIII](#).

¹²⁵ The TFV met with 33 Victims of the Attacks displaced in Bunia (Updated DIP, para.63) but never provided an estimate of how many participating victims are currently displaced outside of Ituri.

to the overall population of Ituri; second, they only refer to displacement *within* Ituri, and thus do not assist in establishing how many potential beneficiaries live in other regions of DRC or abroad.¹²⁶ The TFV is thus unable to support the assertion that many victims reside in Uganda or in other parts of the DRC. In fact, while the Judgment mentions that, in the context of the First Operation, “[...] some fled towards Nzebi, others to Uganda”,¹²⁷ [REDACTED], [REDACTED], [REDACTED], [REDACTED].¹²⁸

62. Despite having no information regarding the location of potential beneficiaries, let alone regarding their presence in Uganda or other parts of the DRC, the TFV intends to carry out outreach, identification and information collection activities in Uganda,¹²⁹ and design specific reparations (involving cash hand-outs and considerable expenses) for those who do not reside in Ituri.¹³⁰ This is nothing more than improvisation at its best with the aim of finding victims to justify its 30 million USD programming.

VI. Determination of the number of new potential beneficiaries and outreach

63. In light of these issues, the Updated DIP must design a strategy to identify new potential beneficiaries before even considering the implementation of reparations. In this regard, the Defence posits that clarification on the proper terminology to be used, is necessary as a first step. Indeed, the DIP should refer only to three categories: (i) potential beneficiaries, *i.e.* participating victims (both direct and indirect) and those who are already identified; (ii) new potential beneficiaries, *i.e.* those who are yet to be identified and any applicant who comes forward during the reparations phase before the cut-off date; and (iii) certified victims, *i.e.* potential beneficiaries who have been found to be eligible. The Defence thus disagrees with the terminology used by the TFV, in particular regarding the proposed distinction between direct and indirect beneficiaries,¹³¹ insofar as it leads to situations, described *infra*, in which reparations are awarded to non-certified victims.¹³²

64. An effective, efficient, and budget-considerate outreach strategy to reach new potential beneficiaries must then be designed. This implies a two-fold process: (i) first, the TFV must carry out a mapping exercise to determine the locations where new potential beneficiaries may reside; and (ii) second, carry out a fair and effective outreach strategy in these areas, in order to

¹²⁶ Updated DIP, paras.21-25.

¹²⁷ Judgment, 8 July 2019, para.505 [internal references omitted].

¹²⁸ ICC-01/04-02/06-T-76-CONF-ENG, 4 April 2016, pg.27,55.

¹²⁹ Updated DIP, para.341,401(g).

¹³⁰ Updated DIP, paras.154,180,198,202,205,273,401(g).

¹³¹ Updated DIP, para.46.

¹³² See *infra*, para.106.

allow new potential beneficiaries to come forward before a pre-determined cut-off date. Based on the results of this exercise, the TFV will have knowledge of the relevant locations and a more accurate estimate of the potential number of beneficiaries, and thus will be able to design victims-tailored reparations. Instead, the TFV's proposal to extend outreach to Uganda or other parts of DRC¹³³ without any information on the location of potential beneficiaries is nothing more than a fishing expedition, which will result in a waste of precious resources.

65. In addition to the question of *where* outreach must be performed, relevant issues arise in relation to *who* disseminates the message, and *what* information is conveyed in the message. A sound strategy in this regard is required to ensure that the applicable principles are respected and that the expectations of the victims are reasonably managed.

66. This further raises the question as to who should have contact with new potential beneficiaries. The TFV, contrary to the 'do no harm' principle, proposes a plethora of intermediaries: VPRS, the Registry, the Trust Fund's local partners, civil society organisations, CLRs in both *Ntaganda* and *Lubanga* cases and implementing partners.¹³⁴ Further, the TFV's proposal is also contradictory and goes against the Chamber's orders. The TFV correctly points out that "the Trial Chamber already decided that the CLRs would not be included in the process of identification".¹³⁵ Then, it holds that "explaining the right to reparations and the link to the case and scope of the case/order/programme is an essential aspect of the process of identification".¹³⁶ Finally – and inexplicably - it states that the CLRs, among others, "should be in a position to make contact with potential beneficiaries to inform them of where and how information is collected" and to explain the eligibility criteria.¹³⁷

67. The Chamber carefully limited the CLRs role during this phase, to avoid the practice implemented in other cases, where the CLRs were directly involved in the search for new potential beneficiaries and subsequently in the preparation of their forms and applications,¹³⁸ thus undermining the transparency and independence of the process. In a phase in which impartiality and independence are fundamental, this task must be left to VPRS, which has long-time experience in this field, or outsourced to a specialised entity or organisation. The role of the CLRs, as well as of other stakeholders, during this delicate phase must be clarified.

¹³³ Updated DIP, paras.341,401(g).

¹³⁴ Updated DIP, para.310.

¹³⁵ Updated DIP, para.332.

¹³⁶ Updated DIP, para.329.

¹³⁷ Updated DIP, para.348.

¹³⁸ Updated DIP, para.330.

68. Moreover, the Defence submits for obvious reasons that the organisation in charge of outreach and identification should not be the same organisation that carries out the verification as part of the eligibility process. Indeed, to ensure fairness and impartiality, a sound distinction between the roles assigned to different entities at different stages of the procedure is required.

69. Important issues are also raised by the content of the outreach message, the wording of which must be carefully limited to avoid unduly raising the expectations of new potential beneficiaries. As such, it needs to clarify that reparations are linked to the judgment, and thus can be awarded only to a limited number of victims who possess specific and strict requirements, in accordance with the temporal and territorial scope of the convicted crimes.¹³⁹ The Defence is thus concerned by the TFV's stated intention, pursuant to outcome five, to "carry out outreach and advocacy within the DRC and beyond to raise the awareness of the communities, families, children who attend school and the public at large about the severity of the crimes and about their consequences."¹⁴⁰ Not only does this approach go well beyond the Reparations Order,¹⁴¹ it is also dangerous inasmuch as it gives the impression that *all* victims of serious crimes in Ituri will be able to access reparations.

70. For this reason, the message must be validated and approved by the Chamber before it is disseminated. To this end, the Defence opposes the TFV's proposal to design all communication materials "jointly with the Registry and in consultation with the CLRs".¹⁴² The Defence contends that the final content of the message must be shared with all Parties, including the Defence, who must be able to make submissions before the Chamber's approval.

71. What is more, the Defence opposes the TFV's proposal that "outreach campaigns will be conducted throughout the life cycle of the reparation programme".¹⁴³ In line with the Court's practice in Lubanga,¹⁴⁴ the Chamber should establish a cut-off date for applicants to come forward. Not only would this expedite the outreach activity and constitute an incentive for

¹³⁹ Reparations Order, paras.6,48.

¹⁴⁰ Updated DIP, para.222.

¹⁴¹ Reparations Order, para.88.

¹⁴² Updated DIP, para.341.

¹⁴³ Updated DIP, para.344.

¹⁴⁴ *The Prosecutor v. Thomas Lubanga Dyilo*, Decision Approving the Proposals of the Trust Fund for Victims on the Process for Locating New Applicants and Determining their Eligibility for Reparations, 7 February 2019, ICC-01/04-01/06-3440-tENG, para.42, Disposition; *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the submissions by the Legal Representative of Victims V01 in its Response to the Twelfth Report of the Trust Fund for Victims on the implementation of collective reparations, filing ICC-01/04-01/06-3500-Conf-Exp, 26 March 2021, ICC-01/04-01/06-3508, para.17, Disposition.

victims to come forward, it would also allow the TFV to begin the implementation with a finite number of beneficiaries. This should mark the end of the outreach programme.

VII. Determination of the potential beneficiaries' eligibility to receive reparations

72. From the moment Trial Chamber VI (i) decided to award collective reparations with individualized components;¹⁴⁵ (ii) determined that there was no need to rule on the merits of individual applications;¹⁴⁶ and (iii) delegated the *administrative* eligibility assessment to the TFV,¹⁴⁷ the determination of the potential beneficiaries' eligibility to receive reparations has been a contentious issue. Whether the Defence has a role to play in this process beyond making submissions on the Updated DIP is a matter pending before the Appeals Chamber.¹⁴⁸ Yet, the fact remains that the eligibility of each potential beneficiary will have to be determined much in the same way as if reparations were individual. In this regard, notwithstanding Trial Chamber VI's delegation of powers to the TFV and the use of the term *administrative*, the eligibility determination remains a judicial matter for which the Chamber is ultimately responsible. Consequently, the Chamber must be fully informed by the TFV as to how it intends to determine the eligibility of potential beneficiaries, both substantively and procedurally. The Updated DIP fails to do just that.

Substantive matters

73. The Updated DIP provides no information regarding the substantive determination of the eligibility of potential beneficiaries, which is surprising to say the least. The TFV states that it "will issue guidelines in due course",¹⁴⁹ assuming that the Chamber will approve the Updated DIP and ask for additional information later, as it did for the IDIP. In this regard, the Defence recalls the Chamber's finding that "the rights of the convicted person are guaranteed, as the Defence have had the opportunity to challenge the applicable standards of proof and causation and will be able to make submissions on the TFV's proposed administrative eligibility assessment before its approval".¹⁵⁰ The Updated DIP's silence here signals that the Defence will be denied even this minimum guarantee.

¹⁴⁵ Reparations Order, para.194.

¹⁴⁶ Reparations Order, para.196.

¹⁴⁷ Reparations Order, para.253.

¹⁴⁸ Defence Appellant Brief, paras.189-195.

¹⁴⁹ Updated DIP, para.368.

¹⁵⁰ Decision on IDIP, para.37.

74. Yet, pursuant to the Reparations Order, the TFV was required to provide such details in the Updated DIP.¹⁵¹ Although Trial Chamber VI delegated the design of the eligibility determination mechanism to the TFV, the intention cannot have been to shroud the process in mystery.

75. Notwithstanding the above, the Defence acknowledges that the TFV provided some substantive guidelines in the context of the IDIP.¹⁵² While the Defence made extensive submissions in response thereto,¹⁵³ regrettably, the Chamber declined to address most of these, including *inter alia*, submissions related the temporal scope, transgenerational harm, establishment of harm and indirect victims.¹⁵⁴ Although it is unclear whether these guidelines will be used in the context of the Updated DIP, the Defence hereby recalls all submissions made with respect to the substantive matters contained therein.¹⁵⁵ Moreover, should new guidelines be issued, the Defence requests that they be shared with all Parties and that it be granted the opportunity to provide submissions.

76. In particular, the Defence regrets that the TFV failed to provide any information as to how it intends to assess the applications of victims alleging to have suffered from transgenerational harm.¹⁵⁶ As previously argued,¹⁵⁷ scientific literature shows that transgenerational trauma is inherently hard to establish, as diagnoses are continuously and rapidly evolving, and require highly specialized medical and psychological expertise to be identified.¹⁵⁸ Establishing that transgenerational trauma is the result of a specific event, in a context of protracted conflict, is even more complex.¹⁵⁹ Thus, the TFV must provide, at the earliest opportunity, an explanation as to how it intends to approach and assess such applications, in order to allow the Parties to submit observations and the Chamber to validate or correct the TFV's approach.

¹⁵¹ Reparations Order, para.253.

¹⁵² Annex 1 to the Trust Fund for Victims' Fourth Update Report on the Implementation of the Initial Draft Implementation Plan, 24 March 2022, ICC-01/04-02/06-2751-Conf-Anx1 ("TFV Guidelines").

¹⁵³ Defence Observations on Fourth Report, Section II.

¹⁵⁴ Decision on Fourth Report, para.27.

¹⁵⁵ Defence Observations on Fourth Report.

¹⁵⁶ TFV Guidelines, para.33.

¹⁵⁷ Defence Appellant Brief, paras.131-133; Reply to LRV1 and LRV2 Response to Mr Ntaganda's Appellant Brief, 30 September 2021, ICC-01/04-02/06-2712, para.4; Defence Additional Matters, para.8(x); Defence Observations on Fourth Report, para.42.

¹⁵⁸ For more detailed submissions, see Defence Final Submissions, para.89, and Defence Appellant Brief, para.131.

¹⁵⁹ Defence Final Submissions, paras.93-96; Defence Appellant Brief, paras.140-148.

77. The same applies to the notion of indirect victims. While the Reparations Order identified four categories of indirect victims,¹⁶⁰ the establishment of the causal link to the requisite standard of proof can be complex. For example, for indirect victims alleging to have suffered economic harm, the causal link is twofold: the applicant must show a link between the harm suffered and the harm suffered by the direct victim¹⁶¹ and, in addition, a link between his/her situation and one of the crimes for which Mr Ntaganda was convicted.¹⁶² Additional information as to what the TFV intends to require of the applicant to show that his/her economically disadvantaged position is linked to one of the convicted crimes, is necessary.

78. Further, the Defence reiterates its concerns related to Trial Chamber VI's finding - currently under appeal - regarding the definition of "indirect victim" and the possibility that members of the Abbé's extended congregation be considered as such on the basis of their membership in the religious community.¹⁶³ This extremely broad approach raises questions as to the applicable standard of proof applied in practice, the demonstration of the harm suffered and, most importantly, the causal nexus with the crimes, which the Updated DIP fails to address.

Procedural matters

79. Regarding the procedural aspects of the eligibility assessment, the TFV provided some limited information in its Fourth Report on the implementation of the IDIP, regarding the procedure followed to determine the eligibility of the first 45 applicants.¹⁶⁴ Once again, the Defence responded, raising legitimate concerns on behalf of the convicted person, which the Chamber declined to address.¹⁶⁵ The Defence takes issue with the Chamber's finding that it "is confident that the TFV has the capacity to conduct, as instructed, a fair, efficient, and expeditious assessment of the victims' eligibility."¹⁶⁶ Having delegated the design and conduct of the eligibility assessment, the Chamber should at least be interested in the procedure followed by the TFV.

80. Nonetheless, the Defence deems it appropriate to address procedural flaws concerning the (i) collection of information; (ii) verification; and (iii) review.

¹⁶⁰ Reparations Order, para.36.

¹⁶¹ See, for example, Reparations Order, para.27.

¹⁶² See, for example, the situation described in the Updated DIP, para.181.

¹⁶³ Defence Appellant Brief, paras.115-117.

¹⁶⁴ Fourth Report, Section B.

¹⁶⁵ Decision on Fourth Report, para.27.

¹⁶⁶ Decision on Fourth Report, para.21.

i. Collection of information

81. The process by which potential beneficiaries may become certified beneficiaries begins with the collection of information. The TFV's proposed method of collecting information, however, is problematic, starting with the purported role of the CLRs. In fact, while both the TFV and CLR2 agree that information should be collected by a neutral body without the involvement of the CLRs,¹⁶⁷ the Updated DIP then provides that "the Trust Fund will work together with [...] the intermediaries of the CLRs and the Registry to collect the relevant information from potential beneficiaries".¹⁶⁸ The Defence takes the view that the role of the CLRs during this phase should be limited to assisting the TFV in contacting their clients.

82. Moreover, the Defence takes issue with the intermediary approach chosen by the TFV for the collection of information.¹⁶⁹ In particular, the TFV itself recalled that "the intermediary approach has not been chosen in the past due to the limited quality of information received".¹⁷⁰ In this particular case, information obtained by the Trust Fund from certain intermediaries "about the social consequences of the fact that the charges for which Mr Ntaganda was convicted [...] do not reflect the perceived larger extent of actions he allegedly committed,"¹⁷¹ suggests that information collected by intermediaries is unlikely to be fair or thorough.

83. Notwithstanding these concerns, the TFV proposes this course of action because, "in light of the very high number of Victims of the Attacks expected and their locations [...] the Registry and/or the Trust Fund's staff are in no position to collect the relevant information from all potential beneficiaries by themselves".¹⁷² Strikingly, by the TFV's own admission,¹⁷³ these "expectations" are baseless, as they do not reflect the number of new potential beneficiaries. In fact, the TFV and the Registry have no knowledge as to whether they would be capable of handling the collection of information or whether it would be *necessary* to resort to the assistance of intermediaries. Hence, the Defence submits that the intermediary approach should not be pursued, at least until more accurate estimates are available. That said, the Defence supports the position advanced by the CLR2, that VPRS be in charge of this process.¹⁷⁴

¹⁶⁷ Updated DIP, paras.332-333.

¹⁶⁸ Updated DIP, para.353.

¹⁶⁹ Updated DIP, paras.249,353-354.

¹⁷⁰ Updated DIP, para.335.

¹⁷¹ Updated DIP, para.138.

¹⁷² Updated DIP, para.350.

¹⁷³ Updated DIP, para.96.

¹⁷⁴ Updated DIP, para.333.

84. Finally, the Defence reiterates its opposition to the use of simplified forms aimed at gathering “only the limited information necessary for the determination of the eligibility”, which, once again, is unduly based on the assumption of large numbers of victims.¹⁷⁵ These simplified forms are simply unfit for purpose. With a view to avoiding “creating or exacerbating conflict and insecurity for the affected populations”, in accordance with the do no harm principle, it is imperative to take stock of the relevant contextual information about Ituri, adopt a robust eligibility determination mechanism, and ensure that judicial reparations are awarded only to genuine victims. Therefore, the required information must include, at a minimum, the applicant’s personal details, a description of the relevant events, details of the harm alleged to be suffered, an explanation as to how the harm can be causally linked to the crimes for which Mr Ntaganda was convicted, a description of the applicant’s movements since 2002 and the reasons for this movement. In addition, the applicants must provide supporting documents to substantiate their application. Regrettably, the use of a simplified form results in the information collected being insufficient and precludes a thorough evaluation of that information, which goes against the true focus of reparations proceedings. Hence, the TFV’s proposal regarding the collection of information cannot be approved as it stands.

85. In any case, the TFV intends to consult the Parties in relation to the development of the simplified form.¹⁷⁶ Accordingly, the Defence will provide additional submissions when in possession of the proposed form. However, it must be underscored that a form for the purposes of reparations was already developed by VPRS upon a request by Trial Chamber VI.¹⁷⁷ While the Chamber did not rule on the form, some work regarding has already been done; there is no need for duplication.

ii. Verification

86. The TFV proposes a 15-day procedure involving a one-step verification process, conducted – at least for the time being - solely by the TFV.¹⁷⁸ The TFV further states that the eligibility process should “[h]ave a simple and efficient identification and verification process in place that ensures that verification takes place shortly after identification”.¹⁷⁹

¹⁷⁵ Updated DIP, para.351.

¹⁷⁶ Updated DIP, para.351.

¹⁷⁷ First Decision on Reparations Process, 26 June 2020, ICC-01/04-02/06-2547, para.35.

¹⁷⁸ Updated DIP, para.371,378.

¹⁷⁹ Updated DIP, para.323.

87. The Defence takes issues with the TFV's overreliance on the need for expeditiousness. While efficiency is important, it cannot override the need for a robust, fair and thorough eligibility determination process. As previously advocated by VPRS, some applications might require a limited amount of time to be assessed, while it will inevitably take longer for others.¹⁸⁰ What really matters in this context is the completeness of the verification process: the 15-day time-limit does not assist in this regard. More importantly, it should not be used to justify recourse to an oversimplified verification procedure.

88. Furthermore, the Defence opposes the TFV's approach to the purported role of VPRS in this process. Indeed, VPRS has raised doubts as to the potential workload resulting from such an exercise, based once again, on the unsupported estimated high number of victims.¹⁸¹ This, in turn, led to the TFV being the only verification body, at least for the time being.¹⁸² However, consultations as to who should be responsible for the verification process should take place only when a more accurate estimate of the number of new potential beneficiaries is available. This notwithstanding, the Defence recalls that the Chamber – in line with the Independent Commission of Experts¹⁸³ – has already praised the importance of VPRS's expertise and instructed the TFV to “[...] consider whether the administrative eligibility assessment and urgency screening could be carried out by the Registry in whole or in part.”¹⁸⁴ The Defence thus advocates for a more prominent involvement of VPRS in the verification process.

89. In any case, should the TFV end up being the only actor involved in the verification process, more information as to the individuals who will assess the eligibility of potential beneficiaries and make the final decisions is needed, in order to ensure the transparency of the process. The TFV should, at the very least, provide information on (i) their legal education; (ii) their professional background; and (iii) their qualifications and skills to conduct the eligibility assessment in a fair and efficient manner.

¹⁸⁰ VPRS observations on the TFV's proposal for the eligibility process in the *Ntaganda* case, distributed to the parties on 10 December 2021, para.23.

¹⁸¹ Updated DIP, para.378.

¹⁸² Updated DIP, paras.373,378-379,401-402.

¹⁸³ Independent Expert Review of the International Criminal Court and the Rome Statute System – Final Report, 30 September 2020, ICC-ASP/19/16, paras.943-947 and R.358, available at https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP19/IER-Final-Report-ENG.pdf.

¹⁸⁴ Decision on IDIP, para.38.

iii. Review

90. The TFV proposes a procedure for the review of negative eligibility decisions in which the only actors involved are the CLRs representing the rejected victim and the TFV itself.¹⁸⁵ The proposed procedure does not envision any role for the Defence, the Registry and, most importantly, the Chamber.

91. Although a similar process was adopted in the context of the IDIP¹⁸⁶ - where the Chamber provided guidance on urgent matters requiring urgent solutions - it should not automatically apply in the context of the Updated DIP. To be clear, the Defence posits that at least in the review process for negative decisions, its involvement would be desirable, with a view to providing a valid counterbalance. The review process is premised on a challenge to a decision – the involvement of another Party besides the one submitting the challenge cannot but enhance the overall fairness and transparency of the procedure. To be sure, not only is this in line with the previous practice of the Court,¹⁸⁷ but a review procedure without the participation of the Defence would be nothing short than unprecedented.

92. For the same reasons, and regardless of whether the Defence is afforded the opportunity to present informed observations, it is fundamental that the Chamber bears a prominent role *at a minimum* in the review process. Indeed, this limited involvement would at least ensure a judicial determination of those disputes in which the TFV's determinations on eligibility are brought into question. Moreover, it would allow the Chamber to review, in practice and on a regular basis, the accuracy of the TFV's decisions. Finally, the Chamber's involvement in this procedure would only require a limited effort, as the number of applications is likely to be less than expected, and only a portion of them will be negatively assessed.

¹⁸⁵ Updated DIP, paras.380-384.

¹⁸⁶ Decision on Second Report, para.13; Decision on the TFV's First Progress Report on the implementation of the Initial Draft Implementation Plan and Notification of Board of Directors' decision pursuant to regulation 56 of the Regulations of the Trust Fund, 28 October 2021, ICC-01/04-02/06-2718-Red, paras.17-21.

¹⁸⁷ *The Prosecutor v. Thomas Lubanga Dyilo*, Order instructing the Trust Fund for Victims to supplement the draft implementation plan, 9 February 2019, ICC-01/04-01/06-3198-tENG, para.14; *The Prosecutor v. Thomas Lubanga Dyilo*, Order for Reparations, ICC-01/04-01/06-3129-AnxA, para.66; *The Prosecutor v. Thomas Lubanga Dyilo*, Corrected version of the "Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable", 21 December 2017, ICC-01/04-01/06-3379-Red-Corr-tENG, para.27; *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Reparations Order, 17 August 2017, ICC-01/12-01/15-236, para.65; *Prosecutor v. Ahmad Al Faqi Al Mahdi*, Decision on Trust Fund for Victims' Draft Implementation Plan for Reparations, 13 July 2018, ICC-01/12-01/15-273-Red, para.70.

VIII. The risks associated with the modalities of reparations in the Updated DIP

93. At the outset, the Defence notes the TFCV's tendency to accord excessive prominence to the victim's wishes when it comes to selecting the most appropriate reparations measures.¹⁸⁸ While this may seem like a facet of the victim-centred approach, reparation modalities cannot be left to the discretion of the victims. In the absence of sufficient guidelines in the Reparations Order,¹⁸⁹ the voluntary nature of reparations only requires that the victim consents to take part in reparations, but the choice of the specific components of rehabilitation measures rests with the TFCV and the implementing partner.

94. Moreover, as foreshadowed by the Defence,¹⁹⁰ the lack of clarity in the Reparations Order as to the meaning of "collective reparations with individualised components" resulted in the TFCV's confusion regarding the meaning of "collective" and "individual", and ultimately in the vast majority of the reparations proposed being individual.

95. According to the Reparations Order, collective reparations "differ from individual reparations in that they benefit a group or category of persons who have suffered a shared harm."¹⁹¹ However, the Updated DIP, with only one exception,¹⁹² does not distinguish between different categories or groups of victims, but proposes that all modalities selected by the TFCV (in particular rehabilitation and socio-economic measures) be made available to all eligible victims.¹⁹³ For example, the TFCV argues that rehabilitation "is collective in that all victims found eligible will have access to all components of the rehabilitation programme".¹⁹⁴ However, the fact that *all* beneficiaries can benefit from all reparation modalities does not make them collective: quite the opposite, it shows that they are not group-specific. The TFCV proposes specific programmes to be tailored by the implementing partners on the basis of the harm suffered by each applicant, specific to their individual needs,¹⁹⁵ and regardless of their belonging to a given group of victims, thus mirroring the Chamber's definition of individual reparations.¹⁹⁶

¹⁸⁸ Updated DIP, paras.131(c),165,183.

¹⁸⁹ Defence Appellant Brief, paras.210-214.

¹⁹⁰ Defence Appellant Brief, para.11.

¹⁹¹ Reparations Order, para.80.

¹⁹² The only group-specific measure is one of financial assistance for direct victims of rape and sexual violence and children born out of rape or sexual slavery. See Updated DIP, para.126-127.

¹⁹³ Updated DIP, paras.118, 131(b).

¹⁹⁴ Updated DIP, para.131(b).

¹⁹⁵ Updated DIP, para.158.

¹⁹⁶ Reparations order, para.70: "Individual reparations are those where the ensuing benefit is afforded directly to an individual to repair the harm the person suffered as a consequence of the crimes for which the defendant was convicted, conferring upon a victim a benefit to which they are exclusively entitled."

96. It is now clear that “collective” is nothing more than a label that, in essence, facilitated the TFV’s departure from the Chamber’s instructions. In reality, the Chamber’s failure to identify the applicable modalities of reparations in the Reparations Order¹⁹⁷ left the TFV without adequate guidance. The resulting issues, set out below, will undoubtedly require amendments to the DIP.

Compensation and financial assistance

97. The Reparations Order correctly defined compensation as a residual and exceptional form of economic relief,¹⁹⁸ which must be used as “a substitute remedy [...] when there is no way to undo the effects of the violation through other measures”.¹⁹⁹ However, the Reparations Order did not foresee other forms of financial assistance, recognizing only that in the case at hand, compensation measures would have to take the form of symbolic payments.²⁰⁰

98. Inexplicably departing from the Reparations Order, the TFV proposes several forms of monetary cash hand-outs, which it categorizes as “symbolic forms of financial assistance, and not specifically [as] compensation [...]”.²⁰¹ In the Updated DIP, the TFV proposes (i) a cash hand-out of [REDACTED] to direct victims of rape and sexual violence and children born out of rape or sexual slavery (“SGBV victims”);²⁰² (ii) a monetary lump-sum to all eligible victims residing outside of Ituri;²⁰³ (iii) potentially, a monetary lump-sum to internally displaced persons in Ituri;²⁰⁴ (iv) a starter sum for all eligible victims at the moment of intake;²⁰⁵ (v) a fixed sum of money to beneficiaries with dependants, in order to cover school fees;²⁰⁶ (vi) a fixed allowance for beneficiaries who undertake a study programme;²⁰⁷ (vii) financial assistance during vocational trainings;²⁰⁸ (viii) additional amounts of money for transportation and loss of earnings; and (ix) a cash subvention for the first year of implementation of an IGA.²⁰⁹ In this regard, the Defence welcomes the removal of the possibility for victims to opt for a lump-sum

¹⁹⁷ The Chamber simply listed the modalities available to the TFV, but did not identify them in relation to the specific harms suffered by the victims. For more detailed submissions, see Defence Appellant Brief, paras.210-214.

¹⁹⁸ Reparations Order, para.202.

¹⁹⁹ Reparations Order, para.84.

²⁰⁰ Reparations Order, para.192, referring to First Experts Report, ICC-01/04-02/06-2623-Anx1-Red2, para.175.

²⁰¹ Updated DIP, paras.121,123.

²⁰² Updated DIP, paras.126-127,238.

²⁰³ Updated DIP, paras.154,198.

²⁰⁴ Updated DIP, para.202.

²⁰⁵ Updated DIP, paras.182,185,207.

²⁰⁶ Updated DIP, para.192.

²⁰⁷ Updated DIP, para.191.

²⁰⁸ Updated DIP, para.193.

²⁰⁹ Updated DIP, para.207.

of money *in lieu* of rehabilitation programmes.²¹⁰ Nonetheless, the use of financial assistance is still predominant across the DIP, as also explicitly stated by the TFV,²¹¹ which is a serious source of concern.

99. Indeed, the TFV misapplied the Reparations Order by proposing cash hand-outs while overlooking their risks; and by ignoring the Chamber's requirement that compensation measures, even if symbolic, be awarded only when other measures cannot be implemented.²¹²

100. In particular, the TFV overlooks (i) the risk of financing armed groups in Ituri (explained above in more detail²¹³); (ii) the risk that victims of attacks falling outside the geographical or temporal scope of the charges will come forward when informed that monetary assistance is being awarded to victims of the 2002-2003 conflict involving members of the Lendu and Hema community;²¹⁴ and (iii) the additional risks highlighted by the TFV²¹⁵ and CLR2, who held that "the disbursement of money to a potentially very high number of victims simultaneously, as it is expected, is likely to even worsen the prevailing general insecurity in the affected communities and thus it is hardly reconcilable with the 'do no harm' principle."²¹⁶

101. In particular, the TFV's intended large-scale outreach campaign will provide all the information necessary to submit a claim, using a simplified form, and to meet the basic requirements for eligibility. This will inevitably attract non-eligible victims, especially in light of the situation of extreme poverty across Ituri.²¹⁷ Notably, a similar risk materialised in the *Lubanga* case.²¹⁸ Taking into consideration the low standard of proof as seemingly applied by the TFV,²¹⁹ the lack of any independent verification, and the TFV's intent to consider the submission of a "coherent and credible account" sufficient for purposes of eligibility,²²⁰ the risk of non-eligible claimants obtaining unwarranted financial compensation is very high. The TFV

²¹⁰ This possibility was envisioned in paras.188-190 of the First DIP.

²¹¹ Updated DIP, para.184: "money transfers do appear to be one of the favourite types of interventions".

²¹² Reparations Order, paras.84,202.

²¹³ *Supra*, paras.21,29,42.

²¹⁴ This risk is briefly and insufficiently dealt with by the TFV in para.346 of the updated DIP.

²¹⁵ Trust Fund for Victims' observations relevant to reparations, 28 February 2020, [ICC-01/04-02/06-2476](#), para.105.

²¹⁶ Public Redacted Version of the "Final Observations on Reparations of the Common Legal Representative of the Victims of the Attacks" (ICC-01/04-02/06-2633-Conf), 21 December 2020, [ICC-01/04-02/06-2633-Red](#) ("CLR2 Final Observations"), para.56.

²¹⁷ *Supra*, para.20.

²¹⁸ *Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, 14 March 2012, [ICC-01/04-01/06-2842](#) ("Lubanga Judgment"), para.147.

²¹⁹ *Supra*, para.84. *See also*, Defence Observations on Fourth Report, paras.24-25.

²²⁰ Updated DIP, para.74. *See also*, Defence Observations on Fourth Report, paras.24-25.

does not propose any countermeasure and its explanation in this regard is, to say the least, insufficient.²²¹

102. Further, the Defence fails to see the purported purpose of these measures, or takes the view that other measures are more appropriate. First, the proposal to award a compensation [REDACTED] to SGBV victims is significantly flawed. The justifications advanced by the TFV are unsatisfactory, and do not explain how this measure can redress the specific harm suffered by this group of victims.²²² Considering the dangers highlighted by the Expert,²²³ other rehabilitation measures listed in the DIP are objectively more appropriate.²²⁴

103. The same applies to the TFV's proposed "support starter sum".²²⁵ The TFV failed to justify how this measure serves any real purpose. Notably, the purported benefit of permitting that the victims "are in the right mental space to benefit from rehabilitation awards" or that they "trust in the actions of the Court"²²⁶ are far outweighed by the risks associated with handing out cash to all eligible victims at the same time.²²⁷

104. Similarly, the Defence takes issue with the TFV's approach to the disbursement of a lump-sum to those victims who reside outside of Ituri. First, as argued above,²²⁸ a mapping exercise is required to have a realistic idea of the number and location of potential recipients of the lump-sum, also for budgetary purposes. Second, the TFV should provide an explanation as to why the same measure was discarded in the *Lubanga* case.²²⁹ Third, no indication is given as to the quantification of the lump-sum. Fourth, the TFV disregards the established principle that monetary hand-outs must be the *extrema ratio*. In this regard, an alternative solution is available: the TFV could establish a system of expense pre-approval and subsequent reimbursement in order to allow eligible victims outside of Ituri to access equivalent reparations measures, such as psychological assistance, medical treatment or socio-economic measures, in their place of residence. This system – which requires a limited administrative effort and is already envisioned for some proposed measures²³⁰ - would allow the TFV to have knowledge

²²¹ Updated DIP, para.346.

²²² Updated DIP, para.126.

²²³ See, for example, Annex 2 to the Registry Transmission of Appointed Experts' Reports, 2 November 2020, [ICC-01/04-02/06-2623-Anx2-Red2](#), paras.66-67.

²²⁴ See Updated DIP, paras. 163, 168, 212-214, 239-240, comprising, *inter alia*, psychological assistance, medical care, physical rehabilitation and assistance for ID-issuance.

²²⁵ Updated DIP, paras.172-177.

²²⁶ Updated DIP, para.185.

²²⁷ CLR2 Final Observations, para.56.

²²⁸ *Supra*, paras.46,64.

²²⁹ Updated DIP, para.209.

²³⁰ Updated DIP, para.192.

and control of how the money is ultimately spent, and at the same ensure that eligible victims have access to the most appropriate treatment to address the harm they suffered.

Socio-economic measures

105. What is more, the same system should be enforced with regard to all socio-economic measures that envision a disbursement of money directly to the beneficiary. In order to minimise the risks highlighted above²³¹ – and acknowledged in the DIP²³² – the TFV should avoid cash hand-outs to the victims as much as possible, and favour instead direct payments to the relevant service providers. Where this is not possible, the expense pre-approval/reimbursement regime should be enforced. In case a cash hand-out is absolutely unavoidable, the TFV should implement a reporting system on how the sums have been spent. For instance, although the TFV's proposal is unclear,²³³ the Defence contends that school fees should be paid directly to the service provider, instead of disbursing the money to the beneficiary. The same should be applied to all tuition fees for university, trainings and language courses.²³⁴ As for material support for IGAs,²³⁵ and all microfinance activities proposed by the TFV,²³⁶ an expenses reporting system is the minimum that should be required.

106. Finally, the Defence takes issue with the TFV's proposal regarding the possibility of granting a pension to those beneficiaries who are not able to pursue IGA by themselves.²³⁷ While the Defence agrees that pension-like financial support should be discarded because it “may not be the best way to rehabilitate the relevant victims”,²³⁸ the Defence opposes the alternative proposal to allow another family member to participate in an IGA. Indeed, there is an issue of eligibility – the family member, unless he/she is able to prove the opposite, would not possess the required *status* to be considered as an eligible beneficiary and thus cannot be included in a reparations programme.

²³¹ *Supra*, paras.100-101.

²³² *See*, for instance, Updated DIP, para.203.

²³³ The language of para.192 seems to suggest that the reimbursement system is in place only for the fixed budget to buy school kits, and not for the school fees.

²³⁴ Updated DIP, paras.188-190.

²³⁵ Updated DIP, paras.193-194,207.

²³⁶ Updated DIP, paras.195-196,207.

²³⁷ Updated DIP, para.210.

²³⁸ Updated DIP, para.210.

Symbolic measures

107. In relation to the Sayo Health Centre, the TFV proposes “the erection of a plaque/small monument” to “commemorate its destruction and underline that it is protected under international law and that **the perpetrator has been punished**.”²³⁹ Although it is unclear whether the plaque will refer directly to Mr Ntaganda and/or the UPC/FPLC, this message risks exacerbating the pre-existing tensions among the different communities living in or around Mongbwalu. Firstly, the Reparations Order only referred to a sign “indicating that the building enjoys special protection under international humanitarian law.”²⁴⁰ This language was carefully limited by the Chamber, with the TFV going beyond its instructions.

108. Secondly, as recognized by the expert,²⁴¹ the wider area surrounding Mongbwalu, including Sayo, has been (and still is) the theatre of ongoing violence, with attacks continuing long after the temporal scope of this case. Hence, there is no clear record of how many times the Sayo Health Center has been targeted or rendered inoperative in the past 20 years, but the number would likely be large.²⁴² As such, a plaque referencing one attack will inevitably be perceived as a one-sided symbolic measure, thus leading to further tension and animosity among the ethnic groups living in the area. In order to mitigate this risk, the TFV must, at a minimum, explore basic parameters, such as (a) who is currently living in Sayo; (b) who left Sayo, when, and why; (c) the ethnic composition of the people living in Sayo; (d) the presence of armed groups.

109. As regards the symbolic measures relating to the death of the Abbé Bwanalunga, the Defence does not in principle oppose the naming of a community centre after him.²⁴³ However, the Defence argues that the TFV must first conduct a full risks assessment, as it well established that during the same conflict, Lendu fighters have also killed clerics from the Hema community.²⁴⁴ In order to avoid further animosity and tension, the TFV needs to evaluate whether such a measure will not be perceived as driven by double-standards or as only repairing

²³⁹ DIP, para.233 (emphasis added).

²⁴⁰ Reparations Order, para.208.

²⁴¹ Dr Sunneva Gilmore, Expert Report on Reparations for Victims of Rape, Sexual Slavery and Attacks on Healthcare, filed as Annex 2 to the Registry Transmission of Appointed Experts’ Reports, 2 November 2020, ICC-01/04-02/06-2623-Conf-Anx2-Red, Part IV (“Dr Gilmore Report”), para.168; *See also* Reply to LRV1 and LRV2 Responses to Mr Ntaganda’s Appellant Brief, 30 September 2021, ICC-01/04-02/06-2712, para.59.

²⁴² For more details on the matter, see Reply to LRV1 and LRV2 Responses to Mr Ntaganda’s Appellant Brief, 30 September 2021, ICC-01/04-02/06-2712, para.59.

²⁴³ Updated DIP, para.228.

²⁴⁴ The Guardian, EU Soldiers in Congo find their hands are tied, 23 June 2003, available at [EU soldiers in Congo find their hands are tied | World news | The Guardian](#).

the harms suffered by one community. This risk assessment is also necessary when it comes to deciding where to establish the community centre.

110. Furthermore, the TFV proposes to hire a consultant whose role would be to search for specific missing persons.²⁴⁵ However, nothing has been directed in this sense in the Reparations Order. The Defence takes the view that deploying one consultant with this purpose will be nothing but ineffective, as also foreshadowed by the TFV, who states that “whether this will lead to the expected result is unclear”²⁴⁶, thus suggesting that this proposal could lead to a waste of resources. Further, the Defence underscores that there are other organisations specialized in this field, which can count on a proper and efficient structure to accomplish this task. For example, ICRC, which owns an office in DRC,²⁴⁷ is known for its incessant work through its “Central Tracing Agency” in restoring family links after someone went missing due to armed conflict or internal violence.²⁴⁸

IX. The multi-faceted role and conflicting tasks attributed to the TFV and the lack of proper oversight over the TFV

111. It stems from the Updated DIP that the TFV has moved away from its *raison d’être* and lost its identity. From an independent and impartial body responsible for convincing the international community to invest resources in reparations for victims, it has become an operative programme management entity. Yet, it is acting contrary to the most basic programme management principles. Only the judiciary can realign the TFV in the right.

112. The absence of the most basic checks and balances in the reparations process envisioned in the Updated DIP is in fact unprecedented. Banking on the delegation of judicial powers to conduct the eligibility assessment of potential beneficiaries, a task which it is, at best, ill-equipped to perform, the TFV proceeded to sideline important stakeholders such as VPRS, let alone the Defence, and ultimately put itself in charge of every single task in every single phase of reparations proceedings. This is best illustrated in Annex B, which lists the multi-faceted and often conflicting tasks the TFV is now responsible for.

113. Allowing one and the same body to perform all of these tasks, on its own, without the involvement of anyone representing the interests of the convicted person and without any

²⁴⁵ Updated DIP, paras.241-243.

²⁴⁶ Updated DIP, para.241.

²⁴⁷ ICRC, ICRC delegation in Kinshasa, available at <https://familylinks.icrc.org/organization/icrc-delegation-kinshasa>.

²⁴⁸ Information is available at <https://www.icrc.org/en/what-we-do/restoring-family-links>.

judicial oversight by the Chamber is neither sound nor legally correct. In short, the same body cannot publicize the possibility for new beneficiaries to obtain reparations; decide what information they must provide to obtain reparations; invite them to come forward; promise them a financial benefit to convince them to do so; meet with new potential beneficiaries; inform them of their rights; tell them what information they must provide to obtain reparations; collect the relevant information; verify the information provided; rule on the eligibility of new potential beneficiaries; and, in the event of a negative determination, inform the CLRs of what is missing and rule on the request for review. In this case, this is but the tip of the iceberg. It also casts a veil of mystery on the entire procedure.

114. Regrettably, the TFV itself advocates for a minimum involvement of the Chamber, as was the case for the IDIP, where the Chamber limited its involvement to receiving reports and providing clarifications if needed.²⁴⁹ However, the Defence posits that while the Chamber's position finds reason in the context of the IDIP, where there is a need to proceed expeditiously and urgently, such necessity is not prominent in the context of the DIP.²⁵⁰

115. Consequently, the Chamber now has an opportunity to correct the course of these proceedings and to take on a greater role in all phases of reparations. This requires the Chamber, at a minimum, to (i) require and obtain all the missing information highlighted in these Defence Observations before approving the DIP; (ii) correct the TFV's actions in conformity with the applicable principles, focusing in particular on the risks posed by the current security situation; (iii) extend its scrutiny and approval to the details and specificities of the proposed programmes, taking into consideration the risks highlighted by the Defence; (iv) play a more prominent role in the determination of the number of new potential beneficiaries and outreach programmes; (v) provide instructions – as Trial Chamber VI did with VPRS in 2020 - on how to proceed for the required exercise to determine the number of victims and their location, and determine who should be in charge of this process; (vi) approve the outreach message before it is disseminated; (vii) set a cut-off date for applications; (viii) request additional information on the substantive aspects of reparations; (ix) renovate its oversight role in all phases of the eligibility assessment, and in particular during the verification process; and (x) design a new process for the review of negative determinations, whereby the Chamber itself decides on the requests for review, involving the Defence, in line with the Court's practice in this regard.

²⁴⁹ Updated DIP, para.306.

²⁵⁰ See, for instance, Updated DIP, paras.36,248,289.

CONCLUSION

116. In light of the above, the Defence posits that a lot of work still needs to be performed before the DIP can be approved and the implementation of reparations can begin. Indeed, although the TFV had a chance to rectify the First DIP and clarify the many issues highlighted by the Parties in January, the Updated DIP remains defective and insufficient.

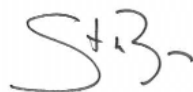
117. Due to page-limit restraints, the Defence did not address the totality of the issues arising from the Updated DIP. However, these Observations highlight a number of risks, matters of concern, and proposed solutions, which should be considered by the Chamber and taken as a starting point for the TFV to correct its proposed plan before the beginning of the implementation phase.

118. What is more, the Defence must express its disappointment with the scarce observations filed by the DRC authorities on 6 May 2022.²⁵¹ The DRC contribution to the process of reparations would have been both desirable and beneficial, thus reflecting the importance of reparations in the country. The DRC authorities could have provided valuable information on many issues, including the security situation in Ituri and the realistic chances of successfully implementing reparations amidst the current conflict. Regrettably, they declined to do so.

CONFIDENTIALITY

119. Pursuant to regulation 23*bis* (1) and (2) of the Regulations of the Court, this Defence Response is classified as confidential as it responds to the Updated DIP, likewise classified as confidential.

RESPECTFULLY SUBMITTED ON THIS 13th DAY OF SEPTEMBER 2022



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²⁵¹ Annex III to the Transmission des observations des autorités de la République Démocratique du Congo relatives à la version publique expurgée du projet mis à jour du Plan de mise en œuvre du Fonds au profit des victimes, 6 May 2022, ICC-01/04-02/06-2760-Conf-AnxIII.