

Original: **English**No.: **ICC-01/04-02/06**Date: **11 March 2024****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**

Public Redacted Version of "Defence observations on the Trust Fund for Victims' Thirteenth Update Report on the Implementation of the Initial Draft Implementation Plan", dated 20 October 2023, ICC-01/04-02/06-2874-Conf

Source: Defence Team of Mr Bosco

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Further to the Decision on the Trust Fund for Victims (“TFV”)’s Ninth to Twelfth Update Reports on the implementation of the Initial Draft Implementation Plan (“IDIP”) issued by Trial Chamber II (“Chamber”) on 31 August 2023 (“Decision on Ninth to Twelfth Update Reports”)¹ and the submission by the TFV of its Thirteenth Update Report on the implementation of the Initial Draft Implementation Plan, on 9 October 2023 (“TFV Thirteenth Update Report”),² Counsel for Mr Bosco Ntaganda (“Defence”) hereby submits these:

Defence observations on the Trust Fund for Victims’ Thirteenth Update Report on the Implementation of the Initial Draft Implementation Plan

“Defence Observations - TFV 13th Report”

INTRODUCTION

1. As a preliminary matter, the Defence respectfully observes that in its Notice of appeal against the Addendum issued by the Chamber on 14 July 2023,³ it challenges the Chamber’s holding therein that the Initial Draft Implementation Plan (“IDIP”)⁴ continued to be “fully operational, as it has not been affected by the Appeals Judgment” and that the TFV could continue determining the eligibility of IDIP victims.⁵ The relief sought by the Defence in its appeal is a finding that the continued implementation of the IDIP was *ultra vires*.

¹ Decision on the TFV’s Ninth to Twelfth Update Reports on the Implementation of the Initial Draft Implementation Plan, 31 August 2023, ICC-01/04-02/06-2868 (“Decision on Ninth to Twelfth Update Reports”).

² Trust Fund for Victims’ Thirteenth Update Report on the Implementation of the Initial Draft Implementation Plan, 9 October 2023, ICC-01/04-02/06-2873 (“TFV Thirteenth Update Report”).

³ Defence Notice of Appeal against the 14 July Addendum to the Reparations Order of 8 March 2021, 16 August 2023, ICC-01/04-02/06-2863, Ground 2.

⁴ Report on Trust Fund’s Preparation for Draft Implementation Plan, 8 June 2021, ICC-01/04-02/06-2676-Conf, with Annex A, Initial Draft Implementation Plan with focus on Priority Victims, ICC-01/04-02/06-2676-Conf-AnxA (‘IDIP’).

⁵ Order for the Implementation of the Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled Reparations Order”, 25 October 2022, ICC-01/02/06-2786 (“Implementation Order”), para.17; Decision on the TFV’s Sixth and Seventh Update Reports on the Implementation of

2. Notwithstanding the arguments put forward its appeal against the Addendum and the relief sought therein, and having reviewed the TFV Thirteenth Update Report, the Defence hereby offers the following observations on six specific issues, namely (i) external challenges impacting the TFV;⁶ (ii) the handover of victims for the purpose of eligibility determinations pursuant to the IDIP;⁷ (iii) the IDIP programme's capacity to include additional victims;⁸ (iv) the collection of information on the urgency needs of potential victims by the implementing partners;⁹ (v) the progress made with broadcasting the 'communication piece' through radio within the affected communities;¹⁰ and (vi) the handover of outreach activities to the Registry/PIOS, including for the IDIP purposes.¹¹

CONFIDENTIALITY

3. Pursuant to regulation 23*bis* (1) and (2) of the Regulations of the Court, these Defence Observations are classified 'confidential' as they respond to submissions likewise classified 'confidential'. The Defence undertakes to submit a public redacted version of these Defence Observations at the earliest possibility.

SUBMISSIONS

I. External challenges impacting the TFV

4. Under the heading 'external challenges' the TFV addresses the highly volatile security situation in the areas in which it is operating, asserting nonetheless that it has not posed new or unforeseen challenges in relation to the programme implementation.¹² The TFV further reiterates that the main impact of this situation for

the Initial Draft Implementation Plan, 16 November 2022, ICC-01/04-02/06-2792 ("Decision on TFV Sixth and Seventh Update Reports"), paras.8-10.

⁶ TFV Thirteenth Update Report, para.8.

⁷ TFV Thirteenth Update Report, paras.19-21.

⁸ TFV Thirteenth Update Report, para.20.

⁹ TFV Thirteenth Update Report, paras.24-26.

¹⁰ TFV Thirteenth Update Report, paras.27-33.

¹¹ TFV Thirteenth Update Report, paras.34-35.

¹² TFV Thirteenth Update Report, para.8.

the TFV and the Common Legal Representatives (“CLRs”) “[...] relates to the capability to reach out to and maintain contact with victims and beneficiaries.”¹³

5. The TFV limiting the impact of the security situation to the capability to reach out to and maintain contact with potential victims is of concern to the Defence despite the Chamber’s assertion, duly noted, that the risk of financing or supporting militias by awarding reparations in this case, without conducting a robust eligibility determination and without exploring the basic parameters provided on multiple occasions by the Defense,¹⁴ is “extremely limited and almost negligible.”¹⁵

6. The Defence takes the view that the impact of the highly volatile security situation on awarding reparations to members of the Lendu community without seeking the most basic information regarding their possible association with or involvement in the activities of militias composed mainly of members of Lendu ethnicity, at the relevant time and now, goes far beyond.

7. This is respectfully, a further issue raised in the Defence appeal against the 14 July Addendum.

II. The handover of victims for the purpose of eligibility determinations pursuant to the IDIP

8. In the 8 March Reparations Order - remanded to the Chamber by the Appeals Chamber to issue a new order for reparations - the Chamber tasked the TFV with conducting the eligibility assessment of potential victims.¹⁶ The 14 July Addendum on the other hand neither assigned this responsibility to any specific body *nor* identified the verification body tasked with conducting the eligibility assessment of potential victims. However, in the First Decision on the Trust Fund for Victims’ Draft

¹³ TFV Thirteenth Update Report, para.8.

¹⁴ See for instance, Defence observations on the Trust Fund for Victims’ Ninth Update Report on the Implementation of the Initial Draft Implementation Plan, 10 February 2023, ICC-01/04-02/06-2829, para.20.

¹⁵ Decision on Ninth to Twelfth Update Reports, para.21.

¹⁶ Reparations Order, 8 March 2021, ICC-01/04-02/06-2659, para.253.

Implementation Plan for Reparations ("First Decision on DIP") issued on 11 August 2023, after the 14 July Addendum, the Chamber assigned this responsibility to the Registry, through the VPRS.¹⁷

9. The Chamber held that the VPRS is the most suitable to perform the eligibility assessment on the basis that (i) this would ensure "independence between the organ entrusted with determining who is eligible to benefit from reparations and the body responsible for providing eligible victims with the service to which they are entitled";¹⁸ (ii) this is in compliance with the role found in the ICC legal framework for both the Registry and TFV, and with the regulations of the Trust Fund, which confer the role of identification and verification to the TFV only in respect of individual reparations;¹⁹ and (iii) this would ensure consistency "in the Court's approaches to victims' access to their rights."²⁰

10. As a preliminary matter regarding this issue, the Defence notes that as of 11 August 2023, the TFV was no longer entrusted with the conduct of eligibility assessments of potential victims.²¹ Moreover, on 31 August 2023, in its Decision on the TFV's Ninth to Twelfth Update Reports,²² the Chamber reiterated its ruling assigning the responsibility to conduct the eligibility assessments of potential victims to the VPRS, including for the purposes of the IDIP. Yet, the TFV continued to assess the eligibility of priority victims, as demonstrated by its submission to the Chamber of Annex 1 to the TFV Thirteen Update Report regarding 17 priority victims for whom it received information gathered by [REDACTED] in the last two reporting periods, *i.e.* 31 May to 31 July 2023 and 1 August to 6 October 2023. Considering that the TFV performed these assessments in accordance with the Chamber's Decision on

¹⁷ First Decision on the Trust Fund for Victims' Draft Implementation Plan for Reparations, 11 August 2023, ICC-01/04-02/06-2860 ("First Decision on DIP"), paras.179,185.

¹⁸ First Decision on DIP, para.180.

¹⁹ First Decision on DIP, para.180.

²⁰ First Decision on DIP, para.181.

²¹ First Decision on the Trust Fund for Victims' Draft Implementation Plan for Reparations, 11 August 2023, ICC-01/04-02/06-2860 ("First Decision on DIP"), paras.179,185.

²² Decision on Ninth to Twelfth Update Reports, para.27.

the TFV's Sixth and Seventh Update Reports²³ as opposed to the procedure set out by the Chamber in the Addendum and First Decision on DIP, this is significant.

11. Furthermore, in its Decision on Ninth to Twelfth Update Reports, the Chamber held that "[t]o ensure consistency, the Chamber hereby directs the TFV to coordinate with the VPRS and to present to the Chamber a working plan as to the way in which the handover of victims for the purposes of the eligibility for the IDIP purposes would be carried out."²⁴

12. The TFV did not comply with the Chamber's instructions. The TFV rather states in the TFV Thirteenth Update Report that it has consulted with the VPRS and that "[t]hey agreed that the TFV will continue to carry out the assessment of eligibility into the IDIP programme in the same way as previously approved by the Trial Chamber."²⁵

13. The TFV further indicates that this process, as currently established, will continue along this trajectory until the end of 2023, and that "[t]he next common assessment point as to the way forward will be early January 2024."²⁶ Thus, whether a handover will eventually occur at some point remains unknown.

14. This does not match the Chamber's instructions. The purpose of the consultations between the TFV and the VPRS was not to decide *proprio motu*, which body was going to conduct the eligibility assessment of potential priority victims, but rather to provide a work plan determining how the TFV was going to hand over to the VPRS the task of assessing the eligibility of potential priority victims in order to ensure consistency with what will be done with regard to the DIP.

²³ TFV Thirteenth Update Report, para.11; Decision on the TFV's Sixth and Seventh Update Reports, para.21.

²⁴ Decision on Eighth to Twelfth Update Reports, para.27 (emphasis added).

²⁵ TFV Thirteenth Update Report, para.20.

²⁶ TFV Thirteenth Update Report, para.21.

15. The TFV proposal is in fact contrary to the Chamber's instructions. It would also render the reparations phase in the present case even more confusing than it already is. Although the eligibility determination process for purposes of the IDIP is a two-step procedure, *i.e.* eligibility and assessment of urgency, it must be handled by one verification body.

16. The Defence disagrees with the TFV's claim that it is confident that the agreed way forward with VPRS may contribute to the IDIP eligibility process being expedited. Moreover, even if the eligibility process was expedited, this would be at the expense of transparency and certainty requirements.

III. The IDIP programme's capacity to include additional victims

17. The Defence is concerned by the TFV's assertion that "[...] the IDIP programme has currently sufficient capacity to include additional victims, as the current contractual arrangements with the two implementing partners relevant to the IDIP programme continue until 30 April 2024. Given the services are provided over a considerable period of time (*e.g.* treatment), the TFV underlines that it is **necessary to include a considerable number of victims** into the programme as soon as possible."²⁷

18. Practical considerations, including contractual considerations, should never be the basis for determining the eligibility of a substantial number of applicants. The IDIP was designed to address the urgent needs of victims, *i.e.* those "for which the victims need to receive immediate physical and/or psychological medical care, and/or support due to financial hardship that endangers the person's life."²⁸ Only victims determined to be eligible, and who meet this test, should be included in the programme set up to address urgent needs. What is more, including more priority victims in the IDIP programme for reasons other than legitimate urgency needs is

²⁷ TFV Thirteenth Update Report, para.20 (emphasis added).

²⁸ 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 TFV IDIP"), para.7.

likely to raise the expectations of potential victims and to create tensions amongst potential victims.

19. The Defence deems it appropriate to recall in this regard that (i) the urgency screening should be made by applying the same standard and burden of proof as for the eligibility determination;²⁹ and (ii) the urgent needs of victims to be addressed through the IDIP programme are only those resulting from the harm suffered as a consequence of the crimes for which Mr Ntaganda has been convicted and for which the victims cannot continue waiting until reparations in the case are fully operational.³⁰ These are the sole relevant criteria / considerations.

IV. The collection of information on the urgency needs of potential victims by the implementing partners

20. The Defence welcomes the details provided by the TFV regarding the collection of information on the urgency needs of potential victims by the implementing partners,³¹ as well as the confirmation that the urgency assessment is not carried out by the implementing partners.³²

21. Regarding the questionnaires, filled in by the implementing partners, the Defence reiterates its request for confirmation that this is the questionnaire previously approved by the Chamber despite the objections of the Defence.³³ In the event, the questionnaire used is different from the version previously approved by the Chamber, the Defence requests to be provided with a copy of this questionnaire.

²⁹ Decision on TFV IDIP, para.32.

³⁰ Decision on TFV IDIP, para.33.

³¹ TFV Thirteenth Update Report, para.24.

³² TFV Thirteenth Update Report, para.25.

³³ See, *inter alia*, Annex 1 to Trust Fund for Victims' Third Update Report on the Implementation of the Initial Draft Implementation Plan, 24 January 2022, ICC-01/04-02/06-2741-Conf-Anx1; Defence observations on the Trust Fund for Victims' Third Update Report on the Implementation of the Initial Draft Implementation Plan, 4 February 2022, ICC-01/04-02/06-2744-Conf, paras.17-21; Annex 1 to 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, pp.16-18; 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, para.48.

22. Considering that the eligibility determination of priority victims, including both the eligibility and the urgency assessment, will now be conducted by the VPRS, the role of the TFV set out in paragraph 24 (i) to (iv), should now be performed by the VPRS and not the TFV. This will assist in expediting the collection of information, by removing one step, as well ensure the "independence between the organ entrusted with determining who is eligible to benefit from reparations and the body responsible for providing eligible victims with the service to which they are entitled."³⁴

V. The progress made with broadcasting the 'communication piece' through radio within the affected communities

23. The Defence welcomes the information provided by the TFV regarding the target communities and the progress made with broadcasting the 'communication piece'.

24. The Defence notes that most of the communities listed are not locations for which positive findings were made in the Trial Judgment and that some communities are also far away from locations for which positive findings were made, such as Paidha in the Republic of Uganda. In addition, some of the locations were not even mentioned during the trial.

25. Consequently, the Defence requests that more information be provided regarding the messages transmitted and the broadcast of these messages, including justifications for the selection of locations as well as information on the selection of radio stations.

³⁴ First Decision on DIP, para.180 – *see above* para.9.

VI. The handover of outreach activities to the Registry/PIOS, including for the IDIP purpose

26. Although limited information is provided in this regard, the Defence welcomes the planned handover of outreach activities from the TFV to the PIOS.³⁵

27. Regarding the eligibility determinations that will be performed by the VPRS, this implies, in the view of the Defence, that the planning of outreach activities will involve the VPRS as the lead agency, much more than the TFV.

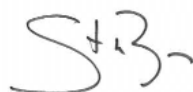
28. Consequently, coordination with the PIOS and the drafting of a working plan for the handover of outreach activities to the PIOS should also involve the VPRS.

29. Also, as in the preceding section concerning the broadcast of the 'communication piece', the Defence requests that the VPRS be instructed by the Chamber to provide more information regarding the messages that will be transmitted and the broadcast of these messages, including justifications for the selection of locations as well as information on the radio stations used.

CONCLUSION

30. The Defence respectfully requests the Chamber to take note of these Defence Observations - TFV 13th Report.

RESPECTFULLY SUBMITTED ON THIS 11th DAY OF MARCH 2024



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³⁵ TFV Thirteenth Update Report, paras.34-35.