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**International
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TRIAL CHAMBER IV

Before: Judge Chang-ho Chung, Single Judge

SITUATION IN DEMOCRATIC REPUBLIC OF THE CONGO

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

Confidential

Submission of observations on the issues identified under paragraph 9 (c) (i), (ii),
and (iii) pursuant to the 'Order setting deadlines in relation to reparations' No.
ICC-01/04-02/06

Source: INTERNATIONAL ORGANIZATION FOR MIGRATION (IOM)

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

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I. Procedural History

1. This submission is pursuant to the Order setting deadlines in relation to reparations (No. ICC-01/04/02/06), issued by the Trial Chamber VI in regard to the Case of *the Prosecutor vs. Bosco Ntaganda* on 5 December 2019 ("The Order"). Such Order invited interested organisations to request leave to make submission pursuant to article 75(3) of the Statute and rule 103 of the Rules of Procedure and Evidence ("RPE") by 10 January 2020. If granted leave, their submissions of up to 20 pages were to be filed by 28 February 2020.

3. On 10 January 2020, the International Organization for Migration ("IOM" or "the Organization") filed a request for leave to submit observations on the issues set out under paragraph 9(c) of the Order.

4. On 16 January 2020, the Common Legal Representative for the Victims of the Attacks presented his submission in response to the Request of IOM and welcomed the intention of the International Organization for Migration to contribute its expertise.

5. On 17 January 2020, the Single Judge granted IOM leave to submit observations of up to 20 pages in the issues identified under paragraph 9 (c) (i), (ii), and (iii) of the Order by 28 February 2020.

6. On 27 February, IOM requested the Trial Chamber for an extension of the deadline for making its submission from 28 February to 10 March 2020. The Trial Chamber agreed and extended the filing deadline to 6 March 2020.

II. Introduction

a) Scope of the submission

7. This submission is based on the following: i) desk analysis of information pertinent to the case of the *Prosecutor vs. Bosco Ntaganda*, including the Trial Judgement and subsequent submissions by various parties in front of the Trial Chamber, ii) consultations with the IOM main Country Office in Kinshasa and the IOM sub-office in Ituri, iii) IOM's experience and expertise in implementing

or supporting reparations programmes across the globe and iv) IOM's observations on recent developments and trends in relation to reparations for survivors of Conflict Related Sexual Violence (CRSV) and reparations in general.

8. The observations and the recommendations contained in this submission are primarily focused on the question of types and modalities of reparations. However, considering the linkages between the different aspects of the reparations process, IOM also uses the opportunity to provide limited input to the rest of the questions under the scope of article 9 c) (i), (ii), and (iii) of the Order.

9. The submission of this document does not exhaust IOM's observations and recommendations in respect to all aspects of reparations in the case of *the Prosecutor vs. Bosco Ntaganda*. IOM remains seized on the matter and will be able to make more detailed submission, should the Trial Chamber request, invite or allow the IOM to make such submission at the appropriate stages of the process.

b) IOM's Experience

10. IOM has a long standing and diverse experience in developing, implementing and supporting reparations and land restitution programmes around the globe. In the interest of brevity of this submission IOM would like to refer the Trial Chamber and other parties to the paragraphs 10 to 23 of the IOM submission in relation to the case of *The Prosecutor vs. Jean-Pierre Bemba Gombo*, before Trial Chamber III, of 17 October 2016 (ICC-01/05-01/08)¹.

11. The above referred submission contains all the relevant information which the Trial Chamber and other parties might require to understand IOM's expertise, capacity and approach. In addition, IOM would like to highlight that since then, the Organization has continued and expanded its engagement on

¹ Submission by the International Organization for Migration to the International Criminal Court pursuant to article 75(3) of the statute: on the issues proposed by Trial Chamber III on the 12th August 2016 (https://www.icc-cpi.int/CourtRecords/CR2016_17749.PDF)

the matters of reparations to supporting the transitional justice process in Sri Lanka and the nascent efforts to develop legislation and mechanism for the survivors of Conflict Related Sexual Violence committed by ISIL in Iraq.

12. Of particular importance and relevance to the case of *the Prosecutor vs. Bosco Ntaganda* is the intensive global policy, advocacy and technical work related to reparations and the survivors of Conflict Related Sexual Violence (CRSV) conducted by IOM during 2019.

13. In June 2019, the IOM, the OHCHR, the Queens University Belfast and the Geneva Academy organized series of events focused on reparations. Two of the four days were dedicated to the principles and modalities of implementing reparations for survivors of CRSV, including expert discussion on the emerging Survivors Trust Fund, advocated for and supported by the 2018 Nobel Peace Prize Laureates, Dr. Denis Mukwege and Ms. Nadia Murad. A Follow up workshop was organized by IOM, in partnership with the Office of the Secretary General Special Representative on Sexual Violence in Conflict at the end of October 2019.

14. Both workshops enabled participation and contributions from independent experts, UN bodies, law practitioners, civil society and survivors. Three key conclusions emerged from the workshops:

- i) Survivors of CRSV are willing and capable to engage in the process of developing reparations models, but the notion of survivors-centred approach should be developed further into concrete models and mechanisms to ensure meaningful participation.
- ii) States bear primary responsibility for establishing and implementing reparations measures, but in absence of political will and resources by the Governments, survivors of CRSV should be able to get access to remedies through international justice institutions or through national justice institutions by using prosecution and litigation pathways under universal jurisdiction principles.

iii) Financing reparations through administrative reparations programmes or judicial reparations remains a challenge, but other options such as using frozen assets and sanction regimes could potentially alleviate the problems.

c) General Principles of IOM's work on reparations

15. IOM's work on reparations and land restitution is based on three core principles. The first one is the comprehensive approach in the design and implementation of reparations programmes. This means that the reparations measures should take consideration of the totality of experience of crimes and harms by the victims, the affected communities and the society in general and include wide array of types and modalities.

16. The second principle which guides IOM's work on reparations is the survivors-centred approach which puts the victim at the centre of the decision making process and prioritizes the reparations measures based on the needs and expectations of the victims.

17. The third operational principle of IOM's work is the focus on feasibility and practicability of the reparations types and modalities. This means triangulation between victims needs and expectations and available capacities and resources.

d) Observations in regard to the *Ntganda* Case

18. In its Judgement (ICC-01/04-02/06-2359, 08 July 2019), the Trial Chamber VI found Mr. Bosco Ntganda guilty on 18 counts. These counts cover seven different types of crimes for which Mr. Ntganda could be found liable to pay reparations for harms suffered by individuals and communities. These include:

- i. Murder and attempted murder
- ii. Intentional attacking civilians
- iii. Rape and Sexual Slavery

- iv. Pillage, attacking protected objects, and destroying the adversary's property
- v. Forcible displacement of populations
- vi. Conscripting and enlisting children under the age of 15 into the armed forces or groups and using them to participate actively in hostilities
- vii. Persecution

19. The number of crimes for which Mr. Ntaganda was convicted, the variety of victim categories and the severity and the impact of the harms suffered by the victims, imply that the reparations types and modalities which need to be considered by the Trial Chamber are likely to be much more complex than the ones considered in the *Lubanga*, *Katanga* or *Al Mahdi* cases².

20. The number of victims who would be eligible for reparations based on the conviction are likely to exceed the number of victims who submitted participation forms.

21. The span between the time when the crimes were committed and the prospective reparations is quite significant.

22. The victims of the crimes for which Mr. Ntaganda was convicted are likely to have suffered different and/or multiple types of harm and are likely to have different needs and expectations in regard to reparations.

e) Observations as regards the situation in Ituri

23. The situation in Ituri remains volatile. In addition to the Ebola occurrence there are also frequent attacks against civilian and military targets conducted by armed groups from North Kivu.

² For example, in the case of *Lubanga* the conviction and the reparations order are focused on only one type of crime and victim category respectively. Similarly, *Al Mahdi* was convicted under one account and the numbers of victim categories and victims are relatively small. In the case of *Katanga*, the counts for which the Mr. Katanga was convicted are more numerous, but all of them are related to one single event in a single location.

24. While the inter-ethnic violence characteristic of the period 2002-2003 seems to have abated, some areas, such as Djugu, remain prone to inter-community clashes and are frequently inaccessible.

25. The Ituri region still suffers from lack of overall security, safety and availability of basic services. Some of these gaps are filled by international actors providing humanitarian and other aid.

f) Consolidated key observations

26. Considering the key factors such as the range of crimes for which Mr. Ntganda was convicted, the potential number of victims and the variety of harms they suffered, the determination of the criteria and methodology on eligibility, types and scope of harm and liability is likely to be more challenging and complex than the other cases which have reached the reparations stage.

27. The significant time span between the occurrence of the violations and the potential reparations process represents compounding challenges. The potential victims are likely to have been subjected to additional violations. Some of them might have had access to coping mechanisms for rehabilitations purposes. Finally, considering the consecutive waves of violence and displacement, they might be difficult to locate and engage.

28. Considering the variety of crimes, harm and victim categories and especially the compounding waves of violence and insecurity combined with a lack of basic services, it is very likely that the prospective reparations programme will have to take a comprehensive, but differentiated approach based on the needs and expectations of the victims.

29. The design of such programme will require not only analysis of the data contained in the participation forms, but also comprehensive and sustained outreach, including a consultative process before the Trial Chamber makes a decision on the types and modalities of reparations.

III. Applicability of principles on reparations set by the Appeals Chamber in the *Lubanga* Case

30. IOM considers the application of the principle on reparations defined by the Appeals Chamber in the *Lubanga* case as generally adequate.

31. IOM would like to propose the introduction of a victim-centred approach as an additional principle. This is to ensure the opportunity for the full and meaningful participation by the victims of human rights violations worldwide to have greater say in the design and implementation of reparations programmes, as well the growing realization by reparations experts and international community that designing and implementing reparations programmes without meaningful participation of victims is unlikely to result in impactful and successful implementation of reparations.

IV. Criteria and methodology in determination of i) the eligibility of victims; (ii) the relevant types and scope of harm; and (iii) the scope of liability of Mr. Ntaganda

32. In regard to the methodology in determination of eligibility, IOM suggests adopting an open and inclusive process. This means expanding the list of eligible victims beyond the ones who have submitted participation forms and conducting appropriate outreach activities to ensure that any individual who feels that she or he might have suffered harm as a result of the crimes for which Mr. Ntaganda was convicted has equal opportunity and perhaps, in some cases, facilitated access to the relevant ICC bodies.

33. Considering the sensitivity of some crimes (e.g. rape and sexual slavery) and the elapsed time since the commission of the crimes, the evidentiary threshold should be tailored in a way which will enable maximum inclusivity and minimum discrimination. As it is unlikely that most of the victims will be able to provide documentary evidence (statements by police, health care providers), the methodology for verification of eligibility should be based on: a) personal statements, b) corroboration with tertiary sources by the institution administering the applications, and c) comparison of the statements with the

already established narrative regarding events and locations in accordance with the facts established by the Trial Chamber during the proceedings.

34. In regard to the types and scope of harm, it is recognized that these will vary depending on many factors. While some of the crimes might have resulted in visible physical harm, others would have resulted in less visible (e.g. psycho-social) harms. In addition, there is the compound effect on victims who have suffered multiple harms because of single or multiple crimes, furthermore aggravated by absence of justice and assistance over considerable time period and the environment of almost constant insecurity and violence in Ituri.

35. The fact that there have been continuous waves of violence and displacement occurring in Ituri, will likely make the tracing and identification of the participating and previously unidentified victims quite challenging.

36. In regard to the liability of Mr. Ntganda, IOM is not in a position to provide any estimations at the moment. IOM's experience in designing and implementing reparations informs that in order to estimate the liability of the perpetrator in judicial processes or responsibilities of the State in administrative processes, the institution responsible for the development of the policy needs to have at least indicative information about: a) the number of victims, b) the victim categories, c) the harm suffered by each category, d) the means of repairing the harm, e) the direct costs of repair, and f) the costs of establishing and implementing the reparations programme. In order to arrive at the above, the ICC bodies (Trust Fund for Victims (TVF), Victims Participation and Reparations Section (VPRS) or third parties (experts, partners) should conduct preliminary assessments based on the above criteria and produce a report which will facilitate the Trial Chamber's decision.

V. The types and modalities of reparations

37. The decision on types and modalities of reparations typically depends on several factors: the harm suffered, the needs and expectations of the victims,

the availability of services and providers and the availability of financial resources.

38. In order to understand these factors further an assessment is required. Such assessment should focus on:

- a) victim consultation
- b) capacity scanning
- c) development of cost scenarios

39. While the assessment mentioned under paragraph 38 should provide the definitive basis for deciding on types and modalities of reparations, IOM can, based on its experience in developing and implementing reparations, provide some observations which could assist the Trial Chamber, the Trust Fund for Victims (TFV) and the Victims Participation and Reparations Section (VPRS) in narrowing the scope of their further assessments and deliberations. The following paragraphs elaborate these observations based on the manifestations of the crime.

40. Murder and attempted murder - This category might include as victims the families and next of kin or individuals who were murdered and for which murders Mr. Ntganda was convicted, as well as individuals who survived an attempt on their life and who suffered physical, psych-social or socio-economic harm due to such actions.

- a) For the first sub-category (families and next of kin), the harm will likely consist of psycho-social trauma due to the loss, deprivation from family life and in some case loss of a socio-economically productive member of the family resulting in loss of income, livelihood and economic opportunities. For these cases, IOM recommends adopting both individual and collective reparations models. Among individual reparations benefits, we recommend symbolic compensation, individual psycho-social counselling (if desired and feasible) and individual benefits from participating in collective income generations

programmes. Among collective reparations benefits, we recommend public recognition of the suffering of the murdered civilians and their families by symbolic measures such as memorials and commemorative events and community-based psycho-social support in case the individualized approach is not feasible or desirable.

b) For the second sub-category (survivors of attempted murder), IOM recommends the following individual reparations measures: immediate medical interventions and support for those who have chronic health problems due to the injury suffered as the result of the action, psycho-social support (if feasible and needed) and symbolic compensation. Considering that the survivors of the murder attempt might have been enduring long-term economic hardships as a result of personal injury or chronic illness, IOM also recommends inclusion of the direct victims or their families (where victim is incapacitated) into collective income generation and livelihood activities. In regard to collective measures, IOM recommends collective psycho-social support and symbolic measures such as memorials.

41. Intentional attacks on civilians - This category is likely to include unknown number of victims. These victims would have suffered a variety of harm, including murder, attempted murder, forced displacement and persecution. Considering the potentially vast pool of victims, the collective suffering, the difficulties with identification and the possibility for overlapping eligibility, IOM recommends taking a collective approach to reparations. The collective reparations measures can range from symbolic (memorials and commemorative events) and community level psycho-social support to community level income generation, livelihoods and small-scale infrastructure interventions. The challenges expected in relation to the design and delivery of reparations measures related to this category are centred on the fact that civilians which were part of a certain community and residing in particular location during the time of the attacks might not belong to the same community

or reside in the same location at the time of the implementation of the reparations measures. Overcoming this challenge will require tracing of the concerned individuals and assessing the best models for collective reparations through consultations.

42. Rape and Sexual Slavery – This category of victims requires the most comprehensive and sensitive approach. The association between the traumatic impact of the crime, the direct physical and psycho-social harm, the damage to the social fabric and the related stigma imply the need for nuanced victim identification and engagement process and significant rehabilitation measures in the same time. The conventional opinion is that victims of sexual violence are unlikely to come forward and publicly identify themselves for the purpose of accountability or reparations. This perception has led many institutional actors, including courts, into designing and implementing reparations programmes without proper engagement and consultation, which in turn resulted in inadequate programming or exclusion. However, recent developments have shown that many victims of sexual violence are not only willing to tell their story, but also actively contribute toward the various justice and assistance mechanisms. During 2019 only, victims of conflict related sexual violence, encouraged by the work of the two Nobel Peace Prize winners, came forward and established network of survivors and spoke very openly and loudly about their needs and expectations. They permanently highlighted their will and interest to actively shape the decisions concerning themselves. This resulted, inter alia, into the adoption of the new UN Security Council Resolution 2467 (2019) (S/RES/2467 (2019)) which calls for a survivors-centred approach. While the notion of a survivor-centred approach remain to be yet precisely formulated, it is clear that the primary aim is to engage the victims from the start in the process where their views and expectations can be heard and incorporated through a consultative process designed and implemented on their own terms. This is one of the most critical observations which IOM would like to bring to the attention of the Chamber. In addition, IOM would like to

highlight few more critical issues which need to be considered in the design and implementation of reparations for victims of sexual violence:

- a) Need for full application of the do-no-harm principle;
- b) Engagement of victims for the purpose of consultations in a carefully tailored way which will enable maximum inclusion with minimum exposure;
- c) Specific focus on the gendered dimension of the crimes and harms, including the existing pre-conditions manifested through structural discrimination and gender inequality;
- d) The specific factor of intersectionality, which renders victims of sexual violence vulnerable -in respect to many aspects based on their ethnic and gender identity, sexual orientation, religious affiliation, political marginalization, poverty or inequality;
- e) Broad scope of rehabilitation measures ranging from individual compensation, pensions and other social support measures, extensive and professional psycho-social support, health care (including necessary surgeries, therapies and medication) socio-economic inclusion through creation of income generation and livelihood opportunities to collective measures such as supporting survivors groups, memorials and truth-telling initiatives;
- f) Specific attention to victims who might have been infected with HIV and other diseases as a result of the crime, including supply with retro-viral medicines and other medication;
- g) Expansion of the reparations programmes to children born out of rape, children in general and families of the survivors;
- h) Due attention to frequently neglected male victims of sexual or sexualized violence.

43. In regard to pillage, attacking protected objects and destroying adversary's property, IOM's recommendation is for the ICC entities to take cautious approach. In IOM's experience compensation for lost and damaged property can be extremely complex and expensive process, especially after such a long time lapse as in the case of *the Prosecutor vs. Bosco Ntganda*. Identification, verification and valuation of the loss and damages which occurred in relation to the crimes for which Mr. Ntganda was convicted will be extremely complex. IOM's recommendation is for the Trial Chamber, the Victims Participation and Reparations Sections (VPRS), the Trust Fund for Victims (TFV) or external partners to conduct further assessment into the feasibility and the models for reparations in regard to this category.

44. IOM also recommends caution in reparations for forcible displacement of population which could be challenging. As an Organization which has significant commitment and experience in supporting internally displaced people (IDPs) and expertise in land and property restitution for displaced population, IOM can foresee several challenges in developing feasible and meaningful reparations for this victim category:

- a) The number of individuals and communities can be quite significant. Experiences of administrative transitional justice programmes such as the case of Colombia show that if the reparations programme includes displacement as violation type the potential number of beneficiaries can be triple than the other categories. In return this might lead to overly complex, labour intensive and prohibitively expensive requirements.
- b) Population in Ituri has been subject to multiple waves of violence and displacement. Tracking the reasons for displacement and identifying if these are related with the crimes for which Mr. Ntganda is convicted will represent a significant challenge for the Court institutions, as well as any other partner.
- c) Calculating the cost of reparations will require taking into consideration complex set of factors and variables, such as loss of Housing, Land and Property

(HLP) rights, loss of livelihood opportunities, individual and community trauma, etc.

For the reasons stated above, IOM would recommend focusing on limited collective rather than individual reparations measures for this category of victims. These can take the form of community rehabilitation and small-scale infrastructure projects and memorialization projects when appropriate. Further assessment in regard to the scale and scope of displacement in relation to the crimes for which Mr. Ntganda is convicted is required.

45. In respect to the conscripting and enlisting children under the age of 15, IOM recommends full alignment of the reparations measures along the reparations provided by the TFV in the *Lubanga* case. IOM's opinion is that, given the overlapping temporal and legal scope, introducing new and different reparative measures is likely to create discrimination and discontent among the victims.

46. Finally, in regard to persecution as a crime, IOM recommends adopting collective rather than individual reparations measures on the grounds that many ethnic groups, communities and their members can claim harm under this category.

VI. Conclusions

47. The multiple accounts and crimes for which Mr. Ntganda is convicted indicate that the design and implementation of the reparations order and mechanism is likely to be more complex than for any other case which has reached the reparations stage at the ICC.

48. The Trial Chamber will need to consider at least seven different categories of victims who suffered variety of harms and have different needs and expectations in respect to reparations.

49. The first guiding principle which IOM recommends is inclusivity. The reparations measures cannot be limited only to victims who submitted

participation forms. This will in return mean additional outreach and scanning of eligibility of victims.

50. The second guiding principle would be to take a comprehensive, but a differentiated approach. This would mean that all types and modalities of reparations should be considered without prejudice about their appropriateness or costs. The decision about the concrete types and modalities should be based by using a differentiated approach where each victim category is considered on the basis of the inflicted harm and the best feasible ways for restitution and rehabilitation.

51. The third guiding principle which IOM recommends is victim-centred approach. This implies inclusive, interactive and meaningful engagement with the victim community and soliciting their views before the decision on reparations is being made.

52. Furthermore, IOM recommends serious consideration to be given to individual monetary compensation. Cash transfers are becoming increasingly preferred mode of humanitarian assistance by the aid agencies regardless of the profile of the beneficiary or the environment where these are administered. The advantages offered by individual monetary compensation are multiple, e.g. individual recognition of harms suffered, availability of choice by the victims and recognition and enhancement of the victim personal agency.

53. IOM acknowledges that for some victim categories, i.e. victims of intentional attacks against civilians, pillage and destruction of property, forcible displacement and persecution, individual reparations including compensation might not be feasible and practical. For these categories of victims, a variety of collective reparations measures should be available.

54. Families of victims of murder, victims of attempted murder and victims of rape and sexual slavery require individualized and tailored approach. IOM recommends that individual compensation is considered as a model and that strong emphasis should also be put on rehabilitation, including medical and

psycho-social support, restitution of civil status and documentation when needed, assistance with integration into society and overcoming stigma and opening of income generation and livelihood opportunities. These should be complemented by appropriate collective reparations measures, such as public apologies and memorialization.

55. In regard to conscripting children under the age of 15, IOM recommends that the Trial Chamber follows the reparations model set in the *Lubanga* case.

56. In respect to activities to be conducted before the decision on reparations, IOM recommends conducting additional assessments and victim consultations by the Trust Fund for Victims (TFV), Victims Participations and Reparations Section (VPRS) and external experts and partners. These assessments and consultations should be focused on three key issues: differentiated analysis of victim categories and harms suffered, development of precise recommendations about types and modalities based on the comprehensive platform and differentiated approach and estimating the direct and administrative costs accordingly.

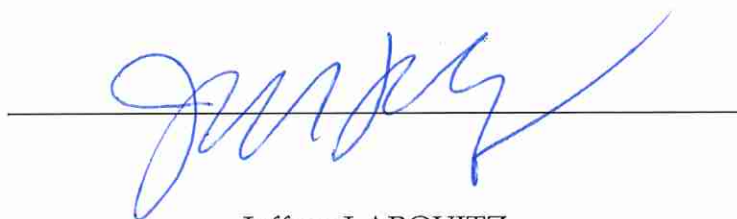
57. In regard to the applicability of the principles established by the Appeals Chamber in the *Lubanga* case, IOM recommends complementing those by including stronger emphasis on a victim-centred approach, including victim consultations and their engagement in the decision-making process.

58. In regard to eligibility criteria, IOM recommends low evidentiary threshold which will enable maximum inclusion while minimizing the requirements and exposure on behalf of the victims.

59. In respect to Mr. Ntganda's liability, IOM recommends that the amount be determined following the assessment mentioned under paragraph 56 above.

60. IOM remains seized on the matter and ready to support the Trial Chamber, the Trust Fund for Victims (TFV) and the Victims Participations and

Reparations Section (VPRS) with any further information and assistance as required.



Jeffrey LABOVITZ
Director, Department of Operations and Emergencies
International Organizations For Migration

Dated this 6 March 2020

At Geneva, Switzerland

Pursuant to Trial Chamber VI's Instruction, dated 11 February 2021, this document is reclassified as "Public"