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**International
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TRIAL CHAMBER II

Before: Judge Chang-ho Chung, Presiding Judge
Judge Péter Kovács
Judge María del Socorro Flores Liera

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

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

Public

**Registry Observations on the Trust Fund for Victims' Initial Draft Implementation
Plan**

Source: Registry

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

The Office of the Prosecutor

Mr Karim A. A. Khan
Mr James Stewart
Ms Nicole Samson

Counsel for the Defence

Mr Stephane Bourgon
Ms Kate Gibson

Legal Representatives of the Victims

Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Mr Philipp Ambach

Trust Fund for Victims

Mr Pieter de Baan

Other (*Country Office*)

Ms Jelena Vukasinovic

I. Introduction

1. Pursuant to Trial Chamber II's "Order for the submission of observations on the initial draft implementation plan with focus on priority victims" (respectively "Chamber" and "Order") issued on 10 June 2021,¹ the Registry hereby submits its observations on the Trust Fund for Victims' initial draft implementation plan ("TFV" and "IDIP" respectively) in the case of *The Prosecutor v. Bosco Ntaganda* ("Ntaganda case" and "Case").

II. Procedural History

2. On 8 March 2021, the Chamber, in its former composition (former Trial Chamber VI), delivered its Reparations Order and directed the TFV to submit, by 8 June 2021 at the latest, an initial draft implementation plan focusing exclusively on the options for addressing the most urgent needs of victims that require priority treatment, relying as much as possible on existing mechanisms, identified intermediaries, and partnerships already established ("Reparations Order").²
3. On 8 June 2021, the TFV submitted a report on its preparation for the draft implementation plan³ and the IDIP.⁴
4. On 10 June 2021, the Chamber issued the Order, directing the parties and the Registry to file any observations on the IDIP by 23 June 2021.⁵

¹ Trial Chamber II, "Order for the submission of observations on the initial draft implementation plan with focus on priority victims", 10 June 2021, ICC-01/04-02/06-2677.

² Trial Chamber VI, "Reparations Order", 8 March 2021, ICC-01/04-02/06-2659.

³ TFV, "Report on Trust Fund's Preparation for Draft Implementation Plan", dated 8 June 2021 and notified on 9 June 2021, ICC-01/04-02/06-2676-Conf. A public redacted version was notified on 15 June 2021 (ICC-01/04-02/06-2676-Red).

⁴ Annex A, "Initial Draft Implementation Plan with focus on Priority Victims", notified on 9 June 2021 and corrected on 14 June 2021, ICC-01/04-02/06-2676-Conf-AnxA-Corr. A corrected public redacted version was notified on 15 June 2021 (ICC-01/04-02/06-2676-AnxA-Corr-Red).

⁵ Order, para. 4 and page 4.

III. Applicable Law

5. The present filing is submitted in accordance with the Order.

IV. Submissions

A. Preliminary remark

6. At the outset, the Registry notes that consultation and engagement with victims must be at the heart of all processes related to reparations. The Registry recalls a recently published report which raised concerns about the little emphasis placed on victims' wishes.⁶ The Registry believes that by providing information about consultations held with victims for the design of the IDIP in future submissions, the TFV will alleviate any such criticism and will strengthen its plan. This being said, the Registry is acutely aware of the extraordinarily complicated situation in relevant areas of the DRC, both in terms of security and COVID-19, which continue to make consultations with victims challenging.

B. Observations on the IDIP

7. In light of the fact that, as announced by the TFV, consultations on the IDIP are still ongoing,⁷ and that a number of aspects of the IDIP would still appear to be at a conceptual stage, the Registry will list below the issues that, in its view, may benefit from further consideration, clarification and potentially standardisation.

⁶ FIDH, "Whose Court is it? Judicial handbook on victim's rights at the International Criminal Court", April 2021, page 65, <https://www.fidh.org/en/issues/international-justice/international-criminal-court-icc/report-judges-must-ensure-meaningful-victim-participation-at-the-icc>. See also Carla Ferstman, "Reparations at the ICC: The Need for a Human Rights Based Approach to Effectiveness", in "Advancing the Impact of Victim Participation at the International Criminal Court: Bridging the Gap Between Research and Practice", November 2020, <https://www.law.ox.ac.uk/research/advancing-impact-victim-participation-ICC-collaboration>.

⁷ See, inter alia, IDIP, para. 4.

This may provide an additional safeguard that the principles to be applied to reparations as also highlighted by the TFV, especially the principles of non-discrimination and “do no harm”, are fully observed in the finalization and implementation of the IDIP.

i) Non-discrimination

8. The Registry notes that the IDIP covers three categories of priority victims: i) all former child soldiers;⁸ ii) former child soldiers who were also victims of rape and sexual slavery and children of former child soldiers born out of rape or sexual slavery;⁹ and iii) priority victims within the victims of the attacks.¹⁰
9. The Registry respectfully submits that the information about the prioritisation and eligibility criteria, as well as about the screening mechanisms and processes provided in the IDIP remains at a too conceptual level to allow the Registry to fully visualize the entire process in order to make comprehensive observations on it. However, from the information included in the IDIP, it appears to transpire that different eligibility and prioritisation criteria, as well as different (external) screening entities, are envisaged for each of the three categories of victims as well as for already participating victims and potential beneficiaries not yet identified,¹¹ which in the Registry’s view, could benefit from a harmonised – and centralised – verification to properly respect the principles of non-discrimination, equal treatment and fair reparations for all victims.
10. With respect to the recommendation made by the TFV in its IDIP regarding the legal representation of victims already identified,¹² the Registry notes that all

⁸ IDIP, paras. 47-64.

⁹ IDIP, paras. 65-71.

¹⁰ IDIP, paras. 72-94.

¹¹ IDIP, paras. 57-60, 70, 76-90. On top of the differences in approach and the contradictions in the information contained in these paragraphs, the Registry finds particularly concerning the proposals envisaged for the determination of the eligibility assessment of the victims of the attacks (for example in 77 where the “geographical area” and “reachability” are listed as criteria for determining the order of priority).

¹² IDIP, paras. 18 and 86.

potential victims in the present Case have the right to legal representation, irrespective of whether they have already participated in proceedings or not, whether they are victims of the attacks or former child soldiers, or whether they have already been identified and filled in a form or not. As previously recommended,¹³ the Registry maintains that as soon as they are identified and assessed, potential beneficiaries of reparations should be informed of their right to legal representation and their information should be sent to the relevant common legal representative in the Case (“CLR”) in order to avoid gaps in legal representation. This would also ensure the coherence and continuity of the victims’ legal representation scheme in place in the Case. In keeping with the TFV’s suggestion regarding potential new beneficiaries pertaining to the attacks,¹⁴ the Registry therefore respectfully recommends that any newly identified applicants for reparations be represented by the relevant CLR in the Case.

11. The Registry offers to remain at the TFV’s disposal as a central assessment provider on all eligibility assessments, due to its general role and expertise on the matter.¹⁵ If so tasked, it would transmit the information collected from the new applicants for reparations to the relevant CLRs once it has completed its preliminary legal assessment on whether the newly identified applicants belong to one or the other of the two groups of victims in the Case (former child soldiers or victims of the attacks).

12. In this context, the Registry respectfully recommends that similar standard eligibility criteria be applied for all categories of victims.¹⁶

¹³ Registry, Annex 1 to “Registry’s Preliminary Observations on Reparations”, dated 5 September 2019 and notified on 6 September 2019, ICC-01/04-02/06-2391-Anx1, para. 29.

¹⁴ IDIP, para. 18.

¹⁵ See “Independent Expert Review of the International Criminal Court and the Rome Statute System”, 30 September 2020, R336, page 287, https://asp.icc-cpi.int/en_menus/asp/Review-Court/Pages/default.aspx. Final Report. Also if Registry services are not considered necessary, it is recommended that a uniform screening mechanism for eligibility and prioritisation be set up for all victims in the Case, that would be administered by a single expert actor, in order to ensure fairness and equal treatment of victims.

¹⁶ The Registry stands ready to assist in the crafting of these criteria, based on the parameters used by the Registry in its previous eligibility assessments in the Case.

13. Moreover, and with a view to the process over and beyond the IDIP and the 125 priority beneficiaries already identified,¹⁷ it is important that victims are properly informed about available reparations and the process for obtaining them in order to be able to make an informed decision about their participation in any reparations programme. Proper information campaigns on these matters are also essential for the victim communities to be able to understand the reparations process and to avoid re-victimisation and additional tensions between individual victims and inside the victim communities.¹⁸ In this regard, the Registry notes the TFV's outreach plans pertaining to the IDIP¹⁹ and stands ready to assist, also for further outreach requirements transcending across the entire victim population in the Case.
14. The Registry notes the TFV's intention to have victim information recorded in a "simple database" administered by implementing partners.²⁰ Noting the security situation on the ground, and also with a view to ideally keeping all victim-specific data in a single and secure depository, the Registry recommends that the VPRS database – VAMS – may be used as the repository of all such information. Ongoing efforts are made on the Registry's side to ensure that VAMS is accessible and can be adapted to the TFV needs.²¹ Despite some obstacles that the TFV has noted, the VPRS offers to continue discussions so that the TFV can provide specific requirements for VAMS adaptations and possibilities can be looked into in more detail.²²
15. Moreover, with respect to the review mechanism for negative decisions envisaged by the TFV for the victims of the attacks,²³ the Registry notes that the Chamber's oversight could be rendered easier if there was a centralised

¹⁷ IDIP, paras. 15-16.

¹⁸ The Registry notes that inter-ethnic tensions are currently very high.

¹⁹ IDIP, paras. 81, 82, 93, 97.

²⁰ IDIP, para. 89.

²¹ See also IDIP, fn. 56.

²² This recommendation goes in line with the Registry recommendation that it retain eligibility assessment – or at least verification - functions as opposed to the outsourcing of this task to an implementing partner; *see* IDIP, para. 89.

²³ IDIP, para. 88.

verification mechanism either with the TFV or the Registry, as the TFV may find appropriate.

ii) *Do no harm*

16. The Registry notes that, according to the TFV's proposal in the IDIP, former child soldier victims (irrespective of whether they also suffered harm as a result of sexual and gender based violence ("SGBV") crimes or not) should apply to participate in the *Lubanga* reparations programme.²⁴ The Registry submits three points to consider in this regard: a) in the interest of stability and predictability, victims who already applied for reparations in a case before the Court may get confused if asked to apply again for reparations in a different case, even if in a simplified manner;²⁵ b) the eligibility criteria, mechanisms and, especially, the applicable deadline in place in the *Lubanga* should not go to the detriment of the *Ntaganda* case victims; c) in light of the Chamber's general monitoring and oversight role for projects specific to each case, it may be prudent to appraise the *Lubanga* Chamber on record of the envisaged activities, not least with a view to also appraising the parties/legal representatives of victims in the *Lubanga* proceedings.²⁶
17. With respect to SGBV victims, the Registry recalls that this is the first time reparations measures for SGBV victims will be designed and implemented before the ICC. The Registry recommends that the TFV's "residual Ntaganda SGBV project as an annex to the Lubanga reparations project"²⁷ be just an initial project with other, more comprehensive projects targeting SGBV victims to follow. This is all the more so since it may be difficult to design a specific SGBV-related sub-programme as an annex to the ongoing *Lubanga* reparation

²⁴ IDIP, paras. 57- 58.

²⁵ Further discussions between the TFV and the LRVs for a further simplified process for relevant victims may address this issue.

²⁶ The Registry however notes that in the present situation both cases are before the same Chamber.

²⁷ IDIP, para. 68.

programme the TFV refers to.²⁸ Noting the TFV's present limitations regarding (1) the capacity of existing partners/projects,²⁹ and (2) fast creation of new and suitable projects (not least through administrative and financial hurdles),³⁰ further consideration may be warranted of more comprehensive projects as part of the DIP for this category of most vulnerable victims.

iii) Risks linked to the extension of the assistance mandate projects to the reparations awards

18. The Registry has noted the list of risks and corresponding mitigating measures identified by the TFV in its IDIP.³¹ In the Registry's view, there may be an additional risk with respect to the proposal of the TFV to extend its assistance mandate projects to reparations awards.³² From the outset of ICC proceedings, victims are informed about the two different mandates of the TFV and their specificities. In addition, in past information campaigns and communications, the Registry has informed victims participating in the different cases before the ICC that they could only receive reparations at the end of the trial, in the eventuality of a conviction. At the same time, TFV assistance programmes tended to focus much broadly on situation victims, in order to maintain a certain distinction from potential future reparations processes (which would potentially have a much smaller remit of beneficiaries). The Registry considers it important not to generate a feeling of frustration amongst victims if instead of receiving specifically devised reparation measures, they are "merely" incorporated in ongoing assistance programs – programs that other victims not participating in the *Ntaganda* proceedings may have accessed much earlier and outside any application process. If the TFV does not wish to uphold a certain separation between assistance and reparation projects (if only regarding the

²⁸ IDIP, para. 68(a). However, the Registry also notes the TFV's submission that existing mechanisms *do* provide specific services to SGBV victims, IDIP, para. 19.

²⁹ IDIP, para. 22.

³⁰ IDIP, para. 21.

³¹ IDIP, para. 97.

³² IDIP, paras. 27 and 74.

groups of beneficiaries), it is submitted that specific outreach activities may be required to counter any risk in particular for the 125 priority beneficiaries already identified,, to potentially feel confused, undermined and frustrated. The Registry concurs with the TFV, as included in its IDIP,³³ that it is very important that victims are properly informed and consulted before they are placed in relevant assistance programs.³⁴

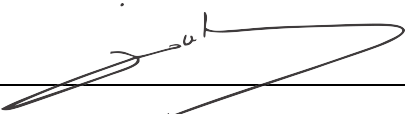
19. Finally, and in relation to the pool of beneficiaries of assistance projects on the one hand, and reparations on the other, the Registry wishes to flag another potential risk of confusion: namely, if on the one hand priority reparation beneficiaries are integrated into assistance projects, and on the other hand local implementing partners are in charge of assessing the eligibility of potential beneficiaries, there is a potential additional imbalance in terms of access criteria: those benefitting from the TFV assistance mandate as victims of the situation may only be assessed in light of broad criteria, ie whether the crimes they have suffered fall within the jurisdiction of the Court; while those benefitting from the TFV reparations mandate as victims of the *Ntaganda* Case would have to be submitted to stricter eligibility criteria, ie whether they have suffered crimes within the scope of the Case. Again, in order to avoid confusion and potential frustration when different beneficiaries of relevant programmes interact, the TFV may wish to have assessed the potential risk(s) beforehand and devised mitigating measures accordingly.

³³ IDIP, para. 28.

³⁴ The Registry assumes that as part of engagement with the priority victims under the IDIP, the TFV would continuously assess victims' views and perceptions, as well as the reparative value of relevant projects.

C. Conclusion

20. The Registry submits that the TFV should be given the opportunity to further explore, clarify and amend its envisaged initiatives outlined in the IDIP, as deemed adequate, in light of the above preliminary remarks and observations, before the Chamber takes a decision on it.



Marc Dubuisson
Director Division of Judicial Services
on behalf of Peter Lewis, Registrar

Dated this 23 June 2021

At The Hague, the Netherlands.