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TRIAL CHAMBER II

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

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

**Public
With Public Annex A**

**Public Redacted Version of “Defence observations on the Trust Fund for Victims’
Third Update Report on the Implementation of the Initial Draft Implementation
Plan”, 4 February 2022**

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 “Third Update Report on the Implementation of the Initial Draft Implementation Plan” on 24 January 2022 (“TFV Third Report”),¹ Counsel for Mr Ntaganda (“Defence”) hereby submits this:

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

“Defence Observations”

INTRODUCTION

1. In its Decision on the TFV’s Second Progress Report on the implementation of the Initial Draft Implementation Plan (“Decision on Second Report” and “IDIP”),² Trial Chamber II (“Chamber”) instructed the TFV, in unequivocal terms, to: (i) provide concrete information as to how the security situation affects the implementation of the IDIP and propose mitigating strategies; (ii) provide additional details as to the way it will substantively assess eligibility and urgency for the purposes of the IDIP; and (iii) propose an alternative way of addressing the urgent needs of former child soldiers who are not SGBV victims or children born out of rape or sexual slavery.³

2. Regrettably, the TFV Third Report fails to implement the Chamber’s instructions, leaving a number of compelling questions unanswered.

3. Regarding the security situation, the TFV Third Report provides a general, vague and unsatisfactory description of the prevailing situation. What is more, it neither addresses nor explains how the security situation impacts the work of the implementing partners and omits to propose any mitigating strategy to counter the

¹ 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](#).

² 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”).

³ [Decision on Second Report](#), Disposition.

risks highlighted by the Defence.⁴ Similarly, the TFV once again fails to provide any information as to how it will *substantively* assess the applicants' eligibility and urgent needs. The TFV Third Report contains no information concerning the required documentation and/or the criteria that will be used to assess the burden of proof. While a simplified questionnaire intended to be used for the urgency screening is provided, this document poses a number of issues itself and is unfit for purpose. Lastly, contrary to the Chamber's instructions, the TFV Third Report does not provide any real alternative proposal to address the urgent needs of former child soldiers who are not SGBV victims or children born out of rape or sexual slavery.

4. More than six months since the Chamber's decision approving in part the IDIP,⁵ and despite the Chamber's repeated requests for additional information, the Chamber and the parties are still oblivious to several aspects of the proposed implementation, including, in particular, information at the core of the eligibility assessment process. The fact that the omissions in the TFV Third Report were either not addressed or not cured by the TFV in its Draft Implementation Plan ("DIP") is a serious source of concern. Indeed, as highlighted *inter alia*, by the Legal Representatives of Victims ("LRVs" or "CLRs"),⁶ the same *lacunae* were carried over to the DIP.

5. Although the Chamber has delegated the identification of victims and the assessment of their eligibility to the TFV, and does not consider it necessary to play a role in the administrative eligibility assessment and urgency screening that would go

⁴ Public Redacted Version of "Defence observations on the TFV Second Progress Report on the implementation of the Initial Draft Implementation Plan", 06 December 2021, ICC-01/04-02/06-2726-Conf, 5 January 2022, [ICC-01/04-02/06-2726-Red](#) ("Defence Observation on Second Report"), paras.4-7.

⁵ 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 the IDIP").

⁶ Public Redacted version of the "URGENT Request of the Common Legal Representative of the Former Child Soldiers for an extension of the time limit to respond to the Trust Fund for Victims' Draft Implementation Plan" (ICC-01/04-02/06-2735-Conf-Exp), 18 January 2022, [ICC-01/04-02/06-2735-Red](#), para.22; Response of the Common Legal Representative of the Victims of the Attacks to the "Public Redacted version of the 'URGENT Request of the Common Legal Representative of the Former Child Soldiers for an extension of the time limit to respond to the Trust Fund for Victims' Draft Implementation Plan" (ICC-01/04-02/06-2735-Conf-Exp)", 20 January 2022, [ICC-01/04-02/06-2737-Conf](#), para.28.

beyond overseeing the design of the process as a whole,⁷ the Defence posits that the deficiencies in the TFV Third Report are symptomatic of the TFV's inappropriate approach to its mandate. Consequently, the Defence respectfully submits that more specific guidance as well as a more robust approach from the Chamber are required.

CONFIDENTIALITY

6. Pursuant to regulation 23*bis* (1) and (2) of the Regulations of the Court, these Defence Observations are classified as confidential as they respond to submissions likewise classified as confidential. A public redacted version of these Defence Observations will be filed shortly in accordance with the Chamber's instructions.

SUBMISSIONS

I. Security situation in Ituri

7. Recalling the TFV's and Defence's submissions in relation to the security situation in Ituri,⁸ the Chamber instructed the TFV to provide further information as to how the security situation actually affects the implementation of the IDIP and, if necessary, propose strategies to mitigate possible risks.⁹ The Chamber recalled four main issues: the population's displacement and the difficulty to reach potential victims;¹⁰ the TFV's statement that national and international organisations have ceased their activities in the areas of relevance;¹¹ the risks of possible tensions, animosity and jealousy among affected communities;¹² and the possible involvement of potential beneficiaries in the events undermining the security situation.¹³

⁷ [Decision on Second Report](#), para.13.

⁸ [Decision on Second Report](#), paras.7-8.

⁹ [Decision on Second Report](#), para.9.

¹⁰ [Decision on Second Report](#), para.7.

¹¹ [Decision on Second Report](#), para.7.

¹² [Decision on Second Report](#), para.8.

¹³ [Decision on Second Report](#), para.8.

8. Regrettably, the TFV Third Report addresses only the first of these issues.¹⁴ It does not clarify whether the main implementing partners, [REDACTED] and [REDACTED], as well as their sub-partners,¹⁵ are among the organisations that ceased their activities in the relevant areas, or whether and to what extent their activity is limited by the security situation. In addition, it is unclear whether the territorial scope of reparations as initially set out in the IDIP¹⁶ remains the same, or whether the implementing partners' area of operation was impacted as a result of the recent security related incidents in Ituri.

9. Further, although the TFV Third Report generally refers to the concern raised by the Defence - that potential beneficiaries may be involved in the recent events undermining the security situation - holding that "in the event such individuals are identified, the Trust Fund would inform their CLR and submit the situation to the Trial Chamber,"¹⁷ this is wholly insufficient. The Chamber asked the TFV to propose strategies to mitigate possible risks.¹⁸ Acknowledging this risk is not enough. Instead, the TFV should propose a strategy aimed at identifying whether potential beneficiaries might be linked to armed groups in Ituri, for example, as part of the eligibility assessment comprising a specific enquiry focussing on the victim's background and affiliations.

10. In this regard, the Defence underscores yet again, that the TFV Third Report presents the ongoing security situation only in general terms, explaining that "various armed groups [...] fueled by ethnic tensions", continue to carry out attacks against the

¹⁴ [TFV Third Report](#), paras.9-10.

¹⁵ For example, "*Centre d'Intervention/Accompagnement Psychologique et Santé Mentale*", based in Bunia, and the various health structures mentioned by the TFV as part of the [REDACTED] project. See Trust Fund first progress report on the implementation of the Initial Draft Implementation Plan and Notification of Board of Director's decision pursuant to regulation 56 of the Regulations of the Trust Fund, 23 September 2021, [ICC-01/04-02/06-2710-Conf](#), ("TFV First Report"), paras.19,33.

¹⁶ Corrigendum to Annex A to the Initial Draft Implementation Plan with Focus on Priority Victims ("Initial Implementation Plan" or "IIP"), 14 June 2021, [ICC-01/04-02/06-2676-Conf-AnxA-Corr](#) ("IDIP"), paras.33,35. [TFV First Report](#), para.22.

¹⁷ [TFV Third Report](#), para.11.

¹⁸ [Decision on Second Report](#), para.9.

Armed Forces of the DRC (“FARDC”) and the civilian population, and attempted to control the mining areas around Mongbwalu.¹⁹ At this stage of the reparations process, with the aim of assessing the impact of the security situation on the implementation of the IDIP, much more is required. First, it is both desirable and necessary to address the reality of the current security situation in Ituri, and to focus specifically on the actions of CODECO, the Lendu based paramilitary group that is behind many of the recent attacks against the FARDC²⁰ and the civilian population. To understand the gravity of the situation, suffice it to say that in just over two months, at least nine deadly attacks against the FARDC and civilian population were carried out by CODECO. Annex A to these Defence Observations provides a list of relevant documented attacks.²¹ Notably, no later than two days ago, more than 60 persons, including many women and children, were massacred by CODECO militants at the Savo camp for displaced persons, in Ituri.²²

11. In light of the CODECO’s affiliation with the Lendu community, to which most victims of the attacks belong, the TFV must obtain, and share with the Chamber and the parties, additional information on the ongoing fighting. Basic parameters, which need to be explored, include: (i) the organization and strength of the CODECO as well as its objectives and political agenda; (ii) the location of CODECO units and whether these areas are accessible generally; (iii) whether any participating victims of the attacks or purported beneficiaries are affiliated to or involved with the CODECO’s ongoing attacks; (iv) the villages targeted by the CODECO; (v) the ethnic composition

¹⁹ [TFV Third Report](#), para.8.

²⁰ See Annex A. See also, [Defence Observations on Second Report](#), para.6.

²¹ A list of attacks with the related sources is available in Annex A.

²² Reuters, “At least 60 people killed in militia attack in Eastern Congo”, 2 February 2022, available at <https://www.reuters.com/world/africa/least-60-people-killed-militia-attack-eastern-congo-2022-02-02/>; New York Post, “At least 60 people killed in militia attack in Eastern Congo”, 2 February 2022, available at <https://nypost.com/2022/02/02/at-least-60-people-were-killed-in-a-militia-attack-on-wednesday-morning-at-the-savo-displaced-persons-in-eastern-democratic-republic-of-congos-ituri-province-the-head-of-a-local-humanitarian-group-and/>; TV5Monde, “RDC: nouveau carnage en Ituri, au moins 40 morts dans un site de déplacés”, 2 February 2022, available at <https://information.tv5monde.com/afrique/rdc-nouveau-carnage-en-ituri-plus-de-50-morts-dans-un-site-de-deplacés-443051>; France24, “RD Congo : nouveau massacre en Ituri dans un site de déplacés”, 2 February 2022, available at <https://www.france24.com/fr/afrique/20220202-rd-congo-nouveau-massacre-en-ituri-dans-un-site-de-d%C3%A9plac%C3%A9s>.

of the villages targeted by the CODECO; (vi) the ethnicity of the persons fleeing these villages; (vii) the destination of the persons fleeing the villages; and (viii) the identity and ethnicity of the persons who occupy the villages from which the population has fled.

12. In the absence of such information, it is neither possible to assess the impact of the security situation on the implementation of the reparations nor to identify new potential beneficiaries; let alone determining whether it will be possible to gain access to them. In sum, more groundwork is necessary before any urgency screening or eligibility assessment can take place.

13. Notably, acknowledging the reality of the security situation is also imperative to understand – and mitigate - the source of possible tensions and animosity among affected communities in the area, in accordance with the *do no harm* principle. On this specific topic, the TFV's statement that it "will continue its outreach effort in collaboration with the CLR's" is far from an acceptable mitigating strategy.

II. Eligibility assessment and urgency screening

14. It appears evident at this point, based on the TFV's submissions since filing its IDIP,²³ that it is either unable or simply reluctant to conduct the eligibility assessment in conformity with the Reparations Order and the Chamber's instructions. Following the First Report, the Chamber encouraged the TFV to include additional information in its future reports as to which supporting documents the TFV will require to assess the standard of proof.²⁴ In its Second Report, the TFV failed to provide any such information. The Chamber specifically noted that "the TFV primarily repeats the same information previously provided regarding the procedure to be followed [...]."²⁵

²³ [IDIP](#), initially filed on 8 June 2021; [TFV First Report](#), filed on 23 September 2021; and Trust Fund's Second Update report on the Implementation of the Initial Draft Implementation Plan, 23 November 2021, [ICC-01/04-02/06-2723-Conf](#).

²⁴ 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](#), para.24.

²⁵ [Decision on Second Report](#), para.10.

Therefore, the Chamber once again encouraged the TFV “to provide substantive, as opposed to procedural, information regarding the eligibility assessment and urgency screening.”²⁶ The TFV Third Report, yet again, fails to include the required information.

15. Not only is the TFV not providing information that forms the backbone of the reparations proceedings, it is also acting contrary to the Chamber’s instructions. The TFV thus appears unwilling to conduct what is a fundamental legal requirement of the reparations process. To date, even after the issuance of the proposed DIP, it is unclear (i) what concrete information and documentation the TFV will require and rely on in assessing and determining eligibility; (ii) what criteria will be considered to assess the reliability of this information; and (iii) to what extent an applicant who is unable to provide documentation should justify his/her inability to do so.

16. If the assumption is that the TFV will conduct a fair, efficient and meaningful eligibility process, then such information must be included in the TFV reports as instructed by the Chamber. While the Chamber delegated the design of the eligibility mechanism to the TFV, the intention cannot have been to shroud the process in mystery.

17. The Questionnaire attached to the TFV Third Report illustrates this point. To begin with, it is concerning that the Questionnaire was only provided to the LRVs for comment and was not made available to the Defence. The TFV has previously indicated that the simplified forms and questionnaires to be used in the eligibility assessment would be shared with, and agreed upon, by the parties, including the Defence.²⁷ It is therefore concerning that the Defence has been left out of consultations.

²⁶ [Decision on Second Report](#), para.12.

²⁷ TFV internal proposal for the administrative assessment for Mr Ntaganda, distributed to the parties on 23 November 2021 (“TFV Internal Proposal”), para.58; 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, 24 January 2022, [ICC-01/04-02/06-2732-AnxA-Red](#) (“DIP”), para.313.

18. Similarly concerning is the simplicity of the Questionnaire. The form does not mention that supporting documents are required, particularly for points 1 (medical documentation), 2 (psychological documentation), 3-6 (financial status) and 7 (marriage certificates). The Chamber has reiterated that the urgency screening needs to be conducted in accordance with the same burden and standard of proof as the assessment of eligibility.²⁸ Indeed, the Chamber has noted that “the urgent needs of victims to be addressed through the IDIP 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.”²⁹ No information sought in the Questionnaire allows the TFV to assess whether the “urgent needs” of the applicant are the result of the convicted crimes.

19. The Defence has previously raised its concern regarding the use of simplified forms³⁰ and the Questionnaire best illustrates this concern. These simplified forms are simply unfit for purpose. The TFV must require much more information to be able to conduct a fair and thorough assessment of the applicant’s eligibility and urgent needs. In addition, the applicants must provide supporting documents to substantiate their application or, at a bare minimum, justify their inability to do so. The proposed questionnaire and the propensity of the TFV to act contrary to the Chamber’s instructions lead to the conclusion that the applicable standard and burden of proof will be lowered as a result.

20. It must be reiterated that, contrary to the TFV’s assertion,³¹ eligibility assessments are necessarily complex to ensure that they serve the purpose for which

²⁸ [Decision on the IDIP](#), paras.32-33.

²⁹ [Decision on the IDIP](#), para.33.

³⁰ Defence observations on the TFV internal proposal for the administrative assessment for Mr Ntaganda, distributed on 1 December 2021, paras.16-17. *See also* 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](#), para.8(xv).

³¹ TFV Internal Proposal, para.81: “the actual evaluation of the eligibility of an individual is not a complex exercise. It requires to check an individual narrative against well-established criteria”.

they are intended. Despite the need for urgency in the case of the IDIP, the TFV must determine the link, if any, between the harm suffered and the crimes for which the person was convicted.³² Only the victims for whom a link can be demonstrated should benefit from reparations. As such, the proposed assessment should reflect the significance of the process. And while efficiency is important, it cannot transcend fundamental aspects of the reparations proceedings.

21. Of note is that the TFV intends to carry forth these simplified and ineffective procedures throughout the entire reparations proceedings. This is clearly demonstrated in the DIP.³³ In the view of the Defence, the Chamber must now step in to correct the course of these proceedings. It is imperative that the Chamber provide explicit eligibility assessment criteria both in relation to the IDIP and the DIP. To do otherwise would leave a fundamental aspect of the reparations proceedings in the hands of an administrative body that has shown, repeatedly, that it is unable or unwilling to apply all the principles developed in the Reparations Order.

III. Urgent measures for Child soldiers

22. The Defence notes that the TFV has again acted contrary to the Chamber's instructions, by failing to advance an alternative proposal to address the urgent needs of Former Child Soldiers not falling within the scope of the [REDACTED] IDIP project.³⁴

23. The TFV simply asserts that it is "currently exploring the available options".³⁵ However, it is noteworthy that the Chamber first rejected the TFV's proposal to include these victims in the *Lubanga* service-based collective reparation programme in July 2021.³⁶ More than six months later, the TFV does not seem to have made any

³² [Decision on the IDIP](#), para.31. See also Reparations Order, 8 March 2021, [ICC-01/04-02/06-2659](#), para.135.

³³ [DIP](#), paras.313,315,332,341,345,351.

³⁴ [Decision on Second Report](#), para.16.

³⁵ [TFV Third Report](#), para.26.

³⁶ [Decision on the IDIP](#), paras.21-22.

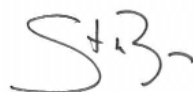
progress in this regard. The TFV's justification that procurement processes can be "time-intensive"³⁷ is without merit, considering that the TFV had ample time to explore and implement a different solution. The current situation brings into question the TFV's capacity to ensure timely and expeditious reparations to victims in urgent needs.

CONCLUSION

24. Regrettably, the Defence notes that the TFV Third Report, just like the Second and the First, remains devoid of what is deemed to be compelling information on the implementation of urgent reparations and the fairness of the eligibility assessment and urgency screening.

25. Even after the Third Report, many issues remain unsettled and vague as well as unlikely to be resolved in the short term on what is perceived to be an urgent situation. For this reason, the Defence respectfully requests the Chamber to play a more active role to correct the course of these proceedings and ensure the fairness of the reparations process as a whole.

RESPECTFULLY SUBMITTED ON THIS 4th DAY OF FEBRUARY 2022



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³⁷ [TFV Third Report](#), para.27.