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**International
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Court**

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Date: **7 October 2022**

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***

Confidential

**Observations on behalf of the convicted person on the Trust Fund for Victims'
Seventh Update Report on the Implementation of the Initial Draft Implementation
Plan**

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 Appeals Chamber's "Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled "Reparations Order"", dated 12 September 2022 ("Appeal Judgment")¹ and the submission by the Trust Fund for Victims ("TFV") of its Seventh Update Report on the implementation of the Initial Draft Implementation Plan ("IDIP") on 26 September 2022 ("TFV Seventh Update Report")², Counsel for the convicted person ("Defence") hereby submits this:

Observations on behalf of the convicted person on the Trust Fund for Victims' Seventh Update Report on the Implementation of the Initial Draft Implementation Plan

"Defence Observations"

INTRODUCTION AND OVERVIEW

1. The TFV Seventh Update Report is based on a flawed premise.
2. The TFV Seventh Update Report is premised "on the Trust Fund's continuous implementation of the IDIP as approved and directed by the Trial Chamber",³ based on the TFV's assertion that "the Trial Chamber's determination in the Reparations Order⁴ in relation to the IDIP was not overturned on appeal."⁵ This is incorrect.
3. In its Judgment of 12 September 2022, the Appeals Chamber held that "the cumulative effect of the errors identified within this judgment materially affects the Impugned Decision in this case."⁶ More particularly, the Appeals Chamber found *inter alia* that "the Trial Chamber erred in issuing the Impugned Decision without having assessed and ruled upon victims' application for reparations, and that the Trial

¹ Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled "Reparations Order", 12 September 2022, [ICC-01/04-02/06-2782](#) ("Appeal Judgment").

² Trust Fund for Victims' Sixth Update Report on the Implementation of the Initial Draft Implementation Plan, 26 September 2022, [ICC-01/04-02/06-2783-Conf](#) ("TFV Seventh Update Report").

³ [TFV Seventh Update Report](#), para.12.

⁴ Reparations Order, 8 March 2021, [ICC-01/04-02/06-2659](#) ("Reparations Order").

⁵ [TFV Seventh Update Report](#), para.12.

⁶ [Appeal Judgment](#), para.749.

Chamber did not lay out at least the most fundamental parameters of a procedure for the TFV to carry out the eligibility assessment.”⁷ Accordingly, the Appeals Chamber directed Trial Chamber II “to issue a new order for reparations, taking into account the terms of this judgment.”⁸

4. The TFV’s initial draft implementation plan (“IDIP”)⁹ and the steps taken pursuant to the IDIP, were based on the authority granted to the TFV in the Reparations Order,¹⁰ which has now been remanded. Trial Chamber II has been ordered to issue a new reparations order taking into account the errors identified in the Appeal Judgment. Until Trial Chamber II issues a new order for reparations within the meaning of Article 82(4) of the Statute, implementation of the IDIP cannot proceed.

5. Consequently, as of 12 September 2022, the date of the Appeal Judgment, the TFV has no mandate or authorisation to conduct the eligibility assessment of any additional participating victims referred to it by the Common Legal Representatives of Victims (“CLRs”).¹¹ As for the 24 Former Child Soldiers and 45 Victims of the Attacks who have been considered eligible and referred for intake, the Appeals Chamber held, *inter alia*, that (i) the Trial Chamber erred by failing to rule on at least a sample of applications and that this error materially affected the Impugned Decision;¹² (ii) the Defence must be able to challenge this information by means of reviewing the applications and making representations thereon;¹³ and (iii) while an administrative screening of eligibility can be carried out by the TFV, the outcome of any such screening must be judicially approved by the Trial Chamber.¹⁴

⁷ [Appeal Judgment](#), para.747.

⁸ [Appeal Judgment](#), para.759.

⁹ 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-AnxA-Corr-Red](#) (“IDIP”).

¹⁰ [Reparations Order](#), para.252, Disposition.

¹¹ *A contrario* [TFV Seventh Update Report](#), para.22.

¹² [Appeal Judgment](#), para.345.

¹³ [Appeal Judgment](#), para.363.

¹⁴ [Appeal Judgment](#), para.387.

6. Accordingly, the eligibility assessment of the above 69 victims will have to be conducted *de novo* on the basis of the new order for reparations that will be issued by Trial Chamber II, and which corrects the errors identified by the Appeals Chamber. In the meantime, until this is done, the TFV has no authority to continue implementing reparations, let alone to spend money to be drawn from a future award for reparations that has yet to be ordered.

7. In these circumstances, it rests with the TFV to “step in with its assistance programme that addresses harm suffered based on crimes falling within the jurisdiction of the Court.”¹⁵ Such a solution was previously envisaged by the TFV when submitting observations on the Defence request for suspensive action, with the aim of avoiding a situation contrary to the do no harm principle.¹⁶

8. The Defence agrees that there is a need for outreach and the communication of messages to the communities and victims in Ituri Province in relation to the effects of the Appeal Judgment on the reparations process. Unfortunately, the Defence was not invited in the meeting(s) scheduled to take place in the week of 26 September 2022. Nonetheless, the Defence remains available and interested to contribute to the dissemination of appropriate messages in Ituri Province.

9. Lastly, while the Defence concurs with the TFV’s request to submit reports every three months upon the issuance the new reparations order, future updated reports in relation to the IDIP should still be submitted every two months, at least until the IDIP has been approved, and the eligibility assessment of the above 69 victims has been conducted *de novo*.

¹⁵ Observations on the Defence Request for Suspensive Effect And Request under rule 103 of the Rules of Procedure and Evidence, 22 June 2021, [ICC-01/04-02/06-2679](#) (“TFV Observations on Defence Request for Suspensive Effect”), para.29.

¹⁶ [TFV Observations on Defence Request for Suspensive Effect](#), para.29.

CONFIDENTIALITY

10. 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.

OBSERVATIONS

11. In its Judgment of 12 September 2022, the Appeals Chamber set out the errors made in the formulation of the Reparations Order in the *Ntaganda* case. According to the Appeals Chamber, Trial Chamber VI failed to make an appropriate determination of the number of potentially eligible or actual victims,¹⁷ and failed to provide an appropriate calculation, or set out sufficient reasoning, for the amount of the monetary award against Mr Ntaganda.¹⁸ The Trial Chamber also erred failing to provide reasons in relation to the concept of transgenerational harm and the evidentiary guidance to establish such harm.¹⁹

12. The Appeals Chamber also found that the Trial Chamber erred in issuing a decision without having assessed and ruled upon victims' application forms for reparations, and had failed to consider and assess even a sample of these forms.²⁰ As a result of this error "the Defence was unable to participate in the assessment of the eligibility of victims to benefit from reparations."²¹ The Appeals Chamber held that "since the amount of the award for reparations in this case should be based on information contained in, among other sources, at least a sample of applications for reparations, the Defence must be able to challenge this information by means of reviewing the applications and making representations thereon."²²

¹⁷ [Appeal Judgment](#), paras.23,155-174,745.

¹⁸ [Appeal Judgment](#), paras.23,235-265,746.

¹⁹ [Appeal Judgment](#), paras.23,471-497,748.

²⁰ [Appeal Judgment](#), paras.23,341-346,363-369,747.

²¹ [Appeal Judgment](#), para.363.

²² *Idem.*

13. Having identified these errors, the Appeals Chamber ordered the partial reversal of the Reparations Order and directed Trial Chamber II to issue a new order for reparations, taking into account the terms of this judgment.²³ The terms of the Appeal Judgment, and the errors identified therein, mean that the implementation of the IDIP cannot simply continue unaffected, as if the Appeal Judgment had never been rendered, or has no effect. As such, the Defence makes the following observations on the TFV Seventh Update Report, as set out below.

I. **The TFV Seventh Update Report is based on a flawed premise**

14. The understandable instinct of the TFV is to continue with the implementation of the reparations process without interruption. However, the Appeals Chamber identified central errors in the Trial Chamber's approach to reparations in the present case, which require the issuance of a **new order for reparations**.²⁴ The Appeals Chamber's findings cannot be circumvented simply by continuing along the same path.

15. The TFV is therefore wrong to assert that "the Trial Chamber's determination in the Reparation Order in relation to the IDIP was not overturned on appeal [...]"²⁵ The Appeals Chamber held that "the cumulative effect of the errors identified within this judgment materially affects the Impugned Decision issued in this case."²⁶ Accordingly, the Appeals Chamber directed Trial Chamber II "to issue a new order for reparations, taking into account the terms of this judgment."²⁷ The IDIP and the measures taken in its implementation stem directly from the Reparations Order, which has been reversed. Until Trial Chamber II issues a new order for reparations, any implementation of the IDIP is without a basis.

²³ [Appeal Judgment](#), para.759.

²⁴ [Appeal Judgment](#), para.759 (emphasis added).

²⁵ [TFV Seventh Update Report](#), para.12.

²⁶ [Appeal Judgment](#), para.749.

²⁷ [Appeal Judgment](#), para.759.

16. This conclusion – however inconvenient– flows from the fact that the IDIP does not exist independently from the Reparations Order. By its very nature, the IDIP exists as one of the implementing vessels for the Reparations Order, which defines its scope and its modalities. The TFV is only authorised to implement the IDIP because it was granted this authority by Trial Chamber VI, through the terms of the Reparations Order.²⁸ As such, where the Appeals Chamber has ordered that Trial Chamber II must produce a new reparations order, in order to comply with the terms of the Appeal Judgment, the TFV has no authority to continue implementing reparations under the IDIP, which draws its authority from the Reparations Order itself.

17. Consequently, the TFV is wrong to continue to implement the IDIP,²⁹ and to assert that the Trial Chamber’s determination in the Reparations Order in relation to the IDIP was not overturned on appeal.³⁰ While undoubtedly inconvenient, the errors committed by Trial Chamber VI cannot be logically separated from the Reparations Order or the IDIP formulated thereon.

II. **The TFV has no authority to conduct eligibility assessments of additional participating victims referred by the CLR**

18. In the TFV Seventh Update Report, the TFV indicates that it “will continue with the eligibility assessment of any additional participating victims referred to it by the CLR.”³¹

19. For the reasons set out above, the process of eligibility assessment implemented by the TFV prior to the Appeal Judgment of 12 September 2022, is no longer valid, is without a basis, and cannot continue. This eligibility assessment process has been undermined by the errors identified by the Appeals Chamber in its very formulation. Most notably, the failure of Trial Chamber II to (i) engage in any way with the

²⁸ [Reparations Order](#), para.252, Disposition.

²⁹ [TFV Seventh Update Report](#), para.12.

³⁰ *Idem*.

³¹ [TFV Seventh Update Report](#), para.22.

applications that are at the heart of the reparations process (at minimum ruling on a proper representative sample of them);³² and (ii) set out even the most fundamental parameters of a procedure for the TFV to carry out the administrative screenings of eligibility of applicants for reparations.³³

20. As such, the Appeals Chamber was unequivocal that “the eligibility assessment to be conducted in the implementation of the future reparations order may thus differ from what was originally intended.”³⁴ There will be a future reparations order. It will require the formulation of a different eligibility assessment procedure, which does not ignore either the application forms themselves,³⁵ or violate the rights of the Defence to be involved in this process.³⁶

21. Reinforcing this conclusion, in footnote 1672 of the Appeal Judgment, the Appeals Chamber drew a roadmap for Trial Chamber II, setting out the steps to be followed to correct the errors at first instance, prior to the issuance of a new reparations order. Trial Chamber II “will need, *inter alia*, to take the following steps:

‘Either attempt to obtain all applications for reparations by potential beneficiaries, within a specific time frame, and rule on them, or assemble and rule upon a proper representative sample of applications for reparations in the event that information is obtained that shows that it is not possible to assemble all potential applications within a reasonable time’

[...]”³⁷

22. This makes sense. Logically, Trial Chamber II must first rule on either all applications, or a representative sample, **before** it can set the eligibility procedure. The TFV cannot continue to perform eligibility assessments and urgency screenings until Trial Chamber II has gathered and ruled on the applications for reparations.

³² [Appeal Judgment](#), paras.23,345-346,386,747.

³³ [Appeal Judgment](#), paras.23,387,747.

³⁴ [Appeal Judgment](#), para.386.

³⁵ [Appeal Judgment](#), paras.345-346.

³⁶ [Appeal Judgment](#), para.363.

³⁷ [Appeal Judgment](#), footnote 1672.

23. Consequently, by simply intending to proceed with the eligibility assessment of additional participating victims, the TFV is implementing a process that violates the procedural rights of both victims and the convicted person, and is directly contrary to the Appeal Judgment.

III. **The eligibility assessment of the 69 victims will have to be conducted *de novo***

24. To this day, 24 Former Child Soldiers and 45 Victims of the Attacks have been considered eligible – pursuant to the prior process of assessment - and referred for intake.³⁸ However, this assessment was conducted under a procedure that was based on errors and was therefore invalid.

25. The errors that undermined the eligibility assessment process are neither technical nor minimal. Relevant to the 69 applicants, **even if** the Trial Chamber had reviewed and ruled on the applications,³⁹ and **even if** the Defence had not been erroneously excluded and had made submissions thereon,⁴⁰ the Appeals Chamber was clear that while an administrative screening of eligibility can be carried out by the TFV, the outcome of any such screening must be judicially approved by the Trial Chamber.⁴¹ In this case, it was not. The 69 victims have not been properly assessed and should not have been referred for intake.

26. The understandable desire of the TFV not to repeat the eligibility assessment process for these 69 individuals, is not lost on the Defence. It was for this very reason that the Defence sought a suspension of the Reparations Order, on the basis that its implementation during the pending appeal “could result in considerable time being

³⁸ [TFV Seventh Update Report](#), para.21.

³⁹ [Appeal Judgment](#), para.345.

⁴⁰ [Appeal Judgment](#), para.363.

⁴¹ [Appeal Judgment](#), paras.387,419.

spent and resources being allocated by the TFV, **as well as raised expectations of victims.**"⁴² The TFV opposed this suspension.⁴³

27. However, the fact that the Defence's fears have now materialized, does not mean that the TFV, the parties, or Trial Chamber II, can continue with the process on the basis that the Appeal Judgment does not exist, or is inapplicable to certain potential beneficiaries. First, to do so, would create a situation of unequal treatment among potential beneficiaries that itself would run contrary to the principle of do no harm. Second, the Appeals Chamber has always been "mindful of the context of these reparations proceedings, which are taking place nearly two decades after the commission of the crimes of which Mr Ntaganda has been convicted."⁴⁴ Despite this, the Appeals Chamber did not carve out any exceptions for individuals who had previously been assessed. Of course, this would not have been possible, given that they were assessed according to an eligibility process that violated both the procedural rights of the convicted person and the victims themselves.

28. Importantly, in opposing the request for suspensive effect, the TFV undertook to "communicate as part of its outreach strategy in this case that appeals are still pending and that therefore changes to the plan may be required."⁴⁵ As such, the re-assessment process falls within this prior communication in relation to these 69 individuals.

29. The reversal of the Reparations Order and the findings of the Appeals Chamber require that the eligibility assessment of the above 69 victims must be conducted *de novo* on the basis of the new order for reparations that will be issued by Trial Chamber II, and which corrects the errors identified by the Appeals Chamber.

IV. The TFV's intent to step in pursuant to its assistance mandate

⁴² Defence Appellant Brief against the 8 March Reparations Order, 7 June 2021, [ICC-01/04-02/06-2675](#), paras.260-272, para.368 (emphasis added).

⁴³ [TFV Observations on Defence Request for Suspensive Effect](#).

⁴⁴ Decision on the Defence request for suspensive effect, 2 July 2021, [ICC-01/04-02/06-2691](#), para.25.

⁴⁵ [TFV Observations on Defence Request for Suspensive Effect](#), para.30.

30. In opposing the Defence request to suspend the implementation of the Reparations Order, the TFV was alive to what it described as “a very limited risk that any persons be found eligible or receive reparations, and later retroactively be found not to be victims of Mr Ntaganda based on adaptations required by an amended Reparations Order.”⁴⁶ Noting that it could be contrary to the do no harm principle if individuals received reparations for the harm they suffered due to crimes committed against them and if they were later told that either the crime or the harm they suffered due to these crimes would not be accountable to Mr Ntaganda, the TFV represented to the Appeals Chamber that it was prepared, “to step in with its assistance programme that addresses harm suffered based on crimes falling within the jurisdiction of the Court. Therefore, even if not attributable to Mr Ntaganda, the victim’s harm based on the same incident, which amounts to a crime falling under the jurisdiction of the Court, would be recognized and the harm would be repaired nonetheless.”⁴⁷

31. The Appeals Chamber relied on this undertaking from the TFV, and found that it lends support to the view that the situation proposed by the Defence in its request for suspensive effect was not “irreversible, hard to correct, or defeating the purpose of the Defence’s appeal.”⁴⁸ As such, this potential mitigating factor - being the inclusion of these 69 individuals as beneficiaries of the TFV’s assistance programme - was already in the contemplation of the Appeals Chamber when it ordered that Trial Chamber II formulate a new order for reparations, taking into account the terms of this judgment.⁴⁹ As such, it appears that the invocation of the TFV’s assistance programme would be an appropriate mitigating factor that seeks to properly minimise the impact of the Appeal Judgment on these 69 individuals.

32. To be clear, the Defence does not adopt the position that the inclusion of these 69 individuals as beneficiaries of the TFV’s assistance programme falls within the TFV’s discretion. Rather, the TFV must first seek leave from Trial Chamber II to

⁴⁶ [TFV Observations on Defence Request for Suspensive Effect](#), para.29.

⁴⁷ *Idem*.

⁴⁸ Decision on the Defence request for suspensive effect, [ICC-01/04-02/06-2691](#), 2 July 2021, para.24.

⁴⁹ [Appeal Judgment](#), para.759.

authorise this measure, on an extraordinary basis. The TFV is not in a position to carve out victims from the judicial reparations process and make unilateral decisions as to their entitlements on the basis that the crimes of which they are victims form part of the material jurisdiction of the Court. This is an exceptional situation, arising from the failure to suspend the implementation of the Reparations Order during the pending appeal. As such, it should be an exception authorised by Trial Chamber II itself, and it properly rests with the TFV to seek leave to do so.

V. **Outreach – Appeal Judgment**

33. As noted above,⁵⁰ the need for outreach and communication to the communities and victims in Ituri Province in relation to the impact of the Appeal Judgment on the IDIP process is both appropriate and necessary.⁵¹ The recognition by the TFV that such outreach should be undertaken reinforces the Defence arguments above that the impact of the Appeal Judgment is significant and will necessarily arrive at a reparations order that differs substantially in both substance and procedure. It appears essential that the affected communities be informed of this significant development.

34. Since the beginning of the reparations phase, the Defence has indicated its intent and willingness to meaningfully engage in the reparations process and contribute to its efficient completion. To this end, the Defence regrets that it was not included in the meeting(s) held in the week of 26 September 2022 to contribute to this process of consultation on the formulation of the messaging for outreach and communication. The Defence would welcome this collaboration and remains ready to assist in the process of the dissemination of appropriate messages in Ituri Province.

VI. **IDIP updated reports should continue to be submitted every two months**

35. Once a new reparations order is in place, a new IDIP has been approved, and the re-assessment of the 69 individuals has been completed, the Defence has no

⁵⁰ *Supra*, para.28.

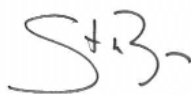
⁵¹ [TFV Seventh Update Report](#), para.30.

objection to the TFV submitting reports every three months, on the basis that this would align with the calendar of the implementing partners' reporting to the Trust Fund, and therefore permit more efficient reporting.⁵² However, until these significant procedural steps have been completed, the Defence submits that it is in the interests of Trial Chamber II and the parties and participants to be informed every two months, as per prior practice, about the steps being taken to shift this reparations process to the version as required by the Appeals Chamber.

CONCLUSION

36. The TFV's decision to continue with business as usual in the *Ntaganda* case is irreconcilable with the content and effect of the Appeal Judgment. A new reparations order that complies with the terms of the Appeal Judgment is being designed, with the involvement of the convicted person. As such, the TFV is no longer authorised to implement reparations, given that its authority came from the Trial Chamber, through the terms of the Reparations Order, which has been remanded. While the impact of these developments can be mitigated in the terms previously proposed by the TFV, this would be an exceptional circumstance requiring the Trial Chamber's leave. Regardless, the Defence remains committed to contributing to the continued development of the reparations phase, within the terms contemplated by the Appeal Judgment.

RESPECTFULLY SUBMITTED ON THIS 7th DAY OF OCTOBER 2022



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⁵² [TFV Seventh Update Report](#), para.32.