

Original: **English**No.: **ICC-01/04-02/06**Date: **8 March 2024****TRIAL CHAMBER II****Before:****Judge Chang-ho Chung, Presiding Judge
Judge Péter Kovacs
Judge Maria del Socorro Flores Liera****SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO****IN THE CASE OF
*THE PROSECUTOR V. BOSCO NTAGANDA*****Public
With Public Redacted Annex A****Public Redacted Version of "Defence response to the TFV and Registry's submissions pursuant to the First Decision on Updated DIP (ICC-01/04-02/06-2860)", dated 16 November 2023, ICC-01/04-02/06-2882-Conf****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 Trust Fund for Victims ("TFV")'s Second Submission of Draft Implementation Plan on 24 March 2022,¹ the First Decision on the Trust Fund for Victims' Draft Implementation Plan for reparations issued by Trial Chamber II ("Chamber") on 11 August 2023 ("First Decision on Updated DIP"),² the TFV's submission of Additional Information on the Draft Implementation Plan, on 3 November 2023 ("TFV Submissions")³ and the Registry Submission pursuant to ICC-01/04-02/06-2860-Red, on 3 November 2023 ("Registry Submissions"),⁴ Counsel for the Convicted Person ("Defence") hereby submits this:

Defence response to the TFV and Registry's submissions pursuant to the First Decision on Updated DIP (ICC-01/04-02/06-2860)

"Defence Response"

INTRODUCTION

1. Pursuant to the First Decision on Updated DIP⁵ and the Chamber's Decision, communicated by electronic means on 14 November 2023,⁶ the Defence hereby provides observations and submissions regarding the Registry Submissions and the TFV Submissions.
2. The aim of these submissions and observations is to assist, where possible, in ensuring that the conduct of the eligibility determination process by the Registry / VPRS, including the identification of potential victims, collection of information and determination of their eligibility, and the implementation of reparations by the TFV can proceed on a sound basis as expeditiously as possible.
3. The aim of the Convicted Person underlying these observations and submissions has remained consistent throughout, *i.e.* to ensure that genuine victims are awarded reparations as

¹ Trust Fund for Victims' second submission of Draft Implementation Plan, 24 March 2022, ICC-01/04-02/06-2750 ("Trust Fund for Victims' second submission of Draft Implementation Plan"), with Annex 1, ICC-01/04-02/06-2750-Anx1-Red-Corr ("Updated DIP").

² First Decision on the Trust Fund for Victims' Draft Implementation Plan for Reparations, 11 August 2023, ICC-01/04-02/06-2860 ("First Decision on Updated DIP").

³ Trust Fund for Victims' Submission of Additional Information on the Draft Implementation Plan, 3 November 2023, ICC-01/04-02/06-2877 ("TFV Submissions").

⁴ Registry Submission pursuant to ICC-01/04-02/06-2860-Red, 3 November 2023, ICC-01/04-02/06-2878 ("Registry Submissions").

⁵ First Decision on Updated DIP, Disposition.

⁶ Email Decision sent from Trial Chamber II to the parties on 14 November 2023 at 14:17.

expeditiously as possible without exacerbating tensions between the communities, and fueling the 20-year protracted conflict since the events in this case.

4. This Defence Response is submitted without prejudice to the ongoing appeal(s) against the 14 July Addendum and the CLR2 and Defence's requests for their respective appeal to be given suspensive effect.

CONFIDENTIALITY

5. Pursuant to regulation 23*bis* (1) and (2) of the Regulations of the Court, this Defence Response is classified as confidential as it refers to submissions likewise classified as confidential.

RESPONSE

I. Registry Submissions

A. *Annex I to the Registry Submissions*

6. Due to the limited time and space available to submit a response to the Registry Submissions, the Defence provides below summary observations and submissions concerning specific paragraphs and sub paragraphs in the Registry Submissions. With a view to assisting the Chamber in considering these observations and submissions in their proper context, the Defence submits along with its response, a copy of the Registry Submissions in which the same observations and submissions (identical wording) have been inserted following the paragraphs they relate to.⁷

7. As a preliminary matter, the Defence deems it appropriate to underscore that the level of detail provided in Annex I concerning the identification of potential victims, the eligibility assessment process and the ensuing activities is much more exhaustive than in previous similar submissions. From the beginning of the reparations phase, the Defence has been requesting⁸ more information from the TFV regarding the procedural aspects of the eligibility assessment process. The Registry Submissions are thus a good beginning in this regard.

⁷ See Annex I – Defence observations and submissions inserted in the Registry Submissions after the relevant paragraphs.

⁸ See, *inter alia*, Defence observations on the Trust Fund for Victims' Fourth Update Report on the Implementation of the Initial Draft Implementation Plan, 7 April 2022, ICC-01/04-02/06-2755, paras.51-59; Observations on behalf of the convicted person on the Trust Fund for Victims' Updated Draft Implementation

8. That said, as set out below, the Defence takes issue with certain aspects of the eligibility determination process described in Annex I and more information is required from the Registry in many areas.

9. Notably, further to the First Decision on Updated DIP in which the Chamber decided to entrust the Registry, through the VPRS, to be responsible for conducting the eligibility determinations during the implementation phase,⁹ Annex I is the Registry / VPRS' first opportunity to describe the *modus operandi* envisaged for the eligibility determination process. Consequently, this is also the Defence's first opportunity to make observations on the same.

Observations and submissions on specific paragraphs

10. **Paragraph 5** – The Defence underscores that information regarding the challenging security situation in the field is included in confidential *ex parte* annex IV. There is no reason for information on the security situation not to be provided to the parties in a confidential annex and with limited and specific redactions, if absolutely necessary.

11. **Paragraph 9** – Reference is made to the VPRS aiming to establish a network of intermediaries and partners who can support Registry activities. Difficulties associated with the use of local intermediaries and partners to identify and reach out potential victims and to liaise with the Registry are numerous. The risk that person, local intermediaries and/or organisations may be affected by conflicts of interests issues is high. More information is required on the recruitment, security screening and validation of appropriate intermediaries and partners if necessary. In and of itself, resort to local intermediaries in the field underscores the need for a robust eligibility determination process.

12. **Paragraph 12 sub. 2** – Whereas it may be necessary to involve community leaders and victims' communities in the organisation and the provision of suitable working areas to conduct the eligibility determination process, community leaders and victims' communities should not be involved in the design of the identification and eligibility process, which the VPRS is responsible.

Plan, 18 May 2022, ICC-01/04-02/06-2765 (“Defence Observations on Updated DIP”), paras.79-80; Defence observations on the Trust Fund for Victims' Fifth Update Report on the Implementation of the Initial Draft Implementation Plan, 6 June 2022, ICC-01/04-02/06-2769, paras.15-18.

⁹ First Decision on Updated DIP, para.185.

13. **Paragraph 12 sub. 3** – Not placing an undue burden on victims must be distinguished from an incomplete eligibility assessment. Any eligibility determination must be based on sufficient information to be provided by the potential victim.

14. **Paragraph 14** - Without prejudice to the Defence appeal against the 14 July Addendum,¹⁰ sources which may need to be consulted by the VPRS include the 8 March Reparations Order,¹¹ 14 July Addendum,¹² Annex 1 to the 14 July Addendum,¹³ 15 December 2020 Clarification Decision,¹⁴ Decision approving the TFV Initial Draft Implementation Plan,¹⁵ Decision on the TFV Fourth Updated Report on the implementation of the Initial Draft Implementation Plan,¹⁶ all of which remain in force based on the 14 July Addendum. The Judgment on the other hand, although it may need to be consulted, has a limited impact considering the content of Annex I to the 14 July Addendum.

15. **Paragraph 15 sub. 1** - Although the Defence takes issue with Annex II to the Registry submissions, the Defence submits that it was indeed necessary for the Registry to provide its understanding of the applicable criteria for eligibility determinations in light of the number of sources which may need to be consulted, not only by the VPRS for the eligibility assessment, but also by victims found not eligible or their representatives when appealing negative determinations before the Chamber.

16. **Paragraph 15 sub. 2** – The Defence understands that Annex III to the Registry Submissions, which is also part of the Registry’s understanding of the scope of the conviction, was prepared to assist staff members in making eligibility determinations. As such, it is of the highest importance for this annex to be accurate and in conformity with the applicable criteria. For lack of space, the Defence is not in position to make detailed observations on the content of Annex III. That said, one problem noted deals with the temporal scope in Annex III, which is not accurate.

¹⁰ See Defence Appellant Brief against the 14 July Addendum to the Reparations Order of 8 March 2021, 30 October 2023, ICC-01/04-02/06-2876 (“Defence Appellant Brief against the 14 July addendum”), Ground 1.

¹¹ Reparations Order, 8 March 2021, ICC-01/04-02/06-2659 (“Reparations Order”).

¹² Addendum to the Reparations Order of 8 March 2021, ICC-01/04-02/06-2659, 14 July 2023, ICC-01/04-02/06-2858 (“14 July Addendum”).

¹³ Annex I to 14 July Addendum, 14 July 2023, ICC-01/04-02/06-2858-AnxI.

¹⁴ Decision on issues raised in the Registry’s First Report on Reparations, 15 December 2020, ICC-01/04-02/06-2630 (“15 December 2020 Clarification Decision”).

¹⁵ Decision on the TFV’s initial draft implementation plan with focus on priority Victims, 23 July 2021, ICC-01/04-02/06-2696.

¹⁶ Decision on the TFV’s Fourth Update Report on the Implementation of the Initial Draft Implementation Plan, 12 May 2022, ICC-01/04-02/06-2761.

17. **Paragraph 16** – The impact of any modification arising from the Defence appeal against the 14 July Addendum must be taken into consideration. In this regard, the Defence concurs with the Registry’s proposal to postpone the actual issuance of eligibility determinations until a final judicial determination of the eligibility criteria is made (see paragraph 24 below).

18. **Paragraph 18** – The Defence takes issue with the last sentence of the paragraph and the source from which it is drawn, *i.e.* paragraph 184(c) of the First Decision on Updated DIP, which was clearly reversed in the Appeals Judgment. How can the VPRS set out to perform eligibility determinations when it is under the impression that there is no need to “rule on the merits of individual applications for reparations.” The Appeals Chamber clarified that the Trial Chamber could rule solely on a sample of victims’ applications.¹⁷ Nonetheless, the merits of all other applications for reparations, leading to the award of individual components under collective reparations must be assessed during the implementation stage.¹⁸

19. **Paragraph 19** - The Defence underscores that information concerning the volatile situation on the ground must be disclosed.

20. **Paragraph 20** – Although Mr Ntaganda was convicted for numerous crimes, most of these crimes were not committed personally by Mr Ntaganda.

21. **Paragraph 21** – The recruitment of local partners, including the conduct of a proper security assessment, validation of the absence of conflicts of interests and trainings will be essential. More information is required from the Registry in this regard.

22. **Paragraph 22** – The Defence questions and is concerned by the VPRS intending to train individuals and/or organisations, who will assist it to carry on its activities, on “[...] the eligibility criteria to benefit from reparations in the instant Case.” Individuals who will be interacting with potential beneficiaries must certainly follow best practices when collecting information, but need not be familiar with eligibility criteria. More information is required from the Registry on the tasks that will be assigned to individuals and/or organisations.

23. **Paragraph 24 sub. 1** – Annex IV should be made available to the Defence.

¹⁷ 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 (“Appeals Judgment”) para.346.

¹⁸ Appeals Judgment, para.387, fn.1672.

24. **Paragraph 24 sub. 2** – It is significant that the Registry foresees the possibility that the Registry’s operations might be impeded by the deteriorating security situation. The Defence refers to previous submissions,¹⁹ which highlight the fact that the precarious security situation on the ground is caused by militias composed mainly of members of Lendu ethnicity. Since most potential victims are likely to be of Lendu ethnicity, the VPRS must not limit its analysis of the security situation to its impact on its work, but also on the roots and causes thereof, which may very well impact the conduct of the eligibility determinations.

25. **Paragraph 24 sub. 3** - More information should be provided by the Registry on the “leads” and their sources regarding the presence of potential victims in [REDACTED]. Based on the evidence adduced at trial, most of victims who [REDACTED].

26. **Paragraph 24 sub. 4** – The Defence underscores the very high importance for the VPRS to cross check the information obtained from local authorities, due to potential conflicts of interests issues.

27. **Paragraph 24 sub. 4** - The Defence notes that further to the 15 December 2020 Clarification Decision, the VPRS did not report any difficulty when assessing whether a village where victims suffered relevant harms was considered inside or outside the scope of the conviction. Other than for Kobu and Sangi²⁰ involving a 5 kilometres issue, the Chamber does not seem to have any difficulty either in this regard. The VPRS should limit its distance measuring exercise to the issues raised by the 15 December 2020 Clarification Decision. The results of this exercise must also be communicated to the Defence.

28. **Paragraph 24 sub. 5** – Indeed, on appeal, the Defence challenges the eligibility criteria in the 14 July Addendum,²¹ which comprise many distinct issues. Should the Appeals Chamber grant Ground 4 of the Defence appeal in all or in parts, this is likely to have major repercussions on the eligibility determinations to be conducted.

29. **Paragraph 24 sub. 5** – The Defence concurs with the VPRS’ proposal to postpone the actual issuance of eligibility determinations until the Appeals Chamber has pronounced

¹⁹ See, *inter alia*, Defence observations on the Trust Fund for Victims’ Ninth Update Report on the Implementation of the Initial Draft Implementation Plan, 10 February 2023, ICC-01/04-02/06-2829, para.15; Defence observations on the Trust Fund for Victims’ Tenth Update Report on the Implementation of the Initial Draft Implementation Plan, 11 April 2023, ICC-01/04-02/06-2843, paras.7-8.

²⁰ 15 December 2020 Clarification Decision, para.26.

²¹ Defence Appellant Brief against the 14 July addendum, Ground 4.

on the Defence appeal. This is precisely why the Defence requested suspensive effect of its appeal, yet to be adjudicated by the Appeals Chamber.

30. **Paragraph 25** – The Defence, as a party to the reparations proceedings, has yet to be consulted on outreach communication materials.

31. **Paragraph 26** – The Defence also requests to be consulted on the content of any communications about reparations.

32. **Paragraph 27** – The Defence understood from the First Decision on the Updated DIP that the VPRS will not be involved in preparing and disseminating targeted messages to potential beneficiaries.²²

33. **Paragraph 28** – The Defence has yet to be consulted.

34. **Paragraph 29 sub. 1** – In the event the VPRS targeted messages to potential beneficiaries are approved, the Defence takes the view that beneficiaries need not and should not be informed of eligibility criteria to receive reparations ahead of any collection of information. The same applies particularly to community leaders.

35. **Paragraph 29 sub. 1** - Potential beneficiaries should solely be informed about the temporal and geographical scope of the conviction. Informing community leaders and potential beneficiaries of eligibility criteria in advance can only obscure the eligibility determination process.

36. **Paragraph 30** – In the event the VPRS is authorised to issue targeted messages to potential beneficiaries, the Defence requests to be involved in the preparation of messages.

37. **Paragraph 34** – More information is required from the VPRS regarding the identity of reliable civil society organisations and local authorities recruited/selected, particularly interlocutors, who will be assisting the VPRS. A proper security verification, assessment and trainings of these organisations is required.

38. **Paragraph 43** – The Defence underscores, as noted by the appeals Chamber, that collective reparations with individual components require that any potential victim seeking to

²² First Decision on the Updated DIP, paras.74-77,144-146,154.

benefit from individual components be determined to be eligible for reparations.²³ This requires an assessment on the merits on any and all information they provide. Once again, the use of a simplified system to collect information should not be mistaken with the need of a proper eligibility determination.

39. **Paragraph 45** – The Defence take the view that the use of a household form should not be pursued. Individual components falling under collective reparations are meant to be awarded to individuals. Each individual should be subject to a individual eligibility assessment.

40. **Paragraph 47** – The use of an electronic interactive form/questionnaire to facilitate data collection by the VPRS is not opposed *per se*. However, the Defence underscores the absolute necessity for potential beneficiaries to provide a full narrative. The narrative provided by potential beneficiaries is a most important source of information allowing for a proper eligibility determination. Limiting the collection of information to close-ended questions would not yield sufficient information.

41. **Paragraph 49** – More information is required from the VPRS regarding the role and the tasks which may be assigned to civil society organisations and/or individuals who may be involved in the collection of information. While speaking the same language as the potential beneficiaries is an advantage, intermediaries must undergo a proper security check and trainings regarding the interview of potential beneficiaries process.

42. **Paragraph 55** - Without prejudice to the Defence appeal against the 14 July Addendum, sources which may need to be consulted by the VPRS include the 8 March Reparations Order, 14 July Addendum, Annex 1 to the 14 July Addendum, 15 December 2020 Clarification Decision, Decision approving the TFV Initial Draft Implementation Plan, Decision on the TFV Fourth Updated Report on the implementation of the Initial Draft Implementation Plan, all of which remain in force based on the 14 July Addendum.

43. **Paragraph 56** – Based on the VPRS' estimates, some 35 months will be required, best case scenario, to complete the eligibility determinations. This is much more than the time allotted by the Chamber to complete this exercise. Moreover, this does not take into account the first level of review, which is to be performed by the VPRS. It also does not take into

²³ Appeals Judgment, para.387, fn.1672.

consideration the second level of review, *i.e.* potential victims found not to be eligible who will appeal their determination before the Chamber.²⁴ It would be tempting in these circumstances to accelerate the eligibility assessment process. This is to be avoided to ensure the success of the reparations phase.

44. **Paragraph 62** – The Defence takes issue with the proposal of the VPRS to assess *de novo* all 2,121 participating victims, including the 661 participating victims considered to be not eligible due the scope of the case. The Chamber noted the initial assessment conducted by the VPRS in the 8 March Reparations Order.²⁵ Consequently, the 661 victims were found not to be eligible on the basis of the 15 December 2020 Clarification Decision.²⁶ Should these potential victims wish to challenge this negative determination, they should do so by way of an appeal before the Chamber.

45. **Paragraph 66** – The term resource person is used here for the first time. The Defence understands a resource person to be a person remunerated for the assistance provided to the VPRS. Previous observations regarding the need for a proper security check, validation (to ensure the absence of conflicts of interests) and trainings apply.

46. **Paragraph 73** – The Defence recalls the VPRS’ proposal to postpone the actual issuance of eligibility determinations until the Appeals Chamber has adjudicated the Defence appeal. With a view to avoiding raising potential victims’ expectations and minimising contacts with victims, the Defence strongly supports the VPRS’ proposal.

47. **Paragraph 75** – The Defence respectfully submits that periodic VPRS reports should also be addressed to the Defence. Although the Chamber found that no intervention of the Defence is required regarding the eligibility determinations performed during the implementation stage, information concerning the implementation of reparations is of significant importance for the Convicted Person, who has a legitimate interest in the outcome of the reparations process, which depends to a large extent on the approval of a sound, feasible and well-articulated implementation plan. Indeed, further, to being convicted of 18 counts of war crimes and crimes against humanity and sentenced to imprisonment for 30 years, Mr Ntaganda has been ordered to pay reparations in the amount of 31,3 million dollars, which is certainly not trite. True, Mr Ntaganda is indigent and the likelihood that he will have

²⁴ First Decision on Updated DIP, para.185.

²⁵ 8 March Reparations Order, para.234.

²⁶ Registry Second Report on Reparations, 15 January 2021, ICC-01/04-02/06-2639-Conf-AnxI, para.3.

to disburse this money personally is at best remote. Nonetheless, the liability determined by Trial Chamber VI will remain a live issue for Mr Ntaganda until the entire sum has been raised by the TFV, if ever, and applied to reparations awarded to beneficiaries in this case.

B. *Annex II to the Registry Submissions*

48. Annex II spells out the Registry / VPRS' understanding of the applicable criteria it intends to use and the sources it intends to rely upon when performing the eligibility assessment process, including the identification of potential victims, collection of information and determination of their eligibility.

49. The Defence acknowledges that it was indeed necessary for the Registry / VPRS to provide its understanding of the applicable criteria for eligibility determinations in light of the number of sources, which remain in force based on the 14 July Addendum. Notably, all of these sources may be referred to, not only by the VPRS when conducting the eligibility assessment, but also by victims determined to be not eligible, or their representatives, when appealing negative determinations before the Chamber.

50. Whereas the Defence considered making observations and submissions on the content of Annex II, its position on the criteria which should govern the determination of the eligibility of potential victims has already been set out in detail in the Defence submissions on the victims' dossiers in the sample,²⁷ including the rationale for the necessity to apply such criteria. Moreover, further to the 14 July Addendum and the criteria adopted therein by the Chamber, Ground 4 of the Defence appeal against the 14 July Addendum challenges these criteria, explaining why they are not suitable to properly guide the VPRS in conducting eligibility determinations. Specific submissions on appeal are directed at, *inter alia*, the presumption of civilian status based on IHL,²⁸ the applicable temporal scope of the convictions and sufficiently close in time criterion²⁹ and the causal link requirement,³⁰ which is no longer a consideration, and the applicability of transgenerational harm in this case. In addition, based on the results of Chamber's eligibility determination of the victims' dossiers in the sample, the thrust of the Defence submissions on appeal is that in the end, the eligibility

²⁷ Submissions on behalf of the convicted person on the dossiers of the victims included in the sample, 1 May 2023, ICC-01/04-02/06-2851.

²⁸ Defence Appellant Brief against the 14 July addendum, paras.97-105.

²⁹ Defence Appellant Brief against the 14 July addendum, paras.91-96.

³⁰ Defence Appellant Brief against the 14 July addendum, paras.106-112.

of potential victims will rely on the geographical and material scope of the case and a good narrative, without more. For the Defence, these represent reversible legal errors.

51. The Defence observes that these issues are indeed present in Annex II, leading to the same conclusion, *i.e.* that potential victims will be determined eligible if they meet the geographical and material scope of the case and provide a good narrative, without more. Notwithstanding, the Defence invites the Registry / VPRS when designing any questionnaire to be used for the collection of information and interviewing potential victims, to insist on obtaining from them a thorough narrative providing a complete description of the events, sufficient to verify the consistency thereof with the Judgment and narratives provided by other victims. In this regard, the Defence opposes the use of questionnaires with close-ended questions, bypassing the need for a narrative.

C. Annex III to the Registry Submissions

52. Annex III spells out the Registry / VPRS' understanding of the applicable scope of the case, in the form of graphics, which it intends to rely upon when conducting the eligibility determinations.

53. The Defence thus understands that Annex III was designed as a tool to assist staff members in making eligibility determinations. As such, it is of the highest importance for this annex to be accurate and in conformity with the applicable criteria.

54. Having reviewed the graphics on the scope of the conviction, the Defence takes the view that they are not sufficiently accurate to be used for the purpose. One of the material issues in this regard pertains to the temporal scope, which focuses on the dates of the first and second operations rather than on the dates of specific events. Others mistakes and inaccuracies include - but are not limited to – information regarding the crime of persecution in Gola.³¹ Trial Chamber VI made a negative finding in the Judgment regarding destruction of property in Gola.³² Accordingly, potential beneficiaries claiming to have suffered persecution through destruction of their property in Gola cannot be considered to be eligible.³³

55. Consequently, the Registry should be instructed to review and correct Annex III.

³¹ Annex III to the Registry Submissions, 3 November 2023, ICC-01/04-02/06-2878-AnxIII, p.18.

³² Judgment, 8 July 2019, ICC-01/04-02/06-2359, para.1155.

³³ See 15 December 2020 Clarification Decision, para.60.

II. TFV Submissions

A. Security Assessment

56. The TFV Submissions demonstrate the increasing obstacles to the effective implementation of reparations in the context of the ongoing conflict in Ituri province. Firstly, the TFV recognizes the “highly volatile security situation” in which the proposed reparations will purportedly be distributed, including the “political insecurity around the December presidential elections as well as the possible departure of the MONUSCO from the country” which “create an unpredictable environment, that could deteriorate rapidly”.³⁴

57. The position of the Defence has been consistent. Reparations awarded in this case must consider not only the insecurity in Ituri, but other factors including an assessment of the majority composition of active militias in Ituri as well as the ongoing crimes committed by these armed groups against civilians.³⁵ The Defence maintains that awarding reparations to members of the Lendu community at this stage, and in this context, without ensuring through a robust admissibility determination process, that they were not Lendu combatants at the relevant time, and/or are not members of, or associated with, active militias in Ituri, will exacerbate tensions between the communities, will likely be perceived as an injustice by the many civilians who are the victims of the crimes committed by these groups,³⁶ and runs the risk of directly financing and fueling the conflict.³⁷

58. The Chamber has dismissed these concerns, which have been repeatedly characterized as “wholly unfounded”.³⁸ However, the Chamber has ordered the TFV to undertake “a new security assessment closer to the time of implementation, taking into account the concerns

³⁴ TFV Submissions, para.96.

³⁵ See, *inter alia*, Defence Observations on the TFV Eighth Update Report, para.11; Defence Observations on the TFV Ninth Update Report, para.16; Defence Observations on the TFV Eleventh Update Report, para.14.

³⁶ Defence observations on the Trust Fund for Victims’ Eleventh Update Report on the Implementation of the Initial Draft Implementation Plan, 12 June 2023, ICC-01/04-02/06-2855, para.13.

³⁷ Observations on behalf of the convicted person on the Trust Fund for Victims’ Eighth Update Report on the Implementation of the Initial Draft Implementation Plan, 9 December 2022, ICC-01/04-02/06-2802, para.10. See also, Radio Okapi, Bunia : la communauté Hema appelle à l’instauration d’un tribunal pénal pour l’Ituri, 25 March 2023, available at <https://www.radiookapi.net/2023/03/25/actualite/securite/bunia-la-communaute-hema-appelle-linstauration-dun-tribunal-penal-pour>; Radio Okapi, La population de l’Ituri compte sur la CPI pour poursuivre les chefs des milices, 30 May 2023, available at <https://www.radiookapi.net/2023/05/30/actualite/justice/la-population-de-lituri-compte-sur-la-cpi-pour-poursuivre-les-chefs-des>; Radio Okapi, Ituri : les victimes des atrocités des groupes armés attendent de la CPI la répression des crimes subis, 31 May 2023, available at <https://www.radiookapi.net/2023/05/31/actualite/justice/ituri-les-victimes-des-atrocites-des-groupes-armes-attendent-de-la-cpi>.

³⁸ Decision on the TFV’s Eighth Update Report on the Implementation of the Initial Draft Implementation Plan, 13 January 2023, ICC-01/04-02/06-2811, para.14; First Decision on Updated DIP, para.119.

raised by the Defence, to ensure that the implementation of reparations can be carried out safely and will not exacerbate conflict or tensions in the region”.³⁹ Relevantly, however, the TFV now submits that the highly volatile situation in Ituri means a security assessment will be possible “only after the elections, and when the conditions of departure of MONUSCO, which is currently under discussion, are known”.⁴⁰

59. The lack of a security assessment, means that the TFV has no strategy in place to implement reparations in a way that will circumvent the active conflict, make their way **only** into the hands of eligible victims, be used **only** for the purposes for which they were intended, and that their distribution to one side of an ongoing ethnic conflict will neither undermine the security situation nor cause any kind of tensions, animosity and jealousy among affected communities.⁴¹ The Defence concerns remain unaddressed. The TFV still has not developed any strategy to address them.

60. Meanwhile, the TFV Submissions indicate that the obstacles to the meaningful implementation of reparations have, in fact, increased. A security assessment will not be possible until after the presidential elections and “when the conditions of the departure of MONUSCO, which is currently under discussion, are known”;⁴² the identification of members of the Sayo community and healthcare practitioners to determine suitable measures is currently impossible given that “Sayo remains inaccessible” due to the ongoing conflict;⁴³ finalisation of the conceptualization of the relevant reparations measures concerning the Abbé Bwanalonga center will only be possible when the security situation allows the TFV to enter Djuga territory;⁴⁴ there is a “low” likelihood that “critical infrastructure to enable reparations” will be in place by the time reparations implementation will start;⁴⁵ no suitable local organizations can be identified who can search for designated missing persons;⁴⁶ and the TFV now having identified numerous obstacles to alternative implementation options for payments.⁴⁷ In short, the TFV Submissions raise far more questions than they answer.

³⁹ Decision on the TFV’s Ninth to Twelfth Update Reports on the Implementation of the Initial Draft Implementation Plan, 31 August 2023, ICC-01/04-02/06-2868, para.23.

⁴⁰ TFV Submissions, para.97.

⁴¹ Decision on the TFV’s Eighth Update Report on the Implementation of the Initial Draft Implementation Plan, 13 January 2023, ICC-01/04-02/06-2811, para.10.

⁴² TFV Submissions, para.97.

⁴³ TFV Submissions, para.47.

⁴⁴ TFV Submissions, para.103.

⁴⁵ TFV Submissions, para.80.

⁴⁶ TFV Submissions, para.67.

⁴⁷ TFV Submissions, paras.90-91,93.

B. Funding and Design of the Ntaganda Programme

61. In the First Decision on Updated DIP, the TFV was asked to provide updated estimates as to the direct and indirect costs of the approved projects and information as to the TFV's projections of its ability to complement the award.⁴⁸ In the Updated DIP, the TFV indicated that neither the parties, Registry, Trial Chamber, nor the TFV were in a position to provide an estimated number of victims.⁴⁹ As such, instead of reporting to the Chamber on the absence of reliable estimates, the TFV designed programmes to spend the amount of liability, then being USD 30 million, with the intention of identifying later the number of victims required to draw the services available from these programmes.⁵⁰

62. The Defence has objected to this process of reverse engineering as being contrary to the purpose of the ICC reparations process,⁵¹ and joined with the LRV2 request for clear information regarding (i) the total number of potential beneficiaries; (ii) their identity; and (iii) their current location. These are pre-requisites to the development of a realistic plan for reparations programmes (including estimated cost) or eligibility assessment.⁵²

63. In the current Submissions, the TFV has put even further distance between its proposed programmes and the Chamber's liability findings, submitting that the monetary amounts assigned to each of the categories of harm, *do not* correspond to an order of what victims are expected to receive. In other words, the TFV does not consider itself to be bound to apply these amounts to the relevant groups of victims for the relevant activities. Rather, it is the Updated DIP that determines the form through which the harm is repaired.⁵³ In practice, therefore, while the Chamber allocated "USD 5,032,898"⁵⁴ for "psychological harm for victims of the attacks" or "USD 130,000"⁵⁵ for the "Sayo Health Centre", the TFV considers itself as being under no obligation to design programmes around these liability findings. The problem being, it is still unclear how the TFV will then determine the form through which the harm will be repaired.

⁴⁸ First Decision on Updated DIP, paras.128-131.

⁴⁹ Updated DIP, para.96.

⁵⁰ Updated DIP, para.269-276.

⁵¹ Defence Observations on Updated DIP, para.45.

⁵² Defence Observations on Updated DIP, para.47.

⁵³ TFV Submissions, paras. 17-21.

⁵⁴ 14 July Addendum, paras.346,358.

⁵⁵ 14 July Addendum, paras.244,356-358.

64. While this level of discretion was justified by the TFV in the Updated DIP on the basis that the Chamber “did not make a determination of the liability of Mr Ntaganda for each of the two group of victims separately, but one determination for all victims of Mr Ntaganda”,⁵⁶ this justification no longer stands, given that the Addendum makes specific liability findings for the different groups of victims. The TFV’s severance of the link between the proposed reparations and the Chamber’s liability findings, transforms them into nothing more than an extension of the TFV’s assistance mandate, undermining the very purpose of conviction-based reparations, and removing the protections in place for the convicted person who is ultimately liable.

65. In addition, despite the fact that the Trial Chamber publicly announced through the Addendum that it had awarded USD 31.3 million to the victims in the *Ntaganda* case,⁵⁷ the TFV now submits that it has set its target of “fund mobilization” at EUR 21 million.⁵⁸ This figure should be considered against the submission that the TFV raised EUR 2 million for *Lubanga* reparations during 2022, and that only one State Party has provided voluntary contributions earmarked for reparations in the *Ntaganda* case.⁵⁹ Against this reality, it appears certain that the fund mobilization target of EUR 21 million in the *Ntaganda* case will not be met.

66. Mr Ntaganda has been designated as indigent throughout these proceedings. It now seems certain that the scope of reparations afforded to victims will be significantly less than the publicly heralded figure of USD 31.3 million. The Defence therefore encourages future public outreach and discourse surrounding reparations in the present case to present a more realistic picture of the scope of reparations, to avoid re-traumatization and distress to victim communities, increased insecurity, and a backlash against Mr Ntaganda, his family, the Court and its staff when nothing like the USD 31.3 million in reparations is provided.

C. Timeline of Implementation

67. The Chamber has announced that the *Ntaganda* reparations programme should take five years “from the effective commencement of the implementation of reparations”.⁶⁰ The TFV now asks for flexibility, on the basis that implementation is dependent on the amount of

⁵⁶ Updated DIP, para.276.

⁵⁷ 14 July Addendum, para.360.

⁵⁸ TFV Submissions, paras.18-22, citing 14 July Addendum, paras.313-314.

⁵⁹ TFV Submissions, para.38.

⁶⁰ First Decision on DIP, para.127.

funds available per year, and on local capacities to provide a great number of victims with the relevant services.⁶¹ No estimation or timeframe is given.

68. Significantly, the TRV's submissions as to timeline are formulated by "leaving aside the precarious security situation in Ituri Province".⁶² With respect, this precarious security situation is necessarily at the center of any assessment of timeline. In reality, the TFV has proposed delaying its security assessment until after an assessment of (i) the presidential elections and (ii) the withdrawal of MONUSCO, the dates of which are far from certain. As such, not only will flexibility necessarily be required, but the timeline remains entirely unpredictable.

D. Social-economic starter sum

69. The TFV repeats that awarding victims a starter sum will have benefits which include enhancing trust in the actions of the Court.⁶³ The Chamber has previously found that the purported benefit of an initial cash payment "enhancing victims' trust in the Court" would be better obtained through successful and timely deployment of reparations.⁶⁴ The Chamber was, however, concerned by the indication that "this practice seems to have been already adopted in the *Lubanga* case" and that by rejecting it, the Chamber would create "unequal treatment of the child soldier victims".⁶⁵ It is now clear that starter sums **were not** paid in *Lubanga*.⁶⁶ Instead, the TFV now submits that starter payments are necessary to avoid [REDACTED].⁶⁷ However, it gives no basis for this conclusion, or indicate that future *Ntaganda* victims would be aware of the details of payments [REDACTED].

70. In terms of how the payments would be made, the TFV still has to "consider the practicalities involved",⁶⁸ and has no answer for the Chamber as to the amount that should be paid.⁶⁹ More importantly, the TFV never addresses the Chamber's concern that providing victims with a lump sum payment may remove the incentive to engage in the programme more broadly;⁷⁰ or the Defence concern of the risk of financing armed groups;⁷¹ or the CLR2

⁶¹ TFV Submissions, para.30.

⁶² TFV Submissions, para.30.

⁶³ TFV Submissions, para.39

⁶⁴ First Decision on Updated DIP, para.46.

⁶⁵ First Decision on Updated DIP, para.46.

⁶⁶ TFV Submissions, para.40.

⁶⁷ TFV Submissions, para.42.

⁶⁸ TFV Submissions, para.42.

⁶⁹ TFV Submissions, para.41.

⁷⁰ First Decision on Updated DIP, para.45.

concern that distribution of starter sums “is likely to even worsen the prevailing general insecurity in the affected communities” and is “hardly reconcilable with the do no harm principle”.⁷² It can therefore reasonably be assumed that the TFV has no information to allay these concerns.

E. *Missing persons-related measures*

71. The Defence understands the TFV to be hoping to locate and identify child soldiers or other persons designated as missing since the two attacks (deceased or alive).⁷³ From the beginning, the CLR2 has been concerned as to the efficacy of this measure, given the 20 years that have now passed, a concern dismissed by the Chamber as speculative. The fact that the TFV can find no organizations in the DRC engaged in this exercise⁷⁴ lends significant support to the CLR2’s concerns.

72. Having been unable to locate the relevant expertise, the TFV’s first proposal is unworkable. In its place, the TFV proposes to undertake further consultations “to explore in more breadth of scope the measures in support of the families of missing persons”, including registration of names, analysis of data, interviews, mechanisms for human identification and “other investigative activity.”⁷⁵ But again, it is unclear which entity or organization would carry out this type of sensitive, detailed, and potentially forensic investigations, which fall outside the obvious remit of TFV or Registry staff, and for which expertise in tracing and restoration of post-conflict family links is still needed. Had this expertise been available in the DRC, the TFV would have presumably found it. The Defence therefore reiterates its concern over wasted resources.⁷⁶

F. *Lump Sum in Lieu*

73. Again, the position of the Defence has been consistent; in proposing the distribution of lump sum payments, the TFV overlooks the risk of financing armed groups in Ituri⁷⁷ and, as highlighted by the CLR2, the TFV overlooks the risk that these payments would likely

⁷¹ Defence observations on Updated DIP, paras.97,100,103.

⁷² Final Observations on Reparations of the Common Legal Representative of the Victims of the Attacks, 21 December 2020, ICC-01/04-02/06-2633 (“LRV2 Final Observations”), para.56.

⁷³ Updated DIP, para.241; First Decision on Updated DIP, para. 97.

⁷⁴ TFV Submissions, para.67.

⁷⁵ TFV Submissions, para.68.

⁷⁶ Defence observations on Updated DIP, para.110.

⁷⁷ Defence observations on Updated DIP, para.97.

worsen the prevailing general insecurity.⁷⁸ As such, the Defence has submitted that the TFV should avoid cash hand-outs to victims as much as possible, and favour instead direct payments to the relevant services providers. Where this is not possible, the expense preapproval /reimbursement regime should be enforced.⁷⁹

74. These concerns have been repeatedly dismissed, with the Chamber finding that if the Defence has “concrete and verifiable information about specific cases of victims deviating reparations funds to other activities, it should bring the issue to the Chamber’s and the TFV’s immediate attention.”⁸⁰ Thus, rather than implementing preventive measures, which go hand in hand with ensuring that only genuine victims receive reparations without exacerbating tensions in Ituri, the Chamber prefers having to react later. The TFV itself has now rejected the suggestion of the expense preapproval/ reimbursement regime as being “not fitting” in the context of Ituri, because “receipts produced are of a limited reliability”. Namely, “receipts were provided by individuals who did not have authority to do so”, “services indicated on receipts were **often** overcharged”, and “the authenticity of the receipt itself was doubtful”.⁸¹ The TFV has accordingly provided concrete information that should funds be provided in this manner, they would be deviated to other activities other than the reparations for which they were intended.

75. As such, the Defence has also submitted that if the expense preapproval/ reimbursement regime is not possible, and cash hand-outs are absolutely unavoidable, then the TFV should implement a reporting system on how the sums have been spent.⁸² The TFV Submissions provide no detail as to any safeguards or reporting systems that may or will be put in place. The TFV emphasizes only that accurate estimates for the amount of these lump sum payments can only be provided closer to implementation, following (i) the selection of an implementing partner, and (ii) determination of the exact parameters of the sub-programmes.⁸³ Both these factors remain unknown.

⁷⁸ LRV2 Final Observations, para.56.

⁷⁹ Defence Observations on Updated DIP, para.105.

⁸⁰ Decision on the TFV’s Eighth Update Report on the Implementation of the Initial Draft Implementation Plan, 13 January 2023, ICC-01/04-02/06-2811, para.18.

⁸¹ TFV Submissions, para.93 (emphasis added).

⁸² Defence Observations on Updated DIP, para.105.

⁸³ TFV Submissions, para.77.

G. *TFV request for additional submissions*

76. Presumably because of the pending status of the Defence and CLR2 requests for suspensive effect,⁸⁴ the Chamber is continuing with the implementation of reparations as if the outcome of the appeal will have no impact on the progress of the reparations phase. The Defence's opposition to the Chamber's continued progression of the reparations proceedings is already on record.⁸⁵ The Defence also takes note of the TFV's request to provide additional submissions 21 days after the decision on suspensive effect is issued, as this delay is deemed essential to providing a fully informed response to the Chamber's requests for additional information.⁸⁶ The Defence does not oppose this request, hoping that it will be given a fair opportunity to submit observations to the same.

H. *Apology*

77. The Defence has read the CLR's submissions as regards a potential apology from Mr Ntaganda with care, noting the views of those victims who think an apology no longer appears useful, and those who feel they would benefit from it.⁸⁷ Consistent among group of victims who welcome an apology, is a request that any apology be sincere, and genuine. [REDACTED] the proposed meeting(s) to be convened by the TFV in the coming weeks,⁸⁸ which the Defence is obviously ready to attend, the Defence also takes this opportunity to note that it [REDACTED], [REDACTED], [REDACTED]. [REDACTED], [REDACTED].

⁸⁴ Notice of Appeal of the Common Legal Representative of the Victims of the Attacks against the "Addendum to the Reparations Order of 8 March 2021, ICC-01/04-02/06-2659", and Request for Suspensive Effect in relation to Trial Chamber II's Decision on the eligibility of Victims a/01636/13, a/00212/13, a/00199/13 and a/00215/13, 16 August 2023, ICC-01/04-02/06-2862, paras.37-43; Request for the Defence appeal against the Addendum issued by Trial Chamber II on 14 July 2023 to be given suspensive effect, 16 August 2023, ICC-01/04-02/06-2864.

⁸⁵ 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, 7 October 2022, ICC-01/04-02/06-2785, paras.14-17; Submissions on behalf of the Convicted Person on the procedure for the constitution of the sample established by the Implementation Order, 9 November 2022, ICC-01/04-02/06-2791, para.7.

⁸⁶ TFV Submissions, paras.34-35.

⁸⁷ Annex A to TFV Submissions, 3 November 2023, ICC-01/04-02/06-2877-Conf-AnxA; Annex B to TFV Submissions, 3 November 2023, ICC-01/04-02/06-2877-Conf-AnxB.

⁸⁸ TFV Submissions, para.74.

CONCLUSION

78. On behalf of the Convicted Person, the Defence respectfully requests the Chamber to consider this Defence Response, hoping that it will be of some assistance.

RESPECTFULLY SUBMITTED ON THIS 8th DAY OF MARCH 2024

Handwritten signature of Stéphane Bourgon, consisting of the letters 'S+B' in a stylized, cursive font.

Me Stéphane Bourgon *Ad.E.*, Counsel for Bosco Ntaganda

The Hague, The Netherlands