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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

Public Redacted Version of “Defence Observations on the TFV initial draft implementation plan”, 23 June 2021, ICC-01/04-02/06-2682-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 submissions of the Report on Trust Fund's preparation for Draft Implementation Plan along with the Trust for Victim's Initial Draft Implementation Plan ("TFV IDIP")¹ on 8 June 2021, Counsel representing Mr Ntaganda ("Mr Ntaganda" or "Defence") hereby submits these:

**Defence Observations on the TFV initial draft implementation plan
("Defence Observations")**

INTRODUCTION AND OVERVIEW

1. In Part VI of the 8 March 2021 Reparations Order ("8 March Reparations Order"),² Trial Chamber VI ordered the Trust Fund for Victims ("TFV") "[...] to prepare a draft implementation plan and submit it for the Chamber's approval within six months [...]"³ adding *inter alia* that "[...] the TFV shall rely on the Registry and the LRVs, as appropriate in light of their mandate and expertise, in order to ensure that the implementation process and consultations with victims comply with all Principles on Reparations [...]"⁴.

2. Then, referring to the concept of prioritisation addressed in the 8 March Reparations Order, Trial Chamber VI departed from the reparations process practice before other trial chambers, by instructing the TFV to also submit, as soon as possible and within three months at the latest, "[...] an initial draft implementation plan focused exclusively on the options for addressing the most urgent needs of victims that require priority treatment."⁵ Notably, in the Disposition of the 8 March Reparations Order, Trial Chamber VI referred to this initial draft implementation plan as "[...] an urgent plan for the priority victims."⁶

¹ Corrigendum to Annex A to the Initial Draft Implementation Plan with Focus on Priority Victims, 14 June 2021, [ICC-01/04-02/06-2676-Conf-AnxA-Corr](#) ("TFV IDIP").

² Reparations Order, 8 March 2021, [ICC-01/04-02/06-2659](#) ("8 March Reparations Order").

³ [8 March Reparations Order](#), para.249.

⁴ [8 March Reparations Order](#), para.251.

⁵ [8 March Reparations Order](#), para.252.

⁶ [8 March Reparations Order](#), disposition.

3. As a preliminary matter, the Defence deems necessary to address the relationship between the principle of *prioritisation* and the *most urgent needs of victims that require priority treatment*, which appear to be Trial Chamber VI's rationale for instructing the TFV to submit an *initial draft implementation plan*.

4. In light of the prevailing circumstances, the TFV IDIP submitted as Annex A to the Report on Trust Fund's Preparation for Draft Implementation Plan submitted on 8 June 2021 ("TFV 8 June Report")⁷ should not be approved by Trial Chamber II in its present form or, at a minimum, be delayed for the reasons set out herein.

5. First, the Defence has recently requested the Appeals Chamber to grant suspensive effect regarding the implementation of the 8 March Reparations Order.⁸ To the extent that the TFV IDIP relies on the 8 March Reparations Order, including on findings and/or principles developed therein by Trial Chamber VI – which are challenged in the Defence Appellant Brief against the 8 March Reparations Order – suspensive effect granted by the Appeals Chamber would result in the suspension or delay of the TFV IDIP. That is not to say however, that the TFV could not take certain *interim* measures – aside from matters arising from the 8 March Reparations Order – to continue preparing for the implementation of the TFV IDIP or TFV *draft implementation plan* ("TFV DIP"), depending on the outcome of the appeals submitted by the LRV2 and the Defence.

6. Second, even if the Defence request for suspensive action was to be denied by the Appeals Chamber, the *do no harm* principle requires no less than delaying approval of the TFV IDIP, at least until the Appeals Chamber pronounces on the appeals lodged by the LRV2 and the Defence and/or the security situation in Ituri is addressed. Significantly, pursuant to this scenario, the *do no harm* principle is relevant and related to both the potential prejudice to victims as well as to the security

⁷ Report on Trust Fund's Preparation for Draft Implementation Plan, 8 June 2021, [ICC-01/04-02/06-2676-Conf](#) ("TFV 8 June Report").

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

situation in Ituri and the possibility of a major ethnic conflict developing, yet again, in Ituri and the Eastern Provinces of the Democratic Republic of Congo (“DRC”).

7. Third, should Trial Chamber II nonetheless consider approving the TFV IDIP, major modifications are required thereto, at a minimum, to protect the rights of the convicted person as well as to limit the potential prejudice to individual victims.

8. From the outset, the identification of the potential beneficiaries targeted by the TFV IDIP, *i.e.* those likely to receive assistance if the TFV IDIP is approved, is a source of concern. In fact, the information provided in the TFV IDIP and the criteria / procedure devised to select the potential beneficiaries allow neither to establish the number of potential beneficiaries *nor* to identify their urgent needs, justifying the submission and approval of an *initial draft implementation plan*.

9. The administrative eligibility assessment set out in the TFV IDIP is even more problematic. For starters, the TFV IDIP does not include a detailed proposal of the way in which it expects to conduct the administrative eligibility assessment, which the TFV acknowledges is required due to the collective reparations with an individualised component ordered by Trial Chamber VII.⁹ Instead, the TFV proposes a *method* to determine eligibility in order to allow it to address the urgent needs of priority victims, in other words, a shortcut. More importantly, for all categories of victims, namely child soldiers, child soldiers having experienced sexual violence during the time spent in the UPC/FPLC (“Child Soldiers/SGBV”) and victims of the attacks, the Defence is entirely left out of the administrative eligibility assessment process. What is more, TFV IDIP provides for the delegation of the administrative eligibility process to implementing partners – without involving the TFV Board, let alone Trial Chamber II – which is clearly untenable. The same applies to the fanciful proposal of training the implementing partners, jointly with the LRV2 – a party to the reparation proceedings – to understand exactly the scope of the charges.

⁹ [TFV IDIP](#), paras.78, 79.

10. As for the information provided in the TFV IDIP regarding the proposed measures, it is also deficient. To begin with, the TFV's recourse to the '*Lubanga collective service-based reparation programme*', the '*Psychosocial and socio-economic reintegration of girl-mothers victims of the wars in Ituri Project*', operating in Irumu territory and the [REDACTED], operating in [REDACTED], is inadequate to say the least. Notably, the TFV acknowledges that the measures available through these TFV delivery structures do not address the totality of the harms of the victims. Furthermore, despite the TFV bold assertion that there is no conceptual barrier to resort to assistance services as interim relief for reparations beneficiaries, the least that can be observed is the evident confusion, likely to create confusion as opposed to clarity, regarding the difference between judicial reparations programs and assistance projects implemented by the TFV.

11. In light of the foregoing, taking into consideration the demanding administrative and budgeting requirements to implement the TFV IDIP, as well as the expected time line and the expected partial results – and the fact that the entire process will have to addressed *de novo* for the victims likely to receive reparations if approved – the disadvantages associated with the Trial Chamber VI's unprecedented initiative to instruct the TFV to submit an initial draft implementation far outweigh the potential benefits.

PROCEDURAL BACKGROUND

12. On 8 March 2021, Trial Chamber VI issuance of the Reparations Order against Mr Ntaganda pursuant to article 75 of the Rome Statute ("Statute" and "8 March Reparations Order").¹⁰

13. On 8 April 2021, the Defence¹¹ and the LRV2¹² filed their respective notices of appeal against the 8 March Reparations Order.

¹⁰ [8 March Reparations Order](#).

14. On 7 June 2021, both the Defence¹³ and the LRV2¹⁴ filed their appeal briefs against the 8 March Reparations Order. In its appeals brief, the Defence requested the suspension of the implementation of the 8 March Reparations Order (“Defence Request for Suspension”).

15. On 9 June 2021, the Defence was notified of the Trust Fund for Victims Initial Draft Implementation Plan (“TFV IDIP”).¹⁵

16. On June 10 2021, Trial Chamber II issued the Order for the submission of observations on the initial draft implementation plan with focus on priority victims (“Order”),¹⁶ directing the parties to file observations by 23 June 2021.

17. On 11 June 2021, the Appeals Chamber ordered the TFV to submit written observations on the Defence Request for Suspension.¹⁷

CONFIDENTIALITY

18. Pursuant to regulation 23*bis* (1) and (2) of the Regulations of the Court, the present observations are classified as confidential as they respond to the submissions likewise classified as confidential.

¹¹ Defence Notice of Appeal against the Reparations Order, ICC-01/04-02/06-2659, 8 April 2021, [ICC-01/04-02/06-2669](#) (“Defence Notice of Appeal”).

¹² Notice of Appeal of the Common Legal Representative of the Victims of the Attacks against the Reparations Order, 8 April 2021, [ICC-01/04-02/06-2668](#) (“LRV2 Notice of Appeal”).

¹³ [Defence Reparations Appeal Brief](#).

¹⁴ Appeal Brief of the Common Legal Representative of the Victims of the Attacks against the Reparations Order, 7 June 2021, [ICC-01/04-02/06-2674](#).

¹⁵ Corrigendum to Annex A to the Initial Draft Implementation Plan with Focus on Priority Victims, 14 June 2021, [ICC-01/04-02/06-2676-Conf-AnxA-Corr](#) (“TFV IDIP”).

¹⁶ Order for the submission of observations on the initial draft implementation plan with focus on priority victims, 10 June 2021, [ICC-01/04-02/06-2677](#) (“Order”).

¹⁷ Order setting a time limit for responses to the request for suspensive effect and invitation to the Trust Fund for Victims to submit observations on that request, 11 June 2021, [ICC-01/04-02/06-2678](#).

SUBMISSIONS

I. The principle of prioritisation versus the most urgent needs of victims that require priority treatment

19. Pursuant to the 8 March Reparations Order, the principle of prioritisation refers to the fact that even though all victims are to be treated fairly and equally, “priority may need to be given to certain victims who are in a particularly vulnerable situation or require urgent assistance”.¹⁸ In other words, in certain circumstances, the principle of prioritisation allows to give priority to certain victims over others.

20. The principle of prioritisation principle had previously been defined in *Lubanga*, *Katanga* and *Al Mahdi*, using similar terms. In the case at hand, however, relying on Dr Gilmore’s expert report,¹⁹ Trial Chamber VI went much further, adding that:

[w]hen determining priorities, attention should be given to individuals who require immediate physical and/or psychological medical care, victims with disabilities and the elderly, victims of sexual or gender-based violence, victims who are homeless or experiencing financial hardship, as well as children born out of rape and sexual slavery and former child soldiers.²⁰

21. Although Trial Chamber VI did not label all of these categories as priority victims *per se* (“attention should be given to”), it is noteworthy that attempting to establish priorities amongst these categories, if required, is bound to be problematic. Indeed, the longer the list of categories of victims to which attention should be given, the less effective it is.

22. Nonetheless, this did not prevent Trial Chamber VI from applying the prioritisation principle, holding that “[...] priority ought to be given to victims who are in a particularly vulnerable situation or require urgent assistance”²¹ (the *Lubanga*, *Katanga* and *Al Mahdi* criteria) and that:

¹⁸ [8 March Reparations Order](#), para.92.

¹⁹ Second Expert Report, [ICC-01/04-02/06-2623-Anx2-Red2](#), para.4.

²⁰ [8 March Reparations Order](#), para.93.

²¹ [8 March Reparations Order](#), para.214.

[i]n particular, priority should be given to individuals who require immediate physical and/or psychological medical care, victims with disabilities and the elderly, victims of sexual or gender-based violence, victims who are homeless or experiencing financial hardship, as well as children born out of rape and sexual slavery and former child soldiers.²²

23. This is important because when instructing the TFV to submit an *initial draft implementation plan*, Trial Chamber VI referred to the “[...] prioritisation established in this Order”²³ but nonetheless directed the TFV to focus “[...] exclusively on the options for addressing the most urgent needs of victims that require priority treatment [...]”.²⁴ Then, in the Disposition of the 8 March Reparations Order, Trial Chamber VI requested the TFV to submit “[...] an urgent plan for the priority victims [...]”.²⁵

24. Indeed, it stems from the above that even though the prioritisation principle is relevant to the preparation of an initial draft implementing plan, it must be distinguished from “the most urgent needs of victims that require priority treatment.”²⁶ In other words, this is what Trial Chamber VI appeared to have in mind when instructing the TFV to submit an initial draft implementation plan, namely, to address the needs of certain victims on an urgent basis.

25. This is the criteria that should have guided the identification of potential beneficiaries who would receive reparations following approval of an initial draft implementation plan, *i.e.* victims who cannot wait for the submission and approval of the draft implementation plan ordered by Trial Chamber VI.²⁷ Needless to say, almost 20 years after the harm suffered as a result of the crimes for which Mr Ntaganda was convicted for, this is a very difficult exercise that requires a case-by-case analysis of the circumstances in which potential beneficiaries find themselves *today*.

²² [8 March Reparations Order](#), para.214 *in fine*.

²³ [8 March Reparations Order](#), para.252.

²⁴ [8 March Reparations Order](#), para.252.

²⁵ [8 March Reparations Order](#), disposition.

²⁶ [8 March Reparations Order](#), para.252.

²⁷ [8 March Reparations Order](#), paras.212, 249, 253 and disposition.

II. Defence request for *suspensive effect*

26. To the extent that the TFV IDIP relies on the 8 March Reparations Orders, including on findings and/or principles developed therein by Trial Chamber VII – which are challenged in the Defence Appellant Brief against the 8 March Reparations Order – suspensive effect granted by the Appeals Chamber would result in the suspension or delay of the TFV IDIP.

27. For the TFV to begin with the reparations process in the context of a possible suspension of the implementation phase can only be detrimental to the victims and the reparations process in itself. Indeed, the suspension was requested in order to avoid the TFV putting in place mechanisms that might not match a new or amended reparations order resulting from the Defence and/or LRV2 appeals against the 8 March Reparations Order.

28. What is more, substantial resources will be involved in the implementation of the TFV IDIP, which could result in a waste of already scarce resources. As pointed out by the TFV itself in the *Lubanga* case, considerable time and resources could be unnecessarily spent if the implementation starts while a decision as crucial as a reparation order is the object of an appeal procedure.²⁸ Trial Chamber II did acknowledge this argument and granted the TFV request to suspend the implementation of the *Decision establishing the principles and procedures to be applied to reparations* until the Appeals Chamber decision.²⁹

29. Hence, the implementation of the 8 March Reparations Order, especially in the current form proposed by the TFV, could result in situations that will have

²⁸ *Prosecutor vs. Thomas Lubanga Dyilo*, Observations in response to the Direction on the conduct of appeal proceedings, 1 October 2012, [ICC-01/04-01/06-2927](#), paras.24-25.

²⁹ *Prosecutor vs. Thomas Lubanga Dyilo*, Decision on the admissibility of the appeals against Trial Chamber I's Decision establishing the principles and procedures to be applied to reparations" and directions on the further conduct of proceedings, 14 December 2012, [ICC-01/04-01/06-2953](#), para.83.

irremediable consequences for the victims, which the Appeals Chamber has accepted as a reason for granting a request for suspension in the past.³⁰

III. The *do no harm* principle and the potential prejudice to individual victims

30. In the present case, starting with the implementation of the 8 March Reparations Orders would undoubtedly raise victims' expectations. Regardless of the capacity of the Registry to manage the expectations of victims,³¹ granting potential beneficiaries a place in a reparation program, with the risk of having to withdraw this person once the Appeals Chamber issues its decision, is prejudicial and in violation of the principle of *do no harm*.

31. Furthermore, the absence of an adequate screening method carries important risks contrary to the principle of *do no harm*. When the final eligibility screening process will be put in place following the issuance of the final Draft Implementation Plan as proposed by the TFV, some victims might no longer have access outside the criteria established by the 8 March Reparations Order, modified or not. Some victims will no longer have access to reparations, thus violating the *do no harm* principle and creating irreversible suffering.

32. What is more, the criteria established by the Trial Chamber with regard to, *inter alia*, the type of victims, the burden of proof and the causal link in relation to transgenerational harm and the adoption of presumptions of harms have been significantly challenged by the Defence on appeal.³² A reversal of one or more of these reparations order's features could have a significant impact on the field.

33. On another note, the implementation of an initial plan targeting priority victims necessarily implies that the TFV must enter in contact with the victims a first time, and most likely a second when the time will come to integrate the reparation

³⁰ *Prosecutor v. Ali Muhammad Ali Abd-El-Rahman*, Decision on Request for Suspensive Effect, 25 August 2020, [ICC-02/05-01/20-134](#), para.6.

³¹ First Decision on Reparations Process, 26 June 2020, [ICC-01/04-02/06-2547](#), para.39.

³² Corrigendum* of the "Defence Appeal Brief – Part II", 31 January 2020, ICC-01/04-02/06-2465-Conf, 30 June 2020, [ICC-01/04-02/06-2465-Conf-Corr](#).

program in the context of the final Draft Implementation Plan. If in addition to this procedure already contact-intensive, victims can be ejected from a reparations program or see its access restricted, the prejudice to those victims could potentially be dramatic and result in re-traumatisation of the victims.³³

34. Furthermore, as pointed out by the TFV itself,³⁴ choosing some victim on the basis of their vulnerability, in opposition to other victims also in need has the potential of triggering jealousy and inner community tensions as well as tensions between community. Again, with the potential of violating the principle of *do no harm*.

IV. The security situation in Ituri and the *do no harm* principle require no less than delaying approval of the TFV IDIP

35. In addition to the potential prejudice to individual victims, the *do no harm* principle calls for delaying approval of the TFV IDIP, due to the prevailing security situation in Ituri.

36. Indeed, as acknowledged in the TFV 8 June Report, the security situation in Ituri at this time, “[...] is extremely volatile” and it has been so at least since December 2017. The unprecedented move by DRC President Tshisekedi on 1 May 2021 – declaring martial law in the provinces of Ituri and North Kivu, replacing the provincial government with military administration, is of significant importance in this regard. The TFV acknowledges that the presence of the army, which has conducted sweep operations on various roads, has significantly improved the security situation in Ituri.³⁵

37. Yet, even the FARDC is unable, at least for the time being, to secure the main road from Bunia, crossing villages relevant to the 8 March Reparations Order,

³³ *Prosecutor vs. Thomas Lubanga Dyilo*, Decision on the admissibility of the appeals against Trial Chamber I's Decision establishing the principles and procedures to be applied to reparations" and directions on the further conduct of proceedings, 14 December 2012, [ICC-01/04-01/06-2953](#), para.83.

³⁴ [TFV IDIP](#), para.80.

³⁵ [TFV 8 June Report](#), para.36.

leading to Mongbwalu. It cannot be ignored that the current situation in this area is a replica of the situation faced by the UPC/FPLC in 2002-2003. Neither can the identity or the composition of the armed group(s) controlling this area and preventing the opening of the main road to Mongbwalu – in this case the CODECO composed of Lendu fighters – be ignored. These are fighters linked and/or associated to the Lendu fighters who massacred the Hema population of Bogoro and who committed numerous abominable massacres in many other villages in Ituri.

38. The TFV refers to the fact many potential victims in this case live in this area, access to which is not possible due to the security situation,³⁶ mostly the actions of the CODECO.³⁷ Yet, the TFV is currently putting together a network of intermediaries for the purpose of reaching out to victims – stressing the fact that supplementary efforts must be deployed to access the Lendu communities – without attempting to understand the genesis of this explosive situation.

39. This is where the *do no harm* principle takes all of its meaning and importance. The TFV acknowledges that for the past 20 years, recurrent violent conflicts have taken place in Ituri and that the quasi totality of its inhabitants has been victims in one form or another of crimes. This leads the TFV to conclude that “[...] there is a major risk that reparations for only a certain part of the community affected by such crimes are perceived as discriminatory and may be rejected by the communities, or, worse, fuel already existing tensions”³⁸ and that “[f]uelling the tension is also a major risk if a group is perceived as taking advantage of the international community over another group”.³⁹

40. This is precisely the potential risk associated with the TFV IDIP on the basis of what appears to be happening in this case, namely, the Lendu community living in

³⁶ [TFV 8 June Report](#), para.29.

³⁷ Annex III to the Registry's Second Report on Reparations, 15 January 2021, [ICC-01/04-02/06-2639-Conf-AnxIII](#), para.10.

³⁸ [TFV IDIP](#), para.80.

³⁹ [TFV IDIP](#), para.80.

villages relevant to the 8 March Reparations Order, under the control of, or held hostage by armed group(s), labeled as potential beneficiaries and likely to receive reparations, are taking advantage of the ICC reparations process over other groups. No mention is made in the TFV IDIP that one of the reasons that likely led the DRC President to declare martial law in Ituri is the recent public speech by Chef Kahwa – a very well-known character in the events leading to the charges laid against Bosco Ntaganda – following the murder of yet again numerous Hema locals, that the Hema will arm and defend themselves, unless measures are taken by the Government to resolve the situation created by armed groups.⁴⁰

41. Application of the *do no harm* principle requires taking the measures necessary to ensure that reparations awarded to victims do not result in yet again, another ethnic conflict. It requires delaying the approval of the TFV DIP, and even more so the TFV IDIP meant to address the most urgent needs of victims, at least until the situation has been resolved in the villages relevant to the 8 March Reparations Order on the main road from Bunia to Mongbwalu.

42. While the TFV attempts to downplay the risks associated with the TFV IDIP *via* proper outreach to community leaders, the example referred to using reparations awarded in the Al Mahdi case is entirely different as well as inapplicable to the complex situation in Ituri. More importantly, the mitigation strategy suggested by the TFV rests on “[...] communicating with community leaders and affected communities themselves [...]” that it concedes is impossible in the current circumstances, which proves the point.

⁴⁰ Beni Lubero Online, *ITURI /Massacres : Le chef Kahwa pointe la complicité des autorités militaires* (26 April 2021) <https://benilubero.com/ituri-massacres-le-chef-kahwa-pointe-la-complicite-des-autorites-militaires/>, consulted on 21 June 2021; Congo Actualité, *BUNIA : la communauté Hema exige du gouvernement plus de sécurité* (24 April 2021) <http://congoactu.cd/bunia-la-communaute-hema-exige-du-gouvernement-plus-de-securite/>, consulted on 21 June 2021.

43. Hence, application of the *do no harm* principle, recognized by Trial Chamber VI in the 8 March Reparations Order, requires delaying approval of the TFV IDIP, at least until the security situation is resolved.

V. The identification of the potential beneficiaries targeted by the TFV IDIP is inefficient

44. The information provided in the TFV IDIP and the criteria and procedure to select the potential beneficiaries neither allow establishing neither the number of potential beneficiaries nor their urgent needs.

45. In order to establish the priority victims to be the beneficiaries of the urgent plan, the TFV rely on the LRVs to establish a list of priority victims from their clients. Although this might be an efficient way of proceeding, the lack of details as to how the selected potential beneficiaries is puzzling, to say the least, and does not respected the order by the Trial Chamber.

46. First, the LRV1 provide a number of victims that could be consider vulnerable, while mentioning that they have not yet achieve recent contact with those potential victim. As a result, no updated information on those potential beneficiaries is available.⁴¹ There is therefore no guarantee that those identified priority potential victims are still, to this day, the most vulnerable victims displaying the *most urgent needs*, which is the requirement to be eligible for this urgent implementation plan.

47. Regarding the proposed list of priority victims by the LRV2, the Defence also note the lack of details in substantiating how those potential victims are meeting the threshold set out by the Trial Chamber to be the victim exhibiting the most urgent needs.⁴²

48. The Defence also takes note of the program proposed by the TFV to repair the specific needs of former child soldiers having suffered SGBV, and consider that

⁴¹ [TFV IDIP](#), para.15.

⁴² [TFV IDIP](#), para.16.

annexing this program to the existing *Lubanga* Programme is efficient and adequate.⁴³ However, the Defence takes issue with the fact that no specific eligibility process is anticipated for this new program.⁴⁴ The burden of proof for SGBV is already lowered in the 8 March Reparations Order, hence, there is no need to erase it completely for the former child soldiers having suffered SGBV to integrate the new annex of the *Lubanga* Programme.⁴⁵

49. Regarding the *Lubanga* victims, the Defence has no updated information on which victims have already received reparations in the *Lubanga* reparations proceedings and have also applied to the *Ntaganda* reparations. The landscape of the TFV IDIP will considerably be transformed if a significant amount of victims admitted in the *Lubanga* case also prove to have urgent needs not addressed in the *Lubanga* reparations proceedings and are thus eligible in the context of the TFV IDIP. The TFV is providing no information in this regard, nor is anticipating this scenario, which should be considered as a source of concern.

50. The Defence takes issue with the proposition by the TFV that former child soldiers that did not participate in the *Lubanga* reparations proceedings be screened according to a simplified process, without a preliminary assessment by VPRS.⁴⁶

51. On a different subject, the TFV, in its quest to identify the potential beneficiaries of this urgent plan, does provide very limited information on the potential new beneficiaries that did not participate in the trial phase. This is also a factor that could significantly modify the scope of the TFV IDIP, by increasing the number of priority victims and requesting more management resources as well as capacity from the programs before the issuance of the final draft implementation plan.

⁴³ [TFV IDIP](#), para.68.

⁴⁴ [TFV IDIP](#), para.68(a).

⁴⁵ [8 March Reparations Order](#), para.67; [TFV IDIP](#), para. 68(a).

⁴⁶ [TFV IDIP](#), para.58.

VI. The administrative eligibility assessment set out in the TFV IDIP is a serious source of concern

52. As a preliminary remark, the TFV IDIP does not include a detailed proposal of the way in which it expects to conduct the administrative eligibility assessment, which it acknowledges is required due to the collective reparations with and individualised component ordered by Trial Chamber VII.⁴⁷ Instead, the TFV proposes a method to determine eligibility to allow it to address the urgent needs of priority victims, in other words, a shortcut.

53. More importantly, in all categories of victims, namely child soldiers, child soldiers having suffered sexual violence, and victims of the attacks, the Defence is entirely left out of the process. Indeed, the TFV is providing the LRVs a chance to challenge a decision if a victim is rejected while the Defence has again no access to the decision on eligibility, no access to the application forms.⁴⁸

54. On top of this, the TFV is entrusting its implementing partners, whom have no legal background, to make apply legal standard that are of sensible application—without involving the TFV Board, let alone Trial Chamber II – which is clearly unacceptable.

55. What is more, the TFV submits that an application-based proceeding would be too heavy for the urgent implementation of the 8 March Reparations Order. The Defence posits that this is not for the TFV to make this legal determination, but for the Trial Chamber. This is for the Trial Chamber to decide.⁴⁹ The type of reparations adopted by the Trial Chamber is of collective nature, with an individual component, which the TFV admitted require an eligibility assessment.⁵⁰

56. What is more, the TFV is requesting the LRVs – which are parties to the reparations proceedings litigation – to be achieving a part of the eligibility

⁴⁷ [TFV IDIP](#), paras.78-79.

⁴⁸ [TFV IDIP](#), paras.88-89.

⁴⁹ [TFV IDIP](#), para.79.

⁵⁰ [TFV IDIP](#), para.79.

assessment. This is a cause for concern for the TFV to put the LRVs in the position of judge and party.

VII. The information provided in the TFV IDIP regarding the proposed measures, is deficient

57. In the 8 March Reparations Order, Trial Chamber II ordered the TFV to prepare a draft implementation plan that:

[...] shall clearly specify the objectives, outcomes, and activities identified as necessary in order to give effect to the present order. In particular, the TFV shall describe the reparation projects it intends to develop, indicating the details of the proposed collective awards, each of the collective projects [...] the modalities of reparations [...] clearly indicate the methods of implementation [...] and the expected timeline necessary [...]⁵¹

58. In its TFV 8 June Report, referring to jurisprudence from the *Al Mahdi* case, the TFV recalled in almost identical terms, what must be included in a draft implementation plan.⁵²

59. Although limited guidance was given to the TFV by Trial Chamber VII regarding the preparation of TFV IDIP, it should necessarily contain the same information. Notably, the TFV IDIP does not.

60. The TFV places the cart before the horse by failing to first identify the potential beneficiaries of the intended reparations which is the main reason for this deficiency.

61. One already existing program is identified, namely the '*Lubanga collective service-based reparation programme*' ("Lubanga Programme"), as well as two existing projects, namely, the '*Psychosocial and socio-economic reintegration of girl-mothers victims of the wars in Ituri Project*', operating in Irumu territory ("Irumu Girl-Mothers Project") and the [REDACTED], operating in [REDACTED] ("[REDACTED]").

⁵¹ [8 March Reparations Order](#), para.249.

⁵² [TFV 8 June Report](#), para.22.

62. The TFV IDIP provides a generic description of the Lubanga Programme, Irumu Girl-Mothers Project and [REDACTED]. It also attempts to explain how, from an administrative, budgeting and project management perspective, it could possibly call upon these existing TFV delivery structures to provide services / benefits to a limited number of beneficiaries drawn from (i) participating victims in the Ntaganda case; and (ii) potential beneficiaries yet to be identified.

63. However, the TFV IDIP fails to provide information on the genesis of these delivery structures, their intended beneficiaries and more importantly how the modalities of reparations delivered *via* these structures appropriately address the harms identified in the 8 March Reparations Order. Stating the objectives of these delivery structures – designed to address harms or needs identified in different circumstances – and the expected outcomes, is of no assistance in the absence of practical information as to how this will be achieved.

64. Significantly, through these delivery structures, the TFV's stated aim is to alleviate only *part* of the harms suffered by the beneficiaries,⁵³ yet to be selected, allowing them to retain access to further reparation measures available upon the TFV DIP's approval. Certainly, this begs the question whether the potential benefit for victims who require urgent assistance – when they will be identified – is worth the investment in the present circumstances. In this vein, the Defence is concerned by the lack of details pertaining to the cost of this interim plan, and how it will impact on the right of the convicted person.⁵⁴

65. The information provided in the TFV IDIP, or lack thereof, regarding the activities that would allow to achieve the 'objectives' – for child soldiers who were also victims of rape and sexual slavery – and accordingly to achieve the 'outcomes' is a good illustration of the deficiencies therein. Indeed, although the TFV intends to have recourse to the *Lubanga* Programme for these beneficiaries, the TFV nonetheless

⁵³ [TFV IDIP](#), para.39.

⁵⁴ [TFV IDIP](#), para.74.

recognizes that the services offered in the *Lubanga* Programme are not specifically designed to address the harm of SGBV victims.⁵⁵ Consequently, the TFV proposes to create a residual *Ntaganda* project as an annex to the *Lubanga* Programme – a measure likely to take six to nine months to operationalize after the development of the scope of work – without providing any details concerning the contents of the said residual program.⁵⁶

66. Another aspect of the TFV IDIP which is a source of concern, *inter alia*, is the TFV's intent to have recourse to 'assistance' projects (Irumu Girl-Mothers Project and [REDACTED]) to provide reparations to victims identified as potential beneficiaries of a judicial reparations process.

67. First, the TFV's attempt to demonstrate that there is no conceptual barrier to resort to assistance services as interim relief for reparations beneficiaries⁵⁷ is unconvincing to say the least. What is even more problematic, however, is the TFV's understanding of the relation between assistance projects and reparations awarded as a result of a judicial reparations process. One example drawn from the TFV's submissions in its Observations on the Defence Request for Suspensive Effect⁵⁸ best illustrates this. Therein, the TFV asserts that in the event an individual who received reparations was later told that as result of a judicial decision, such reparations were not warranted, the TFV IDIP would be ready to step in and to provide assistance from its assistance programme, thereby confusing the rationale and justification for both types of programs / projects.

68. If only for the sake of clarity – which is critical to ensuring the understanding and acceptance of the ICC reparations process by the population – conflating

⁵⁵ [TFV IDIP](#), para.67.

⁵⁶ [TFV IDIP](#), para.68.

⁵⁷ [TFV IDIP](#), paras.25-28.

⁵⁸ 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](#).

assistance projects and judicial reparations process should be avoided. Moreover, any TFV Board decisions to that effect should require judicial authorization.

VIII. The disadvantages associated with the Trial Chamber VI's unprecedented initiative to instruct the TFV to submit an initial draft implementation far outweigh the potential benefits.

Taking into consideration the paucity of information / guidance provided by Trial Chamber VI in the 8 March Reparations Order concerning the preparation of an initial draft implementation plan; it is difficult to discern what Trial Chamber VI really intended when requesting the TFV to prepare such document. To be sure, this is a first as well as a marked departure from the practice of other trial chambers in the field of reparations.

69. To the extent that Trial Chamber VI intended, by requesting the TFV to produce the TFV IDIP to urgently address the most urgent needs of victims that require priority treatment, its initiative certainly appears commendable on its face.

70. However, whether Trial Chamber II should now approve the TFV IDIP submitted on 8 June 2021 is a different matter, which requires, at a minimum, a balancing exercise between the potential benefits to beneficiaries who would receive partial reparations and the costs or disadvantages linked to the adoption of an initial draft implementation plan followed soon thereafter by the approval of a detailed TFV DIP.

71. In this case, considering: (i) the appeals lodged by the LRV2 and the Defence further to the delivery of the 8 March Reparations Order; (ii) the Defence request for suspensive effect of the 8 March Reparations Order before the Appeals Chamber; (iii) the potential prejudice to individual victims, contrary to the *do no harm* principle, in the event the Appeals Chamber quashes or modifies material aspects of the 8 March Reparations Order; (iv) the potential prejudice to victims, contrary to the *do no harm* principle, in the event the TFV IDIP is approved without first addressing the security situation in Ituri; (v) the deficiencies in the TFV IDIP concerning the

identification of the beneficiaries likely to receive reparations; (vi) the deficiencies in the TFV IDIP concerning the administrative eligibility assessment of the beneficiaries likely to receive reparations; (vii) the insufficient information in the TFV IDIP concerning the modalities of reparations envisaged; and the numerous aspects of the 8 March Reparations Order, referred to in the TFV IDIP, which are challenged on appeal, it is evident that the disadvantages associated with approval of the TFV IDIP manifestly outweigh the potential benefits for the beneficiaries if the TFV IDIP is approved without first requesting the TFV to make substantial modifications thereto.

RESPECTFULLY SUBMITTED ON THIS 5th DAY OF NOVEMBER 2021

A handwritten signature in black ink, appearing to read 'StB-'.

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands