



Original: **English**

No.: ICC-01/04-02/06
Date: 05 November 2021

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 First Progress
Report on the implementation of the Initial Draft Implementation Plan”,
04 October 2021, ICC-01/04-02/06-2714-Conf**

Source: Defence Team of Mr Bosco Ntaganda

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

Legal Representatives of Victims

Ms Sarah Pellet
Ms Caroline Walters

Mr Dmytro Suprun
Ms Anne Grabowski

Counsel for the Defence

Me Stéphane Bourgon, *Ad.E.*
Ms Judy Mionki
Me Jacopo Ricci

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Mr Philipp Ambach

Trust Fund for Victims

Mr Pieter de Baan

Further to Trial Chamber II's "Decision on the TFV's initial draft implementation plan with focus on priority victims" dated 23 July 2021 ("23 July Decision"),¹ and the submission by the Trust Fund for Victims ("TFV") of its "Trust Fund first progress report on the implementation of the Initial Draft Implementation Plan and Notification of Board of Director's decision pursuant to regulation 56 of the Regulations of the Trust Fund" ("TFV First Progress Report")², Counsel for Mr Bosco Ntaganda ("Defence" or "Mr Ntaganda") hereby submit this:

Defence observations on the TFV First Progress Report on the implementation of the Initial Draft Implementation Plan

"Defence Observations"

INTRODUCTION

1. Pursuant to the 23 July Decision,³ the Defence hereby provides observations on the TFV First Progress Report.

2. When approving the IDIP despite the information provided by the TFV being insufficient, Trial Chamber II ("Chamber") held that the IDIP should focus exclusively on the most urgent needs of victims.⁴ The Chamber defined urgent needs as "(...) those for which the victims need to receive immediate physical and/or psychological medical care, and/or support due to financial hardship that **endangers the person's life.**"⁵ Accordingly, the Chamber reiterated that "the IDIP's purpose is **not** to initiate the implementation of reparations for all priority victims (...)." ⁶ In this regard and as a preliminary matter, it is significant that many of the proposed activities described for both assistance projects approved by the Chamber – *i.e.*

¹ Decision on the TFV's initial draft implementation plan with focus on priority victims, 23 July 2021, [ICC-01/04-02/06-2696](#), p.21.

² Trust Fund first progress report on the implementation of the Initial Draft Implementation Plan and Notification of Board of Director's decision pursuant to regulation 56 of the Regulations of the Trust Fund, 23 September 2021, [ICC-01/04-02/06-27first progree10-Conf.](#)

³ [23 July Decision](#), Disposition, p.21.

⁴ [23 July Decision](#), para.6.

⁵ [23 July Decision](#), para.7 (emphasis added).

⁶ [23 July Decision](#), para.9.

‘[REDACTED] SGBV Project’ and ‘[REDACTED] – Project for the victims of the attacks’ – do not appear to be responsive to urgent ‘life threatening’ needs. Consequently, considering the novelty of the IDIP concept, the Chamber should examine the ‘adapted proposals’ submitted by [REDACTED] and [REDACTED] on 16 and 18 September⁷ and the Defence respectfully requests that all parties and participants be given access to the same.

3. As a further preliminary matter, the TFV Board of Directors’ decision “to make a first allocation of EUR 1.5 million towards the *Ntaganda* reparations programme from the reparations resources of the Trust Fund”⁸ must be underscored. Whether these funds are earmarked for the IDIP only and whether it would even be possible for the TFV to complement the payment of the reparations award of EUR 30 million ordered by Trial Chamber VI, are certainly relevant questions with a view to determining the appropriate funds that can and should be spent for the implementation of the IDIP and for what timeframe. For the benefit of the victims, the TFV Board of Directors should be more transparent in this regard and the Chamber should exercise closer supervision over the activities of the TFV.

4. In the 23 July Decision, the Chamber noted that “the IDIP does not need to comply with all requirements of a full DIP”.⁹ However, the Chamber did not provide guidance as to which components of a full DIP could acceptably be left out in the context of an IDIP. In this regard, the Defence posits that the administrative eligibility assessment mechanism is certainly one of the requirements which cannot be left out and which cannot be minimized in any way.

5. In this regard, while the Chamber did not approve the administrative eligibility process suggested in the IDIP, it instructed the TFV to submit an alternative proposal for the eligibility assessment and urgency screening of victims to benefit from the IDIP.

⁷ [TFV First Progress Report](#), para.11.

⁸ [TFV First Progress Report](#), para.62.

⁹ [23 July Decision](#), para.12.

6. Notably, the alternative proposal put forward in the TFV First Progress Report remains defective in many ways and should not be approved without material modifications, as addressed herein.

7. From the point of view of the Defence, the administrative eligibility assessment to be conducted by the TFV is the most important component of the IDIP. Accordingly, these Defence Observations are focussed primarily on the defects of the TFV's alternative proposal including, *inter alia*, (i) the reliance on the assessment conducted by VPRS, which was conducted after the end of the briefing period of reparations and without any oversight by the Chamber; (ii) the role of the Defence in the process – or absence thereof – in comparison with the role of the the Common Legal Representatives (“CLR1”, “CLR2”, together “CLR’s”); (iii) the absence of any oversight over the determinations made by the TFV; and (iv) the absence of sufficient details regarding the manner in which the TFV will assess the individual files. The Defence further underscores that the TFV's alternative proposal addresses only the participating victims at this stage and that no information is provided regarding the review of the victims' files who may be found to be not eligible by the TFV.

8. Additional issues addressed in these Defence Observations include matters related to the implementation of the IDIP as well as to the cost of the information / outreach activities planned, which do not appear in the IDIP.

9. In sum, although the TFV First Progress Report provides information that was missing from the IDIP and goes further than the IDIP, it remains defective and incomplete. Consequently, further modifications are required before proceeding with the administrative eligibility assessment and the implementation of the IDIP. In the interest of the victims who have urgent needs, the TFV should not wait two months before submitting its second progress report.

10. Lastly, the Defence deplores the *modus operandi* of the TFV, shutting out the Defence entirely from the implementation of the IDIP, including the administrative eligibility assessment.

PROCEDURAL BACKGROUND

11. On 8 March 2021, Trial Chamber VI issued the Reparations Order (“8 March Reparations Order”).¹⁰

12. On 8 April 2021, the CLR2¹¹ and the Defence¹² submitted their respective Notice of Appeal against the 8 March Reparations Order. The CLR2 Appeal Brief¹³ and the Defence Appellant Brief¹⁴ were filed on 7 June 2021.

13. On 8 June 2021, as directed by Trial Chamber VI in the 8 March Reparations Order, the TFV submitted its IDIP.¹⁵

14. On 10 June, Trial Chamber II invited the parties to submit observations on the IDIP.¹⁶

15. On 23 June 2021, the CLR1,¹⁷ the CLR2,¹⁸ the Registry,¹⁹ and the Defence²⁰ submitted observations on the IDIP. The Defence, *inter alia*, opposed the approval of the IDIP.

¹⁰ Reparations Order, 8 March 2021, [ICC-01/04-02/06-2659](#).

¹¹ 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](#).

¹² Defence Notice of Appeal against the Reparations Order, ICC-01/04-02/06-2659, 8 April 2021, [ICC-01/04-02/06-2669](#).

¹³ 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](#) (“CLR2 Appeal Brief”).

¹⁴ Defence Appellant Brief against the 8 March Reparations Order, 7 June 2021, [ICC-01/04-02/06-2675](#) (“Defence Appellant Brief”).

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](#).

¹⁷ Response of the Common Legal Representative of the Former Child Soldiers to the TFV Initial Draft Implementation Plan with focus on Priority Victims, 23 June 2021, [ICC-01/04-02/06-2681](#) (“CLR1 Observations”).

¹⁸ Observations of the Common Legal Representative of the Victims of the Attacks on the Trust Fund for Victims’ Draft Initial Implementation Plan, 23 June 2021, [ICC-01/04-02/06-2680-Red](#) (“CLR2 Observations”).

¹⁹ Registry Observations on the Trust Fund for Victims’ Initial Draft Implementation Plan, 23 June 2021, [ICC-01/04-02/06-2683](#) (“Registry Observations”).

²⁰ Defence Observations on the TFV initial draft implementation plan, 23 June 2021, [ICC-01/04-02/06-2682-Conf](#). (“Defence Observations”).

16. On 28 June 2021, the TFV filed observations on the responses and observations submitted on the Initial Draft Implementation Plan ("TFV Observations").²¹

17. On 23 July 2021, Trial Chamber II approved the IDIP subject to additional information being provided by the TFV in its first report, including *inter alia*, "(...) an alternative proposal for the eligibility assessment and urgency screening of victims to benefit from the IDIP".²²

18. On 23 September 2021, the TFV filed its First Progress Report.

CONFIDENTIALITY

19. 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

I. The implementation of the IDIP

20. At the outset, the Defence welcomes the TFV's provision of further details with regard to the implementation of the two projects approved by Trial Chamber II, namely the project for former Child Soldiers implemented by [REDACTED] ("[REDACTED] project")²³ and the project for victims of the attack implemented by [REDACTED] ("[REDACTED] project").²⁴

21. The Defence will limit its observations to two specific issues arising from the TFV's report on the implementation of the above projects.

²¹ Observations on the responses and observations submitted on the Initial Draft Implementation Plan, 28 June 2021, [ICC-01/04-02/06-2687-Conf.](#)

²² [23 July Decision](#), para.38.

²³ [TFV First Progress Report](#), section I(1).

²⁴ [TFV First Progress Report](#), section I(2).

22. First, the Defence notes the TFV's proposal to expand the [REDACTED] project to the Mahagi territory²⁵ and the [REDACTED] project to the areas of Bambou, Kilo, Mongwalu, Lipri, Niangaray and other surrounding localities.²⁶ However, in the same report the TFV recalls the Chief of Country Office's remark that many parts of Ituri cannot be reached at this very moment, thus preventing direct outreach activities in many areas.²⁷ This is in line with all recent evaluations of the security situation in north-eastern DRC.²⁸

23. Accordingly, the Defence observes that the TFV's report is deficient in this regard. The TFV should provide further information as to how it intends to expand the above projects *rations loci* in light of the current security situation in Ituri. Further, should some of the mentioned areas be impossible to reach at this moment, the TFV should explain if and how excluding some localities from the geographical scope of the project may create tension among the potential beneficiaries and a perception of difference in treatment among the victims. The TFV should also explain how it intends to remedy this.

24. Second, the Defence notes the TFV's statement that "the annual contract extension with the partner is due on 1 May 2022 and before that time, the Trust Fund and the partner will assess whether and at which cost to increase the number of victims in the programme."²⁹ This applies to both the [REDACTED] and the [REDACTED] projects.³⁰

²⁵ [TFV First Progress Report](#), para.22. In fn.15 of the TFV First Progress Report, the TFV also mentions the possibility of expanding to the Djugu territory.

²⁶ [TFV First Progress Report](#), para.35.

²⁷ [TFV First Progress Report](#), para.58.

²⁸ *Ex multis*, [TFV IDIP](#), paras.13,45,97; [8 March Reparations Order](#), para.194; Experts Report on Reparations, Annex 1 to the Registry Transmission of Appointed Experts' Reports, 2 November 2020, [ICC-01/04-02/06-2623-Anx1-Red2](#), paras.45-46; Trust Fund for Victims' observations relevant to reparations, 28 February 2020, [ICC-01/04-02/06-2476](#), para.107; Observations on the Appointed Experts' Reports and further submissions on reparations on behalf of the Former Child Soldiers, 18 December 2020, [ICC-01/04-02/06-2632](#), para.11.

²⁹ [TFV First Progress Report](#), para.27.

³⁰ [TFV First Progress Report](#), para.37.

25. In this respect, the Defence observes that the TFV's Draft Implementation Plan ("DIP") is due on 17 December 2021.³¹ While at this stage it is hard to predict the timeline for the implementation of the DIP, the TFV should explain how it intends to coordinate the services provided by the [REDACTED] and the [REDACTED] projects with the main reparation projects that will be the object of the DIP and the subsequent Scope of Work.

26. On this note, the Defence recalls that Trial Chamber II approved the TFV's proposal to resort to the two existing assistance projects only "at this stage of the reparation proceedings and until the main reparations structures and programmes in the case are operational".³² This temporal delimitation is required to distinguish between the TFV's dual mandate to implement Court-ordered reparations and provide assistance to victims of crimes under the jurisdiction of the Court.³³ The TFV should provide more clarity with regard to the proposed timeline for the implementation of both projects, bearing in mind the need for a swift transition from assistance activities to Court-ordered reparations once the DIP becomes operational.

II. The TFV's proposal for outreach activities

27. The Defence observes that the cost of the outreach activities planned does not appear in the First Progress Report. The Chamber has previously noted the insufficiency of information provided by the TFV regarding direct and indirect costs.³⁴ It is the view of the Defence that this issue persists. The TFV makes mention of continued work on outreach and mitigation measures together with the Registry's Country Office, 'insofar as the resources in the field permit'.³⁵ This statement is overly ambiguous and requires further clarification. The Defence underscores the need for transparency in the intended allocation of funds.

³¹ Decision on the Trust Fund for Victims' Request to Vary the Time Limit to Submit Draft Implementation Plan, 23 July 2021, [ICC-01/04-02/06-2697](#), p.6.

³² [23 July Decision](#), para.24.

³³ [23 July Decision](#), para.23.

³⁴ [23 July Decision](#), para.15.

³⁵ [TFV First Progress Report](#), para.60.

III. The eligibility assessment and urgency screening

28. The Defence submits that once again, the TFCV's proposal does not provide sufficient information on the way it expects to conduct the eligibility assessment and the urgency screening in practice. For this reason alone, it should not be approved by the Chamber at this stage.

29. In determining eligibility and urgency, the TFCV states that it will refer to the standard of proof as set out in the 8 March Reparations Order to establish if the applicant (i) suffered harm as the result of one of the crimes for which Mr Ntaganda was convicted; and (ii) cannot continue waiting until reparations in the case are fully operational.³⁶

30. This proposal as provided by the TFCV is insufficient and the Defence wishes to emphasize its lack of precision. It is of note that the TFCV's assessment begins with participating victims, for whom the TFCV plans on taking a final determination on eligibility and urgency. It must be recalled that the test to be admitted as a participant is different from the test to be found eligible for reparations. While the former only requires a *prima facie* assessment of the requirements set out in Rule 85 of the Rules of Procedure and Evidence ("Rules"),³⁷ eligibility to receive reparations must be established on the balance of probabilities.³⁸ The TFCV report fails to include a detailed proposal on how it intends to apply this standard of proof (balance of probabilities), in practice.

³⁶ [TFV First Progress Report](#), para.42-43.

³⁷ [Decision on victims' participation](#), paras.30,41-44.

³⁸ See, *ex multis*, *Prosecutor v. Thomas Lubanga Dyilo*, Order for Reparation, 3 March 2015, [ICC-01/04-01/06-3129-AnxA](#), para.65; *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable', 18 July 2019, [ICC-01/04-01/06-3466-Red](#), ("Lubanga 2019 Appeals Judgment on Reparations"), para.181; *Prosecutor v. Germain Katanga*, Ordonnance de réparation en vertu de l'article 75 du Statut, 24 March 2017, [ICC-01/04-01/07-3728](#), ("Katanga Reparations Order"), paras.49-51; *Prosecutor v. Germain Katanga*, Public redacted Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled "Order for Reparations pursuant to Article 75 of the Statute", 8 March 2018, [ICC-01/04-01/07-3778-Red](#), para.42.

31. With specific regard to the urgency screening, the Chamber clarified that the “urgent needs” required to be found eligible for emergency measures are to be interpreted as “(...) those for which the victims need to receive immediate physical and/or psychological medical care, and/or support due to financial hardship that **endangers the person’s life**.”³⁹ By doing so, the Chamber set a high standard to be considered as a victim requiring urgent assistance.

32. The two assistance projects described by the TFV include, *inter alia*, measures of medical assistance, material support, and psychological and physical rehabilitation.⁴⁰ Therefore, an important part of the TFV's urgency screening will have to focus on the specific medical, psychological and financial situation of the individual applicants justifying the need for urgent measures. The Defence submits that the TFV should provide, concretely and with regard to the different needs of the victims, what documentation it will be requiring from the applicants and how such documentation will be assessed.⁴¹ The TFV's proposal contains no information in this regard.

33. In addition, and true to the vagueness of the report, the TFV mentions that the applicants must have suffered harm as the result of one of the crimes for which Mr Ntaganda is convicted, but again, does not explain how it is going to carry out this assessment in practice. It is imperative that the TFV include what kind of documentation it will require to aid in this assessment, including with reference to the applicants' age and their location at the time of commission of the crimes.⁴² The Defence submits that the TFV report fails to address, in practice, how this assessment will be conducted.

34. With regard to the role of the parties in the process, the Chamber held that “the parties should have no **direct** involvement in the eligibility assessment or the

³⁹ [23 July Decision](#), para.7 (emphasis added).

⁴⁰ [TFV First Progress Report](#), para.42-43.

⁴¹ [8 March Reparations Order](#), para.140.

⁴² [8 March Reparations Order](#), para.107,140.

urgency screening".⁴³ However, the Defence underscores the level of CLR's involvement foreseen in the report, which is significant and goes well beyond the level of "assistance" accorded by the Chamber to the CLRs in the 23 July Decision.⁴⁴ This is all the more so considering the complete exclusion of the Defence from this process.

35. Glaringly, the involvement of the CLRs falls into the realms of direct involvement, and in fact forms an integral part of the eligibility assessment proposed by the TFV. First, despite the TFV's statement that "the information provided by the LRVs as a party cannot [...] be seen in any way as a screening or assessment of their urgent needs",⁴⁵ it is evident from the proposal that the information provided by the CLRs on the basis of the VPRS assessment⁴⁶ will be accorded a lot of weight in the determination of eligibility and urgency.⁴⁷ This is significant considering that Trial Chamber VI did not pronounce on such assessment before issuing the 8 March Reparations Order. Second, the final determination will be communicated to the CLRs, and thus one can reasonably infer that the CLRs will be able to challenge any negative decision.⁴⁸ In sum, pursuant to the TFV alternative proposal, the CLRs would be involved before, during and after the TFV's administrative assessment.

36. Further, the Defence takes issue with the TFV's proposal to involve the implementing partners if in need of additional information for the eligibility assessment.⁴⁹ This is concerning for two reasons. First, the implementing partners

⁴³ [23 July Decision](#), para.37 (emphasis added).

⁴⁴ [23 July Decision](#), para.37.

⁴⁵ [TFV First Progress Report](#), para.45.

⁴⁶ [TFV First Progress Report](#), para.48(a).

⁴⁷ [TFV First Progress Report](#), paras. 44, 48(a),(b),(c) and (f).

⁴⁸ Although the TFV First Progress Report is silent in this regard, the TFV included some additional details in its recent observations before the Appeals Chamber. See Observations in relation to the 'Defence Appellant Brief Against the 8 March Reparations Order' and the 'Appeal Brief of the Common Legal Representative of the Victims of the Attacks against the Reparations Order', 30 September 2021, [ICC-01/04-02/06-2713](#), para. 17: "[...] the Trust Fund intends to propose to the Trial Chamber an eligibility process whereby a victim found ineligible by the Trust Fund can – personally or through a legal representative – petition the Trust Fund for an administrative review of this determination."

⁴⁹ [TFV First Progress Report](#), para.46,48(d).

should only be involved after the eligibility assessment has been carried out by the TFV, and only in respect of those applicants who are found to meet the applicable criteria. Second, although unclear from the TFV's proposal, it is likely that any additional information will ultimately be provided by the CLRs, which again points to their heavy involvement in the eligibility and screening process.

37. The Defence also notes that the TFV has had and will continue having consultations with the Registry and the CLRs to develop an eligibility assessment for all Ntaganda victims.⁵⁰ Moreover, the TFV alternative proposal provides that the result of this exercise will be a written proposal open to comments only from the Registry and the CLRs.⁵¹ The TFV then aims to finalize this proposal as the basis for the eligibility assessment to be included in the DIP.⁵² Regrettably, the Defence is excluded from this process. It is submitted that this cannot form the way forward for all the victims, and indeed, the reparations phase of the proceedings at the Court. To the contrary, engaging the Defence in these consultations would be of benefit for all those involved, including the TFV. The Defence is in fact willing to provide a constructive input with a view to a fair and efficient eligibility process.

38. In this respect, the Defence needs to stress its complete exclusion from the eligibility assessment and urgency screening which goes contrary to guaranteeing a fair procedure. In fact, the First Progress Report does not mention the Defence at all. This does not accord with the TFV Observations in response to the parties' observations on the IDIP, where the TFV had at least foreseen a system to periodically disclose to the Defence "the relevant statistics (not the identifying details) of the beneficiaries".⁵³ Inexplicably, this system has completely disappeared in the new eligibility assessment proposal.

⁵⁰ [TFV First Progress Report](#), para 41.

⁵¹ [TFV First Progress Report](#), para 41.

⁵² [TFV First Progress Report](#), para.41.

⁵³ [TFV Observations](#), para.28.

39. The Defence also takes note of the Chamber's finding in its 23 July Decision in relation to the rights of the convicted person, when it stated that the Defence "will be able to make submissions on the TFV's proposed administrative eligibility assessment before its approval".⁵⁴ In support of its finding, the Chamber references the *Lubanga* procedure where the TFV "expressly stated that it would not be opposed to Mr Lubanga having the opportunity to review the screening process of victims at the implementation stage, subject to any protective measures..."⁵⁵ The Appeals Chamber in that case held that "[t]he Trust Fund shall provide Mr Lubanga with the opportunity to review its proposed screening process of victims at the implementation stage, subject to any protective measures."⁵⁶ The Defence opines that the procedure as proposed in *Lubanga* actually envisions more involvement from the Defence and not merely an opportunity to comment on the eligibility mechanism proposed. The phrase "subject to any protective measures" indicates a process within which the results of the screening process are made available to the Defence with the necessary redactions, thus allowing the Defence to provide substantive submissions on the TFV's determinations on eligibility and urgency. It is submitted that this system would be in line with the Trial Chamber's decision to exclude a direct involvement of the parties in the eligibility assessment and urgency screening, but at the same time it would go some way in guaranteeing the inclusion of the Defence in the reparation stage of proceedings.

40. Further, the Defence takes this opportunity to stress that a similar system was also implemented in *Al Mahdi*. In that case, the Chamber considered it "appropriate that Mr Al Mahdi be afforded an opportunity to present informed views and

⁵⁴ [23 July Decision](#), para.37.

⁵⁵ *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2, 3 March 2015, [ICC-01/04-01/06-3129](#), ("Lubanga 2015 Appeals Judgment on Reparations"), para.168; see also *Prosecutor v. Thomas Lubanga Dyilo*, Observations of the Trust Fund for Victims on the appeals against Trial Chamber I 's "Decision establishing the principles and procedures to be applied to reparations", 8 April 2013, [ICC-01/04-01/06-3009](#), para.179.

⁵⁶ *Prosecutor v. Thomas Lubanga Dyilo*, Order for Reparations, 3 March 2015, [ICC-01/04-01/06-3129-AnxA](#), para. 66 (filed as an annex to the Lubanga 2015 Appeals Judgment on Reparations).

concerns regarding the individuals claiming to be owed individual reparations from him".⁵⁷ The Chamber found it "fair to afford the Defence an opportunity to present an informed submission to the TFV" which would "increase the accuracy of the screening itself and ensure the integrity of the overall procedure."⁵⁸ This does not mean identifying information, but sufficient access to information enabling the participation of the Defence and guaranteeing a fair procedure.⁵⁹

41. Furthermore, the Defence would like to stress that the "reparations phase, like all proceedings before the Court, is a judicial process".⁶⁰ In *Al Mahdi*, the Appeals Chamber found that:

[...] the Trial Chamber should maintain judicial control over the entire reparations proceedings, including the screening process that will be undertaken by the TFV. Applicants for individual reparations should be able to contest before the Trial Chamber the decision taken by the TFV on their eligibility for individual reparations, and it is for the Trial Chamber to make the final determination in this respect. The Trial Chamber may also review the assessment by the TFV *proprio motu*.⁶¹

42. In this regard, it is noteworthy that in the TFV's alternative proposal, not only the Defence, but also the Trial Chamber is completely left out of the process. This was not envisioned by the 23 July Decision, and finds no precedent in the Court's practice. For example, in *Lubanga* the Trial Chamber implemented a system whereby the TFV had to carry out its eligibility assessment and then transfer its administrative decisions to the Chamber for review. Only after a final decision by the Chamber approving the TFVs assessment, the applicants would become beneficiaries.⁶²

⁵⁷ *Prosecutor v. Ahmad Al Faqi Al Mahdi*, Reparations Order, 17 August 2016, [ICC-01/12-01/15-236](#), ("Al Mahdi Reparations Order") para. 146(IV).

⁵⁸ [Al Mahdi Reparations Order](#), para.146(IV).

⁵⁹ *Prosecutor v. Ahmad Al Faqi Al Mahdi*, Public redacted Judgment on the appeal of the victims against the "Reparations Order", ("Al Mahdi Appeal Judgement on Reparations") 8 March 2018, [ICC-01/12-01/15-259-Red2](#), para.91.

⁶⁰ *Prosecutor v. Germain Katanga*, Order for Reparations pursuant to Article 75 of the Statute, 24 March 2017, [ICC-01/04-01/07-3728-tENG](#), para.18.

⁶¹ [Al Mahdi Appeal Judgement on Reparations](#), para.98.

⁶² *Prosecutor v. Thomas Lubanga Dyilo*, Decision Approving the Proposals of the Trust Fund for Victims on the Process for Locating New Applicants and Determining their Eligibility for Reparations, 7 February 2019, [ICC-01/04-01/06-3440-tENG](#), paras.30,47.

43. In sum, the Defence reiterates that the TFV cannot play all the roles in the reparations stage of proceedings. The Defence is entirely left out of the process, and so is the Trial Chamber. Both the Defence and the Trial Chamber should be given an opportunity to review the TFV's assessments of the victims' applications.

44. The Defence recognizes that the present issue is linked to the matter of the meaning of "collective reparations with individualized components". The Defence would like to stress that this is a matter under Appeal which remains pending. This notwithstanding, whether individual or collective reparations are awarded, the eligibility of potential beneficiaries must be assessed pursuant to the applicable standard of proof, chain of causation and identity requirements. And as argued elsewhere by the Defence,⁶³ if the ICC reparations scheme is to remain a judicial process in which the convicted person is a party, entitled to participate and make meaningful submissions towards the determination of his or her liability for reparations, it is imperative that due process rights, including *inter alia*, equality of arms and access to all material that will be considered by a trial chamber in the process, be enforced.

CONCLUSION

45. The Defence observes that the TFV's alternative proposal for its eligibility assessment and urgency screening does not contain enough information as to how the TFV intends to proceed in practice, as well as to the proposed role of the parties and the Chamber. In the current circumstances, the Defence respectfully submits that the Chamber should defer the approval of the proposal until further information is provided.

⁶³ See, *inter alia*, Defence Submissions on Reparations, 28 February 2020, [ICC-01/04-02/06-2479-Conf](#), paras.79-108; Defence Submissions on Reparations, 18 December 2020, [ICC-01/04-02/06-2634-Conf](#), paras.149-151.

RESPECTFULLY SUBMITTED ON THIS 5TH DAY OF NOVEMBER 2021

A handwritten signature in black ink, appearing to read 'S+B' with a stylized flourish.

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

The Hague, The Netherlands