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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 Second Progress Report on the implementation of the Initial Draft Implementation Plan”, 06 December 2021, ICC-01/04-02/06-2726-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 the submission of the “Trust Fund’s Second Update report on the Implementation of the Initial Draft Implementation Plan on 23 November 2021 (“TFV Second Report”),¹ the Defence hereby submits these:

**Defence observations on the TFV Second Progress Report
on the Implementation of the Initial Draft Implementation Plan**

“Defence Observations”

INTRODUCTION

1. As a general matter, it is of note that the Initial Draft Implementation Plan (“IDIP”) was requested by Trial Chamber VI as a means of providing urgent assistance to victims.² However, it is clear from the TFV’s Second Report that its proposed projects are yet to begin. In fact, aside from amending the contracts with its partners, everything else, including the intake process, is still pending.³ Indeed, many issues remain unresolved, including the feasibility of the proposed projects to sufficiently correspond to some of the victims’ needs, which conspicuously in many cases do not appear to meet the *urgent / life threatening* requirement justifying the implementation of the “IDIP”.⁴ The security situation notwithstanding, it is clear that the implementation of the IDIP will take some time. The Defence therefore reiterates its concern regarding the overlap between the IDIP and the Draft Implementation Plan (“DIP”).

2. Indeed, the DIP is due on 17 December 2021. The Defence recalls its submissions on this issue, that unless a clear and efficient timeline for the implementation of the IDIP is provided, in the current circumstances the disadvantages associated with the

¹ Trust Fund’s Second Update report on the Implementation of the Initial Draft Implementation Plan, 23 November 2021, [ICC-01/04-02/06-2723-Conf](#) (“TFV Second Report”).

² Decision on the TFV’s initial draft implementation plan with focus on priority victims, 23 July 2021, [ICC-01/04-02/06-2696](#) (“Decision on the IDIP”), para.7.

³ [TFV Second Report](#), para.22.

⁴ [Decision on the IDIP](#), para.7.

IDIP – in particular, the tight timeframe and the expected partial results – clearly outweigh the potential benefits.⁵ Thus, it is imperative that the TFV provide more clarity with regard to its proposed timeline for the implementation of the projects, also bearing in mind the need to transition from assistance activities to reparations once the DIP becomes operational.⁶ Trial Chamber II (“Chamber”) has also stressed that “the IDIP should be operational and the victims should be able to benefit from its projects during the time-period between the IDIP’s approval and the effective implementation of the DIP”.⁷

CONFIDENTIALITY

3. 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. The Defence will file a Public Redacted Version as soon as feasible.

OBSERVATIONS

I. Security situation in Ituri

4. In its observations on the First Report, the Defence questioned the TFV's proposal to expand the projects to other localities given the situation in Ituri.⁸ The Defence notes the TFV's acknowledgement of the security situation.⁹ However, the TFV does not explain (i) how it believes the situation will impact the eligibility assessment and the implementation of reparations; and (ii) what kind of delay this will cause and how it will overlap with the DIP. Further, should some localities and victims

⁵ Public Redacted Version of “Defence Observations on the TFV initial draft implementation plan”, 23 June 2021, ICC-01/04-02/06-2682-Conf, 5 November 2021, [ICC-01/04-02/06-2682-Red](#), para.11.

⁶ Defence observations on the TFV First Progress Report on the implementation of the Initial Draft Implementation Plan, 4 October 2021, [ICC-01/04-02/06-2714-Conf](#) (“Defence Observations on the TFV First Report”), para.26.

⁷ [Decision on the IDIP](#), para.8.

⁸ [Defence Observations on the TFV First Report](#), paras.22-23.

⁹ [TFV Second Report](#), paras.7-11.

be harder to reach, it is imperative that the TFV provide information on how it intends to remedy this issue.

5. In particular, the Defence notes the TFV's assertion that "international and national organisations have ceased their operation in the area of relevance for the reparations."¹⁰ The TFV should clarify whether these organisations include [REDACTED], [REDACTED] and/or other potential implementing partners.

6. Furthermore, the TFV Second Report is devoid of any details regarding the cause of the deteriorating security situation close to Bambu, namely the actions of CODECO, a Lendu based paramilitary group fighting against the armed forces of the Democratic Republic of Congo ("DRC" / "FARDC"); and more recently, the UPDF from Uganda allowed to join the fighting by the DRC Central government.¹¹ The attacks mentioned in the TFV Second Report are that of CODECO, which no later than last week took control of parts of Mongbwalu.¹² This is yet again, a repeat of what happened almost 20 years ago. In these circumstances, the question as to whether the IDIP can be implemented at this time is highly relevant and more information is required. How many members of CODECO are actually former Lendu combatants / civilians who were involved in the events that took place in 2002-2003, possibly seeking reparations in this case, is also a relevant question.

7. Reparations implemented in this context are very likely to exacerbate the rising tensions amongst communities, thereby violating the *do no harm principle*. At a minimum, the prevailing circumstances require that reparations beneficiaries be

¹⁰ [TFV Second Report](#), para.10(iv).

¹¹ France 24, DR Congo to let Uganda pursue rebels on its territory, 28 November 2021, available at <https://www.france24.com/en/live-news/20211128-dr-congo-to-let-uganda-pursue-rebels-on-its-territory>; Al Jazeera, Uganda launches air and artillery raids against ADF in DRC, 30 November 2021, available at <https://www.aljazeera.com/news/2021/11/30/uganda-says-it-launched-joint-operation-with-dr-congo-on-adf>; The Washington Post, Ugandan soldiers enter Congo to fight extremist ADF rebels, 01 December 2021, available at https://www.washingtonpost.com/world/ugandan-soldiers-enter-congo-to-fight-extremist-adf-rebels/2021/12/01/70b3281c-52cf-11ec-83d2-d9dab0e23b7e_story.html.

¹² Radio Okapi, Djugu : les miliciens de CODECO occupent certains quartiers de Mongwalu, 03 December 2021, available at <https://www.radiookapi.net/2021/12/03/actualite/securite/djugu-les-miliciens-de-codeco-occupent-certains-quartiers-de-mongwalu>.

identified / certified with the utmost care, by qualified personnel, applying the legal standards set out in the 8 March Reparations Order, even though these standards are presently the object of an appeal. Notably, further to the TFCV Second Report, the identity and qualifications of those who will conduct this assessment as well as the *modus operandi*, i.e. how, and on the basis of what material / evidence it will be conducted, remains unknown. Contrary to the views of the TFCV, assessing the eligibility of potential beneficiaries is not a simple undertaking. The fact that no oversight of the TFCV's decision making process is envisaged further compounds the issue.

II. Eligibility assessment and urgency screening

8. The Defence notes with concern the TFCV's proposal to instruct the implementing partner to collect basic information and the "general contours of their claims"¹³ following which the TFCV intends to "reach a final determination on eligibility".¹⁴ While expediency for the purposes of urgent victims is acknowledged, the Defence is concerned that "general contours of victims claims" is insufficient in determining the standard and burden of proof as set out in the Reparations Order.

9. The Chamber has held that the "urgency screening should be made by applying the same standard and burden of proof established in the Reparations Order".¹⁵ Indeed, despite the urgency, the Chamber has stressed and reiterated that the urgent needs of victims must be "only those resulting from the harm suffered as a consequence of the crimes for which Mr Ntaganda has been convicted".¹⁶ In this context, the Chamber also clarified that "[t]he urgent needs are 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**".¹⁷

¹³ [TFV Second Report](#), para.17.

¹⁴ *Ibidem*.

¹⁵ [Decision on the IDIP](#), para.32.

¹⁶ [Decision on the IDIP](#), para.33.

¹⁷ [Decision on the IDIP](#), para.7.

10. Following more information from the TFV in its First Report and Defence observations on the lack of substantive details, the Trial Chamber encouraged the TFV “to include additional information as to the way it will conduct the eligibility assessment and urgency screening in its future reports to the Chamber”.¹⁸

11. Indeed, the TFV also committed to include in its Second Report, “a complete eligibility assessment for the IDIP, including also the victims who were negatively preliminarily assessed by VPRS [...] the victims who were already in contact with the Court [...] and for new beneficiaries.”¹⁹ This commitment was clearly not achieved in the TFV Second Report. And while the TFV asserts its intention to finalise the proposal,²⁰ the Defence submits that to this date, the TFV has yet to submit any information on how it intends to assess the burden and standard of proof in both the IDIP and the DIP. To the contrary, the TFV appears unprepared or unwilling to conduct what is a fundamental legal requirement of the reparations process.

12. The Defence thus submits that the TFV has failed to provide, concretely, the information it will require and rely on in assessing and determining eligibility both for the IDIP and the DIP. It is therefore imperative that the Chamber plays a larger role in this process if it is to remain a fair process.

13. As for the consultation process with “[...] the parties, including the Defence, and the Registry [...]” referred to in the TFV Second Report,²¹ concerning the proposed eligibility mechanism to be included in the DIP, the Defence acknowledges that it has indeed been invited to provide comments thereon and did so on 1 December 2021. Due however to the content of the proposed eligibility mechanism – which provided

¹⁸ Public Redacted Version of “Decision on the TFV’s First Progress Report on the implementation of the Initial Draft Implementation Plan and Notification of Board of Directors’ decision pursuant to regulation 56 of the Regulations of the Trust Fund, 28 October 2021, [ICC-01/04-02/06-2718-Red](#) (“Decision on TFV First Report”), para.24.

¹⁹ Public redacted version of “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”, submitted on 23 September 2021, ICC-01/04-02/06-2710-Conf, [ICC-01/04-02/06-2710-Red](#) (“TFV First Report”), para.53.

²⁰ [TFV Second Report](#), para.19.

²¹ *Ibidem*. See also [Decision on TFV First Report](#), para.19.

limited information on the *modus operandi* and very few options still being considered – the Defence was unable to agree with the same. A distinction exists between a genuine consultation process and a *pro forma* invitation to provide comments on a mechanism already decided upon for the most part. Consequently, the Defence intends to submit detailed comments on the proposed eligibility mechanism upon being notified of the DIP.

III. Review process

14. In its First Report, the TFV further endeavoured to elaborate, in its Second Report, a Review process for any negative decision.²² This again, is missing from the Second Report. This lack of information prevents the Chamber to rule on this significant issue. Further, the TFV appears to exclude the Chamber from this process which, the Defence submits, goes against the well-established practice of the Court.²³ At the very least, the Chamber should have the opportunity to rule on a proposed review process.

IV. Child soldiers

15. The TFV requests the Chamber to approve its intention to provide Child Soldiers who have suffered harm other than sexual and gender-based violence with reparations through the collective-service-based reparations programme in the

²² [TFV First Report](#), para.53.

²³ *Prosecutor v. Thomas Lubanga Dyilo*, Decision establishing the principles and procedures to be applied to reparations, 7 August 2012, [ICC-01/04-01/06-2904](#), paras.262,286; *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](#), para.235; *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; *Prosecutor v. Thomas Lubanga Dyilo*, Order instructing the Trust Fund for Victims to supplement the draft implementation plan, 9 February 2016, [ICC-01/04-01/06-3198-tENG](#), paras.14-15,18; *Prosecutor v. Ahmad Al Faqi Al Mahdi*, Public redacted Judgment on the appeal of the victims against the “Reparations Order”, 8 March 2018, [ICC-01/12-01/15-259-Red2](#), paras.69-72,98; *Prosecutor v. Germain Katanga*, Order for Reparations pursuant to Article 75 of the Statute, 24 March 2017, [ICC-01/04-01/07-3728-tENG](#), Disposition.

Lubanga case.²⁴ However, the Chamber has already explicitly rejected this request, and directed the TFV to include these victims in the [REDACTED] project.²⁵ Accordingly, the TFV's request to amend the IDIP should be rejected.

V. Outreach costs

16. The Chamber has previously noted the insufficiency of information provided by the TFV regarding direct and indirect costs.²⁶ Similarly, in its observations following the TFV's First Report, the Defence observed that the cost of the outreach activities planned was not provided.²⁷ The Trial Chamber thus instructed "the TFV to include any relevant information about potential costs of outreach activities in its future reports."²⁸ However, the TFV has not provided this information in its Second Report and merely suggests that it will "keep the Trial Chamber apprised of the costs that arose for those activities".²⁹ The Defence thus notes that the problem of vagueness persists. There is a clear lack of transparency, including in responding to clear guidance from the Chamber.

CONCLUSION

17. The TFV Second Report, as with the first, contains very little information on the eligibility assessment and urgency screening required for the IDIP. Significantly, it contains no proposal for a review process, and no information on how the TFV intends to evaluate the legal requirements, that is, the burden and standard of proof. It is extremely worrying that to this date, it is unclear how this process would work for the IDIP. In fact, it appears that the IDIP will overlap with the DIP with no information on how this overlap will be dealt with. As it stands, many issues remain unresolved and unlikely to be resolved in the short term on what is perceived to be an urgent situation.

²⁴ [TFV Second Report](#), para.29.

²⁵ [Decision on the IDIP](#), paras. 21,22 and Disposition; Decision on TFV First Report, para.10(i).

²⁶ [Decision on the IDIP](#), para.15.

²⁷ [Defence Observations on the TFV First Report](#), para.27.

²⁸ [Decision on TFV First Report](#), para.25.

²⁹ [TFV Second Report](#), para.37.

18. The Defence respectfully submits that the Chamber should play a more active role in the eligibility assessment and review procedure, and should request, as a matter of urgency, further information from the TFV with a view to a clear and detailed procedure for the eligibility assessment and urgency screening. As for the TFV's request to amend the IDIP, it should once again, be rejected.

19. Lastly, in light of the foregoing, bearing in mind the preoccupying security situation in Ituri, the Defence respectfully deems it appropriate to reiterate that the question as to whether the implementation of the IDIP is appropriate / possible, pending the approval of the DIP, remains relevant.

RESPECTFULLY SUBMITTED ON THIS 5th DAY OF JANUARY 2022

A handwritten signature in dark ink, appearing to read 'S+B-'.

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

The Hague, The Netherlands