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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 Trust Fund for Victims’
Fourth Update Report on the Implementation of the Initial Draft Implementation Plan”,
dated 7 April 2022, ICC-01/04-02/06-2755-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 submission by the Trust Fund for Victims (“TFV”) of its “Fourth Update Report on the Implementation of the Initial Draft Implementation Plan”, notified on 25 March 2022 (“TFV Fourth Report”),¹ Counsel for Mr Ntaganda (“Defence”) hereby submits this:

**Defence observations on the Trust Fund for Victims’ Fourth Update Report
on the Implementation of the Initial Draft Implementation Plan**

“Defence Observations on Fourth Report”

INTRODUCTION

1. In its Decision on the TFV’s Third Updated Report on the Implementation of the Initial Draft Implementation Plan (“Decision on Third Report” and “IDIP”),² Trial Chamber II (“Chamber”) noted “[...] the provisional nature of the information provided by the TFV in its Third Report, and that both the Defence and the CLR1 submitted that the details are still insufficient [...]”.³ Consequently, the Chamber deemed it necessary to reiterate its instructions from previous decisions and made it clear that it “would expect” *all issues* listed in the Decision on Third Report to be “properly addressed by the TFV, providing the concrete information requested at the latest in its next report.”⁴

2. Despite the Chamber’s unambiguous instructions, it is clear from a reading of the TFV Fourth Report that the TFV did not comply.

3. On the positive side, albeit to a very limited extent, the TFV Fourth Report addresses and provides details, as specifically requested by the Chamber,⁵ on the way it will *substantively*, as opposed to procedurally, assess eligibility and urgency for the purpose of the IDIP. The information in this regard is found in Confidential Annex 1, which raises a number of issues addressed herein. In sum, the TFV’s approach to substantively assessing the eligibility and urgency for the purposes of the IDIP falls short of the standards set out in the Reparations Order

¹ Trust Fund for Victims’ Fourth Update Report on the Implementation of the Initial Draft Implementation Plan, 24 January 2022, ICC-01/04-02/06-2741-Conf (“Fourth Report”).

² Decision on the TFV’s Third Update Report on the Implementation of the Initial Draft Implementation Plan, 10 February 2022, [ICC-01/04-02/06-2745](#) (“Decision on Third Report”).

³ Decision on Third Report, para.11.

⁴ Decision on Third Report, para.11 (emphasis added).

⁵ Decision on 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-Conf](#) (“Decision on First Report”), para.24, Disposition; Decision on the TFV’s Second Progress Report on the implementation of the Initial Draft Implementation Plan, 17 December 2021, [ICC-01/04-02/06-2730-Conf](#) (“Decision on Second Report”), paras.10,12, Disposition; Decision on Third Report, paras.9-10.

and it is essential for the Chamber to intervene and confirm the applicable standard for both past and future determinations. Needless to say, the fact that some participating victims have most likely already been informed of their eligibility for the purposes of the IDIP, is problematic to say the least. Nonetheless, this should not detract the Chamber from setting the record straight. Significantly, whether the TFV intends to use the same substantive approach for the purposes of the Draft Implementation Plan (“DIP”) is not clear at this stage.⁶ This constitutes a further incentive for the Chamber to pronounce on the correct substantive approach.

4. What is more, the information provided by the TFV on the procedure followed in respect of the limited number of eligibility and urgency determinations already communicated to its implementing partners, [REDACTED] and [REDACTED], is alarming. Certain procedural deficiencies in the TFV’s approach to assessing eligibility and urgency are addressed herein, including *inter alia* the source of the information available to the so-called examiner, the breath of the information available to the examiner and the qualifications of the examiner to perform such assessments. Having delegated the eligibility and urgency assessment to the TFV, a non-judicial and administrative body, the Chamber must not only be aware of the TFV’s substantive approach, it must be informed of, and approve *how* the TFV intends to conduct the assessment.

5. In addition to the above, it stems from the TFV Fourth Report that many issues highlighted by the Chamber in its Decision on Third Report – in which it reiterates instructions issued in previous decisions and requests for information not addressed by the TFV – remain unaddressed. While not all issues bear the same importance, some are critical for the success of the reparations process, such as the impact of the security situation, including the measures required to ensure that no approved beneficiary is related to CODECO, affiliated to Lendu combatants at the relevant time or involved in the activities of militias that continue to use armed force and disturb peace; and the use of a questionnaire that is of no assistance in determining whether the urgency assessment is linked to crimes for which Mr Ntaganda was convicted.

6. In light of the foregoing, the Defence reiterates its prior submission on the importance for the Chamber to intervene and issue more precise and robust instructions to the TFV.

⁶ Annex I to Trust Fund for Victims’ second submission of Draft Implementation Plan, 24 March 2022, [ICC-01/04-02/06-2750-Conf-Anx1](#) (“DIP”), para.368.

CONFIDENTIALITY

7. 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. A public redacted version of these Defence Observations will be filed shortly in accordance with the Chamber's instructions.

SUBMISSIONS

I. Security situation in Ituri

8. In its Decision on Second Report, Trial Chamber II instructed the TFV to provide "concrete information as to how the security situation actually affects the implementation of the IDIP and, if necessary, propose strategies to mitigate the possible risks".⁷ The Chamber highlighted four main issues for the TFV to address.⁸

9. As the TFV only addressed the issue concerning the location of potential victims in the Third Report,⁹ the Chamber reiterated its instructions in its Decision on Third Report.¹⁰ However, the TFV failed once again to follow the Chamber's instructions, as it only addressed the same issue. Regrettably, only two paragraphs on the security situation are provided, and the TFV still describes the security situation in vague terms, holding that "it remains volatile and unpredictable."¹¹

10. What is more, the security situation has further deteriorated since the previous Update Report. The United Nations Office of the Coordination of Humanitarian Affairs claimed that the security situation has recently worsened, highlighting that around 400 civilians have already perished since the beginning of the year.¹² The Head of the MONUSCO, Bintou Keita, issued a similar statement at the end of March, highlighting that CODECO militiamen have recently

⁷ Decision on Second Report, para.7.

⁸ Decision on Second Report, paras.7-8; Defence observations on the Trust Fund for Victims' Third Update Report on the Implementation of the Initial Draft Implementation Plan, 04 February 2022, [ICC-01/04-02/06-2744-Conf](#) ("Defence Observations on Third Report"), para.7.

⁹ Trust Fund for Victims' Third Update Report on the Implementation of the Initial Draft Implementation Plan, 24 January, [ICC-01/04-02/06-2741-Conf](#) ("Third Report"), paras.8-13.

¹⁰ Decision on Third Report, paras.10-11.

¹¹ Fourth Report, para.10.

¹² Media Congo, Ituri: 400 civils tués et 83.000 déplacés depuis janvier 2022 selon les chiffres de OCHA, 31 March 2022, available at <https://www.mediacongo.net/article-actualite-102595-ituri-400-civils-tues-et-83-000-deplaces-depuis-janvier-2022-selon-les-chiffres-de-ocha.html>.

been targeting their attacks on displaced persons' camps.¹³ Since the last Update Report, CODECO has continuously carried out deadly operations, killing hundreds of civilians.¹⁴

11. Furthermore, members of a special taskforce sent by the Central Government to Ituri to promote peace have been captured and kept hostage by CODECO since 16 February 2022.¹⁵ This inter-ethnic taskforce was composed of key figures in the events that took place over two decades ago in Ituri, such as Thomas Lubanga Dyilo and Germain Katanga.¹⁶ The Central Government is currently negotiating with CODECO, and has already satisfied some of the militia's demands, releasing dozens of CODECO members.¹⁷

12. In this context, ethnic tension and animosity in the region remain extremely high. It is thus of high relevance that the TFV provides further details on the possible impact of the current deterioration of the security situation on the implementation of the IDIP. While the difficulty in reaching victims is certainly a fundamental issue, it is not the only one deserving the attention of the TFV. In this regard, the Defence would like to point out once again¹⁸ that reparations implemented in this context could render the security situation even worse by exacerbating

¹³ AA, RDC : Près de 2 300 morts au Nord-Kivu et en Ituri (ONU) - Au dernier trimestre de 2021, 30 March 2022, available at <https://www.aa.com.tr/fr/afrique/rdc-pr%C3%A8s-de-2-300-morts-au-nord-kivu-et-en-ituri-onu/2550568>.

¹⁴ Radio Okapi, Activisme de CODECO à Djugu : plus de 150 personnes tuées au mois de mars(société civile), 2 April 2022, available at <https://www.radiookapi.net/2022/04/02/actualite/securite/activisme-de-codeco-djugu-plus-de-150-personnes-tuees-au-mois-de-mars>; See also Radio Okapi, Ituri : 12 morts dans une nouvelle attaque de la CODECO au site de déplacés de Gokpa 2, 20 March 2022, available at <https://www.radiookapi.net/2022/03/20/actualite/securite/ituri-12-morts-dans-une-nouvelle-attaque-de-la-codeco-au-site-de>; Radio Okapi, Ituri : deux morts dans une double attaque des présumés miliciens CODECO à Matete et Nunua, 13 March 2022, available at <https://www.radiookapi.net/2022/03/13/actualite/securite/ituri-deux-morts-dans-une-double-attaque-des-presumes-miliciens-codeco>; Radio Okapi, Ituri : trois membres d'une même famille tués par CODECO à Dheyo, 28 March 2022, available at <https://www.radiookapi.net/2022/03/28/actualite/securite/ituri-trois-membres-dune-meme-famille-tues-par-codeco-dheyo>; AA, RDC : près de 20 morts dans une nouvelle attaque en Ituri, 8 March 2022, available at <https://www.aa.com.tr/fr/afrique/rdc-pr%C3%A8s-de-20-morts-dans-une-nouvelle-attaque-en-ituri/2527720>; Radio Okapi, Djugu : 5 morts, 3 blessés et 350 vaches pillées à la suite d'attaques par la CODECO, 19 March 2022, available at <https://www.radiookapi.net/2022/03/19/actualite/securite/djugu-5-morts-3-blesses-et-350-vaches-pillees-la-suite-dattaques-par>.

¹⁵ Radio Okapi, RDC : 8 membres de la Task Force prise en otage par les miliciens de la CODECO, 17 February 2022, available at <https://www.radiookapi.net/2022/02/17/actualite/securite/rdc-8-membres-de-la-task-force-prise-en-otage-par-les-miliciens-de-la>.

¹⁶ Radio Okapi, RDC : 8 membres de la Task Force prise en otage par les miliciens de la CODECO, 17 February 2022, available at <https://www.radiookapi.net/2022/02/17/actualite/securite/rdc-8-membres-de-la-task-force-prise-en-otage-par-les-miliciens-de-la>.

¹⁷ Media Congo, Ituri: prise en otage des membres de Task Force, 29 premiers miliciens de CODECO libérés en guise d'échange, 11 March 2022, available at <https://www.mediacongo.net/article-actualite-101588-ituri-prise-en-otage-des-membres-de-task-force-29-premiers-miliciens-de-codeco-liberes-en- guise-d-echange.html>.

¹⁸ Defence observations on the TFV Second Progress Report on the implementation of the Initial Draft Implementation Plan, 6 December 2021, [ICC-01/04-02/06-2726-Conf](#) ("Defence Observations on Second Report"), para.7.

tensions between – and within – the relevant communities, therefore violating the *do no harm* principle. The TFV must take this into account and propose strategies to mitigate these risks.

13. The Defence also reiterates¹⁹ its concerns over potential beneficiaries being affiliated - now or in the past - to CODECO or other active militias in Ituri. Although the TFV has already acknowledged²⁰ this risk, it did not propose any mitigating strategy. The Defence already provided²¹ a list of non-exhaustive basic parameters, such as the location of CODECO units, their organization, strength and political agenda, that should be explored by the TFV with a view to designing a mitigating strategy.

II. TFV's substantive approach to eligibility assessment and urgency screening

14. Following a reiterated request by the Chamber,²² the TFV provided, in the form of internal guidelines submitted as Annex 1 to the TFV Fourth Report (“Internal Guidelines”), substantive information on how it intends to apply the burden of proof in practice. The Defence welcomes the provision of such information. Regrettably however, the TFV's approach to the applicable eligibility criteria is substantially flawed and requires the Chamber's intervention to correct the course of the verification process. These flaws are illustrated below, through an analysis of (i) the general issues that permeate all the Internal Guidelines; and (ii) the specific criteria and requirements as set out in the Internal Guidelines.

15. In light of these issues, it would have been desirable to have this information shared with the Parties *before* the commencement of the eligibility assessment, as *per* the Chamber's initial request.²³ The fact that the eligibility of certain beneficiaries has already been confirmed and that it may have to be revisited if the Internal Guidelines are found to be incorrect, should not detract the Chamber from completing a thorough assessment of Annex 1 and setting the record straight.

16. The Defence also notes that no substantive information on how the burden of proof will be applied in practice is provided in the Draft Implementation Plan (“DIP”).²⁴ However, presuming that the TFV will be using the criteria set out in Annex 1 for their assessment of

¹⁹ Defence Observations on Second Report, para.6.

²⁰ Third Report, para.11.

²¹ Defence Observations on Third Report, para.11.

²² Decision on First Report, para.24, Disposition; Decision on Second Report, paras.10,12, Disposition; Decision on Third Report, paras.9-10.

²³ Decision on First Report, para.24; Decision on Second Report, paras.10,12, Disposition.

²⁴ DIP, para.368.

eligibility in the context of the DIP, additional submissions will be included in the Defence response to the DIP due on 24 April 2022.

a. General issues

17. *The TFV's terms of references:* At the outset, the Defence notes that the terms of reference relied upon by the TFV to adopt eligibility criteria must be considered with caution. In addition to the Reparations Order,²⁵ the TFV largely relies upon (i) Trial Chamber VI's Decision on issues raised in the Registry's First Report on Reparations ("Clarification Decision");²⁶ and (ii) Trial Chamber and Appeals Chamber jurisprudence in the *Lubanga* case.²⁷

18. As concerning the former, it is noteworthy that the clarifications provided by Trial Chamber VI in the Clarification Decision served a very specific purpose, *i.e.* allow the Registry to carry out its general assessment to determine the overall number of victims that *may* be *potentially* eligible for reparations.²⁸ This exercise was limited to an analysis of victim applications for participation to assess whether, following the trial judgment, victims admitted to participate in the proceedings still fell within the scope of the convicted charges.²⁹ Thus, the criteria set out in the Clarification Decision were not necessarily meant to be used for the TFV's assessment of the individual eligibility of victims, where a stricter burden of proof, that of 'balance of probabilities', needs to be applied.

19. With regard to the decisions issued in the *Lubanga* case, the TFV seems to neglect a fundamental difference between the *Lubanga* and the *Ntaganda* reparations, *i.e.* that in *Lubanga*, it is the Trial Chamber that issues a final decision on every single victim's application

²⁵ Reparations Order, 8 March 2021, ICC-01/04-02/06-2659 ("Reparations Order").

²⁶ Annex 1 to Trust Fund for Victims' Fourth Update Report on the Implementation of the Initial Draft Implementation Plan, 24 March 2022, [ICC-01/04-02/06-2751-Conf-Anx1](#) ("Internal Guidelines"), para.2, citing the Decision on issues raised in the Registry's First Report on Reparations, 15 December 2020, [ICC-01/04-02/06-2630](#) ("Clarifications Decision").

²⁷ Internal Guidelines, para.12; The TFV relies a lot on: *The Prosecutor v. Thomas Lubanga Dyilo*, Decision Setting the Size of the Reparations Award for which Thomas Lubanga is Liable, 21 December 2017, [ICC-01/04-01/06-3379-Conf-Corr-tENG](#) ("Lubanga 2017 TC decision"); *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, 1 December 2014, [ICC-01/04-01/06-3121-Red](#); *The 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 AC 2019 Decision").

²⁸ Clarifications Decision, para.12: "the Chamber emphasises that the purpose of this Decision is to provide guidance to the Registry in the context of its assessment of the potential eligibility of victims with a view to determining the overall number of victims that may be potentially eligible for reparations."

²⁹ Order setting deadlines in relation to reparations, 5 December 2019, [ICC-01/04-02/06-2447](#), para.9(a).

for reparation.³⁰ While of course the *Lubanga* case-law is relevant to the present case, the decisions issued therein must be considered with caution. To provide but one example, the Appeals Chamber upheld the *Lubanga* Trial Chamber conclusion that minor inconsistencies regarding the date of birth of potential child soldiers have no bearing on the determination of their eligibility, on the basis of “the discretion of a trial chamber to weigh the sufficiency of the evidence in light of the circumstances of the case”.³¹ More in general, it also found that “corroboration may come from extrinsic evidence, including the testimonial and documentary evidence entered in to the record [...]”.³² These conclusions are evidently linked to the trial chamber’s role as the trier of fact, and its proximity to the evidence throughout the course of the proceedings. The same does not apply to TFV, which has no knowledge of - or familiarity with - the evidence presented during trial and/or the specific circumstances of the present case.

20. *The need for supporting documentation:* In reviewing the application of both Child Soldiers and Victims of the Attacks, the TFV states that “it will not require supporting documents.”³³ This approach is erroneous, as it misinterprets and misapplies the applicable legal framework, the Reparations Order and the relevant case-law of the Court.

21. Rule 94(1)(g) explicitly requires that a victim’s request for reparations contain “to the extent possible, any relevant supporting documentation [...]”. While the words “to the extent possible” allow for exceptions where no such documentation is available,³⁴ this provision clearly establishes the general rule that applicants must provide supporting documents or, when this is not possible, at least justify their inability to do so.³⁵ This is all the more so considering that in the current case, the TFV is basing its assessment on victims applications for *participation*, not for reparations.³⁶ Thus, it is for the TFV to request all the additional information that would be typically included in a victim application for reparations, including, first and foremost, documents supporting their claim.

³⁰ DIP, para.360; *The Prosecutor v. Thomas Lubanga Dyilo*, Rectificatif de la Version publique expurgée de la Décision faisant droit à la requête du Fonds au profit des victimes du 21 septembre 2020 et approuvant la mise en œuvre des réparations collectives prenant la forme de prestations de services Avec une annexe publique contenant une note explicative, [ICC-01/04-01/06-3495-Red-Corr](#), para.104.

³¹ *Lubanga* AC 2019 Decision, para.210.

³² *Lubanga* AC 2019 Decision, para.203.

³³ Internal Guidelines, paras.10,25.

³⁴ Reparations Order, para.140.

³⁵ *Lubanga* AC 2019 Decision, para.204: “[T]o allow the trial chamber to properly reach a conclusion, it is in the interest of the person who is unable to supply any documentation to explain his or her reasons for this inability”.

³⁶ Third Report, para.14.

22. The approach mentioned above was endorsed by Trial Chamber VI in the Reparations Order. The Chamber found that the principle established by Rule 94(1)(g) is also applicable to the eligibility screening in the context of collective reparations.³⁷

23. This is also in line with the Court's jurisprudence on the matter, which is consistently misapplied by the TFV. The Appeals Chamber in *Lubanga* – cited by the TFV in support of its claim that no documentation is needed³⁸ - only established that the Trial Chamber enjoys “a certain amount of flexibility in the assessment of claims”, which allows it to find elements of corroboration in the testimonial and documentary evidence on the record or in other victims' applications.³⁹ As such, even in the absence of documentation, the Chamber *may* consider that a victim's account has sufficient probative value “in light of the totality of the evidence”.⁴⁰ Besides this being a possibility open solely to trial chambers, which have in-depth knowledge of the case record, it is clear that the Appeals Chamber established that eligibility in the absence of supporting documentation is possible on an exceptional basis, while the general rule remains that the applicant has to submit documents in support of his/her claims. This also becomes evident in the Appeals Chamber finding that “some allegations are critical to the overall assessment of the person's eligibility and, unless they are otherwise corroborated, the trial chamber may decline to find the person eligible without documentation supporting those allegations.”⁴¹

24. *Credible and coherent account of fact:* Strictly related to the issue above is the TFV's mischaracterization of the Reparations Order when it states not only that supporting documentation is unnecessary, but also, that “a consistent credible and reliable account of facts is sufficient”. Notably, the TFV applies this ‘standard’ to all applicants in the present case.⁴² Contrary to the TFV's assertion, however, the Reparations Order carefully limited this possibility to victims of rape and/or sexual slavery (“SGBV victims”).⁴³ For all other categories of victims, the general standard applies: the burden of proof falls on the applicant, who needs to demonstrate, through supporting evidence or, in exceptional circumstances, through external corroboration, that he/she suffered harm as a result of one of the crimes for which Mr Ntaganda was convicted.

³⁷ Reparations Order, para.140.

³⁸ Internal Guidelines, footnote 12.

³⁹ Lubanga AC 2019 Decision, para.203.

⁴⁰ Lubanga AC 2019 Decision, para.203.

⁴¹ Lubanga AC 2019 Decision, para.203 (emphasis added).

⁴² Internal Guidelines, paras.10,18,19,20,25,32.

⁴³ Reparations Order, para.139.

25. Similarly, the TFV's approach to discrepancies and inconsistencies in an applicant's factual account is concerning. The TFV asserts, as a general rule, that discrepancies in a victim's application do not cast doubts on his/her credibility.⁴⁴ In support, the TFV cites a Trial Chamber decision in *Lubanga* – premised, as explained above, on a different basis, *i.e.* that the Trial Chamber, with its complete knowledge of the case file, was the ultimate verification body – and a decision in *Katanga* on victim applications *to participate* in the proceedings, where notably a lower standard of proof is applied.⁴⁵ While the Defence accepts that a slight inconsistency, *per se*, is not determinative, it certainly is indicative of possible issues of credibility. At a minimum, it should trigger a particularly rigorous review of the applicant's factual account, if needed through a request for additional information and/or documentation, in order to verify that the applicant is indeed a victim of one of the crimes for which Mr Ntaganda was convicted.

b. Observations on the TFV's guidelines

26. *Proof of ID:* With regard to proof of ID, the TFV holds that in the absence of official or unofficial identification, “a statement signed by credible witnesses establishing the identity of the victim is accepted”, a language used in the Reparations Order.⁴⁶ However, Trial Chamber VI included an additional requirement that is overlooked by the TFV: the signed statements must indicate (i) the identity of the applicant; and (ii) a description of the relationship between the victim and any individual acting on their behalf.⁴⁷ Once again, this is indicative of the TFV's tendency to lower the burden of proof.

27. *Child soldiers:* With regard to Former Child Soldiers, the TFV relies extensively on the *Lubanga* case law to identify the applicable criteria for their eligibility assessment, with particular regard to the age requirement and their enlistment/conscription/participation in hostilities. However, various issues need to be highlighted.

28. With regard to the age requirement, the TFV adopts a rather flexible approach. Specifically, it argues that even if the exact birth date is unknown, the examiner can still determine that the applicant was younger than 15 by taking into account the “specific facts and circumstances of the case and of the victim”.⁴⁸ This is insufficient.

⁴⁴ Internal Guidelines, para.21. See also para.25.

⁴⁵ Internal Guidelines, para.21 and footnote 25.

⁴⁶ Internal Guidelines, para.8, citing Reparations Order, para.137.

⁴⁷ Reparations Order, para.137.

⁴⁸ Internal Guidelines, para.14.

29. It is unclear how the TFV, with its limited knowledge of the case and with scarce information at its disposal, could possibly be able to determine an applicant's age in the absence of any documentation bearing the date of birth. The TFV does not provide any explanation as to what kind of 'facts or circumstances' might be considered in such a situation. In this regard, it must be stressed that age is a factor which is capable, *per se*, of determining the rejection of an application. As such, a more rigorous approach should be applied: documents must be required; if absent, the approach to determining age through other means must be strict and demanding.

30. Instead, the Defence fears that the current approach will simply translate in the TFV accepting the victim's narrative that he/she was younger than 15 at the time of enlistment/conscription in the armed wing of the UPC/FPLC or when they participated in hostilities. This would translate in a flawed application of the applicable standard and burden of proof. This is all the more important considering that the TFV works in a vacuum, in the absence of any Defence input or any kind of oversight.

31. As concerning the verification of enlistment or conscription in the armed wing of the UPC/FPLC or of active participation in hostilities, the TFV holds that this criterion must be established 'on the basis of the quality of all the evidence'. Citing the *Lubanga* Trial Chamber,⁴⁹ the TFV indicates a series of factors that can be taken into account, such as the mention of certain commanders, of certain training camps and of certain battles.⁵⁰

32. However, knowledge of such information, alone, should not be considered sufficient. Names and descriptions of commanders, training camps or battles are publicly available, in great detail, from the judgment,⁵¹ public sources,⁵² and possibly commonly known in Ituri. Instead, the TFV should require more. As explained in *Lubanga*, particular attention should be

⁴⁹ Internal Guidelines, para.17, citing Lubanga 2017 Trial Chamber Decision, paras.89-90.

⁵⁰ Internal Guidelines, para.17.

⁵¹ Judgment, 8 July 2019, ICC-01/04-02/06-2359 ("Judgment"), paras.325-329,364-370,401-402,416; *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, 14 March 2012, [ICC-01/04-01/06-2842](https://www.iccd.org/01/04-02/06-2842) ("Lubanga Judgment"), paras.788-815,823-834,842,852-856,915.

⁵² See for instance Le Procès de Lubanga à la Cour Pénale Internationale, Résumé des conclusions finales dans Le Procureur c. Thomas Lubanga Dyilo, 3 November 2011, available at <https://fr.lubangatrial.org/2011/11/03/resume-des-conclusions-finales-dans-le-procureur-c-thomas-lubanga-dyilo/>; International Refugee Rights Initiative and Association pour la Promotion et le Défense de la Dignité des Victimes, Steps towards Justice, Frustrated Hopes : some Reflections on the Experience of the International Criminal Court in Ituri, January 2012, available at <https://reliefweb.int/sites/reliefweb.int/files/resources/StepsTowardJusticeFinal.pdf>; Mapping Report, Report of the Mapping Exercise Documenting the Most Serious Violations of Human Rights and International Humanitarian Law in the Democratic Republic of the Congo between 1993 and 2003, available at <http://www.mapping-report.org/en/children-associated-with-armed-groups-and-forces-caafag/>; Human Right Watch, Massacres and other Human Rights Abuses, 2003, available at <https://www.hrw.org/reports/2003/ituri0703/DRC0703-05.htm>.

paid to the level of detail of the facts described, including “the circumstances of enlistment, the positions held and the duties performed in the UPC/FPLC, the living conditions in the militia, the circumstances in which the victim left the UPC/FPLC, the activities connected to child-soldier status, the sites of recruitment, training, deployment (including battlefields) and demobilizations, the names of superiors in the UPC/FPLC militia, and the organization responsible for demobilization”.⁵³ The TFV must satisfy itself that the level of detail provided by the applicant could be acquired only by someone who was indeed enlisted/conscripted in the armed wing of the UPC/FPLC or who actively participated in hostilities. The mere mention of some names or places is insufficient.

33. A rigorous approach to the analysis of an applicant’s account of facts is also necessary in light of the situation on the ground at the time of the relevant events. As variously recognized by many sources,⁵⁴ the enlistment/conscription of child soldiers, as well as their use in hostilities, was a wide-spread practice across Ituri, which was put in place by many different military groups and militias. Thus, the risk of child soldiers who were engaged by groups other than the armed wing of the UPC/FPLC coming forward to try and obtain reparations in the *Ntaganda* case is indeed very high.

34. In fact, it is noteworthy that a similar risk was also recognized by the *Lubanga* Trial Chamber:

“At the time of the investigations, UN agencies had received information to the effect that some individuals were falsely presenting themselves at demobilisation centres as former child soldiers from the militias in order to join the reintegration programme.”⁵⁵

35. In light of this, the Defence disagrees with the TFV – and recalls its observations above⁵⁶ - when it comes to the treatment of discrepancies and inconsistencies in the applications of victims who claim to be former child soldiers.⁵⁷ Further guidance from the Chamber in this respect is necessary.

⁵³ Lubanga 2017 TC decision, para.64.

⁵⁴ Child Soldiers International, *Child Soldiers Global Report 2004 - Congo, Democratic Republic of the*, 2004, available at: <https://www.refworld.org/docid/49880668c.html>; Claude Rakisits, *Child Soldiers in the East of the Democratic Republic of the Congo*, p.114, filed as *Prosecutor v. Thomas Lubanga Dyilo*, Annex 10 to the Order Instructing the Registrar to File Additional Documents in the Case Record, 21 July 2017, [ICC-01/04-01/06-3344-Anx10](https://www.icc-01/04-01/06-3344-Anx10), p.114; Amnesty International, *Democratic Republic of Congo: Children at war*, September 2003, p.4, available at <https://www.amnesty.org/fr/documents/afr62/034/2003/en/>

⁵⁵ Lubanga Judgement, para.147.

⁵⁶ *Supra*, para.25.

⁵⁷ Internal Guidelines, paras.18,21.

36. *Victims of the attack:* As concerning the Victims of the Attacks, the TFV provides a series of criteria to determine whether a potential beneficiary falls within the scope of the convicted charges. Recalling, as mentioned below,⁵⁸ that the eligibility assessment comprises much more than a mere verification of whether an applicant falls within the scope of the convicted charges, and that supporting documentation should always be required, the Defence disagrees with the TFV on some discreet points.

37. As concerning the territorial scope, the Defence notes that the TFV's language with regard to the crime of persecution⁵⁹ and victims' references to the bush/forest⁶⁰ is at times unclear.

38. For the former, it must be stressed that, according to Trial Chamber VI, not all acts underlying the crime of persecution can be considered by the TFV, but only those "that served as the basis for the Chamber to convict Mr Ntaganda for the crime of persecution".⁶¹

39. For the latter, the TFV holds that "when a victim refers to any of the crimes having taken place in the bush or forest surrounding a location for which a positive finding is reached, the victim is eligible". However, as explained by Trial Chamber VI, a positive finding referring to a location is insufficient to consider the bush or forest around it as relevant for purposes of eligibility.⁶² Only in five distinct instances identified in the Judgement,⁶³ the TFV can consider facts which took place in the bush or forest around a given location, in light of the fact that "the Chamber entered convictions on the basis of the relevant corresponding conduct having occurred in the forest or bush surrounding these locations."⁶⁴

40. As further explained below,⁶⁵ it must be stressed that determining scope is different than determining eligibility. Mere reference to a place and/or timeframe falling within the convicted charges is not enough. The TFV needs to be satisfied that the applicant was indeed a victim, *i.e.* that he/she personally suffered harm and that this harm is causally linked to the crimes for which Mr Ntaganda was convicted. For example, mere presence in a location where one of the attacks occurred is not enough to establish that the applicant was a victim of that attack.⁶⁶

⁵⁸ *Infra*, para.55.

⁵⁹ Internal Guidelines, para.29.

⁶⁰ Internal Guidelines, para.30.

⁶¹ Clarification Decision, para.60.

⁶² Clarifications Decision, para.19(f).

⁶³ Judgement, paras.898,913-915,959,1005-1007,1054,1063.

⁶⁴ Clarification Decision, para.19(f).

⁶⁵ *Infra*, para.55.

⁶⁶ Reparations Order, para.146: "Personally experiencing the attack" is linked by the Chamber to being "subject to brutal acts".

41. With regard to the temporal scope, the Defence wishes to underline that the ‘sufficiently close in time’ standard should neither be interpreted nor used as a means to condone and/or ignore a victim’s indication of dates falling outside the scope of the convicted charges. To the opposite, and in line with the regime applicable to all inconsistencies, this will be indicative of issues of credibility, which need be fully explored by the verification body. In this regard, the Defence will further address the issues related to the ‘sufficiently close in time’ standard in its observations on the DIP.

42. Finally, the Defence regrets that the TFV declined to provide information on how it will assess transgenerational harm.⁶⁷ Considering the complexity of this type of harm, as well as the difficulty to establish a causal link to the crimes for which Mr Ntaganda was convicted,⁶⁸ information on how the TFV intends to approach transgenerational harm for purposes of eligibility would have been of utmost importance. Such information must be provided at the earliest opportunity, in order to allow the Chamber to approve the applicable criteria before the relevant situation arises.

43. *Establishment of the harm:* As stated by Trial Chamber VI, presumptions of harm – the use of which is currently a matter under appeal⁶⁹ - are premised on the eligibility of the victims being established on the balance of probabilities.⁷⁰ Indeed, once an applicant has proved, to the applicable test, to be a victim of the crimes for which Mr Ntaganda was convicted, the Chamber found that certain harms may be presumed.⁷¹

44. However, the excessively lenient and flexible approach adopted by the TFV when assessing eligibility renders the use of presumptions extremely dangerous. Considering that the TFV (i) condones the lack of ID documents,⁷² documents bearing the date of birth for child soldiers,⁷³ and, in general, documentation supporting the applicant’s claims;⁷⁴ (ii) condones discrepancies and inconsistencies in an applicant’s factual account;⁷⁵ (iii) condones the reference to incorrect dates;⁷⁶ (iii) considers sufficient, for child soldiers, the mention of

⁶⁷ Internal Guidelines, para.33.

⁶⁸ Reply to LRV1 and LRV2 Responses to Mr Ntaganda’s Appellant Brief, 30 September 2021, [ICC-01/04-02/06-2712](#), paras.49-51; Defence Appellant Brief against the 8 March Reparations Order, 7 June 2021, [ICC-01/04-02/06-2675](#) (“Defence Appeal Brief”), paras.142-146.

⁶⁹ Defence Appeal Brief, section V(a).

⁷⁰ Reparations Order, paras.143,144,146.

⁷¹ Reparations Order, paras.143.

⁷² Internal Guidelines, para.8.

⁷³ Internal Guidelines, para.14.

⁷⁴ Internal Guidelines, paras.10,25.

⁷⁵ Internal Guidelines, paras.21,25.

⁷⁶ Internal Guidelines, paras.18,32.

publicly available information regarding commanders, training camps and battles;⁷⁷ (iv) considers sufficient, for all victims, a coherent and credible account of facts;⁷⁸ the use of presumptions of harm translates in an absolute lack of control over the veracity of the applicants' claims. Simply put, using presumptions of harm, anyone who can put forward a coherent story will be entitled to reparations, possibly with individualised components. This is also exacerbated by the absence of the Defence in this process, which leads to there being nobody to rebut the lack of evidence to meet the burden of proof on a balance of probabilities. This system is unsound; it requires an intervention by the Chamber to ensure the fairness of this procedure.

45. In any case, the Defence takes issue with the leniency adopted by the TFV whenever harm is not presumed. Indeed, the TFV intends to evaluate whether harm is established on the balance of probabilities simply through a "review of the victim's narrative".⁷⁹ The TFV seems to ignore that the burden of proof falls on the applicant, who must *demonstrate* the harm suffered and the causal link.⁸⁰ Harm, whether physical, material or psychological, necessitates more than a factual narrative: it needs to be established, preferably through supporting documentation.

46. Further, the Defence notes that in the Internal Guidelines there is no mention of any assessment of whether the harm alleged by the applicant, if not presumed, is a consequence of one of the crimes for which Mr Ntaganda was convicted. In a situation of protracted conflict, the complete oversight of this crucial criteria is, to say the least, concerning.

47. *Indirect victims:* Similar to transgenerational harm, the TFV provides no information on how it intends to assess the eligibility of indirect victims.⁸¹ Further information is required, in accordance with the Chamber's reiterated request.⁸²

48. *Urgency screening:* As concerning the urgency screening, the Defence reiterates its extensive submissions provided in its Observations on the Third Report.⁸³ In particular, the Defence notes that the proposed questionnaire, which does not allow the examiner to assess the

⁷⁷ Internal Guidelines, para.17.

⁷⁸ Internal Guidelines, paras.18,20,25.

⁷⁹ Internal Guidelines, paras.41-43.

⁸⁰ Reparations Order, paras.124,127-128.

⁸¹ Internal Guidelines, para.48.

⁸² Decision on First Report, para.24, Disposition; Decision on the Second Report, paras.10,12, Disposition; Decision on Third Report, paras.9-10.

⁸³ Defence Observations on Third Report, paras.14-21.

causal link and is thus unfit for purpose, is exactly the same as the one submitted as an annex to the Third Report.

49. Further, the Defence underscores that the TFV must assess whether the urgent needs indicated by the applicant are the consequence of one of the crimes for which Mr Ntaganda has been convicted.⁸⁴ Despite the TFV recognizing this in the abstract,⁸⁵ this requirement is absent in the description of the examiner's analysis set out in the Internal Guidelines.⁸⁶ The applicable criteria to assess this causal link must be proposed by the TFV and approved by the Chamber.

III. TFV's procedural approach to eligibility assessment and urgency screening

50. The Defence understands from the TFV Fourth Report that the eligibility assessment and urgency screening process was put in motion for priority victims referred by the Common Legal Representatives ("CLRs") on 17 December 2021 when "a list of 24 priority victims belonging to the group of Former Child Soldiers was transmitted to [REDACTED] together with a questionnaire"⁸⁷ and "a list of 24 priority victims belonging to the group of Victims of the Attacks was transmitted to [REDACTED], together with the questionnaire."⁸⁸ Two further lists comprising a few additional priority victims belonging to the group of Former Child Soldiers were transmitted to [REDACTED] thereafter,⁸⁹ for a total of 56 priority victims. As of 24 March 2022, the TFV had completed the eligibility assessment and urgency screening process for 49 of these priority victims (32 priority victims who are former child soldiers and 17 priority victims of the attacks) who were *all* found to be eligible.⁹⁰ Regarding the urgency requirement for the priority victims who are former child soldiers, 12 were recognized as being in urgent need, 19 were rejected due to their status as beneficiaries in the Lubanga programme, and two remain unreachable.⁹¹ As for the urgency requirement for the priority victims of the attacks, 17 were recognized as being in urgent need and information is still being gathered for two, while five remain unreachable.⁹² The Defence notes that some of these numbers do not add up.⁹³

⁸⁴ Decision on Third Report, para.7.

⁸⁵ Internal Guidelines, para.50.

⁸⁶ Internal Guidelines, para.52.

⁸⁷ Fourth Report, para.17

⁸⁸ Fourth Report, para.23.

⁸⁹ Fourth Report, para.18.

⁹⁰ Fourth Report, paras.22-25.

⁹¹ Fourth Report, para.22.

⁹² Fourth Report, para.25.

⁹³ With regard to former child soldiers, out of 32 victims, 12 were referred to [REDACTED] for intake, 19 are already beneficiaries in *Lubanga*, and two remain unreachable (para.22). The total is thus 33 and not 32. For the overall number of victims assessed, the Defence notes that according to the Fourth report, the TFV positively

51. Although the Defence understands the TFCV's eagerness to begin the eligibility assessment and urgency screening process, almost one year after the Reparations Order was issued, it would have been better for the Chamber to be informed of, and approve, the procedure intended to be followed by the TFCV beforehand. Indeed, if the TFCV's procedural approach is flawed, as the Defence submits, the prejudice to priority victims in urgent need - who have been informed that they qualify for reparations in the context of the IDIP and who now would have to be informed that their eligibility needs to be assessed *de novo* - is substantial.

52. Now that the TFCV has finally informed the Chamber of its substantive approach to the eligibility and urgency screening process – which the Defence avers is erroneous in many ways – at least one thing is clearly established, namely that the eligibility assessment and urgency screening process is indeed a complex matter, which requires evidence, advanced legal skills and experience. After all, the TFCV has been delegated a task which normally falls within the competence of judges. Suffice it to recall the request for clarification submitted to the Chamber by VPRS – the staff members of which are legally qualified and possess vast experience in the field of victim participation and reparations – one year after being instructed by Trial Chamber VI to conduct the very preliminary step of determining which of the participating victims remained potential beneficiaries as a result of the judgement and the positive findings therein. The VPRS completed this exercise – unfortunately without the involvement of the Defence – and informed Trial Chamber VI of the results thereof in its second report dated 15 January 2021.⁹⁴ From the 2121⁹⁵ participating victims, 661 were considered, *prima facie*, to no longer be potential beneficiaries as the events alleged in their requests for participation no longer matched the scope of the crimes for which Mr Ntaganda was convicted.⁹⁶ This was but a preliminary assessment conducted by experienced staff members, after seeking clarification from Trial Chamber VI. It was far from being a determination on the eligibility of the participating victims, which is an entirely different exercise.

53. It follows from the above that the eligibility assessment and urgency screening process, which involves the application of complex concepts – such as the burden of proof, credibility assessments and causal link – cannot be performed by non-legal, field/humanitarian staff having little experience. Consequently, it is imperative for the Chamber, and by extension the parties,

assessed 32 former child soldiers (paras.20-22) and 17 victims of the attacks (para.25), for a total of 49 victims. These numbers are at odds with the statement that “the Trust Fund has conducted the eligibility screening of 45 beneficiaries”(para.12).

⁹⁴ Registry's Second Report on Reparations, 15 January 2021, [ICC-01/04-02/06-2639](#), with Annexes I to III.

⁹⁵ Annex I to the Registry's Second Report on Reparations, 15 January 2021, [ICC-01/04-02/06-2639-Conf-AnxI](#), para.9.

⁹⁶ *Idem*, para.9 (diagram).

to be informed of the qualifications and level of experience that will be demanded by the TFV to qualify as ‘examiner’. The success and importance of the eligibility assessment and urgency screening process requires nothing less.

54. As for the actual procedure followed by the TFV to perform this process, it raises many issues.

55. First, it appears from the procedure set out in the TFV Fourth Report that the TFV conflates eligibility assessment with the preliminary assessment that was performed by the VPRS before the Reparations Order was issued to determine if the events alleged in victim *participation* requests fell, *prima facie*, within the scope of the judgement.⁹⁷ This is *not* the task that was delegated to the TFV. In fact, in the context of the IDIP, the TFV must *first* assess the eligibility of the potential beneficiary, including *inter alia*, whether the narrative of the potential beneficiary – who has the burden of proof – is proved pursuant to the balance of probabilities standard and whether a causal link exists between the events put forward by the potential beneficiary and the crimes for which Mr Ntaganda was convicted, which took place more than 20 years ago. Again, the burden of proof rests on the potential beneficiary and this is a very complex assessment to make. Only then, once a priority victim referred to the TFV by the CLRs has been found eligible, must the TFV perform the urgency screening. This is not what stems from the TFV Fourth Report. Therein, the TFV explains: (i) having sent a list of priority victims (referred to the TFV by the CLRs) to the corresponding implementing partner along with *the* questionnaire; (iii) the implementing partner then locates the priority victim, obtain very limited information and proceeds to complete the questionnaire with the priority victim; (iv) the questionnaire is returned to the TFV by the implementing partner; (v) the TFV performs the eligibility assessment and urgency screening process in the abstract, without any input from the priority victim, other than the answers in the questionnaire; and (vi) the TFV informs the implementing partner – and the applicable CLR – of the result. This procedure is incorrect; it does not allow the TFV to fulfil the mandate delegated to it by the Chamber.

56. The source of the information by the examiner as well as the breath of the evidence that will be considered and assessed by the examiner is of the utmost importance. It stems from the Fourth Report that the information considered so far by the examiner of the TFV is limited to what is provided by the CLRs when referring the priority victims. What, if anything, this information comprises beyond the victim participation form and any document attached thereto,

⁹⁷ Internal Guidelines, para.5.

is unknown. It is also unknown whether any information in the possession of the VPRS is provided to the TFV examiner. More importantly, it is clear from the TFV Fourth Report that no information obtained from the priority victim / potential beneficiary – who has the burden of proof – other than the questionnaire dealing solely with the urgency screening is considered by the examiner.

57. No interview is conducted by the examiner with the potential beneficiary and no exchange of information, documents or evidence takes place between the two. Consequently, the eligibility assessment conducted by the examiner is but a paper exercise performed on the basis, at best, of the same information that was available to the VPRS when conducting the preliminary *prima facie* scope of the judgment assessment. This is evidently insufficient and incorrect as it reduces the eligibility assessment to a mere formality. What is more, this exercise is conducted entirely by one organization, the TFV, in the absence of any kind of oversight. This is wholly unfair to the convicted person. It is not surprising in this context that the TFV confirmed the eligibility of all 49 priority victims assessed so far.

58. At a minimum, much more transparency is required and it is essential for the TFV to develop a procedure that will be fair as much for potential beneficiaries as for the convicted person.

59. To this day, the eligibility assessment and urgency screening process implemented by the TFV is limited to so-called priority victims drawn from the pool of 1460 participating victims who were found to meet the preliminary, *prima facie*, scope of judgment test (2121 – 661). Considering that Trial Chamber VI has dispensed the participating victims of the requirement to submit a genuine request for reparations⁹⁸ and that it has already decided that any participating victim in *Ntaganda*, who qualified as beneficiary in the *Lubanga* case, was automatically certified in this case, the impact of the TFV's erroneous substantive and procedural approach, while serious, is still limited. However, the impact of the TFV's flawed approach will be much greater when the time comes to implement the DIP. This is why it is so important to adopt a sound and transparent procedure before we reach that stage.

CONCLUSION

60. It follows from the foregoing that the TFV's substantive and procedural approach substantive is flawed and that it must be revisited.

⁹⁸ First Decision on Reparations Process, 26 June 2020, [ICC-01/04-02/06-2547](#), para.29.

61. Furthermore, the Chamber – and by extension - the parties, must be informed of the TFV's plans in this regard, and approve the same, ideally before the TFV proceeds further with the eligibility assessment and urgency screening process.

RESPECTFULLY SUBMITTED ON THIS 20th DAY OF MAY 2022

A handwritten signature in dark ink, appearing to read 'S.B.' with a stylized flourish at the end.

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

The Hague, The Netherlands