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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 "Observations on behalf of the convicted person on the Trust Fund for Victims' Eighth Update Report on the Implementation of the Initial Draft Implementation Plan", dated 9 December 2022, ICC-01/04-02/06-2802-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 Decision on the Trust Fund for Victims (“TFV”)’s Sixth and Seventh Update Reports on the implementation of the Initial Draft Implementation Plan (“IDIP”) issued by Trial Chamber II (“Chamber”) on 16 November 2022 (“Decision on Sixth and Seventh Update Reports”)¹ and the submission by the TFV of its Eighth Update Report on the implementation of the Initial Draft Implementation Plan on 28 November 2022 (“TFV Eighth Update Report”),² Counsel for the convicted person (“Defence”) hereby submits this:

**Observations on behalf of the convicted person on the Trust Fund for Victims’
Eighth Update Report on the Implementation of the Initial Draft Implementation
Plan**

“Defence Observations”

INTRODUCTION AND OVERVIEW

1. In its Eighth Update Report, the TFV addresses four main issues, namely (i) the security situation;³ (ii) the conduct of further eligibility assessments;⁴ (iii) the implementation of initial reparations measures;⁵ and (iv) outreach measures taken.⁶ In doing so, the TFV also touches upon certain issues raised in the Trial Chamber’s Decision on the Sixth and Seventh Update Reports.

2. Without prejudice to its position advocated thus far regarding the legality of allowing the TFV to proceed with the implementation of the Initial Draft

¹ Decision on the TFV’s Sixth and Seventh Update Reports on the Implementation of the Initial Draft Implementation Plan, 16 November 2022, [ICC-01/04-02/06-2792](#) (“Decision on the Sixth and Seventh Update Reports”).

² Trust Fund for Victims’ Eighth Update Report on the Implementation of the Initial Draft Implementation Plan, 28 November 2022, [ICC-01/04-02/06-2796](#) (“TFV Eighth Update Report”).

³ TFV Eighth Update Report, paras.16-20.

⁴ TFV Eighth Update Report, paras.21-29.

⁵ TFV Eighth Update Report, paras.30-33.

⁶ TFV Eighth Update Report, paras.34-36.

Implementation Plan (“IDIP”) before issuing a new order for reparations⁷ – rejected by Trial Chamber II⁸ – which will be addressed in the upcoming appeal on the merits of the new Reparations Order, these Defence Observations address the same issues.

3. As a preliminary matter, and as will be seen below, the Defence deems it appropriate to underscore that despite the 12 September Appeals Reparations Judgment and the errors identified therein regarding the involvement of the Defence,⁹ the TFV maintains its approach to reparations proceedings of isolating the representatives of the convicted person and going out of its way to avoid responding to issues raised by the Defence. Yet, there is certainly at least *some* merit in the constructive position adopted by the Defence since the beginning of the reparations phase, which could have expedited the fair implementation of the reparations proceedings for the benefit of all involved.

4. The Defence takes this opportunity to reassure the Chamber, the TFV, the LRVs and the Registry of its aim to work with the Parties and Participants to ensure that reparations proceedings are indeed successful in all fairness to both the genuine victims and the convicted person.

CONFIDENTIALITY

5. 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.

⁷ See for instance Observations on behalf of the convicted person on the Trust Fund for Victims’ Seventh Update Report on the Implementation of the Initial Draft Implementation Plan, 7 October 2022, [ICC-01/04-02/06-2785](#), paras.4-6,15-17-23.

⁸ Order for the implementation of the Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled “Reparations Order”, 25 October 2022, [ICC-01/04-02/06-2786](#) (“Implementation Order”), para.17; Decision on the Sixth and Seventh Update Reports, paras.16-24.

⁹ Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled “Reparations Order”, 12 September 2022, [ICC-01/04-02/06-2782](#) (“Appeals Reparations Judgment”), paras.359-364, fnt.1672.

SUBMISSIONS

I. Security Situation

6. Regarding the security situation, the TFV either misunderstood the Chamber's instructions and/or the position of the Defence or is simply not inclined to address the concerns of the Defence. In the Decision on the Sixth and Seventh Update Reports, the Chamber instructed the TFV "[...] to provide further details in its next Report, addressing in particular the issue as to whether the security situation indeed has a 'much broader impact in scope and importance' on the IDIP's implementation [...]." ¹⁰ The TFV's assertion that "[...] the security situation in the localities where the Trust Fund's implementing partners are operative has not significantly evolved to a point that allows it to provide further details on the scope and importance of the security situation" ¹¹ neither addresses the Chamber's instructions *nor* the concerns of the Defence. Whether the security situation indeed has a "much broader impact in scope and importance" on the IDIP's implementation, means just that, *i.e.* are there other issues - beside access to the victims and the possibility for the implementing partners to operate in their respective areas – that stem from the security situation and which may have an important impact on the implementation of the IDIP.

7. The Defence has previously raised its concerns in this regard on many occasions, focusing on issues such as potential beneficiaries being involved in the events undermining the security situation ¹² and the risks of possible tensions,

¹⁰ Decision on the Sixth and Seventh Update Reports, para.14.

¹¹ TFV Eighth Update Report, para.17.

¹² Defence observations on the Trust Fund for Victims' Third Update Report on the Implementation of the Initial Draft Implementation Plan, 4 February 2022, [ICC-01/04-02/06-2744](#) ("Defence Observations on the Third Update Report"), paras.7,9; Defence observations on the Trust Fund for Victims' Fourth Update Report on the Implementation of the Initial Draft Implementation Plan, 7 April 2022, [ICC-01/04-02/06-2755](#) ("Defence Observations on the Fourth Update Report"), para.13; Defence observations on the Trust Fund for Victims' Fifth Update Report on the Implementation of the Initial Draft Implementation Plan, 6 June 2022, [ICC-01/04-02/06-2769](#) ("Defence Observations on the Fifth Update Report"), para.26.

animosity, and jealousy among affected communities.¹³ Regarding the latter, the CLR2 has also previously submitted that a “solid strategy of risk mitigation is needed to address not only issues arising from the general insecurity of the area and displacement of potential beneficiaries but also the risks of possible tensions, animosity, and jealousy among affected communities.”¹⁴ In its Decisions on the various TFV Update Reports, the Chamber also underscored four issues, including those raised by the Defence.¹⁵ Yet, the TFV still has not provided substantive information to address these genuine concerns.

8. Although the TFV has previously acknowledged the concerns of the Defence regarding the possible involvement of potential beneficiaries in the events undermining the security situation, its past submission on this issue, *i.e.* “the Trust Fund is fully mindful of this risk and in the event such individuals are identified, the Trust Fund would inform their CLR and submit the situation to the Trial Chamber”¹⁶ without more, is wholly insufficient.

9. In fact, it stems from the paucity of information provided by the TFV that its sole objective appears to be to implement and award reparations to potential beneficiaries in the abstract, without taking into consideration the nature of the protracted conflict in Eastern DRC; the fact that the UPC-FPLC of which the convicted person was a member is but one of numerous armed groups responsible for the endless crimes committed in Ituri during the last 20 years; the fact that the reparations

¹³ Defence Observations on the Fourth Update Report, paras.12-13; Defence Observations on the Fifth Update Report, paras.26-28.

¹⁴ 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](#), para.8 citing: Response of the Common Legal Representative of the Victims of the Attacks to the “Trust Fund’s Second Update report on the Implementation of the Initial Draft Implementation Plan” (‘CLR2 Response’), 6 December 2021, [ICC-01/04-02/06-2724](#), para.17.

¹⁵ 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](#), paras.7-9; 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](#), para.10.

¹⁶ Trust Fund for Victims’ Third Update Report on the Implementation of the Initial Draft implementation Plan, 24 January 2022, [ICC-01/04-02/06-2741](#), para.11.

awarded are judicial, yet *quasi* one-sided; and, more importantly, the potential devastating consequences in this context, of awarding reparations to potential beneficiaries belonging to the Lendu ethnic group, either affiliated to former Lendu combatants or the CODECO armed militia, or worse, personally involved in the events undermining the security situation.

10. Population displacements in Ituri during the last 20 years are also highly relevant regarding the security situation. For instance, the villages mentioned in the TFV Eighth Update Report, *i.e.* Nyakunde, Kilo, Bambu and Mongbwalu¹⁷ are villages where members of the Lendu ethnic group, Lendu combatants, and members of the RCD-KML lived at the time relevant to the charges laid against the convicted person. Nonetheless, no information is provided as to who lives there today, who is putting up roadblocks to prevent access to these areas and/or for what purpose or objectives. And if potential beneficiaries no longer live in these areas, the identity of those who chased them, when and why is highly relevant. The risk in this regard of financing militias responsible for the dire security situation through reparations awards, is real.

11. This is where the questions previously identified by the Defence take all their meaning and importance.¹⁸ The TFV should be ordered to obtain and share with the Chamber and the parties, additional information on the ongoing situation in these areas. Basic parameters, which need to be explored, include: (i) the organization and strength of the CODECO and that of other militias, as well as their objectives and political agenda; (ii) the location of CODECO units and other militias and whether these areas are accessible generally; (iii) whether any participating victims of the attacks or purported beneficiaries are affiliated to or involved with the CODECO's ongoing attacks; (iv) the villages targeted by the CODECO and other militias; (v) the ethnic composition of the villages targeted by the CODECO and other militias; (vi) the ethnicity of the persons fleeing these villages; (vii) the destination of the persons

¹⁷ TFV Eighth Update Report, para.18.

¹⁸ See for instance Defence Observations on the Third Update Report, para.11; Defence Observations on the Fourth Update Report, paras.12-13; Defence Observations on the Fifth Update Report, paras.24-27.

fleeing the villages; and (viii) the identity and ethnicity of the persons who occupy the villages from which the population has fled.¹⁹

12. In sum, awarding reparations in Ituri today, 20 years after the events which gave rise to the crimes Mr Ntaganda was convicted of, taking into consideration the security situation and its ramifications, requires a thorough assessment of the governing situation in Ituri today as well as a robust eligibility determination process. Both are missing from the TFV Eighth Update Report. Understanding the dynamics of Ituri today requires significant groundwork and assessing whether potential beneficiaries should be disqualified for the above-mentioned reasons, requires a much more robust yet subtle approach, going beyond the questionnaire presently used by the TFV.

13. The potential of doing more harm than good, contrary to the *do no harm principle*, by awarding reparations to the wrong persons is real. The consequences for Ituri and the DRC of doing so would be far-reaching. The TFV should be ordered to make the best use of the present period - until the Chamber issues a new order for reparations - to do the necessary groundwork in relation to Ituri and to develop the necessary tools to perform eligibility assessments that will allow to identify whether potential beneficiary should be disqualified due to their affiliation to an armed group or involvement in the events undermining the security situation.

II. The conduct of further eligibility assessments

14. To the extent that the TFV has not conducted any additional eligibility assessment since the Appeals Reparations Judgment was rendered and that any further eligibility assessment the TFV may be called upon to perform in the context of the IDIP is expressly authorized by the Chamber,²⁰ little needs to be said in this regard.

¹⁹ Defence Observations on the Third Update Report, para.11.

²⁰ Decision on the Sixth and Seventh Update Reports, paras.19-24.

15. Nonetheless, the Defence fails to understand why the convicted person needs to be isolated from the process *at this stage*. The Defence acknowledges that the Appeals Chamber has highlighted a difference in its role in the eligibility determination process, before and during the implementation phase.²¹ However, the new order for reparations which has yet to be issued by the Chamber will certainly address the eligibility determination procedure and applicable criteria. Accordingly, even though the TFV is authorized to conduct further eligibility determinations in the context of the IDIP, it cannot be said that we have reached the implementation stage and the Defence should, at a minimum, be informed of any further eligibility determinations made by the TFV and have access to the supporting documents.

16. The Defence takes the view that such a restrictive interpretation of the Appeals Reparations Judgment is counterproductive. Once again, the Defence is perceived as an obstacle in the eligibility determination process as opposed to a party to the reparations proceedings, able to assist in ensuring that the eligibility determinations are properly conducted. Time saved by not allowing the Defence access to victims' applications and the TFV determinations at this stage may very well create additional delays in the long run.

17. Lastly, the Defence deems it appropriate to underscore that until the new reparations order is issued by the Chamber and the TFV new Draft Implementation Plan is approved by the Chamber, the IDIP should not be used to determine the eligibility of potential beneficiaries who do not meet the urgency and/or priority requirements.

III. The implementation of initial reparations measures

²¹ Appeals Reparations Judgment, paras.363-364,368-369.

18. Based on the information provided, initial measures have been implemented for the 69 urgent / priority beneficiaries determined to be eligible by the TFV, which is certainly a positive development.²²

19. However, further to the Appeals Reparations Judgment and the orders issued by the Chamber, the eligibility of these 69 beneficiaries will soon be revisited by the Chamber - with input from the parties – with the possibility that some eligibility determinations may be overturned.²³

20. In the event certain eligibility determinations are overturned, and without prejudice for the possibility of these beneficiaries to challenge the Chamber's determination, the manner in which the actual beneficiaries will be informed, and in all likelihood removed from the implementation programs, will be crucial.

21. Accordingly, it is essential that measures be taken ahead of time to inform these beneficiaries of this possibility.

22. As for the information provided that "[REDACTED], [REDACTED],"²⁴ this is an important development that should be handled with care. If averred, there may be various reasons for such happening and it is important for the Defence to be informed, at a minimum, of the outcome.

IV. Outreach measures taken

23. In its Decision on the Sixth and Seventh Update Reports, the Chamber "ENCOURAGES the TFV to provide further details on the content and target communities of the broadcasted messages for outreach purposes and include both parties in any consultation process."²⁵

²² TFV Eighth Update Report, para.26.

²³ Implementation Order, paras.20,26,34(b); Decision on the Sixth and Seventh Update Reports, paras.8,10,17.

²⁴ TFV Eighth Update Report, para.30.

²⁵ Decision on the Sixth and Seventh Update Reports, Disposition.

24. Although the TFV Eighth Update Report does provide some generic information on the outreach measures taken and the content of the broadcasted messages for outreach purposes, the information provided by the TFV falls short of the Chamber's requirements.

25. The TFV did consult with the LRVs but not with the Defence and the Defence has yet to be informed of the identity of the recipients of these messages, let alone of the content of any message.

26. The information broadcasted for outreach purposes directly concerns the convicted person as well the award that will pronounced against him and the generic identity of the potential recipients. The content of the messages is also likely to have a direct impact on the identification of new potential beneficiaries and the information that will be available to them in producing a claim for reparations at this late stage.

27. The Defence has previously offered submissions on the broadcasting and content of outreach messages on many occasions.²⁶ These will not be repeated here. The Defence has also offered its assistance in reviewing proposed outreach messages. Yet the TFV continues to isolate the Defence from the process, always finding a way not to comply with the Chamber's orders, instructions or encouragement. This begs the question, why? Even if the convicted person was not entitled to have a say in the content of outreach messages, there is no reason for not disclosing to him outreach messages distributed or broadcasted, which are of primary interest to him and the monetary award that will be pronounced against him. The Defence calls upon the Chamber to issue express orders to the TFV in this regard.

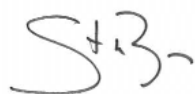
CONCLUSION

²⁶ Defence observations on the TFV First Progress Report on the implementation of the Initial Draft Implementation Plan, 4 November 2021, [ICC-01/04-02/06-2714](#), paras.22-23; Defence Observations on the Third Update Report, para.13; Defence Observations on the Fifth Update Report, paras.28-29; Observations on behalf of the convicted person on the Trust Fund for Victims' Sixth Update Report on the Implementation of the Initial Draft Implementation Plan, 5 August 2022, [ICC-01/04-02/06-2780](#), para.9.

28. Further to the 12 September Appeals Reparations Judgment, it is paramount for the reparations process to proceed expeditiously for the benefit of the genuine victims. The Defence certainly concurs with this objective. It is nonetheless critical for the reparations phase, including the issue of a new order for reparations by the Chamber, to proceed on a sound basis after correcting the errors identified by the Appeals Chamber. The Defence has already undertaken to act swiftly and to offer its assistance in meeting this objective.

29. That said, it respectfully appears to the Defence that the process is ripe for the implementation of a new mindset where the Defence is not seen as an obstacle but rather as a full-fledged party, interested and able to assist in ensuring the success of the reparations phase. These Defence Observations should be considered in this spirit.

RESPECTFULLY SUBMITTED ON THIS 19th DAY OF JANUARY 2023

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

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

The Hague, The Netherlands