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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’ Ninth Update Report on the Implementation of the Initial Draft Implementation Plan”, dated 10 February 2023, ICC-01/04-02/06-2829-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
Mr Tars Van Litsenborgh

Mr Dmytro Suprun
Ms Cherine Luzaisu
Ms Fiona Lau

Counsel for the Defence

Me Stéphane Bourgon, *Ad.E.*
Mrs Kate Gibson
Mr Benjamin Willame

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

Ms Franziska Eckelmans

Further to the Decision on the Trust Fund for Victims (“TFV”)’s Eighth Update Report on the implementation of the Initial Draft Implementation Plan (“IDIP”) issued by Trial Chamber II (“Chamber”) on 13 January 2023 (“Decision on Eighth Update Report”)¹ and the submission by the TFV of its Ninth Update Report on the implementation of the Initial Draft Implementation Plan, on 30 January 2023 (“TFV Ninth Update Report”),² Counsel for the convicted person (“Defence”) hereby submits this:

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

“Defence Observations TFV 9th Report”

INTRODUCTION

1. The TFV Ninth Update Report covers the activities relevant to the implementation of the IDIP conducted between 28 November 2022 and 30 January 2023. The report addresses the security situation as it impacts the implementation of the IDIP; the eligibility assessment and the implementation of initial reparations measures; as well as other issues raised in the Decision on Eighth Update Report, including outreach activities. These Defence Observations address the same issues in the same order.

2. Pursuant to [REDACTED], [REDACTED] “[...] [REDACTED] [...]”,³ the TFV is required to address the impact of the security situation in Ituri on the implementation of the IDIP insofar as it concerns the TFV’s access to potential beneficiaries and the implementation of reparations. Yet, the TFV Ninth Update Report provides information regarding the existence of no less than five active

¹ Decision on the TFV’s Eighth Update Report on the Implementation of the Initial Draft

² Trust Fund for Victims’ Ninth Update Report on the Implementation of the Initial Draft Implementation Plan, 30 January 2023, ICC-01/04-02/06-2817-Conf (“TFV Ninth Update Report”) with its Annex B.

³ Decision on Eighth Update Report, para.16.

militias / armed groups in areas relevant to the reparations proceedings, namely CODECO, Milice d'auto défense Zaire "Mad Zaire", Mouvement d'auto défense Populaire de l'Ituri "MAPI", FRPI and FPIC, which the Defence respectfully submits should at least be of interest to the Chamber.

3. Regarding the TFV's Update on the eligibility assessment, the procedure followed by the TFV upon referral of potential beneficiaries by the CLRs and whether the questionnaire to be completed by potential beneficiaries is still in use are issues that deserve to be considered.

4. Whereas the Defence has no observation to submit regarding the update on the implementation of initial reparations measures in the TFV Ninth Update Report, outreach activities conducted by the TFV continue to be a source of concern.

5. Indeed, while the Defence welcomes the *responses* provided by the TFV – regarding the message(s) broadcasted concerning the impact of the Appeal Judgment on the reparations proceedings, the information provided by the TFV regarding its previous and future outreach activities remains insufficient. Yet, there are reasons for such information to be provided to the Chamber and the Defence.

6. Lastly, the Defence welcome the information provided regarding [REDACTED]. If necessary, the Defence offers its assistance in this regard.

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.

SUBMISSIONS

I. Security Situation

8. In the Trust Fund for Victims' Eighth Update Report on the Implementation of the Initial Draft Implementation Plan ("TFV Eighth Update Report") dated 28 November 2022, the TFV reported, *inter alia*: the extension of the state of siege in Ituri,⁴ increasing instability on Nyakunde and Kilo axes, roadblocks put up on several occasions in the Bambu locality disturbing the security situation, and turmoil in the outskirts of Mongbwalu.⁵ In the TFV Ninth Update Report dated 30 January 2023, the TFV reports, *inter alia*: deadly attacks by armed groups against the Armed Forces of the DRC ("FARDC") and the civilian population, an increase in the number of attacks, in particular in the Djugu territory, several bombs having been disarmed in and around Bunia, fierce battles between CODECO and Mad Zaire around Mongbwalu, emergence of a new armed group – Mouvement d'auto défense Populaire de l'Ituri (MAPI), the deployment of the Force de résistance patriotique de l'Ituri ("FRPI") around Bogoro, Bogoro being surrounded in an eight-kilometre pocket between FRPI, CODECO and the Force patriotique et intégrationiste du Congo (FPIC), and the setting-up of a barrier in Lagabo, imposing an illegal access tax of US 2.5, for anyone wishing to proceed to Boga or Mitego.⁶

9. The TFV also reports about the situation allegedly involving the M23 armed group in and around Goma in North Kivu.⁷ Admittedly, what is going in North Kivu is an important consideration in trying to understand the dynamics of the overall situation in the DRC. This situation, nonetheless, has very little, if any, relevance regarding the reparations proceedings in this case.

⁴ The state of siege in Ituri and its implications was previously addressed by the TFV in previous reports (*See for instance*, Trust Fund for Victims's Third Update Report on the Implementation of the Initial Draft Implementation Plan, 24 January 2022, ICC-01/04-02/06-2741, para.8.) as well as by the Defence, regarding in particular, the difficulties encountered by the Armed Forces of the DRC ("FARDC") when fighting CODECO elements, which control access to relevant areas such as Kobu, Bambu and Lipri (*See for instance*, 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, para.10.).

⁵ 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"), para.18.

⁶ TFV Ninth Update Report, paras.19-20.

⁷ TFV Ninth Update Report, para.21.

10. In the TFV Eight Update Report, the TFV referred to a "visibility and monitoring mission"⁸ conducted by the TFV in Bunia, along with ambassadors based in Kinshasa from Senegal, Canada and the Netherlands. Although this delegation was not authorized to go beyond Bunia, which underscores the fact that very few people, other than local inhabitants, are familiar with the real situation as it is unfolding in the areas relevant to the present reparations proceedings. In the view of the diplomatic delegation that traveled to Bunia, there is a consensus that crimes continue to be committed on a large scale in Eastern DRC, with full impunity, and that justice is urgently required.⁹

11. Regardless, the ICC Prosecutor is not likely to be interested in returning to and has likely no appetite for any further investigations in the DRC.¹⁰ The politics of the ICC are such that the Prosecutor is more likely to investigate elsewhere. The DRC, in particular Eastern DRC (Ituri and the Kivus), is on its own. Unfortunately for the population of the DRC, of all the militias, armed groups and politico-military movements, which operated in Eastern DRC (and which, in some cases, are still active) in the past 20 years or so, only one has been put on trial and some of its leaders convicted (namely *Lubanga* and Mr Ntaganda) and that is the UPC / FPLC.¹¹ This leaves thousands of genuine victims, across Ituri, who are not in a position to claim judicial reparations in the absence of trials and/or convictions involving other armed groups. In these circumstances, the least that can be done by the ICC is to ensure that reparations in this case are not awarded to undeserving claimants who were members of armed groups involved in the events of 2002 – 2003 or worse, who

⁸ TFV Eighth Update Report, para.20.

⁹ *Ibidem*.

¹⁰ Although several sources, including the United Nations Joint Human Rights Office, have stated that some violations committed after 2017 may constitute crimes against humanity. *See for instance*, Bureau Conjoint des Nations Unies aux droits de l'homme, HCD-Monusco, Rapport public sur les conflits en territoire de Djugu, province de l'Ituri Décembre 2017 à septembre 2019, January 2020, available at <https://www.ohchr.org/en/press-releases/2020/01/drc-inter-ethnic-violence-ituri-may-constitute-crimes-against-humanity-un-0?LangID=E&NewsID=25460>

¹¹ Although Germain Katanga and Mathieu Ngudjolo, leaders of the Lendu community, were also tried before the ICC, this was limited to a one day operation in Bogoro while the numerous large scale massacres committed by Lendu combatants, along with the APC, the armed branch of RCD KML, were neither examined nor assessed before the ICC.

are still involved in, or affiliated with, armed groups that continue 20 years later to attack civilians and commit massacres. The ICC's reparations' mandate must be implemented without creating more harm than good by taking a stance in the ongoing conflict that may trigger additional fighting and bloodshed.

12. The Defence does not dispute the fact that victims of the crimes for which Mr Ntaganda was convicted should be repaired. Quite to the contrary, genuine victims should be awarded reparations. As for all the victims of crimes committed by other armed groups, who cannot obtain judicial reparations, only the TFV, through its assistance mandate, can see to it that their sufferings are addressed.

13. These are reasons why the protracted armed conflict in Ituri and Eastern Congo, which began as early as 1999 if not earlier, appears endless. Taking a look at the armed groups mentioned in the TFV Ninth Update Report, in particular, the FRPI, FPIC and CODECO, but also the others, can be revealing in trying to understand the dynamics of the never-ending armed conflict in Ituri. Notably, a significant quantity of information concerning these armed groups, including their composition, location, objectives, and alleged involvement in many massacres, is readily available through open-source material on the web.¹²

¹² See for instance, Agence Afrique, RDC: La Monusco condamne une attaque des miliciens CODECO ayant tué 15 militaires congolais à Ndjala, 30 January 2023, available at <https://www.agenceafrique.com/40833-rdc-la-monusco-condamne-une-attaque-des-miliciens-codeco-ayant-tue-15-militaires-congolais-a-ndjala.html>; Radio Okapi, Ituri : 10 morts dans plusieurs attaques de la CODECO dans le territoire de Djugu, 13 January 2023, available at <https://www.radiookapi.net/2023/01/13/actualite/securite/ituri-10-morts-dans-plusieurs-attaques-de-la-codeco-dans-le-territoire>; Radio Okapi, Ituri : plus de 100 morts recensés dans les attaques des milices en un mois, 13 January 2023, available at <https://www.radiookapi.net/2023/01/13/actualite/securite/ituri-plus-de-100-morts-recenses-dans-les-attaques-des-milices-en-un>; Media Congo, Opérations conjointes Fardc-Updf en Ituri : au moins 5 miliciens de la FRPI tués à Makone, 30 December 2012, available at <https://www.mediacongo.net/article-actualite-115494-operations-conjointes-fardc-updf-en-ituri-au-moins-5-miliciens-de-la-frpi-tues-a-makone.html>; Politico.cd, Ituri : Deux factions de la milice FPIC s'affrontent à Irumu, 4 February 2023, available at <https://www.politico.cd/encontinu/2023/02/04/ituri-deux-factions-de-la-milice-fpic-saffrontent-a-irumu.html/127617/>.

14. Although [REDACTED], the Defence respectfully submits that two major risks arise from the present situation, actions that may *result in* financing or supporting militias, thereby allowing attacks against civilians to continue; and actions that may lead, convince or encourage local inhabitants to take up arms to protect themselves and their rights, thereby triggering more fighting and bloodshed in Eastern DRC. The Defence [REDACTED].

15. CODECO, FRPI and FPIC share at least two characteristics. First, they are Lendu based armed groups - in various ways they are the follow-up to Lendu combatants, whose fighting techniques and *modus operandi* are well documented in the evidence in this case - which have been around for years¹³ and which have similar goals and objectives. Second, they are in, and/or operate from areas relevant to the reparations proceedings, where potential beneficiaries live. In these circumstances, there is a real likelihood that potential beneficiaries living in villages where the majority of inhabitants are Lendus and where CODECO, FRPI and FPIC are and operate, may either be former Lendu combatants and/or affiliated with these armed groups, which are active today. The reasons why these armed groups fight the FARDC, block access to villages / areas relevant for the reparations proceedings and establish roadblocks where illegal taxes are imposed, are benign questions. In fact, such issues and there are more, are revealing concerning the status of local inhabitants. Any reparations awarded to inhabitants fitting this description - *i.e.* that

¹³ CODECO has been active in the region since 2017 (*see for instance*, UN News, RDC : près de 50 corps de civils découverts dans deux fosses communes en Ituri, selon la MONUSCO, 19 January 2023, available at <https://news.un.org/fr/story/2023/01/1131477>; International Crisis Group, Headquarters International Crisis Group, RD Congo : en finir avec la violence cyclique en Ituri, *Rapport Afrique* N°292, 15 July 2020, available at <https://icg-prod.s3.amazonaws.com/292-rdc-ituri%20%281%29.pdf>). FRPI has been created in 2002 (*see for instance*, RFI, RDC: le groupe armé du FRPI de nouveau actif dans l'Ituri, 6 April 2015, available at <https://www.rfi.fr/fr/afrique/20150406-rdc-groupe-arme-rebelles-frpi-nouveau-actif-ituri-violencesprovince-orientale>; GIC Network, L'impasse du processus de paix FRPI: Les leçons tirées d'une approche DDR Communautaire et politique au Congo, 2021, available at https://www.gicnetwork.be/wp-content/uploads/2021/07/06_GIC_Limpasse-du-processus-de-paix-FRPI_WEB.pdf). FPIC is an armed group involved in the region since 2019 (*see for instance*, La Libre Afrique, RDC: plusieurs morts dans une attaque menée par une nouvelle milice en Ituri, 22 October 2020, available at <https://afrique.lalibre.be/55098/rdc-plusieurs-morts-dans-une-attaque-menee-par-une-nouvelle-milice-en-ituri/>).

of being a former Lendu combatant and/or being affiliated to or a member of one of these armed groups, disturbing the peace and allegedly involved in the commission of crimes - support and/or finance these armed group(s) / militia(s) - whether directly or indirectly - even when such reparations are personal and/or do not involve cash transfers.

16. The only preventive measure(s) that can be taken to ensure that the above scenario does not materialize is to adopt a robust eligibility determination process that includes looking into and engaging potential beneficiaries' past. Not only would this be of significant assistance in assessing the chain of causality between the harm suffered and the crimes for which Mr Ntaganda was convicted, it would also ensure that only genuine victims are awarded reparations. Adopting a robust eligibility determination process requires, first and foremost, a thorough understanding of the dynamics of the situation in each village / location as well as in Ituri at large, as well as looking into the composition, objectives, *modus operandi*, location and past actions of these armed groups.

17. Whereas a robust eligibility determination process is necessary / required for the purposes of the reparations procedure of the Court, the actual situation on the ground, concerning locals inhabitants of these areas or of neighbouring villages is quite different. Indeed, reparations other than in specific circumstances should be public and, in the event a potential beneficiary happens to be a former Lendu combatant or a member of, or affiliated to, one of the groups, is very likely to be well known by many in Ituri, in or around relevant villages, from all ethnic groups. This is where the second 'risk' kicks in, *i.e.* the fact that reparations awarded to unworthy claimants may result in additional violence and bloodshed by leading inhabitants of other villages to take up arms and resort to armed fighting.

18. More concretely, to provide but one example, members of the Hema ethnic group - who are precluded from obtaining judicial reparations for the reasons set out above – but who become aware that former Lendu combatants and/or local

inhabitants who are members of an active armed group, involved in disrupting the security situation, are obtaining or have obtained reparations, would necessarily be angered. For instance, consider the population of Bogoro - previously victimized because of the one-day attack / massacre committed by Lendu combatants and others in their village in 2003 – which is today encircled by CODECO, FRPI and FPIC. Should the population of Bogoro become aware that former Lendu combatants and/or members of these armed groups are receiving or have received reparations awarded by the ICC, inhabitants of Bogoro will necessarily be angered. What is more, inhabitants of Bogoro may very well, at some point in time, decide to take up arms and begin fighting.

19. This is what the Defence was referring to when raising the risk of possible tensions, animosity, and jealousy among affected communities as well as the risk of potential devastating consequences, in this context, of awarding reparations to potential beneficiaries belonging to the Lendu ethnic group, who are former Lendu combatants and/or members of, or affiliated to, these armed groups.¹⁴

20. In light of the foregoing, taking stock of [REDACTED]“[REDACTED] [...] [REDACTED], [REDACTED]”,¹⁵ the Defence respectfully posits that the TFV should be invited to make the best of the present situation, awaiting the new reparations order, 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 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) the likelihood that participating

¹⁴ See for instance, 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, paras.12-13; 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, paras.26-28; 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, 9 December 2022, ICC-01/04-02/06-2802, para.7.

¹⁵ Decision on Eighth Update Report, para.13.

victims of the attacks or purported beneficiaries may be members of, or affiliated to CODECO units and other militias; (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; and (vii) the destination of the inhabitants leaving these villages.

II. Update on eligibility assessment

21. As this section of the TFV Ninth Update Report provides operational information, the Defence would normally have very few observations, if any, to submit. In this case, the Defence deems it appropriate to highlight one issue.

22. During the reporting period, the CLR2 referred 12 victims to the TFV for eligibility determination.¹⁶ The TFV reports having referred these 12 *victims* to its [REDACTED], [REDACTED], for “[...] gathering information about their urgent needs”¹⁷ and that “[...] upon receipt of said information, the Trust Fund will assess their eligibility to benefit from IDIP measures.”¹⁸ There is no mention of any other information that is intended to be obtained from these 12 potential victims.

23. It appears from the above that the TFV intends to determine the eligibility of these 12 potential beneficiaries, solely on the basis of the information obtained from the CLR2 and information on their urgent needs obtained from [REDACTED]. There is no mention of the potential beneficiaries having to fill-in a questionnaire or having to produce any additional information.

24. Consequently, the Defence would appreciate being informed: (i) whether this is the standard procedure followed by the TFV; (ii) whether the TFV intends to obtain any other information with a view to making its determination; and (iii)

¹⁶ TFV Ninth Update Report, para.22.

¹⁷ *Ibidem*.

¹⁸ *Ibidem*.

whether the questionnaire, that was the object of much debate earlier,¹⁹ is still being used or has been abandoned.

III. The implementation of initial reparations measures

25. The Defence has no observations on this section.

IV. Outreach

26. On the issue of outreach activities undertaken by the TFV, the Defence appreciates the information provided in the TFV Ninth Update Report regarding messages broadcasted on the radio to affected communities, concerning the impact of the Appeal Judgment on the reparations proceedings in this case. The ‘answers’ in Annex B, taken from a TFV working document, are addressed below.

27. That said, contrary to the Chamber’s instructions,²⁰ no information is provided regarding previous or future outreach activities undertaken by the TFV, not related to the Appeal Judgment. The identity of the communities targeted, the community radios used and most importantly the content of the outreach messages broadcasted, remain unknown, at least to the Chamber and the Defence.

28. The Defence understands [REDACTED] “[REDACTED]”²¹ [REDACTED] “[REDACTED].”²² Nonetheless, outreach activities remain of importance to the convicted person. First, outreach activities in this case are more than a communication effort; their aim is specifically to inform local inhabitants who did not participate in the proceedings, of the possibility to claim reparations for events that happened more than 20 years ago. Second, how, where and to which

¹⁹ See for instance, 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, pp.16-18; 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, para.48.

²⁰ 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, para.26.

²¹ Decision on TFV Eighth Update Report, para.25.

²² *Ibidem*.

communities messages are disseminated, is as much of importance to the convicted person as it is to the Chamber in the exercise of its judicial oversight function. Third, the information communicated to potential beneficiaries, in particular at this stage, 20 years later, is highly relevant to the determination of their eligibility, which, at a minimum, will be reviewed by the Chamber. Fourth, outreach messages broadcasted on community radios will necessarily be heard by all of their audiences, including inhabitants who are not in a position to claim judicial reparations but who nevertheless suffered immensely during the events that gave rise to this case in 2002-2003. It is in the interests of the Court and essential for them, that the information disseminated be accurate, fair and objective. The *do no harm* principle applies across the board. Lastly, for the convicted person, who may be interested in expressing apologies at some stage, as well as for all Congolese who knew him and were aware of his activities at the time, it is important to know what is said about Mr Ntaganda, his liability and his actions, 20 years later, as well as to which communities.

29. All that is required to meet these objectives is for the TFV to be transparent and to disclose / maintain public, its outreach efforts, including to the Defence and most importantly to the Chamber. No protected information related to certain limited victims who should remain anonymous as part of the healing process needs to be included in or disseminated *via* outreach activities. The reasons why the TFV systematically omits to inform the Chamber and Defence of its outreach activities is detrimental to the success of reparations proceedings. In the view of the Defence, this can easily be fixed.

30. Regarding annex B to the TFV Ninth Update Report, *i.e.* the ‘responses’ provided by the TFV, the Defence appreciates that this is a working document of the TFV and that it is not a legal document *per se*. Nonetheless, even though the TFV may need to adapt the *message* to the targeted communities, it must be accurate. It is important for the success of the reparations proceedings that the audience reached by such a message, potential victims or not, are well informed of the status of reparations proceedings before the Court. In this case, the *responses* provide a

generally fair image of the situation but are neither accurate nor sufficiently complete. In any event, this is for the Chamber to determine. [REDACTED], [REDACTED], [REDACTED], [REDACTED], but rather “[...] to issue a new reparations order taking into account the terms of this judgment”²³ on the basis that “the cumulative effect of the errors identified within this judgment materially affects the Impugned Decision.”²⁴ [REDACTED], [REDACTED]. At least part of the audience reached by the responses would welcome such information.

V. Additional issues

31. The Defence welcomes the information provided by the TFV regarding [REDACTED] during the eighth reporting period. It is indeed important that [REDACTED], [REDACTED]. [REDACTED] “[...] [REDACTED].”²⁵

32. The Defence would appreciate being informed of any developments concerning [REDACTED], which the Chamber considers relevant for the Defence.

CONCLUSION

33. The Defence respectfully requests the Chamber to take note of these Defence Observations TFV 9th Report.

RESPECTFULLY SUBMITTED ON THIS 7th DAY OF SEPTEMBER 2023



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

The Hague, The Netherlands

²³ 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 (“Appeal Judgment”), para.750.

²⁴ Appeal Judgment, para.749.

²⁵ TFV Ninth Update Report, para.36.