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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
With Public Annex A**

**Public Redacted Version of “Defence observations on the Trust Fund for Victims’
Eleventh Update Report on the Implementation of the Initial Draft
Implementation Plan”, dated 12 June 2023, ICC-01/04-02/06-2855-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 of the Defence observations on the Trust Fund for Victims' Tenth Update Report on the Implementation of the Initial Draft Implementation Plan on 11 April 2023 ("Defence Observations – TFBV Tenth Update Report")¹ and the Trust Fund for Victims ("TFV")'s submission of its Eleventh Update Report on the Implementation of the Initial Draft Implementation Plan, on 30 May 2023 ("TFV Eleventh Update Report"),² Counsel for the Convicted Person ("Defence") hereby submits this:

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

"Defence Observations – TFBV Eleventh Update Report"

INTRODUCTION

1. Having reviewed the TFBV Eleventh Update Report, the Defence hereby offers the following observations.
2. As a preliminary matter, the Defence notes that despite having submitted substantive observations in relation to the Ninth³ and Tenth⁴ update reports submitted by the TFBV, Trial Chamber II ("Chamber") has yet to pronounce on the same. In fact, the last decision issued by the Chamber in the context of the IDIP goes back to 13 January 2023.⁵

¹ Defence observations on the Trust Fund for Victims' Tenth Update Report on the Implementation of the Initial Draft Implementation Plan, 11 April 2023, [ICC-01/04-02/06-2843-Conf](#) ("Defence Observations – TFBV Tenth Update Report").

² Trust Fund for Victims' Eleventh Update Report on the Implementation of the Initial Draft Implementation Plan, 30 May 2023, [ICC-01/04-02/06-2854-Conf](#) ("TFBV Eleventh Update Report").

³ 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](#) ("TFBV Ninth Update Report").

⁴ Fund for Victims' Tenth Update Report on the Implementation of the Initial Draft Implementation Plan, 30 March 2023, [ICC-01/04-02/06-2839-Conf](#).

⁵ Decision on the TFBV's Eighth Update Report on the Implementation of the Initial Draft implementation Plan, 13 January 2023, [ICC-01/04-02/06-2811-Conf](#).

3. As for the information provided in the TFV Eleventh Update Report, it is modest, to say the least. Yet, many issues did arise during the reporting period - from 30 March to 30 May 2023 - in respect of which, more detailed observations could have been of assistance at this stage. Although a new reparations order is in the works and expected relatively shortly, this should not prevent the TFV from submitting all relevant information to the Chamber. Notably, recent developments regarding the deteriorating security situation in Ituri, are highly relevant and likely to be of assistance to the Chamber, not only for IDIP purposes but also in deciding on crucial issues concerning *inter alia*, the eligibility determination mechanism to be included in the new reparations order.

CONFIDENTIALITY

4. Pursuant to regulation 23*bis* (1) and (2) of the Regulations of the Court, these Defence Observations – TFV Eleventh Update Report are classified confidential as they respond to submissions likewise classified confidential. A public redacted version will be prepared and filed at the earliest opportunity.

SUBMISSIONS

5. These Defence Observations – TFV Eleventh Update Report follow the same presentation as the topics addressed by the TFV, namely (i) update on the security situation; (ii) update on the eligibility assessment; and (iii) update on the implementation of initial reparations measures.

I. Update on the security situation

6. The TFV Eleventh Update Report addresses the security situation in Ituri in one paragraph,⁶ repeating prior submissions that the situation is volatile,

⁶ [TFV Eleventh Update Report](#), para.11.

unpredictable and shows no improvement as violence between the different armed groups operating in the region continues.

7. First, no new information is provided by the TFV concerning the security situation, and more importantly, on the potential impact thereof on the reparations awarded to beneficiaries in the context of the IDIP. For example, no reference is made to the *Programme de désarmement, démobilisation et relèvement communautaire et stabilisation*, the outcome of which does not appear optimistic, as armed groups continue to conduct deadly operations against the civilian population.⁷ No reference is made to information widely reported that as of mid-May 2023, 202 000 persons have already been displaced – bringing the total number of displaced persons in the northern provinces to more than 1.6 million⁸ - and that hundreds of people have perished since the beginning of the year.⁹ Recent events such as the killing of more than 30 civilians and the burning of some 500 houses and two sanitary structures during armed combat between CODECO and FPIC from 23 to 25 April¹⁰ and the killing of 40 persons on Friday 12 May during an attack by one of the militias aimed at three villages in the Djugu territory,¹¹ are also not mentioned. There are many more instances of killings and crimes relevant to the implementation of reparations in this case.

⁷ RFI, RDC: en Ituri, le processus de désarmement des groupes armés ne convainc guère, 9 June 2023, available at <https://www.rfi.fr/fr/podcasts/reportage-afrique/20230608-rdc-en-ituri-le-processus-de-d%C3%A9sarmement-des-groupes-arm%C3%A9s-ne-convainc-gu%C3%A8re-3-3>; See also, Radio Okapi, Bunia : 18 personnes tuées le week-end lors des attaques des AD, 6 June 2023, available at <https://www.radiookapi.net/2023/06/06/actualite/securite/bunia-18-personnes-tuees-le-week-end-lors-des-attaques-des-adf>.

⁸ UNOCHA, République démocratique du Congo: Ituri : Personnes déplacées internes et retournées, mars 2023, 15 May 2023, available at <https://reliefweb.int/report/democratic-republic-congo/republique-democratique-du-congo-ituri-personnes-deplacees-interne-et-retournees-mars-2023>.

⁹ Afica News, DRC: Over 150 dead in two weeks in Ituri, according to the UN, 19 April 2023, available at <https://www.africanews.com/2023/04/19/drc-over-150-dead-in-two-weeks-in-ituri-according-to-the-un/>.

¹⁰ Radio Okapi, Irumu: plus de 30 morts à la suite des combats entre CODECO et FPIC en trois jours, 27 April 2023, available at <https://www.radiookapi.net/2023/04/27/actualite/securite/irumu-plus-de-30-morts-la-suite-des-combats-entre-codeco-et-fpic-en>.

¹¹ AL 24 News, RD Congo : plus de 40 morts dans de nouvelles attaques en Ituri, May 2023, available at <https://al24news.com/fr/rdcongo-plus-de-40-morts-dans-de-nouvelles-attaques-en-ituri/>.

8. The situation is even more concerning, as the Under-Secretary-General for Peace Operations recently confirmed¹² that there will soon be a progressive withdrawal of MONUSCO from the region, in conjunction with the end of the MONUSCO mandate at the end of this year.¹³

9. It is also noteworthy that yet another new armed group from North Kivu, the ‘*Mai-Mai Kifagiyo*’, emerged in Ituri province, and is now conducting several deadly operations.¹⁴ At a minimum, the TFV should assess the potential impact of this new armed group and how it could undermine the current security situation, as well as the implementation of reparations in the region, by exploring basic parameters as suggested by the Defence in the past.¹⁵

10. Annex A to these Defence Observations – TFV Eleventh Update Report compiled from open-source material available to the TFV, provides a concerning overview of the security situation in the Democratic Republic of Congo (“DRC”), particularly in the northern provinces, thus in Ituri.

11. Significantly, two years following the instauration of a state of siege in Ituri and North Kivu by President Tshisekedi, the DRC has been unable to put an end to the violence and the crimes committed by active militias in the region.¹⁶ It is very

¹² Radio Okapi, Forum des As : « Jean-Pierre Lacroix pour « un retrait graduel et responsable » de la MONUSCO », 8 June 2023, available at <https://www.radiookapi.net/2023/06/08/actualite/revue-de-presse/forum-des-jean-pierre-lacroix-pour-un-retrait-graduel-et->

¹³ UNSC, Resolution 2666 (2022), 20 December 2022, available at https://monusco.unmissions.org/sites/default/files/resolution_2666_2022.pdf.

¹⁴ Politico.cd, Ituri : une nouvelle milice fait rage à Mambasa, 30 May 2023, available at <https://www.politico.cd/encontinu/2023/05/30/ituri-une-nouvelle-milice-fait-rage-a-mambasa.html/133558/>. See also, infosPlus.org, Ituri : un groupe armé Mai Mai Kabido quitte le Nord-Kivu pour s’installer à Mambasa sous l’œil de l’état de siège, 7 June 2023, available at <https://infosplus.org/ituri-un-groupe-arme-mai-mai-kabido-quitte-le-nord-kivu-pour-sinstaller-a-mambasa-sous-loeil-de-letat-de-siege/>.

¹⁵ See for instance, Defence observations on the Trust Fund for Victims’ Ninth Update Report on the Implementation of the Initial Draft Implementation Plan, 10 February 2023, [ICC-01/04-02/06-2829](#), para.20.

¹⁶ Politico.CD, Ituri: deux ans après, l’état de siège à l’heure du bilan, 8 May 2023, available at <https://www.politico.cd/encontinu/2023/05/08/ituri-deux-ans-apres-letat-de-siege-a-lheure-du-bilan.html/132697/>; L’Interview.CD, État de siège en Ituri et Nord-Kivu : bilan mitigé après deux ans

important in this regard that the majority composition of the active militias in Ituri, which continue to attack civilians, comes from the Lendu ethnic group.¹⁷ This is not a coincidence; nor can it be dissociated from the events that gave rise to the crimes for which Mr Ntaganda was convicted or from the reparations process in this case. As for the members of the Hema community, they appear to have very little, if any, involvement in these events. In fact, in many instances, they are but the victims of the crimes committed by these active militias. Unsurprisingly, more and more, the Hema Community is voicing its concerns.

12. Recently, the Hema community expressed a keen interest in the creation of an *ad hoc* international criminal tribunal to judge persons responsible of the atrocities currently committed in Ituri by different armed groups.¹⁸ Similar wishes have also recently been voiced during the ICC Prosecutor's recent visit to Ituri.¹⁹ Moreover, in the context of efforts deployed to promote peace between the communities, or at a minimum, to not exacerbate tensions and animosity, the Under-Secretary-General

de lutte contre l'insécurité, 6 May 2023, available at <https://linterview.cd/etat-de-siege-en-ituri-et-nord-kivu-bilan-mitige-apres-deux-ans-de-lutte-contre-linsecurite/>.

¹⁷ 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, p.10, available at <https://icg-prod.s3.amazonaws.com/292-rdc-ituri%20%281%29.pdf>; 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-rebellesfrpi-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, p.11, available at https://www.gicnetwork.be/wp-content/uploads/2021/07/06_GIC_Limpasse-du-processus-de-paix-FRPI_WEB.pdf; 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/>.

¹⁸ Radio Okapi, Bunia : la communauté Hema appelle à l'instauration d'un tribunal pénal pour l'Ituri, 25 March 2023, available at <https://www.radiookapi.net/2023/03/25/actualite/securite/bunia-la-communaute-hema-appelle-linstauration-dun-tribunal-penal-pour>.

¹⁹ See for instance, Radio Okapi, La population de l'Ituri compte sur la CPI pour poursuivre les chefs des milices, 30 May 2023, available at <https://www.radiookapi.net/2023/05/30/actualite/justice/la-population-de-lituri-compte-sur-la-cpi-pour-poursuivre-les-chefs-des>; Radio Okapi, Ituri : les victimes des atrocités des groupes armés attendent de la CPI la répression des crimes subis, 31 May 2023, available at <https://www.radiookapi.net/2023/05/31/actualite/justice/ituri-les-victimes-des-atrocites-des-groupes-armes-attendent-de-la-cpi>.

for Peace Operations, Jean-Pierre Lacroix, recently proposed the idea of a truth, reconciliation and reparations commission in Ituri. According to him, in the past, and in other regions, “cela a beaucoup aidé souvent à obtenir la réconciliation, de dépasser les conflits, les haines, les rancœurs.”²⁰ The Under-Secretary-General for Peace Operations is not alone in advocating the setting up of a truth and reconciliation commission in Ituri.²¹

13. Reparations awarded in this case - in the context of the IDIP or later - must take into consideration not only the dire insecurity situation in Ituri, but also, *inter alia*, (i) the concerns expressed by the Hema community and its advocacy efforts, supported by many,²² for the creation of a criminal tribunal to address the security situation; (ii) the proposition(s) to create a truth and reconciliation commission in Ituri; and (iii) the majority composition of active militias in Ituri as well as the ongoing crimes committed by these armed groups against civilians. Realistically, awarding reparations to members of the Lendu community at this stage, and in this context, without ensuring *via* a robust admissibility determination process, that they were not Lendu combatants at the relevant time, and/or are not members of, or associated with, active militias in Ituri, is bound to exacerbate tensions between the communities. It is also very likely to be perceived as an injustice by the many civilians who are the victims of the crimes committed by these groups, and possibly

²⁰ 7sur7, Ituri : vers la création d'une commission vérité, réconciliation et réparation pour "aider à résoudre des conflits", 5 June 2023, available at <https://7sur7.cd/2023/06/05/ituri-vers-la-creation-dune-commission-verite-reconciliation-et-reparation-pour-aider>.

²¹ See for instance, Organisation Internationale pour la Consolidation de la Paix, Soutien à la médiation et la résilience pour la paix en Ituri et au Grand Nord-Kivu, 21 April 2023, available at <https://www.interpeace.org/fr/resource/soutien-a-la-mediation-et-la-resilience-pour-la-paix-en-ituri-et-au-grand-nord-kivu/>.

²² See for instance, VOA Afrique, Denis Mukwege appelle à la création d'un tribunal international pour la RDC, 10 September 2021, available at <https://www.voaafrique.com/a/denis-mukwege-appelle-%C3%A0-la-cr%C3%A9ation-d-un-tribunal-international-pour-la-rdc/6221059.html>; Media Congo, Insécurité à l'est du pays : Denis Mukwege appelle la Belgique à soutenir un tribunal pénal international, 20 October 2022, available at https://www.mediacongo.net/article-actualite-112423_insecurite_a_l_est_du_pays_denis_mukwege_appelle_la_belgique_a_soutenir_un_tribunal_penal_international.html.

lead to retaliations.²³ No peace and reconciliation efforts or commission, or dedicated criminal tribunal set up to address the security situation in Ituti, could prevail in this context.

14. This is where the *do no harm* principle comes into play. Awarding judicial reparations to genuine victims, while refraining from awarding reparations to former Lendu combatants or members of the Lendu community associated with active militias in Ituri, requires the TFV to gain a thorough understanding of the security situation on the ground, as well as of the genesis of the protracted armed conflict(s) in Ituri, and to implement an admissibility determination procedure that takes this material risk into account.

15. To this day, particularly in the context of the IDIP, the TFV neither addressed this situation nor developed any strategy to do so.

II. The update on the eligibility assessment

16. In its Ninth, Tenth, and Eleventh update reports, the TFV stated “(t)o date, 45 Victims of the Attacks and 25 Former Child Soldiers have been determined eligible for reparations under the IDIP. Of these, 24 Former Child Soldiers and 45 Victims of the Attacks have been referred for intake.”²⁴ It follows that since 28 November 2022, the TFV has not made any eligibility determinations. Although the Chamber has yet to rule on the admissibility of the victims in the *sample*, this should be explained. Moreover, in the same update reports, the TFV confirmed having received 12 priority victim referrals from the CLR2, ten of whom have been referred to [REDACTED]. Notably, [REDACTED] has yet to provide the TFV with the results of

²³ See for instance, 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.9; Defence observations on the Trust Fund for Victims’ Ninth Update Report on the Implementation of the Initial Draft Implementation Plan, 10 February 2023, [ICC-01/04-02/06-2829](#), para.19.

²⁴ [TFV Ninth Update Report](#), para.9; [TFV Tenth Update Report](#), para.17; [TFV Eleventh Update Report](#), para.16.

the information gathered from eight of the ten victims referred to it by the TFV. In this regard, the Defence reiterates its observations in relation to the TFV Tenth Update Report, regarding the time required for the implementing partners to provide the TFV with the information obtained from these victims.²⁵ The TFV should explain why the process is taking so long.

17. Notably, the TFV Eleventh Update Report then provides that “(i)n the reporting period, the Trust Fund additionally transmitted to [REDACTED] a list of sixteen priority victims for gathering information about their urgent needs.” No information is provided regarding the origin of these sixteen priority victims. Such information, including the reason for their referral to [REDACTED] as well as the information the TFV seeks to obtain from these victims, should be provided to the Chamber and the Parties.

18. The TFV’s reference to interviews having been conducted by [REDACTED] is also noteworthy. Once again, no information is provided regarding the use of the questionnaire, which was previously the object of litigation.²⁶ Whether the questionnaire is used by [REDACTED] or whether it has been set aside, should be made clear. In this regard, the Defence deems it appropriate to recall the Chamber’s ruling that “[...] the role of implementing partners in the eligibility assessment and urgency screening should indeed be ‘limited to supporting the TFV in gathering the relevant information.’”²⁷ This is important as the implementing partner’s contribution, by conducting interviews, appears to go beyond supporting the TFV in

²⁵ [Defence Observations – TFV Tenth Update Report](#), para.11.

²⁶ See for instance, Annex 1 to 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-Conf-Anx1](#); 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-Conf](#), paras.17-21; 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.

²⁷ 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-Conf](#), para.25.

gathering the relevant information. More transparency is required in this area. Unfortunately, the TFV did not deem it appropriate to provide any information in this regard in the TFV Eleventh Update Report.

III. Update on the implementation of initial reparations measures

19. The TFV Eleventh Update Report provides that “[REDACTED]. [REDACTED].”²⁸ Notably, before any action is taken by the TFV – or its implementing partner [REDACTED] – this proposal must be approved by the Chamber. In this regard, the Defence recalls that all modalities proposed by the TFV in relation to awarding reparations to [REDACTED] – particularly in the context of the DIP – have not been approved by the Chamber at this stage, as the DIP is now considered as moot.

20. Lastly, regarding victim [REDACTED] who appears to have been treated by [REDACTED] as a beneficiary of the IDIP programme,²⁹ in the absence of any referral, the Defence notes that the eligibility assessment of victim [REDACTED] is still pending³⁰ although this issue was already raised in the previous report.³¹

IV. Additional observations

21. While the TFV Eleventh Update Report – like the TFV Tenth Update Report – does not address the issue of outreach, the Defence respectfully recalls outreach issues raised in the 20 February Defence Observations – TFV Ninth Update Report,³² which have yet to be addressed by the TFV or by the Chamber.

22. The Defence hereby incorporates and reiterates these observations by reference and would appreciate obtaining at least some guidance in this regard.

²⁸ [TFV Eleventh Update Report](#), fn.29.

²⁹ [TFV Tenth Update Report](#), para.22.

³⁰ [TFV Eleventh Update Report](#), para.20.

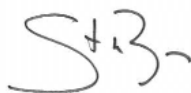
³¹ [TFV Tenth Update Report](#), para.22.

³² [Defence observations – TFV Ninth Update Report](#), paras.26-30.

CONCLUSION

23. The Defence respectfully requests the Chamber to take note of these Defence Observations.

RESPECTFULLY SUBMITTED ON THIS 8th DAY OF SEPTEMBER 2023

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

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

The Hague, The Netherlands