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**International
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TRIAL CHAMBER VI

Before:

**Judge Chang-ho Chung, Single Judge
Judge Kuniko Ozaki
Judge Robert Fremr**

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
*THE PROSECUTOR V. BOSCO NTAGANDA***

Public

**Response on behalf of Mr. Ntaganda
to Registry's preliminary observations on reparations**

Source: Defence Team of Mr. Bosco Ntaganda

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Ms. Fatou Bensouda
Mr. James Stewart
Ms. Nicole Samson

Counsel for the Defence

Me Stéphane Bourgon *Ad.E*
Me Christopher Gosnell
Me Kate Gibson

Legal Representatives of Victims

Ms. Sarah Pellet
Mr. Dmytro Suprun

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation / Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr. Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Mr. Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Mr. Philipp Ambach

Trust Fund for Victims

Mr. Pieter de Baan

Further to the “Order for preliminary information on reparations” issued by Judge Chang-ho Chung (“Single Judge”) on behalf of Trial Chamber VI (“Chamber”) on 25 July 2019 (“Order”)¹ and the filing of the “Registry’s observations, pursuant to the Single Judge’s ‘Order for preliminary information on reparations’” on 5 September 2019 (“Registry Preliminary Observations”),² Counsel for Mr. Ntaganda (“Defence” or “Mr. Ntaganda”) hereby submit this:

“Response on behalf of Mr. Ntaganda to Registry’s preliminary Observations on reparations”

INTRODUCTION

1. The Defence hereby responds to the 5 September 2019 Registry Preliminary Observations.
2. Pursuant to the Order, the Defence hereby focusses primarily on the three issues mentioned in paragraph 4(a) therein, namely the Registry preliminary observations on (i) any proposed methodology for the identification of victims (not yet participating); (ii) whether experts may be usefully appointed to assist the Chamber pursuant to Rule 97 of the Rules of Procedure and Evidence (“Rules”); and (iii) the current security situation in the Democratic Republic of the Congo (“DRC”).
3. Like the Victims Participation and Reparations Section (“VPRS”), which confirms having set out its preliminary observations and recommendations “(...) without yet delving into matters more appropriately addressed in its observations on reparations as scheduled by the Chamber for six weeks after the issuance of the Chamber’s decision on sentence [pursuant to Article 76 of

¹ ‘Order for preliminary information on reparations’, 25 July 2019, ICC-01/04-02/06-2366 (“Order”).

² Registry’s observations, pursuant to the Single Judge’s ‘Order for preliminary information on reparations’ of 25 July 2019, ICC-01/04-02/06-2366”, dated 5 September 2019 but notified on 06 September 2019, ICC-01/04-02/06-2391 (“Registry Preliminary Observations”).

the Statute of the International Criminal Court (“Statute” and “Court”)]”,³ the Defence intends to set out its detailed observations at that time.

4. The Defence welcomes the VPRS’ preliminary observations towards the implementation of a reparations process that needs to be swift, responsive, transparent and efficient, while fully respecting the rights of Mr. Ntaganda. The Defence also takes this opportunity to express its appreciation to the VPRS for taking the time to explain some of the issues set out in its preliminary observations.
5. On behalf of Mr. Ntaganda, the Defence surely intends to contribute to the implementation and efficiency of the reparations process.
6. Nonetheless, the Defence takes issue with certain aspects of the VPRS proposed methodology for the identification of potential new beneficiaries of reparations, in particular regarding the assessment and determination of certified reparations beneficiaries.

PROCEDURAL BACKGROUND

7. On 8 July 2019, the Chamber issued the trial Judgment pursuant to Article 74 of the Statute, finding Mr. Ntaganda guilty of five counts of crimes against humanity and thirteen counts of war crimes.⁴
8. On 25 July 2019, the Single Judge issued his Order.
9. On 5 September 2019, the Registry filed its Registry Preliminary Observations.
10. On 18 September 2019, the Defence submitted a request for a variation of time limit to submit its response to the Registry Preliminary Observations (“Defence Request for Variation of the Time Limit”).

³ Registry Preliminary Observations, Public Annex 1, para.3; Order, para. 5.

⁴ Judgment, ICC-01/04-02/06-2359 (with Annexes A, B and C), 8 July 2019.

11. On the same day, the Single Judge issued his Decision on the Defence Request for Variation of the Time Limit, considering “appropriate to move the deadline for responses to or observations on the Registry observations to 3 October 2019”.⁵
12. On 30 September 2019, the Defence met with VPRS representatives for the purpose of better understanding some the Registry’s observations.

SUBMISSIONS

I. Preliminary considerations

13. The implementation of reparations awarded based on the liability of a convicted person depends primarily on the number of certified beneficiaries entitled to reparations in light of the circumstances identified in the trial Judgment.
14. It is thus significant to consider as a starting point, the total number of victims authorized to participate in the proceedings. In this case, according to the VPRS, there are presently 2,132 participating victims, including 283 former child soldiers and 1,849 victims of the attacks.
15. As acknowledged by the VPRS, “[...] the status of the victims of the attacks appears to have been significantly impacted with the removal of specific crimes and village locations in the Judgement”⁶. It necessarily follows that the number of potential reparations beneficiaries emanating from the participating victims of the attacks is likely to be reduced and will thus have to be determined. The Defence posits that the need to perform this assessment should be included in any subsequent order issued by the Single Judge as a preliminary step.

⁵ Email from the Chamber to the parties and participants, 18 September 2019, at 18h50.

⁶ Registry Preliminary Observations, Public Annex 1, para. 6.

16. On the other hand, the total number of potential beneficiaries is also likely to increase as a result of the identification of new potential beneficiaries, not yet participating. Consequently, it is of the utmost importance to put in place an effective mechanism allowing to identify new potential reparations beneficiaries who fulfill the minimum criteria and who are duly entitled to reparations, while fully respecting the rights of the convicted person and fairness considerations.
17. What is more, as confirmed by the VPRS, as of today, only 38 participating victims in this Case have submitted an application form, which included a section devoted to requesting reparations in accordance with Rule 94.
18. This is a major preliminary consideration. Indeed, even before implementing a mechanism allowing to identify new potential reparations beneficiaries, it will be necessary for the VPRS to meet the 2,094 participating victims who have not yet submitted a request for reparations, for the purpose of determining whether or not they intend to request such reparations and if so, to collect their proper requests.
19. This endeavor, in and of itself, is likely to impact significantly on the time that will be required to assess the potential beneficiaries entitled to reparations. Needless to say, the same exercise will have to be conducted with respect to any new potential beneficiaries identified.

II. Additional preliminary consideration unique to this Case

20. As noted by the VPRS, the ongoing reparations proceedings in the *Lubanga* case is an additional preliminary consideration specific to this case. Indeed, while the approximate number of beneficiaries established in the *Lubanga* case may be instructive with respect to calculating the liability of Mr. Ntaganda *vis-à-vis* child soldier victims, the presence of child soldiers entitled to

compensation in both cases raises a number of complicated issues, the most obvious being: (i) the determination as to who between Thomas Lubanga and Bosco Ntaganda should be liable for reparations awarded to specific child soldiers; and (ii) the necessity to avoid child soldier beneficiaries receiving double reparations for the same prejudice. While the VPRS recommends as a starting point maintaining a separate registration process in this case, particularly for former child soldiers victims, the Defense submits that it is too early to make such a determination, the complexities of which should be properly briefed and considered beforehand.

III. Proposed methodology and timeline

21. In response to the Order, the VPRS proposes a series of recommendations designed to facilitate a streamlined system for the identification of new potential beneficiaries of reparations in advance of the reparations order.
22. While the Registry's aim in making these recommendations is commendable taking into consideration the relevance of implementing the reparations order that will be issued as early as possible, the Defence takes the view that the adoption of a uniform system for the identification of potential new reparations beneficiaries that mirrors the system adopted for participation at trial would be inappropriate.
23. First, the Defense concurs that participating victims and newly identified victim/potential beneficiaries should be assessed against the same criteria. However, the standard of proof applicable to determine their entitlement to reparations is entirely different from that used to authorize alleged victims to participate in the proceedings.
24. Indeed, while alleged victims are authorized to participate in the proceedings following an assessment conducted on a *prima facie* standard of proof,

potential beneficiaries are identified and certified as beneficiaries entitled to reparations based on an assessment conducted on a balance of probabilities standard of proof.

25. Regarding the latter, it is imperative that the person convicted, through his counsel, be involved in the assessment of all requests for reparations submitted by each individual potential beneficiary, whether already a participating victim or a newly identified victim/potential beneficiary.
26. Hence, contrary to the VPRS recommendations, the present system used in this case to authorize alleged victims to participate in the proceedings – whereby applicants are divided into three groups (A, B, and C) and only C-group applicants are referred to the Defence – is inapplicable for the purpose of assessing and determining certified beneficiaries, who will be awarded reparations *via* the reparations order.
27. Second, disclosing all requests for reparations and involving the Defence in assessing and offering submissions on the potential beneficiaries' entitlement to reparations would not impact the time necessary to finalize this process. In this regard, the Defence recalls the procedure followed in the *Lubanga* reparations proceedings in which counsel representing Mr. *Lubanga* had the opportunity to assess and offer submissions on requests for reparations.
28. It is significant that in the *Lubanga* case, the reparations order was affirmed by the Appeals Chamber on 19 July 2019 even though the Trial judgement was rendered on 14 March 2012, some seven years earlier. Although many factors are responsible for such a long delay, the Defence submits that less time would have been required, had the *Lubanga* Defence been involved in this assessment from the beginning.

29. It follows that the three-group system proposed by the VPRS to assess and determine certified reparations beneficiaries, involving the Defence only for C-group requests for reparations would neither save time nor make the process more efficient.
30. On the other hand, implementing the system recommended by VPRS would not ensure full respect for the rights of the convicted person who, in the end, will be found liable for the reparations awarded.
31. The Defence notes in this regard that the three-group system used in this case to authorize alleged victims to participate in the proceedings, which was initially opposed by the Defence,⁷ has not yet been validated by the Appeals Chamber.
32. Additional reasons demonstrate why the VPRS recommended approach should not be used, which the Defence reserves the right to fully brief in its detailed observations to be submitted six weeks after the issuance of the Chamber's decision on sentence, if required.
33. Consequently, the Defence respectfully submits that the three-group system proposed by the VPRS for the assessment and determination of certified reparations beneficiaries is an issue that must be fully briefed and determined before the VPRS is authorized to implement this system.

IV. Legal considerations

34. In light of the foregoing, it follows that the perspective of issuing a reparations order, ascribing liability to Mr. Ntaganda for reparations awarded to certified beneficiaries - without having had the opportunity to assess and offer submissions on each individual application - is a non-starter.

⁷ ICC-01/04-02/06-T-13-ENG, p.50-51.

35. The Registry Preliminary Observations raise further legal and fairness considerations, which the Defence deems necessary to address.
36. First, it is essential that all requests for reparations that will be submitted by participating victims along with their initial application forms to be authorized to participate in the proceedings, be disclosed to the Defence. While the Defence acknowledges that there might be a need for redactions to be applied to this material, these should be kept to a minimum with a view to allowing the Defence to assess whether individual requests meet the minimum requirements.
37. Second, it is necessary for the Defence to be involved and offer submissions on the criteria to be applied to all potential reparations beneficiaries.
38. Third, the Defence supports the VPRS recommendation for the implementation of a form-based approach to assess requests for reparations as well as for the purpose of determining certified reparations beneficiaries. However, it is essential for the Defence to be consulted and have the opportunity to offer submissions regarding the new reparations request form developed by the VPRS.
39. Fourth, based on the information provided by the VPRS regarding the conduct of numerous activities in the field to prepare for the various potential outcomes of the trial, it is necessary for the VPRS to disclose to the Defence the results of its activities conducted in the field, including the information gathered *per* village within the remit of the Case and its estimates regarding the number of potential additional reparations beneficiaries, who have not yet been identified.
40. Fifth, with a view to *inter alia*, maximizing available resources and ensuring the continuity and coherence of the victims' legal representation scheme in

place, the VPRS recommends that any newly pre-identified applicants for reparations be immediately represented by the relevant CLR in the Case. Taking into consideration the change in status of the CLRs, who have become 'parties' as opposed to 'participants' during reparations proceedings, the Defence submits that newly identified reparations beneficiaries should only be represented by the relevant CLR once their status as certified beneficiaries is confirmed. The VPRS also suggests in respect of new potential beneficiaries who clearly do not meet the minimum requirements (B-group applicants), that the CLRs be given an opportunity to submit further material and arguments in support of their applications, without involving the Defence. Not only would this be inappropriate, it is unnecessary. Indeed, if all requests for reparations are transmitted to both the CLRs and the Defence, with the possibility of offering submissions, the Chamber (and the VPRS in the performance of its initial screening) would have all necessary evidence and submissions to determine whether requests for reparations should be granted.

41. Sixth, in addition to its preliminary mapping of new potential reparations beneficiaries, the VPRS suggests that the identification of new potential reparations beneficiaries "can be completed with the help of the CLRs who may also have relevant information to share with the Registry in this regard". For the above mentioned reasons, the Defence submits that assistance received by the VPRS from the CLRs should be limited to the communication of information obtained from the applicants they represent. This is necessary with a view to maintaining the neutrality and the independence of the VPRS in the reparations process.

V. Timeline

42. The VPRS suggests that in the event the judgement in this Case was affirmed on appeal, following its recommendations would allow the Chamber to issue

its reparations order at the conclusion of the appeals phase, complete with all “essential elements”, including a Chamber’s certified list of beneficiaries. In this regard, the Defence surely intends to contribute to making it possible for the Chamber to issue its reparations order as soon as possible. However, taking into consideration that the appeals phase, which has already begun, is likely to be concluded before the end of 2020, the VPRS’ aim appears ambitious to say the least. More importantly, the Defence respectfully submits that the legitimate aim for a reparations order to be issued as quickly as possible should not detract from ensuring full respect for the right of the convicted person.

VI. Role of the Registry

43. At paragraph 31 of the Registry Preliminary Observations, the VPRS summarizes the envisaged roles for the Registry in the reparations process. In the light of the preceding observations, the Defence takes issue with the steps included in paragraph 31 (vii) and (viii). The Defence posits that a different system can be designed and implemented that would be more efficient and save time while fully respecting the rights of the person convicted. The Defence respectfully recommends that further submissions be provided by the VPRS, the CLRs, the Trust Fund for Victims (“TFV”) and the Defence at the request of the Single Judge.

VI. Whether experts may be usefully appointed pursuant to Rule 97

44. Little can and needs to be said at this stage regarding the requirements for experts appointed pursuant to Rule 97 to assist the Chamber during the reparations process.
45. Nonetheless, experts appointed pursuant to Rule 97, have assisted chambers in the past, in issuing reparations orders.

46. Although it is too soon to determine precise areas of expertise for the possible appointment of experts pursuant to Rule 97, the Defence respectfully submits that the successful use of experts during the reparations process rests on the neutrality of the experts selected and more importantly on the clarity of their mandate, including precise instructions.
47. For the purpose of this response the Defence generally concurs with the recommendations of the VPRS in seeking special advice on the long term consequences affecting the victims communities in light of the time elapsed between the judgement issued by the Chamber and the events which gave rise to the charges laid against Mr. Ntaganda. The Defence takes issue however, with the recommendation of the VPRS to seek special advice on the scope of victimization, which falls clearly within the domain and expertise of the Chamber.

VII. Security situation in the DRC

48. To be sure, the security situation in the DRC is an important factor which may impact the celerity of the reparations process. It is thus important for the Chamber to remain informed of the security situation on the ground through the submission of regular reports by the VPRS.
49. However, the Defence insists on the need for VPRS reports addressed to the Chamber in relation to the security situation in the DRC to be communicated / disclosed to the Defence in real time.

CONCLUSION

50. In light of the foregoing, the Defence respectfully requests the Single Judge to:

CONSIDER the submissions in this Defence Response to Preliminary Observations;

ORDER the VPRS, on behalf of the Registry, to perform an initial evaluation of the impact of the Trial Judgment on the number of participating victims of the attacks in this case; and to communicate / disclose the results thereof;

ORDER the VPRS to communicate / disclose the results of its activities conducted in the field, including the information gathered per village within the remit of the Case ; as well as its estimates regarding the number of potential additional reparations beneficiaries, who have not yet been identified;

ORDER the VPRS to communicate the new form developed for the purpose of confirming whether participating victims intend to ask for reparations;

ORDER the CLRs, TFV and Defence to offer submissions on the same, if any, in their next submissions;

DECIDE that the VPRS proposed methodology for the identification of potential new beneficiaries of reparations be reviewed and modified to ensure that Mr. Ntaganda is provided with an opportunity to assess and offer submissions on every reparations request; and/or **ORDER** further submissions from the VPRS, CLRs, TFV and the Defence on the legality and implementation of the proposed methodology or a variation thereof;

ORDER the VPRS to submit and disclose to the CLRs, TFV and the Defence, regular updated reports on the security situation in the DRC and the consequences thereof, if any, on the implementation of the reparations process; and

IDENTIFY the specific issues to be addressed and briefed in the detailed submissions scheduled to be submitted by the VPRS, CLRs, TFV and the Defence, six weeks following the delivery of the Judgment on sentence.

RESPECTFULLY SUBMITTED ON THIS 3rd DAY OF OCTOBER 2019

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

Me Stéphane Bourgon, *Ad.E.*, Counsel representing Mr. Ntaganda

The Hague, The Netherlands