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TRIAL CHAMBER VI

Before: Judge Chang-ho Chung, Presiding Judge
Judge Robert Fremr
Judge Olga Herrera Carbuca

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

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

Public

**Defence request seeking clarifications and/or further guidance following the
“First Decision on Reparations Process” and Request seeking an extension of time
to submit observations on the Registry 30 September Report**

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 First Decision on Reparations Process issued by Trial Chamber VI (“Chamber”) on 26 June 2020¹ and to informal consultations with the Victims Participation and Reparations Section of the Registry (“VPRS”) on 8 September 2020, Counsel representing Mr Ntaganda (“Mr Ntaganda” or “Defence”) hereby submits this:

**Defence request seeking clarifications and/or further guidance following the
“First Decision on Reparations Process” and Request seeking an extension
of time to submit observations on the Registry 30 September Report**

“Defence Request for Clarifications”

INTRODUCTION

1. Whereas the purpose of the First Decision is “to continue advancing with the reparations proceedings, in order for them to be as expeditious, effective and efficient as possible in the current circumstances”,² the Defence respectfully submits that to this end, clarifications and/or further guidance from the Chamber are required at this stage.

2. From the moment the Single Judge acting on behalf of the Chamber (“Single Judge”) issued his Order for preliminary information on reparations on 25 July 2019,³ Mr Ntaganda indicated that he “surely intends to contribute to the implementation and efficiency of the reparations process.”⁴ This requires, however, that the Defence be **effectively** involved as a party to the reparations proceedings and be provided with the means to do so.

3. In its First Decision, the Chamber instructed VPRS to: (i) finalise its assessment of the participating victims who fall within the remit of the case following the Trial Judgment (“Judgment”), in consultation with the respective Legal

¹ First Decision on Reparations Process, 26 June 2020, [ICC-01/04-02/06-2547](#) (“First Decision”).

² [First Decision](#), para.21.

³ Order for preliminary information on reparations, 25 July 2019, [ICC-01/04-02/06-2366](#).

⁴ Response on behalf of Mr. Ntaganda to Registry’s preliminary observations on reparations, 3 October 2019, [ICC-01/04-02/06-2431](#), para.5 (“Defence Preliminary Observations”).

Representatives of Victims (“LRV”) and the Trust Fund for Victims (“TFV”);⁵ (ii) carry out an update of the victims from the *Lubanga* case who could be eligible in the current proceedings;⁶ (iii) carry out a preliminary mapping exercise of the potential newly identified beneficiaries;⁷ and (iv) prepare a sample of potential beneficiaries of reparations with the collaboration of the parties and the TFV.⁸ The result of this work is expected to be included in a report VPRS has been instructed to submit by 30 September 2020 (“30 September Registry Report”).⁹

4. On 1 September, VPRS provided the Defence with a draft sample, in the form of a matrix, for category I and II victims (participating victims and *Lubanga* victims), containing the following information: location, crime, type of harm, gender, age, and, if applicable, any particular vulnerability of the victims. With regards to the newly identified potential beneficiaries, no information, other than relevant locations, is provided in the matrix.¹⁰

5. On 3 September, VPRS reached out to the Chamber seeking further guidance in relation to its eligibility assessment of potential beneficiaries for reparations, more particularly participating victims. VPRS requested further guidance in respect of, *inter alia*: (i) the territorial and temporal scope covered by the Judgment; (ii) the interpretation of indirect victims for the crimes related to child soldiers; and (iii) the eligibility of victims of underlying crimes for which Mr Ntaganda was convicted.¹¹

6. Following VPRS’s 1 September electronic correspondence addressed to the Defence and 3 September request addressed to the Chamber, informal consultations took place between VPRS representatives and the Defence on 8 September 2020. The Defence takes this opportunity to express its appreciation to VPRS for taking the time to provide further information on, *inter alia*, its proposed matrix/sample.

⁵ [First Decision](#), para.29.

⁶ [First Decision](#), para.31.

⁷ [First Decision](#), para.33.

⁸ [First Decision](#), para.37.

⁹ [First Decision](#), paras.43-44.

¹⁰ Email from VPRS to Defence, 1 September 2020, at 12:29.

¹¹ Email from VPRS to the Trial Chamber VI Communications, 3 September 2020, at 17:57.

7. In light of the foregoing and with a view to contributing to expeditious, effective and efficient reparations proceedings in the current circumstances – while fully respecting the rights of Mr Ntaganda – the Defence respectfully requests clarifications and/or further guidance from the Chamber regarding the:

- Defence input in finalising the list of participating victims potentially eligible for reparations considering the reduced scope of the Judgment;
- Preparation of the sample pursuant to paragraph 37 of the First Decision;
- Transmission by the Registry of the complete participating victims’ application forms and the victims in the *Lubanga* proceedings’ application forms;
- Transmission by the Registry of the application forms of the newly identified potential beneficiaries of reparations, on a rolling basis when available; and
- The VPRS suggested ‘form-based approach’ for the identification of new potential beneficiaries.

8. In addition, for the reasons stated herein, the Defence takes this opportunity to request an extension of time to submit observations on the 30 September Registry Report due to be filed on 12 October 2020.

SUBMISSIONS

I. Participating victims potentially eligible for reparations considering the scope of the Judgment

9. Pursuant to the First Decision, the Registry is instructed to “[f]inalise, as soon as practicable, the assessment of how many of the participating victims may potentially be eligible for reparations given the scope of the Judgment, in consultation with the respective LRV, and the TFV, as appropriate”.¹²

¹² [First Decision](#), p.19.

10. Considering VPRS's prior submission that "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 Judgment",¹³ the importance of compiling an updated list of potential eligible beneficiaries based on the existing list of participating victims tailored to the scope of the Judgment cannot be underestimated. Notably, this is also the first step leading to the assessment of the eligibility of participating victims. Moreover, as previously mentioned, "VPRS is best placed to **quickly** submit such an updated list of potential beneficiaries for the Chamber's approval with the possibility **for the parties** to make submissions."¹⁴

11. Yet, while the First Decision refers to consultations between the Registry and the respective LRV and the TFV in completing this task, it omits to address the role envisaged, if any, for the Defence. The Defence can see no reason why, one of the parties, *i.e.* the respective LRV, would be consulted but not the other. This is all the more evident considering VPRS's 3 September request for further guidance addressed to the Chamber, which demonstrates that the remit of the case is still subject to interpretations in many areas, yet to be determined. In these circumstances, it is paramount for the Defence to be included in this consultation process. It also illustrates the necessity for the Defence to be provided with the application forms of all participating victims in order to be able to make meaningful observations as to which victims should be included/excluded from the updated list of participating victims. This is all the more important, considering that during trial, application forms of participating victims were not transmitted to the Defence, other than for the few cases where the Registry could not make a clear determination on the eligibility of an applicant *to participate* in the proceedings.¹⁵

¹³ Annex 1 to the Registry's Preliminary Observations on Reparations, 5 September 2019, [ICC-01/04-02/06-2391-Anx1](#), para.6 ("Registry Preliminary Observations") (emphasis added).

¹⁴ Defence submissions on reparations, 28 February 2020, [ICC-01/04-02/6-2479-Conf](#), para.82 ("Defence Submissions on Reparations") (emphasis added).

¹⁵ Decision on victims' participation in trial proceedings, 6 February 2015, [ICC-01/04-02/06-449](#) ("Ntaganda Participation Decision").

12. Consequently, the Defence respectfully seeks clarification and/or further guidance from the Chamber regarding the involvement of the Defence in the identification of participating victims potentially eligible for reparation considering the scope of the Judgment.

II. Preparation of the sample pursuant to paragraph 37 of the First Decision

13. Pursuant to the First Decision, the Registry is ordered to prepare a sample in consultation with the parties and the TFV.¹⁶ This sample must “be constituted of limited but representative pool of potential beneficiaries” with the aim of collecting “updated information on the harm experienced by victims and their current needs, so as to inform the reparations order” and “allow for an opportunity to engage with victims before a decision on reparations is made”.¹⁷

14. During the 8 September informal consultations between VPRS representatives and the Defence, many aspects of the sample requested by the Chamber as well as the matrix proposed by VPRS were discussed. It stems from this discussion that, in order to plan a meaningful role in the preparation of the sample, it would be advantageous to include additional information in the proposed matrix such as the date of the harm suffered by the victims included in the matrix and basic information identifying the link between the crime and the harm suffered. The Defence understands that these issues will be addressed in the 30 September Registry Report and ensuing Defence submissions.

15. More importantly however, these consultations allowed to clearly identify the need for the Defence, in order to play a meaningful role in the preparation of the sample, to be provided with the complete application forms of the three categories of victims to be included in the sample, namely (i) the participating victims; (ii) the victims in the *Lubanga* case; and (iii) the potential newly identified beneficiaries.

¹⁶ [First Decision](#), para.37.

¹⁷ [First Decision](#), para.37.

16. Indeed, since the aim of the sample is to constitute a representative pool of victims of the crimes for which Mr Ntaganda has been convicted and of the resulting harm, it is not possible for the Defence to make meaningful observations on the victims included in the sample without being able to consult their applications. It is significant in this regard that VPRS intends to use a form for participating victims that does not update the harm suffered by the victims, but rather focuses solely on whether the harm continues to exist and to affect the victims. Without the original application forms, the Defence is unable to assess if the harm suffered is a consequence of a crime for which Mr Ntaganda was convicted.

17. Regarding the first category, VPRS is already in possession of these application forms. Accordingly, the process of applying any necessary redactions and transmitting the *dossiers* to the Defence should begin without delay. The same applies to the *Lubanga's* victims (category 2), bearing in mind that redactions have most likely already been applied in that case. As for the third category, the Defence should be provided with the application forms of the potential newly identified beneficiaries on a rolling basis, when received by VPRS.

18. In the alternative and at a minimum, the Defence must be provided with the application forms of all victims included in the sample/matrix. Of course, this is without prejudice to a further request to receive all the application forms at a later stage, *i.e.* to carry out the assessment of the eligibility of the victims.

19. Consequently, the Defence respectfully seeks clarifications and/or further guidance from the Chamber regarding the timing of the transmission of all application forms to the Defence. This issue is ripe for adjudication by the Chamber with a view to avoiding unnecessary delays at a later time.

III. Transmission by the Registry of the application forms of the newly identified potential beneficiaries of reparations

20. In its preliminary observations on reparations, VPRS “propose[d] that the Chamber adopts a uniform system for the identification of potential new reparations beneficiaries that *in essence* mirrors the system adopted for participation at trial.”¹⁸ In practice, VPRS suggested adopting a system whereby the parties would only be given the opportunity to make observations on applications that cannot be clearly resolved by the Registry (the “three-group system”).¹⁹ In its Response, the Defence firmly opposed this approach.²⁰ The Registry again submitted the adoption of this system in its 28 February 2020 Observations,²¹ which inevitably the Defence opposed once again.²²

21. The Chamber has yet to pronounce on this most important issue. The Defence recalls that when the Chamber adopted this approach during trial, it was directed at authorizing victims *to participate* as opposed to pronouncing on the eligibility of victims for reparations, which is altogether a different issue.²³

22. The mechanism that will govern the transmission of the newly identified potential beneficiaries’ application forms is at the heart of the reparations proceedings. For this reason, in order to advance the reparation proceedings as expeditiously as possible, in particular in the context of the COVID-19 worldwide pandemic, it is essential for the Chamber to pronounce on this most important issue at this time. Waiting until the filing of the submissions due on 18 December 2020 to rule on this issue is likely to delay the proceedings.

23. Consequently, the Defence respectfully seeks clarifications and/or further guidance from the Chamber on the mechanism that will be adopted for the transmission of the application forms of the newly identified potential beneficiaries,

¹⁸ [Registry Preliminary Observations](#), para.10 (emphasis in original) referring to [Ntaganda Participation Decision](#), para.30.

¹⁹ [Registry Preliminary Observations](#), paras.13, 24-27.

²⁰ [Defence Preliminary Observations](#), para.30.

²¹ Annex I to the Registry’s Observations on Reparations in the *Ntaganda* Case, 28 February 2020, [ICC-01/04-02/06-2475-AnxI](#), para.34.

²² [Defence Submissions on Reparations](#), paras.85-86.

²³ [Ntaganda Participation Decision](#), paras.20,34.

including whether the VPRS suggested form-based approach and “three-group system” will be maintained and whether all victim applications forms will be transmitted to the Defence.

IV. Request seeking an extension of time to submit observations on the Registry 30 September report

24. Pursuant to Regulation 35(1) of the Regulations of the Court (“RoC”), the Defence seeks an extension of time to file its observations on the 30 September Registry Report.²⁴ In accordance with regulation 34 RoC, the deadline to submit observations on this report falls on 12 October 2020, which coincides with the beginning of the appeals oral hearing in the current proceedings, set to be held from 12 to 14 October.²⁵ The Defence is already preparing for the appeals oral hearing and will inevitably continue to do so on a full time basis during the period from 30 September to 12 October. At this stage, the resources available to the Defence are very limited and it is essential for the Defence to invest all of its resources towards the preparation of the Appeals oral hearing.

25. The Defence respectfully posits that, in light of the above, good cause has been shown to extend the deadline and requests an extension of 10 days starting from the end of the oral hearings, *i.e.* to file its observations on the 30 September Registry Report on 26 October, or should the Chamber considers more appropriate, to file on 30 October, at the same time as the deadline to disclose any additional information the parties wish the Chamber to consider in the reparation order.²⁶ The Defence contends that this extension of time will not result in any prejudice to the parties, TFCV and/or VPRS and will not impact on other deadlines already set in the current reparations proceedings.

²⁴ [First Decision](#), para.44.

²⁵ Second order scheduling a hearing, 20 August 2020, [ICC-01/04-02/06-2568](#).

²⁶ Decision on Request for an Extension of Time for Filing of Experts’ Report, 20 July 2020, [ICC-01/04-02/06-2553](#), para.8(a).

CONCLUSION

26. In the current circumstances, and despite the best of intention on the part of Mr Ntaganda, the Defence role and involvement in the reparation process is limited to that of a passive observer. Consequently, the Defence respectfully seeks the above-mentioned clarifications and/or further guidance to ensure that the Defence will be a full-fledged player in the reparations proceedings, which is the only way to ensure that the right of the convicted person will be respected and that the reparations proceedings will be fair and expeditious. In this regard, the Defence underscores the fundamental necessity to be provided with the application forms of all potential beneficiaries. Furthermore, the Defence respectfully posits that with a view to making the most of the present situation resulting from the Covid-19 pandemic and avoiding unnecessary delays, the clarifications and/or further guidance sought from the Chamber, are required at this stage.

RELIEF SOUGHT

27. In light of the foregoing, the Defence respectfully requests the Chamber to:

CONSIDER the Defence Request;

CLARIFY AND/OR PROVIDE FURTHER GUIDANCE in relation to the issues highlighted herein, in particular those in paragraphs 12, 19 and 23.

GRANT the Defence a limited extension of time to submit its observations on the Registry 30 September Report until 26 October or, should the Chamber consider appropriate, until 30 October 2020.

RESPECTFULLY SUBMITTED ON THIS 11TH DAY OF SEPTEMBER 2020



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