

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-02/06
Date: 18 November 2020

TRIAL CHAMBER VI

Before: Judge Chang-Ho Chung, Presiding Judge
Judge Robert Fremr
Judge Olga Herrera Carbuccion

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

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

Public

**Public redacted version of the “Observations of the Common Legal
Representative of the Former Child Soldiers
on the ‘Registry’s First Report on Reparations’”**

Source: Office of Public Counsel for Victims (CLR1)

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

Mr Stéphane Bourgon
Ms Kate Gibson

Legal Representatives of the Victims

Ms Sarah Pellet
Ms Anna Bonini

Legal Representatives of the Applicants

Mr Dmytro Suprun
Ms Anne Grabowski

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

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

States' Representatives

Amicus Curiae

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

Mr Pieter de Baan

I. INTRODUCTION

1. The Common Legal Representative of the Former Child Soldiers (the “Legal Representative”) submits observations on the Registry’s First Report on Reparations (the “First Report”)¹ pursuant to paragraph 44 of the “First Decision on Reparations Process” (the “First Decision”)² and in accordance with the revised deadline set out by Trial Chamber VI (the “Chamber”) in its Decision of 29 September 2020.³

2. The First Decision invited observations by the parties on any legal and factual issues identified by the Registry in the First Report. The present observations focus on two legal issues addressed within the First Report which directly relate to the personal interests of the Former Child Soldiers.

3. The first issue raised by the Registry pertains to the temporal scope of the case in relation to the crime of using child soldiers actively in hostilities.⁴ Mr Ntaganda was convicted of using children under the age of 15 years to participate actively in hostilities “*between on or about 6 August 2002 and on or about 30 May 2003*”.⁵ The Registry proposes to interpret a “*3-day window on both sides of [said] temporal scope*” as clearly inside the scope of the case when assessing victim’s applications in the present reparations proceedings.⁶

4. The Legal Representative supports the Registry’s proposal that a fixed window of time should be applied on both sides of the temporal scope and considers

¹ See the “Registry’s First Report on Reparations”, [No. ICC-01/04-02/06-2602](#), 30 September 2020 (the “First Report”).

² See the “First Decision on Reparations Process” (Trial Chamber VI), [No. ICC-01/04-02/06-2547](#), 26 June 2020 (the “First Decision”).

³ See the “Decision on the 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” (Trial Chamber VI, Single Judge), [No. ICC-01/04-02/06-2601](#), 29 September 2020 (the “Extension Decision”).

⁴ See the “Public redacted version of ‘Annex I to the Registry First Report on Reparations, 1 October 2020, ICC-01/04-02/06-2602-Conf-AnxI’”, [No. ICC-01/04-02/06-AnxI-Red](#), 26 October 2020 (“Annex I”), para. 13.

⁵ See the “Judgment” (Trial Chamber VI), [No. ICC-01/04-02/06-2359](#), 8 July 2019, p. 538.

⁶ See Annex I, *supra* note 4, paras. 11-13.

that a window of *at least* three days would be reasonable, but invites the Chamber to consider whether, in the present case, the application of a more extensive window of time may be more appropriate.

5. The second issue identified in the First Report concerns the notion of “*indirect victim*” of child soldier-related crimes. Guidance is requested by the Registry on whether a direct victim of the attack whose child was recruited by the UPC/FPLC may also qualify as an indirect victim of the crimes of recruitment and use of child soldiers.⁷ The Legal Representative submits that there is no impediment for an individual to qualify as both a direct and an indirect victim on this basis.

6. Finally, the Registry appended as Annexes IV and V to the First Report a “Sample Matrix” and a “Security Assessment”.⁸ With respect to the former, the Legal Representative underlines that the Matrix was intended merely as a template to illustrate the general logic adopted for the sampling exercise. As for the latter, she insists that, to avoid re-traumatisation, consultations with victims must be conducted “*in person*”, but the possibility of contacting Former Child Soldiers through this mean appears to be seriously impaired in the current circumstances.

II. PROCEDURAL HISTORY

7. On 8 July 2019, the Chamber, in a different composition, found Mr Ntaganda guilty of 18 counts of war crimes and crimes against humanity.⁹

8. On 25 July 2019, Judge Chang-ho Chung, acting as Single Judge (the “Single Judge”), issued the “Order for preliminary information on reparations”,¹⁰ requesting, *inter alia*, the Registry to submit information on, and any proposed methodology for, the identification of non-participating victims.

⁷ *Idem*, para. 14.

⁸ See the “Annex IV to the Registry First Report on Reparations”, [No. ICC-01/04-02/06-2602-Conf-AnxIV](#) (“Annex IV”) and “Annex V to the Registry First Report on Reparations” (Registry), [No. ICC-01/04-02/06-2602-Conf-AnxV](#) (“Annex V”), 30 September 2020.

⁹ See the Judgment, *supra* note 5.

¹⁰ See the “Order for preliminary information on reparations” (Trial Chamber VI, Single Judge), [No. ICC-01/04-02/06-2366](#), 25 July 2019.

9. On 5 December 2019, the Single Judge issued the Order setting deadlines in relation to reparations,¹¹ instructing, *inter alia*, the parties, the Registry, and the TFV, and inviting the Prosecution, to make submissions on a number of issues related to reparations.

10. On 26 June 2020, the Chamber issued the First Decision, requesting a report from the Registry and inviting the TFV and the parties to provide “*observations in relation to any key legal and factual issues identified by the Registry*”.¹²

11. On 29 September 2020, the Single Judge granted a request for extension of time to submit observations to the Registry’s report and ordered that said observations be filed by 30 October 2020 at the latest.¹³

12. On 30 September 2020, the Registry filed the First Report.¹⁴

III. CONFIDENTIALITY

13. Pursuant to regulation 23bis(1) and (2) of the Regulations of the Court, the present observations are classified as confidential, since they refer to the content of documents likewise classified as confidential.

IV. SUBMISSIONS

1. Legal issues identified in the First Report

a) Temporal scope of the Case in relation to the crime of using child soldiers actively in hostilities

14. In the First Report, the Registry sought guidance in relation to the temporal scope of the case with respect to specific crimes. The First Report discusses in

¹¹ See the “Order setting deadlines in relation to reparations” (Trial Chamber VI, Single Judge), [No. ICC-01/04-02/06-2447](#), 5 December 2019.

¹² See the First Decision, *supra* note 2, paras. 43-44.

¹³ See the Extension Decision, *supra* note 3, para. 8.

¹⁴ See the First Report, *supra* note 1.

particular three instances in which the Judgment refers to time periods beginning and ending “*on or about*” a given date:

- (a) the “First Operation” in the Banyali Kilo locations, between *on or about* 20 November 2002 and *on or about* 6 December 2002;¹⁵
- (b) the “Second Operation” in the Walendu-Djatsi locations, commencing *on or about* 18 February 2003 and concluding in early March 2003;¹⁶ and
- (c) the crime of using child soldiers actively in hostilities, between *on or about* 6 August 2002 and *on or about* 30 May 2003.¹⁷

15. For each of these three instances, the Registry seeks guidance as to the contours of the expression “*on or about*” and proposes a consistent interpretation thereof whereby a “3-day window” on both sides of the temporal scope would be considered as clearly inside the scope of the case.¹⁸

16. As confirmed by the experts appointed in the context of reparations proceedings in the *Bemba* case, “*the slightly flexible ‘on or about [...]’ language does not pose a challenge if applied consistently*”.¹⁹

17. Accordingly, the Legal Representative supports a flexible – yet consistent – interpretation of the expression “*on or about*” and submits that, based on the approach adopted by the Chamber in the Judgment, as well as relevant jurisprudence, it should be deemed to cover a window of *at least* 3 days before or after the relevant specified date.

18. Within the Judgment, in fact, the Chamber convicted Mr Ntaganda for the murder of various individuals in Kilo on 9 December 2002,²⁰ while the Confirmation

¹⁵ See Annex I, *supra* note 4, para. 11.

¹⁶ *Idem*, para. 12.

¹⁷ *Idem*, para. 13.

¹⁸ *Ibid.*

¹⁹ See the “Public Redacted Version of ‘Annex, 28 November 2017, ICC-01/05-01/08-3575-Conf-Exp-Anx-Corr2’”, [No. ICC-01/05-01/08-3575-Anx-Corr2-Red](#), 30 November 2017, para. 27.

²⁰ See the Judgment, *supra* note 5, paras. 543, 873 and 893, as well as p. 535.

Decision referred to these events taking place “*on or about 6 December 2002*”.²¹ Accordingly, Mr Ntaganda’s conviction for this crime²² implies that the Chamber regarded the expression “*on or about*” as capable of covering a period of at least 3 days before or after the specified date.

19. Further, the Chamber’s reasoning in relation to the charges of conscription and enlistment of child soldiers indicates that the phrase “*on or about*” might cover a more extensive window of time. In particular, after noting that “*the temporal scope of the charges in relation to Counts 14 to 15 is between on or about 6 August 2002 and 31 December 2003*”, the Chamber concluded that this required consideration of “*the conduct occurring as of August 2002*”, thus effectively applying a 5-day window to the start date of the relevant period.²³

20. The jurisprudence of other international jurisdictions confirms that the expression “*on or about*” should be interpreted as covering a timeframe of at least a few days before and after the specified date. For instance, in *Šainović et al.*, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia found that the reference in an indictment to events “*beginning on or about 25 March 1999*” was of sufficient scope to include acts which occurred around 20 or 21 March 1999.²⁴ Similarly, the Appeals Chamber of the International Criminal Tribunal for Rwanda dismissed an argument that the Trial Chamber had erred in law in finding that the defendant had distributed weapons “*on 8 and 15 April 1994 and on or around 24 April 1994*”, whereas the indictment averred that the weapon distribution had taken place “*on or about 6 April 1994*”.²⁵

²¹ See the “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda” (Pre-Trial Chamber II), [No. ICC-01/04-02/06-309](#), para. 41.

²² See the Judgment, *supra* note 5, page 535.

²³ *Idem*, footnote 3096.

²⁴ See ICTY, *Prosecutor v. Šainović et al.* (Case No. IT-05-87-A), [Judgment](#) (Appeals Chamber), 23 January 2014, para. 225.

²⁵ See ICTR, *Rutaganda v. Prosecutor* (Case No. ICTR-96-3-A), [Appeal Judgement](#) (Appeals Chamber), 26 May 2003, paras. 296 *et seq.*

21. Against this background, the Legal Representative supports the Registry's proposal that a fixed window of time should be applied on both sides of the temporal scope to reflect the flexibility inherent in the expression "*on or about*". She considers that a window of at least three days would be reasonable, but invites the Chamber to consider whether, in the circumstances of the case, and particularly in light of its approach to the timeframe for the crimes of recruitment of child soldiers,²⁶ the application of a more extensive window of time may be more appropriate to ensure that victims "*sufficiently close in time to the relevant timeframes specified in the charges*"²⁷ will be considered for reparations.

b) Indirect victims of child soldier-related crimes

22. The Registry requests guidance on the scope of the notion of "*indirect victims*" and, in particular, as to the indirect victims of child soldier-related crimes.²⁸ The Registry notes the situation of a/00209/13, who was admitted to participate to the proceedings both as a "*victim of the attack*" and as an "*indirect victim of the crime of enlisting child soldiers*".²⁹

23. The Legal Representative notes that the situation of a/00209/13,³⁰ on which the Registry seeks guidance, must be distinguished from the separate issue of whether those who suffered harm as a result of the conduct of direct victims may qualify as "*indirect victims*", which has been the subject of litigation before the Court.³¹ Such would be the situation, for instance, if a child soldier commits an act of murder and a family member of the person killed wishes to apply as indirect victim, in the proceedings held against those who used child soldiers in hostilities.³²

²⁶ See *supra*, para. 19.

²⁷ See the "Second decision on victims' participation in trial proceedings" (Trial Chamber VI), [No. ICC-01/04-02/06-650](#), 16 June 2015 (the "Second Decision on Participation"), para. 22.

²⁸ See Annex I, *supra* note 4, para. 14.

²⁹ *Ibid.*

³⁰ See the Second Decision on Participation, *supra* note 27, para. 24.

³¹ See the "Redacted version of 'Decision on 'indirect victims''" (Trial Chamber I), [No. ICC-01/04-01/06-1813](#), 8 April 2009, paras. 44-52.

³² *Ibid.*, finding that applicants in this situation are excluded from the category of indirect victims, which is "*restricted to those whose harm is linked to the harm of the affected children when the confirmed*

24. By contrast, victim a/00209/13 incurred harm resulting from crimes committed in the context of the Second Attack as well as harm resulting from the death of his 14-year-old child, while serving in the UPC/FPLC.³³ In the submission of the Legal Representative, there is no legal impediment for one and the same person to qualify simultaneously as a direct and indirect victim in those circumstances. Victim a/00209/13, and others who may be in analogous situations, were victimised by separate crimes, all of which were “*crimes charged*”, as required in the *Lubanga* jurisprudence.³⁴ Said crimes affect different legally protected interests, cause diverse harm and are likely addressed by different types and modalities of reparations. Excluding individuals in this situation from any of the two crime categories would mean that part of the harm they suffer would remain unaddressed, contrary to the rules and purpose of reparations proceedings.

25. The possibility of individuals qualifying simultaneously as a direct and indirect victim has been recognised by the Chamber³⁵ and by scholars³⁶ and does not appear to pose any legal, conceptual or practical difficulties.

26. The Legal Representative agrees that with the Registry’s suggestion that the definition of “indirect victim” adopted by the Appeals Chamber in the *Lubanga* case should equally be applied to the present proceedings. Accordingly, indirect victims should include “*i. the family members of direct victims, ii. anyone who attempted to prevent the commission of one or more of the crimes under consideration, iii. individuals who suffered harm when helping or intervening on behalf of direct victims, and iv. other persons who suffered personal harm as a result of these offences*”.³⁷

offences were committed, not those whose harm is linked to any subsequent conduct by the children, criminal or otherwise”.

³³ See the Second Decision on Participation, *supra* note 27, para. 24.

³⁴ See the “Redacted version of ‘Decision on ‘indirect victims’””, *supra* note 31, para. 52.

³⁵ See the Second Decision on Participation, *supra* note 27, para. 24.

³⁶ See e.g. WEMMERS (A.M.) & MANIRABONA (A.), ‘Defining victims: a proposed typology for victims of war crimes and their need for reparation’, in BANTEKAS (I.) & MYLONAKI (E.) (eds), *Criminological Approaches to International Criminal Law* (Cambridge University Press, Cambridge, 2014), p. 325.

³⁷ See the “(Amended) Order for Reparations” (Appeals Chamber), [No. ICC-01/04-01/06-3129-AnxA](#), 3 March 2015, para. 6(b).

2. Additional considerations

27. Annex IV to the First Report contains the Registry's Sample Matrix.³⁸ The Registry noted in the First Report that this "*draft version*"³⁹ of the matrix was "*meant to illustrate the logic underpinning the sample methodology outlined in this report. Some specifics regarding crimes and locations have been slightly modified since, particularly pertaining to the matrixes for victims under Category I in collaboration with the LRVs. Victim consultations are presently being conducted following these matrixes*".⁴⁰ For the avoidance of doubt, the Legal Representative underscores her understanding that the Sample Matrix in Annex IV was intended merely as a template to illustrate the general logic adopted for the sampling exercise.

28. Lastly, in relation to the Security Assessment annexed to the First Report as Annex V, the Legal Representative underlines that [REDACTED]⁴¹ and that [REDACTED]. Attempts to contact the victims remotely, for instance by phone, would realistically be successful for a fraction of the relevant victims at most. In addition to the pandemic, a situation of increasing insecurity in the region aggravates the difficulties faced in seeking to contact clients. Various villages and territories relevant to the reparation proceedings are affected by conflict between local militias, prompting the population to flee and causing large-scale internal displacement.⁴² The Legal Representative notes that in these circumstances, and in light of the vulnerability of many of the Former Child Soldiers, remote contacts create a real risk of re-traumatisation.

³⁸ See Annex IV, *supra* note 8.

³⁹ See the First Report, *supra* note 1, para. 4.

⁴⁰ See Annex I, *supra* note 4, footnote 50.

⁴¹ See Annex V, *supra* note 8.

⁴² See the "Observations on the impact of COVID-19 measures on operational capacity on behalf of the former child soldiers", [No. ICC-01/04-02/06-2516](#), 21 April 2020, para. 14, with further references. See also e.g., RADIO OKAPI, [RDC : combats entre l'armée et la milice CODECO dans la périphérie de Bunia](#), 25 October 2020 ; [Ituri : une vingtaine de morts dans des affrontements entre l'armée et la milice CODECO](#), 26 October 2020 ; [Ituri: les combats se poursuivent entre FARDC et CODECO à Ngwala](#), 27 October 2020 ; [Ituri : 12 miliciens de la CODECO tués par les FARDC à Mont bleu](#), 28 October 2020 ; and [Ituri : 120 000 déplacés en détresse à Komanda](#), 29 October 2020.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Pellet', followed by a period.

Sarah Pellet
Common Legal Representative of the Former Child Soldiers

Dated this 18th Day of November 2020

At The Hague, The Netherlands