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No.: ICC-01/04-02/06

Date: 25 June 2021

THE APPEALS CHAMBER

Before: Judge Marc Pierre Perrin de Brichambaut, Presiding Judge
Judge Piotr Hofmański
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa
Judge Gocha Lordkipanidze

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

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

Public Document

**Response of the Common Legal Representative of the Former Child Soldiers
to Mr Ntaganda Request for suspensive effect of the Reparations Order**

Source: Office of Public Counsel for Victims (CLR1)

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

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I. INTRODUCTION

1. The Common Legal Representative of the Former Child Soldiers (the “Legal Representative”) hereby files her response to the Defence Request for suspensive effect (the “Defence Request for Suspensive Effect” or the “Defence Request”) included in its Appeal Brief against the Reparations Order (the “Defence Appeal”).¹

2. The Legal Representative opposes the Defence Request for Suspensive Effect in the strongest terms, as developed *infra*.

3. The Legal Representative is not opposing the request of the Trust Fund for Victims (the “TFV”) to submit observations on the appeals against the Reparations Order pursuant to Rule 103 of the Rules of Procedure and Evidence provided there are limited to issues directly touching upon its role and mandate and are submitted with the established deadline, *i.e.* 9 August 2021.

II. PROCEDURAL BACKGROUND

4. On 8 July 2019, Trial Chamber VI (the “Chamber”) convicted Mr Ntaganda of five counts of crimes against humanity and thirteen counts of war crimes,² a conviction that was fully confirmed by the Appeals Chamber on 30 March 2021.³

¹ See the “Defence Appellant Brief against the 8 March Reparations Order”, [No. ICC-01/04-02/06-2675 A5](#), 7 June 2021 (the “Defence Appeal”), paras. 260-272.

² See the “Judgment” (Trial Chamber VI), [No. ICC-01/04-02/06-2359](#), 8 July 2019.

³ See the “Public redacted version of Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled ‘Judgment’” (Appeals Chamber), [No. ICC-01/04-02/06-2666-Red A2](#), 30 March 2021 with [AnxA](#) and [AnxB](#); as well as the “Separate opinion of Judge Howard Morrison and Judge Piotr Hofmański on the Prosecutor’s appeal”, [No. ICC-01/04-02/06-2666-Anx1 A2](#); the “Separate opinion of Judge Howard Morrison on Mr Ntaganda’s appeal”, [No. ICC-01/04-02/06-2666-Anx2 A2](#); the “Separate opinion of Judge Luz Del Carmen Ibáñez Carranza on Mr Ntaganda’s appeal”, [No. ICC-01/04-02/06-2666-Anx3 A2](#); the “Separate opinion of Judge Solomy Balungi Bossa on the Prosecutor’s appeal”, [No. ICC-01/04-02/06-2666-Anx4 A2](#); and the “Corrected version of partly concurring opinion of Judge Chile Eboe-Osuji”, [No. ICC-01/04-02/06-2666-Anx5-Corr A2](#).

5. On 7 November 2019, the Chamber issued the Sentencing Judgment, imposing individual sentences for each of the counts of which Mr Ntaganda had been convicted and a joint sentence of 30 years,⁴ decision which was also entirely confirmed by the Appeals Chamber on 30 March 2021.⁵

6. On 8 March 2021, the Chamber issued the “Reparations Order”.⁶

7. On 8 April 2021, the legal representative of the victims of the attacks (the “CLR2”) and the Defence filed their respective Notice of Appeal against the Reparations Order.⁷

8. On 9 April 2021, the Appeals Chamber appointed Judge Perrin de Brichambaut to preside over the appeals on the Reparations Order.⁸

9. On 7 June 2021, the CLR2 and the Defence filed their respective Document in support of the Appeal against the Reparations Order (jointly the “Appeals”).⁹ A request for suspensive effect was included in the Defence Appeal.¹⁰

10. On 11 June, the Appeals Chamber issued an Order setting a time limit for responses to the Defence Request for Suspensive Effect, inviting, on the one hand, the TFV to submit written observations on the Defence Request on 22 June 2021 and, on

⁴ See the “Sentencing judgment” (Trial Chamber VI), [No. ICC-01/04-02/06-2442](#), 7 November 2019.

⁵ See the “Public redacted version of Judgment on the appeal of Mr Bosco Ntaganda against the decision of Trial Chamber VI of 7 November 2019 entitled ‘Sentencing judgment’” (Appeals Chamber), [No. ICC-01/04-02/06-2667-Red A3](#), 30 March 2021.

⁶ See the “Reparations Order” (Trial Chamber VI), [No. ICC-01/04-02/06-2659](#), 8 March 2021.

⁷ See the “Notice of Appeal of the Common Legal Representative of the Victims of the Attacks against the Reparations Order”, [No. ICC-01/04-02/06-2668 A4](#), 8 March 2021; and the “Defence Notice of Appeal against the Reparations Order, ICC-01/04-02/06-2659”, [No. ICC-01/04-02/06-2669 A5](#), 8 March 2021.

⁸ See the “Decision on the Presiding Judge of the Appeals Chamber in the appeals against the decision of Trial Chamber VI entitled ‘Reparations Order’” (Appeals Chamber), [No. ICC-01/04-02/06-2670 A4 A5](#), 9 April 2021.

⁹ See the “Appeal Brief of the Common Legal Representative of the Victims of the Attacks against the Reparations Order”, [No. ICC-01/04-02/06-2674 A4](#), 7 June 2021; and the Defence Appeal, *supra* note 1.

¹⁰ See the Defence Appeal, *supra* note 1, paras. 260-272.

the other hand, the legal representatives of victims to respond to both the Defence Request for Suspensive Effect and the TFV observations on 25 June 2021.¹¹

11. On 22 June, the TFV submitted its observations on the Defence Request for suspensive effect, in which it requested leave to submit observations on the appeals against the Reparations Order pursuant to Rule 103 of the Rules of Procedure and Evidence.¹²

III. SUBMISSIONS

1. Applicable legal framework

12. The Legal Representative notes that according to article 82(3) of the Rome Statute, an appeal shall not of itself have suspensive effect unless the Appeals Chamber so orders, upon request, in accordance with the Rules of Procedure and Evidence. The Appeals Chamber has previously stated that “[s]uspension involves the non-enforcement of a decision, the subject of an appeal”. *Suspensive effect thereby maintains the position as it was prior to the issuing of the Impugned Decision*”.¹³

13. As recalled by the Appeals Chamber, the latter “has consistently held that its decision to order that an appeal has suspensive effect is discretionary and that, when examining a request for suspensive effect, it ‘will consider the specific circumstances of the case and the factors it considers relevant for the exercise of its discretion under these circumstances’. [...] In past decisions, the Appeals Chamber, when deciding on requests for suspensive effect, has

¹¹ See the “Order setting a time limit for responses to the request for suspensive effect and invitation to the Trust Fund for Victims to submit observations on that request” (Appeals Chamber), [No. ICC-01/04-02/06-2678 A4 A5](#), 11 June 2021.

¹² See the “Observations on the Defence Request for Suspensive Effect and Request under rule 103 of the Rules of Procedure and Evidence”, [No. ICC-01/04-02/06-2679 A4 A5](#), 22 June 2021.

¹³ See *inter alia* the “Decision on request for suspensive effect”, [No. ICC-02/05-01/20-134 OA](#), 25 August 2020, para. 5; the “Decision on the request of the Prosecutor of 19 December 2012 for suspensive effect”, [No. ICC-01/04-02/12-12 OA](#), 20 December 2012, para. 17; and the “Decision on the Prosecutor’s ‘Application for Appeals Chamber to Give Suspensive Effect to Prosecutor’s Application for Extraordinary Review’”, [No. ICC-02/04/01/05-92 OA](#), 13 July 2006, para. 6

considered whether the implementation of the decision under appeal (i) 'would create an irreversible situation that could not be corrected, even if the Appeals Chamber eventually were to find in favour of the appellant', (ii) would lead to consequences that 'would be very difficult to correct and may be irreversible', or (iii) 'could potentially defeat the purpose of the appeal'".¹⁴

2. Legal Representative's Submissions

14. On a preliminary basis, the Legal Representative notes that the Defence Request for Suspensive Effect has been introduced in its Appeal Brief when it should have been introduced, procedurally, in light of its nature and purpose, in its Notice to appeal. This in itself constitutes a ground for the Defence Request to be rejected *in limine*.

15. However, should the Appeals Chamber be minded to consider the merits of the Defence Request, the Legal Representative submits that, as will be demonstrated in due course and without prejudging on the decision of the Appeals Chamber, none of the grounds raised by the Defence concerning the former child soldiers are of such nature to (i) create an irreversible situation that could not be corrected, even if the Appeals Chamber eventually were to find in favour of the Defence; (ii) lead to consequences that would be very difficult to correct and may be irreversible; or (iii) potentially defeat the purpose of the Defence Appeal. In addition, most of the grounds raised by the Defence concern the implementation phase of reparations. Therefore suspending the implementation of the Reparations Order at this stage¹⁵ would not be useful, nor relevant. Instead, it would be prejudicial to the interests of victims who have a definite right to expeditious proceedings. And precisely, awaiting any future implementation, proceedings can only be led expeditiously if the conceptualisation phase is carried out as soon as possible, pending resolution of the Appeals.

¹⁴ See the "Decision on suspensive effect" (Appeals Chamber), [No. ICC-01/13-43 OA](#), 6 August 2015, para. 7.

¹⁵ The current stage corresponds to the conceptualisation by the TFCV of the draft initial implementation plan for priority victims; the draft implementation plan for reparations; and the mapping of the potential additional beneficiaries.

16. In this regard, preventing the TFV to work on the basis of the Reparations Order, awaiting a determination of the Appeals, will just delay once more the implementation of reparations for the benefit of victims in the present case – as expressly recognised by the Defence¹⁶. The Legal Representative insists on the fact that victims in the present case have been waiting for almost 20 years to finally be in a position to benefit for any type of support for the harms they suffered from in 2002-2003.¹⁷ This is sadly demonstrated by the fact that reparations have still not been implemented in the *Lubanga* case, more than nine years after the start of the reparations proceedings in said case.¹⁸

17. In ruling on the Defence Request for Suspensive Effect, the Legal Representative submits that it is of paramount importance that the Appeals Chamber takes into account the rights of the victims to fair trial guarantees, and specifically in the present instance, the right to the expeditiousness of the reparations proceedings. Indeed, the “fair trial” guarantees must apply throughout the proceedings and in respect of all parties and participants, including victims. This is all the more true at the reparations stage, where victims are one of the parties in the proceedings.¹⁹

18. Furthermore, in light of the current practice of the Court with regard to the extremely lengthy preparation stage of reparations, it is extremely unlikely that the appeals against the Reparations Order will not have been adjudicated by the time the TFV is ready to move on to the implementation stage of the reparations proceedings.²⁰

¹⁶ See the Defence Appeal, *supra* note 1, para. 270.

¹⁷ See also *infra* para. 20.

¹⁸ See the “Thirteenth progress report on the implementation of collective reparations as per Trial Chamber II’s decisions of 21 October 2016, 6 April 2017 and 7 February 2019”, [No. ICC-01/04-01/06-3512-Red](#), 21 April 2021, paras. 28-30.

¹⁹ In this regard, see the Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power adopted by the UN General Assembly on 29 November 1985, which calls for enabling victims’ access to Justice and to obtain redress as well as for providing them with fair treatment in this regard. See the Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power adopted by the UN General Assembly on its 96th plenary meeting, UN Doc. [A/RES/40/34](#), 29 November 1985, Principles 4 to 7.

²⁰ See the “Observations on the Defence Request for Suspensive Effect and Request under rule 103 of the Rules of Procedure and Evidence”, *supra* note 12, paras. 27, 30, and 31.

Therefore, in the highly hypothetical scenario consisting in measures being implemented, should the Reparations Order be overturned, entirely, or in part, on appeal, any sprouting community-based measures implemented up to that point should nevertheless be considered to have been awarded under the assistance mandate of the TFV.²¹ As noted in the *Report of the Court on the Revised strategy in relation to victims*, the reparations and assistance mandates can have a significant effect in contributing to the healing process of societies and the Court must constantly monitor and adjust its strategies to respond to local dynamics, which “requires from the entire Court system immense flexibility, creativity and, at times, speed”.²² In fact, in the only instance before the Court where a *conviction* has been overturned by the Appeals Chamber, pending reparations proceedings being prepared (the *Bemba* case), the assistance mandate of the TFV was reactivated to address the harm suffered by the victims of that case.²³ It is however worth recalling that, in the present case, the Appeals Chamber has already adjudicated both the Defence’s Appeals against the Conviction and the Sentencing Decision and in fact, has confirmed both of them in their entirety.

19. The Defence Appeal only concerned disagreements with the Reparations modalities contained in the Reparations Order and do not have any bearing on the content of the reparations measures the TFV will *propose*. Once the TFV has formulated its proposals, the parties are expected to provide their observations before the Trial Chamber will issue its decision, thereby providing ample time for the Defence Appeal

²¹ *Idem*, paras. 25 and 29.

²² See ASSEMBLY OF STATES PARTIES, *Report of the Court on the Revised strategy in relation to victims: Past, present and future*, Doc. [ICC-ASP/11/40](#), 5 November 2012, paras. 46, 80, and 83: “46. One of the unique features of the Rome Statute system is that victims have been granted the right to request reparations and may benefit from support by the TFV under its assistance mandate. The further advantage presented by the reparations and assistance mandates is that positive and pro-active engagement with victims can have a significant effect on how they experience and perceive justice, thus contributing to their healing process and the rebuilding of peaceful societies. [...] 80. Overall, the Court must adapt to the unique aspects of each case and situation. [...] 83. The Court must constantly monitor and adjust strategies and messages in order to respond not only to judicial developments but also to local dynamics. To do so requires from the entire Court system immense flexibility, creativity and, at times, speed”.

²³ See ICC Press Release, “[Following Mr Bemba’s acquittal, Trust Fund for Victims at the ICC decides to accelerate launch of assistance programme in Central African Republic](#)”, 13 June 2018.

to be adjudicated. The Legal Representative further fully concurs with the TFCV's observations pointing at the necessary flexibility of the reparations process, both at its preparation and implementation stages,²⁴ which remains under the control and monitoring of the Chamber, and which in itself negates the need of any suspensive effect of the Reparations Order.

20. Finally, the Legal Representative strongly re-emphasises that her clients have never received any type of assistance, hence the urgency to finally address their situation and of the swift *preparation* process leading – hopefully expeditiously – to the *implementation* of the reparations in the present case.²⁵

3. TFCV's request to submit observations on the Appeals against the Reparations Order

21. The Legal Representative underlines that including a request for leave to submit observations on the appeals against the Reparations Order pursuant to Rule 103 of the Rules of Procedure and Evidence in its observations on the Defence Request for Suspensive Effect does not conform with judicial good practices before the Court. Nonetheless, in order to avoid delaying the proceedings and allow the Chamber to take a prompt decision on the TFCV Request, she includes her response herewith. Incidentally the Legal Representative notes that the TFCV has been on notice since the

²⁴ See the Observations on the Defence Request for Suspensive Effect and Request under rule 103 of the Rules of Procedure and Evidence, *supra* note 12, paras. 26 to 31.

²⁵ See the 14 periodic reports on victims in the case and their general situation submitted by the Registry (respectively [No. ICC-01/04-02/06-632](#), 8 June 2015; [No. ICC-01/04-02/06-889](#), 6 October 2015; [No. ICC-01/04-02/06-1157](#), 8 February 2016; [No. ICC-01/04-02/06-1369](#), 6 June 2016; [No. ICC-01/04-02/06-1567](#), 6 October 2016; [No. ICC-01/04-02/06-1774](#), 6 February 2017; [No. ICC-01/04-02/06-1938](#), 6 June 2017; [No. ICC-01/04-02/06-2056](#), 6 October 2017; [No. ICC-01/04-02/06-2212](#), 6 February 2018; [No. ICC-01/04-02/06-2296-Corr](#), 7 June 2018; [No. ICC-01/04-02/06-2322](#), 9 October 2018; [No. ICC-01/04-02/06-2325](#), 6 February 2019; [No. ICC-01/04-02/06-2353](#), 6 June 2019; and [No. ICC-01/04-02/06-2434](#), 7 October 2019) submitted pursuant to Trial Chamber VI's orders in the first and fourth decisions on victims' participation in trial proceedings. See the "Decision on victims' participation in trial proceedings", [No. ICC-01/04-02/06-449](#), 6 February 2015, para. 24 (ix); and the "Fourth decision on victims' participation in trial proceedings" (Trial Chamber VI), [No. ICC-01/04-02/06-805](#), 1 September 2015, para. 13(ii)(a).

filing of the Appeals and could have requested leave to submit observations thereof in a more timely fashion.

22. The Legal Representative does not oppose the TFV request to submit observations on the Appeals. However, she emphasises that said observations should be limited to issues directly touching upon its role and mandate.²⁶ She further notes that the right to make such observations was granted to the TFV in the *Lubanga* case, with the same purpose.²⁷

23. The Legal Representative however strongly insists on the fact that should the Chamber be minded to grant the TFV Request, the deadline to be applied shall be similar to that of the parties, *i.e.* 9 August 2021. Indeed, however mindful of the competing deadlines faced by the TFV, the Legal Representative is facing similar issues and the possibility offered to the TFV should not cause delay in the adjudication of the present proceedings.

IV. CONCLUSION

24. For the reasons stated *supra*, the Legal Representative respectfully requests the Appeals Chambers to reject the Defence request for suspensive effect, *in limine*. Should the Appeals Chamber be minded to consider the merits of the Defence Request, the Legal Representative respectfully request the Appeals Chamber to reject said request.

25. The Legal Representative further respectfully requests the Appeals Chamber to grant the TFV request to submit observations on the Appeals provided said

²⁶ See the Observations on the Defence Request for Suspensive Effect and Request under rule 103 of the Rules of Procedure and Evidence, *supra* note 12, paras. 32 *et seq.*

²⁷ See the “Scheduling order for a hearing before the Appeals Chamber and invitation to the Trust Fund for Victims to submit observations” (Appeals Chamber), [No. ICC-01/04-01/06-3419](#) A7 A8, 21 September 2018.

observations are limited to issues directly touching upon the TFV's role and mandate and are submitted with the established deadline, *i.e.* 9 August 2021.



Sarah Pellet
Common Legal Representative of the
Former Child Soldiers

Dated this 25th day of June 2021

At The Hague, The Netherlands