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TRIAL CHAMBER II

Before: Judge Chang-Ho Chung, Presiding Judge
Judge Péter Kovács
Judge María del Socorro Flores Liera

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

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

Public Document

**Joint Response of the Common Legal Representatives of Victims to
Mr Ntaganda's Request for Leave to Appeal the Decision on the TFV's IDIP
(ICC-01/04-02/06-2698)**

Source: Office of Public Counsel for Victims (CLR1 and CLR2)

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I. INTRODUCTION

1. The Common Legal Representative of the Victims of the Attacks and the Common Legal Representative of the Former Child Soldiers (jointly the “Legal Representatives” or the “LRVs”) hereby file their Response to the “Application on behalf of Mr Bosco Ntaganda seeking leave to appeal Decision on the TFV’s initial draft implementation plan with focus on priority victims” (the “Defence Request”).¹

2. The Legal Representatives contend that none of the five issues identified in the Request properly arise from the “Decision on the TFV’s initial draft implementation plan with focus on priority victims”² (the “Impugned Decision”) and that on this basis alone, the Defence Request shall be denied. Should Trial Chamber II (the “Chamber”) deem otherwise, the Legal Representatives submit that the Request further fails to satisfy the remaining cumulative criteria set forth in article 82(1)(d) of the Rome Statute (the “Statute”).

II. PROCEDURAL BACKGROUND

3. On 8 July 2019, Trial Chamber VI convicted Mr Ntaganda of five counts of crimes against humanity and thirteen counts of war crimes.³ A conviction that was fully confirmed by the Appeals Chamber on 30 March 2021.⁴

¹ See the “Application on behalf of Mr Bosco Ntaganda seeking leave to appeal Decision on the TFV’s initial draft implementation plan with focus on priority victims”, [No. ICC-01/04-02/06-2698](#), 2 August 2021 (the “Defence Request”).

² See the “Decision on the TFV’s initial draft implementation plan with focus on priority victims” (Trial Chamber II), [No. ICC-01/04-02/06-2696](#), 23 July 2021 (the “Impugned Decision”).

³ See the “Judgment” (Trial Chamber VI), [No. ICC-01/04-02/06-2359](#), 8 July 2019.

⁴ 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 A 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 A A2](#); the “Separate opinion of Judge Howard Morrison on Mr Ntaganda’s appeal”, [No. ICC-01/04-02/06-2666-Anx2 A A2](#); the “Separate opinion of Judge Luz Del Carmen Ibáñez Carranza on Mr Ntaganda’s appeal”, [No. ICC-01/04-02/06-2666-Anx3 A A2](#); the “Separate opinion of Judge Solomy Balungi Bossa on the Prosecutor’s appeal”, [No. ICC-01/04-02/06-2666-Anx4 A A2](#); and the “Corrected version of partly concurring opinion of Judge Chile Eboe-Osuji”, [No. ICC-01/04-02/06-2666-Anx5-Corr A A2](#), all dated the same day.

4. On 7 November 2019, Trial Chamber VI 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.⁵ This decision was also entirely confirmed by the Appeals Chamber on 30 March 2021.⁶

5. On 8 March 2021, Trial Chamber VI issued the “Reparations Order”, acknowledging the harm suffered by the victims and the corresponding needs in terms of reparations modalities. It notably thereby established Mr Ntaganda’s liability, the principles on reparations and the procedure for the preparation of the implementation plan by the Trust Fund for Victims (the “TFV”).⁷

6. On 16 March 2021, the Presidency assigned the present case to a newly constituted Trial Chamber II.⁸ Judge Chang-ho Chung was subsequently elected Presiding Judge of Trial Chamber II.⁹

7. On 8 April 2021, the Common Legal Representative of the Victims of the Attacks (the “CLR2”) and the Defence filed their respective Notice of Appeal against the Reparations Order.¹⁰

8. On 9 April 2021, the Appeals Chamber appointed Judge Perrin de Brichambaut to preside the appeals against the Reparations Order.¹¹

⁵ See the “Sentencing judgment” (Trial Chamber VI), [No. ICC-01/04-02/06-2442](#), 7 November 2019.

⁶ 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.

⁷ See the “Reparations Order” (Trial Chamber VI), [No. ICC-01/04-02/06-2659](#), 8 March 2021.

⁸ See the “Decision assigning judges to divisions and recomposing chambers” (Presidency), [No. ICC-01/04-02/06-2663](#), 16 March 2021, p. 7.

⁹ See the “Decision on the Election of the Presiding Judge” (Trial Chamber II), [No. ICC-01/04-02/06-2664](#), 22 March 2021, para. 2.

¹⁰ 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.

¹¹ 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. On 7 June 2021, the CLR2 and the Defence filed their respective appeal briefs against the Reparations Order.¹² In its Appeal Brief, the Defence further requested suspensive effect of the Reparations Order.¹³

10. On 9 June 2021, the TFV submitted its Report on its Preparation for an Initial Draft Implementation Plan with focus on Priority Victims (the “IDIP”),¹⁴ to which the parties and the Registry were directed to file any observation they may have by 23 June 2021.¹⁵

11. On 11 June 2021, the Appeals Chamber issued an Order setting a time limit for responses to the Defence request for suspensive effect contained within its Appeal Brief against the Reparations Order.¹⁶ On 22 and 25 June 2021 respectively, the TFV and the Legal Representatives submitted their respective responses.¹⁷

¹² See the “Defence Appellant Brief against the 8 March Reparations Order”, [No. ICC-01/04-02/06-2675 A5](#), 7 June 2021; and 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.

¹³ See the “Defence Appellant Brief against the 8 March Reparations Order”, *supra* note 10, paras. 260-273.

¹⁴ See the “Report on Trust Fund’s Preparation for Draft Implementation Plan With Annex A Initial Draft Implementation Plan with focus on Priority Victims”, [No. ICC-01/04-02/06-2676-Conf](#) and [No. ICC-01/04-02/06-2676-Conf-AnxA](#), 9 June 2021. On 14 June, the TFV submitted a Corrigendum to said Annex A, [No. ICC-01/04-02/06-2676-Conf-AnxA-Corr](#) and [No. ICC-01/04-02/06-2676-Conf-AnxA-Corr-Anx](#). See also [No. ICC-01/04-02/06-2676-Red](#) and [No. ICC-01/04-02/06-2676-AnxA-Corr-Red2](#).

¹⁵ See the “Order for the submission of observations on the initial draft implementation plan with focus on priority victims” (Trial Chamber II), No. ICC-01/04-02/06-2677, 10 June 2021. See also the “Registry Observations on the Trust Fund for Victims’ Initial Draft Implementation Plan”, [No. ICC-01/04-02/06-2683](#), 23 June 2021; the “Defence Observations on the TFV initial draft implementation plan”, [No. ICC-01/04-02/06-2682-Conf](#), 23 June 2021; the “Response of the Common Legal Representative of the Former Child Soldiers to the TFV Initial Draft Implementation Plan with focus on Priority Victims”, [No. ICC-01/04-02/06-2681](#), 23 June 2021; and the “Public Redacted Version of the ‘Observations of the Common Legal Representative of the Victims of the Attacks on the Trust Fund for Victims’ Draft Initial Implementation Plan” (ICC-01/04-02/06-2680-Conf)”, [No. ICC-01/04-02/06-2680-Red](#), 28 June 2021 (date of the original confidential submission, 23 June).

¹⁶ 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.

¹⁷ 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](#), 22 June 2021; the “Response of the Common Legal Representative of the Former Child Soldiers to Mr Ntaganda Request for suspensive effect of the Reparations Order”, [No. ICC-01/04-02/06-2685](#), 25 June 2021; and the “Public Redacted Version of the ‘Response of the Common Legal Representative of the Victims of the Attacks to the Defence Request for Suspensive Effect of the Reparations Order, to the TFV’s Observations on the

12. On 28 June 2021, the TFV submitted additional observations regarding its IDIP.¹⁸

13. On 2 July 2021, the Appeals Chamber rejected the Defence's request for suspensive effect of the Reparations Order. It found that it has not been demonstrated that unless the Reparations Order is suspended, its implementation would create an irreversible situation, lead to consequences that would be very difficult to correct, or potentially defeat the purpose of the appeals.¹⁹

14. The same day, the Defence requested the disqualification of Judge Lordkipanidze for the appeals against the Reparations Order.²⁰ On 8 July 2021, the Presidency set a calendar to receive any observations by the LRV and by Judge Lordkipanidze on said request, before convening a plenary session to address the request.²¹

15. On 16 July 2021, the TFV submitted a request to postpone the submission of its Draft Implementation Plan until 17 December 2021. The TFV highlighted the difficulties posed by the public health situation and the security situation both in the

Defence Request for Suspensive Effect, and to the TFV's Request under rule 103 of the Rules' (ICC-01/04-02/06-2684-Conf)", [No. ICC-01/04-02/06-2684-Red A4 A5](#), 25 June 2021. See also the "Response on behalf of Mr Ntaganda to the Trust Fund for Victims' Observations and Request", [No. ICC-01/04-02/06-2686 A4 A5](#), 25 June 2021.

¹⁸ See the "Public redacted version of 'Observations on the responses and observations submitted on the Initial Draft Implementation Plan', submitted on 28 June 2021", [No. ICC-01/04-02/06-2687-Red](#), 28 June 2021.

¹⁹ See the "Decision on the Defence request for suspensive effect" (Appeals Chamber), [No. ICC-01/04-02/06-2691 A4 A5](#), 2 July 2021.

²⁰ See the "Request seeking Judge Lordkipanidze to recuse himself or be disqualified to adjudicate the appeals against the Reparations Order issued by Trial Chamber VI on 8 March 2021", [No. ICC-01/04-02/06-2690](#), 2 July 2021.

²¹ See the "Order concerning the 'Request seeking Judge Lordkipanidze to recuse himself or be disqualified to adjudicate the appeals against the Reparations Order issued by Trial Chamber VI on 8 March 2021' dated 2 July 2021 (ICC-01/04-02/06-2690)" (The Presidency), [No. ICC-01/04-02/06-2692](#), 8 July 2021.

Democratic Republic of the Congo and in Uganda.²² On 22 July 2021, the LRV and the Defence filed their response in support to said request.²³

16. On 23 July 2021, the Chamber issued the Impugned Decision, approving the IDIP subject to amendments and additional information to be provided by the TFV in its next report.²⁴

17. The same day, the Chamber granted the TFV's extension of time limit to submit its Draft Implementation Plan (the "DIP").²⁵ The Chamber however directed the TFV to find all possible alternatives to finalise it as efficiently and expeditiously as possible, taking into account the fact that the time limit cannot be extended indefinitely without infringing on the rights of victims to prompt reparations.

18. On 2 August 2021, the Defence filed its Request.²⁶

III. SUBMISSIONS

19. The Impugned Decision falls within the category of "other decisions" for which leave to appeal must be sought on distinct, identifiable 'issues', the immediate resolution of which may materially advance the proceedings. The Legal Representatives submit that the Defence Request fails to meet the legal criteria applicable to such requests.

²² See the "Trust Fund for Victims' Request to Vary the Time Limit to Submit Draft Implementation Plan", [No. ICC-01/04-02/06-2693](#), 16 July 2021.

²³ See the "Observations on Behalf of Mr Ntaganda on the 'Trust Fund for Victims' Request to Vary the Time Limit to Submit Draft Implementation Plan'", [No. ICC-01/04-02/06-2695](#), 22 July 2021; the "Joint Response of the Common Legal Representatives of Victims to the 'Trust Fund for Victims' Request to Vary the Time Limit to Submit Draft Implementation Plan'", [No. ICC-01/04-02/06-2694](#), 22 July 2021.

²⁴ See the "Decision on the TFV's initial draft implementation plan with focus on priority victims, *supra* note 2.

²⁵ See the "Decision on the Trust Fund for Victims' Request to Vary the Time Limit to Submit Draft Implementation Plan", [No. ICC-01/04-02/06-2697](#), 23 July 2021.

²⁶ See the Defence Request, *supra* note 1.

1. The criteria set forth in article 82(1)(d) of the Statute

20. Article 82(1)(d) of the Statute sets out the criteria for granting a request for leave to appeal as follows: (a) the decision shall involve an issue that would significantly affect: (i) the fair and expeditious conduct of proceedings; or (ii) the outcome of the trial; and (b) for which, in the opinion of the relevant Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings. Due to the cumulative nature of the criteria set out in article 82(1)(d) of the Statute, the failure to satisfy any one of them must result in the rejection of a request for leave to appeal.²⁷

21. For the purposes of the first prong of the above-mentioned test, the Appeals Chamber defined an “issue” as *“an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion”*.²⁸ Moreover, the Appeals Chamber ruled that *“the Pre-Trial or Trial Chamber is vested with power to state, or more accurately still, to certify the existence of an appealable issue”*.²⁹

22. Consequently, it must first be determined whether the purported “issues” in the Request are “appealable issues” within the meaning of article 82(1)(d) of the Statute as interpreted by the jurisprudence of the Court. Indeed, *“while an application for leave to appeal should not contain in detail the arguments which the party intends to raise before the Appeals Chamber, it must still identify clearly the appealable issue, including by way of indicating a specific factual and/or legal error. Only in this case can the Chamber assess whether the issue, provided it was wrongly decided, may have implications on the fairness and expeditiousness of the proceedings or outcome of the trial”*.³⁰

²⁷ See the “Decision on Defence Request for Leave to Appeal Decision 1248” (Trial Chamber IX), [No. ICC-02/04-01/15-1263](#), 22 May 2018, para. 10. See also See the “Decision on Prosecutor’s Application for leave to appeal in part Pre-Trial Chamber II’s Decision on the Prosecutor’s applications for warrants of arrest under article 58” (Pre-Trial Chamber II), [No. ICC-02/04-01/05-20](#), 19 August 2005, para. 21. See also the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, [No. ICC-01/04-168 OA3](#), 13 July 2006, paras. 8, 9, and 14.

²⁸ *Idem*, para. 9.

²⁹ *Idem*, para. 20.

³⁰ See the “Decision on three applications for leave to appeal” (Pre-Trial Chamber I), [No. ICC-02/11-01/11-307](#), 29 November 2012, para. 70.

23. The Appeals Chamber further considered that “[n]ot every issue may constitute the subject of an appeal. It must be one apt to ‘significantly affect’, i.e. in a material way, either a) ‘the fair and expeditious conduct of the proceedings’ or b) ‘the outcome of the trial’”.³¹ Indeed, “the mere fact that an issue is of general interest or could be raised in future pre-trial or trial proceedings is not sufficient to warrant the granting of leave to appeal”,³² and “[l]eave to file interlocutory appeals against decisions should therefore only be granted in exceptional circumstances”.³³

24. Moreover, in analysing whether an appealable issue would “significantly affect” the fair and expeditious conduct of the proceedings under article 82(1)(d) of the Statute, the notion of “fairness” must be understood as referring to situations “when a party is provided with the genuine opportunity to present its case - under conditions that do not place it at a substantial disadvantage vis-à-vis its opponent - and to be appraised of and comment on the observations and evidence submitted to the Court that might influence its decision”.³⁴ In turn, “expeditiousness” must be read as “closely linked to the concept of proceedings ‘within a reasonable time’, namely the speedy conduct of proceedings, without prejudice to the rights of the parties concerned”.³⁵

25. Finally, the Appeals Chamber stated that in order to determine whether an issue would significantly affect the “outcome of the trial” under article 82(1)(d) of the Statute, “[t]he Pre-Trial or Trial Chamber must ponder the possible implications of a given issue being

³¹ *Idem*, para. 10.

³² See the “Decision on the Prosecutor’s application for leave to appeal the Decision on the ‘Protocol on investigations in relation to witnesses benefiting from protective measures’” (Trial Chamber II), [No. ICC-01/04-01/07-2375-tENG](#), 8 September 2010, para. 4. See also the “Decision on Ruto Defence’s Application for Leave to Appeal the ‘Decision on the Prosecution’s Request to Add New Witnesses to its List of Witnesses’” (Trial Chamber V(a)), [No. ICC-01/09-01/11-983](#), 24 September 2013, para. 20.

³³ See the “Decision on the Prosecutor’s application for leave to appeal the Decision on the ‘Protocol on investigations in relation to witnesses benefiting from protective measures’”, *idem*, para. 4. See also the “Decision on the Prosecutor’s and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges” (Pre-Trial Chamber I), [No. ICC-02/11-01/11-464](#), 31 July 2013, para. 7.

³⁴ See, *inter alia*, the “Decision on the Prosecutor’s application for leave to appeal Pre-Trial Chamber III’s decision on disclosure” (Pre-Trial Chamber III, Single Judge), [No. ICC-01/05-01/08-75](#), 25 August 2008, para. 14.

³⁵ *Idem*, para. 18.

*wrongly decided on the outcome of the case. The exercise involves a forecast of the consequences of such an occurrence”.*³⁶

2. Merits of the Purported Issues

26. The Defence identifies five purported issues in its Request. However, at the outset, the Legal Representatives underline that the Defence does not clearly indicate whether such issues would constitute legal, factual or procedural errors, and limits itself to referring to the Chamber’s “errors”³⁷ which it merely qualifies as “*significant, and structural*”³⁸ and which, it guarantees, do not constitute “*mere disagreements with the Chamber*”.³⁹

27. The Legal Representatives submit that such a reasoning falls short from meeting the criteria of article 82(1)(d) of the Statute as developed *supra*, as a party seeking leave to appeal a decision must “*identify clearly the appealable issue, including by way of indicating a specific factual and/or legal error*”.⁴⁰

28. The five issues identified by the Defence are as follows:

(1) the Chamber erred by approving the IDIP in the absence of sufficient information related to the proposed projects and activities;⁴¹

(2) Chamber erred in approving the IDIP on the basis of an abstract alternative proposal for the eligibility assessment and urgent screening of victims;⁴²

(3) the Chamber erred by finding that “[...] *the rights of the convicted person are guaranteed, as the Defence have had the opportunity to challenge the applicable standards of proof and causation*” and “*will be able to make submissions on the TFV’s*

³⁶ See the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, *supra* note 27, para. 13.

³⁷ See the Defence Request, *supra* note 1, paras. 7, 22 and 33.

³⁸ *Idem*, para. 33.

³⁹ *Idem*, paras. 21-23.

⁴⁰ See the Decision on three applications for leave to appeal, *supra* note 30, para. 70.

⁴¹ See the Defence Request, *supra* note 1, para. 16.

⁴² *Idem*, para. 17.

proposed administrative eligibility assessment before its approval", when this is not provided for in the Reparations Order;⁴³

(4) the Chamber erred by approving the IDIP and finding that the eligibility assessment shall be made by applying the same standard as set in the Reparations Order given the pending LRV2 and Defence appeals against the latter;⁴⁴ and

(5) the Chamber erred in approving the TFV's proposal to use two existing assistance projects for reparations in the *Ntaganda* case despite the importance of clearly distinguishing between its reparations and the assistance mandates.⁴⁵

29. The Legal Representatives respectfully submit that none of these issues arise from the Impugned Decision.⁴⁶ Indeed, these issues are a mere repetition of some of the Defence's arguments put forward before the Appeals Chamber in relation to the Reparations Order. In fact, the Defence admits itself that "*much like the errors identified in the parties' appeals against the 8 March Reparations Order, the appealable issues arise directly from the Chamber's determination to expedite the reparations process in the Ntaganda case*",⁴⁷ which seems to be the essential reproach the Defence has with regard to this process. The Defence also concludes that "[...] *if upheld by the Appeals Chamber, any ground of appeal raised by the Defence against the 8 March Reparations Order that relate to the appealable issues [...] would very likely result in the TFV having to recommence all steps taken to design its DIP*".⁴⁸

30. This is all the more surprising when the Defence, on the other hand, portrays itself as one party which has the best interests and expectations of victims at heart.⁴⁹

⁴³ *Idem*, para. 18.

⁴⁴ *Idem*, para. 19.

⁴⁵ *Idem*, para. 20.

⁴⁶ *Idem*, paras. 21-24.

⁴⁷ *Idem*, para. 22 (emphasis added).

⁴⁸ *Idem*, para. 31 (emphasis added).

⁴⁹ *Idem*, para. 2. See also the Defence Appellant Brief against the 8 March Reparations Order, *supra* note 12, paras. 13, 44, and 268.

31. Taken as a whole, these issues clearly emanate from the Defence's many *disagreements* with the Reparations Order, which were captured in no less than 15 grounds of appeal.⁵⁰ Indeed, the Defence already wholly opposed Trial Chamber VI's approach of the reparations process, and in particular its determination on the standard of proof and evidentiary criteria (grounds 4 to 9) and its instructions to the TFV to proceed with both the DIP and the eligibility assessment of new potential beneficiaries (grounds 10 and 12) – which are encapsulated in Issues 2 to 4 in the Defence Request.

32. Regarding Issues 1 and 5, the Legal Representatives note that although brushed upon by the Defence in its Appeal Brief against the Reparations Order, they were not *per se* formulated as grounds of appeal. However, these issues clearly also hail from the Reparations Orders. It thus appears that the Defence is attempting to correct possible deficiencies of its Appeal Brief against the Reparations Order and to circumvent its rights and duties in appeal, by including them in its belated Request against the Impugned Decision.

33. In this regard, Trial Chamber VI already mentioned in its Reparations Order that to establish its IDP, the TFV ought to be “*relying as much as possible on existing mechanisms, identified intermediaries, and partnerships already established*”.⁵¹ This, in light of the TFV's mandate and otherwise previous presence in the DRC, ought to be notably referring to the TFV's assistance programs. However, the Defence did not challenge this matter in its Appeal Brief and is therefore precluded from raising it in its Request. In any event, the Defence seems to take issue not so much with the recourse to the assistance programs, but rather with the necessary clear distinction between both mandates of the TFV,⁵² which is an element that has clearly been underlined by the Chamber itself in the Impugned Decision:

⁵⁰ See the Defence Appellant Brief against the 8 March Reparations Order, *supra* note 12.

⁵¹ See the Reparations Order, *supra* note 7, para. 252.

⁵² See the Defence Request, *supra* note 1, para. 20.

“As to the remaining two assistance projects, the Chamber notes that all participants agree on the need to clearly distinguish the reparation measures deriving from the Ntaganda Reparations Order from the assistance projects generally aimed at the victims of the crimes under the jurisdiction of the Court. The Chamber stresses that, in accordance with the Statutory framework, the TFV’s dual mandate to (i) implement Court ordered reparations, and (ii) provide assistance to victims of the crimes under the jurisdiction of the Court, needs to be clearly distinguished”.⁵³

34. The Defence also ignores the very terms of the Impugned Decision in which the Chamber orders the TFV to include an information campaign in the implementation of its IDIP to explain to the victims the difference between its assistance mandate and the reparation ordered in the present case:

“Secondly, as some Ntaganda victims who require urgent assistance will benefit from the same assistance projects, related mechanisms, and services which are available to situation victims, it is crucial to provide to the Ntaganda victims with relevant information to assist them managing their legitimate expectations, allowing them to make fully informed choices, and avoid generating feelings of frustration and disappointment, or creating further harm. The IDIP’s implementation should therefore be accompanied by a targeted and consistent information campaign aimed at clearly explaining to the victims and their communities that the Ntaganda victims who experience urgent needs are not ‘merely’ incorporated into assistance programmes – of which they could, theoretically, have benefited much earlier – but, on the contrary, that they are given priority to address their needs on an urgent basis as an emergency initial response until the reparations programmes they will benefit from are fully operational”.⁵⁴

35. Whether the Defence’s First Issue constitutes in fact a note of caution or a mere disagreement with the Chamber’s approach, it is in any case difficult to see how it constitutes an appealable issue pursuant to article 82(1)(d) of the Statute. Indeed, and as already mentioned *supra*, when a party challenges a judicial decision, simply expressing a difference of opinion regarding the question *sub judice* is insufficient.⁵⁵

⁵³ See the Impugned Decision, *supra* note 2, para. 23.

⁵⁴ *Idem*, para. 26.

⁵⁵ See the “Decision on Defence requests for leave to appeal the ‘Order setting the commencement date for trial’” (Trial Chamber I), [No. ICC-02/11-01/15-117](#), 2 July 2015, para. 22 ; the “Decision on the ‘Requête

36. Finally, as to the Defence's First Issue,⁵⁶ the same is clearly covered by the amendments required from the TFV by the Chamber in the Impugned Decision.⁵⁷ Indeed, the Defence disagrees with the Chamber's approval of the IDIP albeit accompanied by clear instructions to the TFV to make amendments to it. It appears in fact that the Defence would have preferred – to reach the very same result – that the Chamber would have rather ordered these amendments to be submitted before any approval. Moreover, the Defence states under the First Issue that the Chamber did not have sufficient information to issue its Decision, while the Chamber explicitly noted in the Impugned Decision that: *"following the clarifications and additional details provided by the TFV in its Reply, the Chamber considers that the TFV has provided sufficient information to allow the Chamber to consider the merits of the IDIP's proposals overall"*.⁵⁸ Here again, the First Issue appears to be a clear disagreement with the Impugned Decision, and therefore falls short of meeting the requirements of article 82(1)(d) of the Statute.⁵⁹

37. The Legal Representatives wish to further underline that multiple litigations on the same topics not only significantly delay the reparations process, but are also unlikely to advance the proceedings, contrary to the requirements of article 82(1)(d) of the Statute. Indeed, the Defence does not show how being granted leave to appeal issues already pending before the Appeals Chamber could possibly affect either *"the*

*de la Défense sollicitant l'autorisation d'interjeter appel de la Décision sur la confirmation des charges datée du 9 juin 2014'" (Pre-Trial Chamber II), [No. ICC-01/04-02/06-322](#), 4 July 2014, para. 33 ; the "Decision on the 'Request for Leave to Appeal against the 'Decision on the Request for an order for the commencement of the pre-confirmation phase by the Defence of Saif Al-Islam Gaddafi'" (Pre-Trial Chamber I), [No. ICC-01/11-01/11-490](#), 11 December 2013, para. 31; and the "Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", *supra* note 27, para. 9.*

⁵⁶ See the Defence Request, *supra* note 1, para. 16.

⁵⁷ *Idem*, paras. 14-16, and 23-30.

⁵⁸ See the Impugned Decision, *supra* note 2, para. 15.

⁵⁹ See the "Decision on Defence requests for leave to appeal the 'Order setting the commencement date for trial'", *supra* note 55, para. 22 ; the "Decision on the 'Requête de la Défense sollicitant l'autorisation d'interjeter appel de la Décision sur la confirmation des charges datée du 9 juin 2014'", *supra* note 55, para. 33 ; the "Decision on the 'Request for Leave to Appeal against the 'Decision on the Request for an order for the commencement of the pre-confirmation phase by the Defence of Saif Al-Islam Gaddafi'", *supra* note 55, para. 31; and the "Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", *supra* note 27, para. 9.

fair and expeditious conduct of the proceedings” or “the outcome of the trial”. The Defence shows even less how granting leave to litigate the same issues twice before the Appeals Chamber could *“materially advance the proceedings”*. In addition, the Defence seems to confuse its duty to act diligently and make an appropriate use of all remedies to advocate for the convicted person’s rights,⁶⁰ in a such way that amounts to an abuse – which inevitably leads to unwarranted *“duplication of proceedings”* and *“interferes with the expeditious administration of justice”*.⁶¹

38. Finally, the Defence fails to explain how the fairness, expeditiousness and outcome of the proceedings could possibly be affected if the Appeals Chamber is already seized with the exact same issues and their resolution is pending.

39. In analysing whether an appealable issue would *“significantly affect”* the fair and expeditious conduct of the proceedings under article 82(1)(d) of Statute, the notion of ‘fairness’ must be understood as making reference to situations *“when a party is provided with the genuine opportunity to present its case – under conditions that do not place it at a substantial disadvantage vis-à-vis its opponent – and to be appraised of and comment on the observations and evidence submitted to the Court that might influence its decision”*.⁶² The Defence limits itself to reiterating that there is no procedure to challenge the applicable standard of proof and causation in the Reparations Order, thereby impacting on the fairness of the proceedings.⁶³ However, the Defence has already asserted this very right by appealing, amongst other elements, this same issue before the Appeals Chamber.⁶⁴

40. In turn, ‘expeditiousness’ must be read as *“closely linked to the concept of proceedings ‘within a reasonable time’, namely the speedy conduct of proceedings, without prejudice to the rights of the parties concerned”*.⁶⁵ The Appeals Chamber stated that in order

⁶⁰ *Idem*, para. 52.

⁶¹ See e.g., the “Decision on the ‘*Requête en vertu des Articles 38-3-a, 43-2 et 115-b*’ dated 25 September 2020 (ICC-02/05-01/20-165)” (Presidency), [No. ICC-02/05-01/20-180](#), 12 October 2020, para. 6.

⁶² See e.g. the “Decision on the Prosecutor’s application for leave to appeal Pre-Trial Chamber III’s decision on disclosure”, *supra* note 34, para. 14.

⁶³ See the Defence Request, *supra* note 1, para. 27.

⁶⁴ See the Defence Appellant Brief against the 8 March Reparations Order, *supra* note 12.

⁶⁵ *Idem*, para. 18.

to determine whether an issue would significantly affect the ‘outcome of the trial’ under article 82(1)(d) of the Statute, “[t]he Pre-Trial or Trial Chamber must ponder the possible implications of a given issue being wrongly decided on the outcome of the case. The exercise involves a forecast of the consequences of such an occurrence”.⁶⁶ The Appeals Chamber interpreted the meaning conveyed by ‘advance’ as ‘move forward’ by ensuring that the proceedings follow the right course;⁶⁷ “[r]emoving doubts about the correctness of a decision or mapping a course of action along the right lines provides a safety net for the integrity of the proceedings”.⁶⁸

41. Here again, the issues identified by the Defence⁶⁹ are already before the Appeals Chamber, therefore litigating them twice simultaneously is not likely to advance the proceedings. The Defence argues that it should nonetheless be granted, based on “*the fact that the IDIP is intended for quick implementation*”.⁷⁰ However, the Defence overlooks the fact that the TFV must submit the required amendments in its next Report to the Chamber. And in turn, the Defence, and the Legal Representatives, will be in a position to make observations thereon.

42. Accordingly, it clearly stems from the Defence Request that the purported five Issues identified in the Request do not meet the criteria of article 82(1)(d) of the Statute and shall therefore be dismissed.

⁶⁶ See the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal” (Appeals Chamber), *supra* note 27, para. 13.

⁶⁷ *Idem*, para. 15.

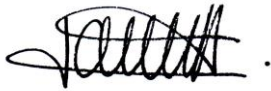
⁶⁸ *Ibid.*

⁶⁹ See the Defence Request, *supra* note 1, paras. 26, and 28-31.

⁷⁰ *Idem*, paras. 28 *et seq.*

IV. CONCLUSION

43. For the foregoing reasons, as none of the Issues identified by the Defence in its Request fulfil the applicable legal criteria, the Legal Representatives respectfully request the Chamber to dismiss it in its entirety.



Sarah Pellet
Common Legal Representative of the
Former Child soldiers



Dmytro Suprun
Common Legal Representative of the
Victims of the Attacks

Dated this 6th day of August 2021

At The Hague, The Netherlands