

**Cour
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**International
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THE APPEALS CHAMBER

Before: Judge Marc 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

**Response of the Common Legal Representative of the Victims of the Attacks to the
“Observations in relation to the ‘Defence Appellant Brief Against the 8 March
Reparations Order’ and the ‘Appeal Brief of the Common Legal Representative of
the Victims of the Attacks against the Reparations Order’”**

Source: Office of Public Counsel for Victims (CLR2)

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 Victims of the Attacks (the “Legal Representative” or the “CLR2”) hereby submits his response to the “Observations in relation to the ‘Defence Appellant Brief Against the 8 March Order’ and the ‘Appeal Brief of the Common Legal Representative of the Victims of the Attacks against the Reparations Order” (the “TFV Observations” or the “Observations”).¹

2. The Legal Representative wishes to emphasise that the TFV Observations have no impact on his appeal submissions or his response to the Defence’s appeal. He maintains that the Reparations Order is deficient in many key aspects. These deficiencies cannot be remedied by *ex post factum* proposals of the TFV on how it interprets its own role in the implementation of the Reparations Order.

3. The Legal Representative further underscores that the Reparations Order must be scrutinised in light of the applicable appellate standards and not on the basis of the manner in which it might be intended to be interpreted by the TFV as the implementing entity. In this regard, the Legal Representative specifically recalls that one important aspect of his appeal against the Reparations Order is the *extent* of discretion conferred upon the TFV.

4. As authorised to do so, the Legal Representative nonetheless avails himself of the opportunity to respond to several aspects of the TFV Observations.

5. While some of the TFV’s proposals or intended courses of action are generally agreeable, it should be borne in mind that they concern preliminary proposals that are not set in stone. In the context of the deficiency of the Reparations Order that failed to set out any kind of guiding principles, there are thus no guarantees that the TFV’s

¹ See the “Observations in relation to the ‘Defence Appellant Brief Against the 8 March Reparations Order’ and the ‘Appeal Brief of the Common Legal Representative of the Victims of the Attacks against the Reparations Order’”, [No. ICC-01/04-02/06-2713 A4 A5](#), 30 September 2021 (the “TFV Observations”).

current stance and proposed courses of action will not be departed from in the future. Furthermore, the TFV's general reference to its Rules and Regulations are insufficient in this regard. They only regulate the general operation of this administrative body; they do not regulate the implementation of fair and meaningful reparations in this case in particular.

6. Another facet of the material impact of the Reparations Order's deficiencies is even emphasised by virtue of the TFV Observations. The process necessary for establishing the basic parameters of reparations through the TFV's proposals to Trial Chamber II, the parties' subsequent observations thereon, and the Trial Chamber's approval process – which may include the latter asking for amendments - unduly and unnecessarily add time-consuming steps to the process. The TFV should only be engaging in setting up an *implementation* plan, not with setting out its framework in the first place. The latter could and should have been resolved through the issuance of guidelines as part of the operative part of the Reparations Order, as argued in the CLR2 Appeal Brief.²

7. For all these reasons, the TFV Observations may be of some assistance in designing a new or amended Reparations Order; they are, however, incapable of curing any defects in the Reparations Order under appeal before the Appeals Chamber.

II. PROCEDURAL BACKGROUND

8. On 8 March 2021, Trial Chamber VI issued the "Reparations Order" (the "Reparations Order").³

² See the "Appeal Brief of the Common Legal Representative of the Victims of the Attacks against the Reparation Order", [No. ICC-01/04-02/06-2674 A4](#), 7 June 2021 (the "CLR2 Appeal Brief"), para. 148.

³ See the "Reparations Order" (Trial Chamber VI), [No. ICC-01/04-02/06-2659](#), 8 March 2021.

9. On 8 April 2021, the Legal Representative and the Defence filed their respective Notices of Appeal against the Reparations Order.⁴

10. On 7 June 2021, the Legal Representative⁵ and the Defence⁶ filed their respective Appeal Briefs against the Reparations Order.

11. On 22 June 2021, the TFV requested authorisation to submit observations on a number of issues arising from the Defence's and the Legal Representative's respective appeals.⁷

12. On 9 August 2021, the Defence filed its response to the Legal Representative's Appeal,⁸ and the Common Legal Representative of the Former Child Soldiers filed her response to the Appeal Briefs of the Legal Representative and the Defence.⁹

13. On the same day, the Legal Representative filed his response to the Defence's Appeal Brief.¹⁰

14. On 9 September 2021, the Appeals Chamber issued the "Decision on various procedural issues", whereby it *inter alia* authorised the TFV to submit observations on seven distinct questions relating to the parties' appeals no later than

⁴ 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 April 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 April 2021.

⁵ See the CLR2 Appeal Brief, *supra* note 2.

⁶ See the "Defence Appellant Brief against the 8 March Reparations Order", [No. ICC-01/04-02/06-2675 OA4](#), 7 June 2021.

⁷ See the "Observations on the Defence Request for Suspensive Effect and Request pursuant to rule 103 of the Rules of Procedure and Evidence", [No. ICC-01/04-02/06-2679 A4 A5](#), 22 June 2021.

⁸ See the "Response on behalf of Mr Ntaganda to the 'Appeal Brief of the Common Legal Representative of the Victims of the Attacks against the Reparations Order'", [No. ICC-01/04-02/06-2702 A4 A5](#), 9 August 2021.

⁹ See the "Response of the Common Legal Representative of the Former Child Soldiers on Mr Ntaganda and the Victims of the Attacks' Appeals against the Reparations Order (ICC-01/04-02/06-2659)", [No. ICC-01/04-02/06-2700 A4 A5](#), 9 August 2021.

¹⁰ See the "Response of the Common Legal Representative of the Victims of the Attacks to the Defence's Appeal Brief (ICC-01/04-02/06-2675)", [No. ICC-01/04-02/06-2701 A5](#), 9 August 2021 (the "CLR2 Response").

30 September 2021.¹¹ It invited the parties to submit a response to the TFV Observations by 25 October 2021.¹²

15. On 30 September 2021, the TFV filed its Observations.

III. SUBMISSIONS

a. Q.1. Can the TFV determine the eligibility of the victims of Mr Ntaganda on the basis of the provisions of the Reparations Order? Would it require more explicit eligibility criteria in order to do so? How does the TFV plan to proceed in implementing the mandate it has received from the Trial Chamber on this issue? Will there be oversight of this process by Trial Chamber II?

16. For all the reasons set out in his Appeal Brief,¹³ the Legal Representative disagrees with the TFV's characterisation that the Reparations Order provides a 'firm basis' for the TFV to proceed,¹⁴ and that the Reparations Order is fully in line with the existing legal framework.¹⁵ As argued in the CLR2 Appeal Brief,¹⁶ Trial Chamber VI failed to give any clear guidance and/or set out a basic operational framework. To the contrary, it left full discretion to the TFV to propose a system the latter sees fit. In these circumstances, and contrary to its statement that "*the Reparations Order is sufficiently clear for it to proceed*",¹⁷ the TFV can operate in an environment that sets no clear limits or anchor point and hence makes the entire implementation process unpredictable for all other involved parties and participants. The fact that there is no clear framework for the TFV to operate in, further implies that there is an implied need for the newly created Trial Chamber II to intervene in order to regulate the TFV's exercise of discretion and/or to address matters which should have been settled at the outset by Trial Chamber VI. This is for instance illustrated in the Decision of 23 July 2021 (the

¹¹ See the "Decision on various procedural issues" (Appeals Chamber), [No. ICC-01/04-02/06-2708 A4 A5](#), 9 September 2021 (the "Decision on procedural issue"), para. 28.

¹² *Idem*, para. 29.

¹³ See the CLR2 Appeal Brief, *supra* note 2.

¹⁴ See the TFV Observations, *supra* note 1, para. 6.

¹⁵ *Idem*, para. 9.

¹⁶ See the CLR2 Appeal Brief, *supra* note 2, Ground 6.

¹⁷ See the TFV Observations, *supra* note 1, para. 30.

“23 July Decision”) where Trial Chamber II disapproved of the TFV’s proposal of further delegation of the process to its implementing partners.¹⁸

17. The Legal Representative takes note of the TFV’s endeavour to propose “*an appropriate model for the process leading to the ‘administrative eligibility assessment’*” in accordance with the Reparations Order in its Draft Implementation Plan.¹⁹ He notes in this regard that, while referring to the TFV’s discretion in the matter,²⁰ Trial Chamber II provided some guidance that is meant to be taken into account by the TFV for the purposes of the design of the ‘administrative eligibility assessment’. In particular, Trial Chamber II held that the administrative eligibility assessment should be harmonised, centralised, and similar for all victims so as to avoid potentially different treatment of the victims of this case and inconsistencies of approach.²¹

18. In relation to judicial oversight of the administrative eligibility process, the Legal Representative takes note of the TFV’s observation that “*the entire process is overseen by the Trial Chamber as set out in the Regulations of the Trust Fund*”,²² and that “*it appears that the Trial Chamber has broad discretion in moulding its judicial oversight role in relation to the eligibility assessment of beneficiaries for collective reparations*”.²³ He notes in this regard that neither Trial Chamber VI nor Trial Chamber II has envisioned their involvement in the eligibility assessment of the victims concerned. For the time being, Trial Chamber II has limited its oversight role to being provided with bi-monthly reports on the details of the implementation of the Initial Draft Implementation Plan.²⁴ Trial Chamber II further made it clear that “[a]fter approval of the DIP, the Chamber envisions that its role and therefore litigation before [it] will be minimal, with the Chamber

¹⁸ 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 “23 July Decision”), para. 36.

¹⁹ See the TFV Observations, *supra* note 1, para. 10.

²⁰ See the 23 July Decision, *supra* note 18, para. 35.

²¹ *Idem*, para. 37.

²² See the TFV Observations, *supra* note 1, para. 12.

²³ *Idem*, para. 16.

²⁴ *Idem*, para. 46.

*solely retaining oversight over the implementation process and inviting and considering submissions only when strictly necessary”.*²⁵

19. Absent clear guidelines and/or a basic operational framework in the Reparations Order, Trial Chamber II, the TFV and the parties are now engaging in a time-consuming process of resolving where the competencies lie and what the relevant criteria are as the process is moving. These parameters should have been set out in the Reparations Order. The Legal Representative anticipates that pending the Appeals Chamber’s determination on the appeals, any of the TFV’s moves forward has the high potential of being subject to litigation.

20. The TFV’s understanding that it feels confidently empowered to design the process, has no impact on the parties’ appeal submissions in relation to the material errors in Trial Chamber VI’s exercise of discretion regarding the way and extent to which the latter delegated its judicial functions, including the design of eligibility assessment, to the TFV. The Legal Representative continues to stand by his appeal submissions in this regard.

b. Q.2. From the perspective of the TFV, can the Defence and/or the legal representatives of victims challenge the choice of victims entitled to the benefit of reparations which the TFV has been tasked to provide? Can the Defence and/or the legal representative of victims do so before Trial Chamber II? At what stage of the proceedings would this occur?

21. The Legal Representative takes note of, and generally agrees with, the TFV’s submissions in response to the second question of the Appeals Chamber.²⁶ Yet, as argued above, Trial Chamber VI should have settled matters related to the design of the eligibility assessment, including the review thereof, in the Reparations Order.

22. As set out at length in his response to the Defence Appeal Brief,²⁷ the Legal Representative concurs in particular with the TFV that the type of reparations ordered

²⁵ *Idem*, para. 40.

²⁶ See the Decision on procedural issues, *supra* note 11, para. 28.b.

²⁷ See the CLR2 Response, *supra* note 10, paras. 93, 98-102, 146-147, 150, 155-159, 162-165.

precludes the involvement of the Defence beyond general observations on the criteria and process.²⁸

c. Q.3. Can the TFV identify and determine the specific modalities of the reparations to be implemented on the basis of the Reparations Order? Can the Defence make submissions in this regard?

23. The Legal Representative has no observations to make in relation to the TFV's submissions in response to the third question of the Appeals Chamber.

d. Q.4. Can the TFV allocate the reparations between the child soldiers and the victims of the attacks on the basis of the Reparations Order?

24. Generally taking note of the TFV's submissions in response to the fourth question posed by the Appeals Chamber, the Legal Representative has a number of observations to make as regards individual aspects thereof.

25. Primarily, the Legal Representative disagrees with the TFV's submission that Trial Chamber VI estimated a number of potential beneficiaries.²⁹ As set out at length in his Appeal Brief, Trial Chamber VI erred in not providing an estimated number of beneficiaries in the present case. This element was crucial for the purposes of the determination of Mr Ntaganda's liability for reparations.³⁰ Consequently, the Legal Representative takes issue with the TFV's submission that "[d]evising the reparation measures is a matter not so much of numbers of victims, but of the effect of the measures on the victims and their communities".³¹ The Legal Representative maintains that the number of eligible beneficiaries in this case are in the tens of thousands and that it is one of the paramount parameters Trial Chamber VI should have set out in the Reparations Order. Therefore, it matters tremendously for how many people reparation measures are being devised in order to achieve their aim of benefiting victims and their communities.

²⁸ See the TFV Observations, *supra* note 1, para. 18.

²⁹ *Idem*, paras. 27-29.

³⁰ See the CLR2 Appeal Brief, *supra* note 2, Grounds 1, 3 and 6 in part.

³¹ See the TFV Observations, *supra* note 1, para. 29.

26. The Legal Representative submits that the approach taken by the TFV is therefore highly problematic. The number of beneficiaries will necessarily determine the effect of the measures and Trial Chamber VI's failure to set a properly grounded estimated number cannot be overcome in a procedurally sound manner by putting forth an entirely flexible concept as that effectively proposed by the TFV in its Observations.³²

27. As regards the proposed allocation of funds between the victims of the attacks and the former child soldiers, the TFV's submissions again highlight the material impact of Trial Chamber VI's failure of setting out clear guidelines in this regard.³³ The TFV proposes a fluid and adaptable process that can be changed and modified as time progresses.³⁴ The Legal Representative not only takes issue with such approach, but underlines that precisely such practice is prone to resulting in unequal treatment in practical terms as argued at length in Ground 5 of his Appeal Brief.

e. Q.5. Does the TFV intend to request Trial Chamber II for further clarity on some of the aforementioned issues? What modality of dialogue with Trial Chamber II does it envisage?

28. The Legal Representative has no observations to make in relation to the TFV's submissions in response to the fifth question posed by the Appeals Chamber.

f. Q.6. Is it of any consequence that Mr Ntaganda is not of Hema ethnicity in relation to the process of identification of child soldiers in terms of the number of child soldiers that might come forward in this case?

29. The Legal Representative has no observations to make in relation to the TFV's submissions in response to the sixth question posed by the Appeals Chamber.

³² *Idem*, paras. 27-29.

³³ See the CLR2 Appeal Brief, *supra* note 2, Ground 5.

³⁴ See the TFV Observations, *supra* note 1, para. 29.

- g. *Q.7. How does the TFV intend to implement the Trial Chamber's determination to "adopt, for the purposes of reparations in this case, the reparation programmes ordered by Trial Chamber II in the Lubanga case, in relation to the overlapping victims and harms of both cases"? How will it take into consideration the finding of the Trial Chamber that both convicted persons are jointly and severally liable for the overlapping victims?*

30. The Legal Representative notes that the TFV does not answer the question posed in any substantial or satisfactory manner. It remains entirely vague on how exactly the TFV intends to deal with the issue of liability in practical terms. This is all the more concerning against the backdrop of the unlimited discretion Trial Chamber VI has conferred upon the TFV. Had the Reparations Order set at least minimum guidelines, it would have ensured that the TFV would be confined to such and be accountable for meeting these.³⁵

h. The TFV's General Observations

31. The Legal Representative disagrees with the TFV's submission that Trial Chamber VI did not abuse its discretion in the manner it delegated its powers to the TFV.³⁶ As argued in Ground 6 of the CLR2 Appeal Brief, Trial Chamber VI provided the TFV with unfettered discretion to design an implementation plan as it sees fit or practicable, without giving clear guidance and/or setting out a basic operational framework.³⁷ Thus, the TFV has been given the exclusive responsibility for designing both *an implementation plan and framework requirements governing the implementation process*, whereas the latter should have been set out in the Reparations Order.

32. The TFV argues that "*Trial Chamber [II] demonstrated that, in the litigation of the initial draft implementation plan, [sic] that it is closely monitoring the Trust Fund's activities and exercises its role as the authority approving the implementation plan and eligibility process*".³⁸ However, Trial Chamber II itself acknowledged in the 23 July Decision that

³⁵ See the CLR2 Appeal Brief, *supra* note 2, Ground 5.

³⁶ See the TFV Observations, *supra* note 1, para. 40.

³⁷ See the CLR2 Appeal Brief, *supra* note 2, Ground 6.

³⁸ See the TFV Observations, *supra* note 1, para. 40.

Trial Chamber VI delegated the identification of victims and the assessment of their eligibility to the TFV,³⁹ and set its own oversight role to the basic minimum.⁴⁰ In fact, absent framework requirements for the implementation process in the Reparations Order, Trial Chamber II can only either approve or disapprove of the TFV's proposals. It retains no other power in relation to the process.

33. The Legal Representative, for all the reasons set out in his Appeal Brief,⁴¹ further disagrees with the TFV's characterisation of the Reparations Order being "fully in line" with the Court's jurisprudence and the Regulations of the TFV.⁴² The Reparations Order evinces material errors that affect the process of rendering reparations to victims in a fair and expeditious manner.

34. As regards the TFV's reliance on the Independent Expert Report, and in particular recommendation number 352,⁴³ the Legal Representative wishes to stress that such policy papers cannot and should not have any impact on the resolution of matters before the Appeals Chamber. Whether Trial Chamber VI erred in fact, law or in the exercise of its discretion are legal matters to be resolved in legal fora. Whether it would be desirable, as a matter of policy, to entrust the TFV with certain functions is not a matter currently before the Appeals Chamber.

35. The policy expressed in the recommendation must, therefore, be read in its context.

36. Furthermore, it needs to be noted in this regard that the recommendation expressed by the independent experts might work in the context of a reparations order that has set out all the necessary parameters for the TFV to engage in the task at hand. In the current circumstances, in which the Reparations Order lacks these basic and

³⁹ See the 23 July Decision, *supra* note 18, para. 35.

⁴⁰ *Idem*, paras. 40 and 46.

⁴¹ See e.g. the CLR2 Appeal Brief, *supra* note 2, paras. 45-49.

⁴² See the TFV Observations, *supra* note 1, para. 40.

⁴³ *Idem*, paras. 41-43.

fundamental parameters, the situation is not akin to that envisaged in the recommendation.

37. To conclude, the Legal Representative submits that the judicial oversight, although limited in the circumstances, over the steps taken by the TFV must not be abandoned.

IV. CONCLUSION

38. The Legal Representative maintains that the Reparations Order is fraught with legal and factual errors and that Trial Chamber VI erroneously exercised its discretion, especially with respect to the extent to which it delegated powers to the TFV.

39. The TFV Observations largely emphasise the materiality of these errors in that they illustrate the fact that the entire implementation process is left to the TFV. The proposals made by the TFV will require judicial approval, which unnecessarily prolongs the process and adds uncertainty in the absence of pre-established framework criteria. Had Trial Chamber VI set out the basic requirements in the Reparations Order, such as number of beneficiaries, division of funds between former child soldier victims and victims of the attacks, as well as the administrative eligibility assessment and review mechanism, it would have properly exercised its judicial function and only left the proposal of an implementation plan in accordance with the established framework requirements governing the implementation process to the TFV.

40. For all these reasons, the Legal Representative maintains his submissions on appeal and in response to the Defence's appeal against the Reparations Order.

RESPECTFULLY SUBMITTED

A handwritten signature in black ink, appearing to read 'D. Suprun', with a long vertical stroke extending downwards from the bottom of the signature.

Dmytro Suprun
Common Legal Representative of the Victims of the Attacks

Dated this 25th Day of October 2021

At The Hague, The Netherlands