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TRIAL CHAMBER VI

Before: Judge Chang-ho Chung, Single Judge

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

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

Public

**Prosecution's response to the Registry's observations, pursuant to the
Single Judge's "Order for preliminary information on reparations"
(ICC-01/04-02/06-2391-Anx1)**

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Introduction

1. The Prosecution hereby responds to the Registry's preliminary observations on reparations. The Prosecution supports the Registry's recommendation that the Chamber issue a preliminary decision setting out the approach and procedure for these reparations proceedings. The reparations proceedings must ensure equal access to all victims (participating victims and new beneficiaries) who suffered harm resulting from the crimes for which Mr Ntaganda has been convicted, while respecting Mr Ntaganda's rights.

Background

2. On 25 July 2019, the Single Judge of Trial Chamber VI issued an order for preliminary information on reparations.¹ The Single Judge requested the Registry to submit: (i) information on, and any proposed methodology for, the identification of victims (not yet participating); (ii) observations on whether experts may be usefully appointed to assist the Chamber pursuant to rule 97 and, if so, submit a list of relevant experts available; and (iii) an update on the security situation in the Democratic Republic of the Congo ("DRC").² The Chamber also indicated that it intends to order the Legal Representatives of Victims ("LRVs"), the Defence, the Prosecution, the Registry and the Trust Fund for Victims ("TFV") to submit observations on reparations six weeks after the issuance of the sentencing decision.³

3. On 5 September 2019, the Registry filed its observations.⁴ The Registry provided recommendations by the Victims Participation and Reparations Section

¹ ICC-01/04-02/06-2366 ("[Preliminary Order](#)").

² [Preliminary Order](#), para. 4.

³ [Preliminary Order](#), para. 5.

⁴ ICC-01/04-02/06-2391 ("[Registry Observations](#)") with public Annex I and confidential Annex II. In an email on 18 September, Trial Chamber VI extended the time limit to file responses to the Registry Observations to 3 October 2019.

(“VPRS”) on the conduct of the reparation proceedings (Annex I),⁵ and a security report (Annex II).⁶

4. The VPRS has conducted a preliminary mapping of potential new victim beneficiaries and gathered information on documentation that could be used to determine eligibility for reparations.⁷ Although 2,132 victims are authorised to participate in the proceedings,⁸ not all participating victims would be entitled to reparations due to the scope of the conviction.⁹ With the possible exception of thirty-eight victims, none of the participating victims appear to have filed requests for reparations within the terms of rule 94.¹⁰

5. The VPRS (with the collaboration of the Legal Representatives) proposes to re-assess the eligibility for reparations of the participating victims,¹¹ and to identify new beneficiaries through individualised reparations forms that “*in essence* mirrors the system adopted for participation at trial”.¹² The VPRS aims at identifying almost all victim beneficiaries before issuance of the reparations order.¹³

⁵ ICC-01/04-02/06-2391-Anx1 (“[VPRS Observations](#)”).

⁶ ICC-01/04-02/06-2391-Conf-Anx2.

⁷ [VPRS Observations](#), paras. 8, 22, 28.

⁸ [VPRS Observations](#), para. 5.

⁹ [VPRS Observations](#), para. 6 and fn. 7 (noting that 18 municipalities included in the confirmation decision were not included in the Judgment).

¹⁰ [VPRS Observations](#), para. 7 (thirty-eight participating victims submitted a previous version of the application form including a section requesting reparations under rule 94. The rest of the victims were only asked whether they “intend to apply for reparations”). *See also* fn. 9 (noting that seventy-seven participating victims initially submitted “joint forms” (including participation and reparations applications) which were not filed in the case as they subsequently submitted forms approved solely for participation).

¹¹ [VPRS Observations](#), para. 6; fns. 17, 20.

¹² [VPRS Observations](#), paras. 10, 12. *See also* para. 11 (proposing that the beneficiaries identified in the *Lubanga* case and who also fall within the remit of this case are afforded the opportunity to complete “a reparations application form for the current proceedings”).

¹³ [VPRS Observations](#), paras. 11, 31(ix). *See also* fn. 19 (noting the possibility that new reparations beneficiaries come forward after the issuance of the reparations order and proposing a similar mechanism of verification than previously identified victims). The Appeals Chamber has indicated that the exact number of victims’ beneficiaries is not necessarily determinative to establish the reparations award. *See* ICC-01/04-01/06-3466-Red (“[Lubanga Second Reparations AD](#)”), para. 171 (finding that the reparations award was not affected by the identification of new victim beneficiaries in the implementation stage since the Trial Chamber did not calculate the award by solely assessing the harm alleged in the individual victims’ applications).

Submissions

6. The Prosecution hereby responds to the VPRS Observations.

7. *First*, the Prosecution welcomes the VPRS' proposal of calculating the updated number of participating victims who have not been impacted by the reduced scope of the case following the judgment,¹⁴ and of providing the estimates of potential new victim beneficiaries (non-participating) and relevant forms of documentation that could be used to support potential victims' claims.¹⁵ In addition to the draft reparations form,¹⁶ the Chamber would also benefit from being informed of the criteria and information relied upon by the VPRS to estimate the number of potential new beneficiaries. This information should be provided ahead of the parties' and participants' submissions tentatively scheduled six weeks after the sentencing decision.

8. *Second*, the Prosecution supports the Trial Chamber issuing a preliminary decision on the procedure and approach it intends to adopt in these reparation proceedings after receiving submissions from the LRVs, the convicted person, the Registry, the TFV, the Prosecution as well as suggested experts and potential *amici curiae*.¹⁷ The Chamber should ensure that all victims (participating victims and new beneficiaries) are assessed against the same criteria.¹⁸ To that purpose, the Prosecution agrees with the VPRS that the Chamber should identify the criteria to be applied to all victim beneficiaries and the requirements of the reparations applications or forms.¹⁹ In the forthcoming observations on

¹⁴ [VPRS Observations](#), para. 6.

¹⁵ [VPRS Observations](#), paras. 8, 31(i).

¹⁶ [VPRS Observations](#), paras. 12, 31(ii).

¹⁷ VPRS requests that this decision contains information on criteria for victim eligibility, standard of proof and its proposed three-fold identification system. *See* [VPRS Observations](#), paras. 11, 17 and 18.

¹⁸ [Lubanga Second Reparations AD](#), paras. 168-169. *See also* ICC-01/12-01/15-259-Red2 (“[Al-Mahdi Reparations AD](#)”), para. 56. *See also* [VPRS Observations](#), fn. 50.

¹⁹ [VPRS Observations](#), paras. 6, 11, 17 and 18.

reparations, Mr Ntaganda and the LRVs will be able to make submissions on these and other issues.²⁰

9. Importantly, the Chamber should clarify in its preliminary decision whether participating victims will be required to submit applications anew.²¹ In any event, the Chamber should inform participating victims that they would be screened again for the purposes of reparations.²² The Chamber should also clarify whether it would decide on each individual application for reparations, if it chooses to request them.²³ This appears to be the VPRS' recommendation as it proposes that the Chamber either ratify or amend the VPRS' individual assessment of each victim (for Groups A and B) or it determine the eligibility of certain victims (for Group C).²⁴

10. Even if the Chamber adopts the VPRS' suggested approach (and identifies all victim beneficiaries in the reparations order), the Chamber should also consider other information, such as reports and/or observations from relevant organisations, experts and the TFV on, *inter alia*, the harm caused by Mr Ntaganda's crimes and the cost of reparations to determine Mr Ntaganda's

²⁰ Once the Chamber issues its preliminary decision, Mr Ntaganda will be on notice of these relevant matters thus further ensuring respect for his rights. See [Lubanga Second Reparations AD](#), para. 3. As VPRS notes, this is consistent with the Appeals Chamber's approach in the *Lubanga* case where it found that Mr Lubanga's rights were respected by permitting him to review the TFV's screening process and comment on the draft implementation plan. See ICC-01/04-01/06-3129 ("[Lubanga First Reparations AD](#)"), para. 167. See [VPRS Observations](#), para. 26, fn. 43.

²¹ The Prosecution understands that this is the VPRS' suggestion, although it only refers to the VPRS' 'assessment' of participating victims against the same criteria applied to new victims (para. 6) and although it does not indicate that the newly developed forms are requests for reparations under rule 94 (para. 12). *But see* [VPRS Observations](#), fn. 9 (making reference to the relevance of some information in the already filed thirty-eight victims' applications for reparations "for the application of article 75(1) of the Statute and rule 95 of the Rules"). If a Chamber does not wish to receive victims' applications under rule 94, it could still issue a reparations order *proprio motu* under rule 95. See [Lubanga Second Reparations AD](#), para. 85 ("Rule 95 is concerned with the procedure that is to be followed if no requests for reparations have been received and the trial chamber nevertheless decides to proceed to consider the question of reparations, on its own motion").

²² [Lubanga Second Reparations AD](#), para. 156 ("the trial chamber must notify, as early as practicable, the victims who were authorised to participate in those proceedings, but who also seek reparations, that they will be screened again in the reparations proceedings").

²³ [Lubanga Second Reparations AD](#), paras. 3, 90.

²⁴ [VPRS Observations](#), paras. 18, 25, 31 (viii)-(ix).

liability in the final reparations order.²⁵ To the extent possible, the Chamber should indicate in its preliminary decision the type of information that it intends to rely on when determining the reparations award (victims' applications, TFV's and expert submissions and reports... etc).

11. Further, the Chamber should also inform the parties of the manner in which it will assess the relevant information, including the standard of proof it will apply and the applicable standards on the requisite causal nexus between the harm and Mr Ntaganda's crimes.²⁶

12. The Prosecution submits that the Chamber's preliminary decision cannot be directly appealed under article 82(4) of the Statute, since it would not constitute "an order under article 75" (that is, a reparations order).²⁷ Article 82(4) only permits a direct appeal against a reparation order by the victims, the convicted person or a *bona fide* owner of property adversely affected.²⁸ The procedure followed in the *Lubanga* case is inapposite to these proceedings. In the *Lubanga* case, the Appeals Chamber exceptionally permitted two direct appeals against: (i) the reparations order issued by Trial Chamber I *and* (ii) the reparations award determined by Trial Chamber II (that is, Mr Lubanga's liability for reparations), since the initial reparations order did not include the award, although it should

²⁵ See below para. 13, referring to [Lubanga Second Reparations AD](#), para. 108.

²⁶ [Lubanga Second Reparations AD](#), paras. 3, 90.

²⁷ [Lubanga First Reparations AD](#), para. 1 (listing the five essential elements of a reparations order). With respect to the fifth element, the VPRS proposes that the reparations order in this case includes the eligible victims.

²⁸ See also ICC-01/04-01/06-2953 ("[Lubanga Admissibility Reparations AD](#)"), paras. 49, 65. VPRS does not indicate the statutory provision justifying an appeal against this preliminary decision. See [VPRS Observations](#), paras. 18(3) ("The completion of field registration and transmission of applications in Groups A, B and C would be finalised before the conclusion of the anticipated *appeals phase*") and 19 ("Should the abovementioned sequence of events be carried out, and should a *potential appeal process* lead to a confirmation of the Judgment where appealed, the Chamber would be in the position to issue its reparations order at the conclusion of the *potential appeals phase*, complete with all 'essential elements', including a Chamber's certified list of beneficiaries"). See also fn. 21 ("Focusing the main litigating role of the parties on the pre-order reparations and *appeals phase*[...]") (emphasis added).

have included it.²⁹ The Chamber's preliminary decision could however be appealed under article 82(1)(d).³⁰

13. *Finally*, the Prosecution endorses the VPRS's recommendation to appoint experts able to inform the Chamber on the long term consequences of Mr Ntaganda's crimes affecting victim communities (including transgenerational harm).³¹ The Chamber would also benefit from expert observations on:

- the causal nexus between the crimes and the harm in circumstances with possible intervening factors, and a feasible manner to establish the nexus bearing in mind the rights of the convicted person;³²
- factual presumptions with respect to certain harms (such as loss of property and psychological harm), and the economic value of these presumptions;³³ and/or

²⁹ [Lubanga First Reparations AD](#), para. 242 (finding that “the Trial Chamber’s determination of the amount of Mr Lubanga’s liability for the awards for reparations constitutes a part of the order for reparations within the meaning of article 75(2) of the Statute and is therefore appealable, pursuant to article 82(4) of the Statute”). The reparation proceedings in the *Lubanga* case were the first reparation proceedings at the ICC and the Appeals Chamber provided guidance with respect to the content of a reparations order. See [Lubanga First Reparations AD](#), para. 1. See also [Lubanga Admissibility Reparations AD](#), paras. 51, 63-64 (finding that Trial Chamber I’s decision on reparations was in fact a reparation order – although the Trial Chamber did not consider that it was - because the decision represented the final judicial decision in respect of reparations). The Appeals Chamber subsequently amended the order. See [ICC-01/04-01/06-3129-AnxA](#).

³⁰ See e.g. [ICC-01/04-01/06-3256-tENG](#), para. 9 (“The Chamber recalls that the reparations stage is distinct from the criminal proceedings. However, the Chamber considers that the term ‘proceedings’ in article 82(1)(d) of the Statute refers, in principle, to the judicial proceedings before the Court *in their entirety* and, consequently, the reparations proceedings are not excluded. Moreover, it seems appropriate that article 82(1)(d) of the Statute, the object of which is to pre-empt the repercussions of erroneous decisions on the fairness of the proceedings, should also apply to the reparations stage”).

³¹ [VPRS Observations](#), para. 33.

³² For example, if the Chamber chooses the “but/for” and “proximate cause” nexus, the Chamber will need to determine when the causality chain is interrupted when harm appears to have more than one cause and, in particular, the relevance and impact of other possible intervening factors and whether those factors may also result from the convicted person’s crimes. See e.g. ICC-01/04-01/07-3804-Red (“[Katanga Transgenerational Harm Decision](#)”) paras. 15-17, 28-34 (setting out Trial Chamber II’s approach on this matter) and paras. 35-142 (applying the Chamber’s approach to the five victims claiming transgenerational harm).

³³ ICC-01/04-01/07-3778-Red (“[Katanga Reparations AD](#)”), para. 75 (finding that “[...]factual presumptions permit a trial chamber to presume a given fact to be established to the requisite standard of proof in the absence of direct evidence.[...] in the absence of direct evidence in certain circumstances, for example, owing to difficulties in obtaining evidence, a trial chamber may resort to factual presumptions in its identification of the heads of harm. The Appeals Chamber considers that resort to factual presumptions in reparations proceedings is within a trial chamber’s discretion in determining “what is ‘sufficient’ for

- the cost of reparation programmes as deemed appropriate. As the Appeals Chamber has confirmed, the cost of reparations (including reparation programmes) together with the different harms suffered by the victims are relevant considerations to determine the amount of the convicted person's liability for reparations.³⁴

14. These observations may inform the Chamber's preliminary decision regarding, among others, the requirements of the application forms and provide further notice to the parties and participants as to the Chamber's approach in these reparation proceedings.

Conclusions

15. The Prosecution respectfully requests that its preliminary observations be considered.



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At The Hague, The Netherlands

purposes of an applicant meeting the burden of proof'. However, the Appeals Chamber emphasises that, while a trial chamber has discretion to freely evaluate the evidence of harm in a particular case, this discretion is not unlimited. A trial chamber must respect the rights of victims as well as the convicted person when resorting to presumptions") and 91 ("it may have been advisable for the Trial Chamber to have indicated to the parties and participants that it was intending to draw the impugned presumption, including but not limited to inviting submissions on its formulation"). *See also* para. 126 (finding that the Chamber's presumption of psychological harm of all inhabitants of Bogoro resulting from the loss of family members (close and distant) was reasonable).

³⁴ [Lubanga Second Reparations AD](#), para. 108 ("The amount of the convicted person's liability should be fixed taking into account the cost of reparations considered to be appropriate and that are intended to be put in place (which can include reparations programmes) and the different harms suffered by the different victims, both individual victims (direct and indirect) in addition to, in particular circumstances, the collective of victims"). *See also* para. 107 (noting that the overall purpose of reparations is "to repair the harm caused and to achieve, to the extent possible, *restitutio in integrum*"). *See also* [Katanga Reparations AD](#), paras. 2, 72.