

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **21 April 2020**

**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**

**Trust Fund for Victims' observations on the impact of COVID-19 on operational  
capacity**

**Source: The Trust Fund for Victims**

**To be notified in accordance with regulation 31 of the *Regulations of the Court* to:****Office of the Prosecutor**

Ms Fatou Bensouda  
 Mr James Stewart  
 Ms Nicole Samson

**Counsel for the Defence**

Mr Stéphane Bourgon

**Legal Representatives of Victims**

Ms Sarah Pellet  
 Mr Dmytro Suprun

**Legal Representatives of Applicants****Unrepresented Victims****Office of Public Counsel for  
Victims**

Ms Paolina Massidda

**Unrepresented Applicants for  
Participation/Reparation****Office of Public Counsel for the Defence****States' Representatives****Amicus Curiae****REGISTRY****Registrar**

Mr Peter Lewis

**Counsel Support Section****Victims and Witnesses Unit**

Mr Nigel Verrill

**Detention Section****Victims Participation and Reparations  
Section**

Mr Philipp Ambach

**Other**

Mr Jean-Claude Aubert  
 Ms Fabienne Chassagneux

## I. PROCEDURAL HISTORY

1. On 8 July 2019, Trial Chamber VI (“Trial Chamber”) convicted Mr Ntaganda for 18 counts of war crimes and crimes against humanity committed in Ituri, Democratic Republic of the Congo (“DRC”), between 2002 and 2003.<sup>1</sup>
2. On 5 September 2019, in response to the “Order for preliminary information on reparations”,<sup>2</sup> the Registry filed its submissions, attaching its preliminary observations as an annex (“Registry’s Preliminary Observations”).<sup>3</sup> On 3 October 2019, the legal representatives of victims (“LRVs”), the defence team for Mr Ntaganda (“Defence”), the Office of the Prosecutor, and the Trust Fund for Victims (“Trust Fund”) submitted their respective responses to the Registry’s Preliminary Observations.<sup>4</sup>
3. On 5 December 2019, the Single Judge issued an order setting the reparations phase calendar, giving the possibility to parties and participants to submit observations on 28 February 2020, as well as final submissions on 30 October 2020.<sup>5</sup>
4. On 28 February 2020, the Defence,<sup>6</sup> the LRVs,<sup>7</sup> the Registry,<sup>8</sup> the Prosecution,<sup>9</sup> and the Trust Fund<sup>10</sup> (“Trust Fund Submissions on Reparations”) made their respective submissions on reparations. These were followed by observations submitted by the Government of the DRC, and the International Organization for Migration.

<sup>1</sup> Judgment with public Annexes A, B, and C, [ICC-01/04-02/06-2359](#).

<sup>2</sup> Order for preliminary information on reparations, 25 July 2019, [ICC-01/04-02/06-2366](#), with Public Annex I and Confidential Annex II.

<sup>3</sup> Registry’s observations, pursuant to the Single Judge’s “Order for preliminary information on reparations” of 25 July 2019, ICC-01/04-02/06-2366, with Public Annex I and Confidential Annex II”, [ICC-01/04-02/06-2391](#).

<sup>4</sup> Joint Response of the Legal Representatives of Victims to the Registry’s Observations on Reparations, [ICC-01/04-02/06-2430](#); Response on behalf of Mr. Ntaganda to Registry’s preliminary observations on reparations, [ICC-01/04-02/06-2431](#); 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), [ICC-01/04-02/06-2429](#); Trust Fund for Victims’ response to the Registry’s Preliminary Observations pursuant to the Order for Preliminary Information on Reparations, 3 October 2019, [ICC-01/04-02/06-2428](#) (“Trust Fund Response on Registry Preliminary Submissions on Reparations”).

<sup>5</sup> Order setting deadlines in relation to reparations, 5 December 2019, [ICC-01/04-02/06-2447](#).

<sup>6</sup> Public Redacted Version of “Defence submissions on reparations”, [ICC-01/04-02/06-2479-Red](#) (“Defence Submissions on Reparations”).

<sup>7</sup> Public Redacted Version of the “Submissions by the Common Legal Representative of the Victims of the Attacks on Reparations”, [ICC-01/04-02/06-2477-Red](#) (“LRV Attack Submissions on Reparations”); Submissions on Reparations on behalf of the Former Child soldiers, [ICC-01/04-02/06-2474](#) (“LRV Child Soldiers Submissions on Reparations”).

<sup>8</sup> Registry’s Observations on Reparations, [ICC-01/04-02/06-2475](#) with one public [annex](#), one confidential annex and one confidential, *ex parte* annex (“Registry Submissions on Reparations”).

<sup>9</sup> Prosecution’s Observations on Reparations, [ICC-01/04-02/06-2478](#) (“Prosecution Submissions on Reparations”).

<sup>10</sup> Trust Fund for Victims’ observations relevant to reparations, [ICC-01/04-02/06-2476](#).

5. On 9 April, the Single Judge issued an order instructing the parties, the Registry and the Trust Fund to provide information on the impact of COVID-19 measures on their respective operational capacity in relation to the reparations proceedings in the *Ntaganda* case.<sup>11</sup>

6. The Trust Fund hereby submits its observations.

## II. GENERAL REMARKS ON THE IMPACT OF COVID-19 IN DRC AND AT THE COURT

7. The COVID-19 outbreak – declared a pandemic by the World Health Organisation on 11 March 2020 – led states and institutions to adopt multiple restrictions on travel and gatherings. Detailed information on the situation in the DRC can be found in the report produced by the Country Analysis Unit.<sup>12</sup> The Trust Fund wishes to highlight the most impacting circumstances of the measures adopted by the DRC and the Court.

8. At the Court, all missions are suspended until further notice and only those missions deemed essential can be undertaken, with the approval of the Crisis Management Team (“CMT”) and Head of Organ. Additionally, as a result of the closure of the Court’s premises from 17 March 2020 onwards, The Hague-based Trust Fund staff involved on the *Ntaganda* case are required to work from home.

9. On 18 March 2020, the DRC authorities decided on the suspension of flights to and from countries in which the pandemic is present, a ban on gatherings and meetings of more than 20 people in public places outside the family home, and other additional precautionary measures. On 24 March 2020, a state of emergency was declared and domestic flights were also suspended. The borders were closed until further notice and regular MONUSCO flights were cancelled. The capital, Kinshasa, was also placed under quarantine as of 28 March 2020. Consequently, and even in the event that the Court would permit a mission to Ituri, it is *de facto* impossible to conduct missions to the DRC until further notice, as well as to organise meetings and workshops in-country. To date and until further notice, staff in the Bunia and Kinshasa offices, both essential and non-essential, are working remotely from their homes.

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<sup>11</sup> Order to provide information on the impact of COVID-19 measures on operational capacity, [ICC-01/04-02/06-2507](#), para. 5.

<sup>12</sup> It is the Trust Fund’s understanding that the report is be submitted by the Registry as an *ex parte* annex to its observations.

10. In short, the various restrictions imposed are such that no mission to DRC is permitted and that even for those staff currently in DRC, they are confined in their homes. The Trust Fund submits however that it has only a limited impact on the reparations proceedings at this stage, as elaborated below.

### **III. IMPACT OF COVID-19 PANDEMIC ON TRUST FUND'S ACTIVITIES IN RELATION TO REPARATIONS PROCEEDINGS**

11. The Trust Fund recalls that on 28 February 2020, all parties and participants submitted their observations, including on the proposed experts. As per the reparations calendar, the Trial Chamber must now determine whether and which experts will be appointed and, if so, these must submit their reports by 28 August 2020. All parties and participants must submit their final observations by 30 October 2020.

12. The Trust Fund submits that the COVID-19 pandemic should not affect the calendar set by the Trial Chamber except on two potential activities: a pre-reparations order screening process, and the use of experts. Otherwise, the Trust Fund submits that the reparations phase can proceed as planned so that the Trial Chamber can issue the reparations order as soon as possible. This is possible and desirable because: (i) the case record already contains sufficient relevant information allowing for the issuance of a reparations order; (ii) the Trust Fund will be in a position to submit data relevant to the determination of the liability by 30 October 2020 despite the COVID-19 outbreak; (iii) the Appeals Chamber set a requirement of expeditiousness of reparations proceedings; and (vi) at the implementation stage, which includes the development of the Trust Fund's draft implementation plan, the "do no harm principle" would permit for necessary adjustments within the parameters of the reparations order.

*The case record is replete of relevant information to the issuance of a reparations order*

13. The Trust Fund recalls that the Appeals Chamber has set out that a reparations order must: (i) be directed against the convicted person, and establish and inform him of his liability; (ii) set out the type of reparations ordered (individual, collective or both) and reasons underpinning said determination; (iii) define the harm caused to direct and indirect

victims; (iv) identify the modalities of reparations; and (v) identify the victims eligible or set out eligibility criteria.<sup>13</sup>

14. The Trust Fund submits that the case record contains relevant information in relation to each of the five elements and that the Trial Chamber can proceed to issuing its reparations order. While competing proposals and arguments have been made in some respects, there is no element on which insufficient information is available that would justify a delay in proceedings including the notification of the reparations order. In particular, extensive information has now been submitted in relation to the scope and nature of the harm,<sup>14</sup> the type of reparations and the appropriate modalities to be ordered,<sup>15</sup> and the eligible victims.<sup>16</sup>

15. In connection to the latter point, and in particular to the screening methodology to be followed in this case, various submissions have been made as to whether it would be feasible and/or desirable for the Trial Chamber to determine which victims are eligible in the reparations order, or to set out the criteria for eligibility therein instead.<sup>17</sup> In addition to its earlier submission on this issue,<sup>18</sup> the Trust Fund wishes to make one observation related to the impact of COVID-19 on this matter.

16. An application-based and pre-reparations order screening process falls within the Trial Chamber's discretion. The Appeals Chamber has stated on two different occasions that

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<sup>13</sup> Appeals Chamber, Prosecutor v. Thomas Lubanga Dyilo, Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012, with Amended order for reparations (Annex A) and public annexes 1 and 2, 3 March 2015, [ICC-01/04-01/06-3129](#) ("First Lubanga Appeals Judgment on Reparations"), para. 32.

<sup>14</sup> See *inter alia* LRV Child Soldiers Submissions on Reparations, paras 38-51; LRV Attack Submissions on Reparations, paras 39-53; Defence Submissions on Reparations, paras 18-26; Trust Fund Submissions on Reparations, paras 73-100; Registry Submissions on Reparations, para. 40; Prosecution Submissions on Reparations, paras 12-16.

<sup>15</sup> See *inter alia* LRV Child Soldiers Submissions on Reparations, paras 65-82; LRV Attack Submissions on Reparations, paras 54-67; Defence Submissions on Reparations, paras 109-116; Trust Fund Submissions on Reparations, paras 101-128; Registry Submissions on Reparations, paras 52-53; Prosecution Submissions on Reparations, paras 22-23.

<sup>16</sup> See *inter alia* LRV Child Soldiers Submissions on Reparations, paras 28-37; LRV Attack Submissions on Reparations, paras 24-30; Defence Submissions on Reparations, paras 57-99 on the proposed mechanism to determine the eligibility of victims prior to the issuance of the reparations order; Trust Fund Submissions on Reparations, paras 40-72; Registry Submissions on Reparations, paras 28-39; Prosecution Submissions on Reparations, paras 5-10.

<sup>17</sup> See *inter alia* LRV Child Soldiers Submissions on Reparations, paras 28-37; LRV Attack Submissions on Reparations, paras 24-30; Defence Submissions on Reparations, paras 57-99; Trust Fund Submissions on Reparations, paras 40-72; Registry Submissions on Reparations, paras 28-39; Prosecution Submissions on Reparations, paras 5-10.

<sup>18</sup> Trust Fund Submissions on Reparations, paras 40-72; Trust Fund Response on Registry Preliminary Submissions on Reparations, paras 6-10 and 16-26.

this approach may not be the most appropriate if it leads to unnecessary delays.<sup>19</sup> In the present circumstances, electing to identify victims prior to or in the reparations order would unquestionably cause a delay. At this moment, conducting any form of a screening process in Ituri is not possible and it is unclear if and when the situation will permit travelling and working in Ituri. For example, in the *Lubanga* case, the Trust Fund had to pause its victims' identification activities since 18 March 2020 because it requires field work and physical interaction. This situation logically stems from the fact that all staff in DRC is working remotely and that domestic travel as well as out-bound travel is not feasible.

17. Therefore, the Trust Fund respectfully submits that, to avoid delays in reparations proceedings, the Trial Chamber opts to set out the eligibility criteria in the reparations order and defer the victim identification and verification process to a less turbulent time.

*Available information on the scope of liability: the Trust Fund will be in a position to submit relevant information by 30 October 2020*

18. Turning now to the availability on the case record of information related to the scope of liability, the Trust Fund appreciates that it is limited at this stage. However, should it be authorised to do so as requested in its 28 February submissions, the Trust Fund still stands ready to submit relevant data to the Trial Chamber, in particular a market survey, to assist its determination.

19. The market survey that the Trust Fund is conducting consists of field-based assessment of the available services, service-providers and related costs, which aims to provide the Trial Chamber with a solid foundation for assisting it in determining liability, as well as the most appropriate reparations modalities.

20. Under normal circumstances, the methodology adopted for a market survey would typically involve physical consultations with a wide range of stakeholders, such as international and local NGOs, United Nations agencies, local authorities, and victim representatives, in addition to a desk review.

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<sup>19</sup> Appeals Chamber, Prosecutor v. Thomas Lubanga Dyilo, Judgment on the appeals against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable', 18 July 2019, [ICC-01/04-01/06-3466-Red](#) ("Second Lubanga Appeals Judgment on Reparations"), para. 88; Appeals Chamber, Prosecutor v. Germain Katanga, Judgement on the appeals against the order of Trial Chamber II of Trial Chamber II of 24 March 2017 entitled "Order for Reparations pursuant to Article 75 of the Statute", 8 March 2018, [ICC-01/04/01/07-3778-Red](#) (Katanga Appeals Judgement on Reparations"), para. 1.

21. The COVID-19 pandemic, as well as the deteriorating overall security situation in Ituri Province, do have an impact on the Trust Fund's ability to conduct a fully-fledged market survey as well to collect other relevant data in relation to the cost of repair, as no field work is currently possible. However, relevant information can still be gathered, and the Trust Fund is currently developing mitigation strategies to make sure that it will be in a position to submit relevant information to the Trial Chamber by 30 October.

22. Over the course of the years, the Trust Fund worked with dozens of implementing partners and received numerous project proposals that were reviewed and graded. A comprehensive desk review of the types of services proposed, the localities in which they were available, the number of individuals that the programme could serve, and the related costs (adequately adjusted to take into account the inflation) will form a solid information base. Any gaps identified will be filled out by using the Trust Fund's extensive network in Ituri, which will be contacted by way of phone calls. When information needs to be gathered in a more systematic way, the Trust Fund may conduct online surveys and analyse programme documentation available in the public domain, so as to determine the quality and relevance of the available services infrastructure. With regards to the integration of the expectations of victims into the market survey, the Trust Fund will ensure consultation with the LRVs.

23. In short, the Trust Fund will be in a position to submit sufficiently relevant information to the Trial Chamber by 30 October 2020 so as to assist in its determination of Mr Ntaganda's liability.

24. It is the Trust Fund's understanding that there is a high probability that Mr Ntaganda be considered indigent and that the funding of reparations awards in his case will likely rely on the Trust Fund's determination as to whether to complement the payment of awards. In this respect, the Trust Fund wishes to draw the Chamber's attention that the COVID-19 crisis is likely to affect donors' financing priorities. It is expected that in the next few years, donors will want to prioritise the funding of activities related to address the medical, social and economic impact of COVID-19. Thus, the Trust Fund will have to considerably intensify its efforts to secure enough funding to complement the payments of reparations awards in current and potentially forthcoming reparations cases before the Court, including the *Ntaganda* case. The availability of the reparations order would strengthen the Trust Fund's ability to encourage donor funding of the reparations awards, given that the category of



victims and types of activities requiring funding would have become concrete and therefore more inviting to potential donor interest.

25. Lastly, in relation to the appointment and use of experts, the Trust Fund – having reviewed the other parties’ and participants’ observations of 28 February 2020 – believes that currently available expert reports (including those submitted in other reparations cases) and access to in-house expertise would suffice for the Trial Chamber’s information in the current circumstances. In any event, the current situation is such that no expertise requiring travel to Ituri can be engaged in the foreseeable future.

26. In light of the above, the Trust Fund submits that the COVID-19 pandemic should not disrupt the reparation proceedings at this stage in accordance with the requirements of expeditiousness and efficiency, as set out by the Appeals Chamber.

*Reparations proceedings must be expeditious*

27. The Appeals Chamber has repeatedly stated that reparations proceedings must be conducted in an expeditious manner and has not refrained to underline when certain procedural steps taken have caused excessive delays.<sup>20</sup> In particular, in relation to the determination of the amount of the convicted person liability’s, the Appeals Chamber has ruled that a trial chamber may rely on estimates as to the cost of reparations programmes and that:

“[i]t is also important, and in the interests of both the victims and the convicted person, that the trial chamber conducts the reparations proceedings as expeditiously as possible. It may therefore, need to weigh the need for accuracy of estimates against the goal of awarding reparations without delay.”<sup>21</sup>

<sup>20</sup>See Appeals Chamber, Prosecutor v. Thomas Lubanga Dyilo, Annex A to “Judgment on the appeals against the ‘Decision establishing the principles and procedures to be applied to reparations’ of 7 August 2012 with Amended order for reparations (Annex A) and public annexes 1 and 2”, 3 March 2015, [ICC-01/04-01/06-3129-AnxA](#) (“Lubanga Reparations Principles”), para. 44 making it a principle on reparations; Second Lubanga Appeals Judgment on Reparations, paras 81, 109; Katanga Appeals Judgement on Reparations, paras 1 and 65.

<sup>21</sup>Second Lubanga Appeals Judgment on Reparations”, para. 109; *See also*, paras 73-93, in particular para. 81: “[r]equiring that, barring exceptional circumstances, the reparations order may only be based on requests for reparations already received would also have a negative impact on the efficiency of the reparations process. This would mean that, for example in cases where there are large numbers of victims, in order to avoid prejudice to those victims, and in order to provide them with a sufficient opportunity to subrequests for reparations, the trial chamber would need to set generous time limits for their submissions. The implementation process, however, could not begin until the reparations order was actually issued and the trial chamber had determined the status of all of those who had at that point applied for reparations. The result would be that valuable time would be lost during which victims would have to wait for reparations – even though they may have already submitted their requests for reparations early on during the trial proceedings”.

28. Similarly, in relation to the approach chose by a trial chamber II to base the reparations proceedings on an individual assessment of each application, the Appeals Chamber stated that it was not persuaded that it was the best approach as “it has led to unnecessary delays in the award of reparations”.<sup>22</sup>

29. In the present case, seeing that a pre-screening reparations order is currently unfeasible due to the COVID-19 pandemic and the deteriorating security situation and considering that sufficient information on the amount of the liability of the convicted person will be placed on the case record within the deadlines set by the Trial Chamber, the Trust Fund submits that delaying the current reparations proceedings as a result of the COVID-19 is not warranted. Further, delaying the reparations proceedings would not protect any of the interests at stake, be it those of the victims or of the convicted.

30. The Trust Fund appreciates that the COVID-19 pandemic and/or the overall security situation in Ituri may continue to impact necessary activities at a later stage, that is, at the implementation stage following the issuance of the reparations order. However, it would be premature to consider delays in reparations proceedings at the current stage.

*Do no harm principle*

31. The Trust Fund recalls that, in Trust Fund Submissions on Reparations, it sought the adoption of the “do no harm” principle which would be applicable at various stages of the proceedings, including in the phase of developing the draft implementation plan, after the reparations order is issued.<sup>23</sup>

32. The Trust Fund believes that the “do no harm” principle could serve as safeguard against the potentially negative effects of issuing the reparations order during the COVID-19 pandemic. For instance, should a certain aspect of the reparations order be found to be (potentially) harmful to victims in the course of the development of the draft implementation plan, the Trust Fund would have a clear basis to adjust its proposed projects while remaining within the framework set by the reparations order.

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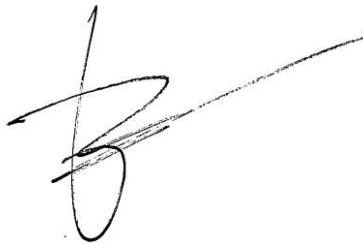
<sup>22</sup> Katanga Appeals Judgement on Reparations, paras 1 and 65. *See also*, para. 64: “*The legal framework leaves it for chambers to decide the best approach to take in reparations proceedings before the Court. Chambers have thus ample margin to determine how best to deal with the matter before them, depending on the concrete circumstances at hand. However, in the exercise of their discretion, it is clear that proceedings intended to compensate victims for the harm they suffered, often years ago, must be as expeditious and cost effective as possible and thus avoid unnecessarily protracted, complex and expensive litigation*” (emphasis added).

<sup>23</sup> Trust Fund Submissions on Reparations, paras 30-33.

33. In sum, the Trust Fund respectfully submits that the COVID-19 pandemic has two specific impacts - inability to conduct a screening in the field and inability for experts to conduct field work– but that it does not compromise the conduct of the reparations proceedings.

#### IV. CONCLUSION

The Trust Fund respectfully requests the Single Judge to take note of the present observations and remains available for any clarification relevant to the *Ntaganda* reparations proceedings.



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Pieter W.I. de Baan  
Executive Director of the Trust Fund for Victims,  
on behalf of the Board of Directors of the Trust Fund for Victims

Dated this 21 April 2020  
At The Hague, The Netherlands