

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **4 May 2020**

**TRIAL CHAMBER VI**

**Before:**

**Judge Chang-ho Chung, Presiding Judge  
Judge Robert Fremr  
Judge Olga Herrera Carbuccia**

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO**

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

**Public**

**Defence Response to the CLR's, the Registry and the TFV's additional arguments  
submitted pursuant to the 'Order to provide information on the impact of  
COVID-19 measures on operational capacity'**

**Source: Defence Team of Mr. Bosco Ntaganda**

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

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*Amicus Curiae*

**REGISTRY**

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**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
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Further to the filing on 21 April 2020 of: (i) the Registry Submissions pursuant to the “Order to provide information on the impact of COVID-19 measures on operational capacity”;<sup>1</sup> (ii) the Observations on the impact of COVID-19 measures on operational capacity on behalf of the former child soldiers;<sup>2</sup> (iii) the Public Redacted Version of the “Submissions by the Common Legal Representative of the Victims of the Attacks pursuant to the ‘Order to provide information on the impact of COVID-19 measures on operational capacity’”;<sup>3</sup> and (iv) the Trust Fund for Victim’s observations on the impact of COVID-19 on operational capacity,<sup>4</sup> Counsel for Mr. Ntaganda (“Defence” or “Mr. Ntaganda”) hereby submit this:

**Defence Response to the CLR’s, the Registry and the TFV’s additional arguments submitted pursuant to the ‘Order to provide information on the impact of COVID-19 measures on operational capacity’**

**(“Defence Response”)**

**INTRODUCTION**

1. On 21 April 2020, the Parties (Common Legal Representatives of Victims (“CLR’s”) and the Defence), the Registry *via* the Victims’ Participation and Reparations Section (“VPRS”) and the Trust Fund for Victims (“TFV”) submitted observations pursuant to the Order to provide information on the impact of COVID-19 measures on operational capacity issued by the Single Judge of Trial Chamber VI (“SJ”, “SJ Order” and “Chamber”).

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<sup>1</sup> Registry Submissions pursuant to the “Order to provide information on the impact of COVID-19 measures on operational capacity”, 21 April 2020, [ICC-01/04-02/06-2519](#) (“Registry 21 April Submissions”).

<sup>2</sup> Observations on the impact of COVID-19 measures on operational capacity on behalf of the former child soldiers, 21 April 2020, [ICC-01/02-04/06-2516](#) (“CLR1 21 April Observations”).

<sup>3</sup> Public Redacted Version of the “Submissions by the Common Legal Representative of the Victims of the Attacks pursuant to the ‘Order to provide information on the impact of COVID-19 measures on operational capacity’”, 21 April 2020, [ICC-01/02-04/06-2518](#) (“CLR2 21 April Submissions”).

<sup>4</sup> Trust Fund for Victim’s observations on the impact of COVID-19 on operational capacity, 21 April 2020, [ICC-01/02-04/06-2517](#) (“TFV 21 April Observations”).

2. In their filings, the CLR2, the Registry/VPRS and the TFV venture beyond what was requested in the SJ Order and/or going their submissions filed on 28 February 2020 (“28 February Submissions”),<sup>5</sup> warranting a response from the Defence.

3. Accordingly, the Defence hereby responds to the new arguments and/or the arguments going beyond their 28 February Submissions put forward by the CLR2, the Registry/VPRS and the TFV on 21 April 2020.

4. The Defence also responds to the information communicated to the Parties, the Registry/VPRS and the TFV by the Chamber on 23 April 2020, by electronic correspondence (at 12h32), concerning the *ex parte* classification of the CLR2’s 21 April 2020 submission.

5. Although the situation created by the spread of Corona/COVID-19 virus and the measures taken as a result might very well require certain creative and flexible solutions, the Defence stands firm on its submission this does not justify taking short cuts or adopting measures contrary to the rights of the convicted person.

## **I. PROCEDURAL BACKGROUND**

6. On 9 April 2020, the Single Judge ordered the Parties (Defence and CLR2s), the Registry and the TFV to file observations on the impact of the measures adopted to prevent the spread of the COVID-19 on their operational capacity to carry on with the reparations proceedings in the *Ntaganda* case.<sup>6</sup>

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<sup>5</sup> Submissions on Reparations on behalf of the Former Child Soldiers, 28 February 2020, [ICC-01/04-02/06-2474](#); Registry’s Observations on Reparations, 28 February 2020, [ICC-01/04-02/06-2475-AnxI](#) (“Registry 28 February Observations”); Trust Fund for Victims’ observations relevant to reparations, 28 February 2020, [ICC-01/04-02/06-2476](#) (“TFV 28 February Observations”); Submissions by the Common Legal Representative of the Victims of the Attacks on reparations, 28 February, [ICC-01/04-02-06-2477](#).

<sup>6</sup> Order to provide information on the impact of COVID-19 measures on operational capacity, 9 April 2020, [ICC-01/04-02/06-2507](#) (“Single Judge Order”).

7. On 21 April 2020, the Defence,<sup>7</sup> the Registry,<sup>8</sup> the CLR1,<sup>9</sup> CLR2<sup>10</sup> and the TFV<sup>11</sup> submitted their observations pursuant to the SJ Order.

## II. APPLICABLE LAW

8. Pursuant to Regulation 24(1) of the Regulations of the Court (“RoC”), the Defence may file a response to any documents submitted by a participant to the proceedings. The Single Judge has previously stated that the parties are entitled to respond to a document filed by any participant in accordance with Regulation 24(1) of the RoC.<sup>12</sup>

9. Moreover, the ICTY Appeals Chamber has had the opportunity to recall that: “[I]f a party raises in a reply an argument or request for the first time, **then the opposing party is deprived of an opportunity to respond and this can harm the fairness of the proceedings.**”<sup>13</sup>

10. Consequently, considering the status of the CLRs as Parties to the reparations proceedings and that of the Registry/VPRS and the TFV, as participants in the reparations proceedings,<sup>14</sup> the Defence is entitled, pursuant to Regulation 24(1) RoC, to respond to arguments submitted in their 21 April submissions going beyond what was requested in the SJ Order and/or going beyond their submissions filed on 28 February 2020.

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<sup>7</sup> Defence observations pursuant to ‘Order to provide information on the impact of COVID-19 measures on operational capacity’, 21 April 2020, [ICC-01/04-02/06-2515](#).

<sup>8</sup> [Registry 21 April Submissions](#).

<sup>9</sup> [CLR1 21 April Observations](#).

<sup>10</sup> [CLR2 21 April Submissions](#).

<sup>11</sup> [TFV 21 April Observations](#).

<sup>12</sup> Decision on request for leave to submit *Amicus Curiae* observations, 17 January 2020, [ICC-01/04-02/06-2460](#).

<sup>13</sup> *Momir Nikolić v. Prosecutor*, [Decision on Prosecution’s motion to strike](#), 20 January 2005, para.18 (emphasis added).

<sup>14</sup> [Single Judge Order](#), para.4.

### III. SUBMISSIONS IN RESPONSE

11. As a preliminary matter, the Defence deems it necessary to underscore that the present situation and the measures taken by the Court to prevent the spread of the Corona/Covid-19 virus should not be seen as an opportunity to take short cuts and/or to implement procedures, which are contrary to the rights of the convicted person who is entitled to reparations proceedings that are *both* fair and expeditious.

#### A. The Registry 21 April Submissions

12. In its 21 April Submissions, the Registry/VPRS proposes to issue periodic updates to the Chamber on its activities and the situation on the ground.<sup>15</sup> While the Registry/VPRS proposal in reaction to the impact of the COVID-19 measures is supported, the Defence underscores that such periodic reports must also be communicated *in toto* to the Parties and Participants. Mr. Ntaganda, both as a Party to the reparations proceedings and more importantly as the object of the reparations proceedings, is entitled to full disclosure of any and all activities conducted on the ground, including any difficulties encountered in the process.

13. In its 21 April Submissions, the Registry/VPRS also suggests, with respect to the *Lubanga* victims, that “a system can be devised whereby the beneficiaries identified by the Trust Fund for Victims in the *Lubanga* proceedings would be contacted by the CLRs appointed in the *Ntaganda* case, and be asked to indicate whether they wish to be considered for reparations in the *Ntaganda* case.”<sup>16</sup> Such information/suggestion was not requested in the SJ Order, thereby warranting a response from the Defence.

14. Moreover, the Registry/VPRS submission goes beyond its 28 February submissions by suggesting that the LRVs appointed in the *Ntaganda* case

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<sup>15</sup> [Registry 21 April Submissions](#), para.16.

<sup>16</sup> [Registry 21 April Submissions](#), para.17 (footnote omitted).

should be called upon to contact the victims in the *Lubanga* case. In this regard, the Defence first recalls its opposition to allowing the CLR2s to be involved in identifying new potential beneficiaries. The role of the CLR2s should and must be limited to representing and assisting participating victims who have been identified as such. The same regime should apply to new beneficiaries identified by VPRS; they should be represented and assisted by the CLR2s only once their status has been confirmed by the Chamber.<sup>17</sup>

15. Furthermore, the Defence underscores and recalls its opposition to the methodology proposed by the Registry to compensate victims in *Lubanga* in this case, simply on the basis of their status as beneficiaries in that case.<sup>18</sup> As submitted in the Defence 28 February 2020 Submissions,<sup>19</sup> the beneficiaries in the *Lubanga* case should not obtain additional compensation for the same harm suffered; only child soldiers who fall outside the temporal scope of the *Lubanga* case should be enabled to submit a dossier to have their eligibility assessed.<sup>20</sup>

#### **B. The CLR2 21 April Submissions**

16. In its 21 April Submissions, the CLR2 proposes to “first, explore ways for the Registry to collect relevant certified statements as well as information on the complete administrative structure, from local authorities remotely and/or with assistance of local intermediaries, and second, to seek cooperation from the Democratic Republic of Congo (“DRC”) Central government in order to enquire on the availability of records of relevant data or, if such records are not available, to seek assistance in the collection of relevant certified statements and other relevant data

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<sup>17</sup> Defence submissions on reparations, 28 February 2020, [ICC-01/04-02/06-2479](#), para.102 (“Defence 28 February Submissions”).

<sup>18</sup> [Registry 21 April Submissions](#), paras.15-17. See [Registry 28 February Observations](#), paras.37-38.

<sup>19</sup> [Defence 28 February Submissions](#), paras.61-63.

<sup>20</sup> *Ibid.*

from local authorities”.<sup>21</sup> Such information / proposals were not requested in the SJ Order, thereby warranting a response from the Defence.

17. The CLR2 proposal amounts to a delegation of the Registry’s responsibilities (in collaboration with the CLR’s), which is within their expertise,<sup>22</sup> to the DRC Central government and/or local authorities. The task of collecting certified statements must not be taken lightly and all possible measures to ensure the fairness of the reparations phase should be put in place. The Defence firmly opposes to this proposal. The lack of information on the training, expertise, professionalism and impartiality of these entities to collect/provide essential data is worrying. The Defence reiterates that the convicted person has the right to have the amount of the reparations he is liable for, determined in a fair and impartial way. To be sure, this right is placed in jeopardy by the CLR2’s suggestion.

18. The *ex parte* classification of the CLR2 21 April Submissions is another issue warranting a response by the Defence. Although the Defence, CLR1, Registry/VPRS and the TFV have been informed by the Chamber, by electronic correspondence,<sup>23</sup> that it would decide on the need for reclassification or the filing of a confidential redacted version of the CLR2 21 April Submissions when adjudicating on the Defence request for reclassification of Annexes II and III to the Registry/VPRS 28 February Submissions filed on 23 March 2020,<sup>24</sup> the fact remains that to this day, the Defence has only been notified of a redacted version of these submissions. Considering the response submitted by the Registry/VPRS to the Defence Request for Reclassification – not opposing the request – it was improper for the CLR2 21 April Submissions to be filed *ex parte* to the Defence, in particular bearing in mind that the aim of these submissions was limited to addressing operational difficulties

<sup>21</sup> [CLR2 21 April Submissions](#), paras.19-20.

<sup>22</sup> [TFV Observations](#), para.63; [Registry 28 February Observations](#), para.57.

<sup>23</sup> Email correspondence from Trial Chamber VI to parties and participants, 23 April 2020, at 12:32.

<sup>24</sup> Request on behalf of Mr. Ntaganda seeking reclassification of Annex II and III to the “Registry’s Observations on Reparations”, 23 March 2020, [ICC-01/04-02/06-2493](#) (“Defence Request for Reclassification”).



encountered by the CLR2 in the current situation. In addition, the CLR2's reliance on the *ex parte* classification of Annexes II and III to the Registry/VPRS 28 February Submissions to justify the *ex parte* classification of his 21 April Submissions is yet another reason why Annexes II and III must be reclassified as requested by the Defence.<sup>25</sup>

19. The present situation resulting from the implementation of measures to prevent the spread of the Corona/Covid-19 virus must not be considered as an opportunity to impede the rights of the convicted person to *both* fair and expeditious reparations proceedings by not disclosing certain information.

### C. TFV 21 April Observations

20. In its 21 April Observations, the TFV submits "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 [...]." <sup>26</sup> The SJ Order did not request such submission by the TFV, thereby warranting a response from the Defence.

21. The TFV's submission fails to take into consideration *inter alia*, that to this day, no relevant information concerning the result of preliminary outreach activities or the mapping and the assessment of potential beneficiaries has been disclosed to the Defence. Needless to say, the absence of information communicated or disclosed, precludes the Defence of the ability to provide meaningful submissions. It appears evident that the TFV is trying to take short cuts with a view to inappropriately accelerating the reparations proceedings, thereby causing prejudice to the convicted person.

22. Furthermore, the TFV submits with regard to the screening method, that "[i]n the present circumstances, electing to identify victims prior to or in the reparations

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<sup>25</sup> *Ibid.*

<sup>26</sup> [TFV 21 April Observations](#), para.12.

order would unquestionably cause a delay [...]” and “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.”<sup>27</sup>

23. Once again, not only does the TFV venture beyond the scope of the SJ Order, it also requests the Trial Chamber to adopt the eligibility criteria approach as opposed to the victims eligibility approach. In its 28 February Observations, the TFV has already informed the Chamber of its views on this issue<sup>28</sup> and there was no need for this additional submission. What is more, the Defence respectfully recalls, as previously submitted, that this should not be the approach relied upon in the present case.<sup>29</sup>

24. What is more, in its 21 April Observations, the TFV also states that it is “currently developing mitigation strategies”<sup>30</sup> in relation to the market survey and that if “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 and infrastructure.”<sup>31</sup>

25. In response, the Defence further underscores the fact that precipitated actions would be contrary to the rights of the convicted person. While securing donors<sup>32</sup> is certainly an important endeavour, the COVID-19 measures implemented should not be a motive to be less rigorous and safe. The COVID-19 pandemic should not serve as a pretext to inappropriately accelerate the proceedings, to the detriment of the convicted person.

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<sup>27</sup> [TFV 21 April Observations](#), paras.16-17.

<sup>28</sup> [TFV 28 February Observations](#), paras.37-72.

<sup>29</sup> [Defence 28 February Submissions](#), para.33.

<sup>30</sup> [TFV 21 April Observations](#), para.21.

<sup>31</sup> [TFV 21 April Observations](#), para.22.

<sup>32</sup> [TFV 21 April Observations](#), para.24.

#### D. The Decision about to be issued by the Chamber

26. Through the Chamber's 23 April electronic correspondence, the Parties, the Registry/VPRS and the TFV were informed that the Chamber might issue a preliminary decision on reparations in the near future.<sup>33</sup>

27. Taking into consideration the Parties, the Registry/VPRS and the TFV's submissions since the beginning of the reparations phase, the nature and purpose of the decision about to be issued is unclear.

28. In the event the Chamber's forthcoming decision resembles the preliminary decision issued by the Trial Chamber in *Lubanga*,<sup>34</sup> or addresses similar substantive issues for the purpose of setting the parameters of the reparations process in this case and guiding the Parties, the Registry/VPRS and the TFV in relation to the steps to be followed and the work to be accomplished, the Defence deems it important to notify the Chamber of the potential ramifications of such a decision for the Defence.

29. Indeed, the Defence is presently fully committed in the appeals process, having to respond and/or reply to, *inter alia*, the CLR's submissions on both the appeals related to the Trial Judgment and the Sentencing Judgment and to the Prosecution Response to Mr. Ntaganda's Appeal Brief – Part II.<sup>35</sup> The Defence must also prepare for appeals oral hearings scheduled to take place from 29 June to 01 July 2020.

30. Considering that the resources available to the Defence at this particular stage are barely sufficient to cope with the above undertakings, the Defence anticipates a situation where it might not have the resources necessary to take all necessary

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<sup>33</sup> Email correspondence from Trial Chamber VI to parties and participants, 23 April 2020, at 12:32. The Defence was informed that the Trial Chamber will be deciding on the [Defence Request for Reclassification](#) "as part of its forthcoming decision setting out the victim identification process, eligibility criteria, and standard of proof for the purposes of the reparations proceedings."

<sup>34</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision establishing the principles and procedures to be applied to reparations, 7 August 2012, [ICC-01/04-01/06-2904](#).

<sup>35</sup> Decision on request for leave to reply, 4 May 2020, [ICC-01/04-02/06-2522](#).

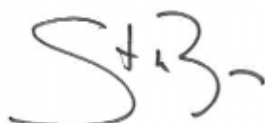
measures required to protect the rights of Mr. Ntaganda in the event the Chamber issues a substantive decision on reparations at this time.

31. Accordingly, the Defence respectfully invites the Chamber to coordinate the issue of any substantive decision on reparations with the appeals proceedings, taking into consideration the limited resources available to the Defence.

### CONCLUSION

32. In light of the foregoing, the Defence respectfully submits that the Registry/VPRS, CLR2 and TFV submissions further to the SJ Order ventured beyond what was requested therein as well as beyond their 28 February Submissions, thereby justifying this Defence Response. More importantly the Defence reiterates that the Chamber should ensure that the COVID-19 measures implemented are neither seen nor used as an opportunity to impede on the rights of Mr. Ntaganda to both fair and expeditious reparations proceedings.

**RESPECTFULLY SUBMITTED ON THIS 4<sup>TH</sup> DAY OF MAY 2020**

A handwritten signature in black ink, appearing to read 'S+B', with a horizontal line underneath the letters.

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands