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Pénale
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**International
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Court**

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

Date: **25 June 2021**

THE APPEALS CHAMBER

Before: Judge Marc Perrin de Brichambaut, Presiding
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 on behalf of Mr Ntaganda to
the Trust Fund for Victims' Observations and Request**

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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Further to 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” issued by the Appeals Chamber on 11 June 2021 (“Order”)¹ and the submission by the Trust Fund for Victims (“TFV”) of its “Observations on the Defence Request for Suspensive Effect and Request under rule 103 of the Rules of Procedure and Evidence” on 22 June 2021 (“TFV Observations and Request”),² Counsel for Mr Bosco Ntaganda (“Defence” or “Mr Ntaganda”) hereby submits this:

**Response on behalf of Mr Ntaganda
to the Trust Fund for Victims’ Observations and Request**

(“Defence Response”)

INTRODUCTION

1. In its observations, the TFV raises two preliminary issues and two main submissions in favor of the Appeals Chamber *not* granting Mr Ntaganda’s request for suspension of the implementation of the Reparations Order issued by Trial Chamber VI on 8 March 2021 (“Defence Request for Suspensive Effect” and “8 March Reparations Order”) set out in the Defence Appellant Brief against the 8 March Reparations Order (“Defence Appellant Brief”).³

2. For the reasons set out herein, the Defence respectfully submits that the TFV’s submissions are unpersuasive.

3. The criteria identified by the Appeals Chamber to grant suspensive effect are met and it is in the interest of justice that the implementation of the 8 March Reparations Order be suspended until the Appeals Chamber adjudicates the appeals lodged by the LRV2 and the Defence.

¹ 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, 11 June 2021, [ICC-01/04-02/06-2678](#) (“Order”).

² Observations on the Defence Request for Suspensive Effect and Request under rule 103 of the Rules of Procedure and Evidence, 22 June 2021, [ICC-01/04-02/06-2679](#) (“TFV Observations and Request”).

³ Defence Appellant Brief against the 8 March Reparations Order, 7 June 2021, [ICC-01/04-02/06-2675](#), paras.260-272 (“Defence Appellant Brief”).

4. To the extent that the Appeals Chamber deems it appropriate and of assistance in adjudicating both appeals, the Defence does not oppose the TFV's request to submit observations on the grounds of appeal raised by the LRV2 and the Defence, which raise fundamental questions concerning the role of the TFV during the implementation phase.

PROCEDURAL BACKGROUND

5. On 8 March 2021, Trial Chamber VI issued the Reparations Order against Mr Ntaganda pursuant to article 75 of the Rome Statute ("Statute" and "8 March Reparations Order").⁴

6. On 8 April 2021, the Defence⁵ and the LRV2⁶ filed their respective notices of appeal against the 8 March Reparations Order.

7. On 7 June 2021, the Defence⁷ and the LRV2⁸ filed their respective appeal briefs against the 8 March Reparations Order. In the Defence Appellant Brief, the Defence requested the suspension of the implementation of the 8 March Reparations Order ("Defence Request for Suspension").

8. On 9 June 2021, the Defence was notified of the Trust Fund for Victims Initial Draft Implementation Plan ("TFV IDIP").⁹

⁴ [8 March Reparations Order](#).

⁵ Defence Notice of Appeal against the Reparations Order, ICC-01/04-02/06-2659, 8 April 2021, [ICC-01/04-02/06-2669](#) ("Defence Notice of Appeal").

⁶ Notice of Appeal of the Common Legal Representative of the Victims of the Attacks against the Reparations Order, 8 April 2021, [ICC-01/04-02/06-2668](#) ("LRV2 Notice of Appeal").

⁷ [Defence Appellant Brief](#).

⁸ Appeal Brief of the Common Legal Representative of the Victims of the Attacks against the Reparations Order, 7 June 2021, [ICC-01/04-02/06-2674](#).

⁹ Corrigendum to Annex A to the Initial Draft Implementation Plan with Focus on Priority Victims, 14 June 2021, [ICC-01/04-02/06-2676-Conf-AnxA-Corr](#) ("TFV IDIP").

9. On 10 June 2021, Trial Chamber II issued the Order for the submission of observations on the initial draft implementation plan with focus on priority victims, directing the parties and the Registry to file observations by 23 June 2021.¹⁰

10. On 11 June 2021, the Appeals Chamber invited the TFV to submit written observations and the legal representatives of victims (“LRVs”) to respond to the Defence Request for Suspensive Effect.¹¹

11. On 22 June 2021, the TFV submitted its Observations on the Defence Request for Suspensive Effect and Request under Rule 103 of the Rules of Procedure and Evidence.¹²

12. On 23 June 2021, the Defence,¹³ VRPS,¹⁴ LRV1¹⁵ and LRV2¹⁶ submitted observations on the TFV IDIP.

RESPONSE TO TFV OBSERVATIONS

I. Preliminary issues raised by the TFV

13. The first preliminary issue raised by the TFV is “[...] whether paragraph 3 of article 82 is applicable to appeals under paragraph 4 of article 82 of the Statute [...]”.¹⁷ The TFV’s observes that “[...] the Appeals Chamber decided previously that article 82(3) finds application to appeals under article 82(4) of the Statute”¹⁸ settles this issue.

¹⁰ Order for the submission of observations on the initial draft implementation plan with focus on priority victims, 10 June 2021, [ICC-01/04-02/06-2677](#).

¹¹ [Order](#).

¹² [TFV Observations and Request](#).

¹³ Defence Observations on the TFV initial draft implementation plan, 23 June 2021, [ICC-01/04-02/06-2682-Conf](#) (“Defence Observations on the TFV IDIP”).

¹⁴ Registry Observations on the Trust Fund for Victims’ Initial Draft Implementation Plan, 23 June 2021, [ICC-01/04-02/06-2683](#) (“Registry Observations on the TFV IDIP”).

¹⁵ Response of the Common Legal Representative of the Former Child Soldiers to the TFV Initial Draft Implementation Plan with focus on Priority Victims, 23 June 2021, [ICC-01/04-02/06-2681](#) (“LRV1 Observations on the TFV IDIP”).

¹⁶ Observations of the Common Legal Representative of the Victims of the Attacks on the Trust Fund for Victims’ Draft Initial Implementation Plan, 23 June 2021, [ICC-01/04-02/06-2680-Conf](#) (“LRV2 Observations on the TFV IDIP”).

¹⁷ [TFV Observations and request](#), para.12.

¹⁸ [TFV Observations and request](#), para.12.

14. The second preliminary issue raised by the TFV is whether the Defence Request for Suspensive Effect was filed timely, considering that it was not raised in Mr Ntaganda's Notice of Appeal¹⁹ but only in the Defence Appellant Brief.

15. While it would have been preferable for the Defence to raise the Request for Suspensive Effect in the Defence Notice of Appeal, this is not a formal requirement and this does not dispose of the issue. Indeed, although Rule 156(5) regulates requests for suspensive effect, this provision deals with appeals regulated by rules 154 and 155 and is as such not applicable to appeals under article 82(4) of the Statute, which are regulated by rules 150 to 153. There is no other rule that specifically regulates suspensive effect in relation to appeals against orders for reparations.

16. Faced with a similar, albeit not identical, situation in the *Bemba* case, the Appeals Chamber considered that "[...] as a practice, **it is preferable that** a request for suspensive effect – which given the nature of the request, ought to be decided as expeditiously as possible – should be presented in the appeal together with the reasons in support of the request as prescribed in Rule 156 of the Rules of Procedure and Evidence".²⁰

17. More importantly, submission of the Defence Request for Suspensive Effect in the Defence Appellant Brief – which is in the interest of victims by avoiding potential further harm resulting from the implementation of a reparations process founded on errors of law – causes no prejudice to the TFV. Notably, the TFV was aware from the filing of the Defence Notice of Appeal that the Defence requested the Appeals Chamber to remand the 8 March Reparations Order to the Trial Chamber VI or to issue an amended Reparations Order, which would necessarily impact its preparation of the draft implementation plan requested therein.

¹⁹ [Defence Notice of Appeal](#).

²⁰ *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Request of the Prosecutor for Suspensive Effect, 3 September 2009, [ICC-01/05-01/08-499](#), para.10 [emphasis added].

18. Furthermore, although the TFV observes that “[...] it has already submitted to the Trial Chamber the Initial Implementation Plan on 8 June 2021”,²¹ it is noteworthy that the *initial implementation plan* submitted by the TFV must first be approved by Trial Chamber II before any action can be taken by the TFV.

19. In addition, the parties to the proceedings as well as the Registry recently submitted observations on the TFV IDIP underlying significant errors and weaknesses regarding core features of the plan. Their unanimous conclusion is that the TFV IDIP is incomplete and that Trial Chamber II should not approve it in its present form.²²

20. Submission of the Defence Request for Suspensive Effect in the Defence Appellant Brief was thus not untimely. Moreover, it is for the Appeals Chamber, when adjudicating the request, to consider the specific circumstances of this case and the factors it considers relevant for the exercise of its discretion under the circumstances.²³

II. Main submissions/issues raised by the TFV

21. The main issue raised by the TFV is “whether a request under article 83(3) of the Statute is the correct tool to achieve what Mr Ntaganda pursues by the Request”.²⁴

22. The TFV understands from the Defence Request for Suspensive Effect that its main purpose is “[...] to suspend the activities of the Trust Fund pending the outcome of the appeal, in particular by delaying the submission of and/or approval of implementation plans with e.g. the effect that Priority Victims, as defined by the Trial Chamber, would not receive reparations in the ensuing weeks”.²⁵

²¹ [TFV Observations and request](#), para.13.

²² [LRV2 Observations on the TFV IDIP](#), para.2; [LRV1 Observations on the TFV IDIP](#), para.4; [Defence Observations on the TFV IDIP](#), para.71; [Registry Observations on the TFV IDIP](#), paras.9, 16-17.

²³ *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the admissibility of the appeals against Trial Chamber I's "Decision establishing the principles and procedures to be applied to reparations" and directions on the further conduct of proceedings, 14 December 2012, [ICC-01/04-01/06-2953](#), para.81 (“Lubanga Decision on Suspensive Effect”).

²⁴ [TFV Observations and request](#), para.15.

²⁵ [TFV Observations and request](#), para.16.

23. The TFV mischaracterizes the Defence Request for Suspensive Effect and misunderstands its rationale.

24. As previously held by the Appeals Chamber, “(s)uspensive effect [...] means that the order for reparations cannot be enforced during the period of its suspension”.²⁶ Accordingly, the Defence Request for Suspensive Effect focusses, first, on the possibility/likelihood that the 8 March Reparations Order will be reversed or amended – noting that both the LRV2 and the Defence, who do not necessarily share the same interests in the outcome of the appeals, have challenged the same key features of the 8 March Reparations Order, which is revealing. The Defence Request for Suspensive Effect then dwells on the possible outcome of the appeals lodged by the LRV2 and the Defence, if one or more of their grounds of appeal are successful.

25. What necessarily arises next, is the analysis of the actions likely to take place in furtherance of the 8 March Reparations Order – during the period until the Appeals Chamber pronounces on the appeals – if suspensive effect is not granted and the consequences thereof. Indeed, even though the time that will be required by the Appeals Chamber to adjudicate the appeals is unknown, the TFV might have sufficient time, if suspension effect is not granted, to: (i) have an initial draft implementation plan approved; (ii) proceed with the administrative eligibility process described therein; (iii) submit and have approved the draft implementation plan requested in the 8 March Reparations Order; and possibly (iv) begin engaging with victims/beneficiaries. Notably, all of these steps would be taken on the basis of a reparations order heavily challenged on appeal by the LRV2 and the Defence.

26. Contrary to the TFV’s mistaken belief, the aim of the Defence Request for Suspensive Effect is certainly *not* to delay awarding reparations to eligible victims. It is rather to ensure that the reparations process is implemented on a sound legal basis, after the Appeals Chamber has adjudicated the appeals and the Reparations Order is final. The underlying objective is evident. It is to avoid having to annul measures taken

²⁶ [Lubanga Decision on Suspensive Effect](#), para.79.

for the purpose of awarding reparations, which no longer match the new or amended reparations order resulting from the judgment on the appeals lodged by the LRV2 and the Defence.

27. The Defence Request for Suspensive Effect submitted pursuant to article 83(3) of the Statute is certainly the proper vehicle to achieve this aim and the TFV's arguments *a contrario* in paragraphs 18 to 20 of its observations, are neither relevant nor probative. As for the TFV's submission that the Appeals Chamber's decision to grant suspensive effect in *Lubanga*²⁷ – when the convicted person appealed Trial Chamber I's "Decision establishing the principles and procedures to be applied to reparations" – was taken in the context of an ongoing appeal against the conviction, contrary to the case at hand,²⁸ it is neither relevant nor a circumstance Mr Ntaganda is relying upon in the Defence Request for Suspensive Effect.

28. Moreover, the TFV mistakenly downplays the importance of the determinations made by Trial Chamber II regarding the type of victims, the burden of proof, and the modalities of reparations, which are crucial features of a reparation order, which shape the measures taken in furtherance of the 8 March Reparations Order. The TFV also errs when asserting that the scope of the Trial Judgment and the type of reparations – *i.e.* collective *with an individual component*, are sufficient features to design and begin the implementation phase. They are not.²⁹

29. The second issue on the merits raised in the TFV's Observations and Request is "[...] whether one or more of the circumstances that the Appeals Chamber developed to guide it in the exercise of its discretion under article 82(3) of the Statute applies to this request."³⁰

²⁷ [Lubanga Decision on Suspensive Effect](#).

²⁸ [TFV Observations and request](#), para.21.

²⁹ [TFV Observations and request](#), paras.24-25.

³⁰ [TFV Observations and request](#), paras.22-30.

30. While some of the arguments set forth by the TFV in support of this issue are not easy to grasp,³¹ the gist of its submissions appears to be that suspensive effect is not required as “[...] none of the actions it is currently taking or which it is taking pending a final judgment on this appeal creates either an irreversible situation or could defeat the purpose of the appeal.”³² The Defence takes issue with the TFV’s submissions including, in particular the arguments set out in paragraphs 26 to 28, which actually demonstrate the opposite.

31. First, the TFV asserts that in the event the Appeals Chamber was to lower the sum of liability imposed on Mr Ntaganda, this change can simply be taken into account by the Trust Fund’s Board of Directors in its fund management and investment decisions, in particular pursuant to regulation 56 of the Regulations of the Trust Fund.

32. In taking such a short-sighted approach, the TFV ignores the importance of the judicial decision regarding the liability of the convicted person to repair the harm caused to all direct and indirect victims of the crimes for which he was convicted. Not only must this sum be proportionate to the harm caused³³ as well as to *inter alia*, the convicted person’s participation in the commission of the crimes for which he or she was found guilty, in the specific circumstances of the case,³⁴ the liability of the convicted person is also directly related to the number of victims eligible to receive reparations, the harms caused, and the cost of repair determined by the Trial Chamber. Moreover, the scope of Mr Ntaganda’s liability for reparations, determined in consultation with, *inter alia*, the TFV, represents the total envelope available to design the programs and projects to repair the totality of the harm caused. It is much more than a mere management or a budgetary figure.

33. If, for example, Mr Ntaganda’s liability was lowered from 30 million to 15 million as a result of the appeals lodged by the LRV2 and the Defence, most if not

³¹ See in particular [TFV Observations and request](#), paras.23-24.

³² [TFV Observations and request](#), para.25.

³³ See *Prosecutor v. Thomas Lubanga Dyilo*, Order for Reparations, 3 March 2015, [ICC-01/04-01/06-3129-AnxA](#), paras.37, 45 (“Lubanga Judgement on Reparations Principles”).

³⁴ [Lubanga Judgement on Reparations Principles](#), para.118.

all of the TFV's actions, including *inter alia*, the planning of projects, project management, design of eligibility mechanism, monetary awards already distributed, etc. would likely have to be addressed *de novo*, thereby wasting substantial amounts of money, which could have been put to use for the benefit of victims rather than to raise their expectations in the absence of a solid basis.

34. It must be recalled that the ICC reparations scheme is a judicial process and that it is neither the TFV's role nor its responsibility to decide how much it will spend/invest in the *Ntaganda* reparations awards, regardless of the amount set by the Trial Chamber.

35. Second, the TFV asserts that in the event the Appeals Chamber was to exclude certain categories of harm from the scope of the Reparations Order, the TFV would be able to adapt its implementation plan accordingly, and in a timely fashion. Again, it is not simply for the TFV to adapt the implementation approved by the Trial Chamber *proprio motu*. If certain categories of harm are excluded, this would necessarily impact the number of victims, Mr Ntaganda's total liability, the number and type of projects to be implemented and the overall planning of the reparations campaign, based on a total envelope. Again, it is not for the TFV to simply adapt to this change. The TFV must implement the 8 March Reparations Order pursuant to the Trial Chamber II's guidance, not the other way around.

36. Third, the TFV asserts that in the event the Defence of Mr Ntaganda obtains an active role in the verification process, or the standard of proof is somehow adapted, in particular for certain categories of victims, the relevant processes can simply be retroactively amended.

37. The TFV ignores that amending retroactively the relevant processes implies starting over again all measures taken, projects implemented, eligibility determinations finalized, reparations awarded, etc. This is in addition to having to meet and engage victims on numerous occasions, contrary to the *do no harm* principle; wasting time, money and resources in the process; and possibly having to withdraw

reparations already awarded to certain victims. To be sure, the impact on victims would be significant.

38. Hence, the criteria developed by the Appeals Chamber to guide it in the exercise of its discretion, namely, “would lead to consequences that ‘would be very difficult to correct and may be irreversible’”,³⁵ are met.

39. Notably, the stance taken by the TFV in its observations is markedly different from the position it advocated in a very similar, almost identical situation, when the Defence for Thomas Lubanga requested suspensive effect of the Reparations Order when appealing the same.³⁶ Therein, the TFV argued that “[...] it would be undesirable for engagement with victims and their communities to commence, only to have to be halted or revised as a result of a later determination of the Appeals Chamber, potentially leading to re-traumatisation of victims.”³⁷

40. In this context, the TFV’s observation that “[c]onsidering the time and resources the Trust Fund plans to invest in setting up the eligibility assessment, the Trust Fund observes the very limited risk that any persons be found eligible or receive reparations, and later retroactively be found not to be victims of Mr Ntaganda based on adaptations required by an amended Reparations Order”,³⁸ can be attributed very little, if any, weight.

41. In fact, the TFV acknowledges that “[...] it cannot overlook, however, that with respect to certain individuals, this risk may materialize”.³⁹

42. What is more, the TFV further observes: “[...] it could be considered as contrary to the *do no harm* principle if individuals received reparations for the harm, they suffered due to crimes committed against them and if they were later told that either

³⁵ [TFV Observations and request](#), para.22.

³⁶ [Lubanga Decision on Suspensive Effect](#).

³⁷ [Lubanga Decision on Suspensive Effect](#), para.83.

³⁸ [TFV Observations and request](#), para.29.

³⁹ [TFV Observations and request](#), para.29.

the crime or the harm, they suffered due to these crimes would not be accountable to Mr Ntaganda”,⁴⁰ thereby proving the point.

43. Regarding the latter, the solution put forward by the TFV to minimize the resulting prejudice to the individuals involved, is a source of concern to say the least. Indeed, in such cases, the TFV proposes “[...] to step in with its assistance programme that addresses harm suffered based on crimes falling within the jurisdiction of the Court”.⁴¹

44. As argued in the Defence Observations on the TFV IDIP, the TFV’s proposition to rely on assistance projects to award reparations triggered by a judicial process is likely to create confusion amongst the victims as regard to the difference between a judicial reparation program and an assistance project.⁴² Indeed, allowing the TFV to use programs and/or projects designed pursuant to its assistance mandate to award reparations authorized by a judicial process, would give the TFV *carte blanche* to do what it wants to do, regardless of the reparations order issued by a trial chamber.

III. TFV request to submit observations pursuant to Rule 103

45. Although the Defence does not oppose the TFV request to submit observations pursuant to Rule 103, if the Appeals Chamber deems it necessary and of assistance, the Defence posits that the time allotted to submit observations should be as short as possible, in order to avoid delaying adjudication on the LRV2 and the Defence appeals, which will, in any case, be inevitable. For example, in the *Al Mahdi* case, the Appeals Chamber allotted two weeks to the TFV to submit observations on the legal representative of victims’ appeal brief.⁴³

46. In addition, it is noteworthy that if the TFV’s request is granted, the Defence must be given an opportunity to respond or to make observations.

⁴⁰ [TFV Observations and request](#), para.29.

⁴¹ [TFV Observations and request](#), para.29.


⁴² [Defence Observations on the TFV IDIP](#), paras.67-68.

⁴³ *The Prosecution v. Al Mahdi*, Direction on the conduct of the appeal proceedings, 11 November 2017, [ICC-01/12-01/15-246](#), paras.1-2.

CONCLUSION

47. In light of the foregoing, the Defence submits that the TFV **did not** present compelling arguments to oppose the Defence Request for Suspensive Effect. The TFV was not prejudiced by the timing of the Defence Request for Suspensive Effect; and moving forward with the implementation of the 8 March Reparations Order, in particular, in the light of the significant flaws identified by the parties and the Registry in the TFV IDIP, would definitely be contrary to the 'do no harm' principle and would create irremediable consequences.

RESPECTFULLY SUBMITTED ON THIS 25th DAY OF JUNE 2021

A handwritten signature in black ink, appearing to read 'S+B' with a flourish at the end.

Me Stéphane Bourgon *Ad.E.*, Counsel for Bosco Ntaganda

The Hague, The Netherlands