

**Cour  
Pénale  
Internationale**

**International  
Criminal  
Court**



Original: **English**

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

Date: **22 June 2021**

**THE APPEALS CHAMBER**

**Before:** Judge Marc Perrin de Brichambaut, Presiding Judge  
Judge Piotr Hofmánski  
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 document**

**Observations on the Defence Request for Suspensive Effect  
and  
Request under rule 103 of the Rules of Procedure and Evidence**

**Source:** The Trust Fund for Victims

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

**Legal Representative of Victims**

Ms Sarah Pellet  
Ms Caroline Walters

**Counsel for the Defence**

Mr Stéphane Bourgon  
Ms Kate Gibson

Mr Dmytro Suprun  
Ms Anne Grabowski  
Ms Nadia Galinier

**Trust Fund for Victims**

Mr Pieter de Baan

**REGISTRY**

---

**Registrar**

Mr Peter Lewis

**Victims Participation and Reparations  
Section**

Mr Philipp Ambach

## BACKGROUND

1. On 8 March 2021, Trial Chamber VI (the ‘Trial Chamber’) issued an order for reparations against Mr Ntaganda (the ‘Reparations Order’) awarding collective reparations with individualised components to direct and indirect victims of the crimes for which Mr Ntaganda was convicted through the Trust Fund pursuant to rule 98 (3) of the Rules of Procedure and Evidence (‘Rules’) and assessing his liability at USD 30 million.<sup>1</sup>

2. In the Reparations Order, pursuant to regulations 54 and 69 of the Regulations of the Trust Fund (the ‘TFV Regulations’), the Chamber ordered the Trust Fund to prepare a draft implementation plan, and an interim draft implementation plan for ‘Priority Victims’ based on existing mechanisms, for the Chamber’s approval, setting the deadlines, respectively, to 8 September and 8 June 2021.<sup>2</sup>

3. The Chamber instructed the Trust Fund to *inter alia* clearly specify the objectives, outcomes, and activities identified as necessary to the implementation of the Order, including by: (i) describing the reparation projects it intends to develop, indicating the details of the proposed collective awards, each of the collective projects with individualised components, and the modalities of reparations identified as appropriate to address each hard; (ii) indicating clearly the methods of implementation, the steps to be taken, direct and indirect costs, and the amount that the Trust Fund intends to use to complement the award; and (iii) including in the draft implementation plan a detailed proposal as to how the Trust Fund expects to conduct the administrative eligibility assessment.<sup>3</sup>

4. Further, the Chamber found that Mr Ntaganda is indigent for the purposes of reparations at the time of the Reparations Order and encouraged the Trust Fund to complement the reparations award to the extent possible and engage in fundraising efforts to the extent necessary to complement the totality of the award.<sup>4</sup> In this regard, the Chamber acknowledged that, in order to fully complement the award, substantial fundraising is necessary, and therefore considered the

---

<sup>1</sup> [Reparations Order](#), ICC-01/04-02/06-2659, paras 249-253 and 257, and disposition.

<sup>2</sup> [Reparations Order](#), paras 249 and 252, and disposition.

<sup>3</sup> [Reparations Order](#), paras 249 and 253, and disposition.

<sup>4</sup> [Reparations Order](#), para. 257.

possibility to have a phased and flexible approach to implementation, including by allowing further prioritisations according to the availability of funds.

5. On 8 April 2021, the common legal representative of the victims of the attacks (the ‘Legal Representative’) and the defence team of Mr Ntaganda each filed a notice of appeal (‘Notice of Appeal’) against the Reparations Order pursuant to article 82 (4) of the Rome Statute (the ‘Statute’).<sup>5</sup>

6. On 9 April 2021, the Appeals Chamber designated the Presiding Judge for the above-mentioned appeals.<sup>6</sup>

7. On 7 June 2021, the Legal Representative and Mr Ntaganda respectively filed their appeal briefs against the Reparations Order.<sup>7</sup> Mr Ntaganda requested in his appeal brief (the ‘Appeal Brief’) the Appeals Chamber, *inter alia*, to order ‘the immediate suspension of the Impugned Decision’ (the ‘Request’).<sup>8</sup>

8. On 8 June 2021, the Trust Fund submitted its initial draft implementation plan (the ‘Initial Implementation Plan’) to the Trial Chamber, proposing to take recourse to an existing reparation programme and to two assistance projects to accommodate the needs of certain victims falling into the category of Priority Victims as defined by the Trial Chamber.<sup>9</sup>

---

<sup>5</sup> [Notice of Appeal of the Common Legal Representative of the Victims of the Attacks against the Reparations Order](#), ICC-01/04-02/06-2668; [Defence Notice of Appeal against the Reparations Order](#), ICC-01/04-02/06-2669.

<sup>6</sup> [Decision on the Presiding Judge of the Appeals Chamber in the appeals against the decision of Trial Chamber VI entitled ‘Reparations Order’](#), ICC-01/04-02/06-2670.

<sup>7</sup> [Appeal Brief of the Common Legal Representative of the Victims of the Attacks against the Reparations Order](#), ICC-01/04-02/06-2674; [Defence Appellant Brief against the 8 March Reparations Order](#), ICC-01/04-02/06-2675 (‘Mr Ntaganda’s Appeal Brief’).

<sup>8</sup> [Mr Ntaganda’s Appeal Brief](#), para. 273. *See also* paras 260-272.

<sup>9</sup> [Public redacted version of “Report on Trust Fund’s Preparation for Draft Implementation Plan”](#), submitted on 8 June 2021, ICC-01/04-02/06-2676-Red, with [Annex A, Public redacted version of “Initial Draft Implementation Plan with focus on Priority Victims”](#), ICC-01/04-02/06-2676-AnxA-Corr-Red (the ‘Initial Implementation Plan’).

9. On 11 June 2021, the Appeals Chamber filed 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’ (the ‘Invitation’).<sup>10</sup>

## **OBSERVATIONS ON THE INVITATION**

10. In accordance with the Invitation, the Trust Fund for Victims (the ‘Trust Fund’) hereby provides its observations on ‘issues arising’ from the Request.

11. The Request is based on article 82 (3) of the Statute providing that an appeal may have suspensive effect, if the Appeals Chamber so orders, upon request.

12. The first preliminary issue arising is whether paragraph 3 of article 82 is applicable to appeals under paragraph 4 of article 82 of the Statute, considering that the Rules of Procedure and Evidence treat appeals under article 82 (4) in the same way as final appeals, i.e. appeals under article 81 (1) and (2) of the Statute. The Trust Fund observes that the Appeals Chamber decided previously that article 82 (3) finds application to appeals under article 82 (4) of the Statute.<sup>11</sup>

13. The second preliminary issue arising is whether the Request was filed timely, considering that the Request was not raised at the time Mr Ntaganda’s Notice of Appeal was filed, but only as part of his Appeal Brief. While this issue is not unequivocally regulated, considering rule 156 (5) of the Rules, its scope of application and systematic position in the Rules and whether it applies to appeals under article 82 (4) of the Statute, the Trust Fund observes in this respect that it has already submitted to the Trial Chamber the Initial Implementation Plan on 8 June 2021.

14. On the merits of the Request, the following issues arise.

---

<sup>10</sup> [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](#), ICC-01/04-02/06-2678.

<sup>11</sup> *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 (A, A2, A3, OA21), (the ‘Lubanga Appeals Chamber Admissibility Decision’), paras 78-80.

15. The main issue is whether a request under article 83 (3) of the Statute is the correct tool to achieve what Mr Ntaganda pursues by the Request. He sets out in paragraph 267 of his Appeal Brief what would change if the appeal was successful, a non-exhaustive list that reads as follows:

Notably, the possible outcome of this appeal, includes inter alia: (i) a requirement being identified for reparations application forms to be transmitted to the Defence; (ii) a requirement being identified for the Defence to become involved in determining the eligibility of potential beneficiaries, both participating victims and new potential beneficiaries; (iii) a requirement being identified for Trial Chamber II becoming involved in some way in ruling on individual applications; (iv) a requirement being identified for guidelines having to be issued to the TFV that would circumscribe its work during the implementation phase; (v) the eligibility of beneficiaries having to be reviewed pursuant to different criteria or using a different standard of proof; (vi) a lesser number of potential beneficiaries being identified; (vii) the liability of the Convicted Person being determined to be less than USD 30,000,000, thereby impacting the implementation of programs; and (viii) the implementation of the reparations process in this case having to be revisited to ensure it is in conformity with the sui generis scheme being developed by the Court. Needless to say, this list is not exhaustive.

16. He then concludes in paragraph 268 that the ‘implementation of the Impugned Decision at this stage could result in considerable time being spent and resources being allocated by the TFV, as well as raised expectations of victims’. Accordingly, the main purpose of the Request 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.

17. The Trust Fund observes that the Appeals Chamber has held that the effect of ordering suspensive effect is that ‘[s]uspension involves the non-enforcement of a decision, the subject of an appeal. Suspensive effect thereby maintains the position as it was prior to the issuing of the Impugned Decision’.<sup>12</sup>

---

<sup>12</sup> *Prosecutor v. Ali Muhammad Ali Abd-El-Rahman*, [Decision on Request for Suspensive Effect](#), 25 August 2020, ICC-02/05-01/20-134, para. 5; *Prosecutor v. Joseph Kony et al.*, [Decision on the Prosecutor’s ‘Application for Appeals Chamber to Give Suspensive Effect to Prosecutor’s Application for Extraordinary Review’](#), 13 July 2006, ICC-02/04-01/05-92, para. 6.

18. The Trust Fund observes that the Appeals Chamber has established that only the convicted person can be held liable for paying reparations.<sup>13</sup> To clarify that it is neither the obligation of the Trust Fund nor that of any related body but only the obligation of the convicted person, the Appeals Chamber has held repeatedly that indigence is not an obstacle to the Trial Chamber issuing an order for reparations against the convicted person.<sup>14</sup> Such an order can be enforced by the Presidency in accordance with the provisions of, in particular, rule 218 of the Rules and regulation 117 of the Regulations of the Court.<sup>15</sup>

19. The Trial Chamber ordered reparations against Mr Ntaganda and also established his indigence at the time of the Reparations Order. It also requested the Presidency's assistance to monitor Mr Ntaganda's financial situation.<sup>16</sup> Taking this into account, the Trust Fund observes that it is highly unlikely that the decision as such will be enforced in the near future, considering the Trial Chamber's finding on indigence and the length of Mr Ntaganda's term of imprisonment. The Trust Fund therefore also observes that the request for suspensive effect of this appeal may not be the correct means of bringing this matter forward. Rather, Mr Ntaganda may need to address the Trial Chamber with his concerns.<sup>17</sup>

20. The Trust Fund underlines in this context that it has been created to take upon itself the responsibility to repair the harm of the victims of crimes committed by persons convicted by the Court, upon the issuance of an order for reparations. The Trust Fund does so as a subsidiary body of the States Parties and, insofar as the convicted person does not have the financial means, within the means available to it from its extra-budgetary financial resources, as obtained through voluntary contributions from States and other public donors, as well as donations from private

---

<sup>13</sup> See *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 (A, A2, A3), (the '*Lubanga* Appeals Chamber 2015 Reparation Judgment'), paras 114-115.

<sup>14</sup> See [Lubanga Appeals Chamber 2015 Reparation Judgment](#), paras 114-115; See also *Prosecutor v. Germain Katanga*, [Judgment on the appeals against the order 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 (A3, A4, A5) (the '*Katanga* Appeals Chamber Reparation Judgment'), para. 189.

<sup>15</sup> See [Katanga Appeals Chamber Reparation Judgment](#), paras 189-190.

<sup>16</sup> [Reparations Order](#), disposition.

<sup>17</sup> See regulations 57, 58, 69 of the TFV Regulations.

donors or through fines and proceeds from forfeitures received through the Court. Where the Trust Fund cannot expect, due to indigence, to receive awards for reparations from the convicted person, as in this case, the Trust Fund's implementation, while by its own accord, is an essential part of the reparative justice system developed under the Statute.

21. The Trust Fund notes that the Appeals Chamber has previously ordered suspensive effect of an appeal against an order for reparations.<sup>18</sup> The Trust Fund observes that this decision was taken in an appeal against an order for reparations that had established that the convicted person due to his indigence could not be ordered to award reparations, but that the Trust Fund should step in with its other resources,<sup>19</sup> an approach that was later quashed by the Appeals Chamber.<sup>20</sup> In addition, this decision was also taken in the context of an ongoing appeal against the conviction, i.e., contrarily to the case at hand, the conviction was not yet confirmed. The Appeals Chamber held in this context that the order for reparations could, in any case, not have been executed unless the Appeals Chamber first confirmed the conviction.<sup>21</sup>

22. The second issue arising on the merits 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. They summarised them as follows:

In past decisions, the Appeals Chamber, when deciding on requests for suspensive effect, has considered whether the implementation of the decision under appeal (i) 'would create an irreversible situation that could not be corrected, even if the Appeals Chamber eventually were to find in favour of the appellant', (ii) would lead to consequences that 'would be very difficult to correct and may be irreversible', or (iii) 'could potentially defeat the purpose of the [...] appeal'.<sup>22</sup> [Footnotes omitted]

---

<sup>18</sup> [Lubanga Appeals Chamber Admissibility Decision](#), disposition and paras 81-85.

<sup>19</sup> *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, paras 270-271.

<sup>20</sup> [Lubanga Appeals Chamber 2015 Reparation Judgment](#), paras 114-115.

<sup>21</sup> [Lubanga Appeals Chamber Admissibility Decision](#), para. 86.

<sup>22</sup> *Prosecutor v. Ali Muhammad Ali Abd-El-Rahman*, [Decision on Request for Suspensive Effect](#), 25 August 2020, ICC-02/01-01/20-134, para. 6. *See also* *Prosecutor v. Joseph Kony et al.*, Decision on the Prosecutor's "Application for Appeals Chamber to Give Suspensive Effect to Prosecutor's Application for Extraordinary Review", 13 July 2006, ICC-02/04/01/5-92, para. 7.



23. The Trust Fund observes that the conviction in this case is final since the Appeals Chamber confirmed it fully on 31 March 2021.<sup>23</sup> The Trust Fund observes that, in the case at hand, and by reference to the standard set by the Appeals Chamber (see *supra* paragraph 17), the fact that the conviction was confirmed only after the issuance of the Reparations Order<sup>24</sup> is a circumstance independent from the Reparations Order and, in that regard, the position before the Reparations Order would have to be considered as if the conviction had already been confirmed.

24. The final conviction implies that the scope of the conviction is determined with finality and ensures certainty in the identification and verification of whether victims fall within the scope of the crimes committed by Mr Ntaganda. In addition, considering that there is a confirmed conviction, and also taking into account the relief sought by Mr Ntaganda,<sup>25</sup> in the ordinary course of events, an order for reparations would be issued in this case. Furthermore, considering the circumstances of this case, it is also reasonable to expect that the award be a collective one ordered pursuant to rule 98 (3) of the Rules (even if among others).

25. The Trust Fund observes that, based on these two expected consequences of the confirmed conviction, 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. The following arguments support the same conclusion:

26. First, any change to the sum of liability can be taken into account by the Trust Fund's Board of Directors in its fund management and investment decisions, and in particular in decisions pursuant to regulation 56 of the Regulations of the Trust Fund.

27. Second, should, as a consequence of the appeal, certain categories of harm be excluded from the scope of the Reparations Order (and only insofar as not falling within the scope of the

---

<sup>23</sup> [Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled 'Judgment'](#), 30 March 2021, ICC-01/04-02/06-2666-Red (A, A2), (the '*Ntaganda* Appeals Judgment'), disposition.

<sup>24</sup> [Ntaganda Appeals Judgment](#).

<sup>25</sup> [Mr Ntaganda's Appeal Brief](#), para. 273, requesting that either the Appeals Chamber or the Trial Chamber order a new or significantly amended order for reparations.

conviction), such as the harm described relevant to the Sayo health centre, the Trust Fund will be able to adapt its implementation plan accordingly, and in a timely fashion.

28. Third, should, as a consequence of the appeal, the Defence of Mr Ntaganda obtain an active role in the verification process of whether victims of the crimes committed by Mr Ntaganda are beneficiaries of reparation measures, or should the standard of proof be somehow adapted, in particular for certain categories of victims, the relevant processes can be retroactively amended. The Trust Fund notes that it has established a straightforward verification process for 'Priority Victims' to enable them to benefit from the Interim Implementation Plan. In addition, in preparing the draft implementation plan due on 8 September 2021, the Trust Fund has started consultations with the Registry on the process that should apply to the eligibility assessment of victims of the attacks more generally.

29. Considering 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. The Trust Fund cannot overlook, however, that, with respect to certain individuals, this risk may materialise. It observes that 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 the crime or the harm they suffered due to these crimes would not be accountable to Mr Ntaganda. However, the Trust Fund is prepared in respect of the individuals at issue, if any, to step in with its assistance programme that addresses harm suffered based on crimes falling within the jurisdiction of the Court. Therefore, even if not attributable to Mr Ntaganda, the victim's harm based on the same incident, which amounts to a crime falling under the jurisdiction of the Court, would be recognised and the harm would be repaired nonetheless.

30. In this regard, the Trust Fund notes that, as part of the Initial Implementation Plan, the Trust Fund plans to use two of its assistance projects to bring reparations to the most vulnerable victims without delay, including victims of rape or sexual slavery and children born out of rape or sexual slavery. The Trust Fund's assessment is that projects that will need to be newly devised and

procured will only start running after or around the time the judgment on this appeal will be delivered, due to the necessary time required for procurement and contracting processes, including in case of single source procurements.<sup>26</sup> Furthermore, the Trust Fund will communicate as part of its outreach strategy in this case that appeals are still pending and that therefore changes to the plan may be required.

31. Finally, the Trust Fund observes that an implementation plan is subject to adaptation to new and changing circumstances, including on location.<sup>27</sup> Any changes required to the plan based on the Appeals Chamber's judgment could therefore be accommodated even if the Trial Chamber already approved the implementation plan. While any such changes require Trust Fund resources, time and efforts as well as proper outreach, the Trust Fund considers that none of this could be characterised as a situation that is hard to correct or irreversible, or which defeats the purpose of the appeal.

## **OBSERVATIONS ON THE APPEAL BRIEF PURSUANT TO RULE 103 OF THE RULES OF PROCEDURE AND EVIDENCE**

32. The Trust Fund notes that Mr Ntaganda's Appeal Brief addresses numerous issues, on which the Appeals Chamber may deem it appropriate to invite further observations from the Trust Fund. The Trust Fund considers that a number of the grounds of appeal raise fundamental questions that concern the role of the Trust Fund during the implementation phase. In addition, several grounds of appeal address issues relevant to the eligibility assessment and also question the role of the Trust Fund in developing the process for such an eligibility assessment in case of collective reparations, as requested by the Trial Chamber. Accordingly, the Trust Fund requests leave to submit observations on these matters pursuant to rule 103 of the Rules of Procedure and Evidence, in particular on the issues raised in grounds 10 to 14, such as:

- the delegation of judicial functions to the Trust Fund (paras 201 *et seq.*);
- the criteria for the assessment of eligibility (paras 206 *et seq.*);

---

<sup>26</sup> See [Initial Implementation Plan](#), paras 24, 68 and 71.

<sup>27</sup> See also *Prosecutor v. Ahmad Al Faqi Al Mahdi*, [Decision on the Updated Implementation Plan of the Trust Fund for Victims](#), 4 March 2019, ICC-01/12-01/15-324-Red, para. 18.

- the role of the Trust Fund in determining the concrete implementation measures (paras 210 *et seq.*);
- the role of the Trust Fund and the monitoring role of the Trial Chamber (paras 215 *et seq.*).

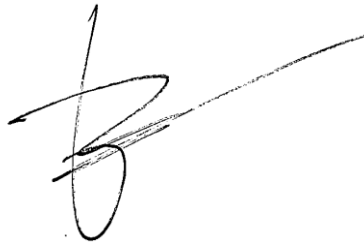
33. Issues relevant to reparation principles and the amount of liability were addressed by the Trust Fund previously before the Trial Chamber (Mr Ntaganda's ground 3 and ground 15). Other issues have an impact on the implementation of the reparations (e.g. grounds 4 to 9). The Appeals Chamber may deem it appropriate to hear the Trust Fund's further observations on any of these matters, including on the application of the do no harm principle (ground 3), the alleged errors relevant to the verification of indirect victims, the evidentiary issues and the standard of proof. In that regard, the Trust Fund notes that the appeal of the Legal Representative may also require observations from the Trust Fund. By reference to this Invitation, the Trust Fund is prepared to submit observations on all those issues insofar as invited by the Appeals Chamber. The Trust Fund respectfully observes that any delineation of such issues by the Appeals Chamber would assist the Trust Fund in submitting concise and relevant observations on the submissions of several parties.

34. Should this request be granted and additional observations be invited pursuant to rule 103 of the Rules, the Trust Fund observes that it currently has two deadlines set by two trial chambers for the submission of complex documents in early September 2021.

## **RELIEF SOUGHT**

The Trust Fund hereby respectfully submits its observations on the Request for consideration of the Appeals Chamber in adjudicating on the Request.

The Trust Fund hereby respectfully seeks leave to submit observations pursuant to rule 103 of the Rules as set out above in paragraph 32.



---

Pieter W.I. de Baan  
Executive Director of the Secretariat of the Trust Fund for Victims,

Dated this 22nd Day of June 2021

At The Hague, The Netherlands