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TRIAL CHAMBER II

Before: Judge Chang-ho Chung, Presiding Judge
Judge Péter Kovacs
Judge Maria del Socorro Flores Liera

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

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

Public

**Application on behalf of Mr Bosco Ntaganda seeking leave to appeal
Decision on the TFV's initial draft implementation plan
with focus on priority victims**

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 Reparations Order issued by Trial Chamber VI on 8 March 2021 (“8 March Reparations Order”),¹ the submission by the Trust Fund for Victims (“TFV”) of its Initial Draft Implementation Plan (“IDIP”)² and the Decision rendered by Trial Chamber II on 23 July 2021 approving the IDIP subject to modifications and further information to be provided by the TFV at a later stage (“Impugned Decision”),³ Counsel for Mr Bosco Ntaganda (“Defence” or “Mr Ntaganda”) hereby submit this:

**Application on behalf of Mr Bosco Ntaganda seeking leave to appeal
Decision on the TFV’s initial draft implementation plan
with focus on priority victims**

“Application for Leave to Appeal”

INTRODUCTION

1. Trial Chamber VI’s unprecedented undertaking in the 8 March Reparations Order, calling upon the TFV to submit an initial draft implementation plan as “[...]an interim and emergency measure aimed at addressing the needs of the victims requiring urgent assistance pending the development and implementation of the full DIP”,⁴ is a laudable initiative. Trial Chamber VI’s undertaking, however, does not justify departing from the ICC legal framework applicable to reparations proceedings or from the practice developed in the Court’s case law concerning the development of draft implementation plans, which must be judicially approved before their actual implementation.

¹ Reparations Order, 8 March 2021, [ICC-01/04-02/06-2659](#) (“8 March Reparations Order”).

² Annex A, Initial Draft Implementation Plan with focus on Priority Victims, 8 June 2021, [ICC-01/04-02/06-2676-Conf-AnxA](#).

³ Decision on the TFV’s initial draft implementation plan with focus on priority victims, 23 July 2021, [ICC-01/04-02/06-2696](#) (“Impugned Decision”).

⁴ [Impugned Decision](#), para.8.

2. Having noted that “[...] all parties and the Registry oppose the IDIP and/or suggest that it should be substantially clarified and amended”⁵, Trial Chamber II (“Chamber”) nonetheless proceeded to approve the IDIP despite missing crucial information. In doing so, the Chamber is authorizing the TFV to implement reparations on the basis of unknown parameters and activities, thereby delegating its judicial functions to the TFV. The Chamber’s decision – “balancing the rights and interests at stake [...] in order to avoid further delays”⁶ – *not* to call upon the TFV to submit an amended IDIP is not only incompatible with the Rome Statute framework, which vests these decisions with the Judges, but is likely to lead to longer delays and wasted resources, while inappropriately raising the expectations of victims.

3. While the Impugned Decision *does not* approve the TFV’s proposal regarding the eligibility assessment – and urgent screening of victims – and provides additional guidelines, it then approves the IDIP and authorizes the TFV to implement reparations on the basis of an alternative proposal for the eligibility assessment and urgency screening of victims, that is not yet in existence. This is an error. It is not sufficient for the Chamber to indicate that the eligibility assessment must be “[...] a fair, efficient, and expeditious process and that the TFV (has) to take ‘into consideration the Registry’s capacity to assist.’”⁷

4. What is more, the Chamber’s findings that the eligibility assessment “[...] shall be made in accordance with the eligibility criteria and the standard and burden of proof as set out in the Reparations Order”⁸ and that the urgency screening “should be made by applying the same standard and burden of proof [...]”⁹ are improper, given that these issues are presently the object of an appeal before the Appeals Chamber. Indeed, any alteration to the standard and burden of proof set out

⁵ [Impugned Decision](#), para.3.

⁶ [Impugned Decision](#), para.16.

⁷ [Impugned Decision](#), para.35.

⁸ [Impugned Decision](#), para.31.

⁹ [Impugned Decision](#), para.32.

in the 8 March Reparations Order will inevitably lead to eligibility assessments conducted in the context of the IDIP, having to be conducted *de novo*.

5. In this regard, the Chamber's pronouncement that "[...] the rights of the convicted person are guaranteed, as the Defence have had the opportunity to challenge the applicable standards of proof and causation and will be able to make submissions on the TFFV's proposed administrative eligibility assessment before its approval"¹⁰ is also incorrect. Indeed, the opportunity to challenge applicable standards of proof and causation is entirely different from the ability to challenge applications for reparations based on the application of these standards. Significantly, the 8 March Reparations Order neither provides nor calls for Defence submissions on the TFFV's administrative eligibility assessment before its approval.

6. Moreover, although the Impugned Decision *does not* approve the service-based and symbolic reparations programmes in the *Lubanga* case *nor* the residual *Ntaganda* SGBV project proposed in the IDIP, it nonetheless authorizes the TFFV's proposal to use two existing assistance projects, in place since May 2020, subject to certain conditions. However, these conditions are insufficient to achieve the Chamber's aim of clearly distinguishing "[...] the TFFV's dual mandate to (i) implement Court ordered reparations, and (ii) provide assistance to victims of the crimes under the jurisdiction of the Court."¹¹ More importantly, the conditions imposed for this purpose, if even possible,¹² will be costly, as well as time and resource intensive, thereby likely giving rise to delays and, significantly, requiring the redirection of funds away from reparations to project and administrative costs.

7. Lastly, the Defence notes that on 23 July 2021, the Chamber granted the TFFV's request for an extension of time to submit its DIP until 17 December 2021, on the

¹⁰ [Impugned Decision](#), para.37.

¹¹ [Impugned Decision](#), para.23.

¹² See *inter alia* [Impugned Decision](#), para.27: [...] Services consisting of medical referrals *v.* the Chamber's expectation that medical and psychological treatment are provided [...] as opposed to simply referrals to health facilities.

basis of health and security concerns. Notably, no mention is made in the Impugned Decision of the impact of the same health and security concerns on the implementation of the IDIP between now and December. At a minimum, such information should have been made available by the TFV. If, as can be expected, these health and security concerns also impact activities related to the further designing and the implementation of the IDIP, it provided an appropriate context as well as the opportunity to call upon the TFV to submit an amended IDIP for the Chamber's approval rather than approving an incomplete IDIP. In its rush to do so, the Chamber committed the errors identified below.

PROCEDURAL BACKGROUND

8. On 8 March 2021, Trial Chamber VI issued the 8 March Reparations Order.¹³
9. On 7 June 2021, the LRV2¹⁴ and the Defence¹⁵ lodged their respective appeals against the 8 March Reparations Order.
10. On 8 June 2021, as directed by the Trial Chamber VI, the TFV submitted the initial draft implementation plan with focus on priority victims ("IDIP").¹⁶
11. On 10 June, the Trial Chamber II invited the parties to submit observations on the IDIP.¹⁷
12. On 23 June 2021, the Legal Representatives¹⁸, the Registry¹⁹, and the Defence²⁰ submitted their observations on the IDIP. The Defence in their observations opposed the approval of the IDIP ("Defence Observations on IDIP").

¹³ [8 March Reparations Order](#).

¹⁴ 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](#) ("LRV2 Appeal Brief").

¹⁵ Defence Appellant Brief against the 8 March Reparations Order, 7 June 2021, [ICC-01/04-02/06-2675](#) ("Defence Appeal Brief").

¹⁶ 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").

¹⁷ 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](#).

13. On 28 June 2021, the TFV submitted a reply to the parties' observations.²¹

APPLICABLE LAW

14. This Defence request is submitted pursuant to Article 82(l)(d) of the Rome Statute ("Statute"), rule 155 of the Rules of Procedure and Evidence ("Rules") and regulation 65 of the Regulations of the Court ("RoC").

SUBMISSIONS

I. Intended grounds of appeal

15. Leave to appeal the Impugned Decision is sought for the purpose of raising the following five grounds of appeal, which constitute appealable issues pursuant to the jurisprudence of the Court.

First ground of appeal

16. Whether the Chamber erred by approving the IDIP in the absence of sufficient information related to the proposed projects and activities, steps to be taken, direct and indirect costs, and timeline for implementation.²²

Second ground of appeal

17. Having rejected the TFV's proposals "[...] to rely on three different administrative eligibility assessments depending on the category of victims [...]" and

¹⁸ 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-Red](#) ("CLR2 Observations"); 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](#) ("CLR1 Observations").

¹⁹ Registry Observations on the Trust Fund for Victims' Initial Draft Implementation Plan, 23 June 2021, [ICC-01/04-02/06-2683](#).

²⁰ Defence Observations on the TFV initial draft implementation plan, 23 June 2021, [ICC-01/04-02/06-2682-Conf](#).

²¹ Observations on the responses and observations submitted on the Initial Draft Implementation Plan, 28 June 2021, [ICC-01/04-02/06-2687-Conf](#).

²² [Impugned Decision](#), para.15.

to delegate parts of the eligibility assessments to external entities,²³ whether the Chamber erred in then approving the IDIP on the basis of an abstract alternative proposal for the eligibility assessment and urgent screening of victims, which had not yet been formulated or presented by the TFV.

Third ground of appeal

18. Whether the Chamber erred by finding that “[...] the rights of the convicted person are guaranteed, as the Defence have had the opportunity to challenge the applicable standards of proof and causation” and “will be able to make submissions on the TFV’s proposed administrative eligibility assessment before its approval”, when this is not provided for in the 8 March Reparations Order.

Fourth ground of appeal

19. Whether the Chamber erred by approving the IDIP and finding that the eligibility assessment “[...] shall be made in accordance with the eligibility criteria and the standard and burden of proof as set out in the Reparations Order”²⁴ and that the urgency screening “[...] should be made by applying the same standard and burden of proof [...]”²⁵ given the pending LRV2 and Defence appeals against the 8 March Reparations Order – the latter specifically challenging the applicable standard of proof and causation.

Fifth ground of appeal

20. Having stressed, in accordance with the Statutory framework, the importance of clearly distinguishing the TFV’s dual mandate to (i) implement Court ordered reparations, and (ii) provide assistance to victims of the crimes under the jurisdiction

²³ [Impugned Decision](#), para.36.

²⁴ [Impugned Decision](#), para.31.

²⁵ [Impugned Decision](#), para.32.

of the Court,²⁶ whether the Chamber then erred in approving the TFV's proposal to use two existing assistance projects for reparations in the *Ntaganda* case.²⁷

II. The five intended grounds of appeal address and constitute 'appealable issues'

21. An "appealable issue" is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion. An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination.²⁸

22. The appealable issues raised by the Defence in this Application for Leave to Appeal fulfill this requirement. They are not mere disagreements with the Chamber, they are errors that stand at the centre of the Impugned Decision, which directly impact the implementation phase of the reparations in this case. Much like the errors identified in the parties' appeals against the 8 March Reparations Order,²⁹ the appealable issues arise directly from the Chamber's determination to expedite the reparations process in the *Ntaganda* case, even if this requires approving an implementation plan: (i) without information about proposed projects and activities, steps to be taken, direct and indirect costs, and a timeline;³⁰ and (ii) with no authorized eligibility assessment and urgency screening mechanism in place.³¹ Whether a Chamber is entitled to approve an implementation plan in the abstract is undoubtedly an issue which must be determined and the resolution of which is essential to these proceedings. As is the question of whether an implementation plan can even move forward when the Appeals Chamber is currently adjudicating

²⁶ [Impugned Decision](#), para.23.

²⁷ [Impugned Decision](#), para.24.

²⁸ *Prosecutor v. Al Hassan*, Decision on Defence Request for Reconsideration and, in the Alternative, Leave to Appeal the "Decision on Witness Preparation and Familiarisation", 9 April 2020, [ICC-01/12-01/18-734](#), para.13.

²⁹ [LRV2 Appeal Brief](#); [Defence Appeal Brief](#).

³⁰ [Impugned Decision](#), para.15.

³¹ [Impugned Decision](#), para.38.

whether the Chamber was wrong to apply the very same standard of proof that will be applied in the proposed eligibility assessments and urgency screenings.

23. Moreover, in a complete diversion from prior practice, the path identified in the Impugned Decision is that projects that are currently underway under the TFV's assistance mandate will simply be appropriated, and re-labeled as reparations. While no reasonable argument can be made that the distinction between the TFV's two mandates has been respected, in identifying this error the Defence is not merely disagreeing with the Chamber's approach, it is identifying a live question which must be adjudicated before the reparations phase can move forward.

24. Of course, the unnecessary prolongation of a reparations phase is harmful to both the victims and convicted person. However, a balance must be struck between expeditious proceedings, and ensuring that the reparations process develops in a manner that is consistent with (i) the Rome Statute framework; (ii) the capacity and mandate of the TFV; (iii) the rights of the convicted person, and which does not circumvent the appellate process or fails to respect the important and corrective function of the Appeals Chamber. Resolution of the issues identified in the present appeal is essential for the determination of matters arising in the reparations phase, and are therefore properly appealable.

III. The five appealable issues significantly affect the fair and expeditious conduct of the proceedings or the outcome of the reparations proceedings

25. The different approaches to the reparations proceedings in different ICC cases mean that no fixed reparations practice has yet to emerge at the Court. The evolving nature of reparations procedure gives rise to significant opportunities for creativity on the part of a Chamber in terms of how to most effectively and fairly direct reparations towards a community affected by the actions of a convicted person.

26. In the *Ntaganda* case, however, the reparations process diverges so greatly from the ICC's past practice, that it is unrecognisable. A reparations plan has been

approved in the absence of crucial information that the TFV has yet to provide, which requires the annexation of assistance projects, and the application of burdens of proof that are currently being challenged on appeal. If the Chamber is indeed mistaken in its ability to approve a reparations plan, central planks of which have not yet been formulated, this will require a repeat of the eligibility assessments process, necessarily affecting the outcome of the reparations proceedings. If the Chamber is indeed wrong to allow ongoing assistance projects to be appropriated for reparations, then the reparations in *Ntaganda* will need to look entirely different. If the Chamber has indeed misapplied burdens of proof and causation, the outcome of the eligibility assessments will necessarily be impacted. The issues identified are not abstract or academic, they have a significant bearing on the proceedings themselves.

27. That the appealable issues impact the fairness of the proceedings is also undeniable. The Impugned Decision is asserting that Mr. Ntaganda's rights are "guaranteed", and that he will have the ability to challenge applicable standards of proof and causation, and will be able to "make submissions on the TFV's proposed administrative eligibility assessment before its approval", despite there being no procedure for this in the 8 March Reparations Order. As for the potential beneficiaries, the Impugned Decision approves an implementation plan that will necessarily be approximate, given the number of unknowns. If the Chamber erred in doing so, or was found to be wrong about the burden of proof and causation requirements, this will require a repeat of the eligibility assessments process, which cannot be considered consistent with the "do not harm" principle, and will impact the fairness of the proceedings.

IV. Immediate resolution of the five appealable issues by the Appeals Chamber may materially advance the reparations proceedings

28. The imperative for an immediate resolution by the Appeals Chamber lies in the fact that the IDIP is intended for quick implementation in order to provide reparations as quickly as possible to priority victims. The aim of seeking

interlocutory relief at this stage is to ensure that reparations proceedings can proceed on a sound legal basis. Delaying resolution of the appealable issues until the TFV (i) provides the missing crucial information related to the proposed projects and activities, steps taken, direct and indirect costs and timeline for implementation;³² (ii) formulates a new alternative proposal for the eligibility assessment and urgent screening of victims;³³ (iii) proceeds to conduct the eligibility assessment and/or urgent screening of priority victims on the basis the standard of proof and causation set out in the 8 March Reparations Order;³⁴ or (iv) proceeds to implement / award reparations to priority victims *via* assistance projects,³⁵ may necessarily have serious repercussions, not only for priority victims selected in the context of the IDIP but also for all beneficiaries declared admissible or awarded reparations further to the approval of the DIP.

29. Indeed, (i) the crucial information provided by the TFV in relation to the proposed projects and activities, steps taken, direct and indirect costs and timeline for implementation, might not respect the terms of the 8 March Reparations Order and/or be challenged;³⁶ (ii) the new alternative proposal for the eligibility assessment and urgent screening of victims that might not be approved by the Chamber and/or be challenged;³⁷ (iii) the standard of proof and causation set out in the 8 March Reparations Order might be reversed or modified by the Appeals Chamber, thereby vitiating eligibility assessments and/or urgent screenings of priority victims conducted on that basis;³⁸ or (iv) recourse to TFV assistance projects to implement /

³² First ground of appeal, para.16.

³³ Second and third grounds of appeal, paras.17,18.

³⁴ Fourth ground of appeal, para.19.

³⁵ Fifth ground of appeal, para.20.

³⁶ First ground of appeal, para.16.

³⁷ Second and third grounds of appeal, paras.17,18.

³⁸ Fourth ground of appeal, para.19.

award reparations to priority victims may later be declared improper and/or be challenged.³⁹

30. If eligibility assessments are subsequently annulled, priority victims and subsequent beneficiaries will face a range of consequences. These include eligibility assessments having to be performed *de novo*, reparations implemented being annulled, reparations having to be assessed *de novo*, and significant delays going well beyond the time required for the resolution of the appealable issues raised herein by the Appeals Chamber.

31. Moreover, the potential consequences associated with the appealable issues raised herein are compounded by the fact that unless they are resolved at this stage, the TFV will necessarily plan, prepare and design its DIP, now due on 17 December 2021, on the same basis. Hence, if upheld by the Appeals Chamber, any ground of appeal raised by the Defence against the 8 March Reparations Order that relate to the appealable issues, in particular, those challenging the standard of proof and causation and the administrative eligibility assessment process, would very likely result in the TFV having to recommence all steps taken to design its DIP.

CONCLUSION

32. The process of providing reparations to victims of crimes for which an ICC accused has been convicted is a complex one. The ICC framework puts the Chamber in the centre of this process; it is the Chamber which is required to make decisions as regards victims' eligibility, harm, modalities, timeframes, projects and programs. It is the elected Judges who were vested by the international community with the power and mandate to adjudicate these matters.

33. The reparations proceedings in *Ntaganda* are extraordinary not only for the prioritisation of expediency above everything else, but because of the scope of

³⁹ Fifth ground of appeal, para.20.

judicial functions that have been delegated to the TFV. Essential steps have been skipped over, while the number of pending and outstanding issues creates significant uncertainty for all involved parties. The errors identified in the current request for leave are significant, and structural. They are properly appealable issues that significantly affect the fairness of the reparations proceedings, for both the convicted person and the beneficiaries, and their outcome. Moreover, their immediate resolution will materially advance the proceedings for the reasons set out above.

RELIEF SOUGHT

34. In light of the foregoing, the Defence respectfully requests Trial Chamber II to:

GRANT the Application for Leave to Appeal;

GRANT the Defence leave to appeal the five appealable issues raised in paragraphs 16, 17, 18, 19 and 20 above.

RESPECTFULLY SUBMITTED ON THIS 2nd DAY OF AUGUST 2021

A handwritten signature in grey ink, appearing to read 'StB' with a flourish at the end.

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

The Hague, The Netherlands