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

Date: **21 August 2023**

THE APPEALS CHAMBER

Before:

**Judge Marc Perrin de Brichambaut
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

Public Redacted Version of "Request for the Defence appeal against the Addendum issued by Trial Chamber II on 14 July 2023 to be given suspensive effect", dated 16 August 2023, ICC-01/04-02/06-2864-Conf

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 Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled “Reparations Order” rendered on 12 September 2022 (“Appeals Judgment”)¹ and the Addendum to the Reparations Order of 8 March 2021 issued by Trial Chamber II on 14 July 2023 (“14 July Addendum” or “Impugned Decision”)², Counsel for Mr Ntaganda (“Convicted Person” or “Defence”) hereby submits this:

Request for the Defence Appeal against the Addendum issued by Trial Chamber II on 14 July 2023 to be given suspensive effect

“Defence Request for Suspensive Effect”

INTRODUCTION

1. The Defence respectfully requests that its upcoming appeal, submitted pursuant to article 82(4) of the Statute, be given suspensive effect pursuant to article 82(3) of the Statute and rule 156(5).

2. The Appeals Chamber previously held that a request for suspensive effect of a reparation order must be made in the notice of appeal.³ Accordingly, this Defence Request for Suspensive Effect is submitted ahead and in support of the request made in the Defence Notice of Appeal against the 14 July Addendum to the Reparations Order of 8 March 2021.⁴

3. The Defence submits that even though victims in this case have been waiting for reparations for a very long time, a situation that is most unfortunate, but which is not attributable to the Defence, the immediate suspension of the Impugned Decision is warranted and necessary, as allowing Trial Chamber II to proceed with the implementation of reparations on the basis of the 14 July Addendum while the

¹ Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled “Reparations Order,” 12 September 2022, ICC-01/04-02/06-2782 (“Appeals Judgment”).

² Addendum to the Reparations Order of 8 March 2021, ICC-01/04-02/06-2659, 14 July 2023, ICC-01/04-02/06-2858 (“14 July Addendum”).

³ Decision on the Defence request for suspensive effect, 2 July 2021, ICC-01/04-02/06-2691 (“AC Decision on Defence Request for Suspensive Effect”), para.21.

⁴ Defence Notice of Appeal against the 14 July Addendum to the Reparations Order of 8 March 2023, submitted on 16 August 2023.

Appeals Chamber adjudicates the Defence Appeal against the Impugned Decision would lead to consequences that would be very difficult to correct and may be irreversible, or could very likely defeat the purpose of the Defence Appeal.

4. Further to numerous significant errors committed by Trial Chamber VI in the Reparations Order issued on 8 March 2021 (“First Reparations Order”),⁵ Trial Chamber II was given the opportunity by the Appeals Chamber to issue a new order for reparations. It failed to do so, issuing instead an Addendum to the First Reparations Order, partially reversed on appeal, inserting therein new provisions incapable of salvaging the original version of the First Reparations Order. In [REDACTED] (“[REDACTED]”), [REDACTED], [REDACTED].⁶ It thus appears evident on the basis of the views expressed by Trial Chamber II that the delivery of an addendum to the First Reparations Order partially reversed on appeal, *in lieu* of a new reparations order as requested by the Appeals Chamber, is not the result of an oversight. The resulting prejudice to the parties, and the victims in this case, is compounded by the scope of the [REDACTED], [REDACTED], thereby depriving the parties of their right to appeal fundamental characteristics of the judicial reparations process, as of right.

CONFIDENTIALITY

5. Pursuant to regulation 23*bis* (1) and (2) of the Regulations of the Court, this Defence Request for Suspensive Effect is classified confidential as it refers to documents bearing the same classification. A public redacted version will be prepared and filed at the earliest opportunity.

⁵ Reparations Order, 8 March 2021, ICC-01/04-02/06-2659 (“First Reparations Order”).

⁶ [REDACTED].

APPLICABLE LAW

6. The Appeals Chamber previously held that article 82(3) of the Statute and rule 156(5) govern requests for suspensive effect of reparation orders that are impugned on appeal.⁷

7. The Appeals Chamber has also held that it has the power to grant a request for suspensive effect when seized of such a request in relation to an appeal under article 82 (4) of the Statute.⁸

8. As to when suspensive effect will be granted, the Appeals Chamber explained that:

"[...] [t]he decision on such a request is within the discretion of the Appeals Chamber. Therefore, when faced with a request for suspensive effect, the Appeals Chamber will consider the specific circumstances of the case and the factors it considers relevant for the exercise of its discretion under the circumstances."⁹

9. In past decisions, the Appeals Chamber further elaborated on the circumstances and factors to be considered, holding that, "[...] 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 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'."¹⁰

⁷ *The 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 ("Lubanga Decision on the Admissibility of the Appeal"), para.80.

⁸ Lubanga Decision on the Admissibility of the Appeal, para.79.

⁹ Lubanga Decision on the Admissibility of the Appeal, fn.195.

¹⁰ Lubanga Decision on the Admissibility of the Appeal, fn.196.

ARGUMENT

10. The Defence acknowledges that the above criteria adopted by the Appeals Chamber to determine whether suspensive effect of a decision being appealed should be granted are of a demanding nature and should be rigorously applied in view of the overriding importance of delivering reparations to victims following the convictions entered against the Convicted Person which are now final.¹¹

11. Nonetheless, the Defence submits that in the circumstances of this case, these criteria are met as the immediate suspension of the 14 July Addendum is the only available avenue to avoid severe and potentially irreparable prejudice, both to the victims in this case and the Convicted person, as well as to steer the reparations process in this case, back in the right direction.

12. In its Decision on the Defence Request for Suspensive Effect of the First Reparations Order,¹² the Appeals Chamber ruled that it was “[...] not persuaded that the immediate suspension of the Impugned Decision, sought by the Defence, is warranted.”¹³ More particularly, the Appeals Chamber found that “[...] it has not been demonstrated that unless the Impugned Decision is suspended, its implementation would create an irreversible situation, lead to consequences that would be very difficult to correct, or potentially defeat the purpose of the appeal of either the Defence or Victims Group 2.”¹⁴

13. The present situation is very different from the circumstances ruling at the time. First, it was the beginning of the implementation phase and many preliminary steps had to be taken before the eligibility determination of victims could begin. Consequently, during the period from 8 March 2021 until the Appeals Judgment was rendered on 12 September 2022, the TFV determined the eligibility of no more than 31

¹¹ AC Decision on Defence Request for Suspensive Effect, para.21.

¹² Defence Appellant Brief against the 8 March Reparations Order, 7 June 2021, ICC-01/04-02/06-2675, paras.260-272.

¹³ AC Decision on Defence Request for Suspensive Effect, para.22.

¹⁴ AC Decision on Defence Request for Suspensive Effect, para.23.

victims.¹⁵ Moreover, even though the Initial Draft Implementation Plan (“IDIP”) submitted by the TFV pursuant to the Impugned Decision was kept operational after the Appeals Judgment reversed the First Reparations Order – which is one of the orders issued by Trial Chamber II now raised on appeal by the Defence – the number of victims whose eligibility was determined by the TFV before the delivery of the 14 July addendum did not rise beyond 70.¹⁶ Moreover, the eligibility determinations made by the TFV were re-assessed by Trial Chamber II based on the criteria included in the 14 July Addendum. Further to this assessment, the number of victims determined to be *not* eligible by Trial Chamber II, even though they were previously determined eligible by the TFV, was limited to four.¹⁷ Furthermore, since these victims had already benefited from reparations, the TFV will be able to step in and fund the reparations awarded to these four victims pursuant to its Assistance mandate.¹⁸

14. Today, further to Appeals Chamber’s finding that Trial Chamber VI erred by failing, “[...] *inter alia*, lay out at least the most fundamental parameters of a procedure to carry out the eligibility assessment,”¹⁹ the 14 July Addendum comprises a section on the procedure for carrying out the eligibility assessment of victims at the implementation stage as well as a section in which Trial Chamber II discusses issues arising from its analysis of the 171 victims’ dossiers included in the sample assembled at its request.²⁰

15. Accordingly, it is very likely that the determination of the eligibility of potential victims in this case will proceed at an accelerated pace in the coming months. [REDACTED], [REDACTED]. Notably, Trial Chamber II [REDACTED],²¹

¹⁵ Trust Fund for Victims’ Sixth Update Report on the Implementation of the Initial Draft Implementation Plan, 25 July 2022, ICC-01/04-02/06-2775, para.30.

¹⁶ Trust Fund for Victims’ Twelfth Update Report on the Implementation of the Initial Draft Implementation Plan, 31 July 2023, ICC-01/04-02/06-2859, para.10.

¹⁷ 14 July Addendum, para.143.

¹⁸ 14 July Addendum, para.143.

¹⁹ Appeals Judgment, paras.23,747.

²⁰ 14 July Addendum, paras.25-148.

²¹ [REDACTED], paras.179-181,185.

[REDACTED], thereby depriving the parties of the possibility to appeal fundamental characteristics of the judicial reparations process, as of right.

16. Significantly, most of the grounds of appeal included in the Defence Notice of Appeal are directed at the procedure set out by Trial Chamber II for carrying out the eligibility assessment of victims at the implementation stage and related issues including *inter alia* transgenerational harm. To provide but one example, Trial Chamber II determined in the 14 July Addendum, considering the presumption of civilian status under IHL, that it does not consider that the absence of information, concerning the occupation of victims (or of their immediate family members) in their dossiers precludes a finding, on the balance of probabilities, that the victims are entitled to reparations.²² The Defence is appealing this determination on the basis *inter alia* that the IHL presumption of civilian status does not find application in relation to the issue at hand. This is important because as it stands, *none* of the victims' dossiers include *any* information concerning their occupation at the time. Trial Chamber II is thus conveying the message to [REDACTED] that it need *not* look for any information regarding the occupation / status of the victims at the time. Notably, this issue was the object of detailed Defence submissions in its observations on the TFCV update reports on the implementation of the IDIP.²³

17. Should this ground of appeal be successful, it will be necessary for [REDACTED] to revisit thousands of eligibility determinations conducted before the delivery of the Appeals Judgment, which implies *inter alia* seeking additional information from victims who have been declared eligible with the possibility of their determination being reversed. The same reasoning applies in respect of other grounds of appeal directed at the determination of the eligibility of potential victims in this

²² 14 July Addendum, para.109.

²³ See *inter alia* Defence observations on the Trust Fund for Victims' Ninth Update Report on the Implementation of the Initial Draft Implementation Plan, 10 February 2023, ICC-01/04-02/06-2829, paras.15-19; Defence observations on the Trust Fund for Victims' Eleventh Update Report on the Implementation of the Initial Draft Implementation Plan, 12 June 2023, CC-01/04-02/06-2855, paras.13-14.

case.²⁴ Notably, the Appeals Chamber did not have the opportunity to assess the substantive criteria or the procedure for carrying out the eligibility assessment of victims at the implementation stage because it was absent from the First Reparations Order.

18. Given the potential very high number of victims whose eligibility determination may have to be revisited, and possibly be reversed, as a result of the Defence appeal, the TFV is not likely to be able to step in, pursuant to its assistance mandate, as it intends to do for the four above mentioned victims, who have now been determined to be *not* eligible by Trial Chamber II. Should the TFV argue otherwise in response to this Defence Request for Suspensive Effect, this raises additional issues regarding the assistance mandate of the TFV and its relationship to judicial reparations.

19. Furthermore, considering the requirement to adopt a victims' centered approach and to apply *inter alia*, the *do no harm* reparations principle, the need to revisit thousands of eligibility determinations and possibly reverse a portion thereof would inevitably create an irreversible situation, or lead to consequences that would be very difficult to correct, or potentially defeat the purpose of the Defence appeal. Indeed, *do no harm* "is an internationally recognized principle that complements the humanitarian principles of humanity, impartiality, neutrality and independence"²⁵, which requires "humanitarian actors to anticipate, monitor, and address the potential or unintended negative effects of their actions".²⁶ To be sure, having to revisit and possibly reverse the status of victims declared eligible – a determination which necessarily raised their expectations high – would be in clear violation of the *do no harm* principle.

20. Due to the errors committed by Trial Chamber VI in the First Reparations Order, genuine victims in this case have been waiting for reparations for a very long

²⁴ See *inter alia* Grounds 4, 5, 6, 7 and 8.

²⁵ Reparations Order, para.50.

²⁶ Reparations Order, para.50.

time. In these circumstances, to proceed with the determination of the eligibility of thousands of potential victims while the Appeals Chamber deliberates on the Defence appeal, taking into consideration the live material risk of having to revisit their determination based on the results of the Defence appeal, is not an appropriate course of action.

21. For these reasons, immediate suspension of the 14 July Addendum is warranted with a view to ensuring, in the interest of victims, that the implementation of reparations in this case will proceed on a sound basis when the Appeals Judgment is rendered, either in application of the Impugned Decision or of a new order for reparations issued by the Appeals Chamber.

22. Additional considerations warranting an order for suspensive effect of the Defence appeal at this stage, include: (i) the deteriorating security situation in Ituri, which makes it very difficult to locate victims and to implement reparations. It is likely that the situation will have improved by the time the Appeals Judgment is rendered, thereby facilitating the implementation of reparations; (ii) the upcoming elections in the Democratic Republic of the Congo ("DRC"). It is likely that the upcoming elections in the DRC will have taken place by the time the Appeals Judgment is rendered, which will facilitate liaison with the DRC Government and increase the likelihood that the DRC authorities will provide better assistance to the TFV; (iii) the TFV being able to use this time to prepare for the implementation of reparations by securing additional donations and concluding the necessary contracts with implementing partners and other entities; and (iv) the possibility for the Appeals Chamber to steer the reparations process in his case back in the right direction. Indeed, certain decisions issued by Trial Chamber II following the Appeals Judgment as well as the Impugned Decision, give the impression that Trial Chamber II considered the Appeals Judgment merely as a delay in the reparations process. Moreover, recent decisions issued by Trial Chamber II, including the [REDACTED] - depriving the parties of the possibility to make submissions on and/or appeal certain fundamental aspects of judicial reparations process in this case, as of right – paves the way for

further litigation before Trial Chamber II, which is not in the interest of victims. Hence, suspending the Impugned Decision would allow the Appeals Chamber to ensure that the reparations process in this case is conducted in accordance with the relevant jurisprudential developments before the Court, while safeguarding the rights of victims and that of the Convicted Person.

RELIEF SOUGHT

23. In light of the foregoing, the Defence respectfully request the Appeals Chamber to grant this Defence Request for Suspensive Effect.

RESPECTFULLY SUBMITTED ON THIS 21st DAY OF AUGUST 2023

A handwritten signature in black ink, appearing to read 'StB-'.

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands