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

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THE APPEALS CHAMBER

Before:

**Judge Gocha Lordkipanidze, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Piotr Hofmański
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa**

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

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

Public

**Defence Response to the request for suspensive effect of the Common Legal
Representative of the victims of the attacks and the observations of the Trust Fund
for 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 request for suspensive effect in relation to the eligibility determination of victims a/01636/13, a/00212/13, a/00199/13 and a/00215/13 submitted by the Legal Representative of the Victims of the Attacks ("LRV2") in his Notice of appeal against the Addendum to the Reparations Order of 8 March 2021 ("LRV2 Notice of Appeal")¹ on 16 August 2023 ("LRV2 Request for Suspensive Effect"); the Request for the Defence appeal against the Addendum issued by Trial Chamber II on 14 July 2023 to be given suspensive effect, submitted on 16 August 2023 ("Defence Request for Suspensive Effect");² the "Order inviting the Trust Fund for Victims to submit observations on the requests for suspensive effect and setting a time limit for responses to the requests and observations" issued by the Appeals Chamber on 22 August 2023 ("Order");³ and the submission by the Trust Fund for Victims ("TFV") of its "Observations on Requests for Suspensive Effect and Request under rule 103 of the Rules of Procedure and Evidence" on 31 August 2023 ("TFV Observations"),⁴ Counsel for Mr Bosco Ntaganda ("Defence" or "Mr Ntaganda") hereby submits this:

Defence Response to the request for suspensive effect of the Common Legal Representative of the victims of the attacks and the observations of the Trust Fund for Victims

"Defence Response – Suspensive Effect"

INTRODUCTION

1. The Defence hereby responds to the TFV Observations and the LRV2 Request for Suspensive Effect.

¹ Notice of Appeal of the Common Legal Representative of the Victims of the Attacks against the "Addendum to the Reparations Order of 8 March 2021, ICC-01/04-02/06-2659", and Request for Suspensive Effect in relation to Trial Chamber II's Decision on the eligibility of Victims a/01636/13, a/00212/13, a/00199/13 and a/00215/13, 16 August 2023, ICC-01/04-02/06-2862 ("LRV2 Notice of Appeal").

² Request for the Defence appeal against the Addendum issued by Trial Chamber II on 14 July 2023 to be given suspensive effect, 16 August 2023, ICC-01/04-02/06-2864 ("Defence Request for Suspensive Effect").

³ Order inviting the Trust Fund for Victims to submit observations on the requests for suspensive effect and setting a time limit for responses to the requests and observations, 22 August 2023, ICC-01/04-02/06-2866 ("Order").

⁴ Observations on Requests for Suspensive Effect and Request under rule 103 of the Rules of Procedure and Evidence, 31 August 2023, ICC-01/04-02/06-2867 ("TFV Observations").

2. In its observations, the TFV focusses on the criteria adopted by the Appeals Chamber in relation to its discretion to grant suspensive effect⁵ and provides a factual assessment of practical implications of both requests for suspensive effect based on the current circumstances of implementation.⁶ The TFV notes that in the event suspensive effect of the appeals is *not* granted, the eligibility determinations of potential victims and reparations programme will necessarily need to be initiated as soon as possible to meet the deadlines set by Trial Chamber II.⁷ Accordingly, the TFV Observations are informed by the impact on potential and participating beneficiaries if the order for reparations – *i.e.* Reparations Order⁸ and Addendum⁹ - is modified after the start of the reparations program.¹⁰ In addition, the TFV Observations address implications on the Court, the Trust Fund, the donors and other stakeholders.¹¹

3. As a preliminary matter, the Defence underscores the objective nature of the TFV Observations, focussing on the practical implications and the potential impact of both requests for suspensive effect, first on the potential or participating beneficiaries,¹² but also on the Court, the TFV, the donors and other stakeholders.¹³

4. Regarding the impact on potential and participating beneficiaries if the order for reparations – *i.e.* 8 March 2021 Reparations Order and 14 July *Addendum* - is modified after the start of the reparations program, the Defence concurs in general with the TFV Observations. In fact, the impact on potential victims is even more severe than the situation depicted by the TFV. For instance, having to revisit the eligibility determination of thousands of victims found eligible – even if their eligibility is ultimately *not* reversed despite modifications to the order for reparations because of

⁵ TFV Observations, paras.18-20.

⁶ TFV Observations, paras.21-28.

⁷ TFV Observations, para.20.

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

⁹ Addendum to the Reparations Order of 8 March 2021, ICC-01/04-02/06-2659, 14 July 2023, ICC-01/04-02/06-2858-Conf (“14 July Addendum”).

¹⁰ TFV Observations, paras.20,22-25,27.

¹¹ TFV Observations, paras.20,26,28.

¹² TFV Observations, paras.20,22-25,27.

¹³ TFV Observations, paras.20,26,28.

the appeals – is, in and of itself, likely to retraumatize the victims, contrary to the *do no harm* principle.

5. As for the LRV2 Request for Suspensive Effect in relation to victims a/01636/13, a/00212/13, a/00199/13 and a/00215/13, in the event the Defence Request for Suspensive Effect is granted, it becomes moot. On the other hand, should the Defence Request for Suspensive Effect be denied, the Defence nonetheless supports the LRV2 Request for Suspensive Effect, noting however, that the risk of re-traumatization is high if the four victims are included in the main reparations program for victims of the attacks, only to be informed later, after the Appeals Judgment is rendered, that they are no longer eligible to receive reparations.

RESPONSE

I. Response to TFV Observations

6. Due to practical implications if the Defence Request for Suspensive Effect is *not* granted, the Defence deems it appropriate to respond first to the TFV observations.

7. Notably, in its First Decision on the Trust Fund’s Draft Implementation Plan for Reparations rendered on 11 August 2023 (“First DIP Decision”) - which would continue to be operative if the Defence Request for Suspensive Effect is *not* granted - Trial Chamber II decided that the Registry, through the VPRS, would be responsible to conduct the eligibility assessment of victims.¹⁴ Trial Chamber II also set important deadlines.¹⁵ The TFV is expected to begin the implementation of reparations by 1 January 2024¹⁶ and the cut-off date for the VPRS to complete the eligibility assessment of potential victims is 31 December 2025.¹⁷ The TFV correctly underscores that meeting these deadlines requires the VPRS to proceed with the eligibility assessment of victims

¹⁴ First Decision on the Trust Fund for Victims’ Draft Implementation Plan for Reparations, 11 August 2023, ICC-01/04-02/06-2860 (“First DIP Decision”), paras.179-181,185.

¹⁵ First DIP Decision, paras.187-188.

¹⁶ First DIP Decision, para.187.

¹⁷ First DIP Decision, para.188.

as soon as possible before the Appeals Chamber adjudicates the LRV2 and Defence appeals.¹⁸ Since Trial Chamber II determined that there are 10,500 potential victims in this case,¹⁹ the VPRS would necessarily have to proceed at an accelerated pace to complete this endeavour in less than 28 months. Consequently, it is reasonable to assume that by the time the Appeals Chamber issues its judgment on both appeals, the eligibility of thousands of potential victims of the attacks will have been determined. Moreover, by the same date, a very high number of victims determined to be eligible are likely to have begun benefiting from reparations.

8. The TFV also correctly points out²⁰ that the substantiated arguments set forth in the Defence Notice of Appeal²¹ focus on victim eligibility matters. In fact, both the LRV2 and the Defence appeals challenge findings in the 14 July Addendum related to the eligibility of potential victims.²² The TFV is also right to underline the central role of eligibility determinations for the victims and the reparations program.²³

9. In this regard, the overall aim of the Defence Request for Suspensive Effect is correctly portrayed in the TFV Observations, namely “[...] to avoid a situation, where [thousands of] victims will be found eligible, then be included in reparations programme, and may later have to be informed that this was an error and they have not been victims of Mr Ntaganda.”²⁴ Significantly, “[t]he Trust Fund considers that changes in the eligibility determinations, once the eligibility process has started, impacts considerably the victim’s right and certainty, and affects the *do no harm* principle.”²⁵

10. Notably, to this day the Appeals Chamber did not have an opportunity to address the potential victim’s eligibility determination process or criteria adopted by

¹⁸ TFV Observations, para.20.

¹⁹ 14 July Addendum, para.320, Dispositions.

²⁰ TFV Observations para.21.

²¹ Defence Notice of Appeal, Grounds 4-13.

²² LRV2 Notice of Appeal, Ground 3.

²³ TFV Observations, para.22.

²⁴ TFV observations, para.23.

²⁵ TFV observations, para.24 (emphasis added).

Trial Chamber II, which increases the possibility of modifications to eligibility criteria resulting from the appeals.

11. Whereas the LRV2 Request for Suspensive Effect relates to four potential victims, the TFV acknowledges that the Defence Request for Suspensive Effect “[...] does not only affect four victims, but potentially a great number of victims.”²⁶ Consequently, noting that “[s]tarting implementation of the reparations order conveys a sense of finality for the beneficiaries,”²⁷ the TFV opines that “[i]nforming a high number of victims of their eligibility, thereby recognizing them as *Ntaganda* victims, and perhaps having their harm repaired, to inform them later that such recognition is reversed may come at the cost of re-traumatization, in particular of vulnerable victims.”²⁸

12. Significantly, the potential re-traumatization of potential victims goes much further. Indeed, the TFV omits to address the fact that in the event eligibility criteria are modified on appeal, it will be necessary, at a minimum, to review the eligibility determination conducted by the VPRS. In most cases, reviewing the eligibility determination of potential victims is not only a paper exercise. It requires meeting *again* the victims determined to be eligible to obtain additional information from them, which carries a further risk of re-traumatization. Hence, even if the implementation of new eligibility criteria or eligibility determination process does not lead to reversing the VPRS eligibility determination, the risk of re-traumatizing a high number of potential victims is very high.

13. At paragraph 25, the TFV highlights that the above implications only arise if the Registry / VPRS starts informing victims of their eligibility to the programme or actively explains to potential victims in the communities the non-final eligibility criteria to identify new beneficiaries.²⁹ The TFV also suggests that the Registry / VPRS

²⁶ TFV Observations para.24.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ TFV Observations, para.25.

be consulted to present the Appeals Chamber with arguments on the possibility to take mitigating measures as to the timeframe, in which to determine the eligibility of victims.³⁰ The TFV does not elaborate further on possible alternative courses of action for the VPRS and stops short of advancing any potential mitigating measures. The Defence is also unable to advance any.

14. It is also noteworthy, as underscored in the TFV Observations,³¹ that in the event the eligibility determination of a very high number of victims were to be reversed, the TFV would *not be able* to step in pursuant to its assistance mandate, as Trial Chamber II encourages it to do for the four victims found not eligible, who were previously determined to be eligible by the TFV in the context of the IDIP.³² Indeed, “[t]he Trust Fund is currently not running a program that could cater for the transfer on great scale of non-eligible victims of the Ntaganda program.”³³ Ordering the suspensive effect of the Defence appeal is thus warranted to avoid a situation, that it will not be possible to reverse later.

15. Furthermore, as highlighted in the TFV Observations “[...] the success of the implementation of a programme depends greatly, among other factors, on the trust in the programme and in their voluntary participation” and “[r]eversing the status of a great number of beneficiaries may alienate not only them, but their families and the affected communities.”³⁴ What is more, the TFV correctly takes the view that reversing the status of a great number of beneficiaries “[...] may impact the success of the implementation of the reparations in the Ntaganda case and the programme’s reputation”³⁵ and beyond this “it may expose the programme, the Court’s and Trust

³⁰ TFV Observations, para.25.

³¹ TFV Observations, para.27.

³² 14 July Addendum, para.143.

³³ TFV Observations, para.27.

³⁴ TFV Observations, para.26.

³⁵ *Ibid.*

Fund's partners' staff and other victims to a hostile environment, thereby negatively reducing the reparative value of the program."³⁶

16. Lastly, while the TFV "[...] notes the additional considerations warranting in the Defence view an order for suspensive effect for which no demonstration was made *vis-à-vis* the rigorous criteria justifying that suspensive effect be granted,"³⁷ these are not addressed in the TFV Observations. The Defence stands by these additional considerations, which highlight at a minimum, the context in which the Defence Request for Suspensive Effect should be adjudicated.

II Response to the LRV2 Request for Suspensive Effect

17. As a preliminary matter, the Defence underscores that in the event the Defence Request for Suspensive Effect was granted, the LRV2 Request for Suspensive Effect would be moot. Indeed, Trial Chamber II's findings that victims a/01636/13, a/00212/13, a/00199/13 and a/00215/13 are *not* eligible would be suspended pending the outcome of the appeals.

18. Should the Defence Request for Suspensive Effect be denied however, implementation of the Addendum and the 8 March Reparations Order would proceed unabated. This includes Trial Chamber II's determination that the above witnesses are *not* eligible despite the TFV's previous finding that they were.³⁸ In these circumstances, it appears reasonable to ensure, at a minimum, that until the Appeals Chamber adjudicates on the LRV2 appeal, these potential victims continue to benefit from reparations they have begun to receive in the context of the IDIP.

19. Accordingly, the Defence supports the LRV2 Request for Suspensive Action, noting that the risk of re-traumatization is high if the four victims are included in the main reparations program for victims of the attacks, only to be informed later, after

³⁶ TFV Observations, para.26

³⁷ TFV Observations, para.20, fn.33.

³⁸ 14 July Addendum, para.143.

the Appeals Judgment is rendered, that they are no longer eligible to receive reparations.

CONCLUSION

20. In light of the TFV Observations and the Defence Response thereto above, granting the Defence Request for Suspensive Action is warranted as well as in the best interest of the potential victims in this case

RESPECTFULLY SUBMITTED ON THIS 7th DAY OF SEPTEMBER 2023

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

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands