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No.: ICC-02/04-01/15

Date: 1 May 2024

THE APPEALS CHAMBER

Before: Judge Luz del Carmen Ibáñez Carranza, Presiding
Judge Tomoko Akane
Judge Solomy Balungi Bossa
Judge Gocha Lordkipanidze
Judge Erdenebalsuren Damdin

SITUATION IN UGANDA

IN THE CASE OF *THE PROSECUTOR v. DOMINIC ONGWEN*

Public

Registry Submission on the Request for Suspensive Effect

Source: Registry

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

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I. Introduction

1. Pursuant to the Appeals Chamber's "Order setting a time limit for submissions on the request for suspensive effect" ("Order") issued on 24 April 2024 in the case of *The Prosecutor v. Dominic Ongwen* ("Case"),¹ the Registry hereby presents its submissions on the "Defence Notice of Appeal of the Reparations Order dated 28 February 2024 and Request for Suspensive Effect".²

II. Procedural History

2. On 15 December 2022, the Appeals Chamber issued its "Judgment on the appeal of Mr Ongwen against the decision of Trial Chamber IX of 4 February 2021 entitled 'Trial Judgment'" in the Case.³
3. On 28 February 2024, Trial Chamber IX ("Trial Chamber") issued the "Reparations Order" in the Case.⁴
4. On 22 April 2024, the Defence filed a notice of appeal, requesting, *inter alia*, the Appeals Chamber to "suspend the implementation of the [Reparations Order] until it renders a judgment on the appeal" ("Defence Request").⁵
5. On 24 April 2024, the Appeals Chamber issued the Order, which included an invitation to the Victims Participation and Reparations Section ("VPRS") of the Registry to make submissions on the Defence Request.⁶

¹ Appeals Chamber, "Order setting a time limit for submissions on the request for suspensive effect", 24 April 2024, ICC-02/04-01/15-2085.

² Defence, "Defence Notice of Appeal of the Reparations Order dated 28 February 2024 and Request for Suspensive Effect", 22 April 2024, ICC-02/04-01/15-2084.

³ Appeals Chamber, Public redacted version of "Judgment on the appeal of Mr Ongwen against the decision of Trial Chamber IX of 4 February 2021 entitled 'Trial Judgment'", 15 December 2022, ICC-02/04-01/15-2022-Red.

⁴ Trial Chamber IX, "Reparations Order", 28 February 2024, ICC-02/04-01/15-2074.

⁵ Defence Request, para. 12.

⁶ Order, para. 2.

III. Applicable Law

6. The Registry submits the present filing pursuant to the Order.

IV. Submissions

7. Article 82(3) of the Rome Statute provides that “[a]n appeal shall not of itself have suspensive effect unless the Appeals Chamber so orders, upon request, in accordance with the Rules of Procedure and Evidence”. The Appeals Chamber has consistently held this decision to be discretionary, with the requests examined based on “the specific circumstances of the case and the factors it considers relevant for the exercise of its discretion under these circumstances”.⁷
8. The Appeals Chamber has further clarified that it needs to be assessed “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’”.⁸ The listed factors are “strict” criteria that “should be rigorously applied in view of the overriding importance of delivering reparations to victims” as expeditiously as possible – furthermore in light of the decision on conviction being final.⁹
9. As previously stated by the Appeals Chamber, “[s]uspension involves the non-enforcement of a decision, the subject of an appeal”, and “[s]uspensive effect thereby maintains the position as it was prior to the issuing of the [i]mpugned [d]ecision” during the time such effect is granted.¹⁰

⁷ *The Prosecutor v. Bosco Ntaganda*, Appeals Chamber, “Decision on the requests for suspensive effect and other procedural issues”, 5 February 2024, ICC-01/04-02/06-2892, para. 40.

⁸ *Ibid.* (citing *The Prosecutor v. Bosco Ntaganda*, Appeals Chamber, “Decision on the Defence request for suspensive effect”, 2 July 2021, ICC-01/04-02/06-2691, para. 21).

⁹ *Id.*, paras. 41, 46.

¹⁰ *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman*, Appeals Chamber, “Decision on request for suspensive effect”, 25 August 2020, ICC-02/05-01/20-134, para. 5 with further sources cited in fn. 5.

10. In the Reparations Order, the Trial Chamber entrusted the VPRS with the mandates of: (i) identifying the beneficiaries for reparations in the Case;¹¹ (ii) collecting information from beneficiaries;¹² and (iii) carrying out the administrative eligibility assessment, using the requirements set out in the Reparations Order.¹³
11. In accordance with the Trial Chamber's instructions that the VPRS shall commence the identification of victims as soon as practicable,¹⁴ the VPRS is currently in the process of setting up the system for identifying victims and collecting their information for the eligibility assessment. To note, the Trial Chamber set a two-year deadline for the completion of the administrative eligibility process for all potential beneficiaries in the present Case,¹⁵ which is estimated to be a total of 49,772 individuals.¹⁶
12. The Registry foresees over the next months to create a solid support network on the ground which will carry out victim identification tasks in multiple key locations. Trainings are being designed for staff and collaborators on the ground, and key documents are being drafted to inform interlocutors about the details of the process, scope of the case and steps ahead. Furthermore, the VPRS is simultaneously finalising the consolidation of the files of victims that already participated in the *Ongwen* proceedings and who, for the largest part, are expected to be eligible for reparations.¹⁷
13. The Defence avers in its notice of appeal that the Trial Chamber's errors led to an overly increased number of estimated beneficiaries.¹⁸ The Registry notes that if suspensive effect were to be granted, many activities relating to the eligibility

¹¹ Reparations Order, para. 809.

¹² *Ibid.*

¹³ *Id.*, para. 810.

¹⁴ *Id.*, para. 809.

¹⁵ *Id.*, para. 813. The Registry notes that the deadline set by the Trial Chamber will thus expire on 28 February 2026.

¹⁶ *Id.*, para. 748.

¹⁷ This may entail the assessment of additional information pertaining to the vulnerabilities and urgency of reparative measures which the Registry may receive from the legal representatives.

¹⁸ Defence Request, paras. 13-27.

assessment of potential new beneficiaries would therefore have to be paused. In particular, the communication of any VPRS assessments to the Trust Fund for Victims (“TFV”) would trigger procedural steps and deadlines which could be difficult to reverse.¹⁹ This is particularly so for any victim that would (have to) be informed on their status as reparation beneficiary.²⁰ This said, preparatory steps in the field will be able to proceed regardless, including the design of trainings, identification of potential support and collaborators on the ground, as well as identification of potential beneficiaries and collection of their information. Similarly, irrespective of suspensive effect, the VPRS could proceed with the internal eligibility assessment of all participating victims based on the parameters issued in the Reparations Order.²¹ Any step beyond such preparatory activities, however, would have to be paused. Considering the average duration of appeal proceedings of comparable scope and complexity, granting suspensive effect would thus impact all steps beyond system design and initial information collection.

14. The Registry notes that the two-year timeframe given by the Trial Chamber to identify the total number of potentially eligible victims has started running and is extremely tight in light of the extensive scope of this case.²² Suspensive effect would slow down Registry efforts and thereby exacerbate challenges in identifying potential beneficiaries and processing their information at the scale as near to the Trial Chamber’s estimation as possible.²³

¹⁹ See, e.g., Reparations Order, para. 810 relating to the administrative eligibility assessment process.

²⁰ Reparations Order, para. 810 d and f. Victims’ expectations may be irreversibly frustrated – potentially leading to re-traumatisation – if they were to be informed of their beneficiary status, only to be informed of the opposite at a later stage.

²¹ The VPRS submits that no communication would be made to victims as to their final beneficiary status until the appeals judgment. As such, even if there are amendments to the parameters as a result of the appeal, the internal VPRS assessments would not risk an irreversible situation (*see* fn. 20).

²² See *supra*, fn. 17.

²³ To note, this issue may be allayed if the running of the two-year timeline were paused during the time that suspensive effect is granted. The overall delaying effect on implementing reparations, however, would still remain.

15. In the absence of suspensive effect and mindful of the fact that the findings on the merits of the Case are final,²⁴ the Registry would be in a position to move beyond its preparatory activities in a swift fashion, and proceed to the eligibility assessments. It would do so in close collaboration with the TFV and following at all times the “do no harm” principle when its activities could have a direct effect on potential beneficiaries.²⁵ In its coordination with the TFV, the Registry would ensure not to engage in any process that could create irreversible effects to the detriment of the moving party on appeal.
16. In conclusion, the Registry submits that suspensive effect of the current appeal proceedings would still allow the VPRS to engage in a number of activities relating to victim identification and preparatory work on eligibility screening, as ordered by the Trial Chamber. Suspensive effect will nonetheless generate a delaying effect on reparation measures being afforded to victims at a future stage. In turn, the absence of suspensive effect would enable the Registry to carry out activities which, while not infringing upon the Defence’s rights, will be fundamental to a speedy reparations process once the appeal has been disposed of.

p.p. 

Marc Dubuisson, Director, Division of Judicial Services
on behalf of Osvaldo Zavala Giler, Registrar

Dated this 1 May 2024

At The Hague, The Netherlands

²⁴ See *supra*, para. 2.

²⁵ See also Reparations Order, paras. 63(ii), 799; this concerns in particular the management of victims’ expectations in direct communication between the Registry and/or the Trust Fund for Victims and potential beneficiaries regarding final eligibility assessments and implementation of reparations measures.