



Original: **English**

No.: **ICC-01/04-02/06**
Date: **2 December 2022**

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 Registry submission in compliance with the “Order for the
implementation of the Judgment on the appeals against the decision of Trial Chamber
VI of 8 March 2021 entitled ‘Reparations Order’”**

Source: Defence Team of Mr Bosco Ntaganda

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

Legal Representatives of Victims

Ms Sarah Pellet

Mr Tars Van Litsenborgh

Mr Dmytro Suprun

Ms Cherine Luzaisu

Ms Fiona Lau

Counsel for the Defence

Me Stéphane Bourgon, *Ad.E.*

Mrs Kate Gibson

Mr Jacopo Ricci

Mr Benjamin Willame

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Mr Philipp Ambach

Trust Fund for Victims

Ms Franziska Eckelmans

Further to the Appeals Chamber’s “Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled “Reparations Order”” issued on 12 September 2022 (“Appeal Judgment”),¹ the “Order for the implementation of the Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled “Reparations Order”” issued by Trial Chamber II (“Chamber”) on 25 October 2022 (“Implementation Order”)² and the Chamber’s “Decision on the Registry submission in compliance with the “Order for the implementation of the Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled ‘Reparations Order’”³ dated 25 November 2022 (“Impugned Decision”) Counsel for the Convicted Person (“Defence”) hereby submits this:

**Application on behalf of Mr Bosco Ntaganda seeking leave to appeal
Decision on the Registry submission in compliance with the “Order for the
implementation of the Judgment on the appeals against the decision of Trial Chamber
VI of 8 March 2021 entitled ‘Reparations Order’”**

“Application for Leave to Appeal”

INTRODUCTION

1. The Reparations Order issued in the *Ntaganda* case by Trial Chamber VI,⁴ was flawed in central and critical respects. The errors identified by the Appeals Chamber went to the very heart of the reparations process, and prompted the remand of the Reparations Order to Trial Chamber II, which was “directed to issue a new order for reparations, taking into account the terms of this Judgment.”⁵
2. Relevant to the present request, the Appeals Chamber found that Trial Chamber VI:
 - i. failed to determine the number of eligible victims, relying on an unworkable estimate of between 1,100 and 100,000 beneficiaries;⁶

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 (“Appeal Judgment”).

² Order for the implementation of the Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled “Reparations Order”, 25 October 2022, ICC-01/04-02/06-2786 (“Implementation Order”).

³ Decision on the Registry submission in compliance with the “Order for the implementation of the Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled ‘Reparations Order’”, 25 November 2022, ICC-01/04-02/06-2794 (“Impugned Decision”).

⁴ Reparations Order, 8 March 2021, ICC-01/04-02/06-2659.

⁵ Appeal Judgment, paras.1,759.

⁶ Appeal Judgment, paras.23,155-174,745.

- ii. failed to provide an appropriate calculation of the monetary award;⁷ and
 - iii. erroneously shut the Defence out of critical aspects of the reparations process, including the review of victim applications.⁸
3. The Appeal Judgment of 22 September 2022 was, objectively, a setback for the swift completion of the reparations proceedings in the *Ntaganda* case. The Appeals Chamber confirmed that the parties had been proceeding on the basis of a Reparations Order that was undermined by Trial Chamber VI's numerous and irremediable errors, and the reparations proceedings would be required to recalibrate with a new Reparations Order that took into account the Appeals Chamber's findings.⁹
 4. Incredibly, rather than seeking to correct and remedy Trial Chamber VI's errors, Trial Chamber II has put in a place a process that is entirely incapable of curing the defects identified by the Appeals Chamber. By prioritising expediency and the imperative of bringing the *Ntaganda* reparations proceedings back on track as quickly as possible, the Trial Chamber has made the errors identified below, and again placed these reparations proceedings at risk of significant review and correction on appeal in a manner inconsistent with the principle of 'do no harm'.
 5. The purpose of the sampling exercise was, according to the Appeals Chamber, to provide a "sufficiently strong evidential basis"¹⁰ for the new Reparations Order. In particular, the Appeals Chamber held that adding an examination of a sample of applications to other evidence already known or subsequently obtained, would assist Trial Chamber II in (i) establishing an actual number of eligible victims;¹¹ (ii) establishing the types of harms suffered and their cost to repair¹²; and (iii) estimating a further number of currently unknown beneficiaries.¹³
 6. By contrast, in the Impugned Decision, Trial Chamber II sets out a "sampling" exercise that is entirely redundant when viewed against the Appeals Chamber's objectives, with no hope whatsoever of bringing the Trial Chamber any closer to determining the number of

⁷ Appeal Judgment, paras.23,235-265,746.

⁸ Appeal Judgment, para.363.

⁹ Appeal Judgment, para.750.

¹⁰ Appeal Judgment, paras.335,339,346.

¹¹ Appeal Judgment, para.346

¹² *Ibidem.*

¹³ *Ibidem.*

eligible victims in the present case, or an appropriate reparations amount. The Trial Chamber approved a sample of 173 potential victims assembled by the VPRS at its request, including on the one hand, 67 *priority* participating victims already determined to be eligible for reparations, and 106 potential victims selected randomly, purportedly representing 5% of the so-called universe of potential victims.¹⁴ However, while the universe of potential victims comprises 2077 potential victims,¹⁵ the sample includes only six non-participating victims.¹⁶ As such, the purported sample is drawn almost exclusively from participating victims. On this basis, the sample assembled is of no assistance to the Trial Chamber in drawing projections regarding the total number of potential victims in the case because the number of non-participating victims is too low. In effect, the sample is by its very composition, statistically redundant.

7. To have been of any use, the sampling exercise was required to begin with an assessment of the total number of potential victims in the case, using as a starting point the information provided by VPRS in January 2021 that the total number of additional non-participating victims would be close to 1100.¹⁷ This would have allowed the identification of a greater number of non-participating victims from across the relevant geographical areas, to then allow an appropriate percentage to be drawn which includes both participating and non-participating victims, without the bias that infects the present sample. This, and the other errors raised below, were only possible after the Trial Chamber erroneously dismissed, almost without reference, the expert conclusions provided by the Defence.
8. As such, the present request for certification is not simply grounded in the Defence submissions having been erroneously dismissed in the absence of sufficient consideration or reasoning. Nor does it raise mere disagreements or conflicting opinion between Trial Chamber II and the Defence. The errors identified are appealable issues, arising directly from the Impugned Decision, which fulfil the criteria for certification under Article 82(1)(d) of the Rome Statute (“Statute”) and Rule 155 of the Rules of Procedure and Evidence (“Rules”).

¹⁴ Impugned Decision, para.24.

¹⁵ Registry submission in compliance with the “Order for the implementation of the Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled ‘Reparations Order’” (ICC-01/04-02/06-2786), 8 November 2022, ICC-01/04-02/06-2788, para.14.

¹⁶ Registry Transmission of 173 Unredacted Victims’ Dossiers to the Chamber and the Legal Representatives of Victims, 28 November 2022, ICC-01/04-02/06-2795, fn.7.

¹⁷ Registry Second Report on Reparations, 15 January 2021, ICC-01/04-02/06-2639-Conf-AnxI, para.39.

9. All the parties and participants to these proceedings are acutely aware of the years that have now passed since Mr. Ntaganda's conviction, and the obstacles these reparations proceedings have already faced. However, assembling a sample on the basis of applications that are readily available, rather than being guided by expert conclusions on statistical analysis, sets the process up for failure. While the evolving procedure of reparations at the ICC admittedly provides little guidance to the Trial Chamber, the clear bias in the sample comports with none of the Court's prior practice. The present request for leave to appeal seeks to rectify the errors which will render the sampling exercise redundant should it proceed on the present footing. On this basis, the Defence respectfully submits that the errors identified warrant appellate scrutiny at this stage.

PROCEDURAL BACKGROUND

10. Following the issuance of the Appeal Judgment, on 26 September 2022, the TFV filed its Seventh Update Report on the Implementation of the Initial Draft Implementation Plan ("Seventh Update Report") whereby it submitted that despite the multiple errors found by the Appeals Chamber, the Appeal Judgment did not affect the Reparations Order in relation to the IDIP.¹⁸
11. On 7 October 2022, the Defence filed its Observations on the Seventh Update Report in which it submitted that following the Appeal Judgment, the TFV has no authority nor legal basis to pursue awarding reparations in the context of the IDIP.¹⁹
12. On 25 October 2022, the Chamber issued an Order of implementation of the Appeal Judgment in which it set out the methodology to assemble a sample of victims' applications. The Implementation Order also invited the parties to make submissions on the procedure for the constitution of the sample; as well as to bring to the attention of the Chamber, any issues related to redactions of the victims' applications.²⁰
13. On 9 November 2022, the Defence filed its submissions on the procedure for the constitution of the sample established by the Implementation Order. The Defence submitted that a requirement exists to reconsider the procedure for the constitution of the

¹⁸ Trust Fund for Victims' Seventh Update Report on the Implementation of the Initial Draft Implementation Plan, 26 September 2022, ICC-01/04-02/06-2783, para.12.

¹⁹ Observations on behalf of the convicted person on the Trust Fund for Victims' Seventh Update Report on the Implementation of the Initial Draft Implementation Plan, 7 October 2022, ICC-01/04-02/06-2785.

²⁰ Implementation Order, paras.34(e),36.

sample to ensure that it is representative and fulfils its goal to correct the errors in the Reparations Order of March 2021.²¹

14. On 16 November 2022, the Chamber issued its Decision on the Sixth and Seventh Update Reports on the Implementation of the Initial Draft Implementation Plan. Trial Chamber II therein rejected the Defence's arguments and instructed the TFV to continue applying the same eligibility assessment and urgency screening only subject to some adjustment to comply with the Appeal Judgment.²²
15. On 25 November 2022, the Chamber issued its Decision on the procedure for the constitution of the sample. Trial Chamber II *inter alia* rejected the Defence submissions and therefore decided to pursue with its proposed sampling methodology.²³

APPLICABLE LAW

16. This Defence request is submitted pursuant to Article 82(1)(d) of the Statute, Rule 155 of the Rules, and regulation 65 of the Regulations of the Court ("RoC").

SUBMISSIONS

I. Grounds of Appeal

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

First ground of appeal

18. Trial Chamber II erred by assembling a sample of potential victims - incapable of assisting it in determining the actual or estimated total number of potential victims in the case - finding nonetheless the sample to be representative in light of its purpose, being "[...] not only to calculate the adequate compensation of victims [...] but also to help the Chamber *project results* to estimate the potential number of beneficiaries."²⁴

²¹ Submissions on behalf of the Convicted Person on the procedure for the constitution of the sample established by the Implementation Order, 9 November 2022, ICC-01/04-02/06-2791, para.61.

²² Decision on the TFV's Sixth and Seventh Update Reports on the Implementation of the Initial Draft Implementation Plan, 16 November 2022, ICC-01/04-02/06-2792, paras.19-24, Disposition.

²³ Impugned Decision, paras.23-24.

²⁴ Impugned Decision, para.16.

Second ground of appeal

19. Trial Chamber II erred by approving a sample of 173 potential victims assembled by the VPRS at its request, which includes 67 *priority* participating victims previously determined to be eligible for reparations by the TFV in the context of the IDIP, and 106 potential victims selected randomly, representing 5% of the so-called universe of potential victims,²⁵ thereby assembling a sample that is biased as well as non-representative, thereby vitiating the sampling process.

Third ground of appeal

20. Trial Chamber II erred by approving a sample comprising 173 potential victims – 167 participating potential victims and 6 non-participating potential victims – and finding that it “[...] is fully satisfied that, from a quantitative and a qualitative point of view, the assembled sample is sufficiently representative of the universe of potential victims in the case”.²⁶

Fourth ground of appeal

21. Trial Chamber II erred by finding that 5% of the potential victims drawn from the so-called universe of potential victims – in addition to the 67 potential participating victims determined to be eligible by the TFV in the context of the IDIP - was sufficient for the sample assembled to be representative of the universe of potential victims, thereby ignoring the expert conclusions submitted by the Defence and failing to provide any scientific basis for its finding.

II. The four intended grounds of appeal constitute ‘appealable issues’

22. 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.²⁷

²⁵ Whereas the universe of potential victims comprises 2077 potential victims, the sample includes only six non-participating victims.

²⁶ Impugned Decision, para.21.

²⁷ *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.

23. The appealable issues raised by the Defence in the present request fulfil this requirement. They are not mere disagreements with Trial Chamber II's approach; they are identifiable errors that stand at the centre of the Impugned Decision, which directly impact the next steps of the reparations phase in the present case, requiring their resolution. The Appeals Chamber was clear that an examination of at least a sample of victim applications for reparations would help cure and correct the errors identified in Trial Chamber VI's Reparations Order.²⁸ The appealable issues arise directly from the Trial Chamber's determination of how this examination of the sample will take place.
24. Firstly, the question of whether the sample established will contribute, in any way, to determining the potential number of beneficiaries and calculating the adequate compensation not only arises directly from the Impugned Decision, but is central to the objective the Appeals Chamber was hoping to achieve by requiring a sampling process in the formulation of the revised Reparations Order.
25. The second and third errors are also directly appealable; they are not mere disagreements with the way in which Trial Chamber II has constituted the sample, but identify errors and bias in its formulation which require remedying before the examination of applications can proceed. If the sample has been assembled in a way that exhibits bias towards participating victims, is insufficiently large, and accordingly cannot be considered representative of the total beneficiaries in the case, then the process of the Trial Chamber and parties assessing the applications in the sample is rendered effectively meaningless. As such, the resolution of the second and third errors are essential for the determination of matters arising in the judicial cause under examination.
26. The fourth error also arises directly from the Impugned Decision, being the Trial Chamber's determination that 5% of the potential victims drawn from the so-called universe of potential victims – in addition to the 67 potential participating victims - was sufficient for the sample assembled to be representative of the universe of potential victims. Given that this determination was made by ignoring the expert conclusions submitted by the Defence, and in the absence of any scientific basis, this error amounts to an appealable issue arising directly from the Trial Chamber's reasoning.

²⁸ Appeal Judgment, para.346.

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

27. The extraordinary step by the Appeals Chamber to remand the Reparations Order to Trial Chamber II, which was then directed to issue a new order for reparations, was a decision which had at its centre, **considerations of fairness**.²⁹ Failing to determine or to provide a workable estimate, based on evidence, of the total number of potential victims in the case, failing to provide an appropriate calculation of the monetary award, and failing to include the Defence in critical aspects of the reparations process, including the review of victim applications, were errors on the part of Trial Chamber VI that essentially undermined the fairness of the process for the convicted person, and victims seeking inclusion.
28. As such, if the sampling process which the Appeals Chamber found should take place to address these errors is similarly flawed, and demonstrates no prospect of assisting the Trial Chamber or the parties in drawing projections regarding the number of potential victims, or the consequent monetary amount needed to rectify the harm, this again goes directly to the fairness of the reparations process.
29. In addition to failing to identify the number of potential beneficiaries and appropriately calculate the award, the Appeals Chamber also criticised the failure of Trial Chamber II to engage in any way with the victims' applications, and assess at least a sample thereof. The sample created by Trial Chamber VI appears to be directed at responding to this specific identified error. No doubt, the sample assembled will allow the Trial Chamber to look at a number of the applications filed in the *Ntaganda* case. The sample as compiled does not, however, go to the more critical errors identified by the Appeals Chamber. This is not a matter of simply reviewing some of the applications. The sampling exercise itself must be conducted in a way that achieves the stated objectives of the Appeals Chamber; moving the parties and Trial Chamber having a solid evidential basis for determining how many potential victims are involved, and what the quantum of reparations should be. If this is not achieved, the same errors which undermined the fairness of the process the first time around will simply be repeated, despite the fact that the "sampling exercise" has ostensibly been ticked off. As such, the four appealable issues significantly affect the fairness of these proceedings.

²⁹ Appeal Judgment, paras.1,759.

30. There is also a question of due process. Consistent with its approach throughout the reparations proceedings, the Defence attempted to contribute positively to this new exercise of creating a sample, by calling upon a statistical expert to provide his advice. No reasonable argument can be made that this expert report was assessed by the Trial Chamber in any meaningful way. Apart from not considering, let alone adopting any of his expert advice, the Impugned Decision makes one erroneous reference to one aspect of the expert report, called a “document”, which is dismissed without analysis in favour of expediency and security.³⁰ Fairness requires reasoned consideration of this material, which is raised in the fourth error above.
31. **As regards expeditiousness**, if the sample is indeed infected by the errors identified by the Defence, the exercise of reviewing the sample applications will fail to advance the process of determining the key questions that remain; how many potential beneficiaries who may benefit from reparations are there in the case, and the calculation of the monetary award. These factors are precisely those that were missing from the initial flawed Reparations Order. The sampling exercise encouraged by the Appeals Chamber, in its present form, fails entirely to move the process towards resolving these outstanding questions.
32. The imperative of trying to “catch up” for time lost by the Appeal Judgment is, in fact, a false economy. Rather than compiling a representative sample, based on established statistic methodology, drawing the sample largely from priority victims and those already participating, while undoubtedly expedient, will not produce an outcome that advances the proceedings in any meaningful way. In fact, it will again put the reparations proceedings on the wrong footing, proceeding without any means of estimating the central open questions. In this way, the appealable issues also significantly affect the expeditiousness of the proceedings.
33. **The outcome of the reparations proceedings** will also be significantly affected if the sampling exercise put in place to rectify past errors does not achieve its purpose. The desired outcome of reparations proceedings is a victim-centred Reparations Order that accurately reflects the number of legitimate beneficiaries as assessed against the conviction, with a monetary figure that is grounded in an accurate assessment of what is

³⁰ Impugned Decision, para.20.

needed to remedy the harms identified. The Reparations Order should also have been developed in a manner which respects the rights of the convicted person in the process.

34. The Appeals Chamber has already indicated that the number of victims and the reparations award should be given the “sufficiently strong evidential basis”³¹ that was missing from the first Reparations Order. According to the Appeals Chamber, this was to be achieved by Trial Chamber VII engaging with the victim applications, by reviewing a representative sample.³² The sample produced by Trial Chamber II, however, which is essentially limited to participating victims, is biased and not representative of the participating victims (due to the direct inclusion of the 67 *priority* victims already determined to be eligible by the TFV), but is even less representative of the victims participating in the case. In this way, the parties and Trial Chamber are squandering the opportunity to produce a “sufficiently strong evidential basis” for the new Reparations Order, which will undoubtedly significantly impact the outcome of the proceedings. As a result of the errors identified by the Defence, the outcome of the reparations proceedings will also be significantly affected if the sampling exercise is not rectified.

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

35. One way or another, it is certain that the Appeals Chamber will review the process of selecting the sample, and the objections of the Defence to this procedure. If the sample is later found to be non-representative, a number of problems will arise. Firstly, the Trial Chamber will have again proceeded without a sufficiently solid evidential base for the central questions concerning number of beneficiaries and the quantum of reparations. In addition, the right of the Defence to assess the applications will again have been undermined. The risk of remand and further delays is a real one.
36. As such, the resolution of the errors identified by the Defence is essential to the progress of these reparations proceedings, and ensuring it proceeds on a basis that will survive the inevitable eventual appellate review. Immediate resolution of the four appealable issues by the Appeals Chamber will accordingly materially advance the reparations proceedings, and leave to appeal should be granted.

³¹ Appeal Judgment, para.335,339,346.

³² Appeal Judgment, para.346.

CONCLUSION

37. In light of the foregoing, the Defence respectfully submits that the Trial Chamber grant leave to appeal the four appealable issues in the form set out above.

RESPECTFULLY SUBMITTED ON THIS 2nd DAY OF DECEMBER 2022

A handwritten signature in black ink, consisting of the letters 'S', 'B', and a small flourish.

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

The Hague, The Netherlands