

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **6 February 2023**

**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***

**Confidential**

**Defence request for leave to file further submissions regarding the Registry 30  
January submissions in compliance with the Trial Chamber's Implementation  
Order and 25 November Decision**

**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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**REGISTRY**

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**Registrar**

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**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

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**Trust Fund for Victims**

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Further to the Appeals Chamber's "Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled 'Reparations Order'", dated 12 September 2022 ("Appeal Judgment");<sup>1</sup> 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 ("Trial Chamber") on 25 October 2022 ("Implementation Order");<sup>2</sup> the Trial 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'" dated 25 November 2022 ("25 November Decision"); and 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,'" filed on 30 January 2023 ("Registry 30 January Submissions"),<sup>4</sup> Counsel for the Convicted Person ("Defence") hereby submits this:

**Defence request for leave to file further submissions, regarding the Registry 30 January submissions in compliance with the Trial Chamber's Implementation Order and 25 November Decision**

**"Defence Request for Leave to File further Submissions"**

## INTRODUCTION

1. The Appeals Chamber found that Trial Chamber VI erred *inter alia* in failing to "[...] make any appropriate determination in relation to the number of potentially

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<sup>1</sup> 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").

<sup>2</sup> 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").

<sup>3</sup> 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 ("25 November Decision").

<sup>4</sup> 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), 30 January 2023, ICC-01/04-02/06-2822 ("Registry 30 January Submissions") with its Annex, 30 January 2023, ICC-01/04-02/06-2822-Conf-Anx-Red.

eligible or actual victims of the award and/or to provide a reasoned decision in relation to its conclusion about that number [...].”<sup>5</sup>

2. In seeking to address this and other errors identified on appeal, the Trial Chamber issued its 25 October Implementation Order and the subsequent 25 November Decision, instructing the parties, participants and if available, the Appointed Experts to, *inter alia*, provide “any additional information or documentation they might have as to the estimated total number of potential beneficiaries of reparations in the present case, along with an explanation of the methodology used to provide such estimate.”<sup>6</sup>

3. On 30 January 2023, the Registry filed its submissions addressing the estimated total number of potential beneficiaries of reparations in the case, along with a confidential *ex parte* annex initially *not* available to the Defence. Unable to access the Registry 30 January Submissions on that day, the Defence queried CMSS on 31 January. On the same day CMSS confirmed that the annex to the Registry’s filing had been notified and the Defence was also able to access the main filing

4. The 25 November Decision requesting additional information or documentation as to the estimated total number of beneficiaries did not envisage the filing of cross responses or further submissions. However, the content of the Registry 30 January Submissions, more particularly the information contained in the confidential *ex parte* annex, renders further submissions by the Defence in reaction thereto, necessary. Accordingly, by analogy with the law applicable to requests for leave to reply, leave is requested to file further submissions in reaction to the Registry 30 January Submissions.

## CONFIDENTIALITY

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<sup>5</sup> Appeal Judgment, para.745.

<sup>6</sup> 25 November Decision, para.37, Disposition.

5. This Defence Request for Leave to File further Submissions is classified confidential pursuant to Regulation 23*bis* RoC, given that it refers to confidential filings. A public redacted version will be submitted at the earliest opportunity.

## APPLICABLE LAW

6. Regulation 24(5) of the Regulations of the Court (“RoC”) prescribes that “(p)articipants may only reply to a response with leave of the Chamber” and that “(u)nless otherwise permitted by the Chamber, a reply must be limited to new issues raised in the response which the replying participant could not reasonably have anticipated.” Although Regulation 24(5) RoC does not expressly indicate when a reply is warranted (as opposed to indicating the scope of a reply), jurisprudence has consistently held that a reply may be appropriate: (i) “in respect of issues raised in the response which the replying participant could not reasonably have anticipated” and (ii) where “it would otherwise be necessary for the adjudication of the matter.”<sup>7</sup>

7. A request for leave to reply must explain the intended subject-matter of the reply to some extent. As held by the Appeals Chamber, a party seeking leave to reply must: (i) do more than “point [...] to issues” to which it wishes to reply, but must rather “demonstrate [...] why they are new and could not reasonably have been anticipated”<sup>8</sup> and (ii) “explain why a reply to the aforementioned issues is otherwise warranted.”<sup>9</sup>

8. Requests for leave to reply must be filed within three days of the response sought to be addressed in the reply.<sup>10</sup>

## ARGUMENTS

9. Considering that cross responses / replies were not envisaged in the 25 November Decision, the Defence herewith seeks leave to file further submissions

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<sup>7</sup> Decision on Mr. Ntaganda’s request for leave to reply (“Ntaganda Appeal Decision on Replies”), 17 July 2017, ICC-01/04-02/06-1994, para.9.

<sup>8</sup> Ntaganda Appeal Decision on Replies, para.13.

<sup>9</sup> *Ibid*, para 14.

<sup>10</sup> Regulation 34(c) RoC

regarding the Registry 30 January Submissions by analogy with the law applicable to requests for leave to reply.

10. The Registry 30 January Submissions address both the issue of transgenerational harm as well as the estimated total number of potential beneficiaries in the case. The Defence seeks leave to file further submissions solely in respect of the latter.

11. As a preliminary matter, the Defence notes that it was notified and/or granted access to the Registry 30 January Submissions no sooner than 31 January 2023. On this basis, this Defence Request for leave to Submit further Submissions is filed within the time limit prescribed by Regulation 34(c) RoC.

12. As for the issues raised in the Registry 30 January Submissions - in relation to which the Defence seeks leave to file further submissions – for the reasons set out below, the Defence submits that they could not reasonably have been anticipated. Although the Trial Chamber requested the parties, participants and if available, the Appointed Experts to provide “any additional information or documentation they might have” as to the estimated total number of potential beneficiaries of reparations in the present case, it could not have been anticipated based on the information available that the Registry would: (i) alter its approach to the determination of the estimated total number of potential beneficiaries; (ii) provide figures never advanced before, obtained *in extremis*, from unknown sources; (iii) redact the identity of the sources of its new information; and (iv) decide *proprio motu* to send a request to the Government of the Democratic Republic of Congo (“DRC”) to obtain figures, without informing the parties and participants, let alone the Trial Chamber, and without considering the downside of such a request. In these circumstances, it is necessary, if not imperative, for the adjudication of the issue at hand, to allow the Defence to submit further submissions on the Registry 30 January Submissions. The four issues on which the Defence seeks leave to file further submissions are set out below.

13. First, the Defence aims to file further submissions regarding the Registry's *volte face* regarding the relevance of the figures now put forward in its submissions as well as, more particularly, in the confidential *ex parte* annex initially not available to the Defence. Notably, when the LRV2 submitted a request to the Single Judge of Trial Chamber VI to order the Registry to obtain information pertaining to the reparations proceedings, in particular on the official census of persons residing in the affected areas at the time of the events that gave rise to the events in this case,<sup>11</sup> the Registry observed and recalled that: (i) "following its mapping exercise, it estimated that there may be at least approximately 1,100 new potential applicants – victims of the attacks [...];"<sup>12</sup> (ii) that "(t)his figure thus represents only an estimate of the minimum number of individuals for which the Registry *was fairly confident*, to be able to establish a link between the harm suffered and the crimes for which Mr Ntaganda was convicted;"<sup>13</sup> (iii) "the Registry sought to obtain approximate figures and basic information regarding the pre-war population in the Case locations as well as linkage between relevant individuals and groups to the crimes for which Mr Ntaganda was convicted;"<sup>14</sup> (iv) "(h)owever, *the authorities consulted during this exercise at the time were not in a position to link any more individuals to the crimes for which Mr Ntaganda was convicted* based on the information available to them then, nor did they have information as to the current situation and whereabouts of any individuals or groups beyond those included in the Registry mapping exercise;"<sup>15</sup> and (v) "(t)he Registry considers that there may be more potential applicants coming forward during the

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<sup>11</sup> Request of the Common Legal Representative of the Victims of the Attacks for an Order to the Registry to collect information pertaining to reparations, 9 November 2020, ICC-01/04-02/06-2624, para.1.

<sup>12</sup> Registry's Observations on the "Request of the Common Legal Representative of the Victims of the Attacks for an Order to the Registry to collect information pertaining to reparations" of 9 November 2020, ICC-01/04-02/06-2624, 18 November 2020, ICC-01/04-02/06-2627 ("Registry's Observations on LRV2's Request for an Order"), para.17.

<sup>13</sup> *Ibidem*.

<sup>14</sup> Registry's Observations on LRV2's Request for an Order, para.18.

<sup>15</sup> *Ibidem* (emphasis added).

registration process. However *it does not anticipate the number to be exponentially higher than the one established thus far during the mapping exercise.*"<sup>16</sup>

14. Referring *inter alia*, to findings of Trial Chamber VIII in the Al Mahdi reparations proceedings and related orders, the Defence opposed the LRV2 request arguing that the data sought to be obtained is simply irrelevant at this stage, and perhaps at all stages of the reparations proceedings.<sup>17</sup>

15. Trial Chamber VI, having noted the submissions of the LRV2, the Registry and the Defence, rejected the LRV2 request, referring in the process *inter alia*, to the Appeals Chamber's pronouncement in *Lubanga* that "[...] (t)he number of victims at the time when the crimes were committed may be a starting point, but other parameters for determining what reparations are appropriate include [...] and the number of victims that are likely to come forward and benefit from reparations, a number that is '*likely to be smaller in the current reality than the overall number of victims of the crimes at the time they were committed.*'"<sup>18</sup>

16. Notably, since then, the Registry was at no time instructed, let alone ordered, to obtain the data the LRV2 wished to obtain, now included in the Registry 30 January Submissions. When submitting its second report on reparations, on 15 January 2021,<sup>19</sup> the Registry referred to the First decision on reparations process issued by Trial Chamber VI on 26 June 2020 – in which it was ordered to submit by 30 September 2020, *inter alia*, a report on the mapping and any identification of potential new beneficiaries, including the crimes reported by them<sup>20</sup> – as well as the Decision on issues raised in

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<sup>16</sup> *Ibidem* (emphasis added).

<sup>17</sup> Defence response to "Request of the Common Legal Representative of the Victims of the Attacks for an Order to the Registry to collect information pertaining to reparations", 9 November 2020, ICC-01/04-02/06-2624, 20 November 2020, ICC-01/04-02/06-2628.

<sup>18</sup> Decision on the Request of the Common Legal Representative of the Victims of the Attacks for an Order to the Registry to collect information pertaining to reparations, 18 December 2020, ICC-01/04-02/06-2631, para.170. (emphasis added)

<sup>19</sup> Registry's Second Report on Reparations, 15 January 2021, ICC-01/04-02/06-2639 ("Registry's Second Report").

<sup>20</sup> First Decision on Reparations Process, 26 June 2020, ICC-01/04-02/06-2547, paras.43-44, Disposition;



the First Registry Report on reparations, issued by Trial Chamber VI on 15 December 2020 – in which no specific guidance was given by Trial Chamber VI regarding the identification of new potential beneficiaries.<sup>21</sup> The Registry structured its second report in accordance with these two decisions,<sup>22</sup> including therein, an update on the mapping of new beneficiaries.<sup>23</sup> The Registry recalled that in the First Order on reparations process, on 26 June 2020, it was instructed to “[...] finalise the mapping of potential new beneficiaries in accordance with relevant instructions;”<sup>24</sup> it referred to the “results of its mapping activities of potential new victim communities as previously reported to the Chamber”<sup>25</sup> and noted that “[...] as part of this identification/consultation exercise, a margin of individuals previously unaccounted for during the mapping may come forward, altering the figures provided previously from Registry mapping efforts. This however, *is not expected to generate a major diversion from the previously reported approximate figure resulting from the Registry mapping efforts to date.*”<sup>26</sup> At no point did the Registry indicate any actions towards or an intention to seek to obtain the information the LRV2 wished to obtain. Quite to the contrary, at all times the Registry unequivocally advocated that the estimated number of new beneficiaries expected to come forward would be limited and would not go beyond 1100. What is more, on 18 May 2022, as the Registry was continuing its field work regarding new potential beneficiaries, it informed the Trial Chamber that on 17 March 2022, it brought to the attention of the TFV that “[...] as a result of activities conducted in the field, it had mapped out approximately 780 potential beneficiaries who have been affected by the current conflict in Ituri and who have never been in contact with the ICC [...] The Registry believes these victims would be distributed in different locations in Djugu territory. *The Registry believes these victims are accounted for to a major extent in the*

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<sup>21</sup> Decision on issues raised in the Registry’s First Report on Reparations, 15 December 2020, ICC-01/04-02/06-2630.

<sup>22</sup> Registry’s Second Report, para.3.

<sup>23</sup> Annex I to Registry’s Second Report on Reparations, 15 January 2021, ICC-01/04-02/06-2639-Conf-AnxI (“Annex I to Registry’s Second Report”), paras.55-57.

<sup>24</sup> Annex I to Registry’s Second Report, para.55.

<sup>25</sup> Annex I to Registry’s Second Report, para.56

<sup>26</sup> *Ibidem.* (emphasis added)

*Registry's Preliminary Mapping exercise and the reported overall number of potential reparation beneficiaries there."*<sup>27</sup>

17. Lastly, it is noteworthy that when Trial Chamber VI appointed experts on reparations, the mandate they were given did not include any requirement to find the information sought to be obtained by the LRV2 or to base their findings on such information.

18. The issue here, is that it is only now, in January 2023, that the Registry decided to adopt the views of the LRV2, and to proceed to obtain related figures, which address the situation at times other than what was initially requested by the LRV2, without informing the Defence, of its actions or intentions, without disclosing its sources.

19. In its Registry 30 January Submissions, the Registry stated unequivocally that the parties to these reparations proceedings are the LRVs and the Defence. To be sure, the Registry is not treating both parties on the same footing. The Defence thus requests to file further submissions in relation to the foregoing as well as on its impact on the ongoing reparations proceedings.

20. Second, the Defence requests leave to address the reasons put forward by the Registry regarding the relevance of the figures obtained in January as well as why these figures would not have been available until now. To put it mildly, it is dumbfounding that new potential beneficiaries would include inhabitants of certain localities who would have moved from relevant locations at the time of the events in 2002-2003; who had not returned as of 2013 when systematic efforts were deployed to collect applications to participate in the proceedings from the greatest number of potential victims as possible;<sup>28</sup> who had not returned during the period 2019 – 2022 when the Registry was completing its mapping exercise<sup>29</sup> and was unable to obtain such

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<sup>27</sup> Registry Observations on the Trust Fund for Victims' Draft Implementation Plan, 18 May 2022, ICC-01/04-02/06-2766-Conf, para.19. (emphasis added)

<sup>28</sup> Notably, close to 2000 potential victims requested to participate in the proceedings at the time.

<sup>29</sup> Registry 30 January Submissions, para.19.

figures from the authorities;<sup>30</sup> and who have suddenly come back in huge numbers – as high as 70%<sup>31</sup> - now, in 2023, as the Trial Chamber is attempting to determine the total estimated number of beneficiaries in the case. The Defence seeks leave to submit further submission on this factual scenario and the evidence required, if it is to be accorded any weight.

21. Third, the Defence seeks leave to address the sources / providers of the information obtained by the Registry in January 2023 – redacted from the confidential *ex parte* annex now available to the Defence - , which is now included in the confidential *ex parte* annex, now available to the Defence. As a starting point, there is no reason for the identity of the Registry's sources to be redacted and not disclosed to the Defence. The Appeals Chamber made it clear, once again, that reparations proceedings are judicial proceedings, which entail a requirement of fairness as well as the right of the convicted person to challenge the probative value of the information used to determine his liability for reparations.<sup>32</sup> The figures included in the Registry's annex cannot be accepted at face value by the Trial Chamber. There is an evidentiary burden to be met and the Defence must have an opportunity to test this information, which begins by exploring who these sources are, what is their relationship to potential victims, what methodology was used to determine these figures, why would these persons - who are likely assuming official functions - request to advance such information and remain anonymous and where these persons were at the time of the events and since the events of 2002 – 2003. Situations as that encountered with Dr Gilmore who refused to provide not only the content of her interviews but also the identity of the persons interviewed<sup>33</sup> - which is antithetical to the concept of fairness in judicial proceedings, displays an obvious bias against the Defence and highlights the lack of independence of the expert - must not be tolerated by the Trial Chamber. The

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<sup>30</sup> Registry's Observations on LRV2's Request for an Order, para.18.

<sup>31</sup> Registry 30 January Submissions, para.19.

<sup>32</sup> Appeal Judgment, para.5.

<sup>33</sup> Annex to Transmission of Appointed Expert Sunneva Gilmore's views on the Defence Request to disclose material relied upon in her Report (ICC-01/04-02/06-2812-Conf), 30 January 2023, ICC-01/04-02/06-2818-Conf-Anx.

Defence seeks leave to submit further submissions on the weight, if any, that can be attributed to the figures presented in the Registry confidential *ex parte* annex, if only based on the way they were obtained and their source, and their adverse impact on the reparations proceedings.

22. Fourth, the Defence aims to file further submissions on the Registry's request addressed to the Government of the Democratic Republic of Congo ("DRC") to obtain figures regarding the census in various municipalities and villages before the conflict as well as, more importantly, at the time of the events.<sup>34</sup> The likelihood of the DRC Government being able to provide such figures, independently and objectively, is at best remote for numerous reasons. Whatever figures are provided by the DRC Government, which has changed but remains nonetheless under the thumb of Joseph Kabila who continues to rule over the DRC in the shadows,<sup>35</sup> cannot be accepted at face value. Once again, there is an evidentiary burden to be met and the convicted person / Defence must have an opportunity to challenge the information brought against him to determine his liability for reparations. The Registry's request must be distinguished from the information obtained from the DRC Government, at a very late stage of the reparations proceedings in *Lubanga*, which existed independently from the Government.<sup>36</sup> If the Trial Chamber is interested in obtaining evidence regarding such

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<sup>34</sup> Registry 30 January Submissions, paras.22-23.

<sup>35</sup> See for instance, Media Congo, Papy Tamba : « Joseph Kabila sera candidat en 2023 pour s'occuper personnellement de Kagame », 8 December 2022, available at <https://www.mediacongo.net/article-actualite-114629-papy-tamba-joseph-kabila-sera-candidat-en-2023-pour-s-occuper-personnellement-de-kagame.html> ; Media Congo, Joseph Kabila et ses troupes en réunion en Afrique du Sud, 6 February 2023, available at <https://www.mediacongo.net/article-actualite-117181-joseph-kabila-et-ses-troupes-en-reunion-en-afrique-du-sud.html>; Jeune Afrique, RDC : comment Joseph Kabila envisage la présidentielle de 2023, 15 July 2022, available at <https://www.jeuneafrique.com/1362427/politique/rdc-comment-joseph-kabila-envisage-la-presidentielle-de-2023/>; The Africa Report, DRC : Joseph Kabila's plan for the 2023 presidential election, 18 July 2022, available at <https://www.theafricareport.com/223714/drc-joseph-kabilas-plans-for-the-2023-presidential-election/> ; Media Congo, Présidentielle de 2023 : les politiques enquete d'alliances, 14 January 2023, available at <https://www.mediacongo.net/article-actualite-116103-presidentielle-de-2023-les-politiques-enquete-d-alliances.html> ; Politico.cd, Présidentielle 2023 : Joseph Kabila, l'invité surprise, 17 May 2022, available at <https://www.politico.cd/la-rdc-a-la-une/2022/05/17/presidentielle-2023-joseph-kabila-linvente-surprise.html/108927/>

<sup>36</sup> *Prosecutor v. Lubanga*, Corrected version of the "Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable", 21 December 2017, ICC-01/04-01/06-3379-Red-Corr-tENG.

figures, a good starting point would be the evidentiary record of the proceedings before the International Court of Justice in the case involving the DRC and the Republic of Uganda. The Defence seeks leave to submit further submissions on the weight, if any, which can be attributed to the Registry's request addressed to the DRC Government as well as to any information to be obtained by the Registry as a result.

### **RELIEF SOUGHT**

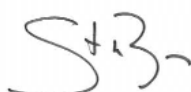
23. In light of the foregoing, the Defence respectfully requests the Chamber to:

**GRANT** the Defence Request for Leave to File Further Submissions;

**AUTHORIZE** the Defence to submit further submissions in relation to the Registry 30 January Submissions, more particularly on the four issues set out in paragraphs 13 to 22 above; and

**SET** a calendar for the Defence to submit its further submissions, taking into account the scope of the information sought and the time necessary to obtain the information / evidence required for this purpose.

**RESPECTFULLY SUBMITTED ON THIS 6<sup>th</sup> DAY OF FEBRUARY 2023**



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

The Hague, The Netherlands