



**Original: English**

**No. ICC-01/04-02/06 A6 A7**

**Date: 5 February 2024**

**THE APPEALS CHAMBER**

**Before:**

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

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO**

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

**Public**

**Decision on the requests for suspensive effect and other procedural issues**

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

**Legal Representatives of Victims**

Ms Sarah Pellet  
Ms Caroline Walter

Mr Dmytro Suprun  
Ms Fiona Lau

**Counsel for the Defence**

Mr Stéphane Bourgon  
Ms Kate Gibson

**Trust Fund for Victims**

Ms Deborah Ruiz Verduzco

**REGISTRY**

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**Registrar**

Mr Osvaldo Zavala Giler

**Victims Participation and Reparations  
Section**

Mr Philipp Ambach

The Appeals Chamber of the International Criminal Court,

In the appeals of the common legal representative of the victims of the attacks and of Mr Bosco Ntaganda against the decision of Trial Chamber II entitled “Addendum to the Reparations Order of 8 March 2021, ICC-01/04-02/06-2659” of 14 July 2023 (ICC-01/04-02/06-2858-Red),

Having before it the “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” of 16 August 2023 (ICC-01/04-02/06-2862),

Having before it the “Defence Notice of Appeal against the 14 July Addendum to the Reparations Order of 8 March 2021” of 16 August 2023 (ICC-01/04-02/06-2863-Red) and the “Request for the Defence appeal against the Addendum issued by Trial Chamber II on 14 July 2023 to be given suspensive effect” of 16 August 2023 (ICC-01/04-02/06-2864-Red),

Having before it the “Observations on Requests for Suspensive Effect and Request under rule 103 of the Rules of Procedure and Evidence” of 31 August 2023 (ICC-01/04-02/06-2867), and

Having before it the “Response on behalf of Mr Ntaganda to the Appeal Brief 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’” of 2 January 2024 (ICC-01/04-02/06-2889-Red), in which submissions in relation to holding a hearing and obtaining *amicus curiae* observations pursuant to rule 103 of the Rules of Procedure and Evidence are made,

*Renders* unanimously the following

## DECISION

1. The requests for suspensive effect of the “Addendum to the Reparations Order of 8 March 2021, ICC-01/04-02/06-2659” are rejected.
2. At the current stage of the proceedings, the Appeals Chamber does not deem it necessary to receive further observations pursuant to rule 103 of the Rules of Procedure and Evidence.
3. In due course, the Appeals Chamber, in its new composition, will rule upon whether or not to hold a hearing in these appeals.

## REASONS

### I. PROCEDURAL HISTORY

1. On 8 March 2021, Trial Chamber VI issued its decision entitled “Reparations Order” (hereinafter: “Reparations Order”).<sup>1</sup>
2. On 16 March 2021, the Presidency assigned the present case to a newly constituted Trial Chamber II (hereinafter: “Trial Chamber”).<sup>2</sup>
3. On 12 September 2022, the Appeals Chamber issued the “Judgment on the appeals against the decision of Trial Chamber VI of 8 March entitled ‘Reparations Order’” (hereinafter: “2022 *Ntaganda* Appeals Chamber Judgment on Reparations”) which partially reversed the Reparations Order and remanded the matter to the Trial Chamber.<sup>3</sup>

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<sup>1</sup> [ICC-01/04-02/06-2659](#).

<sup>2</sup> [Decision assigning judges to divisions and recomposing chambers](#), ICC-01/04-02/06-2663, p. 7.

<sup>3</sup> [ICC-01/04-02/06-2782](#).

4. On 14 July 2023, the Trial Chamber issued the “Addendum to the Reparations Order of 8 March 2021, ICC-01/04-02/06-2659” (hereinafter: “Impugned Decision”).<sup>4</sup>
5. On 11 August 2023, the Trial Chamber issued the “First Decision on the Trust Fund for Victims’ Draft Implementation Plan for Reparations” (hereinafter: “First Decision on the Draft Implementation Plan”).<sup>5</sup>
6. On 16 August 2023, the common legal representative of the victims of the attacks (hereinafter: “Victims Group 2”) filed a notice of appeal against the Impugned Decision containing a request for suspensive effect in relation to the determination in the Impugned Decision of the eligibility of victims a/01636/13, a/00212/13, a/00199/13 and a/00215/13 (hereinafter: “Victims Group 2 Request”).<sup>6</sup>
7. On the same day, the Defence filed a notice of appeal against the Impugned Decision (hereinafter: “Defence Notice of Appeal”),<sup>7</sup> and, separately, a request for suspensive effect of the Impugned Decision (hereinafter: “Defence Request”).<sup>8</sup>
8. On 22 August 2023, the Appeals Chamber issued an order inviting the Trust Fund for Victims (hereinafter: “TFV”), pursuant to rule 103(1) of the Rules of Procedure and Evidence (hereinafter: “Rules”), to submit observations on the requests of Victims Group 2 and the Defence for suspensive effect of the Impugned Decision, and setting a time limit for Victims Group 2 and the Defence to respond to those observations and the respective request for suspensive effect.<sup>9</sup>

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<sup>4</sup> ICC-01/04-02/06-2858-Conf (public redacted version ([ICC-01/04-02/06-2858-Red](#)) filed on the same day).

<sup>5</sup> ICC-01/04-02/06-2860-Conf (public redacted version ([ICC-01/04-02/06-2860-Red](#)) filed on 30 August 2023).

<sup>6</sup> [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](#), ICC-01/04-02/06-2862.

<sup>7</sup> Defence Notice of Appeal against the 14 July Addendum to the Reparations Order of 8 March 2021, ICC-01/04-02/06-2863-Conf (public redacted version ([ICC-01/04-02/06-2863-Red](#)), dated 21 August 2023 and notified 22 August 2023).

<sup>8</sup> Request for the Defence appeal against the Addendum issued by Trial Chamber II on 14 July 2023 to be given suspensive effect, ICC-01/04-02/06-2864-Conf (public redacted version ([ICC-01/04-02/06-2864-Red](#)), dated 21 August 2023 and notified 22 August 2023).

<sup>9</sup> [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](#), ICC-01/04-02/06-2866.

9. On 23 August 2023, the Appeals Chamber, via email, invited the common legal representative of former child soldiers (hereinafter: “Victims Group 1”) to respond to the requests of Victims Group 2 and the Defence for suspensive effect, as well as to the TFV observations on the requests.<sup>10</sup>

10. On 31 August 2023, the TFV filed its “Observations on Requests for Suspensive Effect and Request under rule 103 of the Rules of Procedure and Evidence” (hereinafter: “TFV Observations”).<sup>11</sup>

11. On 7 September 2023, the Defence filed its response to the Victims Group 2 Request and the TFV Observations (hereinafter: “Defence Response to Procedural Issues”).<sup>12</sup>

12. On the same day, Victims Group 1 and Victims Group 2 each filed their responses to the Defence Request and the TFV Observations (hereinafter: “Victims Group 1 Response to Procedural Issues”<sup>13</sup> and “Victims Group 2 Response to Procedural Issues”,<sup>14</sup> respectively).

13. On 5 October 2023, further to a request from the Defence which was not opposed by either group of victims, the Appeals Chamber granted an extension of the time limit for the filing of the appeal briefs of both the Defence and Victims Group 2 to 16h00 on Monday 30 October 2023.<sup>15</sup> The Appeals Chamber further held that the responses may

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<sup>10</sup> Email sent on behalf of the Appeals Chamber to the common legal representative of former child soldiers on 23 August 2023 at 17.13.

<sup>11</sup> [ICC-01/04-02/06-2867](#).

<sup>12</sup> [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](#), ICC-01/04-02/06-2871.

<sup>13</sup> [Response of the Common Legal Representative of the Former Child Soldiers to the request for suspensive effect of the Addendum to the Reparations Order introduced by the Defence \(No. ICC-01/04-02/06-2864-Red\)](#), ICC-01/04-02/06-2870.

<sup>14</sup> [Response of the Common Legal Representative of the Victims of the Attacks to the “Request for the Defence appeal against the Addendum issued by Trial Chamber II on 14 July 2023 to be given suspensive effect” and the Trust Fund for Victims’ “Observations on the Requests for Suspensive Effect and Request under rule 103 of the Rules of Procedure and Evidence”](#), ICC-01/04-02/06-2869 (reclassified as public, pursuant to the Appeals Chamber’s instruction of 13 September 2023).

<sup>15</sup> Email sent on behalf of the Appeals Chamber to the parties and participants on 5 October 2023 at 15.21 communicating its confidential Decision on the Defence’s request for an extension of time. On an exceptional basis, the Appeals Chamber ruled on this matter by email so as to proceed in a manner that was as expeditious and practical as possible in the circumstances that existed at the time, noting that the Defence had submitted its request electronically as a result of technical issues which were being experienced by the Court. The Defence submitted that the technical issues faced by the Court at that time constituted good cause for it to be granted an extension of fourteen days to file its appeal brief. Victims Group 2 did not oppose that request as long as the same extension of time was granted for the filing of

be filed within 60 days of notification of the appeal briefs, pursuant to regulation 59 of the Regulations of the Court.<sup>16</sup>

14. On 30 October 2023, Victims Group 2 and the Defence each filed their appeal briefs against the Impugned Decision (hereinafter: “Victims Group 2’s Appeal Brief”<sup>17</sup> and “Defence Appeal Brief”,<sup>18</sup> respectively).

15. On 2 January 2024, Victims Group 1 and Victims Group 2 each filed their responses to the Defence Appeal Brief (hereinafter: “Victims Group 1’s Response to the Defence Appeal Brief”<sup>19</sup> and “Victims Group 2’s Response to the Defence Appeal Brief”,<sup>20</sup> respectively); and the Defence filed its response to Victims Group 2’s Appeal Brief (hereinafter: “Defence Response to Victims Group 2’s Appeal Brief”).<sup>21</sup>

## II. INTRODUCTION

16. The Appeals Chamber has before it separate requests for suspensive effect from the Defence<sup>22</sup> and Victims Group 2;<sup>23</sup> a request from the TFV to submit observations

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their appeal brief. Victims Group 1 did not oppose either request. Pursuant to regulation 35(2) of the Regulations of the Court, the Appeals Chamber found that the Defence had shown that the technical issues then facing the Court – and the impact that they were having on the Defence’s ability to prepare its appeal brief – constituted good cause for the Defence to be granted the extension of time that it sought for the filing of its appeal brief. The Appeals Chamber further noted that neither group of victims opposed the Defence’s request and that an equivalent extension of time for the filing of their appeal brief would be granted to Victims Group 2.

<sup>16</sup> Email sent on behalf of the Appeals Chamber to the parties and participants on 5 October 2023 at 15.21 communicating its confidential Decision on the Defence’s request for an extension of time.

<sup>17</sup> Appeal Brief 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”, ICC-01/04-02/06-2875-Conf (public redacted version ([ICC-01/04-02/06-2875-Red](#)) filed on 31 October 2023).

<sup>18</sup> Defence Appellant Brief against the 14 July Addendum to the Reparations Order of 8 March 2021, ICC-01/04-02/06-2876-Conf (public redacted version ([ICC-01/04-02/06-2876-Red](#)) filed on 5 December 2023).

<sup>19</sup> Response of the Common Legal Representative of the Former Child Soldiers to the Defence Appeal Brief against the Addendum to the Reparations Order, ICC-01/04-02/06-2888-Conf (public redacted version ([ICC-01/04-02/06-2888-Red](#)) filed on 10 January 2024).

<sup>20</sup> Response of the Common Legal Representative of the Victims of the Attacks to the “Defence Appellant Brief against the 14 July Addendum to the Reparations Order of 8 March 2021” (No. ICC-01/04-02/06-2876-Conf), ICC-01/04-02/06-2887-Conf (public redacted version ([ICC-01/04-02/06-2887-Red](#)) filed on 25 January 2024).

<sup>21</sup> Response on behalf of Mr Ntaganda to the Appeal Brief 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”, ICC-01/04-02/06-2889-Conf (public redacted version ([ICC-01/04-02/06-2889-Red](#)) filed on 23 January 2024).

<sup>22</sup> [Defence Request](#).

<sup>23</sup> [Victims Group 2 Request](#).

pursuant to rule 103 of the Rules;<sup>24</sup> and requests from the Defence for the Appeals Chamber to consider scheduling a hearing and obtaining *amicus curiae* observations.<sup>25</sup>

17. It is the above procedural issues that the Appeals Chamber will address in this Decision.

### III. THE REQUESTS FOR SUSPENSIVE EFFECT

#### A. Preliminary Issues

##### 1. *Filing the Defence Request as a separate document*

18. Victims Group 1 note that the Defence filed an additional 11-page document requesting suspensive effect of the Impugned Decision, separately from the 20-page notice of appeal against the Impugned Decision.<sup>26</sup>

19. The Appeals Chamber observes that while the Defence included brief arguments in relation to the request for suspensive effect in its notice of appeal, it did indeed concurrently file a separate document elaborating on that request.<sup>27</sup>

20. The Appeals Chamber recalls that, in its previous decision on suspensive effect in relation to these proceedings, it held that “a request for suspensive effect of a reparation order must be made in the notice of appeal”.<sup>28</sup> It made that finding in relation to the timing of the request, as the Defence in that instance had requested suspensive effect in its appeal brief rather than in its notice of appeal.<sup>29</sup> In light of the issue that has now arisen, and further to that previous decision, the Appeals Chamber finds it appropriate to clarify that, in the context of appeals against reparation orders, the reasons for the request for suspensive effect should be set out in the notice of appeal. However, given that the Appeals Chamber is making the above clarification for the first time in this decision, it will on this occasion proceed to consider the merits of the Defence Request.

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<sup>24</sup> [TFV Observations](#), para. 32.

<sup>25</sup> [Defence Response to Victims Group 2’s Appeal Brief](#), paras 7, 136.

<sup>26</sup> *See* [Victims Group 1 Response to Procedural Issues](#), para. 15.

<sup>27</sup> [Defence Notice of Appeal](#), para. 14.

<sup>28</sup> [Decision on the Defence request for suspensive effect](#), ICC-01/04-02/06-2691 (A4 A5) (hereinafter: “*Ntaganda* A4 A5 Decision on Suspensive Effect Request”), para. 14.

<sup>29</sup> [Ntaganda A4 A5 Decision on Suspensive Effect Request](#), paras 9-14.



## 2. *Observations from the VPRS*

21. In its observations, the TFV suggests that the Victims Participation and Reparations Section of the Registry (hereinafter: “VPRS”), which is responsible for carrying out the administrative eligibility assessment of potential beneficiaries in this case, may be better placed to present the Appeals Chamber with observations regarding possible mitigating measures as to the time frame for the eligibility determination.<sup>30</sup> The Appeals Chamber, however, considers that it has sufficient submissions before it to determine the requests for suspensive effect without requiring further observations from the VPRS.

### **B. Merits**

#### 1. *Submissions of the parties and the TFV*

##### **(a) Victims Group 2 Request**

22. Victims Group 2 request that, in order to protect the interests and ensure the wellbeing of the concerned victims in line with the “*do no harm*” principle, the Appeals Chamber grant suspensive effect of the Impugned Decision in relation to its findings of the ineligibility of victims a/01636/13, a/00212/13, a/00199/13 and a/00215/13, who had previously been found eligible for reparations by the TFV and included in the Initial Draft Implementation Plan.<sup>31</sup>

23. Victims Group 2 submit that the implementation of the Impugned Decision would have a negative impact on, and possibly cause psychological harm to, the four concerned victims, arguing that this negative impact “would be very difficult to correct and may be irreversible”, and “cannot be prevented or mitigated through a measure other than granting suspensive effect of the present Appeal”.<sup>32</sup> They submit that “those services which have already been provided or were expected to be provided in the context of the [TFV’s Initial Draft Implementation Plan] will now be either reduced or abandoned” and they will be excluded from the benefits of comprehensive rehabilitative measures under the main reparations implementation plan, and be eligible for services

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<sup>30</sup> [TFV Observations](#), para. 25.

<sup>31</sup> [Victims Group 2 Request](#), paras 4, 39-43, 45.

<sup>32</sup> [Victims Group 2 Request](#), paras 41-42.

only in the context of the TFV's assistance mandate, which are "hypothetical and very limited".<sup>33</sup>

24. As a part of the procedural background to their subsequent appeal brief and response to the Defence Appeal Brief, Victims Group 2 note that they had previously referred to the TFV for inclusion in the Initial Draft Implementation Plan other victims who are in a similar situation to the four victims in relation to whom suspensive effect is requested.<sup>34</sup> They point out that, on 6 October 2023, the TFV asked Victims Group 2 for instructions in relation to processing the dossiers of those other victims, noting Victims Group 2's pending request for suspensive effect.<sup>35</sup> They further aver that, on 9 October 2023, they requested the TFV to put on hold the dossiers of those other victims pending the Appeals Chamber's determination of their request for suspensive effect.<sup>36</sup>

#### (b) Defence Request

25. The Defence requests that, given "the live material risk" of having to revisit, and possibly reverse, the eligibility determination of "the potential very high number of victims", as a result of the Defence appeal,<sup>37</sup> and "considering the requirement to adopt a victims' centred approach and to apply[,] *inter alia*, the *do no harm* reparations principle",<sup>38</sup> its appeal be given suspensive effect.<sup>39</sup> The Defence submits that the immediate suspension of the Impugned Decision is warranted and necessary,<sup>40</sup> and "is the only available avenue to avoid severe and potentially irreparable prejudice, both to the victims in this case and [to Mr Ntaganda], as well as to steer the reparations process in this case, back in the right direction".<sup>41</sup>

26. In support, the Defence argues that, unlike the circumstances underlining the Appeals Chamber's previous decision on the Defence's request for suspensive effect of

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<sup>33</sup> [Victims Group 2 Request](#), paras 40-42.

<sup>34</sup> [Victims Group 2's Appeal Brief](#), para. 24; [Victims Group 2's Response to the Defence Appeal Brief](#), para. 25.

<sup>35</sup> [Victims Group 2's Appeal Brief](#), para. 24; [Victims Group 2's Response to the Defence Appeal Brief](#), para. 25.

<sup>36</sup> [Victims Group 2's Appeal Brief](#), para. 25; [Victims Group 2's Response to the Defence Appeal Brief](#), para. 26.

<sup>37</sup> [Defence Request](#), paras 16-18, 20.

<sup>38</sup> [Defence Request](#), para. 19.

<sup>39</sup> [Defence Request](#), paras 1, 3.

<sup>40</sup> [Defence Request](#), paras 3, 21-22.

<sup>41</sup> [Defence Request](#), para. 11.

the Reparations Order,<sup>42</sup> the eligibility determination of potential victims in this case is expected to “proceed at an accelerated pace in the coming months”.<sup>43</sup> Therefore, the Defence contends that allowing the Trial Chamber to proceed with the implementation of reparations on the basis of 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”.<sup>44</sup>

27. Additionally, the Defence avers that the following considerations warrant an order for suspensive effect at this stage: (i) the deteriorating security situation in Ituri; (ii) the upcoming elections in the Democratic Republic of the Congo; (iii) providing the TFV with time to prepare for the implementation of reparations; and (iv) the possibility for the Appeals Chamber to steer the reparations process back in the right direction.<sup>45</sup>

### (c) TFV Observations

28. The TFV notes that the requests of both the Defence and Victims Group 2 focus upon matters of victim eligibility.<sup>46</sup> The TFV submits that “changes in the eligibility determinations, once the eligibility process has started, impacts considerably the victim’s rights and certainty, and affects the *do no harm* principle”.<sup>47</sup> The TFV observes that judicial uncertainty may re-traumatise the four victims who are the subject of the Victims Group 2 request.<sup>48</sup> In respect of the Defence Request, the TFV observes that informing a high number of victims, who were recognised as eligible, that such recognition is reversed may re-traumatise victims,<sup>49</sup> alienate their families and the affected communities;<sup>50</sup> cause “contractual, fund management and reputational issues of the [TFV] vis-à-vis its donors”,<sup>51</sup> and impact upon the success of the implementation of the reparations and the programme’s reputation.<sup>52</sup> The TFV observes that these implications would arise only if the VPRS “starts informing victims of their eligibility

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<sup>42</sup> [Defence Request](#), paras 12-13.

<sup>43</sup> [Defence Request](#), paras 14-15.

<sup>44</sup> [Defence Request](#), paras 1, 3, 21.

<sup>45</sup> [Defence Request](#), para. 22.

<sup>46</sup> [TFV Observations](#), paras 21-23.

<sup>47</sup> [TFV Observations](#), para. 24.

<sup>48</sup> [TFV Observations](#), para. 24.

<sup>49</sup> [TFV Observations](#), para. 24.

<sup>50</sup> [TFV Observations](#), para. 26.

<sup>51</sup> [TFV Observations](#), para. 28.

<sup>52</sup> [TFV Observations](#), para. 26.

to the programme or actively explains to potential victims in the communities the non final eligibility criteria to identify new beneficiaries”.<sup>53</sup>

29. The TFV submits that “a clear articulation of the consequences” of any order for suspensive effect would assist it in mitigating the effects of the suspension on the timeline for implementation.<sup>54</sup> In this respect, the TFV submits that it will be essential to ensure that an order for suspensive effect of the appeals does not affect “any preparatory steps, including procurement, which need to be taken before starting a specific part of a programme with an implementing partner”, as well as the continuance of any internal or external processes in terms of eligibility, insofar as they do not impact victims or communities.<sup>55</sup>

#### **(d) Defence Response**

30. In the Defence Response to Procedural Issues, the Defence generally concurs with the TFV Observations about the impact on potential beneficiaries if a reparations order is modified and argues that this “is even more severe than the situation depicted by the TFV”.<sup>56</sup> The Defence emphasises that given the number of potential victims in this case, and the relevant timeline, the VPRS will have to proceed at an accelerated pace and it is therefore “reasonable to assume that by the time the Appeals Chamber issues its judgments on both appeals, the eligibility of thousands of potential victims of the attacks will have been determined” and “a very high number of victims determined to be eligible are likely to have begun benefitting from reparations”.<sup>57</sup> The Defence notes that the TFV does not itself elaborate on potential mitigating measures that could be taken, nor can the Defence advance any; and it also notes that the TFV could not use its assistance mandate to help a very high number of victims if their eligibility to reparations were to be reversed.<sup>58</sup>

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<sup>53</sup> [TFV Observations](#), para. 25.

<sup>54</sup> [TFV Observations](#), para. 29.

<sup>55</sup> [TFV Observations](#), para. 31.

<sup>56</sup> [Defence Response to Procedural Issues](#), para. 4. *See also* para. 12.

<sup>57</sup> [Defence Response to Procedural Issues](#), para. 7.

<sup>58</sup> [Defence Response to Procedural Issues](#), paras 13-14.

31. Furthermore, the Defence supports Victims Group 2's request for suspensive effect, also averring that it would become moot if its own request for suspensive effect is granted.<sup>59</sup>

32. In the subsequent Defence Appeal Brief, the Defence underscores that, in light of the grounds of appeal and the relief sought, "the potential prejudice to victims if the proceedings are authorized to proceed [...] far outweighs the temporary delay of the implementation phase" that might result if suspensive effect is granted.<sup>60</sup> Thereafter, in the Defence Response to Victims Group 2's Appeal Brief, the Defence submits that, "[c]onsidering that the Registry is likely to be ready to commence the conduct of eligibility determinations", it is in the interests of both victims and justice that the requests for suspensive effect are determined at this time.<sup>61</sup>

#### (e) Victims Group 1 Response

33. In the Victims Group 1 Response to Procedural Issues, Victims Group 1 do not respond to the Victims Group 2 Request since, in their view, it does not impact them.<sup>62</sup>

34. Victims Group 1 request that the Appeals Chamber reject the Defence Request.<sup>63</sup> They argue that the criteria for granting suspensive effect are not met and that suspending the reparations process is against their best interests.<sup>64</sup> They emphasise the need for the reparations proceedings to be expeditious.<sup>65</sup>

35. Victims Group 1 further point to the procedural nature of various grounds of the Defence appeal which they argue neither impact reparations programmes nor the start of their implementation.<sup>66</sup> They further concur with the TFV's Observations that lengthy preparatory steps are needed before specific parts of programmes commence.<sup>67</sup>

36. In their subsequent response to the Defence Appeal Brief, Victims Group 1 underscore that suspensive effect should not be granted, reiterating their previous

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<sup>59</sup> [Defence Response to Procedural Issues](#), paras 5, 17-19.

<sup>60</sup> [Defence Appeal Brief](#), para. 6.

<sup>61</sup> [Defence Response to Victims Group 2's Appeal Brief](#), para. 6, referring to [First Decision on the Draft Implementation Plan](#), para. 187.

<sup>62</sup> [Victims Group 1 Response to Procedural Issues](#), para. 2.

<sup>63</sup> [Victims Group 1 Response to Procedural Issues](#), paras 3, 29.

<sup>64</sup> [Victims Group 1 Response to Procedural Issues](#), paras 3, 19-21, 23, 27.

<sup>65</sup> [Victims Group 1 Response to Procedural Issues](#), paras 22, 24-25.

<sup>66</sup> [Victims Group 1 Response to Procedural Issues](#), para. 22.

<sup>67</sup> [Victims Group 1 Response to Procedural Issues](#), para. 23.

arguments about the procedural nature of the Defence’s grounds of appeal, “the relatively long processes at play between the identification of a potential beneficiary and their access to all of the programmes” and the need for expeditiousness.<sup>68</sup>

**(f) Victims Group 2 Response**

37. Victims Group 2 request that the Appeals Chamber reject the Defence Request.<sup>69</sup> They submit that granting suspensive effect in relation to any of the Defence’s 13 grounds of appeal either has no substantive basis or fails to satisfy the criteria required for suspensive effect.<sup>70</sup> In this regard, Victims Group 2 aver, by reference to each of the 13 grounds of appeal, that the Defence: (a) attempts to re-litigate issues, including the applicability of the presumption of civilian status under international humanitarian law, which have already been determined in previous decisions and/or do not arise from the Impugned Decision;<sup>71</sup> (b) raises grounds that, even if successful, would not have created an irreversible situation that could not be corrected as a result of the implementation of the Impugned Decision, submitting, *inter alia*, that the implementation of reparations measures for new eligible victims is unlikely to start before the Appeals Chamber’s judgment on the Defence’s appeal;<sup>72</sup> or (c) misrepresents the Trial Chamber’s previous findings.<sup>73</sup>

*2. Determination of the Appeals Chamber*

38. Article 82(3) of the Statute provides:

An 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.

39. By way of a preliminary observation, the Appeals Chamber emphasises that the wording of article 82(3) of the Statute is clear that, in the absence of an order from the Appeals Chamber, an appeal shall not of itself have suspensive effect. That is the default position unless and until the Appeals Chamber rules to the contrary. In these appeals, the Appeals Chamber has taken that reality into account from the outset. The

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<sup>68</sup> [Victims Group 1’s Response to the Defence Appeal Brief](#), paras 3, 22. *See also, inter alia*, paras 69-70.

<sup>69</sup> [Victims Group 2 Response to Procedural Issues](#), paras 2, 49.

<sup>70</sup> [Victims Group 2 Response to Procedural Issues](#), para. 2.

<sup>71</sup> [Victims Group 2 Response to Procedural Issues](#), paras 2, 23-29, 43-45.

<sup>72</sup> [Victims Group 2 Response to Procedural Issues](#), paras 2, 30-38.

<sup>73</sup> [Victims Group 2 Response to Procedural Issues](#), paras 39-42.

Appeals Chamber nevertheless considers it appropriate to set out its reasoning in relation to suspensive effect at the present time, together with its determination of the remaining procedural issues that are addressed in this decision.

40. The Appeals Chamber recalls that the decision on a request for suspensive effect is within the discretion of the Appeals Chamber.<sup>74</sup> When examining such a request, the Appeals Chamber “will consider the specific circumstances of the case and the factors it considers relevant for the exercise of its discretion under these circumstances”.<sup>75</sup> The Appeals Chamber has summarised the circumstances in which it may exercise its discretion to grant suspensive effect as follows:

In past decisions, the Appeals Chamber, 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 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”.<sup>76</sup>

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<sup>74</sup> See [Ntaganda A4 A5 Decision on Suspensive Effect Request](#), para. 20; *Situation in the Bolivarian Republic of Venezuela I*, [Decision on the Bolivarian Republic of Venezuela’s request for suspensive effect of Pre-Trial Chamber I’s “Decision authorising the resumption of the investigation pursuant to article 18\(2\) of the Statute”](#), 20 July 2023, ICC-02/18-53 (OA) (hereinafter: “*Venezuela OA Decision on Suspensive Effect*”), para. 10; *Situation in the Republic of the Philippines*, [Decision on request for suspensive effect of Pre-Trial Chamber I’s “Authorisation pursuant to article 18\(2\) of the Statute to resume the investigation” of 26 January 2023 \(ICC-01/21-56\)](#), 27 March 2023, ICC-01/21-67 (OA) (hereinafter: “*Philippines OA Decision on Suspensive Effect*”), para. 15; *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, [Decision on suspensive effect](#), 19 April 2021, ICC-01/12-01/18-1417 (OA3), para. 6, referring to *The Prosecutor v. Jean-Pierre Bemba Gombo*, [Decision on the Request of the Prosecutor for Suspensive Effect](#), 3 September 2009, ICC-01/05-01/08-499 (OA2), para. 11.

<sup>75</sup> [Ntaganda A4 A5 Decision on Suspensive Effect Request](#), para. 20; [Venezuela OA Decision on Suspensive Effect](#), para. 10; [Philippines OA Decision on Suspensive Effect](#), para. 15; *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, [Decision on the Prosecutor’s urgent request for suspensive effect of the “Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido” of 21 October 2014](#), 22 October 2014, ICC-01/05-01/13-718 (OA9), para. 5, referring to previous jurisprudence.

<sup>76</sup> [Ntaganda A4 A5 Decision on Suspensive Effect Request](#), para. 21, referring to *The Prosecutor v. Jean-Pierre Bemba Gombo*, [Decision on the Request of Mr Bemba to Give Suspensive Effect to the Appeal Against the “Decision on the Admissibility and Abuse of Process Challenges”](#), 9 July 2010, ICC-01/05-01/08-817 (OA3), para. 11. See also [Venezuela OA Decision on Suspensive Effect](#), para. 10; [Philippines OA Decision on Suspensive Effect](#), para. 15; *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman*, [Decision on request for suspensive effect](#), 25 August 2020, ICC-02/05-01/20-134 (OA), para. 6; *Situation on registered vessels of the Union of the Comoros, The Hellenic Republic and the Kingdom of Cambodia*, [Decision on the Prosecutor’s request for suspensive effect](#), 31 January 2019, ICC-01/13-81 (OA2), para. 10.

41. Recalling its previous decision on the Defence's request for suspensive effect of the Reparations Order,<sup>77</sup> the Appeals Chamber reiterates that these criteria are of a strict nature and should be rigorously applied in view of the overriding importance of delivering reparations to victims following the Trial Chamber's decision on conviction, which was upheld on appeal, and which is thus final.<sup>78</sup>

42. The above principles will guide the Appeals Chamber's analysis. It will examine the two requests for suspensive effect in turn.

### 3. *The Defence Request*

43. Concerning certain submissions of Victims Group 1 and Victims Group 2 in relation to the Defence Request, the Appeals Chamber, at the outset, emphasises that it will not address the merits of the Defence appeal in the context of the present requests for suspensive effect. Indeed, this Decision is without prejudice to any future determination to be made on the merits, including in relation to the question of whether the Impugned Decision complied with the direction of the Appeals Chamber to issue a "new order for reparations".<sup>79</sup>

44. In exercising its discretion as to whether to order suspensive effect further to the Defence Request, the Appeals Chamber finds that it has not been demonstrated that, unless the Impugned Decision is suspended, its implementation will create an irreversible situation, lead to consequences that would be very difficult to correct, or potentially defeat the purpose of the appeal.

45. In particular, the Appeals Chamber does not find that the Defence has substantiated its central contention that the immediate suspension of the Impugned Decision "is the only available avenue to avoid severe and potentially irreparable prejudice, both to the victims in this case and [to Mr Ntaganda]".<sup>80</sup> The Defence has not substantiated that, in light of the deadlines set by the Trial Chamber to complete the reparations process, failing to suspend the Impugned Decision will lead to very high

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<sup>77</sup> [Ntaganda A4 A5 Decision on Suspensive Effect Request](#), para. 21.

<sup>78</sup> See [Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled "Judgment"](#), 30 March 2021, ICC-01/04-02/06-2666-Red.

<sup>79</sup> See, in particular, [Defence Appeal Brief](#), grounds 1, 2 and 3.

<sup>80</sup> [Defence Request](#), para. 11.



numbers of victims having their eligibility determinations revisited or reversed;<sup>81</sup> and, in that context, that suspending the Impugned Decision is warranted “in the interest of victims”, in line with adopting “a victims’ centered approach” and applying, *inter alia*, “the *do no harm* reparations principle” so that victims are not prejudiced or re-traumatised by any eligibility assessments that may later need to be revisited or reversed.<sup>82</sup>

46. In this regard, the Appeals Chamber finds significant the submissions of both groups of victims, who strongly argue against the Impugned Decision being suspended. In particular, they do not argue that damage or irreversible harm will occur to the victims unless the Impugned Decision is suspended. To the contrary, the Appeals Chamber notes the submission of Victims Group 1 that the suspension of the Impugned Decision as a whole, which will postpone the victims’ access to reparative support, “is plainly prejudicial to their best interests” and will “unequivocally jeopardise” their right to prompt reparation, for which they have been waiting for more than two decades in circumstances in which they have been recognised by the Trial Chamber to be particularly vulnerable.<sup>83</sup> The Appeals Chamber reiterates that the need to repair the harm suffered by the victims of Mr Ntaganda’s crimes as expeditiously as possible is a relevant consideration in determining whether the Impugned Decision must be suspended.<sup>84</sup>

47. Furthermore, the Appeals Chamber notes the submissions of Victims Group 2 that, given the time that the whole process is likely to take, the implementation of reparations measures for new eligible victims is unlikely to start before the Appeals Chamber’s judgment on the Defence’s appeal.<sup>85</sup> The Appeals Chamber also notes the reference in the TFV Observations to preparatory steps, including procurement, still needing to be taken before starting a specific part of a programme,<sup>86</sup> with Victims Group 1 submitting that these steps “cover notably lengthy procurement processes” and “preliminary work with partners”, which are “completely disconnected from the

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<sup>81</sup> See, *inter alia*, [Defence Request](#), paras 17-21; [Defence Response to Procedural Issues](#), paras 7, 9, 11-12.

<sup>82</sup> See [Defence Request](#), paras 19, 21; [Defence Response to Procedural Issues](#), paras 4, 9, 12.

<sup>83</sup> See [Victims Group 1 Response to Procedural Issues](#), paras 3, 20, 27.

<sup>84</sup> See [Ntaganda A4 A5 Decision on Suspensive Effect Request](#), para. 25.

<sup>85</sup> See [Victims Group 2 Response to Procedural Issues](#), para. 34.

<sup>86</sup> See [TFV Observations](#), para. 31; [Victims Group 1 Response to Procedural Issues](#), para. 23.

appeals inasmuch as reparations programmes are going to be implemented in any case”.<sup>87</sup>

48. Moreover, duly bearing in mind the *do no harm* reparations principle, the Appeals Chamber considers that the TFV and the VPRS, being aware, *inter alia*, of the points that have been raised as a result of these requests for suspensive effect, may, in consultation with the Trial Chamber where appropriate, use their discretion, in both managing the expectations of the victims and moving forward with the implementation process in general, to take into account the fact that there are two pending appeals against the Impugned Decision before the Appeals Chamber. In these circumstances, considered progress rather than immediate suspension of implementation is the more appropriate course.

49. Finally, the Appeals Chamber finds the “[a]dditional considerations” that the Defence argues warrant an order for suspensive effect – such as granting suspensive effect in the hope that the security situation in Ituri improves and thereby facilitates the implementation of reparations or that upcoming elections in the Democratic Republic of the Congo will lead to better assistance being provided to the TFV – to be inapposite to the criteria relevant to ordering suspensive effect and unsubstantiated.<sup>88</sup>

50. For the above reasons, the Appeals Chamber rejects the Defence Request.

#### 4. *The Victims Group 2 Request*

51. The Appeals Chamber recalls that the Victims Group 2 Request concerns four victims who had previously been admitted into the Initial Draft Implementation Plan after being assessed as eligible by the TFV, but were found ineligible for reparations by the Trial Chamber in the Impugned Decision.<sup>89</sup> Victims Group 2 challenge that finding of ineligibility under ground 3 of their appeal.<sup>90</sup> In their request for suspensive effect, they argue that implementing the finding in the Impugned Decision that they are ineligible for reparations will mean, *inter alia*, that they will now be excluded from the Initial Draft Implementation Plan and will only be eligible to receive some limited

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<sup>87</sup> See [TFV Observations](#), para. 31; [Victims Group 1 Response to Procedural Issues](#), para. 23.

<sup>88</sup> See [Defence Request](#), para. 22.

<sup>89</sup> [Victims Group 2 Request](#), paras 39-41.

<sup>90</sup> [Victims Group 2 Request](#), paras 30-32; [Victims Group 2’s Appeal Brief](#), paras 107-123.

services in the context of the TFV's assistance mandate rather than benefitting from comprehensive measures under the main reparations implementation plan.<sup>91</sup>

52. At the outset, and by way of a preliminary observation, the Appeals Chamber is not persuaded by Victims Group 2's argument regarding the effect of suspending the Impugned Decision in relation to the admission of the four victims concerned to the main reparations implementation plan. The Appeals Chamber recalls that, in the Impugned Decision, the Trial Chamber found those four victims to be ineligible to receive reparations. The Appeals Chamber further notes that, pursuant to the First Decision on the Draft Implementation Plan, a finding that a victim is eligible to receive reparations requires specific judicial approval by the Trial Chamber.<sup>92</sup> In those circumstances, and in particular in the absence of a positive finding by the Trial Chamber in the Impugned Decision that these four victims are indeed eligible for reparations, the Appeals Chamber has not been persuaded that the suspension of the Impugned Decision would lead to them automatically being included within the main reparations implementation plan.

53. Furthermore, and in any event, the Appeals Chamber does not find that it has been demonstrated that, unless the Impugned Decision is suspended, its implementation will create an irreversible situation, lead to consequences that would be very difficult to correct, or potentially defeat the purpose of the appeal. In particular, the Appeals Chamber emphasises that these four victims retain the right to participate in the main reparations programme if the finding of ineligibility in the Impugned Decision is overturned on appeal.

54. Lastly, the Appeals Chamber observes that the four victims remain eligible to receive limited services in the context of the TFV's assistance mandate.<sup>93</sup> Also, to the extent that the TFV may have discretion to provide these four victims with any additional services that may be of assistance to them given their limited number and current special circumstances in light of these proceedings, and notwithstanding that it has not been persuaded of the need to suspend the Impugned Decision, the Appeals

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<sup>91</sup> [Victims Group 2 Request](#), paras 41-42.

<sup>92</sup> See [First Decision on the Draft Implementation Plan](#), para. 185(f), referring to [2022 Ntaganda Appeals Chamber Judgment on Reparations](#), paras 387, 419.

<sup>93</sup> [Victims Group 2 Request](#), paras 41-42.

Chamber would encourage that discretion to be exercised, and exercised in a diligent manner, and for the VPRS to be kept informed of their situation.

55. In light of the above, the Appeals Chamber rejects the Victims Group 2 Request.

#### IV. OTHER PROCEDURAL ISSUES

##### **A. The TFV Request to make observations on the merits and responses thereto**

56. At the conclusion of its observations on the requests for suspensive effect, the TFV seeks leave to submit further observations pursuant to rule 103 of the Rules on the merits of the two appeals (hereinafter: “TFV Request”).<sup>94</sup> In so doing, the TFV merely notes that the appeals address numerous issues “on which the Appeals Chamber may deem it appropriate to invite further observations” from the TFV and that it “stands ready to make observations, if any, if leave is granted by the Appeals Chamber”.<sup>95</sup> The TFV does not provide any further observations in support of its request.

57. Victims Group 2 oppose the TFV Request.<sup>96</sup> They note that the TFV does not specify the issues in the appeals in relation to which it seeks leave to make observations and they stress that the TFV is not a party to the present proceedings.<sup>97</sup> They submit that the Appeals Chamber will not be assisted by observations from the TFV in relation to any of the issues raised in the appeals and that the request should be rejected.<sup>98</sup> Victims Group 2 further argue, alternatively, that if the Appeals Chamber were to grant the TFV Request, any observations of the TFV should be limited to issues which directly relate to its functions and/or operational activities and that the parties should be permitted to respond to those observations.<sup>99</sup>

58. Neither the Defence nor Victims Group 1 respond to the TFV Request.

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<sup>94</sup> [TFV Observations](#), para. 32.

<sup>95</sup> [TFV Observations](#), para. 32.

<sup>96</sup> [Victims Group 2 Response to Procedural Issues](#), paras 3, 46-49.

<sup>97</sup> [Victims Group 2 Response to Procedural Issues](#), para. 47.

<sup>98</sup> [Victims Group 2 Response to Procedural Issues](#), paras 3, 48-49.

<sup>99</sup> [Victims Group 2 Response to Procedural Issues](#), paras 3, 48, 50.

## **B. Defence submissions in relation to a hearing and *amicus curiae* observations**

59. In its response to Victims Group 2's Appeal Brief, the Defence underscores that the appeals "raise complex legal and procedural issues, the adjudication of which could be facilitated by the scheduling of oral arguments before the Appeals Chamber".<sup>100</sup> The Defence further submits that "the adjudication of certain legal issues such as for example the IHL civilian status presumption, could benefit from *amicus curiae* submissions".<sup>101</sup> The Defence requests the Appeals Chamber to consider scheduling a hearing and obtaining *amicus curiae* observations.<sup>102</sup>

## **C. Determination of the Appeals Chamber**

60. The Appeals Chamber will address the above requests together.

61. In respect of inviting or granting leave for observations to be filed by the TFV or for *amicus curiae* observations, the Appeals Chamber recalls that rule 103(1) of the Rules provides:

At any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate.

62. The Appeals Chamber further recalls that its decision under rule 103(1) of the Rules is discretionary.<sup>103</sup> It may permit the filing of observations either by inviting such submissions *proprio motu* or following a request for leave to address the Appeals Chamber.<sup>104</sup>

63. In considering whether to invite further observations from the TFV, or *amicus curiae* observations, pursuant to rule 103 of the Rules in these appeals, the Appeals Chamber has had regard, *inter alia*, to the extensive submissions of the parties both in the appeal briefs and in the responses thereto. Having done so, the Appeals Chamber

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<sup>100</sup> [Defence Response to Victims Group 2's Appeal Brief](#), para. 7.

<sup>101</sup> [Defence Response to Victims Group 2's Appeal Brief](#), para. 7.

<sup>102</sup> [Defence Response to Victims Group 2's Appeal Brief](#), para. 136.

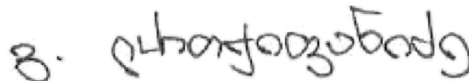
<sup>103</sup> *See, e.g., The Prosecutor v. Bosco Ntaganda*, [Decision on various procedural issues](#), 9 September 2021, ICC-01/04-02/06-2708 (A4 A5), para. 26.

<sup>104</sup> *See, e.g., The Prosecutor v. Bosco Ntaganda*, [Decision on various procedural issues](#), 9 September 2021, ICC-01/04-02/06-2708 (A4 A5), para. 26.

does not deem it necessary to receive further observations pursuant to rule 103 of the Rules at this stage. Should it later appear during the course of the Appeals Chamber's further deliberations on these appeals that additional observations pursuant to rule 103 of the Rules are necessary, the Appeals Chamber will issue further directions at that time.

64. In respect of whether to hold a hearing, and having had regard to the Chambers Practice Manual,<sup>105</sup> the Appeals Chamber considers that, in light of the exceptional circumstance that its composition will shortly change and that the new composition would be responsible for the conduct of any hearing that may be held, the Appeals Chamber deems it more appropriate to rule on this matter in its new composition in due course.

Done in both English and French, the English version being authoritative.



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**Judge Gocha Lordkipanidze**  
**Presiding**

Dated this 5th day of February 2024

At The Hague, The Netherlands

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<sup>105</sup> [Chambers Practice Manual](#), seventh edition, 2023, paras 91, 94.