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

Date: 7 April 2021

**TRIAL CHAMBER II**

**Before:** Judge Chang-ho Chung, Presiding Judge  
Judge Péter Kovács  
Judge María del Socorro Flores Liera

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

**IN THE CASE OF  
*THE PROSECUTOR v. THOMAS LUBANGA DYILO***

**Public redacted version of ICC-01/04/01-06-3487-Conf  
dated 6 October 2020**

**Joint application for information on victims involved in  
proceedings in both the *Lubanga* and the *Ntaganda* cases**

**Source:** Office of Public Counsel for Victims  
Legal Representatives of V01 Victims  
Legal Representative of the Former Child Soldiers in the *Ntaganda* case

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

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**Counsel for the Defence**

**Legal Representatives of V01 Victims**

Mr Luc Walley  
Mr Frank Mulenda

**Legal Representatives of Applicants**

**Legal Representatives of V02 Victims**

Ms Carine Bapita Buyanandu  
Mr Paul Kabongo Tshibangu  
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**Unrepresented Applicants  
(Participation/Reparation)**

**The Office of Public Counsel for the  
Defence**

**The Office of Public Counsel for  
Victims**

Ms Paolina Massidda  
Ms Sarah Pellet  
Ms Caroline Walter  
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**Trust Fund for Victims**

**States' Representatives**

**REGISTRY**

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**Registrar**

Mr Peter Lewis

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

Mr Philipp Ambach

**Others**

Legal Representative of the Former Child  
Soldiers in the *Bosco Ntaganda* case  
(CLR1)

## I. INTRODUCTION

1. The Principal Counsel of the Office of Public Counsel for Victims, the Legal Representatives of V01 Victims, and the Legal Representative of the former Child Soldiers in the *Bosco Ntaganda* case (jointly, the “Legal Representatives” or “Counsel”) file the present application.

2. The Legal Representatives submit that, while generally aware of various victims involved in both the *Lubanga* and the *Ntaganda* cases, they do not know specifically which victims they represent are effectively involved in the other proceedings. Disclosure of such information would facilitate the fulfilment of Counsel’s mandate and eventually the proceedings in both cases. Such information cannot be obtained directly from the victims, without incurring significant delays and risks. It is in the interest of fairness and expeditiousness that the relevant information, which is already in the Registry’s possession, be shared with the respective Counsel under appropriate conditions of confidentiality and on a rolling basis.

## II. PROCEDURAL BACKGROUND

3. On 15 December 2017, Trial Chamber II (the “Chamber”) handed down its “Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable” (the “15 December 2017 Decision”).<sup>1</sup> The Chamber found that hundreds and possibly thousands further victims were also affected by Mr Lubanga’s crimes.<sup>2</sup> Accordingly, the 15 December 2017 Decision provided that persons who had not yet submitted an application for reparations could do so at the implementation stage of the reparations.<sup>3</sup>

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<sup>1</sup> See the “Corrected version of the ‘Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable’” (Trial Chamber II), [No. ICC-01/04-01/06-3379-Red-Corr-tENG](#), 21 December 2017.

<sup>2</sup> *Idem*, para. 111.

<sup>3</sup> *Idem*, para. 293.

4. On 18 July 2019, the Appeals Chamber unanimously confirmed the 15 December 2017 Decision,<sup>4</sup> with one discreet amendment that is not relevant to the present application.

5. On 5 December 2019, Trial Chamber VI issued an order in the case of *The Prosecutor v. Bosco Ntaganda* (the “Ntaganda case”) by which it instructed the VPRS to “carry out an assessment of how many of the victims eligible for reparations as direct victim beneficiaries in the [Lubanga case] are also potentially eligible for reparations in the Ntaganda case”.<sup>5</sup>

6. By email dated 21 January 2020, the Victims Participation and Reparations Section (the “VPRS”) requested leave from the Chamber to share with Trial Chamber VI confidential information in its database concerning the victims found to be entitled to reparations in the *Lubanga* case.<sup>6</sup> By email dated 27 January 2020, the VPRS further clarified that its request included confidential information on the victims “who [would] soon be found to qualify for the reparations in the *Lubanga* case”.<sup>7</sup> The confidential information which was the subject-matter of the VPRS’s request concerned: (a) the total number of victims eligible for reparations in the *Lubanga* case who might potentially qualify for reparations in the *Ntaganda* case; and (b) the codes linked to the name of each victim awarded reparations in the *Lubanga* case.<sup>8</sup>

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<sup>4</sup> See the “Judgment on the appeals against Trial Chamber II’s ‘Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable’” (Appeals Chamber), [No. ICC-01/04-01/06-3466](#), 18 July 2019. Judge Eboe-Osuji and Judge Ibáñez Carranza each appended a separate opinion.

<sup>5</sup> See the “Order setting deadlines in relation to reparations” (Trial Chamber VI), [No. ICC-01/04-02/06-2447](#), 5 December 2019, para. 9.

<sup>6</sup> See the “Order relating to the request of the Victims Participation and Reparations Section of 21 January 2020” (Trial Chamber II), [No. ICC-01/04-01/06-3472-Conf-tENG](#), 4 February 2020, paras 4.

<sup>7</sup> *Idem*, para. 5.

<sup>8</sup> *Ibid.*

7. On 4 February 2020, the Chamber granted the email request.<sup>9</sup>

8. On 28 February 2020, the Registrar filed “basic information” relating to the number of victims eligible for reparations in the *Lubanga* case who are also potentially eligible for reparations in the *Ntaganda* case in the record of the latter case.<sup>10</sup> However, the identifying codes of victims potentially eligible for reparations in both cases are not accessible to the Legal Representative of the former child soldiers in the *Ntaganda* case – except for the victims represented by the same Counsel in both cases.

9. On 26 June 2020, Trial Chamber VI instructed the Registry to assess how many victims eligible for reparations in the *Lubanga* case who also potentially qualify for the *Ntaganda* reparations proceedings, with a view to making determinations as to the beneficiaries of reparations in the latter case.<sup>11</sup>

10. On 16 September 2020, the VPRS communicated by email with the Chamber and Trial Chamber VI, with reference to the victims potentially entitled to reparations in both the *Lubanga* and the *Ntaganda* case.<sup>12</sup> Upon consultation with all Counsel involved in both cases, the VPRS submitted that certain victims are represented by different Counsel in the *Lubanga* and in the *Ntaganda* cases, yet neither Counsel knows of the exact number of victims nor their identity overlapping for reparations purposes. Conversely, the VPRS is aware of said information by virtue of its involvement in both cases. The VPRS requested both Chambers’ authorisation “to disclose to relevant counsel concerned in both cases the reference numbers of child soldier victims represented in both cases presently known to the VPRS, as well as victims identified as such in the future”.<sup>13</sup>

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<sup>9</sup> *Idem*, p. 7.

<sup>10</sup> See the “Registry’s Observations on Reparations”, [No. ICC-01/04-02/06-2475](#), 28 February 2020, para. 2.

<sup>11</sup> See the “First Decision on Reparations Process” (Trial Chamber VI), [No. ICC-01/04-02/06-2547](#), 26 June 2020, para. 31.

<sup>12</sup> See the email from the VPRS to Trial Chambers II and VI dated 16 September 2020, at 09.52.

<sup>13</sup> *Ibid.*

11. On 17 September 2020, the Chamber and Trial Chamber VI indicated by e-mail that the appropriate course of action is “*for the Legal Representatives to seize the Chamber by way of written application, providing the reasons why the information sought is required and why it cannot be obtained directly from their clients*”.<sup>14</sup>

### III. CONFIDENTIALITY

12. Pursuant to regulation 23bis(1) and (2) of the Regulations of the Court, the present submissions are classified confidential *ex parte* only available to the VPRS, the Legal Representatives of victims in the *Lubanga* case and to the Legal Representative of Former Child Soldiers in the *Ntaganda* case, since they refer to information only available to the Registry, them and the Chamber.

### IV. SUBMISSIONS

13. The present application is filed before the Chamber by the Legal Representatives acting jointly. The Legal Representatives understand this to be the procedural course preferred by the Chamber,<sup>15</sup> as well as the most practical avenue to substantiate why the information sought is required and why it cannot be obtained directly from their clients.

14. The Legal Representatives respectfully suggest that the sharing of information concerning the dual involvement of victims with Counsel in both cases would facilitate the fulfilment of Counsel’s mandate and ultimately the proceedings in both cases. As already noted, the Legal Representatives all agree that this course of action:

- avoids confusion amongst victims about their legal representation in the two cases and facilitate their understanding of the reasons why they may have to

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<sup>14</sup> See the email from Trial Chamber II to the VPRS dated 17 September 2020, at 09.51 and email from Trial Chamber VI to the VPRS, dated 17 September 2020, at 15.22.

<sup>15</sup> There is no legal impediment for Counsel representing victims in one case to address another Chamber of the Court, where necessary.

consult with two different counsel including about the harms they suffered from;

- contributes to enhancing cooperation amongst counsel in the different reparations proceedings; and
- would facilitate the performance by Counsel of their tasks in case any litigation were to ensue from reparations proceedings in both cases.<sup>16</sup>

15. Indeed, victims are being contacted or may be contacted by different Counsel with respect to the ongoing proceedings in either case. If the relevant Legal Representative is aware that a victim he or she represents also participates in the other proceedings, he or she can communicate with said victim in a more effective manner, avoiding the confusions inevitably arising from the overlap between the two proceedings as far as the former child soldiers are concerned. Counsel's knowledge of the relevant information will also improve the advice provided to victims and it will impact on the instructions to be received from them, and the subsequent submissions made on their behalf. Such a course would also contribute to a greater cooperation between the Legal Representatives, including for purposes of litigation, to the ultimate benefit of the victims they represent.

16. Assuming *arguendo* that all victims could be consulted directly about their dual participation, a matter that is developed in more details *infra*, the Legal Representatives submit that some room for confusion might still exist. Although Counsel have employed all efforts to diligently inform victims about the proceedings in which they participate, some victims may still lack clarity given:

- the overlap of proceedings;
- the number of persons with whom victims have interacted for purposes of each case; and

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<sup>16</sup> See *supra* note 12.

- the situation of certain victims who, in light of the trauma they have suffered, may struggle to understand or differentiate parallel proceedings before the Court.<sup>17</sup>

17. In addition, making direct contact with the victims has been and continues to be a challenge, due to logistic, security and medical restrictions.<sup>18</sup> Indeed, during field missions conducted in 2016 and 2017, the teams of Legal Representatives were able to meet potential beneficiaries from 73 localities.<sup>19</sup> This was no longer possible for significant parts of 2018 due to the field missions' ban put in place as a result of the volatile security situation in Ituri and the Ebola outbreak.<sup>20</sup> Field activities reassumed later in 2018<sup>21</sup> and in 2019, although only temporarily and for limited areas within Ituri.<sup>22</sup>

18. More recently, measures put in place by the DRC Government to contain the COVID-19 pandemic have had a significant impact on the Legal Representatives' ability to travel to and within the territory of the DRC.<sup>23</sup> Borders have been closed, travellers arriving in the country are quarantined for 14 days and may have to undergo further tests, and internal travel between Kinshasa and other urban centres

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<sup>17</sup> In this respect, see *e.g.* the "Ninth Periodic Report on Victims in the Case and their General Situation", [No. ICC-01/04-02/06-2212](#), 6 February 2018, pp. 6-7; and the "Corrected Version of the 'Tenth Periodic Report on Victims in the Case and their General Situation' filed on 6 June 2018 ICC-01/04-02/06-2296", [No. ICC-01/04-02/06-2296-Corr](#), 7 June 2018, p. 6.

<sup>18</sup> In this respect see for all See for all the "Thirteenth Periodic Report on Victims in the Case and their General Situation", [No. ICC-01/04-02/06-2353](#), 6 June 2019.

<sup>19</sup> See the "Information regarding the Issues as well as the Concerns and Wishes of the Potentially Eligible Victims in the Reparations Proceedings", [No. ICC-01/04-01/06-3293-Red-tENG](#), 25 April 2017, para. 8.

<sup>20</sup> See the "OPCV Response to the 'Requête de la Défense aux fins de suspension de la « Décision approuvant les propositions du Fonds au profit des victimes portant sur la procédure visant à localiser et décider de l'admissibilité aux réparations des nouveaux demandeurs » rendue le 7 février 2019 par la Chambre de première instance II'", [No. ICC-01/04-01/06-3449-Red](#), 1 July 2019, paras. 20 and 21.

<sup>21</sup> See the "Further information on the reparations proceedings in compliance with the Trial Chamber's order of 16 March 2018", [No. ICC-01/04-01/06-3399-Red](#), 4 December 2018, para. 19.

<sup>22</sup> *Idem*, para. 20.

<sup>23</sup> See the "Registry Submissions pursuant to the 'Order to provide information on the impact of COVID-19 measures on operational capacity'" (Registry), [No. ICC-01/04-02/06-2519-Red](#), 21 April 2020, para. 6.



has been prohibited.<sup>24</sup> Attempts to contact the victims remotely, for instance by phone, would realistically be successful only for a fraction of the relevant victims at most. In any case, even if the Legal Representatives were able to contact their clients, many of them are unlikely to know whether their file has already been introduced and/or processed by the Registry in either or both cases.

19. In addition to the pandemic, a situation of increasing insecurity in the region aggravates the difficulties connected with contacting the Legal Representatives' clients. As noted by one of the Legal Representatives, various villages and territories relevant to the reparations proceedings are affected by conflict between local militias, prompting the population to flee and causing large-scale internal displacement.<sup>25</sup>

20. Finally, the Legal Representatives submit that attempting to make direct contact with the victims to ask whether they participate in both proceedings risks creating additional, secondary traumatising and raising their expectations in this regard. Trial Chamber VI has recognised the imperative of minimising contacts with victims in the present circumstances, when it ruled that it did "*not consider it necessary to contact [Lubanga] victims at this stage to ask them whether they wish to be considered for reparations in the Ntaganda case*".<sup>26</sup> Trial Chamber VI referenced, at footnote 76 of the quoted Decision,<sup>27</sup> the submission of one of the Legal Representatives that "[i]t seems therefore appropriate to exercise particular care [...] and to interact with the victims only if indispensable" based on the "*do no harm principle*".<sup>28</sup>

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<sup>24</sup> *Ibid.*

<sup>25</sup> See the "Observations on the impact of COVID-19 measures on operational capacity on behalf of the former child soldiers" (CLR1), [No. ICC-01/04-02/06-2516](#), 21 April 2020, para. 14, with further references.

<sup>26</sup> See the "First Decision on Reparations Process" (Trial Chamber VI), *supra* note 11, paras. 31 and 41.

<sup>27</sup> *Idem*, para. 31.

<sup>28</sup> See the "Submissions on Reparations on behalf of the Former Child Soldiers" (CLR1), [No. ICC-01/04-02/06-2474](#), 28 February 2020, para. 31.

21. REDACTED.<sup>29</sup> The Legal Representatives submit that it is unnecessary to make contact with the relevant victims to request this information, which is readily available to the Registry.

22. The scope of the present application is limited, in that the Legal Representatives do not access to the relevant application forms or documents filed for purposes victims' participation and reparations. The Registry is merely requested to share, at this stage, the list of victims presently known to the VPRS as participating in both cases, and subsequently on a rolling basis victims identified as such in the future. The Legal Representatives will exercise all care in handling said information to ensure its confidentiality is preserved.

## V. CONCLUSION


23. For these reasons, the Legal Representatives respectfully request the Chamber to allow the disclosure, to the relevant Counsel, of the reference names and numbers of victims presently known to the VPRS, as well as victims identified as such in the future, who are involved in both cases.



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For the Legal Representatives  
of V01 Victims



Sarah Pellet  
Legal Representative of the  
Former Child Soldiers in  
the *Ntaganda* case



Paolina Massidda  
Principal Counsel  
Office of Public Counsel  
for Victims

Dated this 7<sup>th</sup> day of April 2021

At The Hague, Netherlands

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<sup>29</sup> REDACTED.