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**International
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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.* BOSCO NTAGANDA**

Public

**With Confidential *ex parte* annex 1, available to the CLR1 and
the Trust Fund for Victims only,
and Confidential redacted annex 1**

**Common Legal Representative of the Former Child Soldiers' submissions on
the 34 applications constituting the sample**

Source: Office of Public Counsel for Victims (CLR1)

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

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I. INTRODUCTION

1. Pursuant to the “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’” (the “25 November 2022 Decision”),¹ the Common Legal Representative of the Former Child Soldiers (the “Common Legal Representative”) hereby submits her observations on the eligibility of the sampled reparations applications to Trial Chamber II (the “Chamber”).²

2. She posits that, owing to the overlap between the *Ntaganda* and the *Lubanga* cases, the criteria applied in the *Lubanga* case and applied in the present case for the purpose of the emergency reparations should continue to apply, and that all 34 victims composing the sample are eligible for reparations.

II. PROCEDURAL BACKGROUND

3. Following the issuance of the Judgment on the appeal against the Reparations Order on 12 September 2022,³ the Chamber constituted a representative sample of victims for the purpose of ruling on their eligibility for reparations. To that end, the Chamber first set out the methodology and criteria for the constitution of the sample, as well as a calendar for the parties to comment thereon, by way of an order issued on 25 October 2022 (the “25 October 2022 Order”).⁴ The Chamber then proceeded to approve the actual composition of the sample as constituted by the Victims

¹ See the “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’” (Trial Chamber II), [No. ICC-01/04-02/06-2794](#), 25 November 2022; with Public Annex 1, [No. ICC-01/04-02/06-2794-Anx1](#) (the “25 November 2022 Decision”).

² See the “Decision assigning judges to divisions and recomposing chambers” (Presidency), [No. ICC-01/04-02/06-2663](#), 16 March 2021, p. 7.

³ See the “Judgment on the appeal against the decision of Trial Chamber VI of 8 March 2021 entitled ‘Reparations Order’” (Appeals Chamber), [No. ICC-01/04-02/06-2782](#), 12 September 2022 (the “Appeals Judgment”).

⁴ See 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’” (Trial Chamber II), [No. ICC-01/04-02/06-2786](#), 25 October 2022 (the “25 October 2022 Order”).

Participation and Reparations Section (the “VPRS”), by way of the 25 November 2022 Decision.⁵

4. In the 25 November 2022 Decision, the Chamber further directed, *inter alia*, that:

(i) the legal representatives of victims (the “LRVs”) immediately contact their clients included in the sample with a view to determining whether they consent to disclosing their identity to the Defence; and that they inform the VPRS and the Defence of the result of this consultation by 28 December 2022 at the latest;

(ii) the VPRS implements redactions to the victims’ dossiers as appropriate and transmit them to the Defence, on a rolling basis and no later than within thirty days of the last transmission by the LRVs, that is on 30 January 2023 at the latest;

(iii) the LRVs make submissions and complement the victims’ dossiers within 30 days of their transmission to the Defence, that is on 3 March 2023;⁶ and

(iv) the Defence makes submissions on the dossiers within 30 days of receipt of the LRVs’ submissions, that is on 3 April 2023.⁷

⁵ See the 25 November 2022 Decision, *supra* note 1.

⁶ Although the VPRS transmitted the last redacted applications on 27 January 2023, they were only made available to the Defence on 31 January.

⁷ See the 25 November 2022 Decision, *supra* note 1, para. 34 (b)-(h).

5. On 12 December 2022,⁸ on 28 December 2022,⁹ and on 26 January 2023,¹⁰ the Common Legal Representative informed the Registry and the Defence that none of the 24 clients she managed to contact consented to disclosing their identity to the Defence.¹¹

6. On 9 January 2023, the Common Legal Representative specified that, in relation to the 14 victims she was not able to contact, redactions to their identity shall be maintained, as they are currently unable to consent to its disclosure to the Defence. She added that *"it [was] reasonable to assume that the reasons advanced by the clients [she was] able to reach (fear for their security, and/or that of their family and the general volatile security situation in Ituri) also concern victims who could not be reached prior to the expiration of the 28 December deadline"*.¹²

⁸ See the email from the Common Legal Representative of Victims to the Registry and the Defence on 12 December 2022 at 10:40 entitled "Information regarding Former Child Soldiers' consent for their identity to be disclosed – 1st transmission".

⁹ See the email from the Common Legal Representative of Victims to the Registry and the Defence on 28 December 2022 at 11:57 entitled "Information regarding Former Child Soldiers' consent for their identity to be disclosed – 2nd transmission".

¹⁰ See the email from the Common Legal Representative of Victims to the Registry and the Defence on 26 January 2023 at 15:54 entitled "Information regarding Former Child Soldiers' consent for their identity to be disclosed – 3rd transmission". Pursuant to the "Decision on the Trust Fund for Victims' submission of information on certain victims selected in Trial Chamber II's approved sample", [No. ICC-01/04-02/06-2808](#), 9 January 2023, three of the Common Legal Representative's clients initially selected for the sample were excluded as having already benefitted from reparations in the *Lubanga* case (a/30383/15, a/30453/15, and a/00707/13) and replaced by one randomly selected victim (see footnote 29 in this regard). See also, the "Decision on the Registry Transmission of One Victim Dossier in Compliance with the 'Decision on the Trust Fund for Victims' submission of information on certain victims selected in Trial Chamber II's approved sample'" (ICC-01/04-02/06-2808)", [No. ICC-01/04-02/06-2813](#), 19 January 2023, approving the selection of a/30057/15 as part of the sample and setting deadlines accordingly.

¹¹ The actual number of sampled victims contacted is 22 (as opposed to 24), as the Common Legal Representative had initially managed to contact two of the victims who were subsequently excluded from the sample (a/00707/13 and a/30383/18). The victim added to the sample on 19 January 2023 (a/30057/15) was successfully contacted and this was shared with the Registry and the Defence on 26 January 2023. See the email from the Common Legal Representative of Victims to the Registry and the Defence on 26 January 2023 at 15:54 entitled "Information regarding Former Child Soldiers' consent for their identity to be disclosed – 3rd transmission".

¹² See the email from the Common Legal Representative of Victims to the Registry and the Defence on 9 January 2023 at 12:27 entitled "RE: Information regarding Former Child Soldiers' consent for their identity to be disclosed – 2nd transmission".

7. On 11 January 2023,¹³ 27 January 2023,¹⁴ and 6 February 2023,¹⁵ the Registry transmitted 16, 17 and one redacted applications to the Defence, respectively.

III. CLASSIFICATION

8. Pursuant to regulation 23bis(1) of the Regulations of the Court, the present submission is filed as public as it does not contain any confidential information. In line with the 25 November 2022 Decision,¹⁶ Annex 1 is submitted as confidential *ex parte* only available to the Common Legal Representative and the Trust Fund for Victims (the “TFV” or the “Trust Fund”), as it contains identifying information concerning victims not known to the other parties and participants. A confidential redacted version is filed simultaneously.

IV. SUBMISSIONS

A. Eligibility criteria

9. Criteria for the eligibility of former child soldiers for reparations have already been set, have not been disturbed by the Appeals Chamber and should therefore continue to apply.

10. Indeed, the Common Legal Representative recalls that, in the Reparations Order, the Chamber ruled that, owing to the temporal, material and geographical overlaps between the *Lubanga* and the *Ntaganda* cases, all victims in the *Lubanga* case

¹³ See the “First Transmission to the Defence of 28 Redacted Victim Dossiers pursuant to Trial Chamber II Decision ICC-01/04-02/06-2794”, [No. ICC-01/04-02/06-2809](#) with 16 confidential *ex parte* annexes available to the Common Legal Representative and the Defence, 11 January 2023.

¹⁴ See the “Third Transmission to the Defence of 92 Redacted Victim Dossiers pursuant to Trial Chamber II Decision ICC-01/04-02/06-2794”, [No. ICC-01/04-02/06-2816](#) with 17 confidential *ex parte* annexes available to the Common Legal Representative and the Defence, 27 January 2023.

¹⁵ See the “Transmission to the Defence of One Redacted Victim Dossier pursuant to Trial Chamber II’s Decision ICC-01/04-02/06-2813”, [No. ICC-01/04-02/06-2825](#) with one confidential *ex parte* annex available to the Common Legal Representative and the Defence, 6 February 2023.

¹⁶ See the 25 November 2022 Decision, *supra* note 1, para. 34(g).

“will be eligible for reparations in the Ntaganda case”.¹⁷ The Chamber also provided general substantive eligibility criteria (in line with the jurisprudence of this Court, in particular in the *Katanga* and *Lubanga* cases),¹⁸ concerning *inter alia*, the standard of proof (balance of probabilities) and its application in the present case;¹⁹ the required proof of identity;²⁰ the fact that obtaining official documentation might prove difficult – if not impossible – and that in these circumstances victims are only required to furnish supporting documentation to bolster their applications “to the extent possible”;²¹ as well as criteria concerning the recourse to presumptions to establish certain harms.²² These criteria have not been disturbed by the Appeals Chamber and remain applicable.

11. Further, based on the guidelines provided by the Chamber in the Reparations Order, the TFV provided its detailed understanding of *how* to apply the eligibility criteria provided by the Chamber (the “Trust Fund’s Methodology on Eligibility”).²³ The Trust Fund indicated that, with the caveat that the contours of the case are slightly different, concerning the eligibility of former child soldiers, it intends to continue applying the criteria in the same way as it did in the *Lubanga* case.²⁴ The TFV also indicated, in relation to the proof of ID and the lack of documents, that the same approach as the one followed in the *Lubanga* case would be adopted.²⁵

¹⁷ See the “Reparations Order” (Trial Chamber II), [No. ICC-01/04-02/06-2659](#), 8 March 2021, para. 246. See also, the “Sixth Decision on the TFV’s administrative decisions on applications for reparations and other related matters” (Trial Chamber II), [No. ICC-01/04-01/06-3523](#), para. 11.

¹⁸ See the Reparations Order, *supra* note 17, paras. 136-147, in particular paras. 144-145.

¹⁹ *Idem*, paras. 136 and 139 (concerning its application to sexual crimes and the fact that victims might not be in a position to produce documents).

²⁰ *Idem*, para. 137.

²¹ *Idem*, paras. 138 and 140.

²² *Idem*, paras. 141-145.

²³ See the confidential “[Annex 1](#)” to the Trust Fund for Victims’ Fourth Update Report on the Implementation of the Initial Draft Implementation Plan, [No. ICC-01/04-02/06-2751-Conf-Anx1](#), 24 March 2022 (the “Trust Fund’s Methodology on Eligibility”).

²⁴ *Idem*, para. 12.

²⁵ *Idem*, paras. 7-10.

12. The Chamber reviewed and approved the Trust Fund’s Methodology on the Eligibility,²⁶ and, in doing so, ruled on the extensive submissions made by the Defence.²⁷

13. The Common Legal Representative concurs with this approach and formulates two observations. First, she recalls that the methodology on eligibility adopted by the Trust Fund in the *Lubanga* case stems directly (and entirely) from the analysis of the Trial Chamber’s judicial review of a representative sample of 473 applications.²⁸ As such, it is a full and accurate reflection of the approach adopted by the Trial Chamber in the *Lubanga* case. Second, she underlines that, in relation to the sexual crimes (which constitute the most important development in the *Ntaganda* case), the Chamber already provided the relevant guidance by indicating that a coherent and credible account suffices to establish their eligibility as victims.²⁹

²⁶ See the “Decision on the IDIP’s Fourth Report”, [No. ICC-01/04-02/06-2761](#), paras. 19-27, in particular para. 24. See also the “Decision on the TFV’s First Progress Report on the implementation of the Initial Draft Implementation Plan and Notification of Board of Directors’ decision pursuant to regulation 56 of the Regulations of the Trust Fund”, [No. ICC-01/04-02/06-2718-Red](#), 29 October 2021, paras. 15-24, in particular para. 24; and the “Decision on the TFV’s Sixth and Seventh Update Reports on the Implementation of the Initial Draft Implementation Plan”, [No. ICC-01/04-02/06-2792](#), 16 November 2022 (that is after the issuance of the Appeals Judgment), para. 21.

²⁷ See the “Public Redacted Version of ‘Defence observations on the Trust Fund for Victims’ Fourth Update Report on the Implementation of the Initial Draft Implementation Plan’, dated 7 April 2022”, [No. ICC-01/04-02/06-2755-Conf](#) and [No. ICC-01/04-02/06-2755-Red](#), 20 May 2022, paras. 14-49 (the “Defence’s Observations on Eligibility”).

²⁸ In the *Lubanga* case, Trial Chamber II reviewed a representative sample of 473 applications, thereby providing very detailed guidance on the application of the eligibility criteria (See the “Decision Setting the Size of the Reparations Award for which Thomas Lubanga is Liable” (Trial Chamber II), [No. ICC-01/04-01/06-3379-Conf-Corr-t-ENG](#) and [No. ICC-01/04-01/06-3379-Red-Corr-t-ENG](#), 21 December 2017, (the “*Lubanga* Decision on Eligibility”). Based on the review of these 473 applications, the Trust Fund put forward its understanding of the application of the eligibility criteria. See the confidential *ex parte* “[Annex E](#)” to the “*Sixième rapport sur le progrès de la mise en œuvre des réparations collectives conformément aux ordonnances de la Chambre de première instance II des 21 octobre 2016 (ICC-01/04-01/06-3251) et 6 avril 2017 (ICC-01/04-01/06-3289) et la Décision du 7 février 2019 (ICC-01/04-01/06-3440-Red)*”, [No. ICC-01/04-01/06-3467](#), 19 July 2019). The Trial Chamber acknowledged that this document reflects the methodology used by the Trial Chamber to verify the 473 applications of the sample. See the “Second Decision on the Administrative Decisions of the Trust Fund for Victims Regarding New Applications for Reparations” (Trial Chamber II), [No. ICC-01/04-01/06-3479-t-ENG](#), 11 September 2020, para. 14.

²⁹ See the Reparations Order, *supra* note 17, para. 139.

14. Accordingly, the Common Legal Representative proceeded to review all 34 applications against those criteria with a view to determining whether her clients are eligible and/or whether additional information ought to be collected to determine their eligibility.

B. Case-by-case analysis

15. For ease of reference of the Chamber and other parties and participants, the Common Legal Representative includes her analysis of the sampled applications in Annex 1. Each column of the chart represents an eligibility criterion (columns E to N). The Common Legal Representative posits that all 34 victims meet the eligibility criteria.

16. *General consideration: lack of supporting documents* – As pointed out by the Chamber in the Reparations Order, victims are to provide supporting documentation to bolster their application, “to the extent feasible”.³⁰ In the current circumstances in Ituri, obtaining (official or unofficial) documentation is simply unfeasible. Indeed, the resurgence of the conflict, the insecurity and the resulting large displacement of the population are such that no such evidence can be obtained today or in the near future.

17. However, as held by the Trial Chamber in the *Lubanga* case and upheld by the Appeals Chamber, in circumstances where the provision of documents proves unfeasible, a coherent and credible account of fact suffices to make a positive finding of eligibility.³¹

18. In the present case, as further described *infra*, all applications contain a coherent and credible account of fact. The Common Legal Representative considered that only one application (a/30057/15) lacked details so as to be able to evaluate with certainty that the standard of proof of balance of probabilities was met. Accordingly, she

³⁰ *Idem*, paras. 138 and 140.

³¹ See the *Lubanga* Decision on Eligibility, *supra* note 28, paras. 94, 97, 101, 109, and 142. See also, 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-01/04-02/06-3466-Red](#), 18 July 2019, paras. 199-204. See also, the Trust Fund’s Methodology on Eligibility, *supra* note 23, para. 10.

proceeded to elicit supplementary information from the victim. They are submitted in Annex 1 (column Q).

19. **Proof of ID** – All 34 victims provided a valid proof of ID, in the form of a copy of their *carte d'électeur* or an *attestation de carence* thereof; an *attestation* of the *chef de collectivité*, of the *chef de groupement* or of an *officier d'état civil*; or an *attestation de naissance*. The Common Legal Representative has noted that, when reviewing the Trust Fund's Methodology on Eligibility, the Defence expressed some disagreement with the approach followed in relation to the evaluation of the proof of ID, which the Common Legal Representative fails to fully understand.³² Regardless, she recalls that proof of ID can be official or unofficial and that absent an official proof of ID the signed statements of two individuals suffice, as per the Court's constant case-law.³³ In the present case, all victims sufficiently establish their identity.³⁴

20. **Age eligibility** – All 34 victims have established to the required standard that they were under the age of 15 when they were recruited into the UPC/FPLC between 6 August 2002 and 31 December 2003, and/or when they were used to participate actively in hostilities, and/or when they were raped while serving in the UPC/FPLC, between 6 August 2002 and 30 May 2003.

21. While some victims were unable to provide a specific date of birth (for instance a/00687/13, a/00576/13, and a/00743/13), all of them demonstrate that they fall within the required *age range*, that is that they were under the age of 15 at the time of the charges. Contrary to the Defence's submissions,³⁵ it is indeed sufficient to take into account the specific facts and circumstances of the case and of the victim to determine that a victim meets the age requirement, as has been established in the *Lubanga* case.³⁶ Even victim a/00576/13, who was only able to state that he was born in 1988, has

³² See the Defence's Observations on Eligibility, *supra* note 27, para. 26.

³³ See the *Lubanga* Decision on Eligibility, *supra* note 28, paras. 68, 74-75, and 77. See also, the Trust Fund's Methodology on Eligibility, *supra* note 23, paras 8-9.

³⁴ See Annex 1, column O.

³⁵ See the Defence's observations on eligibility, *supra* note 27, paras. 28-30.

³⁶ See the *Lubanga* Decision on Eligibility, *supra* note 28, paras. 85.

established that he was under the age of 15 at the time of his conscription in July 2002 (even assuming that he was born on 1 January 1988).

22. *Conscription, enlistment or use* – All 34 victims constituting the sample have demonstrated that they were recruited, and/or used to participate actively in hostilities by the UPC/FPLC during the relevant timeframe. While some victims provided more details than others, all of them provided sufficient information for the purpose of determining their eligibility.

23. The Common Legal Representative wishes to inform the Chamber that the vast majority of victims – contacted pursuant to the 25 November 2022 Decision to determine whether they would agree on disclosing their identity to the Defence – already expressed their lassitude with regard to being approached over and over again about traumatising facts that occurred some 20 years ago. Thus, the Common Legal Representative contacted her clients to obtain further information only when strictly required, that is in the only occurrence where the information available was insufficient to reach a definitive conclusion on the eligibility, *i.e.* a/30057/15.³⁷ In cases where the information provided was scarce yet sufficient, the Common Legal Representative has not collected further information from the victims, in application of the “do no harm” principle.

24. For instance, a/30059/15 – who was, in any event, not reachable – did not provide the names of a commander or of a battle he participated in. However, he described with some details his activities in the militia (as a help who would cook for the others) and explained the reason why he enlisted in the militia. This, as such, is sufficient to rule that he is eligible, and more details are unnecessary at this stage. This does not preclude the Trust Fund from eliciting further details at the time of implementation, for the purpose of determining the most appropriate reparations’ measure(s).

³⁷ See *infra* paras. 26 and 27.

25. The Common Legal Representative recalls in this regard that, as determined by the Trial Chamber in the *Lubanga* case,³⁸ to meet the standard of proof, an applicant does not need to provide information on a set number of criteria. Rather, multiple factors can be taken into account, such as the ability of the victim to describe the training camp they went to, the battles they participated in, the other chores they performed, the names of certain commanders *etc.* It is not required that victims are able to articulate all of these elements to be found eligible.³⁹

26. Of her 34 clients constituting the sample, the Common Legal Representative determined that the only application requiring additional information was that of a/30057/15 whose initial application might be seen as lacking detailed information (he did not describe his role in the militia in any way, did not provide any information as to a site he was deployed to, or a commander he might have seen). While none of this information is required *per se*, erring on the side of caution, the Common Legal Representative proceeded to collect additional information.

27. The applicant explained that he enlisted as a result of the difficult conditions he lived in and that he became the escort of a commander as a result of his courage. Additionally, he was posted in town to ransom civilians. He participated in one battle and took the opportunity to flee.⁴⁰ The applicant explained that he believes that said battle took place about two months after he joined the militia (as opposed to what was recorded by the Registry in his application for participation, according to which he was serving in the militia from August 2002 until mid-2003). The Common Legal Representative recalls that such a discrepancy does not cast doubt on the credibility of the applicant,⁴¹ in particular given the time elapsed since the commission of the crimes

³⁸ See the *Lubanga* Decision on Eligibility, *supra* note 28, paras. 89-90. See also, the Trust Fund's Methodology on Eligibility, *supra* note 23, paras. 16-17.

³⁹ *Ibid.*

⁴⁰ See also Annex 1, column Q.

⁴¹ See the "Decision Setting the Size of the Reparations Award for which Thomas Lubanga is Liable" (Trial Chamber II), No. ICC-01/04-01/06-3379-Conf-Corr-tENG and [No. ICC-01/04-01/06-3379-Red-Corr-](#)

and the particularly violent events experienced by the victim. In short, the additional information collected is amply sufficient to meet the eligibility criteria.⁴²

28. **Sexual crimes** – In the Reparations Order, the Chamber ruled that reliance on a credible and coherent account of fact is sufficient, including in cases of sexual crimes,⁴³ which the Defence appears to accept.⁴⁴ Of her 34 clients constituting the sample, 18 provide a coherent and credible account in relation to the sexual crimes they suffered from while serving in the UPC/FPLC.

29. **Transgenerational harm** – None of the 34 victims constituting the sample allege transgenerational harm specifically and, in line with her submissions on this issue,⁴⁵ the Common Legal Representative has refrained from enquiring any further on this issue. For the sake of the Chamber’s full information, she underlines however that three of the 34 sampled applications contain (unsolicited) information relevant for the issue of transgenerational harm. Victims a/00576/13, a/00743/13, and a/00747/13 all stated that they hate the child they gave birth to as a result of the rapes they suffered.

30. **Conclusion** – The Common Legal Representative posits that all 34 victims constituting the sample are eligible for reparations in the present case. If, by extraordinary, the Chamber were to find that some victims have not established their eligibility to the required standard, the Common Legal Representative recalls that, pursuant to the 25 October 2022 Order,⁴⁶ these victims will have the opportunity to re-submit their applications to the Trust Fund for evaluation of their eligibility.

[tENG](#), 21 December 2017, para. 64. See also the Trust Fund’s Methodology on Eligibility, *supra* note 23, paras. 15, 21, and 25.

⁴² See Annex 1, Column Q.


⁴³ See the Reparations Order, *supra* note 18, paras. 138 and 140.

⁴⁴ See the Defence’s Observations on eligibility, *supra* note 27, paras. 24-25.

⁴⁵ See the “Common Legal Representative of the Former Child Soldiers’ additional submissions on the issue of transgenerational harm and on the estimated potential number of reparations beneficiaries”, [No. ICC-01/04-02/06-2821](#), 30 January 2023, paras. 5 and 46.

⁴⁶ See the 25 October 2022 Order, *supra* note 4, para. 10.

FOR THE FOREGOING REASONS, the Common Legal Representative respectfully requests the Chamber to take note of the present submissions and rule that all 34 victims constituting the sample are eligible for reparations.



Sarah Pellet
Common Legal Representative of the
Former Child soldiers

Dated this 3rd day of March 2023
At The Hague, The Netherlands