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Pénale
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**International
Criminal
Court**

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

Date: **20 April 2023**

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

Decision on the Request on behalf of the Convicted Person seeking communication of material by the Trust Fund for Victims and the lifting of redactions applied by the Registry and the Legal Representatives of Victims to the victims' dossiers

To be notified, in accordance with Regulation 31 of the Regulations of the Court, to:**Legal Representatives of Victims**

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Trial Chamber II of the International Criminal Court, in the case of *The Prosecutor v. Bosco Ntaganda* (the ‘*Ntaganda* case’), having regard to articles 68 and 75 of the Rome Statute (‘Statute’), and regulation 24(5) of the Regulations of the Court (‘Regulations’) issues this Decision on the Request on behalf of the Convicted Person seeking communication of material by the Trust Fund for Victims and the lifting of redactions applied by the Registry and the Legal Representatives of Victims to the victims’ dossiers’ (the ‘Decision’).

I. PROCEDURAL HISTORY

1. On 8 March 2021, Trial Chamber VI delivered the Reparations Order.¹ On 16 March 2021, Trial Chamber VI was dissolved and the case was assigned to Trial Chamber II.²
2. On 12 September 2022, the Appeals Chamber issued its Judgment on the appeal against the decision of Trial Chamber VI of 8 March 2021 entitled “Reparations Order” (the ‘Appeals Judgment’).³ The Appeals Judgment remanded the matter to the Chamber, as it partially reversed the Reparations Order ‘to the extent that Trial Chamber VI failed to’, *inter alia*, assess and rule upon victims’ applications for reparations.⁴
3. On 25 October 2022, the Chamber issued an Order for the implementation of the Appeals Judgment (‘25 October 2022 Order’)⁵ instructing, *inter alia*, the Registry, through the Victims Participation and Reparations Section (‘VPRS’), to assemble a limited but representative sample of victims’ dossiers to be assessed and ruled upon by the Chamber, composed of: (a) all victims that have so far been found eligible to benefit from the Initial Draft Implementation Plan (‘IDIP’) by the Trust Fund for Victims (‘TFV’); and (b) a randomly selected group from the total universe of victims, amounting to 5% of the victims of the attacks and a 5% of the victims of crimes against child soldiers.⁶

¹ Reparations Order, 8 March 2021, [ICC-01/04-02/06-2659](#).

² Presidency, Decision assigning judges to divisions and recomposing Chambers, 16 March 2021, [ICC-01/04-02/06-2663](#), p. 7.

³ Judgment on the appeal against the decision of Trial Chamber VI of 8 March 2021 entitled “Reparations Order” (‘Appeals Judgment’), 12 September 2022, [ICC-01/04-02/06-2782](#).

⁴ Appeals Judgment, [ICC-01/04-02/06-2782](#), p. 11.

⁵ Order for the implementation of the Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled “Reparations Order” (‘25 October 2022 Order’), 25 October 2022, [ICC-01/04-02/06-2786](#).

⁶ 25 October 2022 Order, [ICC-01/04-02/06-2786](#), para. 34(a)-(b).

4. On 25 November 2022, having analysed the Registry's⁷ and the parties'⁸ submissions, the Chamber issued its Decision on the Registry submission in compliance with the 25 October 2022 Order ('25 November 2022 Decision'), *inter alia*, (i) approving the sample assembled by the VPRS, as sufficiently representative of the universe of potential victims in the case; (ii) setting out deadlines for the legal representatives to make submissions and complement the victims' dossiers, and for the Defence to make final submissions on the victims' dossiers; (iii) instructing the TFV to provide the Chamber and the parties with any relevant information or documentation taken into account when reaching the administrative decision on the victims already found eligible for the IDIP purposes; (iv) establishing a procedure for the transmission of victims' dossiers by the VPRS to the Defence with the necessary redactions, depending on the victims' consent; and (v) establishing the relevant procedure for the Defence to challenge the applied redactions.⁹

5. On 19 January 2023, after excluding three victims from the sample,¹⁰ and adding one, the Chamber approved the final sample of 171 victims ('Sample') as sufficiently representative of the universe of potential victims in the case.¹¹

6. On 3 March 2023, the Common Legal Representative for Former Child Soldiers ('CLR1')¹² and the Common Legal Representative of the Victims of the Attacks ('CLR2')¹³

⁷ Registry submission in compliance with the "Order for the implementation of the Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled 'Reparations Order'" (ICC-01/04-02/06-2786) ('Submission on Sample'), 8 November 2022, [ICC-01/04-02/06-2788](#).

⁸ Submissions on behalf of the Convicted Person on the procedure for the constitution of the sample established by the Implementation Order ('Defence Submission'), 9 November 2022, [ICC-01/04-02/06-2791](#), with Public Annex I, [ICC-01/04-02/06-2791-AnxI](#); Common Legal Representative of the Former Child Soldiers' Submissions pursuant to 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'", 9 November 2022, ICC-01/04-02/06-2790-Conf (public redacted version filed on 14 November 2022, [ICC-01/04-02/06-2790-Red](#)); Submissions of the Common Legal Representative of the Victims of the Attacks pursuant to 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'", 9 November 2022, [ICC-01/04-02/06-2789](#).

⁹ Decision on the Registry submission in compliance with the "Order for the implementation of the Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled 'Reparations Order'" ('25 November 2022 Decision'), 25 November 2022, [ICC-01/04-02/06-2794](#), with Annex 1, [ICC-01/04-02/06-2794-Anx1](#).

¹⁰ Decision on the Trust Fund for Victims' submission of information on certain victims selected in Trial Chamber II's approved sample, 9 January 2023, [ICC-01/04-02/06-2808](#), disposition.

¹¹ 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), 19 January 2023, [ICC-01/04-02/06-2813](#), para. 8.

¹² Common Legal Representative of the Former Child Soldiers' submissions on the 34 applications constituting the sample, 3 March 2023, [ICC-01/04-02/06-2835](#), with Confidential *ex parte* annex 1, available to the CLR1 and the Trust Fund for Victims only, and Confidential redacted annex 1.

¹³ Submissions by the Common Legal Representative of the Victims of the Attacks on the dossiers of the victims included in the Sample, 3 March 2023, [ICC-01/04-02/06-2836](#), with Confidential Ex Parte Annexes 1-43 available only to the CLR2 and Confidential Redacted Annexes 1-43.

(together, the ‘LRVs’) filed their submissions and additional information on the dossiers of victims included in the Sample. The TFV did not make submissions in relation to the victims already found eligible for the IDIP purposes.

7. On 29 March 2023, the Defence filed a request (i) seeking communication of any relevant information or documentation taken into account by the TFV when reaching the administrative decision on the victims already found eligible for the IDIP purposes; and ii) requesting the Chamber to review and order the lifting of the redactions applied by the VPRS and the LRVs to the dossiers of the victims included in the sample (‘Request’).¹⁴

8. On 11 April 2023, the LRVs filed their responses (‘Responses’),¹⁵ both requesting the Chamber to reject the Request. On the same date, according to the Chamber’s instructions,¹⁶ the Registry¹⁷ and the TFV¹⁸ filed their observations on the Request (‘Observations’).

9. On 12 April 2023, the Defence submitted a request for leave to reply to the TFV’s observations (‘Leave to Reply’).¹⁹ No responses to the Leave to Reply were submitted.

II. ANALYSIS

a) Leave to Reply

10. The Defence submits that it seeks leave to reply in the interest of the victims and justice and with a view to avoiding further delays.²⁰ Firstly, the Defence argues that the TFV Observations constitute a response to the Request, despite its title, and accordingly, regulation 24(5) of the Regulations would be applicable.²¹ Secondly, the Defence takes issue with the

¹⁴ Request on behalf of the Convicted Person seeking communication of material by the Trust Fund for Victims and the lifting of redactions applied by the Registry and the Legal Representatives of Victims to the victims’ dossiers (‘Request’), 29 March 2023, [ICC-01/04-02/06-2838](#), with Confidential Annex A.

¹⁵ Response of the Common Legal Representative of the Former Child Soldiers to the “Request on behalf of the Convicted Person seeking communication of material by the Trust Fund for Victims and the lifting of redactions applied by the Registry and the Legal Representatives of Victims to the victims’ dossiers” (ICC-01/04-02/06-2838) (‘CLR1 Response’), 11 April 2023, ICC-01/04-02/06-2841-Conf (public redacted version filed on 12 April 2023, [ICC-01/04-02/06-2841-Red](#)); Response of the Common Legal Representative of the Victims of the Attacks to the “Request on behalf of the Convicted Person seeking communication of material by the Trust Fund for Victims and the lifting of redactions applied by the Registry and the Legal Representatives of Victims to the victims’ dossiers” (‘CLR2 Response’), 11 April 2023, [ICC-01/04-02/06-2840](#).

¹⁶ Email from the Chamber’s Legal Officer, 29 March 2023, 16:12.

¹⁷ Registry Observations on Defence Request (ICC-01/04-02/06-2838) (‘Registry Observations’), 11 April 2023, [ICC-01/04-02/06-2842](#).

¹⁸ Observations of the Trust Fund for Victims on the Defence Request of 29 March 2023 (‘TFV Observations’), 11 April 2023, [ICC-01/04-02/06-2844](#).

¹⁹ Defence request for leave to reply to the “Observations of the Trust Fund for Victims on the Defence Request of 29 March 2023” (‘Leave to Reply’), 12 April 2023, [ICC-01/04-02/06-2846](#).

²⁰ Leave to Reply, [ICC-01/04-02/06-2846](#), para. 5.

²¹ Leave to Reply, [ICC-01/04-02/06-2846](#), para. 6.

TFV's submission that it has transmitted all information and documentation available regarding the victims found eligible for the IDIP purposes,²² and argues that a reply is required considering that (i) the 25 October 2022 Order and the 25 November 2022 Decision instructed the TFV, and not the VPRS, to provide the relevant information; (ii) the victims' dossiers are limited to heavily redacted victims' applications and supplemented information by the LRVs, but do not contain any information or documentation taken into account by the TFV; (iii) although established that upon receiving a priority victim referral from the LRVs the TFV forwards it to the implementing partners who locate the victim and provide information to the TFV, neither the referral nor the additional information transmitted to the TFV by the implementing partners has been communicated to the Defence; and (iv) the absence of such information was highlighted by the Defence, which should have triggered input from the TFV.²³

11. The Chamber notes that, pursuant to regulation 24(5) of the Regulations, decisions on whether leave to reply should be granted lie within the Chamber's discretionary powers and must be considered on a case-by case basis.²⁴ In the present case, the Chamber considers that it has sufficient information to make an informed decision on the Request, and does not find it necessary to receive a reply from the Defence. Accordingly, the Chamber rejects the Leave to Reply.

b) Request

i. TFV Material

12. In its Request, the Defence recalls that in the 25 November 2022 Decision, the Chamber unequivocally instructed the TFV to provide the Chamber and the parties with the relevant information or documentation taken into account when reaching the administrative decisions regarding the victims already found eligible for the IDIP purposes.²⁵ However, the Defence notes, to this day, the TFV has not transmitted any such information or documentation to the Defence, although this was mentioned by the Defence in its request for extension of time to make submissions on the Sample.²⁶ In the argument of the Defence, the information or

²² Leave to Reply, [ICC-01/04-02/06-2846](#), para. 7.

²³ Leave to Reply, [ICC-01/04-02/06-2846](#), para. 8.

²⁴ *See, for instance*, Appeals Chamber, Decision on Mr Bemba's request for leave to reply to the Prosecutor's response to the additional evidence request, 2 December 2016, [ICC-01/05-01/08-3479](#), para. 7.

²⁵ Request, [ICC-01/04-02/06-2838](#), paras 4-5, referring to 25 November 2022 Decision, [ICC-01/04-02/06-2794](#), para. 34(f) and disposition.

²⁶ Request, [ICC-01/04-02/06-2838](#), para. 6.

documentation taken into account by the TFV is crucial for the Defence assessment of the victims' dossiers, not only in relation to the IDIP victims eligibility but also in relation to the criteria, material and procedure used by the TFV to determine eligibility.²⁷ Further, the Defence submits that the fact that the TFV found eligible some victims that the VPRS had considered not to be eligible militates strongly in favour of allowing the Defence to understand what made the difference.²⁸ Accordingly, it argues that in order for the Defence's assessment and submissions to be a meaningful exercise, it is imperative that the information and material be provided to the Defence and is of time essence that this is done as soon as practicable.²⁹

13. In its Observations, the TFV argues that it has transmitted all information and documentation available concerning the eligibility to the IDIP of all victims found eligible to benefit from the programme by two emails transmitted to the VPRS on 31 October and 1 November 2022.³⁰ The TFV further submits that it 'understands' that said information and documentation was transmitted to the Chamber by the Registry's confidential *ex parte* transmission of 8 November 2022, to which the TFV does not have access.³¹ The TFV further submits that it has not been included in the process of redacting any such information and documentation by the VPRS, nor in the process of selecting the information shared with the Defence.³² In light of the above, the TFV argues that it is not privy of the exact final form and content of the dossiers shared with either the Chamber or the Defence.³³

14. The Chamber notes that, indeed as pointed out by the Defence, the 25 November 2022 specifically instructed the TFV to transmit the information and documentation taken into account when deciding on the eligibility of the IDIP victims to the Chamber and, with the necessary redactions, to the Defence.³⁴ The fact that the TFV did not comply with the Chamber clear instructions or clarified earlier that it had proceeded otherwise providing the information and documentation to the VPRS, for it to transmit it to the Defence with the necessary redactions, is unhelpful to the proceedings and ultimately to the victims, as it creates unnecessary delays and litigation. The Chamber disapproves such practice.

²⁷ Request, [ICC-01/04-02/06-2838](#), para. 8.

²⁸ Request, [ICC-01/04-02/06-2838](#), para. 9.

²⁹ Request, [ICC-01/04-02/06-2838](#), paras 9-10.

³⁰ TFV Observations, [ICC-01/04-02/06-2844](#), paras 14, 17.

³¹ TFV Observations, [ICC-01/04-02/06-2844](#), para. 15.

³² TFV Observations, [ICC-01/04-02/06-2844](#), para. 16.

³³ TFV Observations, [ICC-01/04-02/06-2844](#), para. 17.

³⁴ 25 November 2022 Decision, [ICC-01/04-02/06-2794](#), para. 34(f)-(g) and disposition.

15. Notwithstanding the above, having reviewed the victims' dossiers transmitted to the Defence and the *ex-parte* annexes³⁵ referred to by the TFV, the Chamber is satisfied that the Defence has received all available information and documentation required for it to assess and make meaningful submissions on the victims' dossiers. Accordingly, the Defence's Request for communication of relevant information or documentation taken into account by the TFV when reaching the administrative decision on the victims already found eligible for the IDIP purposes is dismissed as moot.

ii. Redactions

16. In its Request, the Defence argues that the victims' lack of consent is the sole factor that precludes the disclosure of their identities to the Defence, as opposed to objective justifications to protect their safety, physical and psychological wellbeing, dignity and privacy pursuant to Article 68(1) of the Statute.³⁶ In effect, the Defence argues, Mr Ntaganda is presently serving his sentence in a State of enforcement in a different continent and the Defence, bound *inter alia* by its code of conduct and confidentiality obligations, neither has the resources nor the time to conduct investigations that might prejudice the well-being of victims in any way.³⁷

17. Accordingly, the Defence submits that the victims' security concerns must be genuine and objectively demonstrated, and a balancing exercise is required between the minimum information required to enable the Defence to meaningfully challenge the victims' eligibility and the measures required to protect the victims.³⁸ After describing the process conducted with the VPRS and the LRVs in order to obtain the lifting of redactions,³⁹ the Defence submits that the redactions maintained impede its ability to meaningfully challenge the eligibility of the victims included in the Sample and go beyond the letter and the essence of the redaction procedure set out by the Chamber.⁴⁰

18. The CLR1 submits that the dire security situation in Ituri clearly shows that the victims' security concerns are genuine and objective, which is further demonstrated by the fact that none

³⁵ ICC-01/04-02/06-2788-Conf-Exp-Anx1 and ICC-01/04-02/06-2788-Conf-Exp-Anx2-Corr, which, the Chamber notes, only contain lists of victims and details of the victims' information as compiled in the Registry's databases but no additional documentation.

³⁶ Request, [ICC-01/04-02/06-2838](#), para. 13.

³⁷ Request, [ICC-01/04-02/06-2838](#), para. 13.

³⁸ Request, [ICC-01/04-02/06-2838](#), para. 14.

³⁹ Request, [ICC-01/04-02/06-2838](#), paras 19-21.

⁴⁰ Request, [ICC-01/04-02/06-2838](#), para. 22.

of the victims consented to disclosing their identity to the Defence.⁴¹ As such, the CLR1 argues that the need for protective measures, especially in the form of redactions to the victims' dossiers, remains unequivocal.⁴² The CLR1 further explains that the applied redactions to information that, when read in conjunction with other information may ultimately lead to the identification and/or location of victims and that she had agreed to the lifting of redactions that she ultimately deemed not identifying.⁴³ Finally, the CLR1 submits that the redacted information is not necessary for the Defence in order to provide meaningful observations on the eligibility of the victims concerned, particularly considering the collective nature of reparations in the present case, thus not warranting close scrutiny of the harm suffered by the victims.⁴⁴ In the argument of the CLR1, the Defence is fully able, within the limits of its prerogatives, to meaningfully challenge the victims' dossiers on the basis of all other relevant information in its possession.⁴⁵

19. The CLR2 indicates that, following Defence's requests, he agreed to lift a series of redactions on the victims' dossiers.⁴⁶ However, the CLR2 opposes the Request recalling that the victims' concerns are always paramount and stressing that, pursuant to the Chamber's instructions, even when victims would have consented to their identities being disclosed, all information that might reveal their current residence or that it may be used to locate the victim must be redacted.⁴⁷ In the argument of the CLR2, the lifting of the remaining redactions has a real likelihood of leading to the identification of the victims concerned, particularly when read in conjunction to other information available to the Defence.⁴⁸ The CLR2 submits that the remaining redactions do not undermine in any way the ability of the Defence to make meaningful observations on the eligibility of the victims for reparations, given in particular that the reparations in the present case are collective in nature and thus no specific scrutiny of the multidimensional harm suffered by the victims is required.⁴⁹

20. The Registry noted that, after years of representing and communicating regularly with their clients, and in view of the current volatile situation in Ituri, it considered the LRVs to be in the best position to assess their clients' security situation, and thus engaged with them and

⁴¹ CLR1 Response, [ICC-01/04-02/06-2841-Red](#), para. 15.

⁴² CLR1 Response, [ICC-01/04-02/06-2841-Red](#), para. 15.

⁴³ CLR1 Response, [ICC-01/04-02/06-2841-Red](#), paras 16-18.

⁴⁴ CLR1 Response, [ICC-01/04-02/06-2841-Red](#), para. 19.

⁴⁵ CLR1 Response, [ICC-01/04-02/06-2841-Red](#), para. 19.

⁴⁶ CLR2 Response, [ICC-01/04-02/06-2840](#), para. 19.

⁴⁷ CLR2 Response, [ICC-01/04-02/06-2840](#), para. 20.

⁴⁸ CLR2 Response, [ICC-01/04-02/06-2840](#), paras 23-25.

⁴⁹ CLR2 Response, [ICC-01/04-02/06-2840](#), paras 26-27.

lifted redactions based on their feedback.⁵⁰ The Registry further noted, based on its practice, while certain redacted information when assessed in isolation would not necessarily lead to the identification or location of an individual, they may do so when connected to other (unredacted) pieces of information, which would justify – even if not always obvious – why certain information needs to be redacted.⁵¹

21. The Chamber recalls that when detailing the procedure applicable to redactions to the victims' dossiers, the Chamber took into account the Appeals Chamber's jurisprudence,⁵² which clearly indicates that 'in granting the Defence access to the victims' applications, the necessary redactions shall be made to protect the victims' safety, physical and psychological wellbeing, dignity and privacy, pursuant to article 68 of the Statute'.⁵³ As such, with a view to safeguard the rights of the Defence while providing for an appropriate measure of protection for the victims, as set forth in article 68(1) of the Statute, in its 25 October 2022 Order and 25 November 2022 Decision, the Chamber established the procedure applicable to redactions for both, the situation when the victims consent or do not consent to their identities being disclosed to the Defence.⁵⁴

22. The Chamber is of the view that, in light of the dire security situation in Ituri, the victims' security concerns genuine and objective. The Chamber also considers that the Defence has not demonstrated how its ability to review and comment on the victims' Sample is effectively affected by the redactions maintained in the victims' dossiers. Accordingly, the Chamber maintains that the redactions regime as previously established strikes the relevant balance required by article 68(1) of the Statute, enabling the Defence to make meaningful submissions on the victims' eligibility. Consequently, the Chamber rejects the Request.

⁵⁰ Registry Observations, [ICC-01/04-02/06-2842](#), paras 10-11.

⁵¹ Registry Observations, [ICC-01/04-02/06-2842](#), para. 12.

⁵² 25 October 2022 Order, [ICC-01/04-02/06-2786](#), para. 35.

⁵³ Appeals Judgment, [ICC-01/04-02/06-2782](#), para. 689. *See also* Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable', [ICC-01/04-01/06-3466-Red](#), paras 249-254, 256.

⁵⁴ 25 October 2022 Order, [ICC-01/04-02/06-2786](#), paras 35-36; 25 November 2022 Decision, [ICC-01/04-02/06-2794](#), paras 27-29.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Leave to Reply and the Request.

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



Judge Chang-ho Chung, Presiding Judge



Judge Péter Kovács



Judge María del Socorro Flores Liera

Dated this Thursday, 20 April 2023

At The Hague, The Netherlands