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TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Chang-ho Chung

**SITUATION IN UGANDA
IN THE CASE OF
*THE PROSECUTOR v. DOMINIC ONGWEN***

Confidential

**Decision on the Defence Request for an Order to Disclose the Names of the Victim
Sample Pool of Participating Victims**

Pursuant to Trial Chamber II Single Judge's instruction, dated 01 October 2024, this document is reclassified as "Public"

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

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Trial Chamber IX of the International Criminal Court (the 'ICC' or the 'Court'), in the case of *The Prosecutor v. Dominic Ongwen* (the 'Ongwen case'), having regard to articles 68 and 75 of the Rome Statute ('Statute') and regulations 23 *bis*(3) and 24(5) of the Regulations of the Court ('Regulations'), issues the following Decision on the Defence Request for an Order to Disclose the Names of the Victim Sample Pool of Participating Victims ('Decision').

I. PROCEDURAL HISTORY

1. On 16 November 2022, following developments in another case at the reparations stage of the proceedings before the Court,¹ the Chamber ordered the Registry, through the Victims Participation and Reparations Section ('VPRS'), to provide information regarding: (i) the total number of applications for participation and/or reparations received in the case; and (ii) the total representation, within the applications received, regarding gender, age, and the main groups of the victims of the case.²
2. On 16 December 2022, having received the requested information from the Registry,³ the Chamber issued a decision ('Decision on the Sample') detailing its approach for ruling on a limited but representative sample of victims' dossiers in the case file, amounting to 5% of the universe of participating victims.⁴ Among other instructions, the Chamber directed the Defence, the Office of the Prosecutor ('Prosecution'), the Registry, and Trust Fund for Victims, to make any additional submissions on the estimated total number of potential beneficiaries of reparations in the case and detailing the methodology used to make such calculations.⁵
3. On 16 January 2023, in light of the Registry's transmission of the list of victims included in the sample and their relevant details,⁶ the Chamber issued a decision ('Decision on the Registry Transmission'), *inter alia*, (i) approving the sample of 205 victims, assembled by the VPRS, as sufficiently representative of the universe of potential victims in the case ('Sample'); (ii) setting out deadlines for the legal representatives to make submissions and

¹ See, *inter alia*, *The Prosecutor v. Bosco Ntaganda*, Appeals Chamber, Judgment on the appeal against the decision of Trial Chamber VI of 8 March 2021 entitled "Reparations Order", 12 September 2022, [ICC-01/04-02/06-2782](#); Trial Chamber II, Order for the implementation of the Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled "Reparations Order", 25 October 2022, [ICC-01/04-02/06-2786](#).

² E-mail from Trial Chamber IX Communications, 16 November 2022, at 15:01.

³ Registry Additional Information on Victims ('Registry Additional Information'), 21 November 2022 (notified on 22 November 2022), [ICC-02/04-01/15-2019](#).

⁴ Decision on the Registry Additional Information on Victims ('Decision on the Sample'), 16 December 2022, [ICC-02/04-01/15-2024](#).

⁵ Decision on the Sample, [ICC-02/04-01/15-2024](#), para. 31, disposition.

⁶ Registry Transmission of List of Individuals and Relevant Information for Reparations Sample ('Registry Transmission'), 9 January 2023, [ICC-02/04-01/15-2026](#), with two Confidential *ex parte* Annexes only available to the Registry, ICC-02/04-01/15-2026-Conf-Exp-AnxI and ICC-02/04-01/15-2026-Conf-Exp-AnxII.

complement the victims' dossiers, and for the Defence to make final submissions on the victims' dossiers; (iii) 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 (iv) establishing the relevant procedure for the Defence to challenge the applied redactions.⁷

4. On 29 March 2023, the Defence submitted the Request for an Order to Disclose the Names of the Victim Sample Pool of Participating Victims ('Request'),⁸ asking the Chamber to order the VPRS to disclose to the Defence unredacted versions of all victims applications included in the Sample.

5. On 11 April 2023, the Office of the Public Counsel for Victims ('OPCV')⁹ and the Legal Representatives of Victims ('LRVs'),¹⁰ filed their responses to the Request ('Responses'), opposing it and asking the Chamber to reject it or dismiss it.

6. On 14 April 2023, the Defence submitted a request for leave to reply the OPCV and LRVs Responses ('Leave to Reply'),¹¹ specifically in order to address four issues which, according to the Defence, could not have been foreseen when filing its Request.

7. On 19 April 2023, the OPCV filed its Response to the Leave to Reply,¹² requesting the Chamber to reject it.

II. ANALYSIS

A. Leave to Reply

8. The Defence submits that a reply is warranted in relation to four issues advanced by the OPCV and the LRVs in their Responses, which could not have been foreseen when filling the Request.¹³ The issues identified by the Defence are as follows: (i) the OPCV erred in stating

⁷ Decision on the Registry Transmission of List of Individuals and Relevant Information for Reparations Sample ('Decision on the Registry Transmission'), 16 January 2023, [ICC-02/04-01/15-2027](#), with public annex 1, [ICC-02/04-01/15-2027-Anx1](#), paras 10-13, disposition.

⁸ Defence Request for an Order to Disclose the Names of the Victim Sample Pool of Participating Victims ('Request'), 29 March 2023, ICC-02/04-01/15-2036-Conf (public redacted version on filed the same day, [ICC-02/04-01/15-2036-Red](#)).

⁹ CLRV Response to the "Defence Request for an Order to Disclose the Names of the Victim Sample Pool of Participating Victims" ('OPCV Response'), 11 April 2023, ICC-02/04-01/15-2037-Conf.

¹⁰ Victims' Response to the Defence Request for an Order to Disclose the Names of the Victim Sample Pool of Participating Victims ('LRVs Response'), 11 April 2023, ICC-02/04-01/15-2038-Conf.

¹¹ Defence Request to Reply to ICC-02/04-01/15-2037-Conf and ICC-02/04-01/15-2038-Conf ('Leave to Reply'), 14 April 2023, [ICC-02/04-01/15-2039](#).

¹² CLRV Response to the "Defence Request to Reply to ICC-02/04-01/15-2037-Conf and ICC-02/04-01/15-2038-Conf" ('OPCV Response to Leave to Reply'), 19 April 2023, ICC-02/04-01/15-2042.

¹³ Leave to Reply, [ICC-02/04-01/15-2039](#), paras 1-2.

that the Request should be dismissed *in limine* because the Defence did not request the names from the VPRS first; (ii) the OPCV is misplaced in the suspicion that the Defence 'mysteriously found out the names of 31 persons' in the Sample; (iii) the OPCV has an erroneous misconception that the Defence can effectively review and report on the victims with redacted names, and twists the Defence's arguments about victim a/0326/07; and (iv) the LRVs erred in stating that is not necessary to disclose the names of the persons in the Sample for the Defence to determine whether there is a causal link between the alleged harm suffered by the victim and the crimes for which Mr Ongwen was convicted.¹⁴

9. In its response, the OPCV argues that the Defence's allegations appear to be an attempt to re-litigate matters it failed to properly articulate or argue in its Request and none of the matter constitutes a new issue with the meaning of regulation 24(5) of the Regulations that the Defence could not reasonably have anticipated at the time of its Request.¹⁵

10. 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.¹⁶ 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.

11. Notwithstanding the above, the Chamber deems it necessary to note two issues that arise from the Defence's Leave to Reply. First, the motion contains a number of substantive arguments which, in fact, constitute a reply to the Responses,¹⁷ virtually defeating the purpose of regulation 24(5) of the Regulations. The Chamber disapproves this practice.¹⁸

12. Second, the Chamber notes that the Defence indicates that the lift of redactions to the victims' identities would be justified as it would allow it to cross-reference the identifying information with that existing in 'several large databases containing records of tens-of-thousands of persons returning from the LRA', referring in the relevant footnote to seven

¹⁴ Leave to Reply, [ICC-02/04-01/15-2039](#), paras 1, 16-28.

¹⁵ OPCV Response to Leave to Reply, ICC-02/04-01/15-2042, paras 10-16.

¹⁶ 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.

¹⁷ Leave to Reply, [ICC-02/04-01/15-2039](#), paras 17, 20, 22-24, 26-27.

¹⁸ Pre-Trial Chamber II, *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb')*, Decision on the Defence request and observations on reparations pursuant to article 75(1) of the Rome Statute, 18 August 2020, [ICC-02/05-01/20-117](#), para. 9; Pre-Trial Chamber II, *The Prosecutor v. Mahamat Said Abdel Kani*, Decision on the Defence's request for leave to appeal the 'Decision on legal representation of victims and related matters', 4 August 2021, [ICC-01/14-01/21-136](#), para. 22.

items;¹⁹ six of which²⁰ that have been recognised by the Chamber as formally submitted and are part of the evidence in record of the case,²¹ and one²² which was disclosed by the Prosecution at the Pre-Trial stage,²³ but not formally submitted as part of the evidentiary record of the case.

13. The Chamber underlines that it had specifically instructed the parties and participants to make submissions on the estimated total number of potential beneficiaries of reparations and the methodology used to make such calculations.²⁴ When complying with such instructions, the Chamber would have expected the Defence – and indeed any of the parties or participants – to have made express reference to any documents, among the thousands of items that are part of the evidentiary record of the case, that were to be considered relevant to such determination.²⁵ Similarly, the Chamber notes that, in order to be considered for the purposes of reparations, any item that, although disclosed, may not have been not be formally submitted as part of the evidence of the case during the trial proceedings, should be submitted at this stage.

B. Request

14. In its Request, the Defence submits that, out of the 205 victims included in the Sample, it currently has in its possession 41 unredacted victims applications only, which include 31 applications from victims represented by the LRVs, who consented to have their identity

¹⁹ Leave to Reply, [ICC-02/04-01/15-2039](#), para. 24, footnote 32, mentioning items UGA-OTP-0059-0063, UGA-OTP-0059-0064, UGA-OTP-0059-0065, UGA-OTP-0059-0066, UGA-OTP-0059-0067, UGA-OTP-0165-0124, and UGA-OTP-0224-0909

²⁰ UGA-OTP-0059-0063, UGA-OTP-0059-0064, UGA-OTP-0059-0065, UGA-OTP-0059-0067, UGA-OTP-0165-0124, and UGA-OTP-0224-0909, submitted by the Prosecution form the 'bar table', see Annex A to the Prosecution's request to submit 1006 items of evidence from the 'bar table', 16 January 2017, ICC-02/04-01/15-654-Conf-AnxA, rows 90-93, 887, 893. See also Annex A to the Defence Response to 'Prosecution's request to submit 1006 items of evidence from the 'bar table'. 7 February 2017, ICC-02/04-01/15-701-Conf-AnxA, rows 90-93, 887, 893.

²¹ Decision on Prosecution's Request to Submit 1006 Items of Evidence, 28 March 2017, [ICC-02/04-01/15-795](#), disposition. See also Trial Judgment, 4 February 2021, [ICC-02/04-01/15-1762-Red](#), para 237.

²² UGA-OTP-0059-0066.

²³ Annex A to Prosecution's Communication of the Disclosure of Evidence, 18 April 2016, ICC-02/04-01/15-427-Conf-AnxA, p. 3.

²⁴ Order for Submissions on Reparations, 6 May 2021, [ICC-02/04-01/15-1820](#), para. 5(i)(b); Decision on the Sample, [ICC-02/04-01/15-2024](#), para. 31, disposition.

²⁵ The Defence did not refer these items in its previous submissions, see Defence Submissions on Reparations, 6 December 2021, [ICC-02/04-01/15-1917](#), para. 37; Defence Additional Submissions on Beneficiaries and Transgenerational Harm, 17 February 2023, [ICC-02/04-01/15-2030](#), paras 11-17; Defence Response to the Additional Submissions on Beneficiaries and Transgenerational Harm, 22 March 2023, [ICC-02/04-01/15-2035](#), paras 12-14.

disclosed to the Defence,²⁶ and 10 applications from dual-status victims.²⁷ The Defence deplores that none of the victims represented by the OPCV agreed to have their identity disclosed.²⁸ According to the Defence, in light of the advanced stage of the proceedings, and considering that there has been no incident of interference with persons because of their testimony or filing of a victims' application for participation, there is no objectively justifiable risk as to why the persons in the Sample should have their identifying information redacted.²⁹ As such, the Defence requests the Chamber to order the VPRS to disclose the additional 164 applications without the identifying information being redacted.³⁰

15. In its response, the OPCV recalls that, pursuant to article 68 of the Statute, the Court shall protect the safety, physical and psychological well-being, dignity, and privacy of victims, and in light of this duty and in the absence of the victims' express consent, the disclosure of the concerned victims' identities to the Defence is unwarranted.³¹ The OPCV further submits that the Defence (i) did not comply with the procedure on redactions set out by Chamber whereby challenges to redactions should be raised with the VPRS, seizing the Chamber only exceptionally when no agreement can be reached; and (ii) fails to demonstrate any practical need to receive the disclosure of the victims' identity since, by its own admission, it is in fact able to conduct a meaningful review of the victims' applications.³²

16. In their response, the LRVs submit that (i) the victims continue to fear Mr Ongwen, owing to his 'ruthless conduct' consistent with his conviction confirmed by the Appeals Chamber, and that although Mr Ongwen is now in detention, they remain concerned for their safety and that of their family members upon his return after serving the sentence; (ii) the arguments raised by the Defence as to its ability to review and comment on the Sample are untenable, as the Defence is able to assess the extent of the alleged harm and Mr Ongwen's liability, and to examine the eligibility of the applicants, as demonstrated by its assessment of four victims' applications; (iii) the Defence fails to illustrate how the redacted identities of victims, if lifted, would facilitate the assessment of harm and it has not demonstrated that Mr Ongwen personally knows all victims of the crimes he was convicted of, to justify the disclosure of victims' identity; and (iv) what is required for the Defence to comment on the

²⁶ Request, [ICC-02/04-01/15-2036-Red](#), paras 1, 19.

²⁷ Request, [ICC-02/04-01/15-2036-Red](#), para. 19, footnote 33.

²⁸ Request, [ICC-02/04-01/15-2036-Red](#), para. 19.

²⁹ Request, [ICC-02/04-01/15-2036-Red](#), para. 22.

³⁰ Request, [ICC-02/04-01/15-2036-Red](#), para. 23.

³¹ OPCV Response, ICC-02/04-01/15-2037-Conf, para. 11.

³² OPCV Response, ICC-02/04-01/15-2037-Conf, paras 11-21.

sample is the description of the harm suffered, the events that caused the harm, the extent of the harm, and the causal link between the alleged harms and the crimes for which Mr Ongwen was convicted, and the Defence has not shown that it is unable to access this information from the victims' applications.³³

17. The Chamber recalls that it has previously detailed the procedure applicable to redactions to the victims' applications and the additional information that would be submitted by the OPCV and the LRVs,³⁴ having regard to the Appeals Chamber's jurisprudence,³⁵ 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'.³⁶ As such, with a view to safeguard the rights of the Defence while providing for an appropriate measure of protection for the victims, in its Decision on the Registry Transmission, the Chamber established the procedure applicable to redactions for both, when the victims consent or do not consent to their identities being disclosed to the Defence.³⁷

18. In the present situation, the Chamber notes that only 31 victims represented by the LRVs consented to having their identity disclosed, while none of the victims represented by the OPCV gave their consent.³⁸ According to the LRVs, the victims continue to fear Mr Ongwen and although he is now in detention, they remain concerned for their safety and that of their family members upon his return after serving the sentence.³⁹

19. The Chamber further notes that the Defence has not demonstrated how its ability to review and comment on the victims' sample is affected by not knowing all the victims' names, especially since the Chamber observes, as also pointed out by the OPCV and the LRVs,⁴⁰ the Defence has been in fact able to review and comment on some of the victims' eligibility at this stage, as exemplified by its analysis of four victims' applications.⁴¹

³³ LRVs Response, ICC-02/04-01/15-2038-Conf, paras 10-21.

³⁴ Decision on the Registry Transmission, [ICC-02/04-01/15-2027](#), paras 10-12.

³⁵ Decision on the Registry Transmission, [ICC-02/04-01/15-2027](#), paras 10-12, footnote 17.

³⁶ Judgment on the appeal against the decision of Trial Chamber VI of 8 March 2021 entitled "Reparations Order", 12 September 2022, [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.

³⁷ Decision on the Registry Transmission, [ICC-02/04-01/15-2027](#), para. 11.

³⁸ Request, [ICC-02/04-01/15-2036-Red](#), para. 19.

³⁹ LRVs Response, ICC-02/04-01/15-2038-Conf, paras 10, 15.

⁴⁰ OPCV Response, ICC-02/04-01/15-2037-Conf, para. 21; LRVs Response, ICC-02/04-01/15-2038-Conf, paras 16, 17.

⁴¹ Request, [ICC-02/04-01/15-2036-Red](#), para. 20 a)-c).

20. In light of the above, the Chamber maintains that the redactions regime as previously established strikes the required balance demanded by article 68(1) of the Statute, enabling the Defence to make meaningful submissions on the victims' eligibility. Consequently, the Chamber rejects the Request.

21. In addition, the Chamber reiterates that it expects the Defence to raise any challenge it may have to the redactions applied/maintained directly with the VPRS, seizing the Chamber only exceptionally when no agreement can be reached.⁴² The Chamber will also not rule on further requests attempting to relitigate matters already decided.

C. Publicity

22. In order to give full effect to the principle of publicity of the reparations proceedings, the Chamber hereby directs the LRVs and the OPCV to review their submissions underlying this decision and either file public redacted versions, request the reclassification as public, or justify the need to maintain the current classification as confidential within five days from the notification of the present Decision. The Chamber reiterates that public redacted versions of confidential documents are to be filed as expeditiously as possible, preferably simultaneously to every filing submitted.

⁴² Decision on the Registry Transmission, [ICC-02/04-01/15-2027](#), para. 12.

Pursuant to Trial Chamber II Single Judge's instruction, dated 01 October 2024, this document is reclassified as "Public"

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Leave to Reply and the Request.

DIRECTS the LRVs and the OPCV to review their submissions underlying this decision and either file public redacted versions, request the reclassification as public, or justify the need to maintain the current classification as confidential within five days from the notification of the present Decision.

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



Judge Bertram Schmitt, Presiding Judge



Judge Péter Kovács



Judge Chang-ho Chung

Dated this Thursday, 20 April 2023

At The Hague, The Netherlands