

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: French

No.: ICC-01/04-01/06
Date: 11 November 2020

TRIAL CHAMBER II

Before: Judge Marc Perrin de Brichambaut, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Péter Kovács

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

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

CONFIDENTIAL

***Ex parte* Victims Participation and Reparations Section, Legal Representatives of V01 and V02 Victims, Legal Representative of the Former Child Soldiers in the case of *The Prosecutor v. Bosco Ntaganda* and Office of Public Counsel for Victims**

Decision on the joint application for information on victims involved in proceedings in both *The Prosecutor v. Thomas Lubanga Dyilo* and *The Prosecutor v. Bosco Ntaganda*

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

Office of the Prosecutor

Counsel for Thomas Lubanga Dyilo

Legal Representatives of V01 Victims

Mr Luc Walleyen

Mr Franck Mulenda

**Legal Representative of the Former
Child Soldiers in *Ntaganda***

Ms Sarah Pellet

Legal Representatives of V02 Victims

Ms Carine Bapita Buyangandu

Mr Paul Kabongo Tshibangu

Mr Joseph Keta Orwinyo

Office of Public Counsel for Victims

Ms Paolina Massidda

Other

Trial Chamber VI

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Section

Detention Section

**Victims Participation and Reparations
Section**

Mr Philipp Ambach

Trust Fund for Victims

TRIAL CHAMBER II (“Chamber”) of the International Criminal Court, acting pursuant to article 75 of the Rome Statute and regulation 42(1) and 42(3) of the Regulations of the Court, decides as follows.

I. Procedural history

1. On 15 December 2017, the Chamber handed down its “Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable” (“Decision of 15 December 2017”).¹ In the decision, the Chamber analysed the applications for reparations of 473 individuals claiming to be victims of the crimes of which Thomas Lubanga Dyilo (“Mr Lubanga”) was convicted.² The Chamber found that, of those 473 individuals, 425 had shown on a balance of probabilities that they had suffered harm as a consequence of the crimes of which Mr Lubanga was convicted.³ Accordingly, the Chamber ruled that they were entitled to the collective reparations it had awarded in the case at bar (“425 Beneficiaries”).⁴ The Chamber found, however, that the 425 beneficiaries were not the sum-total of the victims who had suffered harm as a consequence of the crimes of which Mr Lubanga was convicted and that his crimes had also affected hundreds if not thousands of other victims (“New Applicants”).⁵ Lastly, the Chamber stated that, at the implementation stage of the reparations, the

¹ “Corrected version of the ‘Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable’”, ICC-01/04-01/06-3379-Red-Corr-tENG, with two public annexes (Annex I and Annex III) and one confidential annex *ex parte* Registry, Trust Fund for Victims, Legal Representatives of the V01 and V02 Groups of Victims, and Office of Public Counsel for Victims (Annex II); and a confidential redacted version of Annex II. The decision was handed down, with its annexes, on 15 December 2017, and the corrected versions were filed on 21 December 2017.

² Decision of 15 December 2017, paras. 35-191.

³ Decision of 15 December 2017, para. 190.

⁴ Decision of 15 December 2017, para. 194.

⁵ Decision of 15 December 2017, p. 111 and, in particular, paras. 232-244.

Trust Fund for Victims (“Trust Fund”) would screen for eligibility for reparations those persons who had been unable to submit an application for reparations.⁶

2. On 7 February 2019, the Chamber approved the proposals submitted by the Trust Fund on the process for locating new applicants and determining their eligibility for reparations at the implementation stage of reparations (“Decision of 7 February 2019”).⁷

3. On 18 July 2019, the Appeals Chamber handed down a unanimous judgment on two appeals brought against the Decision of 15 December 2017.⁸ The Appeals Chamber also ordered that any recommendations made by the Trust Fund concerning the victims’ eligibility for reparations be subject to the approval of this Chamber.⁹

4. On 4 February 2020, the Chamber instructed the Victims Participation and Reparations Section (“VPRS”) to share with Trial Chamber VI the following confidential information in the VPRS database on the victims entitled to reparations in *The Prosecutor v. Thomas Lubanga Dyilo* (“Lubanga”): (a) the total number of victims entitled to reparations in *Lubanga* and who might potentially qualify for reparations in *The Prosecutor v. Bosco Ntaganda* (“Ntaganda”); and (b) the participation codes linked to the name of each victim entitled to reparations in *Lubanga*.¹⁰

⁶ Decision of 15 December 2017, para. 293, citing the “Decision on the Motion of the Office of Public Counsel for Victims for Reconsideration of the Decision of 6 April 2017”, 13 July 2017, ICC-01/04-01/06-3338-tENG, para. 11.

⁷ “Decision Approving the Proposals of the Trust Fund for Victims on the Process for Locating New Applicants and Determining their Eligibility for Reparations”, 7 February 2019, ICC-01/04-01/06-3440-Conf-tENG (“Decision of 7 February 2019”). A public redacted version of the decision was filed on 4 March 2019.

⁸ “Judgment on the appeals against Trial Chamber II’s ‘Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable’”, 18 July 2019, ICC-01/04-01/06-3466-Conf (“Judgment of 18 July 2019”) with two public annexes. A public version of the judgment was filed on the same day. Judge Eboe-Osuji and Judge Ibáñez Carranza each appended a separate opinion

⁹ Judgment of 18 July 2019.

¹⁰ “Order relating to the request of the Victims Participation and Reparations Section of 21 January 2020” 4 February 2020, ICC-01/04-01/06-3472-Conf-tENG.

5. On 20 May 2020, the Chamber approved the administrative decisions of the Trust Fund on 271 new applications for reparations (“Decision of 20 May 2020”).¹¹

6. On 11 September 2020, the Chamber approved 159 administrative decisions of the Trust Fund on new applications for reparations.¹² In the decision, the Chamber also amended the Decision of 20 May 2020, finding that 272 applicants had shown on a balance of probabilities that they had suffered harm as a result of the crimes of which Mr Lubanga was convicted and must therefore be considered to qualify for the collective reparations ordered in the instant case.¹³

7. On 16 September 2020, the VPRS sought authorization from the Chamber and Trial Chamber VI to disclose to the legal representatives of the victims involved in *Lubanga* and *Ntaganda* the participation codes linked to the names of the victims represented in the two cases.¹⁴

8. On 17 September 2020, the Chamber informed the VPRS that the legal representatives of victims should seize the Chamber by way of an application bringing the issue before it.¹⁵

9. On that same day, Trial Chamber VI also informed the VPRS that the legal representatives of victims should seize it by way of an application bringing the issue before it.¹⁶

10. On 6 October 2020, the Legal Representatives of the V01 group of victims (“Legal Representatives V01”), the Office of Public Counsel for Victims (“OPCV”) and

¹¹ “Decision concerning the First and Second Transmissions of Administrative Decisions on New Applications for Reparations Taken by the Trust Fund for Victims”, 20 May 2020, ICC-01/04-01/06-3476-Conf-tENG.

¹² “Second Decision on the Administrative Decisions of the Trust Fund for Victims Regarding New Applications for Reparations”, 11 September 2020, ICC-01/04-01/06-3479-Conf.

¹³ Decision of 11 September 2020, para. 12.

¹⁴ Email from VPRS to the Chamber on 16 September at 09.52.

¹⁵ Email from the Chamber to VPRS on 17 September 2020 at 09.51.

¹⁶ Email from Trial Chamber VI to VPRS on 17 September 2020 at 15.22.

the Legal Representative of the Former Child Soldiers in *Ntaganda* (together “Legal Representatives”) filed a joint application for the sharing of information on victims involved in *Lubanga* and *Ntaganda* (“Application”).¹⁷

II. Analysis

1. Observations of the Legal Representatives

11. The Legal Representatives submit that sharing information on the victims involved in these two cases would enable them to work more efficiently and would contribute to upholding the principles of fairness and expeditiousness.¹⁸ They state that communication between the Legal Representatives and the victims would be clearer and more effective as a result, improving the quality of legal representation and facilitating victims’ understanding of the issues at play and the reasons for being represented by two different counsel.¹⁹

12. The Legal Representatives submit that this will enhance cooperation amongst counsel, thus facilitating a response to any litigation concerning reparations proceedings in the two cases.²⁰

13. The Legal Representatives state that they found it difficult to interview the victims directly about their dual involvement. First, the Legal Representatives state that it is particularly difficult to establish direct contact with victims because of the security and health situation in Ituri.²¹ Next, they state that a number of victims still cannot be reached remotely, by telephone for instance, and that, in any case, they may be unaware of the phase in which their application stands in the reparations proceedings in the other case.²² Then, the Legal Representatives note that Trial

¹⁷ “Joint application for information on victims involved in proceedings in both the *Lubanga* and the *Ntaganda* cases”, 6 October 2020, ICC-01/04-01/06-3487-Conf-Exp.

¹⁸ Application, ICC-01/04-01/06-3487-Conf-Exp, par. 2.

¹⁹ Application, ICC-01/04-01/06-3487-Conf-Exp, paras 14-16.

²⁰ Application, ICC-01/04-01/06-3487-Conf-Exp, par. 14.

²¹ Application, ICC-01/04-01/06-3487-Conf-Exp, paras 17-19.

²² Application, ICC-01/04-01/06-3487-Conf-Exp, par. 18.

Chamber VI ruled in *Ntaganda* that, at that stage, it was not necessary to contact eligible victims in *Lubanga* who might also qualify for reparations in *Ntaganda*".²³

14. The Legal Representatives state, lastly, that they find it unnecessary to contact the victims for that information as it is already in the Registry's possession.²⁴

15. Therefore, the Legal Representatives move the Chamber to authorize the VPRS to provide them with the names of the victims and the participation code linked to the names of victims already identified as participating in both cases, and to continue to do so on a rolling basis as other victims are identified as such.²⁵

i. Findings of the Chamber

16. The Chamber notes that pursuant to article 68(1) of the Statute, "[t]he Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses".

17. The Chamber also notes that the information mentioned in the Application regarding the victims who applied for reparations in *Lubanga* was collected in accordance with the guidelines of this Chamber,²⁶ which concern, in particular, protective measures.²⁷

18. The Chamber notes that under regulation 42(1) of the Regulations of the Court

[p]rotective measures once ordered in any proceedings in respect of a victim or witness shall continue to have full force and effect in relation to any other proceedings before the

²³ Application, ICC-01/04-01/06-3487-Conf-Exp, para. 20 citing Trial Chamber VI, "First Decision on Reparations Process", ICC-01/04-02/06-2547, 26 June 2020, para. 31.

²⁴ Application, ICC-01/04-01/06-3487-Conf-Exp, para. 21.

²⁵ Application, ICC-01/04-01/06-3487-Conf-Exp, paras. 22-23.

²⁶ "Order instructing the Trust Fund for Victims to supplement the draft implementation plan", 9 February 2016, ICC-01/04-01/06-3198-tENG; "Order relating to the request of the Office of Public Counsel for Victims of 16 September 2016", 21 October 2016, ICC-01/04-01/06-3252-tENG; Decision of 7 February 2019.

²⁷ "Order for the Transmission of the Application Files of Victims who may be Eligible for Reparations to The Defence Team of Thomas Lubanga Dyilo", 22 February 2017, ICC-01/04-01/06-3275-tENG; "Decision on the Application of the Defence for Thomas Lubanga Dyilo of 24 April 2017 concerning Redactions in some of the Files of Potentially Eligible Victims", 5 June 2017, ICC-01/04-01/06-3328-tENG See also Decision of 15 December 2017, para. 59.

Court and shall continue after proceedings have been concluded, subject to revision by a Chamber

The Chamber also notes the first sentence of regulation 42(3) of the Regulations of the Court, which states that “[a]ny application to vary a protective measure shall first be made to the Chamber which issued the order.” Lastly, the Chamber notes that regulation 42 of the Regulations of the Court is applicable at all phases of the proceedings, including the reparations phase.²⁸

19. As mentioned above, this Chamber ordered the initial protective measures in respect of the victims in *Lubanga*. It is therefore a matter for this Chamber, under regulation 42(1) and 42(3) of the Regulations of the Court, to rule on any application for variation of the protective measures ordered in respect of the victims in *Lubanga*. The Chamber’s task, however, is limited to determining whether the grounds set out in the Application warrant granting the Legal Representative of the Former Child Soldiers in *Ntaganda* access to information about the victims identified in *Lubanga*. The Chamber finds that it is not competent to rule on an application for variation of the protective measures ordered in respect of the victims in *Ntaganda*, and that it is for Trial Chamber VI to decide whether to allow Legal Representatives V01 and the OPCV access to information on the victims identified in *Ntaganda*.

20. As to the merits of the Application, the Chamber notes first that the victims’ consent would have to be sought for disclosure to the Legal Representative of the Former Child Soldiers in *Ntaganda* that the victims had also submitted an application for participation and/or reparations in *Ntaganda*.²⁹ Nonetheless, it takes note of the observations made in the Application concerning the current security and health situation in Ituri.³⁰ It also takes note of the observations in the Application regarding

²⁸ Order for Reparations (amended), 3 March 2015, ICC-01/04-01/06-3129-AnxA (the French translation was notified on 1 August 2016), para. 15; “Decision establishing the principles and procedures to be applied to reparations”, 7 August 2012, ICC-01/04-01/06-2904 (The original English version and its French translation were notified on the same day), para. 190.

²⁹ Regulation 42(4) of the Regulations of the Court.

³⁰ Application, ICC-01/04-01/06-3487-Conf-Exp, paras. 17-19.

the difficulty of contacting some of their clients.³¹ The Chamber further notes that the information requested by the Legal Representative of the Former Child Soldiers in *Ntaganda* is limited because she does not seek access to the application forms for participation or reparations or to the documents produced by the victims in support of their applications.³² Furthermore, the Chamber considers that the arguments advanced by the Legal Representative of the Former Child Soldiers in *Ntaganda* with a view to being granted access to the information requested are focused on better representation of victims.³³ Lastly, the Chamber notes that the VPRS is in possession of the information requested.³⁴

21. The Chamber therefore finds that it is appropriate to grant the Application with respect to disclosure to the Legal Representative of the Former Child Soldiers in *Ntaganda* of the participation codes linked to the names of the victims in *Lubanga* who are represented in both cases. It finds, however, that the names of those victims should not be disclosed.

22. Accordingly, the Chamber authorizes the VPRS to provide the Legal Representative of the Former Child Soldiers in *Ntaganda* access to the participation codes linked to the names of the victims in *Lubanga* who are also represented in *Ntaganda*. The disclosure of this information concerns the victims already found to qualify for reparations in *Lubanga* and any new victims who may be found to qualify for reparations during the process for locating new applicants and determining their eligibility for reparations that was approved in the Decision of 7 February 2019.

23. In addition, the Chamber takes note of the ground on which the Legal Representative relies to file the Application as “confidential *ex parte*”, restricting access to the Application to the VPRS and the Legal Representatives and excluding the Defence team for Mr Lubanga, namely, that the Application refers to information that

³¹ Application, ICC-01/04-01/06-3487-Conf-Exp, para. 18.

³² Application, ICC-01/04-01/06-3487-Conf-Exp, para. 22.

³³ Application, ICC-01/04-01/06-3487-Conf-Exp, paras. 14-16.

³⁴ Decision of 4 February 2020, para. 6.

is available only to the Registry, the Legal Representatives and the Chamber.³⁵ The Chamber finds that the stated ground is insufficient as it does not explain why the Defence team for Mr Lubanga may not be informed of the purpose of the Application or of this decision, or why that could affect the safety and well-being of the victims. Consequently, in accordance with regulation 23 *bis*(1) of the Regulations of the Court, the Chamber directs the Legal Representative to state whether there is a basis for restricting access to the Application to the VPRS and the Legal Representatives, while excluding the Defence team for Mr Lubanga, or to file a confidential redacted version of the Application containing those redactions that the Legal Representative considers absolutely necessary.

24. Lastly, the Chamber draws the attention of the Legal Representative of the Former Child Soldiers in *Ntaganda* to the duty to maintain complete confidentiality over the data shared.

FOR THESE REASONS, the Chamber

GRANTS IN PART the Application;

AUTHORIZES the VPRS to provide the Legal Representative of the Former Child Soldiers in *Ntaganda* access to the participation codes linked to the eligible victims identified in *Lubanga*, and the participation codes linked to victims who will be found eligible in due course;

INSTRUCTS the Legal Representative of the Former Child Soldiers in *Ntaganda* to state whether it is necessary for the Application to remain “confidential *ex parte*”, or to file a confidential redacted version of the Application within five days of notification of this decision;

³⁵ Application, ICC-01/04-01/06-3487-Conf-Exp, para. 12.

INSTRUCTS the Legal Representative of the Former Child Soldiers in *Ntaganda* to maintain complete confidentiality over the data shared, and

DISMISSES the remainder of the Application.

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

[signed]

Judge Marc Perrin de Brichambaut

Presiding Judge

[signed]

Judge Olga Herrera Carbuccion

[signed]

Judge Péter Kovács

Dated this 11 November 2020

At The Hague, the Netherlands