

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

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

Date: **8 February 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***

Confidential

Response of the Common Legal Representative of the Victims of the Attacks to the “Defence request for leave to file further submissions regarding the Registry 30 January submissions in compliance with the Trial Chamber’s Implementation Order and 25 November Decision”

Source: Office of Public Counsel for Victims (CLR2)

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

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I. INTRODUCTION

1. The Common Legal Representative of the Victims of the Attacks (the “Legal Representative”) herewith submits his response to the “Defence request for leave to file further submissions regarding the Registry 30 January submissions in compliance with the Trial Chamber’s Implementation Order and 25 November Decision” (the “Defence’s Request” or “Request”).¹

2. With reference to regulation 24(5) of the Regulations of the Court (the “RoC”) the Defence not only seeks leave to make submissions in reply to the Registry’s arguments and approach on estimating the number of potential beneficiaries of reparations but effectively seeks leave to present further submissions on the relevance and weight of the figures on the population size of the affected villages at the time of the events recently collected by the Registry. The Defence also seems to be intending to address a number of other important topics such as the alleged appearance of bias towards the Defence and the alleged lack of independence of the Appointed Expert. It is submitted that the Defence failed to demonstrate that the applicable criteria under regulation 24(5) of the RoC are met, and in particular that the Defence’s further submissions are warranted, and accordingly the Defence’s Request should be rejected in its entirety. If nevertheless the Chamber were to grant the Defence leave to present further submissions based on regulation 24(5) of the RoC or another basis, the Legal Representative should be given an opportunity to respond out of fairness.

¹ See the “Defence request for leave to file further submissions regarding the Registry 30 January submissions in compliance with the Trial Chamber’s Implementation Order and 25 November Decision”, [No. ICC-01/04-02/06-2826-Conf](#), 6 February 2023 (the “Defence’s Request”).

II. PROCEDURAL BACKGROUND

3. On 8 March 2021, Trial Chamber VI issued the “Reparations Order”.² On 16 March 2021, the Presidency assigned the present case to the newly constituted Trial Chamber II (the “Chamber”).³

4. On 12 September 2022, the Appeals Chamber issued its Judgment on the appeals against the Reparations Order.⁴ The Appeals Chamber partially remanded the Reparations Order to the Chamber to the extent that it found that Trial Chamber VI failed to, *inter alia*, make any appropriate determination in relation to the number of potentially eligible or actual victims of the award and/or to provide a reasoned decision in relation to its conclusion about that number.⁵

5. On 25 October 2022, the Chamber issued 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’”.⁶

6. On 25 November 2022, the Chamber issued a decision,⁷ *inter alia*, instructing the parties, the Prosecution, the Trust Fund for Victims (the “TFV”) and the Registry to further complement their submissions and to provide any additional information or documentation in relation to the estimated total number of potential beneficiaries of

² See the “Reparations Order” (Trial Chamber VI), [No. ICC-01/04-02/06-2659](#), 8 March 2021.

³ See the “Decision assigning judges to divisions and recomposing chambers” (Presidency), [No. ICC-01/04-02/06-2663](#), 16 March 2021, p. 7.

⁴ 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 A4 A5](#), 12 September 2022.

⁵ *Idem*, p. 11.

⁶ 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.

⁷ 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 (the “25 November 2022 Decision”); with Public Annex 1, [No. ICC-01/04-02/06-2794-Anx1](#).

reparations in the present case, along with an explanation of the methodology used to provide such an estimate within 60 days.⁸

7. On 30 January 2023, the Legal Representative,⁹ the Common Legal Representative of the Former Child Soldiers,¹⁰ the Registry,¹¹ the TFV,¹² and the Defence¹³ filed their respective submissions, *inter alia*, on the estimated total number of potential beneficiaries of reparations.

8. On 6 February 2023, the Defence filed its Request.¹⁴ In particular, the Defence seeks leave to file further submissions on four topics: (i) “*the Registry’s volte face regarding the relevance of the figures now put forward in its submissions as well as, more particularly, in the confidential ex parte annex initially not available to the Defence*” (the “First Issue”);¹⁵ (ii) “*the reasons put forward by the Registry regarding the relevance of the figures obtained in January as well as why these figures would not have been available until now*” (the “Second Issue”);¹⁶ (iii) “*the sources/providers of the information obtained by the Registry in January 2023*” (the “Third Issue”);¹⁷ and (iv) “*the Registry’s request addressed to the Government of the Democratic Republic of the Congo (“DRC”) to obtain figures regarding the*

⁸ *Idem*, para. 37.

⁹ See the “Submissions by the Common Legal Representative of the Victims of the Attacks pursuant to the 25 October 2022 Order and 25 November 2022 Decision”, [No. ICC-01/04-02/06-2820](#), 30 January 2023.

¹⁰ 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.

¹¹ See 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’” (ICC-01/04-02/06-2786)”, [No. ICC-01/04-02/06-2822](#), 30 January 2023 (the “Registry’s Submissions”); with Conf Exp Annex, [No. ICC-01/04-02/06-2822-Conf-Exp-Anx](#), and Conf Red Annex, [No. ICC-01/04-02/06-2822-Conf-Anx-Red](#).

¹² See the “Trust Fund for Victims’ Submission pursuant to Trial Chamber II’s decisions on the implementation of the Appeals Chamber Judgement against the Reparations Order”, [No. ICC-01/04-02/06-2819](#), 30 January 2023.

¹³ See the “Defence further submissions on transgenerational harm and the estimated total number of potential beneficiaries”, [No. ICC-01/04-02/06-2823-Conf](#), 30 January 2023.

¹⁴ See the Defence’s Request, *supra* note 1.

¹⁵ *Idem*, para. 13.

¹⁶ *Idem*, para. 20.

¹⁷ *Idem*, para. 21.

census in various municipalities and villages before the conflict as well as, more importantly, at the time of the events” (the “Fourth Issue”).¹⁸

III. CONFIDENTIALITY

9. The present submissions are filed confidentially pursuant to regulation 23*bis*(1) of the Regulations of the Court, as they respond to a request likewise classified as confidential. A public redacted version will be filed in due course.

IV. SUBMISSIONS

10. As a preliminary matter, the Legal Representative notes that it is unclear on which basis the Defence’s Request was filed. Indeed, the Defence seeks leave “*to file further submissions in reaction to the Registry 30 January Submissions*” and “*by analogy with the law applicable to requests for leave to reply*”.¹⁹ However, the Defence fails to demonstrate how such an “*analogy*” complies with the legal framework of the Court or its jurisprudence. It then attempts to substantiate its Request in light of the criteria under regulation 24(5) of the RoC.²⁰ In its attempt to do so, rather than demonstrating that the relevant criteria for a leave to reply are met, the Defence presents substantive submissions, although substantive submissions are only permitted at a later stage should leave to reply be granted.

11. In so far as the Defence refers to the criteria under regulation 24(5) of the RoC, the Legal Representative recalls that “[p]articipants may only reply to a response with the leave of the Chamber, unless otherwise provided in these Regulations”, and a “reply must be limited to new issues raised in the response which the replying participant could not reasonably have anticipated”. Importantly, leave to reply should not be granted to a party or participant that merely points to issues arising from a response, without adequately

¹⁸ *Idem*, para. 22.

¹⁹ *Idem*, para. 4.

²⁰ *Idem*, paras. 6-8.

demonstrating why such issues are new and could not have been reasonably anticipated.²¹ Beyond simply reiterating that the issues sought to be addressed in a reply could not have reasonably been anticipated without explaining *why* a reply to these issues is otherwise warranted, is not sufficient in itself for a party or participant to be granted the leave requested.²² Furthermore, a mere disagreement with a response does not warrant granting leave to reply.²³

12. As regards the First Issue, the Defence takes issue “*that it is only now, in January 2023, that the Registry decided to adopt the views of the LRV2, and to proceed to obtain related figures, which address the situation at times other than what was initially requested by the LRV2, without informing the Defence, of its actions or intentions, without disclosing its sources*”.²⁴

13. The Legal Representative submits that even assuming that the Registry’s present approach and way to proceed could not have been reasonably anticipated by the Defence in light of the Registry’s previous submissions on the matter, the Defence fails to demonstrate why the Defence’s further submissions are warranted. In fact, the Registry, similarly to the parties and other participants, was directed by the Chamber to further complement its submissions and to provide any additional information or documentation in relation to the estimated total number of potential beneficiaries of reparations in the present case, along with an explanation of the methodology used to provide such an estimate.²⁵ In compliance with the Chamber’s instructions, the Registry filed its submissions and provided additional information. The Registry explained its approach as follows:

“The findings provided to the Chamber in the context of the preliminary mapping and thereafter were conservative estimates, as they were collated in the context of a limited

²¹ See the “Decision on Mr Ntaganda’s request for leave to reply” (Appeals Chamber), [No. ICC-01/04-02/06-1994 OA6](#), 17 July 2017, para. 13.

²² *Idem*, para. 14.

²³ *Idem*, para. 13.

²⁴ See the Defence’s Request, *supra* note 1, para. 18.

²⁵ See the 25 November 2022 Decision, *supra* note 7, para. 37.

and carefully targeted approach aimed at identifying individuals who did not participate in the Case proceedings, and for whom it could be said with a relative degree of certainty - but still based only on secondary sources consulted- that they suffered harm as a result of at least one of the crimes subject to conviction in the Case".²⁶

14. The Legal Representative posits that contrary to the Defence's contentions,²⁷ the Registry was not obliged, and was never instructed by the Chamber, to inform the Defence, or the other parties or participants, of its actions or intentions as regards the content of its submissions and additional information it intended to seek and to provide to the Chamber. There is nothing wrong or extraordinary for a participant to complement or even adjust its previous submissions in light of additional information in its possession. There is nothing wrong either even if it may appear that the Registry "*decided to adopt the views of the LRV2*".²⁸ The Defence's argument that "*the Registry is not treating both parties on the same footing*"²⁹ is purely speculative. In fact, it is worth recalling that the Registry is a neutral organ of the Court, and the figures provided by the Registry are statistics data collected from authoritative sources. In essence, the Defence's arguments constitute no more than a mere disagreement with the Registry's submissions, which does not warrant granting leave to reply.

15. As regards the Second Issue, the Defence takes issue as to why the relevant figures would not have been available until now.³⁰ The Legal Representative notes that the Registry provided its explanations on the matter.³¹ He posits that again even assuming that the Defence could not have reasonably anticipated that the Registry would submit the relevant figures now, the Defence fails to demonstrate why its further submissions on the matter are warranted. In fact, the Registry was not ordered by Trial Chamber VI to gather the relevant figures in 2020 since the Legal

²⁶ See the Registry's Submissions, *supra* note 11, para. 18.

²⁷ See the Defence's Request, *supra* note 1, para. 18.

²⁸ *Ibid.*

²⁹ *Idem*, para. 19.

³⁰ *Idem*, para. 20.

³¹ See the Registry's Submissions, *supra* note 11, paras. 19-23.

Representative's corresponding request³² was rejected.³³ Regardless of the reasons for the Registry's inability to present the figures earlier, as instructed by the Chamber in its 25 November 2022 Decision, and for the purpose of preparation of its submissions on the estimated number of potential beneficiaries of reparations, the Registry took initiative to collect the relevant figures and these figures are now at the Chamber's disposal and are of the nature to assist the Chamber in its determination. In essence, the Defence seems to be taking issue with the very relevance of the figures on the population size of the affected villages at the time of the events. The Defence's arguments are therefore a mere disagreement on the matter, which is not sufficient for granting leave to reply. The Defence already made observations on the relevance of the figures on the population size of the affected villages,³⁴ and it is submitted that the Chamber will not be assisted by the Defence's further submissions.

16. As regards the Third Issue, by seeking leave to address the sources/providers of the information obtained by the Registry, the Defence aims to challenge the probative value of the information.³⁵ The Legal Representative posits that again the Defence fails to demonstrate why its further submissions are warranted on statistics data collected by the Registry being a neutral organ of the Court. The Defence's arguments, with reference to Dr Gilmore's refusal to provide information, on the existence of "*an obvious bias against the Defence*" and on "*the lack of independence of the [Appointed] expert*"³⁶ are purely speculative. Further, in submitting these arguments, the Defence seems to re-litigate a matter that has already been adjudicated³⁷ by bringing the matter up again

³² See the "Request of the Common Legal Representative of the Victims of the Attacks for an Order to the Registry to collect information pertaining to reparations", [No. ICC-01/04-02/06-2624](#), 9 November 2020.

³³ See the "Decision on the Request of the Common Legal Representative of the Victims of the Attacks for an Order to the Registry to collect information pertaining to reparations" (Trial Chamber VI, Single Judge), [No. ICC-01/04-02/06-2631](#), 18 December 2020.

³⁴ See the "Defence response to "Request of the Common Legal Representative of the Victims of the Attacks for an Order to the Registry to collect information pertaining to reparations", 9 November 2020, ICC-01/04-02/06-2624", [No. ICC-01/04-02/06-2628](#), 20 November 2020.

³⁵ See the Defence's Request, *supra* note 1, para. 21.

³⁶ *Ibid.*

³⁷ See the "Decision on Request on behalf of Mr Ntaganda for disclosure of material relied upon in the Gilmore Expert Report" (Trial Chamber II), [No. ICC-01/04-02/06-2824-Conf](#), 6 February 2023.

rather than filing a request for leave to appeal the relevant decision. In any event, in the present instance, the Chamber being privy to the identity of the information providers is in a position to appreciate alone the weight to be attributed to the figures collected by the Registry. It is worth noting that the figures collected by the Registry, along with the parties' and participants' submissions are only meant to assist the Chamber in estimating the number of potential beneficiaries of reparations, and not to precisely establish that number.

17. As regards the Fourth Issue, the Defence takes issue with the very ability of the Government of the DRC to provide independent and objective figures.³⁸ The Legal Representative submits that the Defence's arguments within the present Issue, and in particular that Joseph Kabila continues to rule over the DRC "*in the shadows*", with reference to a number of press articles,³⁹ are purely speculative and cannot but lead to an absurd conclusion, namely there should be no trust in any data or documents produced by the DRC authorities. The Defence's arguments constitute no more than a mere disagreement on the matter, which does not warrant granting leave to reply.

18. Consequently, the Legal Representative submits that since, as argued *supra*, the Defence failed to demonstrate that the applicable criteria under regulation 24(5) of the RoC have been met, the Defence's Request should be dismissed in its entirety.

19. If nevertheless the Chamber were to grant the Defence leave to present further submissions either based on regulation 24(5) of the RoC or another basis, the Legal Representative submits that he should be given an opportunity to respond. In fact, in essence the Defence effectively seeks leave to present further submissions not only on the Registry's arguments and approach, but also on the weight which can be attributed to the data obtained by the Registry.⁴⁰ Also, as part of its intended submissions, the Defence seems to be intending to address some additional important topics, in

³⁸ See the Defence's Request, *supra* note 1, para. 22.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

particular that *"the Registry is not treating both parties on the same footing"*,⁴¹ the existence of *"an obvious bias against the Defence"*, and *"the lack of independence of the [Appointed] expert"*.⁴² The Legal Representative was not previously given an opportunity to address these topics, and out of fairness should be allowed to do so in response to the Defence's further submissions, if leave is granted by the Chamber.

V. RELIEF SOUGHT

20. For the abovementioned reasons, the Legal Representative respectfully requests the Chamber to:

- **REJECT** the Defence's Request in its entirety.

21. Nevertheless, if the Chamber were to grant the Defence leave to present further submissions either based on regulation 24(5) of the RoC or another basis, the Legal Representative respectfully requests the Chamber to:

- **ALLOW** the Legal Representative to respond to the Defence's further submissions.



Dmytro Suprun
Common Legal Representative of the Victims of Attacks

Dated this 8th day of February 2023

At The Hague, The Netherlands

⁴¹ *Idem*, para. 19.

⁴² *Idem*, para. 21.