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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

Public Redacted Version of the “Response of the Common Legal Representative of the Victims of the Attacks to the “Request on behalf of Mr Ntaganda for disclosure of material relied upon in the Gilmore Expert Report” (No. ICC-01/04-02/06-2815-Conf, dated 23 January 2023)

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”) files his response to the “Request on behalf of Mr Ntaganda for disclosure of material relied upon in the Gilmore Expert Report” (the “Defence Request” or “Request”).¹

2. It is submitted that first, the material requested by the Defence is not disclosable; second, such material is not required for the Defence to comply with Trial Chamber II’s instructions to submit further submissions or possible evidence, if any, on issues relevant to the assessment of the actual damage and harm caused to the health centre in Sayo; and third, non-disclosure of the material causes no prejudice to Mr Ntaganda’s rights. Nevertheless, if the Chamber were to order the disclosure of the material to the Defence, the consent of the concerned victims and other stakeholders regarding the disclosure of their identities and other identifying and contact information to the Defence must be sought, and in case of non-consent necessary redactions must be applied to the requested material. Finally, out of fairness, in light of the different views expressed by the Defence and the Legal Representative, the present response to the Defence Request should also be shared with Dr Sunneva Gilmore (the “Appointed Expert”) to enable her to provide her views on the present issue in an informed manner.

II. PROCEDURAL BACKGROUND

3. On 14 May 2020, Trial Chamber VI appointed four experts (the “Appointed Experts”) and invited them to submit reports to the Chamber, and to notify the parties, the Trust Fund for Victims (the “TFV”), the Victims Participation and Reparations Section (the “VPRS”) and the Prosecution by 28 August 2020.²

¹ See the “Request on behalf of Mr Ntaganda for disclosure of material relied upon in the Gilmore Expert Report”, [No. ICC-01/04-02/06-2812-Conf](#), 16 January 2023.

² See the “Decision appointing experts on reparations” (Trial Chamber VI), [No. ICC-01/04-02/06-2528-Conf](#), 14 May 2020.

4. On 3 July 2020, following a request from the Appointed Experts,³ Trial Chamber VI granted an extension of the deadline for the submission of their reports until 30 October 2020.⁴
5. On 2 November 2020, confidential redacted versions of the Appointed Experts' Reports were filed by the Registry, including the Expert Report on Reparations for Victims of Rape, Sexual Slavery and Attacks on Healthcare by Dr Sunneva Gilmore (the confidential redacted version of the "Expert Report").⁵
6. On 19 January 2021, Trial Chamber VI issued its Decision [REDACTED].⁶
7. On 8 March 2021, Trial Chamber VI issued the "Reparations Order".⁷
8. On 16 March 2021, the Presidency assigned the present case to the newly constituted Trial Chamber II (the "Chamber")⁸. Judge Chang-ho Chung was subsequently elected Presiding Judge of the Chamber.⁹
9. On 12 September 2022, the Appeals Chamber issued its Judgement on the appeals against the Reparations Order.¹⁰

³ See the "Registry Transmission of Appointed Experts' Request for Extension of Time", [No. ICC-01/04-02/06-2549](#), 3 July 2020.

⁴ See the "Decision on Request for an Extension of Time for Filing Experts' Report" (Trial Chamber VI), [No. ICC-01/04-02/06-2553](#), 20 July 2020.

⁵ See the "Registry Transmission of Appointed Experts' Reports" (dated 30 October 2020), [No. ICC-01/04-02/06-2623](#) and [No. ICC-01/04-02/06-2623-Conf-Anx1-Red](#), submitted on 2 November 2020 (the confidential redacted version of the "Joint Experts Report") and [No. ICC-01/04-02/06-2623-Conf-Anx2-Red](#), submitted on 2 November 2020 (the confidential redacted version of the "Expert Report"; jointly the confidential redacted versions of the "Experts' Reports").

⁶ See [REDACTED].

⁷ See the "Reparations Order" (Trial Chamber VI), [No. ICC-01/04-02/06-2659](#), 8 March 2021.

⁸ See the "Decision assigning judges to divisions and recomposing chambers" (Presidency), [No. ICC-01/04-02/06-2663](#), 16 March 2021, p. 7.

⁹ See the "Decision on the Election of the Presiding Judge" (Trial Chamber II), [No. ICC-01/04-02/06-2664](#), 22 March 2021, para. 2.

¹⁰ See the "Judgement 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.

10. On 25 October 2022, through its Implementation Order, the Chamber, *inter alia*, instructed the parties to provide further submissions regarding the actual damage and harm caused to the Sayo health centre as part of the procedure for addressing the errors identified by the Appeals Chamber. These submissions were to be provided by 28 December 2022.¹¹

11. On 12 December 2022, Trial Chamber II granted the request of the Defence for an extension of the applicable time limit to file submissions referred to in the Implementation Order until 30 January 2023.¹²

12. On 21 December 2022, the confidential lesser redacted version and the public lesser redacted version of the Expert Reports were filed by the Registry.¹³

13. On 16 January 2023, the Defence filed its Request.¹⁴

14. On 17 January 2023, the Chamber instructed the Registry to seek the views of the Appointed Expert regarding the disclosure requested by the Defence with the necessary redactions, and to report back to the Chamber within ten days; and also temporarily suspended the deadline for the Defence submissions and possible evidence on the issues relevant to the assessment of the actual damage and harm

¹¹ 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, p. 21 (the “Implementation Order”).

¹² See the “Decision on the Defence request for an extension of the applicable time limit to file submissions referred to in the Implementation Order issued by Trial Chamber II” (Trial Chamber II), [No. ICC-01/04-02/06-2803](#), 12 December 2022. See also the “Public Redacted Version of “Defence request for an extension of the applicable time limit to file submissions referred to in the Implementation Order issued by Trial Chamber II”, dated 6 December 2022, ICC-01/04-02/06-2798-Conf”, [No. ICC-01/04-02/06-2798-Red](#), 7 December 2022.

¹³ See the “Registry Transmission of Confidential Lesser Redacted Version and Public Lesser Redacted Version of Two Reparation Experts’ Reports”, [No. ICC-01/04-02/06-2806](#), 21 December 2022 and “Annex 2: Confidential Lesser Redacted Version of ‘Expert Report on Reparations for Victims of Rape, Sexual Slavery and Attacks on Healthcare’”, [No. ICC-01/04-02/06-2623-Conf-Anx2-Red3](#), 21 December 2022 (the confidential lesser redacted version of the “Expert Report”), and “Annex 2: Public Lesser Redacted Version of ‘Expert Report on Reparations for Victims of Rape, Sexual Slavery, and Attacks on Healthcare’”, [No. ICC-01/04-02/06-2623-Anx2-Red4](#), 21 December 2022 (the public lesser redacted version of the “Expert Report”).

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

caused to the health centre in Sayo.¹⁵ The Registry confirmed receipt of the instructions on the same day.¹⁶

15. On 18 January 2023, the VPRS sought the Chamber's guidance regarding whether the Defence Request can be shared with the Appointed Expert.¹⁷

16. On 19 January 2023, the Chamber directed the Defence to provide its views by the next day regarding whether its Request may be shared confidentially with the Appointed Expert.¹⁸

17. On 20 January 2023, the Defence indicated it had no objection to its Request being shared confidentially with the Appointed Expert,¹⁹ and the Chamber directed the VPRS to transmit the Defence Request to the Appointed Expert.²⁰

18. On the same day, upon the Legal Representative's request,²¹ the Chamber ordered the temporary suspension of the deadline for the submissions and possible evidence on the issues relevant to the assessment of the actual damage and harm caused to the health centre in Sayo for all parties and participants, including the Office of the Prosecutor, the Government of the Democratic Republic of the Congo and, if available, the Appointed Experts.²²

¹⁵ See the Email correspondence from the Chamber dated 17 January 2023 at 12:40.

¹⁶ See the Email correspondence from the Registry dated 17 January 2023 at 17:36.

¹⁷ See the Email correspondence from the Registry dated 18 January 2023 at 16:08.

¹⁸ See the Email correspondence from the Chamber dated 19 January 2023 at 09:05.

¹⁹ See the Email correspondence from the Defence dated 20 January 2023 at 08:23.

²⁰ See the Email correspondence from the Chamber dated 20 January 2023 at 08:57.

²¹ See the Email correspondence from the Legal Representative dated 20 January 2023 at 10:56.

²² See the Email correspondence from the Chamber dated 20 January 2023 at 16:05.

III. CONFIDENTIALITY

19. 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 of these submissions will be filed in due course.

IV. SUBMISSIONS

20. In its Request, the Defence seeks the disclosure of material relied upon by the Appointed Expert, Dr Sunneva Gilmore, in her Report. In particular, this relates to [REDACTED],²³ [REDACTED],²⁴ “Interview 37”,²⁵ and information provided by a “local healthcare provider”²⁶ and collected by an “intermediary”²⁷ (the “Requested Material”).

1) The Requested Material is not disclosable

21. The Legal Representative submits that the Appointed Experts have no general disclosure obligation towards the Defence and nor is the Requested Material disclosable given the scope of the Appointed Experts’ mandate. The Appointed Experts’ mandate and the scope thereof were clearly regulated by Trial Chamber VI’s “Decision appointing experts on reparations”, according to which they were only appointed and instructed to submit their report(s) to the Chamber pursuant to rule 97(2) of the Rules of Procedure and Evidence to assist the Court on specific reparations related issues — and nothing more.²⁸ The Appointed Experts were not instructed as to how consultations were to be conducted, in which format, and were not required to prepare and/or keep records of their interviews and consultations and to communicate those records to the parties and participants at any stage. Ordering the disclosure of

²³ See the Expert Report, *supra* note 13, para. 158

²⁴ *Idem*, para. 161.

²⁵ *Idem*, para. 169.

²⁶ *Idem*, para. 171.

²⁷ *Idem*, para. 179

²⁸ See the “Public redacted version of ‘Decision appointing experts on reparations’” (Trial Chamber VI), [No. ICC-01/04-02/06-2528-Red](#), 14 May 2020, paras. 1, 5, 11 and 14 (the “Decision Appointing Experts”).

the Requested Material to the Defence goes over and above the limited purpose of the appointment of independent experts, which is to assist the Court in determining specific reparations related issues through a report containing the Appointed Experts' own conclusions and recommendations, and the parties and participants have had opportunities to make submissions on the reports.

2) The Requested Material is not necessary and its non-disclosure causes no prejudice to Mr Ntaganda's rights

22. The Legal Representative contends that the Requested Material is not necessary for the Defence, as the information contained in the Expert Report sufficiently reflects the content of the interviews and consultations held by the Appointed Expert.

23. It is submitted that the views expressed by the different stakeholders consulted by the Appointed Experts are not witness statements, and accordingly are not meant to be provided to the Defence in their entirety to enable the Defence to challenge them or, for any other purpose. As outlined by Trial Chamber VI, these views and opinions were expected to be taken into account by the Appointed Experts to reach their own independent conclusions and to formulate recommendations pursuant to the scope of their mandate.²⁹

24. Pursuant to the Implementation Order of the Chamber,³⁰ the parties and participants were only instructed to "*provide further submissions and possible evidence, on the issues relevant to the assessment of the actual damage and harm caused to the health centre in Sayo*".³¹ The Defence has already provided meaningful submissions on the content of the Expert Report, as detailed in the "Defence Appellant Brief against the 8 March Reparations Order"³² and through its Observations on 18 December 2020,³³ and thus

²⁹ *Ibid.*

³⁰ See the Implementation Order, *supra* note 11, p. 21.

³¹ *Idem*, p. 21 and para. 42.

³² See the "Defence Appellant Brief against the 8 March Reparations Order", [No. ICC-01/04-02/06-2675](#), 7 June 2021, paras. 135-139.

³³ See the "Defence Submissions on Reparations", [No. ICC-01/04-02/06-2634-Conf](#), 18 December 2020, para. 136. A public redacted version was filed on 11 January 2021 as: [No. ICC-01/04-02/06-2634-Red](#).

had an opportunity to challenge the Expert Report. The purpose of the Chamber's instructions for further submissions is to provide additional submissions, that is, any new and further submissions that may assist the Chamber in its decision making. The purpose is not to challenge the accounts of victims given to the Appointed Expert or views expressed by other stakeholders.

25. The Legal Representative submits that no access to the Requested Material does not undermine the Defence's ability to conduct its own independent investigations, to collect further information and/or to produce further evidence in relation to the actual damage and harm caused to the health centre in Sayo. Beyond generally arguing that non-disclosure affects the convicted person's rights,³⁴ the Defence fails to demonstrate how the convicted person's rights would be concretely affected should the Requested Material not be disclosed. In fact, the very purpose of the Defence Request seems to be aimed at challenging the views expressed by the concerned victims and other stakeholders, which goes far beyond the purpose of the Chamber's instructions in the Implementation Order.

26. Notably, a confidential lesser redacted version of the Expert Report was filed on 21 December 2022,³⁵ and the redactions contained therein are minimal and do not undermine the Defence's ability to comprehend the conclusions and recommendations made in the Expert Report, or to formulate submissions to assist the Chamber.

3) If the Requested Material were to be disclosed, the victims' and other stakeholders' consent to the disclosure of their identities to the Defence must be sought

27. The Legal Representative takes note of the Chamber's instructions to the Registry to seek the views of the Appointed Expert regarding the disclosure requested by the Defence with the necessary redactions in accordance with article 68 of the Rome

³⁴ See the Defence Request, *supra* note 1, para. 21.

³⁵ See the Expert Report, *supra* note 13.

Statute.³⁶ He submits that if the Chamber were to exceptionally order the disclosure of the Requested Material to the Defence, the identities, and other identifying and contact information of the concerned victims and stakeholders should not be disclosed without their express consent. This principle not only applies to the concerned victims, who are expressly entitled to protection under article 68 of the Statute, but also applies to the concerned intermediaries and other stakeholders who may be at risk on account of the activities of the Court, which is consistent with the jurisprudence of the Court.³⁷

28. As regards victims, the requirement to seek their consent prior to the disclosure of their identities to the Defence has been enforced recently in the present case in which the Chamber instructed the Legal Representative to consult the victims of the attacks included in the sample recently constituted for the purpose of reparations, and further instructed the VPRS and the Legal Representative to apply the necessary redactions to their respective dossiers.³⁸ Notably, none of the victims consulted by the Legal Representative have consented to their identities being disclosed to the Defence.

29. As regards the concerned intermediaries and stakeholders, although the reasons for protecting their identities may be different as compared to the victims, their identities and other identifying and contact information should also not be disclosed to the Defence unless their express consent is provided. In this regard, the reparations system of the Court, which is largely based on the trust and goodwill cultivated

³⁶ See the Email correspondence from the Chamber dated 17 January 2023 at 12:40.

³⁷ See for *e.g.* the “Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled ‘Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU’” (Appeals Chamber), [No. ICC-01/04-01/06-2582 OA18](#), 8 October 2010, footnote 117, referring to the “Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Request for Authorisation to Redact Witness Statements’” (Appeals Chamber), [No. ICC-01/04-01/07-475 OA](#), 13 May 2008, paras. 54-58; the “Redacted Decision on Intermediaries” (Trial Chamber I), [No. ICC-01/04-01/06-2434-Red2](#), 31 May 2010, para. 139(b); and the “Redacted version of the Corrigendum of Decision on the applications by 15 victims to participate in the proceedings” (Trial Chamber I), [No. ICC-01/04-01/06-2659-Corr-Red](#), 08 February 2011, para. 30.

³⁸ 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, p. 21.

between the relevant stakeholders and the Court must be preserved. If every interaction between the relevant stakeholders and the Court leads to a disclosure to the Defence, this would undermine the relevant stakeholders' level of cooperation and trust in the Court, which is inherently required for an effective reparations system.

30. The Legal Representative therefore contends that redactions of the Requested Materials are necessary in order to protect the security, safety and/or well-being of the persons concerned, but also to ensure the proper functioning of the reparations system under the Rome Statute as a whole.

4) The present response to the Defence Request should be shared confidentially with the Appointed Expert

31. The Legal Representative notes the VPRS's request,³⁹ the Chamber's subsequent instructions,⁴⁰ and the Defence's response regarding the possibility to share the Defence Request with the Appointed Expert confidentially,⁴¹ to enable her to meaningfully provide her views as per the Chamber's order. The Legal Representative submits that in light of the different views expressed by the Defence and himself, his response to the Defence Request should also be shared confidentially with the Appointed Expert out of fairness to enable the Appointed Expert to provide her views on the present issue in an informed manner.

V. RELIEF SOUGHT

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

- **REJECT** the Defence Request.

³⁹ See the Email correspondence from the VPRS dated 18 January 2023 at 16:08.

⁴⁰ See the Email correspondence from the Chamber dated 19 January 2023 at 09:05.

⁴¹ See the Email correspondence from the Defence dated 20 January 2023 at 08:23.

33. Nevertheless, if the Chamber were to order the disclosure of the Requested Material to the Defence, the Legal Representative respectfully requests the Chamber to:

- **INSTRUCT** the Registry to seek the consent of the concerned victims and other stakeholders regarding the disclosure of their identities, and other identifying and contact information to the Defence; and
- **INSTRUCT** the Registry to apply the necessary redactions to the Requested Material prior to its disclosure in case of non-consent.

34. Finally, the Legal Representative respectfully requests the Chamber to:

- **INSTRUCT** the Registry to transmit the present response confidentially to the Appointed Expert.

RESPECTFULLY SUBMITTED,



Dmytro Suprun
Common Legal Representative of the Victims of Attacks

Dated this 13th day of February 2023

At The Hague, The Netherlands