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No.: **ICC-01/04-02/06**
Date: **13 February 2023**

TRIAL CHAMBER II

Before: Judge Chang-ho Chung, Presiding Judge
Judge Péter Kovacs
Judge Maria 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 "Request on behalf of Mr Ntaganda for disclosure of material relied upon in the Gilmore Expert Report", dated 16 January 2023, ICC-01/04-02/06-2812

Source: Defence Team of Mr Bosco Ntaganda

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

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Further 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”” issued by Trial Chamber II (“Chamber”) on 25 October 2022 (“Implementation Order”)¹ and to the transmission by the Registry of the confidential lesser redacted versions of the Appointed Experts’ reports on 21 December 2022,² Counsel representing Mr Ntaganda (“Mr Ntaganda” or “Defence”), hereby submits this :

**Request on behalf of Mr Ntaganda for disclosure of material relied upon in the
Gilmore Expert Report
 (“Defence Request”)**

INTRODUCTION

1. The Defence seeks disclosure of material relied upon by Dr Sunneva Gilmore in her Expert Report,³ which is directly relevant to her conclusions on the damage to the Sayo health centre, and the appropriate repair (“Requested Material”).
2. The Defence has been ordered 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”⁴ by 30 January 2023. In its assessment of the damage and harm caused to the Sayo health centre in the Reparations Order,⁵ Trial Chamber VI relied upon the Gilmore Expert Report.⁶ In drawing conclusions relevant to the Sayo health centre, Dr Gilmore cites to and relies upon “[REDACTED]”,⁷

¹ 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](#) (“Implementation Order”).

² Registry Transmission of Appointed Experts’ Reports, 30 October 2020, [Annex 2](#) notified on 3 November 2020, [ICC-01/04-02/06-2623](#) (“Gilmore Expert Report”).

³ *Ibidem*.

⁴ Implementation Order, Disposition.

⁵ Reparations Order, 8 March 2021, [ICC-01/04-02/06-2659](#) (“Reparations Order”).

⁶ See, e.g. Reparations Order, para.242.

⁷ Gilmore Expert Report, para.158.

“[REDACTED]”,⁸ “Interview 37”,⁹ and information provided by a “[REDACTED] healthcare provider”¹⁰ and collected by an “intermediary”.¹¹

3. The Requested Material therefore consists of Dr Gilmore’s interviews and associated material concerning “[REDACTED]”,¹² “[REDACTED]”,¹³ “Interview 37”,¹⁴ and from the cited “[REDACTED] healthcare provider”¹⁵ and collected by the “intermediary”,¹⁶ which are referenced in relation to Dr Gilmore’s conclusions regarding the Sayo health centre. The relevance and disclosability of the Requested Materials are set out below.

CONFIDENTIALITY

4. The Defence Request is filed confidentially pursuant to Regulation 23bis(1) of the Regulations of the Court, as it refers to documents bearing the same classification.

PROCEDURAL BACKGROUND

5. On 14 May 2020, Trial Chamber VI appointed four experts (“Appointed Experts”) and invited them to submit reports to the Chamber, and to notify the parties, the TFV, the Victims Participation and Reparations Section (“VPRS”) and the Prosecution by 28 August 2020.¹⁷

6. On 26 June 2020, Trial Chamber VI issued its First Decision on Reparations, highlighting, *inter alia*, that redactions should be kept to a minimum.¹⁸

⁸ Gilmore Expert Report, para.161.

⁹ Gilmore Expert Report, para.169.

¹⁰ Gilmore Expert Report, para.171.

¹¹ Gilmore Expert Report, para.169.

¹² Gilmore Expert Report, para.158.

¹³ Gilmore Expert Report, para.161.

¹⁴ Gilmore Expert Report, para.169.

¹⁵ Gilmore Expert Report, para.171.

¹⁶ Gilmore Expert Report, para.169.

¹⁷ Decision appointing experts on reparations, 14 May 2020, [ICC-01/04-02/06-2528-Conf.](#)

¹⁸ First Decision on Reparations, 26 June 2020, [ICC-01/04-02/06-2547.](#)

7. On 3 November 2020, confidential redacted versions of the Appointed Experts' Reports were notified to the Defence, including the Expert Report on Reparations for Victims of Rape, Sexual Slavery and Attacks on Healthcare by Dr Sunneva Gilmore ("Gilmore Expert Report").

8. On 12 September 2022, the Appeals Chamber issued its Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled "Reparations Order" partially reversing the Reparations Order ("Appeal Judgment").¹⁹

9. On 25 October 2022, for the purposes of issuing a new Reparations Order addressing the errors identified by the Appeals Chamber, Trial Chamber II instructed the parties to provide further submissions regarding transgenerational harm, and the actual damage and harm caused to the Sayo health centre. The submissions were to be provided within 60 days, by 28 December 2022. The Chamber also instructed the Appointed Experts "to review the redactions to their Reports and additional information".²⁰

10. On 6 December 2022, the Defence requested that the applicable time limit to file submissions regarding transgenerational harm and the Sayo health centre be extended until Monday 30 January. On 12 December 2022, Trial Chamber granted the request.²¹

11. On 21 December 2022, the Registry provided the Defence with a confidential lesser redacted version of the Appointed Experts' Reports,²² with redactions limited in large part to the names of organisations, civil society actors, and practitioners operating in Ituri. No "additional information" was provided.

¹⁹ 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](#).

²⁰ Implementation Order, para.43.

²¹ 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, 12 December 2022, [ICC-01/04-02/06-2803](#).

²² Registry Transmission of Confidential Lesser Redacted Version and Public Lesser Redacted Version of Two Reparation Experts' Reports, 21 December 2022, [ICC-01/04-02/06-2623-Conf-Anx2-Red3](#).

SUBMISSIONS

(i) The Requested Material is Relevant

12. Trial Chamber II has previously held that the Reparations Order, issued by Trial Chamber VI of 8 March 2021, was only “partially reversed” by the Appeals Judgment, and was “remanded to the Chamber to address specific issues.”²³ Trial Chamber II therefore considers the Reparations Order as being operative, and remaining in force.

13. As noted above, the Defence has been ordered 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.”²⁴

14. In assessing the actual damage and harm caused to the health centre in Sayo, the Reparations Order relies on the Gilmore Expert Report.²⁵ For example, Trial Chamber VI relied on the Gilmore Expert Report in its assessment of the cost of repairing the Sayo health centre;²⁶ the adequacy of a focus on rebuilding infrastructure;²⁷ and the cost of reinstating the level of healthcare provision.²⁸

15. In reaching her conclusions on these issues, Dr Gilmore relies directly on an “Interview 37”, and “information collected by an intermediary.”²⁹ Detailed information provided by these individuals directly informs Dr Gilmore’s conclusions, which are then directly relied on by Trial Chamber VI in the Reparations Order. By way of a concrete example, Dr Gilmore notes that “[a]ccording to information collected by an intermediary, a number of property repairs have been carried out, such

²³ Decision on the TFV’s Sixth and Seventh Update Reports on the Implementation of the Initial Draft Implementation Plan, 16 November 2022, [ICC-01/04-02/06-2792](#), para.9.

²⁴ Implementation Order, disposition.

²⁵ Reparations Order, para.242.

²⁶ Reparations Order, para.242, fn.655.

²⁷ Reparations Order, para.242, fn.657.

²⁸ Reparations Order, para.242, fns.658-662.

²⁹ See, e.g. Gilmore Expert Report, fns.667,668,684.

as to the operating theatre and post-operative recovery ward.”³⁰ The Reparations Order then relies on Dr Gilmore’s conclusions which are based on the intermediary’s information.³¹

16. Similarly, the Reparations Order cites to “approximate costs” of medical equipment, that would be potentially required to repair the damage to the Sayo health centre, including an ECG machine, portable ultrasound machine, neonatal incubator, and a small mobile X-ray machine.³² This medical equipment, and its approximate costs, are drawn from the Gilmore Expert Report, [REDACTED] “[REDACTED]” [REDACTED] “[REDACTED].”³³

17. Elsewhere in the Gilmore Expert Report, Dr. Gilmore relies on “[REDACTED]” and “[REDACTED]” to reach her conclusions as to “the impact of the attack on the Saio health clinic”, and the impact on the quality of medical care provided in the relevant region and timeframe.³⁴ Dr. Gilmore also relies on an “[i]nterview with a [REDACTED] healthcare provided, [REDACTED]” to reach her conclusions on the context of the Sayo health centre in the Mongbwalu health zone more generally.³⁵

18. At present, the Defence has no access to these interviews, and the underlying information they contain. If they are to be accorded any weight, the Requested Material must be disclosed to allow for the Defence’s review and consideration, prior to the filing of the Defence’s further submissions on the issues relevant to the health centre in Sayo.³⁶

(ii) The Requested Material is Disclosable

19. A convicted person “enjoys the right to fair and impartial reparations proceedings which includes the principle of equality of arms” affording each party a

³⁰ Gilmore Expert Report, fn.668.

³¹ Reparations Order, para.242, fn.657.

³² Reparations Order, para.242, fn.659.

³³ Gilmore Expert Report, fn.684.

³⁴ Gilmore Expert Report, paras.158,161.

³⁵ Gilmore Expert Report, fn.677.

³⁶ Implementation Order, disposition.

reasonable opportunity to present their case under conditions which do not place them at a substantial disadvantage *vis-à-vis* the other party.³⁷

20. When considering disclosure and redactions of material of this kind, the practice of the Court has been to apply the principle of proportionality, which requires that the non-disclosure (i) restrict the rights of the convicted person only as far as necessary, and (ii) be put in place where they are the only sufficient feasible measure.³⁸ As previously acknowledged in these reparations proceedings by Trial Chamber VI, the guiding principle when carrying out such an assessment is “[REDACTED], [REDACTED], [REDACTED]”.³⁹ In particular, a Chamber should consider “the relevance of the information at issue and the purpose for which it will be relied upon including whether, in reality, its non-disclosure affects the convicted person’s rights”.⁴⁰

21. Without the disclosure of the Requested Material, Mr Ntaganda will be deprived of “[REDACTED]” against him. The Requested Material is comprised of detailed and concrete information, which made its way directly into the Trial Chamber’s calculations and assessment as regards the impact of Mr Ntaganda’s actions were found to have on the Sayo health centre. This information is directly relevant to the additional submissions the Defence has been ordered to provide, and its non-disclosure therefore affects the convicted person’s rights.

22. The Trial Chamber is also aware⁴¹ that the Defence is [REDACTED] [REDACTED] “[REDACTED]” [REDACTED].⁴² Directly relevant to these

³⁷ *Prosecutor v. Thomas Lubanga Dyilo*, Annex A to the Judgment on the appeals against the “Decisions establishing the principles and procedures to be applied to reparations” of 7 August 2012), 3 March 2015, [ICC-01/04-01/06-3129-AnxA](#), para.49.

³⁸ *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’, 18 July 2019, [ICC-01/04-01/06-3466-Red](#), para. 255.

³⁹ [REDACTED], [REDACTED], [REDACTED] (“[REDACTED]”), para.11.

⁴⁰ *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’, 18 July 2019, [ICC-01/04-01/06-3466-Red](#), para.256.

⁴¹ 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, 12 December 2022, [ICC-01/04-02/06-2803](#), para.5, citing Defence request for an extension of the applicable time limit to file

[REDACTED], [REDACTED], is the evidence about the purported destruction and repair of the Sayo health centre provided to Dr Gilmore during the interviews she cites to form her conclusions, which are then relied upon in the Reparations Order.

(iii) The Defence's [REDACTED]

23. The Defence notes [REDACTED], [REDACTED], [REDACTED] "[REDACTED]" [REDACTED] "[REDACTED]".⁴³ In January 2021, a Single Judge of Trial Chamber VI [REDACTED].⁴⁴ Both [REDACTED], [REDACTED], were filed prior to the issuance of the Reparations Order in March 2021.

24. Importantly, [REDACTED], the Single Judge was explicit that "[REDACTED]", [REDACTED] "[REDACTED], [REDACTED]".⁴⁵

25. As such, the reasoning underpinning [REDACTED] is no longer applicable, [REDACTED]. By contrast, the Reparations Order demonstrates that [REDACTED]. This necessarily [REDACTED] "[REDACTED]".⁴⁶ Moreover, the Defence has now been ordered to make further substantive submissions and is currently investigating the issues which are directly addressed by the Requested Material. On this basis, the Requested Material is disclosable.

CONCLUSION

1. Considering the foregoing, the Defence respectfully requests the Chamber to:

GRANT the Defence Request;

ORDER the disclosure of the Requested Material; and

submissions referred to in the Implementation Order issued by Trial Chamber II, 6 December 2022, [ICC-01/04-02/06-2798-Red](#), para.6.

⁴² Implementation Order, paras.38,40,42 and disposition.

⁴³ [REDACTED], [REDACTED], para.17.

⁴⁴ [REDACTED], para.13.

⁴⁵ [REDACTED], para.12.

⁴⁶ *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', 18 July 2019, [ICC-01/04-01/06-3466-Red](#), para.256.

ADJUST the deadline for the Defence submissions regarding the Sayo health centre, if necessary, to allow for the litigation and adjudication of the present request.

RESPECTFULLY SUBMITTED ON THIS 13TH DAY OF FEBRUARY 2023

A handwritten signature in black ink, appearing to read 'StB' with a flourish at the end.

Me Stéphane Bourgon *Ad.E.*, Counsel for Bosco Ntaganda
The Hague, The Netherlands