



Original: **English**

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

Date: **9 June 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 “Defence further submissions on issues related to the Sayo Health Centre”, dated 22 February 2023, ICC-01/04-02/06-2833-Conf

Source: Defence Team of Mr Bosco Ntaganda

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

Legal Representatives of Victims

Ms Sarah Pellet

Mr Tars Van Litsenborgh

Mr Dmytro Suprun

Ms Cherine Luzaisu

Ms Fiona Lau

Counsel for the Defence

Me Stéphane Bourgon, *Ad.E.*

Mrs Kate Gibson

Mr Jacopo Ricci

Mr Benjamin Willame

REGISTRY

Registrar

Mr Osvaldo Zavala Giler

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Mr Philipp Ambach

Trust Fund for Victims

Ms Deborah Ruiz Verduzco

Further to the Appeals Chamber’s “Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled “Reparations Order””, dated 12 September 2022 (“Appeal Judgment”),¹ 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 (“Trial Chamber”) on 25 October 2022 (“Implementation Order”),² and the Trial Chamber’s “Decision on Request on behalf of Mr Ntaganda for disclosure of material relied upon in the Gilmore Expert Report” of 6 February 2023, Counsel for the Convicted Person (“Defence”) hereby submits this:

Defence further submissions on issues related to the Sayo Health Centre

“Defence Submissions”

INTRODUCTION

1. The Appeals Chamber considered that “the Trial Chamber’s findings, in the impugned decision, regarding the issue of the health centre in Sayo, are inadequate. Without further reasoning, it is impossible for the Appeals Chamber to assess their accuracy. It is found that the Trial Chamber failed to meet the requirement to provide a reasoned opinion on the matter.” The Appeals Chamber also recalled that “in awarding reparations, a trial chamber must remain within the confines of the conviction and sentencing decision”³ and that “neither the conviction judgment, nor the sentencing judgment finds that [...] damage was caused to the health centre or loss of adequate healthcare provision was caused to the community.”⁴

2. More particularly, the Appeals Chamber found that the Trial Chamber “erred in failing to properly assess the credibility and reliability of the Second Expert Report, and the basis for its findings, and that it erred in failing to explain how it reached its finding as to causation and harm to the centre”.⁵

3. Consequently, the Appeals Chamber remanded the matter to the Trial Chamber for it to address it again, “taking into account submissions by the parties, addressing the issue of

¹ Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled “Reparations Order”, 12 September 2022, ICC-01/04-02/06-2782 (“Appeal Judgment”).

² 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”).

³ Appeal Judgment, para.540.

⁴ Appeal Judgment, para.548.

⁵ Appeal Judgment, para.548.

disclosure to the Defence of relevant information, and addressing the liability of Mr Ntaganda for repair in this respect”.⁶

4. In light of these findings, the Trial Chamber invited the parties and participants to provide additional submissions regarding “the actual damage and any harm caused to the Health Centre in Sayo, the individual victims, and the community as a whole for loss of adequate healthcare provisions, and the causal nexus between any harm and the crime of intentionally directing attacks against protected objects, namely the health centre in Sayo.”⁷

5. These Defence Submissions are filed further to the Trial Chamber’s instructions.

CONFIDENTIALITY

6. The Defence Submissions are classified as confidential pursuant to Regulation 23bis RoC, given that they refer to and make reference to confidential filings. A public redacted version will be prepared and filed at the earliest opportunity.

PROCEDURAL HISTORY

7. On 14 May 2020, Trial Chamber VI issued its Decision appointing four experts on reparations (‘Appointed Experts’), including Dr Sunneva Gilmore.⁸

8. 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 (“Dr. Gilmore Report”).⁹

9. On 8 March 2021, Trial Chamber VI issued the Reparations Order.

10. On 12 September 2022, the Appeals Chamber issued its Judgment on the appeal against the Reparations Order (“Appeal Judgment”). The Appeal Judgment reversed the Trial Chamber’s findings in relation to the health centre in Sayo and remanded the matter to the Trial Chamber.¹⁰

11. On 25 October 2022, Trial Chamber II issued the Implementation Order, instructing (i) all parties and participants, including the Office of the Prosecutor, the DRC Government and,

⁶ Appeal Judgment, para.549.

⁷ Implementation Order, para.42.

⁸ Decision appointing experts on reparations, 14 May 2020, ICC-01/04-02/06-2528-Conf.

⁹ Registry Transmission of Appointed Experts’ Reports, 30 October 2020, ICC-01/04-02/06-2623, notified on 3 November 2020.

¹⁰ Appeal Judgment, para.549.

if available, the Appointed Experts, 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; and (ii) the Appointed Experts, if available, to review the redactions to their Reports and additional information, indicating whether lesser redacted versions of the confidential and public redacted versions could be filed or justify the need to maintain their current classification.¹¹

12. 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.¹² On 12 December 2022, the Trial Chamber granted the request.¹³

13. On 21 December 2022, the Registry provided the Defence with a confidential lesser redacted version of the Appointed Experts' Reports, with redactions limited in large part to the names of organisations, civil society actors, and practitioners operating in Ituri.¹⁴ No "additional information" was provided.

14. On 16 January 2023, the Defence submitted a request seeking disclosure of certain material relied upon by the Appointed Expert in her Report ("Requested Material") as well as an adjustment of the deadline for submissions on these matters.¹⁵

15. On 17 January 2023, the Trial Chamber instructed the Registry to seek the views of the Appointed Expert regarding the disclosure with necessary redactions of the Requested Material. The Chamber also temporarily suspended the deadline for the filing of the Defence's submissions and possible evidence on these issues.¹⁶

16. On 20 January 2023, the Chamber extended the temporary suspension of the deadline for submissions and possible evidence related to the actual damage and harm caused to the health centre in Sayo.¹⁷

¹¹ Implementation Order.

¹² Defence request for an extension of the applicable time limit to file submissions referred to in the Implementation Order issued by Trial Chamber II, 6 December 2022, ICC-01/04-02/06-2798-Red.

¹³ 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.

¹⁴ Registry Transmission of Confidential Lesser Redacted Version and Public Lesser Redacted Version of Two Reparation Experts' Reports ('Registry Transmission'), 21 December 2022, ICC-01/04-02/06-2806.

¹⁵ Request on behalf of Mr Ntaganda for disclosure of material relied upon in the Gilmore Expert Report, 16 January 2023, ICC-01/04-02/06-2812-Conf

¹⁶ Email from the Chamber's Legal Officer, 17 January 2023, 12:40.

¹⁷ Email from the Chamber's Legal Officer, 20 January 2023, 16:04.

17. On 30 January 2023, the Registry submitted Dr. Gilmore's views.¹⁸ She indicated that providing any information relating to the interviewees' identity would compromise their safety and vitiate their consent and confidentiality; and that the relevant information from interviews was included in the Report.

18. On 2 February 2023, [REDACTED], [REDACTED], [REDACTED], [REDACTED].¹⁹

19. On 6 February 2023, the Chamber issued its decision, denying [REDACTED] Mr. Ntaganda's request for disclosure of material relied upon in Dr. Gilmore Report, and directing all parties and participants to provide further submissions and evidence on the issues relevant to the assessment of the actual damage and harm caused to the health centre in Sayo, within 15 days from the notification of the decision;²⁰

20. On 7 February 2023, the Office of the Prosecutor filed its submissions.²¹

21. On 14 February 2023, the Registry transmitted to the parties the observations of the Democratic Republic of Congo ("DRC") on the issues relevant to the assessment of the actual damage and harm caused to the health centre in Sayo.²² The DRC submits [REDACTED].²³

SUBMISSIONS

I. The applicable standard to award reparations

22. The Appeals Chamber recalled the following principles applicable to reparations, namely that:

- i. "the purpose of reparations proceedings is for the Trial Chamber to quantify the harm caused by the crimes for which Mr Ntaganda was convicted, to the appropriate

¹⁸ Transmission of Appointed Expert Sunneva Gilmore's views on the Defence Request to disclose material relied upon in her Report (ICC-01/04-02/06-2812-Conf), 30 January 2023, ICC-01/04-02/06-2818-Conf.

¹⁹ Annex 1 to the Decision on Request on behalf of Mr Ntaganda for disclosure of material relied upon in the Gilmore Expert Report, 6 February 2023, ICC-01/04-02/06-2824-Conf-Anx1.

²⁰ Decision on Request on behalf of Mr Ntaganda for disclosure of material relied upon in the Gilmore Expert Report, 6 February 2023, ICC-01/04-02/06-2824-Conf.

²¹ Prosecution's submissions pursuant 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, 7 February 2023, ICC-01/04-02/06-2827-Conf ("OTP Submissions on Sayo").

²² Transmission of the Democratic Republic of Congo on the issues relevant to the assessment of the actual damage and harm caused to the health centre in Sayo, 13 February 2023, ICC-01/04-02/06-2830.

²³ Annex III to the Transmission of the Democratic Republic of Congo on the issues relevant to the assessment of the actual damage and harm caused to the health centre in Sayo, 13 February 2023, ICC-01/04-02/06-2830-Conf-AnxIII.

standard of proof and based on evidence of a causal nexus between the crimes in question and the harm alleged”;²⁴

- ii. “in order to protect the rights of the convicted person and ensure that reparations are not awarded to remedy harms that are not the result of the crimes for which he or she was convicted and to also protect the right of the victims to appeal the exclusion of any harms that they consider have been shown to be caused by these crimes” [the Appeals Chamber] referred to the need for a trial chamber to “clearly define the harms that result from the crimes for which the person was convicted”;²⁵
- iii. “the Court’s statutory framework provides for the convicted person to be able to challenge any evidence that could potentially be relied upon in the eventual order for reparations”;²⁶ and
- iv. “harm cannot be attributed to a convicted person if a break in the chain of causation is established in a particular case.”²⁷

II. The credibility and reliability of the Second Expert Report and the basis of its findings

23. The Appeals Chamber found that the Trial Chamber’s error in relation to causation and harm to the Sayo health centre was premised on its failure to properly assess the credibility and reliability of the Second Expert Report, and the basis for its findings.²⁸

24. Precisely with the aim of providing detailed submissions on the reliability of the Second Expert report, the Defence sought access to the underlying material and information relied upon by Dr. Gilmore in her analysis.²⁹ Regrettably, Dr. Gilmore declined to provide such information to the Defence.³⁰ What is more, [REDACTED], [REDACTED].³¹

²⁴ Appeal Judgment, para.531.

²⁵ Appeal Judgment, para.531.

²⁶ Appeal Judgment, para.531.

²⁷ Appeal Judgment, para.15.

²⁸ Appeal Judgment, para.548.

²⁹ Request on behalf of Mr Ntaganda seeking the lifting of redactions applied to the Appointed Experts’ reports, 29 December 2020, ICC-01/04-02/06-2636-Conf, para.17; Request on behalf of Mr Ntaganda for disclosure of material relied upon in the Gilmore Expert Report, 16 January 2023, ICC-01/04-02/06-2812-Conf.

³⁰ Annex to the Transmission of Appointed Expert Sunneva Gilmore’s views on the Defence Request to disclose material relied upon in her Report (ICC-01/04-02/06-2812-Conf), 30 January 2023, ICC-01/04-02/06-2818-Conf-Anx, p.1.

³¹ Annex 1 to the Decision on Request on behalf of Mr Ntaganda for disclosure of material relied upon in the Gilmore Expert Report, 6 February 2023, ICC-01/04-02/06-2824-Conf-Anx1. As recent as December 2022, she complied with the Trial Chamber’s request to provide a lesser-redacted version of her report, without the benefit of recordings and notes.

25. In the absence of the recordings of the interviews conducted by Dr. Gilmore, and the unavailability of her notes, it is not possible to assess the credibility of her sources, or the reliability and probative value that can be accorded to her report.

26. In addition, the Defence offers the following submissions regarding the Second Expert Report.

27. First, Dr. Gilmore undermined her own conclusions on damage when she stated that “[REDACTED], [REDACTED]”.³² Indeed, Dr. Gilmore neither established, nor stated when the health centre became functional again. However, the evidence adduced at trial establishes that: (i) the UPC/FPLC remained in Mongbwalu and Sayo until the beginning of March 2003 when they were chased out by UPDF, APC and Lendu combatants;³³ (ii) during this period, FPLC 401 Brigade monitored the situation of the civilian population closely;³⁴ (iii) reports continuously indicated the situation as being calm;³⁵ (iv) the civilian population had resumed its regular activities;³⁶ (v) significant incidents involving the civilian population were reported to the leadership of FPLC 401 Brigade including *inter alia*, the murder of one Lendu civilian by a member of the FPLC who was found guilty of this crime and executed by firing squad in public, before the civilian population;³⁷ (vi) civilians who returned in Sayo after the attack were neither disturbed nor intimidated by UPC soldiers who were present;³⁸ and (vii) in Sayo, civilians and UPC soldiers lived in harmony.³⁹ [REDACTED], who came back later, does not address the situation in Sayo and Mongbwalu during this period. On this basis, it can be concluded pursuant to the applicable balance of probabilities standard that the Sayo health centre became functional again during this period. In these circumstances, Dr. Gilmore's conclusions regarding the extent of Mr Ntaganda's liability for the loss of adequate healthcare provisions caused to the community must be disregarded.

³² Defence Appellant Brief against the 8 March Reparations Order, 7 June 2021, ICC-01/04-02/06-2675 ("Defence Appellant Brief"), para.138, *citing* Dr. Gilmore Report, para.169. *See also* Appeal Judgment, para.547.

³³ [REDACTED].

³⁴ *See for instance*, DRC-OTP-0017-0053, DRC-OTP-0017-0057, DRC-OTP-0017-0058, DRC-OTP-0017-0063, DRC-OTP-0017-0065, DRC-OTP-0017-0069.

³⁵ *See for instance* DRC-OTP-0017-0033, DRC-OTP-0017-0036, DRC-OTP-0017-0042, DRC-OTP-0017-0044, DRC-OTP-0017-0045, DRC-OTP-0017-0047, DRC-OTP-0017-0048, DRC-OTP-0017-0053, DRC-OTP-0017-0055, DRC-OTP-0017-0057, DRC-OTP-0017-0059, DRC-OTP-0017-0061, DRC-OTP-0017-0064, DRC-OTP-0017-0066, DRC-OTP-0017-0067, DRC-OTP-0017-0068, DRC-OTP-0017-0071, DRC-OTP-0017-0075, DRC-OTP-0017-0077, DRC-OTP-0017-0084, DRC-OTP-0017-0085, DRC-OTP-0017-0086, DRC-OTP-0017-0087, DRC-OTP-0017-0088, DRC-OTP-0017-0093, DRC-OTP-0017-0100; *See also*, **P-886**, T-40-CONF-ENG, pp.16-17.

³⁶ DRC-OTP-0017-0054, DRC-OTP-0017-0056.

³⁷ DRC-OTP-0017-0097, DRC-OTP-0017-0098.

³⁸ **P-886**: T-40-CONF-ENG, pp.16-17.

³⁹ **P-886**: T-40-CONF-ENG, p.17.

28. Second, Dr. Gilmore's statements about the vulnerability of the population *via* the destruction of healthcare facilities, which were relied upon by the Trial Chamber to find that “the attack exacerbated the vulnerabilities of the civilian population”,⁴⁰ are based on modern-day examples, rather than being related to alleged damage in 2002. The Appeals Chamber confirmed that “in fact, the Second Expert Report did not give a view specifically in relation to the health centre in Sayo. It footnoted to a report by MSF in 2020, regarding an attack in Ituri that year”.⁴¹

29. Third, Dr. Gilmore's conclusion – based on the [REDACTED] and other information obtained from unknown and unavailable sources - that the damage to the Sayo health centre was extensive, and was caused by the UPC/FPLC, is baseless.⁴² Notably, the Appeals Chamber recalled Trial Chamber VI's finding that “[...] more than one projectile was fired at the health centre, and that the centre was intentionally made the object of the attack, it is not clear on the basis of the evidence whether the weapon used destroyed the health centre in full or merely damaged it. It is therefore not clear whether the centre was damaged as a result of the crime.”⁴³ Dr. Gilmore's report is of no assistance in establishing otherwise.

30. Fourth, Dr. Gilmore's report is contradictory when it asserts that “it would be inappropriate and disproportionate for Mr Ntaganda to be liable for the full cost of a new health centre”,⁴⁴ but then concludes that Mr Ntaganda should be liable for the full cost of large equipment, transport, maintenance for five years, equipment and medication, and the costs for one doctor and two nurses for five years.⁴⁵ In fact, Dr. Gilmore omitted to even consider the break in the chain of causality, readily apparent in the evidence.

III. The actual damage and any harm caused to the Health Centre in Sayo, the individual victims, and the community as a whole

A. The Sayo Health Centre before the attack

31. To determine Mr. Ntaganda's liability for harm caused to the Sayo health centre, it is necessary to begin by establishing the state and functioning of the health centre *before* the attack. Only then, can the actual damage to the structure of the centre and / or limitation in its functioning, directly resulting from the attack, be established. Even the panorama adduced in

⁴⁰ Reparations Order, 8 March 2021, ICC-01/04-02/06-2675, para.159.

⁴¹ Defence Appellant Brief, para.138. *See also* Appeal Judgment, para.547.

⁴² Defence Appellant Brief, para.137.

⁴³ Appeal Judgment, para.538.

⁴⁴ Dr. Gilmore Report, para.168.

⁴⁵ Dr. Gilmore Report, paras.173,175.

evidence by the Prosecution – including pictures of the Sayo health centre – is of no assistance, as it dates from 2014.⁴⁶ Consideration must also be given to the prevailing situation and fighting that took place in Sayo in the months preceding the attack, when Lendu combatants arrived from various areas and occupied the town, chasing away Hema civilians who lived there.⁴⁷ In this regard, [REDACTED], [REDACTED], appears most relevant to establish the state of the health centre at the relevant time.

32. [REDACTED] the health centre before the attack as only one room divided into two parts; one part was the dispensary, and the other part was the maternity ward, which during the war was actually used to treat wounded people.⁴⁸ In total it only had 14 beds.⁴⁹ It was only at a later time, after the relevant events, that other buildings were added.⁵⁰ At the time of the attack, only five people were being treated at the health centre: three wounded people and one woman who had come to the centre because her son was ill.⁵¹ Importantly, [REDACTED]: [REDACTED].⁵² On the day of the attack, [REDACTED],⁵³ [REDACTED].⁵⁴ There is no reference to a doctor being steadily present at the centre. [REDACTED], [REDACTED],⁵⁵ left the scene before UPC/FPLC set foot in Sayo.⁵⁶

33. Therefore, it stems from the foregoing that: (i) the Sayo Health Centre was a very rudimentary and basic structure, with only a section of a single room dedicated to treatment of the wounded; (ii) later interventions on the structure did not resolve in renovation of the existing buildings, but added new buildings which were not present in November 2002; and (iii) at the time of the attack, the centre had very limited functionality, as demonstrated by the scarce personnel employed, and the absence of any doctor at the premises. This is the starting point to assess any damage that can be attributed to the convicted person.

B. Material damage to the Sayo Health Centre

34. Regarding the material damage, the Appeals Chamber found that “neither the Conviction Judgment nor the Sentencing Judgment finds that, as a result of that crime, damage

⁴⁶ DRC-OT-2083-0083.

⁴⁷ **P-886**: T-39-CONF-ENG, pp.25-30

⁴⁸ [REDACTED].

⁴⁹ [REDACTED].

⁵⁰ [REDACTED].

⁵¹ [REDACTED].

⁵² [REDACTED].

⁵³ [REDACTED].

⁵⁴ [REDACTED].

⁵⁵ [REDACTED].

⁵⁶ [REDACTED].

was caused to the health centre.”⁵⁷ In this context, a review of the information currently before the Chamber is relevant.

35. [REDACTED]: [REDACTED] Sayo in March 2003, the building had not been destroyed. On the contrary, the only visible damage was to the doors⁵⁸ and the windows.⁵⁹ Indeed, [REDACTED] it was not the health centre that had been hit by rocket launcher, but another building in the area.⁶⁰ This is also confirmed by the testimony of P-815, who stated that when he returned to Sayo in March 2003, “the dispensary remained intact”,⁶¹ and by the testimony of Mr. Ntaganda, who stated that when he arrived in Sayo, he observed where the two B-10 projectiles he fired from the *apartaments* had landed, well away from the health centre.⁶²

36. Significantly, [REDACTED], [REDACTED] P-0815,⁶³ testified that he only returned to Sayo a week after the “Lendu combatants and the Ugandans” had driven out the UPC and taken control of the area.⁶⁴ Thus, it cannot be concluded that the doors and windows had been damaged during the events of November 2002 as opposed to during the fighting in early March 2003, when the UPDF, APC and Lendu militia chased out the UPC from Mongbwalu and Sayo.

37. As for the interior of the building, [REDACTED] equipment, mattresses and medication had been taken, and that “there was no piece of furniture at all”.⁶⁵ However, [REDACTED] on this point is contradictory: [REDACTED], the beds were still there.⁶⁶ Further, [REDACTED], just like P-815,⁶⁷ is not in a position to know who took the equipment from the centre. Moreover, he did not specify what equipment was taken, and gave no additional details. No damage to the interior can thus be established with precision, even pursuant to the balance of probabilities standard.

38. *Information gathered by Dr. Gilmore:* In her report, Dr. Gilmore gathered information from two unknown individuals in relation to the Sayo health Centre, namely an healthcare practitioner [REDACTED], and an individual generally referred to as an ‘intermediary’. Concerning the material damage to the centre, no useful information is provided, besides the

⁵⁷ Appeal Judgment, para.539.

⁵⁸ [REDACTED].

⁵⁹ [REDACTED].

⁶⁰ [REDACTED].

⁶¹ **P-815**, T-76-CONF-ENG, p.60.

⁶² **D-300**, T-217-CONF-ENG, pp.50-51.

⁶³ See OTP Submissions on Sayo, para.9 and fn.14.

⁶⁴ [REDACTED].

⁶⁵ [REDACTED].

⁶⁶ [REDACTED].

⁶⁷ **P-815**, T-76-CONF-ENG, p.62.

‘intermediary’ stating that “a number of property repairs have been carried out, such as to the operating theatre and post-operative recovery ward”.⁶⁸ No information is provided as to what exactly was repaired, when, or by whom. As previously mentioned, no interview notes, let alone recordings, are available.

39. In addition, Dr. Gilmore referred to information gathered by VPRS - that an NGO made some repairs in 2005⁶⁹ - as well as to an article by MSF dated 5 June 2020. As the Appeals Chamber found,⁷⁰ these sources do not demonstrate that any material damage was caused to the centre at the relevant time.

40. In light of the paucity of information available, and consistent with Trial Chamber VI’s findings in the Sentencing Judgement,⁷¹ Dr. Gilmore concluded that “[g]iven that the Chamber was unable to determine whether the Saïo health centre was destroyed or damaged by the UPC/FPLC it would be inappropriate and disproportionate for Mr Ntaganda to be liable for the full cost of a new health centre.”⁷²

41. No other information, suggesting that the Sayo Health Centre suffered any material damage in the context of the First Operation, is available. Considering that neither the Conviction Judgment nor the Sentencing Judgment finds that, as a result of that crime, damage was caused to the health centre,⁷³ the information currently available to the Trial Chamber does not permit a finding that Mr Ntaganda is responsible for any material damage to the health centre in Sayo. Even if the Trial Chamber were to impute any material damage arising from the attack of November 2002 to Mr Ntaganda, his liability cannot exceed the cost to replace the centre’s entrance door and windows. In the absence of additional reliable and tested evidence, it cannot be assumed that the attack of November 2002, for which Mr. Ntaganda was convicted, caused any additional damage beyond what is actually established.

C. Damage to individual victims

42. Concerning damage to individual victims. [REDACTED] at the time of the attack, only five people were being treated at the health centre: three wounded people and one woman who had come to the centre because her son was ill.⁷⁴ Notably, Trial Chamber VI was neither able

⁶⁸ Dr. Gilmore Report, fn.668.

⁶⁹ Dr. Gilmore Report, fn.663.

⁷⁰ Appeal Judgment, paras.547-548.

⁷¹ Sentencing judgment, 7 November 2019, ICC-01/04-02/06-2442, para.153.

⁷² Dr. Gilmore Report, para.168.

⁷³ Appeal Judgment, paras.539,548.

⁷⁴ [REDACTED].

to establish the fate of the three wounded persons nor to attribute the death of the baby to UPC/FPLC.⁷⁵ Moreover, as noted by the Appeals Chamber, "it is unknown whether patients made applications to obtain reparations in relation to the destruction of the Sayo health centre."⁷⁶ The situation remains the same following the transmission to the Defence of 171 victims' dossiers contained in the sample assemble by the Trial Chamber. In the event any such applications exist, which are not included in the sample, they should be disclosed forthwith.

43. The Defence does not oppose reparations being awarded to individual victims, if any, who suffered harm as a result of being deprived healthcare, otherwise available in Sayo or Mongbwalu, during the limited time the Sayo health centre was not functioning. However, applicants must be held to a strict evidentiary standard, *i.e.* (i) they must be able to establish that they were in need of medical assistance during or immediately following the First Operation; (ii) they were denied treatment at the Sayo health centre; (iii) in normal circumstances they would have been able to obtain the necessary healthcare at the Sayo health centre; (iv) neither they were not able to obtain the necessary healthcare in Mongbwalu or in the proximity; and (v) they suffered harm as a result.

44. In this context, the prevailing circumstances at the time are crucial and must be considered, namely: (i) in November 2002, the Sayo Health Centre was a very simple and basic structure, heavily understaffed, with very limited capability and without a doctor steadily present at the premises; (ii) at the time of the First Operation, hardly any civilian population was left in Sayo;⁷⁷ and (iii) the wider area of Mongbwalu was served by other better-equipped hospitals and medical centres.⁷⁸

D. Damage to the community as a whole for loss of adequate healthcare provisions

45. At the outset, it is noteworthy to recall the Appeals Chamber findings that: (i) neither the Conviction Judgment nor the Sentencing Judgment finds that, as a result of Mr Ntaganda's crime of intentionally directing attacks against protected objects, namely the health centre in Sayo, loss of adequate healthcare provision was caused to the community;⁷⁹ and (ii) the Trial Chamber erred in finding that the attack "exacerbated the vulnerability and suffering of the civilian population" simply "citing to the Second Expert Report, without any analysis of what

⁷⁵ Judgment, 8 July 2019, ICC-01/04-02/06-2359, fn.1477,1480.

⁷⁶ Appeal Judgment, para.543.

⁷⁷ [REDACTED].

⁷⁸ Dr. Gilmore Report, para.170.

⁷⁹ Appeal Judgment, para.548.

the expert stated, what she relied on to make her assertions, and whether what she stated was credible.”⁸⁰ Such analysis yields the conclusion that the “civilian population” did not suffer any such harm.

46. Whereas the Prosecution submits that “the UPC/FPLC’s attack on the Sayo health centre caused a significant interruption of service both during the attack and for a considerable period thereafter.”⁸¹ This assertion is unsupported by any existing or new evidence. More importantly, it entirely omits to consider the break in the chain of causality addressed below.

47. First, it must be stressed that before the attack of November 2002, “Sayo was the HQ of the Lendu militia”⁸² and the APC⁸³ and thus the health centre was mainly used to treat wounded combatants.⁸⁴ This is a relevant consideration to evaluate the existence of any damage suffered by the civilian population. Consideration must also be given to the atrocious living conditions of the civilian population imposed by Lendu combatants in Sayo before the November 2002 events. The evidence reveals that Lendu combatants coming from many different places, including Lipri, Kpandroma, Fataki, and Djugu, attacked and occupied Sayo in the preceding 12 months, chasing out the Hema, and mistreating the civilian population, including by cutting ears and practicing cannibalism.⁸⁵

48. Second, whether the community around Sayo, considered as a whole, suffered any harm for loss for adequate healthcare, rests on the continued functioning of the Sayo health centre after November 2002 and / or in the availability of healthcare services thereafter in Mongbwalu or other dispensaries.

49. Notably, Dr. Gilmore concluded that “[REDACTED], [REDACTED].”⁸⁶ No further information is provided by Dr. Gilmore or is available in this regard. Pursuant to the balance of probabilities standard, and in light the evidence previously referred to,⁸⁷ “soon” actually refers to the period during which the UPC/FPLC was present in Sayo and Mongbwalu. In this regard, [REDACTED]’s assertion that the Sayo health centre was still closed (had not reopened) when he returned in March 2003, must be disregarded. Indeed, [REDACTED], he returned to Sayo a week after the “Lendu combatants and the Ugandans” had driven out the UPC and taken control

⁸⁰ Appeal Judgment, paras.544,548.

⁸¹ OTP Submissions on Sayo, para.10.

⁸² [REDACTED].

⁸³ **P-886**: T-38-CONF-ENG, p.78.

⁸⁴ Judgment, 8 July 2019, ICC-01/04-02/06-2359, paras.476-477.

⁸⁵ **P-907**: T-91-CONF-ENG, p.31: **P-886**: T-39-CONF-ENG, pp.25-30,54.

⁸⁶ Dr. Gilmore Report, para.169.

⁸⁷ See *supra*, para.27.

of the area.⁸⁸ What [REDACTED] saw when he entered the health centre on the day he returned – *i.e.* "the pavements were covered with blood, and we found three spare bullets"⁸⁹ – neither matches nor corresponds to the state of the health centre when he left. Rather, what [REDACTED] observes on that day is the result of the fighting in early March 2003, when the UPDF, Lendu combatants and APC chased out the remaining elements of FPLC under the command of Kisembo.⁹⁰ In any event, in light of the evidence on the record, this cannot be excluded.

50. What is more, to define “reduced capacity”, Dr. Gilmore focused on [REDACTED], [REDACTED], [REDACTED].⁹¹ Regarding the former, Dr. Gilmore relied on the account [REDACTED]: “[REDACTED], [REDACTED], [REDACTED]”.⁹² Notably, this statement is directly contradicted by [REDACTED], [REDACTED] before the attack of November 2002, there were only 14 beds in the centre.⁹³ [REDACTED], [REDACTED],⁹⁴ [REDACTED]. On a balance of probabilities, his testimony must be accorded more weight and cannot be discounted. Thus, the assertion that the number of available beds was reduced following the attack is simply false.

51. As regards the personnel employed at the centre, [REDACTED] Dr. Gilmore gave an account of the current functioning of the centre, which is virtually identical to [REDACTED] before the attack. More particularly, [REDACTED]: (i) the operating room – not even available at the relevant time - can only be used by a surgeon from the Mongbwalu General Hospital;⁹⁵ (ii) serious cases require referral to the Mongbwalu Hospital;⁹⁶ and (iii) the doctor only visits the centre once per week.⁹⁷ [REDACTED] a similar situation in November 2002: (i) the centre only had two employees (one nurse and one woman who helped deliver babies);⁹⁸ (ii) no doctor worked or was present at the centre;⁹⁹ and (iii) cases had to be referred to Mongbwalu. Notably, [REDACTED] the existence of an operating room; he referred solely a dispensary and a maternity ward.¹⁰⁰ In addition, [REDACTED] the issues and limitations faced by the centre at the time of the interview in 2020; no reference is made to these issues and limitations being

⁸⁸ [REDACTED].

⁸⁹ [REDACTED].

⁹⁰ [REDACTED].

⁹¹ Dr. Gilmore Report, para.169 and fn.667.

⁹² Dr. Gilmore Report, fn.667.

⁹³ [REDACTED].

⁹⁴ [REDACTED]. [REDACTED], [REDACTED]. *See supra*, para.32.

⁹⁵ Dr. Gilmore Report, fn.667.

⁹⁶ *Ibidem*.

⁹⁷ *Ibidem*.

⁹⁸ [REDACTED].

⁹⁹ [REDACTED].

¹⁰⁰ [REDACTED].

non-existent in November 2002, or having been exacerbated as the result of the November 2002 events.¹⁰¹

52. Therefore, no information suggests that the centre suffered a reduction in its functioning or capabilities following the November 2002 attack, besides the very short period of time when it was closed. Thus, the expert's conclusion that the attack "exacerbated the vulnerability and suffering of the civilian population" does not find any basis in the evidence. In short, no evidence or information currently available supports a finding of harm suffered by the community as a whole.

IV. The causal link and breaks in the chain of causality

53. In relation to breaks in the chain of causality, the Appeals Chamber noted that Trial Chamber VI "[...] generally explained the need for proof of a chain of causation when establishing that harm has been caused by one of the crimes for which Mr Ntaganda was convicted and that breaks in that chain of causation should be taken into account."¹⁰² However, the Appeals Chamber also found that Trial Chamber VI "did not consider the issue specifically when addressing harm to the health centre in Sayo."¹⁰³

54. The Appeals Chamber further held that Trial Chamber VI "[...] had an obligation to ensure that the chain of causation was established [...] and that the Trial Chamber erred in failing to properly reason its decision as to the chain of causation establishing that Mr Ntaganda is responsible for the harm caused to the health centre in Sayo."¹⁰⁴ Accordingly, the Appeals Chamber remanded the matter to the Trial Chamber.¹⁰⁵

55. In addition to the above submissions regarding the absence of harm caused to the health centre in Sayo, as well as to individual civilians and the community as a whole, the Defence submits that even if the Trial Chamber were to impute any responsibility on Mr Ntaganda - for harm caused to the health centre, to individual civilians or to the community as a whole, in relation to the attack on the Sayo health centre - a break in the chain of causality significantly limits such liability.

56. Indeed, the evidence admitted at trial establishes that: (i) the UPC / FPLC was present in Mongbwalu and Sayo from the beginning of the First Operation in November 2002 until

¹⁰¹ Dr. Gilmore Report, fn.667.

¹⁰² Appeal Judgment, para.580.

¹⁰³ *Ibidem*.

¹⁰⁴ Appeal Judgment, para.581.

¹⁰⁵ *Ibidem*.

early March 2003;¹⁰⁶ (ii) the UPC / FPLC was present in Bunia from, on or about 6 August 2002 until 6 March 2003;¹⁰⁷ (iii) As a result of the fighting in Bunia between the UPC / FPLC on one hand and the Lendu combatants, APC and UPDF on the other hand, on 6 March 2003, the UPC / FPLC were chased from Bunia;¹⁰⁸ (iv) on the same day, the UPC / FPLC Chief of the General Staff, Floribert Kisembo, went to Bunia with the remaining elements of the UPC / FPLC to consolidate their position in Sayo and Mongbwalu;¹⁰⁹ (v) shortly thereafter, the UPDF along with the APC and Lendu Combatants launched an offensive on Mongbwalu and Sayo, chasing out the UPC / FPLC, Kisembo and any remaining UPC / FPLC elements from Mongbwalu and Sayo who went to Mamedi;¹¹⁰ (vi) from that moment on, Sayo and Mongbwalu were occupied by Lendu Combatants, APC, UPDF and a little later by another armed group – supported by the UPDF – called FAPC;¹¹¹ and (vii) despite an attempt to return to Mongbwalu in June 2003, the UPC / FPLC was never again present in Mongbwalu, let alone in Sayo.¹¹²

57. In these circumstances, the UPC / FPLC having been chased out by force from Sayo and Mongbwalu, by other armed groups - including the UPDF from Uganda, the APC and Lendu Combatants – cannot be held accountable, from that moment on, for any harm caused to the health centre in Sayo, individual civilians and the community as a whole, as a result of the attack on the health centre in Sayo in November 2002.

58. This is all the more important, taking into consideration (i) the absence of, or in any event the very limited, material damage to the health centre;¹¹³ (ii) the fact that the health centre was functional again *soon* after the attack, early during the period the UPC / FPLC was in Mongbwalu and Sayo;¹¹⁴ (iii) the absence of, or very limited harm to, individual civilians as a result of the attack on the health centre;¹¹⁵ and (iv) the absence of, or very limited harm to, the community as a whole, as a result of the attack on the health centre.¹¹⁶ That said, the offensive operation launched by the UPDF, APC and Lendu Combatants in March 2003 breaks the chain

¹⁰⁶ Judgment, paras.329,486-508; [REDACTED]; **D-0300**: T-221-CONF-FRA, p.41.

¹⁰⁷ Judgment, paras.443-449,647-653.

¹⁰⁸ Judgment, paras.647-653.

¹⁰⁹ **D-0300**: T-221-CONF-FRA, pp.38-39.

¹¹⁰ **D-0300**: T-221-CONF-FRA, p.41; Judgment, para.652; Déclaration de Kisembo, (transcription d'audition, 24 novembre 2005), DRC-OTP-0161-3039; Déclaration de Kisembo, (transcription d'audition, 25 novembre 2005), DRC-OTP-2055-1674, p.27.

¹¹¹ [REDACTED] ; **D-300**: T-221-CONF-FRA, p.70.

¹¹² **D-300**: T-221-CONF-FRA, pp.69-72.

¹¹³ *See supra*, paras.34-41.

¹¹⁴ *See supra*, para.49.

¹¹⁵ *See supra*, paras.42-44.

¹¹⁶ *See supra*, para.45-52.

of causality in respect of the November attack on the health centre in Sayo, regardless of the Trial Chamber's findings on the above.

59. Significant importance must be attached to the break in the chain of causation in respect of the November attack on the Sayo health centre as it is a typical example of the significant impact of breaks in the chain of causality on the liability of Mr Ntaganda for reparations in this case.

60. Mr Ntaganda should not and cannot be held liable for reparations in relation to everything that happened in Ituri during the past 20 years. There have been many breaks in the chain of causation in relation to various harms caused to potential victims by the actions of the UPC / FPLC, at the times relevant to this case. To impute responsibility on Mr Ntaganda for reparations despite the presence of breaks in the chain of causation would amount to ignoring the roots and causes of the never-ending armed conflicts and the continuous crimes being committed in Ituri.

RESPECTFULLY SUBMITTED ON THIS 9th DAY OF JUNE 2023

A handwritten signature in dark ink, appearing to read 'S.B.' with a stylized flourish at the end.

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

The Hague, The Netherlands