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No.: **ICC-01/04-02/06**
Date: **15 June 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

Public
With Public Redacted Versions of Annexes 1-3

Public Redacted Version of the "Submissions by the Common Legal Representative of the Victims of the Attacks on the harm caused as a result of the attack on the health centre in Sayo" (No. ICC-01/04-02/06-2834-Conf, dated 22 February 2023)

Source: **Office of Public Counsel for Victims (CLR2)**

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I. INTRODUCTION

1. The Common Legal Representative of the Victims of the Attacks (the "Legal Representative") herewith presents his submissions on the harm caused as a result of the attack on the health centre in Sayo (the "Sayo health centre") pursuant to the 25 October 2022 Order[1] and the 6 February 2023 Decision.[2]

II. PROCEDURAL BACKGROUND

2. On 8 March 2021, Trial Chamber VI issued the "Reparations Order".[3] On 16 March 2021, the Presidency assigned the present case to the newly constituted Trial Chamber II (the "Chamber").[4]

3. On 12 September 2022, the Appeals Chamber issued its Judgment on the appeals against the Reparations Order (the "Appeals Judgment").[5] 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*, provide reasons in relation to the assessment of the harm concerning the Sayo health centre and the breaks in the chain of causation when establishing harm caused by the destruction of that health centre.[6]

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[1] 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 (the "25 October 2022 Order"), para. 42.

[2] See the "Decision on Request on behalf of Mr Ntaganda for disclosure of material relied upon in the Gilmore Expert Report", No. ICC-01/04-02/06-2824-Conf, 6 February 2023 (the "6 February 2023 Decision"), p. 7; with Confidential Annex 1, No. ICC-01/04-02/06-2824-Conf-Anx1.

[3] See the "Reparations Order" (Trial Chamber VI), No. ICC-01/04-02/06-2659, 8 March 2021. The Reparations Order was issued on the basis of, *inter alia*, the "Expert Report on Reparations for Victims of Rape, Sexual Slavery and Attacks on Healthcare", No. ICC-01/04-02/06-2623-Anx2-Red2, 3 November 2020 (the "Second Expert Report").

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

[5] 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 (the "Appeals Judgment").

[6] *Idem*, p. 11.

4. On 25 October 2022, the Chamber issued an order (the "25 October 2022 Order")[7] wherein it, *inter alia*, instructed the parties and participants to present additional submissions and possible evidence in relation to the actual damage and harm caused to the Sayo health centre, the individual victims and the community as a whole for loss of adequate healthcare provision, and the causal nexus between any harm and the crime of intentionally directing attacks against protected objects, namely the Sayo health centre.[8]

5. On 17 January 2023, upon a request from the Defence seeking disclosure of material relied upon by the Appointed Expert, Dr Sunneva Gilmore, in relation to the harm caused to the Sayo health centre (the "Defence Disclosure Request"),[9] the Chamber (i) instructed the Registry to seek the views of the Appointed Expert, Dr Sunneva Gilmore, as to the disclosure with necessary redactions, in accordance with article 68 of the Rome Statute (the "Statute"), of the material relied upon in her Expert Report to reach conclusions in relation to the Sayo health centre, and to report back to the Chamber within ten days; and (ii) decided to temporarily suspend the deadline for the Defence's submissions and possible evidence on the issues relevant to the assessment of the actual damage and harm caused to the Sayo health centre.[10] The Chamber subsequently clarified that said deadline was temporarily suspended for all parties and participants.[11]

6. On 23 January 2023, the Legal Representative filed a response to the Defence Disclosure Request.[12]

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[7] See the 25 October 2022 Order, *supra* note 1.
[8] *Idem*, para. 42.
[9] 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. A public redacted version was filed on 13 February 2023 as No. ICC-01/04-02/06-2812-Red.
[10] See the Email correspondence from the Chamber dated 17 January 2023 at 12:40.
[11] See the Email correspondence from the Chamber dated 20 January 2023 at 16:04.
[12] See 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, 23 January 2023. A public redacted version was filed on 13 February 2023 as No. ICC-01/04-02/06-2815-Red.

7. On 30 January 2023, the Registry transmitted Dr Gilmore's views on the Defence Disclosure Request.[13]

8. On 6 February 2023, the Chamber rejected the Defence Disclosure Request and directed all parties and participants, including the Office of the Prosecutor (the "OTP"), the Government of the Democratic Republic of the Congo and, if available, the Appointed Experts, to provide further submissions and evidence on the issues relevant to the assessment of the actual damage and harm caused to the Sayo health centre, within 15 days from the notification of the present decision (the "6 February 2023 Decision").[14]

9. On 7 February 2023, the OTP filed its submissions on issues relevant to the assessment of the actual damage and harm caused to the Sayo health centre,[15] indicating that the evidence establishes that the attack on the Sayo health centre resulted in damage to the physical structure of the centre, a complete loss of medical equipment, staff and supplies which caused a severe and prolonged disruption of the health centre's services and deprived the community of these services.[16]

III. CLASSIFICATION

10. Pursuant to regulation 23*bis*(1) of the Regulations of the Court, the present submissions are filed confidentially as they refer to the information which is not made public, namely the identity of P-0800 and of another individual referred to by P-0800, and the content of Victim [REDACTED] account. Annexes 1-2 are filed confidentially for the same reasons. Annex 3 is filed confidential *ex parte* available only to the CLR2,

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[13] See 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)", No. ICC-01/04-02/06-2818, 30 January 2023; with Confidential Annex, No. ICC-01/04-02/06-2818-Conf-Anx. A public redacted version of the Annex was filed on 8 February 2023 as No. ICC-01/04-02/06-2818-Anx-Red.

[14] See the 6 February 2023 Decision, *supra* note 2, p. 7.

[15] See the "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"", No. ICC-01/04-02/06-2827-Conf, 7 February 2023. A public redacted version was filed on 8 February 2023 as No. ICC-01/04-02/06-2827-Red.

[16] *Idem*, paras. 7-11.

as it contains the identity of Victim [REDACTED] to which the other parties have no access. A confidential redacted version of Annex 3 is filed simultaneously. A public redacted version of the present submissions will be filed in due course.

IV. SUBMISSIONS

11. In the Appeals Judgment, the Appeals Chamber found that Trial Chamber VI's findings in relation to the harm caused as a result of the attack on the Sayo health centre were inadequate[17] in that the harm caused was not established to the requisite standard due to the Reparations Order's excessive reliance on the Second Expert Report without sufficiently evaluating its credibility.[18] The Appeals Chamber also found that the Reparations Order does not sufficiently elaborate on why the harms caused can be attributed to Mr Ntaganda.[19] The Appeals Chamber did not overturn Trial Chamber VI's finding that the standard of causation is a "*but/for*" relationship between the crimes and the harm, to be assessed by evaluating whether it could have reasonably been foreseen that the acts and conducts underlying the conviction would cause the harm.[20]

12. The Legal Representative submits that the evidence available on the case record along with the additional evidence recently collected by him demonstrates that the attack on the Sayo health centre resulted in a disruption of medical services that unfolded in three phases: (i) the full interruption of the medical services for a period of about six months; (ii) followed by an extremely limited resumption of activities until 2005; (iii) then followed by a broadening – yet at reduced capacity – in the delivery of medical services from 2005 until today. The Sayo health centre has never recovered fully from the attack and the provision of medical services never returned to its pre-attack level, as patients continue to be referred to a bigger medical facility (the Mongwbalu hospital) in contrast to the situation prevailing prior to the attack.

[17] See the Appeals Judgment, *supra* note 5, para. 559.
[18] *Idem*, paras. 530-560.
[19] *Idem*, paras. 579-582.
[20] *Idem*, paras. 564-570.

13. The attack on the Sayo health centre caused multi-faceted harms in the form of direct material harm suffered by the Sayo health centre as a legal entity, and physical, moral, psychological and socio-economic harm suffered individually and collectively by the community of Sayo.

1) The relevant evidence available on the case record

14. Trial Chamber VI, based on the testimony given by Witnesses [REDACTED], [REDACTED] and [REDACTED], established beyond reasonable doubt that three seriously injured men, as well as a Lendu woman and her child – who was approximately two years old and whom the woman had brought to the health centre for treatment – were left behind at the centre. The woman, who was wearing rags and was unarmed at the time she came to the health centre, was killed by the UPC/FPLC during the assault.[21] It further found that the three concerned patients were thus left without medical care and were particularly defenceless.[22] Although Trial Chamber VI could not establish who were the perpetrators of the looting of the Sayo health centre[23] and whether the Sayo health centre was physically damaged as a result of Mr Ntaganda's crime, it found that by attacking the health centre, the UPC/FPLC disrupted the medical care for persons in need.[24]

15. The Legal Representative posits that the fact that, as pointed out by the Appeals Chamber, no application was presented for the Chamber's consideration, should not preclude the Chamber from awarding reparations for the harm caused as a result of the attack on the Sayo health centre. The relevant evidence available on the case record is as such sufficient to enable the Chamber to do so on the standard of balance of probabilities. Nevertheless, the Legal Representative proceeded to collect additional

[21] See the "Judgment" (Trial Chamber VI), No. ICC-01/04-02/06-2359, 8 July 2019, para. 506.
[22] See the "Sentencing Judgment" (Trial Chamber VI), No. ICC-01/04-02/06-2442, 7 November 2019, para. 154.
[23] See the Judgment, *supra* note 21, para. 526, footnote 1563.
[24] See the Sentencing Judgment, *supra* note 22, para. 144.

evidence in order to assist the Chamber to determine on the harm caused as a result of the attack on the Sayo health centre.

2) The additional evidence collected by the Legal Representative

16. The Legal Representative proceeded to consult [REDACTED] ([REDACTED]), who [REDACTED], in order to collect additional evidence on the issue of the harm caused to the Sayo health centre at the time of the events.

17. In his statements provided to the Legal Representative,[25] [REDACTED] indicated that as a result of the attack, the Sayo health centre was not operational for about six months, due to the looting of all material and the fleeing of all medical personnel, [REDACTED]. Subsequently, the health centre resumed activity but at very reduced capacities in only providing primary care as only two out of the previously six staff members returned. Accordingly, patients had to be referred to a bigger facility to receive medical care (the Mongbwalu hospital), which contrasts with the situation before the attack, where a quite comprehensive package of medical care could be provided in Sayo. About two years later (in 2005), the Sayo health centre was rehabilitated by an NGO but only partially. The Sayo health centre's capacities remain reduced until today.[26]

18. In addition to the statements collected from [REDACTED], the Legal Representative also proceeded to consult [REDACTED] – which fully corroborates the statements given by [REDACTED]. In her statements provided to the Legal Representative,[27] she explains that before the attack, the Sayo health centre was staffed with six professional and that when it was attacked, all the medical personnel fled,

[25] See Annex 1. The Legal Representative notes that although [REDACTED] identity is already known to the other parties because of his status of Prosecution witness [REDACTED], in his statements he expressly consented to the disclosure of his identity to the parties and participants. See Annex 1, p. 3.
[26] See Annex 1, pp. 1-2.
[27] See Annex 2. The Legal Representative notes that although [REDACTED] identity is already known to the other parties through [REDACTED] testimony (See No. ICC-01/04-02/06-T-68-CONF-ENG CT, p. 52, lines. 1-5), she expressly consented to the disclosure of her identity to the parties and participants. See Annex 2, p. 1.

[REDACTED]. When she returned to Sayo, four to five months after the attack, the health centre was closed and remained closed for approximately six months after the attack. During this period of interruption of services the population had to go to a bigger facility to receive medical care in Mongbwalu and this continued to be the case even after the health centre was reopened, because of its limited capacities. Even when the health centre reopened, its capacities remained limited as a result notably of the lack of personnel and accordingly patients continued to be referred to the Mongbwalu hospital.[28]

19. The Legal Representative posits that both individuals consulted are [REDACTED] to make comprehensive statements on the impact of the UPC/FPLC's attack on the Sayo health centre. The statements collected are coherent and credible and they are sufficient to establish on a balance of probabilities that it is more likely than not that (i) the Sayo health centre ceased providing any services for at least six months; (ii) when it reopened it provided only limited services; and (iii) still to date the Sayo health centre does not provide the full range of services it used to provide before being attacked. *A fortiori*, taken together along with the in-court testimonies relied upon by Trial Chamber VI, they demonstrate that the attack on the Sayo health centre led to the disruption of medical services that consisted in a six months full cessation of services, followed by a resumption of services at reduced capacity until today.

3) The standard of causation is met

20. The Legal Representative submits that by launching an intentional attack on the Sayo health centre, Mr Ntaganda could have reasonably foreseen that the provision of medical health care would be disrupted for at least a some period of time, either because of physical damage or looting of the Sayo health centre or because of medical

[28] See Annex 2, p. 1.

staff fleeing. Trial Chamber VI clearly established that by attacking the health centre, the UPC/FPLC disrupted the medical care for persons in need.[29]

21. In evaluating whether Mr Ntaganda could have reasonably foreseen that the provision of medical services would be disrupted for a prolonged period of time and until today, the Legal Representative posits that the health centre was targeted in a context where the national and local authorities and the community had only very limited resources[30] and were in no financial or logistical position to step up and ensure that the resumption of services can take place, without an external assistance. Mr Ntaganda either knew or at least could have reasonably been expected to know, the context in which he launched the attack on the Sayo health centre and accordingly could have reasonably foreseen that by intentionally attacking the health centre he would cause disruption of medical services not only on a short term but also on a long term. According to [REDACTED], the external intervention of an NGO did contribute, although only partly, to elevating the level of services offered by the Sayo health centre.[31] However, as held in the *Al Mahdi* case, any sort of rehabilitation provided by an external stakeholder does not diminish the convicted person's liability to fully repair harm caused to a protected object.[32] As evidenced from the statements collected by the Legal Representative, the capacities of the Sayo health centre remain to date reduced because of a lack of equipment but also of qualified medical staff, and as a result patients are still often referred to the Mongbwalu hospital. Absent any evidence that between 2003 and now the Sayo health centre suffered any harm caused by any other perpetrators, no issue of the break of the chain of causation arises.

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[29] See the Sentencing Judgment, *supra* note 22, para. 144.
[30] For more information on the specific dysfunctions and inefficiencies in the DRC health system, see KALAMBAY NTEMBWA (H.) and VAN LERBERGHE (W.), Improving Health System Efficiency: Democratic Republic of the Congo, Improving aid coordination in the health sector, World Health Organisation, Health Systems Governance & Financing, 2015, p. 29.
[31] See Annex 1, p. 2.
[32] See the "Reparations Order" (Trial Chamber VIII), No. ICC-01/12-01/15-236 (the "*Al Mahdi* Reparations Order"), 17 August 2017, para. 65.

4) Harms caused as a result of the attack on the Sayo health centre

i. Direct material harm caused to the Sayo health centre as a legal entity

22. The attack caused direct material harm to the Sayo health centre as a legal entity as it resulted in a disruption in the provision of medical services as well as in a consequential loss of clientele (the patients).

23. Indeed, the Legal Representative submits that possessions (material assets) of a legal entity go beyond physical immovable or movable objects such as chairs or medical supplies but it also encompasses other types of immaterial proprietary interests.[33] In particular, the core business of a legal entity (in this case the provision of medical services) as well as its clientele (in this case the patients) should be regarded as a material asset of the legal entity (in this case the Sayo health centre).[34]

24. Thus, the fact that the attack on the Sayo health centre resulted in a disruption of medical services and loss of clientele (with patients still referred to another facility)

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[33] See in this sense the well-established case-law of the European Court of Human Rights (the "ECtHR"), for instance ECtHR, *Anheuser-Busch Inc. v. Portugal*, Application No. 73049/01, 11 January 2007, para. 63, in which the ECtHR stated that "[t]*he concept of "possessions" referred to in the first part of Article 1 of Protocol No. 1* […] *is not limited to ownership of physical goods and is independent from the formal classification in domestic law: certain other rights and interests constituting assets can also be regarded as "property rights", and thus as "possessions" for the purposes of this provision*". See also, ECtHR, *Öneryıldız v. Turkey*, Application No. 48939/99, 30 November 2004, para. 124; *Broniowski v. Poland*, Application No. 31443/96, 22 June 2004, para. 129; *Beyeler v. Italy*, Application No. 33202/96, 5 January 2002, para. 100; *Iatridis v. Greece*, Application No. 31107/96, 25 March 1999, para. 54; *Centro Europa 7 S.R.L. and di Stefano v. Italy*, Application No. 38433/09, 7 June 2012, para. 171; *Fabris v. France*, Application No. 16574/08, 7 February 2013, paras. 49 and 51; *Parrillo v. Italy*, Application No. 46470/11, 27 August 2015, para. 211; *Béláné Nagy v. Hungary*, Application No. 53080/13, 13 December 2016, para. 76; *Elif Kizil v. Turkey*, Application No. 4601/06, 16 November 2020, para. 61. See also, ECtHR, Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights – Protection of property, updated on 31 August 2022, pp. 7-19.

[34] See, ECommHR, *Karni v. Sweden*, Application No. 11540/85, 8 March 1988, p. 16, where the Commission held that the clientele of a physician (even if built up over a brief period of time and even if generating limited resources) constitutes an asset. See also ECtHR, *Könyv-Tár Kft and Others v. Hungary*, Application No. 21623/13, 18 March 2019, paras. 31-32, in which the ECtHR acknowledged that the business of distributing school books had resulted in the creation of a clientele – albeit limited and volatile – which constituted an asset ; *Buzescu v. Romania*, Application No. 61302/00, 24 August 2005, para. 81, according to which law practices constitute assets; *Iatridis v. Greece*, Application No. 31107/96, 25 March 1999, para. 54 in which the ECtHR held that operating a cinema for eleven years had resulted in the creation of a clientele which constituted an asset. See also, ECtHR, Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights – Protection of property, updated on 31 August 2022, para. 42.

constitutes material harm which Mr Ntaganda could have reasonably foreseen and which therefore warrants reparations.

ii. Collective socio-economic and moral harm caused to the community of Sayo as a result of the attack on the health centre

25. Unlike crimes such as the destruction of property, the crime of attack against a protected object incriminates a behaviour, regardless of whether partial or total physical damages ensued. It is the special nature of the object protected by this provision that warrants the special protection accorded by the international humanitarian law, and in particular by the Statute.[35] It is worth noting in this respect that article 8(2)(e)(iv) of the Statute protects at the same time medical facilities and cultural and religious buildings. In the *Al Mahdi* case, Trial Chamber VIII found that the attack against the protected object at stake (cultural and religious buildings) caused various types of harms, mostly of collective nature, which warranted reparations. Trial Chamber VIII proceeded to define the victim entitled to reparations as the "*community of Timbuktu*", that is "*organisations or persons ordinarily residing in Timbuktu at the time of the commission of the crimes or otherwise so closely related to the city that they can be considered to be part of this community at the time of the attack*".[36]

26. It is submitted that there is no reason to depart from the approach adopted in the *Al Mahdi* case but it is however important to acknowledge that the harms caused are different in nature: where attacks on cultural heritage touch upon the identity of the community, attacks on medical facilities touch upon the overall well-being of the community, both morally and in terms of the provision of medical services, that is in terms of the socio-economic opportunities of the community.

27. In the present case, Trial Chamber VI recognised the elevated harm caused by the attack on the Sayo health centre as a protected object in the Sentencing Judgment,

[35] See the Judgment *supra* note 21, para. 1136; see also the "Judgment and Sentence" (Trial Chamber VIII), No. ICC-01/12-01/15-171, 27 September 2016, para. 16 and footnote 29.
[36] See the *Al Mahdi* Reparations Order, *supra* note 32, para. 56.

in which it stated: "[t]*he objects listed in Article 8(2)(e)(iv)* […] *deserve special protection because of the role these objects, such as medical facilities and schools, play in the daily life and welfare of the civilian population*".[37]

28. The Legal Representative posits that the disruption of medical services caused harm not only to the Sayo health centre as a legal entity but also collectively to the community of Sayo, in the form of an infringement of the right of the community's members to access health care and the consequential damage caused to their welfare. The Legal Representative underlines that the community of Sayo is a collective victim, different from the group of individual patients who were affected by the attack on the health centre, which will be addressed below.

29. The 'community of Sayo' that suffered collective harm as a result of the attack on the Sayo health centre should be defined as the whole number of persons ordinarily residing in Sayo and its surroundings at the time of the commission of the crime,[38] and who could reasonably expect to resort to the Sayo health centre for the provision of medical care.[39] All those who routinely resorted to the Sayo health centre to obtain medical care, or those who knew that they would receive care from the Sayo health centre should they become ill or injured suffered substantial harm when the health centre first discontinued its services and subsequently operated at reduced capacity until today.

30. Indeed, as stated by [REDACTED], patients resorting to the Sayo health centre were often referred, and are still being referred, to another medical facility located in Mongbwalu,[40] which entails not only a loss of the opportunity to obtain medical care at their original community, but also amounts to an infringement upon their right to

[37] See the Sentencing Judgment, *supra* note 22, para. 138 (Emphasis added).
[38] See, *mutatis mutandis*, the definition of the community of Timbuktu: see the *Al Mahdi* Reparations Order, *supra* note 32, para. 56.
[39] See in this regard the Appeals Judgment, *supra* note 5, para. 550 concerning Judge Ibáñez Carranza opinion that the Sayo community might be eligible for reparations as a collective victim. See also in the *Lubanga* case, Separate opinion of Judge Luz Del Carmen Ibáñez Carranza, No. ICC-01/04-01/06-3466-AnxII, 16 September 2019, paras. 134-140.
[40] See Annexes 1 and 2.

health.[41] The need for a seek or injured person to travel in order to reach another health facility outside his or her original location also entails additional costs being incurred.

31. As regards the moral harm caused to the Sayo community, the Legal Representative posits that it is more likely than not that the attack on the Sayo health centre caused at least some form of distress within the community because of the disruption of an important component of the community network.

iii. Individual physical, socio-economic and moral harm caused to the patients of the Sayo health centre

32. In addition to the community of Sayo, the attack on the Sayo health centre caused harm to its individual patients.

33. Trial Chamber VI established beyond reasonable doubt that two persons present at the health centre during the attack fled because they felt that they were in danger, and that three seriously injured men, as well as a Lendu woman and her approximately two years old child, were left behind at the centre. The woman was killed during the assault while the fate of the three men is unknown.[42] Although these findings do not require further corroboration, the Legal Representative notes that in his recently collected statements [REDACTED] confirmed that when the attack was launched all the patients who were not able to flee, that is five patients (3 men, one woman and her child) were killed by the Bosco elements. [REDACTED] because when he returned to Sayo four months after the events [REDACTED].[43] Similarly, the [REDACTED] interviewed by the Legal Representative also confirmed that those who stayed at the

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[41] In this regard, the Inter American Court of Human Rights (the "IACtHR") routinely found that the right to life of communities is violated by virtue of, *inter alia,* the lack of access to health care facilities. See in that sense: IACtHR, *Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment of 29 March 2006, paras 73-74, 177-178 ; *Xákmok Kásek indigenous community v. Paraguay*, Judgment of 24 August 2010, paras 203-207, and 231 (In this case the IACtHR directed that the State establishes a permanent health clinic with the necessary medicines and supplies to provide adequate health care within six months of notification of this judgement (para. 306); *Yakye Axa Indigenous Community v. Paraguay,* Judgement of 17 June 2005, paras. 167-169.

[42] See the Judgment, *supra* note 21, para. 506.

[43] See Annex 1, pp. 1-2.

health centre during the attack were killed, including a woman and her child.[44] Lastly, the Legal Representative collected statements from his client, victim [REDACTED],[45] [REDACTED] the woman who came to the Sayo health centre for treatment with her baby at the time of the attack and was subsequently killed. He also stated that when he returned to Sayo about four months after the attack, he was [REDACTED].[46]

34. Trial Chamber VI found that by launching an attack against the Sayo health centre, a facility that cares for patients, the perpetrators accepted the consequential severe impact on the welfare and/or lives of any patients present at the centre at the relevant time.[47] It is submitted that it is more likely than not that being left without medical care, sick or wounded patients suffered physical and moral harm as direct victims. In addition, it is more likely than not that the denial of medical treatment to the patients in need caused at least psychological suffering to their relatives, especially in case if the concerned patient was subsequently killed or died because of untreated illness or injury. The Legal Representative notes in this regard that the International Committee of the Red Cross considers that in some instances the denial of medical treatment may even constitute cruel or inhuman treatment.[48]

35. The Legal Representative notes that in the *Al Mahdi* case, Trial Chamber VIII declined to make a finding that bodily harm ensued as a result of the attack on the protected objects because "*no factual findings in the Judgement suggest*[ed] *that bodily harm played any part in the criminal plan for which Mr Al Mahdi was convicted*"[49] and that the evidence available before that Chamber was only summary of assertions that this happened during the attack, making it difficult to ascertain the circumstances, thereby making it impossible to ascertain whether the bodily harm was caused by those

[44] See Annex 2, p. 1.
[45] See Annex 3. The Legal Representative notes that the victim did not consent to the disclosure of his identity to the Defence. See Annex 3, p. 2.
[46] See Annex 3, p. 1.
[47] See the Sentencing Judgment, *supra* note 22, para. 144.
[48] See International Committee of the Red Cross, the Health care law factsheet, March 2012, p. 1.
[49] See the *Al Mahdi* Reparations Order, *supra* note 32, para. 97.

attacking the mausoleums.[50] It is submitted that the situation in the present case is precisely the opposite. Mr Ntaganda was found guilty, *inter alia*, of murder and attempted murder in Sayo.[51] Trial Chamber VI established beyond reasonable doubt that three seriously injured men, as well as a Lendu woman and her child were left without medical care.[52] And although Trial Chamber VI could not establish the fate of said three men,[53] it established that the concerned woman was killed by the UPC/FPLC during the assault on the Sayo health centre.[54]

36. In terms of the universe of victims having suffered physical and psychological harm as a result of the attack on the Sayo health centre, the Legal Representative posits that these types of harm were caused to at least the five individuals left behind without medical care identified in the Judgment and may have been caused potentially to a maximum of 25 people (which corresponds to the number of beds of the health centre prior to the attack according to [REDACTED] statements) who were forced to flee despite being sick or wounded. Further, the relatives of those concerned patients who subsequently passed away are also potentially eligible for reparations as indirect victims having suffered moral harm. The Legal Representative posits that it is not necessary to precisely identify at this stage all relevant direct victims and their relatives who may have suffered harm as a result of the attack on the Sayo health centre. The eligibility of potential beneficiaries of reparations on the account of said crime should be assessed by the TFV at the implementation stage.

iv. Individual moral harm caused to the medical personnel

37. Trial Chamber VI found that the medical personnel fled the Sayo health centre to protect their lives and had to abandon the patients to their fate.[55] The Legal Representative posits that the medical personnel suffered a particular type of harm,

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[50] *Ibid*.
[51] See the Judgment, *supra* note 21, p. 535.
[52] *Idem*, para. 506. See also the Sentencing Judgment, *supra* note 22, para. 154.
[53] See the Judgment, *supra* note 21, para. 506, footnote 1477.
[54] *Idem*, para. 506.
[55] *Ibid*.

namely moral harm due to being deprived of their right to fulfil their obligation to discharge their duty, that is providing medical care to the sick and wounded.

38. This obligation derives from various sources and most notably the international humanitarian law which prescribes that the sick and wounded have a right to medical care including during war time, and that no one can be left without medical assistance.[56] The corresponding obligation is that medical personnel has an ethical obligation of care towards patients[57] – an obligation that the Sayo health centre personnel could no longer meet when the attack was launched.

39. This was acknowledged by Trial Chamber VI in the Sentencing Judgment in that it found that by launching an attack on the Sayo health centre the UPC/FPLC disrupted the medical care for persons in need.[58]

40. Consequently, the specific type of moral harm suffered by the medical personnel of the Sayo health centre also warrants reparations.

5) Appropriate types and modalities of reparations

41. The Legal Representative maintains by reference his submissions in relation to the appropriate reparations concerning the harms caused as a result of the attack on the Sayo health centre.[59] He herewith presents the following additional submissions for the Chamber's consideration.

42. Although the fact that the Sayo health centre was partially rehabilitated in 2005 by an external actor is relevant in terms of the appropriate modality of reparation to award, it is however irrelevant concerning the quantification of the harm, in so far as

[56] See International Committee of the Red Cross, the Customary International Humanitarian Law Database, Rule 110.
[57] See World Medical Association, the International Code of Medical Ethics, Article 1 (according to which medical personnel has an ethical *duty* of care).
[58] See the Sentencing Judgment, *supra* note 22, para. 144.
[59] See the "Public Redacted Version of the "Final Observations on Reparations of the Common Legal Representative of the Victims of the Attacks" (ICC-01/04-02/06- 2633-Conf)", No. ICC-01/04-02/06-2633-Red (the "CLR2 Final Reparations Observations"), 21 December 2020, paras. 69-72, 77 and 118.

the partial rehabilitation does not make the harm less important and does not diminish the convicted person's liability in terms of reparations.

43. For instance, a very similar situation arose in the *Al Mahdi* case, in that about three years after the attack (which caused only partial destruction of some of the buildings) UNESCO proceeded to fully rehabilitate the mausoleums. While this had an impact on the appropriate type of reparations awarded, it did not have any impact on the quantification of the damage done. Indeed, Trial Chamber VIII proceeded to evaluate the damage caused and to direct that, instead of proceeding to repair to the physical structures of the buildings which had already be done, alternative measures (such as reinforcing the fences around the cemeteries) that were deemed suitable by the community be put in place.[60]

44. The Legal Representative submits that the Chamber should award an appropriate form of reparations that is commensurate with the harm caused and responsive to the needs of the concerned victims at the time of the implementation of the reparations. He posits that reparations of the harm caused to the Sayo health centre as a legal entity and the community of Sayo as collective victim should aim to increase the existing healthcare capacities to benefit both the health centre and the community as a whole. He suggests that a lump sum be awarded based on the principle of fairness that could be used to cover costs of qualified medical staff, alike suggested by the Second Expert Report,[61] and/or costs of additional material and equipment to reinforce the existing capacities depending on the Sayo health centre's current needs to be inquired into at the implementation stage.

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[60] See the *Al Mahdi* Reparations Order, *supra* note 32, paras. 65 and 116-118. See also the "Decision on the Updated Implementation Plan from the Trust Fund for Victims" (Trial Chamber VIII), No. ICC-01/12-01/15-324-Red, 4 March 2019, paras 66, 72 and 77-78 approving a reparation measure proposed by the TFV aimed at increasing the protection and maintenance of the buildings destroyed in the form of various sub-measures such as, *inter alia,* the improvement of structures surrounding the buildings (enclosures), the organisation of workshops designed to improve the capacity of those in charge of the protection and maintenance of the building.

[61] See the Second Expert Report, *supra* note 3, para. 173.

45. Finally, the individual nature of the harm suffered by the patients of the Sayo health centre and their relatives, and the medical personnel warrants that collective reparations with individualised components be awarded to them, similar to any other individual victims in the present case.[62]

FOR THE FOREGOING REASONS, the Legal Representative respectfully requests the Chamber to take the present submissions into consideration.

Dmytro Suprun
Common Legal Representative of the Victims of the Attacks

Dated this 15th day of June 2023
At The Hague, The Netherlands

[62] See the CLR2 Final Reparations Observations", *supra* note 59, paras. 62-64.