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**TRIAL CHAMBER VI**

**Before:** Judge Robert Fremr, Presiding Judge  
Judge Kuniko Ozaki  
Judge Chang-ho Chung

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO**

**IN THE CASE OF  
*THE PROSECUTOR v. BOSCO NTAGANDA***

**Public  
With Public Annex A**

**Public redacted version of "Submissions on Sentence", 30 September 2019,  
ICC-01/04-02/06-2425-Conf**

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## Introduction

1. On 8 July 2019,<sup>1</sup> Bosco Ntaganda was found guilty of committing five counts of crimes against humanity and thirteen counts of war crimes, both as an individual<sup>2</sup> and as an indirect co-perpetrator.<sup>3</sup>
2. These crimes were committed in assaults in November-December 2002 and in February 2003. The crimes against children under 15 within his own armed group were committed from August 2002 to 31 December 2003. Bosco Ntaganda inflicted terror upon the civilian population of Ituri, in particular the Lendu, and upon the children recruited, used, raped and sexually enslaved in his own armed group.<sup>4</sup> Taking all relevant factors into consideration, the Prosecution recommends that Bosco Ntaganda be sentenced to a prison term of no less than 30 years for his crimes.<sup>5</sup>
3. The Trial Chamber's findings support the imposition of a very high and lengthy sentence of imprisonment:
  - The crimes are extremely grave in their scope and type, in their manner of execution and in the extent of the damage inflicted on victims;
  - Bosco Ntaganda had a central and vital role in the planning, organisation and orchestration of UPC/FPLC operations during which the crimes were committed,<sup>6</sup> and in the recruitment, training and deployment of soldiers including those under the age of 15;<sup>7</sup>

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<sup>1</sup> ICC-01/04-02/06-2359 ("Judgment").

<sup>2</sup> Murder, as a war crime and as a crime against humanity in Mongbwalu; persecution as a crime against humanity in Mongbwalu: Judgment, pp.535, 537.

<sup>3</sup> Judgment, pp.535-539.

<sup>4</sup> Judgment, para.322.

<sup>5</sup> The Prosecution makes the following submissions pursuant to articles 76 and 78 of the Rome Statute, and rule 145 of the Rules of Procedure and Evidence, to assist the Trial Chamber ("Chamber") in its determination of the appropriate sentence to impose on Mr Ntaganda in light of his conviction.

<sup>6</sup> Judgment, paras.830-833, (V)(C)(3)(c) heading, and paras.834,835-837,852-853.

<sup>7</sup> Judgment, paras.830-832.

- Bosco Ntaganda meant to perpetrate crimes and meant for his troops to commit crimes against civilians in order to drive out all the Lendu from the localities targeted during the First and Second Operations<sup>8</sup> and he knew that the enlistment, conscription, use, rape and sexual slavery of children under 15 years old was virtually certain;<sup>9</sup>
  - Bosco Ntaganda personally engaged in the commission of crimes and he ordered and encouraged their commission.<sup>10</sup>
4. In addition, several aggravating circumstances should be taken into account: i) there are multiple victims, each suffering from multiple crimes; (ii) the crimes were committed with particular cruelty; (iii) the crimes caused extensive damage and long-lasting harm; (iv) the crimes were committed against particularly defenceless victims; (iv) Bosco Ntaganda abused his position of power and failed in his duty to protect civilians and soldiers within his own army against horrific crimes; and (v) Bosco Ntaganda breached the Detention Centre policies and violated Court orders for the purpose of impeding the prosecution of his case.
5. There are no mitigating factors, or none that can be accorded any weight.

### **Confidentiality**

6. These submissions are filed confidentially pursuant to regulation 23*bis*(1), (2) of the Regulations of the Court, because they contain confidential information regarding witnesses who are the subject of protective measures.

#### **I. APPLICABLE LAW**

7. The Court's legal regime requires the sentence the Chamber will impose to reflect Bosco Ntaganda's culpability and be proportionate to his crimes.<sup>11</sup> The Appeals

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<sup>8</sup> Judgment, paras.809, 1177.

<sup>9</sup> Judgment, para.811.

<sup>10</sup> Judgment, para.855.

Chamber has held that proportionality is generally measured by the degree of harm caused by the crime and the culpability of the perpetrator.<sup>12</sup> In imposing a proportionate sentence that reflects the culpability of the convicted person, and based on its intimate knowledge of the case,<sup>13</sup> the Chamber shall, pursuant to article 78(1) and rules 145(1) and (2), identify and assess, then balance,<sup>14</sup> all the relevant factors,<sup>15</sup> including the gravity of the crime and the culpability of the convicted person, including his individual circumstances.<sup>16</sup> The Chamber's discretion is guided by the facts of each particular case.<sup>17</sup>

8. In determining the appropriate sentence, the Chamber must be satisfied that any aggravating circumstances – which must relate to the offences resulting in a conviction or to the convicted person him- or herself –<sup>18</sup> are proven beyond reasonable doubt.<sup>19</sup> Such findings may already be contained in the Trial Judgment, or may be made at the sentencing stage by the Chamber on the basis of the evidence presented and submissions made to date. The Chamber may take into account uncharged criminal conduct to aggravate the sentence if there is a sufficiently proximate link with the crimes<sup>20</sup> and the uncharged conduct was, at least, objectively foreseeable by the convicted person<sup>21</sup> and he or she had

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<sup>11</sup> See articles 81(2)(a) and 83(3) of the Statute and rule 145(1) of the Rules; ICC-01/05-01/13-2123-Corr (“*Bemba et al.* SD”), para.36; ICC-01/04-01/06-2901 (“*Lubanga* SD”), paras.25-26, 36; ICC-01/04-01/06-3122 (“*Lubanga* SAJ”), paras.31-34.

<sup>12</sup> *Lubanga* SD, paras.36, 40; *Bemba et al.* SD, para.36.

<sup>13</sup> *Lubanga* SAJ, para.34.

<sup>14</sup> Rule 145(1)(b) of the Rules; *Lubanga* SAJ, paras.32-33; ICC-01/12-01/15-171 (“*Al Mahdi* J&S”), para.68; ICC-01/05-01/08-3399 (“*Bemba* SD”), para.12.

<sup>15</sup> The Appeals Chamber has clarified that, in addition to the gravity of the crime and the individual circumstances of the convicted person (mentioned in article 78(1) of the Statute), the factors mentioned in rule 145(1)(c) of the Rules and any aggravating and mitigating circumstances (listed non-exhaustively in rule 145(2)) are all “factors” to be taken into account by the Trial Chamber. *Lubanga* SAJ, fns.66, 67.

<sup>16</sup> See *Al Mahdi* J&S, para.75; *Bemba* SD, para.20; *Bemba et al.* SD, para.82.

<sup>17</sup> *Krstic* AJ, para.241. See also *CDF* AJ, para.466.

<sup>18</sup> *Lubanga* SD, para.33; *Al Mahdi* J&S, para.73; *Bemba* SD, para.18; *Bemba et al.* SD, para.25.

<sup>19</sup> *Bemba et al.* SD, para.25; *Lubanga* SD, para.33, ICC-01/04-01/07-3484-tENG-Corr (“*Katanga* SD”), para.34; *Bemba* SD, para.18; *Al Mahdi* J&S, para.73.

<sup>20</sup> ICC-01/05-01/13-2276-Red (“*Bemba et al.* SAJ”), paras.115-116 (noting that the sufficient proximity of the link is a case-by-case assessment). See also para.151.

<sup>21</sup> *Bemba et al.* SAJ, paras.263, 334.

sufficient notice.<sup>22</sup> The existence of mitigating circumstances must be proven on a balance of probabilities.<sup>23</sup> Mitigating circumstances are not limited by the scope of the confirmed charges or the Trial Judgment, but must “relate directly to the convicted person”<sup>24</sup> with a link between the convicted person’s actions and the proceedings.<sup>25</sup>

9. Considering non-essential factual findings in aggravation is not double-counting. The Appeals Chamber dismissed Bemba’s arguments that the Trial Chamber impermissibly double-counted “a legal element of the offence or the mode of liability in relation to which an accused was convicted” when it considered in aggravation Bemba’s abuse of lawyer-client privilege, the remedial measures which he took and taking advantage of his position as MLC president.<sup>26</sup> The Appeals Chamber recalled that “what is decisive is that the legal elements of the offence—and the material factual findings underpinning them—are not considered as aggravating factors”.<sup>27</sup> It then clarified that, although certain “factual findings serve[d] to prove the legal elements of the crimes for which Mr Bemba was convicted [...] they *did not* constitute in or of themselves legal elements or the material factual findings underpinning the legal elements” and therefore could properly be considered in aggravation.<sup>28</sup>

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<sup>22</sup> *Bemba et al.* SAJ, para.116, stating that the aggravating facts need not be pleaded in the document containing the charges; it generally suffices for them to be established in the trial judgment or to be included in the Prosecution’s sentencing submissions, so as to allow the convicted person to defend himself.

<sup>23</sup> *Lubanga SD*, para.34.

<sup>24</sup> *Bemba et al.* SD, para.24.

<sup>25</sup> *Bemba SAJ*, para.188.

<sup>26</sup> *Bemba et al.* SAJ, paras.127-128.

<sup>27</sup> *Bemba et al.* SAJ, para.129.

<sup>28</sup> *Bemba et al.* SAJ, para.128. The Appeals Chamber noted that the Trial Chamber had considered Bemba’s abuse of the privileged communications and the remedial measures to establish that there was a common plan, that Bemba essentially contributed, and his *mens rea*; and that the Trial Chamber considered Bemba’s MLC role to establish his criminal responsibility in soliciting the commission of the offences under article 25(3)(b). See also para.129 (discussing the *Nzabonimana* case at the ICTR, where the ICTR Appeals Chamber found no error in the Trial Chamber’s reliance on the same factual finding to establish the accused’s genocidal intent – a legal element that formed the basis of the conviction – and his abuse of influence as an aggravating factor). See also *Bemba et al.* SAJ, paras.275-276, where the Appeals Chamber dismissed similar arguments from Babala.

## II. GRAVITY OF THE CRIMES

10. Bosco Ntaganda was convicted as a direct perpetrator and as an indirect co-perpetrator of many of the most serious crimes of concern to the international community, including rape and sexual slavery of children, murder, forced displacement of population and destruction of property. An *in concreto* assessment<sup>29</sup> of these crimes demonstrates their exceptional gravity. The Defence does not contest the “high gravity” of the crimes for which Mr Ntaganda was convicted.<sup>30</sup> His crimes targeted multiple victims, often particularly defenceless, in the cruellest manner, which caused long-lasting, devastating effects on individual victims, families and communities. These are aggravating circumstances, and must be taken into account by the Chamber in determining the sentence, pursuant to rule 145(2)(b)(iii) and (iv).

11. The massacre in Kobu is a clear example of these aggravating circumstances. There, UPC/FPLC troops executed over 50 people because they were Lendu.<sup>31</sup> They were unarmed, lured to discuss peace and reconciliation or arrested during *ratissage* operations. Before the massacre, some were subjected to physical and verbal abuse, called “beasts” and “animals”; others were raped.<sup>32</sup> To kill them, UPC/FPLC soldiers used sticks and batons, knives and machetes.<sup>33</sup> Many relatives of the victims discovered the mutilated bodies – including women and babies – lying in a banana field. Some of the victims were naked, some were tied up, some had been beaten to death, some had slit throats, and some had been disembowelled, mutilated or decapitated.<sup>34</sup>

<sup>29</sup> *Bemba et al.* SD, para.23; *Bemba* SD, para.16; *Al Mahdi* J&S, para.71.

<sup>30</sup> T-268,35:4-13.

<sup>31</sup> P-963:T-79,73:6-7.

<sup>32</sup> Judgment, para.622.

<sup>33</sup> Judgment, para.628.

<sup>34</sup> Judgment, para.633.

### A. Ntaganda's crimes are inherently grave

12. Not only was Mr Ntaganda convicted of a wide range of war crimes, and crimes against humanity; but the Chamber also found that he meant the crimes to occur in furtherance of an ethnically discriminatory plan to drive out all the Lendu from the localities targeted by the UPC/FPLC military campaign.<sup>35</sup> His crimes are particularly grave because they were systematic and part of the UPC/FPLC soldiers' consistent *modus operandi* in its assault.<sup>36</sup> Significantly, the Chamber found that the crimes of sexual violence against the Lendu were, "like the acts of killings and other acts of physical violence, a tool used by UPC/FPLC soldiers and commanders alike to achieve their objective to destroy the Lendu community in the localities under assault."<sup>37</sup>

13. Although all inherently grave, the Prosecution notes that not all offences forming the grounds for conviction are necessarily equivalent and that the Chamber must weigh each of them.<sup>38</sup> While the consequences of crimes against property threaten the very survival of the predominantly Lendu communities under attack in this case, crimes against persons are inherently graver. But Bosco Ntaganda committed both types of crimes.

### B. The manner of commission of the crimes is an aggravating circumstance

*(i) Ntaganda committed crimes against multiple victims and made them suffer multiple crimes*

14. The crimes for which Bosco Ntaganda has been convicted were carried out on a massive scale and throughout a large territory, over a period of more than 16 months. They include persecuting the inhabitants of 13 villages on ethnic

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<sup>35</sup> Judgment, para.808.

<sup>36</sup> Judgment, para.695. See also the crimes of pillaging, murder, rape, committed during *ratissage* operations: Judgment paras.464, 512, 514, 526, 577, 665, 688, 695.

<sup>37</sup> Judgment, para.805.

<sup>38</sup> *Bemba et al.* SD, para.23, *Katanga* SD, para.43.

grounds, intentionally directing attacks against civilians in 5 of those villages and forcibly displacing the inhabitants, destroying civilian property in 8 villages; pillaging civilian property in 6 villages and intentionally directing an attack on a health centre. His crimes include the murder or attempted murder of more than 76 civilians,<sup>39</sup> the rape of more than 19 men, women and girls;<sup>40</sup> the sexual slavery of civilians, and girls under the age of 15 in his armed group. The Chamber also found that rape and sexual violence inflicted upon female members of the UPC, including under 15 years old, was “common practice”.<sup>41</sup> Bosco Ntaganda’s crimes include the recruitment and use of children under the age of 15 in his escort and in his army.<sup>42</sup>

15. Bosco Ntaganda’s victims were each the victim of more than one crime. They were not only displaced, or raped, or had their houses destroyed or saw their relatives killed. Most suffered several of these crimes simultaneously.<sup>43</sup> The crimes were manifold and compounded the suffering of individual victims. For example, P-18 was displaced from [REDACTED], raped, and sexually enslaved. She witnessed the rape and murder of a family member. She was shot and left for dead.<sup>44</sup> Girl child soldiers such as P-883 were conscripted in the UPC, and also subjected to sexual slavery and rape.<sup>45</sup> P-790 witnessed the murder [REDACTED]; [REDACTED]. He was also displaced in the forest, his house was destroyed and his belongings were pillaged.<sup>46</sup> Bosco Ntaganda’s sentence should reflect this massive, multi-layered victimisation imposed on individual victims.

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<sup>39</sup> Judgment, para.1199.

<sup>40</sup> Judgment, para.1199.

<sup>41</sup> Judgment, paras.407-408, 1196-1197.

<sup>42</sup> Judgment, para.1199.

<sup>43</sup> This is the case for at least: P-18, P-19, P-22, P-27, P-39, P-100, P-103, P-105, P-113, P-127, P-301, P-790, P-863, and P-868.

<sup>44</sup> Judgment, para.1199.

<sup>45</sup> Judgment, para.1199.

<sup>46</sup> Judgment, paras.578, 1199.

*(ii) Ntaganda committed the crimes with particular cruelty*

16. The crimes against children under the age of 15 in the UPC/FPLC were perpetrated with particular cruelty. Some children were abducted; the families of others were forced to give up the children under threat.<sup>47</sup> These children were all denied their families' affection and protection at a very young age.<sup>48</sup> The UPC/FPLC child soldiers faced "very harsh" living conditions in the training camps.<sup>49</sup> They ate once per day – the food sometimes rotten – and often slept outside.<sup>50</sup> They were told they would be killed if they tried to escape.<sup>51</sup> If they disobeyed orders they would be severely beaten and one recruit was executed for losing his weapon.<sup>52</sup> Among children who were demobilised, some were coerced into reintegrating the UPC/FPLC forces and fighting in battle.<sup>53</sup>
17. The rapes and sexual slavery committed by UPC/FPLC soldiers on young girls within their militia were horrific. Some girls such as P-883 and Mave were subjected to repeated sexual assaults, "on a regular basis", by many soldiers who could rape them "whenever they wanted", sometimes under threat of being shot.<sup>54</sup> One young girl aged 9 died of injuries sustained from repeated rapes after her recruitment.<sup>55</sup>
18. The UPC/FPLC used extreme physical violence when raping and sexual enslaving civilians.<sup>56</sup> They subjected their victims to verbal abuse and death threats. The victims had to witness further gruesome crimes perpetrated on others. Many episodes of sexual violence culminated in murders or attempted murders. The Chamber found it "significant that the UPC/FPLC soldiers killed or attempted to

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<sup>47</sup> Judgment, paras.1118-1119.

<sup>48</sup> **P-824**:DRC-OTP-2109-4426, p.4436, para.44.

<sup>49</sup> Judgment, para.375.

<sup>50</sup> Judgment, para.375.

<sup>51</sup> Judgment, para.376.

<sup>52</sup> Judgment, para.377.

<sup>53</sup> Judgment, para.432.

<sup>54</sup> Judgment, paras.409, 411.

<sup>55</sup> Judgment, paras.410, 974.

<sup>56</sup> Judgment, para.806.

kill many of the civilians they subjected to sexual violence”,<sup>57</sup> qualifying the rapes as having the “aim of destruction”.<sup>58</sup>

19. UPC/FPLC soldiers beat P-22 and detained her with seven other prisoners in a pit in the ground near Kilo. They ordered another prisoner to penetrate P-22’s vagina, which he was forced to do, while the soldiers laughed. They then tried to kill P-22 by cutting her neck and throwing her into a pit. She saw other prisoners being executed.<sup>59</sup> P-18 had to witness other women, including her sister-in-law, being raped and killed.<sup>60</sup> Then she was raped, beaten and threatened with death, and ultimately shot at close range with her baby by her side.<sup>61</sup> P-19 could hear women scream as UPC/FPLC soldiers raped them. She heard the men say: “Lendu are useless wild animals”.<sup>62</sup> A UPC/FPLC commander later raped P-19 vaginally and anally; she was shot at when she tried to flee.<sup>63</sup> P-113 was sexually enslaved and raped three times by three UPC/FPLC soldiers over a few days, under threat of death and with great physical brutality.<sup>64</sup> Still in Kobu, a group of men was raped with wooden sticks and died after “suffering a great deal”.<sup>65</sup>
20. The population that had been forcibly displaced by UPC/FPLC troops could not return and was forced to endure harsh conditions, without adequate food, shelter, sometimes in the bush and without access to medical care.<sup>66</sup>

(iii) *Ntaganda committed crimes against particularly defenceless victims*

21. Mr Ntaganda and his troops perpetrated crimes against particularly vulnerable victims. Some were elderly; others were children, including babies. Bosco

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<sup>57</sup> Judgment, para.805.

<sup>58</sup> Judgment, para.806.

<sup>59</sup> Judgment, para.546.

<sup>60</sup> Judgment, paras.600-601.

<sup>61</sup> Judgment, paras.600-601.

<sup>62</sup> Judgment, para.599. *See also* para.622.

<sup>63</sup> Judgment, paras.622, 632, 874.

<sup>64</sup> Judgment, paras.607, 611, 629.

<sup>65</sup> Judgment, para.623.

<sup>66</sup> Judgment, paras.497, 592, 612, 616, 640.

Ntaganda murdered an elderly priest by shooting him after interrogating him.<sup>67</sup> In Mongbwalu, two UPC/FPLC soldiers took turns raping a 13 year-old girl.<sup>68</sup> In the same town, two other UPC/FPLC soldiers captured another girl, aged 14 years, and raped her.<sup>69</sup> UPC/FPLC troops killed two children aged three and six during the assault in Kobu,<sup>70</sup> and killed babies during the massacre in the banana field.<sup>71</sup> In Kobu, a UPC/FPLC commander sexually enslaved an 11 year-old girl.<sup>72</sup>

22. The recruitment of extremely young children into the UPC/FPLC must be reflected in the sentence. This is not “double-counting”. That the victim be under the age of 15 is a requirement of the crime, but the enlistment of particularly young children should be taken into account as an aggravating factor. In *Bemba et al.*, the Appeals Chamber found that factual findings may serve to prove the legal elements, but if they do not constitute in themselves the legal elements or the material factual findings underpinning the legal elements, they can be properly considered in aggravation.<sup>73</sup> P-10 testified that Bosco Ntaganda had an escort aged around nine years old, so small “that he had to roll his sleeves up twice”.<sup>74</sup> P-30 estimated the youngest bodyguard he saw at Ntaganda’s residence to be 10 years old.<sup>75</sup> P-17 saw two children in the UPC/FPLC who he estimated were 10 or 11 years old.<sup>76</sup> A young girl aged 9 was recruited and brought to the training camp, where she was brutally raped and ultimately died of her injuries.<sup>77</sup>

23. UPC/FPLC troops raped and sexually enslaved children under 15 in their militia.

Unlike the crimes of conscription, enlistment and use, the legal elements do not

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<sup>67</sup> Judgment, paras.529-534, 737-742.

<sup>68</sup> Judgment, paras.519.

<sup>69</sup> Judgment, para.521.

<sup>70</sup> Judgment, paras.573, 873.

<sup>71</sup> Judgment, paras.628-633,873.

<sup>72</sup> Judgment, para.579.

<sup>73</sup> *Bemba et al.*, SAJ: paras.128, 129, 275.

<sup>74</sup> Judgment, para.391.

<sup>75</sup> Judgment, para.399; **P-30**:DRC-OTP-2054-2951, p.2970-2971 ll.3-4.

<sup>76</sup> Judgment, para.446, fn.1261.

<sup>77</sup> Judgment, para.411.

contain any age requirement for rape and sexual slavery,<sup>78</sup> and therefore the young age of these victims should be accorded the fullest weight. This includes P-883, who was 11 or 12 years old, when she was abducted into the UPC/FPLC and immediately subjected to grave sexual abuse;<sup>79</sup> a girl named Nadège who was nine;<sup>80</sup> Mave, who was under 15;<sup>81</sup> two girls aged 12 and 13 raped by commander Abelanga;<sup>82</sup> and other girls under 15 years old, all raped or sexually enslaved by UPC/FPLC soldiers while in the militia.<sup>83</sup>

24. The UPC/FPLC attacked other particularly defenceless victims. UPC/FPLC soldiers killed a pregnant woman in Kilo.<sup>84</sup> They murdered nine patients of the Bambu hospital who were “too weak to flee”.<sup>85</sup> There, UPC/FPLC soldiers even shot at one patient who he had just been medically amputated that morning.<sup>86</sup>

*(iv) Ntaganda committed sexual crimes against UPC/FPLC soldiers*

25. The rape and sexual slavery of female and male UPC/FPLC soldiers who were over 15, or for which the age could not be established beyond reasonable doubt as below 15, should be considered in aggravation because these acts are sufficiently linked to the crimes for which Bosco Ntaganda was convicted, they were foreseeable, and he was on notice of them.<sup>87</sup> These acts did not form part of the charges as articulated in counts 6 and 9, but they are crimes<sup>88</sup> and they should be given full weight to determine Mr Ntaganda’s sentence. In *Bemba et al.*, the Appeal Chamber found that reliance on uncharged allegations<sup>89</sup> to aggravate the

<sup>78</sup> Articles 7(1)(g)-1,-2, and 8(2)(e)(vi)-1,-2.

<sup>79</sup> Judgment, para.409.

<sup>80</sup> Judgment, para.410.

<sup>81</sup> Judgment, para.410.

<sup>82</sup> Judgment, para.408.

<sup>83</sup> Judgment, para.408, referring in footnotes to the evidence of **P-31** who testified about the rape of girls of 13-14 years old, and **P-46**, who testified about the rape of girls under 15 years old; Judgment, para.411.

<sup>84</sup> Judgment, para.546.

<sup>85</sup> Judgment, paras.546, 597, 897.

<sup>86</sup> Judgment, paras.546, 897.

<sup>87</sup> *Bemba et al.* Sentencing Appeal Judgment, paras.111-120.

<sup>88</sup> ICC-01/02-04/06-1962, paras.63-64.

<sup>89</sup> The discussion concerned allegations which had occurred after the charged conduct, but the Prosecution submits that the reasoning apply *a fortiori* to concurrent allegations within the timeframe of the charges.

sentence of a convicted person was appropriate because such facts “may inform the assessment of the gravity of the crime or offence or the convicted person’s culpability or give rise to an aggravating circumstance”.<sup>90</sup>

26. In the Judgment, the Chamber found beyond reasonable doubt that many UPC/FPLC female soldiers were raped and subjected to sexual violence.<sup>91</sup> This finding is not limited to soldiers under the age of 15. The Chamber references no less than 11 witnesses who describe sexual violence imposed on PMFs – with no reference to age - and describe a phenomenon of great magnitude.<sup>92</sup> Therefore this finding “clearly forms[s] part of the context of the conviction”.<sup>93</sup>

27. Notice of these allegations was given early in the case.<sup>94</sup> These acts are the same as that those charged for children under the age of 15. These acts were foreseeable, as the Chamber already found that “Mr Ntaganda knew that rapes and sexual violence were occurring within the UPC-FPLC ranks”, without limiting it to children under the age of 15.<sup>95</sup> In particular, they were foreseeable because Bosco Ntaganda raped girl members of his escort himself.<sup>96</sup> Mr Ntaganda was also present, outside the room where Abelanga had just raped a male recruit.<sup>97</sup> [REDACTED].<sup>98</sup> [REDACTED].<sup>99</sup> [REDACTED].<sup>100</sup> Taking these acts of sexual violence into account is crucial for the Chamber to assess the proper sentence to be imposed on Mr Ntaganda.

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<sup>90</sup> *Bemba et al.* Sentencing Appeal Judgment , paras.114.

<sup>91</sup> Judgment 406-413.

<sup>92</sup> Judgment 407 and footnotes 1154-1156.

<sup>93</sup> *Bemba et al.* Sentencing Appeal Judgment, para.116.

<sup>94</sup> The testimony of P-10 in the *Lubanga* case was disclosed to the Defence on 7 October 2013. P-769’s statement was disclosed on 21 January 2015. The original and updated Document Containing the Charges mentions that: “UPC/FPLC commanders and soldiers raped and sexually enslaved their soldiers without regard to age”, ICC-01/04-02/06-203-AnxA, and ICC-01/04-02/06-458-AnxA, para.100.

<sup>95</sup> Judgment, para.1197.

<sup>96</sup> Judgment, paras.407 and 1196.

<sup>97</sup> [REDACTED].

<sup>98</sup> [REDACTED].

<sup>99</sup> [REDACTED]

<sup>100</sup> [REDACTED].

**C. The extensive damage and long lasting harm caused by Bosco Ntaganda are aggravating circumstances**

28. Findings in the Judgment and evidence presented at trial, including during the sentencing phase, show that Bosco Ntaganda's victims suffered tremendously. UPC/FPLC crimes caused extensive damage to the victims, their families, and entire communities. The harm was simultaneously physical, psychological, and material; and had a profound social impact. The damage extended not only to those who experienced the crimes first-hand, but also to those who were born during the conflict, and who are marked by the ongoing impact of these crimes. The magnitude of the harm that remains over 15 years after the crimes were perpetrated, is striking, and should be considered aggravating.

***(i) Harm caused by murder, attempted murder, attacking civilians, persecution***

29. The killing of at least 49 persons in the banana field of Kobu caused immense sorrow. This pain is aggravated by the fact that many family members had to find the bodies of their loved ones atrociously mutilated.<sup>101</sup> After a UPC/FPLC soldier stuck him on the head with a machete, P-108 was discovered by his family in a pool of blood.<sup>102</sup> He could not see or hear for 18 months.<sup>103</sup> Expert P-939 examined his very extensive injuries, still visible 15 years later.<sup>104</sup> P-108 exhibited memory loss, vertigo, and neurological disturbance.<sup>105</sup> Expert P-938 testified that P-108 experienced a persistent sense of loss at being unable to work and intense fear after the attack, which later subsided.<sup>106</sup>

<sup>101</sup> See *i.e.*: **P-100**:T-131,50:3-51:24; **P-105**:T-134,20:22-21:9; **P-857**:T-194,5:2-14; **P-108**:T-180,69:11-22.

<sup>102</sup> Judgment, para.881.

<sup>103</sup> **P-108**, T-185,65:6-66:17.

<sup>104</sup> **P-939**:T-143,26:5-25; DRC-OTP-2059-0146-R02.

<sup>105</sup> **P-939**:T-143,27:7-16.

<sup>106</sup> **P-938**:T-113,78:10-20; DRC-OTP-2059-0049-R02.

30. Bosco Ntaganda's murder of Abbé Boniface Bwanalanga, a beloved figure within the community who was in this role 40 years,<sup>107</sup> terrorised people, sending the message that everyone could be targeted.<sup>108</sup> The murder traumatised the nuns who were abducted by the UPC/FPLC with him.<sup>109</sup> At the time, the priest's murder - targeted because he was Lendu – divided the clergy along ethnic lines.<sup>110</sup>
31. Within the Lendu community, many perceived the murder of the priest as evidence of the UPC/FPLC's will to kill Lendu intellectuals,<sup>111</sup> furthering the cycle of ethnically motivated crimes perpetrated during the conflict.<sup>112</sup> P-824 testified that today, some Lendu still make reference to the murder of the Abbé in 2002.<sup>113</sup> Both he and P-1000 explained that the ethnic dimension of the 2002 conflict created profound mistrust, and "*repli communautaire*"<sup>114</sup> that never mended. To this day, communities divide along ethnic ground in neighbourhoods,<sup>115</sup> villages,<sup>116</sup> at school,<sup>117</sup> at church.<sup>118</sup> This has ramifications in the context of renewed violence affecting Djugu territory since 2017.<sup>119</sup> Mr Ntaganda, who committed crimes of persecution based on ethnic grounds, bears some responsibility on the long-term divisions within the community.
32. P-1000 testified that murders and attacks against civilians had a particular and long-lasting impact on women. Militia attacks displaced families from villages to larger towns, as they could no longer work the fields for fear of being killed.<sup>120</sup> Many women became the sole breadwinners, while continuing to assume family

<sup>107</sup> P-824:DRC-OTP-2109-4426, p.4431, para.26.

<sup>108</sup> P-824:DRC-OTP-2109-4426, p.4432, para.28.

<sup>109</sup> P-824:DRC-OTP-2109-4426, p.4432, paras.27-28.

<sup>110</sup> P-824:DRC-OTP-2109-4426, p.4432, para.30.

<sup>111</sup> P-824:DRC-OTP-2109-4426, p.4433, para.31.

<sup>112</sup> P-824:DRC-OTP-2109-4426, p.4433, para.32.

<sup>113</sup> P-824:DRC-OTP-2109-4426, p.4433, para.31.

<sup>114</sup> P-1000:DRC-OTP-2109-4363, p.4370, para.40.

<sup>115</sup> P-824:DRC-OTP-2109-4426, p.4434, para.33.

<sup>116</sup> P-1000:DRC-OTP-2109-4363, p.4371, para.40.

<sup>117</sup> P-824:DRC-OTP-2109-4426, p.4433, para.33.

<sup>118</sup> P-1000:DRC-OTP-2109-4363, p.4371, para.40.

<sup>119</sup> P-824:DRC-OTP-2109-4426, p.4433, para.31; P-1000:DRC-OTP-2109-4363, p.4371, para.40.

<sup>120</sup> P-1000:DRC-OTP-2109-4363, p.4371, para.41.

responsibilities. The endemic poverty caused by years of conflict prompted families to send only boys to school while girls were sent to do trading or are married off very young, rendering girls particularly vulnerable to abuse, as P-1000 explained, including domestic abuse.<sup>121</sup>

*(ii) Harm caused by sexual crimes, including rape and sexual slavery*

33. The extreme brutality of the rapes and other sexual crimes committed by the UPC/FPLC had an immediate, devastating impact that never healed. In Mongbwalu, a 13 year-old Lendu girl bled profusely when two UPC/FPLC soldiers raped her,<sup>122</sup> and she returned to her house with her clothes soaked in blood. She could barely walk and was unable to speak for a day.<sup>123</sup> Her injury did not heal for months and required surgery years later.<sup>124</sup> Due to the sheer terror caused by the rapes and the constant fear of being exposed as a victim of sexual violence, she dropped out of school.<sup>125</sup>

34. During the Second Operation, P-18, P-19 and P-113 were victims of extremely brutal crimes by the UPC/FPLC which included rapes, sexual slavery for one,<sup>126</sup> and for two of them, attempted murder.<sup>127</sup> They suffered grave physical injuries,<sup>128</sup> to which Expert P-939 testified,<sup>129</sup> and which had a devastating effect on their lives. Expert P-938 examined victims P-18, P-19 and P-113 and described the severe psychological injuries they still exhibit following their ordeal, including suffering from post-traumatic stress disorder.<sup>130</sup>

<sup>121</sup> **P-1000**:DRC-OTP-2109-4363, p.4371, para.41.

<sup>122</sup> Judgment, para.519.

<sup>123</sup> Judgment, para.520.

<sup>124</sup> Judgment, para.520.

<sup>125</sup> Judgment, para.520.

<sup>126</sup> Judgment, para.960.

<sup>127</sup> Judgment, para.874.

<sup>128</sup> **P-19**:DRC-OTP-0108-0155, DRC-OTP-0108-0156, DRC-OTP-0108-0157; **P-18**: DRC-OTP-0096-0133, DRC-OTP-2052-0207.

<sup>129</sup> For P-19: **P-939**:T-143,21:20-25:16, DRC-OTP-2059-0131-R02 ; for P-18: **P-939**:T-143,13:4-18:18; DRC-OTP-2059-0231-R01,p.0241.

<sup>130</sup> **P-938**:DRC-OTP-2059-0069-R04, DRC-OTP-2059-0058-R02; DRC-OTP-2059-0080-R03.

35. Many witnesses testified about the psychological suffering caused by the stigma of being rape victims. Women who were raped feared reprisal, and being exposed and rejected by their families.<sup>131</sup> Speaking of the Ituri context, P-365 testified that “[a]ny raped woman is stigmatised, in all the communities without distinction”.<sup>132</sup> Rape meant women were shunned by their husbands, or were considered unworthy of marriage.<sup>133</sup> Victims had to hide their victimisation, and were haunted by feelings of shame and low self-esteem.<sup>134</sup> Expert P-938 testified that such shame can “pervade the woman’s whole life”.<sup>135</sup>

36. Expert P-938 explained that: “women or indeed men who have been sexually violated will feel contaminated, dirty, unclean, because of the nature of the violation, the very private violation that they have experienced”.<sup>136</sup> This seriously impacted victims’ relationships, including their sexual life.<sup>137</sup> Witnesses P-18, P-19, and P-113, all detailed their struggle with the terror of being exposed as rape victims<sup>138</sup> and the shame affecting their private life.<sup>139</sup>

37. UPC/FPLC soldiers detained P-22 in a pit near Kilo, raped and tried to kill her by cutting her neck with a machete.<sup>140</sup> She survived, but hanged herself in 2005.<sup>141</sup>

38. The Chamber made several findings regarding the short- and long-term physical and psychological impact of the sexual crimes perpetrated by UPC/FPLC troops on UPC/FPLC child soldiers. Nadège, a 9 year-old UPC/FPLC girl recruited into the UPC/FPLC, was raped until she had pus coming out of her vagina, and as a

<sup>131</sup> Judgment, para.88, citing to **P-18**:T-111,32-33;**P-19**:T-115,55-56; **P-113**:T-118,63-64; **P-14**:T-138,100:14-101:7; **P-365**:T-147,34:1-37:1; **P-790**:T-54,35:2-14.

<sup>132</sup> **P-365**:T-147,30:22-23.

<sup>133</sup> **P-365**:T-147,36:22-37:1.

<sup>134</sup> **P-365**:T-147,36:22-37:1; **P-790**:T-54,35:9-14.

<sup>135</sup> **P-938**:T-113,54:3-8

<sup>136</sup> **P-938**:T-114,8:7-9.

<sup>137</sup> **P-938**:T-114,6:6-8:16; DRC-OTP-2059-0058-R02,p.0064; DRC-OTP-2059-0069-R04,p.0075.

<sup>138</sup> See also **P-912**:T-148,77:9-78:7.

<sup>139</sup> For P-18: **P-938**:T-114,8:15-16; **P-18**:T-111,31:14-33:11; for P-19: **P-938**:T-114,8:17-10:9; DRC-OTP-2059-0080-R03; **P-19**:T-115,56:10-17; for P-113: **P-938**:T-114,11:23-12:5; **P-113**:T-118,63:9-65:7.

<sup>140</sup> **P-22**:DRC-OTP-0104-0050, DRC-OTP-0104-0046, DRC-OTP-0104-0040.

<sup>141</sup> **P-22**:DRC-OTP-2078-2501.

result, she died.<sup>142</sup> Mave, another 9 year-old soldier, suffered serious health issues because of the rapes the UPC/FPLC subjected her to.<sup>143</sup> Many girl soldiers contracted sexually transmitted diseases because of the sexual abuse they suffered in the UPC/FPLC.<sup>144</sup> Many others became pregnant as a result of the rapes.<sup>145</sup> This had an important social impact as many could not return to their communities and be exposed as victims of sexual crimes.<sup>146</sup> P-883 became pregnant in her early teens without knowing who, among the various soldiers who raped her, was responsible for the pregnancy.<sup>147</sup> To this day, the child asks her “where is my father”,<sup>148</sup> and is “hated” by some of her family members.<sup>149</sup> In 2016, she testified to still feeling “atrocious suffering” in her body and mind.<sup>150</sup>

39. The rape of other UPC/FPLC recruits by Ntaganda and other officers also caused immense damage to the victims.<sup>151</sup> P-10 told the judges that she still suffers from pain in her stomach following the sexual violence she experienced. She feels totally alienated: “I live alone, like a bird. That's my life”.<sup>152</sup>

*(iii) Harm caused by enlisting, conscripting, using children in hostilities*

40. Children enrolled in the UPC/FPLC are left with life-long physical, psychological, material and social scars. Some children who participated in military operations were injured or died in the battlefield.<sup>153</sup>

41. Former child soldiers suffer from alcohol and drug addiction, habits acquired either while in the UPC/FPLC or after, as a coping mechanism.<sup>154</sup> In the transit

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<sup>142</sup> Judgment, para.410.

<sup>143</sup> Judgment, para.979.

<sup>144</sup> Judgment, para.408, fn.1161.

<sup>145</sup> Judgment, para.407; **P-46**:T-101,68:7-19; **P-824**:DRC-OTP-2109-4426, p.4436, para.45.

<sup>146</sup> **P-46**:T-101,85:10-86:1.

<sup>147</sup> Judgment, para.409.

<sup>148</sup> **P-883**:T-167,96:4-7.

<sup>149</sup> **P-883**:T-168,64:22 –65:4

<sup>150</sup> **P-883**:T-167,96:4-10.

<sup>151</sup> **P-769**:T-120,57:1-20

<sup>152</sup> **P-10**:T-48,29:18.

<sup>153</sup> Judgment, para.416.

<sup>154</sup> See i.e.: **P-824**:DRC-OTP-2109-4426, p.4436, para.45; **P-1000**:DRC-OTP-2109-4363, p.4370, para.37.

centres, the children exhibited violent behaviour because of their experience.<sup>155</sup> Witness P-1000 saw children in a transit centre in Bunia in 2004 who did not respect any one anymore, including their parents, and who suffered from mental illness resulting from their traumatic experiences.<sup>156</sup> Witness P-824 – who also observed former child soldiers in a transit centre, including from the UPC/FPLC – testified: *“ils avaient perdu le sens de la sacralité de la vie humaine”*.

42. The stigma of being a child soldier had a significant impact on victims. Once they were able to leave, they found themselves alienated.<sup>157</sup> Witness P-883 stated that she was rejected by her family and abandoned by her husband who was afraid of her because she knew how to use weapons.<sup>158</sup>
43. These children had their education interrupted by conscription and enlistment, compromising their studies and their future.<sup>159</sup> P-883 testified: “I cried because I realised that if I had been able to continue going to school, perhaps my life would be different”.<sup>160</sup>

*(iv) Harm caused by destruction, pillaging, attacks on protected objects and forced displacement*

44. In Ituri’s socio-economic context, the systematic pillaging of all possessions and the destruction of homes, health centres and other social support structures endangered the very survival of the community. P-790 explained that his life will never be as it once was: *“I have not been able to reconstruct my life to the level it was at before. My life is quite different... so far I have not received any help. I survive on my own financial resources to obtain medication. When it comes to psychological help, there are*

<sup>155</sup> P-1000:DRC-OTP-2109-4363, p.4370, para.35.

<sup>156</sup> P-1000:DRC-OTP-2109-4363, p.4370, paras.35, 38.

<sup>157</sup> P-824:DRC-OTP-2109-4426, p.4436, para.45.

<sup>158</sup> P-883:T-168,36:10-16.

<sup>159</sup> P-824:DRC-OTP-2109-4426, p.4436, para.44; P-1000:DRC-OTP-2109-4363, p.4370, para.36.

<sup>160</sup> P-883:T-168,65:24-25.

*people who surround me with words of encouragement, but neither the government nor any other organization has provided me with any assistance or help whatsoever”.*<sup>161</sup>

45. As for looting, the Chamber found that the UPC/FPLC soldiers “took everything they wanted”,<sup>162</sup> leaving Mongbwalu inhabitants without possessions, which impacted their day-to-day life. For the Second Operation, it noted that the looted harvest affected people’s livelihood and the availability of food.<sup>163</sup> P-824 testified that the pillaging of the population’s goods and livestock in Walendu-Djatsi generated immense, enduring poverty.<sup>164</sup>
46. The shelling of homes and destruction by fire of mainly Lendu villages by the UPC/FPLC caused extensive damage.<sup>165</sup> P-824 testified about the magnitude of the material damage he saw in Mongbwalu and in the Kilo-Bambu area following UPC/FPLC attacks, and about the dire situation of the population. When he arrived in Mongbwalu in January 2003, P-824 saw empty houses with broken doors, and no Lendu inhabitants in town.<sup>166</sup> They had to flee towards Kobu, Kilo and Bambu, and many remain displaced to this day.<sup>167</sup> When he walked through Banyali-Kilo and Walendu-Djatsi about a month after the attacks,<sup>168</sup> P-824 described adults and children dying of malnutrition, and of diseases caused by the bad quality of the water.<sup>169</sup> People had no shelter; in fact, they were still hiding in the forest.<sup>170</sup> P-824 explained that the villages had been entirely destroyed, and that many inhabitants displaced by the UPC/FPLC from these areas never returned.<sup>171</sup>

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<sup>161</sup> **P-790**:T-54,40:15-23.

<sup>162</sup> Judgment, para.1044.

<sup>163</sup> Judgment, para.1044. *See also* **P-857**:T-194,5:15-22.

<sup>164</sup> **P-824**:DRC-OTP-2109-4426, p.4435-4436, para.42. *See also* **P-1000**:DRC-OTP-2109-4363, p.4371, para.40.

<sup>165</sup> Judgment, paras.496, 503, 569, 578, 602, 609, 619.

<sup>166</sup> **P-824**:DRC-OTP-2109-4426, p.4434, paras.36-37.

<sup>167</sup> **P-824**:DRC-OTP-2109-4426, p.4434, para.36.

<sup>168</sup> **P-824**:DRC-OTP-2109-4426, p.4435, para.38.

<sup>169</sup> **P-824**:DRC-OTP-2109-4426, p.4435, para.39.

<sup>170</sup> **P-824**:DRC-OTP-2109-4426, p.4435, paras.39, 41.

<sup>171</sup> **P-824**:DRC-OTP-2109-4426, p.4435, para.38.

47. In Sayo,<sup>172</sup> the UPC/FPLC deprived the mostly Lendu inhabitants of the only functioning health facility.<sup>173</sup> It also destroyed churches – including in Buli<sup>174</sup> and Tchudja –<sup>175</sup> and places of worship of other religions, further deteriorating social life.<sup>176</sup> P-824 described the profound sadness of the population, isolated, and living in constant anguish.<sup>177</sup>

### III. THE CONVICTED PERSON’S CULPABLE CONDUCT

#### A. NTAGANDA’S DEGREE OF PARTICIPATION AND DEGREE OF INTENT

48. Mr Ntaganda’s conceived and implemented a criminal plan “to drive out all Lendu from the localities targeting during the course of their military campaign”.<sup>178</sup> His planning and participation in the commission of crimes was a key to its success.<sup>179</sup> Such conduct deserves a fittingly high and serious sentence.

49. Bosco Ntaganda played a pivotal role in the creation and implementation of the group’s common plan. His role was “determinative in setting up an efficient military group”, and he ensured that the UPC/FPLC “had the numerical strength and capacity” to conduct successful, large-scale military operations.<sup>180</sup> His contributions, which were essential, allowed them “to implement their project to drive out targeted groups of civilians” from relevant areas.<sup>181</sup>

50. Bosco Ntaganda was, with Floribert Kisembo, “the highest ranked leader of the FPLC”.<sup>182</sup> He was the mastermind behind operations to attack a number of

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<sup>172</sup> Judgment, para.1147.

<sup>173</sup> P-824:DRC-OTP-2109-4426, p.4435, para.39.

<sup>174</sup> Judgment, para.609.

<sup>175</sup> P-824:DRC-OTP-2109-4426, p.4435, para.40.

<sup>176</sup> P-824:DRC-OTP-2109-4426, p.4435, para.40.

<sup>177</sup> P-824:DRC-OTP-2109-4426, p.4435, para.41.

<sup>178</sup> Judgment, para.808.

<sup>179</sup> Judgment, paras.322, 323, 808-810, 827, 833.

<sup>180</sup> Judgment, para.833.

<sup>181</sup> Judgment, paras.808-810, 833.

<sup>182</sup> Judgment, para.1179.

villages in Ituri, including the First and Second Operations,<sup>183</sup> and overall commander of the assault on Mongbwalu during the First Operation.<sup>184</sup> During the Second Operation, Mr Ntaganda “exercised oversight over the unfolding [...] and, by reinforcing the chain of command within the group, he made sure that the forces deployed were carrying out the project as planned”.<sup>185</sup> Critically, Mr Ntaganda indicated that he did not have any problems exercising his role.<sup>186</sup>

51. Mr Ntaganda’s orders were obeyed.<sup>187</sup> He “inspired fear amongst the troops and the population”.<sup>188</sup> He stated himself that he was a “highly respected person in the army and within the civilian community” and that “anybody who broke the law was in fear of [him]”.<sup>189</sup> He had a direct role in ordering, encouraging and participating in the commission of crimes, as the Chamber found beyond reasonable doubt:

“[...] it is Mr Ntaganda’s direct orders to kill civilians and loot, his active role as an operational commander, identifying targets, congratulating and supporting the troops in the field, as well as his proximity to the commander and soldiers deployed, which resulted in the commission of crimes. Further with his own personal violent conduct towards civilians, Mr Ntaganda showed his troops how the orders were to be implemented. Mr Ntaganda’s subordinates, who were taught military skills and discipline, were trained to obey orders and therefore naturally proceeded with the commission of the crimes during the course of the First and Second Operation, as requested”.<sup>190</sup>

52. He was also “one of the members of the UPC/FPLC military leadership who was personally and actively involved in the organisation’s recruitment activities”.<sup>191</sup> He established the Mandro training centre, which was a “pivotal event in the

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<sup>183</sup> Judgment, para.834 and heading “Mr Ntaganda devised the military tactic which allowed for the success of the UPC/FPLC taking over of Mongbwalu and the related First and Second Operation”. *See also* para.835: “Mr Ntaganda and Jérôme Kakwavu planned this operation”; and para.837: “With regard to the Second Operation, the Chamber found that Mr Ntaganda took part in the relevant planning”.

<sup>184</sup> Judgment, paras.842, 1179.

<sup>185</sup> Judgment, para.846.

<sup>186</sup> Judgment, para.322.

<sup>187</sup> Judgment, para.322.

<sup>188</sup> Judgment, para.322.

<sup>189</sup> Judgment, para.322, fns.856-858.

<sup>190</sup> Judgment, para.855.

<sup>191</sup> Judgment, para.830.

UPC/FPLC's ability to increase its size and become stronger as an armed group".<sup>192</sup> It was through these training centres in Mandro and elsewhere "that children under the age of 15 became incorporated into the organisation".<sup>193</sup> Mr Ntaganda selected the topics for instruction at Mandro.<sup>194</sup> The training of recruits was under his responsibility; he personally taught recruits at Mandro; personally attended and spoke at graduation ceremonies; and deployed soldiers after training, including those under 15 years at the time of the events.<sup>195</sup>

53. Bosco Ntaganda's own behaviours served as a criminal model to his troops. As the Chamber found, "Mr Ntaganda's presence, actions, and directives illustrate how he intended the troops to behave in the field".<sup>196</sup>

54. As to his level of intent, the Chamber held that Bosco Ntaganda "meant the destruction and disintegration of the Lendu community, which inherently involved the targeting of civilian individuals by way of acts of killing and raping, as well as the targeting of their public and private properties, via acts of appropriation and destruction".<sup>197</sup> The Chamber found that Bosco Ntaganda "willingly sent his troops to attack and kill Lendu civilians, to engage in sexual violence against this population, and to loot and destroy their belongings [...] By way of these acts, Mr Ntaganda also intended for civilians to be chased out of the assaulted localities".<sup>198</sup> These findings show that commission of crimes against civilians, in particular Lendu civilians, was pre-meditated and is befitting an extremely high sentence.

55. The Chamber further found that Bosco Ntaganda "agreed and worked with others to achieve their plan to drive out all the Lendu from the localities targeted

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<sup>192</sup> Judgment, para.831.

<sup>193</sup> Judgment, para.831.

<sup>194</sup> Judgment, para.831.

<sup>195</sup> Judgment, para.832. *See also* para.323.

<sup>196</sup> Judgment, para.1180.

<sup>197</sup> Judgment, para.809 (emphasis added).

<sup>198</sup> Judgment, para.1187 (emphasis added).

during the course of the First and Second Operation”.<sup>199</sup> Thus, his plan was criminal from the outset. Indeed, as regards acts of sexual violence, “the unfolding of the operations shows that these acts were, like the acts of killings and other acts of physical violence, a tool used by UPC/FPLC soldiers and commanders alike to achieve their objective to destroy the Lendu community in the localities under assault.”<sup>200</sup> Furthermore, “this aim of destruction is also evidenced by the particularly violent method used for the rapes committed during the course of the First and Second Operations”.<sup>201</sup>

56. Since at least the beginning of August 2002, Bosco Ntaganda was virtually certain that implementing the plan to drive out all Lendu from the targeted localities would lead to the recruitment and active use in hostilities of children under the age of 15 into the UPC/FPLC and their rape and sexual slavery.<sup>202</sup>

57. Contrary to the Defence’s oral argument,<sup>203</sup> Bosco Ntaganda’s degree of culpability and intent is not lower for the Second Operation than for the First Operation. The Chamber found that UPC/FPLC military leaders planned a military campaign including a series of assaults involving the commission of crimes against Lendu.<sup>204</sup> The UPC/FPLC leaders “had the intention to occupy key positions in Ituri”<sup>205</sup> and “secure important roads leading to and from Bunia”.<sup>206</sup> Further to the overall plan, the UPC/FPLC undertook the First and Second Operations.<sup>207</sup> The Chamber made clear that “the First and Second Operations **are part of the same military campaign and constitute a logical succession of events**”.<sup>208</sup> Although they were in different areas at different times, “the acts

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<sup>199</sup> Judgment, para.1177.

<sup>200</sup> Judgment, para.805 (emphasis added).

<sup>201</sup> Judgment, para.806 (emphasis added).

<sup>202</sup> Judgment, para.811.

<sup>203</sup> T-268,35:25-37:18.

<sup>204</sup> Judgment, para.793 (heading).

<sup>205</sup> Judgment, paras.438, 793.

<sup>206</sup> Judgment, para.793.

<sup>207</sup> Judgment, para.793.

<sup>208</sup> Judgment, para.793 (emphasis added).

performed by the UPC/FPLC troops during these two successive operations **are part of one and the same course of conduct**".<sup>209</sup>

58. The Chamber further emphasized that it had assessed Mr Ntaganda's role in the First and Second Operations in a comprehensive manner "since the First and Second Operations are part of one and the same plan".<sup>210</sup>

59. That Bosco Ntaganda may not have been present during the Second Operation does not diminish his culpability for the crimes committed then. He conceived a plan with others and made essential contributions to that plan that resulted in the commission of the charged crimes. For the crimes for which he has been convicted as an indirect co-perpetrator, his liability as a principal is based on the various essential contributions he made *to the common plan*.<sup>211</sup> The Chamber found that "Mr Ntaganda exercised control over the crimes committed by UPC/FPLC troops pursuant to the common plan to drive out all the Lendu from the localities targeted during the course of the First and Second Operation"<sup>212</sup> and "against children under the age of 15 who were enrolled, raped, subjected to sexual slavery, and/or used to participate in hostilities by the UPC/FPLC".<sup>213</sup>

60. His essential contributions to the Second Operation are equally significant in any event, and include planning it, devising military tactic, instructing commanders to handle the Lipri road, instructing soldiers to pick up ammunition and bring it to the troops in Bambu, monitoring and remaining in contact with the field, reacting strongly to news that a commander was refusing to deploy, disciplining,

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<sup>209</sup> Judgment, para.793 (emphasis added).

<sup>210</sup> Judgment, para.838.

<sup>211</sup> Judgment, paras.834-857.

<sup>212</sup> Judgment, para.857.

<sup>213</sup> Judgment, para.857.

ensuring the proper execution of orders and exercising oversight to ensure the project was carried out as planned.<sup>214</sup>

## B. NTAGANDA'S INDIVIDUAL CIRCUMSTANCES AGGRAVATE HIS SENTENCE

61. Bosco Ntaganda's individual circumstances heighten the need for a high sentence in this case. Bosco Ntaganda was an adult at the time of the crimes. He was not "very young in assuming these responsibilities", as argued by the Defence.<sup>215</sup> He is an experienced and well-trained commander, taught by Ugandan and Rwandan military experts,<sup>216</sup> who is proud that he was quickly promoted to a senior rank because he distinguished himself in his training.<sup>217</sup> He stated that he was a seasoned instructor<sup>218</sup> and a tactician.<sup>219</sup> He knew the laws of war and prohibitions on attacking civilians.<sup>220</sup> He understood the importance of discipline,

<sup>214</sup> Judgment, paras.834-846.

<sup>215</sup> T-268,42:13-14.

<sup>216</sup> T-24,74:21-22. *See also* Judgment, para.312.

<sup>217</sup> Judgment, para.5. *See D-300*:T-209,51:5-52:8 Q. Why, if you recall, why is it that you were selected among the 80 out of the 7,000? A. I remember that the commander, OC of the regiment, requested that a number of youth who were lively and awake should be selected from among the recruits. I was selected from--I was selected as part of those 80 persons. Q. (...) Is that the reason for which you were recruited, because you were lively and awake? A. No, it was not simply because I used to sing. I knew how to sing, yes, that is correct. **I was smart when it came to parades. And I would answer aptly to questions during training. And when we were underground for military exercises, the instructors noticed me and I was somewhat of a model among the other recruits.** So this selection was not based only on my ability to sing but on other criteria, and it is for these reasons I was selected among the 80. Q. What was the outcome of the training of the 80? A. After the training for the 80 persons we had completed the course on leadership and training, and after that training I was among those who were given the rank of sergeant. About six or five or six of us were promoted to the rank of sergeant. Q. What ranks did the others receive, if at all, Mr Ntaganda? A. The rank of corporal. Q. Was there any reason why you and the five others were promoted to the rank of sergeant, whereas the others were given the rank of corporal? A. Yes. You see, in the army each rank has a meaning and a significance. **I was given that rank because I had better results. Those of us who distinguished ourselves during the training were awarded the highest rank**" (emphasis added).

<sup>218</sup> Judgment, para.832. *See also* para.323 and T-24,74:21-22.

<sup>219</sup> T-225,49:7-12: "Q. It's true, isn't it, that many within the UPC/FPLC viewed you as the real operational leader of the army? A. In the army one has successes per times. I was a tactician, I certainly accept that. I commanded a very disciplined army and we had a reputation for discipline. My role was chief of general staff and that was also a well-known fact--deputy chief of general staff".

<sup>220</sup> T-242,21:2-10: "During this training, did the recruits receive training in the laws of war? Interviewee: Yes. Interpreter: Including the Geneva Conventions? Interviewee: Yes, yes". (Speaks English) Now, this is what Floribert Kisembo said on this topic of ideology and training. Do you agree with those--that description provided by Floribert Kisembo? A. Yes, that's what we studied in Jinja. That's what was taught at the training camps for the infantry". *See also*, T-215,10:14-20: "But in general terms, I am familiar with laws governing war which provide that captured persons should not be killed and that any wounded person on the battlefield should not be killed because such a person could provide information. So, secondly, it is forbidden to kill injured soldiers because they are entitled to treatment, just like yourself, because they are soldiers like yourself, and in any event

but he never intended to discipline anyone for committing crimes against the Lendu, because these crimes were part of his plan.<sup>221</sup> He acknowledged the influence, power and fear he held over soldiers and civilians alike.<sup>222</sup>

62. He understood the difference between right and wrong. He said he fought the *génocidaires* in Rwanda because of the crimes they were committing against his own people.<sup>223</sup> Attempting to convince the Chamber that he could never have committed the charged crimes, he stated: “I told myself that I do not wish to see any community, any other community experience what my own community went through”.<sup>224</sup> But Mr Ntaganda went on to do the same thing: to persecute civilians, in particular the Lendu, because of their ethnicity. He is guilty of intentionally attacking civilians and forcibly displacing them, of their murder, rape, sexual enslavement, the destruction of their medical facilities and of looting their property. Implementing his plan led to the enlistment and conscription of children under 15 years into his army, and their use to participate in hostilities.

63. The Chamber flatly rejected his testimony that he always fought and acted for the liberation and freedom of civilians in Ituri, finding that his evidence “is clearly contradicted by the other available evidence on the record which shows that at least a part of the civilian population in Ituri, in particular the Lendu, was actually the target of violent acts by the UPC/FPLC in 2002 and 2003”.<sup>225</sup>

64. Not once did Mr Ntaganda state that he was not properly trained or prepared for the military duties he undertook in the UPC/FPLC. Nor did the Chamber find any such incapacity. It found that Bosco Ntaganda had a unique and central role in

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they might actually be brave soldiers. So it is not possible to kill people who are captured. That is the answer I can provide to your question, Mr President”.

<sup>221</sup> “UPC/FPLC soldiers, however, did not consider that rape, the killing of a Lendu, or the looting of Lendu property, were punishable offences. Similarly, rape of Lendu civilians during UPC/FPLC operations was not punishable”. Judgment, para.332.

<sup>222</sup> Judgment, para.322.

<sup>223</sup> Judgment, paras.5-6, 259.

<sup>224</sup> Judgment, para.259, fn.651.

<sup>225</sup> Judgment, para.261.

setting up the UPC/FPLC as an efficient armed group;<sup>226</sup> that his “skills, experience and initiatives were determinative” in increasing the group’s strength and capacity to carry out its objectives;<sup>227</sup> that his skills were well-perceived and relied upon within the ranks of the UPC/FPLC for the planning and organisation of military operations;<sup>228</sup> and that he was able to plan and lead operations in the UPC/FPLC.<sup>229</sup> Mr Ntaganda did not raise any issues of duress or incapacity during trial, or that he was not equipped in any way to lead the military wing of the UPC/FPLC. To the contrary, he confirmed that he had no difficulties in exercising his role as Deputy Chief of Staff in charge of operations and organisation in the UPC/FPLC.<sup>230</sup> As such, his age is not a mitigating factor in these circumstances.

**C. NTAGANDA’S ABUSE OF POWER OR AUTHORITY AND HIS FAILURE TO PROTECT THE VICTIMS DESPITE HIS DUTY OF CARE ARE AGGRAVATING CIRCUMSTANCES**

65. Throughout the period of the charges, Bosco Ntaganda - as Deputy Chief of Staff of the UPC/FPLC - held a senior military leadership role in the UPC/FPLC and a key position of power.<sup>231</sup> He inspired fear in the troops and the population.<sup>232</sup> He had authority and influence over his troops, including the power to order disciplinary measures.<sup>233</sup> His orders were obeyed.<sup>234</sup> His commanders, in turn, directed the Hema civilian supporters in UPC/FPLC operations.<sup>235</sup>

66. The Chamber made many particular findings on Mr Ntaganda’s effective control over his troops, exercise of authority and on his orders, instructions, planning and

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<sup>226</sup> Judgment, para.852.

<sup>227</sup> Judgment, para.852.

<sup>228</sup> Judgment, para.853.

<sup>229</sup> Judgment, para.322.

<sup>230</sup> Judgment, para.322.

<sup>231</sup> Judgment, paras.322, 323, 808-810, 827, 833.

<sup>232</sup> Judgment, paras.322, 828.

<sup>233</sup> Judgment, para.322, 323, 808-810, 827, 833.

<sup>234</sup> Judgment, paras.322, 828.

<sup>235</sup> Judgment, para.333.

monitoring of operations and on his failures to protect victims. Rather than using his position of authority for positive change in Ituri and frustrate the commission of the crimes, Mr Ntaganda deliberately used his authority and power to fan the flames of the conflict and to commit or order the commission of crimes, to be a criminal model for his troops, to fail to put any measures in place that would either prevent the commission of crimes against civilians and members of his own armed group, or that would punish the offenders.

67. Bosco Ntaganda's abuse of power should aggravate his sentence. As held by the SCSL in *Taylor*, "breach of trust or authority, where the accused was in a position that carries with it a duty to protect or defend the victims, such as in the case of a government official, police chief or commander, can be an aggravating factor".<sup>236</sup> Mr Ntaganda abused his power through the following actions and omissions.

68. *First*, Mr Ntaganda abused his position of authority through his endorsement of criminal conduct through his own conduct and through his direct orders to target and kill civilians.<sup>237</sup> The Chamber held that "[w]ith his own actions, he illustrated for his troops how the orders were to be implemented with regard to the treatment of the Lendu civilians".<sup>238</sup> For example, after the Mongbwalu operation, Mr Ntaganda congratulated everyone present on the successful operation.<sup>239</sup> Mr Ntaganda "[i]nstead of frustrating their commission, [...] personally engaged, in front of his soldiers, in violent conduct towards the enemies".<sup>240</sup>

69. *Second*, Mr Ntaganda abused his position of authority by raping persons in his escort, which he did by virtue of his superior position over them.<sup>241</sup> Indeed, the Chamber found beyond reasonable doubt that Mr Ntaganda had forced sexual

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<sup>236</sup> [Taylor SJ](#), para.29.

<sup>237</sup> Judgment, paras.851, 855. See paras.848-850 (listing Ntaganda's concrete orders to kill Lendu civilians).

<sup>238</sup> Judgment, paras.851, 855.

<sup>239</sup> Judgment, para.847.

<sup>240</sup> Judgment, para.857.

<sup>241</sup> Judgment, para.407.

intercourses with many female members of his personal guard.<sup>242</sup> The rape of female members of the UPC/FPLC was a “common practice” that was “generally known and discussed within the UPC/FPLC”.<sup>243</sup> Members of the UPC/FPLC and UPC/FPLC commanders regularly raped or subjected to sexual violence female members of the UPC/FPLC including those under 15 years of age.<sup>244</sup> The Chamber found beyond reasonable doubt that some female members of the UPC/FPLC were also raped at the Mandro camp.<sup>245</sup> The Chamber found that “commanders, including [Mr Ntaganda] were taking advantage of the coercive environment”<sup>246</sup> in which the children were at the time.

70. *Third*, Mr Ntaganda abused his position of authority by taking the goods looted by his soldiers, which he could do by virtue of his senior position, in particular during the First Operation after which looted goods were found at his residence in Bunia.<sup>247</sup> Looting of enemy property was not punished.<sup>248</sup>

71. *Fourth*, Mr Ntaganda abused his authority by failing to prevent and punish the commission of the crimes despite being in a position to do so. He failed in his duty to protect the civilian population and the women and girls of his army, who were victims of crimes. Although the Chamber declined to enter further findings on modes of liability other than article 25(3)(a),<sup>249</sup> it did make extensive factual findings on Mr Ntaganda’s effective control over the troops,<sup>250</sup> and his failure to prevent the crimes or punish their commission. In particular:

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<sup>242</sup> Judgment, fn.3238.

<sup>243</sup> Judgment, para.407. *See also*, para.1196.

<sup>244</sup> Judgment, para.792.

<sup>245</sup> Judgment, fn.1156.

<sup>246</sup> Judgment, para.1195.

<sup>247</sup> Judgment, paras.516, 1032, 1042, 1183.

<sup>248</sup> Judgment, para.1183.

<sup>249</sup> Judgment, para.1200.

<sup>250</sup> Judgment, paras.321-323, 331, 332, 865-866.

- a. Mr Ntaganda was in charge of deployment and operation of the FFPLC.<sup>251</sup> With regard to children under 15 within his own armed ground, the Chamber found there to be an “absence of measures to exclude such persons” and the UPC/FPLC’s “acceptance that individuals under the age of 15 would therefore become part of the UPC/FPLC”.<sup>252</sup> The UPC/FPLC did not effectively engage in any systematic demobilisation process and the recruitment of individuals under 15 continued.<sup>253</sup>
- b. Mr Ntaganda had the power to order disciplinary measures.<sup>254</sup> For example, he ordered the imprisonment of three UPC/FPLC commanders who were suspected of raping wives of civilians.<sup>255</sup> The victims were not Lendu.<sup>256</sup> Rapes that had been perpetrated during UPC/FPLC operations were not punished;<sup>257</sup> rape and sexual violence in the UPC/FPLC were left largely unpunished and “no effective measures were taken by Mr Ntaganda or Floribert Kisembo to restrain or prevent this practice within their respective groups of escorts”.<sup>258</sup>
- c. Mr Ntaganda was responsible for military training, including the new recruits.<sup>259</sup> He set up the structure for the training and determined the topics for instruction at Mandro camp.<sup>260</sup> Topics did not include international humanitarian law. To the contrary, songs were taught inciting soldiers to attack or kill Lendu or ‘get’ everything, including women ‘for free’.<sup>261</sup> Soldiers were not paid.<sup>262</sup> It was not forbidden to steal

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<sup>251</sup> Judgment, paras.321-322.

<sup>252</sup> Judgment, para.985.

<sup>253</sup> Judgment, paras.430-431. *Also* Judgment, para.788 (noting Mr Ntaganda’s isolated demobilisation efforts).

<sup>254</sup> Judgment, para.323.

<sup>255</sup> Judgment, fn.865.

<sup>256</sup> Judgment, fn.866.

<sup>257</sup> Judgment, para.332, fn.894.

<sup>258</sup> Judgment, para.792. *See also* paras.411-412, 1196.

<sup>259</sup> Judgment, paras.323, 360.

<sup>260</sup> Judgment, para.371.

<sup>261</sup> Judgment, para.373.

<sup>262</sup> Judgment, para.324.

from the civilian population.<sup>263</sup> Moreover, the UPC/FPLC soldiers “did not consider that rape, the killing of a Lendu or the looting of Lendu property were punishable offences”.<sup>264</sup>

d. The Chamber found that “no particular protection was given by the UPC/FPLC to its youngest members”<sup>265</sup> and military leaders “did not create the necessary conditions to ensure a safe environment for the female members of the UPC/FPLC, in which they would not be sexually abused by other members of the group”.<sup>266</sup> To the contrary, “[l]ife in the UPC/FPLC for recruits, including for the youngest ones, meant harsh living conditions, threats, including to their life, monitoring of their movements, and severe punishments, including beatings and executions. While ensuring that the recruits obeyed their orders, the actual orders given to them, including to the youngest ones, directed them to be engaged in violent acts, such as killing the enemy, namely the Lendu, regardless of their sex, age and whether they were soldiers or civilians.”<sup>267</sup>

e. The Chamber found that Mr Ntaganda had the power to frustrate the commission of the crimes.<sup>268</sup>

72. Bosco Ntaganda equally failed to ensure protection of the population in the aftermath of the First and Second Attacks. He took no measures to ensure the safe return of civilians forced to flee from their villages.<sup>269</sup> Instead, “any Lendu person would be killed if they tried to return”.<sup>270</sup>

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<sup>263</sup> Judgment, para.415.

<sup>264</sup> Judgment, paras.332, 1183.

<sup>265</sup> Judgment, para.1195.

<sup>266</sup> Judgment, para.792.

<sup>267</sup> Judgment, para.790. *See also* para.415 (regarding the expression ‘*kupiga na kuchaji*’, an order which meant to attack and loot and was understood to mean also get rid of everyone and everything). *See also* paras.484, 488, 1094, 1099, 1181, 1186.

<sup>268</sup> Judgment, para.856. *See generally* paras.826-857.

<sup>269</sup> Judgment, para.1059.

<sup>270</sup> Judgment, para.1059.

73. The Chamber's findings, contained in the Judgment, about Bosco Ntaganda's failure to prevent and punish the commission of crimes by his troops would undoubtedly give rise to a conviction for superior responsibility if cumulative conviction for article 25 and 28 was legally permissible. The relevant facts and protected values under article 28(a) are different from Mr Ntaganda's contributions under article 25(3)(a), and considering them in aggravation of his sentence would not amount to "double-counting". It is the focus on the breach of the superior's duty to exercise control<sup>271</sup> which is at the heart of its unique object and purpose (demanding active measures of superiors to enforce IHL),<sup>272</sup> while also making it distinct from accessorial participation.<sup>273</sup>

74. This is consistent with the ICTY<sup>274</sup> and ICTR<sup>275</sup> Chambers which considered the facts satisfying different modes of liability for the purpose of sentencing.

75. Mr Ntaganda was on notice of the facts underlying article 28(a) since at least the Confirmation Decision.<sup>276</sup> He argued in his closing brief and oral arguments that

<sup>271</sup> [Krnojelac AJ](#), para.171 (emphasis added). Also [Oric AJ](#), Declaration of Judge Shahabuddeen, paras.20, 24; ICC-02/04-01/15-422-Red, para.45; ICC-02/11-01/11-656-Red, para.262 ("a fundamental difference exists between the forms of commission incriminated in article 25 [...], which establish liability for one's own crimes, and article 28 [...], which establishes *liability for violation of duties* in relation to crimes committed by others", emphasis added); Robinson, p.22-23, 37-38.

<sup>272</sup> E.g. ICC-01/05-01/08-3343 (*Bemba TJ*), para.172; ICC-01/05-01/08-406 (*Bemba AI Amicus Brief*), para.47; Van Sliedregt, p. 190; Nybondas, pp. 135-136. Also Triffterer, p.186. Further Munoz-Rojas/Fréchard, p.194-195, 203-205; Sandoz, paras.3549, 3559-3561.

<sup>273</sup> E.g. ICC-01/04-01/06-3121-Red (*Lubanga Judgment on Appeal Against Conviction*), para.468 (for the *participatory* modes in article 25, "the blameworthiness of the person is directly dependent on the extent to which the person actually contributed to the crime in question").

<sup>274</sup> [Blaškić AJ](#), para.91 (considering that "the provisions of Article 7(1) [akin to article 25 of the Statute] and Article 7(3) [akin to article 28 of the Statute] [...] connote distinct categories of criminal responsibility" but noting that "it is not appropriate to convict under both"; instead, "where the legal requirements pertaining to both of these heads of responsibility are met, a Trial Chamber should enter a conviction on the basis of Article 7(1) [i.e. article 25] only, and consider the accused's superior position as an aggravating factor in sentencing"). See also [Kvočka et al AJ](#), para.104 ("[I]t is not appropriate to convict under both Article 7(1) [JCE liability] and Article 7(3) [superior responsibility] of the Statute for the same crime. Where the legal requirements of both forms of responsibility are met, a conviction should be entered on the basis of Article 7(1) only, and the superior position should be taken into account as an aggravated factor in sentencing").

<sup>275</sup> The ICTR trial chambers have made findings with respect to several modes of liability for the purpose of sentencing. See e.g. [Setako AJ](#), para.268 (when an accused is charged cumulatively under different modes of liability, it is an error of law not to enter a finding on superior responsibility for the purpose of sentencing); [Gatete AJ](#), para.236 (noting that, although the Trial Chamber only entered a conviction under one mode of liability ('committing'), it nonetheless made "findings on planning, instigating, ordering, and aiding and abetting" for the purpose of sentencing).

he took ‘preventive’ and ‘repressive’ measures.<sup>277</sup> These findings on Bosco Ntaganda’s abuses of authority including his failures to prevent and punish the crimes should be considered to aggravate his sentence.

#### D. NTAGANDA’S MISCONDUCT AT THE DETENTION CENTRE AND ATTEMPTS TO OBSTRUCT JUSTICE ARE AGGRAVATING CIRCUMSTANCES

76. Bosco Ntaganda’s misconduct at the Detention Centre and his attempts to obstruct the investigation and/or prosecution of the charges in this case are aggravating factors warranting a higher sentence. The Chamber has previously found that there were *reasonable grounds to believe* that he engaged in witness interference and coaching. It repeatedly emphasised “the gravity of [his] conduct”<sup>278</sup> and ultimately concluded that it “has had a significant impact on the proceedings in the *Ntaganda* case, has resulted in extensive litigation, and has entailed the expenditure of significant resources”.<sup>279</sup> His grave misconduct has indeed left a significant mark on this case and this should not be ignored.

77. In accordance with the Appeals Chamber’s jurisprudence,<sup>280</sup> the Chamber should now enter specific findings *beyond reasonable doubt* regarding Bosco Ntaganda’s

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<sup>276</sup> *Bemba et al.* SAJ, para.116 (“The Appeals Chamber considers that it is impossible to describe in the abstract how close this link has to be; this is a question of the circumstances of each case. Nevertheless, considerations of procedural fairness and the rights of the defence require that the convicted person be sufficiently put on notice of the facts that are taken into account to aggravate the sentence. This does not mean that such facts need to be specifically set out in the document containing the charges. The purpose of the confirmation process is to “determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged”, not to identify potential aggravating factors. If a trial chamber relies upon facts in aggravation that were established in its decision on conviction under article 74 of the Statute, there is, barring exceptional circumstances, also no further notice required to the convicted person as these facts clearly form part of the context of the conviction. The convicted person must, therefore, expect that they may be taken into account by the trial chamber in sentencing. *If, on the other hand, the trial chamber wishes to rely upon facts in aggravation that could not reasonably be expected by the convicted person, it may only do so if proper notice has been provided – for instance in the submissions of the Prosecutor on sentencing – so as to allow the convicted person to defend him- or herself*”).

<sup>277</sup> ICC-01/04-02/06-2298-Anx1-Corr-Reg (Defence Closing Brief), paras.235, 811, 813; T-268, 44:6-8.

<sup>278</sup> ICC-01/04-02/06-1494-Red4, para.22; ICC-01/04-02/06-1913-Red2, paras.18, 22; and ICC-01/04-02/06-2236-Red, para.20.

<sup>279</sup> ICC-01/04-02/06-2236-Red, para.20.

<sup>280</sup> *Bemba* SAJ, paras.111-120. See also *Bemba* SD, fn.249: “A convicted person’s obstruction of justice, or attempts to do so, may, in appropriate circumstances, be considered in sentencing or as separate and independent offences against the administration of the justice, but not both”; Trial Chamber VII, ICC-01/05-01/13-2038,

misconduct at the Detention Centre and attempts to interfere with the investigation and prosecution of the conduct that ultimately resulted in his conviction, so that it can appropriately take it into account as an aggravating factor. It is not correct that Bosco Ntaganda's misconduct while in detention "cannot be taken into account [...] [because] there is no finding beyond reasonable doubt that there was indeed some interference with the administration of justice".<sup>281</sup> The Prosecution was not required to bring new charges; nor did the Chamber need to make factual findings, let alone convict him of article 70 offences, in its Judgment, for this conduct to be considered a factor that aggravates sentence.

78. Nor does the absence of factual findings in the Judgment prevent the Chamber from taking Mr Ntaganda's conduct while in detention into account as an aggravating factor for sentencing. Indeed, the Appeals Chamber has confirmed that "conduct – including criminal conduct – that occurred after the offence for which the convicted person is convicted [...] may amount to an aggravating circumstance" and that "[i]t would be arbitrary to exclude such conduct from consideration merely because it could potentially have been charged as a separate offence".<sup>282</sup> A Trial Chamber can consider such conduct as an aggravating factor provided that there is a sufficiently proximate link with the crimes for which the person was convicted<sup>283</sup> and that the person has received sufficient notice that said conduct could be taken into account for sentencing.<sup>284</sup>

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para.11: "Legally, the Chamber considers that conduct constituting offences against the administration of justice under Article 70 of the Statute can qualify as an aggravating circumstance under Rule 145(2)(b)(vi) of the Rules. Such conduct is sufficiently similar in nature to the aggravating circumstance of '[a]ny relevant prior criminal convictions for crimes under the jurisdiction of the Court or of a similar nature], noting that Article 70(1)(c) of the Statute expressly provides the Court with jurisdiction over corruptly influencing a witness"; *Bemba et al.* SD, paras.54-55, 132-133, 180-181, 237-238.

<sup>281</sup> T-268,41:17-21.

<sup>282</sup> *Bemba* SAJ, para.114.

<sup>283</sup> *Bemba* SAJ, paras.115-116.

<sup>284</sup> *Bemba* SAJ, para.116.

79. First, there is a direct link between Mr Ntaganda's misconduct at the Detention Centre and the crimes for which he has been convicted, since his actions were aimed at obstructing the investigation and prosecution of these crimes.

80. Second, Bosco Ntaganda has had ample notice of the Prosecution's intention to submit that his conduct while in detention constitutes an aggravating factor warranting a higher sentence. He has long been aware of the Prosecution's allegations<sup>285</sup> as well as its intention to submit that his misconduct constitutes an aggravating factor.<sup>286</sup> Consequently, and considering that this relates to *his own conduct*, he has had full notice and every opportunity to defend himself and will have a further opportunity to do so in response to this request. In August 2015, the Chamber found that there were *reasonable grounds to believe* that Mr Ntaganda: "(i) 'abused his entitlement to communications by speaking to non-registered interlocutors without prior approval of the Registry'; (ii) used coded language 'to disguise attempts to disclose confidential information or to interfere with witnesses'; (iii) disclosed the identity of Prosecution witnesses in circumstances which the Chamber found to be of 'grave concern'; (iv) 'intended to engage in a serious form of witness interference'; and (v) 'instructed his interlocutors to coach witnesses, or directly told his interlocutors which story to tell, stressing the need to tell the story in the manner as described by [him] and the necessity of synchronising the stories'."<sup>287</sup>

81. For the purposes of considering Mr Ntaganda's conduct at the Detention Centre in aggravation of his sentence, the Chamber can focus on facts that are not in dispute because he admitted them.<sup>288</sup> He admitted on several occasions,<sup>289</sup>

<sup>285</sup> See ICC-01/04-02/06-349-Conf-Red2 (filed on 19 December 2014).

<sup>286</sup> See e.g. ICC-01/04-02/06-1616, para.18 (dated 7 November 2016).

<sup>287</sup> ICC-01/04-02/06-785-Red, paras.46-57; ICC-01/04-02/06-1494-Red4, para.22; ICC-01/04-02/06-1913-Red2, paras.18, 22; ICC-01/04-02/06-2236-Red, paras.20, 22.

<sup>288</sup> Throughout the case, the Chamber held that its findings continued to stand. See ICC-01/04-02/06-1494-Red4, para.22 (7 September 2016), ICC-01/04-02/06-1913-Red2, para.18 (19 May 2017), ICC-01/04-02/06-2236-Red, para.20 (19 February 2018).

including as recently as at the sentencing hearing,<sup>290</sup> that he breached the Detention Centre rules and has not provided, in nearly five years of litigation, any reasonable explanation for doing so. The Chamber can and should therefore make factual findings *beyond reasonable doubt* that he breached the Detention Centre rules in an attempt to circumvent the Registry's monitoring and engage in witness interference and coaching. In light of his numerous admissions regarding his own misconduct, it would not represent a significant hurdle for the Chamber to find that this conduct has been proven beyond reasonable doubt and amounts to an aggravating factor for sentence.

82. *First*, Bosco Ntaganda admitted that, on numerous occasions, he spoke to non-registered interlocutors,<sup>291</sup> and potential Defence witnesses,<sup>292</sup> without the prior approval of the Registry,<sup>293</sup> and registered an unindicted co-perpetrator on his list of contacts under a false identity.<sup>294</sup>

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<sup>289</sup> See ICC-01/04-02/06-625-Conf-Exp-Red, paras.31, 35, 36, 37, 38, 40, 41, 44, 45, 47, 48; ICC-01/04-02/06-759-Conf-Exp-Red, paras.2, 4, 21-22, 31, 37-39, 40-72, 76.

<sup>290</sup> T-268,42:5-8.

<sup>291</sup> See **D-300**:T-239,58:8-59:19,61:10-19. Bosco Ntaganda admitted speaking to potential Defence witnesses [REDACTED] (**D-300**:T-239,61:10-19), [REDACTED] (**D-300**:T-239,89:11-24), and several other non-registered individuals (see ICC-01/04-02/06-625-Red2, paras.31, 44, 45, 46, and ICC-01/04-02/06-759-Red2, para.76). The Chamber, having reviewed a small sample of the Bosco Ntaganda's telephone communication held, on 18 August 2015, that "[t]he requirement that detained persons only speak to persons that have been placed on their list of non-privileged contacts by the Registry ensures that communications between detainees and those outside the Detention Centre are subject to a form of oversight. *The numerous times Mr Ntaganda circumvented that oversight, even in the limited sample of phone conversations available to the Chamber, is concerning.* The Chamber has already shown that it considers this a serious matter, warranting the full restriction of 'all contact with those persons through whom Mr Ntaganda has breached the Detention Centre's instructions'". ICC-01/04-02/06-785-Red, para.47, emphasis added.

<sup>292</sup> **D-300**:T-239,58:12-59:19.

<sup>293</sup> See ICC-01/04-02/06-504-Conf-Exp (First Report on the post-factum review of the phone conversations made by Mr Ntaganda), paras.7-8: "The analysis of the summaries and transcripts brings to light the fact that Mr Ntaganda does not only speak to the individuals recorded on his authorised non-privileged telephone contacts list, but has access through some of them to other interlocutors who provide him with information and act on his behalf. Having discovered that Mr. Ntaganda has deliberately conversed with unregistered callers in breach of the instructions outlined on the "telephone request form" by the Detention Centre, the latter will be in a position to initiate a disciplinary procedure against him". See also ICC-01/04-02/06-607-Conf-Exp-Red2 (Second Report on the post-factum review of the phone conversations made by Mr Ntaganda), para.8.

<sup>294</sup> **D-300**:T-239,86:22-88:12.

83. *Second*, Bosco Ntaganda admitted that he spoke to his contacts using codes or the Kihema language.<sup>295</sup> The Chamber has already dismissed his convoluted attempts to explain his conduct, namely that “Kinyarwanda is an inherently coded language”,<sup>296</sup> that he feared his calls would be intercepted by sub-Saharan African states who could interfere with efforts to identify potential Defence witnesses,<sup>297</sup> or that he only sought to conceal his information regarding his financial resources from the Registry because of a misplaced concern that this would jeopardize legal aid.<sup>298</sup> Absent any reasonable different explanation, the Chamber should confirm its previous finding that Bosco Ntaganda’s “use of codes was meant to disguise attempts to disclose confidential information or to interfere with witnesses, including [...] by way of coaching”.<sup>299</sup>

84. *Third*, Bosco Ntaganda admitted that he disclosed the identity of Prosecution witnesses, namely [REDACTED] and [REDACTED], to his contacts and third parties.<sup>300</sup> The Chamber rejected the Defence’s suggestion that Bosco Ntaganda’s interlocutors already knew the identity of [REDACTED] or that he did not know that he was revealing confidential information.<sup>301</sup> In fact, it found that he “appear[ed] to have been well aware of the fact that he should not reveal the names of Prosecution witnesses”.<sup>302</sup> The Chamber, noting Bosco Ntaganda’s words that “everything will collapse if they don’t show up” as well as his express wish to speak in codes during this conversation,<sup>303</sup> concluded that he disclosed the identity of this witness with the intention to engage in a serious form of witness interference<sup>304</sup> in a context it found “to be of grave concern”.<sup>305</sup> Likewise,

<sup>295</sup> **D-300**:T-239,89:1-91:15; ICC-01/04-02/06-625-Red2, paras.35, 36, 37, 38, 40, 41, 44, 48; ICC-01/04-02/06-759-Red2, paras.4, 37-39, 40-72.

<sup>296</sup> ICC-01/04-02/06-759-Red2, paras.4, 38-39. *See also* ICC-01/04-02/06-785-Red, para.49.

<sup>297</sup> ICC-01/04-02/06-759-Red2, para.37. *See also* ICC-01/04-02/06-785-Red, para.50.

<sup>298</sup> *Ibid.*

<sup>299</sup> ICC-01/04-02/06-785-Red, paras.48-50.

<sup>300</sup> ICC-01/04-02/06-759-Red2, paras.2, 21-22, 31. *See also* ICC-01/04-02/06-785-Red, paras.51-57.

<sup>301</sup> ICC-01/04-02/06-785-Red, para.51.

<sup>302</sup> *Ibid.*

<sup>303</sup> *Ibid.*

<sup>304</sup> ICC-01/04-02/06-785-Red, para.55.

Bosco Ntaganda admitted<sup>306</sup> to disclosing Witness [REDACTED]’s identity as a Prosecution witness in a conversation with his wife. In this conversation, Bosco Ntaganda states: “[i]f those ones are fini... If they are not there, it will finish! [...] if we make plans with that man whom you know [...] in any case, it can finish. All of them can put the tail between the legs and run away! [...] [W]hen you come to see me, you will know everything”.<sup>307</sup> Here too, his intention to engage in a serious form of witness interference is clear beyond any reasonable doubt.

85. *Fourth*, Bosco Ntaganda admitted that he spoke to potential Defence witnesses about the facts of his case<sup>308</sup> and told them to “remind each other what had happened”.<sup>309</sup> In fact, it is clear from his conversation with a potential Defence witness called [REDACTED]<sup>310</sup> that he sought to influence her account by telling her to say that she was recruited in the UPC/FPLC at the age of 18<sup>311</sup> and that he instructed her to provide evidence discrediting a Prosecution witness.<sup>312</sup> The Chamber should dismiss Mr Ntaganda’s convoluted and evasive testimony that he simply “asked [his witnesses] to remind [him] about a thing or two which may have happened at such and such an occasion”<sup>313</sup> or his suggestion that he simply “wanted to know whether [REDACTED] remembered the age that she had told [him]”.<sup>314</sup> This was a clear attempt to influence the content of a potential witness’s account with a view to obtaining evidence favourable to him.

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<sup>305</sup> ICC-01/04-02/06-785-Red, para.52.

<sup>306</sup> ICC-01/04-02/06-759-Conf-Exp-Red, paras.55-57.

<sup>307</sup> ICC-01/04-02/06-504-Conf-Exp-Anx5. *See also* ICC-01/04-02/06-785-Red, fn.127.

<sup>308</sup> D-300:T-239,58:12-61:19.

<sup>309</sup> D-300:T-243,9:10-10:3.

<sup>310</sup> D-300:T-239,61:10-19.

<sup>311</sup> D-300:T-239,65:6-68:6; 69:5-71:2.

<sup>312</sup> D-300:T-239,65:6-68:6; 71:3-78:15.

<sup>313</sup> D-300:T-239,61:20-62:6.

<sup>314</sup> D-300:T-239,70:17-71:2.

86. Mr Ntaganda's conduct was so serious that the Chamber imposed appropriately stringent limitations and controls over his communications for three years, in order to maintain the integrity of the trial proceedings.<sup>315</sup>

#### E. THERE ARE NO MITIGATING CIRCUMSTANCES

87. No significant mitigating circumstances exist in this case that would warrant any reduction in sentence.

#### *(i) Ntaganda's alleged "good behaviour" at the ICC Detention Centre is not mitigating*

88. Mr Ntaganda's misconduct while in detention gives rise to no mitigation. Instead, as described above,<sup>316</sup> his serious abuse of Detention Centre policies, violations of Court orders and engagement in witness interference are an aggravating factor warranting a higher sentence. Neither the Registry's report on his conduct,<sup>317</sup> its Addendum<sup>318</sup> nor the [REDACTION]<sup>319</sup> [REDACTED] warrant giving Bosco Ntaganda any credit for alleged good conduct in the Detention Centre.

89. *First*, the Chief Custody Officer's report on Bosco Ntaganda's behaviour while in detention is incomplete and inaccurate, and the Chamber should give it little, or no, weight. Bosco Ntaganda's behaviour at the Detention Centre cannot be said to have "always been exemplary and in accordance with the DC regulations"<sup>320</sup> when, according to the Registry's own conclusions:

<sup>315</sup> See ICC-01/04-02/06-508-Conf-Exp; ICC-01/04-02/06-785-Red; ICC-01/04-02/06-1494-Red4; ICC-01/04-02/06-1913-Red2; and ICC-01/04-02/06-2236-Red.

<sup>316</sup> See section III(D).

<sup>317</sup> ICC-01/04-02/06-2367-Conf; ICC-01/04-02/06-2367-Conf-Anx.

<sup>318</sup> ICC-01/04-02/06-2390-Conf-AnxI.

<sup>319</sup> DRC-D18-0002-0069.

<sup>320</sup> ICC-01/04-02/06-2367-Conf, para.4.

(1) he breached Detention Centre regulations by speaking to unauthorised individuals through his telephone, which placed the Detention Centre “in a position to initiate a disciplinary procedure against him”;<sup>321</sup>

(2) he made use of coded language, unusual vocabulary, or the Kihema language in an attempt to conceal his conversations and asked his interlocutors to do the same;<sup>322</sup> and

(3) “there are factual grounds suggesting that Mr Ntaganda has tried to widely convey instructions and information in relation to witnesses and to witness statements and to request that measures be taken either to coach some witnesses or influence them in a way that would meet his expectations”, which “might imply some pressure, in the form of threat or bribing, exerted upon some people”.<sup>323</sup>

90. That the Chief Custody Officer’s overview<sup>324</sup> omits any reference to the Registry’s earlier findings or to the stringent controls and limitations the Chamber imposed over Bosco Ntaganda’s telephone communications and visits for three years is inexplicable and calls into question both its completeness and neutrality.<sup>325</sup> It is likewise concerning that the overview does not refer to disciplinary measures being taken for Bosco Ntaganda’s breaches of the Detention Centre rules, even though he repeatedly admitted to these breaches,<sup>326</sup> whether such measures were

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<sup>321</sup> ICC-01/04-02/06-504-Conf-Exp, para.7. Whilst the Prosecution is unaware whether such disciplinary procedure was indeed initiated, it notes that the Registry found his conduct to be a “breach of the instructions outlined on the “telephone request form” by the Detention Centre” and that the “[f]ailure to obey an order or instruction given by a member of the staff of the detention centre” constitutes a disciplinary offence within the meaning of regulation 209(a) of the Regulations of the Registry.

<sup>322</sup> *Ibid*, paras.10-28. See also ICC-01/04-02/06-607-Conf-Exp-Red2, paras.6-19.

<sup>323</sup> ICC-01/04-02/06-607-Conf-Exp-Red2, para.24 and ICC-01/04-02/06-504-Conf-Exp, para.33.

<sup>324</sup> ICC-01/04-02/06-2367-Conf-Anx.

<sup>325</sup> Regulation 189(c) of the Regulations of the Registry provides that the “detention record” must include “any order restricting access to news and contact issued in accordance with regulation 101” of the Regulations of the Court. In preparing his “overview of Mr Ntaganda’s behaviour whilst in detention”, the Chief Custody Officer ought to have consulted the “detention record” and taken into considerations the Chamber’s findings that were based on the Registry’s own reports.

<sup>326</sup> See ICC-01/04-02/06-625-Conf-Exp-Red, paras.31, 35, 36, 37, 38, 40, 41, 44, 45, 47, 48; ICC-01/04-02/06-759-Conf-Exp-Red, paras.2, 4, 21-22, 31, 37-39, 40-72, 76; ICC-01/04-02/06-T-268, p. 42:5-8.

not deemed necessary to include or simply not taken. At the very least, Bosco Ntaganda's detention record, which the Chief Custody Officer ought to have consulted in preparing his report, must include "any order restricting access to news and contact issued in accordance with regulation 101".<sup>327</sup> The absence of any reference to this order, or to the significant resources the Detention Centre allocated to actively monitor Bosco Ntaganda's communications and visits as a result, is illustrative of the report's shortcomings. In fact, the Defence concedes that the report is incomplete, referring to other alleged incidents, not mentioned in the report.<sup>328</sup> Accordingly, in light of its manifest deficiencies, the Chamber cannot rely on this report as an accurate and comprehensive overview of Bosco Ntaganda's conduct while in detention.

91. Second, that Bosco Ntaganda developed a friendship with a co-detainee [REDACTED] and occasionally assisted him in psychologically challenging moments is irrelevant to the determination of his sentence. However, even if the Chamber were to consider this to be of any relevance, Bosco Ntaganda's actual conduct is of such minimal significance that it warrants no mitigation. Moreover, this conduct pales in comparison to the gravity of the crimes Bosco Ntaganda has been found guilty of committing.

92. Indeed, the Addendum to the Registry's report merely suggests that Bosco Ntaganda was concerned with the psychological state of a co-detainee and informed the Detention Centre staff about this on two occasions, almost two years apart from each other,<sup>329</sup> neither of which the Chief Custody Officer deemed necessary to include in his overview. This was not going "beyond the call of

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<sup>327</sup> Regulation 189(c) of the Regulations of the Registry.

<sup>328</sup> T-268,48:7-12.

<sup>329</sup> ICC-01/04-02/06-2390-Conf-AnxI, paras.10-15.

duty” or “beyond what a normal person would do”.<sup>330</sup> It was the bare minimum to be expected of any detainee.

93. [REDACTED],<sup>331</sup> [REDACTED].<sup>332</sup> This cannot reasonably constitute a mitigating factor to reduce Mr Ntaganda’s sentence for the campaign of terror he lead over more than one year.

*(ii) Ntaganda’s family circumstances are not exceptional*

94. In general, little to no weight is given to the family situation of a convicted person in the absence of exceptional family circumstances, as these are common characteristics of convicted persons, much like the lack of a previous criminal convictions or the prospect of rehabilitation.<sup>333</sup> In any event, and in light of the extreme gravity of his crimes and presence of aggravating circumstances, this factor should be given no weight.

*(iii) Registry’s assessment of indigence is not a mitigating factor*

95. In oral argument, the Defence argued that Mr Ntaganda’s “socio-economic condition”, alleged lack of assets and the Registry’s declaration of indigence are factors that should mitigate Mr Ntaganda’s sentence.<sup>334</sup>

96. As for Mr Ntaganda’s financial assets at the time of events, Mr Ntaganda testified that he was paid a salary of up to \$500 USD per month while in the UPC/FPLC.<sup>335</sup> Despite being declared indigent by the Registry and claiming lack of assets, Mr Ntaganda’s own admissions suggest he and his family actually have assets: (i) he admitted he sought to conceal “potential financial resources of [his] family from

<sup>330</sup> T-268,47:22-24.

<sup>331</sup> T-268,48:13-18.

<sup>332</sup> DRC-D18-0002-0069 (fourth and fifth columns).

<sup>333</sup> [AFRC SJ](#), paras.49, 51. See also [Jokic SJ](#), para.100; [Obrenovic SJ](#), paras.139-40; [Nahimana et al. AJ](#), para.1108, fn.2484 (citing, [Jokic SAJ](#), para.62; [Kunarac et al. SAJ](#), para.413; [Jelusic TJ](#), para.124; [Furundzija TJ](#), para.284); [Ntabakuze AJ](#), para.284; [Ntagerura et al. AJ](#), para.439; [Kunarac AJ](#), para.362.

<sup>334</sup> T-268,42:15-17.

<sup>335</sup> D-300:T-243,53:19-54:3.

the Registry” because of his concern that this would jeopardize his legal aid; and (ii) he admitted that he had legal resources in three locations (Kinshasa, Europe and Bunia) and, hence, that he was capable of defending himself against alleged attempts to appropriate his property by certain individuals.<sup>336</sup>

97. In any event, Chambers have not considered indigence to be a mitigating factor for sentence.<sup>337</sup> In *Bemba et al*, Mr Arido argued that despite being declared indigent by the Registry, he still provided limited financial assistance to his family which should be considered a mitigating factor.<sup>338</sup> This was rejected by Trial Chamber VII which held that it did “not find that Mr Arido’s continued support for his family to be of relevance”.<sup>339</sup>

*(iv) Ntaganda did not cooperate with the Court*

98. Nor has Bosco Ntaganda cooperated in any appreciable manner with the investigation or the prosecution of the charged offences, or with the Court.

99. He did not surrender until five years after the ICC arrest warrant against him was made public. He then twice declined the Prosecution’s request to meet with him and provide relevant information on the charges against him. Although Mr Ntaganda can assert his right to silence as a suspect, he cannot at the same time assert that this is active cooperation with the Court. It is not.

100. Bosco Ntaganda did not admit guilt. Instead, he chose to testify in his own Defence during trial, which is not a mitigating circumstance. He testified for 30

<sup>336</sup> ICC-01/04-02/06-759-Red, paras.37, 62.

<sup>337</sup> The examples of mitigating factors identified in a review of ICTY jurisprudence contained in the [Karadzic TJ](#), para.6036, do not include indigence for the purpose of retaining Defence counsel at trial: “Examples of mitigating circumstances identified in the jurisprudence of the Tribunal have included: (i) co-operation with the Prosecution; (ii) the admission of guilt or a guilty plea; (iii) an expression of remorse, sympathy, compassion, or sorrow for the victims of the crimes; (iv) no prior criminal record; (v) voluntary surrender; (vi) good conduct in detention; (vii) family circumstances; (viii) the character of the convicted person subsequent to the conflict; (ix) duress; (x) preventing the commission of crimes; (xi) assistance to victims; and (xii) age” (citing: [Babić SAJ](#) para.43, 67–68; [Blaškić AJ](#), para.696; [Jokić SJ](#), paras.76, 82, 90–91, 103. [Jelisić AJ](#), para.122).

<sup>338</sup> ICC-01/05-01/13-2086-Corr-Red, paras.47-49.

<sup>339</sup> *Bemba et al*. SD, para.90.

Court days and, in the end, the Chamber found his testimony to be unreliable or not credible at least 36 times.<sup>340</sup> He flatly denied his involvement in the crimes of which he now stands convicted. He stated that Prosecution witnesses against him were lying. That is not cooperation in any legitimate sense.

101. And, as already mentioned above in the context of conduct that should be considered an aggravating circumstance for sentence,<sup>341</sup> Bosco Ntaganda's lack of cooperation with the Court is amply shown through his breaches of Detention Centre rules and orders of the Chamber.

*(v) Ntaganda has done nothing for his victims*

102. To date, despite making three unsworn statements and testifying for 30 court days, Bosco Ntaganda has shown no remorse. He has not apologized to the victims or even acknowledged the suffering he caused. To the contrary, he went as far as to deny that there was an ethnic conflict in Ituri in 2002 and 2003;<sup>342</sup> he denied that he and his troops ever committed any crimes in Ituri;<sup>343</sup> he claimed that he lacked knowledge of UPC/FPLC military operations or lacked the authority to issue orders, despite his high authority.<sup>344</sup> The Chamber found that he lacked credibility on all of these denials.<sup>345</sup>

103. Mr Ntaganda's recent expression of "deep compassion for all the victims from all ethnic groups who suffered during the conflicts that have devastated the

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<sup>340</sup> See, for example: Judgment, paras.110, 171, 261, 359, 373, 415, 498, 515, 528, 533, 551, 552, 638 and fns.413, 737, 850, 893, 906, 972, 994, 1052, 1057, 1065, 1158, 1160, 1177, 1238, 1360, 1371, 1374, 1412, 1414, 1430, 1431, 1434, 1447, 1462, 1529, 1574, 1589, 1596, 1598, 1672, 1679, 1688, 1720.

<sup>341</sup> See *supra* section III(D).

<sup>342</sup> D-300:T-224,44:18-50:3.

<sup>343</sup> See e.g. D-300:T-237,10:3-24; ICC-01/04-02/06-2298-Conf-Anx1-Corr, paras.188, 193, 200, 202, 204, 217-218, 234.

<sup>344</sup> See e.g. D-300:T-238,11:13-12:5; T-215,37:5-9.

<sup>345</sup> See e.g. Judgment, paras.1009-1022, fn.850.

Congo” in 2002 and 2003<sup>346</sup> is not a sincere expression of compassion to *his own victims*.

104. First, it is generalised in the extreme, covering all conflicts throughout the Congo. Second, it must be considered against the totality of his unsworn statement, wherein he maintained an account that the Chamber has already found to lack credibility: that he is not a criminal;<sup>347</sup> that negative portrayals of him were “unfounded lies”;<sup>348</sup> that a number of witnesses who testified against him told “falsehoods”;<sup>349</sup> that his aim has always been to establish peace;<sup>350</sup> that he stands by his testimony<sup>351</sup> (in which he denied the commission of all charged crimes); that it is “a shame” that the Chamber did not find him credible and handed down a guilty verdict;<sup>352</sup> and that he has instructed his counsel to file an appeal.<sup>353</sup>

105. Third, remorse has to be sincere to be considered as mitigating, and should not be done solely as a means to potentially reduce sentence.<sup>354</sup>

106. For assistance to victims to be considered in mitigation, Bosco Ntaganda must have “acted immediately after the commission of the crime to alleviate the suffering of victims”.<sup>355</sup> There is no evidence that he did so.

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<sup>346</sup> T-268,52:15-17.

<sup>347</sup> T-268,51:8-9.

<sup>348</sup> T-268,51:9-10.

<sup>349</sup> T-268,51:9-12.

<sup>350</sup> T-268,51:16-18.

<sup>351</sup> T-268,52:4-6.

<sup>352</sup> T-268,52:7-8.

<sup>353</sup> T-268,52:8-9.

<sup>354</sup> [CDF AJ](#), paras.487-488; [RUF AJ](#), paras.1248-49. See also [Strugar AJ](#), paras.365-367; [Vasiljevic AJ](#), para.177. [CDF AJ, PDO Winter J](#), paras.92-104, esp. 103: “The two convicted persons here only found it worth mentioning that they felt empathy - if they even did that - *after* they were convicted. From this, it is clear to me that their statements were not expressions of remorse or empathy, but rather were simply calculated to achieve a reduced sentence. I therefore hold that the statements of the two convicted were neither real nor sincere”.

<sup>355</sup> [Babic SJ](#), para.94.

*(vi) Ntaganda's alleged efforts to secure peace are not mitigating*

107. Mr Ntaganda's alleged contribution towards peace in Ituri or to the reconciliation of the Lendu and the Hema communities in 2004 was neither palpable nor genuine.<sup>356</sup> The available evidence undercuts the theory of peace or reconciliation, demonstrating instead ongoing conflict and persistent mistrust between Bosco Ntaganda's UPC/FPLC on the one hand and the FNI/FPRI and/or the Lendu community on the other, as well as serious concerns about his and his group's ongoing criminal conduct by MONUC and the international community. This evidence indicates that Mr Ntaganda was considered a threat to peace and security in Ituri in 2003-2005, and that any collaboration with the FNI President was purely strategic.<sup>357</sup>

108. On 7 November 2003, the UPC/FPLC – with Bosco Ntaganda as the Deputy Chief of Staff – formally withdrew all cooperation with MONUC and all participation in the institutions established by the Ituri Pacification Commission.<sup>358</sup> On 24 January 2004, the UN's Special Representative of the Secretary General, Mr William SWING, wrote to President KABILA expressing serious concern for the security of the Ituri population and for the effective implementation of the pacification operations run by MONUC because of Bosco Ntaganda's troops. He called for Mr Ntaganda's immediate arrest.<sup>359</sup>

109. MONUC's rejection of Ntaganda's appointment as FPLC Chief of Staff in December 2003,<sup>360</sup> and its calls for<sup>361</sup> and risk of his arrest by MONUC<sup>362</sup> attested

<sup>356</sup> Katanga SD, para.91. *Contra*, ICC-01/04-02-06-2392, para.2; T-268,45:4-9.

<sup>357</sup> DRC-OTP-0009-0146 p.0147-0148, paras.2(c), (d): MONUC Weekly Report for 14-20 February 2004 suggests that any political alliance between the UPC/FPLC and the FNI/ FRPI was being considered in order to secure a high position at the national level.

<sup>358</sup> DRC-OTP-0014-0245; **D-47**:T-267-CONF-FR-ET,68:18-25,80:11-15. *See also* DRC-OTP-0009-0146, p.0155, paragraph under "CCGA/DDR" heading.

<sup>359</sup> DRC-OTP-2057-0099, p.0103.

<sup>360</sup> **D-47**:T-267-CONF-FR-ET,83:12-14,115:1-7.

<sup>361</sup> DRC-OTP-2057-0099, p.0103.

<sup>362</sup> DRC-OTP-0185-0843, p.0845, para.2(e).

to by D-306<sup>363</sup> and D-47,<sup>364</sup> confirms that Bosco Ntaganda lacked credibility to advance peace and reconciliation in 2004 and 2005, and that his actions were not aimed at either goal. MONUC documents show that the UPC/FPLC troops under Bosco Ntaganda's command attacked United Nations peacekeepers,<sup>365</sup> sought to take MONUC personnel hostage,<sup>366</sup> and prevented humanitarian aid from being distributed to the civilian population.<sup>367</sup> MONUC considered Bosco Ntaganda to be "a source of threat", a "criminal", and a "notorious killer",<sup>368</sup> who was undermining peace in the region.<sup>369</sup>

110. D-306 stated that the campaign to raise awareness among the Hema about the need for peace, unity and free movement of goods was an FNI initiative.<sup>370</sup> Mr Ntaganda's contribution was limited.<sup>371</sup> [REDACTED].<sup>372</sup> In 2004, D-306 confirmed that the UPC/FPLC continued to harass the civilian population of Ituri.<sup>373</sup> D-305 and D-47's evidence on Bosco Ntaganda's peace efforts is partial. Both witnesses are long-time UPC/FPLC members, who espoused the group's doctrines and remained loyal to its leaders.<sup>374</sup> D-305's evidence that Bosco Ntaganda "is someone who really cannot commit such violent crimes"<sup>375</sup> and that all people "be it the Lendu people, the Hema people or Ngiti people [...] liked

<sup>363</sup> D-306:T-267-CONF-FR-ET,33:14-21.

<sup>364</sup> D-47, T-267,64:12-25,49:15-18.

<sup>365</sup> DRC-OTP-0004-0164, p.0164, second-to-last paragraph; DRC-OTP-0007-0314, p.0316, para.4(d); DRC-OTP-0004-0372, p.0373, para.1; DRC-OTP-1029-0465, p.0467, para.8(d); DRC-OTP-0185-0843, pp.844-845, para.2(e).

<sup>366</sup> DRC-OTP-2066-0380, p.0380, para.1(b); DRC-OTP-1029-0579, p.0579, para.2(b).

<sup>367</sup> DRC-OTP-0151-0306; DRC-OTP-0142-0038; DRC-OTP-0142-0042.

<sup>368</sup> DRC-OTP-1029-0591, p.0603, paras.27-28.

<sup>369</sup> DRC-OTP-2057-0099, p.0101-0103; DRC-OTP-0185-0843, p.845, para.2(e); DRC-OTP-1029-0591, p.0603, para.27.

<sup>370</sup> D-306:T-267-CONF-FR-ET,12:3-5.

<sup>371</sup> D-306:T-267-CONF-FR-ET, 12:19-23, 30:1-19 (Ntaganda provided a military escort where it would not have been safe to move without it), 18:10-13,22-23 (Ntaganda encouraged D-306 to travel to other locations), 20:3-9 (Ntaganda told the population at Saleh that "now" it was time for peace).

<sup>372</sup> D-306:T-267,40:25-41:2.

<sup>373</sup> D-306:T-267-CONF-FR-ET,32:3-14.

<sup>374</sup> D-305:T-266,47:1-52:13. D-305 stated that she was a candidate for the UPC elections in 2015 (T-266,52:6-13) and that the "Mamans de l'UPC" remained loyal to Thomas Lubanga "right until the end" (T-266,51:15-24). D-47 was associated with the UPC since 2000, was a Deputy National Secretary, then a National Secretary before being named interim President of the UPC/FPLC and then its spokesperson. He espoused UPC values and doctrine (T-267,46:25-47:20,78:19-79:10).

<sup>375</sup> D-305:T-266, p.39:7-9.

him a lot because of the peace and security that he brought to the region”<sup>376</sup> contradicts the Chamber’s findings in this case<sup>377</sup> and reveals this bias. Witness D-47 equally showed his partiality when suggesting that poor relations with MONUC were the result of Dominique McAdams’ personal “agenda” to “destroy the UPC”.<sup>378</sup>

111. Cantonment and integration into the national army was the law in the DRC,<sup>379</sup> as testified by D-47.<sup>380</sup> Bosco Ntaganda was required to comply with the law and, to any extent that he did, he should not be given credit for it. In any event, D-47’s evidence of Mr Ntaganda’s full compliance with this law is contradicted by the 7 April 2005 *communiqué* by CIAT (*Comité International d’Accompagnement de la Transition*) – the oversight body working with institutions set up to assist in disarmament.<sup>381</sup> The CIAT *communiqué* condemned violence by Bosco Ntaganda and his men against soldiers who chose to demobilise and Hema community *notables* working for peace.<sup>382</sup>

112. Bosco Ntaganda declined to demobilise and integrate into the FARDC for many years,<sup>383</sup> instead leaving Ituri for fear of arrest.<sup>384</sup> He continued to put his own interests above the DRC law and peace.

#### IV. PROSECUTION’S SENTENCE REQUEST

113. The Prosecution requests a global sentence of not less than 30 years in prison in the circumstances of this case. Many of Bosco Ntaganda’s crimes merit, on their own, an individual sentence of 30 years.

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<sup>376</sup> D-305:T-266, p.36:17-19.

<sup>377</sup> Judgment, para.261.

<sup>378</sup> D-47:T-267,65:21-25.

<sup>379</sup> DRC-D18-0002-0063.

<sup>380</sup> D-47:T-267,60:4-61:4,62:1-5.

<sup>381</sup> D-47:T-267,85:6-19,88:21-89:8,90:11-25.

<sup>382</sup> DRC-OTP-2103-1205 p.1267, second paragraph.

<sup>383</sup> D-300:T-223,18:14.

<sup>384</sup> D-305, T-266,37:2-3.

114. Consistent with article 78(3), the Prosecution requests that the Chamber pronounce a sentence for each crime of which Bosco Ntaganda was found guilty, and then a joint sentence specifying the total period of imprisonment. In imposing the initial, individual sentence for each crime, the Chamber shall consider the factors stipulated in article 78(1) of the Statute and rule 145(1)(c) of the Rules, resulting in a sentence that reflects the culpability of the convicted person for that specific crime, including its gravity and the individual circumstances relevant to that crime. The joint sentence may never be lower than the highest individual sentence and no higher than 30 years – the maximum sentence for multiple convictions barring exceptional circumstances.



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**Fatou Bensouda**  
**Prosecutor**

Dated this 20<sup>th</sup> day of January 2020  
At The Hague, The Netherlands