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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 "Response to 'Submissions on sentence on behalf
of Mr Ntaganda' (ICC-01/04-02/06-2424-Conf)", 8 October 2019,
ICC-01/04-02/06-2437-Conf**

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I. Introduction

1. The Prosecution responds to the Defence submissions on sentence,¹ which concede that **“the gravity of the crimes, including their impact on victims, and Bosco Ntaganda’s degree of intent call for the imposition of a high sentence”**.²
2. Despite this admission, the Defence strains to diminish Bosco Ntaganda’s culpability by trying to reduce the scale of his crimes and by claiming that his personal participation in most crimes, his advance notice of them, and his degree of intent were low.³ The crimes are viewed and assessed in total isolation, divorced from the criminal plan. Mr Ntaganda’s proven essential contributions to the plan, and full intent and knowledge of crimes, are either ignored or distorted.
3. The Chamber found that Mr Ntaganda agreed to a plan to drive out all the Lendu from locations targeted during the course of the two Operations.⁴ He planned the operations, devised military tactics, and monitored their implementation.⁵ His conduct demonstrated that he 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.⁶ He “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”.⁷
4. The Chamber also found that the UPC/FPLC “functioned as a tool in the hands of the co-perpetrators, through which they were able to realise [...] the crimes against the Lendu”.⁸ Mr Ntaganda had the power to frustrate the commission of

¹ ICC-01/04-02/06-2424-Conf (“Defence Submissions”).

² Defence Submissions, para. 9.

³ Defence Submissions, paras. 38-40, 47, 50-5, 53, 57, 66, 67, 84, 86, 87, 91, 92, 94, 99.

⁴ ICC-01/04-02/06-2359 (“Judgment”), para. 1177.

⁵ Judgment, paras. 834-846.

⁶ Judgment, para. 1187.

⁷ Judgment, para. 809.

⁸ Judgment, para. 819.

the crimes during both Operations.⁹ Instead of doing so, he “personally engaged, in front of his soldiers, in violent conduct towards the enemies”.¹⁰ His hands are behind each of the carefully planned and fully intended criminal acts for which he was convicted. He knew crimes against children in his army were virtually certain to occur; he imposed no measures to prevent or punish their commission.¹¹ Bosco Ntaganda’s physical presence at crime scenes is entirely irrelevant. The claim that he lacked advance knowledge of crimes is absurd.

5. Moreover, it would be incorrect to ascribe greater culpability to the direct perpetrators (here, the UPC/FPLC) than to Mr Ntaganda.¹² They were his tools carrying out his orders. Indeed, “the degree of responsibility increases as we draw further away from the man who uses the fatal instrument with his own hands and reach the higher ranks of command”.¹³
6. The gravity of Mr Ntaganda’s crimes, his high degree of culpability and intent, the aggravating factors and lack of mitigation, compel a 30-year sentence.

II. Confidentiality

7. These submissions contain confidential witness information and are filed confidentially under regulation 23*bis*(1), (2) of the Regulations of the Court.

⁹ Judgment, para. 856.

¹⁰ Judgment, para. 857.

¹¹ Judgment, paras. 412, 792, 1195.

¹² Van Sliedregt (2015), p. 513; Ohlin, Van Sliedregt and Weigend, pp. 743-744. *Contra*, Defence Submissions, para. 53.

¹³ *Eichmann*, TJ, para. 197. *See also*, *Musema*, AJ, para. 383: “[A]s a general principle, this Appeals Chamber agrees with the jurisprudence of ICTY that the most senior members of a command structure, that is, the leaders and planners of a particular conflict, should bear heavier criminal responsibility than those lower down the scale, such as the foot soldiers carrying out the orders.” *Hategekimana*, TJ, para. 737: “In the Tribunal’s jurisprudence, principal perpetration generally warrants a higher sentence than aiding and abetting. Offenders receiving the most severe sentences also tend to be senior authorities.”

III. Prosecution's Submissions

(i) Defence improperly seeks to re-open findings from the Judgment

8. On several occasions, the Defence appears to re-litigate the Chamber's findings.¹⁴ This is not the proper avenue for the Defence to contest the Judgment. For instance, Mr Ntaganda was convicted of pillage, including of vehicles that were found at his residence.¹⁵ The Chamber does not have to find again, *de novo*, that all the required legal elements are met for the purpose of sentencing, in particular whether the pillaged items were intended for personal or private use.¹⁶ Nor does the Chamber need to re-consider its findings that looted freezers were at Mr Ntaganda's residence.¹⁷ Or that Mr Ntaganda was convicted for the rapes of women in the *Appartements* of Mongbwalu.¹⁸ He was.¹⁹

(ii) Chambers *do* consider uncharged conduct at sentence

9. Uncharged conduct is relevant at the sentencing phase.²⁰ Trial Chamber I in *Lubanga* held that it was "entitled to consider sexual violence in determining the sentence [...] notwithstanding the fact that it did not form part of the Confirmation Decision".²¹ The Chamber is solely required to be satisfied of the conduct and attribution to Mr Ntaganda beyond reasonable doubt.²² The Appeals Chamber in *Bemba et al.* reached the same conclusion:²³ "[i]t would be arbitrary to exclude such conduct from consideration merely because it could potentially have been charged as a separate offence".²⁴ The very fact that conduct that occurred *after* the offences for which the person is convicted may be

¹⁴ See, e.g. Defence Submissions, paras. 55, 57, 61, 62, 65, 66.

¹⁵ Judgment, paras. 1032, 516.

¹⁶ *Contra*, Defence Submissions, paras. 62, 66.

¹⁷ Defence Submissions, para. 61. The Chamber relied on three witnesses for this finding: P-888, P-768, P-901.

¹⁸ Defence Submissions, paras. 47-53.

¹⁹ Judgment, para. 1184, referring to para. 535. See also, paras. 940, 943-44.

²⁰ *Contra*, Defence Submissions, paras. 27, 29, 49, 88.

²¹ *Lubanga* SJ, paras. 67, 68.

²² *Lubanga* SJ, para. 69.

²³ *Bemba et al.*, SAJ, paras. 114-116.

²⁴ *Bemba et al.*, SAJ, para. 114.

relevant for sentencing (either as gravity, as culpability or as an aggravating factor)²⁵ clearly demonstrates the error of the Defence's submission.

10. The Defence claim that Mr Ntaganda's rapes of persons over 15 in his militia "are not international crimes"²⁶ is incorrect: neither the elements of the crimes nor the Appeals Chamber placed any limit on the age of victims.²⁷ On the contrary, the Judges found that there is "no conceivable reason" to limit who may be the victim of rape sexual slavery in armed conflict.²⁸

(iii) The scale of the crimes is significant

11. The Chamber made findings beyond reasonable doubt about specific numbers of murders, attempted murders and rapes,²⁹ and also made findings beyond reasonable doubt about a number of *unspecified* murders, attempted murders and rapes.³⁰ The Chamber must take all of these findings into account in considering the scale of the crimes in this case. It cannot ignore that Mr Ntaganda was found responsible for these additional rapes and murders.³¹ In *Lubanga*, the sentence imposed considered the widespread nature of the crimes, without findings on the precise number or proportion of recruits under 15.³²

12. Pillage in the First Operation was widespread.³³ The Chamber found that pillage in Mongbwalu was done during a *ratissage* operation in which the UCP/FPLC and Hema civilian supporters searched "from house to house" for items to

²⁵ *Bemba et. al.*, SAJ, para. 114.

²⁶ Defence Submissions, para. 88.

²⁷ ICC-01/04-02/06-1962, paras. 64-65.

²⁸ ICC-01/04-02/06-1962, para. 64.

²⁹ Judgment, paras. 1199, 888, 513, 890, 891, 892, 893, 894, 1184, 940, 519-523, 545, 548, 535.

³⁰ Judgment, paras. 512, 1199, 623, 899, 878, 880-882, 940, 579, 599, 622-623, 629.

³¹ *Contra*, Defence Submissions, paras. 33, 35.

³² *Lubanga* SJ, paras. 49-50. *See also*, *Bemba* SJ, para. 49: "The Chamber found that MLC soldiers pillaged property from CAR civilians on a large scale and with grave consequences for the victims. As described by P9, "looting took place in practically every town where MLC troops were to be found ... MLC soldiers just went through every single house and took whatever they wanted". P6 noted that "pillaging became widespread already on the very first day of the deployment of those [MLC] troops ... it was in the house-by-house search that the MLC soldiers carried out these acts of violence".

³³ *Contra*, Defence Submissions, para. 60.

loot.³⁴ The looting continued even after the town was captured.³⁵ There was “no limit on what could be looted and the members of the UPC/FPLC took anything that they wanted”.³⁶ Looted goods included household items such as chairs, beds, mattresses, radio and television sets, clothing food items, gold and vehicles.³⁷ The scale is high. As to value,³⁸ the Chamber found “while there is some disparity in the value of the looted items [...], these items represented the bulk of the victims’ possessions, played an important role in the victims’ day-to-day lives and/or their business”.³⁹ The scale and impact was high.⁴⁰

13. Bosco Ntaganda has been convicted for *five* instances of the crime of intentionally directing attacks against civilians.⁴¹ Defence propositions on this criminal conduct are either incorrect or seek to revisit the Judgment.⁴² The Chamber was satisfied that Mr Ntaganda directed an attack against civilians, and intended the object of the attack to be civilians. Therefore, Defence’s suggestion that the victims were combatants has already been rejected by the Chamber,⁴³ and cannot be rehashed at sentencing.⁴⁴ That this crime does not require proof of injury is irrelevant;⁴⁵ the Chamber *did* find that civilians were “unlawfully killed” in Sayo and in *ratissage* operations in Mongbwalu.⁴⁶

³⁴ Judgment, para. 512.

³⁵ Judgment, para. 512.

³⁶ Judgment, para. 514.

³⁷ Judgment, para. 514.

³⁸ *Contra*, Defence Submissions, para. 61.

³⁹ Judgment para. 1044.

⁴⁰ *Bemba* SJ, para. 49: “The Chamber found that MLC soldiers pillaged property from CAR civilians on a large scale and with grave consequences for the victims. As described by P9, “looting took place in practically every town where MLC troops were to be found ... MLC soldiers just went through every single house and took whatever they wanted”. P6 noted that “pillaging became widespread already on the very first day of the deployment of those [MLC] troops ... it was in the house-by-house search that the MLC soldiers carried out these acts of violence”.

⁴¹ *Contra*, Defence Submissions, para. 54.

⁴² Defence Submissions, para. 55.

⁴³ Judgment, paras. 906-908, 921-922

⁴⁴ Defence Submissions, para. 55, points (5), (6), (7).

⁴⁵ Defence Submissions, para. 55, points (1), (2), (4).

⁴⁶ Judgment, paras. 888, 889, 1199.

14. The Chamber made explicit findings that UPC/FPLC soldiers raped women in the *Appartements* camp,⁴⁷ and convicted Mr Ntaganda of these rapes.⁴⁸
15. The scale of the crimes against children who were recruited and used by the UPC/FPLC, raped and sexually enslaved is large.⁴⁹ The UPC/FPLC “extensively” recruited individuals of all ages, including those under the age of 15 and “many” young recruits including under the age of 15 were trained in UPC/FPLC camps.⁵⁰ The Chamber found that a long list of leaders had a number of escorts under the age of 15: Mr Ntaganda, Lubanga, Kisembo, Abelanga, Karwakarwa, Roger/Roy, Ndukute, Lusigo, Ndunguntse, Mbuyi, Mulenda, Kasangaki, Lieven, and another soldier.⁵¹ Children under the age of 15 were also used for patrols or information gathering and in battle.⁵² There was no threshold age for deployment and children under 15 were deployed as any other soldier.⁵³
16. Nor were the crimes “novel”.⁵⁴ Commanders were aware that recruiting and using children under the age of 15 was unlawful under IHL (unlawful since 1977).⁵⁵ Mr Ntaganda said he received IHL training.⁵⁶ Indeed, the UPC/FPLC’s own records claimed to prohibit the recruitment and use of children under the age of 18 within its own armed group as early as October 2002.⁵⁷
17. The “severe punishments” inflicted on recruits were aimed equally at the children under 15:⁵⁸ “recruits were punished in the same way, regardless of their age”.⁵⁹

⁴⁷ Judgment, para. 535, evidence discussed in fns. 1600, 1601; para. 940. *Contra*, Defence Submissions, paras. 48, 50.

⁴⁸ Judgment, para. 1184, referring to para. 535. See also, paras. 940 first bullet point, 943-944.

⁴⁹ *Contra*, Defence Submissions, paras. 68-69.

⁵⁰ Judgment, paras. 347 and 362.

⁵¹ Judgment, paras. 387, 388, 389, 390, 391, 399, 401, 402.

⁵² Judgment, paras. 403, 404, 414, 416.

⁵³ Judgment, para. 414.

⁵⁴ Defence Submissions, para. 76. Geneva Conventions, Additional Protocol II, Article 4(3)(c), **1977**: “Children who have not attained the age of 15 years shall neither be recruited in the armed forces or groups, nor be allowed to take part in hostilities”.

⁵⁵ Defence Submissions, para. 76.

⁵⁶ **D-300**: T-209, 50:14-25.

⁵⁷ Judgment, paras. 417-428.

⁵⁸ *Contra*, Defence Submissions, para. 77.

⁵⁹ Judgment, para. 377.

Defence conjecture, without evidence, that camp conditions were tough because these particular recruits “might be inclined to indiscipline” must be disregarded.⁶⁰

18. The Defence concedes that the rape and sexual slavery of children under the age of 15 in the UPC/FPLC is “very grave”.⁶¹ But it claims that Mr Ntaganda’s culpability for these crimes is “low”, which is wrong:⁶² (i) he used a number children under 15 in his own escort;⁶³ (ii) he knew that some of his escorts were below the age of 15;⁶⁴ (iii) he was involved in recruitment of all ages;⁶⁵ (iv) he had “control over the crimes” committed against children under 15 who were enrolled, raped, sexually enslaved and used to participate in hostilities;⁶⁶ (v) female members of the UPC/FPLC – including under 15 years old –⁶⁷ were regularly raped, *inter alia*, by Mr Ntaganda’s chief escort and by Mr Ntaganda himself;⁶⁸ (vi) this common practice was discussed within the UPC/FPLC;⁶⁹ (vii) these rapes were largely left unpunished;⁷⁰ (viii) no particular protection was given by the UPC/FPLC to its youngest members even though Mr Ntaganda “could not reasonably ignore their vulnerability”;⁷¹ (ix) commanders, including Mr Ntaganda, were taking advantage of the coercive environment in which they were in;⁷² and, critically, (x) “Mr Ntaganda **knew** that rapes and sexual violence were occurring within the UPC/FPLC ranks, and that female recruits and soldiers under the age of 15 were not excluded from this practice”.⁷³

⁶⁰ Defence Submissions, para. 77.

⁶¹ Defence Submissions, para. 85.

⁶² *Contra*, Defence Submissions, paras. 85-87.

⁶³ Judgment, para. 386-391.

⁶⁴ Judgment, para. 1192.

⁶⁵ Judgment, para. 1193.

⁶⁶ Judgment, para. 857.

⁶⁷ Judgment, para. 408.

⁶⁸ Judgment, para. 407, 1196.

⁶⁹ Judgment, para. 407.

⁷⁰ Judgment, para. 412, 1196.

⁷¹ Judgment, para. 1195.

⁷² Judgment, para. 1195.

⁷³ Judgment, para. 1197 (emphasis added).

(iv) There is no distinction in culpability between the two Operations

19. The Prosecution incorporates its submissions on sentence⁷⁴ in response to Defence arguments seeking to lower Mr Ntaganda's culpable conduct during the Second Operation.⁷⁵ The two operations were "part of one and the same plan",⁷⁶ "to drive out all the Lendu from the localities targeted during the course of their military campaign against the RCD-K/ML".⁷⁷ Both operations were "planned and prepared in advance".⁷⁸ Mr Ntaganda meant for all the crimes for which he was convicted against the population to occur.⁷⁹ His presence in the field during the First Operation committing crimes and commanding the troops is one form of essential contribution; for the Second Operation, his planning,⁸⁰ orders,⁸¹ monitoring, provision of troops and ammunition, asserting discipline and oversight, reinforcing the chain of command, ensuring proper execution of orders and ensuring "that the forces deployed were carrying out the project as planned",⁸² are other essential contributions. His subordinates were trained to obey his orders and did so, as requested, during both operations.⁸³ His "own personal violent conduct towards civilians" was the way he "showed his troops how the orders were to be implemented".⁸⁴ *In concreto*, Bosco Ntaganda's degree of participation, intent and culpability for the crimes committed in both operations is very high.⁸⁵

20. The Chamber did not find that the Second Operation's purpose was lawful,⁸⁶ but rather that it was to "launch various assaults on villages located in the Walendu-

⁷⁴ ICC-01/04-02/06-2425-Conf, paras. 57-60.

⁷⁵ Defence Submissions, paras. 36 ss.

⁷⁶ Judgment, para. 838.

⁷⁷ Judgment, para. 808.

⁷⁸ Judgment, para. 834.

⁷⁹ Judgment, para. 810.

⁸⁰ Judgment, paras. 551, 552, 834, 837.

⁸¹ Judgment, paras. 552, 554, 557, 809.

⁸² Judgment, para. 846. *Also* paras. 565, 554, 837.

⁸³ Judgment, paras. 557, 855.

⁸⁴ Judgment, para. 855.

⁸⁵ *Contra*, Defence Submissions, para. 40.

⁸⁶ *Contra*, Defence Submissions, para. 41, fn. 68, citing Judgment, paras. 442, 550.

Djatsi *collectivité*, seize the Main Road, and drive out the targeted group from this area”.⁸⁷ Floribert Kisembo and Salumu Mulenda explained the objective to the troops and gave orders to “*kupiga na kuchaji*”, meaning to shoot at everyone.⁸⁸ Salumu Mulenda explained the objective was to “destroy the triangle which was a pocket of resistance to the UPC” and to destroy the enemy, which included Lendu civilians.⁸⁹ Mr Ntaganda’s essential contributions were made to this end, not simply to open the main road.⁹⁰

21. A concrete evaluation of Bosco Ntaganda’s overarching and essential contributions to the plan and to the crimes reveals one of the highest levels of contribution (and culpability). That he also directly perpetrated some of the crimes may elevate his level of culpability. But even when he did not personally commit the crimes, or was not present at the crime scene, his culpability remains very high for having planned the commission of crimes, for ordering their commission,⁹¹ and for “illustrating for his troops how the orders were to be implemented with regard to the treatment of Lendu civilians”.⁹²

22. Attempts to lower Bosco Ntaganda’s degree of intent through a theory of alleged “lack of advance knowledge”⁹³ per crime fails to reflect the Chamber’s findings that he acted intentionally within the meaning of article 30 of the Statute – concretely, that he 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 in the First and Second Operations.⁹⁴ He used the UPC/FPLC as his tool.⁹⁵

⁸⁷ Judgment, para. 838.

⁸⁸ Judgment, paras. 1090-1091.

⁸⁹ Judgment, para. 558. *See also*, Chamber’s findings at para. 560 that Kisembo stated to troops on 17 February 2003 that the objectives of the assault was to drive out Lendu civilians from Kobu, Bambu and Lipri.

⁹⁰ Judgment, paras. 837, 846. *Contra*, Defence Submissions, para. 41.

⁹¹ Judgment, paras. 826-851.

⁹² Judgment, para. 851.

⁹³ Defence Submissions, paras. 39-40.

⁹⁴ Judgment, paras. 809, 1177.

⁹⁵ Judgment, para. 819.

23. This type of argument was flatly rejected by the Trial Chamber VII in *Bemba et al.*, where that Chamber dismissed arguments that it should take into account Mr Mangenda's degree of knowledge in respect of each coached witness for whom he was convicted. The Chamber referred to its findings that Mr Mangenda acted intentionally, *i.e.* with intent and knowledge under Article 30 of the Statute, and noted that the Defence arguments reflected a disagreement with the Chamber's assessment of the evidence that should be raised with the Appeals Chamber.⁹⁶

24. The Chamber held that Mr Ntaganda meant for rape and sexual slavery to be committed in the implementation of their plan.⁹⁷ It found that he knew that rapes and sexual violence were occurring within the UPC/FPLC ranks, including to those under the age of 15,⁹⁸ and that he raped members of his escort himself.⁹⁹

25. The Chamber found that "Mr Ntaganda was present and aware that civilian women were brought to the *Appartements* camp by UPC/FPLC soldiers and commanders in Mongbwalu; these women were raped in the camp, and then thrown out, to be replaced by other women".¹⁰⁰

(v) Mr Ntaganda personally committed brutal, premeditated crimes

26. The Defence claim that Mr Ntaganda may have (1) beat and murdered *Abbé* Bwanalanga, (2) ordered the execution of two Lendu prisoners, and (3) ordered the beating and execution of two other prisoners at the *Appartements*, "out of some momentary anger",¹⁰¹ without premeditation or brutality,¹⁰² is unsupported.

27. *First*, the Defence can neither reasonably suggest that Bosco Ntaganda did not premeditate *Abbé* Bwanalanga's murder, nor that he did not act with brutality, given the Chamber's findings beyond reasonable doubt that: (1) the UPC/FPLC

⁹⁶ *Bemba et al.* SJ, para. 127.

⁹⁷ Judgment, paras. 805-806, 1187-1188.

⁹⁸ Judgment, para. 1197.

⁹⁹ Judgment, paras. 407, 1196.

¹⁰⁰ Judgment, para. 1184, referring to para. 535. *See also* para. 940. *Contra*, Defence Submissions, paras. 47-53.

¹⁰¹ Defence Submissions, para. 46.

¹⁰² Defence Submissions, paras. 41, 43, 45, 46.

went to capture the priest at the Mongbwalu parish and took him to the *Appartements*;¹⁰³ (2) Bosco Ntaganda interrogated the priest “while hitting him with a piece of wood”;¹⁰⁴ (3) he ordered his bodyguards to take the priest outside;¹⁰⁵ (4) there, he killed the priest, by shooting at him a first time and shooting at him again to “finish him off”, as he was lying on the ground;¹⁰⁶ (5) he ordered his bodyguards to dispose of the body by throwing it in the bush.¹⁰⁷ Bosco Ntaganda’s brutal, yet methodical approach to this targeted assassination of a Lendu leader,¹⁰⁸ demonstrates that it was carried out with wilful deliberation.

28. *Second*, contrary to the Defence’s claim that “there are no details as to the manner or even the reason for the[se] killings”,¹⁰⁹ P-768 testified that “two Lendu civilians who [had been] arrested” were presented to Bosco Ntaganda and that “[w]hen [Bosco Ntaganda] saw they were Lendu, he ordered that they be executed, and they were killed [...] they were shot [...] soldiers shot at them”.¹¹⁰ Bosco Ntaganda’s methodical, merciless execution of these two civilians for the sole reason that they were Lendu increases the gravity of his crimes.

29. *Third*, the Chamber should take into account Bosco Ntaganda’s involvement in the murder of two prisoners at the *Appartements* camp.¹¹¹ P-17, a credible witness,¹¹² testified that Mr Ntaganda came to the *Appartements* prison, ordered that the two prisoners be taken out of the prison, with their hands tied behind

¹⁰³ Judgment, para. 530.

¹⁰⁴ Judgment, para. 532.

¹⁰⁵ Judgment, para. 533.

¹⁰⁶ Judgment, para. 533.

¹⁰⁷ Judgment, para. 533. *See also*, **P-768**: T-33, 56:21-25.

¹⁰⁸ Witness P-768 testified that the priest was killed a day after he was arrested by the UPC/FPLC (**P-768**: T-33, 55:17-22) and that, although the interrogation and beatings by Bosco Ntaganda that he personally witnessed “didn’t take much time”, he also “[thought] they had been together for a long time” (**P-768**: T-35, 65:3-8). The Prosecution further notes that, contrary to the Defence’s claims (Defence Submissions, para. 43.), the Chamber found Witness P-768’s testimony about this event to be “credible”, “reliable”, “detailed”, “coherent”, “strong”, and “partly corroborated” (Judgment, para. 533, fns. 1589, 1592, 1593).

¹⁰⁹ Defence Submissions, fn. 77.

¹¹⁰ **P-768**: T-33, 54:18-24, 55:3-7. The Prosecution notes that, contrary to the Defence’s claim (Defence Submissions, para. 44), the Chamber found P-768’s testimony regarding the murder of two Lendu persons on Bosco Ntaganda’s order to be “clear and detailed” (Judgment, fn. 1507).

¹¹¹ *Contra*, Defence Submissions, para. 45.

¹¹² Judgment, paras. 106-117.

their backs, and asked his subordinates for a place “where it could be done”. He and his bodyguards then took the prisoners to a nearby hole, where his bodyguards “began to hit and beat up [...] those persons”. They continued to hit them after they fell to the ground, until a soldier “finish[ed] off” the prisoners using a bayonet and dumped their bodies in the hole.¹¹³ These murders are illustrative of Bosco Ntaganda’s premeditation, ruthlessness, and brutality.

IV. There are no mitigating circumstances

(i) Mr Ntaganda’s experience of the Rwandan genocide is not mitigating

30. Claims that Mr Ntaganda fell into criminal conduct because of his experience in Rwanda are flawed and repeat failed arguments that he had good intentions.¹¹⁴ Rather than using his position of authority to work genuinely towards peace between warring ethnic groups in Ituri, Mr Ntaganda agreed to a plan to *target* a part of the Ituri population and drive them out of places they were living,¹¹⁵ to “destroy the Lendu community”¹¹⁶ by willingly sending his troops to kill Lendu civilians, engage in sexual violence against them and loot and destroy their belongings.¹¹⁷ His response to the alleged same crimes as is in Rwanda,¹¹⁸ was to plan *the destruction* of one of those ethnic communities. This is not mitigating.

(ii) Mr Ntaganda did not protect Lendu civilians and integrating APC soldiers is not “substantially mitigating”

31. The Defence’s submission that Mr Ntaganda allegedly “protected Lendu civilians”¹¹⁹ and “saved the lives of enemy soldiers”,¹²⁰ and that he should get

¹¹³ **P-17:** T-59, 23:15-24:24.

¹¹⁴ The Chamber rejected Mr Ntaganda’s testimony that he always fought and acted for the liberation and freedom of civilians in Ituri, finding that his evidence was “clearly contradicted” by other evidence that the Lendu were the target of violent acts by the UPC/FPLC in 2002 and 2003: Judgment, para. 261. The Prosecution relies on its Submissions on Sentence, paras. 61-64. *Contra*, Defence Submissions, paras. 103-110.

¹¹⁵ Judgment, paras. 261, 808.

¹¹⁶ Judgment, para. 805.

¹¹⁷ Judgment, para. 1187.

¹¹⁸ Defence Submissions, para. 108, citing Mr Ntaganda’s testimony.

¹¹⁹ Defence Submissions, heading preceding para. 115.

“substantial weight in mitigation”,¹²¹ is neither supported by the facts nor by the case law cited by the Defence. Accordingly, it should be dismissed.

32. *First*, D-54’s evidence does not show that Bosco Ntaganda “protected Lendu civilians”.¹²² D-54 mentioned the presence of an individual called “Bosco”¹²³ when another person, Chef Kawha, gave shelter to some Lendu civilians [REDACTED]¹²⁴ after these villages came under attack by a group of Lendu combatants [REDACTED].¹²⁵ Even assuming that this individual was Bosco Ntaganda, D-54 did not actually give any evidence regarding this individual’s alleged “role in protecting these civilians”.¹²⁶ Not cross-examining D-54¹²⁷ because of her lack of relevance to the case does not mean that the Prosecution “did not contest [D-54’s] testimony”.¹²⁸ D-54 simply gave no substantive evidence that required any cross-examination. Had the Chamber deemed that D-54’s evidence showed “that the common plan had its limits”,¹²⁹ it would have considered this evidence in reaching a conclusion on Bosco Ntaganda’s guilt. In fact, however, with one exception unrelated to the core of her evidence,¹³⁰ the Chamber did not refer to D-54. It did, however, find beyond reasonable doubt that Mr Ntaganda agreed to a common plan to drive out all the Lendu from the localities targeted

¹²⁰ Defence Submissions, heading preceding para. 111.

¹²¹ Defence Submissions, para. 114; *also* para. 115.

¹²² *Contra*, Defence Submissions, para. 115.

¹²³ **D-54**: T-244, 17:7-10.

¹²⁴ While D-54 refers to these villages as being a mix of the Hema and Lendu tribes (**D-54**: T-243, 71:10-24), Pilo Kamaragi, a prominent civilian leader of the Hema community who was associated with the UPC/FPLC, referred to Kparnganza as a “Hema localit[y]” in a document entitled “Report about massacre of 8th to 16th of June, 2002” (**DRC-OTP-0126-0030**).

¹²⁵ **D-54**: T-244, 8:14-22. The Prosecution notes that this event took place before the temporal scope of this case.

¹²⁶ Defence Submissions, para. 115. While she mentions a “Bosco” as being part of the delegation of four sent by Chief Kahwa to look for the Lendu civilians (**D-54**: T-244, 16:18-17:10), D-54 testified that: (1) it was Chief Kahwa who addressed the civilians at a gathering and reassured them that they would not be killed (**D-54**: T-244, 18:19-25); (2) food was provided by “people from outside” (**D-54**: T-244, 18:16-18); (3) medical care “was provided by the chief of that collectivity” (**D-54**: T-244, 19:5-7); and it was Chief Kahwa who allocated a place to the Lendu civilians (**D-54**: T-244, 21:4-6).

¹²⁷ T-244, 27:7-11: “MR IVERSON: I’m not surprised, Mr President. And I do not have any questions at all for this witness. PRESIDING JUDGE FREMR: Mr Iverson, it is a historical moment because I even intended to say that before guiding you, at previous session, that cross-examination is not compulsory part in some cases and I see that we are on the same page.”

¹²⁸ *Contra*, Defence Submissions, para. 115.

¹²⁹ Defence Submissions, para. 115.

¹³⁰ Judgment, para. 647, fn. 2064, referring to an attack on Mandro by UPDF-backed forces on 4 March 2003.

during the course of their military campaign¹³¹ and meant the destruction and disintegration of the Lendu community.¹³²

33. The Defence's suggestion that Bosco Ntaganda "persuaded" Floribert Kisembo to "spare [the] lives" of P-16 and 63 other APC soldiers is incomplete.¹³³ His actions were, in fact, dictated by opportunism and necessity. According to P-16, Bosco Ntaganda preferred to integrate and train these soldiers, because the UPC/FPLC did not have real, trained soldiers in its army.¹³⁴ For the same reason and despite his reluctance, Bosco Ntaganda agreed to have ex-APC soldiers in the UPC/FPLC's General Staff.¹³⁵ As for D-251's evidence regarding an apparently similar incident,¹³⁶ it is too unspecific to be given any weight, especially in light of the fact that the Chamber already found parts of her evidence to lack credibility.¹³⁷
34. *Second*, the facts of the case cited by the Defence¹³⁸ in support of its claim that Bosco Ntaganda's actions deserve "substantial mitigation"¹³⁹ differ vastly from this case. Indeed, in *Popović et al.*, the ICTY accorded "significant weight" as mitigating circumstances to Pandurević's "brave" actions of (1) opening a corridor for thousands of Bosnian men fleeing the Srebrenica enclave where genocide was taking place, which "potentially spared" thousands of men, and which he did "in contravention of the orders from his superiors and with the knowledge that it would potentially put him in jeopardy", and (2) challenging his superiors, in writing and on two occasions, about the Srebrenica murder operations.¹⁴⁰ Moreover, the same judges accorded "only limited weight" to other mitigating factors advanced by Pandurević, namely that he (1) protected Muslim

¹³¹ Judgment, para. 808.

¹³² Judgment, para. 809.

¹³³ Defence Submissions, para. 111.

¹³⁴ **P-16:** DRC-OTP-0126-0422, pp. 0430-0431, para. 47: "[REDACTED]".

¹³⁵ **P-16:** DRC-OTP-0126-0422, pp. 0433-0434, para. 62: "[REDACTED]".

¹³⁶ Defence Submissions, para. 112.

¹³⁷ Judgment, para. 103 and fns. 213, 248, 1157.

¹³⁸ *Popović et al.* TJ, paras. 2140, 2219.

¹³⁹ Defence Submissions, para. 115.

¹⁴⁰ *Popović et al.* TJ, paras. 2219-2222.

civilians from Serb paramilitaries and gave them food, (2) arranged for regular prisoner exchanges and cease fire agreements with the enemy forces, (3) arranged for the evacuation of Muslim civilians trapped by combat, and (4) ordered the release of several teenaged Muslim prisoners.¹⁴¹ In contrast, the mitigating circumstances advanced by the Defence, namely Bosco Ntaganda's presence at Mandro when some Lendu civilians would have been given shelter and his convenient integration of ex-APC soldiers into the UPC/FPLC forces, do not concern the victims of his crimes and are insignificant.

(iii) Mr Ntaganda did not prevent the training of young recruits

35. The Defence's claim that Mr Ntaganda "personally intervened to prevent the training of individuals whom he perceived to be too young"¹⁴² misrepresents the Chamber's factual findings and is not based on any reliable evidence.

36. *First*, the Chamber did not find that Bosco Ntaganda "appl[ie]d a test of physical maturity in an effort to screen out the youngest recruits".¹⁴³ It made no link between the screening process and age. In fact, it found that this process "was exclusively based on physical abilities as opposed to age" and that "age as such was not a bar for [the recruits] to receive training".¹⁴⁴ The Chamber found that "the UPC/FPLC extensively recruited individuals of all ages, in particular 'young people', including individuals under the age of 15",¹⁴⁵ that Mr Ntaganda had individuals under the age of 15 in his own bodyguard,¹⁴⁶ and that there was "an absence of measures to exclude" children under the age of 15 from UPC/FPLC recruitment.¹⁴⁷

¹⁴¹ *Popović et al.* TJ, para. 2223, fn. 6365.

¹⁴² Defence Submissions, para. 116; *also* paras. 75, 117-119.

¹⁴³ Defence Submissions, para. 75 (emphasis added) and fn. 143, referring to Judgment, fn. 998.

¹⁴⁴ Judgment, para. 361, fn. 998.

¹⁴⁵ Judgment, para. 347.

¹⁴⁶ Judgment, paras. 387-391.

¹⁴⁷ Judgment, para. 985.

37. *Second*, the Chamber referred to the evidence of D-210 and D-80 only in respect of uncontroversial matters,¹⁴⁸ such as visits to Rwampara or Mandro camps¹⁴⁹ and only where it was corroborated by other witnesses.¹⁵⁰ Otherwise, it held that “a number of aspects of the prior recorded testimony of D-80 cannot be relied upon”,¹⁵¹ and that he was “not credible” when he claimed that the living conditions at Rwampara were good or that sexual relations among recruits or instructors were prohibited.¹⁵² Likewise, D-80’s evidence that Mr Ntaganda was concerned about persons he considered “*inapte pour la formation*”¹⁵³ should be rejected as manifestly lacking credibility. As for D-210, the Chamber considered that “his evidence does not indicate that age was in fact the reason that he was turned away” and did not rely on his account.¹⁵⁴

38. *Third*, D-210 merely testified about Bosco Ntaganda’s presence at some distance when he was turned away.¹⁵⁵ Neither he nor D-80 refer to action taken by Mr Ntaganda to exclude a single recruit.¹⁵⁶ There is no evidence that Mr Ntaganda personally made *any* effort to exclude a recruit, based on age or physical ability.

¹⁴⁸ The Chamber relied on D-210’s evidence that (1) Mugisa Muleke “supervised the [Mandro] training centre and reported to Mr Ntaganda” and that (2) “Mr Ntaganda regularly visited the training centre” (Judgment, para. 365, fns. 1012, 1013). It relied on D-80’s evidence that (1) “Zimulinda was the commander of the Rwampara training camp”; (2) Bosco Ntaganda visited the Rwampara training camp on 12 February 2003; (3) the UPC/FPLC operated other training camps; (4) Bosco Ntaganda attended nightly sessions at the training camps during which songs were sung; and (5) recruits were issued with weapons and uniforms at the completion of their training (Judgment, paras. 368, 369, 370, 372, 378, 379 and fns. 1021, 1025, 1026, 1046, 1072, 1076).

¹⁴⁹ Judgment, para. 365, fn. 1013 and para. 369, fn. 1025.

¹⁵⁰ Judgment, fns. 1012, 1013, 1021, 1025, 1026, 1046, 1072, 1076.

¹⁵¹ Judgment, fn. 135.

¹⁵² Judgment, fns. 1056, 1157.

¹⁵³ **D-80**: DRC-D18-0001-6163, p. 6172, para. 61(l).

¹⁵⁴ Judgment, fn. 998.

¹⁵⁵ **D-210**: T-206, 47:15-16.

¹⁵⁶ D-210 testified that he could not hear what Bosco Ntaganda was saying to the individuals he was with (**D-210**: T-207, 19:6-18) and D-80 stated that, although Bosco Ntaganda expressed his concerns about certain individuals, he also stated: “*je ne me souviens pas que Bosco Ntaganda m’ait donné un ordre concernant le départ de ces gens*” (**D-80**: DRC-D18-0001-6163, p. 6172, para. 61(l)).

(iv) Mr Ntaganda did not protect civilians once areas were secured

39. There is no evidence that Mr Ntaganda tried to protect the civilian population against attacks – certainly not the Lendu population.¹⁵⁷ The Defence relies primarily for all these assertions on the testimony of Mr Ntaganda himself, which is not credible. If Mr Ntaganda tried to protect any civilian populations it was only the Hema population and those aligned with it. The Defence claim ignores the Chamber’s findings: (i) that it did not find Mr Ntaganda credible when he said he always fought and acted for the liberation and freedom of the civilian population in Ituri;¹⁵⁸ (ii) that in Mongbwalu “any Lendu person would be killed if they tried to return to Mongbwalu”;¹⁵⁹ and (iii) that the UPC/FPLC’s conduct in the aftermath of the assault “was clearly aimed at creating conditions to hamper the return of the Lendu [...] *for at least a considerable period*”.¹⁶⁰

40. It is incorrect that the Chamber found that punishment of crimes against Lendu civilians was “insufficient” or that Mr Ntaganda made efforts “to punish the most grave misconduct by UPC/FPLC forces against civilians”.¹⁶¹ The Chamber found punishments against Lendu were non-existent: the rape, killing or looting of Lendu were not punishable offences *at all*.¹⁶² It found that the few punishments for UPC/FPLC crimes against *other* ethnicities “must be distinguished”.¹⁶³ Mr Ntaganda *never* punished the “most grave” misconduct by UPC/FPLC forces against Lendu.

41. In *Krajišnik*, the Chamber disregarded alleged isolated, benevolent acts - against non-Serb individuals - given “the magnitude of the crimes of which [Krajišnik] is found responsible”. The Chamber held that “sporadic benevolent acts or ineffective assistance may be disregarded” as a mitigating factor if “the convicted

¹⁵⁷ *Contra*, Defence Submissions, paras. 120-123.

¹⁵⁸ Judgment, para. 261.

¹⁵⁹ Judgment, para. 1059.

¹⁶⁰ Judgment, para. 1061 (emphasis added).

¹⁶¹ Defence Submissions, para. 122.

¹⁶² Judgment, paras. 332, 800, 1183.

¹⁶³ Judgment, para. 332.

person is shown to have been in a position to take steps to control or prevent all acts of violence.”¹⁶⁴

(v) Mr Ntaganda made no genuine effort to achieve peace and reconciliation

42. Mr Ntaganda’s alleged peace efforts are not established.¹⁶⁵ [REDACTED] awareness-raising mission to Hema locations was not Mr Ntaganda’s initiative.¹⁶⁶ Nor were the three goals of [REDACTED] awareness-raising mission Mr Ntaganda’s goals.¹⁶⁷ Mr Ntaganda spoke to the public only at one location.¹⁶⁸ D-302’s untested statement¹⁶⁹ is contradicted by D-306’s testimony.¹⁷⁰ Instead, Ituri populations continued to be harassed by the UPC in 2004.¹⁷¹ In 2004, MONUC reported planning of attacks by Mr Ntaganda’s troops on its peacekeepers¹⁷² and that the UPC/FPLC threatened humanitarians.¹⁷³

43. The video of the celebration following the *collation des grades* near Largu in July 2004 does not show reconciliation between ethnic communities.¹⁷⁴ There is no evidence that the Lendu population was present, or its views represented.¹⁷⁵ [REDACTED] made no link between [REDACTED] awareness-raising campaign

¹⁶⁴ *Krajišnik* TJ, para. 1163: “Krajišnik made some efforts during the indictment period to provide help to non-Serb individuals. [...] While these acts did show some benevolence in respect of Muslims and Croats, they did not impede the achievement of the common objective of the JCE. Keeping in mind the magnitude of the crimes of which Momčilo Krajišnik is found responsible, the assistance provided by him was sporadic. By occupying a central position within the leadership of Bosnia-Herzegovina, Momčilo Krajišnik had the power to provide assistance to the victimized population on a larger scale, had he wished to do so.”

¹⁶⁵ *Contra* Defence Submissions, paras. 124, 126-128.

¹⁶⁶ *Contra* Defence Submissions, para. 126. See [REDACTED].

¹⁶⁷ *Contra*, Defence Submissions, para. 127: “The three key purposes of the pacification process advocated by Mr. Ntaganda was [sic] sensitization for peace, unity and free movement of persons with their possessions”. The Defence rely on DRC-D18-0001-6754, a document which does not mention Mr Ntaganda and which concerns a meeting in Bule which, [REDACTED], Mr Ntaganda did not attend. [REDACTED].

¹⁶⁸ *Contra* Defence Submissions, para. 126, referring to Mr Ntaganda having spoken “publicly at these events”.

¹⁶⁹ **D-302**: ICC-01/04-02/06-2397-AnxB, paras. 20-21.

¹⁷⁰ **D-306**: T-267, 20:7-8.

¹⁷¹ **D-306**: T-267, 36:15-22.

¹⁷² DRC-OTP-0154-0648, p. 0648; DRC-OTP-2066-0380, p. 0380, para. 1(b); DRC-OTP-0185-0843, pp. 0844-0845, para. 2(e); DRC-OTP-1029-0579, pp. 0579-0580, para. 2(b)-(c); DRC-OTP-0007-0314, p. 0316, para. 4(d)(1)-(2); DRC-OTP-0004-0372, p. 0373, para. 1; DRC-OTP-1029-0465, p. 0467, para. 8(d); DRC-OTP-1029-0591, p. 0595, para. 3(b)(iv).

¹⁷³ DRC-OTP-0151-0306.

¹⁷⁴ *Contra* Defence Submissions, paras. 124, 128.

¹⁷⁵ **D-47**: T-267, 52:1-5: “[M]ainly officials of various sorts were present. And we had representatives of public power”. D-47 referred to “[l]a population, les spectateurs” (T-267-Conf-FR ET, 49:28, 53:11-13), without further precision about them, (Largu was a predominantly Hema locality: **D-300**: T-250, 44:10-11; T-173, 79:11-12).

and the video event.¹⁷⁶ Even D-47 made a distinction between “reconciliation operations” carried out between the “top leaders of the party with certain community leaders in Ituri” on the one hand, and the “common bloc” created between the UPC and the FNI, on the other.¹⁷⁷ The video depicts - at most - an alliance between certain leaders of the UPC/FPLC and FNI, but nothing about the Hema-Lendu relations in Ituri in 2004. D-47 and D-306 confirmed the presence of the Djugu territory administrator, Tchachu Lylo, a Lendu, who was a former UPC and FNI official.¹⁷⁸

44. D-306 stated that those receiving ranks were all UPC officers.¹⁷⁹ It is disputed that Mr Ndjabu was representing the views of the FNI/FRPI or, in any case, of the Lendu community, which a MONUC report shows was divided over the alliance with Bosco Ntaganda.¹⁸⁰ Mr Ndjabu, who was back in Ituri in February 2004 after his detention in Kinshasa with Mr Lubanga, was reported by MONUC as “siding with Lubanga’s group in a bid to secure a high position at national level”.¹⁸¹

45. The Defence claim that Mr Ntaganda became a man of peace by 2004, but the Chamber found that he had sought the destruction of the Lendu in 2002 and 2003.¹⁸² The suddenness of the change betrays the lack of genuineness¹⁸³ of his

¹⁷⁶ [REDACTED].

¹⁷⁷ D-47: T-267, 48:20-49:2.

¹⁷⁸ D-306: T-267, 23:17-24:3 ; D-47:T-267, 57:6-8.

¹⁷⁹ D-306: T-267, 27:20-28:2. *Contra*, Defence Submissions, para. 129.

¹⁸⁰ A MONUC report dated 14-20 February 2004 cites FNI President *ad interim* Pitchu Iribi as follows: “He acknowledged that the FNI President [Floribert Ndjabu] was siding with Lubanga’s group in a bid to secure a high position at national level. (...) Mr Pichou claimed to be strongly opposed to a new alliance with the Lubanga/Bosco group and that the leadership of FNI/FRPI was divided over the issue. He assured MONUC that he was still committed to the DCR process together with COS of FRPI, commander Germain”. DRC-OTP-0009-0146, p. 0147, para. 2(c). The same report describes the attitude of the Lendu community as follows: “The Bunia-based Lendu community has informed MONUC that they are considering to taking their distances vis-à-vis FNI leader Floribert Ndjabu, whose rapprochement with Thomas Lubanga’s COS Bosco is, reportedly, being dismissed by most in the community. According to Mr. Kalimi Nyassi, First Vice-President of the IIA [Ituri Interim Administration] and a prominent figure/decision maker within the Lendu community, a “high-level” meeting has been convened towards that end. This stance follows a similar move by FNI President *a.i.* [Pichou Iribi] who assured MONUC that he was personally opposed to that collusion, and that the leadership of the movement is currently divided over the issue”. DRC-OTP-0009-0146, p. 0147-0148, para. 2(d).

¹⁸¹ DRC-OTP-0009-0146, p. 0147, para. 2(c). In the video, Ndjabu addresses “*les gens de l’UPC*”, not the population (DRC-OTP-2084-0041, p. 0052, l. 350).

¹⁸² Judgment, para. 809.

¹⁸³ *Katanga* SJ, para. 91.

alleged efforts towards peace and reconciliation. Chambers have carefully assessed a convicted person's apparent reasons for making alleged peace efforts,¹⁸⁴ and whether they were effective.¹⁸⁵ This Chamber should consider the context of Mr Ntaganda's alleged change: (i) the Ituri interim administration was in place, backed by the international community;¹⁸⁶ (ii) by late 2003, recruitment by armed groups was prohibited;¹⁸⁷ (iii) the IMEF and MONUC's Ituri Brigade had been given a mandate to use force,¹⁸⁸ and deployed to the interior of Ituri, threatening the UPC/FPLC's grip on territory and illegal tax revenues;¹⁸⁹ (iv) UPC/FPLC's leaders were regarded as blocks to peace; and (v) MONUC sought Mr Ntaganda's arrest.¹⁹⁰

46. The Chamber rejected Mr Ntaganda's testimony that he always fought and acted for the liberation and freedom of the civilian population in Ituri.¹⁹¹ Unlike in *Plavšić*,¹⁹² where the evidence of the convicted persons' peace efforts came from witnesses with "high international reputation",¹⁹³ Mr Ntaganda relies on witnesses whose evidence is limited¹⁹⁴ and partial.¹⁹⁵ Unlike Ms *Plavšić*, who

¹⁸⁴ *Katanga* SJ, para. 95, where the Trial Chamber notes that Germain Katanga signed the agreement to end hostilities "at the insistence of MONUC and the Ugandan authorities".

¹⁸⁵ *Katanga* SJ, para. 95, noting that the agreement to end hostilities signed by Mr Katanga "was not respected by the groups involved in the ongoing war in Ituri".

¹⁸⁶ **P-245**: T-142, 17:12-18:8, 71:8-14.

¹⁸⁷ DRC-D18-0002-0063.

¹⁸⁸ DRC-OTP-0074-0422, p. 0425, para. 3.

¹⁸⁹ The UPC/FPLC had been opposed to their arrival: **P-12**: DRC-OTP-2054-0073, p. 0139, ll. 5-11; **P-31**: DRC-OTP-2054-4494, p. 4509, l. 24 – p. 4510, l. 3.

¹⁹⁰ DRC-OTP-2057-0099, p. 0103 ; DRC-OTP-0185-0843, p. 0845, para. 2(e).

¹⁹¹ Judgment, para. 261.

¹⁹² Defence Submissions, para. 133, fn. 275.

¹⁹³ *Plavšić* SJ, para. 94.

¹⁹⁴ [REDACTED], D-306 was unaware of the division among the FNI/FRPI leadership and the Lendu community regarding the alliance between the FNI President and Bosco NTAGANDA in February 2004 (T-267-CONF-FR ET, 35:27- 36 :20, 37:4-27. See DRC-OTP-0009-0146, p. 0147-0148, paras. 2(c) and (d)), and of MONUC's mandate in relation to peace and reconciliation (T-267-CONF-FR ET, 32:15-18). He was therefore unable to provide the Chamber with the full picture of Bosco NTAGANDA's conduct in 2004, focussed as he was on matters at his own level[REDACTED].

¹⁹⁵ **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).

“manifested courage” and “took great personal risk” in her peace efforts,¹⁹⁶ in 2004 Mr Ntaganda was dismissive of legitimate peace efforts by the DRC and MONUC, as shown by his failure to take up his FARDC appointment for half a decade, choosing instead to continue waging war within other armed groups in Eastern DRC;¹⁹⁷ and by his group’s refusal to cooperate with MONUC and the Ituri Pacification Commission.¹⁹⁸

47. Germain Katanga was not given credit for his efforts to encourage peace.¹⁹⁹ This Chamber should consider Mr Ntaganda’s lack of cooperation with the institutions that legitimately pursued peace in Ituri, including whether he personally participated in the Ituri Pacification Commission proceedings and the meetings of the *Comité de concertation de groupes armés* (“CCGA”), as was done in *Katanga*.²⁰⁰ MONUC was fully aware of the “realities on the ground”²⁰¹ and did not spare other Ituri militia leaders from arrest.²⁰² Germain Katanga earned credit at sentence for his “positive role” and contribution in the process of demobilising child soldiers from his group.²⁰³ In stark contrast to Mr Ntaganda,²⁰⁴ (i) Mr Katanga “led by example”, as “the first person to demobilise”,²⁰⁵ “alongside a child at the beginning of the process” which, “in the mind of the Chamber, sent a strong message to other combatants”;²⁰⁶ (ii) MONUC confirmed Mr Katanga’s involvement in the demobilisation process and his *personal* expression of willingness to cooperate with MONUC and IMEF;²⁰⁷ and (iii) Mr Katanga’s

¹⁹⁶ *Plavšić* SJ, paras. 85, 89, 93, 94.

¹⁹⁷ DRC-OTP-2102-1032, p. 1044, para. 54 ; DRC-OTP-2102-1093, p. 1097, para. 19.

¹⁹⁸ 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.

¹⁹⁹ *Contra*, Defence Submissions, para. 133, fn. 275. *Katanga* SJ, para. 114: “[T]he Chamber is unable to establish [...] whether globally speaking Germain Katanga actually sought, through his alleged efforts, to actively promote the peace process”.

²⁰⁰ *Katanga* SJ, paras. 96, 99-100.

²⁰¹ *Contra* Defence Submissions, para. 139.

²⁰² *See* Defence Submissions, paras. 137, 139. MONUC arrested Floribert Kisembo , among others, in 2003 and 2004: **D-300**: T-222, 16:4-7, 17:8-24; DRC-OTP-0004-0435, p. 0435, para. 1; DRC-OTP-0074-0628, p. 0673.

²⁰³ *Katanga* SJ, para. 115.

²⁰⁴ He declined to demobilise and integrate into the FARDC for many years. *See D-300*: T-223, 18:14.

²⁰⁵ *Katanga* SJ, para. 109.

²⁰⁶ *Katanga* SJ, paras. 110-111.

²⁰⁷ *Katanga* SJ, para. 144. .

contribution to demobilisation was a *sine qua non*, including by his physical presence at a demobilisation centre he set up.²⁰⁸ In contrast, MONUC reported that Mr Ntaganda was a threat to peace.²⁰⁹

48. Bosco Ntaganda did not facilitate substantial demobilisation of UPC/FPLC soldiers, nor their integration into the FARDC in 2004.²¹⁰ There is no evidence that he was responsible for the integration of 207 former “UPC/L” members into the FARDC.²¹¹ Moreover, the number – approximately 10% of the size of UPC/FPLC troops under his command in July 2002²¹² – is paltry.

(vi) Mr Ntaganda’s surrender is not a mitigating factor

49. Mr Ntaganda fled to the US Embassy in early March 2013, reportedly due to pressure from the split within the M23 in February 2013.²¹³ The Single Judge of Pre-Trial Chamber II found that the material before her “suggests that Mr Ntaganda’s voluntary surrender was prompted by the likelihood of him being killed or by pressure imposed on him by the Rwandan Government”²¹⁴ and cautioned that “it should not be forgotten that Mr Ntaganda had been at large for many years since the issuance of the first warrant of arrest [...] Mr Ntaganda did not choose to face justice, but instead managed to avoid apprehension during this period, in total disregard of the serious accusations brought against him”.²¹⁵

50. In contrast to the 5-month delay in surrendering in the *Blaškić* case cited by the Defence,²¹⁶ Mr Ntaganda evaded justice for five years from the date his arrest

²⁰⁸ *Katanga* SJ, paras. 109-110, referring to witness testimony corroborated by documentary evidence.

²⁰⁹ DRC-OTP-2057-0099, pp. 0101-0103; DRC-OTP-0185-0843, p. 845, para. 2(e); DRC-OTP-1029-0591, p. 0603, para. 27.

²¹⁰ *Contra* Defence Submissions, paras. 135-136.

²¹¹ DRC-OTP-0138-0027.

²¹² Some 1,800-2,000 recruits were estimated to have been at Mandro training camp alone by July 2002. Judgment, paras. 314, 365, 705.

²¹³ Registry report to Pre-Trial Chamber II citing various reports on the reasons behind Mr Ntaganda’s surrender: ICC-01/04-02/06-120-Conf.

²¹⁴ ICC-01/04-02/06-147, paras. 43-47.

²¹⁵ ICC-01/04-02/06-147, para. 41.

²¹⁶ Defence Submissions, fn. 294.

warrant was made public.²¹⁷ In *Popović*, the “significant delay” of 3.5 years before Pandurević’s surrender, coupled with unsubstantiated and generalized reasons for not surrendering earlier, was given “only limited weight” in mitigation.²¹⁸

(vii) Mr Ntaganda did not cooperate with the Court

51. As set out previously,²¹⁹ cooperation and good behaviour are not *per se* a mitigating circumstance.²²⁰ Testifying is not cooperation, especially given the overwhelming number of times Mr Ntaganda was found to give unreliable, incredible and evasive testimony.²²¹ Moreover, Mr Ntaganda staged a hunger strike and refused to attend Court several times both in person or by the video-link facilities that were made available to him.²²² The Chamber considered his behaviour to be “disruptive”.²²³

52. There is no evidence before the Chamber of any “other incidents” of assistance at the Detention Centre.²²⁴ When Mr Ntaganda first mentioned that [REDACTED], [REDACTED].²²⁵ [REDACTED].²²⁶

53. The time Mr Ntaganda spent in pre-trial detention has not been excessive.²²⁷ In the *Blaškić* case,²²⁸ the tribunal was hampered by the complexity of proceedings and the volume of materials on appeal.²²⁹ No such issues existed in this case.

²¹⁷ P-315, notes of meeting with Bosco Ntaganda, 17 November 2010, DRC-OTP-2062-0363, p. 0363, second para.: “I can’t go to The Hague because they don’t really understand the problems of Ituri. There was myself, and there are others. They should go and answer the questions. After they go, then I can respond. It’s because of my tribe that I’ve been targeted. I know why they gave me my warrant. The ICC is political. When we resisted against the central government, that’s when they launched this warrant.”

²¹⁸ *Popović* TJ, para. 2224.

²¹⁹ Sentence Submissions, paras. 98-101.

²²⁰ *Bemba et al.* SJ, para. 136.

²²¹ 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, 1494, 1507, 1529, 1574, 1589, 1596, 1598, 1672, 1679, 1688, 1720.

²²² T-126, 21:16-22:11; T-131, 2:15-3:11, 12:16-13:13.

²²³ T-131, 2:15-3:11.

²²⁴ *Contra*, Defence Submissions, para. 150.

²²⁵ ICC-01/04-02/06-2390-Conf, para. 11.

²²⁶ ICC-01/04-02/06-2390-Conf, para. 15.

²²⁷ *Nikolić* SJ, paras. 269-273, where the Trial Chamber considered that the time spent in pre-trial detention **could not** be considered a mitigating factor. *Contra*, Defence Submissions, para. 151.

²²⁸ Defence Submissions, para. 151, fn. 308.

54. If Mr Ntaganda requested to be brought to the ICC, far from his family, he cannot now argue that this distance should reduce his sentence.²³⁰ Nor can he reasonably claim that the restrictions on his telephone contact warrant a lower sentence²³¹ as these were imposed because of his own wrongdoing. The Chamber found that Mr Ntaganda's wife was also involved in "sharing [...] confidential information, allowing unregistered persons to speak to Mr Ntaganda and witness interference", yet it allowed contact with her in order to allow him to maintain relations with his children.²³² The Appeals Chamber held that his "right to privacy and family life was being appropriately balanced with the objectives of the stated aim of the restrictions".²³³

V. Prosecution's Sentence Request

55. The Prosecution hereby reiterates and reincorporates by reference all the previous submissions and conclusions set out in its Sentence Submissions.



Fatou Bensouda
Prosecutor

Dated this 20th day of January 2020
At The Hague, The Netherlands

²²⁹ *Blaškić* AJ, para. 728.

²³⁰ *Contra*, Defence Submissions, para. 152.

²³¹ Defence Submissions, para. 153.

²³² ICC-01/04-02/06-785, para. 62.

²³³ ICC-01/04-02/06-1817-Conf, para. 101.