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**International
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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 redacted version of ICC-01/04-02/06-2423-Conf

Observations on Sentencing on behalf of the Former Child Soldiers

Source: Office of Public Counsel for Victims (CLR1)

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I. PROCEDURAL BACKGROUND

1. On 8 July 2019, Trial Chamber VI (the “Chamber”) convicted Mr Ntaganda of five counts of crimes against humanity and thirteen counts of war crimes¹ and issued an order on the procedure to be adopted for sentencing.²

2. On 17, 18 and 20 September 2019, the Chamber heard the testimony of three witnesses³ and the parties’ and legal representatives of victims’ final oral submissions.⁴ The Chamber ordered the filing of written sentencing submissions by 30 September 2019, with any potential responses to follow by 8 October 2019.⁵

II. LEGAL FRAMEWORK

3. The imposition of a sentence has two primary objectives pursuant to the Preamble to the Rome Statute: retribution and deterrence.⁶ The 283 former child soldiers participating as victims in the proceedings aim at pursuing both. They pursue retribution, as opposed to revenge, in the sense that the penalty imposed must reflect the seriousness of the crimes for which Mr Ntaganda was convicted, and of their suffering as a result thereof. They pursue deterrence, in the sense that the sentence must be sufficient to discourage Mr Ntaganda from reoffending and ensure that others who may commit similar crimes will be dissuaded from doing so.

4. The Rome Statute and the Rules of Procedure and Evidence establish a comprehensive framework for the determination of a sentence.⁷ The Chamber must first identify and assess the relevant factors in Article 78(1)⁸ and Rules 145(1)(c)

¹ See the “Judgment” (Trial Chamber VI), [No. ICC-01/04-02/06-2359](#), 8 July 2019 (the “Judgment”).

² See the “Order on sentencing procedure” (Trial Chamber VI), [No. ICC-01/04-02/06-2360](#), 8 July 2019.

³ See P-0305: [No. ICC-01/04-02/06-T-266-Red-ENG WT](#) and P-0306 and P-0047: [No. ICC-01/04-02/06-T-267-Red-ENG WT](#).

⁴ See [No. ICC-01/04-02/06-T-268-Red-ENG WT](#).

⁵ *Idem*, p. 53, lines 1-4.

⁶ See e.g. the “Decision on Sentence pursuant to article 76 of the Statute” (Trial Chamber II), [No. ICC-01/04-01/07-3484-tENG-Corr](#), 23 May 2014, paras. 37-38 (the “Katanga Sentencing Decision”) and the “Decision on Sentence pursuant to Article 76 of the Statute” (Trial Chamber III), [No. ICC-01/05-01/08-3399](#), 21 June 2016, para. 10 (the “Bemba Sentencing Decision”), paras. 66-67.

⁷ See e.g. the “Judgment and Sentence” (Trial Chamber VIII), [No. ICC-01/12-01/15-171](#), 27 September 2016, para. 68 (the “Al Mahdi Judgment”).

⁸ In the present observations, the term ‘Article’ refers to the Rome Statute unless otherwise indicated.

and 145(2),⁹ and then balance all of them in accordance with Rule 145(1)(b).¹⁰ Taking these factors into account, the Chamber is called to assess both the gravity of the crimes for which Mr Ntaganda was convicted – which is not disputed by the Defence¹¹ – and the applicability of any aggravating and mitigating circumstances. These categories are not, however, neatly distinguishable or mutually exclusive.¹² While issues pertaining to the constitutive elements of the offence should be considered under the rubric of gravity, “[b]eyond such elements, the Chamber has a degree of discretion to consider relevant factors in assessing gravity or, if exceptional, as aggravating circumstances”.¹³ The Common Legal Representative of the Former Child Soldiers (the “Legal Representative”) underscores that, while some of the factors discussed *infra* could, in principle, be relevant to both the gravity of the crimes and the existence of aggravating circumstances, she has deemed it appropriate to frame these as aggravating circumstances based on their exceptional nature.¹⁴

5. Moreover, Article 78(3) provides that, when a person has been convicted of more than one crime, the Court shall pronounce a sentence for each crime, as well as a joint sentence.¹⁵ The Legal Representative emphasises that the imposition of separate sentences for the crimes of recruitment of child soldiers (Counts 14 and 15),

⁹ In the present observations, the term ‘Rule’ refers to the Rules of Procedure and Evidence unless otherwise indicated.

¹⁰ See the “Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the ‘Decision on Sentence pursuant to Article 76 of the Statute’” (Appeals Chamber), [No. ICC-01/04-01/06-3122 A4 A6](#), 1 December 2014, paras. 32-34 (the “*Lubanga* Appeals Sentencing Decision”). The Legal Representative recalls that there are several possible approaches to the interaction between the factors set out in Article 78(1) and those in Rule 145(1)(c), and that the Appeals Chamber has not found it necessary to decide which of the possible approaches is the correct one, provided that all relevant factors are taken into account and not double-counted. *Idem*, paras. 61-66.

¹¹ See [No. ICC-01/04-02/06-T-268-Red-ENG WT](#), p. 35, lines 4 and 12-13; p. 39, lines 10-11; p. 41, lines 2-3; and p. 50, line 17.

¹² See the “Judgment on the appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled ‘Decision on Sentence pursuant to Article 76 of the Statute’” (Appeals Chamber), [No. ICC-01/05-01/13-2276-Red A6 A7 A8 A9](#), 8 March 2018, para. 112 (the “*Bemba et al.* Appeals Sentencing Decision”).

¹³ See the *Bemba* Sentencing Decision, *supra* note 6, para.15, citing *inter alia* ICTY, *Vasiljević*, Case No. IT-98-32, [Appeals Judgment](#), 25 February 2004, para. 157 (the “*Vasiljević* Appeals Judgment”). See also *e.g.* SCSL, *Taylor*, Case No. SCSL-03-01-T, [Sentencing Judgment](#), 30 May 2012, para.28.

¹⁴ See *e.g.* the “Decision on Sentence pursuant to Article 76 of the Statute” (Trial Chamber I), [No. ICC-01/04-01/06-2901](#), 10 July 2012, paras. 32-34 (the “*Lubanga* Sentencing Decision”).

¹⁵ The Legal Representative’s submissions are without prejudice to any potentially more severe sentence the Chamber may decide to impose in relation to other Counts.

their active use in hostilities (Count 16) and rape and sexual slavery (Counts 6 and 9) is particularly important for her clients. Said approach would take into account the ethnic dimension of the conflict, facilitating the healing process of individual victims and reconciliation within the Iturian community as a whole. The recognition by the Chamber that different ethnic groups were victimised by the UPC/FPLC derives not only from Mr Ntaganda's conviction for the crimes perpetrated against former child soldiers, but also from the imposition of an appropriately severe sentence for each crime, separate from those pertaining to other Counts.

III. WAR CRIMES OF ENLISTMENT, CONSCRIPTION AND ACTIVE USE IN HOSTILITIES OF CHILDREN UNDER 15 (COUNTS 14, 15 AND 16)

1. Gravity

6. The gravity of the crimes of recruitment and use of child soldiers perpetrated by Mr Ntaganda justifies the imposition of a lengthy sentence,¹⁶ given the gravity *in abstracto* of said crimes, the harm caused to victims, their families and affected communities, and Mr Ntaganda's degree of participation in the crimes, which must be premised on his high-ranking position, the essential character of his contributions to the crimes and the fact that he acted with full intent and knowledge.

7. Contrary to what the Defence argued,¹⁷ the gravity of said crimes must not be assessed exclusively by reference to those victims individually addressed in the Judgment and who the Chamber specifically found beyond reasonable doubt were under 15 years of age. Specific victims and incidents were discussed in the Judgment only as examples, as evidential details to prove the crimes.¹⁸ Mr Ntaganda was charged and found guilty not only in relation to those victims, but for the relevant offences as described by given parameters. The charge of recruitment, a continuous crime, related to acts "*committed in the institutionalised coercive environment of the UPC/FPLC, in similar circumstances over a period of time, and not as isolated acts*",¹⁹ and

¹⁶ See Article 78(1). See also the *Lubanga* Sentencing Decision, *supra* note 14, para. 36, referring to gravity as a "*principal consideration*"; and the *Bemba* Sentencing Decision, *supra* note 6, para. 15, noting that gravity is "*one of the principal factors to be considered in the determination of a sentence*".

¹⁷ See [No. ICC-01/04-02/06-T-268-Red-ENG WT](#), p. 40, lines 2-4.

¹⁸ See the Judgment, *supra* note 1, para. 40.

¹⁹ *Idem*, para. 1112.

Mr Ntaganda was thus convicted as an indirect co-perpetrator for “[c]onscripting and enlisting children under the age of 15 years into an armed group between on or about 6 August 2002 and 31 December 2003”.²⁰ While the Chamber referred to the active use of child soldiers in hostilities in a more specific way, based on the understanding that “individuals cease to actively participate when not engaged in combat related activities”, it convicted Mr Ntaganda for these crimes as defined by reference to parameters, as opposed to named victims: the relevant types of conduct, locations and timeframes.²¹ Accordingly, it convicted Mr Ntaganda for the use of child soldiers in the First Operation and the assault on Bunia in May 2003, their use as bodyguards and to gather information in the period from 6 August 2002 to 30 May 2003.²² Mr Ntaganda’s conviction is not limited to the non-exhaustive list of victims discussed in the Judgment, and the gravity of his crimes cannot therefore be assessed only by reference to said victims.

a) Inherent gravity of the crimes

8. The jurisprudence of the Court has already established that the inherent gravity of crimes against child soldiers is exceptionally high by reason of the young age and thus the vulnerability of the individuals targeted, who must be below 15 years.²³ As recognised in the *Lubanga* proceedings, and confirmed by the Pre-Trial Chamber in the present case,²⁴ these “are undoubtedly very serious crimes that affect the international community as a whole. [...] The vulnerability of children means that they need to be afforded particular protection that does not apply to the general population, as recognised in various international treaties”.²⁵

²⁰ *Idem*, p. 529.

²¹ *Idem*, para. 1113.

²² *Idem*, p. 529.

²³ See SCSL, *Sesay et al. (RUF)*, Case No. SCSL-04-15-T, [Sentencing Judgment](#), 8 April 2009, para. 182 (the “RUF Sentencing Judgment”) and, *Fofana and Kondewa (CDF)*, Case No. SCSL-04-14-T, [Judgement on the Sentencing](#), 9 October 2007, paras. 55-58 (the “CDF Sentencing Judgment”).

²⁴ See e.g. the “Decision on the Defence’s application for interim release” (Pre-Trial Chamber II), [No. ICC-01/04-02/06-147](#), 18 November 2013, para. 50 and the “Second Decision on Bosco Ntaganda’s Interim Release” (Pre-Trial Chamber II), [No. ICC-01/04-02/06-284](#), 17 March 2014, para. 32.

²⁵ See the *Lubanga* Sentencing Decision, *supra* note 14, para. 37 (footnotes omitted).

9. The crime of conscription, as opposed to enlistment, is characterised by an *“added element of compulsion”*,²⁶ which can be established by demonstrating that an individual joined the armed group *“due to, inter alia, a legal obligation, brute force, threat of force, or psychological pressure amounting to coercion”*.²⁷

10. The Legal Representative submits that, in the present case, the distinction between enlistment and conscription is largely theoretical and that both forms of recruitment are of comparable gravity, and should thus result in the same sentence. Contrary to the Defence submissions during the sentencing hearing that there is a *“huge different [sic]”* between enlistment and conscription and that evidence of the latter in the present case is *“remote, if at all present”*,²⁸ the Chamber dealt with both crimes jointly in the Judgment, and convicted Mr Ntaganda for both.²⁹

11. The various methods of recruitment employed by the UPC/FPLC included threats, awareness-raising campaigns and rallies, and persuasion of individuals of influence within the community to mobilise *“young people”*, effectively resulting in an obligation on families to provide children for military service or pay a fee to be exempted from such obligation.³⁰ The Chamber concluded that, as a result, some individuals joined the UPC/FPLC *“voluntarily”* while others were recruited forcibly.³¹

12. The Legal Representative emphasises that said enlistment did not take place in an environment where the children could exercise a free choice to join a militia, to the extent such a choice could conceivably be made by a person below the age of 15. To the contrary, the circumstances in which the UPC/FPLC’s recruitment campaigns occurred had significant impact on any child soldier’s decision to join and on any parent’s decision to surrender his or her child to the militia. As articulated by the UN Special Representative on Children and Armed Conflict, said campaigns took place

²⁶ See the “Judgment pursuant to Article 74 of the Statute” (Trial Chamber I), [No. ICC-01/04-01/06-2842](#), 5 April 2012, paras. 607-608 (the *“Lubanga Judgment”*); and the *Lubanga Appeals Sentencing Decision*, *supra* note 10, para. 277.

²⁷ See the Judgment, *supra* note 1, para. 1106, citing the *Lubanga Appeals Sentencing Decision*, *supra* note 10, para. 278.

²⁸ See [No. ICC-01/04-02/06-T-268-Red-ENG WT](#), p. 34, line 11-13.

²⁹ See the Judgment, *supra* note 1, para. 1107 and p. 538.

³⁰ *Idem*, paras. 348-349.

³¹ *Idem*, paras. 350 and 1119.

“in the context of poverty, ethnic rivalry and ideological motivation”, where joining the UPC/FPLC was often *“a desperate attempt to survive by children with a limited number of options”*.³² Against this background, the Legal Representative submits that despite being considered by the Chamber as formally ‘voluntary’, Mr Ntaganda’s enlistment of children cannot be considered of lesser gravity.

13. The Legal Representative underlines that it is particularly important for her clients — especially her Hema clients and their families, but also for the whole Iturian community — that the Chamber recognises said reality. In all likelihood, imposing the same sentence for conscription and enlistment would not change the total time Mr Ntaganda will have to serve in detention, but it would robustly contribute to this meaningful and emblematic recognition.

b) Harm caused to victims, families and communities

14. The gravity of Mr Ntaganda’s recruitment and active use of child soldiers is significantly enhanced by the dramatic, long-term consequences of said crimes on the young victims, their families and the affected communities.³³

15. The Judgment confirms that children under the age of 15 *“got shot at, were injured, or died on the battlefield”*.³⁴ Others were seriously wounded at the UPC/FPLC training camps.³⁵ Further, the long-term psychological consequences of the children’s traumatic recruitment, their separation from their families, their exposure to an environment of violence and fear and their witnessing and/or perpetration of brutal

³² See the “Submission of the Observations of the Special Representative of the Secretary General of the United Nations for Children and Armed Conflict pursuant to Rule 103 of the Rules of Procedure and Evidence”, [No. ICC-01/04-01/06-1229](#), 18 March 2008, paras. 13-14.

³³ The consequences of crimes against child soldiers have been discussed extensively in the case law, including the *Lubanga* Sentencing Decision, *supra* note 14, paras. 38-44; the *RUF* Sentencing Judgment, *supra* note 23, paras. 184 *et seq.*; the *CDF* Sentencing Judgment, *supra* note 23, paras. 56 *et seq.* Rule 145(1)(c) also refers to *“the harm caused to the victims and their families”*. The Court’s sentencing decisions to date place significant reliance on said factor in their gravity assessment, see *e.g.* the *Lubanga* Sentencing Decision, *supra* note 14, paras. 38-44; the *Katanga* Sentencing Decision, *supra* note 6, paras. 47-57; and the *Al Mahdi* Judgment, *supra* note 7, paras. 80 and 108.

³⁴ See the Judgment, *supra* note 1, para. 416. The Chamber heard the testimony of survivors injured in combat, see *e.g.* P-0883: [No. ICC-01/04-02/06-T-168-Red-ENG WT](#), pp. 43-44; P-0010: [No. ICC-01/04-02/06-T-48-Red-ENG WT](#), pp. 26-27; P-0888: [No. ICC-01/04-02/06-T-105-Red-ENG WT](#), p. 48.

³⁵ See the Judgment, *supra* note 1, paras. 376-377. Also see P-0116: [No. ICC-01/04-02/06-T-195-Red-ENG WT](#), p. 21.

acts of violence cannot be overstated.³⁶ Experts confirm that former child soldiers often experience debilitating mental health conditions including post-traumatic stress disorder, drug or alcohol abuse, depression, dissociation, aggressiveness and suicidal behaviour.³⁷ These disorders may affect victims for their entire lives.³⁸ The trauma invariably suffered by child soldiers also negatively impacts their education, the development of cognitive and social skills and their prospects of employment.³⁹

16. The impact of Mr Ntaganda's crimes goes thus well beyond the immediate harm suffered by child soldiers. It extends to the victims' family, including the parents who lost their children or lost any possibility to establish a relationship with their children in the future. Children born as a result of the sexual violence or conceived by child soldiers while in the militia are also deeply affected by these crimes, with long-term effects that cripple individuals and families for generations.⁴⁰

c) Degree of Mr Ntaganda's participation and intent

17. Pursuant to Rule 145(1)(c), the Chamber must also consider the "*degree of participation*" and the "*degree of intent*" of Mr Ntaganda, who was convicted as an indirect co-perpetrator for the crimes of recruitment and use of child soldiers.⁴¹

18. The jurisprudence of the Court confirms that, *in abstracto*, perpetration and co-perpetration under Article 25(3)(a) carry a higher level of blameworthiness than other modes of liability such as aiding and abetting under Article 25(3)(c).⁴² At the same time, there is no indication in either the Statute or the jurisprudence of the Court of any hierarchy of gravity among the variations set out under

³⁶ See the *Lubanga* Sentencing Decision, *supra* note 14, paras. 38-39.

³⁷ *Idem*, paras. 40-41.

³⁸ *Idem*, Dissenting Opinion of Judge Odio Benito, para. 9. See also *e.g.* [REDACTED]: [REDACTED], [REDACTED], [REDACTED]; and P-0116: [No. ICC-01/04-02/06-T-195-Red-ENG WT](#), pp. 21-22.

³⁹ See *e.g.* [REDACTED]: [REDACTED], [REDACTED]; and P-0010: [No. ICC-01/04-02/06-T-48-Red-ENG WT](#), p. 28. See also the *Lubanga* Sentencing Decision, *supra* note 14, paras. 41-42; and the RUF Sentencing Judgment, *supra* note 23, paras. 184-186.

⁴⁰ See the *Lubanga* Sentencing Decision, *supra* note 14, para. 19.

⁴¹ While the Chamber qualified Mr Ntaganda's individual criminal responsibility as indirect co-perpetration, it also found that "*the extent of Mr Ntaganda's involvement in the setting up of a guard unit for himself is demonstrated by the evidence*". See the Judgment, *supra* note 1, para. 759.

⁴² See the *Bemba et al.* Appeals Sentencing Decision, *supra* note 12, para. 60 and the "Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction" (Appeals Chamber), [No. ICC-01/04-01/06-3121-Red A5](#), 1 December 2014, para. 462.

Article 25(3)(a).⁴³ Accordingly, indirect perpetration or co-perpetration are not necessarily less grave than direct perpetration for sentencing purposes.⁴⁴ In fact, Mr Ntaganda did use children under the age of 15 as his personal bodyguards, which constitutes the direct perpetration of this crime, although the Chamber found his role to be more accurately captured under the mode of liability of indirect co-perpetration.⁴⁵

19. The gravity *in concreto* of Mr Ntaganda's criminal conduct reached the highest level based on (i) the position of authority he occupied within the UPC/FPLC;⁴⁶ (ii) his direct, personal and essential contribution to the perpetration of said crimes;⁴⁷ and (iii) the intentional and thus deliberate and fully informed nature of such contribution.⁴⁸

20. As Deputy Chief of Staff, Mr Ntaganda had control over military planning and operations,⁴⁹ was responsible for the imposition of disciplinary measures and the training of recruits⁵⁰ and decided on their deployment.⁵¹ His orders were obeyed by subordinates and he inspired fear amongst the troops and the population.⁵² The Chamber concluded that Mr Ntaganda, together with Thomas Lubanga and Floribert Kisembo, "*held the positions of highest authority within the UPC/FPLC*".⁵³

⁴³ See the *Al Mahdi* Judgment, *supra* note 6, para. 60.

⁴⁴ In this sense, see also ICTY, *Stakić*, Case No. IT-97-24-A, [Judgement](#), 22 March 2006, para. 380; the *Vasiljević* Appeals Judgment, *supra* note 13, paras. 181-182; *Jerusalem District Court, A-G v. Eichmann*, Case No. 40/1, [Judgment](#), 36 I.L.R. 5-14, 18-276, 12 December 1961, para. 197.

⁴⁵ See the Judgment, *supra* note 1, para. 759.

⁴⁶ The jurisprudence of the Court confirms this increases the gravity of the crime, see *e.g.* the *Katanga* Sentencing Decision, *supra* note 6, para. 66. See also ICTY, *Kunarac et al.*, Case No. IT-96-23 & IT-96-23/1-A, [Judgment](#), 12 June 2002, para. 863 and HOLÁ (B.), BIJLEVELD (C.) and SMEULERS (A.), "Consistency of International Sentencing: ICTY and ICTR Case Study", *European Journal of Criminology*, Vol. 9 (2012), pp. 544-545.

⁴⁷ See the *Lubanga* Sentencing Decision, *supra* note 14, para. 52; the *Katanga* Sentencing Decision, *supra* note 6, paras. 65-67. See also the RUF Sentencing Judgment, *supra* note 23, paras. 1205 and 1252; and ICTY, *Furundžija*, Case No. IT-95-17/1-A, [Appeals Judgment](#), 21 July 2000, para. 227.

⁴⁸ See the *Katanga* Sentencing Decision, *supra* note 6, para. 68.

⁴⁹ See the Judgment, *supra* note 1, paras. 321-322, where the Chamber also found that Floribert Kisembo's role, as Chief of Staff, was predominately administrative or political.

⁵⁰ *Idem*, paras. 323 and 360.

⁵¹ *Idem*, para. 378.

⁵² *Idem*, para. 322.

⁵³ *Idem*, para. 814. See also paras. 827-829.

21. Mr Ntaganda provided an “*essential contribution to the crimes*” perpetrated in the execution of the common plan agreed with his co-perpetrators.⁵⁴ He was personally and extensively involved in the recruitment of children under 15,⁵⁵ having asked community leaders to assist with these efforts and “*made at least three specific calls for young people and children to join UPC/FPLC ranks*”.⁵⁶ He established the Mandro training camp, the first centre where the UPC/FPLC training system was put in place, which was instrumental to the incorporation of children under the age of 15 into the organisation.⁵⁷ He paid regular visits to training camps, closely supervising the training.⁵⁸ He personally taught recruits and attended *kitamaduni* sessions and graduation ceremonies.⁵⁹ Further, children under 15 were trained as radio operators at Mr Ntaganda’s own residence.⁶⁰

22. Mr Ntaganda’s crucial role in the active use of children has also been proven beyond reasonable doubt. The Chamber found that he “*decided on the deployment of soldiers after training [...] and therefore, also on the deployment of kadogos, including those who were under 15 at the time of the events*”.⁶¹ Mr Ntaganda was thus the key decision-maker behind the assignment of children to participate in the First Operation and in the UPC/FPLC assault on Bunia in May 2003,⁶² to act as escorts,⁶³ and to carry out information-gathering duties.⁶⁴ He also set up a company of bodyguards for himself,⁶⁵ which included several individuals “*manifestly under the age of 15*”.⁶⁶

23. Mr Ntaganda acted with full knowledge and intent in recruiting and actively using children in hostilities. His personal contribution to these crimes, as described

⁵⁴ *Idem*, para. 1174.

⁵⁵ *Idem*, para. 830.

⁵⁶ *Idem*, paras. 355-359.

⁵⁷ *Idem*, paras. 365 and 831.

⁵⁸ *Idem*, paras. 365, 360, 369, 370 and 831-832.

⁵⁹ *Idem*, para. 372 and 832.

⁶⁰ *Idem*, para. 371 and 1191.

⁶¹ *Idem*, para. 832.

⁶² *Idem*, para. 416.

⁶³ *Idem*, paras. 380-402.

⁶⁴ *Idem*, para. 404.

⁶⁵ *Idem*, para. 759.

⁶⁶ *Idem*, paras. 381, 387-391, and 758.

supra, was undisputedly deliberate.⁶⁷ The Chamber also found that, given *inter alia* the frequency and proximity of his contacts with individuals “manifestly” under 15, Mr Ntaganda was bound to know that children were being recruited, trained and deployed by the UPC/FPLC⁶⁸ and that he “meant for” other commanders and soldiers to engage in the relevant conduct, knowing it would result in the recruitment and use of child soldiers.⁶⁹ In fact, these crimes had been carefully planned. As early as in June 2002, political leaders of the emerging UPC/FPLC decided to mobilise the children in their community,⁷⁰ and “as of at least the beginning of August 2002, the co-perpetrators were virtually certain that the implementation of their plan [...] would lead to [...] the recruitment and active use in hostilities of children”.⁷¹

2. Aggravating Circumstances

24. Several aggravating circumstances listed in Rule 145(2)(b) apply to Mr Ntaganda’s conviction for the recruitment and active use of children in hostilities.

a) Particular cruelty

25. Mr Ntaganda’s crimes against child soldiers were characterised by their particular cruelty and by the extreme brutality of the treatment to which the young victims were subjected in UPC/FPLC training camps, as well as after deployment. This constitutes an aggravating circumstance justifying a severe sentence.⁷²

26. In UPC/FPLC training camps, recruits were severely underfed, made to sleep outside, deprived of medical care, and subject to a ruthless disciplinary system involving death threats, beatings, imprisonment and executions.⁷³ The same, brutal treatment applied to all recruits, regardless of their age and gender.⁷⁴

⁶⁷ *Idem*, para. 1175.

⁶⁸ *Idem*, paras. 1191-1194.

⁶⁹ *Idem*, para. 1198.

⁷⁰ *Idem*, para. 787.

⁷¹ *Idem*, para. 811.

⁷² See Rule 145(2)(b)(iv). See also the *Bemba* Sentencing Decision, *supra* note 6, paras. 44-47, confirming this aggravating circumstance can apply even where the Chamber has also taken into account the ensuing suffering caused to victims as a factor in assessing the gravity of the crimes.

⁷³ See the Judgment, *supra* note 1, paras. 331; 375-377 and 817-819.

⁷⁴ *Idem*, para. 1195.

27. Similarly, the activities in which the children participated went far beyond what is legally required for said crime, *i.e.* activities presenting a “link” with “*combat in which the armed force or group of the perpetrator is engaged*”.⁷⁵ Children were deployed in the frontlines,⁷⁶ ordered to “*engage [...] in violent acts, such as killing the enemy, namely the Lendu, regardless of their sex, age and whether they were soldiers or civilians*”⁷⁷ and were told to kill and loot indiscriminately, as reflected by the expression “*kupiga na kuchaji*”.⁷⁸ And indeed, evidence indicates that, whilst deployed, children under the age of 15 used their weapons, killed people, and looted goods.⁷⁹

28. The brutal ill-treatment to which children under the age of 15 were subjected within the UPC/FPLC could not have occurred without Mr Ntaganda’s callous disregard for their well-being. He was fully aware of the living conditions in the training camps and that children under the age of 15 were “*threatened, punished, and suffered physical violence, the same as other recruits and soldiers*” to ensure they “*would be obedient and execute any orders*”.⁸⁰ He knew of the “*harsh disciplinary system and difficult living conditions in the camp*”, which was under his responsibility, but had no desire to modify them.⁸¹

29. Moreover, the jurisprudence of the Court also established that sexual violence committed against child soldiers may qualify as an aggravating circumstance, under “*particular cruelty*” pursuant to Rule 145(2)(b)(iv), of the recruitment crimes.⁸² The fact that Mr Ntaganda has been convicted for the separate crimes of rape and sexual slavery does not preclude such a finding. Indeed, nothing precludes the legal

⁷⁵ See the “Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction”, *supra* note 42, para. 340.

⁷⁶ See *supra* para. 22.

⁷⁷ See the Judgment, *supra* note 1, para. 790.

⁷⁸ *Idem*, paras. 415-416. On the gravity of ordering child soldiers to commit crimes, see also the RUF Sentencing Judgment, *supra* note 1, paras. 180-181.

⁷⁹ See *e.g.* P-0888: [No. ICC-01/04-02/06-T-105-Red-ENG WT](#), pp. 82-84; P-0010: [No. ICC-01/04-02/06-T-47-Red2-ENG WT](#), pp. 9 and 14-15 and [No. ICC-01/04-02/06-T-50-Red-ENG WT](#), pp. 19-23; and P-0030: [No. ICC-01/04-02/06-T-146-Red-ENG WT](#), pp. 6-32.

⁸⁰ See the Judgment, *supra* note 1, para. 1195.

⁸¹ *Ibid.*

⁸² See the *Lubanga* Sentencing Decision, *supra* note 14, para. 67.

elements of one crime to be considered an aggravating circumstance in relation to another crime, of which the convicted person is found guilty.⁸³

b) Number of victims

30. The scale of the crimes for which Mr Ntaganda was convicted, including their temporal and geographical scope, the number of victims involved and the repeated and continuous nature of the criminal offences, is a fundamental consideration in the determination of the appropriate sentence.⁸⁴ Those convicted of perpetrating crimes in several incidents or engaging in a longer and more continuous pattern of criminal behaviour deserve in principle a longer sentence than those convicted on the basis of fewer incidents or a shorter pattern.⁸⁵

31. The Judgment contains factual findings on the widespread nature of the crimes of recruitment and use of child soldiers committed by Mr Ntaganda.⁸⁶ The fact that the presence of child soldiers within the UPC/FPLC ranks was commonplace is also confirmed by the reference, in the Judgment, to at least fourteen named UPC/FPLC figures at all levels, including leaders, commanders and lower-level soldiers, having used individuals under 15 as their bodyguards.⁸⁷

32. The recruitment of children, a crime continuous in nature,⁸⁸ started “*from at least June 2002*”⁸⁹ and continued throughout the period relevant to the charges, from August 2002 to December 2003, corresponding to almost 17 months.

⁸³ See e.g. ICTY, *Kunarac et al.*, Case No. IT-96-23 & IT-96-23/1-A, [Judgment](#), 12 June 2002, para. 867 and [Appeals Judgment](#), 12 June 2002, para. 357 (in relation to discriminatory motive as a legal element of torture and as an aggravating circumstance for rape) and *Blaškić*, No. IT-95-14-A, [Appeals Judgement](#), 29 July 2004, para. 693 (in relation to discriminatory motive being considered both as a legal element of persecution and as an aggravating factor for the crime of murder). This approach does not give rise to impermissible double-counting or unfairness towards the convicted person as any overlap between the different counts for which he was convicted will ultimately be addressed as a matter of concurrence of the terms of imprisonment imposed. See e.g. the *Lubanga* Sentencing Decision, *supra* note 14, para. 27.

⁸⁴ See Rule 145(2)(b)(iv) and Rule 145(1)(c), referring to the “*circumstances of manner, time and location*”.

⁸⁵ See e.g. the *Lubanga* Sentencing Decision, *supra* note 14, paras. 45-50; and the *Bemba* Sentencing Decision, *supra* note 6, para. 22. See also ICTY, *Blaškić*, Case No. IT-95-14-T, [Judgement](#), 3 March 2000, para. 784; ICTR, *Kambanda*, Case No. ICTR 97-23-S, [Judgment and Sentence](#), 4 September 1998, para. 42; and the RUF Sentencing Judgment, *supra* note 23, paras. 180-183.

⁸⁶ See e.g. the Judgment, *supra* note 1, paras. 347 and 362.

⁸⁷ *Idem*, paras. 399-402.

⁸⁸ *Idem*, para. 42.

⁸⁹ *Idem*, para. 347 (footnotes omitted).

Following recruitment, children were trained alongside other recruits⁹⁰ and then deployed to the battlefield or assigned to other tasks involving active participation in hostilities.⁹¹ Despite discussions concerning the demobilisation of children in the summer of 2003, “*recruitment and use of individuals under 15 continued*” and some of the demobilised children were rearmed or threatened into reintegrating into the UPC/FPLC.⁹²

33. While the Chamber did not reach a finding as to the exact number of child soldiers within the UPC/FPLC,⁹³ the widespread and frequent nature of the crimes and their extensive timeframe necessarily entail a multiplicity of victims which shall be taken into account as an aggravating circumstance.⁹⁴ Further, in the ongoing reparations proceedings in the *Lubanga* case, the Trust Fund for Victims estimated that approximately 3,000 victims were impacted by said crimes.⁹⁵ More broadly, the number of victims identified by the Court does not reflect the full extent of the UPC/FPLC’s recruitment and use of child soldiers since many victims – particularly those belonging to the Hema community and victims of rape and sexual violence – continue to be reluctant to report the crimes to which they were subjected.

c) *Particular defencelessness of victims*

34. The requirement that victims be under 15 years of age is a constitutive element of the crimes of recruitment and use of child soldiers determining their gravity, and cannot therefore be considered an aggravating factor.⁹⁶ Nevertheless, in determining the sentence, the Chamber should take into account the fact that some of the victims

⁹⁰ *Idem*, para. 378.

⁹¹ See *supra* para. 22.

⁹² See the Judgment, *supra* note 1, paras. 431-432 and 788.

⁹³ The same applied in Lubanga. See the *Lubanga* Sentencing Decision, *supra* note 14, paras. 45-50.

⁹⁴ See Rule 145(2)(b)(iv). The Legal Representative recalls that UN observers on the grounds estimated that around 20% of the recruits in the Mandro camp were children. Other UN sources indicated that at least 40% of each militia force in 2002-2003 was composed of children below the age of 18, “*with a significant minority below the age of 15*”. See DRC-OTP-0074-0422, p. 0461, para. 141.

⁹⁵ See e.g. the “Filing on Reparations and Draft Implementation Plan”, [No. ICC-01/04-01/06-3177-Red](#), 3 November 2015, para. 253; repeated in the “Prosecution’s observations on the Trust Fund for Victims’ Filing on Reparations and Draft Implementation Plan”, [No. ICC-01/04-01/06-3186](#), 18 December 2015, para. 5. See also the “Information regarding Collective Reparations”, [No. ICC-01/04-01/06-3273](#), 13 February 2017, paras. 34 and 39 and the “*Opinion de Mme la juge Herrera Carbuccia*”, [No. ICC-01/04-01/06-3252-Anx](#), 25 October 2016, para. 9.

⁹⁶ See *supra* para. 4. See also the *Lubanga* Sentencing Decision, *supra* note 14, para. 78.

in the present case were significantly younger than the 15-year limit set out in Article 8(2)(b)(xxvi). Children as young as 9 were recruited and used by the UPC/FPLC,⁹⁷ including at Mr Ntaganda's residence and in his escort.⁹⁸

35. Further, the existence of additional elements of vulnerability which are not inherent in the victims' status of individuals under the age of 15 can and should be taken into account as an aggravating circumstance.⁹⁹ In the present case, Mr Ntaganda's young victims were particularly vulnerable not only because of their age but also as a result of the ill-treatment they were subjected to in the UPC/FPLC ranks.¹⁰⁰ They were also regularly made to partake in alcohol and drugs,¹⁰¹ which increased their vulnerability. As noted in the Judgment, once recruited, child soldiers *"were subjected to conditions of living and training which could only have the impact of increasing their vulnerability and making them even more docile and submissive to their commanders"*.¹⁰² The Chamber also found that, with regard to children below 15 years of age in the UPC/FPLC ranks, *"Mr Ntaganda could not reasonably ignore their vulnerability and the fact that commanders, including him, were taking advantage of the coercive environment in which they were at the time"*.¹⁰³

⁹⁷ See e.g. the Judgment, *supra* note 1, para. 410 and footnotes 1115 and 1170. Others were only slightly older, see e.g. the Judgment, *supra* note 1, footnote 1000.

⁹⁸ *Idem*, para. 371 and footnote 1115.

⁹⁹ See e.g. ICTY, *Deronjić*, Case No. IT-02-61-A, [Judgment on Sentencing Appeal](#), 20 July 2005, para. 127; ICTY, *Mrđa*, Case No. IT-02/59-S, [Sentencing Judgement](#), 31 March 2004, para. 46; ICTY, *Banović*, Case No. IT-02-65/1-S, [Sentencing Judgement](#), 28 October 2003, para. 50, and ICTY, *Nikolić*, Case No. IT-94-2-S, [Sentencing Judgment](#), 18 December 2003 (*"Nikolić Sentencing Judgment"*), para. 184.

¹⁰⁰ See e.g. ICTY, *Furundžija*, Case No. ICTY-95-17/1-T, [Trial Judgment](#), 10 December 1998, para. 283.

¹⁰¹ See e.g. P-0758: [No. ICC-01/04-02/06-T-161-Red-ENG WT](#), p. 37; P-0976: [No. ICC-01/04-01/06-T-171-Red3-ENG CT WT](#), p. 22; P-0877: [No. ICC-01/04-02/06-T-109-Red-ENG WT](#), pp. 49-50; and P-0031: [No. ICC-01/04-01/06-T-202-Red2-ENG WT](#), p. 6. Also see the *Lubanga* Judgment, *supra* note 26, para. 32.

¹⁰² See the *Lubanga* Sentencing Decision, *supra* note 14, para. 818.

¹⁰³ *Idem*, para. 1105. The jurisprudence of the ICTY and SCSL clarify that, in sentencing proceedings, considering the impact of the crimes on victims in one section and their vulnerability in another section does not constitute impermissible double-counting. See e.g. the RUF Sentencing Judgment, *supra* note 23, para. 23; and the *Nikolić* Sentencing Judgment, *supra* note 99, para. 64.

IV. WAR CRIMES OF RAPE AND SEXUAL SLAVERY (COUNTS 6 AND 9)

1. Gravity

36. The gravity of the sexual violence crimes perpetrated by Mr Ntaganda is exceptionally high,¹⁰⁴ both *in abstracto* and in the particular circumstances of the present case, given the harm caused and the degree of his participation and intent.

a) *Inherent gravity of the crimes*

37. Rape and sexual violence are heinous crimes of domination and intimate violence whose utmost gravity has been consistently recognised by international courts and tribunals. As noted by the Appeals Chamber in the present proceedings, “rape and sexual slavery are by definition crimes of a gravity comparable to that of a grave breach of the Geneva Conventions or serious violation of Common Article 3”.¹⁰⁵ The Trial Chamber in *Bemba* also highlighted the grave nature of sexual violence crimes, particularly where these are perpetrated against children.¹⁰⁶

38. The Special Court for Sierra Leone (the “SCSL”) similarly concluded that the “inherent gravity” of sexual violence crimes is “exceptionally high”,¹⁰⁷ noting among other things that “the gravamen of crimes of sexual violence involves physical aggression on the most private and intimate parts of an individual’s body”.¹⁰⁸ The jurisprudence of the *ad hoc* tribunals further confirms that sexual violence crimes are inherently grave and deserve therefore a “significant sentence”¹⁰⁹ and that “rape is an inherently humiliating offence and that humiliation is always taken into account when appreciating the inherent gravity of this crime”.¹¹⁰

¹⁰⁴ See *supra* footnote 11.

¹⁰⁵ See the “Judgment on the appeal of Mr Ntaganda against the ‘Second decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9’” (Appeals Chamber), [No. ICC-01/04-02/06-1962 OA5](#), 15 June 2017, para. 49 (the “Appeal Ruling on Counts 6 and 9”).

¹⁰⁶ See the *Bemba* Sentencing Decision, *supra* note 6, para. 35, citing, for example, Articles 36(8)(b), 42(9), 43(6), 54(1)(b), and 68(1) to (2); and Rules 16(1)(d), 17(2)(a)(iv), 17(2)(b)(iii), 17(3), 19(f), 63(4), 70, 72(1), 86, 88(1), 88(5), and 112(4).

¹⁰⁷ See the RUF Sentencing Judgment, *supra* note 23, paras. 117-136.

¹⁰⁸ *Idem*, para. 118.

¹⁰⁹ See BAIG (L.), “Sentencing for Sexual Violence Crimes”, in BRAMMERTZ (S.) and JARVIS (M.) (eds.), *Prosecuting Conflict-Related Sexual Violence at the ICTY*, OUP, 2016, p. 273, referring *inter alia* to ICTY, *Furundžija*, Case No. IT-95-17/1-A, [Appeals Judgment](#), 21 July 2000, paras. 248-252 and ICTY, *Kunarac et al.*, Case No. IT-96-23 & IT-96-23/1-A, [Judgment](#), 12 June 2002, para. 361.

¹¹⁰ See ICTY, *Češić*, Case No. IT-95-10/1-S, [Sentencing Judgement](#), 11 March 2004, para. 53.

b) Harm caused to victims, families and communities

39. The rape and sexual slavery crimes for which Mr Ntaganda was convicted have life-long consequences for their victims. The multi-faceted impact of sexual violence crimes was aptly summarised by the Trial Chamber in the *Bemba* case, noting that victims generally suffer from four types of consequences:

*“(i) medical (including lesions to organs, human immunodeficiency virus (‘HIV’), loss of virginity, and unwanted pregnancies); (ii) psychological (fear, anxiety, anger, aggression, guilt, isolation, embarrassment and shame, loss of confidence, and washing rituals); (iii) psychiatric (PTSD, reactive depression, melancholia, neuroses, addictive behaviour, and psychosomatic disorders); and (iv) social (stigmatisation and repudiation)”.*¹¹¹

40. The extreme physical suffering experienced by young victims of sexual violence within the UPC/FPLC is reflected in the Judgment, where the Chamber referred for instance to “[a] girl named Nadège, who was around nine years old at the time, and who was taken to training at Lingo camp, was raped; P-0758 explained that there was pus coming out of Nadège’s vagina and that, as a result, she died”.¹¹² Another child soldier named Mave, who was assigned as an escort to Floribert Kisembo, developed severe health problems including fistula as a result of regular rapes.¹¹³ The Chamber also heard the testimony of P-0883, who contracted Hepatitis B, syphilis and typhus and suffered from an unwanted pregnancy.¹¹⁴

41. The Chamber heard expert evidence demonstrating that sexual violence almost universally affects the emotional wellbeing of the victims.¹¹⁵ For instance, P-0010 stated that the rapes she had been subjected to[REDACTED] more than a decade earlier were “an open wound” for her.¹¹⁶ P-0883 testified along the same lines.¹¹⁷ The psychological repercussions are particularly serious for victims of sexual slavery

¹¹¹ See the *Bemba* Sentencing Decision, *supra* note 6, para. 36.

¹¹² See the Judgment, *supra* note 1, para. 410.

¹¹³ *Idem*, para. 411.

¹¹⁴ See P-0883: [No. ICC-01/04-02/06-T-168-Red-ENG WT](#), pp. 63-64. See also the Judgment, *supra* note 1, para. 187 assessing this part of P-0883’s testimony as credible.

¹¹⁵ See P-0850: [No. ICC-01/04-02/06-T-113-Red-ENG WT](#), pp. 53-54.

¹¹⁶ See P-0010: [No. ICC-01/04-02/06-T-48-Red-ENG WT](#), p. 28.

¹¹⁷ See P-0883: [No. ICC-01/04-02/06-T-167-Red-ENG WT](#), p. 96.

who often had no choice but to continue living with their abusers in the coercive environment of UPC/FPLC training camps for protracted periods.¹¹⁸

42. Alongside physical and psychological consequences, victims suffer severely on the social and economic level. The “*cultural or communal stigmatisation, shame and fear*”¹¹⁹ frequently experienced by victims is a further obstacle to their recovery, as “*a climate of denial, shame and fear prevents many of them from seeking assistance*”.¹²⁰ For female child soldiers who gave birth as a result of the rapes, stigmatisation made it difficult to return to their parents and communities with a fatherless child. Former female child soldiers were also stigmatised where they did not have a child, as their communities rightly assumed that they had undergone sexual abuses.¹²¹

43. At the inter-generational level, sexual violence produces pecuniary and non-pecuniary consequences, loss of family structure and support, loss of sense of security, transmitted guilt and shame, as well as transmitted diseases. P-0883 testified, for instance, to the pervasive and life-long impact of the sexual violence she was subjected to on her family life, and particularly on her son born out of rape.¹²²

c) Degree of Mr Ntaganda's participation and intent

44. The gravity of Mr Ntaganda's sexual violence crimes is increased by reason of the position of authority he occupied within the UPC/FPLC,¹²³ as well as his essential, deliberate and fully informed contribution to said crimes.

45. The evidence demonstrated beyond reasonable doubt that, “*as of at least the beginning of August 2002*”, Mr Ntaganda and his co-perpetrators knew that the implementation of their criminal plan would lead to the rape and sexual slavery of children under the age of 15 within the UPC/FPLC as a matter of “*virtual certainty*”.¹²⁴ And indeed, as their common plan unfolded, the rape of female UPC/FPLC members

¹¹⁸ See *mutatis mutandis* the conclusion of the SCSL concerning harm suffered by child soldiers victims of sexual slavery in Sierra Leone, see the RUF Sentencing Judgment, *supra* note 23, para. 132.

¹¹⁹ See the Judgment, *supra* note 1, para. 88.

¹²⁰ See DRC-OTP-0074-0422, para. 151; P-0938: [No. ICC-01/04-02/06-T-113-Red-ENG WT](#), 30 June 2016, pp. 53-55.

¹²¹ See P-0046: [No. ICC-01/04-02/06-T-101-Red-ENG WT](#), p. 85.

¹²² See P-0883: [No. ICC-01/04-02/06-T-168-Red-ENG WT](#), pp. 64-66.

¹²³ See *supra* para. 20.

¹²⁴ See the Judgment, *supra* note 1, para. 811.

by male soldiers and commanders became so widespread and regular¹²⁵ that the Chamber found it to amount to a “*common practice [...] generally known and discussed within the UPC/FPLC*”.¹²⁶ The prevalence of sexual violence in UPC/FPLC training camps was apparent, as these acts were often carried out openly¹²⁷ and produced visible consequences such as pregnancies among female recruits.¹²⁸ Mr Ntaganda’s daily proximity and interactions with both victims and perpetrators made it impossible for him to ignore their occurrence.¹²⁹ Accordingly, the Chamber found beyond reasonable doubt that 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*” and that he “*meant for the UPC/FPLC soldiers and commanders to engage in the relevant conducts*”.¹³⁰

46. Consistent with the intent to commit these crimes, Mr Ntaganda left these criminal offences largely unpunished, and no measures were taken by Mr Ntaganda or his co-perpetrators to halt said practice.¹³¹ His failure to “*create the necessary conditions to ensure a safe environment for the female members of the UPC/FPLC*”¹³² was particularly egregious, given Mr Ntaganda’s responsibility for military training, his power to order disciplinary measures, and his ability to secure obedience among troops.¹³³

47. But Mr Ntaganda’s contribution to the perpetration of rape and sexual slavery committed by the UPC/FPLC against children went well beyond his culpable omissions.¹³⁴ Mr Ntaganda “*exercised control over the[se] crimes*”¹³⁵ and, instead of

¹²⁵ See *infra* paras. 51 *et seq.*

¹²⁶ See the Judgment, *supra* note 1, para. 407.

¹²⁷ See *e.g.* the Judgment, *supra* note 1, para. 409.

¹²⁸ *Idem*, para. 407.

¹²⁹ See *e.g.* the Judgment, *supra* note 1, paras. 407 and 1196 (where the Chamber found “*a pattern of daily sexual violence perpetrated by [Mr Ntaganda’s chief escort] Claude Uzauakiliho against Mr Ntaganda’s escorts*”) and para. 792 (find that “*some of the UPC/FPLC commanders themselves subjected some members of the UPC/FPLC to sexual violence*”).

¹³⁰ *Idem*, paras. 1197-1198.

¹³¹ *Idem*, paras. 392 and 412.

¹³² *Idem*, para. 792.

¹³³ *Idem*, paras. 322-323.

¹³⁴ [REDACTED] testified for instance that he was raped by commander Abelanga in Mr Ntaganda’s presence and his only concern was Mr Abelanga’s health. See [REDACTED]: [REDACTED].

¹³⁵ See the Judgment, *supra* note 1, para. 857.

frustrating their commission, he condoned and encouraged the perpetrators.¹³⁶ He led by example, as the Chamber found “*beyond reasonable doubt that Mr Ntaganda had forced sexual intercourses with many female members of his personal guard*”, and that it is “*appropriate to rely on acts of rape performed by Mr Ntaganda on his personal bodyguards*” in the assessment of his level of intent for the crimes for which he was convicted.¹³⁷ Mr Ntaganda is therefore responsible for a conscious, direct and inherently criminal contribution to the crimes of rape and sexual slavery perpetrated against UPC/FPLC child soldiers.

2. Aggravating Circumstances

a) *Particular defencelessness of victims*

48. The war crimes of rape and sexual enslavement, *per se* very serious, are aggravated in the present case by the fact that the victims were particularly defenceless by reason of their young age and their condition of child soldiers in the UPC/FPLC ranks.¹³⁸ The Legal Representative notes that the victims’ age is not a constitutive element of the crimes in Articles 8(2)(e)(vi)(1) and 8(2)(e)(vi)(1).¹³⁹ Accordingly, the fact that the victims of crimes for which Mr Ntaganda was convicted were under 15 years of age, and even as young as 9 years old,¹⁴⁰ can and should be taken into account as an aggravating circumstance.

49. Moreover, the children subjected to rape and sexual slavery were particularly defenceless because they were “*kept captive in a state of extreme vulnerability*”.¹⁴¹ As noted by the Chamber, the practice of sexual violence within the UPC/FPLC could

¹³⁶ [REDACTED] testified for instance that he was raped by commander Abelanga in Mr Ntaganda’s presence and his only concern was Mr Abelanga’s health; his words were: “*you’re going to die because of those practices of yours*”. See [REDACTED]: [\[REDACTED\]](#).

¹³⁷ See the Judgment, *supra* note 1, para. 407 and footnote 3238, where the Chamber also confirms that Mr Ntaganda was duly put on notice of the potential use of this evidence against him.

¹³⁸ See *e.g.* the “Second decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9” (Trial Chamber VI), [No. ICC-01/04-02/06-1707](#), 4 January 2017, para. 26 (the “Second Decision on Jurisdiction”); and the *Bemba* Sentencing Decision, *supra* note 6, paras. 42-43. A victim’s young age has been considered in aggravation in relation to crimes involving sexual violence, see *e.g.* ICTY, *Kunarac et al.*, Case No. IT-96-23 & IT-96-23/1-A, [Judgment](#), 12 June 2002, paras. 354 and 380 and SCSL, the RUF Sentencing Judgment, *supra* note 23, para. 128.

¹³⁹ See the Judgment, *supra* note 1, para. 965. See also the Appeal Ruling on Counts 6 and 9, *supra* note 105, para. 65 and the Second Decision on Jurisdiction, *supra* note 138, para. 54.

¹⁴⁰ See the Judgment, *supra* note 1, paras. 974 and 1199.

¹⁴¹ *Idem*, para. 978.

only occur “*due to the circumstances in which these vulnerable young girls were kept, notably not being able to leave*”.¹⁴² Following their recruitment, the victims were exposed to a severely coercive environment while in UPC/FPLC training camps, where they were subjected to brutal discipline, death threats, and continuous monitoring.¹⁴³ Their wellbeing was left in the hands of camp commanders and the UPC/FPLC hierarchy. Mr Ntaganda and his co-perpetrators failed to provide even minimal levels of care, and instead systematically subjected children to sexual abuse.

50. The Legal Representative notes that the Chamber’s factual finding as to the existence of a coercive environment within the UPC/FPLC training camps contributed to the proof of the constitutive elements of the war crimes of rape and sexual slavery.¹⁴⁴ This does not preclude, however, consideration of the same factual finding in the context of the aggravating circumstance of “*particular defencelessness of the victim*”.¹⁴⁵ In the alternative, the Legal Representative respectfully requests that said coercive environment be taken into account in the assessment of the gravity of the crimes in Counts 6 and 9, while the victims’ young age should in any case be considered as an aggravating circumstance under Rule 145(2)(b)(iii).

b) Number of victims

51. Mr Ntaganda was convicted for rape and sexual slavery against children under the age of 15 incorporated into the UPC/FPLC “*between on or about 6 August 2002 and 31 December 2003 in Ituri*”.¹⁴⁶ Within this large geographical area and long period of time, sexual violence against children under the age of 15 occurred on a widespread and systematic basis.¹⁴⁷ These crimes were perpetrated against a multiplicity of victims, repeatedly against each victim and by multiple perpetrators, which warrants the application of the aggravating circumstance set out in Rule 145(2)(b)(iv). The Chamber concluded in fact that female members of the

¹⁴² *Idem*, para. 792.

¹⁴³ *Idem*, paras. 409 and 976-979.

¹⁴⁴ *Idem*, paras. 976 *et seq.*

¹⁴⁵ See *mutatis mutandis* the Bemba et al. Appeals Sentencing Decision, *supra* note 12, para. 128, concerning allegations of double-counting in relation to Mr Bemba’s position of authority in his sentencing as relevant to both the constitutive elements of the crime and as an aggravating factor.

¹⁴⁶ See the Judgment, *supra* note 1, pp. 536-537.

¹⁴⁷ See *e.g. idem*, footnote 1157.

UPC/FPLC were “regularly raped and subjected to sexual violence” and that this amounted to a “common practice”.¹⁴⁸

52. The extent to which sexual violence was normalised within the UPC/FPLC is also confirmed by the lyrics of a song taught to recruits as part of their training, suggesting that soldiers would ‘get’ everything, including women, ‘for free’ in the UPC/FPLC.¹⁴⁹ P-0758 also testified that female recruits within the UPC/FPLC were referred to as ‘*guduria*’, a term which designates a communal cooking pot and meant that soldiers could freely help themselves to sex with them whenever they pleased.¹⁵⁰

53. The Legal Representative reiterates that the number of former child soldiers who participated in the proceedings or testified at trial about sexual violence crimes is far from representative of the full extent of the phenomenon, and that the total figure of victims affected by the crimes under Count 6 and 9 is likely to be significantly higher.¹⁵¹ This further supports a finding that Mr Ntaganda’s sexual violence crimes against child soldiers affected “multiple victims”.

c) *Abuse of Authority*

54. The crimes of rape and sexual slavery against child soldiers also entailed an element of abuse of authority on the part of Mr Ntaganda and his co-perpetrators. While resort to “force”, “threat of force”, and the creation of a “coercive environment” rendered the victims more vulnerable, in most if not all cases the sexually abused child soldiers were also in position of subordination to the perpetrator within the UPC/FPLC hierarchical structure.¹⁵² Victims felt therefore duty-bound to submit to sexual violence, as failing to do so would mean disobeying orders.¹⁵³ In the context of

¹⁴⁸ *Idem*, paras. 407, 409, 792 and 977.

¹⁴⁹ See the Judgment, *supra* note 1, para. 373.

¹⁵⁰ See P-0758: [No. ICC-01/04-02/06-T-161-Red-ENG WT](#), p. 31. Also see the “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda” (Pre-Trial Chamber II), [No. ICC-01/04-02/06-309](#), 9 June 2014, para. 81.

¹⁵¹ Sexual violence is often a source of shame for victims and is invariably under-reported, with the estimated reporting rate of rape being lower than 15% in post-conflict environments like Ituri. See P-0938: [No. ICC-01/04-02/06-T-113-Red-ENG WT](#), p. 56.

¹⁵² See the Judgment, *supra* note 1, para. 407.

¹⁵³ *Idem*, footnotes 1158 and 1156. See also P-0963: [No. ICC-01/04-02/06-T-80-Red-ENG WT](#), p. 41; P-0888: [No. ICC-01/04-02/06-T-105-Red-ENG WT](#), pp. 39-40; P-0898: [No. ICC-01/04-02/06-T-155-Red-](#)

an armed militia, an order to submit to conduct that qualifies as rape or sexual enslavement constitutes an abuse of authority as required for the application of an aggravating circumstance pursuant to Rule 145(2)(b)(iv).¹⁵⁴

d) Particular cruelty

55. The aggravating circumstance of particular cruelty under Rule 145(2)(b)(iv) also applies to the crimes of rape and sexual slavery due to the brutal manner in which these crimes were perpetrated.¹⁵⁵ Victims were subjected to sexual violence “*on a near-continuous basis*”¹⁵⁶ and by multiple perpetrators.¹⁵⁷

56. The abuse could last for months, as young female recruits were sexually enslaved in camps alongside their perpetrators, accompanied by the constant threat and fear of being subjected to further sexual violence at their whim.¹⁵⁸ Acts of rape were often coupled with threats and violence.¹⁵⁹ For instance, witnesses testified that victims were often threatened they would be shot if they refused to submit to sexual violence.¹⁶⁰ Adding to the sense of shame and humiliation experienced by victims, rapes sometimes took place within sight or earshot of other recruits and soldiers,¹⁶¹ in the forced proximity of life in UPC/FLPC camps.¹⁶²

V. ABSENCE OF MITIGATING CIRCUMSTANCES

57. No mitigating circumstances whatsoever apply to Mr Ntaganda. While “*cooperation with the Court*” may constitute a mitigating circumstance,¹⁶³ said

ENG WT, p. 57; and P-0010: [No. ICC-01/04-02/06-T-47-Red2-ENG WT](#), pp. 32-33; and [No. ICC-01/04-02/06-T-50-Red-ENG WT](#), pp. 38-42 and 62-63.

¹⁵⁴ See the *Katanga* Sentencing Decision, *supra* note 6, para. 75.

¹⁵⁵ See the *Bemba* Sentencing Decision, *supra* note 6, para. 47.

¹⁵⁶ See the Judgment, *supra* note 1, para. 977.

¹⁵⁷ *Idem*, paras. 411 and 979.

¹⁵⁸ *Idem*, paras. 378 and 409. It should be noted that the duration of sexual enslavement is not a constitutive element of said crime. See ICTY, *Kunarac et al.*, Case No. IT-96-23-T & IT-96-23/1-T, [Judgment](#), 22 February 2001, para. 121.

¹⁵⁹ See *mutatis mutandis* the *Bemba* Sentencing Decision, *supra* note 6, para. 44.

¹⁶⁰ See the Judgment, *supra* note 1, para. 977 and footnotes 790 and 1157. See also P-0010: [No. ICC-01/04-02/06-T-47-Red2-ENG WT](#), pp. 35-36; and P-0883: [No. ICC-01/04-02/06-T-168-Red-ENG WT](#), pp. 31-32 and 39.

¹⁶¹ See *e.g.* the Judgment, *supra* note 1, footnote 1156; and P-0898: [No. ICC-01/04-02/06-T-153-Red-ENG WT](#), pp. 72-75 and [No. ICC-01/04-02/06-T-155-Red-ENG WT](#), p. 57.

¹⁶² See *mutatis mutandis* the *Bemba* Sentencing Decision, *supra* note 6, para. 44.

¹⁶³ Rule 145(2)(a)(ii).

cooperation must exceed good behaviour or non-hindrance of the trial.¹⁶⁴ Mr Ntaganda's conduct falls well short of what is required for the application of this provision. Far from cooperating with the Court, Mr Ntaganda abused the right to communication afforded to him at the Detention Centre.¹⁶⁵ Further, the materials presented by the Prosecutor and the Registry demonstrate beyond reasonable doubt that Mr Ntaganda and some of his associates engaged in an effort to interfere with prospective witnesses, including former child soldiers.¹⁶⁶ The fact that Mr Ntaganda was not separately charged in relation to these acts pursuant to Article 70 does not preclude the Chamber from taking into account, for the purposes of sentencing, the information it has received pertaining to witness interference.¹⁶⁷

58. Equally, Mr Ntaganda has not made any efforts to compensate the victims,¹⁶⁸ and has not acknowledged their suffering or apologised for his actions. Mr Ntaganda's belated and opportunistic expression, during the sentencing hearing, of "*deep compassion for all the victims*"¹⁶⁹ does not amount to an assumption of responsibility for the crimes and falls well short of the "*sincere statement of remorse*" that is required for the application of a mitigating circumstance.¹⁷⁰ On the contrary, Mr Ntaganda consistently claimed that there were simply no children below the age of 18 in the UPC/FPLC ranks¹⁷¹ and put forward an improbable interpretation of the

¹⁶⁴ See the *Katanga* Sentencing Decision, *supra* note 6, paras. 127-128. See also the *Bemba* Sentencing Decision, *supra* note 6, para. 81.

¹⁶⁵ See the "Order instructing the Registry to put in place additional temporary restrictions on contact" (Trial Chamber VI), No. ICC-01/04-01/06-508-Conf-Exp, 13 March 2015, as referred to in the "Public redacted version of "Prosecution final observations on the need for further restrictions to NTAGANDA's contacts", 21 July 2015, ICC-01/04-02/06-738-Conf-Exp", [No. ICC-01/04-02/06-738-Red](#), 15 January 2016, para. 31.

¹⁶⁶ See *e.g.* [REDACTED] and [REDACTED].

¹⁶⁷ See the *Bemba* Sentencing Decision, *supra* note 6, para. 80 and footnote 249; the *Bemba et al.* Appeals Sentencing Decision, *supra* note 12, paras. 114 *et seq.*; and the *Lubanga* Sentencing Decision, *supra* note 14, para. 29.

¹⁶⁸ See Rule 145(2)(a)(ii).

¹⁶⁹ See [No. ICC-01/04-02/06-T-268-Red-ENG WT](#), p. 52, lines 15-17.

¹⁷⁰ See the *Katanga* Sentencing Decision, *supra* note 6, paras. 116-121. See also the *Al Mahdi* Judgment, *supra* note 7, paras. 103-105.

¹⁷¹ See *e.g.* D-0300: [No. ICC-01/04-02/06-T-239-Red-ENG CT WT](#), p. 83. See also [No. ICC-01/04-02/06-T-268-Red-ENG WT](#), p. 52, lines 4-5 ("*I do not hesitate to tell you I stand by what I said during my testimony*").

term ‘*kadogo*’ to suggest it did not refer to child soldiers.¹⁷² Moreover, Mr Ntaganda categorically stated that rape was not accepted within the army and that he gave instructions forbidding the “*sleep[ing] with*” of female recruits, which were followed “*to the letter*”.¹⁷³ These far-fetched assertions, clearly dismissed by Chamber as not credible,¹⁷⁴ constitute an affront to the suffering of former child soldiers, perpetuate their stigmatisation and hamper reconciliation efforts amongst affected communities.

VI. THE FORMER CHILD SOLDIERS’ VIEWS ON THE APPROPRIATE SENTENCE

59. Convictions for recruitment and active use in hostilities of child soldiers have resulted in lengthy sentences of imprisonment, amounting for instance to 50 and 35 years’ imprisonment respectively for two defendants in the *RUF Case* before the SCSL.¹⁷⁵ While one of Mr Ntaganda’s co-perpetrators, Thomas Lubanga, was convicted to terms of imprisonment ranging from 12 to 14 years for these crimes, the Legal Representative submits that a more severe sentence is justified in the present case based on the application of several aggravating circumstances,¹⁷⁶ the more extensive temporal scope of Mr Ntaganda’s crimes,¹⁷⁷ and the inapplicability of mitigating circumstances that were specific to Mr Lubanga.¹⁷⁸

60. The Legal Representative also notes that, under the legal framework applicable in the DRC, all war crimes including the recruitment and active use in hostilities of children under the age of 15, as well as rape and sexual slavery, are capital offences subject to the death sentence.¹⁷⁹

61. The Legal Representative observes that the appropriate sentence to be imposed on Mr Ntaganda in light of the inherent gravity of these crimes, the harmed

¹⁷² See e.g. D-0300: [No. ICC-01/04-02/06-T-239-Red-ENG CT WT](#), p. 83; [No. ICC-01/04-02/06-T-209-Red-ENG WT](#), pp. 34-35; and [No. ICC-01/04-02/06-T-211-Red-ENG WT](#), p. 24.

¹⁷³ See e.g. D-0300: [No. ICC-01/04-02/06-T-214-Red-ENG WT](#), pp. 8-9; and [No. ICC-01/04-02/06-T-239-Red-ENG CT WT](#), pp. 46-47.

¹⁷⁴ See e.g. the Judgment, *supra* note 1, paras. 359, 361 and 407 and corresponding footnotes.

¹⁷⁵ See the RUF Sentencing Judgment, *supra* note 23 and SCSL, *Sesay et al. (RUF)*, Case No. SCSL-04-15-A, [Appeals Judgment](#), 20 October 2009.

¹⁷⁶ See *supra* section III.2.

¹⁷⁷ See *supra* para. 32.

¹⁷⁸ See the *Lubanga* Sentencing Decision, *supra* note 14, para. 97.

¹⁷⁹ See Article 223 of the DRC *Code pénal*, as amended by the [Loi n°15/022 du 31 décembre 2015 modifiant et complétant le Décret du 30 janvier 1940 portant Code pénal](#).

caused, his degree of participation and intent, and the application of the aggravating circumstances of particular cruelty, the multiplicity and particular defencelessness of victims would be a sentence of imprisonment for:

- (a) 18 years for conscripting children under the age of 15 (Count 14);
- (b) 18 years for enlisting children under the age of 15 (Count 15); and
- (c) 20 years for using children under the age of 15 to actively participate in hostilities (Count 16).

62. The Legal Representative observes that the appropriate sentence based on the inherent gravity of Mr Ntaganda's sexual violence crimes, the harmed caused, his degree of participation and intent and the application of the aggravating circumstances of particular cruelty, multiplicity and particular defencelessness of victims, and abuse of power would be a imprisonment for:

- (a) 30 years for the war crime of rape (Count 6); and
- (b) 30 years for the war crime of sexual slavery (Count 9).

VII. LEVEL OF CONFIDENTIALITY

63. Pursuant to regulations 23*bis*(1) and (2) of the Regulations of the Court (the "Regulations"), the present observations are classified as "confidential" as they refer to documents marked with the same classification.

Respectfully submitted,



Sarah Pellet
Legal Representative of the
Former Child Soldiers

Dated this 24th day of January 2020

At The Hague, The Netherlands