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**International
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Court**

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TRIAL CHAMBER VI

Before: Judge Chang-ho Chung, Presiding Judge
Judge Robert Fremr
Judge Olga Herrera Carbuccion

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

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

Public

Public Redacted Version of the “Response of the Common Legal Representative of the Victims of the Attacks to the “Submissions on sentence on behalf of Mr. Ntaganda” (ICC-01/04-02/06-2424-Conf)”

Source: Office of Public Counsel for Victims (CLR2)

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

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I. INTRODUCTION

1. The Common Legal Representative of the Victims of the Attacks (the “Legal Representative”) hereby submits his response to the Defence’s “Submissions on sentence on behalf of Mr Ntaganda” (the “Defence Sentencing Submissions”).¹

2. It is submitted that the Defence is advocating an impermissibly narrow interpretation of the Chamber’s findings contained in the Trial Judgment which, if followed, would undermine the overall determinations of the Chamber and set a precedent which would be irreconcilable with the very nature of criminal liability for crimes against humanity and war crimes.

3. The Defence also seeks to indirectly challenge explicit findings of the Chamber established beyond reasonable doubt in an attempt to downplay Mr Ntaganda’s role. This is not only contrary to the Trial Judgment, but also impermissible in the sense that the Defence now adduces material and raises issues it could and should have raised at trial.

4. The Chamber should not follow the Defence’s submissions on the above points, but rather evaluate Mr Ntaganda’s sentence on the basis of its own findings, including relevant findings on gravity, and on the aggravating and limited mitigating factors previously identified.²

5. Given the limited number of pages accorded to the Legal Representative for his response, he cannot address all matters raised in the Defence Sentencing Submissions. Indeed, although the Legal Representative has previously addressed Mr Ntaganda’s convictions in relation to counts 6 and 9, he – for reasons of the page

¹ See the “Submissions on sentence on behalf of Mr. Ntaganda”, No. [ICC-01/04-02/06-2424-Conf](#), 30 September 2019 (the “Defence Sentencing Submissions”).

² See the “Sentencing Submissions of the Common Legal Representative of the Victims of the Attacks”, No. [ICC-01/04-02/06-2422-Conf](#), 30 September 2019 (the “CLR2 Sentencing Submissions”).

limit imposed – will not do so in the present submissions. Yet, he points out that, also in relation to these convictions, the Defence impermissibly seeks to challenge the factual findings of the Chamber. The Legal Representative will, therefore, have to defer to the submissions of the Common Legal Representative for the Former Child Soldiers in this regard.

II. CONFIDENTIALITY

6. Pursuant to regulations 23*bis*(1) and (2) of the Regulations of the Court, these submissions are classified as confidential as they make reference to confidential information and documents classified as confidential. A public redacted version will be prepared in due course.

III. PROCEDURAL HISTORY

7. On 8 July 2019, Trial Chamber VI (the “Chamber”) rendered its judgment (the “Trial Judgment”),³ whereby it found Mr Ntaganda guilty on 18 counts, namely five counts of crimes against humanity and thirteen counts of war crimes.

8. On 30 September 2019, pursuant to the Chamber’s order,⁴ and following hearings relating to the sentencing procedure, the parties and participants filed written submissions on the determination of Mr Ntaganda’s sentence.⁵ The deadline for responses has been set for 8 October 2019.⁶

³ See the “Judgment” (Trial Chamber VI), No. [ICC-01/04-02/06-2359](#), 8 July 2019 (the “Trial Judgment”).

⁴ See the transcript of the hearing of 17 September 2019, No. [ICC-01/04-02/06-T-266-Red-ENG-WT](#), p. 5, lines 20-22.

⁵ See the CLR2 Sentencing Submissions, *supra* note 2; the “Observations on Sentencing on behalf of the Former Child Soldiers”, No. [ICC-01/04-02/06-2423-Conf](#); the Defence Sentencing Submissions, *supra* note 1; and the “Submissions on Sentence”, [No. ICC-01/04-02/06-2425-Red](#), 30 September 2019.

⁶ See the transcript of the hearing of 17 September 2019, *supra* note 4, p. 5, lines 20-22.

I. SUBMISSIONS

a. The Defence misrepresents Mr Ntaganda's convictions and liability

9. The Chamber has found Mr Ntaganda individually criminally responsible, as a direct perpetrator and an indirect co-perpetrator, on 18 counts and set out in the Trial Judgment the specific criminal acts underlying Mr Ntaganda's convictions in relation to the crimes committed in the context of the First and Second Operations that satisfied all elements of the crimes beyond reasonable doubt. The Defence, while recognising "*the gravity of the crimes, including their impact on the victims*"⁷ and that "[t]he crimes for which Mr. Ntaganda is convicted arise from a single common plan",⁸ asks the Chamber to take an overly narrow view of the convictions, by attempting to (i) challenge the gravity based solely on the number of the underlying specific criminal acts and limited number of victims concerned, and (ii) downplay Mr Ntaganda's role in the commission of these particular criminal acts on the basis of physical presence. The latter will be addressed in the following section *infra*.

10. The Defence draws upon comparisons with cases brought before the international *ad hoc* tribunals to demonstrate that – given the "confirmed number"⁹ of e.g. murder victims – Mr Ntaganda's convictions are not of significant gravity and only warrant a "*sentence of no more than 23 years imprisonment*."¹⁰ The Defence relies on a reference from the *Bemba et al.* case for the purposes of demonstrating that "*the limited role of the convicted person went to gravity, rather than mitigation*,"¹¹ when the 'role' of the convicted person in question was completely different from that of Mr Ntaganda and the Defence in that case had specifically underlined that the former "*has never been 'in a commanding or authoritative' role and that he has not been an*

⁷ See the Defence Sentencing Submissions, *supra* note 1, para. 9.

⁸ *Idem*, para. 31.

⁹ *Ibid.*, para. 33.

¹⁰ *Ibid.*, para. 159.

¹¹ *Ibid.*, para. 23, footnote 14.

*instigator of the offences.”*¹² As will be developed further *infra*, Mr Ntaganda had essentially this role: he was in a commanding and authoritative role and one of the members devising the common plan, as found by the Chamber.

11. Mr Ntaganda’s role as the overall commander of the First Operation in which he also physically participated and in which context he also physically carried out criminal acts, as well as his crucial planning and overseeing role in the Second Operation define his degree of participation.

12. The Defence’s further argument on the ‘scale’, in other words, an argument on the number of victims and comparisons drawn to Srebrenica and Rwandan genocide cases¹³ is misplaced in the circumstances. The murders, rapes and other criminal acts for which Mr Ntaganda has been convicted were committed as part of the common plan devised by him and others. Some were even committed by him directly. And it was Mr. Ntaganda’s essential contribution, his briefings, his plans, his role as the most senior military commander that led to the commission of the crimes, including the “*undetermined and unspecified number of other killings during ratissage operations [...] plus the death of an unspecified number of ‘some men’ [...] and ‘several women and girls’*”.¹⁴ He played the same essential role in the crimes relating to the undetermined number of raped women and girls,¹⁵ the destruction of the undetermined number of houses in several villages,¹⁶ and also the mass crimes targeting many villages as a whole, namely intentional attacks against civilians, persecution, forcible transfer and displacement of civilians, where it is simply unfeasible to exhaustively identify all the victims concerned because of the sheer scale of the crimes. It is submitted that “*the sheer scale of the alleged crimes makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of*

¹² See the “Decision on Sentence pursuant to Article 76 of the Statute” (Trial Chamber VII), No. [ICC-01/05-01/13-2123-Corr](#), 22 March 2017, paras. 128-129.

¹³ See the Defence Sentencing Submissions, *supra* note 1, paras. 33-35.

¹⁴ *Idem*, para. 35.

¹⁵ *Ibid*, para. 50.

¹⁶ *Ibid.*, para. 64.

the crimes”,¹⁷ as previously found by the ICTR Appeals Chamber. In the same vein, the ICTY Appeals Chamber held that “*although the identity of a victim is information that is valuable to the preparation of a defence, convictions may also be entered on unspecified victims.*”¹⁸

b. Degree of responsibility

13. The Defence also seeks the Chamber to re-assess Mr Ntaganda’s responsibility and make findings that are essentially contrary to (i) the Chamber’s findings set out in the Trial Judgment on Mr Ntaganda’s participation and role in the common plan, the objective of the common plan and various findings on the elements of crimes, and (ii) the concept of individual criminal liability for crimes against humanity and war crimes in general. In sum, the Defence is impermissibly attempting to challenge the Chamber’s findings beyond reasonable doubt as set out in the Trial Judgment by advancing or reiterating previous arguments to the contrary. These submissions should therefore be given no weight when the Chamber engages in weighing all relevant factors in determining Mr Ntaganda’s appropriate sentence.

14. Concretely, the Defence attempts to establish that the physical absence of Mr Ntaganda during the Second Operation should result in the mitigation of his sentence for the despicable crimes committed during said Operation.¹⁹ However, the Chamber did not make such findings and consequently this cannot form the basis of mitigating circumstances claimed by the Defence. The Defence misconstrues jurisprudence to the effect that the convicted person’s degree of participation and intent must be assessed *in concreto*.²⁰ It attempts to portray Mr Ntaganda’s degree of participation and intent as insignificant by focusing on his physical presence²¹ or

¹⁷ See ICTR, *The Prosecutor v. Ntagerura et al.*, Case No. ICTR-99-46-A, [Appeal Judgement](#), 7 July 2006, para. 23.

¹⁸ See ICTY, *The Prosecutor v. Šainović et al.*, Case No. IT-05-87-A, [Appeal Judgement](#), 23 January 2014, para. 558.

¹⁹ See the Defence Sentencing Submissions, *supra* note 1, paras. 36-40.

²⁰ *Idem*, para. 23 referring to the “Decision on Sentence pursuant to article 76 of the Statute” (Trial Chamber II), No. [ICC-01/04-01/07-3484](#), 23 May 2014, para. 61.

²¹ *Ibid.*, paras. 36-40.

newly raised alleged intentions and motives.²² By doing so, it ignores the actual findings of the Chamber entered beyond reasonable doubt as to the degree of participation and intent of Mr Ntaganda. Mr Ntaganda was not a minor clog in the wheel. The Chamber found that he was one of the principals who conceived the common plan,²³ and the one who, by virtue of his senior position, was essential to the implementation of this plan.²⁴

15. In *Delalić et al.*, the ICTY Appeals Chamber held that the “*absence of [...] active participation [in the criminal acts of subordinates] is not a mitigating circumstance. Failure to prevent or punish subordinate crimes is the relevant culpable conduct and lack of active participation in the crimes does not reduce that culpability.*”²⁵ The same applies for a common plan where the objective of the common plan is being carried out without the direct participation of the accused, *i.e.* a member of the common plan, and in this case, Mr Ntaganda. The *degree* of Mr Ntaganda’s participation is not significantly different; this is why the Chamber found him guilty pursuant to article 25(3)(a) of the Statute even in the instances where he did not himself physically carry out the criminal act.²⁶ The Chamber found Mr Ntaganda guilty as an indirect co-perpetrator and recalled that individual criminal responsibility is that where the crime is committed “*through another person, regardless of whether that other person is criminally responsible*”.²⁷ It further recalled “*that in the current case, the concept of indirect co-perpetration entails a form of co-perpetration where the common plan is executed through other persons, who function as a tool of all of the co-perpetrators.*”²⁸ The “*commission ‘through another person’ who actually carries out the incriminated conduct, by virtue of the accused’s control over that person. And the latter’s conduct is therefore imputed on the*

²² *Ibid.*, paras. 39-46.

²³ See the Trial Judgment, *supra* note 3, paras. 808-811.

²⁴ *Idem*, paras. 852-857.

²⁵ See ICTY, *The Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, [Appeal Judgement](#), 20 February 2001, para. 737.

²⁶ See Trial Judgment, *supra* note 3, para. 1199.

²⁷ *Idem*, para. 771.

²⁸ *Ibid.*, para. 772.

former."²⁹ The Chamber found him responsible on the basis of his participation which was determinative, holding in particular that *"the UPC/FPLC military campaign [...] was largely dependent upon Mr Ntaganda's personal involvement and commitment as one of the group's highest ranking military figures."*³⁰

16. Moreover, the Chamber set out specific findings on (i) the intent of the co-perpetrators in targeting the Lendu civilian population,³¹ and (ii) Mr Ntaganda's own intent – without distinction between the First and Second Operation.³²

17. The Defence's submissions that *"Mr Ntaganda's degree of participation and intent in the violent crimes of the Second Operation is substantially less than those committed in the First Operation"*³³ are misplaced in that they ignore or challenge the findings of the Chamber, namely as regards his liability as an indirect co-perpetrator with the requisite *mens rea* who – together with others – conceived the criminal common plan in the first place. Mr Ntaganda is a principal,³⁴ not as the Defence now attempts to demonstrate, a mere contributor to a small degree. Mr Ntaganda may challenge these findings on appeal, but he cannot now invoke a 'lesser degree of participation' or raise novel explanations for his motives and intent that do not form part of the Chamber's findings.

18. In this regard, the Chamber should also not entertain challenges to its findings beyond reasonable doubt on Mr Ntaganda's liability, through submissions that

²⁹ *Ibid.*, para. 773 referring to the "Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction" (Appeals Chamber), No. [ICC-01/04-01/06-3121-Red](#), 1 December 2014, paras. 445 and 465.

³⁰ *Ibid.*, para. 853.

³¹ See the Trial Judgment, *supra* note 3, paras. 810-811.

³² *Idem*, para. 1188.

³³ See the Defence Sentencing Submissions, *supra* note 1, para. 40. See also *idem*, para. 53: *"Mr. Ntaganda's culpability for the purposes of sentencing should also be assessed on the basis of concrete knowledge of, and participation in, these events."*

³⁴ See the Trial Judgment, *supra* note 3, paras. 808: *"The Chamber finds beyond reasonable doubt that Mr Ntaganda and other military leaders of the UPC/FPLC, including Thomas Lubanga and Floribert Kisembo, worked together and agreed [sic] in the common plan to drive out all the Lendu from the localities targeted during the course of their military campaign [...] It is this agreement, [...] which tied them together and made them co-perpetrators."* See also *idem*, paras. 809-810.

essentially reiterate Mr Ntaganda's defence at trial – which the Chamber rejected. Examples of such attempts are abundant in the Defence submissions and the Legal Representative will address but a few, namely that *“Mr. Ntaganda's degree of participation and intent in the violent crimes of the Second Operation is substantially less than those committed during the First Operation”*,³⁵ or *“all of Mr. Ntaganda's contributions appear to have been directed at the lawful purpose [...] which was to open the Main Road”*,³⁶ and *“his concrete participation and degree of intent should be assessed in light of his low level participation and degree of intent in relation to these incidents.”*³⁷ These assertions are inherently erroneous because the Chamber found otherwise. The Defence attempts to equate ‘degree of contribution’ to physical presence or direct perpetration, none of which is correct. The Chamber found that Mr. Ntaganda's degree of participation was that of a principal in the common plan, who also by virtue of his position planned the operations, instructed the troops, and made sure the operations were logistically supported.³⁸ It thus found him to be responsible as an indirect co-perpetrator, one of the forms of liability contained in article 25(3)(a) of the Statute.

19. The Defence also seeks to challenge the Chamber's findings on Mr. Ntaganda's *mens rea* by submitting, e.g. that *“the Chamber must exclude from the scale of [...] pillaging any goods where there is reasonable doubt as to whether they were intended for military, as opposed to personal use”*,³⁹ and arguing that *“a further finding would have to be made that Mr Ntaganda intended these items for personal, instead of military, use.”*⁴⁰ These submissions ignore the fact that the Chamber found the crime of pillaging proven beyond reasonable doubt and hence rejected the defence of military necessity⁴¹ – or as the Defence now formulates it, intended military use'.⁴² It is therefore submitted that the Defence's arguments regarding the intended use are misplaced as the

³⁵ See the Defence Sentencing Submissions, *supra* note 1, para. 40.

³⁶ *Idem*, para. 41.

³⁷ *Ibid.*, para. 57.

³⁸ See the Trial Judgment, *supra* note 3, paras. 837, 839-840 and 842.

³⁹ See the Defence Sentencing Submissions, *supra* note 1, para. 62.

⁴⁰ *Idem*, para. 66.

⁴¹ See the Trial Judgment, *supra* note 3, para. 1030.

⁴² See the Defence Sentencing Submissions, *supra* note 1, para. 66.

intended use forms part of the elements of the crime and factual findings thereon can only be challenged upon appeal. The Chamber cannot – and certainly should not – overturn or otherwise undermine its own findings in relation to sentencing as effectively requested by the Defence.

c. Submissions on motives and motivations

20. As briefly touched upon *supra*, the Defence also seeks to challenge the Chamber's findings on Mr Ntaganda's *mens rea* by offering an entire new range of explanations regarding his possible motives,⁴³ state of mind,⁴⁴ perceptions,⁴⁵ motivations,⁴⁶ and intent and requests, especially in relation to Mr Ntaganda's purported motivations, that "*these circumstances and motivations should be considered in substantial mitigation of sentence*".⁴⁷ Where such submissions have previously been raised and rejected, the only avenue for the Defence is the appeal of the Trial Judgment. Where such submissions are entirely novel, such as in relation to the killing of the *Abbé*, they are impermissibly raised and should in any event be given no weight.

21. Moreover, any motives that may or may not have led to Mr Ntaganda engaging in the criminal conduct for which he has been convicted beyond reasonable

⁴³ *Idem*, para. 41: "Furthermore [...] all of Mr. Ntaganda's contributions appear to have been directed at the lawful purpose to the Second Operation, which was to open the Main Road." Emphasis added.

⁴⁴ *Ibid.*, para. 43: "The testimony [...] upon [which] [...] the Chamber relied for this very important conviction, indicates that Mr. Ntaganda had been 'angered' by some documents that had been found in Bwanalonga's residence that purportedly indicated that 'the Hema and the Tutsi were trying to see how they could conquer an empire and dominate over the others. Mr. Ntaganda was striking Bwanalongwa with a piece of wood which 'didn't take much time' before Mr. Ntaganda shot him. This description suggests that Mr. Ntaganda was not acting with cold-blooded deliberation or premeditation [...]." Emphasis added.

⁴⁵ *Ibid.*, para. 108: "Mr. Ntaganda's perception of the situation, and his reaction, cannot be divorced from the hard lessons that he had just lived through in Rwanda. He knew that Tutsi and Hema were being slaughtered in Congo just as they had been in Rwanda."

⁴⁶ *Ibid.*, paras. 108-110: "He knew about the calls to genocide by Kabila [...] Yet [...] [Mr Ntaganda's] are not venal or vicious motives. In fact, the impact that the genocide must have had on Mr. Ntaganda – and of the measures that might be necessary to stop the genocide – should not be under-estimated. [...] Mr. Ntaganda's actions were a reaction to what he saw as the continuation of the genocide that he had already lived through, and that had required force of arms to stop." Emphasis added.

⁴⁷ *Ibid.*, para. 110.

doubt, do not deserve “*substantial mitigation of sentence*”.⁴⁸ As the Defence rightly points out: “*None of this excuses or justifies even a single crime of which Mr. Ntaganda has been convicted.*”⁴⁹ Mr. Ntaganda has denied all responsibility for the criminal conduct and specific acts he was charged with and has ultimately been convicted of. He cannot now advance explanations as to his good-natured motives.

22. The Defence’s attempt to downplay Mr Ntaganda’s culpability is particularly striking in relation to the murder of *Abbé Bwanalonga*. The Chamber found that Mr Ntaganda personally killed the priest after beating him with a piece of wood during interrogation,⁵⁰ and his subordinates were ordered to simply throw the body into the bush.⁵¹ And the Defence is now attempting to demonstrate that the killing took place in the heat of the moment and in effect constitutes nothing but voluntary manslaughter.⁵² It was not. Mr Ntaganda mistreated and executed the priest at point blank; a man of advanced age. *Had* Mr Ntaganda pled guilty to the murder of *Abbé Bwanalongwa*, the explanations now given by the Defence could have been considered and should have been raised as a defence of diminished responsibility. However, given that Mr Ntaganda denied the killing, he cannot now attempt to advance the above as purported mitigating circumstances. In any event, the Legal Representative also strongly opposes the Defence’s interpretation of this act not constituting a cold-blooded murder.⁵³

d. Mr Ntaganda’s claim that he saved enemy soldiers

23. The Defence submits that Mr Ntaganda saved the lives of 63 former APC soldiers for which he should be credited “*substantial weight in mitigation*”.⁵⁴ First of all,

⁴⁸ *Ibid.*, para. 110.

⁴⁹ *Ibid.*, para. 109.

⁵⁰ See the Trial Judgment, *supra* note 3, paras. 532-533.

⁵¹ *Idem*, para. 533.

⁵² See the Defence Sentencing Submissions, *supra* note 1, para. 43: “*Mr. Ntaganda was not acting with [...] deliberation or premeditation*”.

⁵³ *Idem*, para. 43. See *cf.* the Trial Judgment, *supra* note 3, paras. 532-533, and the CLR2 Sentencing Submissions, *supra* note 2, para. 28.

⁵⁴ See the Defence Sentencing Submissions, *supra* note 1, para. 114, referring to the Trial Judgment, *supra* note 3, para. 114.

the ‘citation’ in the Trial Judgment refers to the summary of the evidence of P-0016 and does not constitute a finding of the Chamber. Secondly, even if entirely accepted, the relevant part of the testimony is that “*Ntaganda convinced [Kisembo] that they should be trained to become real soldiers to integrate the new UPC/FPLC because the UPC/FPLC did not have trained soldiers at that time.*”⁵⁵ Thus, Mr Ntaganda did not ‘save’ the lives of 63 out of compassion, humanity, or other ethical considerations; he rather took the opportunity to use the 63 to the advantage of the common plan. The Defence’s attempt to use this strategy in mitigation is falling decidedly short of genuine acts deserving credit in mitigation.

e. Pre-conviction detention

24. The Defence’s arguments in relation to Mr Ntaganda’s pre-conviction detention⁵⁶ have no merit. Article 78(2) of the Statute already foresees that the convicted person is entitled to the deduction of the time spent in detention. By definition, every accused in pre-conviction detention is ‘innocent’ until the Chamber reaches a verdict pursuant to Article 74 of the Statute. Furthermore, according to Article 60(3) of the Statute relevant Chambers are under obligation to periodically review the detention of the person concerned and may modify their ruling as to detention if they are satisfied that changed circumstances so require. Pre-Trial Chamber II rejected Mr Ntaganda’s request for interim release,⁵⁷ and in particular his argument that since he surrendered voluntarily to the Court, he could not be said he intended to evade justice.⁵⁸ Subsequently, Pre-Trial Chamber II reviewed twice its

⁵⁵ See the Trial Judgment, *supra* note 3, para. 354. Emphasis added.

⁵⁶ See the Defence Sentencing Submissions, *supra* note 1, paras. 151-154.

⁵⁷ See the Decision on the Defence’s Application for Interim Release” (Pre-Trial Chamber II, Single Judge), No. [ICC-01/04-02/06-147](#), 18 November 2013.

⁵⁸ *Idem*, paras. 40-41. In particular, the Single Judge held in para. 41 as follows: “*It should not be forgotten that Mr. Ntaganda had been at large for many years since the issuance of the first warrant of arrest in August 2006 until he apparently sought refuge in the United States Embassy in Kigali on 18 March 2013. In particular, despite the issuance of the first warrant of arrest on 22 August 2006 followed by another warrant of arrest six years later, 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. Even after the issuance of the second warrant of arrest on 13 July 2012, Mr. Ntaganda managed to escape for another eight months before his surrender to the Court. Thus, his prior ability to escape for such a lengthy period of time, until the moment of his choosing, enhances his motivation to flee when the circumstances allow,*” and in para. 44 that “Mr.

ruling holding that Mr Ntaganda shall continue to be detained.⁵⁹ Mr Ntaganda's detention was subsequently reviewed three times by the Trial Chamber.⁶⁰ There is therefore nothing exceptional warranting mitigation in the fact that Mr Ntaganda has been detained since his arrest and transfer.⁶¹ In the *Blaškić* case referred to by the Defence,⁶² the 8-year period of detention pending a final outcome in the case was considered a mitigating factor in light of the person's voluntary surrender to the tribunal.⁶³ However, the 6-year period of pre-conviction detention cannot and should not be credited to Mr Ntaganda in mitigation, given that his surrender, as held by Pre-Trial Chamber II and upheld by the Chamber,⁶⁴ was not driven by good will to comply with international justice, and further given his grave interference with the administration of justice while in detention which resulted in restrictions being imposed on his contacts and visits.

f. Mr Ntaganda's personal experience of genocide in Rwanda

25. The Defence contends that Mr Ntaganda's personal experience, when 17y.o., of genocide in Rwanda should constitute a mitigating factor.⁶⁵ However, the Defence fails to explain how precisely said experience had impacted on Mr Ntaganda's overall conduct for which he has been found guilty, in arguing in broad fashion that

Ntaganda's surrender was not driven by good will to comply with international justice. Rather, he was pressured by the circumstances resulting from the split of the M23 and the outbreak of fighting between Mr. Ntaganda's faction and his deputy's faction, headed by Mr. Makenga."

⁵⁹ See the "Second Decision on Bosco Ntaganda's Interim Release" (Pre-Trial Chamber II, Single Judge), No. [ICC-01/04-02/06-284](#), 17 March 2014; and the "Third Decision on Bosco Ntaganda's Interim Release" (Pre-Trial Chamber II, Single Judge), No. [ICC-01/04-02/06-335](#), 17 July 2014.

⁶⁰ See the "Fourth decision on Mr Ntaganda's interim release" (Trial Chamber VI), No. [ICC-01/04-02/06-391](#), 31 October 2014; the "Fifth decision on Mr Ntaganda's interim release" (Trial Chamber VI), No. [ICC-01/04-02/06-477](#), 26 February 2015; the "Sixth decision on Mr Ntaganda's interim release" (Trial Chamber VI), No. [ICC-01/04-02/06-670-Red](#), 25 June 2015.

⁶¹ It worth noting that during the last review of Mr Ntaganda's detention, the Defence submitted that "to the best of its knowledge, there are no changed circumstances warranting a modification of the Chamber's previous ruling pursuant to Article 60(3) [...]" See the "Observations on behalf of Mr Ntaganda on the existence of changed circumstances in relation to his detention pursuant to Article 60(3)", No. [ICC-01/04-02/06-615](#), 29 May 2015, para. 2.

⁶² See the Defence Sentencing Submissions, *supra* note 1, para. 151, footnote 308.

⁶³ See ICTY, *The Prosecutor v. Blaškić*, Case No. IT-95-14-A, [Appeal Judgement](#), 29 July 2004, para. 728.

⁶⁴ See the "Fourth decision on Mr Ntaganda's interim release" (Trial Chamber VI), No. [ICC-01/04-02/06-391](#), 31 October 2014, para. 8.

⁶⁵ See the Defence Sentencing Submissions, *supra* note 1, paras. 103-110.

“[n]o one living through such an experience [...] would fail to have their view of the world and human nature profoundly affected”,⁶⁶ and “Mr Ntaganda’s perception of the situation of the situation, and his reaction, cannot be divorced from the hard lessons that he had just lived through in Rwanda”,⁶⁷ and “the impact that the genocide must have had on Mr Ntaganda – and of the measures that might be necessary to stop a genocide – should not be underestimated.”⁶⁸ Absent of any evidence, the Defence’s contentions are purely speculative and are not of a nature to demonstrate the existence of a mitigating factor under the standard of balance of probabilities.

g. Other factors

26. As regards the other individual and mitigating circumstances advanced by the Defence, the Legal Representative submits that they should not be given any significant weight and reiterates his Sentencing Submissions in this regard.⁶⁹

RESPECTFULLY SUBMITTED



Dmytro Suprun
Common Legal Representative of the Victims of the Attacks

Dated this 24th Day of January 2020

At The Hague, The Netherlands

⁶⁶ *Idem*, para. 105.

⁶⁷ *Ibid.*, para. 108.

⁶⁸ *Ibid.*, para. 109.

⁶⁹ See the CLR2 Sentencing Submissions, *supra* note 2, paras. 17-64.