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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

**Public Redacted Version of “Submissions on sentence on behalf of Mr.
Ntaganda”, 30 September 2019, ICC-01/04-02/06-2424-Conf**

Source: Defence Team of Mr. Bosco Ntaganda

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Pursuant to Trial Chamber VI (“Chamber”)’s 8 July 2019 Order on the sentencing procedure (“Order”)¹ and further to the supplemental sentencing evidence adduced by the parties, Counsel representing Bosco Ntaganda (“Defence”, “Mr. Ntaganda” or “Bosco Ntaganda”) hereby submit these “Submissions on sentence on behalf of Mr. Bosco Ntaganda”:

INTRODUCTION

1. On 8 July 2019, Mr. Ntaganda was found guilty of 13 counts constituting war crimes and 5 counts constituting crimes against humanity.
2. The purpose of these submissions is to assist the Chamber in determining, further to the Trial Judgment rendered pursuant to Article 74 of the Statute of the International Criminal Court (“Judgment”, “Statute” and “Court”), the sentence that reflects and is proportional to the culpability of Mr. Ntaganda on the basis of Article 78 of the Statute and Rule 145 of the Rules of Procedure and Evidence (“Rules”).
3. On 22 March 2013, further to serving as a General in the *Forces armées* of the Democratic Republic of Congo (“FARDC”) for almost two years, Bosco Ntaganda surrendered voluntarily in the custody of the Court.
4. The charges laid against Bosco Ntaganda were confirmed by Pre-Trial Chamber II on 9 June 2014 and trial proceedings were held from 2 September 2015 to 30 August 2018 when the Chamber began its deliberations.
5. Since March 2013, Bosco Ntaganda has been detained at the Court’s Detention Center (“ICC DC”). His behaviour and cooperation with ICC DC staff has been exemplary at all times.
6. Bosco Ntaganda is married to [REDACTED] since June 2002. He is the father of seven children aged from seven [REDACTED] to 20 years old [REDACTED].

¹ *Ntaganda*, Order on the sentencing procedure, 8 July 2019, ICC-01/04-02/06-2360 (“Order”). All further references are to the *Ntaganda* case unless otherwise indicated.

Following his transfer to the ICC DC, Mr. Ntaganda was declared indigent. Due mainly to his limited financial resources, he was seldom visited by his wife and children during his period of detention. More importantly, due to logistical difficulties in obtaining passports and the insufficiency of funds in the Registry TFFV, Mr. Ntaganda has not seen his three youngest children since March 2013.

7. Moreover, due to restrictions imposed on his non-privileged communications during the entire trial proceedings, whereby his contacts with his family were limited to telephone calls to his wife and mother for a maximum of one hour per week, Mr. Ntaganda's conditions of detention were particularly difficult.
8. Bosco Ntaganda nonetheless cooperated with the Court at all times. In particular, he testified in his own defence during a period of almost three months (more than 30 court days) during which he responded to all questions put to him by Counsel, Prosecution, Participants and, more importantly, the Chamber.
9. The gravity of the crimes Bosco Ntaganda was convicted of is recognized, as is his degree of intent in respect of some of these crimes. In and of themselves, the gravity of the crimes, including their impact on the victims, and Bosco Ntaganda's degree of intent call for the imposition of a high sentence.
10. However, Bosco Ntaganda's personal circumstances as well the presence of very powerful mitigating factors must be taken into account in determining the appropriate sentence to be imposed.
11. These factors include, *inter alia*, Bosco Ntaganda's personal experience during the Rwandan genocide; measures taken by Bosco Ntaganda to save the lives of enemy combatants; measures taken by Bosco Ntaganda to protect Lendu civilians in Mandro; Bosco Ntaganda turning away and refraining from enlisting some potential child soldiers considered to be too young; Bosco Ntaganda deploying his forces to protect the civilian population; Bosco Ntaganda's contribution to the demobilization of members of the *Forces Patriotiques pour la*

Libération du Congo (“FPLC”) and the integration of others in the FARDC; Bosco Ntaganda’s voluntary surrender; Bosco Ntaganda’s lengthy testimony during trial; Bosco Ntaganda’s exemplary behaviour in detention; Bosco Ntaganda’s long period of pre-conviction detention; [REDACTED]; and Bosco Ntaganda’s express compassion and sympathy for the suffering and harm endured by all victims.

12. Two additional factors are particularly deserving of consideration and credit in this regard, namely Bosco Ntaganda’s actions and contribution to the reconciliation with Lendu combatants and civilians, including the *Front des Nationalistes et Intégralistes* (“FNI”) and the *Front de Résistance Patriotique de l’Ituri* (“FRPI”) in 2004 as well as Bosco Ntaganda amending his own conduct upon becoming *Chef d’état-major général* towards the end of 2003.
13. Indeed, taking into consideration the Chamber’s conclusions regarding the common plan adhered to by Bosco Ntaganda in relation to the Lendu community at large during the first half of 2003, his material and genuine efforts and contribution in reaching out to the Lendu community – thereby saving many lives and further suffering while displaying a complete shift in attitude – is most significant and deserves due consideration.
14. As for Bosco Ntaganda’s alteration of his own conduct - which began as early as during the FPLC operations in Mongbwalu in June 2003 – it demonstrates, as evidenced by witnesses who testified during the sentencing phase, that rehabilitation is an attainable goal in determining the appropriate sentence to be imposed. It also evinces that already in 2003 – 2004, Bosco Ntaganda’s rehabilitation was already under way.
15. In light of the foregoing, expanded upon in these submissions, the Defence respectfully submits that the appropriate sentence to be imposed on Mr. Ntaganda should definitely be less than the maximum sentence that can be imposed pursuant to Article 78 as proposed by the Prosecution. The Defence

thus respectfully submits that the appropriate sentence to be imposed should be no more than 23 years' imprisonment.

PROCEDURAL HISTORY

16. These submissions follow the parties and participants preliminary oral submissions and Mr. Ntaganda's personal statement heard on 20 September 2019.

APPLICABLE LAW

17. Article 78 of the Statute, in conjunction with its Preamble and Rule 145 of the Rules, set out what the Appeals Chamber has described as "a comprehensive scheme for the determination and imposition of a sentence."²

18. Article 78(1) prescribes that a Trial Chamber, in determining sentence, shall take into such factors as "the gravity of the crime and the individual circumstances of the convicted person." Rule 145(1)(a) sets out what may be described as an ultimate requirement of any sentence: "the totality of any sentence [...] must reflect the culpability of the convicted person." As summarized by the Appeals Chamber, these provisions require a Chamber to "exercise its discretion in entering a sentence that is proportionate to the crime and reflects the culpability of the convicted person."³

19. Rules 145(1)(a) and 145(2), which set out "[m]itigating" and "aggravating" circumstances, then give an indicative list of factors that may be taken into account, and that must⁴ all be "[b]alance[d]" in coming to a proper sentence:

- a. Extent of damage caused, in particular the harm caused to victims and their families (Rule 145(1)(c));

² *Lubanga* SAJ, para.32. *See also Bemba et al.* SAJ, para.79.

³ *Lubanga* SAJ, para.40. *Al Mahdi* SJ, para.67.

⁴ Rule 145 (1)(b) ("the Court shall [...] [b]alance all the relevant factors [...] and consider the circumstances of both the convicted person and of the crime.")

- b.** The nature of the unlawful behaviour and the means employed to execute the crime (Rule 145(1)(c));
- c.** The degree of participation of the convicted person (Rule 145(1)(c));
- d.** The degree of intent (Rule 145(1)(c));
- e.** The circumstance of manner, time and location (Rule 145(1)(c));
- f.** The age, education, social and economic condition of the convicted person (Rule 145(1)(c));
- g.** Circumstances falling short of constituting grounds for exclusion of criminal responsibility, such as duress (“mitigating circumstance”);
- h.** The convicted person’s conduct after the act, including any efforts by the person to compensate the victims and any cooperation with the Court (“mitigating circumstance”);
- i.** Any relevant prior criminal convictions for crimes under the jurisdiction of the Court or of a similar nature (“aggravating circumstance”);
- j.** Abuse of power or official capacity (“aggravating circumstance”);
- k.** Commission of the crime where the victim is particularly defenceless, or with particular cruelty, or where there were multiple victims (“aggravating circumstance”);
- l.** Commission of the crime for any motive involving discrimination or any of the grounds referred to in article 21, paragraph 3;
- m.** “Other circumstances which, although not enumerated above [as aggravating circumstances], by virtue of their nature are similar to those mentioned.”

20. A factor once used to determine gravity may not be used again as an aggravating circumstance.⁵ The error that must be carefully avoided is “double-counting” the same factor twice.⁶
21. “Gravity” is usually evaluated first in ICC judgments,⁷ reflecting its primary importance in sentencing.⁸ Gravity includes the nature of a convicted person’s culpable conduct,⁹ even if sometimes that discussion is formally separated from the scale and nature of the crimes themselves.¹⁰ Either way, as required under Rule 145(1)(a), any sentence “must reflect the culpability of the convicted person,” which will depend primarily on the convicted person’s “degree of participation and intent”.¹¹ The concept of gravity, as explained by the ICTY Appeals Chamber, “does not refer to a crime’s ‘objective gravity’, but rather to the particular circumstances surrounding the case and the form and degree of the accused’s participation in the crime.”¹² The manner in which the elements of the crime were committed, its scale, or the manner in which the convicted person

⁵ *Katanga* SJ, para.35 (“Factors to be taken into account when assessing the gravity of the crime will not additionally be taken into account as aggravating circumstances, and *vice versa*”); *Al Mahdi* SJ, para.70.

⁶ *Bemba et al.* SAJ, paras.112,333; *Al Mahdi* SJ, para.70.

⁷ See e.g. *Katanga* SJ, paras.43-52; *Al Mahdi* SJ, paras.71-72; *Lubanga* SJ, para.36.

⁸ *Aleksovski* AJ, para.182 (“[...] Trial Chambers should take into account such factors as the gravity of the offence. This has been followed by Trial Chambers. Thus, in the *Čelebići* Judgement, the Trial Chamber said that ‘[t]he most important consideration, which may be regarded as the litmus test for the appropriate sentence, is the gravity of the offence’. In the *Kupreškić* Judgement, the Trial Chamber stated that ‘[t]he sentences to be imposed must reflect the inherent gravity of the criminal conduct of the accused. The determination of the gravity of the crime requires a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime’. The Appeals Chamber endorses these statements”); *Kunarac* TJ, para.856 (“Consideration of the gravity of the conduct of the accused is the starting point for reaching an appropriate sentence”).

⁹ *Katanga* SJ, para.61; *Blagojević* TJ, para.833 (“By ‘gravity of the offence’ the Trial Chamber understands that it must consider the crimes for which each Accused has been convicted, the underlying criminal conduct generally, and the specific role played by Vidoje Blagojević and Dragan Jokić in the commission of the crime”); *Tolimir* TJ, para.1215.

¹⁰ *Lubanga* SJ, para.51; *Al Mahdi* SJ, para.83.

¹¹ See e.g. *Popović* TJ, para.2182 (“the Trial Chamber must focus on Borovčanin’s specific criminal conduct and the role which he played in the commission of these crimes.”)

¹² *Mrkšić* AJ, para.375. In *Galić*, the Appeals Chamber clarified that the individual criminal conduct of the accused must be assessed as part of gravity, not as an aggravating or mitigating circumstance. *Galić* AJ, para.409.

participated, are matters that concern gravity, rather than aggravation¹³ or mitigation.¹⁴

22. As stated by the *Katanga* Trial Chamber:

In order to determine the gravity, the particular circumstances as well as the nature and degree of participation of the convicted person in the commission of the crime must be taken into account, given that the sentence, as mentioned above, and as underscored in the Prosecution Closing Statement, must be proportionate to the offence committed and to the culpability of the convicted person.¹⁵

23. The “nature and degree of participation of the convicted person”, as well as the “degree of intent” are not dictated by the form of liability on which the conviction is based. Different modes of liability do not provide “a hierarchy of blameworthiness, let alone prescribe, even by implication, a scale of punishments.”¹⁶ Instead, the “convicted person’s degree of participation and intent must therefore be assessed *in concreto*, on the basis of the Chamber’s factual and legal findings in the Judgment.”¹⁷ The ultimate task, as explained by the *Lubanga* Appeals Chamber, is to “weigh the relevant factors in order to determine a sentence that reflects the culpability of the convicted person.”¹⁸

24. A Trial Chamber may not assess an accused’s culpability on any facts that have not been “proved beyond reasonable doubt.”¹⁹ This has been expressly stated in respect of aggravating circumstances,²⁰ and must likewise apply to gravity.²¹

¹³ See *Mrksić* AJ, paras.400; *Boškoski* TJ, para.588.

¹⁴ See *Bemba et al.* SJ, para.129 (the limited role of the convicted person went to gravity, rather than mitigation).

¹⁵ *Katanga* SJ, para.43 (underline added).

¹⁶ *Katanga* SJ, para.61. See *Martić* AJ, para.84.

¹⁷ *Katanga* SJ, para.61. See *Bemba et al.* SJ, para.23; *Bemba et al.* SAJ, para.44 (“In relying on an extraneous consideration to diminish the gravity of the offences, rather than determining *in concreto* their actual gravity bearing in mind the extent of the damage, the Trial Chamber erred”); *Al Mahdi* SJ, para.71 (“the gravity of the acts committed by the convicted person has to be assessed *in concreto*, in the light of the particular circumstances of the case.”)

¹⁸ *Lubanga* SAJ, para.40 (underline added).

¹⁹ *Katanga* SJ, para.34.

²⁰ *Katanga* SJ, para.34 (“Therefore, only those facts which are proved beyond reasonable doubt may be taken into account to convict or as aggravating circumstances”); *Al Mahdi* SJ, para.73 (“The Chamber must be convinced of the existence of aggravating circumstances beyond reasonable doubt.”)

25. Conversely, mitigating factors to the benefit of an accused may be taken into consideration once shown to exist on a balance of probabilities.²²
26. The gravity assessment prescribed by Rule 145(1)(c) relates to the elements of the convicted crimes (“nature of the unlawful behaviour”, “degree of participation”, “degree of intent”, and “circumstances of manner, time and location”). These findings must, by virtue of being related to the elements of the crimes, be made beyond reasonable doubt. Such fact-finding is possible in a criminal trial only on the basis of the specific procedural safeguards prescribed by the Statute and Rules. The essential components of those procedural safeguards include equal investigation of exonerating circumstances (Article 54(1)(a); notice (Article 74(2)); disclosure (Article 67(2) and Rule 77). All of the rights of the accused under Article 67 pertain to “any charge,” and are not applicable to matters that are not charged.
27. The Appeals Chamber has made clear that a person may not be sentenced for crimes other than those charged:

The convicted person is sentenced for the crime or offence *for which he or she was convicted*, not for *other* crimes or offences that that person may also have committed, but in relation to which no conviction was entered. This applies even when, based on the factual findings entered by the Trial Chamber, it may be concluded that these other crimes or offences were actually established at trial. If it were otherwise, the sentencing phase could, in fact, be used to enlarge the scope of the trial – which would be incompatible with the Court’s procedural framework.²³

28. However, the Appeals Chamber, in the absence of statutory guidance on the issue, recently indicated that although non-charged criminal conduct could not be taken into account “for its own sake,” “[t]his is not to say” that such other

²¹ See e.g. *Simba* TJ, para.435 (rejecting that convicted person had played a role in planning as sentencing factor crime where Chamber “not convinced beyond reasonable doubt”).

²² *Katanga* SJ, para.34 (“The Chamber may, however, consider a mitigating circumstance where, on a balance of probabilities, the Defence establishes the existence of such a circumstance”); *Al Mahdi* SJ, para.71.

²³ *Bemba et al.* SAJ, para.112 (underline added).

offences are “entirely irrelevant to sentencing.”²⁴ The Appeals Chamber noted that the confirmation process is not designed to give notice of aggravating factors; that all that is required is adequate notice by other means; and that there need only be a “proximate link” with the crimes on which there is a conviction.²⁵

29. Despite this apparent flexibility, the requirement of proof beyond reasonable doubt of any negative sentencing factor is undisputable and always applies.²⁶ The Defence submits that there are few, if any circumstances in which the conduct of an accused could be determined by a Chamber to the standard “beyond a reasonable doubt” unless it had been adjudicated within the framework of the procedural safeguards necessary for adjudication of charges. This is the position, also in the absence of statutory guidance, that has been adopted by the ICTY Appeals Chamber.²⁷ If an accused was deliberately not charged with a crime on which evidence is subsequently heard at trial, it is submitted that it would be inappropriate to make any findings on that conduct beyond a reasonable doubt, and therefore inappropriate for that conduct to be taken into account either to enhance gravity or as aggravation.
30. Finally, the gravity of multiple convictions must take into account the extent to which they are based on the same conduct, to avoid multiple-counting of the gravity of the same conduct. As stated by the ICTY Appeals Chamber:

The fact that an accused’s conduct may legitimately be legally characterised as constituting different crimes would not overcome the fundamental principle that he should not be punished more than once in respect of the same conduct. In the case of two legally distinct crimes arising from the same incident, care would have to be taken that the sentence does not doubly punish in respect of the same act which is relied on as satisfying the elements common to the two

²⁴ *Bemba et al.* SAJ, para.114.

²⁵ *Bemba et al.* SAJ, paras.115-116.

²⁶ *Katanga* SJ, para.34; *Lubanga* SJ, para.33; *Bemba et al.* SJ, para.25.

²⁷ See e.g. *Mucić et al.* AJ, para.763 (“The Appeals Chamber agrees that only those matters which are proved beyond reasonable doubt against an accused may be the subject of an accused’s sentence or taken into account in aggravation of that sentence”); *Simba* AJ, paras.82-83 (“for sentencing purposes, a Trial Chamber may only consider in aggravation circumstances pleaded in the Indictment.”)

crimes, but only that conduct which is relied on only to satisfy the distinct elements of the relevant crimes.²⁸

31. The crimes for which Mr. Ntaganda is convicted arise from a single common criminal plan. The appropriate sentence should be assessed accordingly. The following discussion is organized in relation to crimes that overlap to the greatest extent: (i) violent crimes; (ii) the targeting crime; (iii) property crimes; (iv) crimes related to child soldiers; and (v) crimes of consequence or motive that are ancillary to categories (i)-(iii). In addition to the overlap within these categories, there is also substantial overlap in the conduct between these categories that should likewise be taken into account in arriving at an appropriate sentence.

SUBMISSIONS

I. The gravity of the offences with which Mr. Ntaganda is convicted

a. Violent crimes against civilians: murder and rape (counts 1, 2, 4 and 5)

32. An important consideration in the evaluation of sentence is the scale of the crimes for which a conviction has been entered. Only those crimes that have been proven beyond reasonable doubt can be taken into account for the purpose of sentencing.²⁹ Estimates or approximations of the scale of crimes based on any lower standard of proof are not a suitable basis for sentencing.³⁰

33. In *Katanga*, where the accused received a sentence of 12 years, the Trial Chamber passed sentence on the basis of its finding that “at least 30 civilians not taking part in the hostilities,” while also acknowledging that “the number of victims of the killings carried out on that date by Ngiti combatants far exceeded that

²⁸ *Mucić et al.* AJ, para.769. See *Kunarac* TJ, para.855.

²⁹ *Tolimir* TJ, para.569 (“For some of the incidents described in the Indictment, the Chamber was unable to determine either the precise number killed or even an approximation in the form of a range. Therefore, the Chamber has not included these killings when calculating the total number killed. Where the Chamber has found a range of numbers of victims, it has taken the minimum number of people it believes beyond reasonable doubt to have been killed by Bosnian Serb Forces.”)

³⁰ *Tolimir* TJ, para.569

figure.”³¹ It is submitted that the latter estimation was not the basis on which Mr. Katanga was sentenced, but only the number that could be adjudicated beyond a reasonable doubt. ICTY Trial Chambers have likewise been careful to set out the confirmed number of victims at Srebrenica upon which convictions are entered.³² In *Serushago*, the sentence of 15 years imprisonment, following a plea, was based on a precise numerical findings that the convicted person “personally murdered four Tutsi, while thirty-three other people were killed by militiamen placed under his authority.”³³

34. The importance of scale to sentence is highlighted by the *Musema* case, where the accused claimed he had less authority than Serushago. The Appeals Chamber found that the two accused had similar authority, but that the “material difference” was that “Musema was involved as a leader of perpetrators in several incidents, resulting in the death of thousands of Tutsis.”³⁴
35. The Defence and Prosecution seem to roughly agree³⁵ on the number of murders and rapes of which Mr. Ntaganda has been convicted. In respect of the First Operation, the Chamber convicted Mr. Ntaganda for **eleven specific murders**,³⁶ **eight rapes**,³⁷ and **four attempted murders**.³⁸ The Chamber also indicated that there were an undetermined and unspecified number of other killings during

³¹ *Katanga* SJ, para.47.

³² *Tolimir* TJ, para.597; *Popović* TJ, para.664 (“the Trial Chamber is satisfied beyond reasonable doubt that at least 5,336 identified individuals were killed in the executions following the fall of Srebrenica”); *Blagojević* TJ, para.362.

³³ *Serushago* TJ, para.27.

³⁴ *Musema* AJ, para.390 (underline added).

³⁵ T-268,5:3 (“the crimes for which your Honours have found him guilty include the murder or attempted murder of at least 72 civilians, the rape of more than 19 men, women and girls [...]).

³⁶ TJ, paras.1199 (first four bullets appear to refer to 11 murders specifically); 888 (1 victim); 513,890 (1 victim, woman killed at Salumu’s Camp, accused of being commander of Lendu combatants); 891 (2 victims), 892 (2 victims), 893 (victims in Kilo, based on a review of the cross-references to fn. 1630 and paragraphs 544-547 and 895), 1184 (Abbé Bwanalanga).

³⁷ TJ, paras.940 (first bullet), 519-523,545 (Kilo), 548 (Kilo). The TC appears to contemplate that some number of rapes may have been committed at the *Appartements* Camp, at paragraph 535, but does not say how many were raped, nor state expressly that it was finding beyond a reasonable doubt that any women who were brought back to the *Appartements* camp actually were raped.

³⁸ TJ, para.1199, last sub-bullet, 894.

ratissage operations in Mongbwalu and Sayo.³⁹ The violent crimes found to have been committed in the Second Operation are: **62 specific murders**,⁴⁰ plus the death of an unspecified number of “**some men**” who had also been the object of rape in Kobu;⁴¹ **nine specified victims of rape**, plus an unspecified number of “**some men**” and “**several women and girls**” including an 11 year old girl at Kobu;⁴² and **four attempted murders**.⁴³

36. The Chamber is invited — based on its own findings — to distinguish Mr. Ntaganda’s “degree of participation” and “degree of intent” in the two operations. This invitation in no way contradicts the Chamber’s findings that the two operations were “part of one and the same course of conduct,”⁴⁴ but reflects that sentencing is to be based on a concrete evaluation of culpability.⁴⁵
37. Mr. Ntaganda admitted, and the Chamber found, that he commanded the First Operation and that he was present in the field commanding troops from the third day of the First Operation onwards.⁴⁶
38. This level of participation is very different from the Chamber’s findings as to Mr. Ntaganda’s participation in the Second Operation, which consisted of: (1)

³⁹ TJ, para.512 (“killing people”).

⁴⁰ TJ, para.1199, sub-bullets 5-8.

⁴¹ TJ, para.1199, sub-bullet 9; paras.623,899 (“some men”).

⁴² TJ, paras.940,579,599,622-623,629,1199 (third bullet).

⁴³ TJ, paras.878,880-882.

⁴⁴ TJ, paras.793,838 (“one and the same plan”). For the purposes of establishing liability, the TC stated, para.838, that it “has assessed Mr. Ntaganda’s role in a comprehensive way, taking into account the totality of his actions in the context of the First and Second Operation.” This approach to liability does not foreclose a more graduated and concrete evaluation to the nature of Mr. Ntaganda’s contribution for the purpose of sentencing.

⁴⁵ *Katanga* SJ, paras.61-69; *Bemba et al.* SJ, para.124 (“Although it has been established that Mr. Mangenda bears responsibility as a co-perpetrator, the Chamber notes that in assessing Mr. Mangenda’s degree of participation, it may draw upon the nature of the actual contributions, since they inform his culpability [...] the Chamber will give some weight to Mr. Mangenda’s varying degree of participation in the execution of the offences.”)

⁴⁶ See e.g. TJ, paras.475 (present during failed first attack on Mongbwalu); 489,1180 (arrival in Mongbwalu sometime after the beginning of the successful operation on Mongbwalu, but before the operation in Sayo); 493 (giving orders to field commanders as to how the next day’s operations should be conducted); 500 (overseeing the assault on Sayo); 508,848 (giving an order that amounted to intentionally directing attacks against civilians; 841,1181 (briefing the troops before their departure to the Mongbwalu operation); 849-850,1182 (giving orders for the commission of crimes, and personally committing the crime of murder); 1179 (“overall commander” of the First Operation).

participating in two planning meetings, in which Mr. Ntaganda gave instructions concerning allocation of tasks and where to obtain ammunition,⁴⁷ and was subsequently informed about this ammunition being obtained;⁴⁸ (2) “monitoring the unfolding Second Operation,”⁴⁹ which included being informed about the failure of the attack on Lipri,⁵⁰ and being aware of the arrival of FPLC troops in Kobu, Bambu and Lipri;⁵¹ (3) “general awareness” of FPLC operations undertaken during this time period, which included the Second Operation;⁵² and (4) “exercis[ing] oversight over the unfolding Second Operation and, by reinforcing the chain of command within the group, [making] sure that the forces deployed were carrying out the project as planned,”⁵³ as when he reprimanded an officer for failing to advance⁵⁴ – which, incidentally, was not inherently related to any of the crimes committed during the Second Operation.⁵⁵ Significantly, unlike in respect of the First Operation, the Trial Chamber found that: (1) it could not find that Mr. Ntaganda was present in the theatre of operations during the Second Operation;⁵⁶ (2) it could make no finding that Mr. Ntaganda had briefed troops prior to the Second Operation;⁵⁷ (3) Mr. Ntaganda was “monitoring” and “generally involved” in the Second Operation, but that P-0901 and P-0055 were unable to provide any “specific examples of the interaction between Mr. Ntaganda and the commanders”;⁵⁸ and (4) Floribert Kisembo and Salumu were

⁴⁷ TJ, paras.551-552,837.

⁴⁸ TJ, paras.555,557.

⁴⁹ TJ, paras.565,846 (“monitored the unfolding (sic) via the UPC/FPLC radio communications system”).

⁵⁰ TJ, para.565.

⁵¹ TJ, para.565.

⁵² TJ, para.554.

⁵³ TJ, para.846.

⁵⁴ TJ, para.565.

⁵⁵ TJ, para.554, second bullet (indicating that the messages concerning “disciplinary matters” was sent on 13 February; TJ, para.620 (determining the date of the Kobu massacre as being the 25th or 26th of February).

⁵⁶ TJ, paras.554 (“the Chamber does not consider that the only reasonable conclusion is that Mr. Ntaganda circulated through the area close to the villages assaulted during the Second Operation”), 572 (“the Chamber does not rely on P-0790’s evidence and the aforementioned hearsay evidence to make a finding beyond reasonable doubt that Mr. Ntaganda was seen in Kobu during the Second Operation.”)

⁵⁷ TJ, para.560,fn.1701.

⁵⁸ TJ, para. 565,4th bullet.

the commanders who had the main operational command of the Second Operation.⁵⁹

39. As to Mr. Ntaganda's degree of intent in respect of the violent crimes committed during the Second Operation, the Chamber found: (1) that by using expressions such as *kupiga na kuchaji* prior to the first operation, Bosco Ntaganda (along with Thomas Lubanga and other members of the common plan) "meant the destruction and disintegration of the Lendu community, which inherently involved the targeting of acts of killing and raping";⁶⁰ (2) that Mr. Ntaganda "intended the troops to continue with the same criminal conduct during the course of the Second Operation";⁶¹ (3) that Mr. Ntaganda knew about the Kobu massacre after it happened and said words that implied that he agreed with it;⁶² but (4) that it was unnecessary, for the purpose of liability, to determine exactly when Mr. Ntaganda learned about the Kobu massacre.⁶³ The Chamber made no finding — and could not on the evidence have made any finding — that Mr. Ntaganda had advance knowledge of the Kobu massacre or the Bambu Hospital massacre.
40. 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. Although the form of liability is the same for both operations, Mr. Ntaganda's concrete role was much less in the second. In particular, it is noteworthy that: (i) the Second Operation occurred three months after Mr. Ntaganda's actions in respect of the First Operation;⁶⁴ (ii) the underhanded tactic of luring civilians from their hiding places based on a false promise of peace⁶⁵

⁵⁹ TJ, paras.558-561,563-564,572,575,837 ("further organised by Floribert Kisembo from Mongbwalu").

⁶⁰ TJ, para.809.

⁶¹ TJ, para.1187.

⁶² TJ, para.638.

⁶³ TJ, para.638,fn.2035.

⁶⁴ TJ, para.486 (referring to start of successful operation on Mongbwalu as being "on or about 20 November 2002"); cf. TJ, para.567 referring to start of Second Operation as being "[o]n or about 18 February 2003").

⁶⁵ TJ, paras.591,597-598.

had no parallel in the First Operation, at least for as long as Mr. Ntaganda was present;⁶⁶ (iii) the scale of the killings was much greater than in the First Operation; (iv) the manner of the killings was more egregious and very different than that which had occurred in the First Operation; and (v) the Chamber made no finding, and could have made no finding on the evidence, that Mr. Ntaganda had any advance knowledge⁶⁷ of the mass killing events during the Second Operation, let alone the manner and unprecedented scale of those events.

41. Furthermore, although not a requirement for liability, 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.⁶⁸

42. **Murders in the First Operation.** Mr. Ntaganda's concrete involvement in violent crimes has been found to be highest in respect of five murders during the First Operation: the direct murder of Abbé Bwanalanga;⁶⁹ the murder, on Mr. Ntaganda's orders, of two prisoners from Nzebi;⁷⁰ and the murder, on Mr. Ntaganda's orders, of two prisoners at the *Appartements* camp accused of being APC soldiers.⁷¹

43. The testimony on which these convictions are based provides very little detail about Mr. Ntaganda's motivations or emotional state when he participated in these murders. P-0768, upon whose uncorroborated testimony the Chamber relied for this very important conviction, indicates that [REDACTED].⁷² Mr. Ntaganda was striking [REDACTED]⁷³ before Mr. Ntaganda shot him.⁷⁴ This

⁶⁶ TJ, paras.540-544 (referring to killings of some individuals in Kilo who had been reassured that they would be well-treated if they emerged from the bush at an unspecified date after 6 December); cf. TJ, para.489, fn.1412 (finding that it Mr. Ntaganda "remained in the town for at a minimum one week after the UPC/FPLC took over Mongbwalu", thus not encompassing these events in Kilo).

⁶⁷ For relevance of "advance knowledge", see *Popović* TJ, paras.2186,2213.

⁶⁸ TJ, paras.442 ("[t]he UPC wanted to open the Main Road, which was in better condition and shorter than the other available roads"), 550.

⁶⁹ TJ, paras.532-533,737-741,850,1184,1199.

⁷⁰ TJ, paras.510,849.

⁷¹ TJ, paras.528,850.

⁷² P-0768:T-33,56:14-15.

⁷³ P-0768:T-35,65:5. P-0768 does not describe how severely Mr. Ntaganda [REDACTED].

description suggests that Mr. Ntaganda was not acting with cold-blooded deliberation or premeditation,⁷⁵ nor does it suggest that he acted with zeal, sadism, or brutality.⁷⁶ Indeed, the lack of detail provided by the witness in respect of the most culpable conduct of Mr. Ntaganda in the entire case is striking. The usual burden and standard of proof must apply to any factors that enhance gravity, especially given that the Prosecution had every opportunity to adduce any and all details from its one witness to this event that were relevant not only to liability but also sentencing. The Chamber should not draw inferences based on circumstances as a replacement for direct evidence that could have been adduced.

44. The same observation applies to the uncorroborated testimony of the same witness on whose testimony the Chamber has convicted Mr. Ntaganda for ordering the killing of two prisoners at Nzebi. Virtually no detail was provided by the witness about the manner in which these two prisoners were shot,⁷⁷ or the manner in which Mr. Ntaganda issued the order for their execution.⁷⁸
45. The third murder event in which Mr. Ntaganda has been found to be directly involved concerns two APC soldiers held prisoner at the *Appartements* camp. The uncorroborated description of this event also provides no indication as to whether Mr. Ntaganda acted with zeal or enthusiasm, premeditation, depravity, or any other way that would enhance gravity.⁷⁹ Although the description was evidently considered by the Chamber to be a sufficient basis for conviction, the

⁷⁴ [REDACTED]. **P-0768**:T-35,64:15-21.

⁷⁵ *Galić* AJ, para.450; *Lukić & Lukić* SJ, para.1067 (emphasizing the premeditated nature of killings as an aggravating factor).

⁷⁶ This single incident, over a short time, stands in sharp contrast to other cases that were marked by brutality. *See e.g. Mrksić* AJ, para.410; *Lukić* TJ, para.740; *D Nikolić* SAJ, para.30 (“context of depravity” and “enjoyment” of violence); *Kvočka et al.* AJ, para.117; *Simba* AJ, para.319; *Kayishema* AJ, para.354.

⁷⁷ The sole witness to these killings at first testified that he [REDACTED] (**P-0768**:T-33,55:2 [REDACTED]), then said he did not (**P-0768**:T-35,59:16-17 [REDACTED]). Accordingly, there are no details as to the manner or even the reason for the killings.

⁷⁸ *See* **P-0768**:T-33,54:20-55:7.

⁷⁹ **P-0017**:T-59,23:15-25:3.

lack of detail should preclude the Chamber from finding any circumstances that enhance gravity.

46. In conclusion, notwithstanding the evident gravity of the offences *per se*, the personal conduct of Mr. Ntaganda does not reflect zeal, premeditation or brutality. There is also considerable doubt and ambiguity – especially in relation to the killing of the Abbé – as to whether Mr. Ntaganda may have acted out of some momentary anger that should reduce his culpability. Furthermore, the number of soldiers in front of whom he committed these acts is uncertain,⁸⁰ and there is no indication that he boasted about or broadcast these events.
47. **Rape in the First Operation.** As to the rapes committed during the First Operation, the Chamber appears to have found **eight** specific instances: (1) of an unidentified 13-year old civilian, by a soldier named Saidi and one other soldier;⁸¹ (2) of an unidentified 14-year old by two unidentified UPC/FPLC soldiers;⁸² (3) of an unidentified young woman, and her mother;⁸³ (4) of an unidentified Lulu girl by a soldier named [REDACTED]; (5) of P-0022, by a male detainee at Kilo who was ordered to do so by FPLC soldiers;⁸⁴ and (6) of two unidentified girls at Kilo who were summoned by [REDACTED] in an environment that was found by the Trial Chamber to have been coercive to the degree necessary for rape.⁸⁵ The Chamber has made no finding that Mr. Ntaganda had advance or contemporaneous awareness of any of these rapes.
48. The circumstances at the *Appartements* are discussed at paragraph 535 of the Judgment. The Chamber made no express finding in this paragraph that the sexual intercourse engaged in by UPC soldiers with local women at the

⁸⁰ Cf. TJ, paras.855,857.

⁸¹ TJ, para.519.

⁸² TJ, para.521. The Trial Chamber appears to have found that the testimony of P-0912 relates to the same 14-year old about whom P-0892 gave testimony. TJ, para.521.

⁸³ TJ, para.521.

⁸⁴ TJ, para.545,942.

⁸⁵ TJ, para.548,945.

Appartements was rape.⁸⁶ However, at paragraph 940, the Chamber states that it had made a finding that UPC/FPLC soldiers “forced women and girls to have sexual relations with them, including at the *Appartements* camp.”⁸⁷ The Chamber also implies that Mr. Ntaganda knew about the rapes by the UPC soldiers at the *Appartements*:

In light of the fact that Mr. Ntaganda is not charged with rape as a direct perpetrator, the conduct of Mr. Ntaganda is not addressed in the present analysis. However, the Chamber gives due consideration, for the purpose of determining the facts underlying the charges, that Mr. Ntaganda was present when women were brought to the *Appartements*, and that he brought women there himself.⁸⁸

49. The Chamber is invited to make clear that it does not rely, directly or indirectly, on any suggestion that Mr. Ntaganda personally raped anyone for the purpose of determining gravity. He was not charged with this crime, which necessarily impacts the extent to which such allegations were, and had to be, contested at trial. Relying on the gravity of acts that are uncharged and unconvicted would be improper.

50. The Chamber also does not make clear how many rapes were committed at the *Appartements*; whether any of the sexual relations there were consensual; nor state expressly that Mr. Ntaganda knew about rape, as opposed to sexual relations. The Defence understands the Chamber’s finding to have been that it could not determine beyond a reasonable doubt that Mr. Ntaganda was present in Mongbwalu for more than a week after the “UPC/FPLC took over Mongbwalu.”⁸⁹

⁸⁶ TJ, para.535. The Defence is mindful of the implication of the discussion that subsequently.

⁸⁷ TJ, para.940.

⁸⁸ TJ, para.535, fn.1601.

⁸⁹ TJ, fn.1412 (Mr. Ntaganda “remained in the town for at a minimum one week after the UPC/FPLC took over Mongbwalu”).

51. The Chamber made no finding suggesting that Mr. Ntaganda had any advance or direct knowledge of any of the other instances of rape during the First Operation. Indeed, he had left the area by the time of the rapes at Kilo.⁹⁰
52. Mr. Ntaganda's "degree of intent" and "degree of participation" in the crime of rape is based on his participation in the common criminal plan. The Chamber has found that this was one of the intended crimes within the scope of the plan, and not merely a consequence that was virtually certain, or foreseeable. Within the scope of the plan, rape was one of the "tool[s]" to "destroy the Lendu community,"⁹¹ and that the intent to destroy and disintegrate the Lendu community "inherently involved the targeting of civilian individuals by way of acts of killing and raping."⁹²
53. However, Mr. Ntaganda's culpability for the purpose of sentencing should also be assessed on the basis of concrete knowledge of, and participation in, these events. He was not charged with, and has not been found to have committed, rape. The Chamber has not made any clear findings that he was aware of, or directly contributed to any rapes. His participation is less direct, and his degree of intent is lower, than in cases where accused have directly perpetrated rape, or provided very substantial assistance to a rape as an aider and abettor.⁹³

b. Intentionally directing attacks against civilians (count 3)

54. Mr. Ntaganda has been convicted for four incidents of intentionally directly attacks against civilians. The two incidents during the First Operation were: (1) indiscriminate targeting in Mongbwalu and Sayo;⁹⁴ and (2) ordering the firing of a grenade launcher at a group of civilians during the Sayo attack.⁹⁵

⁹⁰ TJ, fn.1412.

⁹¹ TJ, para.805.

⁹² TJ, para.809.

⁹³ See e.g. *Furundzija* TJ, paras.282 (8 years' imprisonment), p.112; *Kunarac* TJ, paras.864-867,871.

⁹⁴ TJ, para.494 ("fired at everyone in Mongbwalu, including the 'civilian population'"), 922-923 ("indiscriminately attacked all Lendu, civilians and fighters alike").

⁹⁵ TJ, paras.508,744,922 ("Mr Ntaganda also ordered a UPC/FPLC soldier to fire a grenade launcher at the slope of a mountain where a number of men and women wearing civilian [...]"), 1199 (second

55. The gravity and culpability of the targeting in the **First Operation** should be evaluated in the context of the Chamber's findings that: (1) the crime of directly targeting does not require any actual injury;⁹⁶ (2) no injuries resulted from the one incident when Mr. Ntaganda ordered the targeting of a group of civilians;⁹⁷ (3) it did not reject P-0017's testimony that Mr. Ntaganda uttered the words "this should discourage them, that they would not have the strength to reorganise or to launch a counter-attack," which implies that the purpose of the order was to prevent a counter-attack; (4) Mr. Ntaganda did not order any further targeting of this group of civilians once they had scattered, apparently unhurt;⁹⁸ (5) the Lendu fighters in the First Operation "were not uniformly dressed, which made them difficult to identify", that they included "women and children";⁹⁹ (6) the UPC/FPLC forces "faced resistance" in both Mongbwalu and Sayo, from both the APC and from "Lendu persons";¹⁰⁰ (7) "those killed in Mongbwalu during the UPC/FPLC assault on the town, including children and the elderly, may have comprised both Lendu fighters and civilians, and that some of these civilians may have been actively engaged in hostilities";¹⁰¹ and (8) it could not find that anyone killed "during the assault" on Mongbwalu or Sayo had been unlawfully killed.¹⁰² These various factors should lead to a relatively low level of culpability in relation to the commission of this crime during the First Attack.

56. The incidents of intentionally directing attacks in the **Second Operation** for which Mr. Ntaganda was convicted were: (1) using heavy weapons in Bambu without sufficient awareness of the nature of the targets, or the presence of

bullet).

⁹⁶ TJ, para.904.

⁹⁷ TJ, paras.508 ("the people spread in all directions, but none of them appear to have been injured"), 922.

⁹⁸ TJ, para.508.

⁹⁹ TJ, para.885.

¹⁰⁰ TJ, paras.885-886.

¹⁰¹ TJ, para.885.

¹⁰² TJ, paras.885-887.

civilians, in the town;¹⁰³ and (2) chasing civilians into the bush at Buli and Jitchu.¹⁰⁴

57. Mr. Ntaganda was not present on the ground during the Second Operation and had no advance or contemporaneous awareness of the specific events in question. While Mr. Ntaganda has been found liable for these events through his participation in a common plan, his concrete participation and degree of intent should be assessed in light of his low level of participation and degree of intent in relation to these incidents. He had no information upon which to take corrective action in respect of these incidents, which occurred over a very short – rather than extended – period of time.

c. Property crimes

58. The Chamber convicted Mr. Ntaganda of indirect co-perpetration of the war crimes of pillage and destroying the enemy's property in the following instances during the First Operation: (1) the destruction of "some houses" during operations against Mongbwalu and Sayo;¹⁰⁵ and (2) the looting of a Land Rover vehicle, medical equipment, household items, livestock and corrugated metal roofing during *ratissage* operations in Mongbwalu¹⁰⁶ and Sayo.¹⁰⁷ As to the Second Operation, the Trial Chamber found: (1) the destruction of primarily or exclusively thatched-roof houses during the Second Operation at Lipri, Tsili, Kobu, Buli, Jitchu and Sangi;¹⁰⁸ and (2) looting metal roofing, personal

¹⁰³ TJ, para.926.

¹⁰⁴ TJ, paras.928,1199, second bullet.

¹⁰⁵ TJ, paras.496,503,1156,1199 (eleventh bullet).

¹⁰⁶ TJ, paras.512,514-516,1032,1199 (seventh bullet).

¹⁰⁷ TJ, paras.526,1032.

¹⁰⁸ TJ, paras.569 (Lipri and Tsili), 578(Kobu), 602,(Sangi), 609(Buli), 619(Jitchu) 1157,1199(eleventh bullet, confining conviction for destroying property in Second Operation to Lipri, Tsili, Kobu, Jitchu, Buli and Sangi).

belongings, a goat, a motorcycle, mattresses, and crops in Lipri, Kobu, Bambu, and Jitchu.¹⁰⁹

59. Property crimes are “generally of lesser gravity than crimes against persons.”¹¹⁰

The extent of damage, destruction or theft of property is evidently highly relevant to gravity,¹¹¹ and can only be considered on sentencing to the extent established beyond reasonable doubt.

60. Little evidence was heard that assists the Chamber in determining the precise scale of the pillage and destruction in the First Operation. Furthermore, some of the destruction during operations in Mongbwalu could be attributable to the fact that the UPC/FPLC, as the Chamber found, “faced resistance” in both Mongbwalu and Sayo and had, in fact, faced such stiff resistance during the first attempt to take Mongbwalu that they had been defeated.¹¹² This makes it difficult to ascertain, without challenging in any way the Chamber’s finding that such unlawful destruction did occur, the scope of the damage that was criminal beyond reasonable doubt. Furthermore, as to Mr. Ntaganda’s degree and participation and intent, it follows from the Chamber’s finding as to the chronology of events that Mr. Ntaganda was not present when most damage was likely caused during the initial seizure of Mongbwalu.¹¹³

61. The Chamber’s findings concerning looting during the First Operation are not – and cannot be in light of the evidence – specific as to scale. The Chamber appears to have inferred that the “freezers” seen at Mr. Ntaganda’s residence by P-0901 had been brought from Mongbwalu, even though this was not P-0901’s evidence;¹¹⁴ accepted that gold was brought to Mr. Ntaganda from Mongbwalu,

¹⁰⁹ TJ, paras.569 (crops in Lipri); 578 (personal belongings, metal roofs, a goat, a motorcycle in Kobu), 589 (“new foams” in Bambu), 617 (“looted” in Jitchu), 1032,1199, seventh bullet (confining conviction for pillage in Second Operation to “Kobu Lipri, Bambu and Jitchu”).

¹¹⁰ *Al Mahdi* SJ, para.77; *Katanga* SJ, paras.42,43.

¹¹¹ *Al Mahdi* SJ, para.78.

¹¹² TJ, para.477.

¹¹³ TJ, paras.489,492-493 (implying that Mr. Ntaganda arrived in Mongbwalu only after the centre of Mongbwalu had been taken).

¹¹⁴ TJ, fn.1530 *cf.* **P-0901**:T-28,58:13 [REDACTED].

but without any indication of quantum or source;¹¹⁵ and accepted P-0888's testimony which, however, went no further than to assert that the items appropriated from Mongbwalu that he saw at Mr. Ntaganda's house in Bunia were "vehicles".¹¹⁶ The Defence submits, accordingly, that there is no specific finding as to the scale or value of any goods that were looted from Mongbwalu in general, or even the amount that was ultimately given to Mr. Ntaganda himself.

62. Furthermore, the Chamber must exclude from the scale of such pillaging any goods where there is reasonable doubt as to whether they were intended for military, as opposed to personal, use.¹¹⁷ The Defence submits that almost any of the items, including mattresses and roofing, was amenable to military use.
63. The main, if not exclusive, form of property destruction during the Second Operation was the destruction of houses.¹¹⁸ The scale of such destruction that has been found by the Chamber is uncertain, particularly because some of the damage visible on satellite images could be attributable to lawful combat in or near the villages where, as the Trial Chamber found, there was substantial armed resistance.¹¹⁹ Evidence was heard demonstrating that the UPC/FPLC perceived – with good reason, as it turned out – that there were substantial enemy forces in these areas.¹²⁰
64. Furthermore, in the absence of a contrary description, the Chamber should find that the "houses" that were burned were thatched-roof houses which, according to P-0127, comprised "99.9 per cent" of the houses in the villages that he was

¹¹⁵ TJ, fn.1530.

¹¹⁶ TJ, fn.1530; P-0888:T-105,84:14-19 [REDACTED]

¹¹⁷ TJ, para.1027.

¹¹⁸ See e.g. para.569, fn.1748; 578, fn.1782; 602, fn.1869.

¹¹⁹ See e.g. TJ, paras.566 (Lipri), 575 (Kobu), 582,584 (Bambu).

¹²⁰ See e.g. P-0127:T-139,80:10-81:20 (Lipri); P-0805:T-25bis,34:20-23 (Kobu); P-0863:T-181,57:16-57:20, 58:2-5 (Bambu).

describing.¹²¹ As stated by P-0857, such a structure could be built in a day and did not “require a lot of money.”¹²²

65. The scale of looting during the Second Operation is also difficult to quantify. Not only is there doubt about the quantity of items taken, but also doubt about whether any such items were for private or personal use instead of being for military use.¹²³ Furthermore, there is substantial evidence that some of the looting on which testimony was heard was carried out – or could possibly have been carried out – by Lendu combatants and civilians not under the FPLC’s control.¹²⁴ The Chamber’s reasonable doubt as to who committed the rape of a woman at Bambu¹²⁵ must likewise apply to attribution of looting to the UPC/FPLC that rests on nothing more than circumstantial conjecture.
66. Finally, Mr. Ntaganda’s personal participation and degree of intent must be considered. The Chamber found that Mr. Ntaganda did not personally appropriate any items during the First Operation.¹²⁶ The Chamber has found that some of the items, including possibly the Land Rover vehicle, ended up in his house and that his instruction to troops prior to the First Operation to *kupiga na kuchaji* signified an authorization to pillage. For any of these items to contribute to Mr. Ntaganda’s culpability, a further finding would have to be made that Mr Ntaganda intended these items for personal, instead of military, use. The Defence submits that no such finding can be made in respect of the Land Rover and many other items as well.

¹²¹ See e.g. **P-0127**:T-139,64:20-21 (“I would say that 99 per cent, even 99.9 per cent of the houses, of the huts, were – had thatched roofs. We’re talking about huts.”)

¹²² **P-0857**:T-194,22:19 [REDACTED]; **P-0127**:T-139,59:25-60:1 (“Well, you have the walls which are made of sticks and mud, rammed earth, the roof is of straw.”)

¹²³ TJ, para.1027.

¹²⁴ See e.g. **P-0850**:T-112,86:6-17 (“Lendus engaged in looting those items” immediately after chasing the UPC forces out of Kilo); DRC-OTP-2067-1989, para.1 [REDACTED]; **P-0859**:T-51,32:20-33:2.

¹²⁵ TJ, fn.1814 (“while the evidence indicates that the UPC/FPLC arrived in the morning and the woman’s burial took place that same day, the evidence does not allow the Chamber to infer beyond reasonable doubt that the perpetrator was a member of the UPC/FPLC.”)

¹²⁶ TJ, para.754.

67. Mr. Ntaganda's substantially lower degree of participation and knowledge of the Second Operation has been discussed above, which likewise applies to property crimes.

d. Child soldiers

68. The Defence submits that it is very difficult if not impossible for the Chamber to quantify how many individuals under the age of 15 were enlisted, conscripted, or used actively. This Chamber is not bound, and invited not to follow, the *Lubanga* Trial Chamber's (ambiguous)¹²⁷ finding that the number of such individuals enlisted or conscripted could be described as "widespread." The Appeals Chamber only declined to overturn this finding as an abuse of discretion,¹²⁸ which does not mean that the finding is correct, especially based on the evidence heard in this trial.

69. **Enlistment.** The Defence notes that for the purpose of conviction, the Chamber has already used formulations similar to that adopted by the *Lubanga* Trial Chamber, such as "the UPC/FPLC extensively recruited individuals of all ages, in particular 'young people', including individuals under the age of 15, in various locations throughout Ituri."¹²⁹ The Chamber is invited, given the importance of establishing gravity based only on findings beyond reasonable doubt, to state expressly and with as much precision as possible the scale of under-15's whom it believes can be found were enlisted, conscripted or used in a manner that is attributable to Mr. Ntaganda.

¹²⁷ The *Lubanga* Trial Chamber never stated expressly that it was finding that the enlistment, conscription or use of individuals under 15 was "widespread." The Trial Chamber instead found that there was widespread recruitment of "young people, including children under the age of 15." *Lubanga* TJ, para.911. Whether or not the Trial Chamber intended the adjective "widespread" to apply to those "under the age of 15" is never expressly stated, although a subsequent paragraph states (without defining the term) that "the involvement of children was widespread." TJ, para.50. The Appeals Chamber commented that "the Trial Chamber's language could have been clearer," but interpreted the Trial Chamber's statements as meaning "that the 'widespread recruitment' pertained to individuals under the age of fifteen." *Lubanga* SAJ, para.102.

¹²⁸ *Lubanga* SAJ, para.102 ("while the Trial Chamber's language could have been clearer [...]").

¹²⁹ TJ, para.347. See TJ, para.362 "[m]any young recruits, including individuals under the age of 15, among them P-0883 and P-0898, were trained in UPC/FPLC training camps, notably in Mandro, Rwampara, and Bule".

70. The evidence in this case does not establish beyond a reasonable doubt that the presence of under-15's in the UPC/FPLC was "widespread". The Chamber notably, and correctly in the Defence's view, refrained from finding beyond a reasonable doubt that the individuals in civilian clothing on the "Rwampara video"¹³⁰ had been enlisted.¹³¹ Only two individuals on the "Rwampara video" were found by the Chamber to have been under 15 years of age.¹³² When this finding is compared to the total number of recruits visible on the video, then it should be quite clear that it would be incorrect and unsafe to infer that the recruitment of individuals under 15 into the FPLC was "widespread." The video, on the contrary, suggests that it was exceptional.¹³³
71. There is also the danger of double-counting the same individuals mentioned by different witnesses. Amongst Mr. Ntaganda's escort, for example, the Chamber has specifically identified three individuals under 15.¹³⁴ Evidence of other witnesses is then cited which refers to members of Mr. Ntaganda's escort, but without any identification.¹³⁵ Furthermore, the Chamber acknowledged that the term "*kadogo*" does not necessarily denote someone under 15,¹³⁶ and that some of the age estimates straddle the age of 15, requiring particular care in coming to a view as to just how many individuals were under 15.

¹³⁰ DRC-OTP-0120-0293-Ex01,2:50-30:27.

¹³¹ See TJ, para.1124 ("the Chambers findings on the enlistment of individuals under the age of 15 within the UPC/FPLC are not based on the mere presence of such individuals at UPC/FPLC training camps, and as such there is no risk that any persons clearly under the age of 15, who coincidentally found themselves at a certain point in time in an UPC/FPLC camp without actually having been enlisted or conscripting into the armed group, are mistakenly found to fall within the parameters of the present crime.")

¹³² TJ, para.387.

¹³³ One of the few other documents that give an indication of percentages is the FARDC "*Liste nominative*", which shows that only five out of 207 former UPC/FPLC fighters must or may have been under 15 at the time of their enlistment. DRC-OTP-0138-0027; FTB, para.1381.

¹³⁴ TJ, paras.387-388.

¹³⁵ TJ, para.390.

¹³⁶ TJ, para.389 ("Mr. Ntaganda's escort comprised *kadogos*, including individuals under 15 years of age," then referring to evidence from witnesses giving age range estimates that included the definition of *kadogo* as going up to).

72. Further care arises from the Chamber's finding that three out of the five alleged child soldiers witnesses were not reliable in giving their own age.¹³⁷ The only reasonable inference is that they were lying. If a majority of the witnesses who appeared before the Chamber were willing to lie, then unverified assessments of the vast scale of child soldiers within the UPC should likewise be treated with great caution, and certainly not a basis for a finding beyond a reasonable doubt.
73. The figures mentioned by the Prosecution during closing arguments based on the number of participating victims or estimates by the TFV¹³⁸ are manifestly deficient. The procedures are manifestly unreliable for even a rough estimate of scale, let alone one that could be relied upon beyond a reasonable doubt. D-0172 and D-0211 – unlike three out of the five child soldier witnesses advanced by the Prosecution – provided honest testimony, against their own self-interest, about the lies they told about their own age or affiliation in the hope of obtaining benefits that are insignificant¹³⁹ in comparison to the prospect of reparations from the ICC.
74. The gravity of the crime must also be evaluated in the context of the absence of any reliable documentation of age;¹⁴⁰ very different cultural attitudes towards age;¹⁴¹ and instances of recruits lying about their age to be accepted for training.¹⁴²
75. Mr. Ntaganda's degree of intent should be assessed in relation to at least two important factors that reduce gravity. First, Mr. Ntaganda did at least apply a test of physical maturity in an effort to screen out the youngest recruits.¹⁴³

¹³⁷ TJ, para.94,98(P-0010); 158(P-0758); 196,199(P-0888).

¹³⁸ D-0207:T-261,21:4-17.

¹³⁹ D-0172:T-245,35:7-8; D-0211:T-247,17:24-25 [REDACTED].

¹⁴⁰ TJ, para.86; D-0038:T-249,56:2.

¹⁴¹ P-0758:T-160,73:21-25 [REDACTED]; P-0108:T-186,49:2-16 [REDACTED]; D-0172:T-245,19:16 ("No, I didn't know my date of birth"), 64:23 (indicating that he was only told his correct date of birth by his father in 2006).

¹⁴² P-0046:T-102,65:3-9 (appearing to recall two cases amongst the sample of approximately 50 individuals whom she said had reported to her that they were under 15 at the time of enlistment).

¹⁴³ TJ, fn.998; D-0210:47:1; D-0080:DRC-D18-0001-6163, para. 61(l); D-0300:T-214,33:3-34:1.

Second, none of the child soldiers whom the Chamber has found to have been in Mr. Ntaganda's proximity can be found to have been extremely young.¹⁴⁴

76. A further factor relevant to Mr. Ntaganda's degree of intent is the very short period of time that enlistment of child soldiers had been criminalized. In fact, the enlistment, conscription and use of child soldiers was codified as an international crime only as of 1 July 2002.¹⁴⁵ Mr. Ntaganda cannot have been convicted for any such acts prior to this date, but even after this date the novelty of the criminalization should be taken into account in assessing gravity. This is particularly the case in respect of any enlisted prior to 1 July 2002 and who have remained in the FPLC after that date. The fact that commanders were informed that recruiting or enlisting child soldiers under 18 was a human rights violation¹⁴⁶ is very different from notice of a criminal prohibition. Any acts prior to 1 July 2002 are not criminal, and any acts immediately thereafter should take into account the possibility of lack of notice.
77. The gravity of the crime of enlistment is not enhanced by the conditions of child soldiers during the training. Although the Chamber has found that "severe punishments" were inflicted on recruits for indiscipline,¹⁴⁷ this treatment does not appear to have been especially targeted at child soldiers.¹⁴⁸ Furthermore, military training and discipline is severe by nature, both for the protection of future combatants and also to instil discipline in an army consisting of recruits who had lived through internecine ethnic conflict and, therefore, might be

¹⁴⁴ Any inferences about the percentages of child soldiers within Mr. Ntaganda's escort, and the fact that he would have seen such individuals frequently, must take into account the large number of escorts. **P-0055**:T-71,83:23; **D-0300**:T-214,48:7.

¹⁴⁵ Triffterer (3rd ed.), p.523. The suggestion is made that the United Nations considered the criminal prohibition to have achieved customary status as of no later than 30 November 1996, thus justifying the inclusion of this crime in the Statute of the Special Court for Sierra Leone. The Secretary-General appears to have relied on the formulation in the draft Rome Statute. Even if this status had been achieved as of 30 November 1996, it cannot properly be said that effective notice of the existence of the crime, let alone jurisdiction of the ICC, was achieved before 1 July 2002.

¹⁴⁶ **P-0046**:T-102,44:16-50:8.

¹⁴⁷ TJ, paras.377,790.

¹⁴⁸ TJ, para.377.

inclined to indiscipline. Complaints about the food or accommodation should also take into account the general conditions of hardship at that time.¹⁴⁹

78. The Chamber is invited to clarify whether it has made a finding beyond reasonable doubt in respect of the most severe mistreatment of a recruit, involving the execution of a recruit for losing his weapon.¹⁵⁰ The Chamber narrates the witness's account as if it is accepted, notwithstanding that the witness was found to have not given credible testimony about his own age.¹⁵¹ Assuming that the event itself has been found beyond reasonable doubt, there is nevertheless no finding that the person was a child soldier.¹⁵² If the person was not a child soldier, then this act – as well as any other acts or conditions directed at those 15 years of age or older – is neither charged nor an international crime. Taking such conditions or conduct into account to enhance gravity would, accordingly, be inappropriate.

79. The submission that recruits were ever – let alone “very often”¹⁵³ – given drugs to make them courageous has not been accepted by the Chamber beyond reasonable doubt and should be disregarded. The uncorroborated and hearsay testimony basis for this claim is manifestly deficient,¹⁵⁴ and is rightly not reflected in the Judgment.

80. **Conscription.** The gravity of the crime of conscription must be assessed in light of the fact that conscripting individuals above 15 years of age or older is not a crime. Such conscription can neither be a basis for conviction, nor used to enhance gravity.¹⁵⁵ Mr. Ntaganda's speeches encouraging recruitment,¹⁵⁶ or even

¹⁴⁹ P-0046:T-102,101:4-22.

¹⁵⁰ TJ, para.377,1120.

¹⁵¹ *Id.*

¹⁵² The Prosecution adduced no testimony concerning his age other than that he was a “boy,” which does not exclude that he may have been 15, 16 or 17. No other testimony or evidence was adduced concerning this event that clarifies the purported victim's age. P-0888:T-105,41:1.

¹⁵³ T-268,20:17-18.

¹⁵⁴ P-0877:T-109,50:5-14.

¹⁵⁵ Cf. TJ, paras.349,1118.

¹⁵⁶ TJ, paras.357-359.

any knowledge that he may have had about a system to compel recruitment, must be viewed in light of the lack of any criminal prohibition for conscription of those 15 years of age or older.

81. Presumptions or generalizations in this regard are unsafe, particularly given the evidence that many young people were highly motivated to obtain military training. Amongst the motivations compelling individuals to seek such training were witnessing relatives having been killed by the enemy,¹⁵⁷ protection,¹⁵⁸ or lack of other options¹⁵⁹ – *i.e.* survival. P-0898 and his friends, for example, decided to join the UPC militia [REDACTED];¹⁶⁰ that he then “took the decision to join the army”¹⁶¹ in order to “protect the Hema civilian population”;¹⁶² and that he was told by UPC soldiers that “if I agreed,” he would have to follow training before coming a soldier.¹⁶³ D-0038 testified that he and many others sought out training because there “were killings all over the place”¹⁶⁴ that “were continuing” when he returned from Equateur.¹⁶⁵
82. This is no excuse for the enlistment of children under 15, but distinguishes the situation from the mass abductions that were seen in Sierra Leone.¹⁶⁶ The one alleged event of collective conscription was not accepted by the Chamber.¹⁶⁷
83. **Use of child soldiers to actively participate in hostilities.** The scale of the use of child soldiers to actively participate in hostilities, as with the number of child soldiers in the UPC/FPLC is unclear, but the Chamber has found that such participation occurred: (i) in the First Operation; (ii) as bodyguards; (iii)

¹⁵⁷ *E.g.* P-0898:T-153,51:12-13; P-0046:T-102,63:20-64:3.

¹⁵⁸ DRC-OTP-0208-0284,p.0327; P-0046:T-103,16:1-4; D-0038:T-249,39:23,41:15,44:2-1,49:16-17.

¹⁵⁹ TJ, para.350.

¹⁶⁰ P-0898:T-153,51:12-13.

¹⁶¹ P-0898:T-153,51:23-24.

¹⁶² TJ, para.353.

¹⁶³ P-0898:T-153,52:2-3.

¹⁶⁴ D-0038:T-249,14:1.

¹⁶⁵ D-0038:T-249,39:23,55:9-10.

¹⁶⁶ *See e.g.* Sesay TJ, paras.625,1635,1684,1689,1701.

¹⁶⁷ TJ, fn.974 (declining to make any finding in respect of the allegation of an abduction event in Mudzipela.)

participating in patrols or collecting intelligence; and (iv) during the assault on Bunia in May 2003.¹⁶⁸ The scale of such use is hard to determine, but sentence should not be based on the participation of any person whom the Chamber cannot determine beyond a reasonable doubt was under 15.¹⁶⁹ The Chamber's finding that there "was no age threshold for deployment" should not be taken as substituting for the requirement of making findings beyond reasonable doubt of each and every instance of a person under 15 being used to actively participate that will be taken into account.

84. Mr. Ntaganda's degree of participation and intent in the use of child soldiers must be based on specific findings. As previously discussed, the number of individuals that the Chamber has found to have been in Mr. Ntaganda's vicinity as being under 15 is limited. Mr. Ntaganda had no role and no influence over the forces that Kisémbu gathered for the assault Bunia in May 2003.¹⁷⁰ The evidence before the Chamber, which it did not reject in the Judgment, is that Mr. Ntaganda had fled to Goma after the defeat by UPDF forces, and remained there until after Kisémbu had re-taken Bunia.¹⁷¹ Mr. Ntaganda's direct knowledge and participation in such use of child soldiers should be adjusted accordingly.

85. **Rape and sexual enslavement of child soldiers: Counts 6 and 9.** The Chamber has found three victims under Counts 6 and 9: P-0883 at Camp Bule;¹⁷² "Mave" by commander Kisémbu;¹⁷³ and "Nadège" at Camp Lingo.¹⁷⁴ The acts described are very grave. However, there is no indication, and the Chamber did not find, that Mr. Ntaganda had advance, contemporaneous, or even subsequent

¹⁶⁸ TJ, paras.403-404,416,1126-1130.

¹⁶⁹ See e.g. TJ, fn.1196, apparently suggesting some doubt as to the age of one of the two friends of P-0888 that may have been participating at that time. There is also some doubt as to whether the Trial Chamber intended descriptions in footnotes to always amount to a finding, especially in relation to an age estimate given by a witness – P-0888 – whose testimony was not deemed credible in relation to his own age. See TJ, para.196.

¹⁷⁰ TJ, para.416; D-0038:T-249,83:12-18.

¹⁷¹ D-0300:T-221,45:5-47:11.

¹⁷² TJ, paras.409, 974.

¹⁷³ TJ, 411,974.

¹⁷⁴ TJ, paras.410,974. The Chamber did not find sexual enslavement in respect of Nadège.

knowledge of any of these events. Mr. Ntaganda was not present at any of the locations where these events occurred. In particular, the rapes of “Mave” appear to have occurred some time after the First Operation was over.¹⁷⁵

86. The basis of the Chamber’s finding of liability for these intra-force rapes of child soldiers is that they were a “virtually certain” consequences of the criminal plan.¹⁷⁶ This is a lesser degree of direct intent, especially given the very small number of incidents that have been found by the Chamber to have occurred.
87. Mr. Ntaganda’s culpability for these crimes, which flows from his participation in the common plan, should be proportionate to his low degree of participation and intent in relation to these acts.
88. The Chamber has also found, possibly beyond reasonable doubt, that “[f]emale members of the UPC/FPLC were regularly raped.”¹⁷⁷ The Chamber has also found that Mr. Ntaganda raped his own bodyguards.¹⁷⁸ It cannot be underscored strongly enough, however, that these acts were neither charged in this case, nor are they international crimes. The only rapes that have been charged in this case, and that qualify as international crimes, are those of individuals under 15 years of age.

e. Persecution, forcible transfer and ordering displacement

89. Persecution criminalizes a severe deprivation of fundamental rights for a discriminatory purpose.¹⁷⁹ The severe deprivation, in this case, coincides with the other criminal acts of which Mr. Ntaganda is convicted.¹⁸⁰ The gravity of the conviction for persecution should, accordingly, be assessed in light of the

¹⁷⁵ See P-0887:T-93,36:16-21.

¹⁷⁶ TJ, para.811.

¹⁷⁷ TJ, para.407.

¹⁷⁸ TJ, para.407.

¹⁷⁹ TJ, para.988.

¹⁸⁰ TJ, para.1024 (“most underlying acts are in fact acts referred to under Article 7(1) of the Statute and, accordingly [...] all abovementioned incidents committed in Mongbwalu, Sayo, Nzebi, Kilo, Nyangaray, Kobu, Bambu, Lipri, Tsili, Jitchu, Buli, Gola, and Sangi are connected to crimes within the jurisdiction of the Court, as established elsewhere in the present Judgment.”)

principle that punishment should not be imposed “more than once in respect of the same conduct.”¹⁸¹ The additional gravity in respect of persecution, accordingly, should be limited to the prohibited discriminatory motive.

90. Forcible transfer and ordering displacement likewise depend on “expulsion or other coercive acts” that are, in effect, the same criminal acts of which Mr. Ntaganda has been convicted.¹⁸² The overlap between the “coercive acts” and the crimes convicted is virtually complete, with the additional gravity limited to the consequences of the crime. While displacement does constitute a serious hardship for victims, there is considerable uncertainty about the duration and scale of displacement. Many unsubstantiated estimates have been articulated which, however, do not meet the threshold of beyond reasonable doubt and almost never give information about return to former places of residence. While not relevant to liability, this consequence is certainly relevant to sentencing. The mitigation arising from Mr. Ntaganda’s efforts at reconciliation, discussed below, should be deemed particularly significant in respect of forcible transfer and ordering displacement.

f. Conclusion

91. The gravity of Mr. Ntaganda’s conduct should be assessed in light of his concrete role, and knowledge of, the crimes in question.
92. His knowledge of, and participation in, the crimes committed in the Second Operation was limited. He was not present on the ground during the operation, and had no direct and contemporaneous knowledge of the crimes being committed. In particular, he had no advance or contemporaneous knowledge of the two mass killing events during the Second Operation which, in manner of execution and scale, were different than anything that happened during the First Operation. Even the opportunity to punish anyone after the Second Operation, of

¹⁸¹ *Mucić et al.* AJ, para.769.

¹⁸² TJ, paras.1057-1067,1084-1094.

which the Chamber has taken account as an indicator of his intent,¹⁸³ was limited by the defeat and dispersal of FPLC forces that occurred very shortly after the end of the Second Operation.

93. No finding has been made that Mr. Ntaganda acted with depravity, zeal, enthusiasm or even significant pre-meditation in relation to the five murders in which he has been found to have participated directly.
94. Mr. Ntaganda was not, and could not have been, convicted for personally committing rape, because he was not so charged. The Chamber has also not found, with the potential exception of the *Appartements*, that Mr. Ntaganda had any advance or contemporaneous knowledge of rapes of civilians. The only exception is the findings in respect of the rapes at the *Appartements*, which are ambiguous as to scale and what exactly Mr. Ntaganda knew based on the relatively short period that he was present there.
95. Mr. Ntaganda's order to fire a single rocket at a group of civilians during the First Operation appears to have resulted in no injuries. The gravity of the other acts of directly attacking civilians during the First Operation should be evaluated in light of the Chamber's other findings regarding the participation of Lendu civilians in combat; and Mr. Ntaganda's involvement in the Second Operation was not such that he was aware, or contributed to, any of the unlawful targeting that was found to have occurred.
96. The scale of property crimes is uncertain. No goods stolen or destroyed can be taken into consideration for sentencing purposes unless the theft or destruction has been proven beyond reasonable doubt, and that any goods appropriated were for personal and not military uses.
97. The Chamber has made findings indicating that Mr. Ntaganda knew that the common criminal plan in which he was joining would necessarily lead to the

¹⁸³ TJ, para.639.

enlistment, conscription and use of child soldiers; that he was aware of individuals under the age of 15 within the UPC militia; and that he made recruitment calls to the youth that were indiscriminate as to age.

98. The Defence submits, however, that the Chamber cannot make the general finding that the enlistment of persons under 15 within the UPC militia was widespread. Furthermore, the timing of the criminalization of this conduct – on exactly 1 July 2002, which was after the training had already begun at Mandro – must be considered in assessing gravity. No finding has been made that Mr. Ntaganda had any direct knowledge of the rapes of child soldiers of which he has been convicted, all of which took place at camps where he was not routinely present.
99. The Chamber is invited, accordingly, to consider carefully: (i) the degree of Mr. Ntaganda's concrete participation in, and contribution to, the crimes, especially by distinguishing his contribution to the crimes committed in the two operations; (ii) the degree of intent, especially by distinguishing his knowledge of the crimes committed in the two operations; and (iii) the extent to which the various different crimes overlap and arise from the same conduct.

II. Mr. Ntaganda's individual and mitigating circumstances

a. Applicable law

100. Article 78(1) requires Chambers to take into account "the individual circumstances of the convicted person." Rule 145(1)(c) specifically mentions "the age, education and economic condition of the convicted person," which appears to fit neatly within an "individual circumstance." The "mitigating circumstances" that are specifically mentioned as also relevant in Rule 145(2)(a) are circumstances that fall short of excusing criminal responsibility, and a convicted person's "conduct after the act", including compensation of victims and cooperation with the Court. The examples of mitigation given are indicative

only, and the jurisprudence of the ICC and of other international tribunals attest to the wide range of circumstances that might be considered in mitigation.¹⁸⁴

101. There is some divergence of practice at the ICC concerning which factors are “individual circumstances” as opposed to “mitigating circumstance.”¹⁸⁵ Regardless of the boundary between these two concepts, what matters is that the factors are considered as one or the other in determining an appropriate sentence.¹⁸⁶
102. Mitigating circumstances relate to the appropriate sentence that should be imposed given the individual circumstances and role of the convicted person, and in no way lessen the gravity of the offence itself.¹⁸⁷

b. Mr. Ntaganda’s personal experience of genocide in Rwanda informed his conduct in 2002 and 2003, in particular, his decision to participate in the common plan

103. The reason that a person falls into criminal conduct is relevant to sentencing. The reasons that can be relevant include social, professional and family circumstances.¹⁸⁸ In Mr. Ntaganda’s case, the compelling experience that caused him to associate in 2000 with his future co-perpetrators¹⁸⁹ was his experience of genocide just six years’ before.

¹⁸⁴ See e.g. *Bemba et al.* SAJ, para.187 (“trial chambers are ‘endowed with a considerable degree of discretion [...], as well as in deciding how much weight, if any, to be accorded to the mitigating circumstances identified’”); *Katanga* SJ, paras.76-140; *Lubanga* SJ, paras.83-91; *Al Mahdi* SJ, para.109. See also *Popović* TJ, para.2140; *Milutinović et al.* TJ, para.1152.

¹⁸⁵ In *Katanga*, the accused’s “personal circumstances” are subsumed within “mitigating circumstances,” as was conduct after the act and cooperation with the Court. In *Al Mahdi*, “mitigating circumstances” were limited to matters related directly to the commission of the crime itself. See *Katanga* SJ, paras.76-123; *Al Mahdi* SJ, paras.94-105.

¹⁸⁶ *Al Mahdi* SJ, para.74 (“[...] While the Chamber must consider any mitigating circumstances, it need not do so under any particular heading or according to any particular rubric”); *Bemba et al.* SAJ, para.285 (no error where trial chamber considered family circumstances under “overall circumstances” rather than under “mitigation”).

¹⁸⁷ *Katanga* SJ, para.77.

¹⁸⁸ *Blaškić* TJ, para.779 (“Chambers have often found it appropriate to review the accused’s personal history - socially, professionally and within his family. It is essential to review these factors because they may bring to light the reasons for the accused’s criminal conduct [...] not so much [...] in order to understand the reasons for the crime but more to assess the possibility of rehabilitating the accused.”)

¹⁸⁹ TJ, paras.22,799,808-809.

104. Mr. Ntaganda joined the RPF at age 17 in the context of a discriminatory regime threatening genocide against an ethnic group.¹⁹⁰ Those signs of threat turned into a full-scale holocaust of the Tutsi. That holocaust had to be stopped by force of arms, taken up by Mr. Ntaganda and his comrades in the RPF. The UN's presence did nothing to prevent that holocaust. Sweat and blood and force of arms was required.¹⁹¹ The military intervention was not quick enough, however, to save Mr. Ntaganda's own family members: Mr. Ntaganda personally saw the dead bodies of his own sister and nephew.¹⁹²
105. No one living through such an experience, especially at such a tender age as Mr. Ntaganda, would fail to have their view of the world and human nature profoundly affected.
106. The genocide that had been stopped in Rwanda resurfaced in eastern Congo, provoking warnings from a UN Special Rapporteur about the dangers of genocide in Congo itself.¹⁹³ The flames of genocide were fanned by President Joseph Kabila spreading messages of hatred against a "Hema-Tutsi empire,"¹⁹⁴ calling them "vermin,"¹⁹⁵ and more openly by his cabinet director who called for the extermination of Tutsi in Congo.¹⁹⁶ With thousands of Rwandese *genocidaires* present in eastern Congo, including the notorious *Interahamwe* who had fled into eastern Congo following the deployment of French troops in Western Rwanda, these calls posed an imminent threat of genocide.¹⁹⁷ As the Chamber itself acknowledged, it was the former Rwandese *genocidaires* who contributed to a "'witch-hunt' against the Tutsi and, generally in Zaire, a strong hostility towards

¹⁹⁰ D-0300:T-209,47-49; TJ, para.5-6.

¹⁹¹ D-0300:T-211,5-6.

¹⁹² D-0300:T-211,7:6-15.

¹⁹³ Garreton Report, p.8.

¹⁹⁴ P-0976:T-153,19:15-21:6.

¹⁹⁵ P-0012:T-164,65:8-13 [REDACTED], 68:8-12.

¹⁹⁶ D-0300:T-243,35:3-5.

¹⁹⁷ TJ, para.6 ("Several hundred thousand Hutu, including perpetrators of the genocide, fled Rwanda into neighbouring Zaire"); D-0300:T-211,17:16-17; Garreton Report, pp.5,8.

the Rwandese among politicians and the most educated segments of the population.”¹⁹⁸

107. The “fighting” – which often appears to have simply been massacres of civilians – that opposed Lendu and Hema prior to the formation of the UPC militia was particularly vicious and uncontrolled.¹⁹⁹ As one Prosecution witness testified, the situation was one of “life or death” for the Hema population.²⁰⁰ The purpose of the attack by Lendu militia and the APC on Mudzipela²⁰¹ that preceded the first armed intervention by the recruits at Mandro, led by Mr. Ntaganda, was to “eradicate[] the Hema from the entire region.”²⁰² This was just one of many attacks and forms of severe persecution of Hema civilians²⁰³ including – shockingly – cannibalism.²⁰⁴
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.²⁰⁵ He knew that elements of the *Interahamwe* were integrated into the APC.²⁰⁶ He knew about the calls to genocide by Kabila.²⁰⁷ Mr. Ntaganda’s perspective was reflected in his words at the time,²⁰⁸ and as he explained in his own words before the Chamber:

¹⁹⁸ TJ, para.6,21.

¹⁹⁹ **D-0038**:T-249,14:1,16:13-14,39:23,49:12-50:2; Garreton Report, pp.17-21; **D-0172**:T-245,23:3 (“Lendu were killing people here and there”).

²⁰⁰ **P-0017**:T-60,64:15-17.

²⁰¹ TJ, para.444.

²⁰² **P-0017**:T-60,66:4.

²⁰³ **P-0800**:T-68,16:21-22,21:5-9;T-69,25:3-17,27:25-28:1; **P-0907**:T-89,12:20-13:8,78:14-20;T-91,13:13-2,32:17-33:18; **P-0887**:T-94,41:5-42:6.

²⁰⁴ **D-0800**:T-69,23:17; **P-0907**:T-91,31:15-32:5; **P-0887**:T-94,46:7-47:18; **P-0005**:T-189,27:24-28:4; **P-0894**:DRC-OTP-2076-0194, pp.0199-0200, paras.29-31; DRC-OTP-0214-0116, pp.0117-0118; DRC-OTP-0074-0422,p.0436, para.36.

²⁰⁵ See e.g. **D-0300**:T-211,33:16-25 (“After that communiqué or announcement, all the officers who did not belong to the RCD-Goma which had just been created were eliminated, all of them, not only officers, but any Tutsi citizen in Kisangani, Kinshasa, Lubumbashi, all Tutsi civilians, all of them who were not able to escape to the east to Rwanda and to Uganda, all of them were exterminated.”)

²⁰⁶ **D-0300**:T-229,57:15-24.

²⁰⁷ **D-0300**:T-243,35:3-4.

²⁰⁸ **P-0769**:T-120,16:2-12 [REDACTED]

When we arrived in Congo in 1998, the current father of Congo, Kabila, or rather his director of cabinet, Ndombasi, declared to the entire population of Congo that it was necessary to kill all Tutsis and everybody who looked like them. And at that time there were troubles immediately in Ituri because of that message in that region. There was inter-ethnic conflict. People were killing each other. That was in 2000 that happened. When I arrived what did I see? I saw the killings in Mudzipela. And these massacres were no different to what I saw in Rwanda, the way in which people had been massacred with machetes, with knives. Perhaps the Rwandan genocide was on a wider scale, but the way in which people had been killed in the Congo was the same. People were killed with machetes. Children being carried by their mothers were killed, although being carried by their mothers on their back. That happened in Nyankunde, Drodro, Tchomia, Kacheli (phon). Your Honour, you haven't had the opportunity to see these pitches where the Hema were killed. It was Hema that were killed. And when I speak about the genocide, having experienced the Rwandan genocide, I saw what was happening in Congo was similar or the same.²⁰⁹

109. None of this excuses or justifies even a single crime of which Mr. Ntaganda has been convicted. Yet these 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 a genocide – should not be under-estimated.
110. The Prosecution's suggestion that Mr. Ntaganda "did exactly the same thing"²¹⁰ as the perpetrators of genocide in Rwanda is shocking and outrageous: there is no comparison at all between the scale of crimes that occurred in Rwanda, and the crimes of which Mr. Ntaganda has been found guilty. 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. These personal circumstances and motivations should be considered in substantial mitigation of sentence.

c. Mr. Ntaganda saved the lives of enemy soldiers

²⁰⁹ D-0300:T-243,35:2-19.

²¹⁰ T-268,14:10.

111. P-0016, upon whom the Chamber relied repeatedly through the Judgment, testified that Kisémbó wanted to [REDACTED] and 63 other APC soldiers taken prisoner after Lompondo's defeat.²¹¹ Mr. Ntaganda intervened and persuaded Kisémbó to spare their lives. According to P-0016, [REDACTED].²¹²
112. Mr. Ntaganda did the same thing during the operation in Mongbwalu in the summer of 2003, ordering his troops not to kill a group of prisoners whom they wished to kill, and instructing that they be integrated into the FPLC.²¹³
113. Mr. Ntaganda's actions in this regard were consistent with his previous training and military practice with the RPF and Chui mobile force.²¹⁴ This also represented a marked departure from the brutal practices that had prevailed during the period of disorganized ethnic fighting that had prevailed in the preceding years.
114. Saving lives is an act that must be accorded substantial weight in mitigation, which is not diminished by the fact that it may also have been militarily advantageous.²¹⁵ Mr. Ntaganda did more than merely refrain from committing a criminal act: he persuaded Kisémbó, his superior, not to commit a serious atrocity and saved the lives of 64 individuals.²¹⁶ This alone is a major act of mitigation that deserves substantial credit.

d. Mr. Ntaganda protected Lendu civilians

²¹¹ DRC-OTP-0126-0422-R03, para.47, cited at TJ, para.354.

²¹² *Id.*

²¹³ D-0251:T-260,16:14-17,31:19-21.

²¹⁴ D-0300:T-212,62:15-20.

²¹⁵ *Popović* TJ, paras.2140,2219 ("in the view of the Trial Chamber, even if Pandurević's motivations in opening the corridor included military considerations and protecting Serb lives, this does not detract from the fact that objectively he saved thousands of lives. The Trial Chamber is overall convinced that Pandurević's action in opening the corridor was a clear and compelling instance of assistance to potential victims.")

²¹⁶ See e.g. *Kupreškić et al.* AJ, para.430 (permitting the Trial Chamber's consideration that Josipović stopped soldiers from killing a Muslim civilian woman); *Blagojević* AJ, para.342.

115. “Many”²¹⁷ Lendu civilians who were attacked by rival Lendu militia groups were welcomed, supported and protected at Mandro,²¹⁸ including by Mr. Ntaganda personally.²¹⁹ These Lendu were welcomed to Mandro in June 2002, which coincides with the formation of the criminal plan that has been identified by the Chamber.²²⁰ The protection afforded to these civilians, coincident with the formation of the common plan, demonstrates that the common plan had its limits, and that Mr. Ntaganda also possessed the desire to protect Lendus who were threatened. The Prosecution did not contest this testimony. Mr. Ntaganda’s role in protecting these civilians constitutes, in itself, substantial mitigation.²²¹ It also demonstrates that the scope of the criminal acts that he intended had its boundaries, and that he was not driven by indiscriminate or venal ethnic hatred.

e. Mr. Ntaganda personally turned away recruits considered to be too young, and did not have personal knowledge of the presence of child soldiers who were very young

116. Mr. Ntaganda personally intervened to prevent the training of individuals whom he perceived to be too young. D-0210 testified that Mr. Ntaganda was personally present when D-0210 and two of his friends were rejected from training with the words: “[w]e’re not training little children like you here, you have to go home.”²²² The Chamber appears to have considered D-0210 to be credible,²²³ but found that his rejection for training was based on size rather than age.²²⁴ D-0080 similarly declared that Mr. Ntaganda told him that there were individuals at Rwampara who were “*inapte pour la formation*” who were to be sent away.²²⁵ This

²¹⁷ D-0054:T-244,22:22.

²¹⁸ D-0054:T-244,6:15-24:4 [REDACTED]; DRC-OTP-0126-0030.

²¹⁹ D-0054:T-244,17:7-10.

²²⁰ D-0054:T-244,8:16-25.

²²¹ See e.g. *Popović* TJ, paras.2140,2219

²²² D-0210:47:1.

²²³ TJ, para.365 (relying on his testimony for other purposes).

²²⁴ TJ, fns.966,998.

²²⁵ D-0080:DRC-D18-0001-6163, para.61(l). Although the Chamber found that “a number of aspects of the prior recorded testimony of D-0080 cannot be relied upon,” his statement was not deemed categorically unreliable, and was relied upon in certain respects. See TJ, para.58,fn.135,372,378.

is corroborated by comparing the apparent ages of the graduates,²²⁶ with the apparent ages of the recently-arrived potential recruits.²²⁷

117. The Chamber has found that Mr. Ntaganda's determination of age was criminal because it was not based on age as such.²²⁸ Mr. Ntaganda should nevertheless be given credit for excluding individuals based on immaturity,²²⁹ especially given the context of the lack of reliability identification documents.
118. Mr. Ntaganda's approach did not, based on the Chamber's findings, lead to Mr. Ntaganda being surrounded by a large number of very young children. The youngest such person mentioned is a person "reported to be called Bahati" who was said to be "12/13 years old,"²³⁰ to which must be applied an appropriately cautious margin of error given that the estimate is uncross-examined and uncorroborated. Two other individuals at Mr. Ntaganda's residence training briefly as radio-operators were sometimes described by P-0290 as "15 or so."²³¹ The three escorts identified by the Chamber as "manifestly under 15"²³² were not extremely young. None of this is to contest the Chamber's findings that these individuals were under 15, but merely that this case is entirely unlike the findings in the *Sesay et al.* case²³³ in terms of the scale and extreme youth of many of the conscripts.
119. Accordingly, Mr. Ntaganda's efforts – albeit inadequate – to exclude those who were manifestly too immature to be enlisted as soldier should be accorded some weight in mitigation.

f. Mr. Ntaganda protected civilians once areas had been secured

²²⁶ DRC-OTP-0120-0293-Ex01,6:51-7:01,31:19-36:40.

²²⁷ DRC-OTP-0120-0293-Ex01,13:45-13:58,16:26-17:10,17:22-17:35. The Chamber did not find that any of these individuals were enlisted.

²²⁸ TJ, paras.347,359-361.

²²⁹ TJ, fn.998; D-0300:T-214,33:3-34:1.

²³⁰ TJ, para.391, fn.1113.

²³¹ P-0290:T-65,41:3. Cf. TJ, para.371.

²³² TJ, fn.1099.

²³³ See e.g. *Sesay* TJ, para.1689.

120. Despite having been found guilty of crimes committed during combat or immediately after combat, once in control of an area Mr. Ntaganda tried to protect the civilian population against attacks, and punished crimes against the civilian population.
121. Forces were deployed in Mudzipela in August 2002 to try to protect the population from further attack.²³⁴ Other such deployments included at Nisi and Mabanga;²³⁵ specifically at the Catholic mission in Mongbwalu;²³⁶ on the Nyangaray road;²³⁷ and in Mandro after the closure of the training camp there.²³⁸ [REDACTED].²³⁹
122. Although the Chamber has found that UPC/FPLC punishment of crimes against Lendu civilians was insufficient,²⁴⁰ credit should still be accorded in mitigation for Mr. Ntaganda's efforts to punish the most grave misconduct by UPC/FPLC forces against civilians. Mr. Ntaganda personally ordered the arrest of PIGWA and KASANGAKI for having stolen cows;²⁴¹ of ABELANGA for looting after the liberation of Mongbwalu;²⁴² of LINGANGA for launching an attack in a period of pacification;²⁴³ and of a renegade UPC commander for pillaging goods in Lopa, Katoto, and another village that was Lendu.²⁴⁴ Mr. Ntaganda openly approved of the execution of Liripa as punishment for having killed a Lendu civilian.²⁴⁵ A soldier was executed, on the orders of Thomas Lubanga and in order to set a clear example, at Camp Ndromo for having severely mistreated a Nande

²³⁴ D-0300:T-214,82-84.

²³⁵ D-0300:T-217,29:10-14.

²³⁶ D-0300:T-217,92:22-93:12.

²³⁷ D-0300:T-219,13:5-17; DRC-OTP-0120-0294,01:24:10-01:25:11 (Transl.DRC-OTP-0176-0187,0238:1372-1373); DRC-OTP-0127-0058,23:44-25:48 (Transl.DRC-OTP-2102-3675,3696,490-3700,596).

²³⁸ D-0300:T-220,24:20-28:17.

²³⁹ D-0038:T-249,74:23-78:1;T-251,15:13-18,40:22-25.

²⁴⁰ See e.g. TJ, paras.332,1183.

²⁴¹ D-0300:T-213,54:4-5,86:1;T-222,68:4-69:2.

²⁴² D-0300:T-213,13:24-14:1;T-214,10:13-21;T-233,54:7-8.

²⁴³ D-0300 : T-219,31:16-25; D-0038:T-250,4:20-5:7; P-0055: T-74,47:10 et ss.

²⁴⁴ D-0038:T-250,5:8-6:23.

²⁴⁵ DRC-OTP-0017-0033,p.0097(Transl.DRC-OTP-2102-3854,p.3919);DRC-OTP-0017-0033, p.0098 (Transl.DRC-OTP-2102-3854,p.3920); D-0300:T-222,62:19-64:21.

family.²⁴⁶ Mr NTAGANDA also ordered the burning of looted goods in Komanda.²⁴⁷

123. Although none of these acts were found to have any impact on the Chamber's reasoning in respect of liability, they are now properly considered as mitigation. Efforts to reduce the scale or mitigate the impact of crimes,²⁴⁸ or to prevent others from committing criminal acts,²⁴⁹ are proper matters in mitigation.

g. Mr. Ntaganda reached out to the FNI, FRPI and Lendu community and achieved reconciliation in 2004

124. The video of the rank-giving ceremony in Largu, followed by the celebration at Drodro on 17 July 2004, is compelling evidence of Mr. Ntaganda's substantial efforts to reconcile ethnic communities in 2004, in particular the Hema and the Lendu.²⁵⁰
125. The video shows Mr. Ntaganda present at both the ceremony and the celebration. Also present at both occasions are representatives of the FNI (including Floribert Ndjabu, its President, and René Shakpa)²⁵¹ and of the interim administration appointed by the DRC government (including the interim administrator himself, Tchachu Lilo and his Deputy Kiza Mateso).²⁵²
126. Mr. Ntaganda played a substantial role in the process leading to this moment. According to D-0306, [REDACTED] to hold a pacification meeting in Bule, and

²⁴⁶ D-0300:T-215,42:9-43:10.

²⁴⁷ D-0300:T-213,13:9-23("I had learnt that some soldiers had looted, I asked for those soldiers to be brought in. [...] I asked that the items that had been looted should be brought and that those who had looted those items be flogged. They were asked to lie on the ground and to be whipped. [...] The people of Bunia were all aware that I had taken such a measure and they were happy with that decision"), 14:3-17.

²⁴⁸ Kupreškić TJ, para.860; Krajišnik TJ, para.1163; Sikirica et al. SJ, paras.195,229 (credit given for ameliorating conditions at a prison camp).

²⁴⁹ Kupreškić AJ, para.430.

²⁵⁰ D-0305:T-266,23:3-24:5; D-0306:T-267,27:3-19,31:2-18.

²⁵¹ D-0305:T-266,27:19-21;28:6-8;32:21-23;34:8-9;D-0306:T-267,21:13-15;22:22-25;25:2-9;26:7-11;D-0047:T-267,56:22-23 (Mr. Ndjabu was present only for the celebration).

²⁵² D-0047:T-267,57:6-10.

who [REDACTED] pacification tour [REDACTED].²⁵³ Mr Ntaganda's spoke publicly at these events, urging Hema and Lendu to recognize that "you're the same people ... you're drinking the same water",²⁵⁴ and that it was time to make peace.²⁵⁵

127. Mr. Ntaganda also largely succeeded. Even though the witness agreed that an unspecified level of harassment by elements of the "UPC and other militias"²⁵⁶ did occur, he also affirmed that the peace message "bore fruit, people started moving, businesses were up and running. Hema people would go to Bule, Kpandroma and everywhere and we had a lot of results [REDACTED]."²⁵⁷ The three key purposes of the pacification process advocated by Mr. Ntaganda was sensitization for peace, unity and free movement of persons with their possessions.²⁵⁸ As stated by D-0306, Mr. Ntaganda "really wanted to restore peace."²⁵⁹

128. The extent to which these efforts succeeded and were genuine is reflected in the euphoric²⁶⁰ scenes on the 17 July video. Mr. Ndjabu is very warmly welcomed²⁶¹ and is seated next to Mr. Ntaganda.²⁶² Mr. Ndjabu is introduced as an honoured guest and gives a speech that provides a compelling indication of how far former enemies had come in just a few months:

²⁵³ DRC-D18-0001-6754.

²⁵⁴ **D-0306**:T-267,20:15-19.

²⁵⁵ See also D-0302 statement, paras.21-22 ("Il disait qu'on ne pouvait pas se battre entre nous, il disait toujours qu'on devait vivre ensemble parce que nous étions sur le même territoire et que nous étions des frères"); D-0303 Statement, para.39 ("Il s'est adressé à tout le monde pour dire que comme nous parlons la même langue et nous vivons sur le même territoire [...] C'était un appel à la paix et à la réconciliation.")

²⁵⁶ **D-0306**:T-267,36:15-19 (underline added). Notably, the Kisembo militia continued to be present in various locations. See **D-0047**:T-267,72:14-17.

²⁵⁷ **D-0306**:T-267,20:22-21:1. See D-0303 Statement, para.40 ("Suite à la réunion nous avons conclu un accord suivant lequel les Hema pouvaient avoir accès aux marchés Lendu sans problème, principalement dans les villages de MASUMBUKO, KPARNGANZA, et UZI. C'était une entente de libre accès aux marchés.")

²⁵⁸ DRC-D18-0001-6754; **D-0306**:T-267,12:20-24,13:17-21.

²⁵⁹ **D-0306**:T-267,15:20-24.

²⁶⁰ **D-0047**:T-267,53:2-4 ("The spectators were all very enthusiastic. [...] But they felt reassured, they felt that there was peace, whereas there was a lot of tendencies which had previously been opposed.")

²⁶¹ DRC-OTP-0118-0002,48:52-49:31.

²⁶² DRC-OTP-0118-0002,55:43.

Je vous remercie donc de tout cœur, [...] Ça, c'est la première chose. En second lieu, je dois dire que ma présence ici est un signe qui ... qui témoigne de notre bonne volonté de vivre en paix avec vous. J'ai déjà rencontré des gens de l'UPC à MONGBWALU, ceux de KOBU ne me connaissaient pas encore, peut-être, mais il était impératif que je vienne parmi vous, afin que vous sachiez que je souhaite que nous avançons main dans la main, et que nous fassions tous nos projets ensemble, pour le bien de nos populations.²⁶³

129. The presence and enthusiasm of Lendu and Hema community leaders together at this celebration cannot be overstated. Mr. Ndjabu opens his remarks by saying “FNI hurray” and UPC “huray”, and refers to the FPLC soldiers as “our soldiers” and “our officers.”²⁶⁴ As D-0305 testified, the ceremony “was a sign that we could live safely together.”²⁶⁵ D-0047 described the ceremony as being:

of capital importance, because the – it showed the reconciliation was a fact that had been consolidated, that it had happened, because if people from these two groups, these two armed groups – you could see – and also from the different ethnic groups who at a certain time were very much involved in violent opposition, if they were able to spend time together to celebrate this type of event and then to eat together at this meal. I think that this is an indication that reconciliation has taken place.²⁶⁶

130. The event is not just a private affair between the FNI and UPC. The territorial administration of Djugu was also represented, in the person of its head, Tchachu Lylo (a Lendu)²⁶⁷ and its Deputy Head, Kiza Mateso,²⁶⁸ each of whom gave speeches. Mr. Tchachu Lylo confirms in the course of his speech that the UPC has been recognised as an official political party since 2 July 2004.²⁶⁹ These meetings are entirely consistent with the “*Acte d’engagement*” dated 25 December 2003, and signed by the FAPC, the FNI/FRPI and the UPC/RP, to ensure and facilitate peace and security, free movement, and delivery of humanitarian aid.²⁷⁰ Accordingly,

²⁶³ DRC-OTP-0118-0002,56:53:58:47; DRC-OTP-2084-0041,II.345-353.

²⁶⁴ DRC-OTP-0118-0002,56:42-56:50; DRC-OTP-2084-0041,II.334-337,346.

²⁶⁵ **D-0305**:T-266,26:17-19.

²⁶⁶ **D-0047**:T-267,57:16-22.

²⁶⁷ **D-0306**:T-267,23:7.

²⁶⁸ **D-0047**:T-267,57:6-10.

²⁶⁹ DRC-OTP-0118-0002, 01:03:24-01:03:27; DRC-OTP-2084-0041, II.397-398; **D-0047**:T-267,58:12-15.

²⁷⁰ DRC-OTP-0018-0108; **D-0047**:T-267,68:8-69:10.

this was a process that commenced, in effect, almost immediately once Mr. Ntaganda had become the Chief of Staff of the UPC/RP, if not before.

131. The genuine warmth between Mr. Ntaganda and the Lendu representatives is strong evidence that he is not driven by ethnic hatred or animus. Indeed, Mr. Ntaganda and some of his forces subsequently went and lived with Lendu soldiers for some period of time.²⁷¹
132. These words are spoken at the place where, a little more than a year before, there had been “a horrendous slaughter” of Hema civilians by Lendu combatants.²⁷² Mr. Ntaganda had also sent his representative to a pacification meeting in Kobu some time prior to this meeting in Drodoro.²⁷³ Similar meetings and events were held elsewhere, including at Bule, Iga Barrière, Katoto, Lopa and Muhito.²⁷⁴
133. These events are clear and direct evidence of substantial and immediate efforts at reconciliation by Mr. Ntaganda. Such “conduct after the act” to promote reconciliation should be accorded substantial weight in mitigation, as it has been in previous cases.²⁷⁵
134. MONUC’s attitude towards these efforts, which is discussed below in more detail, is immaterial. MONUC had no monopoly on reconciliation efforts. These events demonstrate Mr. Ntaganda’s ability and willingness to work with his Lendu counterparts; that he actively pursued peace and security efforts that included his Lendu counterparts and the national interim administration; and that his effort actually succeeded in bringing people together in a spirit of harmony, and facilitated security and free movement of people of all ethnicities.

²⁷¹ D-0302 Statement, para.26.

²⁷² DRC-OTP-0005-0283 [REDACTED]; DRC-OTP-0074-0422,p.0446 (reporting the “killing of 408 civilians, the serious injury of 80 others, 48 of them still in the local hospital at the time of the investigation”, by “Lendu militias”). See **D-0038**:T-249,81:14-82:17; DRC-OTP-0065-0148, p.0151 [REDACTED]; DRC-OTP-0109-0215, p.0126 [REDACTED].

²⁷³ **D-0047**:T-267,49:12-21.

²⁷⁴ **D-0306**:T-267,18:22-25.See DRC-OTP-0127-0064 (34:05-35:00,57:47-1:07:01,02:08:23-02:10:10,02:17:41-02:19:33).

²⁷⁵ *Katanga* SJ, paras.91,115; *Plavšić* SJ, para.94.

Mr. Ntaganda's efforts saved lives and prevented suffering, which is deserving of substantial credit.

h. Mr. Ntaganda facilitated substantial demobilization of soldiers, and integration of soldiers into the FARDC in 2004

135. Once Mr. Ntaganda became the Chief of Staff of the FPLC in December 2003, efforts at demobilization of forces, and of integration of forces into the FARDC, accelerated. Discussions are reflected in letters from the DRC Ministry of Defence dated 12 September 2003;²⁷⁶ the UPC/RP's declared support on 22 September 2003 for the pacification efforts of MONUC;²⁷⁷ the positive response from the UPC leadership to MONUC in respect of demobilization is dated 6 February 2004;²⁷⁸ a letter of 11 December 2004 conferring ranks on a number of individuals, including Mr. Ntaganda, reflects their involvement in integration process (but not necessarily that they actually were integrated);²⁷⁹ and finally a "*Liste Nominative des ELM (Miliciens) de l'Ituri*" issued by the "*Republique Democratique du Congo, Forces Armées*" dated 1 November 2005, lists 207 former "UPC/L" members amongst its ranks.²⁸⁰
136. D-0020 offers a detailed description of his own demobilisation following an initial meeting of Mr. Ntaganda with his officers in mid-2004, in which Mr. Ntaganda set out the choice between demobilization and integration into the FARDC.²⁸¹ Mr. Ntaganda subsequently had a meeting with the head of MONUC, Mme. Mcadams at Muhito to discuss demobilization. Shortly thereafter, Mr. Ntaganda ordered D-0020 to lead a group of some 500 individuals to submit their arms to CONADER at Bunia.²⁸²

²⁷⁶ DRC-D18-0002-0063.

²⁷⁷ DRC-D18-0002-0065 (letter from Djokaba Lambi to Commander Iceberg, 22 September 2003).

²⁷⁸ DRC-D18-0002-0060.

²⁷⁹ DRC-OTP-0086-0036.

²⁸⁰ DRC-OTP-0138-0027; FTB, para.1381; D-0020 Statement, para.19.

²⁸¹ D-0020 Statement, para.15.

²⁸² D-0020 Statement, para.18.

- i. **MONUC's negative view, especially in early 2004, does not detract from the credit that should be given to Mr. Ntaganda for his reconciliation and demobilization efforts**

137. Negative comments by MONUC about Mr. Ntaganda or about the rapprochement of the FNI and FPLC do not alter the picture that arises from these events. MONUC, according to its own reports, had compromised its neutrality by having [REDACTED].²⁸³ These reports also acknowledge that at least armed clash arose from a MONUC patrol having been [REDACTED].²⁸⁴
138. Conversely, MONUC had decided to “go after” Mr. Ntaganda.²⁸⁵ [REDACTED].²⁸⁶
139. These reports demonstrate that MONUC is, at best, only dimly aware of the realities on the ground and, at worst, manipulated by factions capitalizing on that ignorance. [REDACTED] is ironic in light of this Chamber's finding that Kisembo was the one who issues the operational order during the attack on Kobu, telling Salumu just before the massacre there: “show them what you are capable of.”²⁸⁷
140. MONUC was also perceived by the UPC, apparently with good reason, of having engaged in various abusive practices against civilians, particularly those associated with the UPC – which by then was a recognised and legal political party. For example, Pakistani troops reportedly fired on a peaceful protest and engaged in other arbitrary and brutal acts against civilians²⁸⁸ and arbitrarily arrested and beat the *Chef de groupement* of Iga Barriere.²⁸⁹ The documents show, regardless of whether these complaints are well-founded, that the UPC had substantial reasons for disagreement with MONUC that had nothing to do with

²⁸³ DRC-OTP-0155-0147, p.0147.

²⁸⁴ *Id.*

²⁸⁵ DRC-OTP-1029-0579, p.0580.

²⁸⁶ See e.g. DRC-OTP-1029-0591, p.0595 [REDACTED]; DRC-OTP-2057-0099, p.0102 [REDACTED].

²⁸⁷ TJ, para.626.

²⁸⁸ **D-0047**:T-267,66:7-1; DRC-OTP-0014-0245 (“la population qui manifestait pacifiquement contre l’arrestations arbitraire de la comité politique et militaire de l’UPC/RP sera la cible gratuite des tirs en armes automatiques de la Brigade de l’Ituri.”)

²⁸⁹ DRC-D18-0002-0061.

resisting the process of reconciliation and peace. The MONUC documents do not undermine what the preponderance of the evidence shows, namely, that substantial demobilisation and integration of forces into the FARDC did take place in 2004. As D-0047 testified, the man responsible for this process on the ground was Mr. Ntaganda.²⁹⁰

141. Importantly, the *Katanga* Trial Chamber gave credit to Mr. Katanga for his demobilisation efforts despite MONUC reports noting that Mr. Katanga had also “been quite uncooperative with the MONUC”; that he had been involved in “numerous incidents involving FNI/FRPI combatants”; the discovery of prison camps where female detainees had “apparently” been subject to sexual violence; and the discovery of a large FNI/FRPI stockpile of weapons.²⁹¹ The importance of providing an incentive to former wrongdoers to contribute to peace and security is so great that even inconsistent steps towards that process should be taken into consideration in sentencing. Despite some negative MONUC reports, the evidence shows that Mr. Ntaganda’s contribution to peace, reconciliation and security in 2004 was extensive, and should be accorded substantial weight.

j. Mr. Ntaganda should be given credit for surrendering voluntarily, despite the delay in doing so

142. Mr Ntaganda surrendered voluntarily to the United States Embassy in Kigali on 19 March 2013. He indicated to the Registry representative that his surrender had been voluntary, that he wished to go to the ICC voluntarily, and that he did not wish to litigate his transfer to the seat of the Court.²⁹²

143. Voluntary surrender should be treated as a mitigating factor even though such a person is under an obligation to surrender,²⁹³ and even after a significant delay.²⁹⁴

²⁹⁰ D-0047:T-267,63:2-75:22.

²⁹¹ *Katanga* SJ, para.113.

²⁹² ICC-01/04-02/06-44-Conf-Exp, para.1.

²⁹³ *Kunarac* TJ, para.868.

²⁹⁴ *Blaskić* TJ, para.776; *Blaskić* AJ, para.728 (recognizing voluntary surrender 5 months after publication of arrest warrant as a mitigating circumstance).

Treating delayed surrender as a mitigating factor in such circumstances will encourage others in a similar situation to surrender.

- k. Mr. Ntaganda has cooperated with the Court by providing lengthy testimony, admitting potentially incriminating facts, and being entirely respectful in his demeanour and conduct in court**

144. Just as submitting to an interview with the Prosecution an acknowledged form of cooperation that should be treated as a mitigating factor,²⁹⁵ so too should a statement given in court at trial. Such credit should be given even if the Chamber does not accept all of the statements of an accused as credible.²⁹⁶ What is required is an assessment of the quantity and the quality of the information provided viewed as a whole.²⁹⁷
145. Although there were “limited occasions” when Mr Ntaganda was “hesitant, and avoided answering directly a few questions put to him by the Prosecution,” and despite not finding him credible on all matters on which he testified,²⁹⁸ the Chamber undoubtedly found Mr. Ntaganda to have been a cooperative witness who made a real effort to provide “detailed and comprehensive” testimony over a period of 30 court days.²⁹⁹ In waiving his right to silence, and opening himself up to any questions that might be asked of him by the Prosecution, the Judges, and the representatives of the victims, Mr. Ntaganda deserves significant credit.
146. Further, Mr. Ntaganda voluntarily acknowledged certain facts that he knew might potentially be viewed as incriminating. In particular, he acknowledged his

²⁹⁵ *Popović* TJ, para.2191 (participating in an interview treated as “substantial cooperation” and entitled to “some weight” as a mitigating factor.)

²⁹⁶ *Blaskić* TJ, para.780 (“the Trial Chamber must take note of the exemplary behaviour of the accused throughout the trial, whatever the judgement as to his statements as a witness.”)

²⁹⁷ *Bralo* SAJ, para.51; *Milutinović* TJ, para.1183.

²⁹⁸ TJ, paras.257,261.

²⁹⁹ TJ, para.258.

commanding role during the First Operation,³⁰⁰ and he acknowledged that he used visual assessments of maturity to determine suitability for enlistment.³⁰¹

147. Mr. Ntaganda was also consistently respectful and cooperative during court proceedings. He consented to absenting himself from the courtroom to facilitate the testimony of P-0010.³⁰² He was even respectful during the short period of his hunger-strike, which arose from truly exceptional circumstances that are discussed further in section j below.

l. Mr. Ntaganda's conduct in detention has otherwise been "exemplary"

148. Mr. Ntaganda's conduct while in detention was "exemplary."³⁰³ He has "always been respectful towards" the staff of the ICC Detention Centre; engaged in no disruptive or insulting behaviour; and "played a constructive role and intervened appropriately with the management of the ICC DC on behalf of other detainees, when those other detainees could be described as struggling with being in custody."³⁰⁴

m. Mr. Ntaganda substantially contributed to [REDACTED]

149. [REDACTED].

150. The Defence is informed of other incidents, [REDACTED]. The full scale of Mr. Ntaganda's "constructive role" is vaguely referenced in the [REDACTED]. [REDACTED].³⁰⁵ This [REDACTED] is but the tip of the iceberg showing the importance of Mr. Ntaganda's role in caring for his [REDACTED].

³⁰⁰ D-0300:T-216,44:11-45:1-5.

³⁰¹ D-0030:T-213,79:17-80:3.

³⁰² P-0010:T-46,54:9-12.

³⁰³ ICC-01/04-02/06-2367-Conf-Anx, p.1.

³⁰⁴ *Id.*

³⁰⁵ DRC-D18-0002-0067.

n. Mr. Ntaganda has endured a long period of pre-conviction detention, much of it under very difficult conditions, warranting a reduction of sentence

151. Mr. Ntaganda served more than six years and three months in detention prior to the pronouncement of a judgment against him.³⁰⁶ The lengthy period of pre-conviction detention – i.e. detention during the period that the accused is still presumed innocent – should be taken into account in mitigation of sentence. This has been recognised in previous cases even where the long period of pre-conviction detention is not attributable to anyone’s fault and does not amount to undue delay.³⁰⁷
152. The mitigation warranted by this period should be enhanced by the conditions arising from his detention in The Hague. Mr. Ntaganda has received six family visits during his six-and-a-half years of detention at the ICC DC. Given the costs of travel and accommodation, only four of Mr. Ntaganda’s seven children have been able to visit him so far. Mr. Ntaganda has, never been visited at the ICC DC by three of his seven children: [REDACTED] – [REDACTED]. The abridgement of the right to family life is much greater than if Mr. Ntaganda were to be detained at a location reasonably close to his place of residence.³⁰⁸
153. The burden of these limited family visits was substantially increased during the period of strict monitoring of Mr. Ntaganda’s telephone communications. Because of the limitations on Registry resources, the consequence of the Chamber’s order for active monitoring of Mr. Ntaganda’s communications meant that he was limited to one hour of communication with the outside world,

³⁰⁶ ICC-01/04-02/06-44-Conf-Exp, para.3, (within the custody of the ICC as of 22 March 2013).

³⁰⁷ *Blaskić* AJ, para.728. And *see* fn.1559 (“time spent in custody before and during the proceedings is a factor in mitigation of sentence”).

³⁰⁸ *See e.g.* Case of Khodorkovskiy and Lebedev v. Russia, para.3 (the rights of prisoners “must be guaranteed under the same conditions as for that of free persons [...] subject to the restrictions that are unavoidable in a closed environment.”)

with only two persons, for a period of twenty-six months.³⁰⁹ These measures were reduced on 19 May 2017, and finally lifted on 19 February 2018.

154. The Chamber found that these measures were justified and necessary based on reasonable grounds to believe that Mr. Ntaganda intended engaged in acts of witness interference or coaching.³¹⁰ Even accepting that the restrictions were justified, three negative consequences were out of the Chamber's control: (1) the resource constraints that limited Mr. Ntaganda's communications so severely; (2) Mr. Ntaganda's distance from his family, which made alternative forms of communication impossible; and (3) the long duration of proceedings, which caused the restrictions to continue for a long period. The heavy impact of the restrictions arising from these factors – whose continuation related to the duration of proceedings – should be taken into account in mitigation.

o. Mr. Ntaganda has expressed his sympathy for the victims

155. Mr. Ntaganda stated after closing arguments that he feels “great compassion as a result of all the suffering and harm visited upon the civilian populations of all the ethnic groups.”³¹¹ He reiterated this sentiment at the close of the sentencing hearing: “I wish to also express my deep compassion for all the victims from all the ethnic groups who suffered during the conflicts that have devastated the Congo during this period of time, namely 2002 and 2003.”³¹²

p. Mr. Ntaganda is a family man, whose family will be impacted heavily by a long period of detention

156. Mr. Ntaganda has seven children and has been together with his wife for seventeen years.³¹³ He has not been able to see three of his children – [REDACTED] – since having been transferred to The Hague by the ICC. He is a

³⁰⁹ ICC-01/04-02/06-508-Conf-Exp, para.7; ICC-01/04-02/06-1494-Conf-Exp; ICC-01/04-02/06-1913.

³¹⁰ ICC-01/04-02/06-785-Conf-Exp, paras.55,57.

³¹¹ T-264,67:5-6.

³¹² T-268,52:15-16.

³¹³ D-0300:T-209,41:24-43:5.

loving and solicitous husband and father, as is reflected on the video of the celebration of his daughter [REDACTED]'s birthday.³¹⁴ Mr. Ntaganda's detention, and the remoteness of his place of detention from his family, has had a heavy impact on Mr. Ntaganda and his family. An extremely long period of further detention, whether at a great distance from his family or closer, will have a major impact not only on Mr. Ntaganda, but also on his family.

III. Aggravating circumstances

157. The Defence submits that no aggravating circumstances exist. As the burden rests on the Prosecution to establish any such circumstances, the Defence intends to respond to any such arguments once they have been fully set out by the Prosecution in its written submissions.

CONCLUSION

158. The criminal conduct of which Mr. Ntaganda has been convicted is grave and merits an appropriate sentence. The Chamber should, however, carefully consider the scale of the crimes that it can say have been committed beyond a reasonable doubt; the variable degree of Mr. Ntaganda's participation in different crimes; his acts during the events that saved the lives of enemy combatants and civilians; his substantial efforts at reconciliation in 2004; and the heavy impact that detention has already had, and will continue to have, on his family life.

159. A sentence of no more than 23 years' imprisonment would reflect and be proportional to the culpability of Bosco Ntaganda.

³¹⁴ DRC-OTP-0159-0477,01:48:49; D-0300:T-243,34:2-34:23.

RESPECTFULLY SUBMITTED ON THIS 24TH DAY OF JANUARY 2020

A handwritten signature in black ink, appearing to read 'StB-' with a horizontal line extending from the end.

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands