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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 “Response on behalf of Mr. Ntaganda to Prosecution
CLR1/CLR2 submissions on sentence”, 8 October 2019, ICC-01/04-02/06-2438-Conf**

Source: Defence Team of Mr. Bosco Ntaganda

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Other

Further to the Prosecution's "Submissions on sentence" filed on 30 September 2019 ("Prosecution Submissions"),¹ the "Observations on Sentencing on behalf of the Former Child Soldiers" ("CLR1 Submissions")² and "Sentencing Submissions of the Common Legal Representative of the Victims of the Attacks" ("CLR2 Submissions")³ filed on the same day, Counsel representing Mr. Ntaganda ("Defence" or "Mr. Ntaganda") hereby submit this

Response on behalf of Mr. Ntaganda to Prosecution and CLR1/CLR2 submissions on sentence

INTRODUCTION

1. Pursuant to Trial Chamber VI ("Chamber")'s oral Order of 20 September 2019,⁴ the Defence hereby responds to the Prosecution and CLR1/CLR2 30 September 2019 submissions on sentence.
2. The Prosecution's use of the terms "gravity of the crimes", "culpable conduct" and "aggravating circumstances" interchangeably in its submissions enhances the risk of 'double counting'. The Prosecution also makes a series of related submissions, which run afoul of the applicable case law.
3. The submission that Mr. Ntaganda's rape of escorts aged 15 or older should be considered in aggravation of any of the crimes with which he has been convicted is incorrect. Mr. Ntaganda can be sentenced only for conduct for which he has been convicted, and aggravating circumstances related directly thereto. Crimes against other victims, even if it is the same crime, is a circumstance that exceeds the proper limits of aggravating circumstances.

¹ Submissions on Sentence, 30 September 2019, ICC-01/04-02/06-2425.

² Observations on Sentencing on behalf of the Former Child Soldiers, 30 September 2019, ICC-01/04-02/06-2423.

³ Sentencing Submissions of the Common Legal Representatives of the Victims of the Attacks, 30 September 2019, ICC-01/04-02/06-2422.

⁴ T-268,53:1-4.

4. Unproved and contested allegations of interference with the administration of justice may not be taken into consideration as an aggravating factor. Only those matters which are proved beyond reasonable doubt against Mr. Ntaganda may be the subject of his sentence or taken into account in aggravation of sentence.
5. Submissions that Mr. Ntaganda's "abuse of power" – related to the manner in which Mr. Ntaganda participated in the crimes – "should aggravate his sentence"⁵ must also be rejected.
6. The Prosecution and CLR1/CLR2 submissions on the gravity of the crimes rely on harm that has not and which cannot be found to have been caused by Mr. Ntaganda's crimes. Although the extent of the damage caused is a factor in assessing the gravity of crimes, such harm can only be taken into consideration for sentencing purposes if proved beyond reasonable doubt that it results from Mr. Ntaganda's crimes.
7. Notably, all of the crimes but one cited by the Prosecution as having been committed with particular cruelty involve the direct participation or contemporaneous knowledge of Mr. Ntaganda. Moreover, the Prosecution's repeated assertion that Mr. Ntaganda's personal circumstances, in particular concerning his personal experience during the Rwandan genocide, constitute aggravating circumstances, is plainly wrong.
8. Many of the Prosecution and CLR1/CLR2 submissions are not based on findings in the Trial Judgment, not based on findings that have been made beyond a reasonable doubt and, in the case of the CLR1's submissions, not based on evidence. In particular, the CLR1's claims about the number of child soldiers and victims of Counts 6 and 9 are baseless or unsubstantiated.
9. The Prosecution submission that "(n)o significant mitigating circumstances exist in this case that would warrant any reduction in sentence" downplays and/or

⁵ Prosecution Submissions, para.67.

ignores significant actions taken by Mr. Ntaganda during the events, Mr. Ntaganda's conduct after the crimes and Mr. Ntaganda's acts and conduct while in detention, all of which are clearly established on a balance of probabilities.

10. In particular, the Prosecution's public and overt criticism of the Registry is wholly inappropriate, unwarranted and should be strongly rejected.
11. Mr. Ntaganda's acts and conduct, *inter alia* protecting Lendu civilians in Mandro; saving the lives of captured enemy combatants; implementing demobilisation programs and the integration of FPLC members in the FARDC; reaching out to the Lendu leadership and community, succeeding in reconciling former enemies; cooperating with the Court; well behaving in detention; and [REDACTED], taken individually or collectively, are powerful mitigating factors deserving significant consideration.
12. In and of itself, Mr. Ntaganda's contribution to peace and reconciliation with the Lendu leadership and community, in the presence of, and with the involvement of DRC government authorities, only months after the events giving rise to the charges laid against him, is – despite the views expressed by certain MONUC authorities at the time – deserving of maximum credit in establishing Mr. Ntaganda's sentence.

SUBMISSIONS

I. The Prosecution's discussion of "aggravating circumstances" as part of gravity enhances the risk of double-counting

13. The Prosecution's submissions contain references to "aggravating circumstances" in the context of the discussion of gravity;⁶ the same facts are discussed both as a matter of gravity and aggravating circumstances;⁷ and, as discussed in section IV below, Mr. Ntaganda's position of authority and his command position are

⁶ Prosecution Submissions, paras.11,22,25,28.

⁷ See e.g. Prosecution Submissions, paras.19,37 (discussing same facts in relation to P-0022 in relation to both gravity and aggravating circumstances).

discussed as both “culpable conduct” and as an aggravating circumstance.⁸ The structure of the Prosecution’s submission deviates from that followed in *Lubanga*⁹ and *Katanga*,¹⁰ where the Chambers discussed gravity comprehensively, including the role of the accused, before moving to aggravating circumstances. The overlapping nature of the Prosecution’s submissions exaggerates aggravating circumstances and increases the risk of double-counting.

II. The findings of rape of non-child soldiers, including by Mr. Ntaganda personally, were not based on any charges, nor do they relate to the victims of any charges; accordingly, they are not aggravating circumstances

A. Introduction

14. No person can be sentenced for a crime with which they were not charged, and for which they were not convicted. This does not preclude taking into account conduct in aggravation of the convicted crime that might independently amount to a criminal offence, provided that the conduct is “directly related”¹¹ or “sufficiently proximate”¹² to the convicted crime.
15. The meaning of “directly related” and “sufficiently proximate” is illustrated by the types of conduct that are statutorily and jurisprudentially recognized as aggravating circumstances. These invariably pertain to the manner of commission of the crime in question, the circumstances of the perpetrator or victim of the crime in question, or concealment of the crime itself. The commission of the same type of crime against different victims, even purportedly as part of the same course of conduct, does not satisfy the requirement of being “directly related.” This would extend aggravating circumstances beyond their proper limits and, in substance, imposes a sentence for the uncharged crimes.

⁸ *Infra*, Section IV.

⁹ *Lubanga* SJ, paras.36-53.

¹⁰ *Katanga* SJ, paras.42-69.

¹¹ *Bemba et al.* SAJ, para.117; *Tolimir* TJ, para.1220.

¹² *Bemba et al.* SAJ, para.115.

16. In addition, no proper notice was given of this potential aggravating circumstance, and the conduct is not an international crime. Relying on this conduct in aggravation to any degree, accordingly, would be improper.

B. Aggravating circumstances must be “directly related” or “sufficiently proximate” to the convicted crime

17. No sentence may be imposed on Mr. Ntaganda for the rapes that the Chamber has found he committed against his escorts, or for other rapes within the FPLC against non-child soldiers.¹³ This prohibition is not a mere technicality. All persons have the right to be informed “in detail of the nature, cause and content”¹⁴ of any criminal charge against them, and to contest those charges,¹⁵ before any conviction or sentence could be imposed for that alleged conduct. Accordingly, no person can be convicted, let alone sentenced, for a crime with which they have not been charged. As articulated by the ICC Appeals Chamber:

The convicted person is sentenced for the crime or offence *for which he 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.¹⁶

18. The *Bemba et al.* Appeals Chamber recognized, however, that conduct is not excluded as a potential aggravating circumstance of a crime of which the accused is convicted merely because the uncharged conduct also constitutes a separate crime.¹⁷

19. A pre-condition for doing so, however, is that the other conduct have “a sufficiently proximate link with” the crimes for which a conviction was entered.¹⁸

¹³ TJ, paras.407,1196, fn.3238.

¹⁴ ICC Statute, Article 67(1)(a).

¹⁵ ICC Statute, Article 67(1),67(1)(b),67(1)(d).

¹⁶ *Bemba et al.* SAJ, para.113.

¹⁷ *Bemba et al.* SAJ, para.114.

¹⁸ *Bemba et al.* SAJ, para.115.

20. The nature of the conduct before the *Bemba et al.* Appeals Chamber was an attempt by the accused, once they realized that they were under suspicion for the offences against the administration of justice, to conceal their offences by offering further bribes to the same witnesses for their silence. The Trial Chamber characterized this conduct as “remedial measures” designed “to frustrate the Article 70 investigation” into the very crimes that were subsequently charged, and on which the accused were convicted.¹⁹
21. The Appeals Chamber rejected Defence arguments that this could not be taken into account because it had not been separately charged, holding that the “‘cover-up’ was directly related to the offences for which Mr. Bemba was convicted.”²⁰ Accordingly, this was conduct that was “relevant for the sentencing phase to establish that offence’s gravity or the convicted person’s culpability in that regard or may amount to an aggravating circumstance.”²¹ Attempts to cover-up a crime have frequently been accepted as “directly related” to that crime for the purpose of sentencing and thus, a potential aggravating circumstance.²²
22. The type of conduct that is “sufficiently proximate” to another crime to be taken into account as an aggravating circumstance is illustrated by the statutory examples set out in Rule 145(2)(b), which include: “abuse of power”; “commission of the crime where the victim is particularly defenceless”; “commission of the crime with particular cruelty”; and “commission of the crime for any motive involving discrimination”.²³ All relate directly to the manner or means by which the crime was committed, or the circumstances of the victim.

¹⁹ See *Bemba et al.* SJ, para.238.

²⁰ *Bemba et al.* SAJ, para.117.

²¹ *Bemba et al.* SAJ, para.114.

²² *Popović* TJ, para.2199 (concealment measures four years after the crime, but before the issuance of an indictment); *Popović* AJ, para.2046; *Mucić et al.* AJ, para.789 (intimidation of witnesses); *Bemba et al.* SJ, paras.55,133,238 (cover-up measures immediately after the commission of the offence).

²³ Rule 145(2)(b).

23. Further potential aggravating circumstances include: enthusiasm or zeal with which the crime was committed;²⁴ premeditation and motive, including discriminatory motive when this is not an element of the crime itself;²⁵ position of command;²⁶ and vulnerability, status or defencelessness of the victims.²⁷
24. In *Lubanga*, sexual violence was considered as a potential aggravating circumstance where it was committed against the same victims of the crimes with which he was charged and convicted. The conduct in question, whose relatedness to the convicted crimes does not appear to have been contested,²⁹ fell within the aggravating circumstances defined in Rule 145(2)(b)(iv) and Rule 145(1)(c).³⁰ Since the purported aggravating circumstances related to the very same victims at the very same time as the crimes for which Mr. Lubanga was being sentenced, the conduct was sufficiently “proximate” or “related” to be considered in aggravation.
25. In contrast, the Prosecution here asks the Chamber to take into account crimes against non-child soldiers as aggravation of the same type of crime against child soldiers.³¹ In other words, the Prosecution is asking that crimes against other persons be taken into account in sentencing the crimes against the three victims of Counts 6 and 9.
26. The ICTY Prosecutor made a very similar request, albeit only temporarily, in *Kunarac*, seeking that uncharged acts of rape against particular victims be treated as aggravating circumstances of charged acts of rape against other victims. The Trial Chamber not only rejected the request, but instructed the Prosecution to “desist from citing such conduct as an aggravating factor”:

²⁴ Jelisić AJ, para.86.

²⁵ Vasiljević AJ, paras.172-173.

²⁶ Blaškić AJ, para.686.

²⁷ See e.g. Deronjić SAJ, para.124 (taking advantage of particular defencelessness of the victims); Krajišnik AJ, para.814.

²⁹ *Lubanga* SJ, paras.64-66 (noting the Defence’s arguments primarily in relation to notice).

³⁰ *Lubanga* SJ, para.67.

³¹ Prosecution Submissions, para.25.

The Prosecutor contends that “any evidence” presented to the Trial Chamber of the accused’s conduct can be used for sentencing purposes. The Trial Chamber should consider “all acts and omissions that were part of the same course of conduct or common scheme or plan as the offence of conviction to be relevant for purposes of sentencing.” [...] the Prosecutor submitted that, in order to expedite the proceedings, she decided not to amend the Indictment in mid-trial, “despite relevant and credible evidence which arose during trial” which shows beyond a reasonable doubt that Zoran Vuković committed additional rapes against FWS-50 and FWS-75. The Prosecutor asserts that this “evidence is credible, relevant and illustrates Vuković’s hostile behavior against Muslim girls and indicates his violence and criminal energy against defenceless and vulnerable victims”. This evidence, it was submitted, should therefore be considered in aggravation of Zoran Vuković’s crimes. [...] Turning to the Prosecutor’s closing arguments [...] the Prosecutor appears to have withdrawn her submission that the evidence relating to uncharged alleged rapes could be used in aggravation of Zoran Vuković’s sentence. Had she not done so, however, the view of the Trial Chamber is as follows. The Prosecutor does not appear to have argued that any uncharged criminal conduct should be considered in aggravation. She appeared rather to have argued that only uncharged acts and omissions that were part of the same course of conduct or common scheme or plan as the offence of conviction would be relevant for sentencing purposes. Even assuming, however, that the Defence was put on notice to put its case with respect to such uncharged acts and omissions, that those uncharged offences were established beyond reasonable doubt and that they can be said to be part of the same plan as the offence of conviction, the Trial Chamber would not allow such an uncharged crime being used as an aggravating circumstance. The reason is this: an offender can only be sentenced for conduct for which he has been convicted. [...] Only those circumstances directly related to the commission of the offence charged and to the offender himself when he committed the offence, such as the manner in which the offence was committed, may be considered in aggravation. In other words, circumstances not directly related to an offence may not be used in aggravation of an offender’s sentence for that offence. To permit otherwise would be to whittle away the purpose and import of an indictment. Either the Prosecutor should charge such conduct as an offence, or, where it is not directly related to another charged offence, she should desist from citing such conduct as an aggravating factor.³²

27. The same concept of “aggravating circumstances” applies at both the ICC and ICTY, and the ICC Appeals Chamber has relied on ICTY jurisprudence in this

³² *Kunarac* TJ, paras.848-850 (underline added).

area without justifying that reliance.³³ If anything, the ICC confirmation process suggests that punishing crimes against victims outside the scope of the confirmed charges, even indirectly, is even more unacceptable. The fact that it is the same crime, or committed as part of the same “course of conduct,” does not lessen the impropriety, especially since most international cases typically involve a “course of conduct.” Such an exception would, in effect, nullify Article 74(2)’s requirement that no conviction shall “exceed the facts and circumstances of the charges”.

28. A potential argument that is implicitly raised by the CLR1 is that these other acts can be taken into consideration because they inform the Trial Chamber’s assessment of “his level of intent for the crimes for which he was convicted.”³⁴ Indeed, evidence of rape committed personally by Mr. Ntaganda was admitted by the Chamber because it was deemed relevant to Counts 6 and 9.³⁵ The Chamber also relied on this evidence to draw inferences about Mr. Ntaganda’s *mens rea* in respect of Counts 6 and 9,³⁶ and its ultimate finding that Mr. Ntaganda “was aware that, in the ordinary course of events, and during the relevant period, in relation to the consequence, children under the age of 15 years [...] would be raped and subjected to sexual slavery”.³⁷
29. The Chamber’s reliance on this evidence, however, does not make is an aggravating circumstance.
30. **First**, the range of circumstances that might be relevant a finding of *mens rea* is virtually unlimited, whereas the range of aggravating circumstance are strictly limited to those that are “sufficiently proximate” and “directly related” to the specific crime being sentenced. The fact that the Chamber has taken into account this evidence to infer *mens rea* provides no basis to determine that the acts are

³³ See e.g. *Bemba et al.* SAJ, paras.114-115.

³⁴ CLR1 Submissions, para.47.

³⁵ See P-0010 Admissibility Decision, para.14.

³⁶ TJ, para.1197.

³⁷ TJ, para.1198.

sufficiently proximate to be aggravating. The two tests are entirely different, serve different purposes, and are governed by different requirements of fairness and notice.

31. **Second**, the crime that is sought to be aggravated is the rape and/or sexual enslavement of three specified victims of rape and sexual slavery.³⁸ The purported aggravating conduct does not relate to these three victims, but rather to different individuals. The fact that it is the same crime (against different individuals), even committed in the same way or as part of the same “course of conduct,” does not make it “directly related” to the crime in a way that aggravates the crime against the three individuals.
32. **Third**, there is a substantial disproportion and remoteness between the crime being sentenced and the purported aggravating circumstances. The convicted crimes did not occur at locations where Mr. Ntaganda was regularly present, nor did he participate in these rapes personally. Conversely, the non-convicted crimes include the finding (for which Mr. Ntaganda was not on trial), that he had “forced sexual intercourses with many female members of his personal guard”,³⁹ and that he “knew that rapes and sexual violence were occurring within the UPC/FPLC ranks.”⁴⁰ Finding that these acts aggravate the three instances of Counts 6 and 9 would import a much higher degree of culpability and would, in effect if not by design, lead to the sentencing of Mr. Ntaganda for very serious uncharged crimes. If Mr. Ntaganda was in jeopardy of being convicted and sentenced for such serious crimes, clear notice of that was required so that he could have mounted a fully informed defence against those charges.

³⁸ TJ, para.974.

³⁹ TJ, para.407,1196, fn.3238.

⁴⁰ TJ, para.1197. The Chamber has not found, as suggested by the Prosecution and CLR1, that Mr. Ntaganda was present when Abelanga raped a male recruit [REDACTED]. Prosecution Submissions, para.27, CLR1 Submissions, para.47.

33. **Fourth**, the purported aggravating conduct has not yet been recognized as an international crime, even though there are statements by the Trial Chamber⁴¹ and the Appeals Chamber⁴² implying that it might be in the future. Taking into account as an aggravating circumstance conduct that falls outside of the jurisdiction of the ICC is controversial, and should be undertaken only after full and appropriate litigation when the question is squarely raised. The fact that it was not squarely raised is a direct consequence of the Prosecution's decision not to charge the conduct. The indirect recognition of a new crime on sentencing would be inappropriate and further weighs against recognizing these acts as "directly related" to the crimes for which conviction has been entered.
34. **Fifth**, a finding that is "part of the context of the conviction"⁴³ may be a necessary, but it is not a sufficient, condition to satisfy the requirements of being "sufficiently proximate" or "directly related." This language from the *Bemba et al.* case pertains to the separate requirement of notice, not to the proximity that a finding must have to be treated as an aggravating circumstance.
35. **Sixth**, adequate notice of the aggravating circumstance is a separate and necessary condition that is not satisfied here. In *Bemba et al.*, for example, the aggravating conduct was forthrightly set out in the DCC,⁴⁴ and then approved as a material fact in the Confirmation Decision.⁴⁵ This ensured fairness by allowing the Defence to: (i) know that this conduct was part of the Prosecution case; (ii) know how it related to the charges, even if not expressly charged; (iii) know what the conduct was; and (iv) contest the allegations in question and evaluate the need and importance (or otherwise) of bringing Defence evidence to refute the allegation. On this basis, the *Bemba et al.* Trial Chamber was able to make

⁴¹ Second Decision on Counts 6 and 9, paras.52-53.

⁴² Appeal Judgment on Second Decision on Counts 6 and 9, paras.63-67.

⁴³ Prosecution Submissions, para.26.

⁴⁴ *Bemba et al.*, Prosecution Submission on the Confirmation of Charges, paras.235-255.

⁴⁵ *Bemba et al.*, Decision Confirming the Charges, paras.69,82.

findings beyond reasonable doubt,⁴⁶ which were then duly taken into account as part of sentencing.⁴⁷

36. This approach stands in sharp contrast to the manner in which Mr. Ntaganda's personal commission of rape was introduced into this case. It is not reflected, contrary to the Prosecution's suggestion,⁴⁸ in the UDCC. In fact, paragraph 104 of the UDCC implies that Mr. Ntaganda did not engage in the conduct for which the Prosecution wants him to be sentenced: "Other commanders [*i.e.* other than Mr. Ntaganda] led by negative example. They raped girl and women soldiers, including those below the age of 15, and kept them as sex slaves."⁴⁹ Contrary to this indication, paragraph 446 of the Pre-Trial Brief states that Mr. Ntaganda raped a child soldier, and paragraph 445 implies that he may have raped a child soldier.⁵⁰ However, Mr. Ntaganda was convicted of neither of these allegations because the Trial Chamber did not find that P-0010's testimony as to her age was reliable.⁵¹ In consequence, the crimes for which the Prosecution seeks aggravation relate to incidents that do not, and could not, fall within Counts 6 and 9.

37. The *Lubanga* Trial Chamber⁵² and the *Bemba et al.* Appeals Chamber⁵³ have suggested that allegations arising for the first time during sentencing hearings can provide adequate notice of matters to be considered in aggravation of sentence. While this may be true in respect of matters that are not, or that cannot be, seriously contested (such as the existence of a prior criminal conviction), the summary procedures of a sentencing phase provide no proper opportunities similar to the fact-finding phase of a criminal trial. The cover-up allegations in

⁴⁶ *Bemba et al.* TJ, paras.770-800.

⁴⁷ *Bemba et al.* SJ, paras.55,133,238.

⁴⁸ Prosecution Submissions, para.27, fn.94, citing UDCC, para.100 (making no allegation that Mr. Ntaganda personally raped any child soldier, or anyone else).

⁴⁹ UDCC, para.104 (underline added).

⁵⁰ See e.g. OTP PTB, paras.445 (implying that Mr. Ntaganda may have committed rape against child soldiers),446 (alleging personal rape by Ntaganda of a child soldier, P-0010).

⁵¹ See TJ, paras.98 (P-0010's testimony as to age "cannot be relied upon"), 196-199.

⁵² *Lubanga* SJ, para.68.

⁵³ *Bemba et al.* AJ, para.116.

the *Bemba et al.* case, for example, could not have been raised for the first time during a sentencing hearing. Doing so would have deprived the Defence of any opportunity to contest the facts, which would have been in no way mitigated by the extremely summary procedures permitted at the sentencing phase.

C. Conclusion

38. The Chamber's finding that Mr. Ntaganda or other soldiers raped non-child soldiers in the UPC/FPLC cannot be taken into account as an aggravating circumstance for the three instances of Counts 6 and 9, nor any other crime, of which Mr. Ntaganda stands convicted. The conduct pertains to different victims. Using those uncharged events in sentencing would be profoundly unfair, inappropriate and an abuse of discretion. However, any determination to the contrary, even to a small degree, should be made clear in the Sentencing Judgment so that the matter can be adjudicated on appeal.

III. Allegations of interference with the administration of justice are contested and not proven beyond a reasonable doubt and, accordingly, may not be taken into consideration as an aggravating factor

39. A bedrock principle of sentencing is 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."⁵⁴

40. The Prosecution acknowledges that there has been no finding beyond reasonable doubt that Mr. Ntaganda attempted to pervert the course of justice,⁵⁵ but asks that it do so now. The Prosecution tries to overcome the obvious unsuitability of current proceedings for such an evidentially complex and contested issue by asserting that Mr. Ntaganda has already admitted the offence.⁵⁶

⁵⁴ *Mucić et al.* AJ, para.763; *Kajelijeli* AJ, para.82. See *Al-Mahdi* SJ, para.73; *Katanga* SJ, para.34.

⁵⁵ Prosecution Submissions, para.80.

⁵⁶ See Prosecution Submissions, paras.81-85.

41. The claim is specious. First, the Chamber's findings in the context of the restrictions litigation fall far short of the "beyond reasonable doubt" standard; second, Mr. Ntaganda has not admitted that he interfered with the administration of justice; and third, this sentencing proceeding is manifestly unsuitable for litigating and adjudicating the contested issue.
42. **First**, in accordance with Regulation 101 of the RoC, the previous litigation of this issue before the Chamber has always been conducted according to the standard of "reasonable grounds to believe."⁵⁷ This standard pervades the Chamber's previous findings on this issue,⁵⁸ impacting on such matters as whether the Prosecution's interpretation of Mr. Ntaganda's conversation had to be merely a reasonable interpretation, or the only reasonable interpretation,⁵⁹ and whether the Chamber could properly accept as accurate any purported translation as long as it had not been expressly contested by the Defence.⁶⁰ Indeed, the few reports of Mr. Ntaganda's conversations relied upon to meet the "reasonable grounds to believe standard" are mere summaries prepared in English, directly from the original telephone conversations in Kinyarwanda or Swahili, without the benefit of a transcript. As for Mr. Ntaganda's conversations later obtained by the Prosecution as part of its parallel Article 70 investigation – some of which were relied upon by the Chamber *ex parte* in reaching decisions on restrictions⁶¹ – they were also the object of summaries prepared directly in English, by the Prosecution, not the Registry,⁶² without the benefit of a transcript. The Chamber subsequently recognized that such summaries prepared by the Prosecution were

⁵⁷ First Restrictions Decision, paras.39-40; Second Restrictions Decision, para.22.

⁵⁸ First Restrictions Decision, paras.50,55,57.

⁵⁹ First Restrictions Decision, para.55.

⁶⁰ First Restrictions Decision, paras.51,52.

⁶¹ See e.g. Second Restrictions Decision referring to Prosecution's submissions on the restrictions to NTAGANDA's contacts, Prosecution's Submissions on Mr. Ntaganda Restrictions, with Annexes C to O *ex parte* to the Defence.

⁶² Prosecution's Submissions on Mr. Ntaganda Restrictions summaries prepared by "OTP/LSU" contained in Annexes C, D, E, G, H, I, J, K, L, O.

not even sufficiently reliable for use in court,⁶³ let alone for findings beyond reasonable doubt.

43. The “reasonable grounds to believe” standard falls far below the standard of “beyond reasonable doubt,” and is even more permissive than “substantial grounds to believe”⁶⁴ and “balance of probabilities”.⁶⁵ It is the same difference between the grounds necessary to issue an arrest warrant,⁶⁶ and to convict.⁶⁷
44. **Second**, the Prosecution’s attempt to leap this distance in a single bound by asserting that Mr. Ntaganda has admitted witness interference is baseless and wrong. Mr. Ntaganda has strenuously and consistently denied, and still denies, that he encouraged anyone to provide false testimony to the Court, or that he encouraged anyone to interfere with any Prosecution witness.⁶⁸
45. The Prosecution made little effort to advance these allegations during Mr. Ntaganda’s cross-examination. Of the thousands of Mr. Ntaganda’s conversations in the Prosecution’s possession, only two passages were put to him during cross-examination.⁶⁹ Mr. Ntaganda’s responses were not “convoluted and evasive,”⁷⁰ but reflect confusing questioning, which included Prosecution counsel attempting to read the translation of Mr. Ntaganda’s words to him, including purported laughter.⁷¹ Mr. Ntaganda flatly denied that the conversation – which is not only ambiguous but occurred years in advance of the choice of any Defence witnesses⁷² – reflected any effort at coaching.⁷³

⁶³ T-209,22:4-9 (“their use will not be permitted, due to the fact that they have been prepared by a party to the proceedings, and are therefore based on an understanding and translation of the conversations by the same party.”)

⁶⁴ Article 61(5).

⁶⁵ *Al Mahdi* SJ, para.74 (“balance of probabilities” for mitigating circumstances); *Katanga* SJ, para.34.

⁶⁶ Article 58(1).

⁶⁷ Article 66(3).

⁶⁸ See e.g. Defence Submissions on Restrictions, para.23,37-75.

⁶⁹ See T-239,65:2-78 :15,91:19-92:23.

⁷⁰ Prosecution Submissions, para.85.

⁷¹ See e.g. T-239,69:15-70:9 [REDACTED].

⁷² Conversation dated 19 October 2013, DRC-OTP-2101-1391; DRC-OTP-2101-1106; audio DRC-OTP-2094-0218.

46. In fact, most of the conduct that the Prosecution now seeks to rely on as an aggravating circumstance⁷⁴ is neither a violation of detention centre rules, nor in itself wrongful. This includes: speaking in code (prior to any special order not to do so); speaking in any particular language; speaking about the case; speaking with unindicted alleged co-perpetrators; speaking with potential Defence witnesses; or speaking with potential witnesses for the Defence about the case. Such conversations are particularly likely when the charged events happened so long before that an accused may need to refresh their recollection based on conversations with other persons.
47. Speaking with unregistered third parties during a telephone conversation with a registered interlocutor is an infraction of Detention Centre rules. But it has now been at least 6 years since the commission of these infractions.⁷⁷ Since then, Mr. Ntaganda has, as Registry reports attest, made great efforts to comply with the special restrictions on his communications imposed by the Trial Chamber, including the prohibition on using coded language.⁷⁸ In *Katanga*, the accused's conversations with unregistered third parties⁷⁹ was not considered sufficiently serious by the Prosecution to warrant even a mention in its sentencing submissions, let alone cited as an aggravating circumstance.⁸⁰

⁷³ T-239,70:20-71:2.

⁷⁴ Prosecution Submissions, paras.82,83.

⁷⁷ Conversation dated 19 October 2013 (DRC-OTP-2101-1391; DRC-OTP-2101-1106; audio DRC-OTP-2094-0218) and conversation dated 19 October 2019 (DRC-OTP-2101-1098; DRC-OTP-2101-1381; audio DRC-OTP-2094-0217).

⁷⁸ Fourth Registry Report, paras.11,12; *See also* Second Restrictions Decision, para.25.

⁷⁹ *Katanga*, Decision on Request 1200 of the Prosecutor for Prohibition and Restrictive Measures Against Mathieu Ngudjolo with Respect to Contacts Both Outside and Inside the Detention Centre, 24 June 2009, ICC-01/04-01/07-1243-tENG-Red; Second Decision on Measures of prohibition and Restriction of Contacts Both Outside and Inside the Detention Centre in respect of Mathieu Ngudjolo, 24 July 2009, ICC-01/04-01/07-1334-Conf-Exp-tENG; Third Decision on Measures of Prohibition and Restriction of Contacts Both Outside and Inside the Detention Centre in respect of Mathieu Ngudjolo, ICC-01/04-01/07-1498-tENG-Red.-

⁸⁰ *Katanga*, Prosecution's Sentence Request, ICC-01/04-01/07-3455, 7 April 2014; ICC-01/04-01/07-T-344-Red-ENG and ICC-01/04-01/07-T-345-Red-ENG.

48. Furthermore, neither the Defence nor Mr. Ntaganda have conceded nearly as many examples of such conduct as the Prosecution suggests in its submissions.⁸¹ However, when confronted with two examples during his cross-examination — and even when he was not so confronted⁸² — he forthrightly admitted them.⁸³ This is compelling evidence that such communications were not for the purpose of coaching or intimidation.
49. Mr. Ntaganda was also forthright in acknowledging, and explaining, the unique circumstances in which he mentioned the names of two protected witnesses to an interlocutor.⁸⁴ Contrary to the Prosecution's submission, the Chamber did not "reject" that these interlocutors may have already known [REDACTED] identity, but simply insisted, in respect of one of them, that the disclosure nevertheless [REDACTED]⁸⁵ and in respect of the other that it [REDACTED].⁸⁶ Mr. Ntaganda's forthright admission of the disclosure of these individuals' identities warrants leniency in any weight that the Chamber might be inclined to attach to it for the purposes of sentencing.
50. In conclusion, the Prosecution's claim that "it would not represent a significant hurdle" for the Chamber to find beyond a reasonable doubt that Mr. Ntaganda attempted "to engage in witness interference and coaching"⁸⁷ is wrong. The facts are too complex to be summarily adjudicated at this stage, unlike a situation where the facts are unambiguous or could be determined directly by the Chamber. The Prosecution's parenthetical indication in a disclosure filing that it "reserves its right to use the evidence obtained under Article 70 during and after

⁸¹ The Defence disputes that most of the paragraphs of Defence filing 625 reflect any such concession. In particular, the Prosecution is incorrect that any such concession was made in paragraphs 36,37,40,41,47 and 48 of filing 625, or in paragraph 76 of filing 759. See ICC-01/04-02/06-625-Conf-Exp; ICC-01/04-02/06-759-Conf-Exp; Prosecution Submissions, fns.289,291.

⁸² Defence Observations on Second Report, paras.31,44-45.

⁸³ T-239,61:10-19; 89:11-24.

⁸⁴ Defence Submissions on Restriction, paras.51-57.

⁸⁵ First Restrictions Decision, para.51.

⁸⁶ First Restrictions Decision, para.54.

⁸⁷ Prosecution Submissions, para.81.

the Defence case [...] and for sentencing, if applicable”⁸⁸ is not notice of anything. Seeking a finding beyond reasonable doubt that Mr. Ntaganda committed an Article 70 offence in the penultimate filing in the case, on the basis of allegations that he has not had a reasonable opportunity to contest (as by calling witnesses, for example), would be unfair and inappropriate.

IV. The Prosecution’s submissions double-count abuse of authority and superior responsibility

51. The Prosecution’s⁸⁹ and Child Soldiers’⁹⁰ request that Mr Ntaganda’s sentence be aggravated by his abuse of authority and superior responsibility must be rejected.
52. All of the factors substantiating the Prosecution’s request in respect of abuse of authority relate to the manner in which Mr. Ntaganda participated in the crimes, which must be addressed as a matter of gravity. In fact, the Prosecution’s own submissions reveal double-counting: (i) the purported “endorsement of criminal conduct” described at paragraph 65 is also addressed at paragraph 53 under degree of participation and intent; (ii) the purported exercise of power to rape at paragraph 69 is elsewhere addressed at paragraphs 25 through 27; and (iii) failing to exercise powers to prevent and punish crimes at paragraph 71 is elsewhere addressed at paragraphs 50 and 51. Only the seizure of goods from subordinates, at paragraph 70, is not directly addressed elsewhere in the Prosecution’s submissions, but could and should have been addressed in paragraphs 44 through 47. Adopting the Prosecution’s analysis would lead to double-counting.
53. The proper approach is illustrated in *Lubanga*, where the Trial Chamber took into account Mr. Lubanga’s position in its discussion of gravity – in particular, how

⁸⁸ Prosecution Disclosure of Article 70 Evidence, para.18, Prosecution Submissions, para.80.

⁸⁹ Prosecution Submissions, paras.65-71.

⁹⁰ CLR1 Submissions, para.54.

Mr. Lubanga had participated in the crimes.⁹¹ The Trial Chamber rejected that Mr. Lubanga's "position as President and commander-in-chief of the UPC constitutes an aggravating circumstance" on the basis that "these factors should not be 'double-counted' for the purposes of sentence."⁹² On appeal, the Prosecution argued that the issue was not Mr. Lubanga's "position" as such, but rather the abuse of the authority associated with the position.⁹³ The Appeals Chamber rejected the Prosecution's argument, noting that the Trial Chamber had already addressed the "manner in which his authority was exercised" in its discussion of the nature of Mr. Lubanga's participation in the criminal plan.⁹⁴ The Appeals Chamber held that "the Trial Chamber did not err in not taking into account Mr. Lubanga's abuse of power as an aggravating factor when it had already considered it in its assessment of the gravity of the crime."⁹⁵

54. Similarly, Mr. Al Mahdi's position and authority as head of the "Hesbah" was not deemed an aggravating circumstance where the exercise of those powers was integral to the manner in which he had co-perpetrated the crimes:

The Chamber is not convinced by the Prosecution's submission that Mr Al Mahdi abused his power and official capacity as head of the Hesbah and that this is an aggravating circumstance. Indeed, in line with the Appeals Chamber's jurisprudence, the Chamber considers that the mere fact that Mr Al Mahdi committed the crime in this position does not as such constitute an aggravating circumstance.⁹⁶

55. Conversely, the Trial Chamber *Bemba et al.* took into account an abuse of authority where Mr. Bemba had misused his position as the president of a political party for personal purposes, namely, to encourage one witness to accept a bribe.⁹⁷ The authority was not used as an instrumentality for the co-perpetration of the offence, which meant that it had not elsewhere been taken

⁹¹ *Lubanga* SJ, para.52.

⁹² *Lubanga* SJ, para.51.

⁹³ *Lubanga* SAJ, para.83.

⁹⁴ *Lubanga* SAJ, para.84.

⁹⁵ *Lubanga* SAJ, para.85.

⁹⁶ *Al Mahdi* SJ, para.86.

⁹⁷ *Bemba et al.* SJ para.234.

into account in the discussion of his participation in the offence,⁹⁸ leaving it to be addressed as an aggravating circumstance, or not at all. The Appeals Chamber rejected the Defence's challenge to this finding.⁹⁹

56. Abuse of authority is not a way to take into account two different aspects of the same fact. This was expressly rejected by the ICTY Appeals Chamber in the *Dragomir Milošević* case:

The Appeals Chamber is not convinced by the Prosecution's argument that relying on different aspects of the same fact is permissible. In weighing a fact, either as an aspect of the gravity of the crime or as an aggravating circumstance, the Trial Chamber is required to consider and account all of its aspects and implications on the sentence in order to ensure that no double-counting occurs. The Appeals Chamber thus finds that the said facts could only be taken into consideration once – either as factors relevant to the gravity of the crimes or as aggravating circumstances.¹⁰⁰

57. The conclusion arising from these cases is that where the co-perpetration is committed through an official position, then it must be addressed as a matter of gravity. The request, accordingly, should be rejected.
58. The same double-counting is reflected in the Prosecution's request that sentence be aggravated on the basis of superior responsibility. All of the constitutive factors of superior responsibility¹⁰¹ are already addressed elsewhere in the Prosecution's submissions on the manner in which Mr. Ntaganda participated in the crimes.¹⁰² Attaching any additional weight to superior responsibility, accordingly, would amount to impermissible double-counting.

⁹⁸ *Bemba et al.* SJ, paras.219-223.

⁹⁹ *Bemba et al.* SAJ, para.159.

¹⁰⁰ *D Milošević* AJ, para.309. See *Popović* AJ, para.2026 ("A reading of the Trial Judgement reveals that *Miletić's* actions constituting these contributions generally fell within his regular duties. His key role in the JCE to Forcibly Remove was therefore inextricably linked to his position in the VRS Main Staff and this aspect was duly taken into consideration by the Trial Chamber in its findings on the gravity of the crime, even though his position and authority were not explicitly discussed. The Appeals Chamber recalls that factors considered in establishing the gravity of the crime cannot be considered again as separate aggravating circumstances. Accordingly, the Trial Chamber erred in law").

¹⁰¹ Prosecution Submissions, para.71.

¹⁰² Prosecution Submissions, paras.50-51.

V. The Prosecution and LRVs rely on harm that has not been found, and cannot be found, to have been caused by Mr. Ntaganda's crimes beyond a reasonable doubt

59. A factor in assessing the gravity of a crime under Rule 145(1)(c) is the “extent of the damage caused.” For any such harm to be taken into consideration in sentencing it must be proven beyond reasonable doubt to be attributed to the crimes for which Mr. Ntaganda has been convicted. Even in the less stringent context of reparations, “[t]he standard of causation is a ‘but/for’ relationship between the crime and the harm and, moreover, it is required that the crimes for which Mr. Lubanga was convicted were the ‘proximate cause’ of the harm for which reparations are sought.”¹⁰³ Claims by victims of material harm caused because of “upheavals to their lives brought about by the attack on Bogoro or the death of a relative in the attack” have been rejected – even applying the standard balance of probabilities,¹⁰⁴ let alone beyond reasonable doubt.
60. The more general the phenomenon of harm, the more causally complex it is, and the more improper would be a finding that such harms are causally attributed to the convicted crimes beyond a reasonable doubt. Many of the harms invoked by the Prosecution and LRV's are causally complex, especially in the context of widespread and long-last conflict, severe poverty, high mortality rates, and poor or non-existent health care. For example, the Prosecution asserts that Mr. Ntaganda: (i) bears “some”¹⁰⁵ responsibility for the ethnic divisions that persist to this day; (ii) is responsible for the vulnerability of girls to domestic abuse because years of conflict “prompted families to send only boys to school”;¹⁰⁷ (iii) the damage that P-0824 saw in Mongbwalu and Kilo,¹⁰⁸ and the poverty that he saw

¹⁰³ *Lubanga*, Order for Reparations, para.59.

¹⁰⁴ *Katanga*, Order for Reparations, para.172.

¹⁰⁵ Prosecution Submissions, para.31.

¹⁰⁷ Prosecution Submissions, para.32.

¹⁰⁸ Prosecution Submissions, paras.36,46.

elsewhere,¹⁰⁹ when he arrived there in January 2003; and (iv) the death of displaced persons from diseases arising from consuming poor quality water.¹¹⁰

61. These and other similar claims scattered throughout the Prosecution¹¹¹ and LRV's¹¹² submissions are misplaced. Mr. Ntaganda has been convicted of crimes related to two military operations spanning a period of less than 30 days in two specific areas.¹¹³ The preceding years had seen intense and widespread armed conflict on an ethnic basis in the entire region, involving numerous armed groups and national armed forces.¹¹⁴ These conflicts had massive and enduring consequences on poverty, homes, agriculture, and every aspect of the lives of the population. The only harm that can be taken into consideration for the purpose of sentencing Mr. Ntaganda, however, is that which can be attributed beyond a reasonable doubt to the specific crimes of which he has been convicted.
62. Mr. Ntaganda's crimes did not cause the ethnic divisions in Ituri; the "endemic poverty"¹¹⁵ of the region; nor even any and all damage or poverty that P-0824 saw on his first visit to Mongbwalu and surrounding areas. As the Chamber found in respect of P-0317,¹¹⁶ P-0824 was in no position to know whether the damage he saw was caused during the First Operation, or during previous conflicts. Furthermore, consequent harms – such as deaths arising from consumption of tainted water – involve intervening causation that precludes attribution beyond a reasonable doubt. No finding can be made that Mr. Ntaganda is responsible in any legal sense for these phenomena or consequences.

¹⁰⁹ Prosecution Submissions, paras.44-45.

¹¹⁰ Prosecution Submissions, para.46.

¹¹¹ ICC-01/04-02/06-T-268-CONF-ENG,7:8-8:9;10:16-20.

¹¹² ICC-01/04-02/06-T-268-CONF-ENG,19:9-10;27:10-12.

¹¹³ *See* TJ, para.33,1199.

¹¹⁴ TJ, para.21; Garreton Report, pp.10-35.

¹¹⁵ Prosecution Submissions, para.32.

¹¹⁶ TJ, fn.1809 ("The Chamber – taking into account that Bambu was attacked several times prior to the assault on or about 18 February 2003 – finds that the evidence is insufficient to show that the destruction ascertained by these witnesses was caused by UPC/FPLC troops during the charged assault on Bambu.")

63. Caution should also be exercised in attributing any and all dysfunctional behaviour of former child soldiers to their experience as child soldiers.¹¹⁸ The anecdotal descriptions offered by P-1000 are illustrative. [REDACTED].¹¹⁹ Yet the Prosecution would have the Chamber attribute to Mr. Ntaganda his subsequent “bad behaviour”¹²⁰, despite the numerous other reasonably possible causes of such behaviour. [REDACTED].¹²¹ [REDACTED]¹²² – [REDACTED].¹²³ P-1000’s opinion that ex-combatants with the FPLC had an attitude of superiority, could be easily manipulated by politicians, or that they had a tendency to become alcoholics or drug addicts¹²⁴ are likewise behaviours that are too causally complex to be attributed to enlistment as child soldiers – even assuming that any finding that they were child soldiers could be made, which it cannot. The same applies to P-0824’s observation at a CTO that included only “some” that were from UPC, implying that the majority may have been from the FNI.¹²⁵
64. P-1000’s observations on the purported indirect impact on communities of the conflict¹²⁶ are even more remote from the convicted crimes. These general observations cannot be taken as proven beyond a reasonable doubt, let alone proven to have been caused by having previously been a child soldier.
65. The claim that child soldiers “invariably”¹²⁷ suffered various harms is unsubstantiated and incorrect.¹²⁸ Some individuals may have had their relationships with their parents interrupted,¹²⁹ but others not. To be taken into account for sentencing, specificity and proof beyond reasonable doubt is

¹¹⁸ Prosecution Submissions, paras.40-43.

¹¹⁹ P-1000 Statement, para.32.

¹²⁰ *Id.*

¹²¹ *Id.* para.33.

¹²² *Id.* para.34.

¹²³ *Id.* para.35.

¹²⁴ *Id.* para.39.

¹²⁵ P-0824 Statement, para.44.

¹²⁶ Prosecution Submissions, para.31; P-1000 Statement, para.40.

¹²⁷ CLR1 Submissions, para.15.

¹²⁸ CLR1 Submissions, para.15 (relying on factual findings in the *Lubanga* SJ that are based on evidence that has not been presented by the Prosecution in this case).

¹²⁹ CLR1 Submissions, para.16.

required as to which child soldier victim purportedly suffered the harm and to what extent. Broad assertions are insufficient, especially in light of direct evidence before the Chamber that this phenomenon was not an invariable consequence of being a child soldier.¹³⁰ Even greater caution and concrete, individualized evidence is required in respect of “inter-generational” harm.¹³¹

66. The quantum of harm suffered by victims of crimes must, moreover, be measured in light of the general conditions of the time. Conditions of deprivation endured by those forcibly displaced, for example,¹³² must be measured against the general conditions of deprivation prevailing during this period that are unrelated to the crimes.
67. Furthermore, the impact of having been a child soldier must be assessed not against the backdrop of a hypothetical happy and peaceful childhood, but against the trauma-inducing conditions of the time, including the real and constant threat of Lendu combatants killing family members, and of extermination more generally.¹³³ Vague generalizations are, in this context, unsuitable as proof beyond reasonable doubt.

VI. Mr. Ntaganda did not commit crimes with particular cruelty

68. With one exception, none of the crimes cited by the Prosecution as crimes having been committed with particular cruelty¹³⁴ involved the direct participation or contemporaneous knowledge of Mr. Ntaganda. The absence of his direct participation in these events is a relevant consideration in assessing gravity.¹³⁵

¹³⁰ **P-0898**:T-154,70:20-21;72:10-15 [REDACTED]; **P-0918**:T-155,90:8-12 [REDACTED].

¹³¹ See *Katanga*, Decision on the Transgenerational Harm, paras.9-14,141-142.

¹³² Prosecution Submissions, para.20.

¹³³ TJ, paras.6,11,21,23,25; **P-0017**:T-60,66:4,64:15-17 [REDACTED]; **D-0057**:T-246,13:8-10; **P-0116**:T-196,14:10-14; **D-0038**:T-249,49:16-17,50:1-2; DRC-OTP-0109-0136, pp.0139-140; **D-0017**:T-252,85:2-7; **D-0300**:T-215,27:11-18,47:13-19; **D-0300**:T-215,47:7-12.

¹³⁴ Prosecution Submissions, paras.16-20,33-38.

¹³⁵ The Prosecution seeks to ‘double-count’ of certain acts as a question of gravity (Prosecution Submissions, paras.33-38) and as an aggravating circumstances (Prosecution Submissions, paras.16-20).

VII. The Prosecution and LRVs cite findings that have not been made beyond reasonable doubt

69. The Chamber states at the beginning of the Judgment that it applied the standard of beyond reasonable doubt “not to ‘each and every fact in the Trial Judgment’, but only to the facts constituting elements of the crime and mode of liability of the accused as charged.”¹³⁶ Therefore, not every finding – let alone every recitation of evidence – can necessarily be taken as a finding beyond reasonable doubt.
70. An example is the recitation in a footnote of P-0017’s hearsay evidence that Abelanga had raped two bodyguards who were 12 or 13 years old.¹³⁷ This footnote appears at the end of the following sentence: “As set out with more specificity in the cases discussed below, PMF’s who suffered acts of sexual violence as just described included girls under 15 years of age.”¹³⁸ Yet it is quite clear that the Chamber did not accept P-0017’s hearsay testimony as to age, finding that the “age of those victims was not established.”¹³⁹ Accordingly, this incident was excluded from the Chamber’s findings in respect of Counts 6 and 9, which are limited to exactly three victims.¹⁴⁰
71. The Prosecution nevertheless cites this allegation in support of its claim that the Chamber should take into account the exact age of victims of Counts 6 and 9 as an aggravating factor.¹⁴¹ The Prosecution, relying on the same footnote in the Judgment, also asserts that “other girls under 15” were “all raped or sexually enslaved”¹⁴² even though the Chamber expressly stated that it could make no finding in relation to these other allegations beyond a reasonable doubt.¹⁴³ These submissions – which reflect an attempt to have the Chamber take into account

¹³⁶ TJ, para.44.

¹³⁷ TJ, fn.1161.

¹³⁸ TJ, para.408.

¹³⁹ TJ, para.409, fn.1161, para.973.

¹⁴⁰ TJ, para.974.

¹⁴¹ Prosecution Submissions, para.23.

¹⁴² Prosecution Submissions, para.23.

¹⁴³ TJ, para.972.

findings that have not been established beyond a reasonable doubt – should be rejected.

72. Similarly, the Prosecution asks the Chamber to go beyond its findings that certain enlisted individuals were under 15 to make a further finding that they were “extremely young,” and to take this into account as an aggravating circumstance.¹⁴⁴ In particular, the Prosecution and the Child Soldiers ask the Chamber to now specifically find that children aged 9 or 10 were enlisted, including one of Mr. Ntaganda’s own bodyguards.¹⁴⁵
73. No such specific findings as to age are possible beyond a reasonable doubt, and have not been made in the Judgment. The Prosecution’s sentencing submissions invite the Chamber to rely on P-0017’s testimony of having seen two children whom he estimated to have been 10 or 11 years old,¹⁴⁶ despite any finding that this estimate was reliable, let alone proven beyond reasonable doubt.¹⁴⁷ P-0010 testified about a bodyguard of [REDACTED] at Mr. Lubanga’s residence,¹⁴⁸ not, as the Prosecution asserts,¹⁴⁹ at Mr. Ntaganda’s residence. In any event, this age estimate is not retained in the text of the Judgment, which is limited to a finding of “under 15 years of age.”¹⁵¹ A similar contrast between a footnote and the body of the Judgment is found in respect of P-0010’s testimony that of one of Mr. Ntaganda’s escorts was nine years old.¹⁵²
74. These estimates of age have not been, and cannot be, accepted beyond a reasonable doubt as exact. The Chamber emphasised that it applied “a large margin of error” even when testimonial estimates were accompanied by video

¹⁴⁴ Prosecution Submissions, para.22.

¹⁴⁵ Prosecution Submissions, para.22.

¹⁴⁶ Prosecution Submissions, para.22; CLR1 Submissions, para.34.

¹⁴⁷ TJ, para.446, fn.1261.

¹⁴⁸ **P-0030:DRC-OTP-2054-2951**, p.2971,1.4.

¹⁴⁹ Prosecution Submissions, para.22.

¹⁵¹ TJ, para.398.

¹⁵² TJ, para.391,fn.1115.

evidence that it could examine.¹⁵³ An even greater margin of error must apply when there is no testimonial corroboration or video evidence against which the estimate can be verified. Accordingly, the uncorroborated and unverified estimates of exact age, cited for the purpose of showing enlistment of “extremely young children” in the UPC/FPLC, cannot be accepted beyond reasonable doubt, or taken into account as an aggravating circumstance.

VIII. Mr. Ntaganda’s personal circumstances are not an aggravating factor

75. The Prosecution is wrong to have repeated its assertion that Mr. Ntaganda “did the same thing” as had occurred during the genocide in Rwanda in April to July 1994.¹⁵⁴ The scale of criminality in this case bears no comparison to Rwanda in 1994. Mr Ntaganda was a victim of those events, and he fought to end them. This cataclysmic experience coloured his outlook and influenced his subsequent actions, including in 2002 and 2003 in Ituri.¹⁵⁶ This outlook in no way excuses the crimes of which Mr. Ntaganda has been convicted, but goes some way to understanding why he would take such vigorous measures in response to widespread attacks – and open threats of extermination¹⁵⁷ – against Hema civilians in Ituri.

IX. The Child Soldiers’ submissions rely repeatedly on information not in evidence

76. The submissions of the LRV of Child Soldiers are replete with references to sources not in evidence, including a United Nations report that was submitted in

¹⁵³ TJ, para.387 (“However, on the basis of three video extracts discussed in the context of P-0010’s testimony, and recalling its finding that P-0010’s testimony on her experiences in Mr Ntaganda’s escort is credible, the Chamber, while allowing for a large margin of error, is satisfied beyond reasonable doubt that one individual identified by P-0010 as Lamama and one individual she identified as ‘one of our kadogos’, while not remembering the person’s name, who had both, according to P-0010, worked as escorts for Mr Ntaganda, were manifestly under the age of 15 at the time the relevant extracts were recorded, around February 2003.”)

¹⁵⁴ Prosecution Submissions, para.62.

¹⁵⁶ P-0769:T-120,16:2-12; D-0300:T-243,35:2-19.

¹⁵⁷ P-0012:T-164,65:8-13.

the *Lubanga* case,¹⁷¹ and to a Prosecution expert report cited in the *Lubanga* Sentencing Judgment that was not tendered in this case.¹⁷² The experience of being a child soldier is a causally complex and highly variable experience that cannot be proven beyond a reasonable doubt based on general reports, especially when they are not even in evidence. These submissions must be rejected *in limine*.

X. The Child Soldiers' Submissions concerning the numbers of Child Soldiers, and victims of Counts 6 and 9, are unsubstantiated

77. The Child Soldiers' submission that the Chamber can sentence Mr. Ntaganda on the basis of vague and open-ended estimates of the number of child soldiers illustrates the unacceptability of bending the "beyond reasonable doubt" standard. The Child Soldiers' submission that the Chamber need only give examples of victims¹⁷³ is then followed by the claim that "approximately 3,000 victims were impacted by the said crimes."¹⁷⁴ Not satisfied with this number, the Child Soldiers then claims that this still "does not reflect the full extent of the UPC/FPLC's recruitment and use of child soldiers."¹⁷⁵

78. The Chamber is invited to reject these entirely unsubstantiated claims and strictly adhere to the principle that no person may be sentenced on the basis of any fact that has not been proven beyond reasonable doubt.

79. Furthermore, the Child Soldiers claim that the Chamber should sentence Mr. Ntaganda not on the basis of the three victims of Counts 6 and 9, but rather that basis that "the total figure of victims affected by the crimes under Counts 6 and 9 is likely to be significantly higher."¹⁷⁶ The reliance on the word "likely" bespeaks

¹⁷¹ CLR1 Submissions, para.12.

¹⁷² CLR1 Submissions, para.15 (relying on factual findings in the *Lubanga* SJ that are based on evidence that has not been presented by the Prosecution in this case). See also CLR1 Submissions, fns.101-102 (referring to factual findings in the *Lubanga* SJ).

¹⁷³ CLR1 Submissions, para.7.

¹⁷⁴ CLR1 Submissions, para.33.

¹⁷⁵ CLR1 Submissions, para.33.

¹⁷⁶ CLR1 Submissions, para.53.

the insufficiency of the proof on which the Child Soldiers seek to rely. The submission should be rejected, and Mr. Ntaganda should be sentenced on the basis of the findings beyond reasonable doubt in the Judgment.

XI. The Prosecution's submission that "no significant mitigating circumstances exist" is appalling

80. As a preliminary matter, it must be recalled that mitigating factors, as opposed to aggravating circumstances are established on a balance of probabilities standard.

A. Bosco Ntaganda's good behaviour in detention

81. The Prosecution's attack on the integrity of the Registry¹⁷⁷ is unwarranted. The CCO was evidently aware of the reports that he had previously given the Chamber.¹⁷⁸ His failure to repeat this information in his conduct report in no way reflects negatively on his diligence or neutrality. The insinuation that the Detention Centre should have imposed disciplinary measures on Mr. Ntaganda in addition to the restrictions imposed by the Trial Chamber is utterly unjustified.¹⁷⁹ The Prosecution's submissions in this regard – having been placed on the record in a public filing – should be strongly rejected by the Trial Chamber.

82. The Prosecution's trivialization¹⁸⁰ of what the [REDACTED] indicates is troubling. Mr. Ntaganda went far beyond the call of duty, and far beyond what any other detainee has done. Substantial reliance has been placed on his goodwill and willingness to intervene in cases of difficulty over a long period of time. These are not matters to be casually dismissed, [REDACTED].

B. Bosco Ntaganda's cooperation with the Court

¹⁷⁷ Prosecution Submissions, paras.88-90.

¹⁷⁸ First Registry Report; Addendum First Registry Report; Second Registry Report; Fourth Registry Report; Fifth Registry Report.

¹⁷⁹ Prosecution Submissions, para.90.

¹⁸⁰ Prosecution Submissions, paras.91-93.

83. Mr. Ntaganda's cooperation with the Court is manifest. He had every right to go to trial. He engaged in the fullest form of cooperation possible in the context of a trial, namely providing testimony for 30 days. He exposed himself to all questions and, yes, to the possibility that his testimony would be deemed not credible by the Trial Chamber.¹⁸¹ These negative findings do not in all cases imply that he lied, and still less do they demonstrate that the vast majority of his extensive testimony was reliable and truthful. Denying that one is a "criminal"¹⁸² is not a mark of deceit, nor does it undermine the sincerity of his expressions of remorse for victims.

C. Bosco Ntaganda's conduct at the relevant time

84. The Prosecution entirely omits to address measures taken by Bosco Ntaganda in Mandro to: (i) protect Lendu civilians targeted by combatants of their own community,¹⁸³ and (ii) save the lives of captured APC combatants that his superior Kisembo wanted to kill.¹⁸⁴ Both are significant mitigating factors.

85. Moreover, as evinced by the testimony of D-0302 who met Bosco Ntaganda for the first time after the liberation of Bunia in May 2003, Bosco Ntaganda amended his own conduct as early as June 2003, but more particularly when he was promoted FPLC Chef d'Etat-major general.¹⁸⁵ The improvement in Bosco Ntaganda's conduct also deserves credit.

D. Bosco Ntaganda's contribution to peace and reconciliation was exceptional

86. Contrary to the Prosecution's assertion,¹⁸⁶ Bosco Ntaganda's contribution to peace and reconciliation in 2004 was in fact phenomenal. Only a few months

¹⁸¹ Prosecution Submissions, para.100.

¹⁸² Prosecution Submissions, para.104.

¹⁸³ Defence Sentencing Submission, para.115.

¹⁸⁴ Defence Sentencing Submission, para.111-112.

¹⁸⁵ DRC-D18-0002-0023, paras. 16-25, 29-34 ; DRC-D18-0002-0001, paras. 15-36.

¹⁸⁶ Prosecution Submissions, para.107.

following massacres committed by Lendu combatants – killing hundreds of civilians in many villages, including Drodro¹⁸⁷ – without retaliating as ordered by Lubanga,¹⁸⁸ Bosco Ntaganda reached out to the Lendu community to re-establish peace and security. The evidence clearly demonstrates that reconciliation between the Hema and Lendu communities on one hand, and the UPC/FPLC and FNI on the other hand, was taking place, as evinced in the testimony of D-0302¹⁸⁹, D-0303,¹⁹⁰ D-0305,¹⁹¹ D-0306,¹⁹² D-0047,¹⁹³ audio-visual documents¹⁹⁴ and Prosecution MONUC exhibits.¹⁹⁵ The evidence also establishes Bosco Ntaganda's significant involvement and contribution to peace and reconciliation.

87. Views expressed in certain MONUC documents that UPC/FPLC/FNI reconciliation was solely strategic and/or an impediment to implementation of the MONUC mandate do not undermine the reality of the reconciliation taking place. Nor does it lessen in any way the resulting advantages in terms of peace and security for all Iturians living in areas where reconciliation was taking place.
88. The Prosecution's attempt to challenge this reality by portraying Bosco Ntaganda in a negative light is unconvincing and must be disregarded. While the documents used by the Prosecution reveal Bosco Ntaganda's bad reputation in MONUC circles, they do not demonstrate Bosco Ntaganda's actual involvement in the events described therein. As evidenced by the use of terms such as [REDACTED],¹⁹⁶ [REDACTED],¹⁹⁷ [REDACTED],¹⁹⁸ [REDACTED],¹⁹⁹

¹⁸⁷ DRC-OTP-0005-0283; **D-0300**:T-243,35:2-19.

¹⁸⁸ **D-0300**:T-221,71 :15-72:6.

¹⁸⁹ DRC-D18-0002-0023, 20-24.

¹⁹⁰ DRC-D18-0002-0001, 37-40.

¹⁹¹ **D-0305**:T-266,24:3 et ss.

¹⁹² **D-0306**:T-267,12:4 et ss. DRC-D18-0001-6754.

¹⁹³ **D-0047**:T-267,48:10-16,48:20-49:2 et ss.

¹⁹⁴ DRC-OTP-0118-0002; DRC-D18-0001-0436; DRC-OTP-0127-0064.

¹⁹⁵ DRC-OTP-0004-0372, para.2; DRC-OTP-0009-0146, para.2.c,3.e.

¹⁹⁶ DRC-OTP-0009-0146, para 3.C.

¹⁹⁷ DRC-OTP-0009-0146, para.5.

¹⁹⁸ DRC-OTP-0009-0146, para.10.

¹⁹⁹ DRC-OTP-2066-0380, para.1.a.

[REDACTED],²⁰⁰ [REDACTED],²⁰¹ the probative value of these documents, admitted for sentencing purposes without the Defence being provided with an opportunity to contest the same, is very low.

89. Notably, the Prosecution entirely omits to address the main reason for Bosco Ntaganda's bad reputation in MONUC circles, namely MONUC expressly siding with Kisembo following his separation from the UPC²⁰² and Kisembo spreading false rumours about Bosco Ntaganda.²⁰³ One such rumour is particularly revealing, where Kisembo blamed Bosco Ntaganda for the ambush during which a MILOB was killed, whereas this attack on MONUC happened in Katoto at a time when forces under the command of Kisembo controlled the area.²⁰⁴ References in official MONUC documents and correspondence to open threats by Bosco Ntaganda against MONUC in a document, which was rejected by the Chamber, is also revealing.²⁰⁵
90. Contrary to the Prosecution's assertion,²⁰⁶ UPC/FPLC did not formally withdraw from all cooperation with MONUC, as evidenced by further exchange of correspondence.

E. Bosco Ntaganda's contribution to the demobilization and integration of FPLC members in the FARDC was instrumental

91. Contrary to the Prosecution's submission,²⁰⁷ the evidence establishes that many FPLC members were either demobilized or integrated in the FARDC in 2004.²⁰⁸ It also demonstrates that Bosco Ntaganda, in his capacity as Chef d'Etat-major

²⁰⁰ DRC-OTP-0009-0146, para.10.a.

²⁰¹ DRC-OTP-0007-0316, para.4.d.; DRC-OTP-1029-0465, para 8.d.

²⁰² Defence Sentencing Submissions, para.137-139.

²⁰³ DRC-OTP-0009-0146, para.4.n.

²⁰⁴ DRC-OTP-2057-0099, p.0102; **D-0047**:T-267,72:14 et ss.

²⁰⁵ DRC-OTP-0142-0038;DRC-OTP-0154-0648;DRC-OTP-2057-0099,pp.0099,0102.

²⁰⁶ Prosecution Submissions, para.108.

²⁰⁷ Prosecution Submissions, para.111.

²⁰⁸ DRC-D18-0002-0063;DRC-D18-0002-0060.

general, was responsible for and willingly implemented UPC/FPLC efforts to demobilize or integrate its members in the FARDC.²⁰⁹

92. The Prosecution's challenge based on the 7 April 2005 CIAT *communiqué*, admitted for impeachment purposes only, does not impact Bosco Ntaganda's contribution. The Prosecution's attempt to challenge this reality by portraying Bosco Ntaganda in a negative light is unconvincing and must be disregarded.²¹⁰
93. As for Bosco Ntaganda himself, not only did he integrate the FARDC in 2009, he was actually entrusted by the DRC President to oversee the integration of all CNDP members in the FARDC, choosing peace over war.²¹¹

CONCLUSION

94. The victims of the attacks LRV (but neither the prosecution nor the child soldiers) has argued briefly that Mr. Ntaganda should be given a life sentence, noting that this is the wish of "the majority"²¹² of his clients, implying that a substantial minority disagree with that request. The circumstances of this case do not rise to the level of "extreme gravity" required under article 77(b) that have characterized other cases in which a life sentence was imposed, such as for those who played "a key role in the organization and execution" of the Srebrenica genocide;²¹³ who played an influential, direct and/or zealous role in the Rwanda genocide;²¹⁴ or who were involved in a campaign of targeting the civilian population of Sarajevo in which the accused was directly involved that continued for a period of years.²¹⁵ The extreme circumstances that might justify a

²⁰⁹ DRC-OTP-0132-0324.

²¹⁰ See *supra* para.88.

²¹¹ DRC-OTP-2102-1220, paras.35,99; DRC-OTP-2102-1247,para.183; DRC-OTP-2102-1560,para.153.

²¹² CLR2 Submissions, para.63.

²¹³ See e.g. *Popović* TJ, paras. 2157,2164.

²¹⁴ *Musema* TJ, paras.1001-1004; *Gatete* TJ, paras.677-686; *Ndindabahizi* TJ, paras.508-511. Cf. *Bagosora et al.* AJ, paras.738-741.

²¹⁵ *Galić* AJ, para.455 (by a bare majority on appeal of 3-2, quashing a 20 year sentence imposed at trial).

life sentence are not present here. A sentence of no more than 23 years would be proportionate.

RESPECTFULLY SUBMITTED ON THIS 24TH DAY OF JANUARY 2020

A handwritten signature in black ink, appearing to read 'StB-'.

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands