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Date: **8 October 2019**

**TRIAL CHAMBER VI**

**Before:** **Judge Robert Fremr, Presiding Judge**
**Judge Kuniko Ozaki**
**Judge Chang-Ho Chung**

**SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO**

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

**Confidential**

# Response of the Common Legal Representatives of Former Child Soldiers to the "Submissions on sentence on behalf of Mr. Ntaganda" (ICC-01/04-02/06-2424-Conf)

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## I. PROCEDURAL HISTORY

1. On 8 July 2019, Trial Chamber VI (the "Chamber") convicted Mr Ntaganda of five counts of crimes against humanity and thirteen counts of war crimes.[1]

2. On 17, 18 and 20 September 2019, the Chamber heard the testimony of three witnesses, the parties' and legal representatives of victims' oral submissions and Mr Ntaganda's statement.[2]

3. On 30 September 2019, the Defence filed its "Submissions on sentence on behalf of Mr Ntaganda" (the "Defence Submissions")[3] and the Common Legal Representative of the Former Child Soldiers (the "Legal Representative") filed the "Observations on Sentencing on behalf of the Former Child Soldiers" (the "Sentencing Observations").[4] The Prosecution and Common Legal Representative of the Victims of the Attack also filed submissions on sentencing on the same day.[5]

## II. CONFIDENTIALITY

4. Pursuant to regulations 23*bis*(1) and (2) of the Regulations of the Court, the present response is classified as "confidential" given the original classification of the Defence Submissions.

## III. SUBMISSIONS

5. The Legal Representative welcomes the Defence's recognition that "[i]*n 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*".[6] She disagrees, however, with the suggestion that a total term of no more than 23 years would be an

[1] See the "Judgment" (Trial Chamber VI), No. ICC-01/04-02/06-2359, 8 July 2019 (the "Judgment").
[2] See P-0305: No. ICC-01/04-02/06-T-266-RED-ENG; P-0306 and P-0047: No. ICC-01/04-02/06-T-267-CONF-ENG; and oral submissions: No. ICC-01/04-02/06-T-268-CONF-ENG.
[3] See the "Submissions on sentence on behalf of Mr Ntaganda", No. ICC-01/04-02/06-2424-Conf, 30 September 2019 (the "Defence Submissions").
[4] See the "Observations on Sentencing on behalf of the Former Child Soldiers", No. ICC-01/04-02/06-2423-Conf, 30 September 2019 (the "Sentencing Observations").
[5] See the "Submissions on Sentence", No. ICC-01/04-02/06-2425-Conf, 30 September 2019 (the "Prosecution Submissions") and the "Sentencing Submissions of the Common Legal Representative of the Victims of the Attacks", No. ICC-01/04-02/06-2422-Conf, 30 September 2019.
[6] See the Defence Submissions, *supra* note 3, para. 9.

appropriate sentence in the circumstances,[7] as well as with several factual and legal points put forward by the Defence. Due to the very stringent page limit allocated by the Chamber,[8] the present observations focus on the more salient points. However, the fact that any given issue arising from the Defence Submissions is not addressed should not be understood as a concession or absence of opposition by the victims represented by the Legal Representative.

### 1. Mr Ntaganda's liability as a co-perpetrator implies a significant level of blameworthiness

6. According to the Defence, the form of liability upon which the conviction is based does not dictate the nature and degree of participation and intent of the convicted person. It further argues that there is no hierarchy of blameworthiness and that Mr Ntaganda's degree of participation must be assessed *in concreto* on the basis of the factual and legal findings contained in the Judgment.[9]

7. The Legal Representative submits that the position of the Defence, relying on the 2014 *Katanga* sentencing decision,[10] which was not reviewed by the Appeals Chamber, overlooks key subsequent developments in the jurisprudence of the Court. In particular, in its review of the sentencing decision in the *Bemba* et al. case, the Appeals Chamber emphasised that:

> "[…] *a mode of liability describes a certain typical factual situation that is subsumed within the legal elements of the relevant provision, and that the difference between committing a crime and contributing to the crime of others would normally reflect itself in a different degree of participation and/or intent within the meaning of rule 145 (1) (c) of the Rules. This however does not mean that the principal perpetrator of a crime/offence necessarily deserves a higher sentence than the*

[7] See the Defence Submissions, *supra* note 3, para. 15.
[8] See the transcript of the hearing held on 20 September 2019, No. ICC-01/04-02/06-T-268-CONF-ENG ET, p. 53, lines 1 to 4: "[…] *potential responses are expected by 8 October and the page limits for them is 35 pages for Defence, 25 pages for Prosecution and 15 pages each for the legal representatives*".
[9] See the Defence Submissions, *supra* note 3, para. 23.
[10] *Ibid*, quoting the "Decision on Sentence pursuant to article 76 of the Statute" (Trial Chamber II), No. ICC-01/04-01/07-3484-tENG-Corr, 23 May 2014, para. 61: "[a]*rticle 25 merely identifies and lists various forms of illegal conduct and, in that respect, the proposed distinction between the liability of a perpetrator of a crime and that of an accessory to a crime does not in any way amount to a hierarchy of blameworthiness, let alone prescribe, even by implication, a scale of punishments*".

> *accessory to that crime/offence. Whether this is actually the case ultimately depends upon all the variable circumstances of each individual case. In this regard, the Appeals Chamber observes that the Court's legal framework does not indicate an automatic correlation between the person's form of responsibility for the crime/offence for which he or she has been convicted and the sentence, nor does it provide any form of mandatory mitigation in case of conviction as an accessory to a crime/offence. Rather, as pointed out by the Prosecutor, the sentencing factors enunciated in the Statute and the Rules are fact-specific and ultimately depend on a case-by-case assessment of the individual circumstances of each case*".[11]

8. It follows that indeed, as argued by the Defence, the convicted person's degree of participation must be assessed primarily *in concreto*. However, the jurisprudence of the Court indicates that the various modes of liability establish the framework against which the *in concreto* analysis must be carried out. According to said framework, there is a difference in principle between committing a crime and contributing to a crime of others, a difference to the effect that: "*generally speaking and all other things being equal, a person who is found to commit a crime him- or herself bears more blameworthiness than a person who contributes to the crime of another person or persons*".[12]

9. While it is a well-established principle of just punishment that the accessory's sentence should generally be more lenient than that imposed on the principal,[13] individuals who commit the crime based on one of the modes of perpetration set out in article 25(3)(a) of the Rome Statute (the "Statute") are not accessories to a crime committed by someone else, but principals since they decide whether and how the crime will be committed. They display a higher degree of objective involvement, the

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[11] See the "Judgment on the appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled 'Decision on Sentence pursuant to Article 76 of the Statute'" (Appeals Chamber), No. ICC-01/05-01/13-2276-Red A6 A7 A8 A9, 8 March 2018, para. 80 (the "*Bemba* et al. Appeals Sentencing Decision"). See also the "Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction" (Appeals Chamber), No. ICC-01/04-01/06-3121-Red A5, 1 December 2014, para. 462 (the "*Lubanga* Appeals Judgment").

[12] *Ibid.*

[13] See *e.g.* FLETCHER (G.P.), *Rethinking Criminal Law*, Boston, Little, Brown and Co., 1978, pp. 654 *et seq*. See also See AMBOS (K.), *Treatise on International Criminal Law*, Vol. I, Oxford University Press, 2013, pp. 146-147; and OHLIN (J.D.), VAN SLIEDREGT (E.) and WEIGEND (T.), "Assessing the Control-Theory", *Leiden Journal of International Law*, Vol. 26, 2013, pp. 743-746.

extent of their contribution is more serious and so is their blameworthiness. As noted by the Appeals Chamber:

> "[…] *the Trial Chamber chose an objective criterion to distinguish commission liability from accessorial liability, as opposed to, for instance, a distinction based on the accused person's mental relationship to the crime in question. In the view of the Appeals Chamber, it is indeed appropriate to distinguish between liability as a perpetrator and as an accessory primarily based on the objective criterion of the accused person's extent of contribution to the crime. This is because the blameworthiness of the person is directly dependent on the extent to which the person actually contributed to the crime in question*".[14]

10. Indirect co-perpetrators bear the most serious degree of participation within the meaning of rule 145(1)(c) of the Rules of Procedure and Evidence; they are "principals" to the crime. In the present case, the starting point against which the specific *in concreto* factors must be assessed is that Mr Ntaganda is principal to the crime, which translates into a more serious degree of wrongdoing and blameworthiness.

### 2. Mr Ntaganda's knowledge and intent aggravate his crimes against child soldiers

11. The Defence Submissions seek to underplay Mr Ntaganda's role and his *mens rea* in relation to the crimes against child soldiers.

12. First, the Defence argues that the number of child soldiers in Mr Ntaganda's vicinity was "*limited*",[15] that none of the children in his proximity was "*extremely young*",[16] the "*youngest such person* [being] *12/13 years old*", and that therefore "*this case is entirely unlike the findings in the* Sesay *et al. case in terms of the scale and extreme youth of many of the conscripts*".[17] These arguments are squarely contradicted by the evidence and by the Judgment, which contains extensive findings as to Mr Ntaganda's degree of awareness of the UPC/FPLC's recruitment and active use of

[14] See the *Lubanga* Appeals Judgment, *supra* note 11, para. 468.
[15] See the Defence Submissions, *supra* note 3, para. 84.
[16] *Idem*, para. 75.
[17] *Idem*, para. 118.

child soldiers.[18] Several children "*manifestly under 15*" were found to have been part of Mr Ntaganda's escort,[19] including for instance a child of around 9 years of age who was "*so small he had to roll his sleeves up twice*".[20] The evidence also confirms the presence of children of 9-10 years old in the UPC/FPLC's ranks, including in Mr Ntaganda's proximity.[21] Further, the Chamber concluded that child soldiers including children aged 9 and 10 were present at Mr Thomas Lubanga's residence[22] where Mr Ntaganda attended meetings.[23] The Defence's attempt to distinguish the present case from *Sesay* et al. based on the "*extreme youth*" of the recruits, who were in that case between 10 and 12 years old,[24] is therefore misplaced. More generally, the Legal Representative wonders how much younger child soldiers may conceivably be for the Defence to concede that their recruitment and use in hostilities is of the utmost gravity. Incidentally, she recalls that according to Mr Ntaganda, there were simply no children below the age of 18 in the UPC/FPLC ranks.[25]

13. Second, the Defence alleges that Mr Ntaganda's degree of intent is diminished by "*the very short period of time that enlistment of child soldiers had been criminalized*", since – it claims – the recruitment and use of child soldiers were only codified as international crimes on 1 July 2002.[26] The Legal Representative notes that the issue of Mr Ntaganda's possible lack of notice of the criminal prohibition of recruitment and use of children under the age of 15 appears to have been raised for the first time in the Defence Submissions.[27]

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[18] See the Judgment, *supra* note 1, *e.g.* paras. 1190-1195.
[19] *Ibid*.
[20] *Idem*, para. 381 and footnote 1115.
[21] See the Sentencing Observations, *supra* note 4, para. 34 and the Prosecution Submissions, *supra* note 5, para. 22.
[22] See the Judgment, *supra* note 1, para. 410 and footnote 1133.
[23] *Idem*, para. 648.
[24] See the Defence Submissions, *supra* note 3, para. 233, citing: SCSL, *Sesay* et al. *(RUF)*, Case No. SCSL-04-15-T, Judgement, 2 March 2009, para. 1689, which refers to children between 10 and 12 years of age.
[25] See *e.g.* No. ICC-01/04-02/06-T-239-CONF-ENG CT2, p. 83. Mr Ntaganda expressed during the sentencing hearing his intention to stand by his testimony at trial, see No. ICC-01/04-02/06-T-268-CONF-ENG, p. 52, lines 4-5 ("*I do not hesitate to tell you I stand by what I said during my testimony*").
[26] See the Defence Submissions, *supra* note 3, para. 76.
[27] Mr Ntaganda testified that he received training in, and was familiar with, the laws of war, see No. ICC-01/04-02/06-T-242-red-ENG WT, p. 21 and No. ICC-01/04-02/06-T-215-ENG CT WT, p. 10). See

14. As noted by Pre-trial Chamber I in the *Lubanga* case, even prior to 1 July 2002, the date the Statute entered into force, the Hema and Lendu communities of Ituri were familiar with the Statute and the type of conduct which gives rise to criminal responsibility under it.[28] And indeed, while the International Criminal Court (the "ICC") can only exercise jurisdiction from 1 July 2002, the criminal nature of the recruitment and active use in hostilities of children under 15 was internationally recognised well before then,[29] and the relevant prohibitions achieved customary law status as of November 1996 at the latest.[30] Contrary to the Defence Submissions,[31] international criminal courts and tribunals have consistently held that even non-codified international customary law can give an individual "*reasonable notice*" of conduct that could entail criminal liability.[32]

15. Within the Court's legal framework, article 32(2) of the Statute specifies that a mistake of law shall only be a ground for excluding criminal responsibility where it negates the mental elements required by the crime. The Chamber found that the

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also No. ICC-01/04-02/06-T-268-CONF-ENG, p. 52, lines 4-5 ("*I do not hesitate to tell you I stand by what I said during my testimony*").

[28] See the "Decision on the Confirmation of Charges", No. ICC-01/04-01/06-803-tEN, 29 January 2007, para. 312.

[29] See *e.g.* article 4(c) of the Statute of the Special Court for Sierra Leone adopted on 16 January 2002; articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute, entered into force on 1 July 2002 but concluded in 1998 and signed by the DRC on 8 September 2000. See also article 77(2) of the 1977 Additional Protocol I to the Geneva Conventions (ratified by the DRC on 3 June 1982); article 4(3)(c) of the 1977 Additional Protocol II to the Geneva Conventions (ratified by the DRC on 12 December 2002); article 38(3) of the 1989 Convention on the Rights of the Child (ratified by the DRC on 27 September 1990); and the 2000 Optional Protocol to the Convention on the Right of the Child on the Involvement of Children in Armed Conflict (ratified by the DRC on 11 November 2001). The Legal Representative also notes the measures taken domestically in the DRC, already in 2000, to implement the prohibition, see Committee on the Rights of the Child, Consideration of reports submitted by States parties under article 8 (1) of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict – Democratic Republic of the Congo, UN Doc. CRC/C/OPAC/COD/1, 18 April 2011.

[30] See UN Secretary-General, Report on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, paras. 14 *et seq.*; and SCSL, *Norman*, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion based on Lack of Jurisdiction (Child Recruitment), 31 May 2014, para. 53.

[31] See the Defence Submissions, *supra* note 3, footnote 145.

[32] See *e.g.* STL, No. STL-11-01/1/AC/R176bis, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (Appeals Chamber), 16 February 2011, para. 134; and ICTY, *Milutinović* et al., Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, 21 May 2003, para. 41.

mental elements required to convict Mr Ntaganda for the relevant crimes were proved beyond reasonable doubt,[33] and the Defence has not articulated why his alleged (and unproved) mistake of law should lead to a mitigated sentence.[34]

16. Incidentally, the Legal Representative notes that Mr Ntaganda himself testified he was on notice of the prohibition to recruit child soldiers within the UPC/FPLC. Indeed, according to his testimony, very stringent physical criteria were applied to any person willingly joining the militia[35] to ensure they were not below 18 years of age. Moreover, Mr Ntaganda testified that the UPC/FPLC document dated 21 October 2002[36] and the document dated 27 January 2003 about the follow-up on demobilisation of child soldiers,[37] were just a general reminder that the recruitment of children aged below 18 was prohibited.[38]

17. Regarding the physical criteria applied, the Defence claims that Mr Ntaganda's degree of intent is reduced because he "*did at least apply a test of physical maturity in an effort to screen out the youngest recruits*".[39] The Legal Representative respectfully submits that any such screening efforts were not only manifestly inadequate to avoid the recruitment of child soldiers, but were also not consistently carried out, given the number of individuals under the age of 15 that the Chamber found to have been present within the UPC/FPLC.

18. Finally, the Defence Submissions seek to downplay Mr Ntaganda's *mens rea* with respect to the rapes and sexual slavery under Counts 6 and 9 for which he was convicted.[40] It is alleged that Mr Ntaganda lacked reproachable knowledge or that he possessed a lesser degree of intent because he was not present at the scene or

[33] See the Judgment, *supra* note 1, paras. 1169-1189.
[34] TRIFFTERER (O.) & OHLIN (J.D.), "Article 32: Mistake of fact or mistake of law", in Triffterer (O.) (Ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 3rd edition, Munich, C.H.Beck, 2016, p. 1173.
[35] See No. ICC-01/04-02/06-T-213-CONF-ENG CT, pp. 72-75. See also the Judgment, *supra* note 1, footnote 998.
[36] See DRC-OTP-0029-0274, referenced in the Judgment, *supra* note 1, para. 419.
[37] See DRC-OTP-0029-0275, referenced in the Judgment, *supra* note 1, para. 421.
[38] See No. ICC-01/04-02/06-T-239-CONF-ENG CT2, pp. 15-16, 19-20, 22-23 and 29-30.
[39] See the Defence Submissions, *supra* note 3, para. 75. See also *idem*, paras. 117-119.
[40] *Idem*, paras. 85-86 and 98.

otherwise aware of three specific incidents of rape.[41] In the view of the Legal Representative, the Judgment is clear that, "*as of at least the beginning of August 2002*",[42] Mr Ntaganda and his co-perpetrators knew that the implementation of their criminal plan would lead to the rape and sexual slavery of children under the age of 15 within the UPC/FPLC as a matter of "*virtual certainty*".[43] Rape became a "*common practice* […] *generally known and discussed within the UPC/FPLC*"[44] and Mr Ntaganda "*knew that rapes and sexual violence were occurring within the UPC/FPLC ranks, and that female recruits and soldiers under the age of 15 were not excluded from this practice*".[45] The Judgment found, as a consequence, that Mr Ntaganda "*meant for the UPC/FPLC soldiers and commanders to engage in the relevant conducts*".[46]

19. It has been established beyond reasonable doubt that Mr Ntaganda acted, with respect to these crimes, with criminal intent pursuant to article 30(2) of the Statute. In the submission of the Legal Representative, this sets out the degree of intent relevant for sentencing purposes.

20. The Defence also alleges that, although the Judgment found that "[f]*emale members of the UPC/FPLC were regularly raped*" and that "*Mr. Ntaganda raped his own bodyguards*", the only rapes that have been charged in the present case are those of individuals under 15 years of age.[47] In this regard, the Legal Representative posits that what matters is not whether Mr Ntaganda committed these crimes directly but rather whether he "*exercised control over the*[se] *crimes*" which was established in the Judgment.[48] Significantly, there is no hierarchy of gravity among the variations set out under article 25(3)(a)of the Statute,[49] direct perpetration is not inherently more

[41] *Idem*, para. 86.
[42] See the Judgment, *supra* note 1, para. 811.
[43] *Ibid.*
[44] *Idem*, para. 407.
[45] *Idem*, para. 1197.
[46] *Idem*, para. 1198.
[47] See the Defence Submissions, *supra* note 3, para. 88.
[48] See the Judgment, *supra* note 1, para. 857.
[49] See the "Judgment and Sentence" (Trial Chamber VIII), No. ICC-01/12-01/15-171, 27 September 2016, para. 60 and the Sentencing Observations, *supra* note 4, para. 18.

serious than co-perpetration or indirect co-perpetration for the purposes of sentencing.[50]

### 3. Uncharged conduct can be taken into account for sentencing

21. The Defence Submissions maintain that it would be "*inappropriate*" for the Chamber to reach findings beyond reasonable doubt on conduct for which Mr Ntaganda was not charged and to take such findings into account for sentencing purposes.[51] Said line of argument ignores the fact that the Chamber has already made findings in this sense within the Judgment, and ruled on their impact on matters pertaining to sentencing.[52] This is consistent with the approach adopted by the Appeals Chamber, confirming that criminal conduct for which the defendant was not charged can be taken into account in sentencing provided it has a "*sufficiently proximate link*" with the charged crimes.[53] International human rights case law also confirms that such findings would not infringe on Mr Ntaganda's right to be presumed innocent.[54]

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[50] In this sense, see also ICTY, *Stakić*, Case No. IT-97-24-A, Judgement, 22 March 2006, para. 380; *Vasiljević*, Case No. IT-98-32, Appeals Judgement, 25 February 2004, paras. 181-182; and *Jerusalem District Court, A-G v. Eichmann*, Case No. 40/61, Judgment, 12 December 1961, para. 197.

[51] See the Defence Submissions, *supra* note 3, paras. 27-29 and 94.

[52] See *e.g.* the Judgment, *supra* note 1, footnote 3238 ("*The Chamber has previously ruled on the admissibility of evidence related to Mr Ntaganda's personal conduct amounting to acts of rape and/or sexual slavery (T-29, page 59; Decision 968; T-46, page 19). Notably, on 30 October 2015, the Chamber dismissed a Defence challenge seeking clarification that such evidence was not admissible. On this occasion, the Chamber indicated the following: 'It is undisputed that Mr Ntaganda has not been charged as a direct perpetrator with the crimes of rape and sexual slavery. However, the Chamber finds unpersuasive the submission that evidence of the type challenged by the Defence does not have relevance to the confirmed charges. As indicated by the Presiding Judge in his oral ruling, there is a connection between this type of evidence and the charges. Indeed, the conduct of an accused, in particular during the temporal period of the charges, has sufficient potential relevance, including in relation to various modes of liability and to mens rea' (Decision 968, para. 13). In line with this guidance, the Chamber found beyond reasonable doubt that Mr Ntaganda had forced sexual intercourses with many female members of his personal guard (see above para. 407). The Chamber notes that, notwithstanding the fact that this material does form a necessary part of the present case, Mr Ntaganda received full disclosure of the relevant material, prior to the start of the trial, and was thereby put on adequate notice of potential use of this evidence to support the charges brought against him, the Chamber finds it appropriate to rely on acts of rape performed by Mr Ntaganda on his personal bodyguards in its assessment of the mental elements required for his principal liability as an indirect co-perpetrator of the war crimes of rape and sexual slavery.*").

[53] See the *Bemba* et al. Appeals Sentencing Decision, *supra* note 11, para. 115.

[54] See *e.g.* ECtHR, *Göktepe v. Belgium* (App. No. 50372/99), Arrêt, 2 June 2005; and *Delespesse v. Belgium* (App. No. 12949/05), Arrêt, 27 March 2008.

22. The same approach applies in relation to rapes and sexual slavery perpetrated against UPC/FPLC recruits who could not be proved beyond reasonable doubt to be under the age of 15, including the rapes committed by Mr Ntaganda personally. While not covered by the charges, the Chamber should take the relevant evidence into account for sentencing. Further, the Defence's suggestion that these are not "*international crimes*"[55] conflicts with a clear ruling by the Appeals Chamber on said point[56] and must therefore be dismissed.

### 4. The recruitment and use of child soldiers was widespread

23. The Legal Representative reiterates that the UPC/FPLC's recruitment and use of children between 6 August 2002 and 31 December 2003 was widespread.[57] The Defence Submissions refer to the findings to this effect by the *Lubanga* Trial Chamber, endorsed by the Appeals Chamber, and note the similar formulation adopted by the Chamber in the Judgment.[58]

24. However, under the guise of seeking "*precision*" on the Chamber's findings, Mr Ntaganda now advances a number of arguments in a last-ditch attempt to convince the Chamber that the presence of individuals under 15 in the UPC/FPLC was not widespread.[59] To the extent this constitutes an impermissible attempt to re-litigate matters decided in the Judgment,[60] the Legal Representative does not deem it necessary to respond to each argument individually.

25. Nevertheless, the Legal Representative must stress that she opposes in the strongest terms the Defence's insinuation that three of the witnesses who testified at

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[55] See the Defence Submissions, *supra* note 3, para. 88.
[56] See the "Judgment on the appeal of Mr Ntaganda against the 'Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9'" (Appeals Chamber), No. ICC-01/04-02/06-1962 OA5, 15 June 2017, paras. 63-64. See also the Sentencing Observations, *supra* note 4, paras. 55 *et seq*.
[57] See the Sentencing Observations, *supra* note 4, paras. 30-33 and the "Closing brief on behalf of the Former Child Soldiers", No. ICC-01/04-02/06-2276-Conf-Corr, 8 October 2018, paras. 70-74 (the "Child Soldiers Closing Brief").
[58] See the Defence Submissions, *supra* note 3, paras. 68-69 and 83 *et seq*.
[59] *Idem*, paras. 70 *et seq*.
[60] See *e.g.* the Judgment, *supra* note 1, paras. 347 and 362.

trial "*were lying*" and that, by implication, former child soldiers would be generally "*willing to lie*" in the hope of securing reparations from the ICC.[61] The fact that the Chamber was not able, based on the totality of the evidence, to reach a conclusion to the stringent 'beyond reasonable doubt' standard on some of the witnesses' age does not mean, as the Defence claims, that those witnesses lied.[62] On the contrary, the Chamber's careful assessment of the age of potential victims, including by allowing for a "*large margin of error*",[63] render its finding that the "*UPC/FPLC extensively recruited individuals of all ages, in particular 'young people', including individuals under the age of 15*" unassailable.[64]

26. Further, the Defence claims that Mr Ntaganda "*intervened to prevent the training of individuals whom he perceived to be too young*"[65] and these "*efforts – albeit inadequate – to exclude those who were manifestly too immature to be enlisted as solider should be accorded some weight in mitigation*".[66] Mr Ntaganda has not been convicted for his lone failure to prevent the crimes. Rather, said failure was only one of the manners in which he contributed to the crimes charged.[67] This assertion by the Defence, involving at most one isolated instance where Mr Ntaganda is said to have been present (from a distance) when two children were allegedly turned away because of their size,[68] cannot mitigate the sentence given the extent and continuous recruitment of child soldiers of which he has been found guilty beyond reasonable doubt.[69]

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[61] See the Defence Submissions, *supra* note 3, paras. 72-73.
[62] For instance, in relation to P-0758, the Chamber noted the unreliability and internal inconsistency of the records presented at trial and concluded that "*while mindful that the witness may have faced particular difficulties in remembering specific dates and timeframes, including in light of her increased vulnerability, it cannot be established beyond reasonable doubt that the witness was under 15 years old when she joined the UPC/FPLC*". See the Judgment, *supra* note 1, para. 158.
[63] *Idem*, paras. 387-388.
[64] *Idem*, para. 347.
[65] See the Defence Submissions, *supra* note 3, para. 116.
[66] *Idem*, para. 119.
[67] See the Judgment, *supra* note 1, footnote 2330 referring to the "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda" (Pre-Trial Chamber II), No. ICC-01/04-02/06-309, 9 June 2014, para. 108 and the "Updated Document Containing the Charges", No. ICC-01/04-02/06-458-AnxA, 16 February 2015, paras. 126-131.
[68] See the Judgment, *supra* note 1, footnote 966.
[69] *Idem*, para. 1112 and p. 529.

### 5. The brutal treatment and severe punishments in training camps give rise to the aggravating circumstance of "particular cruelty"

27. Contrary to the Defence's arguments,[70] the extreme brutality of the treatment to which child soldiers were subjected in the UPC/FPLC training camps justifies the application of the aggravating circumstance of "*particular cruelty*".[71]

28. First, the Defence argued that "*this treatment does not appear to have been especially targeted at child soldiers*".[72] The Legal Representative does not dispute that, as stated in the Judgment, the brutal punishments and abysmal living conditions applied to UPC/FPLC recruits regardless of their age.[73] The application of the aggravating circumstance of particular cruelty does not require, however, that child soldiers be deliberately targeted or singled out for ill-treatment.[74]

29. Second, the Legal Representative opposes the Defence's preposterous claims that that the ill-treatment to which her clients were subjected was in fact for their own "*protection*" and to "*instil discipline*" among recruits otherwise prone to indiscipline.[75] These claims are belied by the gratuitous and arbitrary nature of the punishment meted out on UPC/FPLC recruits, including those under the age of 15, who – as found by the Chamber in the Judgment – were "*beaten by the instructors without any apparent reasons*".[76]

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[70] See the Defence Submissions, *supra* note 3, paras. 77-78.
[71] See the Sentencing Observations, *supra* note 4, paras. 25-29.
[72] See the Defence Submissions, *supra* note 3, para. 77.
[73] See the Judgment, *supra* note 1, para. 377.
[74] See *e.g.* the "Decision on Sentence pursuant to Article 76 of the Statute" (Trial Chamber I), No. ICC-01/04-01/06-2901, 10 July 2012 (the "*Lubanga* Sentencing Decision"), paras. 57-59 and the "Decision on Sentence pursuant to Article 76 of the Statute" (Trial Chamber III), No. ICC-01/05-01/08-3399, 21 June 2016 (the "*Bemba* Sentencing Decision"), paras. 44-47, making no reference to such a requirement. See rule 145(2)(b)(v) of the Rules of Procedure and Evidence, providing for separate aggravating circumstances in case of crimes committed for any motive involving discrimination based on prohibited grounds including age. The Legal Representative has not invoked the application of said aggravating circumstance.
[75] See the Defence Submissions, *supra* note 3, para. 77.
[76] See the Judgment, *supra* note 1, para. 377.

### 6. Inapplicability of mitigating circumstances invoked by Mr Ntaganda

30. None of the circumstances put forward in the Sentencing Submissions justify a mitigation of the sentence imposed on Mr Ntaganda. The Legal Representative opposes, in particular, the Defence's claim of mitigation based on the fact that Mr Ntaganda is a husband and a father, and a long period of detention would disrupt his family life.[77] This argument is not only of limited, if any, relevance for the purposes of sentencing,[78] but also an affront to the suffering of the many child soldiers who, through no fault of their own, had their family life and childhood destroyed by the UPC/FPLC, and to all those parents who lost their children to the UPC/FPLC, or lost any possibility of relationship with them.

31. Further, the Defence claims that Mr Ntaganda's "*not venal or vicious*" motives in perpetrating the crimes, including his experience during the Rwandan genocide and his desire to protect the Hema community "*should be considered in substantial mitigation*".[79] The Legal Representative recalls that international criminal tribunals have recognised that a variety of motives, including for instance sadism and desire for revenge or group hatred, constitute aggravating circumstances.[80] The alleged absence of such motives on Mr Ntaganda's part, and the fact that he committed recruitment, active use in hostilities, rape and sexual slavery against child soldiers allegedly just as a step in the pursuit of the co-perpetrators' broader plan, may at most determine the inapplicability of the relevant aggravating circumstance, but does not constitute ground for mitigation.

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[77] See the Defence Submissions, *supra* note 3, para. 156.
[78] See *e.g.* the "Decision on Sentence pursuant to article 76 of the Statute" (Trial Chamber II), No. ICC-01/04-01/07-3484-tENG-Corr, 23 May 2014, paras. 88 and 144 and *Bemba* Sentencing Decision, *supra* note 74, para. 78.
[79] See the Defence Submissions, *supra* note 3, paras. 103-110.
[80] See *e.g.* ICTY, *Nikolić*, Case No. IT-94-2-S, Sentencing Judgment, 18 December 2003, para. 213; *Delalić* et al., Case No. IT-96-21-T, Judgment, 16 November 1998, paras. 1235 and 1264; and *Blaškić*, Case No. IT-95-14-A, Appeal Judgement, 29 July 2004, para. 695. See also rule 145(2)(b)(v) of the Rules of Procedure and Evidence, providing for an aggravating circumstance for cases where the crime was committed with discriminatory motives.

32. More broadly, the Legal Representative urges the Chamber to use caution in considering the Defence's leitmotiv, throughout the proceedings, that Mr Ntaganda was a hero moved at all times by noble sentiments and pursuing a just cause. The Legal Representative refers, in particular, to the SCSL Appeal Chamber's conclusion that the "*motivations of a combatant do not alter the demands on that combatant to ensure their conduct complies with the law*" and that "[a]*llowing mitigation for a convicted person's political motives, even where they are considered by the Chamber to be meritorious, undermines the purposes of sentencing rather than promotes them* [and] *provides implicit legitimacy to conduct that unequivocally violates the law*".[81]

33. The ICTY Appeals Chamber held, along similar lines, that:

> "*The sentencing purpose of affirmative prevention appears to be particularly important in an international criminal tribunal, not the least because of the comparatively short history of international adjudication of serious violations of international humanitarian and human rights law. The unfortunate legacy of wars shows that until today many perpetrators believe that violations of binding international norms can be lawfully committed, because they are fighting for a 'just cause'. Those people have to understand that international law is applicable to everybody, in particular during times of war. Thus, the sentences rendered by the International Tribunal have to demonstrate the fallacy of the old Roman principle of* inter arma silent leges *(amid the arms of war the laws are silent) in relation to the crimes under the International Tribunal's jurisdiction*".[82]

34. In the specific context of the UPC/FPLC's recruitment and active use of child soldiers, the *Lubanga* Trial Chamber refused to apply a mitigating circumstance on said basis, noting "[t]*he critical factor is that, in order to achieve his goals, he used children as part of the armed forces over which he had control* […] *whether or not Mr Lubanga genuinely feared attacks by others, his response should not have included using children as*

[81] See SCSL, *Fofana and Kondewa*, Case No. SCSL-04-14-A, Appeal Judgment, 28 May 2008, paras. 530-534.
[82] See ICTY, *Kordić and Čerkez*, Case No. IT-95-14/2-A, Appeal Judgement, 17 December 2004, para. 1082 (further references omitted).

*part of the armed wing of the UPC*".[83] The Legal Representative respectfully invites the Chamber not to depart from this approach.

## IV. CONCLUSION

35. As recognised by the Defence, "[i]*n 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*".[84] The Legal Representative stands by her position, as expressed in the Sentencing Observations, that the appropriate sentence to be imposed based on the gravity of the crimes, the application of several aggravating circumstances and the absence of mitigating circumstances is imprisonment for 18 years for conscripting children under the age of 15 (Count 14); 18 years for enlisting children under the age of 15 (Count 15); 20 years for using children under the age of 15 to actively participate in hostilities (Count 16); 30 years for the war crime of rape (Count 6); and 30 years for the war crime of sexual slavery (Count 9).[85]

Respectfully submitted,

Sarah Pellet
Legal Representative of the
Former Child Soldiers

Dated this 8th day of October 2019

At The Hague, The Netherlands

[83] See the *Lubanga* Sentencing Decision, *supra* note 74, para. 87.
[84] See the Defence Submissions, *supra* note 3, para. 9.
[85] See the Sentencing Observations, *supra* note 4, paras. 61-62.