

Ntaganda is sentenced to 30 years

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By: James Hendry

Bosco Ntaganda was sentenced to 30 years based on eighteen charges arising from attacks made on Lendu people in the Ituri region of the Democratic Republic of the Congo in 2002 and 2003. This Journal published a commentary how-bosco-ntaganda-was-convicted-as-an-indirect-co-perpetrator-in-eighteen-crimes and later early-submissions-about-how-ntaganda-reparations-hearings-should-proceed. This comment will explore the Trial Chamber's reasons for his 30-year sentence.

The 30-year sentence is the highest meted out so far by the Court out of four such decisions involving substantive crimes, namely 14 years for Lubanga in 2012, 12 years for Katanga in 2014 and Al-Mahdi to nine years in 2016. It was a challenge to the Chamber to sentence Ntaganda for his conviction of 18 crimes committed by many soldiers under his joint command over almost one and a half years and a

large amount of territory. The crimes were often proved by their effects on a few specific victims, while the evidence often established that they were among many others who suffered the same fate.

Goals of sentencing

The Chamber initially outlined the legal framework for sentencing for its discretion in the Rome Statute contained in articles 76-8 and Rule 145-7, describing it as a 'comprehensive scheme for the determination of a sentence' based on the values of ending impunity and preventing crime (para. 8). However, the Chamber noted that the Rome Statute did not expressly state the purpose of punishment, but it concluded that the primary objectives were retribution and deterrence (for a general overview of this practice, see here). The Chamber referred to the Katanga sentencing decision at para. 38 which described the purpose of sentencing as the expression of society's condemnation of the act and perpetrator, deterrence, recognizing the perpetrator's culpability while contributing to the peace of the affected communities and easing the perpetrator's reintegration into society to the extent a sentence could (para. 9). The Chamber said that it did not interpret retribution as revenge, but as an expression of international condemnation of the crime; the harm to victims was acknowledged by a proportionate sentence; and that the principle of deterrence was aimed at the perpetrator and was also meant to deter future crime. The Chamber acknowledged that retribution was a relevant purpose for sentencing but observed that it should not be given 'undue weight' footnoting para. 38 of Katanga's case for the proposition that sentencing, particularly at the international level, cannot ensure social reintegration (para. 10).

Sentencing principles

The Chamber noted that it had considerable discretion in sentencing. However, it decided to review the principles that governed it starting with article 78(1) (emphasizing that it must consider factors such as the gravity of the crime and the individual circumstances of the perpetrator) and the purpose of retribution in sentencing meant that a sentence must be proportionate to the culpability of the perpetrator and therefore to the gravity of the crime (para. 11). It stated that it would assess the gravity of the crimes at two levels. First, it would assess the gravity of the crime in *abstracto* by considering the elements of the crime and the mode of liability. Second it would individualize the penalty by assessing gravity in *concreto* in the circumstances of the case by looking at the harms caused and the culpability of the perpetrator primarily as established in the conviction decision (para. 11). This involved looking at the particular circumstances of the case from a qualitative and quantitative standpoint taking into account the gravity of the crimes – the circumstances of the acts constituting the elements of the offence – and the gravity of the culpable conduct – for example, the conduct constituting the elements of the mode of liability (para. 16). It also said that it would consider the factors in Rule 145(1)(c) (extent and particularity of harms, the nature of the conduct, the means employed, the perpetrator's intent and degree of participation, the circumstances of the crimes and the perpetrator himself) and other relevant factors (para. 16). The Chamber added that individualizing the sentence also involved balancing aggravating and mitigating factors (para. 12). The Chamber said that some factors might come up for consideration in various places in the sentencing decision and so it

would identify these factors and attach appropriate weight to them in determining the sentence but would count such factors in the sentence calculus only once (para. 13).

The Chamber said that the issue of gravity of crimes may vary according to their object: crimes against the person are graver than those against property (para. 14).

The Chamber noted that the Rome Statute did not pre-establish a hierarchy among modes of liability and so it would assess the level of culpability for sentencing purposes based on the perpetrator's degree of participation and intent in the circumstances. The Chamber said that it would treat all the modes of liability under article 25(3)(a), direct, co-perpetration and indirect co-perpetration as amounting to principal perpetration (para. 15).

The Chamber noted that some aggravating factors would come up in the assessment of gravity, but Rule 145(2)(b) enumerates an open list of aggravating factors such as prior convictions, abuse of power, the defencelessness of the victims, cruelty or multiple victims, discrimination and other similar circumstances. Aggravating factors must be proximately related to the crimes. The Chamber also noted that 'uncharged offences' should not be considered even though these crimes had been established at trial (para. 18). The Chamber also noted that a legal element of a crime or mode of liability cannot be used as an aggravating factor, so Ntaganda's conviction for enlisting and using children under 15 in hostilities would not allow it to consider the victims being under 15 as an aggravating factor (para. 20).

The Chamber also discussed taking mitigating factors into account, including those in Rule 145(2)(a), such as mental capacity, duress, or the perpetrator's conduct after the act but noted that these factors do not lessen the gravity of the offence.

Organizing the sentencing in this case

The Chamber decided to deal with the Ntaganda's 18 convictions in groups determined by their common protected interests. Thus, crimes against life (counts 1-3), sexual violence (rape and sexual slavery)(counts 4-9), crimes against property or civilian objects (counts 11, 17-8), persecution (count 10) and recruitment of children under 15 into the Patriotic Force for the Liberation of the Congo (UPC/FPLC) and their use in hostilities (counts 14-6) would be assessed jointly (para. 30). The Chamber also thought it fair to consider that, while murder, rape, sexual slavery were war crimes and crimes against humanity with their own contextual elements, the convictions were based on the same underlying actions (para. 31).

On the general issue of the concrete evaluation of culpability, the Defence argued that Ntaganda was less involved in some attacks than others and so his degree of participation and intent should be assessed differently for the various parts of the conflict. The Chamber responded that the degree of his intent throughout the campaign was the same as his co-perpetrators who commanded their troops to carry out the perpetrators' shared purpose to expunge the Lendu from the localities attacked. And, though his proximity to some of the attacks was less than to others, his sharing the common purpose

which lead to the same conduct by his troops throughout the attacks did not lessen his degree of participation, even where his personal participation in the attacks was less intense than his other co-perpetrators (para. 34). The Chamber assessed his culpability for crimes committed throughout to be high and not diminished by lack of proximity to the fight (para. 36).

The Chamber went though the groups of crimes to be considered jointly.

Murder

With respect to the crimes of murder, attempted murder and intentionally attacking civilians (counts 1,2,3) Ntaganda had been found liable as a direct perpetrator in one murder and as indirect co-perpetrator in many others.

In assessing the gravity of the crimes in the abstract, the Chamber held murder as a loss of life was one of the most serious crimes ended lives and caused significant grief to the families and friends of the victims (para. 44). The Chamber assessed the crime of intentionally attacking civilians to be less serious than murder in the abstract because it did not require proof of harm (para. 53).

In the concrete circumstances, Ntaganda personally killed a priest and he and his co-perpetrators' forces killed 73 victims and attempted to murder another five, along with what the Chamber had found as 'murders of unquantified numbers of persons'. The Chamber assessed the scale of the crime of murder as large (para. 47) leaving many dead and many others traumatised (para. 49).

Ntaganda's degree of participation and intent in the murders was substantial (para. 67). He intended to kill the priest himself and intended to kill Lendu civilians throughout as part of the plan he executed with his co-perpetrators (paras. 58-9). Ntaganda had commanded operations to carry out the co-perpetrators' joint plan, ordered civilians killed and endorsed the murderous acts of his soldiers by his personal conduct. The Chamber held that the intensity of his involvement and proximity to many of the murders increased his culpability (para. 62). The Chamber found that his degree of participation and intent to be substantial considering his planning and subsequent approval of the murderous acts of the direct perpetrators, even considering his lesser proximity to some of the attacks (para. 67).

The Chamber then considered that he had been convicted of intentionally attacking civilians committed in achieving the purposes of the joint plan, therefore establishing his intent that they be attacked (para. 68). In the circumstances, the use of heavy weapons and the common practice of soldiers firing on civilians made it a large-scale crime (para. 56). The Chamber held that the circumstances showed that his role in planning, supervising and carrying out the common purpose through his troops involved attacks on Lendu civilians, which he subsequently endorsed, meant he had a substantial level of culpability, increased by his proximity and intense involvement to some of the attacks (para. 77).

The murders were aggravated by their cruelty and brutality (para. 81). Many victims were particularly defenceless (para. 82). The clear message he sent to his troops as a high-ranking commander by

killing a priest himself aggravated his culpability for that crime (para. 83). The Chamber held that the discriminatory intent of the crimes against the Lendu of which he was part could not be an aggravating circumstance here because it had been considered already in assessing the common plan and mode of liability, but it was an aggravating factor in the case of the priest who was targeted on ethnic grounds (para. 84). The Chamber also held that the fact that some of the civilians intentionally attacked were killed as a result was an aggravating factor (para. 85).

The Chamber sentenced him to 30 years for the murders and attempted murders and 14 years for intentionally attacking civilians.

Rape and sexual slavery

Ntaganda was convicted as indirect co-perpetrator of rapes and sexual slavery by the UPC/FPLC of civilian women and girls as well as female members of the UPC/FPLC under the age of 15 (count 6 and 9). The Chamber decided to consider the two groups of victims separately. Once again, because of the overlap of some of the conduct underlying rape and sexual slavery, it would only consider the additional element of power of ownership for the charges of sexual slavery. It would also consider that the same conduct underlay the war crimes and crimes against humanity of rape and sexual slavery.

In considering the gravity of the crimes, the Chamber noted that the Rome Statute and Rules recognized the special status of these violent crimes, especially when children were victims (para. 95). The Chamber noted that this continued the recognition of the extreme gravity of such crimes from the international criminal tribunals in Kunarac, para. 655 and Mucic, para. 495. In the circumstances, the Chamber noted that it made findings of 21 specific and ‘an unquantified number of persons’ of rapes (including some of men) leading it to conclude the scale of rape was significant (para. 98). The rapes were carried out under threat of and actual violence, which the Chamber said it would consider only as an issue of gravity because the same evidence had been used to establish the coercive nature of the rapes and could not be used again as an aggravating factor (fn. 256). There were two specific findings of sexual slavery where the victims were subject to loss of liberty for weeks. Generally, the Chamber found physical, psychological, and social harms including stigmatization and social rejection suffered by the victims, shared with the family members and communities (para. 102). There was evidence that female victims had a hard time reintegrating into their families because of loss of their self-respect, that of their families and potential partners, they testified that they always suffered stigmatization and ‘lesser status’, would have difficulties finding a husband and often would hide the rape to avoid these consequences (paras. 105-7, fn. 288).

The Chamber then considered the evidence of rape and sexual violence against members of the UPC/FLPC that it had considered in assessing the gravity of the crimes, notwithstanding the numbers were ‘not representative of the number of female UPC/FPLC’ victims’ (para. 108). The Chamber noted that this violence took place in the coercive context of training camps and active hostilities, with the same resulting harms as for civilian victims (paras. 111-13). However, it did not consider the inter-generational harms of the sexual crimes because of the difficulty of proving this harm on a reasonable

doubt standard and the general nature of the way it was argued by the Legal Representatives of the Victims (fn. 317).

In considering Ntaganda's degree of participation as indirect co-perpetrator in the war crimes and crimes against humanity of rape and sexual slavery, the Chamber noted his contribution to the commission of these crimes was part of the joint goal with his co-perpetrators. More specifically, it noted that he was present when some of the rapes occurred. The Chamber also considered the way rape and sexual violence were used as tools in the objective to destroy the Lendu community and that the intent to achieve this goal involved killing and rape (para. 116). The Chamber assessed his degree of culpability as substantial, increased by his proximity to many of the rapes (para. 117).

In considering the sexual violence crimes against female members of the UPC/FPLC under 15, the Chamber noted that it had found Ntaganda was aware that in the ordinary course of events and during the relevant period, the implementation of the criminal plan would lead to sexual crimes within the militia itself. The Chamber noted that because this was a consequence of the plan it satisfied a lower degree of intent than required for sexual crimes against civilians (para. 118). Due to Ntaganda's participation in the recruitment and training of the UPC/FLPC and the control over the crimes committed during the campaigns, it concluded he knew these sexual crimes were being committed, were not punished and that he had even participated in them and so had not provided a safe environment for the female members of his force (para. 119). The Chamber noted that Ntaganda was not convicted for rape directly but had considered the fact of his involvement in assessing the mens rea for these crimes and so did not consider it an aggravating factor (fn. 331). It also considered his abuse of his position of authority and control (fn. 332).

The Chamber considered the facts that the victims of sexual violence among civilians were young as an aggravating factor as well as the repeated victimization and cruelty practised on them. The Chamber did not consider the coincidence of sexual violence with murders nor the discriminatory intent (being Lendu) involved because the first was considered with the crimes of murder and the latter as part of the mode of liability in the aggravation assessment (paras. 124-5).

The Chamber considered the age of the victims and vulnerability and repetition as aggravating factors in the case of female members of the UPC/FPLC, though not the fact of being under 15, which was an element of these crimes (para. 126). The Chamber refused to accede to the Prosecutor's argument that all rapes should be considered in aggravation because they had not been included in the charges and so did not have a sufficient link to the crimes proved against Ntaganda (paras. 128-9).

The Chamber assessed 28 years for the rapes and 12 years for the sexual slavery of civilians, 17 years for rapes of female members of the UPC/FLPC and 14 for sexual slavery.

Pillage, attacking protected objects and destroying adversary's property

The Chamber distinguished between the gravity of crimes against persons and against property, which are generally less grave (para. 136).

In the abstract, destruction of houses deprives civilians of private space, shelter and security. The crime of directing an attack against protected property comes from the law of war's general prohibition of attacking civilian objects and some acts specifically noted in article 8(2)(e)(iv), including medical facilities and schools that are especially important for civilian welfare, make such a crime more grave than attacking regular civilian objects, especially when medical facilities are needed in time of conflict (para. 138).

In the circumstances, the pillaged property often represented all a families' possessions affecting their food and livelihood. It was committed on a significant scale and so of serious gravity. So too was the attack on the medical facilities in one town. Houses and buildings were destroyed in many towns over a large geographic area on a significant scale. The Chamber accused the Defence of impropriety in arguing that the houses could be rebuilt in a day, because the point of the law was to protect a home and the disruption of the inhabitants' lives, not the quality of its construction (para. 146). The Chamber considered the fine detail of the harms: a Land Rover at Ntaganda's house was not considered an appropriation because it had not been proved to be for private and personal use (para. 150).

The Chamber found Ntaganda's degree of participation and intent to amount to substantial culpability, intensified by his direct involvement in some actions (para. 149). He was convicted as an indirect co-perpetrator for pillage, intentionally directing attacks against a protected object and destroying adversary's property as war crimes in the course of his campaigns of attacking Lendu and killing them and destroying their property as encompassed by his order to use the 'kupiga na kuchaji' tactic which was understood by his soldiers to encompass both actions (para. 148).

The Chamber did not consider the discriminatory intent against the Lendu as an aggravating factor because it had been considered in assessing mode of liability (para. 151). The Chamber did not consider the damage to the targeted Sayo health centre as an aggravating factor because it was not proved the damage was caused by the crime, but it did hold that the fact that seriously injured men and a Lendu woman and child were left behind defenceless and without medical care was an aggravating factor (para. 154).

The Chamber sentenced him to 12 years for pillage and 15 for destruction of adversary's property and 10 for the attack on the one health centre.

Forcible transfer of population and ordering the displacement of civilian population

In the abstract, the Chamber found that the prohibition of forcible transfer as a crime against humanity is to protect the right of individuals to stay in their homes and communities and a serious crime (para. 158).

In the circumstances, the Chamber considered only the additional element of forcible transfer because it had already considered the coercive acts that caused it (para. 159). It concluded that the number of people transferred to be significant based not on the proof of those numbers, but rather based on the number of localities affected (para. 160). The Chamber noted that the multi-layered victimizing of

some of the victims had already been considered in the sentence related to the causal coercive measures (fn. 413). Some victims were forced to move repeatedly, many were forced to live in the bush without adequate sustenance and the Chamber rejected the Defence argument that living conditions were harsh everywhere and so the forcible movement was not severe (para. 162).

In the abstract, the war crime of ordering the displacement of a number of members of a civilian population protected the same interests as forcible transfer, though the crime did not require proof that the displacement actually occurred and so the Chamber thought it less serious than the latter where the actual harms must be proved (para. 163).

In the circumstances, Ntaganda's orders and those of his commanders in their campaigns were to attack the *Lendu 'kupiga na kuchaji'* to drive them out (paras.164-5). Though an indirect co-perpetrator, he shared the joint goal to drive the Lendu from targeted localities. Ntaganda on at least one occasion gave the order himself. The Chamber found his culpability substantial, with his proximity in some cases to making it worse (para. 168).

The Chamber did not consider his discriminatory intent as aggravating for either of these crimes because it was considered in determining the mode of liability, nor did it consider the actual transfer as aggravating the crime of ordering displacement where it might have been considered as it was not an element of the offence because it was considered in the assessment of culpability for forcible transfer (para. 170). Thus, there were no aggravating factors.

The Chamber found his culpability to be substantial and ordered a sentence of 10 years for forcible transfer and eight for ordering displacement (para. 173).

Persecution

In the abstract, the Chamber viewed persecution as one of the most serious crimes against humanity because it protects individuals from discrimination based on grounds including ethnicity, a fundamental value in international law to belong to a particular group (para. 175).

Though this crime recognizes the dimension of discrimination in the other crimes in this case the discriminatory aspect of the common plan was considered in establishing the mode of liability for the crimes committed by Ntaganda and so there were no additional elements to be added here.

The Chamber gave him a 30-year sentence for the persecution that underlay every separate crime, taking into account that the sentence for persecution could not be higher than the one imposed for any underlying crime pursuant to article 78(3) (para. 177).

Conscripting and enlisting children under 15 into armed forces and hostilities

In the abstract, the Chamber was of the view that conscripting and enlisting children was very serious, because it subjected them to combat and risk to life and limb. Their vulnerability required protection

beyond that accorded to the general population (para. 179). Child soldiering presented some specific issues. The Chamber did not agree with the Defence arguments about different cultural attitudes to age and cases of recruits lying about their age because the crime was specifically meant to protect children who might not act in their best interests in situations of economic hardship (fn. 452). The Chamber also noted that while conscription involved coercion unlike enlistment, it may be difficult to distinguish between voluntary and forced joining an armed force since children may be unable to give proper consent (para. 180).

In the circumstances, the Chamber noted the argument made by counsel for victims that the number of proven victims did not reflect the full extent of the UPC/FLPC's use of child soldiers but said that it had to rely on evidence established beyond reasonable doubt (para. 182). It also noted that it had not made findings about the exact number of child soldiers. However, it did consider the established facts that families were forced to provide children for military service, that child soldiers were involved in conflict over 17 months throughout Ituri, that Ntaganda and other commanders had escorts under 15, some former child soldiers had testified they were under 15, that unspecified numbers of under-15s had fought (killing and being killed and having difficulties fleeing when defeated because of the weight of their equipment) and doing reconnaissance in addition to three specific witnesses who were under 15 at the time of the attacks, that the UPC/FLPC had recruited and trained extensively, including young people and under 15s but noting that it did not find that recruitment of under 15s was extensive (para. 153, fn. 461). The Chamber found that these experiences had significant negative impact on victims such as compromising future family and educational goals (para. 184).

The Chamber found that though Ntaganda's intent in relation to the conscription and enlistment of child soldiers was lower than for the crimes against the Lendu, his degree of participation in recruitment, training and deployment of the UPC/FLPC, including child soldiers was significant (para. 192). The Chamber also found that the novelty of the crime (in force July 1, 2002) did not diminish its gravity (para. 191).

The Chamber held that the harsh conditions of training were an aggravating factor in respect of child soldiers who were more vulnerable than adults (para. 193). The Chamber said that it would not consider the sexual victimization of three witnesses because it had already considered crimes of sexual violence and that it could also not consider the fact that child soldiers were under 15 because that was an element of the offence, though it did consider the fact one was very young as an aggravating factor (paras. 194-5).

The Chamber sentenced him to 15 years.

Ntaganda's individual circumstances

In considering mitigating factors, the Chamber rejected the argument that he acted for the protection of the population of Ituri noting that the alleged protection of one group through the intended destruction of another did not mitigate his actions (para. 210). It rejected the argument that Ntaganda

had acted to protect the civilian population or punish crimes against civilians that would mitigate crimes against the Lendu (paras. 215-6). It also rejected an argument that Ntaganda made a genuine and concrete contribution to peace, reconciliation or disarmament (para. 224).

The Chamber did not accord any value to his surrender to the Court because of the five-year delay after the first arrest warrant (para. 228). The Chamber did not consider his behaviour during the trial sufficiently exceptional as to constitute a mitigating circumstance (para. 230). Though finding his behaviour in detention 'commendable,' the Chamber thought that it carried too little weight to impact the sentence (para. 235). The Chamber said that while sincere statements of remorse might have mitigative effect, Ntaganda's statements of compassion for harms suffered by all groups were too general and not addressed to his victims and did not offset his denial of committing the crimes and lack of assistance to victims (para. 238).

His sentence was reduced by time served under article 78(2). The Chamber held that the time spent in custody away from his family had been balanced with the need for his detention and did not apply in mitigating the sentence further (para. 244).

Under article 77(1) the total period of imprisonment would not exceed 30 years being the highest individual sentence pronounced. The sentence of 30 years for persecution encompassed the overlap of conduct covered by the other crimes and reflects culpability for the distinct crimes against child soldiers (para. 249). The Chamber did not find the gravity of the crimes and Ntaganda's culpability warranted a life sentence (para. 250).

Conclusion

Sentencing Ntaganda to 30 years imprisonment for 18 crimes committed over a period of a year and a half and a large area of Ituri against the Lendu people involved a very careful analysis by the Chamber of the limits of its discretion and the fine detail of the facts. The Chamber held that the primary objectives were retribution and deterrence. One of the significant points in the process was the way the Chamber considered the specific findings of victims of the crimes fitted into a general narrative of the how the conflict proceeded against the Lendu over time and geography. For example, 21 specific cases of rapes were proved but they were fitted into a larger narrative of 'an unquantified number of persons' of rapes occurring during a campaign where rape and sexual violence had been used as a tool of warfare to render a true picture of the gravity of the crimes. This way of understanding the evidence and how it fit into a large conflict carried out with similar tactics fits with the approach to evidence advanced in an excellent series of commentaries on how evidence should be understood in the context of war crimes and crimes against humanity written by a member of the editorial board of this Journal, Darryl Robinson here.

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Image: Bosco Ntaganda during the delivering of the judgment of ICC Trial Chamber VI at the seat of the Court in The Hague (The Netherlands) on 8 July 2019 ©ICC-CPI.