

## BRIEFING PAPER

# The Trial of Bosco Ntaganda at the ICC

## EXECUTIVE SUMMARY

On September 2, 2015, the trial of Bosco Ntaganda is set to begin at the ICC in The Hague. He is charged with war crimes and crimes against humanity for his alleged involvement in the conflict in Ituri Province, Democratic Republic of Congo (DRC). This paper summarizes the relevant historical and legal background of the trial. For more details see our trial monitoring site, [www.IJMonitor.org](http://www.IJMonitor.org).

## The Defendant

Bosco Ntaganda is the alleged former Deputy Chief of the General Staff of the Patriotic Forces for the Liberation of Congo (FPLC), the armed wing of the Union of Congolese Patriots (UPC). Known as “the Terminator” or “Warrior” among his troops for his tendency to lead from the front and directly participate in the military operations, Ntaganda served in a number of rebel groups throughout eastern Congo for over a decade. In addition to his alleged leadership of the FPLC, Ntaganda held an instrumental position in the National Congress for the Defense of the People (CNDP). After a 2009 peace agreement between the Congolese government and the CNDP, Ntaganda served as a general in the Congolese army until 2012. In April 2012, Ntaganda and a group of Congolese soldiers mutinied to form the M23, a rebel group alleged to have committed horrific human rights violations, including summary executions, mass rape, and forced recruitment of child soldiers.

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## The Charges

On June 9, 2014, ICC Pre-Trial Chamber II unanimously found substantial grounds to believe that Bosco Ntaganda committed 18 counts of war crimes and crimes against humanity in the Ituri region of eastern DRC in 2002 and 2003. Ntaganda is charged with the war crimes of murder and attempted murder; attacking civilians; rape; sexual slavery of civilians; pillaging; displacement of civilians; attacking protected objects; destroying the enemy's property; rape and sexual slavery of child soldiers; and enlisting and conscripting child soldiers under the age of fifteen years and using them to participate actively in hostilities. Ntaganda is also charged with the crimes against humanity of murder and attempted murder; rape; sexual slavery; persecution; and forcible transfer of population.

The pre-trial chamber found that there are substantial grounds to believe that Ntaganda bears individual criminal responsibility pursuant to different modes of liability for different crimes. Ntaganda is charged with direct perpetration and indirect perpetration under Rome Statute article 25(3)(a) and with ordering and inducing the commission of a crime under article 25(3)(b). Ntaganda is also charged with any other contribution to the commission or attempted commission of crimes under Rome Statute article 25(3)(d). Under article 28(a) of the Statute, Ntaganda is charged as a military commander for crimes committed by his subordinates.

The charges against Ntaganda pertain exclusively to his involvement in the war in Ituri between 2002 and 2003. The [human rights community](#) has criticized the limited geographic and temporal scope of the charges, in light of the widespread allegations that Ntaganda led summary executions, rape, and forced recruitment of child soldiers throughout the DRC's North Kivu province between 2006 and 2012.

### War crimes

- Murder and attempted murder
- Attacking civilians
- Rape
- Sexual slavery of civilians
- Pillaging
- Displacement of civilians
- Attacking protected objects
- Destroying the enemy's property
- Rape and sexual slavery of child soldiers
- Enlistment and conscription of child soldiers under the age of fifteen years and using them to participate actively in hostilities

### Crimes against humanity

- Murder and attempted murder
- Rape
- Sexual slavery
- Persecution
- Forcible transfer of population

### Mode of Liability

- Direct perpetration (Rome Statute article 25(3)(a))
- Indirect co-perpetration (Rome Statute article 25(3)(a))
- Ordering, inducing (Rome Statute article 25(3)(b))
- Any other contribution to the commission or attempted commission of crimes (Rome Statute article 25(3)(d))
- Military commander for crimes committed by subordinates (Rome Statute article 28(a))

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## Warrants of Arrest and Surrender

The ICC issued its first arrest warrant against Ntaganda in 2006, charging him with enlisting, conscripting, and using child soldiers in the war in Ituri in 2002 and 2003. Notwithstanding this pending warrant, the Congolese government permitted Ntaganda to serve and eventually become a general in the Congolese army in 2009. Though the Congolese government assisted in the arrest and transfer to The Hague of other Congolese officials accused of war crimes, the government maintained that arresting Ntaganda threatened the DRC's fragile peace. In July 2012, the ICC issued a second arrest warrant for Ntaganda, expanding the charges to include other grave crimes committed by the UPC during the war in Ituri, including murder, persecution, and rape based on ethnic grounds. The ICC Office of the Prosecutor previously had been criticized for bringing only child soldiers charges against Thomas Lubanga, with whom Ntaganda allegedly committed those crimes.

Ntaganda did not enter ICC custody until March 18, 2013, when he voluntarily showed up at United States embassy in Kigali, Rwanda, and asked to be transferred to The Hague. The first accused to surrender voluntarily to the ICC, Ntaganda [reportedly](#) faced a backlash from his troops after internal fighting within M23 and waning support from the Rwandan government.

## Background on the Conflict in Ituri

Often described as the DRC's bloodiest corner, Ituri has long been the site of ethnic disputes between the Hema and the Lendu communities. The fighting initially stemmed from localized land conflicts between the two ethnic groups, dating back to the Belgian rule over Congo in the late-nineteenth century and intensifying in 1994 when the disputes became intertwined with the Hutu-led genocide of Tutsis in neighboring Rwanda.

In neighboring Zaire (now the DRC), President Mobutu Sese Seko's three-decade dictatorship resulted in the gradual erosion of all state institutions and widespread discontent throughout the country. In 1996, the Alliance of Democratic Forces for the Liberation of Congo (AFDL), an armed rebel group largely backed by Rwanda and Uganda, took control of Zaire and changed the country's name to the Democratic Republic of Congo. In 1997, Laurent Kabila, AFDL's leader, declared himself president.

Once in power, Kabila quickly turned on his former allies. Feeling increasingly threatened, Rwanda and Uganda aligned to engender a new rebel movement led by Congolese Tutsis, known as *Banyamulenge*. Kabila enjoyed increasing support from Zimbabwe, Burundi, Angola, and anti-Tutsi Congolese militias, *Mai-Mai*. Violent clashes between the two sides broke out between 1998 and 2002, becoming popularized throughout international media as "Africa's first world war."

The region's rich natural resources largely fueled the conflicts and the international involvement therein. Driven by a desire to gain control of the region's gold, diamonds, and timber resources, direct clashes between Ugandan and Rwandan militaries frequently occurred throughout Ituri and the larger region. As the conflict intensified, the Lendu began to identify with the Hutu, and the Hema with the Tutsi, exacerbating the longstanding conflict between the Lendu and Hema ethnic groups.

Despite UN involvement and the warring sides signing the Sun City peace agreement in April 2002, the fighting intensified, with the renewed attacks reinforcing the conflict's underlying ethnic character. In August 2002, the UPC militia, together with the Ugandan army, launched

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an offensive to control Bunia, the main town in Ituri, deliberately killing Lendu, Nande, and Bira civilians throughout the attack. From August 2002 to March 2003, the UPC controlled Bunia, forming a Hema-controlled government under Thomas Lubanga, the leader of the UPC. After establishing its hold over Bunia, the UPC moved south to attack Songolo, killing approximately 100 citizens. In November 2002, the UPC attacked the gold mining town of Mongbwalu, where UPC combatants targeted and killed an estimated 200 Lendu civilians. Following the Mongbwalu offensive, UPC forces attacked Kilo, where they forced civilians presumed to be Lendu to dig their own graves before killing them. Described as an “army of children,” the UPC forcibly recruited children as young as seven, including girls, for military service.

In June 2003, a French-led European Union peacekeeping force intervened to halt the fighting. In September 2003, the United Nations Organization Mission in the Democratic Republic of Congo (MONUC) assumed peacekeeping responsibilities in Ituri.

The 1998-2003 war destroyed the institutional means to resolve these tensions peacefully. The conflicts dislocated many communities and resulted in a collapsed justice system, limiting the potential of traditional conflict-resolution mechanisms. The absence of the rule of law perpetuated the overall culture of impunity.

The ICC opened its investigation into the Congo in 2004 after a [referral from President Joseph Kabila](#). Besides Ntaganda, the ICC issued arrest warrants against three rebel leaders in relation to crimes committed in the Ituri region: Thomas Lubanga of the UPC, Mathieu Ngudjolo of the Nationalist and Integrationist Front (FNI), and Germain Katanga of the Patriotic Resistance Front in Ituri (FRPI). In March 2012, the ICC [convicted Lubanga](#) of conscripting, enlisting, and using child soldiers during the Ituri conflict between 2002 and 2003. The ICC [acquitted Ngudjolo](#) in December 2012. In March 2014, [the ICC found Katanga guilty](#) of war crimes and crimes against humanity stemming from a February 2003 attack on civilians in Ituri. The [Lubanga](#) and [Ngudjolo](#) judgments were upheld on appeal. Reparations proceedings in both the Lubanga and Katanga cases are ongoing.

## Jurisdiction

The Democratic Republic of Congo ratified the Rome Statute, the founding treaty of the ICC, on April 11, 2002. This allowed the court jurisdiction over war crimes, crimes against humanity, and genocide committed by Congolese nationals or on Congolese territory after July 1, 2002, the date that the Rome Statute entered into force in the DRC. The ICC only has jurisdiction in cases where the national government proves unwilling or unable to investigate and prosecute the relevant crimes. The ICC began investigating crimes in the DRC after the Congolese government formally referred the situation in the DRC to the ICC in April 2004. The former ICC Prosecutor, Luis Moreno-Ocampo, initially confined his investigations to the Ituri province, due to the gravity of violence throughout the 2002-2003 Ituri conflict. In 2008, the ICC prosecutor opened investigations into the North and South Kivu provinces in eastern DRC, which led to arrest warrants against two rebel leaders, Callixte Mbarushimana and Sylvestre Mudacumura. However, the ICC judges [declined to confirm charges against Mbarushimana](#), and [Mudacumura remains at large](#).

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## The Prosecution

During the confirmation of charges hearing, the prosecution detailed a “widespread and systematic” attack pursuant to an UPC/FPLC organizational policy to drive civilians perceived to be non-Hema, such as ethnic Lendu, Bira, and Nande, out of the mineral-rich Ituri province. The prosecution charged that the crimes against the civilian population were carried out during two specific attacks in Ituri. The prosecution used video evidence to show that Ntaganda commanded a group that raped women and pillaged Ituri villages using forcibly recruited and trained child soldiers. ICC Prosecutor Fatou Bensouda stressed, “[h]e played a key role in planning assaults against the civilian population in order to gain territory [...] he persecuted civilians on ethnic grounds, through deliberate attacks, forced displacement, murder, rape, sexual enslavement, and pillaging.” The prosecution also argued that Ntaganda “failed to prevent or punish crimes by troops under his effective command or control.”

## The Defense

At the confirmation of charges hearing, the defense portrayed Ntaganda as a peacemaker whose FPLC forces provided security to villages caught amidst a much larger and violent ethnic conflict.

The defense interpreted the prosecution’s video evidence differently. Acknowledging that the video showed Ntaganda in Ituri in the aftermath of the FPLC military operations, the defense claimed the FPLC aimed to drive out a rival armed militia, the *Armée Populaire Congolaise* (APC) and not to attack civilians. The video featured Ntaganda explaining “our objective is to fight all these leaders who are only fighting for their own good.”

At the confirmation of charges hearing, the defense also disputed the prosecution’s claim that Ntaganda was motivated by ethnic hatred. Presenting a list of 35 high-ranking members of FPLC and the UPC, the defense noted that only ten of these members belonged to the Hema ethnic group, with others identifying as Lendu and Tutsi; according to the defense, the notion that the group operated to persecute the non-Hema population was simply “meaningless.”

In addition to disputing the ethnic character of the conflict, the defense contested the credibility of evidence underlying the charges against Ntaganda. Noting that several charges were based exclusively on anonymous sources and a deceased witness’ uncorroborated statement, the defense said that reliance on such testimony robs the defense of its right to test the evidence’s reliability. The defense will likely continue with this argument at the trial stage.

## Trial Procedure and Location

The case will start with opening statements by all parties and participants. Then, the prosecution will call witnesses to testify against Ntaganda and the defense will have the opportunity for cross-examination. Once the prosecution has presented its case, the victims’ legal representatives will be able to call victims to appear before the Court to testify or to present other evidence. Then, Ntaganda’s lawyers will present their defense. They will call witnesses and the prosecution will have the opportunity for cross-examination. Following the closing statements of the prosecution, legal representatives, and defense, the judges will adjourn to evaluate the evidence and deliver a final judgment. There is currently no time limit for the judges’ deliberation, which could take several months.

If the judges find Ntaganda guilty on all or part of the charges, the court can sentence Ntaganda to a prison sentence and can also order that his property be taken to pay reparations to victims. Though ICC rules prohibit the death penalty, the rules do not include sentencing guidelines to indicate the length of Ntaganda's potential prison sentence. If the court does not convict Ntaganda on any of the charges, he will go free and retain the presumption of innocence. If he is acquitted of all charges, no reparations will be awarded to victims.

As in previous trials at the ICC, it is possible that some victims may apply to present their views and concerns in person at some stage during the trial. To date, 1120 victims have been approved to participate in the proceedings. The court separated the victims into two distinct groups for the purpose of their representation: the first group consisted of former UPC child soldiers and their relatives, and the second consisted of victims of UPC attacks and these victims' relatives. The court decided to separate the victims due to widespread concerns that victims of Hema ethnicity (the ethnic group purportedly represented by the UPC) and Lendu and non-Hema victims might have divergent interests.

The trial will be held at the seat of the court in The Hague, the Netherlands. On March 13, 2015 Trial Chamber VI recommended to the court's Presidency that opening statements in the trial be held *in situ* in Bunia, DRC. In principle, all parties (the prosecution, defense, and legal representatives of the victims) agreed that holding part of the trial closer to the location of the crimes and the victim community would be in the interest of justice. However, further submissions by the prosecution and legal representatives of the victims raised serious security concerns in the region generally and to witnesses and victims specifically. After considering these factors, as well as the high cost of conducting opening statements in Bunia, the Presidency concluded that the benefits to holding part of the trial *in situ* are outweighed by the risks.

## Why This Case is Important

The case against Bosco Ntaganda is an integral component of a larger effort to ensure justice for the victims of longstanding and systematic violence throughout the DRC. Despite the numerous serious crimes committed throughout the country's armed conflict, the ICC has initiated public cases against only six suspects for alleged war crimes or crimes against humanity committed there. The ICC is a court of last resort and aims to prosecute the most serious crimes.

Ntaganda's case also represents the first time the ICC has held that sexual violence crimes against child soldiers by their own commanders could constitute war crimes. Former Prosecutor Luis Moreno-Ocampo briefly addressed an armed group's sexual violence toward its own soldiers in the Lubanga case. However, Ocampo's failure to raise the issue from the beginning of the proceedings and especially prior to and at the confirmation of charges stage precluded the judges from providing any clarity on the potential charge. Bensouda, however, raised the claim at the confirmation of charges stages (and as per the second arrest warrant) in the Ntaganda case, representing a larger interest in prosecuting sexual and gender-based crimes, as manifested in the Office of the Prosecutor's [June 2014 policy paper](#).

The pre-trial chamber rejected the defense's argument that the novel charges violated international humanitarian law, which is "not intended to protect combatants from crimes committed by combatants within the same group." Agreeing with the prosecution, the chamber noted that child soldiers do not necessarily lose their special protections under international humanitarian law (IHL) solely by virtue of their membership in an armed group, especially considering the coercion often underlying such membership. Highlighting Rome

Statute article 8(2)(e)(vii), which prohibits children under the age of 15 from participating in hostilities, the chamber stated, “[t]o hold that children under the age of 15 years lose the protection afforded to them by IHL merely by joining an armed group, whether as a result of coercion or other circumstances, would contradict the very rationale underlying the protection afforded to such children against recruitment and use in hostilities.” Moreover, children under the age of 15 years lose their protection afforded by IHL only during their direct/active part in hostilities, but the sexual character of these crimes, which involve elements of force/coercion or the exercise of rights of ownership, logically preclude active participation in hostilities at the same time.

This determination built on a number of previous strands of thought in international criminal law. In the *Lubanga* case, Judge Elizabeth Odio Benito’s dissent noted that “the use of young girls and boys by combatants within or outside the group is a war crime and as such encoded in the charges against the accused.” In the *Charles Taylor* trial, the Special Court for Sierra Leone (SCSL) also accepted that the sexual abuse of child soldiers by members of their own armed group can constitute war crimes. Emphasizing that child soldiers who were also used as sexual slaves were not taking active part in the hostilities at the time of the sexual violence, the SCSL held that IHL’s protections still applied. The SCSL Statute does not specifically enumerate the war crime of sexual slavery, so the conduct was charged under the war crime of “outrages on personal dignity.”

## Related Cases

### Thomas Lubanga

In March 2012, the [ICC convicted Thomas Lubanga](#), former president of the UPC, of conscripting, enlisting, and using children under the age of 15 in combat operations during the Ituri conflict in 2002 and 2003. The court [sentenced him](#) to 14 years in prison. His conviction and sentence were both [upheld on appeal](#) in December 2014. The Appeals Chambers recently held that Lubanga is liable to pay for reparations to the victims who suffered harm as a result of the crimes for which he was convicted.

### Mathieu Ngudjolo Chui

The ICC charged Mathieu Ngudjolo Chui with seven counts of war crimes and three counts of crimes against humanity allegedly committed during his leadership in the Front for National Integration (FNI). In December 2012, the [ICC acquitted Ngudjolo](#) on all charges due to insufficient evidence to link Ngudjolo to the alleged crimes. The charges mostly related to the FNI’s involvement in a February 2003 attack on the village of Bogoro in Ituri, where the group battled the UPC, led by Lubanga. The Appeals Chamber [upheld this acquittal](#).

Initially, the ICC joined Ngudjolo’s case with Germain Katanga’s, due to the widespread belief that the two shared responsibility for the attack on Bogoro. However, the court [severed the cases](#) after announcing it was considering a re-characterization of the facts of the case relating to Katanga’s mode of liability. Acknowledging that the any potential re-characterization would delay Katanga’s trial, judges noted there was no need to similarly delay Ngudjolo’s judgment and accordingly severed the cases.

### Germain Katanga

In March 2014, [the ICC convicted Germain Katanga](#), former president of the Patriotic Resistance Front in Ituri (FRPI), on the basis of his accessory liability, of one crime against

humanity (murder) and four war crimes (murder, attacking a civilian population, destruction of property, and pillaging). The charges stem from the February 2003 attack on the village of Bogoro in Ituri. Katanga was [sentenced to 12 years in prison](#). There was [no appeal](#) to the conviction or sentencing. Proceedings to decide on reparations to be awarded to the victims of those crimes are ongoing.

### Sylvestre Mudacumura

In July 2012, the ICC issued an arrest warrant for Sylvestre Mudacumura, a military commander of the Democratic Forces for the Liberation of Rwanda (FDLR). Still at large, Mudacumura is charged with individual criminal responsibility for nine counts of war crimes from January 2009 to the end of September 2010 committed in the Kivu. Mudacumura's charges include attacking civilians, murder, mutilation, cruel treatment, rape, torture, destruction of property, pillaging, and outrages against personal dignity.

### Callixte Mbarushimana

On September 28, 2010, the ICC indicted Mbarushimana for crimes against humanity and war crimes allegedly committed by the FDLR in the Kivu provinces in 2009. In December 2011, Pre-Trial Chamber I, by a majority, [declined to confirm the charges](#) against Mbarushimana, finding there was insufficient evidence to establish substantial grounds to believe Mbarushimana could be held criminally responsible for the charged crimes.

## Timeline

**September 8, 2000:** The Democratic Republic of Congo signs the Rome Statute of the International Criminal Court.

**April 11, 2002:** The DRC ratifies the Rome Statute of the ICC.

**June 2004:** After a referral from Congolese president Joseph Kabila, the ICC opens an investigation into the situation in the DRC.

**January 12, 2006:** The prosecution applies for its first warrant of arrest against Ntaganda. The prosecution charged the military leader with war crimes of recruiting and using child soldiers in active combat in 2002 and 2003 in the Ituri district.

**August 22, 2006:** The ICC issued a sealed arrest warrant for Ntaganda. The arrest warrant remained under seal because, according to the court, “public knowledge of the proceedings in the case might result in Bosco Ntaganda hiding, fleeing, and/or obstructing or endangering the investigations or the proceedings of the court.”

**April 28, 2008:** The ICC unsealed the arrest warrant for Ntaganda, after determining that “the circumstances that led to the sealing have changed,” that unsealing the arrest warrant would “not endanger the witnesses of the DRC cases” and that it was “the right moment” to make the warrant public.

The unsealed warrant revealed that the chambers found there were reasonable grounds to believe that Ntaganda had *de jure* and *de facto* authority over the FPLC in its practice of enlisting and conscripting child soldiers and that Ntaganda had taken part directly in attacks in which FPLC soldiers under the age of 15 actively participated.



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**January 2009:** Backed by Rwanda, Ntaganda overthrows Laurent Nkunda and takes over leadership of the CNDP, an armed militia group.

**March 23, 2009:** The CNDP and the Congolese government sign a peace agreement, which, in part, facilitates Ntaganda's integration into the Congolese army.

**March 14, 2012:** Thomas Lubanga, the first person to be tried by the ICC, is found guilty of enlisting and conscripting children under the age of 15 years into the FPLC and using them actively in armed conflict. He is sentenced to 14 years imprisonment.

**April 4, 2012:** Citing poor conditions in the army and the Congolese government's unwillingness to implement the March 23, 2009 peace deal, Ntaganda and a group of Congolese soldiers mutiny to form M23. International human rights groups allege that M23 is responsible for widespread war crimes, including summary executions, rapes, and the forced recruitment of children.

**May 14, 2012:** The prosecution requests a second arrest warrant for Ntaganda for additional crimes committed in the Ituri region.

**July 13, 2012:** The ICC issues its second arrest warrant for Ntaganda. The expanded charges include the crimes against humanity of murder; persecution based on ethnic grounds; and rape/sexual slavery. The additional war crimes include intentional attacks against civilians; murder; rape and sexual slavery; and pillaging. The charges all relate to crimes alleged to have taken place in the Ituri region between 2002 and 2003.

**March 18, 2013:** Ntaganda surrenders himself at the U.S. embassy in Kigali, Rwanda, and asks to be transferred to The Hague. Ntaganda's surrender was the first time an accused voluntarily submitted himself to the ICC.

**March 26, 2013:** Ntaganda appears for the first time before an ICC judge who schedules the confirmation of charges hearing for September 23, 2013.

**June 17, 2013:** Pre-Trial Chamber II postpones the confirmation of charges hearing to February 10, 2014, after the prosecution requested additional time to ensure the protection of witnesses and effective disclosure of evidence to the defense.

Acknowledging that the case had been dormant for several years, the single judge acting for the chamber noted, "Where the suspect is evading justice for many years, it is neither possible nor reasonable to impose on the Prosecutor a permanent stand-by availability of the teams for years."

**February 10-14, 2014:** Ntaganda appears for his confirmation of charges hearing at the ICC. During the five-day hearing, the Office of the Prosecutor and the defense presented evidence to Pre-Trial Chamber II.

**June 9, 2014:** The Pre-Trial Chamber II of the ICC unanimously confirms 18 charges against Ntaganda for war crimes and crimes against humanity.

**July 16, 2014:** ICC pre-trial chamber judge Ekaterina Trendafilova authorizes lead defense lawyer, Marc Desalliers, to step down from the case. On July 14, 2014, Desalliers applied to withdraw, citing irreconcilable views with Ntaganda on the conduct of his defense.

**August 15, 2014:** Stéphane Bourgon is appointed as the new lead defense counsel representing Ntaganda.

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**October 9, 2014:** Trial Chamber VI sets the start date for the trial of Ntaganda as June 2, 2015.

**March 19, 2015:** Trial Chamber VI recommends to the ICC Presidency that opening statements of the trial be held *in situ* in Bunia, DRC. The recommendation was in the interest of the court bringing its judicial work closer to those most affected by Ntaganda's alleged crimes.

**April 22, 2015:** Trial Chamber VI judges postpone the trial opening to July 2015 to give the ICC Registry additional time to prepare for the possibility of holding opening statements in Bunia.

**June 15, 2015:** The ICC Presidency declines the trial chamber's recommendation to hold opening statements of the trial in Bunia, DRC. Among the reasons cited by the Presidency for not holding the trial *in situ* are the security in Bunia, the safety of witnesses and victims, and high costs.

**September 2, 2015:** The trial of Bosco Ntaganda is expected to commence at the seat of the court in The Hague.

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