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Date: **9 April 2020**

THE APPEALS CHAMBER

Before: **Judge Howard Morrison, Presiding**
Judge Chile Eboe-Osuji
Judge Piotr Hofmański
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF
THE PROSECUTOR V. BOSCO NTAGANDA

Public
***with* Public Annexes A and B, Public Redacted Version of Annex C, and Confidential Annexes D and E**

Public Redacted Version of "Sentencing Appeal Brief", 10 February 2020, ICC-01/04-02/06-2468-Conf

Source: **Defence Team of Mr. Bosco Ntaganda**

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[2] Ground 7 refers to the second of two grounds referred to in the Notice of Appeal as "Ground 7". The first "Ground 7" is withdrawn.

APPEAL BRIEF ON SENTENCE

INTRODUCTION

1. On 7 November 2019, further to the Trial Judgment delivered on 8 July 2019, the Chamber pronounced individual sentences for each count Mr. Ntaganda was convicted of and sentenced Mr. Ntaganda to a joint sentence of thirty (30) years of imprisonment.

2. The sentence imposed by the Chamber is clearly disproportionate to the crimes Mr. Ntaganda was convicted of, warranting the intervention of the Appeals Chamber.

3. In determining the joint sentence to be imposed, the Chamber committed numerous errors of law, fact and procedure. The Chamber, *inter alia*, misappreciated the evidence, failed to consider relevant facts and took into consideration irrelevant facts. Moreover, the Chamber's weighing and balancing of relevant facts was so unreasonable as to constitute an abuse of its discretion, compounded in many cases, by its failure to provide a reasoned opinion or providing sufficient reasons.

4. The Chamber repeatedly failed to consider pursuant to rule 145(1)(c) Mr. Ntaganda's degree of concrete participation in certain crimes, in particular in respect of the crimes committed during the Second Operation, when Mr. Ntaganda was not present in the area, as distinct from the First Operation.

5. The Chamber also failed to assess Mr. Ntaganda's very limited degree of participation in sexual violence crimes, Counts 4-9, *in concreto* and erred by double counting the same factors in pronouncing individual sentences, in particular in respect of Count 10, persecution.

6. While the Chamber articulated the right test for the admission of mitigating circumstances, the Chamber erred in its application of the balance of probabilities

standard of proof. As a result, the Chamber erred by failing to accord weight in mitigation to numerous circumstances, including in particular: Mr. Ntaganda's genuine and substantial contribution to peace and reconciliation with the Lendu community, demobilisation and integration in the national armed forces of UPC/FPLC members, saving the lives of 63 enemy fighters, and punishing UPC/FPLC members for crimes committed against civilians, including Lendu civilians.

7. In the light of the Chamber's finding in the trial judgment that Mr. Ntaganda and other military leaders of the UPC/FPLC (…) meant the destruction and disintegration of the Lendu community (…)", Mr. Ntaganda's honest, sincere and real actions leading to reconciliation with the Lendu community, were deserving of the highest mitigation value. The Chamber erred by concluding otherwise despite the abundant evidence adduced.

8. The Chamber also erred by failing to attach mitigation weight to Mr. Ntaganda's unique and substantial efforts to protect a [REDACTED] at [REDACTED] from serious harm.

9. These are but some of the errors committed by the Chamber warranting the intervention of the Appeals Chamber set out in this Appeal Brief.

10. As a result, the Appeals Chamber is respectfully requested to quash the manifestly unreasonable and disproportionate joint sentence imposed by the Chamber and to impose its own sentence, significantly lower.

PROCEDURAL HISTORY

11. On 7 November 2019, the Chamber rendered its Sentencing Judgment.[3] The Chamber considered the following individual sentences appropriate:

[3] SJ.

a. Murder and attempted murder as a crime against humanity and as a war crime (Counts 1 and 2): 30 years of imprisonment;
b. Intentionally directing attacks against civilians as a war crime (Count 3): 14 years of imprisonment;
c. Rape of civilians as a crime against humanity and as a war crime (Counts 4 and 5): 28 years of imprisonment;
d. Rape of children under the age of 15 incorporated into the UPC/FPLC as a war crime (Count 6): 17 years of imprisonment;
e. Sexual slavery of civilians as a crime against humanity and as a war crime (Counts 7 and 8): 12 years of imprisonment;
f. Sexual slavery of children under the age of 15 incorporated into the UPC/FPLC as a war crime (Count 9): 14 years of imprisonment;
g. Persecution as a crime against humanity (Count 10): 30 years of imprisonment;
h. Pillage as a war crime (Count 11): 12 years of imprisonment;
i. Forcible transfer of the civilian population as a crime against humanity (Count 12): 10 years of imprisonment;
j. Ordering the displacement of the civilian population as a war crime (Count 13): 8 years of imprisonment;
k. Conscripting and enlisting children under the age of 15 years into an armed group and using them to participate actively in hostilities as a war crime (Counts 14, 15, and 16): 18 years of imprisonment;
l. Intentionally directing attacks against protected objects as a war crime (Count 17): 10 years of imprisonment; and
m. Destroying the adversary's property as a war crime (Count 18): 15 years of imprisonment.

12. On the basis of these individual sentences, and applying the requirement of article 78(3) that a joint sentence to be no less than any individual sentence, the

Chamber imposed a joint sentence of 30 years, which was equivalent to the sentences imposed for Counts 1 and 2 (murder), and for Count 10 (persecution).

13. Article 81(2)(a) of the Rome Statute of the International Criminal Court ("Statute") provides that a decision under article 76 may be appealed in accordance with the Rules, "on the ground of disproportion between the crime and the sentence". Article 83(3) permits a Chamber to "vary the sentence in accordance with Part 7."

14. On 9 December 2009, the Defence filed its Notice of Appeal against Sentencing Judgement (ICC-01/04-02/06-2442).[4]

APPLICABLE LAW

15. A sentencing decision, pursuant to article 83(2), is subject to appellate review on the basis of errors of fact, law or procedure. Where a sentencing decision is materially affected by such an error, as in respect of a conviction decision, it is subject to reversal or amendment. In respect of an error of fact, article 83(2) provides that the Appeals Chamber may remand the matter back to the original Trial Chamber for further deliberations, which is to "report back accordingly"; or the Appeals Chamber may "itself call evidence to determine the issue."[5]

16. In addition to these grounds of appeal, article 83(3) prescribes that "[i]f in an appeal against sentence the Appeals Chamber finds that the sentence is disproportionate to the crime, it may vary the sentence". Accordingly, a sentence may be revised by the Appeals Chamber even in the absence of any specific error of fact, law or procedure if it is found to be disproportionate.[6]

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[4] Defence-Notice-2448.

[5] *Bemba-et-al*-SAJ-2276, para.362.

[6] *Kenyatta*-Judgment-1032, para.25 ("In addition, the Appeals Chamber may interfere with a discretionary decision [when it] amounts to an abuse of discretion. Even if an error of law or of fact has not been identified, an abuse of discretion will occur when the decision is so unfair or

17. An Appeals Chamber will intervene in respect of errors of fact, law or disproportionality according to the following standards of review

> (i) the Trial Chamber's exercise of discretion is based on an erroneous interpretation of the law; (ii) the discretion was exercised based on an incorrect conclusion of fact; or (iii) as a result of the Trial Chamber's weighing and balancing of the relevant factors, the imposed sentence is so unreasonable as to constitute an abuse of discretion.

18. Although Trial Chambers have a broad discretion in determining the appropriate sentence based on balancing relevant circumstances,[7] this discretion must be exercised – and is subject to appellate review – according to the standards set out in the quotation above. As explained by the Appeals Chamber in the *Kenyatta* case in respect of appellate review in general:

> 23. With respect to an exercise of discretion based upon an alleged erroneous interpretation of the law, the Appeals Chamber will not defer to the relevant Chamber's legal interpretation, but will arrive at its own conclusions as to the appropriate law and determine whether or not the first instance Chamber misinterpreted the law.
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> 24. With regard to an exercise of discretion based upon an incorrect conclusion of fact, the Appeals Chamber applies a standard of reasonableness in appeals pursuant to article 82 of the Statute, thereby according a margin of deference to the Chamber's findings. The Appeals Chamber will not interfere with the factual findings of a first instance Chamber unless it is shown that the Chamber committed a clear error, namely, misappreciated the facts, took into account irrelevant facts or failed to take into account relevant facts. Regarding the misappreciation of facts, the Appeals Chamber will not disturb a Pre-Trial or Trial Chamber's evaluation of the facts just because the Appeals Chamber might have come to a different conclusion. It will interfere only where it cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it [….] The Appeals Chamber will also consider whether the first instance Chamber gave weight to extraneous or

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unreasonable as to 'force the conclusion that the Chamber failed to exercise its discretion judiciously'").

[7] *Bemba-et-al*-SAJ-2276, para.22.

> irrelevant considerations or failed to give weight or sufficient weight to relevant considerations in exercising its discretion.[8]

19. The sufficiency of the Trial Chamber's reasons is therefore of fundamental importance to the degree of deference that its findings are owed. The *Kenyatta* decision emphasizes the Appeals Chamber's need to be able to "discern how the Chamber's conclusion could have reasonably been reached from the evidence before it."[9] This approach was confirmed in the *Bemba* Appeals Judgment, which stated that "[i]n determining whether a given factual finding was reasonable, a trial chamber's reasoning in support thereof is of great significance."[10]

20. In respect of matters that can be relied on by the Trial Chamber only if proven beyond a reasonable doubt, such as factors enhancing gravity or aggravating circumstances,[11] the Appeals Chamber "must be satisfied that factual findings that are made beyond reasonable doubt are clear and unassailable, both in terms of evidence and rationale."[12] Where this cannot be discerned, then the Trial Chamber has committed a reversible error that warrants *de novo* review by the Appeals Chamber.

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[8] *Kenyatta*-Judgment-1032, paras.23-25 (footnotes omitted); *Bemba-et-al*-SAJ-2276, para.22.
[9] *Id*.
[10] *Bemba*-AJ-3636, para.43.
[11] *Katanga*-SJ-3484, para.34 ("Therefore, only those facts which are proved beyond reasonable doubt may be taken into account to convict or as aggravating circumstances"); *Al-Mahdi*-SJ-171, para.73 ("The Chamber must be convinced of the existence of aggravating circumstances beyond reasonable doubt"); *Lubanga*-SJ-2901, para.33; *Bemba-et-al*-SJ-2123, para.25; ICTR-*Simba*-TJ, para.435 (rejecting that convicted person had played a role in planning as sentencing factor crime where Chamber "not convinced beyond reasonable doubt").
[12] *Bemba*-AJ-3636, para.45.

GROUND 1: THE CHAMBER SYSTEMATICALLY FAILED TO CONCRETELY ASSESS MR. NTAGANDA'S "DEGREE OF PARTICIPATION" IN THE SECOND OPERATION WHEN EVALUATING HIS CULPABILITY FOR HIS CRIMES

21. The Chamber erred in failing to distinguish Mr. Ntaganda's "degree of participation" in the crimes of the First Operation, from his degree of participation in the Second. In substance, the Chamber sentenced Mr. Naganda on the basis of its liability findings without sufficiently distinguishing his "degree of participation" in the various crimes. This was an error of law and of fact.

22. The Chamber assessed Mr. Ntaganda's degree of participation in the two operations as if it was a single phenomenon: "the Chamber considers Mr. Ntaganda's degree of participation and intent regarding the murders and attempted murders committed during both the First and Second Operation to be substantial."[13] The Chamber's approach was driven, in part, by categorically rejecting presence and knowledge of the crimes as irrelevant to assessing his degree of participation:

> The Chamber further recalls that Mr Ntaganda's giving of orders to commit crimes and personal engagement in violent conduct towards the enemy – which the Chamber only found to have been established in relation to the First Operation – was just one of the ways through which he contributed to the common plan. The Chamber thus considers Mr Ntaganda's culpability for the crimes committed during both the First Operation and the Second Operation to be high, irrespective of whether he was in close physical proximity to the locations where the crimes were physically carried out, and even in instances where he did not have previous, contemporaneous or subsequent knowledge of the specifics of the crimes committed."[14]

23. The Chamber chose, accordingly, to disregard as irrelevant its own findings that Mr. Ntaganda: (i) was not found to have been anywhere near the theatre of the Second Operation when the crimes took place; and (ii) had no previous,

[13] SJ, para.67.
[14] SJ, para.36 (underline added, footnotes omitted).

contemporaneous or, in many cases, even subsequent knowledge about the crimes of which he was convicted as a direct perpetrator. The Chamber's categorical disregard of these criteria was a legal error in the interpretation of the "degree of participation", or a factual error arising from the disregard or misappreciation of facts manifestly relevant to that criterion.

24. Physical presence, while neither a precondition for liability nor determinative of the degree of participation, is nevertheless an important indicator of the degree of the control and knowledge over the crime that is, in turn, usually indicative of culpability. Hence, in *Katanga*, the Chamber noted that the convicted person's contribution "was, however, made as part of a criminal purpose shared by many persons without it being established that Germain Katanga was present in person at the scenes of the crimes."[15] In *Bemba et al.*, a relevant factor in sentencing one of the co-accused was that he was "not present when any of the illicit conduct occurred".[16] Conversely, Mr Al Mahdi's "overall responsibility for the execution phase of the attack" was concretely demonstrated by the fact that he "personally oversaw the attack itself – he was present at all of the attack sites and directly participated in the destruction of five of the protected buildings."[17]

25. The lack of physical presence or proximity might be of lesser significance where the accused participates in executing the crime in some other manner – such as, for example, issuing instructions over communication devices and/or being fully informed of the circumstances through those communication devices as the crimes are unfolding.

26. The Chamber did not find, however, that Mr. Ntaganda issued any such instructions. More generally, the Chamber could not find that he had operational-level communication and control over the Second Operation as a whole. The most

[15] *Katanga*-SJ-3484, para.143.
[16] *Bemba-et-al*-SAJ-2276, para.140.
[17] *Al-Mahdi*-SJ-171, para.53.

that the Chamber could find, relying on its findings in the Judgment, is that Mr. Ntaganda: (i) "took part in the relevant planning" of the Second Operation; (ii) "remained in contact with the commanders in the field and monitored its unfolding via the UPC/FPLC radio communications system"; and (iii) "exercised oversight over the unfolding [*sic*] and ensured that the deployed forces were carrying out the project as planned."[18]

27. These generalizations, however, are based on more specific findings – at paragraphs 552, 554 and 565 of the Judgment – that demonstrate the truly limited nature of Mr. Ntaganda's participation in the Second Operation. In those paragraphs, the Chamber found that: (1) although Mr. Ntaganda was "monitoring" and "generally involved" in the Second Operation, it could not identify any "specific examples of the interaction between Mr Ntaganda and the commanders";[19] (2) Mr. Ntaganda's lone outbound communication to the commanders of the Second Operation was a general reiteration – not an order – that field commanders must follow the commands of their superior officers, which was a response to an "info" message (i.e. a "copy message") about a commander refusing to advance;[20] (3) Mr. Ntaganda's role in the "planning" of the Second Operation was limited to advising where ammunition could be obtained, agreeing with Kisembo as to the identity of certain commanders, and advising Kisembo to travel to Mongbwalu by airplane;[21] (4) the superior commanders of the Second Operation were Floribert Kisembo and Salumu Mulenda[22] (not Mr. Ntaganda); and (5) it could not find that Mr. Ntaganda had briefed any troops prior to the Second Operation.[23]

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[18] SJ, para.65.
[19] TJ, para.565,4th bullet.
[20] TJ, para.565.
[21] TJ, para.552.
[22] TJ, paras.558-561,563-564,572,575,837. *See also* SJ, para.75 ("further organised by Floribert Kisembo from Mongbwalu").
[23] TJ, para.560, fn.1701.

28. These findings do not sustain any inference that Mr. Ntaganda participated in the execution of the crimes for which he was sentenced. In this circumstance, Mr. Ntaganda's lack of proximity to any of the crimes of the Second Operation was a highly relevant criterion of his "degree of participation" in those crimes that should not have been categorically disregarded by the Chamber.

29. The Chamber's categorical disregard of "previous, contemporaneous, or subsequent knowledge of the specifics of the crimes committed"[24] was also an error. The issue was not merely knowledge of "specifics" of the crimes, but their very occurrence. In fact, a requirement of the mode of liability for which Mr. Ntaganda was sentenced is awareness of the factual circumstances allowing him or her to exert control over the crime.[25] Since this is the mode of participation on which Mr. Ntaganda was sentenced, the degree of Mr. Ntaganda's knowledge of the crimes for which he was being sentenced was a highly relevant consideration in assessing this "degree of participation".

30. The existence of a liability finding, which includes intent, does not exhaust the analysis required for a proper determination of sentence. Rule 145(1)(c) expressly requires a Trial Chamber, having convicted an accused, to assess the "*degree* of participation." This was particularly necessary in the context of two sets of crimes that were committed in very different circumstances, including: (i) the three-month interval between the two operations,[26] thus making it unsafe to assume that any and all indicia of participation in the First Operation applied automatically the Second; (ii) the "particular cruelty" with which some of the Second Operation crimes were

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[24] SJ, para.36.

[25] *Lubanga*-TJ-2842, para.941 ("aware of the factual circumstances that enabled him to exercise functional control over the crime"); *Lubanga*-Confirmation-Decision-803, para.366; *Katanga*-TJ-3436, para.1416 ("aware of the factual circumstances which allow the person to exert control over the crime"); *Ruto-Kosgey-Sang*-Confirmation-Decision-373, para.348; *Muthaura*-Confirmation-Decision-382, para.419.

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

committed,[27] and which the Chamber took into account as enhancing gravity[28] or in aggravation;[29] (iii) the underhanded tactic of luring civilians from their hiding places based on a false promise of peace[30] which had no parallel in the First Operation;[31] and (iv) the different scale of the crimes, in which, for example, at least 62[32] out of the total of 73 identified murders[33] were committed during the Second Operation.

31. The issues at stake, accordingly, went far beyond "the specifics"[34] of the crimes. These differences did not concern minor details such as whether a specific crime should be carried out using a gun or a knife. The issue that needed to be addressed, and that was disregarded by the Chamber, was Mr. Ntaganda's degree of knowledge of crimes in the Second Operation that were very different in nature, and separated in time and circumstance, from those of the First Operation.[35]

32. The disparate degree of participation by a particular co-perperator *within* a single common plan has been previously taken into account by Trial Chambers in sentencing. In *Bemba et al*., the Trial Chamber recognized that, notwithstanding a conviction based on 14 separate crime incidents within a common plan, it had to adopt "a more nuanced approach" than merely applying a blanket level of culpability for all crimes.[36] Even though all 14 incidents could have been characterized, as this Chamber has done, as part of a "campaign" that "constituted a logical succession of events,"[37] the Trial Chamber nonetheless recognized that "in

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[27] SJ, paras.79-82.
[28] SJ, para.81.
[29] SJ, para.82.
[30] TJ, paras.591,597-598.
[31] TJ, paras.540-544 (referring to killings of some individuals in Kilo who had been reassured that they would be well-treated if they emerged from the bush at an unspecified date after 6 December); *cf*. TJ, para.489, fn.1412 (finding that it Mr. Ntaganda "remained in the town for at a minimum one week after the UPC/FPLC took over Mongbwalu", thus not encompassing these events in Kilo).
[32] SJ, para.40.
[33] SJ, para.47.
[34] SJ, para.36.
[35] For relevance of "advance knowledge", *see* ICTY-*Popović*-TJ, paras.2186,2213.
[36] *Bemba-et-al*-SJ-2123, para.123.
[37] SJ, para.37.

assessing Mr Mangenda's degree of participation, it may draw upon the nature of the actual contributions, since they inform his culpability. [….] The Chamber will give some weight to Mr Mangenda's varying degree of participation in the execution of the offences."[38] The Chamber distinguished between three different "degrees of participation" in the 14 crime events.[39]

33. This Chamber conducted no such analysis, or did so in such a cursory and inadequate manner that it failed to give these differences any, or adequate weight. The difference in the scale and nature of the crimes of the Second Operation, as found in the Chamber's Judgments,[40] called for such analysis. The difference in Mr. Ntaganda's degree of participation and knowledge in the crimes also called for such an analysis. His involvement in the Second Operation – both knowledge and contribution – was substantially less for the Second Operation than for the First. This should have been taken into account by ascribing to him a substantially lower level of culpability for the crimes of the Second Operation. Most obviously, the fact that there was no finding that Mr. Ntaganda had any advance or contemporaneous knowledge of the Kobu massacre or of the Bambu Hospital massacre – the two major killing events as found in the Judgment – should have been expressly addressed and taken into account in sentencing. It was not.

34. The limited discussion that can be found is inadequate. As discussed above, the so-called "relevant planning" for the Second Operation in which Mr. Ntaganda participated[41] was minimal and did not relate to the planning of any crimes. The characterization that Mr. Ntaganda generally had "contact with the commanders in the field and monitored its unfolding via the UPC/FPLC radio communications system" says little, or nothing, about his concrete participation in the crimes. The Chamber's mere recitation of the basis for its liability finding does not satisfy the

[38] *Bemba-et-al*-SJ-2123, para.124.
[39] *Bemba-et-al*-SJ-2123, para.123.
[40] *See e.g.* SJ, paras.40,47,79-82,98.
[41] SJ, para.65.

requirement of rule 145(1)(c) that the Chamber concretely examine "degree of participation".

35. Furthermore, the Chamber's error was not remedied by finding that there was a baseline of participation in the crimes of the two operations, but that Mr. Ntaganda's specific actions during the First Operation "*further increase* his culpability."[42] The Chamber was still required under rule 145(1)(c) to address its mind to, and factor into its analysis, the absence of any finding, for example, that Mr. Ntaganda had advance knowledge of the Kobu massacre, or any finding of concrete contribution to this massacre. As the singular and unique killing event of which Mr. Ntaganda was convicted, involving the majority of all the murder victims in the case, it was incumbent on the Chamber to squarely address Mr. Ntaganda's minimal degree of concrete degree of participation in this event. The absence of any concrete participation by Mr. Ntaganda in this mass killing event had to be considered in coming to a proper view of his culpability.

36. The error is highly material given the disparity in the number and circumstances of the murders committed during the Second Operation relative to the first. Indeed, the Chamber took into account the brutality of the Kobu massace as an aggravating circumstance[43] without, however, taking into account Mr. Ntaganda's lesser degree of participation in these murders.

37. The Chamber's approach is discussed as a "[p]reliminary issue"[44] and also informs the sentences imposed for all the crimes of the First and Second Operations: murder, attacking civilians, rape, sexual enslavement, pillage and destroying the enemy's property, forcible transfer, and persecution.[45] The individual sentences for each of these crimes are infected by the Chamber's failure to acknowledge and

[42] SJ, para.36 (italics added). *See* SJ, para.67.
[43] SJ, para.81.
[44] SJ, paras.32-38.
[45] SJ, paras.39-89 (murder and intentionally attacking civilians); 114-132 (rape and sexual slavery); 149 (pillage and destroying the enemy's property), 166-172 (forcible transfer).

properly evaluate Mr. Ntaganda's substantially lesser degree of participation in the Second Operation as compared to the First.

38. The appropriate remedy is to reverse the error committed by the Chamber; find that Mr. Ntaganda's degree of participation in the crimes of the Second Operation is substantially less than found by the Chamber; reduce substantially each of the individual sentences of which he was sentenced on the basis of this error; and reduce Mr. Ntaganda's joint sentence substantially.

GROUND 2: THE CHAMBER FAILED TO CONDUCT AN *IN CONCRETO* ANALYSIS OF MR. NTAGANDA'S LIMITED PARTICIPATION AND KNOWLEDGE OF RAPE IN COMING TO INDIVIDUAL SENTENCES FOR COUNTS 4 AND 5

39. The Chamber erred by failing to concretely evaluate Mr. Ntaganda's "degree of participation" in the rapes of civilians for which he was sentenced under Counts 4 and 5. In particular, the Chamber failed to acknowledge, or adequately take into account that its own findings failed to established that Mr. Ntaganda had any advance, contemporaneous or even *post facto* knowledge of rapes of any civilians, with the lone arguable exception of the events at the *Appartements* in Mongbwalu.

40. The Chamber's finding was that Mr. Ntaganda was present at the *Appartements* camp when an unknown number of women[46] were brought there and raped.[47] The Chamber, while denying that it relied "directly or indirectly, on the proposition that Mr. Ntaganda personally committed rapes of civilian women at the *Appartements*," also asserted that it "has taken into account his presence at the camp,

[46] SJ, fn.255 ("found more broadly that soldiers and commanders raped an unquantified number of women at the *Apartements* [*sic*] camp").
[47] SJ, paras.115,117.

his awareness that women were brought there, and the fact that he brought women there himself."[48]

41. Just what the Chamber had "taken into account" is unclear given the absence of an express finding that Mr. Ntaganda knew that the women brought to the *Appartements* camp were forced to have sex – *i.e.* raped.[49]

42. More broadly, the Chamber fails to address that these were the only rapes of civilians for which the Chamber found that Mr. Ntaganda had any arguable knowledge. The Chamber does not even mention this in its discussion of "Mr Ntaganda's degree of participation and intent." The Chamber relies instead on its reasoning in respect of liability that the rapes were within the intended scope of the common criminal plan to infer a high level of participation[50] and that, accordingly, his culpability was "substantial".[51] The Chamber erred, however, in failing to go beyond its liability findings to assess Mr. Ntaganda's very limited concrete knowledge of and participation in these crimes.

43. Notably, Mr. Ntaganda – according to the Chamber's own findings – was not found to have had any knowledge of the "21 specific victims of rape" for which he was sentenced.[52] Mr. Ntaganda was, accordingly, not found to have had any advance or contemporaneous knowledge of the specific rapes for which he was sentenced. In fact, based on the Chamber's own findings, he had left the area of Mongbwalu by the time of the Kilo rapes, whose egregious circumstances were treated by the Chamber as a factor enhancing gravity.[53]

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[48] SJ, para.115 (footnote omitted).
[49] SJ, para.115.
[50] SJ, para.116.
[51] SJ, para.117.
[52] SJ, para.98.
[53] SJ, para.99 ("P-0022 was hit on the back of her head with a rifle butt and thrown in a makeshift underground prison before UPC/FPLC soldiers forces another detainee to insert his hand into her vagina") (footnote omitted).

44. No adequate or reasonable discussion of the "degree of participation" in the crime of rape could have failed to address Mr. Ntaganda's lack of contemporaneous or advance knowledge of any of the specific 21 rapes for which he was sentenced. This was necessary to contextualize and balance the Chamber's findings as to his arguable knowledge of rapes at the *Appartements* and, in particular, to properly assess Mr. Ntaganda's degree of participation in rapes whose reprehensible circumstances were treated as an aggravating circumstance. The Chamber did not do so, demonstrating that it entirely disregarded Mr. Ntaganda's limited degree of participation,[54] or gave it insufficient consideration.

45. The appropriate remedy is to reverse the error committed by the Chamber; find that Mr. Ntaganda's degree of participation in rape of civilians (Counts 4 and 5) is substantially less than found by the Chamber; reduce substantially each of the individual sentences of which he was sentenced on the basis of this error; and reduce Mr. Ntaganda's joint sentence substantially. The Chamber is invited, in the interests of justice, to apply this same reasoning and same remedy in respect of Counts 7 and 8 (sexual enslavement of civilians).

GROUND 3: THE CHAMBER FAILED TO CONDUCT AN *IN CONCRETO* ANALYSIS OF MR. NTAGANDA'S LIMITED PARTICIPATION AND KNOWLEDGE OF RAPE AND SEXUAL SLAVERY IN COMING TO INDIVIDUAL SENTENCES FOR COUNTS 6, 7, 8 AND 9

46. The Chamber erred in failing to address Mr. Ntaganda's lack of knowledge or concrete participation in the sexual enslavement of civilians (Counts 7 and 8).

47. Counts 7 and 8 involved, according to the Chamber's findings, two victims: an unidentified 11-year old girl, and P-0113. Both incidents occurred during the second

[54] The Chamber should have known that this issue needed to be addressed in light of the Defence's arguments before it: SJ, paras.51,53.

operation.[55] The Chamber made no finding that Mr. Ntaganda was aware of these incidents. Furthermore, and unlike the Chamber's findings in respect of rape, the Chamber made no finding that Mr. Ntaganda was aware of any instance of sexual enslavement at any time, involving any victim, whether civilian or military.

48. The Chamber did not acknowledge this highly salient consideration in coming to a view of Mr. Ntaganda's "degree of participation" in these crimes for which he was sentenced. In pronouncing an individual sentence of 12 years for the instances of sexual enslavement of two civilian victims[56] the Chamber did not even mention that there was no indication that Mr. Ntaganda had any knowledge of either of these crimes – an obviously relevant consideration. This was an error of law in the definition of "degree of participation", or a misappreciation of the facts.

49. The same error impacts the Chamber's analysis of Counts 6 and 9 (rape and sexual slavery, respectively, of child soldiers). Three victims were found for these crimes, according to the Chamber.[57] None of these victims was in proximity to Mr. Ntaganda at the time of the crimes. There was no finding that Mr. Ntaganda had any advance, contemporaneous or subsequent knowledge of these crimes.[58] Importantly, the Chamber failed to discuss whether the actions imputed to Mr. Ntaganda as purportedly tolerating or approving rape with in the FPLC at other locations[59] had any causal impact on the perpetration of crimes against the three victims of Counts 6 and 9. This was an important consideration given the very small number of instances of the crimes under Counts 6 and 9, and the fact that they occurred at locations far

[55] SJ, para.101.
[56] SJ, para.132 ("a sentence of 12 years to appropriately reflect the gravity of the sexual slavery of civilian victims").
[57] SJ, fn.345. It is significant that the Chamber does not even expressly identify the limited number of victims of this crime in the text of the Sentencing Judgment, consigning this highly salient circumstance to a footnote. *See* TJ, para.974.
[58] SJ, paras.126-127; TJ, paras.974-982.
[59] SJ, para.119; TJ, para.1197.

from where Mr. Ntaganda was located and without any other indication of his knowledge of those events.

50. The Chamber does not even mention, for example, that one of the three victims — "Mave" — was raped and sexually enslaved by Kisembo after the FPLC forces had been defeated by the UPDF and was separated into two distinct groups,[60] with Mr. Ntaganda having limited or no knowledge, let alone participating, in the activities of the Kisembo group in Mamedi.[61] Indeed, Mr. Ntaganda was not even in Ituri at the time of this rape. This limited degree of participation had to be considered by the Chamber to arrive at a proper view of Mr. Ntaganda's culpability.

51. In failing to conduct any of the foregoing analyses, the Chamber misapplied the concept of "degree of participation"; failed to take into account relevant facts; failed to give a reasoned opinion; and arrived at manifestly disproportionate individual sentences for the crimes under Counts 6, 7, 8 and 9.

52. The appropriate remedy is to reverse the error committed by the Chamber; reduce substantially each of the individual sentences on the basis of this error; substantially reduce Mr. Ntaganda's individual sentences under these Counts; and reduce Mr. Ntaganda's joint sentence substantially.

GROUND 4: THE CHAMBER ERRED IN FINDING THAT MR. NTAGANDA PARTICIPATED IN THE SECOND OPERATION MURDERS BY NOT DISCIPLINING MR MULENDA, OR BY INDICATING HIS POST FACTO APPROVAL OF THOSE CRIMES

53. The Chamber erred in finding that Mr. Ntaganda's participation in the Second Operation murders, which included the Kobu massacre, was enhanced either by: (i) failing to punish the commander in the field, Mr. Mulenda; and (ii) purportedly

[60] TJ, para.652.
[61] *See* SJ, paras.108-109.

expressing approval for Mulenda's troops having committed the Kobu massacre and other murders.[62]

54. **(i)** A prerequisite for any finding that Mr. Ntaganda's culpability should be enhanced for having failed to punish Mr. Mulenda for the Kobu massacre is a finding that Mr. Ntaganda had the capacity and opportunity to do so. The Chamber failed to make this predicate finding, which needed to be established beyond reasonable doubt. Significantly, the Chamber faulted Mr. Ntaganda for not having imposed disciplinary measures "in the period before [Mulenda] left the UPC/FPLC following the 6 March 2003 clashes with the UPDF in Bunia."[63] The Chamber failed, despite implicitly recognizing that Mr. Ntaganda was not in a position to discipline Mr. Mulenda after Mulenda had left the UPC/FPLC on 6 March 2003, to make the findings necessary to conclude that Mr. Ntaganda could have disciplined Mulenda between the date of the Kobu massacre, which was found to have occurred on or around 26 February 2003[64] and 6 March 2003. This was a live and contested issue based on the Chamber's own acceptance that Mr. Ntaganda was in Fataki during the period of the Second Operation[65] and relied heavily on P-0055's testimony, who placed Mr. Ntaganda as still absent from Bunia at least as of 2 March 2003.[66] The Chamber, accordingly, erred in finding that Mr. Ntaganda's culpability was enhanced by a failure to punish Mulenda without having made the necessary predicate findings that he could have done so.

55. **(ii)** The Chamber did not find that Mr. Ntaganda's purported expression of approval of Mulenda contributed to, or had any encouraging effect on, any future crime. The expression of approval for a crime, in itself, does not reveal any enhanced

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[62] SJ, paras.66-67.
[63] TJ, para.639 (footnote omitted).
[64] TJ, para.620.
[65] TJ, para.552 ("Mr. Ntaganda was to go to Fataki").
[66] P-0055 acknowledged [REDACTED] that other documents show occurred on 2 March 2003, DRC-OTP-2067-1976, paras.1-2; DRC-OTP-0018-0113. *See* **P-0055**:T-74,72:3-74:11. Confirmation that [REDACTED], **P-0055**:T-74,71:16-73:15.

degree of participation in a crime, let alone after the crime has already been committed and completed. Not even the degree of intent is enhanced, since intent must animate the *actus reus*.[67] Enhancing gravity on the basis of the expression of *post facto* sentiments of approval for a crime was an error of law.

56. This error materially contributed to a disproportionate individual sentence for Counts 1 and 2. The appropriate remedy is to reverse the error committed by the Chamber; substantially reduce the individual sentences of which he was sentenced on the basis of this error, given that this was the only indication of Mr. Ntaganda's concrete contribution to the Kobu massacre; and reduce Mr. Ntaganda's joint sentence substantially.

GROUND 5: THE CHAMBER ERRED IN FINDING THAT THE DEATHS ARISING FROM INTENTIONALLY DIRECTING ATTACKS ON CIVILIANS COULD NOT BE CONSIDERED AN AGGRAVATING CIRCUMSTANCE (COUNT 3)

57. The Chamber erred in law in relying on deaths of persons who did not constitute legitimate targets caused by intentionally directing attacks on civilians as being an aggravating circumstance for the purposes of sentencing those attacks.[68]

58. The deaths in question occurred during the Second Operation: six individuals killed as a result of a shell fired in Bambu-Yalala, and a person killed while trying to flee in the bush around Buli.[69] The Prosecution could have charged, but chose not to charge, this consequence as murder, which is the crime that properly addresses unlawful deaths arising from intentionally directing attacks on civilians. Treating this separate crime as an aggravating circumstance improperly sentences Mr. Ntaganda for a consequence that, according to the Chamber itself, falls outside of the scope of

[67] Statute, article 30 ("if the material elements are committed with intent and knowledge.")
[68] SJ, para.85.
[69] SJ, fn.233.

the crime of intentionally directing attacks on civilians.[70] Treating this consequence as an aggravating circumstance improperly imports consequences that have been expressly excluded from the scope of this crime, but which are encompassed by another crime, which was not charged.[71]

59. If the Chamber's approach were to be countenanced, the Prosecution would have no need to ever charge murder or unlawful killing in the context of armed conflict: it could simply charge intentionally directing attacks on civilians, which entails no result requirement, and then seek punishment for any deaths that do ensue. This would undermine proper notice of the crimes for which a person is in jeopardy of punishment.

60. Furthermore, this is not a case of separate but related conduct that might be treated as an aggravating circumstance,[72] but is rather a different consequence than that which is charged, and that could have been separately charged. Treating such an uncharged consequence, especially in circumstances where the crime could have been easily charged, is an error of law.

61. This error materially contributed to a disproportionate individual sentence for Count 3. The appropriate remedy is to reverse the error committed by the Chamber; reduce the individual sentence for Count 3; and reduce Mr. Ntaganda's joint sentence accordingly.

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[70] TJ, para.904.

[71] *Bemba-et-al*-SAJ-2276, para.113 ("The convicted person is sentenced for the crime or offence for which he or she was convicted, not for other crimes or offences that that person may also have committed, but in relation to which no conviction was entered. This applies even when, based on the factual findings entered by the Trial Chamber, it may be concluded that these other crimes or offences were actually established at trial. If it were otherwise, the sentencing phase could, in fact, be used to enlarge the scope of the trial – which would be incompatible with the Court's procedural framework.")

[72] *Bemba-et-al*-SAJ-2276, paras.114-116.

GROUND 6: THE CHAMBER ERRED BY "DOUBLE-COUNTING" CERTAIN FACTORS WHEN IMPOSING A DISPROPORTIONATE INDIVIDUAL SENTENCE OF 30 YEARS FOR PERSECUTION (COUNT 10)

62. The Chamber, by imposing on Mr. Ntaganda an individual sentence of 30 years for persecution, impermissibly double-counted factors that it had already considered – and said that it had considered – in pronouncing individual sentences for the crimes underlying the persecution conviction, including murder. Indeed, the 30-year individual sentence for persecution corresponds precisely to the highest individual sentence for those underlying crimes (murder).

63. The Chamber stated clearly that it had already factored the discriminatory element into its assessment of the gravity of the underlying crimes, including murder. The Chamber stated this expressly in declining to rely on the discriminatory element as an aggravating circumstance in respect of those crimes:

> Finally, the Chamber recalls that the murders were committed with a discriminatory intent, pursuant to the common plan to drive out all the Lendu from the localities targeted during the course of the UPC/FPLC's military campaign against the RCD-K/ML. Since the discriminatory element has been considered by the Chamber as part of the common plan and thus the mode of liability, and as such in Mr Ntaganda's degree of participation and intent, the Chamber has not considered it separately as an aggravating circumstance. However, regarding the murder of the *Abbé*, the Chamber considers the fact that Mr Ntaganda intentionally targeted the victim on ethnic grounds, namely by reason of his identity as a Lendu, to constitute an aggravating circumstance.[73]

64. The Chamber had already taken the discriminatory intent into consideration in pronouncing an individual sentence for murder by indirect co-perpetration. The Chamber conducted this analysis under the rubric of "the degree of intent" under rule 145(1)(c), noting that Mr. Ntaganda meant "for the aforementioned conduct to be targeted towards the Lendu civilian population as such, the latter thereby

[73] SJ, para.84 (underline added) (footnotes omitted).

amounting to persecution."[74] The Chamber's incorporation of the discriminatory element into sentencing for murder is expressly permitted under rule 145(2)(b), which allows a Trial Chamber to "take into account, as appropriate: […] (b) [a]s aggravating circumstances: […] (v) commission of the crime for any motive involving discrimination on any of the grounds referred to in article 21, paragraph 3." This is what the Chamber did in respect of the directly committed murder of *Abbé* Bwanalonga, but not in respect of the indirectly co-perpetrated murders, in which the discriminatory intent had already been considered as part of gravity.

65. The Chamber did the same for rape and sexual slavery (Counts 4, 5, 7 and 8);[75] pillage, destruction of houses and attack on a protected object (Counts 11, 17 and 18);[76] and forcible transfer of population and ordering the displacement of the civilian population (Counts 12 and 13).[77] Since the discriminatory intent had been considered as part of the common plan and thus the mode of liability, discriminatory intent was not counted again as an aggravating circumstance[78] except in respect of crimes directly perpetrated (the killing of the *Abbé*).

66. The Chamber even appears to acknowledge this in its discussion of the appropriate sentence for Persecution. The Chamber recognized that the "conduct amounting to the crimes underlying Counts 1 to 5, 7 to 8, 11 to 13, and 17 to 18 took place pursuant to a common plan and organizational policy that also contained a

[74] SJ, para.34 (footnote omitted).
[75] SJ, para.125 ("Finally, the Chamber recalls that the crimes of rape and sexual slavery were committed with a discriminatory intent […]. Since the discriminatory intent has been considered by the Chamber as part of the common plan and thus the mode of liability, the Chamber has not considered it separately as an aggravating circumstance.")
[76] SJ, para.151 ("the Chamber recalls that the discriminatory intent to commit these crimes has already been taken into account in the mode of liability. It is therefore not separately considered her as an aggravating circumstance for these specific crimes.")
[77] SJ, paras.169 ("The Chamber recalls that the forcible transfer of population was committed with a discriminatory intent [...] Since the discriminatory intent has been considered by the Chamber as part of the common plan and thus the mode of liability, the Chamber has not considered it separately as an aggravating circumstance."),171 ("In relation to the fact that ordering the displacement of the civilian population was committed with a discriminatory intent, [...] the Chamber integrates its consideration [...] and does not consider this to constitute a separate aggravating circumstance.")
[78] SJ, paras.84,125,151,169,171.

discriminatory element", which "should not be counted again when assessing the gravity of the crime of persecution and the existence of any aggravating circumstances in relation to this crime."[79] The Chamber, on this basis, concluded that "there are no additional elements to be considered in relation to persecution committed by Mr Ntaganda both as a direct perpetrator and as an indirect co-perpetrator."[80] When ruling on the gravity of the crime of Persecution, the Chamber confirmed that: "[w]hat differentiates the crimes underlying Counts 1 to 5, 7 to 8, 11 to 13, and 17 to 18 from persecution is the discriminatory dimension of the latter" and that accordingly, "there are no additional elements to be considered in relation to persecution committed by Mr Ntaganda both as a direct perpetrator and as an indirect co-perpetrator."[81]

67. The Chamber then committed error by thinking that the consequence of this overlap was that it should pronounce a sentence equal to the highest sentence imposed for those underlying crimes. Rather than recognizing that the redundancy meant that any individual sentence for persecution was already fully reflected in the individual sentences for the underlying crimes, the Chamber proceeded to find that "the sentence imposed on him for the crime of persecution, both as a direct perpetrator and as an indirect co-perpetrator, should not be higher than the highest sentence imposed for any of the underlying crimes amounting to persecution, which is 30 years of imprisonment."[82] This meant, in respect of murder for example, that Mr. Ntaganda received an individual sentence of 30 years for murder, which fully encompassed the discriminatory element of those murders; and then also received an individual sentence of 30 years for persecution, by way of murder.

68. Rather than recognizing that the redundancy meant that any individual sentence for persecution was already fully reflected in the individual sentences for

[79] SJ, para.176 (footnotes omitted).
[80] SJ, para.176.
[81] SJ, para.176 (footnote omitted).
[82] SJ, para.177.

the underlying crimes, the Chamber proceeded to find that "the sentence imposed on him for the crime of persecution, both as a direct perpetrator and as an indirect co-perpetrator, should not be higher than the highest sentence imposed for any of the underlying crimes amounting to persecution, which is 30 years of imprisonment."[83] This meant, in respect of murder for example, that Mr. Ntaganda received an individual sentence of 30 years for murder, which fully encompassed the discriminatory element of those murders; and then also received an individual sentence of 30 years for persecution, by way of murder.

69. This is a textbook case of double-counting. Having fully taken into account the underlying act and the discriminatory dimension of the underlying act in the individual sentence for the crime of murder, there was no room for any additional sentence to be imposed for persecution. The only appropriate sentence was not a sentence equal to that previously imposed for the same conduct, but rather a sentence of zero to avoid double-counting.

70. The comprehensive nature of the overlap between persecution and the underlying acts is highlighted by the ICTY's pre-2004 jurisprudence which held that not even a cumulative conviction was possible for persecution and the underlying crimes constituting the persecution.[84] The Defence is not arguing that this approach, which was subsequently reversed, is the correct approach;[85] however, this current of judicial opinion illustrates how inappropriate would be imposing a separate individual sentence for persecution equal to the sentence for the underlying crime,

[83] SJ, para.177.
[84] ICTY-*Kordić*-AJ, para.1039 ("It was reasoned that where a charge of persecutions is premised on murder and is proven, the Prosecution need not prove an additional fact in order to secure the conviction for murder because the offence is subsumed by the offence of persecutions, which requires proof of a materially distinct element of discriminatory intent in the commission of the act. Similarly, the Appeals Chamber in these cases, as well as in *Krnojelac*, held that convictions for persecutions under Article 5(h) and for other inhumane acts under Article 5(i) on the basis of the same conduct are impermissibly cumulative 'since the crime of persecution in the form of inhumane acts subsumes the crime against humanity of inhumane acts'") (footnotes omitted), referring to ICTY-*Krnojelac*-AJ, para.188.
[85] ICTY-*Kordić*-AJ, para.1040.

especially when the discriminatory intent has already been expressly considered in sentencing for the underlying crime. Notably, in ICTY cases where the Trial Chamber was found to have erred in not entering a cumulative conviction, the Appeals Chamber refrained from revising the sentence upwards or entering a separate sentence for persecution.[86]

71. Accordingly, the Chamber erred in sentencing Mr. Ntaganda to an individual 30 years sentence for the crime of persecution. This sentence double-counted not only the criminality underlying the persecution conviction, but also the discriminatory dimension of that criminality, which the Chamber had previously taken into consideration in pronouncing individual sentences for Counts 1 to 5, 7 to 8, 11 to 13, and 17 to 18. The only appropriate sentence for persecution, in these circumstances, was zero.

72. Accordingly, the Chamber erred in sentencing Mr. Ntaganda to an individual 30 years sentence for the crime of persecution. This sentence double-counted not only the criminality underlying the persecution conviction, but also the discriminatory dimension of that criminality, which the Chamber had previously taken into consideration in pronouncing individual sentences for Counts 1 to 5, 7 to 8, 11 to 13, and 17 to 18. The only appropriate sentence for persecution, in these circumstances, was zero.

73. Accordingly, the Chamber erred in sentencing Mr. Ntaganda to an individual 30 years sentence for the crime of persecution. This sentence double-counted not only the criminality underlying the persecution conviction, but also the discriminatory dimension of that criminality, which the Chamber had previously taken into consideration in pronouncing individual sentences for Counts 1 to 5, 7 to 8, 11 to 13, and 17 to 18. The only appropriate sentence for persecution, in these circumstances, was zero.

[86] ICTY-*Stanisić*-AJ, para.1096, ICTY-*Naletilić*-AJ, paras.620-632.

74. This error materially contributed to an erroneous and disproportionate individual sentence for Count 6. The appropriate remedy is to reverse the error committed by the Chamber; reduce the individual sentence for Count 6 to zero; and reduce Mr. Ntaganda's joint sentence substantially.

GROUND 7: THE CHAMBER ERRONEOUSLY DISREGARDED THE FACT THAT MR. NTAGANDA SAVED THE LIVES OF 64 ENEMY SOLDIERS[87]

75. The Chamber erred in law, or misappreciated the facts, in considering that saving the lives of 64 enemy combatants was not a mitigating factor.[88]

76. The Chamber did not reject the evidence of P-0016 – a witness upon whim it relied extensively – that Mr. Ntaganda intervened to dissuade Floribert Kisembo from killing 64 enemy soldiers.[89] Instead, the Chamber accorded no weight at all to this action. The Chamber did not "consider this to be a mitigating factor, and accords it no weight" because Mr. Ntaganda's "actions appear to have been aimed at using the soldiers for the benefit of the common plan."[90] This was a clear legal or factual error.

77. First, even assuming that Mr. Ntaganda saved the lives of these 64 individuals for the motive indicated by the Chamber, the value of saving lives is nonetheless such a substantial humanitarian act that it must be acknowledged and encouraged. Thus, in *Popović et al.*, the Trial Chamber held that:

> even if Pandurević's motivations in opening the corridor included military considerations and protecting Serb lives, this does not detract from the fact that objectively he saved thousands of lives. The Trial Chamber is overall convinced that Pandurević's action in

[87] This ground of appeal refers to the second "Ground 7" enumerated in the Notice of Appeal. The first "Ground 7" is withdrawn.
[88] SJ, para.212.
[89] SJ, para.211.
[90] SJ, para.212 (underline added).

> opening the corridor was a clear and compelling instance of assistance to potential victims.[91]

78. The policy reasons for such an approach are clear and compelling. Actions that protect human life on a large scale must be acknowledged, accorded weight and encouraged, even when those actions may be tainted by some ulterior motive. Almost any humanitarian action can be characterized as in the interests of the fighting force involved in the action. Such dual purposes are not, however, a reason for rejecting the value of such actions. Saving the lives of 64 individuals is a substantial humanitarian act that must be recognized a mitigating factor.

79. The number of individuals saved was substantial. Indeed, it is almost equal to the total number of murder victims for which Mr. Ntaganda was convicted. Mr. Ntaganda apparently had to intervene quite forcefully to save these lives. As described by P-0016, "there was a heated discussion, but after some time Bosco succeeded in convincing them."[92]

80. The same approach has been followed in other ICTY cases. In *Blagojević*, the Chamber recognized that saving the lives of a number of Muslim boys should be accepted as a mitigating factor, despite the Prosecution argument that it should be accorded no weight because it was merely an act in compliance with the law.[93] In *Karadžić*, the accused's withdrawal from politics and public life was considered as a mitigating circumstance, despite the Prosecution's submission that the reason for doing so was a promise of non-prosecution in exchange.[94] Analogously, pleas of guilt have been universally accepted as a reason for diminishing sentence,[95] despite the self-interested motives that might underpin such a plea.

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[91] ICTY-*Popović*-TJ, para.2220.
[92] DRC-OTP-2054-1447, at 1457.
[93] ICTY-*Blagojević*-AJ, para.342.
[94] ICTY-*Karadžić*-AJ, para.754, ICTY-*Karadžić*-TJ, para.6057, ICTY-*Karadžić*-Decision-Holbrooke-Agreement, para.55; ICTY-*Karadžić*-Decision-Immunity, paras.21-23.
[95] *Al-Mahdi*-SJ-171, para.100.

81. In addition or in the alternative, the Chamber did not have a proper evidential basis to find that Mr. Ntaganda's "actions appear to have been aimed"[96] at using the soldiers for the benefit of the common plan. This is not a finding in the Judgment. The only basis for this assertion is the words of P-0016, who stated that "NTAGANDA *a raisonne qu'il leur fallait des véritables militaires à intégrer dans la nouvelle armée et pour assurer l'entraînement et le bon fonctionnement des FPLC, vu que les FPLC n'avaient pas de militaires formés*. *NTAGANDA ne voulait pas que nous, les soixante-trois detenus, soyons tués*."[97] P-0016 does not specify whether Mr. Ntaganda had "reasoned" in this manner internally, or whether this was the reasoning that he presented to Kisembo to convince him to spare the lives of these prisoners. In any event, the Chamber's own use of the word "appear"[98] demonstrates the speculative nature of its inference concerning Mr. Ntaganda's "aim", and was not a proper basis on which to dismiss this substantial humanitarian act.

82. The Chamber's categorical dismissal of Mr. Ntaganda's act of saving the lives of 64 individuals was legally wrong, and based on a speculative finding of fact as to Mr. Ntaganda's motive. The Chamber is invited, given the absence of any proper exercise of discretion by the Chamber, to give substantial weight in mitigation to Mr. Ntaganda's actions in saving these lives, and to concretely and substantially reduce Mr. Ntaganda's sentence in recognition of his actions.

GROUND 8: THE CHAMBER MISUNDERSTOOD, OR ERRONEOUSLY REJECTED, THE SIGNIFICANCE OF MR NTAGANDA'S RECENT PRSONAL EXPERIENCE OF GENOCIDE, WHICH HE FOUGHT TO END, IN RWANDA

83. The Chamber erred in determining that Mr. Ntaganda's traumatic personal experience in the Rwandan genocide was irrelevant to sentencing. The Chamber fundamentally misunderstood the Defence's argument concerning the significance of

[96] SJ, para.212.
[97] **P-0016**:DRC-OTP-0126-0422, para.47.
[98] SJ, para.212.

these experiences. The argument was not that "the alleged protection of one group through acts aimed at the destruction and disintegration of another" could be a reason for mitigating sentence, but rather that the horrible and traumatizing experience of genocide endured by Mr. Ntaganda helps contextualize and explain Mr. Ntaganda's criminal conduct. The personal background of an offender, especially traumatic experiences, is routinely taken into account for this purpose. The Chamber erred in law, or misappreciated the facts, in doing otherwise.

84. The reason that a person offends, which can include social, professional and family circumstances, is relevant to sentencing.[99] In the United States, the likely trauma of war-time combat has been treated as a relevant factor in sentencing veterans for domestic crimes, and the failure to do so has been found to be reversible error on appeal:

> It is also unreasonable to conclude that Porter's military service would be reduced to "inconsequential proportions," 788 So. 2d, at 925, simply because the jury would also have learned that Porter went AWOL on more than one occasion. Our Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines as Porter did. Moreover, the relevance of Porter's extensive combat experience is not only that he served honorably under extreme hardship and gruesome conditions, but also that the jury might find mitigating the intense stress and mental and emotional toll that combat took on Porter.[100]

85. Difficult or traumatic family circumstances of an offender are routinely taken into consideration in mitigation, even in respect of violent crimes, because "his or her

[99] ICTY-*Blaškić*-TJ, paras.779,778 ("Chambers have often found it appropriate to review the accused's personal history - socially, professionally and within his family. It is essential to review these factors because they may bring to light the reasons for the accused's criminal conduct […] not so much […] in order to understand the reasons for the crime but more to assess the possibility of rehabilitating the accused.")
[100] *Wagner*.

moral culpability is likely to be less than the culpability of an offender whose formative years have not been marred in that way."[101]

86. The Chamber indicated that it "does not doubt the traumatic impact on Mr. Ntaganda of having lived through the Rwandan genocide, including the loss of his close family members."[102] The Chamber then switched to an irrelevant discussion of whether Mr. Ntaganda had always in 2002 and 2003 fought for the liberation and freedom of the civilian population, implying that the latter would diminish or extinguish the former.[103]

87. This approach was misguided. The relevance of an offender's past trauma is not that it justifies criminal conduct, but that it diminishes the culpability of criminal conduct. There were ample indications that this trauma was highly relevant to a full assessment of Mr. Ntaganda's motivations and the truly exceptional and extreme circumstances that surrounded his offences.

88. Mr. Ntaganda was only 17 when he joined the RPF, when his entire ethnic group was under threat of genocide.[104] That threat turned into a full-scale holocaust of the Tutsi, which was only put to an end by Mr. Ntaganda and his comrades-in-arms in the RPF taking up arms to put a stop to it.[105] The UN, which would later be present in Ituri, utterly failed to prevent or put a stop to that genocide, which claimed the lives of Mr. Ntaganda' sister and nephew. He personally saw their dead bodies.[106]

89. No one living through these experiences, especially at such a tender age as Mr. Ntaganda, would fail to have their outlook profoundly affected. Fears of a recurrence of this slaughter, targeted on ethnic grounds, would have been an irresistible

[101] *Bugmy*, para.40; *R v Williams*, paras.58-59; *R v B.V.T*, para.87.
[102] SJ, para.210.
[103] SJ, para.210.
[104] **D-0300**:T-209,47-49; TJ, paras.5-6.
[105] **D-0300**:T-211,5-6.
[106] **D-0300**:T-211,7:6-15.

motivation in Mr. Ntaganda's mind at the time that he was found to have joined the common criminal plan.

90. Indeed, there were ample indications at that time, confirmed by the UN,[107] of a continuation of this genocide in eastern Congo, to which many *genocidaires* had fled.[108] President Joseph Kabila fanned the flames of hatred against a "Hema-Tutsi empire,"[109] calling them "vermin,"[110] and more openly by his cabinet director who called for the extermination of Tutsi in Congo.[111] The Chamber itself acknowledged that the former Rwandese *genocidaires* contributed to a "'witch-hunt' against the Tutsi and, generally in Zaire, a strong hostility towards the Rwandese among politicians and the most educated segments of the population."[112]

91. The "fighting" amongst Lendu and Hema prior to the formation of the UPC militia was particularly vicious and uncontrolled.[113] As one Prosecution witness testified, the situation was one of "life or death" for the Hema population.[114] The APC attack on Mudzipela[115] in August 2002 had the objective, according to Prosecution witness P-0017, to "eradicate[] the Hema from the entire region."[116] This was just one of many attacks and forms of severe persecution of Hema civilians[117] including – shockingly – cannibalism.[118]

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[107] DRC-OTP-2084-0408, p.8.
[108] TJ, para.6 ("Several hundred thousand Hutu, including perpetrators of the genocide, fled Rwanda into neighbouring Zaire"); **D-0300**:T-211,17:16-17; DRC-OTP-2084-0408, pp.5,8.
[109] **P-0976**:T-153,19:15-21:6.
[110] **P-0012**:T-164,65:8-13 (Kabila Sr describing the Tutsi and any who resembled them "vermin"),68:8-12.
[111] **D-0300**:T-243,35:3-5.
[112] TJ, para.6,21.
[113] **D-0038**:T-249,14:1,16:13-14,39:23,49:12-50:2; DRC-OTP-2084-0408, pp.17-21; **D-0172**:T-245,23 :3 ("Lendu were killing people here and there").
[114] **P-0017**:T-60,64:15-17.
[115] TJ, para.444.
[116] **P-0017**:T-60,66:4.
[117] **P-0800**:T-68,16:21-22,21:5-9;T-69,25:3-17,27:25-28:1; **P-0907**:T-89,12:20-13:8,78:14-20;T-91,13:13-2,32:17-33:18; **P-0887**:T-94,41:5-42:6.
[118] **D-0800**:T-69,23:17; **P-0907**:T-91,31:15-32:5; **P-0887**:T-94,46:7-47:18; **P-0005**:T-189,27:24-28:4; **P-0894**: DRC-OTP-2076-0194, pp.0199-0200, paras.29-31; DRC-OTP-0214-0116, pp.0117-0118; DRC-OTP-0074-

92. Mr. Ntaganda's reasons for associating with his co-perpetrators, given these circumstances, cannot be divorced from the echoes of what he had just lived through in Rwanda. He knew that Tutsi and Hema were being slaughtered in Congo just as they had been in Rwanda.[119] He knew that elements of the *Interahamwe* were integrated into the APC.[120] He knew about the calls to genocide by Kabila.[121] He perceived, and spoke at the time, of the connection between the threat in Congo and the genocide that Rwanda had suffered.[122]

93. As he explained in his own words before the Chamber:

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

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0422, p.0436, para.36.

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

[120] **D-0300**:T-229,57:15-24.

[121] **D-0300**:T-243,35:3-4.

[122] **P-0769**:T-120,16:2-12 ("he also said this conflict that's taking place here is like the one in Rwanda, so you really need to get involved, get involved heavily in the militia and in the political cadre to support the movement.")

Congo was similar or the same. [123]

94. The Sentencing Submissions before the Chamber explained clearly that this evidence was not invoked to justify Mr. Ntaganda's actions, but to explain and contextualize the motivations and personal circumstances that led him into his criminal conduct.[124] The Chamber's rejection of this argument on the basis that Mr. Ntaganda's conduct was criminal[125] does not address the submission. The conduct may be criminal, and yet the traumatic and personal circumstances of a convicted person can still be highly relevant to assessing culpability.

95. The circumstances that Mr. Ntaganda lived through as an adolescent were extreme. He grew up under threat of genocide against his ethnic group. That genocide was then unleashed, leading to the deaths of at least many hundreds of thousands of individuals. Mr. Ntaganda had to take up arms to put an end to that genocide. This background, while in no way a legal justification for the crimes for which he is being sentenced, is highly relevant to assessing his culpability and should have been taken into consideration in mitigation.

96. In the absence of any reasons addressing this argument, or any indication that the Chamber properly exercised its discretion, the Appeals Chamber is invited to address this issue *de novo*, and to find that Mr. Ntaganda's unique and exceptional background must be taken into consideration in substantial mitigation of sentence. This error materially contributed to a disproportionate individual sentence. The appropriate remedy is to reverse the error committed by the Chamber; give weight to this factor in mitigation; and reduce Mr. Ntaganda's joint sentence accordingly.

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[123] **D-0300**:T-243,35:2-19.
[124] Defence-Submissions-2424, paras.100-110.
[125] SJ, para.210.

GROUND 9: THE CHAMBER ERRED IN LAW, OR MISAPPRECIATED THE FACTS, IN REJECTING THE EVIDENCE THAT MR. NTAGANDA PROTECTED LENDU CIVILIANS AT MANDRO; THAT HE PROTECTED CIVILIANS FROM ATTACKS ON SPECIFIED OCCASIONS; AND THAT HE PUNISHED CRIMES AGAINST CIVILIANS

97. The Chamber erred when it failed to find, on the balance of probabilities standard, that Mr. Ntaganda engaged in substantial actions to protect civilians that should be accorded weight in mitigation. In particular, the Chamber's rejection of the evidence of Mr. Ntaganda's efforts to protect Lendu civilians at Mandro – on the basis that his identification as "Bosco" was not definitive – was manifestly unreasonable.

98. This rejection was part of a pattern of unreasonable or unexplained rejections by the Chamber of evidence that was sufficient to show, on a balance of probability, that: (i) Mr. Ntaganda welcomed and protected Lendu civilians in Mandro in June 2002;[126] (ii) Mr. Ntaganda protected civilians by deploying troops in Mudzipela in August 2002, in Nizi, in Mabanga, at the Catholic mission in Mongbwalu, on the Nyangaray road, in Mandro after the closure of the training camp and in Risasi;[127] and (iii) Mr. Ntaganda punishing crimes committed by FPLC troops.[128]

I. Protection of Lendu civilians in Mandro

99. The Chamber erred in refusing to accept the evidence of D-0054 and others that Mr. Ntaganda welcomed and protected Lendu civilians at Mandro after fleeing from attacks by Lendu civilians. The Chamber did so on two grounds: (i) the identification of the commander who welcomed the Lendu civilians at Mandro as "Bosco" was not sufficiently conclusive; [129] and (ii) the assistance to civilians could

[126] Defence-Submissions-2424, para.115.
[127] Defence-Submissions-2424, para.121.
[128] Defence-Submissions-2424, para.122.
[129] SJ, para.214

not be reconciled, according to the Chamber, with its broader findings that Mr. Ntaganda participated in a common criminal plan to do the contrary.

100. **(i)** The Chamber recognised that Mr. Ntaganda was based in Mandro, in charge of the training centre, at the time that the Lendu civilians sought refuge there.[130] Mr. Ntaganda, according to the Chamber, worked closely with Chief Kahwa,[131] who was the other person identified by D-0054 as present when the Lendu civilians were welcomed.[132] The Chamber had no evidence to nourish its supposition that there might be another commander named "Bosco" to whom D-0054 could have been referring.[133] In fact, the Prosecution did not even cross-examine D-0054 on this or any other point,[134] which must, in the circumstances, be treated as a tacit acceptance that the "Bosco" to whom D-0054 was referring was, in fact, Mr. Ntaganda.

101. The Chamber, meanwhile, failed to even address Mr. Ntaganda's testimony corroborating that of D-0054 in this regard.[135]

102. **(ii)** The Chamber's reliance on its findings of Mr. Ntaganda's participation in a common plan is not a proper basis for categorically rejecting that he protected Lendu civilians. Such a finding is not incompatible with the instances of protection of civilians in accordance with D-0054's testimony. Even individuals convicted of genocide at the ICTR were found to have saved the lives of Tutsis where demonstrated by the evidence, and these actions were accepted in mitigation.[136] The essence of mitigation is that, a person may engage in acts that limit, contain or curtail the scope or consequences of their own criminal conduct.

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[130] TJ, paras.314,364-366,371.
[131] TJ ,paras.288,309,364.
[132] **D-0054**:T-244,16:12-20.
[133] **D-0300**:T-219,32:9-15.
[134] **D-0054**:T-244,27:7-8.
[135] **D-0300**:T-213,70 :20-71:13;T-231,10:18-13:5.
[136] ICTR-*Serugendo*-TJ, para.69; ICTR-*Nzabirinda*-SJ, para.77; ICTR-*Rugambarara*-SJ, para.37.

103. The Chamber erred in law or in fact in rejecting the evidence that Mr. Ntaganda protected the lives of Lendu civilians who sought refuge at Mandro.

II. Protection of other civilians by deploying troops

104. The Chamber also improperly relies on several findings in the Judgement to contradict the remaining seven incidents of protection of civilians: (i) the protection of Lendu civilians upon their return to Mongbwalu; (ii) the UPC/FPLC's conduct in the aftermath of the assaults in Mongbwalu, Lipri, Tsili, Kobu and Bambu; and (iii) the general protection of the civilian population in Ituri in 2002 and 2003.[137]

105. The Chamber misappreciated the evidence, or applied a standard significantly higher than balance of probability. In particular, the Chamber misappreciated the evidence in stating that "the testimony referred to in support thereof is Mr Ntaganda's only".[138] This is incorrect. Other evidence was relied on to establish that Mr. Ntaganda protected civilians in two locations: the Nyangaray road[139] and Risasi.[140] This evidence was more than adequate to make a finding on a balance of probability.

III. Punishment of crimes

106. The Chamber misappreciated the facts, or failed to give reasons, in rejecting unmistakable evidence that Mr. Ntaganda punished crimes of subordinates. The evidence before the Chamber demonstrated at least eight such highly probative acts of punishment.[141] The Chamber's dismissal of this evidence on the basis that the victims were not necessarily *Lendu* persons[142] is irrelevant: the evidence still shows

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[137] SJ, para.251.
[138] SJ, para.215.
[139] Defence-Submissions-2424, fn.237 referring to **D-0300**:T-219,13:5-17; DRC-OTP-0120-0294, 01:24:10-01:25:11 (Transl.DRC-OTP-0176-0187, 0238:1372-1373); DRC-OTP-0127-0058, 23:44-25:48 (Transl.DRC-OTP-2102-3675, pp.3696,490-3700,596).
[140] Defence-Submissions-2424, fn.239 referring to **D-0038**:T-249,74:23-78:1;T-251,15:13-18,40:22-25.
[141] Defence-Submissions-2424, para.122.
[142] SJ, para.216.

that Mr. Ntaganda punished crimes. Furthermore, the most that the Chamber was able to say in respect of the victims is that their ethnic identity, in some cases, was not established. This was not a proper basis, on a balance of probability to categorically dismiss this clear evidence of Mr. Ntaganda's actions to limit and punish violent criminal acts.

107. The Chamber minimized Mr. Ntaganda's specific acts of punishment – including the burning of goods looted by his men to set an example against such practice, the execution by firing squad in public at Camp Ndromo – approved by the UPC/FPLC President- of a serious offender who looted in the house of Nande civilians, and the detention of Abelanga, Pigwa and Kasangaki – on the basis that these acts were "isolated."[143] No reasonable Chamber could have accorded these actions zero significance. Each of these actions, despite their allegedly limited number – were high profile actions meant to set an example.[144]

108. The Chamber also erred in rejecting a separate execution by firing squad, in public, in Mongbwalu – also authorized by the UPC/FPLC hierarchy – of an offending soldier, Liripa, for murder. The Chamber misappreciated the evidence in rejecting this punishment "due to a lack of credibility in the relevant testimony of Mr Ntaganda".[145] This ignored, however, that corroboration of this event was provided by no less than four massages in the logbook.[146] P-0859, the brother of the Lendu civilian who was killed, also testified that Liripa was executed after an investigation led by Kasangaki, because he had fired on his brother.[147] The Chamber therefore disregarded highly relevant and direct evidence and, accordingly, reached an erroneous conclusion.

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[143] SJ, para.216.
[144] **D-0017**:T-252,76:15-78:12; **D-0300**:T-215,7:18-8:1; **D-0300**:T-227,83:7-22;T-242,84:17-86:16.
[145] SJ, para.216.
[146] DRC-OTP-0017-0033, pp.0097 (second), 0098 (both), 0099 (first), (Transl.DRC-OTP-2102-3854, pp.3919,3920,3921); **D-0300**:T-222,61:2-65:12. *See also* DCB, paras.175,290,291,685.
[147] **P-0859**:T-51,42:5-46:3.

IV. Conclusion and Remedy

109. The Chamber erred when it failed to find, on the balance of probabilities standard, that Mr. Ntaganda engaged in substantial actions to protect civilians, that should be accorded weight in mitigation. His efforts to protect Lendu civilians at Mandro is merely the most obvious error, that is so egregious that it reflects the misapplication of the relevant standard of proof; misappreciates relevant evidence; or is an abuse of discretion.

110. This error materially contributed to a disproportionate individual sentence. The appropriate remedy is to reverse the error committed by the Chamber; address this issue *de novo*; give weight to this factor in mitigation; and reduce Mr. Ntaganda's joint sentence accordingly.

GROUND 10: THE CHAMBER ERRED IN FACT, LAW AND PROCEDURE IN FAILING TO FIND THAT MR. NTAGANDA CONTRIBUTED TO RECONCILIATION WITH THE LENDU COMMUNITY AND FACILITATED THE DEMOBILISATION OF UPC/FPLC MEMBERS

111. In the Judgment, the Chamber found that "Mr. Ntaganda and other military leaders of the UPC/FPLC […] agreed in the common plan to drive out all the Lendu from the localities targeted during the course of their military campaign […]"[148] and that "[b]y way of this agreement […] [they] meant the destruction and disintegration of the Lendu community […]".[149]

112. Against this quasi genocidal intent finding, it can be presumed that efforts deployed towards peace and reconciliation, in particular with the Lendu community, during and immediately following the period during which crimes were found to have been committed, would be considered as major positive achievements

[148] TJ, para.808.
[149] TJ, para.809.

deserving substantial weight in mitigation. The Chamber erred by concluding otherwise.

113. The Chamber erred in fact and in law in finding that it "does not consider a genuine and concrete contribution to peace and reconciliation, or demobilisation and disarmament on the part of Mr. Ntaganda to be established overall, on a balance of probabilities"[150]. Under both headings, reconciliation and demobilizations, the Chamber's decision "[…] not [to] take this into account in mitigation"[151] was manifestly unreasonable, warranting the intervention of the Appeals Chamber.

114. As demonstrated below, the Chamber erred in its assessment of the evidence; failed to take into consideration highly relevant and probative evidence; considered irrelevant facts; and erred in its application of the balance of probabilities standard of proof. Having properly considered the totality of the evidence, no reasonable Chamber could have failed to accord high mitigation value to Mr. Ntaganda's genuine and objective contribution to peace and reconciliation with the Lendu community as well as to the demobilisation and integration the armed forces of the Democratic Republic of Congo ("DRC") of UPC/FPLC members.

I. The Chamber erred in the application of the balance of probabilities standard of proof

115. The Chamber held that "[w]hether mitigating circumstances exist is considered on a balance of probabilities. Although mitigating circumstances must relate directly to the convicted person, they need not directly relate to the crimes that the person is convicted of. Moreover, they are not limited by the scope of the confirmed charges, or the Chamber's findings in the Judgment."[152]

[150] SJ, para.224.
[151] SJ, para.224.
[152] SJ, para.24.

116. In cases before the Court, the balance of probabilities standard of proof has been referred to the 'more likely than not' standard.[153]

117. In the family case *In re H and others (Minors)*, Lord Nicholls explained that the balance of probabilities standard of proof was a flexible test in the following terms: "[t]he balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was **more likely than not**. […]"[154]

118. Applying the balance of probabilities standard of proof to the establishment of mitigating circumstances, the ICTY Appeals Chamber previously held that:

> The standard of proof with regard to mitigating circumstances is not, as with aggravating circumstances, proof beyond reasonable doubt, but proof on a balance of probabilities: the circumstance in question must have existed or exists "more probably than not.[155]

119. In this case, the Chamber set out to assess mitigating circumstances put forward on behalf of Mr. Ntaganda pursuant to the balance of probabilities standard of proof. As demonstrated below however, the evidence considered by the Chamber as being relevant, the manner in which the Chamber analysed the evidence and the irrelevant factors it considered, demonstrates that the Chamber erred in the application of the balance of probabilities standard of proof.

II. Mr. Ntaganda genuinely and concretely contributed to peace and reconciliation with the Lendu community

120. Pursuant to the balance of probabilities standard of proof, the Chamber had to determine whether, on the evidence before it, it was more probable than not that Mr. Ntaganda had genuinely and concretely contributed to peace and reconciliation with the Lendu community.

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[153] *Ruto-Sang*-Separate-Opinion-1334, para.31.
[154] *In re H and others*, at 586 (emphasis added).
[155] ICTY-*Babić*-SAJ, para.33.

121. The Chamber held that "promotion of peace and reconciliation may only constitute a mitigation circumstance if it is genuine and concrete."[156] Notably, Trial Chamber II in Katanga considered that "efforts undertaken to promote peace and reconciliation **can and must be taken into account in the sentencing and could potentially mitigate the sentence**". While the Katanga Trial Chamber also considered that such efforts must be both palpable and genuine, it nonetheless specified that results were not a pre-condition "**without the need to demand results**."[157] While concrete actions refer to what is "existing in a real form that can be seen or felt",[158] genuine denotes "honest and sincere".[159]

122. At paragraph 219, the Chamber noted that the evidence before it on the alleged reconciliation between ethnic communities in 2004, indicated that:

> (i) in 2004, the FNI had an initiative to conduct an awareness raising campaign among Lendu and – particularly – Hema about the need for peace, unity and free movement of people and goods; (ii) as part of this initiative, pacification meetings were held in various Hema villages; (iii) one of these meetings, held in March 2004 in Bule, was attended by a delegation sent by Mr Ntaganda; (iv) Mr Ntaganda encouraged the initiative; (iv) Mr Ntaganda had a role in ensuring the security of FNI representatives while they were travelling to the locations where such meetings were held; (v) Mr Ntaganda spoke about peace in Sali, and at events in Largu, Mabanga, and Lopa; (vi) Mr Ntaganda invited Lendu to a pacification meeting in Lopa; (vii) a 'rank giving ceremony' was held in Largu in July 2004 followed by a celebration in Drodro which was attended by members of the UPC (including Mr Ntaganda), members of the FNI (including its President Floribert Ndjabu), and members of the territorial administration of Djugu, including its Head, Tchachu Lylo, and its Deputy Head, Kiza Mateso. Mr Ntaganda was involved in the organisation of this event.[160]

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[156] SJ, para.218.
[157] *Katanga*-SJ-3484, para.91 (emphasis added).
[158] Cambridge dictionary https://dictionary.cambridge.org/fr/dictionnaire/anglais/concrete.
[159] Cambridge dictionary https://dictionary.cambridge.org/fr/dictionnaire/anglais/genuine.
[160] SJ, para.219.

123. Despite such convincing evidence, the Chamber considered that "a genuine and concrete contribution to peace and reconciliation […] on the part of Mr. Ntaganda [was not] established overall, on a balance of probabilities."[161] No reasonable Trial Chamber, having properly and objectively considered this evidence could have reached such a finding, which is manifestly unreasonable.

124. What is more, the Chamber's assessment of the evidence before it failed to consider highly relevant evidence further establishing concrete efforts deployed by the UPC/FPLC and Mr. Ntaganda to reach out and contribute to reconciliation with the Lendu community, including *inter alia*:

- Mr. Ntaganda's own words during a meeting in Sali, urging Hema and Lendu to recognize that "you're the same people… you're drinking the same water".[162]

- Mr. Ntaganda's address to the population in Largu where Lendu inhabitants had returned, stating *inter alia* "nous parlons la même langue et nous vivons sur le même territoire, pourquoi nous ne vivons pas en harmonie ?".[163] D-0303 testified that this was "un appel à la paix et à la réconciliation."[164]

- D-0306's testimony that Mr. Ntaganda "really wanted to restore peace";[165] and

- Evidence related to another *Collation des grades* ceremony held in Katoto, which corroborates UPC/RP and Mr. Ntaganda's peace and reconciliation undertakings.[166]

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[161] SJ, para. 224.
[162] *See* Defence-Submissions-2424, para.126, referring to **D-0306**:T-267,20:15-19.
[163] *See* Defence-Submissions-2424, para.126, referring to DRC-D18-0002-0001, para.39.
[164] DRC-D18-0002-0001, para.39.
[165] Defence-Submissions-2424, para.127, referring to **D-0306**:T-267,15:20-24.

A. Nature of the activities established by the evidence

125. The Chamber erred in considering that the nature of the activities established by the evidence suggest a strategic alliance between the UPC/FPLC and the FNI, as opposed to broader reconciliation and peace between the Lendu and Hema communities, and that such an alliance was being considered in order to secure a high position at the national level.

126. *First*, little, if any, probative value can be attributed to the MONUC weekly report referred to by the Chamber.[167] In fact, it is unclear whether paragraphs 2 (c) and (d) were even admitted in evidence. This document was first used by the Defence to impeach P-0190 regarding his fabricated narrative concerning the murder of a UN observer by Mr. Ntaganda.[168] Paragraph 2 (a) was read into the transcript for that purpose.[169] Later, the Prosecution requested the admission of certain additional portions of the document - page 0152, paragraph l and pages 0154-0155, paragraph 10(b) - from the bar table. The Chamber admitted these portions over Defence objections that they contained information prejudicial to the accused, beyond the temporal scope of the charges and the fact that they could have been adduced *via* Witness P-0761.[170] Significantly, paragraphs 2 (c) and (d) are the result of MONUC intelligence gathering from limited one-sided sources involved in a struggle for the Presidency of the FNI following the return of Ndjabu, the FNI President to Bunia. More importantly, contrary to the Chamber's observations, the bid to secure a high position at the national level is clearly attributed personally to Ndjabu for siding with Lubanga's group, not to the UPC/FPLC and even less so to Mr. Ntaganda.

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[166] DRC-OTP-0127-0064, 34:05-35:00,57:47-1:07:01,02:08:23-02:10:10,02:17:4102:19:33; DRC-OTP-0165-0349, p.0371, l.481 to p.0372, l.514, p.0379, l.710 to p.0383, l.821, and p.0413, l.1556 to p.0416, l.1634; DRC-OTP-0165-0276, p.0297, l.0459 to p.0298, l.0491, p.0304, l.666 to p.0308, l.767, and p.0336, l.1473 to p.0339, l.1541.

[167] SJ, para.220, fn.593 referring to DRC-OTP-0009-0146-R01, from 0147 to 0148, para.2(d).

[168] **P-0190**:T-99,30:25-16.

[169] The Chamber indeed found that P-0190's testimony lacks in credibility and did not rely on his testimony (*see* TJ, para.143; Defence-Request-1483; Decision-1580.

[170] Decision-1838.

127. *Secondly*, even assuming that one of the aims of reconciliation between the UPC/FPLC on one hand and the Lendu community on the other was "in order to secure a high position at the national level", the achievement of reconciling - even if only partially - the Hema and Lendu communities, unable to live together a short while before, remains extraordinary. Its positive outcome on the security of the Ituri population in all villages where it was taking place cannot be underestimated. The Chamber thus erred in taking irrelevant facts into consideration.

128. *Thirdly*, the Chamber also erred by minimizing the significance of the July 2004 event held in Largu because it was a "military occasion, namely a 'rank giving ceremony' where all soldiers receiving ranks were UPC/FPLC officers."[171] Respectfully submitted, the Chamber missed the point. While the event was indeed a UPC/FPLC rank giving ceremony, the public character of the event, the presence of members of the Hema and Lendu communities, the presence of Lendu combatants, and more importantly, the presence of the senior political leaders of the UPC/FPLC and the FNI, highlight the remarkable and unavoidable symbolic of the event and reveal the far-reaching significance of the event for reconciliation between the Hema and Lendu communities.

129. *Fourthly*, the Chamber also erred in considering the July 2004 event in Largu as a private affair between the FNI and the UPC/FPLC because the Lendu Djugu territory administrator Tshashu Lylo was also a former UPC and FNI official. The Chamber failed to consider that Tshashu Lylo made it clear that he was present in his capacity as administrator of the territory and that he was appointed by the President of the DRC Republic in Decree number 04/60. He also stated that he began his speech with 'Djugu Hurrah' because "I see that all the people here are from the population of the territory of Djugu" and that he finished his introduction with 'UPC Hurrah' and 'FNI Hurrah' "because you represent the two political branches which are on the

[171] SJ, para.220.

Djugu territory".[172] On this issue, the Chamber failed to consider the presence of Kiza Mateso, Tshashu Lylo's deputy who was never a member of the UPC/FPLC or FNI, even though he is from the Hema community. In fact, Kiza Mateso was the Vice Governor of Ituri when Lompondo was Governor until August 2002.[173] The official capacity of these guests and the content of Tshashu Lylo's speech in particular, make it clear that they represented the State and did not attend the event as members of the UPC/FPLC or FNI. Their presence is another indicator missed by the Chamber of the potential positive repercussions of the July 2004 event.

130. *Fifthly*, the Chamber erred by according weight to evidence suggesting that "the majority of the Lendu community was reportedly dismissive in early 2004 of the FNI leader Floribert Ndjabu's rapprochement with Mr. Ntaganda."[174] The evidence referred to by the Chamber is drawn from document DRC-OTP-0009-0146 addressed above as having little or no probative value.[175] Moreover, the presence of the incumbent FNI President at the festivities that followed the *Collation des grades* in Largu and the speech he delivered on this occasion, clearly outweigh any rumours of the Lendu community being reportedly dismissive of him, gathered by MONUC intelligence services from one-sided sources. Furthermore, the number of FNI and FRPI representatives holding various positions of responsibility who signed document DRC-D18-0001-6754, [REDACTED], illustrates overwhelming support for the dialogue between FNI/FRPI and UPC/RP, which could only take place owing to the security provided by UPC/RP through Mr. Ntaganda.[176]

131. *Sixthly*, the Chamber erred by taking into consideration the absence of evidence that Mr. Ntaganda personally visited any villages affected by the events which are the subject of his conviction, such as Mongbwalu, Lipri or Kobu.

[172] DRC-OTP-0118-0002; DRC-OTP-2084-0041, ll.377-383.
[173] DRC-D18-0001-6587.
[174] SJ, para.220.
[175] *See above* para.126.
[176] [REDACTED].

Respectfully submitted, this is an irrelevant consideration regarding the nature of the reconciliation activities established by the evidence. It neither impacts the genuine and concrete character of the reconciliation activities, nor the positive repercussions on their broader reconciliation value. The evidence nevertheless establishes that reconciliation meetings and activities between the Hema and Lendu communities occurred in many villages affected by the events which gave rise to the charges against Mr. Ntaganda, including *inter alia*, Katoto, Lopa, Iga Barrière, Muhito, Kobu[177] and Mongbwalu,[178] owing to the security provided by UPC/RP through Mr. Ntaganda.

132. Lastly, the Chamber erred in considering that the nature of the activities established by the evidence did not suggest broader reconciliation and peace between the Lendu and Hema communities. To provide but one example, the President of the FNI stated during the festivities following the *Collation des grades* depicted in DRC-OTP-0118-0002:

> Je vous remercie donc de tout cœur, […] Ça, c'est la première chose. En second lieu, je dois dire que ma présence ici est un signe qui ... qui témoigne de notre bonne volonté de vivre en paix avec vous. J'ai déjà rencontré des gens de l'UPC à MONGBWALU, ceux de KOBU ne me connaissaient pas encore, peut-être, mais il était impératif que je vienne parmi vous, afin que vous sachiez que je souhaite que nous avancions main dans la main, et que nous fassions tous nos projets ensemble, pour le bien de nos populations.[179]

133. The Chamber failed to consider the far reaching and highly symbolic value of the FNI President's speech. The Chamber also failed to take into consideration the tremendous importance of this watershed event underscored by D-0305[180] and D-0047[181] who were both present. The Chamber also missed the significant meaning of

[177] **D-0047**:T-267,49:19-24.
[178] **D-0306**:T-267,27:18.
[179] DRC-OTP-0118-0002, at 56:53:58:47; DRC-OTP-2084-0041, ll.345-353.
[180] **D-0305**:T-266,26:17-19.
[181] **D-0047**:T-267,57:16-22.

events depicted in the video evidence, such as Christine, a Hema woman, dancing happily with NDJABU, the FNI President in la *salle des fêtes* de Drodro[182] where a year before, hundreds of Hema civilians were massacred by Lendu combatants.[183] No reasonable Trial Chamber, having assessed the totality of the evidence, could have failed to observe the immediate effect and the potential repercussions on the broader reconciliation and peace between the Lendu and Hema communities of the events depicted in the videos shown and commented upon by witnesses D-0305,[184] [REDACTED][185] and D-0047[186] and admitted in evidence.

B. Mr. Ntaganda's contribution to peace and reconciliation was substantial

134. The Chamber misappreciated the evidence when holding that it indicates only a limited involvement on the part of Mr. Ntaganda to the peace process.

135. *First*, the Chamber wrongly concluded that the evidence indicated the pacification campaign was in fact an FNI initiative.[187] While the Chamber referred to [REDACTED],[188] it failed to consider the testimony of D-0047, rich in details, regarding the scope of the reconciliation activities involving both the UPC/RP and the FNI, which took place in numerous places in 2004 and his participation therein.[189] The evidence clearly evinces that reconciliation efforts between the Hema and Lendu communities constituted an initiative wanted and promoted by both sides

> It was in December 2003 and we really wanted to have a permeable zone. It was a necessity to be together. And in January, February we were in the locality of and we wanted to--the representatives of FRPI and FNI were together and we really wanted to be together. And later on in February there was a delegation that was led by me in the

[182] **D-0305**:T-266,32:21-33:8.
[183] **D-0300**:T-221,46:21-47:11.
[184] **D-0305**:T-266,22:11-36:6.
[185] [REDACTED].
[186] **D-0047:**T-267,50:4-57:22**.**
[187] SJ, para.221.
[188] DRC-D18-0001-6754.
[189] **D-0047**:T-267,48:17-50:3.

> month of April in 2004 and this delegation went to Kpandroma and the objective, basically, was to uphold the national opinion and the local opinion and there was no reason to be dispersed.[190]

136. *Secondly*, the Chamber misappreciated the evidence by holding that "[w]itness D-0306 specifically rejected the suggestion that the FNI collaborated with Mr Ntaganda in the awareness raising mission".[191] Reading D-0306's evidence as a whole clearly illustrates the positive and constructive nature of his relationship with Mr. Ntaganda. It also establishes that Mr. Ntaganda not only encouraged [REDACTED], reassuring him that his security would be ensured at all times.

> [REDACTED].[192]

Evidently, the Chamber misread D-0306's testimony that [REDACTED][193]

137. *Thirdly*, the Chamber erred by according insufficient weight to Mr. Ntaganda's speeches about peace in Sali, Lopa and Largu and his inviting Lendu to a meeting in Lopa, leading the Chamber to conclude that his involvement in the pacification campaign was limited.[194] Mr. Ntaganda's own words as reported by D-0306 are revealing in this regard:

> [REDACTED][195]

138. *Fourthly*, Mr. Ntaganda insisted during his testimony that he was not a politician[196] and the evidence establishes that he was not.[197] In 2004, Mr. Ntaganda was the Chief of Staff of UPC/FPLC. In this capacity, Mr. Ntaganda ensured that UPC/RP/FNI reconciliation efforts could proceed unabated by providing security. In and of itself, this was a major contribution to reconciliation activities, which could

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[190] **D-0047**:T-267,49:5-11.
[191] SJ, para.221.
[192] [REDACTED].
[193] **D-0306**:T-267,41:2 (emphasis added).
[194] SJ, para.221.
[195] [REDACTED].
[196] **D-0300**:T-224,70:4-5.
[197] **D-0047**:T-267,47:25-48:9,63:4-10.

not have taken place without his support. As revealed by the evidence considered by the Chamber, Mr. Ntaganda's contribution went even further.

139. Lastly, the Chamber erred in holding that the genuine nature of Mr. Ntaganda's actions is placed in doubt by other evidence, including the testimony of D-0306, D-0302, D-0303 and D-0305, and documents DRC-OTP-0185-0843 and DRC-OTP-2057-0099.

140. To begin with, document DRC-OTP-2057-0099, at page 0099, was not admitted into evidence.[198]

141. As for document DRC-OTP-0185-0843, a MONUC military daily report, it can be attributed very little or no probative value. The Chamber itself held that this document falls in the category of material being of a relatively low probative value in terms of the actual conduct of Mr. Ntaganda.[199] In fact the Chamber went as far as holding that Mr. Ntaganda's actual role in the events therein described is unclear.[200]

142. Moreover, the evidence, [REDACTED],[201] taken at its highest indicates that in 2004, reconciliation between the Hema and Lendu communities remained work in progress and had not yet resulted in ensuring full security for the civilian population at large in all areas of Ituri.

143. Without more, the limited evidence concerning the residual harassment of the civilian population in 2004 does not minimize in any way the extraordinary character of reconciliation efforts deployed by the UPC/RP and Mr. Ntaganda. Nor does it

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[198] This document is nonetheless highly significant due to its lack of reliability and the fact that the Chamber refused to admit it on two separate occasions: *see* decisions on admission of document DRC-OTP-0132-0239, which is a copy of the same letter, Decision-1181, paras.17-18 and Decision-2402, paras.38-39. MONUC's reliance on this document in correspondence and other documents to disseminate unfounded accusations against Mr. Ntaganda demonstrates the weaknesses of its intelligence gathering capabilities at the time and illustrates the limited probative value which can be attributed to MONUC documents.

[199] SJ, para.223, fn.610.

[200] SJ, para.223, fn.610.

[201] [REDACTED].

impact the overwhelming and reasonable conclusion that the UPC/RP and Mr. Ntaganda's contribution to reconciliation between the Hema and Lendu communities was real, concrete, palpable and genuine. In conformity with the *Katanga* Trial Chamber's holding regarding the mitigation value of reconciliation efforts, this conclusion is not undermined by the fact that the results were not complete. [202]

C. Conclusion

144. The Chamber's finding that a genuine and concrete contribution to peace and reconciliation on the part of Mr. Ntaganda was not established[203] constitutes a reversible error warranting the intervention of the Appeals Chamber. The Appeals Chamber is requested to quash the Chamber's finding, replacing it by its own conclusion that Mr. Ntaganda's contribution to reconciliation between the Hema and Lendu communities was significant and that his actions in this regard were concrete and genuine. Consequently, the sentence imposed on Mr. Ntaganda must be adjusted downwards significantly.

III. Mr. Ntaganda objectively contributed to the demobilisation and integration in the national armed forces of UPC/FPLC members

145. Pursuant to the balance of probabilities standard of proof, the Chamber had to determine whether, on the evidence before it, it was more probable than not that Mr. Ntaganda had genuinely and concretely contributed to the demobilisation and integration of FPLC members in the FARDC.

146. The Chamber erred in finding that "a genuine and concrete contribution […] to demobilisation and disarmament on the part of Mr. Ntaganda [was not] established overall, on a balance of probabilities."[204] No reasonable Trial Chamber,

[202] *Katanga*-SJ-3484, para.91.
[203] SJ, para.224.
[204] SJ, para.224.

having properly and objectively considered the totality of the evidence on this issue could have reached such a finding, which is manifestly unreasonable.

A. Mr. Ntaganda genuinely and concretely contributed to the demobilisation and the integration into the FARDC of UPC/FPLC members

147. The Chamber erred in noting that the evidence on Mr. Ntaganda's concrete role in the demobilisation and integration into the FARDC of UPC/FPLC members was fairly limited.[205]

148. *First*, the Chamber acknowledged based on the testimony of D-0020 that Mr. Ntaganda appointed an officer to oversee the demobilisation of 500 soldiers.[206] However, the Chamber failed to consider that the said soldiers were in fact demobilized via CONADER;[207] that this event was preceded by a meeting of all officers convened by Mr. Ntaganda during which he told them that "*ce n'était plus le moment des hostilités et qu'il fallait dorénavant nous tourner vers le désarmement, la demobilisation ou l'intégration dans l'armée nationale* ("FARDC")"[208] and gave them two options, at their discretion: demobilisation or integration into FARDC.[209] The Chamber also failed to consider D-0020's testimony that "*Bosco Ntaganda a également facilité l'intégration de plusieurs membres des FPLC dans l'armée nationale.* "[210] In and of itself, the evidence of D-0020 establishes that Mr. Ntaganda's contribution to the demobilisation and integration process was substantial.

149. *Secondly*, while the Chamber noted D-0047's testimony that "Mr. Ntaganda worked with a government committee responsible for demobilisation and was responsible for preparing lists of those who wanted to either demobilize or

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[205] SJ, para.222.
[206] SJ, para.222, fn.605.
[207] DRC-D18-0002-0013, para.18.
[208] DRC-D18-0002-0013, para.15.
[209] DRC-D18-0002-0013, para.15.
[210] DRC-D18-0002-0013, para.19.

integrate",[211] it failed to take into consideration the most important aspect of D-0047's testimony. In his capacity as FPLC Chief of staff, Mr. Ntaganda was the highest ranking FPLC member in the field responsible for overseeing and implementing UPC/RP demobilisation and integration undertakings

> "Q. [15:06:22] And did Bosco Ntaganda play a role in the field within the group preparing the way for demobilisation?
>
> A. [15:06:37] Yes. Yes, demobilisation and reception of these former soldiers in the community byway of a number of bodies that govern Ituri, we set up a special committee to work together. And this group--the national secretary responsible for defence, minister responsible for defence, he was the person who was on that committee and he worked in the field hand in hand with General Bosco, who was the chief of staff, with a view to facilitating the implementation of the DRC programme for the billeting of troops and so on and so forth."[212]

and

> Q. [15:04:54] Did Bosco Ntaganda have a role to play in preparing for these events that led to the integration?
>
> A. [15:05:04] Yes. As chief of general staff of the FPLC, he was the one who was given the responsibility of preparing the lists, the lists of all those who wanted to be in the national army and the lists of those who wanted to be demobilised. He took care of all those preparations.[213]

150. Considering Mr. Ntaganda's position, role and responsibilities regarding the UPC/RP demobilisation and integration process, he necessarily contributed and was involved in the implementation of these activities. D-0047 confirmed that FPLC members were demobilised and that others were integrated as evidenced by DRC-OTP-0138-0027.[214]

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[211] SJ, para.202, fn.604.
[212] **D-0047**:T-267,63:2-10.
[213] **D-0047**:T-267,62:16-21.
[214] DRC-OTP-0138-0027.

> Q. [15:05:35] During your term as acting president, did you ever hear about FPLC members being demobilised as part of the other programme?
>
> A. [15:05:49] Yes, many soldiers belonging to the FPLC enroled and agreed to be demobilised and joined the demobilised person's camp in Nizi, that was the largest demobilisation site. But there were others, others who ended up there.[215]

and

> Q. Which people were integrated into the national army?
>
> A. [15:04:38] Yes, the members who were integrated into the army were all those who expressed a willingness to serve under the national flag.[216]

The Chamber erred in failing to give Mr. Ntaganda credit for FPLC members who were demobilised or integrated into the FARDC.

151. Regarding D-0047's testimony, no weight can be attributed to information drawn from document DRC-OTP-2103-1205 and the Chamber erred in considering such information even for impeachment purposes. The record underscores that D-0047 was incarcerated in Kinshasa in 2005 and had no knowledge of this document.[217]

B. Mr. Ntaganda's reputation in MONUC circles does not undermine his contribution to the demobilisation and integration process

152. The Chamber erred by according weight to what it considered to be clear indications that "the UPC/FPLC, with Mr Ntaganda as its Deputy Chief of Staff, was uncooperative with MONUC and other key institutions working for pacification in Ituri at that time, and that according to MONUC, Mr Ntaganda was a threat to peace and security during this period."[218]

153. *First*, paragraph 12 (at page 0155) of document DRC-OTP-0009-0146-R01, referred to in footnote 606 of the Sentencing Judgment, was not admitted into

[215] **D-0047**:T-267,62:22-63:1.
[216] **D-0047**:T-267,62:13-15.
[217] **D-0047**:T-267,85:6-92:18.
[218] SJ, para.223.

evidence and as previously mentioned, can be attributed little or no probative value.[219]

154. Moreover, as held by the Chamber "the provocations of Bosco's group" referred to in paragraph 12 of this document[220] deserves little if any weight: "the Chamber considers much of the material relied on in support [of Mr. Ntaganda and his group's "ongoing criminal conduct"] to be of relatively low probative value in terms of the actual conduct of Mr. Ntaganda"[221] and "[t]he Chamber also takes into account that Mr Ntaganda's poor reputation with MONUC may have been connected to its alleged siding with Floribert Kisembo following the split within the UPC/FPLC".[222]

155. Furthermore, not only is the absence of UPC/RP representatives at the meeting referred to in this document not explained, this absence must be considered in the light of (i) document DRC-D18-0002-0060, which confirms that UPC/RP intended to attend the meeting and (ii) D-0047's testimony concerning this document, both of which the Chamber failed to consider:

[REDACTED].[223]

156. *Secondly*, the Chamber misappreciated the evidence by relying without more on the Prosecution's submission that "on 7 November 2003, the UPC/FPLC, with Mr. Ntaganda as the Deputy Chief of staff, formally withdrew all cooperation with MONUC […]".[224]

157. To begin with, the document referred to by the Prosecution is a political document authored by the UPC/RP President *ad interim* (D-0047) in which there is no mention of Mr. Ntaganda. More importantly, the UPC/RP President's letter does not

[219] *See above* para.126.
[220] DRC-OTP-0009-0146-R01, at 0155, para.12.
[221] SJ, para.223.
[222] SJ, para.223, fn.610.
[223] **D-0047**:T-267,108:9-14.
[224] SJ, para.223, fn.611 referring to Prosecution-Submissions-2425, para.108.

amount to a permanent withdrawal of all cooperation with MONUC "*en attendant que des dispositions plus conciliatrices soient prises pour que nous continuions à consolider le processus en cours dans notre pays, ensemble avec les autres Congolais, épris de paix durable*",[225] as established by further correspondence between UPC/RP and MONUC.[226] This letter is nonetheless highly significant as it sheds light on the tumultuous relationship between the UPC/RP and the new MONUC director in Bunia, Dominique MacAdams since the latter assumed her duties

> Actually, this is a letter that I-inaudible-signed to the director of MONUC, and there was a copy also to the hierarchy and other people, and it sets out the position that the UPC had taken in relation to everything that the UPC deplored, namely, the attitudes, the reaction of Ms McAdams. And by way of this letter, the UPC made a firm commitment to cut off all cooperation with this lady from MONUC until she came to her senses.[227]

158. Despite the little time available, D-0047 testified about the deteriorating relationship between the UPC/RP and MONUC, in particular with its Director, during the preceding 50 days, which is the first of two main reasons for MONUC wanting to arrest Mr. Ntaganda,[228] beginning in the fall of 2003; the other being Kisembo's perfidious departure from the UPC/RP, creating the so-called UPC/K and siding with the MONUC. [229]

159. Notably, the UPC/RP President's letter – corroborated by document DRC-D18-0002-0065, which the Chamber failed to take into consideration – confirms the UPC/RP commitment to maintain its peace and reconciliation efforts along with other socio-political stakeholders "[*l]'UPC/RP reste néanmoins liée à sa noble politique de*

[225] DRC-OTP-0014-0245, at 0247.
[226] DRC-D18-0002-0060.
[227] **D-0047**:T-267,70:11-16.
[228] **D-0047**:T-267,65:1-66:15.
[229] **D-0047**:T-267,71:14-22,112:7-113:9.

pacification et de reconciliation qu'elle ne cessera de poursuivre avec d'autres acteurs socio-politiques et militaires comme le FNI/FRPI, etc."[230]

160. *Thirdly*, for the reasons stated in its "Defence response to "Prosecution's request for the admission of additional documentary evidence on sentencing"",[231] the Chamber erred by admitting 8 MONUC daily reports.[232] That the Prosecution initially requested the admission of 14 MONUC daily reports and the Chamber denied admission of 6, is not relevant. That in the Sentencing Judgment, the Chamber found 5 of the 8 documents admitted to have low probative value and did not refer to 2 other documents admitted is also not relevant. Paragraphs 27-28 of the remaining document DRC-OTP-1029-0591 that was admitted 'Major conclusions and recommendations' - another MONUC G2 Branch intelligence gathering weekly report covering events taking place after the period covered by the charges and submitted via the bar table - also has little if any probative value. Moreover, Mr. Ntaganda did not have an opportunity to challenge this document and the Chamber erred in giving the same any consideration.

161. The Chamber also erred by according weight to documents DRC-OTP-0154-0648 and DRC-OTP-2057-0099 (pp. 0101-0103). Although both documents appear to be official UN documents - including a letter from the Special Representative of the UN Secretary General in Congo addressed to the DRC President – highly critical of Mr. Ntaganda, they refer to events in which the actual role of Mr. Ntaganda is both unclear and not established. The Chamber noted that "much of the material relied in support of the events [described in the letter] to be of relatively low probative value in terms of the actual conduct of Mr. Ntaganda."[233] One striking example relates to

[230] DRC-OTP-0014-0245, at 0247.
[231] Defence-Response-2392, paras.1-3,9-12,24.
[232] DRC-OTP-2066-0380; DRC-OTP-0204-0236; DRC-OTP-0185-0843; DRC-OTP-1029-0579; DRC-OTP-0007-0314; DRC-OTP-0004-0372; DRC-OTP-1029-0465; DRC-OTP-1029-0591.
[233] SJ, para.223.

purported death threats proffered by Mr. Ntaganda against MONUC personnel, including its Director:

> *Il y a lieu d'ajouter que des menaces de mort* ***ont été proférées*** *contre des membres du personnel de la MONUC, y compris contre la Dirctrice pour l'Ituri, dans une lettre signée de M. Bosco en date du 20 novembre 2003*.[234]

162. The source of the SRSG's most serious accusation against Bosco Ntaganda, communicated to the DRC President, is DRC-OTP-2057-0099 (page 0099), a one page handwritten document; bearing a signature having no resemblance to that of Mr. Ntaganda; relating to an absurd list of persons to be killed including close allies to Mr. Ntaganda; and not admitted in evidence due to its absence of reliability.[235] How a serious organisation such as the MONUC and the SRSG give weight to such a dubious document, which can only be a forgery, in a letter addressed to the DRC President, is beyond imagination. It demonstrates that no weight can be attributed to these documents as well as to what extent the MONUC had decided to go after Mr. Ntaganda without a proper foundation.

163. The Chamber also erred in according weight to documents DRC-OTP-0142-0042 and DRC-OTP-0142-0038, the former being a letter addressed to Mr. Ntaganda, which simply could not have reached him at the time, and the latter being a letter in which Mr. Ntaganda is not mentioned, addressed to the DRC Minister of Interior but not even copied to the UPC/RP:

> I never read this letter. This letter is to the minister, madam minister, and no copy was sent to the UPC. I don't see anything along the lines of cc. Nothing for the UPC. So, you see, I can't imagine a letter for which there was no cc to me or to the UPC. Honestly, no, I can't envisage that. And what seems strange is that, because in the administrative correspondence, when you mention a third party you

[234] DRC-OTP-2057-0099, at 0102 (emphasis added).
[235] DRC-OTP-0132-0239 (Transl.DRC-OTP-0132-0239).

> have to provide another copy to the third party so he or she can defend himself for herself. This comes as a surprise to me today.[236]

164. In this regard, the Chamber also erred in rejecting the Defence request for additional time to examine witness D-0047.[237] In his capacity as President *ad interim* of the UPC/RP, having direct dealings with all relevant players including the MONUC, Mr. Lubanga and Mr. Ntaganda, D-0047 was in the best of position to enlighten the Chamber on the events referred to in all MONUC documents the Prosecution intended to rely upon against Mr. Ntaganda. That was an error which impacts the Chamber's evaluation of all such documents.

165. *Fourthly*, even if the Chamber's consideration that "the UPC/FPLC, with Mr Ntaganda as its Deputy Chief of Staff, was uncooperative with MONUC and other key institutions working for pacification in Ituri at that time",[238] had any merit, the Chamber erred by failing to recognize and accord mitigation value to Mr. Ntaganda's concrete role and contribution in the demobilisation and the integration into the FARDC of UPC/FPLC members. The Chamber failed to take into consideration Defence submissions that in *Katanga*, the Trial Chamber gave credit to Mr. Katanga for his demobilisation efforts despite MONUC reports noting that Mr. Katanga had also "been quite uncooperative with the MONUC"; that he had been involved in "numerous incidents involving FNI/FRPI combatants"; the discovery of prison camps where female detainees had "apparently" been subject to sexual violence; and the discovery of a large FNI/FRPI stockpile of weapons. The importance of providing an incentive to former wrongdoers to contribute to peace and security is so great that even inconsistent steps towards that process should be taken into consideration in sentencing.[239]

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[236] **D-0047**:T-267,94:19-25.
[237] Defence-Request-2403; T-266,6:6-7:17.
[238] SJ, para.223.
[239] Defence-Submissions-2424, para.141.

166. *Fifthly*, for the reasons stated in its "Defence response to "Prosecution's request for the admission of additional documentary evidence on sentencing"",[240] the Chamber erred by admitting documents DRC-OTP-2102-1032, DRC-OTP-2102-1093, DRC-OTP-2102-1220, DRC-OTP-1247, DRC-OTP-1560, DRC-OTP-1535, for the purpose of showing "Mr. Ntaganda's involvement with the FARDC or the CDNP".[241] The Chamber acknowledged that information contained in the excerpts the Prosecution requested to have admitted contained information unduly prejudicial to Mr. Ntaganda and irrelevant for the stated purpose, leading it to admit only specific sentences, or parts of sentences that refer to Mr. Ntaganda's role or position in the aforementioned armed forces.[242] The fact that the Chamber did not refer to these documents in the Sentencing Judgment to find that Mr. Ntaganda declined to integrate into the FARDC for a number of years is also irrelevant in this regard, as they were inevitably considered.

167. Furthermore, having admitted these documents over the objections of the Defence, the Chamber erred by rejecting the Defence request for the admission of two relevant statements addressing the excerpts admitted and explaining why Mr. Ntaganda, having been promoted to the rank of *Général de Brigade* on 11 December 2004[243] only integrated the FARDC in 2009.[244] The main reason Mr. Ntaganda did not immediately integrate the FARDC in 2004, as D-0047 testified about,[245] is because he wanted assurances he would not be arrested as others were. D-0047's testimony about his own incarceration for a period of nine years in Macala, Kinshasa, DRC, without a trial, is relevant in this regard.[246]

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[240] Defence-Response-2392, paras.1-3,9-12,13-17.
[241] Decision-2402, para.32.
[242] Decision-2402, para.32.
[243] DRC-OTP-0086-0036.
[244] Defence-Request-2403, paras.22-27.Oral ruling at T-267,7:23-8:23.
[245] **D-0047**:T-267,92:25-94:1.
[246] **D-0047**:T-267,91:9-92:5.

168. The two statements sought to be admitted by the Defence also shed light on the circumstances in which Mr. Ntaganda joined the FARDC in 2009, taking steps to facilitate the integration of CNDP members in the national army rather than continuing the armed struggle with the FARDC, thereby choosing peace over war for the wellbeing of his men and the civilian population.[247] In light of the documents admitted by the Chamber at the request of the Prosecution, these statements were relevant and probative to establish that Mr. Ntaganda's rehabilitation was already well under way. The Appeals Chamber should now consider these two statements.

CONCLUSION

169. Bearing in mind the applicable burden of proof for the admission of evidence in mitigation - balance of probabilities - the evidence before the Chamber amply demonstrates that, following the events which gave rise to his convictions, Mr. Ntaganda genuinely and concretely contributed to peace and reconciliation between the Hema and Lendu communities, and contributed to the demobilisation and integration into the FARDC of UPC/FPLC members.

170. That reconciliation was in progress and not yet complete and that certain difficulties were encountered in the demobilisation and integration process, do not minimize in any way Mr. Ntaganda's exceptional achievements, which are deserving of very high mitigation value.

171. This is particularly the case in light of the Chamber's finding that "Mr. Ntaganda and other military leaders of the UPC/FPLC (…) meant the destruction and disintegration of the Lendu community".[248]

172. The Chamber is requested to quash the Chamber's holding at paragraph 224 of the Sentencing Judgment; to enter its own findings confirming the mitigation

[247] Annexes D and E.
[248] TJ, para.809.

value of Mr. Ntaganda's contribution to peace, reconciliation, demobilisation and integration; and to significantly adjust his sentence downwards.

GROUND 11: THE CHAMBER ERRED BY FAILING TO GIVE WEIGHT TO MR. NTAGANDA'S CONDUCT DURING THE TRIAL AND COOPERATION WITH THE COURT, AND BY FAILING TO GIVE A REASONED OPINION IN TAKING MR. NTAGANDA'S HUNGER STRIKE INTO ACCOUNT TO DIMINISH THE MITIGATING VALUE OF HIS COOPERATION WITH THE COURT

173. The Chamber erred in law by failing to give a reasoned opinion, and misappreciated the facts, in failing to give credit to Mr. Ntaganda for his "consistently respectful and cooperative" behaviour trial, including its finding — without explanation or reasons — that his cooperation was diminished by the "exception" to this behaviour arising from his hunger strike.

174. The Chamber summarily concluded — without reasons[249] — that Mr. Ntaganda's degree of cooperation with the Court should be treated as diminished by his hunger strike which very briefly impacted on the trial schedule.[250] The Chamber reached this finding, however, without addressing either Mr. Ntaganda's statement, which was read in open court during this event[251] or the Defence submissions concerning the truly exceptional and difficult circumstances giving rise to the hunger strike.[252] Mr. Ntaganda's statement in particular, is revealing of Mr. Ntaganda's state of mind at the time. Although a Chamber is not required to address every argument of a party, it cannot ignore all arguments raised in respect of a relevant factor in

[249] SJ, para.229 ("with the exception of his hunger strike").
[250] One and a half court days were devoted to discussion of Mr Ntaganda's situation. (T-126, T-128, T-129, T-130). Trial hearings continued in Mr Ntaganda's absence after a brief interruption, for a total period of 14 court days.
[251] T-128,7:18-13:19.
[252] Defence-Submissions-2424, paras.151-154.

sentencing.[253] Rejecting cooperation as a mitigating factor, based in part on the finding that Mr. Ntaganda's hunger strike constituted a relevant lack of cooperation, was a failure to state reasons as well as an abuse of the Chamber's discretion.

175. The appropriate remedy is for the Appeals Chamber to consider the issue *de novo*;[254] to find that Mr. Ntaganda's hunger strike should not be treated as an exception to his consistent good behaviour; to accept that Mr. Ntaganda's good behaviour is a relevant factor in mitigation; and to accord that factor concrete weight in reducing sentence.

GROUND 12: NO REASONABLE CHAMBER COULD HAVE FAILED TO CONCRETELY TAKE INTO ACCOUNT MR. NTAGANDA'S SUBSTANTIAL EFFORTS TO PROTECT [REDACTED] FROM HARM IN MITIGATION

176. The Chamber erred in failing to decide whether Mr. Ntaganda – as submitted before the Chamber – had substantially contributed to [REDACTED].[255] The Chamber did not address this submission, finding merely that Mr. Ntaganda's conduct was "commendable", without any further specification of what it considered as being "commendable."[256] The Chamber then gave this undefined commendable behaviour no weight in mitigation: "considering this against the overall gravity and aggravating circumstances established above for the crimes of which he has been

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[253] ICTR-*Karemera*-Decision-Provisional-Release, paras.14-15 ("the Trial Chamber erred in failing to take into account all the factors which were relevant to its taking a fully informed and reasoned decision as to whether, pursuant to Rule 65 of the Rules, Ngirumpatse will appear for trial if provisionally released and, more generally, as to whether or not he should be granted provisional release"); ICTY-*Perišić*-AJ, para.96 ("the Appeals Chamber concludes that the Trial Chamber's failure to address the relevant portions of this testimony in its analysis of Perišić's superior responsibility constituted a failure to provide a reasoned opinion, an error of law").

[254] ICTR-*Ndindiliyimana*-AJ, para.23 ("The Appeals Chamber recalls that a trial chamber's failure to provide a reasoned opinion constitutes an error of law which allows the Appeals Chamber to consider the relevant evidence and factual findings in order to determine whether a reasonable trier of fact could have established beyond reasonable doubt the findings challenged by the appellant.") *See* Defence-Submissions-2424, paras.151-154.

[255] SJ, paras.11,149.

[256] SJ, para.235.

convicted, the Chamber considers the weight accorded to be too limited to impact on the individual and overall sentences."[257]

177. The Chamber's approach amounts to a failure to give reasons and a misappreciation of the facts. The Chamber was required, given the importance of the claim and the applicable standard of proof,[258] to indicate whether it accepted, or not, that Mr. Ntaganda had substantially contributed to [REDACTED]. By characterizing Mr. Ntaganda's conduct as merely "commendable," the Chamber failed to reach a finding in respect of a key submission before it. The Chamber was obliged to make that finding one way or the other so that the convicted person would know what behaviour was deemed of insufficient "weight" to have any concrete impact on sentence whatsoever.

178. The evidence before the Chamber was more than adequate to find that Mr. Ntaganda substantially contributed to [REDACTED] going way beyond what can be expected from a detained person. The uncontroverted evidence before the Chamber was that Mr. Ntaganda [REDACTED]. [REDACTED][259]

179. [REDACTED][260] [REDACTED].

180. This event was preceded by Mr. Ntaganda alerting [REDACTED]. It was apparently subsequent to this warning [REDACTED] "that the information was invaluable and important to DC Staff in helping to ensure their duty of care towards" [REDACTED].

181. Subsequent to these events, Mr. Ntaganda was specifically listed as part of [REDACTED]. [REDACTED]. The Chamber denied admission of this document on

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[257] SJ, para.235.
[258] *Katanga*-SJ-3484, para.34 ("The Chamber may, however, consider a mitigating circumstance where, on a balance of probabilities, the Defence establishes the existence of such a circumstance"); *Al-Mahdi*-SJ-171, para.71.
[259] Addendum-AnxI-2390, para.15.
[260] *Id*. para.14.

the basis that the equivalent information was summarized in the report of the DJSS, which was before the Chamber.[261] That was an error [REDACTED]. [REDACTED], shows that Mr. Ntaganda has not only rendered specific acts of assistance, but that this assistance has continued over an extended period of time.

182. The evidence amply demonstrates, on a standard of balance of probability, that Mr. Ntaganda has a substantial – if not determinative – role in [REDACTED]. The Chamber should have made this finding expressly. In the absence of any such finding by the Chamber, and in the absence of any reasoning expressing a view on this evidence and the Defence's submissions one way or the other, the Appeals Chamber is invited to itself make this finding based on the evidence before it.

183. [REDACTED]. Not only did Mr. Ntaganda's actions [REDACTED], they amounted to an exemplary form of cooperation with the Court, allowing it to avoid a catastrophic breach of its duty of care [REDACTED]. Furthermore, this was not an isolated act but an extended period of assistance [REDACTED]. They also demonstrate, in themselves, significant rehabilitation. The Chamber misappreciated the facts, and failed to state reasons, in failing to make this express finding on a balance of probability.

184. If the Chamber had made this finding, it could only have concluded that this substantial service to [REDACTED] and to the Court deserved at least some concrete recognition in mitigation. Importantly, a mitigating circumstance is not one that "lessen[s] the gravity of the offence but becomes relevant for diminishing sentence."[262]

185. The Appeals Chamber, again in light of the absence of any discernible exercise of discretion by the Chamber based on relevant findings, is invited to find that Mr. Ntaganda's action should be concretely recognized in mitigation. His actions

[261] Decision-2402, para.30.
[262] *Bemba-et-al*-SJ-2123, para.24.

contributed, at least substantially, [REDACTED] This is not merely "commendable," but worthy of concrete recognition in mitigation of sentence. The Appeals Chamber is invited, in the absence of a properly exercised discretion by the Chamber, to exercise its own discretion; give concrete weight to this factor in mitigation; and reduce Mr. Ntaganda's joint sentence accordingly.

RESPECTFULLY SUBMITTED THIS 9TH DAY OF APRIL 2020

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