



**Summary**

**Judgment of the Appeals Chamber**

*in*

***The Prosecutor v. Bosco Ntaganda***

*Read by*

**Judge Howard Morrison**

**Presiding**

**The Hague, 30 March 2021**

1. The Appeals Chamber is delivering today two judgments: the first judgment in relation to the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019, which convicted him of war crimes and crimes against humanity; and the second one in relation to the appeal of Mr Ntaganda against the sentencing decision of Trial Chamber VI of 7 November 2019, which sentenced him to a joint sentence of 30 years imprisonment. I will refer to these decisions as the Conviction Decision and the Sentencing Decision.
2. I shall first address the appeals against the Conviction Decision, starting with the procedural background.

**A. Appeal against conviction**

*1. Background of the appeal proceedings*

3. On 8 July 2019, the Trial Chamber rendered the Conviction Decision, in which it found Mr Ntaganda guilty of five counts of crimes against humanity (murder and attempted murder, rape, sexual slavery, persecution, forcible transfer and deportation) and thirteen counts of war crimes (murder and attempted murder, intentionally directing attacks against civilians, rape, sexual slavery, pillage, ordering the displacement of the civilian population, conscripting and enlisting children under the age of 15 years into an armed group and using them to participate actively in hostilities, intentionally directing attacks against protected objects, and destroying the adversary's property).

4. The Trial Chamber found that Mr Ntaganda was guilty as an indirect co-perpetrator for all crimes charged and as a direct perpetrator for one act of murder, constituting a crime against humanity and a war crime, as well as an underlying act of persecution as a crime against humanity.

5. Today's judgment by the Appeals Chamber addresses the appeals against the Conviction Decision of both Mr Ntaganda and the Prosecutor. In his appeal brief, Mr Ntaganda raises fifteen grounds of appeals challenging the fairness of the proceedings and arguing that the Trial Chamber committed several errors of law, fact and procedure. In her appeal brief, the Prosecutor raises two grounds of appeal challenging the Trial Chamber's interpretation of the term 'attack' in article 8(2)(e)(iv) of the Statute (intentionally directing attacks against protected objects). In relation to some of his challenges, Mr Ntaganda requests that the Appeals Chamber order a new trial or a permanent stay of the proceedings and, in relation to others, that it reverse his conviction. The Prosecutor asks the Appeals Chamber to 'enter additional and limited findings of fact' and to convict Mr Ntaganda for two additional incidents.

## ***2. First ground of appeal***

6. In his first ground of appeal, Mr Ntaganda challenges Judge Kuniko Ozaki's judicial independence under article 40(2) of the Statute.

NON-AUTHORITATIVE SUMMARY OF APPEAL JUDGMENTS  
NTAGANDA CASE – 30 MARCH 2021

7. The Appeals Chamber considers that the legal framework of the Court does not provide for any appeal against a decision taken by an absolute majority of the judges under article 40 of the Statute to the Appeals Chamber. While Judge Eboe-Osuji does not concur with this reasoning, he concurs with the Appeals Chamber's ultimate outcome. The Appeals Chamber emphasises that the judicial independence of judges is at the core of the Court's legal framework to safeguard the general integrity of the proceedings before the Court. It is for this reason that the Statute provides for a specific mechanism in article 40 which focuses on this subject matter and sets out the procedure to follow should an issue about the independence of a judge arise. This procedure has been followed in the present case.

8. The Appeals Chamber, considers however, that an appellant may still raise on appeal matters affecting the fairness of the proceedings. In that regard, the Appeals Chamber notes that article 81(1)(b)(iv) of the Statute expressly provides the convicted person, or the Prosecutor on his or her behalf, with the possibility to raise a ground that 'affects the fairness or reliability of the proceedings or decision'. In the present case, Mr Ntaganda neither presents arguments challenging the fairness or reliability of the Conviction Decision under that provision. Therefore, the Appeals Chamber dismisses the first ground of appeal.

9. Judge Ibáñez, while agreeing with the outcome of the Appeals Chamber, disagrees with its reasoning insofar as it concludes that the issue of judicial

independence is not appealable before the Appeals Chamber. In her view, Mr Ntaganda has a right to raise any issue that may have affected the fairness of the proceedings pursuant to article 81(1)(b)(iv) of the Statute. However, Judge Ibáñez finds that Mr Ntaganda has failed to show a material effect of the alleged lack of independence of Judge Ozaki.

10. Judge Eboe-Osuji is of the view that the Appeals Chamber is not precluded from considering the issue of Judge Ozaki's independence just because it was already determined by the plenary of judges. However, after having examined Mr Ntaganda's arguments, Judge Eboe-Osuji would still confirm the conclusion of the plenary of judges that on the independence of Judge Ozaki and reject this ground of appeal.

### ***3. Second ground of appeal***

11. In his second ground of appeal, Mr Ntaganda submits that his right to a fair trial was violated because (i) the Trial Chamber resorted, in an excessive manner, to *ex parte* material; (ii) the Prosecutor failed to disclose Mr Ntaganda's non-privileged conversations from the Detention Centre, to which she had obtained access, and the Trial Chamber did not take measures to mitigate the prejudice that resulted from these disclosure violations; (iii) the Trial Chamber failed to suspend the proceedings prior to the resolution of the 'no case to answer' appeal; and (iv) the Trial Chamber prioritised expeditiousness at the expense of Mr Ntaganda's right to a fair hearing.

NON-AUTHORITATIVE SUMMARY OF APPEAL JUDGMENTS  
NTAGANDA CASE – 30 MARCH 2021

12. Regarding the first challenge, the Appeals Chamber finds that, while resort to *ex parte* proceedings should be limited, in the present case Mr Ntaganda received sufficient notice of the content of the relevant *ex parte* submissions. Furthermore, the Trial Chamber took adequate measures to counterbalance potential prejudice.

13. Regarding the second challenge, the Appeals Chamber finds no error in the Trial Chamber's reliance on the risk of prejudice to the Prosecutor's investigation, as well as on the protection of witnesses, as reasons for withholding parts of the relevant material from disclosure. The Appeals Chamber notes that, in the Trial Chamber's assessment, prejudice to Mr Ntaganda was limited and that it took measures to protect the rights of Mr Ntaganda.

14. Regarding the third challenge, the Appeals Chamber finds that Mr Ntaganda has not demonstrated that the Trial Chamber erred in not suspending the proceedings prior to the resolution of his appeal against the Decision denying leave to file his no case to answer motion.

15. With respect to the fourth challenge, the Appeals Chamber finds that Mr Ntaganda has not demonstrated that the Trial Chamber prioritised expeditiousness at the expense of his right to a fair hearing.

16. Therefore, the Appeals Chamber rejects the second ground of appeal.

**4. *Third ground of appeal***

17. Under the third ground of his appeal, Mr Ntaganda submits that the Trial Chamber erred in convicting him of criminal acts that were outside the scope of the charges. The Appeals Chamber finds that it is not necessarily inconsistent with article 74(2) of the Statute for the Prosecutor to formulate and for the pre-trial chamber to confirm charges that do not consist of an exhaustive list of individual criminal acts. The Appeals Chamber finds that the criminal acts which Mr Ntaganda challenges under this ground of appeal were included in the confirmed charges and that, therefore, the Trial Chamber did not err in convicting Mr Ntaganda of these acts, as they do not exceed the facts and circumstances described in the charges. The Appeals Chamber therefore rejects the third ground of appeal.

**5. *Fourth and Fifth grounds of appeal***

18. In his fourth and fifth grounds of appeal, Mr Ntaganda challenges the Trial Chamber's finding that an attack had been directed against a civilian population pursuant to, or in furtherance of, an organisational policy.

19. In particular, under the fourth ground of appeal, Mr Ntaganda disputes the finding that the UPC/FPLC had a policy to attack and chase away Lendu civilians as well as those who were perceived as non-Iturians. He argues that the Trial Chamber erred in its assessment of the evidence relied on to establish this policy. For reasons that are fully set out in the judgment and following careful review of

the Trial Chamber's evidentiary assessment, the Appeals Chamber rejects this challenge and finds that the Trial Chamber's overall conclusion concerning the existence of an organisational policy is reasonable. Mr Ntaganda also argues that the Trial Chamber erred in finding that the UPC/FPLC was an organisation prior to 9 August 2002. However, he fails to identify any material impact of the alleged error. Accordingly, this argument was dismissed *in limine*.

20. Under the fifth ground of appeal, Mr Ntaganda challenges the Trial Chamber's finding that an attack was directed against a civilian population. In particular, he alleges that the Trial Chamber failed to find that a civilian population was the primary object of the attack and did not accord sufficient weight to the legitimate purpose of the six military operations during which the attack was committed. He also argues that the Trial Chamber wrongly limited its analysis of the evidence to six military operations and failed to consider relevant evidence regarding other UPC/FPLC operations. Finally, he submits that it was an error to find that orders to attack civilians were issued.

21. For reasons that are fully set out in its judgment, the Appeals Chamber finds that article 7 of the Statute requires a finding that the attack was 'directed against any civilian population' and does not require a separate finding that the civilian population was the primary object of the attack. This means no more than that the attack targeted the civilian population; it need not be established that the *main* aim or object of the relevant acts was to attack civilians. An attack directed



against a civilian population may also serve other objectives or motives. The question of whether an attack was directed against a civilian population is essentially a factual issue that may be assessed by considering, *inter alia*, the means and method used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in its course, the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war.

22. Taking the foregoing into account, the Appeals Chamber finds that the Trial Chamber properly directed itself as to the relevant considerations, and reasonably concluded that the attack was directed against a civilian population.

23. The Appeals Chamber also concurs with the Trial Chamber's view that the requirement that the acts form part of a 'course of conduct' indicates that article 7 of the Statute is meant to cover a series or overall flow of events, as opposed to a mere aggregate of random or isolated acts. The Appeals Chamber considers that this does not require an analysis of the totality of the activities and military operations of a state or organisation to establish that there was a course of conduct involving the multiple commission of acts referred to in article 7(1) or that the attack targeted a civilian population. After a careful review of the Trial Chamber's findings and the evidence relied upon, the Appeals Chamber

concludes that its conclusions that orders to attack civilians had been issued and that an attack against the civilian population took place were reasonable.

24. On the basis of the foregoing, the Appeals Chamber rejects Mr Ntaganda's fourth and fifth grounds of appeal. Judge Ibáñez and Judge Eboe-Osuji have set out their views on aspects of the legal requirements for the contextual elements of crimes against humanity in separate opinions.

#### **6. *Sixth ground of appeal***

25. Under the sixth ground of appeal, Mr Ntaganda argues that territorial control is a condition of ordering displacement of the civilian population under article 8(2)(e)(viii) of the Statute and that the Trial Chamber therefore erred by relying 'on orders issued during the conduct of hostilities but *prior to* the relevant territory falling under the control of the UPC/FPLC to found the conviction' for this crime.

26. The Appeals Chamber notes that there is no explicit requirement in article 8(2)(e)(viii) of the Statute, the Elements of Crimes, article 17 of Additional Protocol II, or customary international humanitarian law that, to order the displacement of the civilian population in the context of a non-international armed conflict, the perpetrator must be in occupation of, or exercise territorial control over, the relevant area. While the Appeals Chamber accepts Mr Ntaganda's argument that article 49 of the Fourth Geneva Convention may

provide useful guidance in interpreting article 17 of Additional Protocol II to the extent that similar language is used, the fundamental differences between the two provisions, mean that the requirements for one cannot simply be transposed into the other. In view of these differences, the Appeals Chamber cannot accept Mr Ntaganda's argument that article 8(2)(e)(viii) of the Statute should be interpreted as requiring territorial control in accordance with the requirements of article 49 of the Fourth Geneva Convention.

27. With respect to Mr Ntaganda's argument that civilians must be within the perpetrator's power and control in order to give effect to an order to displace and that therefore territorial control is a requirement under article 8(2)(e)(viii) of the Statute, the Appeals Chamber considers that whether the person is in a position to give effect to an order to displace the civilian population is a question of fact that depends primarily on the position occupied by the accused person and his or her duties and responsibilities, including the ability to ensure compliance with his or her orders. Given that the Trial Chamber's analysis of this element focused on the perpetrators' positions of authority and power to ensure compliance with their orders, the Appeals Chamber can find no error in the approach.

28. In view of the foregoing, the Appeals Chamber rejects Mr Ntaganda's argument that territorial control is a condition of ordering displacement as a war crime under article 8(2)(e)(viii) of the Statute. The sixth ground of appeal is rejected.

**7. *Seventh ground of appeal***

29. Under the seventh ground of appeal, Mr Ntaganda challenges the Trial Chamber's assessment of his own testimony, arguing that it rejected his testimony when it contradicted prosecution evidence and thus reversed the burden of proof. The Appeals Chamber considers that the credibility, reliability and weight of defence evidence falls to be assessed in the same manner as evidence presented by the Prosecutor. It finds that the Trial Chamber properly assessed the credibility of Mr Ntaganda's testimony in light of the evidentiary record as a whole and resolved inconsistencies in that evidence. There is no indication that, in doing so, it reversed the burden of proof.

30. Mr Ntaganda also argues that the Trial Chamber should have considered the fact that he testified before other defence witnesses in his favour. The Appeals Chamber finds that the Trial Chamber has discretion in how it considers the timing of the accused's testimony and the argument that it should have considered the timing of Mr Ntaganda's testimony favourably is unjustified.

31. Also under the seventh ground of appeal, Mr Ntaganda argues that the Trial Chamber wrongly rejected the evidence of one of his former bodyguards – D-0017 - in its entirety because it found that it lacked any credibility. The Appeals Chamber is not persuaded by this argument; it considers that the Trial Chamber weighed D-0017's evidence against the other evidence on the record and rejected it on a reasoned basis.

32. Finally, under this ground, Mr Ntaganda argues that the Trial Chamber wrongly relied on the prior recorded statements of two witnesses to enter convictions against him. The majority of the Appeals Chamber considers that there is no legal impediment to prior recorded testimony admitted pursuant to rule 68(2) of the Rules being relied upon to establish individual criminal acts in circumstances in which they are not the direct acts of the accused. However, prior recorded testimony must not form the sole or decisive basis for the conviction for a particular crime as such. Other instances of similar criminal acts must be established on the basis of oral testimony so that the right of the accused to challenge the evidence grounding his conviction for that crime is not prejudiced. In relation to the prior recorded statements that were the subject of Mr Ntaganda's complaint, the Appeals Chamber considers that they were not the 'sole or decisive' basis for the Trial Chamber to enter convictions against Mr Ntaganda.

33. Therefore, the Appeals Chamber rejects the seventh ground of appeal.

34. Judge Eboe-Osuji is unable to concur with the majority's determinations regarding the use of prior recorded statements for the purposes of conviction and considers that the Trial Chamber erred in relying on unsworn statements that speak to the acts and conduct of those through whom Mr Ntaganda was found to have committed the crimes in question.

**8. *Eighth ground of appeal***

35. Under the eighth ground of appeal, Mr Ntaganda challenges the Trial Chamber's findings in relation to six discrete events during which crimes were committed by the UPC/FPLC. Mr Ntaganda argues that the Trial Chamber's assessment of the evidence with regard to these six events was tainted by its reliance on the 'uncorroborated testimony' of accomplice witnesses, namely, P-768, P-963 and P-17. I will not provide a detailed summary of the Appeals Chamber's assessment of this evidence. For present purposes, it suffices to say that the Trial Chamber was aware of the general standards applicable to the assessment of witnesses' credibility including those concerning accomplice witnesses and provided sufficient reasoning to support its reliance on the evidence of these witnesses. It is of the view that the Trial Chamber provided a reasonable assessment of the evidence of P-768, P-963 and P-17. Therefore, the eighth ground of appeal is rejected.

**9. *Ninth to twelfth grounds of appeal***

36. Under the ninth, tenth, eleventh and twelfth grounds of appeal, Mr Ntaganda submits: that the Trial Chamber erred in finding that individuals under the age of 15 years were used as escorts, were enlisted in the UPC/FPLC and actively participated in the hostilities; that it was unreasonable for the Trial Chamber to find that incidents of rape and sexual enslavement occurred or that Mr Ntaganda knew about these incidents based on the testimony of P-0758, P-0883 and the

testimony of a number of witnesses regarding the rape of a person named Mave; and that the Trial Chamber erred in inferring that he intended and knew that individuals under the age of 15 would be, or were being recruited or conscripted into the UPC/FPLC and, thereafter, used to participate actively in hostilities.

37. For reasons that are fully set out in the judgment, the Appeals Chamber finds that the Trial Chamber provided a reasonable assessment of the evidence of the relevant witnesses when making the impugned findings regarding the use of individuals under the age of 15 within the UPC/FPLC and Mr Ntaganda's knowledge of incidents of rape and sexual enslavement of individuals under the age of 15, including the rape of Mave, and about the recruitment and conscription of individuals under the age of 15 into the UPC/FPLC.

38. On the basis of the foregoing, the Appeals Chamber rejects Mr Ntaganda's ninth, tenth, eleventh and twelfth grounds of appeal.

### **Indirect Co-Perpetration**

39. The remaining grounds of appeal relate to the mode of responsibility of indirect co-perpetration.

40. Judge Eboe-Osuji and I entertain considerable reservations concerning the application and scope of the Trial Chamber's judgment in respect of Mr Ntaganda's criminal responsibility in utilizing the theories of 'indirect co-perpetration' and 'control of the crime'. They are set out in separate opinions. In

our view, the issues and scope of application of ‘indirect co-perpetration’ and ‘control of the crime’ theories are not settled in international criminal law. My reservations do not lead me to conclude that the Conviction Decision needs to be set aside because of the limits of appellate review and because the Trial Chamber was expressly following the earlier jurisprudence of the Court which was apparent to the appellant. On the other hand, Judge Eboe-Osuji’s reservations lead him to conclude that Mr Ntaganda’s conviction should be set aside insofar as it is based on the theory of indirect co-perpetration. He would, however, confirm the conviction for those crimes that he considers Mr Ntaganda to have directly committed.

41. Judge Ibáñez also writes separately in support of the theory of ‘indirect co-perpetration’ and ‘control of the crime’. In her view, indirect co-perpetration is a mode of liability enshrined in article 25(3)(a) of the Rome Statute that constitutes one of the most appropriate tools to deal with the type of mass criminality associated with international crimes under the jurisdiction of this Court.

#### ***10. Thirteenth ground of appeal***

42. Under the thirteenth ground of appeal, Mr Ntaganda raises a number of arguments aimed at demonstrating that the Trial Chamber erred in its approach to the common plan and the crimes committed in implementation of this plan.



43. The Appeals Chamber is of the view that, contrary to Mr Ntaganda's argument, the Trial Chamber's finding that 'the co-perpetrators meant the destruction and disintegration of the Lendu community' was not an expansion of the common plan charged by the Prosecutor.

44. Regarding the evidence upon which the Trial Chamber relied to make findings in relation to the meeting that took place in Kampala in June 2002, Mr Ntaganda has not demonstrated that this evidence is contradictory and 'insufficient to sustain a finding'. The Appeals Chamber also finds that Mr Ntaganda has not demonstrated an error in the Trial Chamber's reliance on the evidence of that meeting to establish that the co-perpetrators agreed in a common plan 'to drive out all the Lendu from the localities targeted during the course of their military campaign against the RCD-K/ML'. Furthermore, the Appeals Chamber considers that the Trial Chamber was not required to infer the existence of a common plan from evidence of subsequent concerted action of the co-perpetrators, as argued by Mr Ntaganda. Nor was it an error for it to rely on the evidence of commission of crimes by individual soldiers.

45. Regarding the Trial Chamber's findings on crimes committed in the implementation of the common plan, the Appeals Chamber considers these findings to be sufficiently detailed and specific to the crimes in question. It notes that, contrary to Mr Ntaganda's argument, the findings relate to 'more than just the commission of crimes' and include meetings, specific orders and instructions

to the troops. The Appeals Chamber therefore considers that it was reasonable for the Trial Chamber to infer from these findings that the co-perpetrators meant for these crimes to be committed by virtue of the common plan.

46. Mr Ntaganda also argues that the Trial Chamber erred in convicting him for the actions of Hema civilians in Mongbwalu. The Appeals Chamber finds that it was reasonable for the Trial Chamber to conclude on the basis of the evidence of orders to the Hema civilians and their joint operation with the UPC/FPLC soldiers that the Hema civilians ‘functioned as a tool in the hands of the co-perpetrators’ and that their ‘will had become irrelevant’.

47. The Appeals Chamber therefore rejects the thirteenth ground of appeal.

### ***11. Fourteenth and fifteenth grounds of appeal***

48. Under the fourteenth ground of appeal, Mr Ntaganda argues that the Trial Chamber erred in finding that he possessed the requisite *mens rea* as an indirect co-perpetrator for crimes committed during the First Operation. He submits that: (i) the Trial Chamber erred in fact in relying on two alleged directives given by him to enter a finding about his *mens rea*; (ii) none of the other factors relied upon by the Trial Chamber to infer his intent for the crimes charged either collectively or individually, sustain its finding of *mens rea*; and (iii) in inferring the existence of a fact upon which a conviction relies, the Trial Chamber failed to consider the reasonable possibility of other available conclusions, and associated relevant

evidence. After a careful review of the evidence underlying each of the Trial Chamber's factual findings supporting its findings on Mr Ntaganda's *mens rea* for the First Operation, the Appeals Chamber concludes that none of the appellant's challenges renders the Trial Chamber's determination on his knowledge and intent of the crimes unreasonable.

49. In the fifteenth ground of appeal, Mr Ntaganda alleges: (i) legal errors in the Trial Chamber's application of the law on indirect co-perpetration; (ii) errors in the assessment of his contribution to, and *mens rea* for, the crimes committed during the Second Operation; (iii) errors in the Trial Chamber's factual findings on his direct contributions to the Second Operation, arguing that his '*de minimis*' contributions to the Second Operation reveal no awareness that he was exercising control over, or making an essential contribution to, the crimes of the Second Operation; and (iv) errors in the Trial Chamber's reliance on the testimony of P-0055 that Mr Ntaganda was contemporaneously informed of the Kobu massacre and expressed approval of that event.

50. The Appeals Chamber considers that, consistent with the principle of causation, an accused's essential contribution must be to the crime for which he or she is responsible. However, a contribution of a co-perpetrator which, on its face, is not directly to a specific crime, but to the implementation of the common plan more generally may still suffice. The Appeals Chamber finds that for indirect co-perpetration, the 'knowledge' component of *mens rea* includes an awareness

on the part of the co-perpetrator of the factual circumstances that enabled him or her, together with other co-perpetrators, to jointly exercise control over the crime and Mr Ntaganda fails to identify an error on the facts of this case. In light of the foregoing, Mr Ntaganda shows no error in the Trial Chamber's application of the law on indirect co-perpetration and his arguments are rejected.

51. In relation to Mr Ntaganda's argument that the Trial Chamber was 'bound to analyse [his] responsibility in respect of both operations separately', the Appeals Chamber recalls that the decisive consideration for co-perpetration, is whether Mr Ntaganda's contribution as a whole amounted to an essential contribution to the crimes within the framework of the common plan, and determines that the Trial Chamber was not required to analyse Mr Ntaganda's essential contribution with respect to the specific crimes charged in each operation. Therefore, the Trial Chamber was not required to assess Mr Ntaganda's *mens rea* in respect of the specific criminal acts committed in each operation. In order to find him criminally responsible as a co-perpetrator for specific criminal acts of murder or rape that took place on particular dates and in particular locations, it need not be established that Mr Ntaganda was aware of the details of these events, including whether and which specific acts had been committed. Rather, what must be established is that he possessed the requisite *mens rea* with respect to the crimes as such in the sense of murder, rape,

persecution, pillage, etcetera committed in the implementation of the common plan.

52. The Appeals Chamber considers that the Trial Chamber did not err in finding that the First and Second Operations ‘were part of the same military campaign and constituted a logical succession of events’. Given that both operations were an integral part of the common plan and were inter-related, the Trial Chamber was correct to assess Mr Ntaganda’s role in a holistic way rather than conduct a separate analysis of his contributions and *mens rea* for the First and Second Operations respectively.

53. In relation to Mr Ntaganda’s challenges to the Trial Chamber’s factual assessment of his essential contribution to the implementation of the common plan, the Appeals Chamber recalls that a determination of whether an alleged co-perpetrator exercised control over the crimes necessarily depends on a holistic assessment of all the relevant facts and evidence. It considers that, on the basis of the findings and evidence relied upon, the Trial Chamber’s conclusion in the present case was reasonable. Finally, the Appeals Chamber finds that the Trial Chamber’s conclusion that Mr Ntaganda meant for the troops deployed during the Second Operation to engage in the conducts and cause the consequences required for the commission of crimes was reasonable.

54. The fourteenth and fifteenth grounds of appeal are rejected.

***12. Prosecutor's appeal***

55. The Prosecutor raises two grounds of appeal, under which she argues that the Trial Chamber erred in not considering that the term 'attack' in article 8(2)(e)(iv) of the Statute has a 'special meaning' and that an 'attack' for the purpose of this provision 'is not limited to the conduct of hostilities'. This is in relation to Count 17, under which Mr Ntaganda was charged with attacking protected objects as a war crime, including in relation to looting at the hospital in Mongbwalu and breaking into the church in Sayo. The Trial Chamber concluded that it would not consider these two events under Count 17, as they did not constitute 'attacks'.

56. The Appeals Chamber finds, by majority, Judge Ibáñez dissenting, that the Prosecutor's appeal should be rejected.

57. Judge Hofmański and I find that the term 'attack' used in article 8(2)(e)(iv) of the Statute means 'combat action' and that the Trial Chamber did not err by not applying a different definition of 'attack'. Judge Balungi Bossa considers that it was unacceptable for the Trial Chamber to find that the conduct of hostilities ceased after the assault in Mongbwalu; for reasons set out in her separate opinion, she declines to overturn Mr Ntaganda's acquittal for the charge of attacking protected objects as a war crime against the hospital in Mongbwalu and the church in Sayo. Judge Eboe-Osuji is of the view that the kind of attack that the Rome Statute forbids can occur outside the course of active hostilities and he does

not accept the Trial Chamber’s findings in this respect; for reasons set out in his partly concurring opinion, he declines to overturn the Trial Chamber’s dispositif on this particular matter. Judge Ibáñez Carranza partly agrees with Judge Balungi Bossa and Judge Eboe-Osuji that the Trial Chamber erred in the interpretation of the term ‘attack’ in article 8(2)(e)(iv) of the Statute, and finds that the term ‘attack’ includes the preparation, the carrying out of combat action and the immediate aftermath thereof; she would grant the Prosecutor’s appeal and would reverse the Trial Chamber’s findings in this respect.

### ***13. Appropriate Relief***

58. The Appeals Chamber confirms, by majority, the Conviction Decision and rejects the appeals lodged by Mr Ntaganda and the Prosecutor.

### ***14. Separate Opinion of Judge Ibáñez Carranza***

59. In her separate opinion, Judge Ibáñez addresses two fundamental legal concepts that, as illustrated in Mr Ntaganda’s submissions made in both the conviction and sentencing appeals proceedings, amount to misrepresentations that require further clarification. The aim of Judge Ibáñez’ separate opinion is to strengthen the Appeals Chamber Judgment and to assist in a better understanding of the criminal law applied at the Court for this and future cases before both this Court and other national and international jurisdictions. In this regard, she discusses: (i) the contextual elements of crimes against humanity, in particular the requirement that the widespread or systematic attack directed against any

civilian population be carried out pursuant to or in furtherance of an organisational policy, and (ii) the meaning and scope of indirect co-perpetration, including through an organised power apparatus, as a mode of liability provided for in the Statute.

60. In relation to the first issue, Judge Ibáñez considers that the focus of the determination of whether an organisation qualifies as such within the meaning of article 7 of the Statute ought to be on those features that would allow it to carry out a widespread or systematic attack directed against any civilian population. Furthermore, to establish the existence of a policy to commit an attack within the meaning of article 7 of the Statute, it is unnecessary to prove that such policy was underpinned by any sort of ideology or motivation. In Judge Ibáñez' view, it is possible that the State or organisation is motivated by a legitimate aim but the means through which it seeks to achieve it are criminal resulting in a widespread or systematic attack directed against the civilian population. She considers that when interpreted in light of the object and purpose of the Statute, the policy requirement ought to be understood as imposing a minimum threshold that aims at excluding ordinary crimes from the realm of crimes against humanity. Moreover, Judge Ibáñez is of the view that a widespread or systematic attack for the purpose of crimes against humanity amounts to a campaign of serious human rights violations that manifests in the multiple commission of acts referred to in article 7(1) of the Statute.



61. In relation to the facts of this case, Judge Ibáñez considers that the UPC/FPLC was a well-organised structure capable of planning, conceiving and implementing an organisational policy to attack and chase away the Lendu civilians as well as those who were perceived as non-Iturians. Judge Ibáñez is of the view that while the aim of the UPC/FPLC to put an end to the power exercised by the RCD-K/ML in the territory of Ituri may have been legitimate, the means by which this objective was sought to be achieved crystallised into a policy, the implementation of which resulted in a widespread and systematic attack against the civilian population during the First and the Second Operation. In her opinion, the fact that the UPC/FPLC may have conducted other military operations in relation to which no evidence on the commission of crimes against civilians was presented, is irrelevant to the Trial Chamber's finding that the attack comprised of multiple acts referred to in article 7(1) of the Statute which was directed against the Lendu civilians.

62. With respect to the second issue, Judge Ibáñez finds that indirect co-perpetration is an integrated mode of liability encompassed in article 25(3)(a) of the Rome Statute that combines the constitutive elements of co-perpetration and indirect perpetration and is therefore compatible with the principle of legality and the rights of the accused. She considers that the control of the crime serves as the objective distinguishing criterion to differentiate perpetration in all its modalities from other forms of individual criminal responsibility under article 25(3) and

article 28 of the Statute. Furthermore, Judge Ibáñez considers that indirect perpetration through an organised power apparatus is one modality of commission through another person as provided in article 25(3)(a) of the Statute. By virtue of his or her hierarchical position within the hierarchically structured organisation and its automatic functioning ensured by the replaceable nature of its members, the indirect perpetrator exercises functional control over the crimes and retains the power to frustrate their commission. Judge Ibáñez is of the view that due to the nature of the crimes under the jurisdiction of the Court that generally involve large-scale and mass criminality, indirect co-perpetration constitutes an appropriate tool to deal with such atrocities and to investigate, prosecute and convict those bearing the highest responsibility.

63. Judge Ibáñez considers that regarding the mental element in the context of indirect co-perpetration through an organised power apparatus, the accused persons must be aware of, and intend

- (i) to participate in a common plan that involves the commission of crimes;
- (ii) a coordinated realisation of the objective elements of the crime;
- (iii) the fact that implementing their common plan will result in the realisation of the objective elements of the crime or be aware that the realisation of the objective elements will be a consequence of their acts in the ordinary course of events; and
- (iv) the existence of an organised power structure hierarchically controlled by them that functions automatically and is composed of replaceable elements at the base willing to implement the common plan and commit crimes as a result.

64. In her view, unlike in cases of direct perpetration where the perpetrator fulfils the concrete elements of the crime in person, there is no need for the

indirect co-perpetrator to be aware of the particularities of each criminal incident because these are committed through another person and therefore they are different modes of liability.

65. In this case, Judge Ibáñez finds that the UPC/FPLC was an organised power apparatus given that it was hierarchically organised and composed of replaceable members willing to carry out the criminal plan of the organisation. Throughout the period relevant to the charges, Mr Ntaganda exercised, by virtue of his hierarchical position, control over the automatic functioning of the organisation which led to compliance with the instructions, directives and orders by the replaceable direct perpetrators on the ground. In Judge Ibáñez's view, the facts of the case show that Mr Ntaganda was aware and intended the commission of crimes that were indirectly perpetrated by UPC/FPLC forces and Hema civilians. He was therefore properly charged and convicted as an indirect co-perpetrator through an organised power apparatus.

## **B. Appeal against sentence**

### ***1. Background of the appeal proceedings***

66. On 7 November 2019, the Trial Chamber sentenced Mr Ntaganda for the five counts of crimes against humanity and the thirteen counts of war crimes for which he was convicted. Mr Ntaganda received a joint sentence of thirty (30) years of imprisonment with a deduction for the time spent in detention from 22

March 2013 onwards. In his appeal against the Sentencing Decision, Mr Ntaganda raises twelve grounds of appeal in which he alleges that the Trial Chamber either abused its discretion and/or committed errors of law and fact in relation to its findings on his degree of participation in, and knowledge of, the crimes committed during the First and Second Operations as well as findings related to various aggravating and mitigating circumstances. In this respect, he requests that the Appeals Chamber reverse the Trial Chamber's alleged errors and substantially reduce the related individual sentences and the joint sentence. Mr Ntaganda's grounds of appeal and the Appeals Chamber's findings in this regard are summarised as follows.

## ***2. First ground of appeal***

67. In his first ground of appeal, Mr Ntaganda submits that the Trial Chamber erred in law and in fact by not making a distinction between his degree of participation in the crimes committed during the First Operation and those committed in the Second Operation.

68. The Appeals Chamber is not persuaded by Mr Ntaganda's argument that the Trial Chamber erred in refusing to consider his physical proximity to, and knowledge of the specifics of the crimes committed as demonstrating a lesser degree of participation in the Second Operation. In its view, it is in the nature of indirect perpetration, as a form of criminal responsibility, that physical proximity to the commission of crimes and knowledge of the specific details of how the

crimes are committed are not required in order to find an individual responsible as a principal perpetrator. Although the Appeals Chamber accepts that these factors may be indicative of the degree of participation of an individual in certain circumstances, it is not convinced that the absence of these factors *must* be taken into account as generally pointing to a lesser degree of participation. In the present case, the Appeals Chamber considers that the Trial Chamber properly assessed Mr Ntaganda's degree of participation by evaluating the role he played in relation to the commission of the crimes.

69. Accordingly, the Appeals Chamber concludes that the Trial Chamber did not err in refusing to consider his physical proximity to, and knowledge of the specifics of the crimes committed as demonstrating a lesser degree of participation in the Second Operation. Likewise, the Appeals Chamber considers that his argument that the Trial Chamber assessed his participation in the two operations as though it were a 'single phenomenon' is unfounded. In the Appeals Chamber's view, the Trial Chamber carried out an assessment of the *in concreto* gravity of his culpable conduct for each crime.

### ***3. Second ground of appeal***

70. In his second ground of appeal, Mr Ntaganda challenges the Trial Chamber's assessment of his degree of participation in and knowledge of the crime of rape of civilians under counts 4 and 5.

71. The Appeals Chamber notes that the Trial Chamber carried out a concrete assessment of his degree of participation in the crimes. It recalled that some of the rapes that occurred during the First Operation took place at the *Appartements* camp which was Mr Ntaganda's base. Moreover, it took into account 'his presence at the camp, his awareness that women were brought there, and the fact that he brought women there himself'. In the Appeals Chamber's view, his knowledge was therefore clearly established. Furthermore, on the basis of the Trial Chamber's further analysis, it concluded that Mr Ntaganda's degree of culpability was 'substantial' regarding the rapes committed against civilians during both operations. Consequently, the Appeals Chamber finds no error in the Trial Chamber's approach.

#### ***4. Third ground of appeal***

72. In his third ground of appeal, Mr Ntaganda submits that the Trial Chamber failed to address his lack of knowledge or concrete participation in the sexual enslavement of civilians and in the rape and sexual slavery of three individuals under the age of 15.

73. With respect to the crimes committed against civilians during the Second Operation, the Appeals Chamber considers that the Trial Chamber carried out a concrete assessment of his degree of participation in the crimes. Based on the Trial Chamber's findings, the Appeals Chamber concludes that Mr Ntaganda's knowledge of the crimes committed against the victims was established by virtue

of the agreement made between the co-perpetrators to implement the common plan. As for the crimes against individuals under the age of 15, the Appeals Chamber finds no error in the Trial Chamber's conclusion that while his degree of intent was 'lower than for the sexual crimes against civilians', 'his degree of involvement and participation in their commission was significant'.

**5. *Fourth ground of appeal***

74. In his fourth ground of appeal, Mr Ntaganda submits that the Trial Chamber erred by finding that his participation in the Second Operation murders, including the Kobu massacre, was 'enhanced' by (i) his failure to punish commander Salumu Mulenda for the Kobu massacre; and (ii) his purported post facto approval of the Kobu massacre and other murders committed by Mr Mulenda's troops.

75. The Appeals Chamber notes that, in reaching its conclusion that his participation and intent regarding the murders and attempted murders in the Second Operation was 'substantial', the Trial Chamber did not find that Mr Ntaganda's participation in or intent regarding the Second Operation was 'enhanced' by his failure to punish Salumu Mulenda or his expression of approval of the Kobu murders, as Mr Ntaganda suggests. Rather, in reaching its conclusion the Trial Chamber considered a number of factors, including the fact that Mr Ntaganda took part in the relevant planning of this operation and that he remained in contact with the commanders in the field.

76. As to the argument that the Trial Chamber erred in law in relying on his expression of *post facto* approval of the Kobu massacre, the Appeals Chamber considers that this argument conflates the notion of intent with the evidentiary considerations that may be relevant to establishing it. The Trial Chamber took into account the fact that Mr Ntaganda expressed approval of the murders when he was informed of what had happened in conjunction with other findings relevant to establishing his *mens rea*. Accordingly, the Appeals Chamber finds no error in the Trial Chamber's assessment of Mr Ntaganda's failure to punish Mr Mulenda or his expression of approval of the Kobu murders for the purposes of sentencing.

**6. *Fifth ground of appeal***

77. In his fifth ground of appeal, Mr Ntaganda challenges the Trial Chamber's assessment of an aggravating circumstance related to the deaths of seven individuals that resulted from the crime of intentionally directing attacks against civilians.

78. The Appeals Chamber notes that under article 8(2)(e)(i) of the Elements, actual harm or death is not a required element for the crime of intentionally directing attacks against civilians to be fulfilled. Hence, where actual harm or death does arise as a consequence of the unlawful attack(s) on civilians, a trial chamber is not precluded from considering that actual harm or death in its determination of an appropriate sentence provided that it is sufficiently linked to



the crime of intentionally directing attacks against civilians, was objectively foreseeable by the convicted person and the findings related to this consequence were established beyond reasonable doubt. Accordingly, the Appeals Chamber finds no error in the Trial Chamber's approach and assessment.

**7. *Sixth ground of appeal***

79. In his sixth ground of appeal, Mr Ntaganda argues that by imposing an individual sentence of 30 years for the crime of persecution, which was equal to the highest individual sentence imposed for the underlying crime of murder, the Trial Chamber impermissibly engaged in double-counting. In his view, the only appropriate sentence for persecution, in these circumstances, was zero given the overlapping conduct and the related discriminatory dimension between the crimes underlying counts 1 to 5, 7 to 8, 11 to 13, and 17 to 18 and the crime of persecution.

80. The Appeals Chamber considers that Mr Ntaganda's argument ignores the two-step sentencing process prescribed under article 78(3) of the Statute. The Appeals Chamber considers that the calculation of an individual sentence necessarily entails an assessment of all the circumstances relevant to a particular crime. If the circumstances relevant to more than one individual sentence were to be excluded from the calculation of any one of those individual sentences, the true culpability of a convicted person for a particular crime would be unclear. Consequently, the Appeals Chamber finds that the Trial Chamber did not err in

imposing an individual sentence for persecution by taking into account the same underlying conduct and the discriminatory nature of such conduct that was also considered when setting individual sentences for the crimes underlying counts 1 to 5, 7 to 8, 11 to 13, and 17 to 18. Moreover, the Appeals Chamber considers that a sentence amounting to zero would have effectively ignored Mr Ntaganda's conviction for the crime of persecution and, therefore, resulted in an error of law.

**8. *Seventh to twelfth grounds of appeal***

81. In these grounds of appeal, Mr Ntaganda challenges the Trial Chamber's assessment of mitigating circumstances.

82. In the **seventh ground of appeal**, he submits that the Trial Chamber erred in law, or misappreciated the facts, in considering that saving the lives of 64 enemy combatants was not a mitigating factor. In his view, his actions represented a 'substantial humanitarian act' deserving of acknowledgment and weight in mitigation. However, given that the Trial Chamber found Mr Ntaganda's actions to have been aimed at using the captured soldiers for the 'benefit of the common plan', the Appeals Chamber considers that regardless of how many individuals Mr Ntaganda was alleged to have saved or how 'forcefully' he had to intervene to save these lives, his ulterior motive necessarily diminished the value of his actions. As such his actions cannot objectively amount to a 'substantial humanitarian act'.

83. In his **eighth ground of appeal**, Mr Ntaganda disputes the Trial Chamber's rejection of his traumatic personal experience in the Rwandan genocide in mitigation of his sentence. The Appeals Chamber notes that, notwithstanding the fact that the Trial Chamber expressly acknowledged the suffering and discrimination that Mr Ntaganda had endured as a result of his experience in the genocide, it was reasonable for the Trial Chamber to find that his personal experience could not diminish his culpability given his criminal conduct and the gravity of his crimes.

84. In his **ninth ground of appeal**, Mr Ntaganda submits that the Trial Chamber erred in failing to enter findings on and accord weight in mitigation to (i) his alleged protection of Lendu civilians in Mandro in June 2002; (ii) his protection of other civilians by deploying troops; and (iii) his punishment of crimes against civilians. In his **tenth ground of appeal**, Mr Ntaganda challenges the weight accorded by the Trial Chamber to his alleged genuine and concrete contribution to peace and reconciliation with the Lendu community, as well as to the demobilisation and integration of UPC/FPLC members into the armed forces of the DRC. For reasons that are fully set out in its judgment, the Appeals Chamber notes the Trial Chamber's comprehensive findings on these issues and concludes that the Trial Chamber's assessment of the evidence was reasonable and based on the correct application of the 'balance of probabilities' standard of proof and its discretionary powers.

85. In his **eleventh ground of appeal**, Mr Ntaganda challenges the Trial Chamber’s assessment of his cooperative behaviour with the Court during trial as a mitigating factor. The Appeals Chamber notes that ‘good behaviour and cooperation with the Court’ during a trial is expected of any accused person. As such, good behaviour and cooperation cannot, in and of itself, constitute a factor in mitigation of a sentence. However, as correctly stated by the Trial Chamber, such behaviour may be considered to be a mitigating factor if it is found to be ‘exceptional’ in nature.

86. In rejecting this factor as mitigating, the Appeals Chamber finds that the Trial Chamber’s holistic assessment of his behaviour was reasonable and finds no merit in his argument that the Trial Chamber misappreciated the facts when concluding that his conduct during the trial was not exceptional.

87. In his **twelfth ground of appeal**, Mr Ntaganda challenges the Trial Chamber’s assessment of his efforts to assist fellow detainees, who could be described as struggling with being in custody, as a mitigating factor. The Appeals Chamber notes that in finding Mr Ntaganda’s actions to be ‘commendable’, the Trial Chamber was fully aware of the facts and circumstances surrounding his actions and expressed its appreciation for his conduct. The Trial Chamber also clearly assigned weight to this factor in mitigation. However, in balancing this factor against the gravity and aggravating circumstances established for the crimes for which Mr Ntaganda was convicted, it found this factor to be ‘too

limited’ to have an impact on his individual and overall sentences. The Appeals Chamber finds no error with the Trial Chamber’s exercise of discretion in this respect.

**9. *Appropriate Relief***

88. Having rejected Mr Ntaganda’s grounds of appeal in their entirety, the Appeals Chamber hereby confirms the Trial Chamber’s sentencing judgment.