Cour
Pénale
Internationale

International
Criminal
Court

Original: **English**

No.: **ICC-01/04-02/06 A**
Date: **9 December 2019**

THE APPEALS CHAMBER

Before: **Judge Chile Eboe-Osuji**
Judge Howard Morrison
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

Notice of Appeal against Sentencing Judgment (ICC-01/04-02/06-2442)

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

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor
Mrs. Fatou Bensouda
Mr. James Stewart
Mrs. Helen Brady

Counsel for the Defence
Me Stéphane Bourgon, *Ad.E.*
Me Christopher Gosnell
Me Kate Gibson

Legal Representatives of Victims
Mrs. Sarah Pellet
Mr. Dmytro Suprun

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants (Participation / Reparation)

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar
Mr. Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

I. INTRODUCTION

1. The Trial Chamber ("Chamber") erred in law, procedure and on the facts by imposing a sentence of 30 years on Mr. Ntaganda. On the basis of these errors, the sentence is disproportionate and should be reduced.

2. The Chamber repeatedly failed to consider, as required by rule 145(1)(c) of the Rules of Procedure and Evidence ("Rules"), Mr. Ntaganda's degree of concrete participation in certain crimes. Instead, the Chamber often repeated the basis of liability, without further considering Mr. Ntaganda's *degree* of participation in different crimes. For example, the Chamber failed to assess *in concreto* Mr. Ntaganda's degree of participation in the crimes committed during Second Operation, as distinct from the First Operation; and failed to assess *in concreto* his limited degree of participation in the sexual violence crimes for which he was convicted in Counts 4 through 9. A concrete assessment of personal culpability requires the Chamber to go beyond the finding of liability to ensure that the punishment is proportionate to the convicted person's individual responsibility.

3. The Chamber also "double-counted" the same factors in pronouncing an individual sentence of 30 years for persecution (Count 10) for acts, and discriminatory intent, that the Chamber had already taken into account in arriving at individual sentences for crimes underlying that crime.

4. The Chamber also erred in law, and in fact, in rejecting relevant mitigating circumstances, including by: failing to recognize Mr. Ntaganda's objectively substantial efforts towards reconciliation of Hema and Lendu communities in Ituri in 2004, and demobilization and integration of *Forces Patriotiques pour la Libération du Congo* ("FPLC") forces into the national army; failing to accord any weight to the lives of 63 enemy fighters who were saved by Mr. Ntaganda; misunderstanding and erroneously dismissing the significance of Mr. Ntaganda's traumatic experiences fighting against the Rwandan genocide; and failing to attach mitigation weight to his

substantial efforts to protect a fellow detainee at the International Criminal Court Detention Centre ("ICC DC") from serious harm.

5. The Appeals Chamber is asked to quash the individual and joint sentences imposed by the Chamber, and impose under article 83(3) individual and joint sentences that are no higher than 23 years.

II. PROCEDURAL HISTORY

6. On 7 November 2019, the Chamber rendered its Sentencing Judgment.[1] The Chamber considered the following individual sentences appropriate:

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;

[1] Sentencing Judgment, 7 November 2019, ICC-01/04-02/06-2442 ("SJ").

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.

7. 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).

8. 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."

9. Rule 150 of the Rules provides that an appeal against a decision of sentence under article 76 of the Statute may be filed not later than 30 days from the date on which the party filing the appeal is notified of the decision.

10. Regulation 57 of the Regulations of the Court ("RoC") sets out the requirements of the notice of appeal:

> (a) The name and number of the case;
>
> (b) The title and date of the decision of conviction or acquittal, sentence or reparation order appealed against;

(c) Whether the appeal is directed against the whole decision or part thereof;

(d) The specific provision of the Statute pursuant to which the appeal is filed;

(e) The grounds of appeal, cumulatively or in the alternative, specifying the alleged errors and how they affect the appealed decision;

(f) The relief sought.

III. NOTICE OF APPEAL

11. Notice of appeal is hereby given in the case of *The Prosecutor v. Bosco Ntaganda* (ICC-01/04-02/06) from the Sentencing Judgment of 7 November 2019, ICC-01/04-02/06-2442. The appeal, which is brought under article 81(2)(a), is directed against the whole decision. The grounds of appeal and relief sought are set out below.

IV. GROUNDS OF APPEAL

A. ERRORS IN ASSESSING GRAVITY AND AGGRAVATING CIRCUMSTANCES

GROUND 1. The Chamber systematically failed to concretely assess Mr. Ntaganda's "degree of participation" in the Second Operation when evaluating his culpability for those crimes.

12. The Chamber explains in a "preliminary" discussion[2] of the degree of Mr. Ntaganda's involvement in the crimes[3] committed in the First Operation and the Second Operation that:

> [t]he 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

[2] SJ, paras.32-38.

[3] *See e.g.* SJ, paras.67 (murder), 76-77 (intentionally attacking civilians), 117 (rape), 149 (property crimes), 168 (forcible transfer).

> 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.[4]

13. This statement reflects an error of law and/or a misappreciation of the facts. Rule 145(1)(a) not only permits, but requires, a Chamber to "give consideration […] to […] the degree of participation of the convicted person" and the "degree of intent." The issue that had to be examined was not merely "physical proximity" or "specifics," but rather the substantial and concrete differences in Mr. Ntaganda's role in, and knowledge of, the scale and nature of the crimes as between the two operations. The Chamber erred in law to the extent that it found that it need not conduct such an analysis because the degree of participation was already dictated by the finding that Mr. Ntaganda had committed all these crimes through the same common plan; and/or erred in fact in believing that a difference in Mr. Ntaganda's participation could be reduced to mere "proximity" and "specifics." The Chamber erred in failing to apprehend, and consider in its reasons, that the concrete differences in Mr. Ntaganda's degree of participation and degree of intent in the crimes of the two operations was substantial.

14. An evaluation of the degree of participation — at least where significantly different for different crimes[5] — requires consideration of the convicted person's concrete contribution to the particular crimes, as well as his knowledge of those crimes.

15. The Chamber did not conduct this analysis, or did so in such a cursory and inadequate manner that it failed to give these differences any, or adequate weight. The crimes of the Second Operation, as found in the Chamber's Judgment,[6] involved

---

[4] SJ, para.36.
[5] *Bemba et al.*, Decision on Sentence Pursuant to Article 76 of the Statute, 22 March 2017, ICC-01/05-01/13-2123-Corr, para.124; *Katanga*, Decision on Sentence pursuant to Article 76 of the Statute, 23 May 2014, ICC-01/04-01/07-3484-tENG-Corr, paras.61-69.
[6] Judgment, 8 July 2019, ICC-01/04-02/06-2359 ("TJ").

particular brutality and were significantly more widespread than those committed during the First Operation. Yet Mr. Ntaganda's knowledge of the crimes in the Second Operation, as well as his contribution, was limited in comparison with those of the First Operation. There is a very substantial difference in culpability, for example, between a crime that is directly ordered, as the Chamber found in respect of some First Operation crimes, and a massacre of 49 people of which Mr. Ntaganda had no advance or contemporaneous knowledge, and to which he made no concrete or direct contribution.

16. The discussion of Mr. Ntaganda's concrete role in the Second Operation is manifestly deficient and does not address the degree of participation in the "crimes". The reference to so-called "relevant planning" in respect of the Second Operation as a whole (which was, in any event, extremely limited) says little or nothing about Mr. Ntaganda's concrete contribution to the crimes themselves, in particular, the Kobu massacre.[7] Likewise, the Chamber's characterization that Mr. Ntaganda had "contact with the commanders in the field and monitored its unfolding via the UPC/FPLC radio communications system"[8] says little, if anything, about his concrete participation in the crimes. The Chamber's repetition of the basis for its finding on indirect co-perpetration[9] does not satisfactorily address his *degree of participation*.

17. 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."[10] 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.

[7] SJ, para.65.
[8] SJ, para.65.
[9] *See e.g.* SJ, paras.75-76.
[10] SJ, para.36 (italics added). *See* SJ, para.67.

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 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.

18. In failing to do so, the Chamber misapplied the concept of culpability; failed to take into account relevant facts; failed to give a reasoned opinion; and arrived at manifestly disproportionate individual sentences for all the crimes committed during the Second Operation, in particular the 30-year sentence for Counts 1 and 2.

GROUND 2. 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 4 and 5.

19. The Chamber erred by failing to concretely evaluate Mr. Ntaganda's awareness of, and contribution to, rapes committed against civilians in determining sentence.[11]

20. The only such discussion of rapes of civilian victims (Counts 4 and 5) relates to Mr. Ntaganda's knowledge of rapes of civilians committed at the location known as the "*Appartements*" during the First Operation, which the Chamber found was based on his presence there at the time.[12] The Chamber omits any further discussion of other instances of Counts 4 and 5 and, accordingly, fails to consider Mr. Ntaganda's much lower level of knowledge of other rapes, including the cruel circumstances of the rapes committed at Kilo[13] and during the Second Operation.[14] Importantly, the Judgment makes no finding that Mr. Ntaganda had any advance, contemporaneous, or subsequent knowledge of these rapes, or that he concretely contributed to these

[11] SJ, paras.90-132.
[12] SJ, para.115.
[13] SJ, para.99.
[14] SJ, paras.123-124.

particular rapes. Having given particular weight to the cruel circumstances of these rapes as an aggravating circumstance,[15] it was incumbent on the Chamber to examine Mr. Ntaganda's culpability in relation to that cruelty and the crimes as a whole. The Chamber omitted to do so.

21. In failing to conduct any of the foregoing analyses, the Chamber misapplied the concept of culpability; failed to take into account relevant facts; failed to give a reasoned opinion; and pronounced a manifestly disproportionate individual sentence of 28 years for the Counts 4 and 5.

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.

22. The Chamber erred by failing to concretely evaluate Mr. Ntaganda's awareness of, and contribution to, rapes and sexual slavery committed against civilians and against child soldiers in determining sentence.[16]

23. Both instances of sexual slavery of civilians (Counts 7 and 8) for which Mr. Ntaganda was convicted occurred during the Second Operation.[17] The Chamber failed to conduct any concrete analysis of Mr. Ntaganda's contribution or knowledge of either of the two instances.[18] It was incumbent on the Chamber to assess Mr. Ntaganda's culpability in respect of the crimes against these two victims on the basis of a concrete assessment of his direct knowledge or contribution to this separate crime. The Chamber failed to do so and, accordingly, failed to take into account of Mr. Ntaganda's limited degree of participation in those events.

[15] SJ, paras.123-124.
[16] SJ, paras.90-132.
[17] SJ, para.117.
[18] SJ, para.101.

24. The same error impacts the Chamber's analysis of Counts 6 and 9 (rape and sexual slavery, respectively, of child soldiers). The Chamber found that there were three victims of these crimes. None of these victims was in proximity to Mr. Ntaganda at the time of the crimes, or at virtually any other time, and there is no indication that Mr. Ntaganda had any advance, contemporaneous or subsequent knowledge of these crimes. 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[19] had any 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 from where Mr. Ntaganda was located and without any other indication of his knowledge of those events.

25. The Chamber does not even mention, for example, that one of the three victims — "Mave" — was raped and sexually enslaved by Kisembo during a period when the FPLC forces had been defeated by the Uganda People's Defence Forces ("UPDF") and separated into two distinct groups,[20] with Mr. Ntaganda having limited or no knowledge, let alone participating, in the activities of the Kisembo group in Mamedi.[21] Indeed, Mr. Ntaganda was not even in Ituri at the time of this rape for which he was sentenced. This limited degree of participation had to be considered by the Chamber to arrive at a proper view of Mr. Ntaganda's culpability.

26. In failing to conduct any of the foregoing analyses, the Chamber misapplied the concept of culpability; 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.

---

[19] SJ, para.119.
[20] TJ, para.652.
[21] *See* SJ, paras.108-109.

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.

27. 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 expressing approval for Mulenda's troops having committed the Kobu massacre and other murders.[22]

28. Enhancing Mr. Ntaganda's culpability for having failed to punish Mr. Mulenda, in the absence of a finding that Mr. Ntaganda had the capacity and opportunity to do so, was an error of law or misappreciated the facts. Only if Mr. Ntaganda had the capacity to punish could the failure to punish be taken into consideration. The Chamber, in failing to make and give reasons for such a predicate finding, misappreciated the facts or misunderstood the law.

29. The Chamber did not find that Mr. Ntaganda's purported expression of approval of Mr. 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 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 be simultaneous with the *actus reus*. Enhancing gravity on the basis of the expression of *post facto* sentiments of approval for a crime was an error of law.

30. This error materially contributed to a disproportionate individual sentence for Counts 1 and 2.

[22] SJ, paras.66-67.

GROUND 5. The Chamber erred in finding that the deaths arising from intentionally directing attacks on civilians could be considered an aggravating circumstance (Count 3).

31. 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.[23]

32. 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.[24] The Prosecution could have charged, but chose not to charge, this consequence as murder, which is the crime that properly addresses deaths arising from intentionally directing attacks on civilians. Treating this separate crime as an aggravating circumstance improperly purports to sentence Mr. Ntaganda for consequences that, according to the Chamber, fall outside of the scope of the crime of intentionally directing attacks on civilians.[25] 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.

33. 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.

[23] SJ, para.85.
[24] SJ, fn.233.
[25] TJ, para.904.

34. Furthermore, this is not a case of separate but related conduct that might be treated as an aggravating circumstance,[26] but rather a different consequence than that which is charged. Treating such an uncharged consequence, especially in circumstances where the crime could have been easily charged, is an error of law.

35. This error materially contributed to a disproportionate individual sentence for Count 3.

GROUND 6. The Chamber erred by "double-counting" certain factors when imposing a disproportionate individual sentence of 30 years for persecution (Count 10).

36. The Chamber noted, in discussing the individual sentence for persecution, that it had already imposed individual sentences for all of the crimes constituting the deprivation of fundamental rights underlying the persecution conviction.[27] The Chamber also indicated that it had also already taken into account the "discriminatory element" with which each of these individual crimes was committed,[28] as is confirmed in previous paragraphs in the Sentencing Judgement.[29] The Chamber expressly concluded that "there are no additional elements to be considered in relation to persecution committed by Mr. Ntaganda."[30]

37. The Chamber nevertheless proceeded to impose an individual sentence for persecution of "30 years of imprisonment."[31]

---

[26] *Bemba et al.*, Judgment on the appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Decision on Sentence pursuant to Article 76 of the Statute", 8 March 2018, ICC-01/05-01/13-2276-Red, paras.114-116.
[27] SJ, para.174. *See* TJ, para.990.
[28] SJ, para.176.
[29] *See e.g.* SJ, paras.34,84,125,151,169,171,176.
[30] SJ, para.176.
[31] SJ, para.177.

38. This was a clear error of law, or a misappreciation of the facts. Having already taken into account the gravity of both acts constitutive of persecution, and of the discriminatory intent with which they were committed, any additional individual sentence for persecution constituted double-counting. The Chamber, in stating that the sentence for persecution "should not be higher than the highest sentence imposed for any of the underlying crimes amounting to persecution," appears to have mistakenly believed that it was obliged to impose a sentence equivalent to those underlying crimes. Doing so, however, meant counting again factors that had already been reflected in the individual sentences for other crimes.

39. The only individual sentence that could have been pronounced for persecution, in light of the factors that the Chamber expressly stated had already taken account, was zero.

40. This error materially contributed to a disproportionate individual sentence of 30 years for Count 10 (persecution).

GROUND 7. The Chamber erred in finding that the gravity of crimes was enhanced by the suffering or traumatization of witnesses to those crimes.

41. The Chamber found that gravity should be enhanced in respect of certain murders because they were witnessed, or their aftermath was witnessed, by certain non-victim witnesses. Aside from the fact that the Chamber failed to assess Mr. Ntaganda's limited participation in these murders, which is addressed in Ground 1, the Chamber also erred by finding that gravity should be enhanced by the presence of witnesses of the crimes or their aftermath. This crime-impact is too remote to receive reparations, and should likewise be deemed too indirect and remote to be considered in sentencing.

42. The Chamber erred in law in taking into consideration such matters, or misappreciated the facts leading to a disproportionate sentence in respect of Counts 1 and 2.

B. ERRORS OF LAW, FACT AND PROCEDURE THAT CAUSED THE CHAMBER TO DISREGARD OR GIVE INADEQUATE WEIGHT TO RELEVANT MITIGATING CIRCUMSTANCES

GROUND 7. The Chamber erroneously disregarded the fact that Mr. Ntaganda saved the lives of 63 enemy soldiers.

43. The Chamber erred in law, or misappreciated the facts, in according no weight in mitigation to Mr. Ntaganda saving the lives of 63 enemy soldiers.[32] The Chamber did so on the purported basis that sparing their lives and integrating them into the FPLC was for the ulterior purpose of advancing the common criminal plan and must, accordingly, be accorded no weight in mitigation. The Chamber ignores that, regardless of ulterior motive, saving 63 human lives must be given significant weight in mitigation. The Chamber's failure to take this factor into account because of ulterior motive was an error of law or misappreciated the facts.[33]

GROUND 8. The Chamber misunderstood, or erroneously rejected, the significance of Mr. Ntaganda's recent personal experience of genocide, which he fought to end, in Rwanda.

44. The Chamber accepted the traumatic impact that the Rwandan genocide had on Mr. Ntaganda, but then disregarded it as a mitigating circumstance on the basis that "the alleged protection of one group through acts aimed at the destruction and

[32] SJ, para.212.
[33] *Prosecutor v. Vujadin Popović*, Case No. IT-05-88-T, Judgement, 10 June 2010, paras.2140,2219.

disintegration of another cannot under any circumstance constitute a matter in mitigation."[34]

45. This was not the argument raised by the Defence. The argument, instead, was that Mr. Ntaganda's traumatic experience of genocide in Rwanda informed his motivations and coloured his outlook.[35] Such motivations, even if they lead to misguided or even criminal conduct, can constitute a matter in mitigation. The Chamber's rejection of this argument, and its failure to even address it, was an error of law, misappreciated the facts and reflected a failure to give a reasoned opinion.

GROUND 9. The Chamber committed an error of law, or misappreciated the facts, in rejecting the evidence that Mr. Ntaganda protected many Lendu civilians at Mandro; that he protected civilians from attacks on specified occasions; and that he punished crimes against civilians.

46. The Chamber misappreciated the facts, or erred in law, in failing to find, and then consider, that Mr. Ntaganda protected groups of civilians from attack at various times.[36]

47. The Chamber's rejection of the evidence concerning Mr. Ntaganda's direct role in welcoming and expressing concern for Lendu civilians arriving at Mandro misappreciates the evidence and/or misapplies the correct standard of proof for

[34] SJ, para.210.
[35] Submissions on sentence on behalf of Mr. Ntaganda, 30 September 2019, ICC-01/04-02/06-2424, paras.103,105 ("The reason that a person falls into criminal conduct is relevant to sentencing [….] In Mr. Ntaganda's case, the compelling experience that caused him to associate in 2000 with his future co-perpetrators was his experience of genocide just six years' before […] No one living through such an experience, especially at such a tender age as Mr. Ntaganda, would fail to have their view of the world and human nature profoundly affected") (footnotes omitted); Response on behalf of Mr. Ntaganda to Prosecution and CLR1/CLR2 submissions on sentence, 8 October 2019, ICC-01/04-02/06-2438, para.75 ("This outlook in no way excuses the crimes of which Mr. Ntaganda has been convicted, but goes some way to understanding why he would take such vigorous measures in response to widespread attacks — and open threats of extermination — against Hema civilians in Ituri")(footnotes omitted).
[36] SJ, paras.213-216.

evidence in mitigation.[37] No reasonable Chamber could have failed to accept, on a balance of probabilities, that these had been established on the basis of the testimonial evidence heard.

48. Likewise, no reasonable Chamber could have rejected Mr. Ntaganda's uncontradicted testimony that he protected the civilian population on seven specific occasions, and that he punished many instances of criminal conduct. Merely referring to the Chamber's overall conclusions was an insufficient basis to find that this evidence could not be believed on a balance of probability standard.

49. The Chamber, on the basis of the same errors, declined to accord any weight to uncontradicted evidence that Mr. Ntaganda did punish crimes against civilians.[38] The fact that other crimes were committed does not mean that these acts in mitigation should be disregarded *ab initio* or deemed less likely to have occurred. The very notion of mitigation recognizes that even amidst criminal conduct, a person may engage in acts that limit, contain or curtail the scope of criminal conduct or consequence.

GROUND 10. The Chamber erred in fact, law and procedure in failing to find that Mr. Ntaganda objectively contributed to reconciliation in Ituri in 2004, and facilitated demobilization.

50. The Chamber misappreciated the evidence, and reached a manifestly unreasonable conclusion, in finding that Mr. Ntaganda did not concretely and objectively contribute to ethnic reconciliation in Ituri in 2004.[39] The evidence abundantly demonstrated that he did, which is not undermined by the fact that this reconciliation was incomplete, or that the actions of both sides may have been informed by tactical considerations. The Chamber's failure to make this finding on a

[37] SJ, para.214.
[38] SJ, para.216.
[39] SJ, para.224.

balance of probability, and to accord it weight in mitigation, was an error of fact, and a manifestly unreasonable conclusion.

51. The Chamber also misappreciated the evidence or applied the wrong burden of proof in rejected that Mr. Ntaganda had facilitated the demobilization of FPLC soldiers, or their integration into the national armed forces.[40] No reasonable judge, applying the correct standard of proof, could have failed to do so.

52. The Chamber also committed a series of legal and procedural errors during the sentencing proceedings by admitting irrelevant and prejudicial material, while curtailing the Defence's opportunity to adduce relevant information, in particular, relevant rebuttal evidence.[41]

GROUND 11. The Chamber erred by failing to give weight to Mr. Ntaganda's conduct during the trial and cooperation with the Court, and failed to give a reasoned opinion in taking into Mr. Ntaganda's hunger strike to diminish its view of Mr. Ntaganda's degree of cooperation with the Court.

53. The Chamber erred in failing to take account of Mr. Ntaganda cooperation with the court, including his good conduct during the trial and giving lengthy testimony that was mostly accepted by the Chamber. The Chamber also failed to give a reasoned opinion for taking Mr. Ntaganda's hunger strike into account as an "exception" to his otherwise "consistently respectful and cooperative" conduct during the proceedings.[42]

54. The Chamber's reliance on the hunger strike as a factor that reduced the weight to be accorded to his good conduct during trial failed to fully consider the

[40] SJ, para.222.
[41] ICC-01/04-02/06-T-266,6:6-9:21; Urgent second request for authorization and admission of additional sentencing evidence, and for additional time to examine Witness D-0047, 16 September 2019, ICC-01/04-02/06-2403.
[42] SJ, para.229.

extreme circumstances that led to the hunger strike, which should be taken as justifying or excusing the conduct, and certainly not reflecting disrespect or lack of cooperation with the Court. In relying on this factor, without any reasons, in coming to its general conclusion that his cooperative conduct was not of such weight to be taken into consideration in mitigation, the Chamber misappreciated the facts in a manner that materially affected the sentence, and failed to give a reasoned opinion.

GROUND 12. No reasonable Chamber could have failed to concretely take account of Mr. Ntaganda's substantial efforts to protect a fellow detainee from harm in mitigation.

55. The Chamber accepted that Mr. Ntaganda's conduct in respect of a fellow detainee was "commendable," but found that this conduct was not important enough to "impact on the individual and overall sentences."[43]

56. The Chamber misappreciated the facts in failing to give greater weight to Mr. Ntaganda's conduct. The Defence submits there is ample evidence to demonstrate, on a balance of probability, that Mr. Ntaganda intervened to prevent serious harm from befalling a fellow detainee. Furthermore, Mr. Ntaganda's intercession to protect his fellow detainee has continued over an extended period. These actions demonstrate that Mr. Ntaganda is a person who can make a positive contribution to the life of those around him, which is the hallmark of rehabilitation. The severe negative consequences that were averted, the extent and duration of Mr. Ntaganda's contributions, and their significance in demonstrating rehabilitation since incarceration, warrant giving concrete weight to this factor in mitigation.

[43] SJ, para.235.

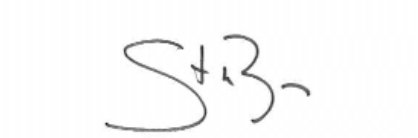
C. EFFECT OF ERRORS IN RELATION TO MITIGATING CIRCUMSTANCES

57. The errors in Grounds 7 to 12, individually and collectively, materially contributed to the Chamber's imposition of a manifestly excessive and disproportionate sentence. When properly considered, those mitigating circumstances warrant a reduction of sentence.

V. RELIEF SOUGHT

58. The Appeals Chamber is requested, on the basis of the foregoing errors and the arguments to be set out in the brief in support of this notice of appeal, to **QUASH** the individual sentences identified above as well as the manifestly excessive and disproportionate joint sentence imposed by way of the Sentencing Judgment, and **REPLACE** it with a sentence of no more than 23 years of imprisonment.

RESPECTFULLY SUBMITTED THIS 9TH DAY OF DECEMBER 2019



Me Stéphane Bourgon, *Ad.E* Counsel representing Bosco Ntaganda

The Hague, The Netherlands