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THE APPEALS CHAMBER

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF THE PROSECUTOR v. BOSCO NTAGANDA

Public redacted version of
Judgment
on the appeal of Mr Bosco Ntaganda against the decision of Trial Chamber VI of
7 November 2019 entitled ‘Sentencing judgment’

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

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The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Bosco Ntaganda against the decision of Trial Chamber VI entitled ‘Sentencing judgment’ of 7 November 2019 (ICC-01/04-02/06-2442),

After deliberation,

Unanimously,

Delivers the following

JUDGMENT

The ‘Sentencing judgment’ of Trial Chamber VI is confirmed.

REASONS

I. KEY FINDINGS

1. 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 these factors may be indicative of the degree of participation of an individual in certain circumstances, it cannot be said that the absence of these *factors must* be taken into account as generally pointing to a lesser degree of participation.

2. Under article 8(2)(e)(i) of the Elements, actual harm or death is not required for the crime of intentionally directing attacks against civilians to be fulfilled. However, 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.

3. For the crime of persecution, which is not a stand-alone crime but one requiring a connection with any act constituting a crime against humanity or any crime within the jurisdiction of the Court, certain circumstances (*i.e.* the underlying factual conduct or those establishing the ‘discriminatory dimension’ of persecution) are relevant to the calculation of more than one individual sentence. In such a case, 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.

4. Article 78(3) of the Statute, in relevant part, requires a trial chamber to ‘pronounce a sentence for each crime’. However, in doing so, this provision does not prescribe the manner in which a chamber discusses each crime in order to arrive at an appropriate individual sentence. What is important, is that an individual sentence is pronounced for each crime.

5. In determining what constitutes a mitigating factor, and the weight, if any, to attribute to it, trial chambers have broad discretion. Consequently, the individual circumstances of a convicted person will not as a matter of routine amount to a mitigating circumstance.

6. 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, such behaviour may be considered to be a mitigating factor if it is found to be ‘exceptional’ in nature. The exceptionality of such behaviour will necessarily depend on the circumstances of each case.

II. INTRODUCTION

7. On 7 November 2019, Trial Chamber VI sentenced Mr Ntaganda for the five counts of crimes against humanity and the thirteen counts of war crimes for which he was convicted.¹ Mr Ntaganda received a joint sentence of thirty (30) years of

¹ [Conviction Decision](#), para. 1199, pp. 526-530, 535-538. Mr Ntaganda was convicted of crimes against humanity (murder and attempted murder, rape, sexual slavery, persecution, forcible transfer and deportation) and 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

imprisonment with a deduction for the time spent in detention from 22 March 2013 onwards.² In his appeal against the Sentencing Decision, Mr Ntaganda raises twelve grounds of appeal and 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 Operations³ as well as findings related to various aggravating and mitigating circumstances.⁴ In this respect, Mr Ntaganda requests that the Appeals Chamber reverse the Trial Chamber's alleged errors and substantially reduce the related individual sentences and the joint sentence.⁵

8. On 12, 13 and 14 October 2020, the Appeals Chamber held an oral hearing, on a partially virtual basis, where it received submissions from the parties and participants on, *inter alia*, issues arising in Mr Ntaganda's appeal against the Sentencing Decision.

9. For the reasons elaborated on in this judgment, the Appeals Chamber rejects Mr Ntaganda's appeal and confirms the Sentencing Decision.

10. For ease of reference an annex containing the designations used and materials cited in this judgment is appended.⁶

III. PROCEDURAL HISTORY

11. On 7 November 2019, the Trial Chamber rendered the Sentencing Decision, in which it sentenced Mr Ntaganda to a joint sentence of 30 years of imprisonment.⁷

12. On 9 December 2019, Mr Ntaganda filed his notice of appeal against the Sentencing Decision.⁸

13. On 10 February 2020, Mr Ntaganda filed his appeal brief against the Sentencing Decision.⁹

participate actively in hostilities, intentionally directing attacks against protected objects, and destroying the adversary's property).

² [Sentencing Decision](#), section VI Disposition, p. 117.

³ See e.g. [Mr Ntaganda's Appeal Brief](#), paras 21-56.

⁴ See e.g. [Mr Ntaganda's Appeal Brief](#), paras 57-185.

⁵ See e.g. [Mr Ntaganda's Appeal Brief](#), paras 38, 45, 52, 56, 61, 74, 82, 96, 172, 175, 185.

⁶ See [Annex - Designations and Cited Materials](#).

⁷ [Sentencing Decision](#).

⁸ [Mr Ntaganda's Notice of Appeal](#).

14. On 14 April 2020, the Prosecutor filed her response to Mr Ntaganda's appeal brief.¹⁰

15. On 15 May 2020, Victims Group 1 and Victims Group 2 filed their respective observations on Mr Ntaganda's appeal brief.¹¹

16. On 27 May 2020, Mr Ntaganda filed his reply to the Prosecutor's response to his appeal brief.¹²

17. On 2 June 2020, Mr Ntaganda filed his response to the observations of Victims Groups 1 and 2.¹³

18. On 12, 13 and 14 October 2020, the Appeals Chamber held a hearing during which the parties and participants made submissions with regard to Mr Ntaganda's appeal against the Sentencing Decision.¹⁴

IV. STANDARD OF REVIEW

19. Article 81(2)(a) of the Statute provides that '[a] sentence may be appealed, in accordance with the Rules of Procedure and Evidence, by the Prosecutor, or the convicted person on the ground of disproportion between the crime and the sentence'. According to article 83(2) of the Statute, the Appeals Chamber may intervene only if it 'finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error'.

20. The Appeals Chamber recalls that its primary task in an appeal against a sentencing decision is to review whether a trial chamber made any errors in sentencing the convicted person.¹⁵ In this respect, the Appeals Chamber has previously noted that

⁹ [Mr Ntaganda's Appeal Brief](#).

¹⁰ [Prosecutor's Response](#).

¹¹ [Observations of Victims Group 1](#), [Observations of Victims Group 2](#).

¹² [Mr Ntaganda's Reply](#).

¹³ [Mr Ntaganda's Response to Observations of Victims](#).

¹⁴ [T-272](#).

¹⁵ [Bemba et al. Sentencing Appeal Judgment](#), para. 21, referring to [Lubanga Sentencing Appeal Judgment](#), para. 39.

[its] role is not to determine, on its own, which sentence is appropriate, unless – as stipulated in article 83 (3) of the Statute – it has found that the sentence imposed by the Trial Chamber is ‘disproportionate’ to the crime. Only then can the Appeals Chamber ‘amend’ the sentence and enter a new, appropriate sentence.¹⁶

21. The Appeals Chamber considers that pursuant to article 78(1) of the Statute and rule 145 of the Rules, trial chambers have broad discretion in the determination of an appropriate sentence.¹⁷ With respect to the relevant standard of review for a decision involving an exercise of discretion, the Appeals Chamber has established that

[...] it will not interfere with the Chamber’s exercise of discretion merely because the Appeals Chamber, if it had the power, might have made a different ruling. The Appeals Chamber will only disturb the exercise of a Chamber’s discretion where it is shown that an error of law, fact or procedure was made. In this context, the Appeals Chamber has held that it will interfere with a discretionary decision only under limited conditions and has referred to standards of other courts to further elaborate that it will correct an exercise of discretion in the following broad circumstances, namely where (i) it is based upon an erroneous interpretation of the law; (ii) it is based upon a patently incorrect conclusion of fact; or (iii) the decision amounts to an abuse of discretion. Furthermore, once it is established that the discretion was erroneously exercised, the Appeals Chamber has to be satisfied that the improper exercise of discretion materially affected the impugned decision. [Footnotes omitted].¹⁸

22. The Appeals Chamber considers that the above standard of review applies equally to decisions on sentencing.¹⁹

23. In the context of sentencing proceedings, the Appeals Chamber has previously held that

[its] review of a Trial Chamber’s exercise of its discretion in determining the sentence must be deferential and it will only intervene if: (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

¹⁶ [Lubanga Sentencing Appeal Judgment](#), para. 39.

¹⁷ [Bemba et al. Sentencing Appeal Judgment](#), para. 22 referring to [Lubanga Sentencing Appeal Judgment](#), para. 40.

¹⁸ [Bemba Appeal Judgment](#), para. 48. See also [Bemba et al. Appeal Judgment](#), para. 100; [Ngudjolo Appeal Judgment](#), para. 21; [Kenyatta OA5 Judgment](#), para. 22. See also [Kony OA3 Judgment](#), paras 79-80; [Ruto and Sang OA Judgment](#), paras 89-90; [Lubanga Sentencing Judgment](#), para. 41.

¹⁹ [Lubanga Sentencing Appeal Judgment](#), para. 42; [Bemba et al. Sentencing Appeal Judgment](#), para. 23.

factors, the imposed sentence is so unreasonable as to constitute an abuse of discretion.²⁰

24. With respect to an exercise of discretion based upon an alleged erroneous interpretation of the law, an alleged incorrect conclusion of fact or an alleged abuse of discretion, the Appeals Chamber will apply the standard of review with respect to errors of law, errors of fact and an abuse of discretion as set out below.

A. Error of law

25. Regarding errors of law, the Appeals Chamber has previously found that

[it] will not defer to the Trial Chamber's interpretation of the law. Rather, it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law. If the Trial Chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the Impugned Decision.²¹

26. Rule 145 of the Rules provides the overall framework for a trial chamber's determination of an appropriate sentence. In particular, rule 145(1)(b) of the Rules, provides that the Court shall '[b]alance all the relevant factors, including any mitigating and aggravating factors and consider the circumstances both of the convicted person and of the crime'. These are, thus, mandatory factors which a trial chamber must take into account when imposing a sentence and failure to consider any of the listed factors may amount to a legal error.²²

B. Error of fact

27. Regarding errors of fact, the Appeals Chamber will determine whether a trial chamber's factual findings were reasonable in the particular circumstances of the case. In assessing the reasonableness of factual findings, the Appeals Chamber will consider whether a trial chamber's evaluation was consistent with logic, common sense, scientific knowledge and experience, and whether a trial chamber took into account all relevant and connected evidence, and was mindful of the pertinent principles of law.

²⁰ [Lubanga Sentencing Appeal Judgment](#), para. 44; [Bemba et al. Sentencing Appeal Judgment](#), para. 24.

²¹ [Lubanga Appeal Judgment](#), paras 17-18; [Ngudjolo Appeal Judgment](#), para. 20; [Bemba Appeal Judgment](#), para. 36; [Bemba et al. Appeal Judgment](#), para. 99.

²² [Lubanga Sentencing Appeal Judgment](#), para. 42.

28. Beyond the foregoing considerations, the Appeals Chamber will not disturb a trial chamber's factual finding only because it would have come to a different conclusion.²³ When considering alleged factual errors, the Appeals Chamber will allow the deference considered necessary and appropriate to the factual findings of a trial chamber. Such deference is justified by certain considerations that inescapably result from the construction of the Statute. The first consideration is that the Statute has vested a trial chamber with the specific function of determining an appropriate sentence. This function warrants the presumption that it has been properly performed, unless and until the contrary is shown. The second consideration is that the Statute requires the appellant to raise specific errors on appeal and the Appeals Chamber reviews a trial chamber's decision through the lens of the errors raised.

29. Nevertheless, the Appeals Chamber's deference to the factual findings of a trial chamber is not without qualification. The Appeals Chamber may interfere with a trial chamber's factual finding if it is shown to be attended by errors including the following: insufficient support by evidence; reliance on irrelevant evidence; failure to take into account relevant evidentiary considerations and facts; failure properly to appreciate the significance of the evidence on record; or failure to evaluate and weigh properly the relevant evidence and facts. The Appeals Chamber may interfere where it is unable to discern objectively how a trial chamber's conclusion could have reasonably been reached from the evidence on the record.

30. The Appeals Chamber will consider the validity of the challenged factual finding *vis-à-vis* other relevant factual findings in a holistic manner. However, this does not mean that the Appeals Chamber will review the entirety of the evidentiary record. The Appeals Chamber will have regard not only to the arguments put forward by the appellant, but also to the evidence relied upon by a trial chamber and the arguments of all other parties and participants on the point in issue. In assessing the correctness of a factual finding, a trial chamber's reasoning in support thereof is of great significance. In particular, if the supporting evidence appears weak, or if there are significant contradictions in the evidence, deficiencies in a trial chamber's

²³ [Lubanga Conviction Appeal Judgment](#), para. 21.

reasoning as to why it found that evidence persuasive may lead the Appeals Chamber to conclude that the finding in question was unreasonable.

C. Abuse of discretion

31. Where a discretionary decision allegedly amounts to an abuse of discretion, the Appeals Chamber has stated the following:

Even if an error [...] has not been identified, an abuse of discretion will occur when the decision is so unfair or unreasonable as to ‘force the conclusion that the Chamber failed to exercise its discretion judiciously’. The Appeals Chamber will also consider whether the first instance Chamber gave weight to extraneous or irrelevant considerations or failed to give weight or sufficient weight to relevant considerations in exercising its discretion. The degree of discretion afforded to a Chamber may depend upon the nature of the decision in question.²⁴

D. Material effect

32. Where an error is established, the material effect of this error on a trial chamber’s decision will have to be assessed, pursuant to article 83(2) of the Statute.²⁵ Importantly, an error and its materiality must not be assessed in isolation; rather the Appeals Chamber must consider the impact of the error in light of the other relevant findings relied upon by a trial chamber for its decision on sentencing. In this regard, a sentence is materially affected when it is demonstrated that a trial chamber’s exercise of discretion led to a disproportionate sentence.²⁶

E. Substantiation of arguments

33. Regulation 58(2) of the Regulations of the Court requires the appellant to refer to ‘the relevant part of the record or any other document or source of information as regards any factual issue’ and ‘to any relevant article, rule, regulation or other applicable law, and any authority cited in support thereof’ as regards any legal issue. It also stipulates that the appellant must, where applicable, identify the finding or ruling challenged in the decision with specific reference to the page and paragraph number. In addition to these formal requirements, an appellant is obliged to present

²⁴ [Kenyatta OA5 Judgment](#), para. 25 (footnotes omitted). *See also*, [Bemba et al. Appeal Judgment](#), para. 101.

²⁵ [Lubanga Sentencing Appeal Judgment](#), para. 45; [Bemba et al. Sentencing Appeal Judgment](#), para. 25.

²⁶ [Lubanga Sentencing Appeal Judgment](#), para. 45.

cogent arguments that set out the alleged error and explain how a trial chamber erred.²⁷ In alleging that a factual finding is unreasonable, an appellant must explain why this is the case, for example, by showing that it was contrary to logic, common sense, scientific knowledge and experience. In their submissions on appeal, it will be for the parties and participants to draw the attention of the Appeals Chamber to all the relevant aspects of the record or evidence in support of their respective submissions relating to the impugned factual finding. Furthermore, in light of article 83(2) of the Statute an appellant is required to demonstrate how the error materially affected the impugned decision. Whether an error or the material effect of that error has been sufficiently substantiated will be determined on a case by case basis.²⁸

V. MERITS

A. First ground of appeal: Alleged failure to concretely assess Mr Ntaganda's participation in the Second Operation

34. Under the first ground of appeal, Mr Ntaganda submits that the Trial Chamber erred in law and in fact by not distinguishing his degree of participation in the crimes committed during the First Operation from those committed in the Second Operation.²⁹

1. *Relevant part of the Sentencing Decision*

35. The Trial Chamber considered that '[t]he ultimate assessment of the level of culpability of the convicted person and its impact on the sentence always depends on an *in concreto* assessment of the degree of participation and the degree of intent in the particular circumstances of the case'.³⁰ The Trial Chamber recalled that, apart from sexual slavery (counts 7 and 8) and attacking a protected object (count 17), all the crimes of which Mr Ntaganda was found guilty as an indirect co-perpetrator were committed during both operations.³¹ It stated that it would 'consider his participation as part of its assessment of the *in concreto* gravity of his culpable conduct'.³² The Trial Chamber detailed its analysis per crime, taking into consideration the gravity of

²⁷ See [Lubanga Appeal Judgment](#), paras 30-33.

²⁸ [Lubanga Appeal Judgment](#), para. 31.

²⁹ [Mr Ntaganda's Appeal Brief](#), para. 21.

³⁰ [Sentencing Decision](#), para. 15.

³¹ [Sentencing Decision](#), para. 34, referring to [Conviction Decision](#), paras 900-901, 929, 947-948, 962-963, 1025, 1043, 1074, 1101, 1148, 1168.

³² [Sentencing Decision](#), para. 35.

the crimes, as well as Mr Ntaganda's degree of culpability (participation and intent) and individual circumstances.³³ Furthermore, the Trial Chamber considered as an aggravating circumstance 'the brutality of the murder of at least 49 persons in the banana field in Kobu during the Second Operation', noting that '[t]hese particularly cruel acts caused additional physical and psychological suffering to those who were subjected to them before being killed and to those who survived the injuries inflicted'.³⁴

2. *Summary of submissions*

(a) **Mr Ntaganda's submissions**

36. Mr Ntaganda submits that the Trial Chamber erred in not distinguishing his participation in the First Operation from his participation in the Second Operation and in treating both operations as a 'single phenomenon'.³⁵ Mr Ntaganda alleges that this 'approach was driven, in part, by categorically rejecting presence and knowledge of the crimes as irrelevant to assessing his degree of participation'.³⁶

37. Mr Ntaganda maintains that the Trial Chamber disregarded its own finding that he 'was not found to have been anywhere near the theatre of the Second Operation when the crimes took place', and that this amounts to an error.³⁷ He maintains that physical presence is 'an important indicator of the degree of the control and knowledge over the crime that is, in turn, usually indicative of culpability', and cites the Court's jurisprudence in support of this argument.³⁸ While he concedes that the lack of physical presence/proximity could be of 'lesser significance' in cases where the accused participates in the execution of the crime remotely, he emphasises that there is no such finding in this case.³⁹ He asserts that the Trial 'Chamber could not find that he had operational-level communication and control over the Second

³³ For the assessment of gravity, degree of participation and intent, and aggravating circumstances, *see* [Sentencing Decision](#), paras 39-89 (counts 1, 2 and 3), 90-132 (counts 4, 5, 6, 7, 8 and 9), 133-156 (counts 11, 17 and 18), 157-173 (counts 12 and 13), 174-177 (count 10), 178-198 (counts 14, 15 and 16); for the assessment of individual circumstances, *see* paras 199-245.

³⁴ [Sentencing Decision](#), paras 80-81. *See also* para. 78.

³⁵ [Mr Ntaganda's Appeal Brief](#), paras 21-22. *See also* [T-272](#), p. 16, lines 2-4.

³⁶ [Mr Ntaganda's Appeal Brief](#), para. 22 (emphasis in original).

³⁷ [Mr Ntaganda's Appeal Brief](#), para. 23. *See also* [T-272](#), p. 17, lines 17-18.

³⁸ [Mr Ntaganda's Appeal Brief](#), para. 24, *referring to* [Katanga Sentencing Decision](#), para. 143; [Bemba et al. Sentencing Appeal Judgment](#), para. 140; [Al Mahdi Conviction and Sentencing Decision](#), para. 53. *See also* [T-272](#), p. 17, lines 12-16.

³⁹ [Mr Ntaganda's Appeal Brief](#), paras 25-26.

Operation as a whole’ and that the nature of his participation therein was ‘truly limited’.⁴⁰ He submits that ‘[t]he 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’ committed during the Second Operation.⁴¹

38. Mr Ntaganda maintains that the Trial Chamber disregarded its own finding that he ‘had no previous, contemporaneous or, in many cases, even subsequent knowledge about the crimes of which he was convicted as a direct perpetrator’.⁴² Mr Ntaganda submits that his lack of knowledge of (and participation in) either the Kobu or Bambu Hospital massacres – ‘the two major killing events as found in the Judgment – should have been expressly addressed and taken into account in sentencing’.⁴³ He contends that the Trial Chamber erred by ‘account[ing] the brutality of the Kobu massacre [*sic*] as an aggravating circumstance without, however, taking into account Mr. Ntaganda’s lesser degree of participation in these murders’.⁴⁴

39. Finally, Mr Ntaganda submits that the error was ‘not remedied’ by the Trial Chamber’s finding that ‘there was a baseline of participation’ in both operations, which could be seen in its assertion that ‘Mr. Ntaganda’s specific actions during the First Operation “*further increase his culpability*”’.⁴⁵ In his view, ‘[t]he error is highly material given the disparity in the number and circumstances of the murders committed during the Second Operation relative to the first’.⁴⁶

(b) The Prosecutor’s submissions

40. The Prosecutor submits that the Trial Chamber conducted the ‘appropriate *in concreto* assessment of Ntaganda’s degree of participation in the crimes’, given that

⁴⁰ [Mr Ntaganda’s Appeal Brief](#), paras 26-27. See also [T-272](#), p. 17, lines 19-21.

⁴¹ [Mr Ntaganda’s Appeal Brief](#), para. 34. See also [T-272](#), p. 18, lines 12-16.

⁴² [Mr Ntaganda’s Appeal Brief](#), para. 23. See para. 29, referring to [Sentencing Decision](#), para. 36. See also [T-272](#), p. 18, line 22.

⁴³ [Mr Ntaganda’s Appeal Brief](#), para. 33. See also para. 35.

⁴⁴ [Mr Ntaganda’s Appeal Brief](#), para. 36, referring to [Sentencing Decision](#), para. 81.

⁴⁵ [Mr Ntaganda’s Appeal Brief](#), para. 35, quoting [Sentencing Decision](#), para. 36 (emphasis in original).

⁴⁶ [Mr Ntaganda’s Appeal Brief](#), para. 36. See also [T-272](#), p. 19, lines 4-6.

Mr Ntaganda was found to have contributed as an indirect co-perpetrator to the crimes committed in both operations pursuant to a common plan.⁴⁷

41. The Prosecutor contends that the Trial Chamber properly assessed Mr Ntaganda's essential contribution to the common plan, which demonstrated his 'determinative role in the conception, planning and implementation of both operations, and formed a concrete and sound basis for the Chamber to conclude that his degree of participation for the crimes committed across both operations was substantial'.⁴⁸ She submits that Mr Ntaganda's arguments disregard these findings, diminish the nature of his participation in both operations and 'artificially separat[e] the two operations without factual basis'.⁴⁹ She also disputes his claim regarding the disparity in the number and circumstances of the crimes committed in the two operations.⁵⁰

42. The Prosecutor argues that a fact-specific analysis is required to ensure that account is taken of the totality of an individual's contributions and 'the sentence is appropriately individualised to the convicted person's culpability'.⁵¹ She submits that lack of physical proximity to, and advance or contemporaneous knowledge of, the crimes 'does not automatically diminish a convicted person's degree of participation in those crimes and his/her culpability'.⁵² She contends that such a view would 'imply that indirect co-perpetrators who may be more removed from the immediacy of the crimes (such as senior commanders involved at the broader operational level) are necessarily less culpable for crimes than those carrying out the operations on the ground'.⁵³ Similarly, she argues that awareness of the specific crimes and victims resulting from the implementation of the common plan is not necessary for either conviction or sentencing.⁵⁴ Finally, the Prosecutor submits that the cruelty of the crimes committed during the Kobu massacre was foreseeable to Mr Ntaganda and that

⁴⁷ [Prosecutor's Response](#), para. 8, referring to [Sentencing Decision](#), paras 32-36.

⁴⁸ [Prosecutor's Response](#), paras 9-10. See also paras 15-16.

⁴⁹ [Prosecutor's Response](#), paras 10-11.

⁵⁰ [Prosecutor's Response](#), paras 12-13.

⁵¹ [Prosecutor's Response](#), para. 20 (footnotes omitted). See also para. 22.

⁵² [Prosecutor's Response](#), para. 21 (footnotes omitted).

⁵³ [Prosecutor's Response](#), para. 21.

⁵⁴ [Prosecutor's Response](#), para. 24.

the Trial Chamber reasonably found that this cruelty constituted an aggravating circumstance.⁵⁵

3. *Determination by the Appeals Chamber*

43. The Appeals Chamber observes that rule 145(1)(c) of the Rules requires a trial chamber to consider, *inter alia*, ‘the degree of participation of the convicted person’ for the purposes of determining a sentence. The Appeals Chamber considers that the degree of participation of an individual must be assessed on a case-by-case basis, taking into account all relevant facts in a manner that properly reflects the culpability of the individual.

44. In assessing Mr Ntaganda’s participation, the Trial Chamber noted that he was convicted as an indirect co-perpetrator of most of the crimes committed during both the First and Second Operations and that, as a result, the conduct of the individual UPC/FPLC soldiers in the execution of the crimes was to be attributed to him and the other co-perpetrators as their own.⁵⁶ It referred to its findings regarding the essential contribution Mr Ntaganda made to the common plan.⁵⁷ In particular, it highlighted that ‘Mr Ntaganda’s role was determinative in setting up a strong military group capable of driving out from certain areas all Lendu civilians [...] and that Mr Ntaganda devised the military tactic which allowed for the success of the UPC/FPLC taking over of Mongbwalu and the related First and Second Operation’.⁵⁸ On the basis of his essential contribution, it considered

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.⁵⁹

⁵⁵ [Prosecutor’s Response](#), para. 26.

⁵⁶ [Sentencing Decision](#), para. 35.

⁵⁷ [Sentencing Decision](#), para. 35, referring to [Conviction Decision](#), paras 826-857.

⁵⁸ [Sentencing Decision](#), fn. 92, referring to [Conviction Decision](#), section V.C.3.c.1-V.C.3.c.2.

⁵⁹ [Sentencing Decision](#), para. 36; on this point, the Trial Chamber recalled, at footnote 92 of this paragraph, its finding that ‘Mr Ntaganda’s role was determinative in setting up a strong military group capable of driving out from certain areas all Lendu civilians (*see* Judgment, section V.C.3.c.1) and that Mr Ntaganda devised the military tactic which allowed for the success of the UPC/FPLC taking over of Mongbwalu and the related First and Second Operation (*see* Judgment, section V.C.3.c.2)’.

45. In the circumstances described above, 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.⁶⁰ As the Prosecutor highlights, those in command who are removed from the immediate location and may be unfamiliar with the specifics of the crimes are not necessarily less culpable than the direct perpetrators.⁶¹ Indeed, 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.⁶² 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.

46. The Appeals Chamber is also not persuaded by Mr Ntaganda's argument that the Trial Chamber assessed his participation in the two operations as though it were a 'single phenomenon'.⁶³ As set out above, the Trial Chamber found Mr Ntaganda's culpability for the crimes committed during both operations to be high, but considered also 'the fact that during the First Operation he gave orders to commit crimes and personally engaged in violent conduct towards the enemy' as a factor that 'may further increase his culpability' in this respect.⁶⁴ The Trial Chamber went on to carry out an assessment of the *in concreto* gravity of Mr Ntaganda's culpable conduct in

⁶⁰ [Mr Ntaganda's Appeal Brief](#), paras 21-29.

⁶¹ [Prosecutor's Response](#), para. 21.

⁶² See [Lubanga Appeal Judgment](#), paras 469 ('[a]t the core of this approach is the assumption that a co-perpetrator may compensate for his or her lack of contribution at the execution stage of the crime if, by virtue of his or her essential contribution, the person nevertheless had control over the crime.' (footnotes omitted)), 473 ('in circumstances where a plurality of persons was involved in the commission of crimes under the Statute, *the question of whether an accused "committed" a crime [...] cannot only be answered by reference to how close the accused was to the actual crime and whether he or she directly carried out the incriminated conduct.*' (emphasis added)).

⁶³ [Mr Ntaganda's Appeal Brief](#), para. 22.

⁶⁴ [Sentencing Decision](#), para. 36.

relation to each crime. The Appeals Chamber observes that, in this context, it distinguished between Mr Ntaganda's participation in both operations.⁶⁵

47. For example, regarding murder and attempted murder (counts 1 and 2), the Trial Chamber noted that, with the exception of the murder of *Abbé Bwanalunga*, Mr Ntaganda was convicted as an indirect co-perpetrator for all other murders committed during the First and Second Operations and that he and his co-perpetrators meant for civilians to be killed.⁶⁶ It took into account the general manner in which he participated in both operations,⁶⁷ as well as the specifics of his participation in the First⁶⁸ and Second⁶⁹ Operations. On the basis of this assessment, the Trial Chamber considered Mr Ntaganda's participation and intent related to murder and attempted murder during both operations to be substantial.⁷⁰ It stated that it also took 'into

⁶⁵ [Sentencing Decision](#), paras 69, 75-77, 88 (intentionally attacking civilians); paras 115, 117, 120, 130 (rape and sexual slavery); paras 148-149 (pillage, attacking protected objects, and destroying the adversary's property); paras 167-168, 172 (forcible transfer of population and ordering the displacement of the civilian population). The analysis of the crime of persecution was subsumed within the aforementioned crimes (*see* [Sentencing Decision](#), paras 176-177), while the crimes of conscripting and enlisting children under the age of 15 years into armed forces or groups and using them to participate actively in hostilities were not distinguished between the different operations (*see* [Sentencing Decision](#), paras 186-192, 197).

⁶⁶ [Sentencing Decision](#), para. 59.

⁶⁷ [Sentencing Decision](#), paras 59-60 (the Trial Chamber considered that: (i) Mr Ntaganda as the Deputy Chief of Staff controlling the military planning and operations, intended 'to drive out all the Lendu from the localities targeted during the course of the UPC/FPLC's military campaign' and that 'he made an essential contribution towards the achievement of the co-perpetrators' common plan'; (ii) he 'had a unique and central role in the setting up of the UPC/FPLC as an efficient armed group'; and (iii) he played an 'essential role in the planning, organisation and carrying out of the UPC/FPLC's operations during which crimes against the Lendu were committed.' (footnotes omitted)).

⁶⁸ [Sentencing Decision](#), paras 61-62 (in relation to the First Operation, the Trial Chamber noted that 'in addition to his overall participation and commanding role in the take-over of Mongbwalu and Sayo, as described below with respect to Count 3, the Chamber found that, in a number of instances, Mr Ntaganda gave direct orders to kill civilians and endorsed the criminal conduct of his soldiers by way of his personal conduct. Furthermore, it found that Mr Ntaganda's direct orders to kill civilians and loot, his active role as an operational commander and his proximity to the commanders and soldiers deployed resulted in the commission of crimes. Notably in relation to the First Operation, Mr Ntaganda showed his troops –through his own actions – how the orders were to be implemented with regard to treatment of the Lendu civilians. [...] [t]he intensity of his involvement and his proximity to the murders committed in Mongbwalu, Sayo and Nzebi are factors which the Chamber considers to increase Mr Ntaganda's culpability' (footnotes omitted)).

⁶⁹ [Sentencing Decision](#), paras 65-66 (as for the Second Operation, the Trial Chamber found that Mr Ntaganda: (i) 'took part in the relevant planning'; (ii) 'remained in contact with the commanders in the field and monitored its unfolding via the UPC/FPLC radio communications systems'; and (iii) 'exercised oversight over the unfolding and ensured that the deployed forces were carrying out the project as planned'. It further noted that 'after the conclusion of the Second Operation, Mr Ntaganda indicated his approval of the behaviour of Salumu Mulenda's troops in relation to killings in Kobu' and recalled that 'Mulenda was not disciplined, including not by Mr Ntaganda, for the killings which occurred in Kobu during the Second Operation.' (footnotes omitted)).

⁷⁰ [Sentencing Decision](#), para. 67.

account that his degree of participation during [the First] operation was higher compared to the Second Operation, given the intensity of his involvement in and his proximity to [...] some of the murders committed during the First Operation'.⁷¹

48. Finally, Mr Ntaganda notes that the Trial Chamber took into account the particular cruelty of some of the Second Operation crimes, including the Kobu massacre, as enhancing gravity or in aggravation.⁷² The Prosecutor argues that the Trial Chamber did not err in this respect because factual findings in the Conviction Decision regarding the manner in which the UPC committed crimes, and Mr Ntaganda's own behaviour and knowledge, establish that the cruelty of the crimes was objectively foreseeable to Mr Ntaganda.⁷³

49. The Appeals Chamber notes that the Trial Chamber considered the particular cruelty of certain crimes as an aggravating circumstance, but did not assess whether this cruelty was objectively foreseeable to Mr Ntaganda.⁷⁴ In the view of the Appeals Chamber, the Trial Chamber committed a legal error in considering the cruelty of the direct perpetrators for the purpose of sentencing Mr Ntaganda without establishing his culpability for this aggravating circumstance by assessing the objective foreseeability of this cruelty to him.⁷⁵ Nevertheless, given the nature of the atrocity crimes committed in the present case, as well as Mr Ntaganda's high level position and criminal responsibility as a principal perpetrator, the Appeals Chamber is satisfied that it was objectively foreseeable to him that some crimes would be committed with particular cruelty. Therefore, the Appeals Chamber finds that the legal error identified does not materially affect the reasonableness of the Trial Chamber's consideration of the particular cruelty of some of the Second Operation crimes, including the Kobu massacre.

50. In view of the foregoing, the Appeals Chamber finds that the Trial Chamber's assessment appropriately distinguished the degree to which Mr Ntaganda participated

⁷¹ [Sentencing Decision](#), para. 67.

⁷² [Mr Ntaganda's Appeal Brief](#), paras 30, 36.

⁷³ [Prosecutor's Response](#), para. 26.

⁷⁴ [Sentencing Decision](#), paras 80-81.

⁷⁵ [Bemba et al. Sentencing Appeal Judgment](#), paras 263, 334 (where the Appeals Chamber held that consequences 'may be taken into account to aggravate the sentence in one way or another *as long as [they] were, at least, objectively foreseeable by the convicted person.*' (emphasis added)). See also [Lubanga Sentencing Appeal Judgment](#), para. 90.

in the crimes committed in each operation and took into account all relevant factors in a manner that properly reflected his individual culpability.

51. Accordingly, having considered and rejected Mr Ntaganda's arguments the Appeals Chamber rejects this ground of appeal.

B. Second ground of appeal: Alleged failure to concretely assess Mr Ntaganda's participation in and knowledge of the crime of rape under counts 4 and 5

52. Under this ground of appeal, Mr Ntaganda submits that the Trial Chamber failed to concretely assess his degree of participation in and knowledge of the crime of rape of civilians under counts 4 and 5.⁷⁶

1. Relevant part of the Sentencing Decision

53. In assessing the gravity of the crime of rape of civilians for which Mr Ntaganda was convicted, the Trial Chamber recalled that it 'made findings on at least 21 specific victims of rape, in addition to making broader findings of rapes of unquantified numbers of persons'.⁷⁷ It concluded that the scale of this crime was 'significant'.⁷⁸

54. The Trial Chamber further recalled that Mr Ntaganda 'conceived a common plan by virtue of which he and his co-perpetrators meant, *inter alia*, for civilians to be raped'.⁷⁹ It concluded that his degree of culpability was 'substantial' regarding the rapes as a crime against humanity and as a war crime committed against civilians during the First and Second Operations.⁸⁰ It also considered that his culpability increased because of 'the intensity of his involvement in, and his proximity to, the rapes of civilians committed at the *Appartements* camp'.⁸¹

⁷⁶ [Mr Ntaganda's Appeal Brief](#), para. 39.

⁷⁷ [Sentencing Decision](#), para. 98, referring to [Conviction Decision](#), paras 518-523, 535, 545, 548, 579, 599-601, 607, 622-623, 629, 940-941, 946-948, 1199.

⁷⁸ [Sentencing Decision](#), paras 98, 130.

⁷⁹ [Sentencing Decision](#), para. 114, referring to [Conviction Decision](#), paras 808, 810, 1188. See also [Sentencing Decision](#), para. 34.

⁸⁰ [Sentencing Decision](#), paras 117, 130.

⁸¹ [Sentencing Decision](#), para. 117.

2. *Summary of submissions*

(a) **Mr Ntaganda's submissions**

55. Mr Ntaganda submits that the rapes which took place at the *Appartements* camp were the only ones he was found to have 'any arguable knowledge' of, but argues that the Trial Chamber made no mention of this in its assessment of his degree of participation and intent.⁸² In his view, by reasoning that the rapes were committed 'within the intended scope of the common criminal plan', the Trial Chamber inferred a 'high level of participation', and thus found his culpability to be "substantial".⁸³ With respect to the "21 specific victims of rape", Mr Ntaganda contends that the Trial Chamber was required to take his lack of knowledge into account in assessing his degree of participation in rapes 'whose reprehensible circumstances were treated as an aggravating circumstance'.⁸⁴

56. As a result of the Trial Chamber's error, Mr Ntaganda submits that his individual sentences and his joint sentence should be substantially reduced.⁸⁵ He requests that the same reasoning and remedy be applied in relation to sexual enslavement of civilians under counts 7 and 8.⁸⁶

(b) **The Prosecutor's submissions**

57. The Prosecutor submits that Mr Ntaganda's arguments about the Trial Chamber's failure to assess *in concreto* his degree of participation mischaracterises the Trial Chamber's finding regarding his *mens rea* for these crimes is a challenge to his conviction and should, therefore, be dismissed *in limine*.⁸⁷

58. With respect to the 21 specific victims of rape, the Prosecutor argues that contrary to Mr Ntaganda's contention, the Trial Chamber 'merely observed that the precise number of rape victims was larger than this number, on a scale that was "significant"'.⁸⁸ She further maintains that, in finding that his degree of participation in the rape of civilians was substantial, the Trial Chamber relied more generally on his

⁸² [Mr Ntaganda's Appeal Brief](#), para. 42.

⁸³ [Mr Ntaganda's Appeal Brief](#), para. 42.

⁸⁴ [Mr Ntaganda's Appeal Brief](#), paras 43-44.

⁸⁵ [Mr Ntaganda's Appeal Brief](#), para. 45.

⁸⁶ [Mr Ntaganda's Appeal Brief](#), para. 45.

⁸⁷ [Prosecutor's Response](#), paras 29-30.

⁸⁸ [Prosecutor's Response](#), para. 30, referring to [Sentencing Decision](#), para. 98.

‘contributions to the military operations’ and ‘his specific participation in the rape of civilian women at the *Appartements* camp’.⁸⁹ She avers that ‘[h]e knew that UPC troops were raping civilian women, as it occurred around him when he was in Mongbwalu’.⁹⁰ The Prosecutor adds that Mr Ntaganda did not need to know or intend the specific details of the underlying incidents in order to have had a substantial degree of culpability for these crimes.⁹¹

3. *Determination by the Appeals Chamber*

59. Mr Ntaganda challenges the Trial Chamber’s alleged failure to conduct a concrete assessment of his degree of participation in the rape of civilians for which he was convicted and sentenced under counts 4 and 5.⁹² In support of his contention, he asserts that the Trial Chamber failed to look ‘beyond its liability findings’ in relation to the scope of the common plan when assessing his ‘very limited concrete knowledge of and participation in these crimes’.⁹³ For the reasons that follow, the Appeals Chamber is not persuaded by Mr Ntaganda’s arguments.

60. As discussed above,⁹⁴ the Trial Chamber addressed Mr Ntaganda’s culpability by assessing his degree of participation in the crimes during the First and Second Operations and found that, although the degree of his participation ‘may have varied’, Mr Ntaganda’s degree of intent regarding the crimes committed in both operations remained the same.⁹⁵

61. In that regard, 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.⁹⁶ While the Trial Chamber did not rely ‘directly or indirectly, on the proposition’ of Mr Ntaganda’s personal involvement in the rapes at that location, it took into account ‘his presence at the camp, his awareness

⁸⁹ [Prosecutor’s Response](#), para. 31, referring to [Sentencing Decision](#), paras 115-117.

⁹⁰ [T-272](#), p. 32, lines 15-17.

⁹¹ [Prosecutor’s Response](#), para. 32. See also [T-272](#), p. 32, lines 9-10.

⁹² [Mr Ntaganda’s Appeal Brief](#), para. 39.

⁹³ [Mr Ntaganda’s Appeal Brief](#), para. 42.

⁹⁴ See paragraph 34 above.

⁹⁵ [Sentencing Decision](#), para. 34.

⁹⁶ [Sentencing Decision](#), para. 115, referring to [Conviction Decision](#), paras 527, 535.

that women were brought there, and the fact that he brought women there himself”.⁹⁷ His knowledge was therefore clearly established.

62. Moreover, as Mr Ntaganda was convicted as an indirect co-perpetrator for these rapes, in assessing his degree of participation and intent, the Trial Chamber relied on its findings regarding the scope of the common plan where ‘acts of sexual violence against the Lendu’ were used as a tool “‘by UPC/FPLC soldiers and commanders alike to achieve their objective to destroy the Lendu community in the localities under assault” and that the intent to destroy and disintegrate the Lendu community “‘inherently involved the targeting of civilian individuals by way of acts of killing and raping”’.⁹⁸ On the basis of this analysis, the Trial Chamber concluded that Mr Ntaganda’s degree of culpability was ‘substantial’ regarding the rapes committed against civilians during both operations.⁹⁹ It further considered that his degree of culpability in the First Operation increased because of ‘the intensity of his involvement in, and his proximity to, the rapes of civilians committed at the *Appartements* camp’.¹⁰⁰ The Appeals Chamber finds no error in the Trial Chamber’s approach as the Trial Chamber explained the factors it took into consideration when reaching these conclusions.¹⁰¹

63. Turning to Mr Ntaganda’s contention that the Trial Chamber did not find that he had knowledge of “‘the 21 specific victims of rape”’,¹⁰² the Appeals Chamber finds that Mr Ntaganda misreads the Sentencing Decision. The Trial Chamber recalled its finding on those rapes to highlight that the number of victims was in fact greater and that the scale of this crime was ‘significant’.¹⁰³

64. As for Mr Ntaganda’s contention that he lacked ‘contemporaneous or advanced knowledge of any of the specific 21 rapes’,¹⁰⁴ the Trial Chamber considered that in light of its findings on ‘Mr Ntaganda’s role as a co-perpetrator’ and its assessment of his culpability during both operations under that mode of liability, it was unnecessary

⁹⁷ [Sentencing Decision](#), para. 115.

⁹⁸ [Sentencing Decision](#), para. 116, referring to [Conviction Decision](#), paras 805, 809.

⁹⁹ [Sentencing Decision](#), paras 117, 130.

¹⁰⁰ [Sentencing Decision](#), para. 117.

¹⁰¹ See [Mr Ntaganda’s Appeal Brief](#), para. 41.

¹⁰² [Mr Ntaganda’s Appeal Brief](#), para. 43, quoting [Sentencing Decision](#), para. 98.

¹⁰³ [Sentencing Decision](#), para. 98.

¹⁰⁴ [Mr Ntaganda’s Appeal Brief](#), para. 44.

to address his submission on the lack of his knowledge of rapes and sexual slavery.¹⁰⁵ The Appeals Chamber has already addressed and rejected a similar contention on his absence of knowledge about the crimes raised under the first ground of appeal,¹⁰⁶ and, accordingly, will not consider it further.

65. Finally, Mr Ntaganda requests to extend the reasoning and remedy of his pleadings under this ground of appeal to sexual enslavement of civilians under counts 7 and 8.¹⁰⁷ The Appeals Chamber notes that these issues are specifically challenged under his third ground of appeal and will, therefore, be addressed under that ground.

66. In light of the foregoing, the Appeals Chamber finds that the Trial Chamber correctly assessed Mr Ntaganda's degree of participation in and knowledge of the crimes under counts 4 and 5. Accordingly, having considered and rejected Mr Ntaganda's arguments the Appeals Chamber rejects this ground of appeal.

C. Third ground of appeal: Alleged failure to concretely assess Mr Ntaganda's participation in and knowledge of the crimes of rape and sexual slavery under counts 6 to 9

67. Under this 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 15.¹⁰⁸

1. Relevant part of the Sentencing Decision

68. In assessing Mr Ntaganda's degree of culpability for the crimes of sexual slavery committed against two civilians during the Second Operation (counts 7 and 8), the Trial Chamber relied on its findings made for the crime of rape against civilian under counts 4 and 5 to conclude that his culpability was substantial.¹⁰⁹

69. Regarding his degree of culpability for the crimes of rape and sexual slavery committed during the First and Second Operations against three female UPC/FPLC

¹⁰⁵ [Sentencing Decision](#), fn. 322, referring to paras 32-38 (regarding Mr Ntaganda's culpability during the First and Second Operations).

¹⁰⁶ See paragraph 45 above.

¹⁰⁷ [Mr Ntaganda's Appeal Brief](#), para. 45.

¹⁰⁸ [Mr Ntaganda's Appeal Brief](#), paras 46, 49.

¹⁰⁹ [Sentencing Decision](#), paras 34, 114-117, 130. See also paragraphs 53-54 above.

members under the age of 15 (counts 6 and 9), the Trial Chamber recalled its findings about Mr Ntaganda's awareness of the consequences from the implementation of the common plan that would lead to the sexual violence against such individuals within the UPC/FPLC ranks.¹¹⁰ It considered that while his degree of intent regarding these crimes 'was lower' than that for the rape and sexual slavery of civilians, 'his degree of involvement and participation in their commission was significant'.¹¹¹

2. *Summary of submissions*

(a) **Mr Ntaganda's submissions**

70. Mr Ntaganda avers that 'the Chamber misapplied the concept of "degree of participation"; failed to take into account relevant facts; [and] failed to give a reasoned opinion'.¹¹² In support of his submissions, he submits that the Trial Chamber made no finding on his 'aware[ness] of any instance of sexual enslavement at any time, involving any victim, whether civilian or military'.¹¹³

71. With respect to the rape and sexual slavery of individuals under the age of 15 (counts 6 and 9), Mr Ntaganda submits that none of the victims of these crimes were in proximity to him at the time of their occurrence and there was no finding that he had any 'advance, contemporaneous or subsequent knowledge of these crimes'.¹¹⁴ He adds that the Trial Chamber failed to discuss how 'the actions imputed to [him] as purportedly tolerating or approving rape with in [*sic*] the FPLC at other locations had any causal impact on the perpetration of crimes against the three victims'.¹¹⁵

(b) **The Prosecutor's submissions**

72. The Prosecutor submits that Mr Ntaganda repeats arguments he advances under his first and second grounds of appeal and the issue of the requisite *mens rea* for the

¹¹⁰ [Sentencing Decision](#), para. 118.

¹¹¹ [Sentencing Decision](#)[https://intranet.icc.int/chambers/AppealsDivision/NtagandaA/DraftJudgment/Consolidateddraftjudgment/httpng Decision](https://intranet.icc.int/chambers/AppealsDivision/NtagandaA/DraftJudgment/Consolidateddraftjudgment/httpngDecision), paras 120, 130.

¹¹² [Mr Ntaganda's Appeal Brief](#), para. 51.

¹¹³ [Mr Ntaganda's Appeal Brief](#), para. 47.

¹¹⁴ [Mr Ntaganda's Appeal Brief](#), para. 49.

¹¹⁵ [Mr Ntaganda's Appeal Brief](#), para. 49.

crimes of rape and sexual slavery against individuals under the age of 15 raised in his appeal against the Conviction Decision.¹¹⁶

73. The Prosecutor argues further that Mr Ntaganda mischaracterises and ignores the Trial Chamber's finding that he had the requisite *mens rea* for the crimes under counts 6 to 9, and that it correctly assessed his *in concreto* degree of culpability for those crimes.¹¹⁷ She avers that there is 'no legal or factual basis for the Chamber to reduce [Mr Ntaganda's] degree of culpability due to his lack of physical proximity to the specific victims or the lack of specific findings regarding his advance or contemporaneous knowledge' of the incidents.¹¹⁸ She argues that the Trial Chamber was also not required 'to differentiate between Mr Ntaganda and some other hypothetical indirect perpetrator to determine where he sat on the scale of participation'.¹¹⁹

74. The Prosecutor avers further that there is no requirement for the Trial Chamber 'to find a causal impact of his conduct on the perpetration of rape and sexual slavery' of the victims.¹²⁰ She submits that causation under the law of co-perpetration may be established by showing that 'the accused provided an essential contribution to the common criminal plan', which the Trial Chamber did find, thereby establishing a causal link between his conduct and the crimes.¹²¹

(c) The victims' observations

75. Victims Group 1 argue that the Trial Chamber correctly assessed and weighted Mr Ntaganda's degree of intent and participation,¹²² and that '[t]aken cumulatively', his various forms of contribution to the crimes were crucial for their commission.¹²³ They further assert that Mr Ntaganda misinterprets the Trial Chamber's finding about his knowledge of the crimes.¹²⁴ They conclude that the 'causal connection' between

¹¹⁶ [Prosecutor's Response](#), paras 34-35, referring to [Mr Ntaganda's Appeal Brief – Part II](#), paras 272-277.

¹¹⁷ [Prosecutor's Response](#), paras 35, 37.

¹¹⁸ [Prosecutor's Response](#), para. 38 (emphasis in original omitted). See also [T-272](#), p. 31, line 24 to p. 32, line 6.

¹¹⁹ [T-272](#), p. 32, line 25 to p. 33, line 2.

¹²⁰ [Prosecutor's Response](#), para. 39.

¹²¹ [Prosecutor's Response](#), para. 39.

¹²² [Observations of Victims Group 1](#), paras 23, 37.

¹²³ [Observations of Victims Group 1](#), para. 35.

¹²⁴ [Observations of Victims Group 1](#), para. 28.

him and the crimes was properly established, and any attempt to ‘relitigate the issue’ should be dismissed *in limine*.¹²⁵

(d) Mr Ntaganda’s response to the victims

76. Mr Ntaganda submits that he did not challenge the Trial Chamber’s assessment of ‘his degree of intent under rule 145(1)(c) of the Rules’.¹²⁶ Rather, he avers that his submission concerns the misapplication of ‘the concept of degree of participation’ under the mentioned rule and that the Trial Chamber ‘failed to take into account relevant facts and give a reasoned opinion’.¹²⁷ While he agrees with Victims Group 1 that ‘physical proximity may not always exist in co-perpetration’,¹²⁸ he argues that it was not sufficient for the Trial Chamber to merely find that his culpability for ‘11 different crimes’ under both operations was considered ‘to be high, irrespective of [his] physical proximity [to] or knowledge [of]’ said crimes.¹²⁹ He maintains that he ‘has not suggested that the *mens rea* threshold for liability as a co-perpetrator is or should equate to “actual knowledge”’.¹³⁰ Rather, he avers that the requirement for a co-perpetrator’s essential contribution that has the power to frustrate the commission of the crime, this ‘does not mean that once this essential contribution is established, there can be no subsequent differentiation in the defendant’s degree of participation in the different crimes for which he or she was convicted’.¹³¹

3. Determination by the Appeals Chamber

77. The Appeals Chamber notes that Mr Ntaganda mainly challenges the Trial Chamber’s alleged failure to make a concrete assessment of his participation in and knowledge of the crimes of rape and sexual slavery under counts 6 to 9¹³² and to take into account his lack of knowledge of these crimes.¹³³

78. The Appeals Chamber is not convinced by Mr Ntaganda’s contention that the Trial Chamber ‘misapplied the concept of “degree of participation”; failed to take into

¹²⁵ [Observations of Victims Group 1](#), para. 35.

¹²⁶ [Mr Ntaganda’s Response to Observations of Victims](#), para. 6 (emphasis in original omitted).

¹²⁷ [Mr Ntaganda’s Response to Observations of Victims](#), para. 6 (emphasis in original omitted).

¹²⁸ [Mr Ntaganda’s Response to Observations of Victims](#), para. 7.

¹²⁹ [Mr Ntaganda’s Response to Observations of Victims](#), para. 10.

¹³⁰ [Mr Ntaganda’s Response to Observations of Victims](#), para. 12.

¹³¹ [Mr Ntaganda’s Response to Observations of Victims](#), para. 12 (footnotes omitted).

¹³² [Mr Ntaganda’s Appeal Brief](#), paras 46-47, 49.

¹³³ [Mr Ntaganda’s Appeal Brief](#), paras 48-49.

account relevant facts; [and] failed to give a reasoned opinion’.¹³⁴ With respect to the crimes committed against civilians during the Second Operation (counts 7 and 8), the Trial Chamber carried out a concrete assessment of his degree of participation in the crimes.¹³⁵ Notably, the Trial Chamber recalled that Mr Ntaganda was convicted as an indirect co-perpetrator for these crimes, took into account his contribution to these crimes and relied on its findings that (i) he ‘conceived a common plan by virtue of which he and his co-perpetrators meant, *inter alia*, for civilians to be [...] subjected to sexual slavery’;¹³⁶ and (ii) acts of sexual violence against the Lendu were used as tools by the co-perpetrators to achieve the goals of the common plan to destroy the Lendu community.¹³⁷ In that regard, Mr Ntaganda’s knowledge of the crimes committed against the victims specified by the Trial Chamber was established by virtue of the agreement made between the co-perpetrators to implement the common plan.¹³⁸ On that basis, the Trial Chamber concluded that Mr Ntaganda’s degree of culpability was substantial in relation to these crimes.¹³⁹

79. Regarding the crimes under counts 6 and 9, the Trial Chamber first recalled its finding that Mr Ntaganda was aware that the implementation of the common plan ‘would lead to, *inter alia*, the rape and sexual slavery of children under the age of 15 within UPC/FPLC ranks’.¹⁴⁰ It considered that by his involvement in the recruitment and enlistment of individuals under the age of 15 into the UPC/FPLC ranks, Mr Ntaganda created the conditions which led to the commission of the sexual abuse.¹⁴¹ The Trial Chamber also found that Mr Ntaganda ‘exercised control over the crimes committed by the UPC/FPLC against children under the age of 15 [...] during the course of the UPC/FPLC’s military campaign’.¹⁴²

80. Relying on these findings, the Trial Chamber found that ‘the only reasonable conclusion was that Mr Ntaganda knew that rapes and sexual violence were occurring within the UPC/FPLC ranks, and that female recruits and soldiers under the age of 15

¹³⁴ [Mr Ntaganda’s Appeal Brief](#), para. 51.

¹³⁵ [Sentencing Decision](#), paras 114, 116-117. *See also* paras 32-38, 60, 65, 71-72, 75-77.

¹³⁶ [Sentencing Decision](#), para. 114, *referring to* [Conviction Decision](#), paras 808, 810, 1188.

¹³⁷ [Sentencing Decision](#), para. 116, *referring to* [Conviction Decision](#), para. 805.

¹³⁸ [Sentencing Decision](#), para. 114.

¹³⁹ [Sentencing Decision](#), paras 117, 130.

¹⁴⁰ [Sentencing Decision](#), para. 118.

¹⁴¹ [Sentencing Decision](#), para. 119.

¹⁴² [Sentencing Decision](#), para. 119.

were not excluded from this practice'.¹⁴³ Notably, the Trial Chamber recalled its finding that female UPC/FPLC members 'were regularly raped and subjected to sexual violence' and that this was 'generally known and discussed within the UPC/FPLC, as well as that Mr Ntaganda himself, and his chief escort, were among those who inflicted rape on his female bodyguards'.¹⁴⁴ The Trial Chamber underscored that these crimes were 'left largely unpunished, notably within Mr Ntaganda's escort', and that Mr Ntaganda failed to 'ensure a safe environment for the female members of the UPC/FPLC'.¹⁴⁵ The Trial Chamber concluded that while his degree of intent was 'lower than for the sexual crimes against civilians',¹⁴⁶ 'his degree of involvement and participation in their commission was significant'.¹⁴⁷ The Appeals Chamber finds no error in the Trial Chamber's approach as it provided reasons for its appreciation of the factors it considered relevant to its determination of his degree of participation in the crimes.

81. Turning to Mr Ntaganda's contention about his lack of any kind of knowledge of the crimes of rape and sexual slavery of individuals under the age of 15,¹⁴⁸ the Appeals Chamber notes that this argument has already been addressed and rejected in the context of disposing of his appeal against the Conviction Decision.¹⁴⁹ Consequently, this argument is rejected insofar as Mr Ntaganda repeats it in his appeal against the Sentencing Decision.¹⁵⁰ The Appeals Chamber observes further that Mr Ntaganda repeats his argument about his lack of physical proximity to the crimes and thus knowledge of them committed during both operations.¹⁵¹ This argument has already been addressed and rejected under his first ground of appeal.¹⁵²

82. In view of the foregoing, the Appeals Chamber finds that the Trial Chamber correctly assessed Mr Ntaganda's degree of participation in and knowledge of the crimes under counts 6 to 9 and took into account all relevant factors that

¹⁴³ [Sentencing Decision](#), para. 119.

¹⁴⁴ [Sentencing Decision](#), para. 119.

¹⁴⁵ [Sentencing Decision](#), para. 119.

¹⁴⁶ [Sentencing Decision](#), para. 130. *See also* para. 118.

¹⁴⁷ [Sentencing Decision](#), para. 120.

¹⁴⁸ [Mr Ntaganda's Appeal Brief](#), paras 49-51.

¹⁴⁹ *See* [Ntaganda Conviction Judgment](#), para. 855; [Mr Ntaganda's Appeal Brief – Part II](#), paras 258-261, 269-271.

¹⁵⁰ *See* [Bemba et al. Sentencing Appeal Judgment](#), paras 138, 150.

¹⁵¹ [Mr Ntaganda's Appeal Brief](#), para. 49.

¹⁵² *See* paragraph 45 above.

appropriately reflected his individual culpability. Accordingly, having considered and rejected Mr Ntaganda's arguments the Appeals Chamber rejects this ground of appeal.

D. Fourth ground of appeal: Alleged error in finding that Mr Ntaganda participated in the Second Operation murders by not disciplining Salumu Mulenda, or by indicating *post facto* approval of the Kobu massacre

83. Under this 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 approval of the Kobu massacre and other murders committed by Mr Mulenda's troops.¹⁵³

1. Relevant part of the Sentencing Decision

84. The Trial Chamber assessed Mr Ntaganda's essential contribution to the common plan generally and the manner in which he participated in the Second Operation specifically.¹⁵⁴ It also took into account that 'Mr Ntaganda was not found to have committed himself, or given any direct orders to commit, murders during the course of the Second Operation'.¹⁵⁵ Nevertheless, it noted that he indicated his *ex post facto* approval of the Kobu killings and that 'Mulenda was not disciplined, including not by Mr Ntaganda, for the killings which occurred in Kobu'.¹⁵⁶ The Trial Chamber concluded that Mr Ntaganda's degree of participation and intent regarding the murders and attempted murders committed during the Second Operation was 'substantial'.¹⁵⁷

2. Summary of submissions

(a) Mr Ntaganda's submissions

85. Mr Ntaganda submits that the Trial Chamber erred in relying on his failure to punish Salumu Mulenda for the Kobu massacre without first finding that he 'had the capacity and opportunity to do so' between the date of the Kobu massacre, on or

¹⁵³ [Mr Ntaganda's Appeal Brief](#), para. 53.

¹⁵⁴ [Sentencing Decision](#), paras 59, 65.

¹⁵⁵ [Sentencing Decision](#), para. 66.

¹⁵⁶ [Sentencing Decision](#), para. 66, referring to [Conviction Decision](#), para. 639.

¹⁵⁷ [Sentencing Decision](#), para. 67.

around 26 February 2003, and the date when Mr Mulenda left the UPC/FPLC, 6 March 2003.¹⁵⁸ In his view, '[t]his 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' and given that P-0055 testified that Mr Ntaganda was 'still absent from Bunia at least as of 2 March 2003'.¹⁵⁹

86. Mr Ntaganda also claims that the Trial Chamber erred in relying on his purported approval of the Kobu massacre and other murders committed by Mr Mulenda's troops, in the absence of any finding that this 'contributed to, or had any encouraging effect on, any future crime'.¹⁶⁰ He argues that expressing approval of a crime after it has been committed does not enhance an accused's degree of participation in or intent in relation to that crime.¹⁶¹ Finally, Mr Ntaganda submits that these errors 'materially contributed to a disproportionate individual sentence for Counts 1 and 2' (murder and attempted murder).¹⁶²

(b) The Prosecutor's submissions

87. Recalling the Trial Chamber's findings in the Conviction Decision,¹⁶³ the Prosecutor avers that it 'made the necessary finding that Ntaganda had the capacity to discipline Mulenda for the crimes committed in Kobu'.¹⁶⁴ She highlights that Mr Ntaganda 'had the power to order disciplinary measures in relation to his subordinates', that he acknowledged that he had this power and that Mr Mulenda was a brigade commander in the UPC.¹⁶⁵ Therefore, she submits that, in finding that Mr Ntaganda did not discipline Mr Mulenda for the Kobu massacre, the Trial 'Chamber recognised that Ntaganda had the power to discipline Mulenda when he was still one of his subordinates but did not exercise it'.¹⁶⁶ She also contends that there is no finding that Mr Ntaganda was in Fataki during the Second Operation.¹⁶⁷

¹⁵⁸ [Mr Ntaganda's Appeal Brief](#), para. 54. *See also* [T-272](#), p. 15, lines 8-19.

¹⁵⁹ [Mr Ntaganda's Appeal Brief](#), para. 54 (footnotes omitted).

¹⁶⁰ [Mr Ntaganda's Appeal Brief](#), para. 55.

¹⁶¹ [Mr Ntaganda's Appeal Brief](#), para. 55. *See also* [T-272](#), p. 15, lines 20-25.

¹⁶² [Mr Ntaganda's Appeal Brief](#), para. 56.

¹⁶³ [Prosecutor's Response](#), para. 41. *See also* [T-272](#), p. 29, lines 17-24, p. 31, lines 3-14.

¹⁶⁴ [Prosecutor's Response](#), para. 42 (footnotes omitted). *See also* [T-272](#), p. 33, lines 9-16.

¹⁶⁵ [Prosecutor's Response](#), para. 42 (footnotes omitted). *See also* [T-272](#), p. 30, lines 17-18, p. 33, lines 6-8.

¹⁶⁶ [Prosecutor's Response](#), para. 42.

¹⁶⁷ [Prosecutor's Response](#), para. 42.

88. The Prosecutor further submits that ‘whether Ntaganda’s *ex post facto* expression of approval for Mulenda’s crimes and his failure to discipline him had any encouraging effect on future crimes is immaterial in this appeal’,¹⁶⁸ as the Trial Chamber correctly considered his behaviour ‘as an additional indicator of his degree of participation and intent when sentencing him for the crimes of which he was convicted, and not as forms of *ex post facto* participation in those crimes’.¹⁶⁹ Moreover, she avers that his approval of the crimes was in line with his role and contribution throughout the Second Operation.¹⁷⁰ Lastly, she argues, with reference to the Court’s jurisprudence, that “‘conduct [...] that occurred after the offence for which the convicted person is convicted may also be relevant for the sentencing phase to establish that offence’s gravity or the convicted person’s culpability in that regard or may amount to an aggravating circumstance’”.¹⁷¹

3. *Determination by the Appeals Chamber*

89. As an initial remark, the Appeals Chamber notes that 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.¹⁷² Rather, in reaching its conclusion that Mr Ntaganda’s participation and intent regarding the murders and attempted murders in the Second Operation was ‘substantial’, the Trial Chamber assessed, *inter alia*, the fact ‘that Mr Ntaganda took part in the relevant planning’ of this operation, ‘remained in contact with the commanders in the field’, monitored and ‘exercised oversight over the unfolding and ensured that the deployed forces were carrying out the project as planned’.¹⁷³ Therefore, the challenged findings were not the only considerations supporting the Trial Chamber’s conclusion on Mr Ntaganda’s participation and intent regarding the murders and attempted murders of the Second Operation, and, in any event, they were not found to have ‘enhanced’ his degree of participation and intent.

¹⁶⁸ [Prosecutor’s Response](#), para. 43 (footnotes omitted).

¹⁶⁹ [Prosecutor’s Response](#), para. 43 (footnotes omitted).

¹⁷⁰ [Prosecutor’s Response](#), para. 43.

¹⁷¹ [Prosecutor’s Response](#), para. 43, referring to [Bemba et al. Sentencing Appeal Judgment](#), para. 114.

¹⁷² [Mr Ntaganda’s Appeal Brief](#), para. 53.

¹⁷³ [Sentencing Decision](#), para. 65 (footnotes omitted).

90. Mr Ntaganda argues that the question of whether he had the capacity and opportunity to punish Mr Mulenda following the Kobu massacre was a ‘live and contested issue’, which should have been addressed by the Trial Chamber, given that he was in Fataki during the Second Operation and had a limited time frame in which to act.¹⁷⁴ However, he does not explain how his physical whereabouts would have impacted on his ability to discipline Mr Mulenda and the Appeals Chamber can discern no obvious difficulty in this regard. Indeed, related findings of the Trial Chamber in the Sentencing Decision and Conviction Decision show that Mr Ntaganda could and did exercise disciplinary powers in relation to the Second Operation despite his physical absence from the scene. In particular, the Appeals Chamber notes that the Trial Chamber found, in the Sentencing Decision, that Mr Ntaganda was communicating with commanders in the field and was monitoring the unfolding of the Second Operation remotely.¹⁷⁵ It also found, in the Conviction Decision, that Mr Ntaganda had the ‘power to order disciplinary measures’ as part of his role as Deputy Chief of Staff in charge of Operations and Organisation.¹⁷⁶ Specifically in relation to the Second Operation, it noted Mr Ntaganda’s testimony that, when he was informed of a commander who had disobeyed an order, he promptly responded to this issue because it was a disciplinary matter and ‘when he was made aware of a case of indiscipline, he did not hesitate’.¹⁷⁷ In these circumstances, the Appeals Chamber considers that it was not necessary for the Trial Chamber to explicitly consider whether Mr Ntaganda had occasion and opportunity to punish Mr Mulenda for the Kobu murders because he was physically removed from the scene and had a limited time frame in which to act.

¹⁷⁴ [Mr Ntaganda’s Appeal Brief](#), para. 54.

¹⁷⁵ [Sentencing Decision](#), para. 65.

¹⁷⁶ [Conviction Decision](#), para. 323, referring to **D-0300: T-211**, pp. 51-52; **D-0300: T-227**, pp. 82-83; **P-0017: T-63**, p. 6; DRC-OTP-0018-0170 (‘a letter sent by Mr Ntaganda in his capacity as Deputy Chief of Staff to a subordinate officer, asking to send him any disobedient soldier, adding that he had a central prison.’) (French translation: DRC-OTP-0173-0517, at 0518).

¹⁷⁷ [Conviction Decision](#), para. 565. See [Conviction Decision](#), fn. 1723, referring to Logbook entry DRC-OTP-2102-3854, at 3998: (‘Mr Ntaganda confirmed having sent this message to Salongo Ndekezi (**D-0300: T-228**, page 3), indicated that the message relates to the previous message sent by Salumu Mulenda (**T-220**, page 74), and also stated that it concerns Americain’s refusal to advance (**T-228**, page 5)’).

91. Regarding Mr Ntaganda's argument that the Trial Chamber erred in law in relying on his 'expression of *post facto* sentiments of approval for a crime',¹⁷⁸ namely 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. While the Appeals Chamber accepts the argument that 'intent must animate the *actus reus*',¹⁷⁹ it considers that the conduct of the accused after a crime may nonetheless provide information or evidence that is relevant to an assessment of his or her intent at the time of the offence.¹⁸⁰ In the present case, the Trial Chamber took into account the fact that Mr Ntaganda expressed approval of the murders that had been committed in Kobu when he was informed of what had happened.¹⁸¹ This was considered in conjunction with other findings relevant to establishing Mr Ntaganda's *mens rea*, including his role in conceiving 'a plan to drive out all the Lendu from the localities targeted during the course of the UPC/FPLC's military campaign' by virtue of which the Trial Chamber found that 'Mr Ntaganda and his co-perpetrators meant, *inter alia*, for civilians to be killed',¹⁸² and the fact that he 'gave direct orders to kill civilians and endorsed the criminal conduct of his soldiers by way of his personal conduct' during the First Operation.¹⁸³ In this context, the Appeals Chamber considers that the Trial Chamber did not err in taking into account Mr Ntaganda's reaction after the murders in Kobu as a relevant consideration in assessing his intent in relation to the crimes committed.

¹⁷⁸ [Mr Ntaganda's Appeal Brief](#), para. 55.

¹⁷⁹ [Mr Ntaganda's Appeal Brief](#), para. 55.

¹⁸⁰ See, [Bemba et al. Sentencing Appeal Judgment](#), para. 114 ('conduct – including criminal conduct – that occurred after the offence for which the convicted person is convicted may also be relevant for the sentencing phase to establish that offence's gravity or the convicted person's culpability in that regard or may amount to an aggravating circumstance. [...] [n]evertheless, it must be underlined that conduct *after* the offence must not be taken into account for its own sake. This is because the convicted person is not punished for it. Nevertheless, it may inform the assessment of the gravity of the crime or offence or the convicted person's culpability or give rise to an aggravating circumstance.') (emphasis in original, footnotes omitted). The Appeals Chamber notes, further, the broad and non-exhaustive list of factors which a chamber may take into consideration in the sentencing assessment under rule 145(1)(c) of the Rules, which accords with the Trial Chamber's assessment in the present case. See [Lubanga Sentencing Appeal Judgment](#), para. 66 ('the issue is whether the Trial Chamber considered all the relevant factors and made no error in the weighing and balancing exercise of these factors in arriving at the sentence.'). See also [Bemba et al. Sentencing Appeal Judgment](#), paras 40 ('it falls within the discretion of a trial chamber to identify the relevant circumstances for its assessment of the mandatory sentencing factors.'), 159 ('in determining the appropriate sentence, the Trial Chamber *must* identify all relevant factors and weigh them'.) (emphasis in original, footnotes omitted).

¹⁸¹ [Sentencing Decision](#), para. 66.

¹⁸² [Sentencing Decision](#), para. 59, referring to [Conviction Decision](#), paras 808, 810, 1188.

¹⁸³ [Sentencing Decision](#), para. 61, referring to [Conviction Decision](#), paras 510, 528, 851.

92. The Appeals Chamber, therefore, 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. Accordingly, having considered and rejected Mr Ntaganda's arguments the Appeals Chamber rejects this ground of appeal.

E. Fifth ground of appeal: Alleged error in aggravating the individual sentence for the crime of intentionally directing attacks against civilians

93. Mr Ntaganda was convicted as an indirect co-perpetrator for the war crime of intentionally directing attacks against civilians committed during both the First and the Second Operations.¹⁸⁴ In imposing an individual sentence of 14 years for this crime, the Trial Chamber considered the deaths of seven people, including two children, which occurred during the attacks, to constitute an aggravating circumstance.¹⁸⁵ In Mr Ntaganda's view, this amounted to a legal error as it improperly sentenced him for a consequence, which, in his submission, was expressly excluded from the scope of the crime of intentionally directing attacks against civilians.¹⁸⁶

1. Relevant part of the Sentencing Decision

94. At the outset, the Trial Chamber recalled, *inter alia*, that for a factor to be considered an aggravating circumstance, it must be established beyond reasonable doubt and it cannot be a legal element of the crime or mode of liability.¹⁸⁷ Furthermore, any factor, other than those enumerated in rule 145(2)(b)(i) to (v) of the Rules, may be considered in aggravation 'if they are similar to the aggravating circumstance listed in rule 145(2)(b) of the Rules 'by virtue of their nature'.¹⁸⁸ Notably, the Trial Chamber recalled further that

[a]ggravating circumstances must relate to the crimes of which a person was convicted or to the convicted person him- or herself. For a factor to be

¹⁸⁴ [Conviction Decision](#), paras 902-929.

¹⁸⁵ [Sentencing Decision](#), paras 85, 88-89. *See also* [Conviction Decision](#), paras 586, 605.

¹⁸⁶ [Mr Ntaganda's Appeal Brief](#), para. 58, *referring to* [Conviction Decision](#), para. 904.

¹⁸⁷ [Sentencing Decision](#), paras 17, 20.

¹⁸⁸ [Sentencing Decision](#), para. 17.

considered as aggravating, there must be a sufficiently proximate link between the factor and the crime or crimes that form the basis of the conviction.¹⁸⁹

95. As noted above, for the crime of intentionally directing attacks against civilians, the Trial Chamber found that where ‘persons who did not constitute legitimate targets at the time of the attack were killed as a result of attacks that the UPC/FPLC intentionally launched at civilians’ to constitute an aggravating circumstance.¹⁹⁰ In this regard, six individuals were found to have been killed in Bambu when a shell hit a civilian compound located in Bambu-Yalala and at least one person was killed in Buli, by a UPC/FPLC member, while being chased into the surrounding bush.¹⁹¹ A sentence of 14 years was imposed, which in the Trial Chamber’s view, appropriately reflected ‘the gravity of the intentional attacks against civilians, Mr Ntaganda’s culpability and the aggravating circumstance with respect to Count 3’.¹⁹²

2. *Summary of submissions*

(a) **Mr Ntaganda’s submissions**

96. Mr Ntaganda argues that the deaths of seven individuals, which occurred as a consequence of the crime of intentionally directing attacks against civilians amounts to a separate crime which the Prosecutor should have charged as murder.¹⁹³ He argues that by treating this consequence as an aggravating circumstance, the Trial Chamber improperly took into account a factor that was ‘expressly excluded from the scope of the crime’ of intentionally directing attacks on civilians and effectively punished him for an uncharged crime.¹⁹⁴ This approach, he contends, undermines proper notice of the crimes for which a person may be punished and results in an error of law.¹⁹⁵ In addition, he submits that the consequence in question does not equate to ‘separate’ but ‘related conduct’ that might be treated as an aggravating circumstance, rather, it is ‘a different consequence than that which is charged, and that could have been separately

¹⁸⁹ [Sentencing Decision](#), para. 18 (footnotes omitted).

¹⁹⁰ [Sentencing Decision](#), para. 85.

¹⁹¹ [Sentencing Decision](#), fn. 233.

¹⁹² [Sentencing Decision](#), para. 89.

¹⁹³ [Mr Ntaganda’s Appeal Brief](#), para. 58.

¹⁹⁴ [Mr Ntaganda’s Appeal Brief](#), para. 58.

¹⁹⁵ [Mr Ntaganda’s Appeal Brief](#), paras 59-60.

charged’.¹⁹⁶ Mr Ntaganda argues that the Trial Chamber’s error ‘materially contributed to a disproportionate individual sentence for Count 3’.¹⁹⁷

(b) The Prosecutor’s submissions

97. The Prosecutor submits that, given that the crime of intentionally directing attacks against civilians does not require any actual harm to civilians to ensue from such an attack, the Trial Chamber was entitled to consider any harm that did in fact result from such attacks as an aggravating circumstance.¹⁹⁸ She argues that since the ‘unlawful attacks were the immediate cause of death’ of the seven individuals, it was a consequence that was not only ‘sufficiently proximate’ and ‘directly related’ to the charged crime but was also ‘a readily foreseeable possibility’.¹⁹⁹ Contrary to Mr Ntaganda’s argument, the Prosecutor avers that, by entering findings in the Conviction Decision that certain civilians had died as a result of the unlawful attacks, Mr Ntaganda was properly placed on notice that this consequence may be taken into consideration in sentencing.²⁰⁰ As such, she argues that Mr Ntaganda could have presented “‘additional evidence or submissions relevant to the sentence’” during the sentencing phase.²⁰¹

98. As to Mr Ntaganda’s claim that ‘murder’ is the crime which properly addresses unlawful deaths arising from intentionally directing attacks against civilians, the Prosecutor disagrees.²⁰² She argues that ‘the statutory prohibition on intentionally directing attacks against civilians [article 8(2)(e)(i) of the Statute] is separate and distinct from the prohibition of the wilful killing or murder of a person’ [article 8(2)(c) of the Statute].²⁰³ In support thereof, the Prosecutor submits that ‘[t]hese crimes are distinguished (among other requirements) by the question [of] whether the perpetrator’s interaction with the victim occurs in the conduct of hostilities, or whether the victim is in the hands of (or power of) the perpetrator at the material

¹⁹⁶ [Mr Ntaganda’s Appeal Brief](#), para. 60.

¹⁹⁷ [Mr Ntaganda’s Appeal Brief](#), para. 61.

¹⁹⁸ [Prosecutor’s Response](#), para. 49.

¹⁹⁹ [Prosecutor’s Response](#), para. 55.

²⁰⁰ [Prosecutor’s Response](#), paras 54-55, referring to [Bemba et al. Sentencing Appeal Judgment](#), paras 114, 116. See also [Lubanga Sentencing Decision](#), paras 67-68.

²⁰¹ [Prosecutor’s Response](#), para. 54, referring to article 76(2) of the Statute.

²⁰² [Prosecutor’s Response](#), paras 57-65.

²⁰³ [Prosecutor’s Response](#), para. 65.

time'.²⁰⁴ For civilians who are unlawfully killed during the conduct of hostilities, as in the present case, the only appropriate charge is article 8(2)(e)(i) of the Statute and not murder, pursuant to article 8(2)(c) of the Statute.²⁰⁵ As the Trial Chamber correctly determined which killings occurred outside the conduct of hostilities and which occurred under the power of the perpetrator(s), the Prosecutor submits that Mr Ntaganda fails to show any error in the Trial Chamber's approach.²⁰⁶ Consequently, the Prosecutor contends that this ground should be dismissed.²⁰⁷

3. *Determination by the Appeals Chamber*

99. For the reasons that follow, the Appeals Chamber finds no merit in Mr Ntaganda's argument that the Trial Chamber erred in relying on the deaths of seven individuals, which were a consequence of the crime of intentionally directing attacks against civilians, as an aggravating circumstance when determining his sentence for that crime.

100. The Appeals Chamber recalls its finding in the *Bemba et al.* Sentencing Appeal Judgment that 'the consequences of a crime or offence in relation to which a person was convicted may be taken into account to aggravate the sentence in one way or another as long as these consequences were, at least, objectively foreseeable by the convicted person'.²⁰⁸ The Appeals Chamber explained that this approach

takes into account that, when sentencing the convicted person, a trial chamber must assess, *inter alia*, the gravity of the crime, including the harm caused. However, as the eventual sentence must reflect the culpability of the convicted person, it must be demonstrated that these consequences were, at least, objectively foreseeable. This applies both for the assessment of gravity of the crime or offence and for potential aggravating circumstances. If it were otherwise, there would be a risk that a person is punished beyond his or her culpability.²⁰⁹

101. The Appeals Chamber emphasised that, when considering aggravating circumstances, 'what must be established is a sufficiently proximate link between the factor being considered as aggravating and the offences that formed the basis for the

²⁰⁴ [Prosecutor's Response](#), para. 65.

²⁰⁵ [Prosecutor's Response](#), para. 65.

²⁰⁶ [Prosecutor's Response](#), paras 67-69.

²⁰⁷ [Prosecutor's Response](#), para. 75.

²⁰⁸ [Bemba et al. Sentencing Appeal Judgment](#), paras 5, 263, 334.

²⁰⁹ [Bemba et al. Sentencing Appeal Judgment](#), para. 5.

conviction’.²¹⁰ 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. However, the Appeals Chamber finds that, 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.

102. In the case at hand, the Appeals Chamber observes that in convicting Mr Ntaganda for the crime of intentionally directing attacks against civilians, the Trial Chamber found beyond reasonable doubt that certain individuals, who were not legitimate targets at the time of the attacks on the towns of Bambu and Buli during the Second Operation were killed as a result of the unlawful attacks.²¹¹ In sentencing Mr Ntaganda for this crime, the Trial Chamber considered this consequence to constitute an aggravating circumstance.²¹² The Appeals Chamber finds no error in this approach as these findings, which were established beyond reasonable doubt and have not been reversed on appeal, provide an appropriate basis to establish that the deaths of these individuals were sufficiently proximate to the unlawful attacks and were, at the very least, objectively foreseeable consequences.

103. Contrary to Mr Ntaganda’s argument, by treating this consequence as an aggravating circumstance the Trial Chamber did not improperly import ‘consequences that have been expressly excluded from the scope of this crime’.²¹³ Rather, the Trial Chamber’s approach ensured that Mr Ntaganda’s sentence for the crime of intentionally directing attacks against civilians was properly aggravated and fully reflective of his culpability.

104. While Mr Ntaganda does not appear to dispute that conduct that is ‘separate but related’ to a crime for which a person is convicted may be properly considered as an

²¹⁰ [Bemba et al. Sentencing Appeal Judgment](#), para. 151 (footnote omitted).

²¹¹ [Conviction Decision](#), paras 586, 605, 911, 915, 926-927.

²¹² [Sentencing Decision](#), para. 85.

²¹³ [Mr Ntaganda’s Appeal Brief](#), para. 58.

aggravating circumstance, he nevertheless asserts – without substantiation – that the deaths arising from the unlawful attacks amount to a ‘different consequence than that which is charged, and that could have been separately charged’.²¹⁴ The Appeals Chamber recalls the potential for overlap that exists between the crimes listed in the various sub-paragraphs of article 8(2) of the Statute,²¹⁵ such that a particular conduct may constitute one or more crimes.²¹⁶ Nevertheless, the Appeals Chamber considers that the fact that the conduct in question might have also been charged as a separate crime does not preclude such conduct from the Trial Chamber’s sentencing considerations for the crime for which Mr Ntaganda was actually convicted.²¹⁷ As stated above, what is important is that the aggravating circumstance is sufficiently linked to the crime which is the basis for the conviction, was objectively foreseeable, and that the findings related to this conduct were established beyond reasonable doubt. When all of these requirements are met, it is irrelevant that the deaths caused by the unlawful attacks could have been charged as a separate crime. Having rejected

²¹⁴ [Mr Ntaganda’s Appeal Brief](#), para. 60.

²¹⁵ [Ntaganda OA5 Judgment](#), para. 48 ([i]n the view of the Appeals Chamber, while the potential overlap between provisions may be of relevance to their interpretation, little weight should be attached to this argument in the interpretation of article 8 (2) of the Statute. When the provisions on war crimes were negotiated, there was a desire to “define the specific content or constituent elements of the violations in question.” States were concerned, in particular, with providing certainty as to the specific conduct that would give rise to criminal liability and in upholding the principle of legality. [...] States were aware of the potential overlap between the categories of crimes listed in the various sub-paragraphs of article 8 (2) of the Statute. There is no indication that the States intended to avoid such overlap’).

²¹⁶ See [Elements](#), General Introduction, para. 9 ([a] particular conduct may constitute one or more crimes’).

²¹⁷ [Bemba et al. Sentencing Appeal Judgment](#), paras 113 ([...] the sentence imposed on a convicted person for crimes and offences under the jurisdiction of the Court must be proportionate to the crime or offence and reflect the culpability of the convicted person. 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’), 114 ([t]his is not to say that the fact that a convicted person may have committed other offences is entirely irrelevant to sentencing. [...] However, this provision does not mean that offences committed *after* the offence for which the convicted person was convicted, may never be taken into account. This is because conduct – including criminal conduct – that occurred after the offence for which the convicted person is convicted may also be relevant for the sentencing phase to establish that offence’s gravity or the convicted person’s culpability in that regard or may amount to an aggravating circumstance. It would be arbitrary to exclude such conduct from consideration merely because it could potentially have been charged as a separate offence. The Appeals Chamber notes that this approach finds support in the case law of the ICTY and ICTR, which, however, as noted by the Prosecutor, is not entirely consistent on this point. Nevertheless, it must be underlined that conduct *after* the offence must not be taken into account for its own sake. This is because the convicted person is not punished for it. Nevertheless, it may inform the assessment of the gravity of the crime or offence or the convicted person’s culpability or give rise to an aggravating circumstance’) (emphasis in original).

Mr Ntaganda's argument that the deaths of the seven individuals should have been charged as a separate crime, the Appeals Chamber will not consider his further unsubstantiated argument that the charge of murder was the crime that 'properly addresses unlawful deaths arising from intentionally directing attacks on civilians'.²¹⁸

105. Finally, the Appeals Chamber notes Mr Ntaganda's argument that if the Trial Chamber's approach were accepted, then the Prosecutor would no longer need to 'charge murder or unlawful killing in the context of an armed conflict' because it could simply seek punishment for any deaths that arise from a conviction for intentionally directing attacks against civilians.²¹⁹ In his view, '[t]his would undermine proper notice of the crimes for which a person is in jeopardy of punishment'.²²⁰ The Appeals Chamber considers Mr Ntaganda's argument about uncharged crimes to be unfounded. The argument confuses the questions of whether an accused person may be convicted of a given crime on the one hand, and which factors may be taken into account for sentencing on the other hand. As to his argument that the Trial Chamber's approach undermines proper notice to a convicted person, the Appeals Chamber has previously explained that the right of a convicted person to be placed on notice of the facts that will be taken into account to aggravate the sentence is unaffected because

[i]f a trial chamber relies upon facts in aggravation that were established in its decision on conviction under article 74 of the Statute, there is, barring exceptional circumstances, also no further notice required to the convicted person as these facts clearly form part of the context of the conviction. The convicted person must, therefore, expect that they may be taken into account by the trial chamber in sentencing.²²¹

106. As noted above, the Trial Chamber, in convicting Mr Ntaganda for the crime of intentionally directing attacks against civilians, found beyond reasonable doubt that certain individuals who were not legitimate targets at the time of the attacks on the towns of Bambu and Buli during the Second Operation were killed as a result of the unlawful attacks.²²² The Appeals Chamber considers this finding to be related to the

²¹⁸ [Mr Ntaganda's Appeal Brief](#), para. 58.

²¹⁹ [Mr Ntaganda's Appeal Brief](#), para. 59.

²²⁰ [Mr Ntaganda's Appeal Brief](#), para. 59.

²²¹ [Bemba et al. Sentencing Appeal Judgment](#), para. 116 (footnotes omitted).

²²² [Conviction Decision](#), paras 586, 605, 911, 915, 926-927.

degree of harm caused by the commission of this crime, which is similar in nature to the aggravating circumstances recognised in rule 145(2)(b)(iii) and (iv) of the Rules.²²³ In these circumstances, the Appeals Chamber finds that Mr Ntaganda was not deprived of notice of the possibility that his sentence for this crime may be aggravated by the deaths of certain individuals. Mr Ntaganda's argument is therefore rejected.

107. Accordingly, having considered and rejected Mr Ntaganda's arguments the Appeals Chamber rejects this ground of appeal.

F. Sixth ground of appeal: Alleged double-counting of factors when imposing an individual sentence of 30 years for persecution

108. Under this 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 sentence imposed for the underlying crime of murder, the Trial Chamber impermissibly 'double-counted' the conduct underlying his conviction for persecution and the 'discriminatory element' of this crime. He argues that since the Trial Chamber had already accounted for this legal element in its assessment of the gravity of the crimes underlying 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.²²⁴

1. Relevant part of the Sentencing Decision

109. The Trial Chamber convicted Mr Ntaganda for persecution as a direct perpetrator for killing *Abbé Bwanalunga* and as an indirect co-perpetrator of crimes committed in the context of the First and Second Operations (*i.e.* crimes underlying counts 1 to 5, 7 to 8, 11 to 13, and 17 to 18).²²⁵ The Trial Chamber found that the conduct underlying Mr Ntaganda's conviction for persecution and his conviction for the crimes underlying counts 1 to 5, 7 to 8, 11 to 13, and 17 to 18 was the same;

²²³ [Sentencing Decision](#), para. 17.

²²⁴ [Mr Ntaganda's Appeal Brief](#), paras 62, 69, 71-73.

²²⁵ [Sentencing Decision](#), fns 438-439, referring to [Conviction Decision](#), paras 745-752, 810, 995-1008, 1012-1022, 1024-1025, 1199, 1206.

however, what differentiated these crimes from persecution was the ‘discriminatory dimension of the latter’.²²⁶

110. Accordingly, in assessing the gravity of the crime of persecution, the Trial Chamber considered that

[u]nder these circumstances, the Chamber considers that any factors taken into account by the Chamber in its assessment of the gravity of the crimes underlying Counts 1 to 5, 7 to 8, 11 to 13, and 17 to 18, including Mr Ntaganda’s degree of culpability in relation thereto, as well as any aggravating circumstances for these crimes, should not be counted again when assessing the gravity of the crime of persecution and the existence of any aggravating circumstance in relation to this crime.²²⁷

111. Consequently, the Trial Chamber found that there were ‘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’.²²⁸

112. In imposing an individual sentence for persecution, the Trial Chamber found that

in the circumstances of the present case, where every underlying act was charged as a separate crime of which Mr Ntaganda was convicted, 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.²²⁹

113. Lastly, in determining the joint sentence, the Trial Chamber noted that the sentence for persecution as a crime against humanity ‘combines Mr Ntaganda’s culpability and the aggravating circumstances for the underlying crimes (i.e. the crimes that Mr Ntaganda was convicted for under Counts 1 to 5, 7 to 8, 11 to 13, and 17 to 18). The overlap in conduct that underlies the various crimes has therefore been taken into account’.²³⁰

²²⁶ [Sentencing Decision](#), para. 176, referring to [Conviction Decision](#), 1013-1022. See also [Elements](#), article 7(1)(h).

²²⁷ [Sentencing Decision](#), para. 176 (footnotes omitted).

²²⁸ [Sentencing Decision](#), para. 176.

²²⁹ [Sentencing Decision](#), para. 177. The Appeals Chamber notes that the highest sentence imposed was for the underlying crime of murder, which was 30 years of imprisonment.

²³⁰ [Sentencing Decision](#), para. 249.

2. *Summary of submissions*

(a) **Mr Ntaganda's submissions**

114. Mr Ntaganda submits that the Trial Chamber erred in sentencing him to an individual 30-year sentence for persecution.²³¹ In his view, 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, the Trial Chamber should have recognised that ‘any individual sentence for persecution was already fully reflected in the individual sentences for the underlying crimes’.²³² He argues that in such circumstances, ‘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’.²³³

115. Mr Ntaganda maintains that the sentence imposed for persecution ‘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’.²³⁴

(b) **The Prosecutor's submissions**

116. The Prosecutor argues that in calculating Mr Ntaganda's sentence of 30 years for persecution, the Trial Chamber correctly ‘took into account the discriminatory intent that had also been taken into account in calculating [his] individual sentence of 30 years for murder’.²³⁵ She submits that ‘it would have been erroneous for the Chamber to have done anything else’ since it was required to comply with the ‘unique regime for sentencing’ established by article 78(3) of the Statute.²³⁶ Under this provision, ‘an individual sentence for each crime (based on the circumstances of that crime alone) is calculated *before* determination of an appropriate joint sentence (based

²³¹ [Mr Ntaganda's Appeal Brief](#), para. 62.

²³² [Mr Ntaganda's Appeal Brief](#), paras 67-68.

²³³ [Mr Ntaganda's Appeal Brief](#), para. 69.

²³⁴ [Mr Ntaganda's Appeal Brief](#), paras 71-73.

²³⁵ [Prosecutor's Response](#), para. 76.

²³⁶ [Prosecutor's Response](#), paras 76, 78, respectively.

on the number and character of the individual sentences, and their underlying facts)'.²³⁷

117. As to Mr Ntaganda's argument that it is a "textbook case of double-counting" if the same factual conduct is reflected in more than one individual sentence, the Prosecutor submits that this argument overlooks that the law requires that an individual sentence be expressly imposed.²³⁸ She recalls that the Trial Chamber, 'notwithstanding its view "that cumulative convictions are permissible", took into account that Ntaganda was convicted "of certain crimes that are wholly or in part based on the same conduct"' which included the discriminatory nature of the crimes.²³⁹

118. The Prosecutor submits that Mr Ntaganda 'mistakes the concept of impermissible "double-counting"',²⁴⁰ which reflects the principle that "factors taken into consideration as aspects of the gravity of a crime cannot additionally be taken into account as separate aggravating circumstances, and vice versa", or as mitigating circumstances'.²⁴¹ In her view, the 'danger of double-counting arises primarily in the calculation of the appropriate *individual sentence(s)*'.²⁴² The Prosecutor submits that in the case at hand, the Trial Chamber was 'alert to the danger of double-counting' in calculating the individual sentences and specifically 'gave effect to this prohibition [...] with regard to murder under counts 1 and 2' and in its consideration of all the other individual sentences.²⁴³

119. Lastly, she argues that any alleged error in the individual sentence imposed for persecution cannot materially impact the joint sentence 'because the 30-year individual sentence for persecution was not the *only* 30-year individual sentence' imposed.²⁴⁴ The Trial Chamber was 'required by law to impose a joint sentence of 30 years or more' because this was the highest sentence imposed for the underlying

²³⁷ [Prosecutor's Response](#), para. 76 (emphasis in original).

²³⁸ [Prosecutor's Response](#), para. 79.

²³⁹ [Prosecutor's Response](#), para. 81, referring to [Mr Ntaganda's Appeal Brief](#), para. 69.

²⁴⁰ [Prosecutor's Response](#), para. 82, referring to [Mr Ntaganda's Appeal Brief](#), paras 62, 69, 71-73.

²⁴¹ [Prosecutor's Response](#), para. 82, referring to [D. Milošević Appeal Judgment](#), para. 306; [M. Nikolić Sentencing Appeal Judgment](#), para. 58; [Deronjić Sentencing Appeal Judgment](#), para. 106.

²⁴² [Prosecutor's Response](#), para. 82 (emphasis in original).

²⁴³ [Prosecutor's Response](#), para. 83 (footnotes omitted).

²⁴⁴ [Prosecutor's Response](#), para. 85 (emphasis in original).

crime of murder as well, which Mr Ntaganda does not challenge.²⁴⁵ As such, the Prosecutor argues that, contrary to Mr Ntaganda's request for the Appeals Chamber to reduce the joint sentence should this ground of appeal be upheld, the Appeals Chamber cannot do so, as a matter of law, based only on the alleged error in the individual sentence for persecution as Mr Ntaganda would need 'to show error *both* in the individual sentence for persecution (30 years) *and* the individual sentence for murder (30 years)'.²⁴⁶

(c) Mr Ntaganda's reply to the Prosecutot

120. Mr Ntaganda submits that by 'imposing an individual sentence for the umbrella crime of persecution, *i.e.* 30 years, the Trial Chamber punished Mr. Ntaganda for the same conduct in respect of which he had already been punished *via* the imposition of the individual sentences for each underlying crime[s]'.²⁴⁷ In his view, neither the Trial Chamber nor the Prosecutor explained 'what additional criminality is being addressed by the sentence imposed for Count 10 which has not already been addressed elsewhere'.²⁴⁸

121. As to the material effect of the error, Mr Ntaganda argues that contrary to the Prosecutor's contention, the joint sentence would be materially impacted if 'the individual sentence for murder is modified as a result of [his] appeal'.²⁴⁹ In the event that it is not altered, Mr Ntaganda argues that the Appeals Chamber should still intervene to correct this error of law in the interests of justice.²⁵⁰

122. Moreover, he argues that the Trial Chamber's error, regarding count 10, 'is compounded by the single sentence entered by the Trial Chamber for Count 1 (murder as a crime against humanity) and Count 2 (murder as a war crime)'.²⁵¹ He recalls that article 78(3) of the Statute requires a trial chamber to 'assess the sentence for each

²⁴⁵ [Prosecutor's Response](#), para. 77. *See also* para. 84

²⁴⁶ [Prosecutor's Response](#), para. 85 (footnotes omitted, emphasis in original).

²⁴⁷ [Mr Ntaganda's Reply](#), para. 6.

²⁴⁸ [Mr Ntaganda's Reply](#), para. 6.

²⁴⁹ [T-272](#), p. 22, lines 15-20.

²⁵⁰ [T-272](#), p. 22, line 25 to p. 23, line 3.

²⁵¹ [Mr Ntaganda's Reply](#), para. 7.

particular crime separately from the others for which convictions have been entered’.²⁵²

3. *Determination by the Appeals Chamber*

123. The Appeals Chamber notes the well-established prohibition on ‘double-counting’ of factors relevant to the determination of a sentence, such that “‘factors taken into consideration as aspects of the gravity of a crime cannot additionally be taken into account as separate aggravating circumstances, and *vice versa*’”.²⁵³ The Appeals Chamber has previously held, in this regard, that a legal element of the crime or mode of liability in relation to which an accused was convicted cannot be considered as an aggravating circumstance.²⁵⁴

124. The Appeals Chamber considers that in the context of the Court’s sentencing regime, the risk of double-counting is perhaps most likely to occur in a trial chamber’s determination of the appropriate individual sentence. During this step of the sentencing process, a trial chamber identifies all the relevant factors associated with the gravity of the particular crime, (such as the degree of participation and intent of the convicted person) and any aggravating or mitigating circumstances arising from the underlying facts. The trial chamber then attaches the appropriate weight to these factors being careful not to rely on the same factor more than once.²⁵⁵

125. In the case at hand, Mr Ntaganda argues that double-counting should be understood more broadly so as to prohibit double-counting of “‘any factor, and not merely constituting elements of the offence’”.²⁵⁶ Specifically, he argues that by imposing an individual sentence for the ‘umbrella crime of persecution’, the Trial Chamber impermissibly double-counted factors, namely the conduct and discriminatory element, that had already been taken into account in the determination of the individual sentences for each underlying crime amounting to persecution.²⁵⁷

²⁵² [Mr Ntaganda’s Reply](#), para. 7; [T-272](#), p. 19, lines 10-12 (‘before imposing a sentence on an accused, a Trial Chamber must first determine an individual sentence for each separate crime for which the accused was found guilty’).

²⁵³ [D. Milošević Appeal Judgment](#), para. 306, referring to [M. Nikolić Sentencing Appeal Judgment](#), para. 58; [Deronjić Sentencing Appeal Judgment](#), para. 106.

²⁵⁴ [Bemba et al. Sentencing Appeal Judgment](#), para. 129.

²⁵⁵ [Bemba et al. Sentencing Appeal Judgment](#), para. 112.

²⁵⁶ [Mr Ntaganda’s Reply](#), para. 3, referring to Triffterer, p. 1895.

²⁵⁷ [Mr Ntaganda’s Reply](#), para. 6; [Mr Ntaganda’s Appeal Brief](#), paras 62-64, 67-69, 71-73.

The Appeals Chamber understands Mr Ntaganda's argument to suggest that the imposition of an individual sentence for persecution effectively punished him twice for the same conduct and the discriminatory element found to be present in it.²⁵⁸ For the reasons that follow, the Appeals Chamber is not persuaded by Mr Ntaganda's arguments.

126. The Appeals Chamber notes that Mr Ntaganda was convicted of persecution both as a direct perpetrator and as an indirect co-perpetrator in connection with acts of murder (counts 1 and 2), intentionally attacking civilians (count 3), rape (counts 4 and 5), sexual slavery (counts 7 and 8), pillage (count 11), forcible transfer of the population (count 12), ordering the displacement of the civilian population (count 13), intentionally directing attacks against protected buildings (count 17) and the destruction of the property of an adversary (count 18).²⁵⁹

127. The Trial Chamber found that for the purposes of sentencing it would take into account the fact that 'the conduct which underlies the convictions for persecution and the crimes underlying Counts 1 to 5, 7 to 8, 11 to 13, and 17 to 18 is the same and took place pursuant to a common plan and organisational policy that also contained a discriminatory element'.²⁶⁰ In so far as commission as an indirect co-perpetrator was concerned, the Trial Chamber took into account the 'discriminatory element' in its assessment of the gravity of those crimes being careful not to also count it as an aggravating circumstance.²⁶¹ Similarly, in so far as liability as a direct perpetrator was concerned, the Trial Chamber considered the 'discriminatory element' only as an aggravating circumstance in its assessment of the crimes underlying counts 1 and 2.²⁶²

²⁵⁸ [Mr Ntaganda's Reply](#), paras 5-6.

²⁵⁹ [Conviction Decision](#), paras 745-752, 810, 995-1008, 1012-1022, 1024-1025, 1199, 1206. *See also* [Sentencing Decision](#), paras 174-177.

²⁶⁰ [Conviction Decision](#), para. 1206; [Sentencing Decision](#), para. 176.

²⁶¹ [Sentencing Decision](#), para. 176.

²⁶² [Sentencing Decision](#), para. 176. *See also* [Sentencing Decision](#), para. 84, **counts 1 and 2**: '[f]inally, 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'; [Sentencing Decision](#), para. 125, **counts 4, 5, 7 and 8**: '[f]inally, 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'; [Sentencing Decision](#), para. 151, **counts 11, 17 and 18**: '[t]he Chamber found that the

Notably, Mr Ntaganda takes no issue with the Trial Chamber's consideration of the 'discriminatory element' in this manner when calculating the individual sentences for the crimes underlying counts 1 to 5, 7 to 8, 11 to 13, and 17 to 18.

128. With respect to the calculation of the individual sentence for persecution, the Trial Chamber noted that there were 'no additional elements to be considered in relation to persecution'.²⁶³ Consequently, in calculating the individual sentence, the Trial Chamber noted that since 'every underlying act was charged as a separate crime of which Mr Ntaganda was convicted' the sentence for persecution 'should not be higher than the highest sentence imposed for any of the underlying crimes amounting to persecution, which is 30 years of imprisonment'.²⁶⁴

129. Against this background, the Appeals Chamber considers that Mr Ntaganda's argument that the Trial Chamber erred in imposing an individual sentence for persecution as it amounted to double-counting, ignores the two-step sentencing process prescribed under article 78(3) of the Statute. When a person is convicted of more than one crime, the Trial Chamber is required, by law, to first impose an individual sentence for each crime that fully reflects the convicted person's culpability for that particular crime. The calculation of an individual sentence necessarily entails an assessment of all the circumstances relevant to a particular crime.

130. For the crime of persecution, which is not a stand-alone crime but one requiring a connection with any act constituting a crime against humanity or any crime within the jurisdiction of the Court,²⁶⁵ certain circumstances (*i.e.* the underlying factual

pillage, destruction of houses and the attack on a protected object, took place in villages and towns predominantly inhabited by Lendu. However, 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 here as an aggravating circumstance for these specific crimes'; [Sentencing Decision](#), para. 169, **count 12**: '[t]he 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'; [Sentencing Decision](#), para. 171, **count 13**: '[i]n relation to the fact that ordering the displacement of the civilian population was committed with a discriminatory intent, [...], the Chamber integrates its considerations set out in paragraph 169 above and does not consider this to constitute a separate aggravating circumstance' (footnotes omitted).

²⁶³ [Sentencing Decision](#), para. 176.

²⁶⁴ [Sentencing Decision](#), para. 177.

²⁶⁵ [Elements](#), article 7(1)(h)(4).

conduct or those establishing the ‘discriminatory dimension’ of persecution) are therefore relevant to the calculation of more than one individual sentence. In such a case, 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, as described above, when setting individual sentences for the crimes underlying counts 1 to 5, 7 to 8, 11 to 13, and 17 to 18.

131. The Appeals Chamber notes Mr Ntaganda’s argument that the jurisprudence of the ICTY pre-dating 2004, further illustrates the inappropriateness of imposing an individual sentence for persecution equal to that of the underlying crime of murder.²⁶⁶ The Appeals Chamber observes that the jurisprudence relied upon by Mr Ntaganda concerned, *inter alia*, the question of whether cumulative convictions were permissible for persecution and murder as crimes against humanity when based on the same facts. Initially, the ICTY Appeals Chamber found that such convictions were ‘impermissibly cumulative’. It held that where the crime of persecution in the form of murder is based on the same facts, there could be no conviction for murder because this crime would be subsumed under the conviction for persecution.²⁶⁷ Nevertheless,

²⁶⁶ [Mr Ntaganda’s Appeal Brief](#), para. 70, referring to [Kordić & Čerkez Appeal Judgment](#), paras 1039-1040, referring to [Krnojelac Appeal Judgment](#), para. 188.

²⁶⁷ [Krnojelac Appeal Judgment](#), para. 188 (‘the convictions entered against Krnojelac under count 5 of the Indictment (crime against humanity of inhumane acts) for the above beatings must be reversed since the crime of persecution in the form of inhumane acts subsumes the crime against humanity of inhumane acts. The possibility of multiple convictions based on the same facts is thus eliminated’); [Vasiljević Appeal Judgment](#), para. 146 (‘the Trial Chamber found that persecution under Article 5(h) of the Statute (Count 3) requires the materially distinct elements of a discriminatory act and a discriminatory intent and is therefore more specific than murder as a crime against humanity under Article 5(a) of the Statute (Count 4) and inhumane acts as a crime against humanity under Article 5(i) of the Statute (Count 6). By applying the case-law on cumulative convictions to the present case, the Appellant is convicted of murder under Article 3 of the Statute (Count 5) and persecution under Article 5(h) of the Statute (Count 3)’); [Krstić Appeal Judgment](#), para. 231 (‘[t]he Appeals Chamber addressed these two issues in its recent decisions in *Vasiljević* and *Krnojelac*. In *Vasiljević*, the Appeals Chamber disallowed convictions for murder and inhumane acts under Article 5 as impermissibly cumulative with the conviction for persecution under Article 5 where the persecution was accomplished through murder and inhumane acts. The Appeals Chamber concluded that the offence of persecution is more specific than the offences of murder and inhumane acts as crimes against humanity because, in addition to the facts necessary to prove murder and inhumane acts, persecution requires the proof of a materially distinct element of a discriminatory intent in the commission of the act. The same result was reached

the Appeals Chamber notes that, subsequently, the ICTY's jurisprudence was reversed in the *Čelebići* appeal,²⁶⁸ allowing for separate convictions to be entered for murder and persecution in the form of murder because each crime has a distinct legal element not contained in the other (*i.e.* an element which requires proof of a fact not required by the other). Consequently, the basis for cumulative convictions for different crimes at the ICTY was no longer the acts or omissions of the accused, but rather the legal elements of each statutory provision.

132. Accordingly, the Appeals Chamber finds Mr Ntaganda's reliance upon the aforementioned jurisprudence of the ICTY to be inapposite. Notably, as seen above, the jurisprudence is unrelated to sentencing and, as such, has no bearing on the question of whether an individual sentence for persecution equal to that of its underlying crime was permissible. Additionally, the Appeals Chamber notes that Mr Ntaganda did not challenge the cumulative convictions entered by the Trial Chamber with respect to persecution as a crime against humanity and other connected crimes against humanity such as murder, in his appeal against the Conviction Decision.²⁶⁹ Consequently, he must accept that his convictions for both the crime against humanity of persecution and the crime against humanity of murder have been entered and that

by the Appeals Chamber in *Krnjelac*, which concluded that "the crime of persecution in the form of inhumane acts subsumes the crime against humanity of inhumane acts") (footnotes omitted).

²⁶⁸ [Čelebići Appeal Judgment](#), paras 412-413 ('reasons of fairness to the accused and the consideration that only distinct crimes may justify multiple convictions, lead to the conclusion that multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other. Where this test is not met, the Chamber must decide in relation to which offence it will enter a conviction. This should be done on the basis of the principle that the conviction under the more specific provision should be upheld. Thus, if a set of facts is regulated by two provisions, one of which contains an additional materially distinct element, then a conviction should be entered only under that provision'). This test was followed consistently in later jurisprudence of the ICTY, see [Kordić & Čerkez Appeal Judgment](#), paras 1040-1041 ('[t]he Appeals Chamber considers that cogent reasons warrant a departure from this jurisprudence as an incorrect application of the *Čelebići* test to *intra*-Article 5 convictions. These cases are in direct contradiction to the reasoning and proper application of the test by the Appeals Chambers in *Jelisić*, *Kupreškić*, *Kunarać*, and *Musema*. [...] The Appeals Chamber finds that the definition of persecutions contains materially distinct elements not present in the definition of murder under Article 5 of the Statute: the requirement of proof that an act or omission discriminates in fact *and* proof that the act or omission was committed with specific intent to discriminate. Murder, by contrast, requires proof that the accused caused the death of one or more persons, regardless of whether the act or omission causing the death discriminates in fact or was specifically intended as discriminatory, which is not required by persecutions. Thus, cumulative convictions on the basis of the same acts under Article 5 of the Statute are permissible in relation to these crimes') (emphasis in original and footnotes omitted).

²⁶⁹ [Conviction Decision](#), para. 1206.

sentences for each of these convictions must be pronounced, in accordance with the procedure stipulated in article 78(3) of the Statute.

133. Moreover, the Appeals Chamber considers that the pronouncement of an individual sentence of 30 years for the crime of persecution, which was equal to the sentence imposed for the underlying crime of murder, was not evidence of double-counting on the part of the Trial Chamber. As noted above, the Trial Chamber, by operation of law, was obliged to pronounce an individual sentence for persecution. 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. Importantly, Mr Ntaganda's argument fails to appreciate that, regardless of the fact that the penalties for persecution and murder were the same, he was not sentenced to a sum total of all the individual sentences imposed on him. Rather, these and other individual sentences imposed served to inform the Trial Chamber's calculation of the joint sentence which was the *actual* penalty for which Mr Ntaganda was punished.

134. Having established that by pronouncing individual sentences for persecution and the underlying crimes of persecution the Trial Chamber did not engage in double-counting, the Appeals Chamber will now consider whether the Trial Chamber committed this error when calculating the joint sentence and thereby effectively punished Mr Ntaganda twice for the same underlying conduct and discriminatory element.

135. The Appeals Chamber observes that in calculating the joint sentence the Trial Chamber was aware of the potential overlap in circumstances, noting that

[a]s set out above, the sentence determined for the crime against humanity of persecution combines Mr Ntaganda's culpability and the aggravating circumstances for the underlying crimes (i.e. the crimes that Mr Ntaganda was convicted for under Counts 1 to 5, 7 to 8, 11 to 13, and 17 to 18). The overlap in conduct that underlies the various crimes has therefore been taken into account.²⁷⁰

136. While the Trial Chamber did not explain how it accounted for the overlap in the underlying conduct when calculating the joint sentence, the Appeals Chamber

²⁷⁰ [Sentencing Decision](#), para. 249.

observes that pursuant to article 78(3) of the Statute the Trial Chamber was required to set a joint sentence that ‘was no less than the highest individual sentence pronounced’. As the highest individual sentence was 30 years imposed for both murder and persecution, the Trial Chamber found it appropriate to impose a joint sentence of 30 years which was the *minimum* possible joint sentence that it could have fixed, pursuant to article 78(3) of the Statute. A sentence higher than 30 years would have required the imposition of life imprisonment, which, in its discretion, the Trial Chamber considered unwarranted.²⁷¹ In the Appeals Chamber’s view, by declining to increase Mr Ntaganda’s joint sentence to exceed 30 years, the Trial Chamber evidently did not engage in double-counting to the detriment of Mr Ntaganda. Mr Ntaganda’s argument is therefore rejected.

137. Lastly, the Appeals Chamber notes Mr Ntaganda’s argument that the Trial Chamber’s erred with regard to its sentence for persecution was ‘compounded by the single sentence entered by the Trial Chamber for Count 1 (murder as a crime against humanity) and Count 2 (murder as a war crime) – two different crimes’.²⁷² According to Mr Ntaganda, article 78(3) of the Statute required the Trial Chamber ‘to assess the sentence for each particular crime separately from the others for which convictions have been entered’.²⁷³

138. In this regard, the Trial Chamber stated in the Sentencing Decision that

[a]s noted above, for the purpose of its assessment of the appropriate sentence, the Chamber has taken into account that although the convictions for murder (Counts 1 and 2), rape (Counts 4 and 5) and sexual slavery (Counts 7 and 8), as crimes against humanity and as war crimes, respectively, are each premised on the existence of distinct contextual elements, Mr Ntaganda’s convictions for these crimes are based on the same underlying conduct. For the sentence to be fair, this must be taken into account. Therefore, in order to determine a fair and proportionate sentence, the Chamber discusses the crimes against humanity and war crimes of respectively murder, rape and sexual slavery together. In addition, the Chamber has taken into account the fact that some of the conduct underlying the convictions for different crimes is also the same.²⁷⁴

²⁷¹ [Sentencing Decision](#), para. 250.

²⁷² [Mr Ntaganda’s Reply](#), para. 7.

²⁷³ [Mr Ntaganda’s Reply](#), para. 7.

²⁷⁴ [Sentencing Decision](#), para. 31, referring to [Sentencing Decision](#), paras 94, 159, 176.

139. The Appeals Chamber notes that article 78(3) of the Statute, in relevant part, requires a trial chamber to ‘pronounce a sentence for each crime’. However, in doing so, the Appeals Chamber considers that this provision does not prescribe the manner in which a chamber discusses each crime in order to arrive at an appropriate individual sentence. What is important, is that an individual sentence is pronounced for each crime. In the case at hand, where crimes constituting both crimes against humanity and war crimes were based upon the same underlying conduct, the Appeals Chamber finds that it was reasonable for the Trial Chamber to have assessed these crimes together in the way that it did. Contrary to Mr Ntaganda’s argument, the Trial Chamber ultimately pronounced individual sentences for each of these crimes that included 30 years for murder as a crime against humanity and 30 years for murder as a war crime; 28 years for rape as a crime against humanity and 28 years for rape as a war crime; 12 years for sexual slavery as a crime against humanity; and 12 years for sexual slavery as a war crime. Mr Ntaganda’s argument is therefore rejected.

140. Accordingly, having considered and rejected Mr Ntaganda’s arguments the Appeals Chamber rejects this ground of appeal.

G. Seventh ground of appeal: Alleged failure to consider saving the lives of 64 enemy soldiers as a mitigating circumstance

141. Under this ground of appeal, Mr Ntaganda 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 circumstance’.²⁷⁵ In support of this assertion, Mr Ntaganda raises two arguments, namely, (i) that his actions represented a ‘substantial humanitarian act’ deserving of acknowledgment and weight in mitigation;²⁷⁶ and (ii) that the Trial Chamber’s finding concerning his motive for saving the lives of the enemy combatants lacked a proper evidential basis.²⁷⁷

²⁷⁵ [Mr Ntaganda’s Appeal Brief](#), para. 75 (footnotes omitted).

²⁷⁶ [Mr Ntaganda’s Appeal Brief](#), paras 76-80.

²⁷⁷ [Mr Ntaganda’s Appeal Brief](#), paras 81-82, referring to [Sentencing Decision](#), para. 212.

1. Relevant part of the Sentencing Decision

142. In relation to Mr Ntaganda's alleged intervention that resulted in saving the lives of 64 enemy combatants in Mandro,²⁷⁸ the Trial Chamber noted the evidence of P-0016, a former APC soldier who was captured along with 63 other enemy soldiers.²⁷⁹ According to P-0016, Mr Ntaganda integrated and trained him and the other enemy soldiers into the UPC/FPLC 'because at that time the armed group did not have any trained soldiers of its own'.²⁸⁰ Consequently, the Trial Chamber found that '[g]iven that Mr Ntaganda's actions appear to have been aimed at using the soldiers for the benefit of the common plan, the Chamber does not consider this to be a mitigating factor, and accords it no weight'.²⁸¹

2. Summary of submissions

(a) Mr Ntaganda's submissions

143. Mr Ntaganda submits that, 'even assuming' that the Trial Chamber's finding regarding his motive for saving the lives of 64 enemy combatants was correct, the 'value of saving lives is nonetheless such a substantial humanitarian act that it must be acknowledged and encouraged'.²⁸² Relying upon the jurisprudence of the ICTY,²⁸³ Mr Ntaganda argues that '[a]ctions 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'.²⁸⁴ In his view, the number of individuals that he allegedly saved was substantial, 'almost equal to the total number of murder victims for which [he] was convicted'.²⁸⁵

²⁷⁸ [Sentencing Decision](#), para. 211. The Appeals Chamber notes that in the [Conviction Decision](#), para. 354 the Trial Chamber referred to **P-0016**: DRC-OTP-026-0422-R03, at 0430, para. 47, noting that '**P-0016**, a former APC soldier, testified to having been arrested after the defeat of Governor Lomondo, and brought, together with 63 other APC soldiers, to Mandro' (emphasis added). The Appeals Chamber thus understands the event described by **P-0016** and challenged by Mr Ntaganda, under this ground of appeal, to have occurred in Mandro rather than Mongbwalu, as stated by the Trial Chamber in the [Sentencing Decision](#) at para. 211.

²⁷⁹ [Sentencing Decision](#), para. 211.

²⁸⁰ [Sentencing Decision](#), para. 212, referring to DRC-OTP-0126-0422-R03, para. 47.

²⁸¹ [Sentencing Decision](#), para. 212.

²⁸² [Mr Ntaganda's Appeal Brief](#), para. 77.

²⁸³ [Mr Ntaganda's Appeal Brief](#), paras 77, 80, referring to [Popović et al. Trial Judgment](#), para. 2220, [Blagojević & Jokić Appeal Judgment](#), para. 342, [Karadžić Appeal Judgment](#), para. 754.

²⁸⁴ [Mr Ntaganda's Appeal Brief](#), para. 78.

²⁸⁵ [Mr Ntaganda's Appeal Brief](#), para. 79.

144. Additionally or alternatively, Mr Ntaganda argues that the Trial Chamber did not have ‘a proper evidential basis to find that [his] “actions appear to have been aimed” at using the soldiers for the benefit of the common plan’.²⁸⁶ He submits that the only basis for the Trial Chamber’s assertion was the words of P-0016.²⁸⁷ Mr Ntaganda further submits that the Trial Chamber’s use of the word ‘appear’ demonstrates the ‘speculative nature of its inference concerning [his] “aim”, and was not a proper basis on which to dismiss this substantial humanitarian act’.²⁸⁸

(b) The Prosecutor’s submissions

145. The Prosecutor submits that the Trial Chamber ‘seems to have used the verb “appear” in its natural sense to mean that Ntaganda’s motive was clear, manifest or evident to the Chamber’.²⁸⁹ She claims that Mr Ntaganda disregards the common plan and his contributions to it which form the basis of his conviction.²⁹⁰ In this regard, she argues that Mr Ntaganda’s ‘purported decision not to kill P-0016 and other captured APC soldiers in order to integrate them into the UPC/FPLC further contributed to the implementation of the common plan and the resulting crimes’.²⁹¹ The Prosecutor argues that even if Mr Ntaganda’s motive for saving the enemy combatants was proven to be altruistic, his actions would not have constituted what other international tribunals call ‘selective assistance’ to victims.²⁹² In her view, Mr Ntaganda had the power to save lives but ‘he instead used it to kill, rape and perpetrate serious and violent crimes’.²⁹³

146. Finally, the Prosecutor submits that none of the ICTY’s case law relied upon by Mr Ntaganda are relevant, given that ‘the convicted persons in those cases were not

²⁸⁶ [Mr Ntaganda’s Appeal Brief](#), para. 81, referring to [Sentencing Decision](#), para. 212.

²⁸⁷ [Mr Ntaganda’s Appeal Brief](#), para. 81, referring to DRC-OTP-0126-0422, para. 47.

²⁸⁸ [Mr Ntaganda’s Appeal Brief](#), para. 81, referring to [Sentencing Decision](#), para. 212.

²⁸⁹ [Prosecutor’s Response](#), para. 91, referring to The Oxford Thesaurus, p. 16 (defining ‘appear’ to mean, among others, ‘be clear or evident or plain or manifest’) (emphasis in original); Merriam-Webster Dictionary (‘4. to become evident or manifest’).

²⁹⁰ [Prosecutor’s Response](#), para. 93, referring to [Conviction Decision](#), paras 808-809.

²⁹¹ [Prosecutor’s Response](#), para. 93. See also [T-272](#), p. 34, lines 9-11 (‘[i]n a nutshell, his alleged saving of 64 enemy soldiers was to recruit them into his armed group with the purpose of implementing a common criminal plan. It was not a humanitarian act, contrary to his ground 7.’).

²⁹² [Prosecutor’s Response](#), para. 96.

²⁹³ [Prosecutor’s Response](#), para. 96.

found to have acted to further promote the criminal activity inherent in the common criminal enterprise'.²⁹⁴

(c) The victims' observations

147. Victims Group 2 concur with the submissions of the Prosecutor in relation to the ICTY's case law which Mr Ntaganda relies on.²⁹⁵ They further submit that 'compelling a prisoner of war to fight in the forces of the hostile power, cannot constitute a mitigating factor under any circumstance'.²⁹⁶ In addition, they argue that the Trial Chamber was not required to establish, to a standard of beyond reasonable doubt, that Mr Ntaganda's actions were aimed at saving the lives of those enemy combatants, rather it was 'entirely sufficient and legally sound' for the Trial Chamber to conclude, on a balance of probabilities, that Mr Ntaganda's motive was not based on 'pure altruism'.²⁹⁷

(d) Mr Ntaganda's response to the victims

148. Mr Ntaganda submits that the Trial Chamber's approach amounts to an abuse of discretion, especially since there was no evidence to suggest that he intended to use the enemy soldiers to commit further crimes. Instead, he argues that the evidence showed that he intended to create a disciplined armed force.²⁹⁸ Additionally, Mr Ntaganda argues that the Trial Chamber's failure to acknowledge his actions as a mitigating factor was further compounded by its failure to consider that P-0016 had a pivotal position and role in the organisation of the UPC army, as well as 'to consider its finding that the UPC/FPLC was engaged in a military campaign against RCD-KML/APC' and therefore the experience of these former APC soldiers was of a high value.²⁹⁹

²⁹⁴ [Prosecutor's Response](#), para. 97 (footnotes omitted). *See also* paras 98-102.

²⁹⁵ [Observations of Victims Group 2](#), paras 13-14.

²⁹⁶ [Observations of Victims Group 2](#), para. 14.

²⁹⁷ [Observations of Victims Group 2](#), para. 16.

²⁹⁸ [Mr Ntaganda's Response to Observations of Victims](#), para. 16, *referring to* DRC-OTP-0126-0422-R02, para. 47.

²⁹⁹ [Mr Ntaganda's Response to Observations of Victims](#), para. 17, *referring to* [Conviction Decision](#), para. 793.

3. *Determination by the Appeals Chamber*

149. As noted above,³⁰⁰ Mr Ntaganda raises two arguments in relation to the Trial Chamber's finding that his alleged actions in saving the lives of 64 enemy combatants was not a mitigating circumstance. The Appeals Chamber will address these arguments in turn.

150. First, Mr Ntaganda argues that even if the Trial Chamber was correct about his ulterior motive for saving the lives of the enemy combatants, his actions, nevertheless, amounted to a 'substantial humanitarian act' which should have been recognised as a mitigating circumstance.³⁰¹ In the Appeals Chamber's view, Mr Ntaganda's argument is misguided. The Appeals Chamber considers that actions taken by a convicted person to protect life may generally be characterised as altruistic and potentially be considered as a mitigating circumstance. However, the Appeals Chamber considers that it was reasonable for the Trial Chamber to find that Mr Ntaganda's actions in relation to the 64 enemy combatants was not a mitigating circumstance given that the Trial Chamber found his actions to have been taken with the aim of benefitting the common plan. In such circumstances, Mr Ntaganda's actions cannot objectively amount to a 'substantial humanitarian act'. If it were otherwise, the purpose of mitigation – to reduce the severity of a sentence – would be undermined. The Trial Chamber found Mr Ntaganda's actions to be aimed at using the captured soldiers for the 'benefit of the common plan'.³⁰² Thus, regardless of how many individuals Mr Ntaganda was alleged to have saved or how 'forcefully' he had to intervene to save these lives, the Appeals Chamber considers that his ulterior motive necessarily diminished the value of his actions.³⁰³

151. Furthermore, as argued by the Prosecutor and Victims Group 2,³⁰⁴ the Appeals Chamber finds that, contrary to Mr Ntaganda's argument, none of the ICTY cases cited by him support his contention that his actions should have been construed as 'assistance to victims' warranting consideration as a mitigating factor. As discussed

³⁰⁰ See paragraph 141 above.

³⁰¹ [Mr Ntaganda's Appeal Brief](#), paras 77-78.

³⁰² [Sentencing Decision](#), para. 212.

³⁰³ See [Mr Ntaganda's Appeal Brief](#), paras 78-79.

³⁰⁴ [Prosecutor's Response](#), paras 97-102; [Observations of Victims Group 2](#), paras 13-14.

below, the circumstances in which the convicted persons in those cases intervened to save victims are distinguishable from the circumstances in which Mr Ntaganda acted.

152. For instance, in *Popović et al.*, the ICTY Trial Chamber found the circumstances in which Pandurević's acts occurred demonstrated a 'clear and compelling instance of assistance to potential victims'.³⁰⁵ In particular, the ICTY Trial Chamber found that

[a]t a time in which other VRS members were actively hunting down, capturing, and executing Bosnian Muslim men without mercy and pursuing a genocidal plan, **Pandurević's** decision to open the corridor and enable the safe passage of thousands of Bosnian Muslim men is striking. In doing so, thousands of men were potentially spared. He took this decision in contravention of the orders from his superiors and with the knowledge that it would potentially put him in jeopardy. **Pandurević's** action in this regard stands out as an instance of courage and humanity in a period typified by human weakness, cruelty and depravity.³⁰⁶

In addition, the Appeals Chamber notes that unlike Mr Ntaganda, *Pandurević* was found to have played a limited role in the crimes.³⁰⁷ Even though his motivation in opening the corridor was found to include 'military considerations and protecting Serb lives', it was not aimed at furthering the common purpose of the joint criminal enterprise.³⁰⁸

153. In *Blagojević & Jokić*, Jokić intervened to ensure safe passage for a group of Bosnian Muslim boys through a minefield.³⁰⁹ The ICTY Trial Chamber considered his intervention to be a mitigating factor with respect to his conviction for the crimes underlying persecution since he had saved persons belonging to the targeted group.³¹⁰ This decision was upheld by the ICTY Appeals Chamber which found that while 'mere compliance with the law is not ordinarily a factor in assessing an accused's

³⁰⁵ [Popović et al. Trial Judgment](#), para. 2220.

³⁰⁶ [Popović et al. Trial Judgment](#), para. 2219 (footnotes omitted, emphasis in original).

³⁰⁷ [Popović et al. Trial Judgment](#), para. 2211 ('**Pandurević** was not a participant in the JCE to Forcibly Remove. He did not share the intent to carry out this common purpose. He was not present in Potočari during the transfer operation, nor was he involved in any respect in the planning and design of the operation.') (footnotes omitted). See also para. 2213 ('**Pandurević** was not a participant in the JCE to Murder. He neither shared the intent to carry out its common purpose, nor did he significantly contribute to it') (footnotes omitted).

³⁰⁸ [Popović et al. Trial Judgment](#), para. 2220. See also [Popović et al. Trial Judgment](#), paras 2211, 2213, 2220.

³⁰⁹ [Blagojević & Jokić Appeal Judgment](#), para. 341.

³¹⁰ [Blagojević & Jokić Trial Judgment](#), para. 854.

good character, [...] a Trial Chamber, in exercise of its discretion, may credit an accused for fully complying with certain obligations, [...] or may permissibly credit an accused for preventing the commission of crimes'.³¹¹ In contrast, Mr Ntaganda's intervention was found to have contributed to the common plan, the implementation of which resulted in the commission of crimes.³¹² Similarly, in *Karadzic*, the ICTY Trial Chamber found that his decision to withdraw from politics and public life was a mitigating circumstance that had a 'positive influence on the establishment of peace and stability' in Bosnia and Herzegovina.³¹³ Thus, unlike in Mr Ntaganda's case, Karadzic's actions were not aimed at the commission of further crimes.

154. Finally, Mr Ntaganda cites to the *Al Mahdi* case and argues that guilty pleas may diminish a sentence despite the 'self-interested motives that might underpin such a plea'.³¹⁴ The Appeals Chamber considers this analogy to guilty pleas to be immaterial to Mr Ntaganda's circumstances. As noted by the Trial Chamber in the *Al Mahdi* case, an admission of guilt contributes to the expeditious resolution of a case, thus 'saving the Court's time and resources and relieving witnesses and victims of what can be a stressful burden of giving evidence in Court'.³¹⁵ It may also have a deterrent effect on others tempted to commit similar crimes.³¹⁶ Therefore, an admission of guilt may have mitigating value when determining a sentence. In contrast, Mr Ntaganda's act of saving the lives of 64 enemy combatants in order to integrate them into his own army and further the common plan has no corresponding value. Accordingly, the Appeals Chamber finds no merit in Mr Ntaganda's argument that his actions amounted to a 'substantial humanitarian act'. The Appeals Chamber, therefore, rejects this argument.

155. Second, Mr Ntaganda argues that the Trial Chamber's finding concerning his motive for saving the lives of the enemy combatants lacked a proper evidential basis.³¹⁷ In particular, Mr Ntaganda submits that the Trial Chamber's dismissal of his actions was 'legally wrong, and based on a speculative finding of fact as to [his]

³¹¹ [Blagojević & Jokić Appeal Judgment](#), para. 342 (footnotes omitted).

³¹² [Sentencing Decision](#), para. 212.

³¹³ [Karadžić Trial Judgment](#), para. 6057.

³¹⁴ [Mr Ntaganda's Appeal Brief](#), para. 80.

³¹⁵ [Al Mahdi Conviction and Sentencing Decision](#), para. 100 (footnotes omitted).

³¹⁶ [Al Mahdi Conviction and Sentencing Decision](#), para. 100.

³¹⁷ [Mr Ntaganda's Appeal Brief](#), paras 81-82.

motive’.³¹⁸ The Appeals Chamber notes that Mr Ntaganda essentially takes issue with the Trial Chamber’s use of the word ‘appear’ when determining that his actions ‘*appear* to have been aimed at using the soldiers for the benefit of the common plan [...]’.³¹⁹ For the reasons that follow, the Appeals Chamber is not persuaded by this argument.

156. Contrary to Mr Ntaganda’s argument, the Trial Chamber’s finding on Mr Ntaganda’s motive was based upon all of the evidence before it. P-0016 specifically stated that Mr Ntaganda preferred to integrate and train him and the other 63 soldiers into the UPC/FPLC because at that time the armed group did not have any trained soldiers of its own.³²⁰ Furthermore, in the Conviction Decision, the Trial Chamber noted that ‘[t]he UPC/FPLC used several forms of recruitment’,³²¹ and that ‘[a]s a result of these different forms of recruitment, some individuals joined the UPC/FPLC voluntarily, and others were recruited forcibly’.³²² In particular, the Trial Chamber found that Mr Ntaganda was (i) involved in the recruitment process,³²³ and (ii) made a decisive contribution to setting up an efficient military group and devising its military tactic.³²⁴ Consequently, the Appeals Chamber finds that it was reasonable for the Trial Chamber to find, on a balance of probabilities, that Mr Ntaganda’s motive for saving the 64 enemy combatants ‘*appear* to have been aimed at using the soldiers for the benefit of the common plan’.³²⁵ Rather than being speculative, the Trial Chamber’s finding was established on a proper evidentiary basis. Mr Ntaganda’s argument is therefore rejected.

³¹⁸ [Mr Ntaganda’s Appeal Brief](#), para. 82.

³¹⁹ [Sentencing Decision](#), para. 212 (emphasis added).

³²⁰ [Sentencing Decision](#), para. 212, *referring to* **P-0016**: DRC-OTP-0126-0422-R03, para. 47.

³²¹ [Conviction Decision](#), para. 348.

³²² [Conviction Decision](#), para. 350; on this point, the Trial Chamber further noted, at the same paragraph, that ‘[t]he motives of those who joined voluntarily included the loss of their parents and the need to seek refuge for lack of other options, as well as a desire to avenge family members’ deaths.’ (footnotes omitted).

³²³ [Conviction Decision](#), para. 355, *referring to, inter alia*, **P-0055**: T-70, pp. 60 to 61, T-71, p. 63. *See also* [Conviction Decision](#), paras 831-832 (‘[t]he evidence demonstrates that the Mandro training centre was established by Mr Ntaganda. [...] The training of recruits in the UPC/FPLC was under the responsibility of Mr Ntaganda [...]. He personally taught recruits at Mandro [...]. He also decided on the deployment of soldiers after training [...]’) (footnotes omitted).

³²⁴ [Conviction Decision](#), paras 830-846.

³²⁵ [Sentencing Decision](#), para. 212.

157. Accordingly, having considered and rejected Mr Ntaganda's arguments the Appeals Chamber rejects this ground of appeal.

H. Eighth ground of appeal: Alleged failure to consider Mr Ntaganda's personal experience in the Rwandan genocide as a mitigating circumstance

158. Under this ground of appeal, Mr Ntaganda argues that the Trial Chamber erred in law, or misappreciated the facts, by failing to consider his 'traumatic personal experience in the Rwandan genocide' as a mitigating factor.³²⁶ He argues that while his 'motivations and personal circumstances that led him into his criminal conduct' are no justification for his actions, they nevertheless are 'highly relevant to assessing his culpability and should have been taken into consideration in mitigation'.³²⁷ In his view, the Trial Chamber's error 'materially contributed to a disproportionate individual sentence' and, as a result, Mr Ntaganda requests that the Appeals Chamber address the issue *de novo*.³²⁸

I. Relevant part of the Sentencing Decision

159. The Trial Chamber noted Mr Ntaganda's submissions concerning his experiences during the Rwandan genocide and the persecution of the Hema, which had taken place in the DRC, before the crimes for which he was convicted had occurred.³²⁹ In particular, the Trial Chamber noted his submission that while his experience neither "excuses or justifies" the crimes for which he was convicted, his "actions" were a reaction to what he saw as the continuation of the genocide [...]"³³⁰

160. In addressing these arguments, the Trial Chamber explained that while it did 'not doubt the traumatic impact on Mr Ntaganda of having lived through the Rwandan genocide, including the loss of his close family members', it nevertheless 'did not find Mr Ntaganda credible when he affirmed that he always fought and acted, including in 2002 and 2003, for the liberation and freedom of the civilian population in general in Ituri and that this revolutionary ideology was governing the functioning of the

³²⁶ [Mr Ntaganda's Appeal Brief](#), para. 83.

³²⁷ [Mr Ntaganda's Appeal Brief](#), paras 94-95, respectively.

³²⁸ [Mr Ntaganda's Appeal Brief](#), para. 96.

³²⁹ [Sentencing Decision](#), para. 209.

³³⁰ [Sentencing Decision](#), para. 209.

UPC/FPLC’.³³¹ Moreover, the Trial Chamber recalled that it had found, beyond reasonable doubt, that

Mr Ntaganda agreed to a common plan to drive out all the Lendu from the localities targeted during the UPC/FPLC’s military campaign against the RCD-K/ML, and by way of this agreement, meant the *destruction and disintegration* of the Lendu community, which inherently involved the targeting of civilian individuals by way of acts of killing, rape, and the targeting of their public and private property.³³²

161. Consequently, the Trial Chamber considered that ‘the alleged protection of one group through acts aimed at the destruction and disintegration of another cannot under any circumstance constitute a matter of mitigation’.³³³ The Trial Chamber therefore gave no weight in mitigation to this matter.³³⁴

2. *Summary of submissions*

(a) **Mr Ntaganda’s submissions**

162. Mr Ntaganda argues that the Trial Chamber ‘fundamentally misunderstood’ the significance of his ‘traumatic personal experience in the Rwandan genocide’.³³⁵ He contends that his submissions about his experiences were not meant to justify his criminal conduct, rather, they were meant to ‘contextualize and explain’ it.³³⁶ With reference to case law of various domestic jurisdictions,³³⁷ Mr Ntaganda argues that an offender’s past trauma is highly relevant to the sentencing process and could serve to diminish an offender’s culpability.³³⁸

163. In addition, Mr Ntaganda argues that given the absence of ‘any reasons’, from the Trial Chamber with respect to his argument, the Appeals Chamber should address

³³¹ [Sentencing Decision](#), para. 210.

³³² [Sentencing Decision](#), para. 210, referring to [Conviction Decision](#), paras 808-809 (emphasis in original).

³³³ [Sentencing Decision](#), para. 210.

³³⁴ [Sentencing Decision](#), para. 210.

³³⁵ [Mr Ntaganda’s Appeal Brief](#), para. 83.

³³⁶ [Mr Ntaganda’s Appeal Brief](#), para. 83.

³³⁷ [Mr Ntaganda’s Appeal Brief](#), paras 84-85, referring to [Porter v. McCollum](#); [R v Williams](#); [R. v B.V.T.](#); [Bugmy v. The Queen](#).

³³⁸ [Mr Ntaganda’s Appeal Brief](#), para. 87.

the issue *de novo* and find that his ‘unique and exceptional background must be taken into consideration in substantial mitigation of sentence’.³³⁹

(b) The Prosecutor’s submissions

164. The Prosecutor submits that Mr Ntaganda incorrectly claims that the Trial Chamber misunderstood his arguments regarding the Rwandan genocide.³⁴⁰ She avers that before the Trial Chamber, Mr Ntaganda used his experience during the genocide to ‘explain—and to a certain extent justify—his criminal actions to diminish his culpability’.³⁴¹ However, on appeal Mr Ntaganda appears to suggest that this evidence was not raised to justify his criminal conduct and should have been considered as a ‘mitigating factor *per se*’, since the “‘traumatic family circumstances of an offender are routinely taken into consideration in mitigation’”.³⁴² To the extent that Mr Ntaganda modifies his arguments on appeal, the Prosecutor contends that they should be dismissed *in limine*.³⁴³

165. The Prosecutor further argues that it was within the Trial Chamber’s discretion to determine whether Mr Ntaganda’s past experience in Rwanda could mitigate his sentence.³⁴⁴ In her view, the case law relied upon by Mr Ntaganda in support of his argument are ‘factually distinct’ and ‘do not establish that traumatic experiences automatically mitigate a sentence’.³⁴⁵ Finally, the Prosecutor submits that since the Trial Chamber’s decision ‘evinces no error, the Appeals Chamber need not conduct a *de novo* determination of this matter’.³⁴⁶

(c) The victims’ observations

166. Victims Group 2 submit that Mr Ntaganda failed to establish on the ‘balance of probabilities’ standard that the trauma resulting from his experience in Rwanda had an impact on his criminal conduct and was therefore a mitigating factor.³⁴⁷ Furthermore, they aver that Mr Ntaganda should have presented ‘additional evidence’ in support of

³³⁹ [Mr Ntaganda’s Appeal Brief](#), para. 96.

³⁴⁰ [Prosecutor’s Response](#), para. 105.

³⁴¹ [Prosecutor’s Response](#), para. 108.

³⁴² [Prosecutor’s Response](#), para. 107.

³⁴³ [Prosecutor’s Response](#), para. 108.

³⁴⁴ [Prosecutor’s Response](#), para. 106.

³⁴⁵ [Prosecutor’s Response](#), para. 109.

³⁴⁶ [Prosecutor’s Response](#), para. 104.

³⁴⁷ [Observations of Victims Group 2](#), paras 20-21.

his contention.³⁴⁸ In their view, Mr Ntaganda's testimony, alone, about his traumatic experience was insufficient to demonstrate, on a balance of probabilities, the impact of same on the specific conduct for which he was found guilty.³⁴⁹ In addition, they submit that, before the Trial Chamber, Mr Ntaganda's arguments were 'general' and 'abstract' and were 'incapable of demonstrating a link between the *trauma* allegedly suffered and the *conduct* that would have concretely been affected by said trauma'.³⁵⁰ Based on the submissions and the evidence before it at the time, Victims Group 2 submit that the Trial Chamber 'reached an entirely reasonable conclusion'.³⁵¹

(d) Mr Ntaganda's response to the victims

167. Mr Ntaganda disputes Victims Group 2's observation that he failed to establish to the requisite standard of proof how his traumatic experience impacted on his criminal conduct. He maintains that the purpose of his argument was to 'contextualize and explain' his criminal conduct.³⁵² In addition, he avers that since the Trial Chamber found that his past traumatic experience did have an impact on him, there was no need to have adduced further evidence.³⁵³

3. *Determination by the Appeals Chamber*

168. In essence, Mr Ntaganda disputes the Trial Chamber's rejection of his traumatic personal experience in the Rwandan genocide, which he argues should have been taken into account in mitigation of his sentence.³⁵⁴ Mr Ntaganda argues that, by failing to do so, the Trial Chamber erred in law or misappreciated the facts.³⁵⁵ For the reasons that follow, the Appeals Chamber is not persuaded by these arguments.

169. The Appeals Chamber notes that in his submissions before the Trial Chamber, Mr Ntaganda recounted his experiences of the genocide and emphasised the similarities between the massacres he had witnessed in Rwanda with the massacres that took place in the DRC against the Hema.³⁵⁶ Mr Ntaganda argued that in

³⁴⁸ [Observations of Victims Group 2](#), para. 20.

³⁴⁹ [Observations of Victims Group 2](#), para. 21.

³⁵⁰ [Observations of Victims Group 2](#), para. 23 (emphasis in original).

³⁵¹ [Observations of Victims Group 2](#), para. 24.

³⁵² [Mr Ntaganda's Response to Observations of Victims](#), paras 20-21.

³⁵³ [Mr Ntaganda's Response to Observations of Victims](#), para. 23.

³⁵⁴ [Mr Ntaganda's Appeal Brief](#), paras 83, 94-95.

³⁵⁵ [Mr Ntaganda's Appeal Brief](#), para. 83.

³⁵⁶ [Mr Ntaganda's Sentencing Submissions](#), para. 108, referring to **D-0300: T-243**, p. 35, lines 2-19.

committing the crimes for which he was convicted, he was reacting ‘to what he saw as the continuation of the genocide that he had already lived through, and that had required force of arms to stop’.³⁵⁷

170. In addressing these submissions, the Trial Chamber expressly acknowledged the suffering and discrimination that Mr Ntaganda had endured as a result of his experience in the genocide but considered that this matter could not mitigate his sentence.³⁵⁸ In particular, the Trial Chamber recalled that it did not find Mr Ntaganda to be credible when he ‘affirmed that he always fought and acted, including in 2002 and 2003, for the liberation and freedom of the civilian population in general in Ituri [...]’.³⁵⁹ Furthermore, the Trial Chamber recalled that it had ‘found beyond reasonable doubt that Mr Ntaganda agreed to a common plan to drive out all the Lendu from the localities targeted during the UPC/FPLC’s military campaign’ and ‘by way of this agreement, meant the *destruction and disintegration* of the Lendu community [...]’.³⁶⁰ In this context, the Trial Chamber concluded that ‘the alleged protection of one group through acts aimed at the destruction and disintegration of another cannot under any circumstance constitute a matter of mitigation’.³⁶¹

171. The Appeals Chamber finds that it was reasonable for the Trial Chamber to consider that Mr Ntaganda’s personal traumatic experience could not diminish his culpability given his criminal conduct and the gravity of his crimes. Indeed, the Appeals Chamber considers that Mr Ntaganda’s actions cannot be reconciled with what he claimed the genocide had taught him. In particular, Mr Ntaganda testified that

I remember that when we put an end to the genocide in Rwanda, our superiors told us that what we had just seen, those of us soldiers, if possible, we had to do everything to prevent this from happening again in Africa. And this was in my mind wherever I went. I testified about that. And I told myself that I do not wish to see any community, any other community experience what my own community went through.³⁶²

³⁵⁷ [Mr Ntaganda’s Sentencing Submissions](#), para. 110.

³⁵⁸ [Sentencing Decision](#), para. 210.

³⁵⁹ [Sentencing Decision](#), para. 210.

³⁶⁰ [Sentencing Decision](#), para. 210 (emphasis in original).

³⁶¹ [Sentencing Decision](#), para. 210.

³⁶² D-0300: T-209, p. 41.

172. Consequently, the Appeals Chamber finds no merit in Mr Ntaganda's argument that the Trial Chamber 'misunderstood' his submissions or misappreciated the facts concerning his personal traumatic experience in the Rwandan genocide.³⁶³

173. In addition, the Appeals Chamber notes Mr Ntaganda's argument that a convicted person's previous traumatic and personal circumstances is 'highly relevant' to assessing his/her culpability and is 'routinely' taken into account for this purpose.³⁶⁴ In support of this argument, Mr Ntaganda refers to cases from various domestic jurisdictions.³⁶⁵ In particular, Mr Ntaganda cites to the case of *Porter v. McCollum*, in which the US Supreme Court reversed a death sentence imposed upon Mr Porter because his counsel had failed to investigate and present evidence of Mr Porter's 'abusive childhood, his heroic military service and [associated] trauma [...], his long-term substance abuse, and his impaired mental health and mental capacity'.³⁶⁶ An expert in neuropsychology testified that Mr Porter's 'brain damage [...] could manifest in impulsive, violent behaviour' and that, at the time of the crime, 'Porter was substantially impaired in his ability to conform his conduct to the law and suffered from an extreme mental or emotional disturbance, two statutory mitigating circumstances'.³⁶⁷ Furthermore, Mr Ntaganda cites to other domestic case law, namely, *R v Williams*, *R. v B.V.T.* and *Bugmy v The Queen*, where the sentenced persons had either been sexually abused as children or had abused alcohol and drugs at a very young age.³⁶⁸ The Appeals Chamber considers that the potential impact of a convicted person's previous traumatic circumstances on his or her sentence is necessarily a fact specific assessment. The personal circumstances of the sentenced persons in the cases relied upon by Mr Ntaganda are not comparable with his case; the Appeals Chamber notes especially that no evidence was adduced to show that he suffered brain damage or any other form of mental illness as a result of traumatic experiences he may have encountered during the Rwandan genocide. In these

³⁶³ [Mr Ntaganda's Appeal Brief](#), para. 83.

³⁶⁴ [Mr Ntaganda's Appeal Brief](#), paras 83, 94-95.

³⁶⁵ [Mr Ntaganda's Appeal Brief](#), paras 84-85, referring to [Porter v. McCollum](#); [R v Williams](#); [R. v B.V.T.](#); [Bugmy v. The Queen](#).

³⁶⁶ [Porter v. McCollum](#), p. 4.

³⁶⁷ [Porter v. McCollum](#), p. 6.

³⁶⁸ [R v Williams](#), para. 23-28; [R. v B.V.T.](#); paras 10, 20; [Bugmy v. The Queen](#), para. 12.

circumstances, the Appeals Chamber considers Mr Ntaganda's reliance on the abovementioned domestic cases to be misplaced.

174. Finally, the Appeals Chamber recalls that in determining what constitutes a mitigating factor, and the weight, if any, to attribute to it, trial chambers have broad discretion.³⁶⁹ Consequently, the individual circumstances of a convicted person will not as a matter of routine amount to a mitigating circumstance. Mr Ntaganda's argument is therefore rejected.

175. Accordingly, having considered and rejected Mr Ntaganda's arguments the Appeals Chamber rejects this ground of appeal.

I. Ninth ground of appeal: Alleged error in rejecting evidence that Mr Ntaganda protected civilians and punished crimes committed against civilians

176. Under this ground of appeal, Mr Ntaganda submits that the Trial Chamber erred in failing to make findings on and accord weight in mitigation to the following: (i) that he 'welcomed and protected Lendu civilians in Mandro in June 2002';³⁷⁰ (ii) that he protected civilians on several occasions;³⁷¹ and (iii) that he punished crimes committed by FPLC troops against civilians.³⁷²

1. Protection of Lendu civilians in Mandro

(a) Relevant part of the Sentencing Decision

177. In his submissions before the Trial Chamber, Mr Ntaganda argued that he welcomed and protected Lendu civilians in June 2002, and that this constituted 'substantial mitigation'.³⁷³ The Trial Chamber noted that D-0054 – whose testimony Mr Ntaganda relied upon – 'refers to Chief Kawha [*sic*] having given shelter in Mandro to some Lendu civilians who fled an attack by a group of Lendu "combatants" in June 2002'.³⁷⁴ It further observed that, although D-0054 mentioned a person named 'Bosco' being part of the delegation sent to collect the civilians, the

³⁶⁹ [Bemba et al. Sentencing Appeal Judgment](#), para. 188; [Lubanga Sentencing Appeal Judgment](#), para. 111.

³⁷⁰ [Mr Ntaganda's Appeal Brief](#), paras 97-103.

³⁷¹ [Mr Ntaganda's Appeal Brief](#), paras 97-98, 104-105.

³⁷² [Mr Ntaganda's Appeal Brief](#), paras 98, 106-108.

³⁷³ [Sentencing Decision](#), para. 213, referring to [Mr Ntaganda's Sentencing Submissions](#), para. 115.

³⁷⁴ [Sentencing Decision](#), para. 214, referring to **D-0054: T-243**, p. 71; and **T-244**, pp. 6-22.

witness provided ‘no other details on this person’s role in the events’.³⁷⁵ The Trial Chamber also recalled its finding ‘beyond reasonable doubt’ that ‘Mr Ntaganda agreed to a common plan to drive out all the Lendu from the localities targeted during the course of the UPC/FPLC’s military campaign and meant the destruction and disintegration of the Lendu community’.³⁷⁶ In light of this and ‘the limited concrete evidence on [Mr Ntaganda’s] actual role in the event described by D-0054’,³⁷⁷ the Trial Chamber did not consider this matter to be established on a balance of probabilities and gave it no weight in mitigation.³⁷⁸

(b) Summary of submissions

(i) *Mr Ntaganda’s submissions*

178. Mr Ntaganda challenges the Trial Chamber’s rejection of the evidence of D-0054 and others that he ‘welcomed and protected Lendu civilians at Mandro’, who fled attacks.³⁷⁹ He submits that the Trial Chamber’s conclusion regarding D-0054’s identification of him ‘as “Bosco” was ‘manifestly unreasonable’.³⁸⁰ In Mr Ntaganda’s view, the Trial Chamber ‘had no evidence to nourish its supposition that there might be another commander named “Bosco” to whom D-0054 could have been referring’.³⁸¹ Moreover, Mr Ntaganda argues that in the absence of any cross-examination on the part of the Prosecutor of D-0054 on ‘this or any other point’ it ‘must, in the circumstances, be treated as a tacit acceptance’ that the ‘Bosco’ mentioned by the witness was him.³⁸² Mr Ntaganda avers that the Trial Chamber failed to address his testimony corroborating the testimony of D-0054 on this issue.³⁸³ Furthermore, he contends that the Trial Chamber’s reliance on its finding that he participated in a common plan is ‘not a proper basis for categorically rejecting that he protected Lendu civilians’.³⁸⁴ Mr Ntaganda refers to ICTR cases in which actions of saving the lives of Tutsis were accepted in mitigation with respect to persons

³⁷⁵ [Sentencing Decision](#), para. 214, referring to **D-0054: T-244**, pp. 16-17.

³⁷⁶ [Sentencing Decision](#), para. 214, referring to [Conviction Decision](#), paras 808-809.

³⁷⁷ [Sentencing Decision](#), para. 214.

³⁷⁸ [Sentencing Decision](#), para. 214.

³⁷⁹ [Mr Ntaganda’s Appeal Brief](#), para. 99.

³⁸⁰ [Mr Ntaganda’s Appeal Brief](#), para. 97.

³⁸¹ [Mr Ntaganda’s Appeal Brief](#), para. 100.

³⁸² [Mr Ntaganda’s Appeal Brief](#), para. 100.

³⁸³ [Mr Ntaganda’s Appeal Brief](#), para. 101, referring to **D-0300: T-213**, p. 70, line 20 to p. 71, line 13; **D-0300: T-231**, p. 10, line 18 to p. 13, line 5.

³⁸⁴ [Mr Ntaganda’s Appeal Brief](#), para. 102.

convicted of genocide.³⁸⁵ Mr Ntaganda avers that the Trial Chamber's rejection of evidence of his efforts to protect the lives of Lendu civilians amounts to an error of law or fact.³⁸⁶

(ii) *The Prosecutor's submissions*

179. The Prosecutor submits that Mr Ntaganda failed to show that he protected Lendu civilians in Mandro,³⁸⁷ that he 'misreads' the Sentencing Decision and 'misapprehends the evidence'.³⁸⁸ She avers that the Trial Chamber was correct to discount the evidence of D-0054 and that it did so due to the limited concrete evidence on Mr Ntaganda's actual role in the event described by D-0054,³⁸⁹ together with its finding that Mr Ntaganda 'agreed to a common plan to drive out all the Lendu from the localities targeted in the UPC/FPLC military campaign' shortly after the incident.³⁹⁰ The Prosecutor argues that her decision not to cross-examine D-0054 does not equate to a tacit acceptance of this testimony and that the witness did not provide 'substantive evidence that required any cross-examination'.³⁹¹ Lastly, she points to the vagueness of Mr Ntaganda's testimony on the matter and recalls the Trial Chamber's findings on the lack of credibility of his testimony.³⁹²

(c) **Determination by the Appeals Chamber**

180. Mr Ntaganda's main argument under this sub-ground of appeal concerns the testimony of D-0054 on a certain individual referred to as 'Bosco', who was part of the delegation sent by Chief Kahwa to collect Lendu civilians fleeing an attack and to provide them with shelter in Mandro.³⁹³ Mr Ntaganda argues that the Trial Chamber should have accepted this testimony and should have accorded weight to it in mitigation of his sentence, as (i) '[t]he Chamber recognised that Mr. Ntaganda was based in Mandro' at the relevant time; (ii) 'Mr. Ntaganda, according to the Chamber, worked closely with Chief Kahwa'; and (iii) '[t]he Chamber had no evidence to

³⁸⁵ [Mr Ntaganda's Appeal Brief](#), para. 102, referring to [Serugendo Trial Judgment](#), para. 69; [Nzabirinda Sentencing Judgment](#), para. 77; [Rugambarara Sentencing Judgment](#), para. 37.

³⁸⁶ [Mr Ntaganda's Appeal Brief](#), para. 103.

³⁸⁷ [Prosecutor's Response](#), paras 113-116. See also [T-272](#), p. 34, line 14.

³⁸⁸ [Prosecutor's Response](#), para. 114.

³⁸⁹ [Prosecutor's Response](#), para. 114, referring to [Sentencing Decision](#), para. 214.

³⁹⁰ [Prosecutor's Response](#), para. 114.

³⁹¹ [Prosecutor's Response](#), para. 115.

³⁹² [Prosecutor's Response](#), para. 116, referring to [Mr Ntaganda's Appeal Brief](#), para. 101 and [Sentencing Decision](#), para. 215.

³⁹³ [Sentencing Decision](#), para. 214.

nourish its supposition that there might be another commander named “Bosco” to whom D-0054 could have been referring’.³⁹⁴

181. The Appeals Chamber notes that, contrary to Mr Ntaganda’s contention, the Trial Chamber did not reject the evidence of D-0054 due to an insufficient identification of ‘Bosco’. Rather, the Trial Chamber rejected this evidence because D-0054 did not provide details on ‘this person’s role in the events.’³⁹⁵ The Appeals Chamber notes that D-0054’s testimony on the event in issue was limited and does not support Mr Ntaganda’s allegation that he protected Lendu civilians.³⁹⁶ Furthermore, in its assessment of this evidence, the Trial Chamber referred to its findings in the Conviction Decision on Mr Ntaganda’s agreement to the common plan ‘to drive out all the Lendu from the localities targeted during the course of the UPC/FPLC’s military campaign’.³⁹⁷ The Appeals Chamber sees no error in the Trial Chamber’s reliance on this fact, given its relevance. The Trial Chamber properly exercised its discretion in balancing all the relevant factors to reach its conclusion on this matter.

182. Regarding Mr Ntaganda’s contention that the Trial Chamber failed to address his corroborating testimony,³⁹⁸ the Appeals Chamber notes that this testimony relates to Mr Ntaganda’s whereabouts at the time and to his work with Chief Kahwa. It thus appears that Mr Ntaganda seeks to show that the Trial Chamber disregarded evidence that supports the identification of ‘Bosco’ by D-0054. However, as discussed earlier, the Trial Chamber’s primary concern was not the identification of ‘Bosco’, but ‘the limited concrete evidence on [Mr Ntaganda’s] actual role in the event’.³⁹⁹ Mr Ntaganda’s testimony would therefore not be relevant to this issue. Consequently, Mr Ntaganda has not demonstrated that the Trial Chamber’s failure to consider his testimony undermines its assessment and conclusion.

³⁹⁴ [Mr Ntaganda’s Appeal Brief](#), para. 100.

³⁹⁵ [Sentencing Decision](#), para. 214, *referring to, inter alia*, [T-243](#), p. 71; and [T-244](#), pp. 6-22.

³⁹⁶ [T-244](#), p. 16, lines 12-20, 23

³⁹⁷ [Sentencing Decision](#), para. 214, *referring to* [Conviction Decision](#), paras 808-809.

³⁹⁸ [Mr Ntaganda’s Appeal Brief](#), para. 101, *referring to* **D-0300**: [T-213](#), p. 70, line 20 to p. 71, line 13; **D-0300**: [T-231](#), p. 10, line 18 to p. 13, line 5.

³⁹⁹ [Sentencing Decision](#), para. 214.

183. In view of its above conclusions regarding the testimony of D-0054, the Appeals Chamber finds it unnecessary to consider Mr Ntaganda's arguments based on jurisprudence of the *ad hoc* tribunals.⁴⁰⁰

184. For the foregoing reasons, the Appeals Chamber rejects Mr Ntaganda's arguments regarding the testimony of D-0054.

2. *Protection of other civilians by deploying troops*

(a) **Relevant part of the Sentencing Decision**

185. In considering the evidence that Mr Ntaganda tried to protect civilians against attacks, the Trial Chamber noted that this only consisted of his own testimony,⁴⁰¹ and recalled that it did not find his testimony credible that in 2002 and 2003 he fought and acted 'for the liberation and freedom of the civilian population in general in Ituri'.⁴⁰² It also recalled its findings that: (i) 'the Lendu did not return to Mongbwalu after the UPC/FPLC's takeover of the town while the UPC/FPLC was still there because of the risk of being killed';⁴⁰³ (ii) 'the UPC/FPLC's conduct in the aftermath of the assault was clearly aimed at creating conditions to hamper the return of the Lendu for at least a considerable period';⁴⁰⁴ and (iii) '[the UPC/FPLC's] conduct in the aftermath of the assaults on Lipri, Tsili, Kobu, and Bambu also deterred the population from returning'.⁴⁰⁵

186. Consequently, the Trial Chamber did not consider it to be established on a balance of probabilities 'that Mr Ntaganda genuinely tried to protect the civilian population – at least not the Lendu civilian population - from attacks once areas had been secured', and gave this factor no weight in mitigation.⁴⁰⁶

(b) **Summary of submissions**

(i) *Mr Ntaganda's submissions*

⁴⁰⁰ [Mr Ntaganda's Appeal Brief](#), para. 102, referring to [Serugendo Trial Judgment](#), para. 69; [Nzabirinda Sentencing Judgment](#), para. 77; [Rugambarara Sentencing Judgment](#), para. 37.

⁴⁰¹ [Sentencing Decision](#), para. 215.

⁴⁰² [Sentencing Decision](#), para. 215, referring to [Conviction Decision](#), para. 261.

⁴⁰³ [Sentencing Decision](#), para. 215, referring to [Conviction Decision](#), para. 536.

⁴⁰⁴ [Sentencing Decision](#), para. 215, referring to [Conviction Decision](#), para. 1061.

⁴⁰⁵ [Sentencing Decision](#), para. 215, referring to [Conviction Decision](#), para. 1067.

⁴⁰⁶ [Sentencing Decision](#), para. 215.

187. Mr Ntaganda avers that the Trial Chamber erred in failing to find that he engaged in substantial actions to protect civilians and in according no weight to this factor in mitigation.⁴⁰⁷ He submits that the Trial Chamber ‘misappreciated the evidence’ by considering that there was only his testimony in support of the alleged events, as there was also other evidence that he protected civilians in two locations – the Nyangaray road and Risasi.⁴⁰⁸ Alternatively, he avers that the Trial Chamber applied a standard significantly higher than ‘balance of probability’.⁴⁰⁹

(ii) The Prosecutor’s submissions

188. The Prosecutor submits that Mr Ntaganda failed to show on a balance of probabilities that he tried to protect civilians after he secured areas.⁴¹⁰ She contends that Mr Ntaganda cannot use his appeal against his sentence to challenge the Trial Chamber’s findings in the Conviction Decision.⁴¹¹ The Prosecutor submits that the Trial Chamber was correct to rely on its findings from the Conviction Decision to determine an appropriate sentence,⁴¹² and argues that Mr Ntaganda’s reference to ‘two items of evidence and five extracts of his testimony does not assist his claim’.⁴¹³

(c) Determination by the Appeals Chamber

189. Mr Ntaganda argues that the Trial Chamber ‘improperly relie[d] on several findings’ in the Conviction Decision to contradict alleged incidents of protection of civilians.⁴¹⁴ However, he does not specify what was improper about the Trial Chamber’s reliance on its findings. The Appeals Chamber finds no merit in Mr Ntaganda’s contention and notes that a trial chamber may rely on its findings made in the conviction decision for the purpose of determining an appropriate sentence. In the case at hand, the Trial Chamber noted a number of findings made in the Conviction

⁴⁰⁷ [Mr Ntaganda’s Appeal Brief](#), paras 97, 104-105 (In particular, Mr Ntaganda refers to the following, at paragraph 104: ‘(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’).

⁴⁰⁸ [Mr Ntaganda’s Appeal Brief](#), para. 105.

⁴⁰⁹ [Mr Ntaganda’s Appeal Brief](#), para. 105.

⁴¹⁰ [Prosecutor’s Response](#), paras 113, 117-119. *See also* [T-272](#), p. 34, line 14.

⁴¹¹ [Prosecutor’s Response](#), para. 117.

⁴¹² [Prosecutor’s Response](#), para. 117.

⁴¹³ [Prosecutor’s Response](#), para. 119 (footnotes omitted).

⁴¹⁴ [Mr Ntaganda’s Appeal Brief](#), para. 104.

Decision⁴¹⁵ to support its conclusion that it was not ‘established on a balance of probabilities that Mr Ntaganda genuinely tried to protect the civilian population – at least not the Lendu civilian population - from attacks once areas had been secured’.⁴¹⁶

190. Mr Ntaganda submits that apart from his testimony there was other evidence to establish that he protected civilians in the Nyangaray road and Risasi.⁴¹⁷ The Appeals Chamber, however, notes that Mr Ntaganda does not explain how this evidence contradicts the Trial Chamber’s findings such that its failure to expressly rely on this evidence would amount to an error. It is also not apparent from the video extracts and the testimony of D-0038, to which he refers.⁴¹⁸ Mr Ntaganda’s submission that the Trial Chamber ‘misappreciated the evidence’ is unfounded.⁴¹⁹

191. Accordingly, the Appeals Chamber sees no error in Trial Chamber’s approach nor in the exercise of its discretion in balancing all relevant factors to reach its conclusion on this matter. Mr Ntaganda’s arguments are, therefore, rejected.

3. *Punishment of crimes against civilians*

(a) **Relevant part of the Sentencing Decision**

192. In his sentencing submissions, Mr Ntaganda relied on the evidence that he personally ordered the arrest of (i-ii) ‘PIGWA and KASANGAKI for having stolen cows’; (iii) ‘ABELANGA for looting after the liberation of Mongbwalu’; (iv) ‘LINGANGA for launching an attack in a period of pacification’; and (v) ‘a renegade UPC commander for pillaging goods in Lopa, Katoto, and another village that was Lendu’.⁴²⁰ He further submits that (vi) he ‘openly approved of the execution of Liripa

⁴¹⁵ [Sentencing Decision](#), para. 215 (‘the Chamber recalls, as noted above, that it did not find Mr Ntaganda credible when he testified that he fought and acted in 2002 and 2003 for the liberation and freedom of the civilian population in general in Ituri. It also recalls its findings that the Lendu did not return to Mongbwalu after the UPC/FPLC’s takeover of the town while the UPC/FPLC was still there because of the risk of being killed, that the UPC/FPLC’s conduct in the aftermath of the assault was clearly aimed at creating conditions to hamper the return of the Lendu for at least a considerable period, and that its conduct in the aftermath of the assaults on Lipri, Tsili, Kobu, and Bambu also deterred the population from returning.’) (footnotes omitted), *referring to* [Conviction Decision](#), paras 261, 536, 1061, 1067.

⁴¹⁶ [Sentencing Decision](#), para. 215.

⁴¹⁷ [Mr Ntaganda’s Appeal Brief](#), para. 105.

⁴¹⁸ DRC-OTP-0120-0294, at 01h24m10s-01h25m11s; translation: DRC-OTP-0176-0187, at 0238; DRC-OTP-0127-0058, at 23m44s-25m48s; translation: DRC-OTP-2102-3675, at 3696-3700); **D-0038: T-249**, p. 74, line 21 to p. 75, line 9.

⁴¹⁹ [Mr Ntaganda’s Appeal Brief](#), para. 105.

⁴²⁰ [Mr Ntaganda’s Sentencing Submissions](#), para. 122 (footnotes omitted).

as punishment for having killed a Lendu civilian’; (vii) ‘[a] soldier was executed, on the orders of Thomas Lubanga and in order to set a clear example, at Camp Ndromo for having severely mistreated a Nande family’; and (viii) he ‘ordered the burning of looted goods in Komanda’.⁴²¹

193. In analysing Mr Ntaganda’s alleged efforts to punish crimes against civilians, the Trial Chamber recalled its findings that for the UPC/FPLC, ‘rape, murder and pillage committed against the Lendu were not considered punishable offences’.⁴²² It further recalled its findings that most of the instances of punishment raised by Mr Ntaganda were, ‘*inter alia*, isolated in nature, not established due to a lack of credibility in the relevant testimony of Mr Ntaganda, or directed towards crimes against civilians of ethnicities other than Lendu’.⁴²³ As a result, the Trial Chamber considered that the acts referred to could not be ‘properly qualified as efforts to reduce the scale or mitigate the impact of crimes against the Lendu, or to prevent others from committing criminal acts against the Lendu’.⁴²⁴ Accordingly, the Trial Chamber gave no weight to these acts in mitigation.⁴²⁵

(b) Summary of submissions

(i) Mr Ntaganda’s submissions

194. Mr Ntaganda submits that the Trial Chamber erred in rejecting evidence that ‘[he] punish[ed] crimes committed by FPLC troops’ against civilians.⁴²⁶ He argues that the Trial Chamber ‘misappreciated the facts, or failed to give reasons’ when rejecting the evidence of ‘at least eight [...] highly probative acts of punishment’.⁴²⁷ Mr Ntaganda contends that it is irrelevant that the victims of crimes were not necessarily Lendu.⁴²⁸ He submits that the Trial Chamber ‘minimized’ his specific acts of punishment.⁴²⁹ Mr Ntaganda also challenges the Trial Chamber’s rejection of the

⁴²¹ [Mr Ntaganda’s Sentencing Submissions](#), para. 122 (footnotes omitted).

⁴²² [Sentencing Decision](#), para. 216, referring to [Conviction Decision](#), para. 332.

⁴²³ [Sentencing Decision](#), para. 216, referring to [Conviction Decision](#), para. 332, fns 885-886, 893.

⁴²⁴ [Sentencing Decision](#), para. 216.

⁴²⁵ [Sentencing Decision](#), para. 216.

⁴²⁶ [Mr Ntaganda’s Appeal Brief](#), para. 98. See also paras 106-108.

⁴²⁷ [Mr Ntaganda’s Appeal Brief](#), para. 106 (footnotes omitted).

⁴²⁸ [Mr Ntaganda’s Appeal Brief](#), para. 106.

⁴²⁹ [Mr Ntaganda’s Appeal Brief](#), para. 107.

evidence of a separate execution of an offending soldier “due to a lack of credibility” in Mr Ntaganda’s relevant testimony.⁴³⁰

(ii) *The Prosecutor’s submissions*

195. The Prosecutor submits that Mr Ntaganda ‘misrepresents’ the Sentencing Decision when arguing that the evidence in issue was rejected solely on the basis that the victims were not necessarily Lendu persons.⁴³¹ She asserts that the Trial Chamber’s decision to reject that evidence was reasonable.⁴³² Regarding Mr Ntaganda’s claim that the Trial Chamber ‘minimized’ his acts of punishment or erred in rejecting the evidence of the separate execution, the Prosecutor argues that Mr Ntaganda has already appealed these findings in his appeal against the Conviction Decision.⁴³³ Lastly, she avers that Mr Ntaganda ‘fails to place in context’ the Trial Chamber’s findings regarding his purported punitive measures.⁴³⁴

(c) **Determination by the Appeals Chamber**

196. The Appeals Chamber observes at the outset that Mr Ntaganda has raised similar arguments regarding the punishment of crimes committed by UPC/FPLC troops against civilians in his appeal against the Conviction Decision.⁴³⁵ The Appeals Chamber considered and rejected these arguments.⁴³⁶ The Appeals Chamber therefore dismisses his present arguments to the extent that Mr Ntaganda challenges the Trial Chamber’s reliance on its findings that (i) ‘rape, murder and pillage committed against the Lendu were not considered punishable offences’; and (ii) most of the

⁴³⁰ [Mr Ntaganda’s Appeal Brief](#), para. 108, quoting [Sentencing Decision](#), para. 216.

⁴³¹ [Prosecutor’s Response](#), para. 120. *See also* [T-272](#), p. 34, lines 14-15 ([t]he evidence did not show that Mr Ntaganda [...] punished perpetrators of crimes’).

⁴³² [Prosecutor’s Response](#), para. 120.

⁴³³ [Prosecutor’s Response](#), para. 121, referring to [Mr Ntaganda’s Appeal Brief – Part II](#), para. 126.

⁴³⁴ [Prosecutor’s Response](#), para. 122.

⁴³⁵ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 126 (‘the Chamber also failed to consider that the UPC/FPLC policy to *inter alia*, protect the civilian population as a whole, was also communicated to the troops *via* punishments meted out against UPC/FPLC members who committed violations. While the Chamber found that a disciplinary system was in place, it found that “these examples of punishment do not affect its finding that some offenses were not considered punishable within the UPC/FPLC”. That was an error. [...] [T]he Chamber failed to consider the impact of the two instances when the punishment of death by firing squad, in public, was imposed by the highest UPC/FPLC authorities, when a UPC/FPLC member looted from the house of a Nande civilian in Bunia and when a UPC/FPLC member killed a Lendu civilian in Mongbwalu. In both cases, this ultimate punishment was imposed to send a strong message and to deter the commission of crimes. [...] [T]he Chamber rejected numerous examples of disciplinary measures imposed based on the purported “isolated character of these incidents” [...]’) (footnotes omitted).

⁴³⁶ [Ntaganda Conviction Judgment](#), paras 371-372.

instances of punishment referred to by Mr Ntaganda were ‘isolated in nature’ or ‘not established due to a lack of credibility’.⁴³⁷

197. Mr Ntaganda further argues that the Trial Chamber’s dismissal of evidence on the basis that the victims were not Lendu is irrelevant.⁴³⁸ The Appeals Chamber notes that the Trial Chamber’s finding that punishments were ‘directed towards crimes against civilians of ethnicities other than Lendu’⁴³⁹ relates to only some of the instances of punishment raised by Mr Ntaganda. The relevant finding in the Conviction Decision is based on, *inter alia*, the testimony of P-0017 that a case of punishment for rape of a Nyali woman ‘was possible specifically because of the intervention of Floribert Kisembo, whose mother is of Nyali ethnicity’.⁴⁴⁰ In view of this finding, the Appeals Chamber considers that the Trial Chamber did not err in taking the ethnicity of victims into account in its determination of whether the instances of punishment could ‘be properly qualified as efforts to reduce the scale or mitigate the impact of crimes against the Lendu, or to prevent others from committing criminal acts against the Lendu’.⁴⁴¹ In view of the foregoing, the Appeals Chamber finds that the Trial Chamber has properly exercised its discretion. Mr Ntaganda’s arguments are, therefore, rejected.

198. Accordingly, having considered and rejected Mr Ntaganda’s arguments the Appeals Chamber rejects this ground of appeal.

J. Tenth ground of appeal: Alleged failure to find that Mr Ntaganda contributed to reconciliation with the Lendu

⁴³⁷ [Mr Ntaganda’s Appeal Brief](#), paras 107 ([t]he 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.”), 108 ([t]he 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”) (footnotes omitted). See [Sentencing Decision](#), para. 216 (“the Chamber found that rape, murder and pillage committed against the Lendu were not considered punishable offences. In addition, for most of the instances of punishment raised by the Defence, the Chamber recalls that it found them to be, *inter alia*, isolated in nature, not established due to a lack of credibility in the relevant testimony of Mr Ntaganda [...]”) (footnotes omitted).

⁴³⁸ [Mr Ntaganda’s Appeal Brief](#), para. 106.

⁴³⁹ [Sentencing Decision](#), para. 216, referring to [Conviction Decision](#), para. 332, fns 885-886.

⁴⁴⁰ [Conviction Decision](#), fn. 896, referring to **P-0017: T-59**, p. 42.

⁴⁴¹ [Sentencing Decision](#), para. 216.

community and facilitated the demobilisation of UPC/FPLC members

199. Under this ground of appeal, Mr Ntaganda submits that the Trial Chamber erred in failing to accord weight in mitigation 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.⁴⁴²

1. Contribution to peace and reconciliation with the Lendu community

(a) Relevant part of the Sentencing Decision

200. The Trial Chamber assessed the potentially mitigating circumstance related to ‘Mr Ntaganda’s alleged contribution to peace, reconciliation, and security in 2004 in Ituri’,⁴⁴³ noting that only a ‘genuine and concrete’ promotion of peace and reconciliation may warrant weight in mitigation.⁴⁴⁴

201. The Trial Chamber found that the evidence suggests the existence of ‘a strategic alliance between the UPC/FPLC and the FNI, as opposed to broader reconciliation and peace between the Lendu and Hema communities’,⁴⁴⁵ and that this alliance was being considered ‘to secure a high position at the national level’.⁴⁴⁶ Regarding ‘the July 2004 event held in Largu’, it found that it was a “rank giving ceremony”, where all soldiers that received ranks were UPC/FPLC officers.⁴⁴⁷ Furthermore, the Trial Chamber noted that the evidence ‘suggests that the majority of the Lendu community was reportedly dismissive in early 2004 of the FNI leader Floribert Njabu’s “rapprochement” with Mr Ntaganda’.⁴⁴⁸ Lastly, it considered the absence of evidence that Mr Ntaganda had visited any villages affected by the events.⁴⁴⁹

⁴⁴² [Mr Ntaganda’s Appeal Brief](#), paras 113-114. *See also* paras 111-112, 115-172.

⁴⁴³ [Sentencing Decision](#), paras 217-224.

⁴⁴⁴ [Sentencing Decision](#), para. 218.

⁴⁴⁵ [Sentencing Decision](#), para. 220.

⁴⁴⁶ [Sentencing Decision](#), para. 220.

⁴⁴⁷ [Sentencing Decision](#), para. 220, *referring to* **D-0306: T-267**, pp. 27-28. *See also* fn. 590 (‘**D-0047** also testified that this was a “military activity”’), *referring to* **T-267**, p. 52.

⁴⁴⁸ [Sentencing Decision](#), para. 220, *referring to* DRC-OTP-0009-0146-R01, at 0147-0148, para. 2(d).

⁴⁴⁹ [Sentencing Decision](#), para. 220. *See also* fn. 594 (‘**D-0047** testified that the UPC went to Kobu in January/February 2004, but the Chamber notes that, according to the witness, Mr Ntaganda was not present and that there is no concrete evidence of his role in relation to this event, apart from **D-0047** stating that he received a report of the visit’), *referring to* **D-0047: T-267**, p. 49; **T-267-FRA**, pp. 45-46.

202. The Trial Chamber further noted that the evidence indicates that Mr Ntaganda had ‘only a limited involvement’ in the peace process.⁴⁵⁰ It took into account evidence indicating that he encouraged an awareness raising initiative and ‘facilitated the security of FNI representatives in moving through Hema locations’.⁴⁵¹ Notwithstanding, it held that the evidence indicates that ‘the pacification campaign was in fact an FNI initiative’.⁴⁵² Likewise, the Trial Chamber found that Mr Ntaganda’s speeches on peace in Sali, Lopa and Largu, as well as the fact that he invited Lendu to a meeting in Lopa, indicated ‘some, but limited, involvement of Mr Ntaganda in the pacification campaign’.⁴⁵³ Moreover, it considered that the genuineness of his actions were contradicted by other evidence.⁴⁵⁴ The Trial Chamber noted D-0306’s testimony and other evidence demonstrating that ‘the UPC continued to harass the civilian population in Ituri’.⁴⁵⁵

⁴⁵⁰ [Sentencing Decision](#), para. 221.

⁴⁵¹ [Sentencing Decision](#), para. 221.

⁴⁵² [Sentencing Decision](#), para. 221, referring to **D-0306**: [T-267](#), pp. 12, 15-17.

⁴⁵³ [Sentencing Decision](#), para. 221, referring to **D-0302**: DRC-D18-0002-0023, at 0026, paras 20-22; **D-0303**: DRC-D18-0002-0001, at 0007, paras 37-40; and **D-0306**: [T-267](#), p. 20.

⁴⁵⁴ [Sentencing Decision](#), para. 221. See also fn. 599 (‘[i]n this respect, the Chamber has not accorded much weight to **D-0305**’s evidence on the outcome of the reconciliation activities or Mr Ntaganda’s role therein. The witness testified that people in Ituri “be it the Lendu people, the Hema people or Ngiti people [...] liked [Mr Ntaganda] a lot because of the peace and security that he brought to the region” [...]. The Chamber considers the credibility of the witness’s evidence on this subject, and her general evidence on Mr Ntaganda’s character, to be low, noting that she is an acquaintance of Mr Ntaganda’s [...], her indication that the reason for her testimony was to counter untrue things that have been said about Mr Ntaganda, in relation to whom she could not believe that he was someone who would have committed violent crimes [...], a matter clearly contradicted by the Chamber’s findings in this case, and further noting that she was evasive on the issue of her alleged membership in the FPLC [...].’), referring to **D-0305**: [T-266](#), pp. 36, 38-39, 44-46, 58-62.

⁴⁵⁵ [Sentencing Decision](#), para. 221. See also fn. 601 (‘[t]he Chamber notes blanket statements from **D-0302** that following pacification meetings in Largu and Lopa, there were no more problems between the Hema and the Lendu, and that thanks to Mr Ntaganda’s speeches, peace and reconciliation was restored between the two groups [...]. In assessing **D-0302**’s evidence, the Chamber notes other categorical statements from him such as that when Mr Ntaganda became Chief of Staff at the end of 2003, he emphasised the importance of protecting civilians [...], that it was his policy that soldiers should not commit crimes [...], that he did not tolerate threats or crimes against Hema or Lendu [...], and that Mr Ntaganda was deserving of a Nobel Prize and protected the civilian population and soldiers [...]. The Chamber notes that these statements are contradicted by its findings in the Judgment, and notes that this alleged “complete shift in attitude” come just months after the occurrence of violent crimes against the Lendu civilian population for which the Chamber found Mr Ntaganda guilty. Without further explanation for the motivation of this alleged sudden “complete shift in attitude”, the Chamber gives very little weight to the testimony of this witness in this regard and to the aforementioned blanket statements. For these reasons, the Chamber also dismisses the Defence’s arguments regarding Mr Ntaganda’s alleged shift in attitude [...].’), referring to **D-0302**: DRC-D18-0002-0023, at 0025-0027, paras 19, 23-24, 27-28, 30; fn. 603 referring to (“rising harassment against the civilian population” by Thomas Lubanga’s “faction of the militia”, with Mr Ntaganda (“BOSCO”) as his military appointee’), referring to DRC-OTP-0185-0843, at 0844-0845, para. 2(e).

203. Overall, the Trial Chamber did not consider it to be established, on a balance of probabilities, that Mr Ntaganda genuinely and concretely contributed to peace and reconciliation, thus giving it no weight in mitigation.⁴⁵⁶

(b) Summary of submissions

(i) Mr Ntaganda's submissions

204. Mr Ntaganda submits that the Trial Chamber erroneously applied the standard of balance of probabilities when assessing evidence in mitigation.⁴⁵⁷ With reference to previous jurisprudence of the Court, Mr Ntaganda argues that while efforts to promote peace and reconciliation ‘must be both palpable and genuine’, it need not “‘demand results’”.⁴⁵⁸ In support of this contention, Mr Ntaganda raises two main arguments.

205. First, Mr Ntaganda avers that the Trial Chamber erred in fact by concluding ‘that the nature of the activities established by the evidence suggest[s] a strategic alliance between the UPC/FPLC and the FNI, as opposed to broader reconciliation and peace between the Lendu and Hema communities’.⁴⁵⁹ He challenges the probative value of document DRC-OTP-0009-0146-R01;⁴⁶⁰ argues that the Trial Chamber improperly minimised the significance of certain events and misappreciated the relevant evidence;⁴⁶¹ and that it considered irrelevant evidence.⁴⁶² Mr Ntaganda further submits that the Trial Chamber erred in finding that the evidence did ‘not suggest broader reconciliation and peace between the Lendu and Hema communities’.⁴⁶³

206. Second, Mr Ntaganda argues that the Trial Chamber misappreciated the evidence when it found that he did not substantially contribute to peace and

⁴⁵⁶ [Sentencing Decision](#), para. 224.

⁴⁵⁷ [Mr Ntaganda's Appeal Brief](#), paras 115-119.

⁴⁵⁸ [Mr Ntaganda's Appeal Brief](#), para. 121, referring to [Katanga Sentencing Decision](#), para. 91 (‘[t]he Chamber considers that the efforts undertaken to promote peace and reconciliation can and must be taken into account in the sentencing and could potentially mitigate the sentence. It considers, however, that such efforts must be both palpable and genuine, without the need to demand results’. footnotes omitted).

⁴⁵⁹ [Mr Ntaganda's Appeal Brief](#), para. 125. See also paras 126-133.

⁴⁶⁰ [Mr Ntaganda's Appeal Brief](#), para. 126. See also fn. 167.

⁴⁶¹ [Mr Ntaganda's Appeal Brief](#), paras 127-130.

⁴⁶² [Mr Ntaganda's Appeal Brief](#), para. 131.

⁴⁶³ [Mr Ntaganda's Appeal Brief](#), para. 132. See also [T-272](#), p. 25, lines 15-18.

reconciliation,⁴⁶⁴ and when it concluded that his involvement in the peace process was ‘limited’.⁴⁶⁵ Finally, he presents several arguments alleging that the Trial Chamber failed to consider D-0047’s testimony;⁴⁶⁶ misappreciated D-0306’s evidence;⁴⁶⁷ accorded insufficient weight to specific pieces of evidence;⁴⁶⁸ and incorrectly accorded too much weight to other items of evidence.⁴⁶⁹

(ii) *The Prosecutor’s submissions*

207. The Prosecutor submits that ‘[t]he Chamber considered the evidence that Ntaganda claims it did not’⁴⁷⁰ and refers to the applicable sections of the Sentencing Decision where she avers that this evidence was in fact considered.⁴⁷¹ She argues that ‘[t]he Chamber reasonably considered Defence submissions and evidence’.⁴⁷² In this regard, she avers that the Trial Chamber: (i) ‘reasonably considered the existence of a strategic alliance between the UPC/FPLC and the FNI, as opposed to a broader reconciliation’;⁴⁷³ (ii) ‘correctly considered the July 2004 event held in Langu’,⁴⁷⁴ and that Mr Ntaganda merely disagrees with the assessment, without showing any error;⁴⁷⁵ (iii) ‘reasonably considered that Ntaganda did not personally visit any of the villages affected by the events’;⁴⁷⁶ and that this was relevant to the Trial Chamber’s determination of whether his actions were a ‘genuine and concrete contribution [...] to peace and reconciliation’;⁴⁷⁷ (iv) ‘reasonably considered that the pacification campaign was an FNI initiative’;⁴⁷⁸ (v) ‘reasonably assessed Ntaganda’s limited

⁴⁶⁴ [Mr Ntaganda’s Appeal Brief](#), paras 134-143.

⁴⁶⁵ [Mr Ntaganda’s Appeal Brief](#), para. 134. See also [T-272](#), p. 25, lines 20-22.

⁴⁶⁶ [Mr Ntaganda’s Appeal Brief](#), para. 135, referring to **D-0047**: [T-267](#), p. 48, line 17 to p. 50, line 3.

⁴⁶⁷ [Mr Ntaganda’s Appeal Brief](#), para. 136, referring to [Sentencing Decision](#), para. 221. See also [T-272](#), p. 26, lines 23-24.

⁴⁶⁸ [Mr Ntaganda’s Appeal Brief](#), para. 137, referring to [Sentencing Decision](#), para. 221. See also [T-272](#), p. 25, lines 23-25 (‘[n]ow, Mr Ntaganda’s own words in some of his speeches: “You the Hema, you the Lendu, you are living together on the same hills. You are living together. Now it’s time to make peace. Peace must be restored.”’).

⁴⁶⁹ [Mr Ntaganda’s Appeal Brief](#), paras 139-143.

⁴⁷⁰ [Prosecutor’s Response](#), p. 56. See paras 126-127. See also [T-272](#), p. 35, lines 1-5.

⁴⁷¹ [Prosecutor’s Response](#), para. 126, referring to [Sentencing Decision](#), para. 219(iv)(v)(vii), fns 577, 579, 581-582, 586-587.

⁴⁷² [Prosecutor’s Response](#), p. 57. See paras 128-145. See also [T-272](#), p. 35 lines 23-25.

⁴⁷³ [Prosecutor’s Response](#), p. 58. See paras 129-131.

⁴⁷⁴ [Prosecutor’s Response](#), p. 59. See paras 132-135. See also [T-272](#), p. 36 lines 18-23.

⁴⁷⁵ [Prosecutor’s Response](#), para. 132. See also [T-272](#), p. 36, lines 1-4.

⁴⁷⁶ [Prosecutor’s Response](#), p. 61. See paras 136-137.

⁴⁷⁷ [Prosecutor’s Response](#), para. 136.

⁴⁷⁸ [Prosecutor’s Response](#), para. 138. See also [T-272](#), p. 36, lines 11-15.

involvement in the FNI initiative’;⁴⁷⁹ and (vi) ‘reasonably assessed the evidence showing [a] lack of genuineness’ of Mr Ntaganda’s actions.⁴⁸⁰

(iii) *The victims’ observations*

208. Regarding Mr Ntaganda’s reliance on the *Katanga* case,⁴⁸¹ Victims Group 2 submit that ‘determining mitigating circumstances is highly fact-sensitive’ and not ‘readily’ comparable.⁴⁸² They further submit that the only similarity between the *Katanga* case and the present case is that both chambers ‘engaged in assessing whether the alleged efforts and contributions were both genuine and palpable *viz.* concrete’.⁴⁸³

(iv) *Mr Ntaganda’s response to the victims*

209. Mr Ntaganda asserts that he ‘neither attempted to compare the facts of this case with those in *Katanga* nor relied on the facts in that case’.⁴⁸⁴ Rather, he submits that he attempted to highlight the significance of efforts undertaken in the promotion of peace and reconciliation for potential mitigation of a sentence, of which ‘results are not a pre-condition’.⁴⁸⁵

(c) Determination by the Appeals Chamber

(i) *Consideration of evidence of Mr Ntaganda’s reconciliation efforts*

210. Mr Ntaganda argues that the Trial Chamber 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’.⁴⁸⁶ The Appeals Chamber notes that the Trial Chamber did in fact consider the evidence to which Mr Ntaganda refers and concluded that the evidence did not establish that his efforts for peace and reconciliation were genuine and concrete.⁴⁸⁷ Furthermore, the

⁴⁷⁹ [Prosecutor’s Response](#), paras 139-140.

⁴⁸⁰ [Prosecutor’s Response](#), p. 62. *See* paras 141-145.

⁴⁸¹ [Observations of Victims Group 2](#), para. 29.

⁴⁸² [Observations of Victims Group 2](#), para. 30.

⁴⁸³ [Observations of Victims Group 2](#), para. 30 (footnotes omitted).

⁴⁸⁴ [Mr Ntaganda’s Response to Observations of Victims](#), para. 28.

⁴⁸⁵ [Mr Ntaganda’s Response to Observations of Victims](#), para. 28. *See also* [Mr Ntaganda’s Appeal Brief](#), para. 121.

⁴⁸⁶ [Mr Ntaganda’s Appeal Brief](#), para. 124.

⁴⁸⁷ [Sentencing Decision](#), para. 219 (ii) and fn. 577, *referring to* **D-0306: T-267**, pp. 12-15, 18-19; para. 219 (iv) and fn. 579, *referring to* **D-0306: T-267**, pp. 15-16; para. 219(v) and fn. 581, *referring to* **D-**

Appeals Chamber notes Mr Ntaganda's submission that '[a]lthough the Trial Chamber did refer to the evidence related to concrete efforts deployed by the UPC/FPLC and Mr. Ntaganda to reach out and contribute to reconciliation with the Lendu community, it failed to provide a reasoned opinion'.⁴⁸⁸ The Appeals Chamber is not persuaded by this argument. The Trial Chamber clearly detailed its reasoning in the Sentencing Decision, noting that 'the nature of the activities established by the evidence [...] suggest[ed] a strategic alliance between the UPC/FPLC and the FNI' and that 'the evidence before the Chamber indicates only a limited involvement'.⁴⁸⁹

211. Consequently, Mr Ntaganda's arguments regarding the Trial Chamber's consideration of evidence of his reconciliation efforts are rejected.

(ii) Whether the nature of the activities did not suggest broader reconciliation and peace

212. Mr Ntaganda also challenges the Trial Chamber's factual finding that the nature of the activities, established by the evidence, 'suggest[s] a strategic alliance between the UPC/FPLC and the FNI, as opposed to broader reconciliation and peace between the Lendu and Hema communities'.⁴⁹⁰ In support of this contention, Mr Ntaganda raises several arguments.⁴⁹¹

213. First, he argues that little, if any, probative value can be accorded to a MONUC weekly report and submits that it is unclear whether parts of this document were admitted into evidence.⁴⁹² The Appeals Chamber, however, notes that document DRC-OTP-0009-0146-R01 was admitted in full.⁴⁹³ Mr Ntaganda also argues that, contrary to the Trial Chamber's finding, this document suggests that 'the bid to secure a high position at the national level [was] clearly attributed personally to Ndjabu [...]' rather than the UPC/FPLC or himself.⁴⁹⁴ However, the Appeals Chamber notes that the Trial Chamber's finding did not attribute the bid to secure a position to anyone in

0306: [T-267](#), p. 20; para. 219 (v) and fn. 582, referring to DRC-D18-0002-0023, at 0026, para. 22 and DRC-D18-0002-0001, at 0007, paras 37-40; para. 224. See [Prosecutor's Response](#), para. 126.

⁴⁸⁸ [Mr Ntaganda's Response to Observations of Victims](#), para. 30.

⁴⁸⁹ [Sentencing Decision](#), paras 220-221.

⁴⁹⁰ [Mr Ntaganda's Appeal Brief](#), para. 125.

⁴⁹¹ [Mr Ntaganda's Appeal Brief](#), paras 126-133.

⁴⁹² [Mr Ntaganda's Appeal Brief](#), para. 126, referring to DRC-OTP-0009-0146-R01.

⁴⁹³ [Decision on Prosecution's request for admission of documentary evidence](#), para. 7. See also [T-99](#), p. 30, line 25 to p. 31, line 15, p. 93, lines 11-17.

⁴⁹⁴ [Mr Ntaganda's Appeal Brief](#), para. 126.

particular. The Trial Chamber only noted ‘that an alliance between the UPC/FPLC and the FNI *was being considered* in order to secure a high position at the national level’.⁴⁹⁵ Mr Ntaganda has not identified any error in the Trial Chamber’s reliance on document DRC-OTP-0009-0146-R01. Consequently, his arguments regarding this document are rejected.

214. Second, Mr Ntaganda avers that even if one of the purposes of reconciliation between the UPC/FPLC and the Lendu community was to secure a high position at the national level, ‘the achievement of reconciling [...] the Hema and Lendu communities, [...] remains extraordinary’.⁴⁹⁶ However, Mr Ntaganda does not explain why, in his view, a possible motivation behind the above-mentioned alliance was an ‘irrelevant fact’, especially in light of the overall conclusion of the Trial Chamber that ‘a *genuine* and concrete contribution to peace and reconciliation’ was not established.⁴⁹⁷ This argument is therefore rejected.

215. Third and fourth, Mr Ntaganda argues that the Trial Chamber ‘missed the point’ when discussing evidence pertaining to the July 2004 event in Largu,⁴⁹⁸ and that it erred in considering that event ‘as a private affair between the FNI and the UPC/FPLC’.⁴⁹⁹ This is in relation to the Trial Chamber’s findings that only UPC/FPLC soldiers received ranks during that event and that the head of the Djugu administration present at the event was ‘a former UPC and FNI official’.⁵⁰⁰ Mr Ntaganda does not explain why it was an error for the Trial Chamber to ‘minimiz[e] the significance’ of this event and what was the alleged ‘far-reaching significance of the event for reconciliation between the Hema and Lendu communities’.⁵⁰¹ The Appeals Chamber, therefore, rejects Mr Ntaganda’s arguments regarding the July 2004 event in Largu.

216. Fifth, Mr Ntaganda submits that the Trial Chamber erred by according weight to evidence of the Lendu community being dismissive of the FNI leader’s

⁴⁹⁵ [Sentencing Decision](#), para. 220 (emphasis added).

⁴⁹⁶ [Mr Ntaganda’s Appeal Brief](#), para. 127.

⁴⁹⁷ [Sentencing Decision](#), para. 224 (emphasis added).

⁴⁹⁸ [Mr Ntaganda’s Appeal Brief](#), para. 128.

⁴⁹⁹ [Mr Ntaganda’s Appeal Brief](#), para. 129.

⁵⁰⁰ [Sentencing Decision](#), para. 220.

⁵⁰¹ [Mr Ntaganda’s Appeal Brief](#), para. 128.

‘rapprochement’ with Mr Ntaganda.⁵⁰² However, other than referring to some evidence which purportedly shows the contrary, Mr Ntaganda does not identify any error in the Trial Chamber’s findings.⁵⁰³

217. Sixth, Mr Ntaganda submits that the Trial Chamber erred in considering as relevant the absence of evidence that he visited the villages impacted by the events.⁵⁰⁴ It is, however, unclear why he views the lack of evidence regarding his visits to the affected villages as irrelevant to the question of whether he made ‘a genuine and concrete contribution to peace and reconciliation’.⁵⁰⁵ Accordingly, the Appeals Chamber rejects this argument.

218. Finally, Mr Ntaganda avers that the Trial Chamber failed: (i) to consider the FNI President’s speech during the *Collation des grades*;⁵⁰⁶ (ii) to consider the significance of the *Collation des grades*, emphasised by witnesses D-0305 and D-0047;⁵⁰⁷ and (iii) to apprehend the significance of the related video evidence.⁵⁰⁸

219. The Appeals Chamber observes that while the Trial Chamber did not expressly state that it considered the FNI President’s speech, it is nevertheless evident that it did consider the significance of the FNI President’s presence at the event. As discussed earlier, the Trial Chamber examined the evidence of the celebration and referred to the presence of President Floribert Ndjabu.⁵⁰⁹ The Trial Chamber examined this evidence in the context of ‘an alliance between the UPC/FPLC and the FNI’ aimed at ‘secur[ing] a high position at the national level’.⁵¹⁰ Viewed in this context, the FNI President’s speech does not appear to be of such significance that the Trial Chamber’s failure to specifically refer to it would amount to an error. The Appeals Chamber also observes that the Trial Chamber considered the testimony of witnesses D-0305 and D-

⁵⁰² [Mr Ntaganda’s Appeal Brief](#), para. 130.

⁵⁰³ [Mr Ntaganda’s Appeal Brief](#), para. 130, referring to documents DRC-OTP-0009-0146 and DRC-D18-0001-6754; [REDACTED].

⁵⁰⁴ [Mr Ntaganda’s Appeal Brief](#), para. 131.

⁵⁰⁵ [Sentencing Decision](#), para. 224.

⁵⁰⁶ [Mr Ntaganda’s Appeal Brief](#), paras 132-133.

⁵⁰⁷ [Mr Ntaganda’s Appeal Brief](#), para. 133, referring to [T-266](#), p. 26, lines 17-19 and [T-267](#), p. 57, lines 16-22.

⁵⁰⁸ [Mr Ntaganda’s Appeal Brief](#), para. 133, referring to **D-0305**: [T-266](#), p. 32, line 21 to p. 33, line 8 and **D-0300**: [T-221](#), p. 46, line 21 to p. 47, line 11.

⁵⁰⁹ [Sentencing Decision](#), para. 219.

⁵¹⁰ [Sentencing Decision](#), para. 220.

0047 in relation to the event in Largu and the celebration that followed.⁵¹¹ It is further noted that the Trial Chamber considered D-0305's credibility to be low.⁵¹² Regarding the video evidence, Mr Ntaganda has not explained 'the significant meaning of events depicted' in that evidence or why the Trial Chamber's failure to accord weight to those events renders its findings unreasonable.⁵¹³ Consequently, the Appeals Chamber rejects Ntaganda's arguments regarding said celebration.

220. Accordingly, the Appeals Chamber rejects Mr Ntaganda's argument that the Trial Chamber erred in finding that the nature of the activities did not suggest broader reconciliation and peace.

(iii) Mr Ntaganda's limited involvement in the peace process

221. Turning to Mr Ntaganda's submission that his contributions to peace and reconciliation were substantial and that the Trial Chamber erred in finding that the evidence only indicates a limited involvement,⁵¹⁴ the Appeals Chamber notes that in support of this submission, Mr Ntaganda makes several arguments challenging the Trial Chamber's assessment of evidence.⁵¹⁵

222. First, Mr Ntaganda avers that the Trial Chamber incorrectly concluded 'that the evidence indicated the pacification campaign was in fact an FNI initiative'⁵¹⁶ and that it failed to consider the testimony of D-0047 on this matter.⁵¹⁷ However, the testimony of D-0047, which Mr Ntaganda quotes in support of his argument, does not contradict the Trial Chamber's finding.⁵¹⁸ This argument is rejected.

⁵¹¹ [Sentencing Decision](#), fns 586-587, 590, 592.

⁵¹² [Sentencing Decision](#), fn. 599 ('[t]he Trial Chamber considers the credibility of the witness's evidence on this subject, and her general evidence on Mr Ntaganda's character, to be low, noting that she is an acquaintance of Mr Ntaganda's [...], her indication that the reason for her testimony was to counter untrue things that have been said about Mr Ntaganda, in relation to whom she could not believe that he was someone who would have committed violent crimes [...], and further noting that she was evasive on the issue of her alleged membership in the FPLC').

⁵¹³ [Mr Ntaganda's Appeal Brief](#), para. 133.

⁵¹⁴ [Mr Ntaganda's Appeal Brief](#), para. 134.

⁵¹⁵ [Mr Ntaganda's Appeal Brief](#), paras 135-143.

⁵¹⁶ [Mr Ntaganda's Appeal Brief](#), para. 135, referring to [Sentencing Decision](#), para. 221.

⁵¹⁷ [Mr Ntaganda's Appeal Brief](#), para. 135, referring to **D-0047: T-267**, p. 49, lines 5-11.

⁵¹⁸ **D-0047: T-267**, p. 49, lines 7-8 ('the representatives of FRPI and FNI were together and we really wanted to be together.'). See [Sentencing Decision](#), para. 221 ('the evidence indicates that the pacification campaign was in fact an FNI initiative.').

223. Second, Mr Ntaganda submits that the Trial 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”’.⁵¹⁹ The Appeals Chamber, however, observes that, contrary to Mr Ntaganda’s claim, the testimony of D-0306 clearly supports the Trial Chamber’s finding. The witness stated: [REDACTED].⁵²⁰ The Trial Chamber also specifically considered the testimony of this witness that ‘Mr Ntaganda encouraged the aforementioned awareness raising initiative and facilitated the security of FNI representatives in moving through Hema locations’.⁵²¹ Accordingly, this argument is rejected.

224. Third, Mr Ntaganda argues that the Trial Chamber accorded ‘insufficient weight to [his] speeches about peace in Sali, Lopa and Largu and his inviting Lendu to a meeting in Lopa’.⁵²² However, other than quoting a portion of one of those speeches, Mr Ntaganda does not explain why in his view the Trial Chamber erred in finding ‘some, but limited, involvement of Mr Ntaganda in the pacification campaign’.⁵²³ He merely disagrees with the weight the Trial Chamber accorded to his speeches, without demonstrating any particular error. Therefore this argument is rejected.

225. Fourth, Mr Ntaganda submits that he was not a politician and that he contributed to the reconciliation efforts by providing security.⁵²⁴ However, the Appeals Chamber notes that he does not explain how this proposition affects the Trial Chamber’s findings. His argument is therefore rejected for failure to identify an error.

226. Finally, Mr Ntaganda submits that the Trial Chamber ‘erred in holding that the genuine nature of [his] actions is placed in doubt by other evidence’.⁵²⁵ Concerning the alleged low probative value of document DRC-OTP-0185-0843,⁵²⁶ on which the Trial Chamber relied, the Appeals Chamber observes that the Trial Chamber noted the lack of clarity of that document specifically with regard to ‘Mr Ntaganda’s actual role

⁵¹⁹ [Mr Ntaganda’s Appeal Brief](#), para. 136, referring to [Sentencing Decision](#), para. 221.

⁵²⁰ **D-0306: T-267**, p. 40, line 25 to p. 41, line 2.

⁵²¹ [Sentencing Decision](#), para. 221, referring to **D-0306: T-267**, pp. 40-41.

⁵²² [Mr Ntaganda’s Appeal Brief](#), para. 137. See also [T-272](#), p. 37, lines 8-9 (‘[s]peeches alone cannot suffice. Ntaganda played a leading role in brutalising the Lendu community. He cannot benefit from passive and limited interventions’).

⁵²³ [Sentencing Decision](#), para. 221.

⁵²⁴ [Mr Ntaganda’s Appeal Brief](#), para. 138.

⁵²⁵ [Mr Ntaganda’s Appeal Brief](#), para. 139. See also paras 140-143.

⁵²⁶ [Mr Ntaganda’s Appeal Brief](#), para. 141.

in the events’.⁵²⁷ The Trial Chamber did not express any concerns as to other aspects of this document, including its reference to ‘rising harassment against the civilian population’.⁵²⁸ Mr Ntaganda does not give any other reasons why this document should be accorded little probative value as a whole. Mr Ntaganda also does not explain why, in his view, the evidence of D-0306 and other ‘limited evidence concerning the residual harassment of the civilian population in 2004 does not minimize’ the character of his reconciliation efforts.⁵²⁹ The Appeals Chamber notes that, while Mr Ntaganda is correct to note that page 0099 of document DRC-OTP-2057-0099, to which the Trial Chamber referred, was not admitted into evidence, the Trial Chamber’s reference to that page appears to be a typographical error that was of no consequence given that the relevant parts of the document were admitted into evidence.⁵³⁰ In any event, the Trial Chamber’s finding in question is supported by other evidence, outlined above. The Appeals Chamber, therefore, rejects these arguments.

(iv) Conclusion

227. Accordingly, this sub-ground of appeal regarding Mr Ntaganda’s contribution to peace and reconciliation with the Lendu community is rejected.

2. *Contribution to the demobilisation and integration of UPC/FPLC members into the national armed forces*

(a) Relevant part of the Sentencing Decision

228. The Trial Chamber assessed the potentially mitigating circumstance related to Mr Ntaganda’s alleged contribution to the ‘demobilisation and integration into the FARDC of UPC/FPLC soldiers’, and considered that the evidence showing his

⁵²⁷ [Sentencing Decision](#), fn. 610.

⁵²⁸ [Sentencing Decision](#), fn. 603, (‘DRC-OTP-0185-0843, from 0844 to 0845, para. 2(e), referring to “rising harassment against the civilian population” by Thomas Lubanga’s “faction of the militia”, with Mr Ntaganda (“BOSCO”) as his military appointee’).

⁵²⁹ [Mr Ntaganda’s Appeal Brief](#), para. 143.

⁵³⁰ Page 0099 is a handwritten letter, dated 20 November 2003 and unrelated to the Trial Chamber’s finding in question. As will be discussed, the Trial Chamber declined to admit this letter, *see* footnote 592 below. Elsewhere in the Sentencing Decision ([Sentencing Decision](#), fn. 612, *referring to* DRC-OTP-2057-0099, at 0101-0103), in a similar context, the Trial Chamber referred to the part of document DRC-OTP-2057-0099 which had been admitted (*see* [Rule 68\(2\)\(b\) Decision](#), para. 53). That part of the document, which the Trial Chamber appears to have intended to rely upon in the present context, contains a letter referring to ‘*toutes sortes d’exactions graves contre les populations civiles*’, supporting the Trial Chamber’s finding that ‘the UPC continued to harass the civilian population in Ituri’ (DRC-OTP-2057-0099, at 0101).

‘concrete role’ in the process was ‘fairly limited’.⁵³¹ It further noted that the most significant evidence was D-0020’s testimony on Mr Ntaganda’s appointment of an officer ‘to oversee the demobilisation of 500 soldiers’.⁵³² Conversely, it noted MONUC’s remarks that Mr Ntaganda was ‘a potential obstacle to the disarmament process in early 2004, that disarmament and reintegration was, in any event, a legal requirement, and that Mr Ntaganda himself declined to integrate into the FARDC for a number of years’.⁵³³ Finally, the Trial Chamber took into consideration ‘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’.⁵³⁴ It also pointed to MONUC’s remark that he ‘was a threat to peace and security during [that] period’.⁵³⁵

229. Overall, the Trial Chamber did not consider it to be established, on a balance of probabilities, that Mr Ntaganda genuinely and concretely contributed to demobilisation and disarmament, thus giving it no weight in mitigation.⁵³⁶

(b) Summary of submissions

(i) *Mr Ntaganda’s submissions*

230. Mr Ntaganda submits that he ‘genuinely and concretely contributed to the demobilisation and the integration into the FARDC of UPC/FPLC members’,⁵³⁷ and

⁵³¹ [Sentencing Decision](#), para. 222. *See also* fn. 604 ([t]he Chamber does not consider any of the documents referred to by the Defence in paragraph 135 of its submissions or paragraph 91 of its response to add anything in this regard, noting that none of them speak to Mr Ntaganda’s concrete role in the events depicted therein. The same applies to the December 2003 *Acte d’engagement* cited by the Defence in paragraph 130 of its submissions, noting evidence from **D-0047** that Mr Ntaganda was not at the meeting where the document was created because of his fear of arrest by MONUC [...]. **D-0020** testified that in mid-2004 Mr Ntaganda met with officers and informed them that they must disarm, demobilise or integrate in the FARDC [...], and attended a demobilisation ceremony with MONUC representatives [...]. **D-0047** testified that Mr Ntaganda worked with a government committee responsible for demobilisation and was responsible for preparing lists of those who wanted to either demobilise or integrate [...]. However, in assessing **D-0047**’s evidence, the Chamber notes that **D-0020** testified that in fact it was Mr Ntaganda’s secretary who was in charge of compiling the lists for reintegration [...], and information in a report from the *Comité International d’Accompagnement de la Transition*, the oversight body working with institutions set up to assist in disarmament, that later – in 2005 – Mr Ntaganda, Thomas Lubanga, and the UPC were not cooperating with authorities in respect of the demobilisation program and raised allegations of assassinations and tortures on the orders of the UPC hierarchy, in particular Mr Ntaganda, *vis-à-vis* combatants who chose to hand in their weapons [...].’).

⁵³² [Sentencing Decision](#), para. 222, *referring to* ICC-01/04-02/06-2397-Conf-AnxA, p. 4, para. 18.

⁵³³ [Sentencing Decision](#), para. 222.

⁵³⁴ [Sentencing Decision](#), para. 223.

⁵³⁵ [Sentencing Decision](#), para. 223.

⁵³⁶ [Sentencing Decision](#), para. 224.

that his reputation within MONUC circles has no bearing on his contribution.⁵³⁸ He argues that the Trial Chamber erred by finding otherwise, as the evidence does not support its findings.⁵³⁹

(ii) *The Prosecutor's submissions*

231. The Prosecutor avers that the Trial Chamber assessed the testimonies of D-0020 and D-0047,⁵⁴⁰ and that Mr Ntaganda does not provide any reason why the Trial Chamber's reliance on the '7 April 2005 communiqué of CIAT' was erroneous.⁵⁴¹ She argues that, in light of the evidence relied upon by the Trial Chamber, its finding that Mr Ntaganda's contribution was very limited was reasonable.⁵⁴²

232. The Prosecutor further presents several arguments in support of the Trial Chamber's assessment: that MONUC's weekly report DRC-OTP-0009-0146-R01 was fully admitted into evidence;⁵⁴³ that there was no error in the Trial Chamber's admission of the 8 MONUC Daily Reports and that it did not rely or place 'significant weight' on most of them;⁵⁴⁴ and that the Trial Chamber did not refer to the Six UN Reports in the Sentencing Decision.⁵⁴⁵ Finally, the Prosecutor avers that Mr Ntaganda's 'request to admit two documents on appeal' must be rejected, as it does not meet the requirements under regulation 62 of the Regulations of the Court.⁵⁴⁶

(iii) *The victims' observations*

233. Regarding the admission of the Six UN Reports, Victims Group 1 contend that said documents demonstrated that Mr Ntaganda 'only assumed a position within the FARDC many years after his alleged appointment, if at all'.⁵⁴⁷ They argue that, even

⁵³⁷ [Mr Ntaganda's Appeal Brief](#), p. 57. See paras 147-151.

⁵³⁸ [Mr Ntaganda's Appeal Brief](#), paras 152-168.

⁵³⁹ [Mr Ntaganda's Appeal Brief](#), paras 145-146.

⁵⁴⁰ [Prosecutor's Response](#), para. 147.

⁵⁴¹ [Prosecutor's Response](#), para. 148.

⁵⁴² [Prosecutor's Response](#), para. 149. See also [T-272](#), p. 37, lines 8-14 ('Ntaganda played a leading role in brutalising the Lendu community. He cannot benefit from passive and limited interventions. Similar limitations afflict Mr Ntaganda's alleged disarmament efforts. Ntaganda himself declined to integrate in the FARDC for a number of years. Indeed, MONUC considered Mr Ntaganda a potential obstacle in early 2004. The UPC/FPLC, with Mr Ntaganda as its deputy chief of staff, was uncooperative with MONUC and other institutions working for pacification in Ituri.').

⁵⁴³ [Prosecutor's Response](#), para. 151.

⁵⁴⁴ [Prosecutor's Response](#), para. 154.

⁵⁴⁵ [Prosecutor's Response](#), para. 157.

⁵⁴⁶ [Prosecutor's Response](#), para. 158.

⁵⁴⁷ [Observations of Victims Group 1](#), para. 44.

if the admission of these documents was an error, it would not have affected the Sentencing Decision in any way, as none of them is referred to in that decision.⁵⁴⁸ Victims Group 1 further assert that Mr Ntaganda ‘appears to invoke misplaced policy considerations’ on the need to “‘provid[e] an incentive to former wrongdoers to contribute to peace and security’”.⁵⁴⁹ They refute ‘this broad assertion’, as it seems to suggest that ‘the pursuit of peace and security prevail over the victim’s right to justice’.⁵⁵⁰ They further argue that he misunderstands the extent of applicable mitigating circumstances under rule 145(2)(a)(ii) of the Rules⁵⁵¹ and that ‘Mr Ntaganda cannot be incentivised retroactively through the application of a mitigating circumstance’.⁵⁵²

(iv) Mr Ntaganda’s response to the victims

234. In response to the victims’ observations, Mr Ntaganda challenges some facts which he regards as ‘irrelevant’.⁵⁵³ He reiterates his argument that the admission of the Six UN Reports was erroneous as those reports ‘had no proper place in the sentencing procedure’.⁵⁵⁴ Moreover, he maintains that his submission on the importance of recognising that relevant steps taken by a wrongdoer to contribute ‘to peace and security’ was aimed at indicating ‘the Trial Chamber’s failure to consider it’.⁵⁵⁵

(c) Determination by the Appeals Chamber

(i) Trial Chamber’s assessment of evidence of Mr Ntaganda’s role

235. Mr Ntaganda challenges the Trial Chamber’s finding that “‘a genuine and concrete contribution [...] to demobilisation and disarmament on the part of Mr.

⁵⁴⁸ [Observations of Victims Group 1](#), para. 45.

⁵⁴⁹ [Observations of Victims Group 1](#), para. 46, quoting [Mr Ntaganda’s Appeal Brief](#), para. 165.

⁵⁵⁰ [Observations of Victims Group 1](#), para. 46. Victims Group 1 further stress, at footnote 110 of this paragraph, that they concur with the Prosecutor’s assertion that this case differs from the *Katanga* case.

⁵⁵¹ [Observations of Victims Group 1](#), para. 47.

⁵⁵² [Observations of Victims Group 1](#), fn. 112. See also [T-272](#), p. 43, lines 21-23 (‘[t]he former child soldiers want the penalty applied to Mr Ntaganda to reflect the gravity of his crimes and the suffering these crimes produced on them and continue to produce.’).

⁵⁵³ [Mr Ntaganda’s Response to Observations of Victims](#), para. 43, referring to [Sentencing Decision](#), para. 222.

⁵⁵⁴ [Mr Ntaganda’s Response to Observations of Victims](#), para. 47.

⁵⁵⁵ [Mr Ntaganda’s Response to Observations of Victims](#), para. 48.

Ntaganda [was not] established overall, on a balance of probabilities”⁵⁵⁶ First, he submits that although the Trial Chamber considered the evidence showing that he appointed an officer to oversee the demobilisation of 500 soldiers, it failed to consider the evidence of what he had told officers before that event.⁵⁵⁷ Second, he submits that the Trial Chamber ‘failed to take into consideration the most important aspect of D-0047’s testimony’ that, given Mr Ntaganda’s position as FPLC Chief of Staff, he ‘necessarily contributed’ to the process and ‘that FPLC members were demobilised and that others were integrated’.⁵⁵⁸

236. The Appeals Chamber notes that the Trial Chamber based its finding on ‘Mr Ntaganda’s concrete role’ in the process on the testimony of witnesses D-0020 and D-0047, a report from the CIAT,⁵⁵⁹ and some information from MONUC.⁵⁶⁰ The Trial Chamber also took into account information provided by witness D-0020 on Mr Ntaganda’s appointment of ‘an officer to oversee the demobilisation of 500 soldiers’,⁵⁶¹ and further considered that none of the documents Mr Ntaganda presented demonstrate his ‘concrete role in the events’.⁵⁶² In this respect, Mr Ntaganda’s challenge to the Trial Chamber’s failure to specifically address some parts of D-0020’s and D-0047’s evidence is unsubstantiated.⁵⁶³ Both D-0020’s account of Mr Ntaganda’s address to officers and D-0047’s testimony of his role in the demobilisation and integration into the FARDC are consistent with the Trial Chamber’s findings and only provide additional detail. Mr Ntaganda does not identify any error.

237. Mr Ntaganda further argues that the Trial Chamber should not have accorded weight to document DRC-OTP-2103-1205, as witness D-0047 was incarcerated in 2005 and had no knowledge of this document.⁵⁶⁴ However, Mr Ntaganda does not

⁵⁵⁶ [Mr Ntaganda’s Appeal Brief](#), para. 146.

⁵⁵⁷ [Mr Ntaganda’s Appeal Brief](#), para. 148.

⁵⁵⁸ [Mr Ntaganda’s Appeal Brief](#), paras 149-150.

⁵⁵⁹ [Sentencing Decision](#), fn. 604.

⁵⁶⁰ [Sentencing Decision](#), paras 222-223.

⁵⁶¹ [Sentencing Decision](#), para. 222.

⁵⁶² [Sentencing Decision](#), fn. 604, referring to [Mr Ntaganda’s Sentencing Submissions](#), para. 135; and [Mr Ntaganda’s Response to Prosecutor and Victims’ Sentencing Submissions](#), para. 91.

⁵⁶³ [Mr Ntaganda’s Appeal Brief](#), paras 148-150.

⁵⁶⁴ [Mr Ntaganda’s Appeal Brief](#), para. 151.

substantiate his challenge to this document, which is a report of the CIAT,⁵⁶⁵ a clearly relevant piece of evidence regarding his non-cooperation with authorities in respect of the demobilisation programme.⁵⁶⁶ It is also unclear why D-0047's lack of knowledge of this document has any impact on its reliability. This argument is rejected.

238. Accordingly, the Appeals Chamber rejects Mr Ntaganda's challenges to the Trial Chamber's assessment of the evidence of D-0020 and D-0047, as well as of document DRC-OTP-2103-1205.

(ii) Trial Chamber's assessment of MONUC's reports and other documents

239. Mr Ntaganda submits that his 'reputation in MONUC circles' has no bearing on his contribution to the demobilisation and integration process, presenting several arguments related to documentary and witness evidence.⁵⁶⁷

240. Regarding Mr Ntaganda's argument that the relevant paragraph of document DRC-OTP-0009-0146-R01 was not admitted into evidence,⁵⁶⁸ the Appeals Chamber notes that it has already rejected a similar argument in relation to the previous sub-ground of this ground of appeal.⁵⁶⁹ Furthermore, Mr Ntaganda seems to argue that in light of the Trial Chamber's remark that some of the material relied upon by the Prosecutor in the sentencing proceedings was of 'relatively low probative value', paragraph 12 of said document 'deserves little if any weight'.⁵⁷⁰ However, the Appeals Chamber notes that the remark of the Trial Chamber on the probative value of the Prosecutor's material does not relate to the document in question, but to other documents.⁵⁷¹

⁵⁶⁵ DRC-OTP-2103-1205.

⁵⁶⁶ DRC-OTP-2103-1205, at 1267, para. 2.

⁵⁶⁷ [Mr Ntaganda's Appeal Brief](#), paras 152-168.

⁵⁶⁸ [Mr Ntaganda's Appeal Brief](#), para. 153, referring to DRC-OTP-0009-0146-R01, p. 0155, para 12.

⁵⁶⁹ See paragraph 213 above.

⁵⁷⁰ [Mr Ntaganda's Appeal Brief](#), para. 154, referring to [Sentencing Decision](#), para. 223.

⁵⁷¹ [Sentencing Decision](#), para. 223, referring to [Prosecutor's Sentencing Submissions](#), paras 107-109; [Prosecution Response](#), paras 42, 47. See [Sentencing Decision](#), fn. 610 ('[f]or many of the documents cited by the Prosecution, the Chamber notes that the sources of relevant information are, according to the documents themselves, unconfirmed or require further corroboration, (see, e.g., DRC-OTP-2066-0380, at 0380, para. 1(b); DRC-OTP-0007-0314, at 0316, para. 4(d); DRC-OTP-0004-0372, at 0373, para. 1; and DRC-OTP-1029-0465, at 0467, para. 8(d)). For others, Mr Ntaganda's actual role in the events therein described is unclear (see, e.g., DRC-OTP-0185-0843, from 0844 to 0845, para. 2(e)). See also in this regard the arguments of the Defence in paragraph 88 of its response. The Chamber also

241. Mr Ntaganda further submits that the absence of UPC/RP representatives at meetings referred to in document DRC-OTP-0009-0146-R01 should have been considered in the light of other evidence.⁵⁷² The document refers to meetings on 17 February 2004, at which ‘FNI, UPC-Kisembo, PUSIC and FAPC were represented’.⁵⁷³ It states that ‘MONUC made it clear [...] that the Disarmament and Community Reintegration process would not be derailed by the provocations of Bosco’s group’.⁵⁷⁴ However, the finding which Mr Ntaganda seeks to challenge is that on 7 November 2003, the UPC/FPLC withdrew cooperation with MONUC.⁵⁷⁵ The circumstances leading to his absence from the above-mentioned meetings on 17 February 2004 do not appear to be relevant to this finding. In addition, the Trial Chamber based that finding primarily on the evidence of D-0047 and other documents. It is unclear how Mr Ntaganda’s challenge to the reliability of document DRC-OTP-0009-0146-R01 in this context can have any impact on that finding. Mr Ntaganda’s arguments regarding this document are therefore rejected.

242. Mr Ntaganda also takes issue with the probative value of some documents and the information the Trial Chamber relied upon regarding his non-cooperation ‘with MONUC and other key institutions working for pacification in Ituri at that time’ and that he was considered ‘a threat to peace and security during this period’.⁵⁷⁶ The Appeals Chamber finds his challenge unfounded for a number of reasons.

243. First, the Trial Chamber’s finding on his non-cooperation was based on evidence that ‘[o]n 7 November 2003, the UPC/FPLC, with Mr Ntaganda as the Deputy Chief of Staff, formally withdrew all cooperation with MONUC and all participation in the institutions established by the Ituri Pacification Commission’.⁵⁷⁷ The motivation behind the withdrawal, to which Mr Ntaganda refers,⁵⁷⁸ has no bearing on this specific finding. Furthermore, the Trial Chamber did refer to motives

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, *see* Defence Response, para. 89.’).

⁵⁷² [Mr Ntaganda’s Appeal Brief](#), para. 155.

⁵⁷³ DRC-OTP-0009-0146-R01, at 0155, para. 12.

⁵⁷⁴ DRC-OTP-0009-0146-R01, at 0155, para. 12. *See* [Sentencing Decision](#), fn. 606.

⁵⁷⁵ [Sentencing Decision](#), fn. 611, *referring to* DRC-OTP-0009-0146-R01, at 0155, para. 12.

⁵⁷⁶ [Mr Ntaganda’s Appeal Brief](#), paras 156-159, *referring to* [Sentencing Decision](#), para. 223.

⁵⁷⁷ [Sentencing Decision](#), fn. 611, *referring to* **D-0047: T-267**, pp. 70, 80-81; DRC-OTP-0009-0146-R01, at 0155, para. 12; and [Prosecutor’s Sentencing Submissions](#), para. 108.

⁵⁷⁸ [Mr Ntaganda’s Appeal Brief](#), paras 156-159. *See* [Prosecutor’s Response](#), para. 153.

behind his non-cooperation in other contexts. It considered the evidence of Mr Ntaganda's absence from a meeting 'because of his fear of arrest by MONUC'⁵⁷⁹ and 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'.⁵⁸⁰ Mr Ntaganda does not identify any error in the Trial Chamber's consideration of these aspects of his non-cooperation.

244. Second, Mr Ntaganda challenges the Trial Chamber's reliance on MONUC reports which indicated that 'Mr Ntaganda was a threat to peace and security'.⁵⁸¹ Regarding document DRC-OTP-1029-0591, Mr Ntaganda argues that it has 'little if any probative value', as it concerns events occurring after the period of time relevant to the charges, and that he did not have an opportunity to challenge this document.⁵⁸² The Appeals Chamber notes that this document concerns events that occurred in the period of 28 February to 5 March 2004.⁵⁸³ The section of the Sentencing Decision containing reference to this document relates to events in 'early 2004', including the disarmament process.⁵⁸⁴ The document in question thus concerns the period of time relevant to the Trial Chamber's enquiry. Furthermore, it is noted that at the time the Prosecutor sought the admission of this document, Mr Ntaganda requested its dismissal *in limine*.⁵⁸⁵ Notably, he challenged the probative value of this and other documents, arguing that the situation described therein '[did] not rebut Mr. Ntaganda's efforts in 2004 to encourage reconciliation with Lendu leaders'.⁵⁸⁶ This shows that, contrary to Mr Ntaganda's assertion, he did have an opportunity to challenge this document and availed himself of that opportunity. It is also clear that at the time he had no issue with the period to which the document referred. Mr Ntaganda's arguments regarding this document are therefore rejected.

⁵⁷⁹ [Sentencing Decision](#), fn. 604, referring to [T-267](#), pp. 49, 64, 68-69; DRC-OTP-0018-0108. See [Mr Ntaganda's Appeal Brief](#), para. 158, referring to [T-267](#), pp. 65-66.

⁵⁸⁰ [Sentencing Decision](#), fn. 610. See [Mr Ntaganda's Appeal Brief](#), para. 158.

⁵⁸¹ [Mr Ntaganda's Appeal Brief](#), paras 160-164, referring to [Sentencing Decision](#), para. 223.

⁵⁸² [Mr Ntaganda's Appeal Brief](#), para. 160.

⁵⁸³ DRC-OTP-1029-0591, at 0591.

⁵⁸⁴ [Sentencing Decision](#), paras 220-223.

⁵⁸⁵ [Prosecutor's Request on Sentencing Evidence](#), para. 11, fn. 23; [Mr Ntaganda's Response to Prosecutor's Request on Sentencing Evidence](#), paras 1, 9-12; [Decision of 13 September 2019](#), paras 11-12, 42.

⁵⁸⁶ [Mr Ntaganda's Response to Prosecutor's Request on Sentencing Evidence](#), para. 24.

245. Mr Ntaganda further objects to the Trial Chamber's reliance on documents DRC-OTP-0154-0648 and DRC-OTP-2057-0099, arguing that his role in the events described therein is unclear and not established.⁵⁸⁷ The Appeals Chamber notes that the Trial Chamber did not rely on these documents to establish specific acts of Mr Ntaganda. The relevant finding of the Trial Chamber is that '*according to MONUC, Mr Ntaganda was a threat to peace and security during this period*'.⁵⁸⁸ The finding of the Trial Chamber was thus not that Mr Ntaganda was a threat to peace, but that such was MONUC's opinion about him. Furthermore, these two documents were among other evidence upon which the Trial Chamber relied. Therefore, even if one were to agree that, on their own, these documents were not sufficient to establish the acts attributed to Mr Ntaganda, they were corroborated by other evidence.⁵⁸⁹ Regarding Mr Ntaganda's objections to the reliability of a letter, dated 20 November 2003, allegedly signed by him and proffering threats against MONUC personnel,⁵⁹⁰ it is noted that for the impugned finding the Trial Chamber did not rely on the part of document DRC-OTP-2057-0099 containing that letter. It relied on another part, which is a letter from MONUC. While that letter makes reference to the alleged threats proffered by Mr Ntaganda, it mainly describes other acts directed against MONUC personnel.⁵⁹¹ Furthermore, the Trial Chamber was mindful of issues with the authenticity of the letter of 20 November 2003 and declined to admit it for that reason.⁵⁹² Mr Ntaganda's arguments are rejected.

246. Mr Ntaganda submits that the Trial Chamber erred in according weight to documents DRC-OTP-0142-0042 and DRC-OTP-0142-0038, as the former is a letter that never reached him and the latter does not mention him.⁵⁹³ The Appeals Chamber notes that the former letter is from MONUC and refers to violent acts directed by the

⁵⁸⁷ [Mr Ntaganda's Appeal Brief](#), paras 161-162.

⁵⁸⁸ [Sentencing Decision](#), para. 223 (emphasis added), referring to DRC-OTP-1029-0591, at 0603, paras 27-28; DRC-OTP-0142-0038; DRC-OTP-0142-0042; DRC-OTP-2057-0099, at 0101-0103; and DRC-OTP-0154-0648, at 0648.

⁵⁸⁹ See [Sentencing Decision](#), fn. 612, referring to DRC-OTP-1029-0591, at 0603, paras 27-28; DRC-OTP-0142-0038; and DRC-OTP-0142-0042. See also [Sentencing Decision](#), para. 224.

⁵⁹⁰ [Mr Ntaganda's Appeal Brief](#), paras 161-162.

⁵⁹¹ DRC-OTP-2057-0099, at 0102.

⁵⁹² [Decision on Prosecution's first request on evidence](#), para. 18. See also [Decision of 13 September 2019](#), para. 39.

⁵⁹³ [Mr Ntaganda's Appeal Brief](#), para. 163.

UPC against humanitarian personnel.⁵⁹⁴ Irrespective of whether it reached Mr Ntaganda, the letter is addressed to him, which is relevant to the impugned finding of the Trial Chamber. The second letter describes similar events.⁵⁹⁵ Contrary to Mr Ntaganda's argument, this letter does mention him.⁵⁹⁶ These arguments of Mr Ntaganda are rejected. In view of this, the Appeals Chamber also rejects, as wholly unsubstantiated, Mr Ntaganda's argument that the Trial Chamber erred in not allowing more time for the examination of a witness, who could have 'enlighten[ed] the Chamber on the events referred to in all MONUC documents'.⁵⁹⁷

247. Third, the *Katanga* case upon which Mr Ntaganda relies in an attempt to make a comparison with his own case⁵⁹⁸ is factually distinct from this case.⁵⁹⁹ Mr Ntaganda has failed to demonstrate that it was an error for the Trial Chamber not to consider his submissions based on the *Katanga* case.

248. Finally, Mr Ntaganda's argument that 'the Chamber erred by admitting [the Six UN Reports], for the purpose of showing [his] "involvement with the FARDC or the CDPN"'⁶⁰⁰ is dismissed as it fails to identify any error in the Sentencing Decision. As he acknowledges, the Trial Chamber did not refer to those documents in its assessment. Nor is there any support for his contention that those documents 'were inevitably considered'.⁶⁰¹ The Appeals Chamber therefore dismisses the related

⁵⁹⁴ DRC-OTP-0142-0042.

⁵⁹⁵ DRC-OTP-0142-0038.

⁵⁹⁶ DRC-OTP-0142-0038, at 0038.

⁵⁹⁷ [Mr Ntaganda's Appeal Brief](#), para. 164.

⁵⁹⁸ [Mr Ntaganda's Appeal Brief](#), para. 165.

⁵⁹⁹ [Katanga Sentencing Decision](#), paras 91 ('[t]he Chamber considers that the efforts undertaken to promote peace and reconciliation can and must be taken into account in the sentencing and could potentially mitigate the sentence. It considers, however, that such efforts must be both palpable and genuine, without the need to demand results.'). 109-111, 112 ('[t]he Chamber also notes [...] that several MONUC reports drafted from June 2003 onwards also attest to Germain Katanga's cooperation with that Mission and, consequently, to his involvement in the disarmament and demobilisation process. [...] The report shows that Germain Katanga was very amenable to the MONUC mission to both areas, and had approved the "DRC" process (i.e. disarmament and reintegration into the community). The Chamber considers that it is worth recalling the statement made by Witness **P-160** that, in late 2003, the convicted person was determined "[...] to walk the path of peace.'). 115 ('according to the Chamber, several documents and testimonies testify to the positive role that he played, specifically in the process of disarming and demobilising child soldiers. In fact, following the criterion of the balance of probabilities, the Chamber considers as established [by] Germain Katanga's active participation in the demobilisation process and, bearing in mind his conduct, what amounts to his positive contribution at the time. It therefore considers that these efforts must be taken into account in the sentence to be imposed on him.').

⁶⁰⁰ [Mr Ntaganda's Appeal Brief](#), para. 166.

⁶⁰¹ [Mr Ntaganda's Appeal Brief](#), para. 166.

argument that the Trial Chamber erred in declining to admit two statements ‘addressing the excerpts admitted’.⁶⁰² It additionally notes that Mr Ntaganda fails to identify any error in the Trial Chamber’s rejection of those documents.⁶⁰³

(iii) Conclusion

249. In view of the foregoing, this sub-ground of appeal regarding the Trial Chamber’s assessment of Mr Ntaganda’s contribution to the demobilisation and integration of UPC/FPLC members into the national armed forces is rejected.

250. Accordingly, having considered and rejected Mr Ntaganda’s arguments, the Appeals Chamber rejects this ground of appeal.

K. Eleventh ground of appeal: Alleged failure to give weight to Mr Ntaganda’s conduct during the trial and cooperation with the Court

251. Under this ground of appeal, Mr Ntaganda argues that the Trial Chamber erred in rejecting his cooperative behaviour during the trial as a mitigating factor, based in part on a finding that his cooperation with the Court was ‘diminished’ by his hunger strike.⁶⁰⁴

⁶⁰² [Mr Ntaganda’s Appeal Brief](#), paras 167-168.

⁶⁰³ [T-266](#), p. 7, line 23 to p. 8, line 23 (‘the Defence requests permission to tender and, if granted, tenders pursuant to Rule 68(2)(b) of the Rules, two statements in rebuttal of the extracts of documentary evidence from 2008, 2009 and 2010 admitted by the Chamber from the bar table in its decision with filing number 2402, that concern Mr Ntaganda’s involvement with the CNDP. According to the Defence, the statements are necessary to rebut claims that the CNDP was responsible for, quote, “human rights abuses and international crimes” unquote, and that Mr Ntaganda’s role in the CNDP demonstrates that he resisted integration into the FARDC. The Prosecution opposes the admission of the statements. In line with the clarification provided by the Chamber to the parties by email yesterday evening, the Chamber notes that the Defence appears to have misunderstood this part of the Chamber’s aforementioned decision. The Chamber clarifies that it only considered the items concerned to be relevant and have probative value “to the extent the Prosecution aims to rely on the items to show Mr Ntaganda’s involvement with the FARDC or the CNDP” and limited the admission into evidence to the information referring to Mr Ntaganda’s allegedly having been part of, or having played a role in, the FARDC and/or the CNDP. The Chamber’s decision therefore cannot be taken as the Chamber having accepted, as submitted by the Defence, that in principle, allegations of international crimes and human rights abuses involving the CNDP are relevant to the sentencing of Mr Ntaganda. Furthermore, no information about any alleged conduct or actions of the CNDP has been admitted into evidence. As there is no information about the CNDP before the Chamber, and thus no information about any alleged international crimes committed by this entity, the Defence’s submission that it must challenge the allegations about the CNDP as a whole or that Mr Ntaganda was part of a group engaging in international crimes is misplaced.’).

⁶⁰⁴ [Mr Ntaganda’s Appeal Brief](#), paras 173-174, referring to [Sentencing Decision](#), para. 229.

1. *Relevant part of the Sentencing Decision*

252. The Trial Chamber assessed Mr Ntaganda's conduct during the trial, noting that 'good behaviour and compliance with the law [...] are not normally taken into account in mitigation unless exceptional'.⁶⁰⁵ The Trial Chamber recalled that 'with the exception of his hunger strike, Mr Ntaganda was consistently respectful and cooperative during court proceedings' and 'consent[ed] to absenting himself from the courtroom to facilitate the testimony of certain witnesses'.⁶⁰⁶

253. The Trial Chamber noted that while Mr Ntaganda 'gave lengthy and detailed testimony and generally answered all questions put to him', it did not find his testimony credible on 'important aspects' related to the crimes committed during the First and Second Operations for which he was convicted.⁶⁰⁷ In addition, the Trial Chamber noted that Mr Ntaganda also 'made no sincere demonstrations of remorse towards his victims'.⁶⁰⁸ In light of these considerations, the Trial Chamber found that 'while noting with appreciation Mr Ntaganda's respectful and positive behaviour during trial, the Chamber does not consider his behaviour exceptional so as to constitute a mitigating circumstance. The Chamber therefore affords this factor no weight in mitigation'.⁶⁰⁹

2. *Summary of submissions*

(a) **Mr Ntaganda's submissions**

254. Mr Ntaganda argues that the Trial Chamber misappreciated the facts when it failed to credit him for his cooperation with the Court.⁶¹⁰ In his view, by summarily

⁶⁰⁵ [Sentencing Decision](#), para. 229.

⁶⁰⁶ [Sentencing Decision](#), para. 229 (footnotes omitted).

⁶⁰⁷ [Sentencing Decision](#), para. 230, referring to [Conviction Decision](#), paras 256-258. See [Sentencing Decision](#), fn. 633 ('[s]ee, e.g., Judgment, footnote 1431 (where the Chamber considered Mr Ntaganda not credible in relation to his testimony that by the time he arrived in Mongbwalu, the entirety of the town had already been taken over), para. 498 and footnotes 1434 and 1477 (where the Chamber considered Mr Ntaganda not credible in relation to his testimony that, when the UPC/FPLC entered Mongbwalu, the population had already fled and that he only saw one body in Sayo and was not an eyewitness to any other killings), footnote 1507 (where the Chamber considered Mr Ntaganda not credible in relation to his denial of ordering killings in Nzebi), para. 528 and footnote 1574 (where the Chamber considered Mr Ntaganda not credible in relation to his testimony [sic] that only one person was taken 'prisoner' during the First Operation and that this person was subsequently released) and para. 533 (where the Chamber considered Mr Ntaganda not credible on his denial of having killed Abbé Boniface Bwanalonga).').

⁶⁰⁸ [Sentencing Decision](#), para. 230, referring to its subsequent paras 236-239.

⁶⁰⁹ [Sentencing Decision](#), para. 230.

⁶¹⁰ [Mr Ntaganda's Appeal Brief](#), para. 173.

concluding that his cooperation with the Court was diminished because of his hunger strike, the Trial Chamber failed to provide reasons and abused its discretion.⁶¹¹ Mr Ntaganda submits that his hunger strike had a brief impact on the trial's schedule, noting that '[o]ne and a half court days were devoted to discussion of [his] situation' and that while hearings continued in his absence, the total period of interruption was 14 days.⁶¹² Furthermore, he submits that the Trial Chamber failed to address his statement read in open court,⁶¹³ which was 'revealing of [his] state of mind at the time' and other submissions 'concerning the truly exceptional and difficult circumstances giving rise to the hunger strike'.⁶¹⁴

(b) The Prosecutor's submissions

255. The Prosecutor contends that the Trial Chamber 'correctly accorded no weight to Ntaganda's alleged good conduct and cooperation during his trial, and gave a reasoned decision'.⁶¹⁵ In her view, 'the Trial Chamber was entitled to contrast Mr Ntaganda's good and respectful behaviour on the one hand, with his uncooperative behaviour of going on a hunger strike on the other hand', and that, 'it was the duty of the Trial Chamber to consider Mr Ntaganda's behaviour in its entirety'.⁶¹⁶ The Prosecutor notes that the Trial Chamber did not find Mr Ntaganda's testimony credible on a number of issues, and that he never sincerely expressed remorse towards his victims.⁶¹⁷ Moreover, she states that Mr Ntaganda's hunger strike disrupted the proceedings and rather than constituting 'cooperative, respectful behaviour, it constituted a lack of respect to justice as well as to the victims'.⁶¹⁸

256. As the Trial Chamber did not find Mr Ntaganda's behaviour during trial to be 'exceptional', the Prosecutor maintains that there was no behaviour which merited mitigation that could have been diminished by Mr Ntaganda's hunger strike.⁶¹⁹

⁶¹¹ [Mr Ntaganda's Appeal Brief](#), paras 173-174; [T-272](#), p. 51, lines 1-3.

⁶¹² [Mr Ntaganda's Appeal Brief](#), fn. 250, referring to [T-126](#), [T-128](#), [T-129](#), [T-130](#).

⁶¹³ [Mr Ntaganda's Appeal Brief](#), para. 174, referring to [T-128](#), p. 7, line 18 to p. 13 line 19.

⁶¹⁴ [Mr Ntaganda's Appeal Brief](#), para. 174, referring to [Mr Ntaganda's Sentencing Submissions](#), paras 151-154; [T-272](#), p. 51, lines 5-7.

⁶¹⁵ [Prosecutor's Response](#), para. 160, referring to [Sentencing Decision](#), para. 229.

⁶¹⁶ [T-272](#), p. 47, lines 6-9.

⁶¹⁷ [Prosecutor's Response](#), para. 162, referring to [Sentencing Decision](#), para. 230.

⁶¹⁸ [T-272](#), p. 47, lines 12-13.

⁶¹⁹ [Prosecutor's Response](#), para. 163.

Finally, she contends that the Trial Chamber reasonably assessed the issue within its discretion.⁶²⁰

(c) The victims' observations

257. Victims Group 2 recall that according to the Court's jurisprudence, 'good and compliant behaviour does not carry any weight in mitigation'.⁶²¹ They submit that Mr Ntaganda's hunger strike constituted a 'lack of cooperation' and was therefore relevant for the Trial Chamber's assessment.⁶²² Victims Group 2 further submit that Mr Ntaganda 'does not demonstrate any discernible error in the Trial Chamber's reasoning' and merely disagrees with its assessment.⁶²³ Consequently, they submit that this ground of appeal should be dismissed.⁶²⁴

(d) Mr Ntaganda's response to the victims

258. Mr Ntaganda contends that, but for his hunger strike, the Trial Chamber's assessment of his good behaviour and cooperation with the Court 'met the threshold to qualify as mitigating circumstances pursuant to the Court's case law'.⁶²⁵ He argues that Victims Group 2 fails to address the main issue, namely, the Trial Chamber's failure to provide reasons for its finding that his hunger strike had an impact upon the Trial Chamber's assessment of his conduct and cooperation with the Court.⁶²⁶ In the absence of such reasons, Mr Ntaganda avers that Victims Group 2's argument, that the Trial Chamber was entitled to treat his hunger strike as a lack of cooperation, is without merit.⁶²⁷

3. Determination by the Appeals Chamber

259. The Appeals Chamber notes that in assessing Mr Ntaganda's conduct during the trial, the Trial Chamber found that despite his 'respectful and positive behaviour' it did not consider his behaviour to be exceptional so as to constitute a mitigating

⁶²⁰ [Prosecutor's Response](#), para. 164.

⁶²¹ [Observations of Victims Group 2](#), para. 38, referring to [Katanga Sentencing Decision](#), para. 127; [Bemba Sentencing Decision](#), para. 81; [Al Mahdi Conviction and Sentencing Decision](#), para. 109.

⁶²² [Observations of Victims Group 2](#), para. 39, referring to [Šešelj Urgent Order to the Dutch Authorities Regarding Health and Welfare of the Accused](#), para. 2.

⁶²³ [Observations of Victims Group 2](#), para. 41.

⁶²⁴ [Observations of Victims Group 2](#), para. 41.

⁶²⁵ [Mr Ntaganda's Response to Observations of Victims](#), para. 55.

⁶²⁶ [Mr Ntaganda's Response to Observations of Victims](#), para. 56.

⁶²⁷ [Mr Ntaganda's Response to Observations of Victims](#), para. 57.

circumstance.⁶²⁸ In seeking to impugn this finding, Mr Ntaganda argues that the Trial Chamber misappreciated the facts and failed to provide reasons for its decision.⁶²⁹ For the reasons that follow, the Appeals Chamber is not convinced by Mr Ntaganda's arguments.

260. At the outset, the Appeals Chamber considers 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.⁶³⁰ The exceptionality of such behaviour will necessarily depend on the circumstances of each case.

261. In the case at hand, the Appeals Chamber observes that the Trial Chamber assessed Mr Ntaganda's conduct during the trial, holistically, noting both the positive and negative aspects of his behaviour.⁶³¹ On balance, the Trial Chamber found that his conduct was not exceptional and, therefore, did not warrant any weight in mitigation.⁶³² In reaching this conclusion, the Trial Chamber noted Mr Ntaganda's hunger strike which it found to be an exception to his otherwise 'consistently respectful and cooperative' behaviour.⁶³³ Mr Ntaganda argues that the Trial Chamber reached this finding without considering his statement, (read out in open court) and which is purported to be 'revealing of [his] state of mind at the time',⁶³⁴ or his submissions concerning the 'difficult circumstances giving rise to the hunger strike'.⁶³⁵ The Appeals Chamber notes that although not mentioned in the '[c]onduct during trial' section of the Sentencing Decision, the Trial Chamber did consider the conditions arising from Mr Ntaganda's detention which led to his hunger strike in the

⁶²⁸ [Sentencing Decision](#), para. 230.

⁶²⁹ [Mr Ntaganda's Appeal Brief](#), paras 173-174.

⁶³⁰ [Sentencing Decision](#), para. 229. See [Bemba Sentencing Decision](#), para. 81.

⁶³¹ [Sentencing Decision](#), paras 229-230.

⁶³² [Sentencing Decision](#), para. 230.

⁶³³ [Sentencing Decision](#), para. 229.

⁶³⁴ [Mr Ntaganda's Appeal Brief](#), para. 174, referring to [T-128](#), p. 7, line 18 to p. 13 line 19.

⁶³⁵ [Mr Ntaganda's Appeal Brief](#), para. 174, referring to [Mr Ntaganda's Sentencing Submissions](#), paras 151-154.

section entitled ‘Mr Ntaganda’s family circumstances and the conditions of his detention’.⁶³⁶ In this regard, the Trial Chamber stated:

243. As to the other matters raised by the Defence in relation to the conditions arising from Mr Ntaganda’s detention, the Chamber recalls that the restrictions on Mr Ntaganda’s contacts were imposed on him because of his own actions. In imposing those restrictions, the Chamber was mindful of Mr Ntaganda’s right to family life and took into account the need for the restrictions imposed to be necessary and proportionate in this regard. The Chamber further recalls that these restrictions have been periodically reviewed, including as to their continuing proportionality to and impact on Mr Ntaganda’s family and private life, including on his wife and children. The Appeals Chamber held in respect of the Chamber’s first review that Mr Ntaganda’s ‘right to privacy and family life was being appropriately balanced with the objectives of the stated aim of the restrictions’. In relation to the Defence’s submission that the impact of the restrictions on Mr Ntaganda’s contacts was compounded by factors ‘outside the Chamber’s control’, the Chamber recalls further that during its continuing review of the restrictions, it expressly took account of such factors, including the limited number of family visits received since Mr Ntaganda’s arrival at the Detention Centre, the practical limitations of the Registry in relation to which the Chamber had no direct oversight and the length of time that the restrictions had been in place. It therefore considers that the matters raised by the Defence were already appropriately taken into account by the Chamber in imposing and reviewing the restrictions.

244. For all these reasons, the Chamber does not consider Mr Ntaganda’s family circumstances, and the related matters of his detention, to constitute mitigating circumstances in this case.⁶³⁷

262. In light of the abovementioned findings of the Trial Chamber, the Appeals Chamber finds no merit in Mr Ntaganda’s argument that the Trial Chamber misappreciated the facts in relation to his hunger strike. The Appeals Chamber finds that the Trial Chamber was fully aware of all the relevant circumstances for its decision and did not ‘ignore all arguments raised’ as suggested by Mr Ntaganda.⁶³⁸ In addition to its finding on Mr Ntaganda’s hunger strike, the Trial Chamber noted further that he was not ‘credible on important aspects’ of his testimony related to the crimes committed during the First and Second Operations for which he was convicted and that he made ‘no sincere demonstrations of remorse towards his victims’.⁶³⁹ Consequently, the Appeals Chamber considers that in finding that Mr Ntaganda’s

⁶³⁶ [Sentencing Decision](#), paras 240-244.

⁶³⁷ [Sentencing Decision](#), paras 243-244 (footnotes omitted).

⁶³⁸ [Mr Ntaganda’s Appeal Brief](#), para. 174.

⁶³⁹ [Sentencing Decision](#), para. 230.

conduct during the trial was not exceptional, the Trial Chamber provided a reasoned decision and did not abuse its discretion in reaching its conclusion. Mr Ntaganda's arguments in this respect are rejected.

263. Having considered and rejected Mr Ntaganda's arguments, the Appeals Chamber accordingly rejects this ground of appeal.

**L. Twelfth ground of appeal: Alleged failure to consider
Mr Ntaganda's intervention on behalf of other detainees**

264. Under this ground of appeal, Mr Ntaganda submits that the Trial Chamber erred in failing to decide whether he 'had substantially contributed to [REDACTED]' and in failing to give any weight to this factor in mitigation of his sentence.⁶⁴⁰

1. Relevant part of the Sentencing Decision

265. In assessing Mr Ntaganda's behaviour toward and cooperation with the Court, the Trial Chamber considered his conduct while in detention.⁶⁴¹ On the basis of a Registry Report the Trial Chamber noted that

Mr Ntaganda's behaviour in detention has been, according to the Chief Custody Officer, 'exemplary', that he has always been respectful towards the Detention Centre staff, has good to excellent relationships with other detainees, and 'played a constructive role and intervened appropriately with the management of the ICC DC on behalf of other detainees, when those other detainees could be described as struggling with being in custody'.⁶⁴²

266. The Trial Chamber further noted two specific examples that were mentioned in an Addendum to the Registry's Report, which were indicative of Mr Ntaganda's behaviour in relation to other detainees and deemed to be of assistance to the staff of the Detention Centre in the execution of their duty of care.⁶⁴³ Specifically, the Trial Chamber noted paragraphs 10-15 of the Addendum to the Registry Report which stated as follows:

[REDACTED].

⁶⁴⁰ [Mr Ntaganda's Appeal Brief](#), para. 176 (emphasis in original).

⁶⁴¹ [Sentencing Decision](#), paras 231-235.

⁶⁴² [Sentencing Decision](#), para. 234, *referring to* Registry Report, p. 2.

⁶⁴³ [Sentencing Decision](#), para. 234, *referring to* Addendum to the Registry Report, paras 10-16.

267. The Trial Chamber found these specific actions of Mr Ntaganda, as detailed in the Addendum to the Registry Report, to be ‘commendable’.⁶⁴⁴ However, in considering these actions against the ‘overall gravity and aggravating circumstances established’ in relation to the crimes for which Mr Ntaganda was convicted, the Trial Chamber considered ‘the weight accorded to be too limited to impact on the individual and overall sentences’.⁶⁴⁵

2. *Summary of submissions*

(a) **Mr Ntaganda’s submissions**

268. Mr Ntaganda argues that the Trial Chamber ‘erred in failing to decide whether [he] [...] had substantially contributed to [REDACTED]’.⁶⁴⁶ He argues that by finding his conduct to be merely ‘commendable’, the Trial Chamber failed to give reasons and misappreciated the facts.⁶⁴⁷ Mr Ntaganda contends that given ‘the importance of the claim and the applicable standard of proof’, the Trial Chamber was required to indicate whether it accepted the claim, or not, ‘so that the convicted person would know what behaviour was deemed of insufficient “weight” to have any concrete impact on sentence whatsoever’.⁶⁴⁸

269. Mr Ntaganda submits that ‘[t]he evidence before the Chamber was more than adequate’ to find that he had ‘substantially contributed to [REDACTED]’.⁶⁴⁹ In addition, he points to a document prepared by the [REDACTED] which he avers provided additional evidence of his [REDACTED].⁶⁵⁰ Mr Ntaganda argues that the Trial Chamber erred by denying admission of this document on the basis that the ‘equivalent information was summarized in the [Addendum to the Registry Report], which was before the Chamber’.⁶⁵¹ In his view, the information in this document went beyond that contained in the Addendum to the Registry Report and would have ‘allowed for further comprehension of this event’.⁶⁵²

⁶⁴⁴ [Sentencing Decision](#), para. 235.

⁶⁴⁵ [Sentencing Decision](#), para. 235.

⁶⁴⁶ [Mr Ntaganda’s Appeal Brief](#), para. 176 (emphasis in original).

⁶⁴⁷ [Mr Ntaganda’s Appeal Brief](#), para. 177.

⁶⁴⁸ [Mr Ntaganda’s Appeal Brief](#), para. 177 (footnotes omitted).

⁶⁴⁹ [Mr Ntaganda’s Appeal Brief](#), para. 178.

⁶⁵⁰ [Mr Ntaganda’s Appeal Brief](#), para. 181.

⁶⁵¹ [Mr Ntaganda’s Appeal Brief](#), para. 181, referring to [Decision of 13 September 2019](#), para. 30.

⁶⁵² [T-272](#), p. 51, line 15.

270. Furthermore, Mr Ntaganda submits that his actions amounted to ‘an exemplary form of cooperation with the Court’.⁶⁵³ He suggests that because of his actions, the Court effectively avoided ‘a catastrophic breach of its duty of care [REDACTED]’.⁶⁵⁴ Moreover, he claims that his actions, in themselves, are indicative of his ‘significant rehabilitation’.⁶⁵⁵

271. Finally, Mr Ntaganda submits that given the Trial Chamber’s errors, the Appeals Chamber should exercise its discretion and recognise that his actions deserve recognition as a mitigating circumstance. Accordingly, the Appeals Chamber should give weight to this factor in mitigation and reduce his joint sentence.⁶⁵⁶

(b) The Prosecutor’s submissions

272. The Prosecutor argues that Mr Ntaganda’s arguments under this ground of appeal merely express disagreement with the Trial Chamber’s ‘reasonable decision without showing a discernible error’.⁶⁵⁷ She further argues that Mr Ntaganda ‘overstates his actions’ since the Addendum to the Registry Report suggests that he was simply concerned with the [REDACTED] and as such his actions did not amount to a substantial contribution towards [REDACTED].⁶⁵⁸ In addition, the Prosecutor submits that the mere mention of Mr Ntaganda’s name in the [REDACTED], does not demonstrate that his assistance [REDACTED] was substantial.⁶⁵⁹ In her view, the [REDACTED].⁶⁶⁰ Furthermore, she contends that the non-admission of the [REDACTED] was not an error on the part of the Trial Chamber, as this document ‘did not deprive the Trial Chamber of any relevant factor or information it should have taken into account’ because this information was reflected in the [Addendum to the Registry Report] which was on the record.⁶⁶¹

⁶⁵³ [Mr Ntaganda’s Appeal Brief](#), para. 183.

⁶⁵⁴ [Mr Ntaganda’s Appeal Brief](#), para. 183.

⁶⁵⁵ [Mr Ntaganda’s Appeal Brief](#), para. 183.

⁶⁵⁶ [Mr Ntaganda’s Appeal Brief](#), para. 185.

⁶⁵⁷ [Prosecutor’s Response](#), para. 166. *See also* [T-272](#), p. 34, lines 19-20 (‘[h]is alleged assistance to a certain individual was limited and the Trial Chamber thus correctly accorded it only limited weight’).

⁶⁵⁸ [Prosecutor’s Response](#), para. 167, *referring to* [Mr Ntaganda’s Appeal Brief](#), paras 178, 182.

⁶⁵⁹ [Prosecutor’s Response](#), para. 168.

⁶⁶⁰ [Prosecutor’s Response](#), para. 168.

⁶⁶¹ [T-272](#), p. 47, lines 22-24.

273. The Prosecutor argues that, contrary to Mr Ntaganda's arguments, the Trial Chamber did provide a reasoned decision.⁶⁶² Moreover, she argues that in concluding that the weight to be attached to Mr Ntaganda's actions was "too limited to impact on [his] individual and overall sentence", the Trial Chamber identified the relevant facts and 'was not required to enter further findings', as suggested by Mr Ntaganda.⁶⁶³ The Prosecutor submits that it was 'within the Chamber's discretion to accord Ntaganda's actions limited weight, and to consider that it did not minimise his sentence, given the gravity of his crimes and the aggravating circumstances'.⁶⁶⁴

(c) The victims' observations

274. Victims Group 2 submit that they 'cannot entirely agree' with the Prosecutor's characterisation of Mr Ntaganda's conduct while in detention.⁶⁶⁵ In their view, Mr Ntaganda's actions 'deserve[d] some recognition in mitigation', but 'could only have been given limited weight by the Trial Chamber'.⁶⁶⁶ Contrary to Mr Ntaganda's arguments, Victims Group 2 submits that the Trial Chamber did in fact consider Mr Ntaganda's actions 'as a mitigating factor and *did* attach credit, although limited, to this factor'.⁶⁶⁷ They argue that 'the specific weighing and attaching of weight to specific factors is within the discretionary power of the Trial Chamber and in the absence of a showing of a material error, the Appeals Chamber may not interfere with the Trial Chamber's decision'.⁶⁶⁸ Victims Group 2 further submit that Mr Ntaganda's specific actions while in detention 'could not have significantly impacted on the individual and overall sentences'.⁶⁶⁹

275. Finally, Victims Group 2 argue that the Trial Chamber's decision not to admit the [REDACTED] into evidence was also based on its discretionary power which may only be disturbed on appeal if it is shown that the Trial Chamber abused its discretion.

⁶⁶² [Prosecutor's Response](#), para. 169, referring to [Sentencing Decision](#), paras 234-235.

⁶⁶³ [Prosecutor's Response](#), para. 170, referring to [Sentencing Decision](#), para. 235.

⁶⁶⁴ [Prosecutor's Response](#), para. 171, referring to [Sentencing Decision](#), para. 235.

⁶⁶⁵ [Observations of Victims Group 2](#), para. 45.

⁶⁶⁶ [Observations of Victims Group 2](#), para. 45.

⁶⁶⁷ [Observations of Victims Group 2](#), para. 46 (emphasis in original).

⁶⁶⁸ [Observations of Victims Group 2](#), para. 46.

⁶⁶⁹ [Observations of Victims Group 2](#), para. 47 (footnotes omitted).

In this regard, they submit that Mr Ntaganda ‘fails to demonstrate any abuse of discretion’.⁶⁷⁰

(d) Mr Ntaganda’s response to the victims

276. Mr Ntaganda argues that Victims Group 2 ‘wrongly asserts’ that the Trial Chamber attached some weight to his actions as a mitigating factor.⁶⁷¹ He argues that, without more, Victims Group 2’s assertion that the Trial Chamber correctly decided not to admit the [REDACTED] into evidence is unconvincing.⁶⁷²

3. Determination by the Appeals Chamber

277. The Appeals Chamber notes that Mr Ntaganda essentially takes issue with the Trial Chamber’s assessment of his conduct in relation to [REDACTED] and alleges that this factor was given ‘no weight’ in mitigation.⁶⁷³ In particular, Mr Ntaganda argues that the Trial Chamber erred in finding that his specific actions while in detention were merely “‘commendable’”, without specifically addressing whether it found his actions to have [REDACTED].⁶⁷⁴ In Mr Ntaganda’s view, had the Trial Chamber found that he had made a [REDACTED], it would have concluded that his actions ‘deserved at least some concrete recognition in mitigation’.⁶⁷⁵ For the reasons that follow, the Appeals Chamber finds no merit in these arguments.

278. The Appeals Chamber notes that Mr Ntaganda’s argument in this regard is speculative and demonstrates no discernible error in the Trial Chamber’s approach. In finding Mr Ntaganda’s actions to be ‘commendable’, the Trial Chamber was fully aware of the facts and circumstances surrounding his actions, as referenced in the Addendum to the Registry Report.⁶⁷⁶ Rather than misappreciating these facts, the Trial Chamber actually expressed its appreciation for Mr Ntaganda’s conduct and, contrary to Mr Ntaganda’s argument, clearly assigned weight to this factor.⁶⁷⁷ 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

⁶⁷⁰ [Observations of Victims Group 2](#), para. 46.

⁶⁷¹ [Mr Ntaganda’s Response to Observations of Victims](#), para. 60.

⁶⁷² [Mr Ntaganda’s Response to Observations of Victims](#), para. 61.

⁶⁷³ [Mr Ntaganda’s Appeal Brief](#), para. 176 *et seq.*

⁶⁷⁴ [Mr Ntaganda’s Appeal Brief](#), para. 177.

⁶⁷⁵ [Mr Ntaganda’s Appeal Brief](#), para. 184 (emphasis in original).

⁶⁷⁶ [Sentencing Decision](#), paras 233-235.

⁶⁷⁷ [Sentencing Decision](#), para. 235.

to be ‘too limited’ to have an impact on his individual and overall sentences.⁶⁷⁸ The Appeals Chambers finds the Trial Chamber’s exercise of discretion in this regard to be reasonable. Similarly, Mr Ntaganda fails to show that the Trial Chamber misappreciated the fact that his conduct not only [REDACTED], but also amounted to ‘an exemplary form of cooperation with the Court’.⁶⁷⁹ As noted above, the Trial Chamber was fully aware of his conduct. In the absence of any discernible errors in the Trial Chamber’s assessment of the relevant facts and the weight it accorded to Mr Ntaganda’s conduct while in detention, the Appeals Chamber rejects this argument.

279. Furthermore, the Appeals Chamber notes Mr Ntaganda’s argument concerning the Trial Chamber’s decision not to admit into evidence the Detention Centre’s so-called [REDACTED], which he claims was an error on the part of the Trial Chamber.⁶⁸⁰ Mr Ntaganda argues that this document would have provided additional information about his specific acts of assistance as well as demonstrated that this assistance ‘continued over an extended period of time’.⁶⁸¹ The Appeals Chamber notes that in its Decision of 13 September 2019, the Trial Chamber denied admission of this document and explained:

29. *Ex parte document*: The Defence tenders one document into evidence which remains *ex parte*, Chambers and Registry only, as it relates to matters concerning the private life of an accused person in another case before the Court. The relevant information contained in the document is referred to in the *addendum* to the Registry Report. The Prosecution requests access to the document or to a redacted version thereof in order to make submissions in relation thereto and indicates that it ‘reserves its right’ to do so until it has obtained such access.

30. The Chamber notes that the aforementioned document tendered by the Defence is relevant to one matter concerning Mr Ntaganda’s conduct while in detention, which has been placed on the record of the case by means of filing of the *addendum* to the Registry Report. Under these circumstances and noting further the *ex parte* nature of the document and the concomitant effect thereof on the document’s probative value, the Chamber considers it not appropriate to admit the document into evidence. The Chamber therefore denies the admission of the aforementioned document.⁶⁸²

⁶⁷⁸ [Sentencing Decision](#), para. 235.

⁶⁷⁹ [Mr Ntaganda’s Appeal Brief](#), para. 183.

⁶⁸⁰ [Mr Ntaganda’s Appeal Brief](#), para. 181.

⁶⁸¹ [Mr Ntaganda’s Appeal Brief](#), para. 181.

⁶⁸² [Decision of 13 September 2019](#), paras 29-30 (footnotes omitted).

280. The Appeals Chamber finds that it was reasonable for the Trial Chamber to deny admission into evidence of the [REDACTED], given the nature of the document and the effect thereof on its probative value. The information contained in this document was, as pointed out by Mr Ntaganda, summarised in the Addendum to the Registry Report as follows:

[REDACTED].⁶⁸³

281. The Appeals Chamber notes that the Trial Chamber specifically took note of this information when reaching its conclusion that Mr Ntaganda's specific actions in detention were 'commendable'.⁶⁸⁴ In these circumstances, the Appeals Chamber finds that the Trial Chamber had all the relevant information necessary for its decision and that Mr Ntaganda shows no error in this regard.

282. In addition, the Appeals Chamber finds, contrary to Mr Ntaganda's arguments,⁶⁸⁵ that the Trial Chamber provided a reasoned decision. With references to the Registry Report and the Addendum to the Registry Report, the Trial Chamber identified the information it considered to be relevant for its conclusion,⁶⁸⁶ specifically noting, *inter alia*, information detailing Mr Ntaganda's intervention with the management of the Detention Centre "on behalf of other detainees, when those other detainees could be described as struggling with being in custody".⁶⁸⁷ Mr Ntaganda's argument in this regard is therefore rejected.

283. Accordingly, having considered and rejected Mr Ntaganda's arguments the Appeals Chamber rejects this ground of appeal.

VI. APPROPRIATE RELIEF

284. The Appeals Chamber has rejected all the grounds of appeal put forward by Mr Ntaganda. Accordingly, the Appeals Chamber finds that it is appropriate to reject Mr Ntaganda's appeal and to confirm the Sentencing Decision.

Done in both English and French, the English version being authoritative.

⁶⁸³ See paragraph 266 above. *See also* Addendum to the Registry Report, para. 16.

⁶⁸⁴ See [Sentencing Decision](#), para. 234, *referring to* Addendum to the Registry Report, paras 10-16.

⁶⁸⁵ [Mr Ntaganda's Appeal Brief](#), paras 177, 182.

⁶⁸⁶ [Sentencing Decision](#), paras 234-235.

⁶⁸⁷ [Sentencing Decision](#), para. 234, *referring to* Registry Report, p. 2.



Judge Howard Morrison
Presiding

Dated this 30th day of March 2021

At The Hague, The Netherlands