

**Cour
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**International
Criminal
Court**

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THE APPEALS CHAMBER

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
*THE PROSECUTOR v. BOSCO NTAGANDA***

**Public Document
with two Public Annexes**

**Observations of the Common Legal Representative of
the Former Child Soldiers on Part I of Mr Ntaganda's Appeal against
the Judgment pursuant to Article 74 of the Rome Statute**

Source: Office of Public Counsel for Victims (CLR1)

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Ms Helen Brady

Counsel for the Defence

Mr Stéphane Bourgon
Ms Kate Gibson

Legal Representatives of the Victims

Ms Sarah Pellet
Ms Anna Bonini

Legal Representatives of the Applicants

Mr Dmytro Suprun
Ms Anne Grabowski

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. As a preliminary matter, the Legal Representative invites the Appeals Chamber to consider whether Mr Ntaganda's submissions in the context of the present appeal meet the applicable requirements under the Court's core texts.

2. In particular, regulation 57 of the RoC, as recently amended,¹ requires the appellant to state *inter alia* "[t]he specific provision of the Statute pursuant to which the appeal is filed" and "[t]he grounds of appeal [...] specifying the alleged errors and how they affect the appealed decision". The Legal Representative notes that Mr Ntaganda's Notice of Appeal fails to provide even such fundamental information for some of the fifteen grounds of appeal advanced. For instance, for Ground 3, Mr Ntaganda simply stated that "[t]he Trial Chamber erred in law in convicting Mr. Ntaganda of individual criminal acts for which he was not charged, and/or of criminal acts for which the facts and circumstances were not adequately plead".² Similarly, for Ground 6, the Notice of Appeal merely indicates that "[t]he Trial Chamber erred in law and in fact in entering a conviction for ordering displacement as a war crime".³ As noted by the ICTR Appeals Chamber, the purpose for setting forth the grounds of appeal in the notice is *inter alia* "to focus the mind of the Respondent, right from the day the notice of appeal is filed, on the arguments which will be developed subsequently in the Appeal brief and to give details of the arguments the parties intend to raise in support of the grounds of appeal".⁴ The lack of precision and detail in the Notice of Appeal precluded the realisation of these objectives.

3. Mr Ntaganda's First Appeal Brief similarly lacks detail and substantiation.⁵ The Appeals Chamber has been prepared to dismiss arguments *in limine* where the appellant fails to set out an alleged error and to indicate with sufficient precision

¹ See the [RoC Informational Note](#).

² See the [Notice of Appeal](#), p. 8.

³ *Idem*, p. 10.

⁴ See the [Nahimana Notice of Appeal Decision](#), para. 50, citing the [Bagilishema Notice of Appeal Decision](#), p. 3.

⁵ The Legal Representative also notes that for some of the grounds of appeal, such as Ground 1, Mr Ntaganda even failed to specify, either in the [Notice of Appeal](#) or in the [First Appeal Brief](#), whether he alleges an error of law, an error of fact, or a procedural error. Concerning the limited scope of the provision in Article 81(1)(b)(iv), which does not appear to be applicable to the present circumstances. See [Triffterer Article 81](#), p. 1941.

how said error materially affected the impugned decision.⁶ While the level of substantiation required depends “on the specific argument raised, including the type of error alleged”,⁷ a minimum level of substantiation is required in all instances.⁸

II. SUBMISSIONS

1. Ground 1: Judge Ozaki did not lose her appearance of independence

4. Mr Ntaganda argues that, by reason of her appointment as an Ambassador of Japan, Judge Ozaki ceased to “satisfy the requirements of Article 40 of the Statute”,⁹ thus Trial Chamber VI was not properly constituted and “the Judgment was not validly rendered”.¹⁰ His arguments under the first ground of appeal consist merely in a repetition of those advanced in the Request for Reconsideration and the Request for Disqualification, both of which were rejected.¹¹ While the Legal Representative stands by the position set out in her previous filings on said arguments,¹² she also notes that they need not be entertained by the Appeals Chambers on the merits.

5. In fact, Mr Ntaganda continues to ignore the fundamental distinction drawn by both the *Ad Hoc* Presidency¹³ and the Plenary of Judges¹⁴ between, on the one hand, the requirements for a person to serve as a Judge of the Court and the conduct incompatible with the discharge of judicial functions and, on the other, the question of the grounds for disqualification of a Judge from sitting in a particular case. Conflating these two issues, Mr Ntaganda (a) misinterprets the permissible scope of the present appeal in relation to Judge Ozaki’s appointment; (b) fails to make

⁶ See the [Interim Release Appeal Judgment](#), para. 32; the [Lubanga Appeal Judgment](#), para. 30; the [Kony Admissibility Appeal](#), paras. 50-51; the [Bemba Admissibility Appeal](#), paras. 102-104; and the [Bemba Detention Appeal](#), paras. 69-71.

⁷ See the [Lubanga Appeal Judgment](#), para. 31; and [Triffterer Article 81](#), p. 1926.

⁸ The Legal Representative notes the findings of the ICTY Appeals Chamber in the *Kupreškić et al.* case according to which “a party who submits that the Trial Chamber erred in law must at least identify the alleged error and advance some arguments in support of its contention. An appeal cannot be allowed to deteriorate into a guessing game for the Appeals Chamber. [...] If the party is unable to at least identify the alleged legal error, he or she should not raise the argument on appeal”. See the [Kupreškić Appeal Judgement](#), para. 27.

⁹ See the [Notice of Appeal](#), p. 7; and the [First Appeal Brief](#), paras. 1-17.

¹⁰ See the [First Appeal Brief](#), para. 1.

¹¹ See the [Decision on Reconsideration](#) and the [Plenary Decision on Disqualification](#).

¹² See the [CLRs Joint Response on Stay of Proceedings](#); the [CLRs Joint Response on Disqualification](#); and the [CLRs Joint Response on Request for Leave to Reply](#).

¹³ See the [Decision on Judge Fremr’s Excusal](#), p. 4; and the [Decision on Judge Chung’s Excusal](#), p. 4.

¹⁴ See the [Decision on Reconsideration](#), paras. 16-17.

submissions relevant the applicable standard; and (c) incorrectly suggests that the members of the Appeal Chambers may be conflicted in respect of this ground of appeal. Accordingly, Mr Ntaganda's first ground of appeal should be dismissed.

(a) Mr Ntaganda misinterprets the permissible scope of the present appeal

6. As noted in the Decision on Reconsideration, *"a distinction [has] to be drawn between a decision on an administrative issue concerning whether an activity of a judge, in general, is likely to affect confidence in a judge's independence (article 40 of the Statute) and the question of a judge's capacity to continue to sit in a particular case because his or her impartiality might reasonably be doubted on any ground (article 41 of the Statute)"*.¹⁵ The former issue – the general question of Judge Ozaki's independence – was addressed by the Plenary Decision on Independence,¹⁶ an exercise of internal administrative functions by the Judges,¹⁷ concluding that Judge Ozaki's appointment to the post of Ambassador *"did not violate any aspect of article 40 of the Statute"*.¹⁸ The latter issue – Judge Ozaki's continued capacity to sit in the *Ntaganda* case – is a *"judicial matter"*¹⁹ that was settled by the Plenary Decision on Disqualification following a specific challenge by Mr Ntaganda pursuant to Article 41.²⁰ Only this latter question is a justiciable matter that can be properly advanced and adjudicated on appeal.

7. By contrast, the Plenary Decision on Independence *"is not a decision which pertains to judicial proceedings, [...] does not impact on the fair trial rights of any accused"*²¹ and is not subject to appeal. The Legal Representative concurs with the Prosecution that Mr Ntaganda's first ground of appeal amounts to an impermissible attempt to appeal the Plenary Decision on Independence.²² The Legal Representative endorses

¹⁵ *Idem*, para. 17.

¹⁶ See the [Plenary Decision on Independence](#).

¹⁷ See the [Decision on Reconsideration](#), para. 16.

¹⁸ See the [Plenary Decision on Independence](#), para. 16.

¹⁹ See the [Decision on Reconsideration](#), para. 16. Also see the [Decision on Judge Fremr's Excusal](#); the [Decision on Judge Chung's Excusal](#); the [Plenary Decision on Disqualification](#); and the [Čelebići Bureau Decision](#), para. 9.

²⁰ See the [Request for Disqualification](#).

²¹ See the [Decision on Reconsideration](#), para. 19.

²² See the [Prosecution First Response](#), para. 3. The [Notice of Appeal](#) refers exclusively to Articles 40 and 74(1), and does not mention Article 41. The [First Appeal Brief](#) confirms that the first ground of appeal concerns *"compatibility of Judge Ozaki's service as a Japanese diplomat with article 40"* (para. 2);

the arguments advanced by the Prosecution in this respect,²³ and adds that this conclusion is fully in line with the approach recently adopted by the Appeals Chamber in the context of the *Afghanistan* situation, where it drew a clear link between a party's right to trigger specific proceedings under the Statute and its standing to appeal decisions resulting from said proceedings.²⁴ In the present circumstances, where the Statute does not empower parties to trigger a challenge to the independence of a Judge under Article 40,²⁵ the resulting decision of the Plenary cannot be subject to appeal.

8. The Legal Representative notes that issues arising from Judge Ozaki's appointment only fall within the permissible scope of the present appeal to the extent the appellant were to challenge the Plenary Decision on Disqualification, arguing that Judge Ozaki should have been disqualified pursuant to Article 41 and that the Plenary's refusal to do so affected the fairness of the proceedings against Mr Ntaganda.²⁶ The caselaw of the *ad hoc* tribunals confirms this approach,²⁷ including in the *Čelebići* Appeal Judgment, the very decision cited by Mr Ntaganda as the basis for his contention that the general "*lack of independence of a Judge is a justiciable matter*".²⁸ In said case, contrary to Mr Ntaganda's suggestion that "*the appeal primarily challenged the Bureau's decision*" concerning Judge Odio Benito's independence,²⁹ the ICTY Appeals Chamber was at pains to emphasise that it had "*not dealt with this matter as an appeal from the decision of the Bureau*",³⁰ but rather only

"raises the same issues that were adjudicated in the Plenary's Decision on Independence" (para. 5); and is based on the contention that "*the Decision on Independence was wrongly decided*" (para. 3). Mr Ntaganda also asks the Appeals Chamber Judges to consider whether their disqualification is required on the basis that they should not "*decide appeals from their own decisions*" (para. 5), i.e. the [Plenary Decision on Independence](#).

²³ See the [Prosecution First Response](#), paras. 4-6.

²⁴ See the [Afghanistan Oral Decision](#), pp. 3-4.

²⁵ See Article 41(2)(b). See also [Triffterer Article 40](#), p. 1257.

²⁶ See the [Prosecution First Response](#), para. 7.

²⁷ See the [Blagojević Bureau Decision](#), para. 4; the [Galić Appeals Judgement](#), paras. 31 and 34; and the [Seromba Interlocutory Appeal Decision](#), para. 4.

²⁸ See the [First Appeal Brief](#), para. 4.

²⁹ See the [First Appeal Brief](#), footnote 6.

³⁰ See the [Čelebići Appeals Judgement](#), footnote 1165.

the “question whether a judge should have been disqualified from hearing a case is relevant to the fairness of the trial [...] and [...] is therefore a valid ground of appeal from a conviction”.³¹

(b) Mr Ntaganda fails to make submissions relevant to the applicable standard

9. The question of the permissible scope of Mr Ntaganda’s appeal under this ground is not merely procedural, but impacts on the applicable standard to be considered by the Appeals Chamber and the relevance of the arguments advanced by Mr Ntaganda.

10. As previously clarified by the Plenary, its Decision on Independence under Article 40 concerned the compatibility of “*the role of ICC Judge and that of Japanese diplomat [...] in abstracto*”.³² By contrast, to succeed in his challenge under Article 41, Mr Ntaganda was required to prove *in concreto* “to the requisite high threshold, that there is an objectively reasonable appearance that Judge Ozaki may be unable to discharge her judicial duties in the Ntaganda case impartially [...] in view of the entirety of the entailing circumstances”.³³ While said lack of impartiality may be based, among other things, on a judge’s concurrent employment,³⁴ the Plenary cited with approval the ICTY Bureau’s finding that in such cases:

*“the party raising the issue of disqualification [...] must show a link between the activity allegedly incompatible with the judicial function and the particular case at issue. It would not be sufficient for that party to claim merely that the Judge in question is exercising a political, administrative or professional activity incompatible with his or her judicial functions”.*³⁵

11. Mr Ntaganda framed the entirety of his arguments under this ground of appeal as a challenge against the Plenary Decision on Independence, claiming that the roles of ICC Judge and Japanese diplomat are incompatible *in abstracto*. He did not argue – let alone prove – that the Plenary erred in any way in its Decision on Disqualification, nor did he put forward any arguments to the effect that Judge

³¹ *Ibid.*, emphasis added.

³² See the [Plenary Decision on Disqualification](#), para. 34.

³³ *Idem*, para. 35. See also e.g. the [Bemba et al. Decision on Excusal](#), p. 3, third paragraph.

³⁴ See the [CLR’s Joint Response on Disqualification](#), para. 28.

³⁵ See the [Decision on Reconsideration](#), para. 16 (emphasis added), citing the [Čelebići Bureau Decision](#), paras. 6 and 9-10.

Ozaki's appointment had a "*direct and specific impact*"³⁶ upon her impartiality in the *Ntaganda* case specifically, rendering the proceedings unfair.³⁷ By insisting in his reference to the incorrect standard under the Statute, Mr Ntaganda repeated the error made in his Disqualification Request, which was dismissed by the Plenary on the basis that it "*misstate[d] the legal issue*" at stake.³⁸ The Legal Representative notes that this ground of appeal should be dismissed on the same basis.

(c) The Appeals Chamber Judges are not conflicted in respect of this ground of appeal

12. Mr Ntaganda incorrectly suggests that the members of the Appeals Chamber may be conflicted in respect of this ground of appeal by reason of their involvement in the Plenary Decision on Independence.³⁹ The Legal Representative concurs with the Prosecution that said argument should not be entertained.⁴⁰ Again, in this context, Mr Ntaganda ignored the distinction between issues arising under Articles 40 and 41, and the corresponding procedures to be followed.

13. Judge Ozaki's disqualification from sitting in the *Ntaganda* case, the only issue potentially falling within the permissible scope of the present appeal proceedings, was addressed exclusively in the Plenary Decision on Disqualification of 17 June 2019.⁴¹ The members of the Appeals Chamber abstained from participating in any aspect of that decision on the basis that "*their participation may place them in a potential situation of conflict vis-à-vis their responsibilities as judges of the Appeals Division*".⁴²

14. While the members of the Appeals Chamber did take part in the earlier Plenary Decision on Independence,⁴³ this does not disqualify them from considering the present appeal. The Plenary Decision on Independence was an "*internal*

³⁶ See the [Čelebići Bureau Decision](#), para. 10.

³⁷ In this respect, Judge Ozaki noted that she only assumed her duties as Japanese Ambassador "*after the completion of substantive deliberations on the Article 74 Judgement*". See [Plenary Decision on Independence](#), para. 5; and the [Decision on Reconsideration](#), para. 33.

³⁸ See the [Plenary Decision on Disqualification](#), para. 35. Also see the [Decision on Reconsideration](#), para. 21.

³⁹ See the [First Appeal Brief](#), para. 5.

⁴⁰ See the [Prosecution First Response](#), paras. 13-14.

⁴¹ See the [Plenary Decision on Disqualification](#).

⁴² *Idem*, paras. 56-57.

⁴³ See the [Plenary Decision on Independence](#), para. 8.

*administrative decision of the judges” concerning the issue of whether Judge Ozaki’s appointment in general would be likely to affect confidence in her independence, “not a decision pertaining to Judge Ozaki’s capacity to sit in the Ntaganda case, with the latter issue not yet having arisen [at the time]”.*⁴⁴ The ICTY Appeals Chamber in *Čelebići* confirmed in virtually identical circumstances that *“the fulfilment by a Judge of his or her duty to take part in a collegiate decision of an administrative nature on the administrative issue discussed so far cannot amount to a ground for subsequently disqualifying such a judge, sitting in the Appeals Chamber, from discharging a judicial function”*, even where the relevant factual background overlaps.⁴⁵ As noted *supra*, the legal and factual considerations pertaining to Judge Ozaki’s general independence under Article 40 differ from those pertaining to her capacity to sit in the *Ntaganda* case, as does the applicable legal standard, and the *“degree of congruence”*⁴⁶ between the two does not require the disqualification of the members of the Appeals Chamber.

2. Ground 3: The conviction does not exceed the scope of the charges

15. According to Mr Ntaganda, the Trial Chamber erred in convicting him of fifteen criminal acts that were *“not within the scope of the charges”*⁴⁷ (the “Challenged Acts”). Two of the Challenged Acts pertain to crimes against child soldiers, *i.e.*:

- “(xii) the rape and sexual slavery of child soldiers in relation to P-0883 at Camp Bule, and Mave, assigned to Floribert KISEMBO [...]*
- (xiv) using children under the age of 15 to participate actively in hostilities in the First Operation in so far as this finding relies on evidence relating to Sayo [...].”*⁴⁸

16. The Legal Representative concurs with the Prosecution that said arguments, which were only raised by Mr Ntaganda as part of his closing submissions and only for some of the Challenged Acts,⁴⁹ should be dismissed. The Legal Representative

⁴⁴ See the [Decision on Reconsideration](#), para. 18.

⁴⁵ See the [Čelebići Bureau Decision](#), para. 15. Also see *mutatis mutandis* the [Taylor Decision on Withdrawal or Disqualification](#); and the [Stanišić and Župljanin Panel Decision](#).

⁴⁶ See the [First Appeal Brief](#), para. 5.

⁴⁷ *Idem*, para. 18.

⁴⁸ *Idem*, para. 22 (footnotes omitted).

⁴⁹ See the [Judgment](#), para. 36; the [Prosecution First Response](#), paras. 38-39 and [Annex B](#) thereto (also highlighting that Mr Ntaganda specifically questioned witnesses on the Challenged Acts he now claims to be beyond the scope of the charges). While Mr Ntaganda has objected, during trial, to the

reiterates her position, maintained throughout the trial, that the charges concerning crimes against child soldiers have been pleaded and confirmed by reference to confined parameters and not, as suggested by Mr Ntaganda, specific criminal acts.⁵⁰ As explained in detail in the Prosecution First Response,⁵¹ Mr Ntaganda was charged and tried for the crimes of enlistment, conscription, rape and sexual slavery of child soldiers “*in Ituri between on or about 6 August 2002 and 31 December 2003*” and for the crime of use of children under the age of 15 to actively participate in hostilities “*in Ituri between on or about 6 August 2002 and 30 May 2003*”. The degree of specificity of said charges is consistent with the approach of the Court, as adopted in *Lubanga* and unchallenged in *Bemba*, as well as with the jurisprudence of other tribunals.⁵²

17. While endorsing the Prosecution’s arguments on this ground of appeal, the Legal Representative briefly sets out additional considerations supporting the conclusion that, in the present case, the framing of charges concerning sexual violence crimes against child soldiers by reference to parameters was permissible, and constituted an adequate basis for conviction.

18. First, the Legal Representative notes that the charges of rape and sexual slavery against child soldiers (Counts 6 and 9 respectively) were framed not only based on “*narrowly confined*”⁵³ temporal and geographical parameters, but also by reference to a limited category of victims, *i.e.* “*UPC/FPLC child soldiers under the age of 15*”.⁵⁴ The *ad hoc* tribunals’ caselaw confirms that the identification of victims by reference to “*their category or position as a group*” is a relevant consideration in

admission of evidence he deemed to pertain to incidents falling outside the scope of the charges (see *e.g.* the [First Request for Leave to Appeal](#) and the [Second Request for Leave to Appeal](#)), he raised no such objection in relation to the Challenged Acts concerning crimes against child soldiers prior to his closing submissions.

⁵⁰ See the [CLR1 Response to Closing Brief](#), para. 22.

⁵¹ See the [Prosecution First Response](#), para. 37.

⁵² *Idem*, paras. 40-41.

⁵³ See the [Judgment](#), para. 41.

⁵⁴ See the [Confirmation Decision](#), paras. 74, and 81-82; the [Judgment](#), para. 968; and the [Sentencing Judgment](#), para. 108. The Trial Chamber and Appeal Chamber have consistently held that the victims’ age is not a constitutive element of the crimes in Articles 8(2)(e)(vi). See the [Judgment](#), para. 965; the [Second Decision on Jurisdiction](#), para. 54; and the [Appeal Ruling on Counts 6 and 9](#), para. 65.

assessing whether material facts and circumstances have been pleaded with sufficient precision.⁵⁵

19. Second, Mr Ntaganda's argument that a higher degree of specificity applies to the charges of rape and sexual slavery of child soldiers than to those of conscription and enlistment,⁵⁶ is contradictory and ill-founded. While Mr Ntaganda claims that *both* rape and sexual slavery in relation to P-0883 and Mave fall outside the facts and circumstances described in the charges, the only argument advanced in support of said contention is that "*the continuing nature of being a child soldier does not circumvent the need to plead discrete acts of rape*".⁵⁷ This somewhat cryptic wording suggests that Mr Ntaganda may regard the "*continuing nature*" of the relevant crime as the single yardstick determining whether the relevant charges need to be pleaded at the level of individual acts or not.⁵⁸ According to that reasoning, Mr Ntaganda's challenge concerning the charges of sexual slavery is bound to fail, since the continuing nature of this crime, "*analogous to the continuing criminality of conscription and enlistment of child soldiers*",⁵⁹ has been widely recognised.⁶⁰

⁵⁵ The *ad hoc* tribunals considered that this may be sufficient even in cases where a high degree of specificity is required, such as those concerning alleged criminal acts personally carried out by the accused. See e.g. the [Krnojelac Decision](#), para. 18; the [Brdjanin Decision](#), para. 22; and the [Ntagerura et al. Judgment](#), para. 32.

⁵⁶ Mr Ntaganda acknowledges that "*in respect of counts 14-16*" the facts and circumstances were not described in this case at the level of individual acts (see the [First Appeal Brief](#), para. 21), but he does not appear to challenge this approach except for stating the use of children under the age of 15 to participate actively in hostilities in the First Operation exceeds the scope of the charges "*in so far as this finding relies on evidence relating to Sayo*". See the [First Appeal Brief](#), para. 22(xiv). Indeed, it is well-established that the crimes of enlisting and conscripting are offences of a continuing nature, which continue to be committed until the children leave the armed group or reach age fifteen and that the relevant material facts can be framed as a pattern, rather than through multiple individual acts. See e.g. the [Lubanga Appeal Judgment](#), paras. 131-132, 135; the [Lubanga Confirmation of Charges Decision](#), para. 248; the [Taylor Trial Judgment](#), paras. 117-119 and 1357; and the [RUF Appeal Judgment](#), para. 830.

⁵⁷ See the [First Appeal Brief](#), para. 22(xii). Also see the [Defence Request for Leave to Reply](#), para 13.

⁵⁸ See e.g. the [Defence Closing Brief Reply](#), para. 11 ("*Counts 6 (rape) and 9 (sexual enslavement) refer to crimes that are constituted by relatively discrete events that are not inherently "continuous" as the Prosecution tries to argue*").

⁵⁹ See [Sellers Viseur](#), p. 121.

⁶⁰ See the [Judgment](#), para. 42; the [Gbagbo Separate Opinion](#), para. 69; the [Habré Trial Judgment](#), para. 1504 (French version only); the [Taylor Trial Judgment](#), para. 1018; the [RUF Trial Judgment](#), para. 427; the [AFRC Trial Judgment](#), para. 39; and the [Kunarac Trial Judgment](#), para. 542. Also see [Triffterer Article 8\(2\)\(b\)\(xxii\)](#), pp. 490 *et seq.*; and [Oosterveld](#), pp. 17-18.

20. The Legal Representative notes, however, that the jurisprudence of the Court and the practice of other international tribunals reflect the adoption of a more holistic approach to the assessment of the required degree of specificity of the charges. The continuing or repeated nature of the relevant crime is but one of the factors to be taken into account, as part of a case- and fact-specific assessment that cannot be carried out *in abstracto*.⁶¹ As explored in further detail in the Prosecution First Response,⁶² said factors pertain, *inter alia*, to the widespread nature and sheer scale of the crimes, including their geographical and temporal scope and the number of victims and incidents; the applicable mode of liability and level of proximity of the accused to the crimes; and the type of criminality, including the continuous nature of the relevant offence, whether it was directed against a group or collectivity of people; and the fact that victims and perpetrators were continually on the move between various locations within a given area at the time of the commission of the crimes.

21. In the present case, several factors militate in favour of the application of the less stringent standard developed for the recruitment of child soldiers to the charges of *both* sexual slavery *and* rape against said children. Mr Ntaganda was not charged for personally carrying out the acts of rape and sexual enslavement relevant to Counts 6 and 9,⁶³ but rather as an indirect co-perpetrator. The charges described a pattern of ongoing criminality against UPC/FPLC child soldiers who were victimised continuously (for sexual enslavement) and repeatedly (for rape), by a number of perpetrators and at various locations, tracing the movements of the UPC/FPLC forces in Ituri. And indeed, with respect to the Challenged Acts, the Trial Chamber found beyond reasonable that P-0883 and Mave were raped repeatedly and on a regular basis by many soldiers at various locations,⁶⁴ but also noted that these incidents *per se* were “not representative of the number of female UPC/FPLC victims who were subjected to

⁶¹ See the [Chambers Practice Manual](#), para. 38; the [Ongwen Oral Decision](#), p. 20, lines 7-9; the [AFRC Appeals Judgment](#), para. 37; the [Taylor Appeal Judgment](#), para. 40; the [Kupreškić Appeal Judgement](#), para. 89; the [Prlić Appeal Judgment](#), para. 28; and the [Blaškić Appeal Judgment](#), para. 210.

⁶² See the [Prosecution First Response](#), paras. 19 *et seq.*

⁶³ See the [Judgment](#), para. 1196, and footnote 3238.

⁶⁴ *Idem*, paras. 409, 411, and 974.

rape and sexual violence, given the Chamber's finding that such conduct against female members was a common practice in the UPC/FPLC during this time period".⁶⁵

22. Accordingly, the charges concerning sexual violence crimes against child soldiers were appropriately framed by reference to parameters and constituted an adequate basis for Mr Ntaganda's conviction.⁶⁶ The Challenged Acts concerning crimes against child soldiers fall squarely within the scope of said charges.

III. CONCLUSION

23. For these reasons, the Legal Representative respectfully requests the Chamber to dismiss the appeal (grounds 1 and 3) in its entirety.



Sarah Pellet

Common Legal Representative of the
Former Child Soldiers

Dated this 27th Day of February 2020

At The Hague, The Netherlands

⁶⁵ See the [Sentencing Judgment](#), para. 108.

⁶⁶ The Legal Representative also wishes to draw the Appeals Chamber's attention to the adverse impact that a general requirement that all crimes must be pleaded and confirmed at the level of individual criminal acts would entail on cases involving sexual violence crimes, and particularly those against children. As noted by commentators, "*evidence of sexual violence often comes out late in the investigation of atrocity crimes*" (see [Sacouto](#)) and "*the added stigma associated with sexual and gender-based violence crimes and the difficulties of attaining victim participation at trial means there may be heavy turnover of witnesses and evidence for the prosecutor attempting to bring these charges*" (see [Lattanzi](#)). These obstacles are only compounded where the stigmatised victim was, at the time of the events, a child under the age of 15. Imposing a strict rule barring a trial chamber from considering specific incidents of sexual and gender-based violence not specifically confirmed by the pre-trial chamber, such as the rape of a particular child soldier at a specified location and date, would often preclude the prosecution of such crimes and would be even less justified in cases where, as here, the accused received adequate notice of all the material facts and circumstances prior to trial and suffered no prejudice as a result of the charges being confirmed by reference to parameters.