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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 redacted version with Public Annexes A, B, C and D

Prosecution response to “Sentencing Appeal Brief”

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INTRODUCTION

1. The individual sentences and the joint sentence of 30 years imposed on Ntaganda reflect the gravity of the 18 counts of war crimes and crimes against humanity for which he was convicted, and his substantial degree of culpability for them. The Chamber's Sentencing Judgment is reasoned, and adequately considered the arguments and evidence submitted by the Parties and participants. Ntaganda improperly challenges his conviction in his Sentencing Appeal, and merely disagrees with the Chamber's reasonable—and correct—rejection of any mitigating factor without showing an error. He misunderstands the law and misapprehends the record.

2. In Grounds 1 to 4, Ntaganda disregards his essential role in the commission of the crimes *throughout* the period of the charges. Not only did he have the power to frustrate their commission, he also planned, ordered, coordinated and monitored the commission of the crimes; he expressed his satisfaction after civilians were killed, and personally engaged in violent and criminal conduct in front of his subordinates. Ntaganda ignores that he *meant* for his troops to kill and attack civilians, rape and sexually enslave them, persecute them, forcibly transfer them and order their displacement, pillage and attack their protected objects and destroy the adversary's property. He disregards that he *necessarily knew* that children under the age of 15 years would be enlisted, conscripted and used to participate actively in hostilities and that they would be raped and subjected to sexual slavery. Ntaganda himself killed and raped, participated in recruitment drives, and used children under 15 years old as his personal escorts. These crimes were left unpunished.

3. In Ground 5, Ntaganda misunderstands the applicable law for the crime of unlawfully directing attacks against civilians under article 8(2)(e)(i) of the Statute. Since proof of death or serious harm is not an element required by this crime, the Chamber adequately increased his sentence for this crime when civilians were killed as a result of an attack.

4. In Ground 6, Ntaganda misapprehends the 'two step' process for sentencing established by article 78(3), in which an individual sentence for each crime is calculated *before* determination of an appropriate joint sentence. Adherence to the Statute's requirements does not amount to impermissible 'double-counting'. Thus, in calculating Ntaganda's individual sentence for persecution, the Chamber correctly considered the discriminatory intent that it had also considered in sentencing him for murder.

5. In Grounds 7 to 12, Ntaganda disagrees with the Chamber's reasonable and correct evaluation—and rejection—of his alleged mitigating circumstances. The Chamber correctly found that Ntaganda's personal circumstances and his alleged actions did not constitute mitigating factors, were not established on a balance of probabilities, or carried too limited weight to impact his individual or overall sentences. The Chamber explicitly considered Ntaganda's arguments and the underlying evidence but came to a different, correct and reasonable conclusion.

6. Ntaganda fails to show any error.¹ His Sentencing Appeal should be rejected and his 30-year sentence confirmed.

CONFIDENTIALITY LEVEL

7. Pursuant to regulation 23*bis*(1) of the Regulations of the Court, the Prosecution files this response as confidential since it refers to information with the same confidentiality level. The Prosecution will file a public redacted version as soon as practicable.

¹ Regarding the standard of review for sentencing decisions: see [Bemba et al. Second SAJ](#), paras. 28-31; [Bemba et al. SAJ](#), paras. 21-25.

I. THE CHAMBER CORRECTLY ASSESSED NTAGANDA’S DEGREE OF PARTICIPATION FOR THE SECOND OPERATION (GROUND 1)

8. The Chamber conducted the appropriate *in concreto* assessment of Ntaganda’s degree of participation in the crimes, correctly finding it to be substantial for both the First and Second Operations, and higher for certain crimes committed in the First Operation due to his physical proximity to, and intensity of involvement in, those crimes.² The Chamber’s assessment was appropriate in this case, in which Ntaganda—a senior commander in the UPC/FPLC—was convicted as an indirect co-perpetrator who essentially contributed to the crimes committed in the First and Second Operations (which were part of the same military campaign) pursuant to a common plan.³ In challenging the Chamber’s assessment insofar as it related to the crimes of the Second Operation, Ntaganda ignores the nature and consequences of his collective contributions to both operations, and seeks to re-litigate those aspects of his conviction.⁴ Moreover, he fails to appreciate the Chamber’s *in concreto* assessment of his actual participation, erroneously focusing instead on the *absence* of certain indicators of participation.

I.A. The Chamber correctly assessed Ntaganda’s essential contributions to both operations collectively

9. In assessing Ntaganda’s degree of participation as an indirect co-perpetrator of the crimes committed in the First and Second Operations, the Chamber recalled its findings regarding his essential contributions to the common plan.⁵ Those findings included that: Ntaganda was one of the UPC/FPLC’s highest-ranking military figures who played a central and active role as an operational commander;⁶ he was the Deputy Chief of Staff of Operations in charge of the troops’ deployment and operations;⁷ he was personally and actively involved in setting up a strong military group capable of driving out Lendu civilians from the targeted areas, including through his recruitment activities and establishing the Mandro training camp,

² [Sentencing Judgment](#), paras. 32-38 (re the crimes of the First and Second Operations collectively), 59-67 (re murder and attempted murder), 68-77 (re intentionally attacking civilians), 114-117 (re rape and sexual slavery of civilians), 118-120 (re rape and sexual slavery of child soldiers), 147-150 (re pillage, destroying the adversary’s property and intentionally directing attacks against protected objects), 166-168 (re forcible transfer of the population and ordering the displacement of the civilian population), 186-192 (re the conscription, enlistment and use of child soldiers).

³ [Sentencing Judgment](#), paras. 32-36.

⁴ [Sentencing Appeal](#), paras. 21-38.

⁵ [Sentencing Judgment](#), para. 35 (fn. 90, citing [Judgment](#), paras. 826-857).

⁶ [Judgment](#), paras. 827-828, 852-853.

⁷ [Judgment](#), para. 827-828.

which was pivotal in enabling the UPC/FPLC to increase its size and capabilities to be able to implement the common plan;⁸ the First and Second Operations were carried out pursuant to the military tactics that he devised, planned and oversaw;⁹ he was involved in the planning, preparation and oversight of the Second Operation, remaining in contact with the commanders to monitor the unfolding of the operation and to ensure that the project was being carried out as planned;¹⁰ and he gave orders to UPC/FPLC troops to commit crimes and personally illustrated to troops how he expected his orders to be implemented through his own actions.¹¹ The Chamber found that Ntaganda exercised control over the crimes committed by UPC/FPLC soldiers—and was able to frustrate their commission—during *both* operations.¹²

10. The above findings demonstrate Ntaganda's 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.¹³ Yet Ntaganda disregards these findings entirely in Ground 1 of his appeal, and misapprehends—and diminishes—the relevance of his specific operational involvement in the Second Operation, arguing that these alone were insufficient to conclude that his participation in the Second Operation was substantial.¹⁴ Not only does Ntaganda's selective approach ignore the major part of the Chamber's *in concreto* analysis of his participation,¹⁵ it evinces his failure to understand the nature of his conduct for which he was convicted, and the consequences of that conduct on the commission of crimes by the UPC/FPLC during the relevant period.

11. Moreover, in focusing only on his specific operational conduct in the Second

⁸ [Judgment](#), paras. 830-833.

⁹ [Judgment](#), paras. 834-846.

¹⁰ [Judgment](#), paras. 837-838.

¹¹ [Judgment](#), paras. 847-851.

¹² [Judgment](#), para. 857.

¹³ [Sentencing Judgment](#), paras. 36, 67 (re murder and attempted murder), 77 (re intentionally attacking civilians), 117 (re rape and sexual slavery of civilians), 120 (re rape and sexual slavery of child soldiers), 149 (re pillage, destroying the adversary's property and intentionally directing attacks against protected objects), 168 (re forcible transfer of the population and ordering the displacement of the civilian population), 192 (re the conscription, enlistment and use of child soldiers).

¹⁴ [Sentencing Appeal](#), paras. 25-27 (identifying the Chamber's findings regarding his operational contributions to the Second Operation: see [Judgment](#), paras. 550-565), 30-31 (comparing his participation in the two operations and claiming his participation in the Second was lower than in the First), 33 (claiming that the difference in scale and nature of the crimes of the Second Operation called for a separate analysis of his participation in those crimes).

¹⁵ See *below* paras. 15-17.

Operation,—as he did in his Conviction Appeal-Part II¹⁶—Ntaganda artificially separates the two operations without factual basis.¹⁷ He directly contradicts the Chamber’s findings that the First and Second Operations were part of one and the same military campaign and constituted a logical succession of events, such that the acts performed by the UPC/FPLC soldiers during these two operations formed part of the same course of conduct.¹⁸ Given these findings, the Chamber appropriately determined in sentencing him—as it did in convicting him¹⁹—that Ntaganda’s role had to be assessed in a comprehensive way, taking into account the totality of his actions in respect of both operations.²⁰ Ntaganda’s attempt to challenge this aspect of his conviction *via* his Sentencing Appeal should be dismissed *in limine*.²¹

12. Moreover, while Ntaganda argues that the crimes of the First and Second Operations were committed “in very different circumstances” (thus warranting a separate analysis of his participation in each),²² this claim finds no support in the record. The two operations occurred two months apart;²³ UPC/FPLC troops were given the same orders in both operations to “attack the Lendu” and “*kupiga na kuchaji*”; troops followed the same *modus operandi* in both operations, characterised by an initial assault and taking control of the town or village, followed by a *ratissage* operation aimed at eliminating survivors and looting;²⁴ and troops committed the same crimes repeatedly over time across the two operations (apart from sexual slavery, which the Chamber found only occurred in the Second Operation).²⁵

13. The alleged differences between the two operations that Ntaganda identifies do not assist him:

- *First*, while the Kobu massacre was unique in terms of the number of identified

¹⁶ Ntaganda challenged this finding in his appeal against conviction insofar as it relates to the Chamber’s assessment of his *mens rea* and contributions to the crimes of the First and Second Operations, and the Prosecution has responded to Ntaganda’s arguments: see [Conviction Appeal-Part II](#), paras. 360-363, 389-397 and [Prosecution Response Conviction Appeal-Part II](#), paras. 278-287.

¹⁷ *Contra* [Sentencing Appeal](#), paras. 21-22.

¹⁸ [Sentencing Appeal](#), para. 22. See [Sentencing Judgment](#), paras. 35, 37; [Judgment](#), paras. 664, 793.

¹⁹ [Judgment](#), para. 838. See further para. 1187. See also [Prosecution Response Conviction Appeal-Part II](#), paras. 278-287.

²⁰ [Sentencing Judgment](#), paras. 34-35.

²¹ [Bemba et al. SAJ](#), para. 138 (“even though a decision on sentence will, to a certain extent, rely on findings made in the conviction decision the appropriate avenue to challenge these findings is in an appeal against the conviction decision [...] and not in an appeal against sentence.”). See also paras. 139-140, 170, 176.

²² [Sentencing Appeal](#), para. 30.

²³ Compare [Sentencing Appeal](#), para. 30(i) (claiming that the First and Second Operations took place three months apart), with [Judgment](#), paras. 539, 543 (the First Operation assault on Kilo continued until 9 December 2002), 554 (Ntaganda issued instructions in respect of the Second Operations as early as 12 February 2003), 566 (the first assault on Lipri commenced on 17 February 2003).

²⁴ [Judgment](#), paras. 688, 695, 1178; [Sentencing Judgment](#), para. 48.

²⁵ [Judgment](#), Section VII. Disposition. See also [Prosecution Response Conviction Appeal-Part II](#), para. 284.

victims (49),²⁶ it cannot be relied upon as a benchmark from which to differentiate the First and Second Operations. It was not unique that victims had been captured and detained before their murder,²⁷ nor was it unique in the cruelty or brutality of the UPC/FPLC soldiers' conduct.²⁸ The Chamber found that certain crimes were committed with "particular cruelty" in *both* operations and that Ntaganda himself engaged in such conduct.²⁹

- *Second*, Ntaganda's bare comparison of the numbers of murder victims between the First and Second Operation also provides no meaningful basis on which to distinguish the two operations. While Ntaganda highlights that 62 out of the 73 identified murders took place in the Second Operation,³⁰ this figure ignores the full scale of criminality for which Ntaganda was convicted, illustrating similar patterns of victimisation in the two operations. Specifically, in addition to the 73 *identified* victims of murder across both operations³¹ the Chamber found Ntaganda responsible for the murder of *unquantified* numbers of victims in Mongbwalu, Sayo and Kilo (First Operation), and Kobu (Second Operation).³² The total number of victims of murder for which Ntaganda was convicted is therefore higher than the 73 identified victims to which Ntaganda refers. Moreover, Ntaganda disregards that he was also convicted of 11 additional counts, such as intentionally attacking civilians in Mongbwalu and Sayo

²⁶ 49 out of the 73 identified victims of murder were committed in the Kobu massacre: [Sentencing Judgment](#), paras. 40, 47; [Judgment](#), paras. 873, 1199.

²⁷ [Sentencing Judgment](#), para. 48 (finding that in some instances in Mongbwalu, Nzebi, Kobu and Sangi, victims were detained prior to their murder or attempted murder).

²⁸ *Contra* [Sentencing Appeal](#), paras. 30(ii)-(iii), 33, 35-36.

²⁹ [Sentencing Judgment](#), paras. 78-81 (describing the treatment of P-0022 and the other detainees she was kept with in a pit, the Kobu massacre, and "other murders and attempted murders" described in the Judgment, as cited in footnotes 219 and 220), 99 and fn. 256 (describing the cruelty of certain instances of rape), 123. *See further e.g.* [Judgment](#), paras. 513 (a woman accused of being a Lendu chieftain was interrogated, put on her knees which were crushed, and made to stay on the floor for a couple of hours before being killed), 519-520 (a 13 year old girl was bleeding profusely, had difficulty walking and was unable to speak for a day after being raped by commander Saidi), 521 (P-0892 was beaten and raped, her body and cheeks swollen in certain parts), 525 (a detained man was kept in a pit for three days), 528 (finding that two detainees at the *Appartements* camp were tied up and beaten before being killed pursuant to Ntaganda's order), 532 (Ntaganda interrogated *Abbé* Boniface Bwanalonga while beating him with a piece of wood), 588 (a woman's genitals had been mutilated and she had been raped).

³⁰ [Sentencing Appeal](#), para. 30(iv).

³¹ [Sentencing Judgment](#), para. 47.

³² [Judgment](#), paras. 873 (First Operation: "the killing of people" occurred in Mongbwalu, Sayo and Nzebi during the assaults, in Mongbwalu and Sayo during the *ratissage*, and at the *Appartements* camp following interrogations; the killing of "Lendu persons" occurred in Kilo. Second Operation: "at least" four people were killed in Kobu during the assault and *ratissage*; "some men" who had been raped in Kobu were killed), 1199; [Sentencing Judgment](#), para. 47 (recalling that the Chamber had found "at least" 73 people had been killed "in addition to making broader findings of murders of unquantified numbers of persons").

(First Operation), and Bambu, Jitchu and Buli (Second Operation);³³ the rape of an unquantified number of victims in Mongbwalu and Kilo (First Operation) and an unquantified number of victims in Kobu, Sangi and Buli (Second Operation);³⁴ unquantified crimes against property—including pillage committed on a “significant scale”—in Mongbwalu and Sayo (First Operation) and Kobu, Lipri, Bambu and Jitchu (Second Operation);³⁵ and the forcible transfer and ordering the displacement of “significant” numbers of civilians in Mongbwalu (First Operation) and Lipri, Tsili, Kobu and Bambu (Second Operation).³⁶

14. Ntaganda shows no error in the Chamber’s assessment of his degree of participation in the First and Second Operations collectively, or in its finding that this participation was substantial.

I.B. The Chamber correctly assessed Ntaganda’s degree of participation *in concreto*

15. Ntaganda mistakes the Chamber’s reasoning in claiming that in assessing his participation in both operations collectively, the Chamber set a “baseline” for his degree of participation across both operations and assessed his participation in a “generalised” manner.³⁷ The Chamber conducted an appropriate *in concreto* assessment of Ntaganda’s degree of participation for each crime individually.

16. *First*, the Chamber relied upon its findings regarding his essential contributions to *both* operations.³⁸ It did not set an artificial “baseline”; rather, it found—based on the evidence—that some of Ntaganda’s actions contributed to both operations and that this participation in the crimes in both operations was substantial. As noted above, Ntaganda ignores the significance of these findings, and simply denies them.³⁹

³³ [Judgment](#), paras. 906-915, 1199; [Sentencing Judgment](#), paras. 54-56.

³⁴ [Judgment](#), paras. 940, 1199; [Sentencing Judgment](#), paras. 90-93.

³⁵ [Judgment](#), para. 1032 (pillage), 1138-1139 (attacking protected objects), 1156-1157 (destroying the adversary’s property), 1199; [Sentencing Judgment](#), paras. 139-140, 144, 145-146.

³⁶ [Judgment](#), paras. 1050-1051, 1199; [Sentencing Judgment](#), para. 160.

³⁷ *Contra* [Sentencing Appeal](#), paras. 26-27, 35.

³⁸ *See above* paras. 9-10.

³⁹ For example: (i) Ntaganda claims that the lack of physical presence or proximity might have been less significant if he had been found to have participated in the crimes such as by issuing instructions or being fully informed of the circumstances through communication devices: [Sentencing Appeal](#), para. 25. But this ignores that the Chamber found him to have been in contact with commanders and to have been kept informed regarding the unfolding of the Second Operation using the UPC/FPLC radio communications systems: [Judgment](#), para. 565; (ii) Ntaganda claims that an example of his limited participation in the Second Operation was his “lone outbound communication” to commanders of the Second Operation to reiterate that field commanders must

17. *Second*, the Chamber examined Ntaganda's *specific* involvement in each crime, appropriately finding that the type and intensity of his involvement for certain crimes increased his culpability. For example, for the crimes of murder and attempted murder committed during the First Operation, the Chamber recalled that in addition to his overall participating and commanding role in the take-over of Mongbwalu and Sayo, Ntaganda gave direct orders to UPC/FPLC soldiers to kill civilians; and demonstrated through his own behaviour how things were to be done.⁴⁰ Accordingly, the Chamber found that while his degree of participation in the murders and attempted murders during both operations was substantial, his degree of participation was greater in the First Operation than in the Second Operation given the intensity of his involvement and proximity to some of those murders.⁴¹ As is evident from its reasoning, the Chamber did not ignore Ntaganda's less intense involvement in the Second Operation, but instead found his degree of participation in it to be significant *despite* it not being as high as his involvement in the First Operation.⁴²

18. The Chamber conducted the same *in concreto* assessment of Ntaganda's degree of participation for each of the remaining crimes for which he was convicted.⁴³ Ntaganda shows no error in the Chamber's comprehensive and nuanced approach.

I.C. Geographical proximity to and knowledge of specific details of the crimes do not automatically entail a higher degree of culpability

19. Ntaganda claims that the Chamber erred in assessing his degree of participation to be substantial for the crimes committed in the Second Operation given his lack of physical proximity to, and specific advance/contemporaneous knowledge of, those crimes.⁴⁴ Apart from there being no factual basis to reduce the assessment of Ntaganda's degree of participation in this case, this proposition has no legal basis.

follow commands of superior officers: [Sentencing Appeal](#), para. 27(2). This characterisation of the communication ignores the Chamber's finding that the purpose of Ntaganda's communication was to reassert discipline and ensure the proper execution of orders in the Second Operation. The Chamber found he exercised oversight over the unfolding of the Second Operation and reinforced the chain of command: [Judgment](#), paras. 565, 846.

⁴⁰ [Sentencing Judgment](#), paras. 61-62.

⁴¹ [Sentencing Judgment](#), para. 67.

⁴² *Contra* [Sentencing Appeal](#), paras. 22, 28-29.

⁴³ [Sentencing Judgment](#), paras. 68-77 (intentionally attacking civilians), 114-117 (rape and sexual slavery of civilians), 118-120 (rape and sexual slavery of child soldiers), 147-150 (pillaging, attacking protected objects and destroying the adversary's property), 166-168 (forcible transfer and ordering the displacement of civilians), 186-192 (conscripting, enlistment and use of child soldiers).

⁴⁴ [Sentencing Appeal](#), paras. 21-25, 28-29.

20. *First*, it is well-established in the jurisprudence of this Court that an individual's degree of participation must be assessed *in concreto*,⁴⁵ as the Chamber did.⁴⁶ As with all other sentencing factors in the Statute and Rules, this entails a fact-specific analysis to ensure that the sentence is appropriately individualised to the convicted person's culpability.⁴⁷ In this context, Chambers' findings in other cases are not directly transposable to this case,⁴⁸ and Ntaganda's simple comparisons are therefore inapposite.⁴⁹

21. *Second*, although physical presence at the location of the crimes and advance/contemporaneous knowledge of them may be relevant factors in determining a convicted person's degree of participation and intent for the purpose of sentencing,⁵⁰ the absence of these factors does not automatically diminish a convicted person's degree of participation in those crimes and his/her culpability.⁵¹ Such a presumption would violate the requirement of conducting a case-specific, *in concreto* assessment of a proportionate sentence.⁵² It would also 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. This conclusion would disregard the realities of warfare, in which the most

⁴⁵ [Sentencing Judgment](#), para. 15; [Katanga SJ](#), para. 61 ("The convicted person's degree of participation and intent must therefore be assessed *in concreto*, on the basis of the Chamber's factual and legal findings in its Judgment"); [Al Mahdi TJ](#), para. 71 ("In order to determine a proportionate sentence, the gravity of the acts committed by the convicted person has to be assessed *in concreto*, in the light of the particular circumstances of the case"); [Bemba et al. SJ](#), para. 23 ("With regard to the 'gravity of the crime' factor, the Chamber recalls that this factor must be assessed *in concreto*, namely in the light of the particular circumstances of the case").

⁴⁶ See *above* paras. 15-18.

⁴⁷ [Bemba et al. SAJ](#), para. 60 ("[T]he Appeals Chamber observes that the Court's legal framework does not indicate an automatic correlation between the person's form of responsibility for the crime/offence for which he or she has been convicted and the sentence, nor does it provide any form of mandatory mitigation in case of conviction as an accessory to a crime/offence. Rather, as pointed out by the Prosecutor, the sentencing factors enunciated in the Statute and the Rules are fact-specific and ultimately depend on a case-by-case assessment of the individual circumstances of each case"); [Lubanga SAJ](#), paras. 76 (Chambers have an obligation to tailor a penalty to fit the gravity of the crime and the individual circumstances of the accused), 77 ("According to the Court's provisions, the sentence must be 'appropriate' and must be based on all the relevant factors of the specific case").

⁴⁸ [Lubanga SAJ](#), paras. 76-77 ("This obligation to individualise sentences means that 'it is frequently impossible to transpose the sentence in one case *mutatis mutandis* to another'").

⁴⁹ *Contra* [Sentencing Appeal](#), paras. 24, 32. The factual contexts of *Bemba et al.* and *Al Mahdi*, where the accused were convicted of specific crimes occurring in limited circumstances, are incomparable to the scale of criminality involved in Ntaganda's case. The weight given to the physical presence of Mangenda and Al Mahdi in their respective sentences is therefore inapposite for the purposes of sentencing Ntaganda.

⁵⁰ [Sentencing Judgment](#), para. 78 (fn. 213).

⁵¹ *Contra* [Sentencing Appeal](#), paras. 35, 37-38.

⁵² [Sentencing Judgment](#), para. 15; [Katanga SJ](#), para. 61 ("The convicted person's degree of participation and intent must therefore be assessed *in concreto*, on the basis of the Chamber's factual and legal findings in its Judgment"). See further [Lubanga SJ](#), para. 93 (stating that the setting of automatic starting points for assessing sentences undermines the fundamental principle that the sentence should always be proportionate to the crime).

responsible persons are not necessarily on the ground where the crimes are committed.⁵³ Notably, the Statute does not envisage a hierarchy amongst the different modes of liability.⁵⁴

22. A proper *in concreto* assessment envisages that the *totality* of an individual's contributions is relevant in assessing their degree of participation.⁵⁵ For example, Trial Chamber I assessed Thomas Lubanga's degree of participation as a co-perpetrator in the enlistment, conscription and use of child soldiers, taking into account his contributions at the level of the common plan (such as his role as the President of the UPC/FPLC, his overall coordinating role over the activities of the UPC/FPLC, and his agreement in the common plan to establish political and military control over Ituri—a result of which the enlistment, conscription and use of child soldiers was virtually certain to occur—and his contributions at the specific level of the crime (such as making decisions on recruitment policy, giving speeches to recruits, and his personal use of bodyguards under the age of 15 years).⁵⁶ The Chamber in this case conducted a similarly comprehensive, *in concreto* analysis of Ntaganda's degree of participation, relying on Ntaganda's different contributions to find that his participation was substantial.⁵⁷ Ntaganda's claim that the Chamber should have applied a more nuanced approach rather than applying a blanket level of culpability⁵⁸ fails to properly acknowledge the Chamber's correct approach.

23. *Third*, the Chamber did not need to expressly find that Ntaganda had advance or contemporaneous knowledge of specific incidents, such as the Kobu massacre or the Bambu hospital murders, to determine that his participation in all of the crimes committed in the Second Operation was substantial.⁵⁹ There is no such requirement in rule 145(1)(c), which instead refers to the *degree* of participation and of intent. To the extent that Ntaganda

⁵³ Ntaganda seems to agree with this proposition: [Sentencing Appeal](#), para. 25.

⁵⁴ [Sentencing Judgment](#), para. 15 (“The Statute does not pre-establish any *in abstracto* hierarchy among individual modes of liability for the purposes of sentencing”); [Bemba et al. SAJ](#), para. 60; [Katanga SJ](#), para. 61 (“[A]rticle 25 merely identifies and lists various forms of illegal conduct and, in that respect, the proposed distinction between the liability of a perpetrator of a crime and that of an accessory to a crime does not in any way amount to a hierarchy of blameworthiness, let alone prescribe, even by implication, a scale of punishments”). See also [Lubanga SJ](#), para. 93 (stating that the setting of automatic starting points for assessing sentences undermines the fundamental principle that the sentence should always be proportionate to the crime).

⁵⁵ [Katanga SJ](#), para. 61 (“The convicted person's degree of participation and intent must therefore be assessed *in concreto*, on the basis of the Chamber's factual and legal findings in its Judgment”); [Bemba et al. SJ](#), para. 124 (stating that while an individual bears responsibility as a co-perpetrator, in assessing their degree of participation for sentencing, the Chamber “may draw upon the nature of the actual contributions, since they inform [his/her] culpability”).

⁵⁶ [Lubanga SJ](#), para. 52.

⁵⁷ See above paras. 15-18.

⁵⁸ [Sentencing Appeal](#), paras. 32-33.

⁵⁹ *Contra* [Sentencing Appeal](#), paras. 29, 33-36.

challenges the Chamber's findings in the Trial Judgment regarding his *mens rea*,⁶⁰ his arguments should be summarily dismissed.⁶¹

24. In any event, Ntaganda is incorrect. It was not necessary for the purposes of convicting (much less, sentencing) him that Ntaganda was aware of the *specific* crimes and victims that resulted from the implementation of the common plan.⁶² Article 30(2)(b) of the Statute requires that the accused "means to cause that consequence or is aware that it will occur in the ordinary course of events". In a case of indirect co-perpetration, this element is established if it is shown that the accused was aware that the implementation of the common plan would, in the ordinary course of events, result in the commission of the *type* of crimes charged in the localities targeted in the First and Second Operations.⁶³ In Ntaganda's case, the Chamber, relying on direct and indirect evidence,⁶⁴ found that he meant for the troops during the First and Second Operations to engage in the conduct that would result in the commission of the crimes in the charged localities for which he was convicted,⁶⁵ and that he was aware of the relevant circumstances.⁶⁶ It therefore made all requisite findings regarding Ntaganda's intent and knowledge for each crime in the First and Second Operations which provided a relevant basis for the Chamber's assessment of his substantial *degree* of participation in the crimes.

25. *Fourth*, an individual's various contributions to a crime will, as a matter of logic, be

⁶⁰ See e.g. [Judgment](#), para. 638 and fn. 2035 (where the Chamber found that Ntaganda knew of the Kobu "incident" *at least* shortly after it happened, and that it was not necessary for the purposes of determining his criminal responsibility to ascertain exactly how and when he came to know about it).

⁶¹ Ntaganda has challenged the Chamber's finding that he possessed the requisite *mens rea* for the crimes committed in the Second Operation in his appeal of his conviction: [Conviction Appeal-Part II](#), paras. 360-410. The Prosecution responded to that challenge: [Prosecution Response Conviction Appeal-Part II](#), paras. 269-302.

⁶² [Brđanin AJ](#), paras. 418, 420-425; [Brima et al. AJ](#), para.76.

⁶³ [Bemba et al. AJ](#), para.1308. Albeit in the context of joint criminal enterprise, see, e.g., [Šainović et al. AJ](#), para.1491; [Kvočka et al. AJ](#), para. 276. In the context of article 25(3)(d), see [Al-Hassan Confirmation Decision](#), paras. 950-951 (referring to the *Katanga* case and finding that the Chamber "examine *la contribution que M. Al Hassan a apporté à chaque crime (entendu comme torture, traitements cruels, atteinte à la dignité et autres actes inhumains ; condamnation ; attaque contre des biens protégés ; viol, esclavage sexuel et autres actes inhumains (mariages forcés); et persécution* compris dans le dessein commun. Par conséquent, la Chambre n'estime pas nécessaire de procéder à l'examen du lien entre la contribution de M. Al Hassan et chaque fait criminel constitutif des crimes susmentionnés. La Chambre retient la responsabilité de M. Al Hassan pour chaque crime dès le moment où il est établi au standard requis à ce stade de la procédure qu'il a apporté une contribution au crime concerné") (emphasis added).

⁶⁴ [Judgment](#), paras. 1177-1198.

⁶⁵ Namely, murder, intentionally attacking civilians, rape, sexual slavery, persecution, pillage, forcible transfer, ordering the displacement of the civilian population, attacking protected objects and destroying the adversary's property: [Judgment](#), para. 1189. The Chamber also found that Ntaganda meant for UPC/FPLC soldiers to engage in conduct which, in the ordinary course of events would result in the enlistment, conscription and use of child soldiers and that the child soldiers would be subjected to rape and sexual slavery: [Judgment](#), para. 1198.

⁶⁶ [Judgment](#), paras. 1189, 1198.

considered cumulatively in assessing their degree of participation. Therefore, having first found that Ntaganda had a substantial degree of participation in the crimes across both operations based on certain contributions, the Chamber correctly found that Ntaganda's more specific and intense participation in individual crimes *increased* his degree of participation in those crimes. Ntaganda incorrectly proposes the reverse approach, by which the Chamber should discount its assessment of his participation due to the absence of certain findings at the level of the specific crimes. Ntaganda provides no legal support for such an illogical and unworkable methodology.⁶⁷

26. *Finally*, the Chamber did not err in taking into account the particular cruelty of the Kobu massacre as an aggravating circumstance, notwithstanding that it had made no express finding regarding Ntaganda's advance or contemporaneous knowledge of the crime.⁶⁸ Ntaganda merely repeats his sentencing submissions without showing an error.⁶⁹ The Chamber considered Ntaganda's arguments and explained that "'particular cruelty' is an aggravating circumstance which refers to the factual findings regarding the manner in which a crime is executed," and that "while direct participation or contemporaneous knowledge are factors relevant for assessment of degree of participation and intent for the purposes of sentencing [,] [t]he mode of liability pursuant to which an accused is convicted for a certain crime has no impact on the cruelty of the crime itself".⁷⁰ Moreover, as with the consequences of a crime (which may be taken into account to aggravate a sentence either in assessing gravity or as an aggravating circumstance), it suffices that these considerations were, at least, objectively foreseeable by the convicted person.⁷¹ And the cruelty of the crimes committed was clearly foreseeable to Ntaganda. The Chamber found that, *inter alia*, the UPC/FPLC troops committed other crimes with cruelty and brutality;⁷² troops committed crimes repeatedly and according to the same *modus operandi* across both operations;⁷³ Ntaganda by his own presence, actions and directives sought to demonstrate to his troops how he expected them to behave;⁷⁴ he endorsed Salumu Mulenda's conduct in commanding the Kobu

⁶⁷ *Contra* [Sentencing Appeal](#), paras. 35, 37-38.

⁶⁸ *Contra* [Sentencing Appeal](#), paras. 33, 35-36.

⁶⁹ [Defence Sentencing Response](#), para. 68.

⁷⁰ [Sentencing Judgment](#), para. 77 (fn. 213).

⁷¹ [Bemba et al. SAJ](#), paras. 263 and 334. *See also* [Lubanga SAJ](#), para. 90 (finding that aggravating factors may be attributed to a convicted person even in the absence of proof of intent or knowledge, provided there is any element of culpability).

⁷² *See above* fn. 29.

⁷³ [Judgment](#), para. 1178.

⁷⁴ [Judgment](#), para. 1180.

massacre;⁷⁵ and he supervised and was kept informed during the Second Operation.⁷⁶ In the circumstances, the Chamber reasonably found that the cruelty of the Kobu massacre constituted an aggravating circumstance.

27. For the reasons set out above, Ground 1 should be dismissed.

II. THE CHAMBER CORRECTLY ASSESSED NTAGANDA'S DEGREE OF CULPABILITY FOR RAPE UNDER COUNTS 4 AND 5 (GROUND 2)

28. The Chamber found that Ntaganda had a substantial degree of culpability (comprising his degree of participation and intent) for the rape of civilians committed in the First and Second Operations; and that the intensity of his involvement in and proximity to the rapes at the *Appartements* camp increased his culpability for them.⁷⁷ The Chamber did not err in its assessment.⁷⁸

29. *First*, Ntaganda's repeated arguments that the Chamber failed to concretely evaluate his degree of participation,⁷⁹ and that his degree of culpability should be reduced due to his purported lack of advance/contemporaneous knowledge of the rapes (that the Chamber failed to acknowledge or take into account),⁸⁰ must be rejected.⁸¹

30. Ntaganda in fact challenges—and mischaracterises—the Chamber's findings regarding his *mens rea* for the rape of civilians. Contrary to Ntaganda's contention:

- The Chamber found that Ntaganda had the requisite *mens rea* for rape under counts 4 and 5.⁸² This formed a sufficient basis for the Chamber to assess his degree of culpability for the rape of civilians. To the extent that Ntaganda challenges the basis for the Chamber's *mens rea* finding, that is a challenge to his conviction and not to his sentence—which is the subject of this appeal—and should be dismissed *in limine*;

⁷⁵ [Judgment](#), paras. 637-638.

⁷⁶ [Judgment](#), paras. 565 (fourth bullet point), 846.

⁷⁷ [Sentencing Judgment](#), para. 117.

⁷⁸ [Sentencing Appeal](#), paras. 39-45.

⁷⁹ [Sentencing Appeal](#), para. 39.

⁸⁰ [Sentencing Appeal](#), para. 43.

⁸¹ See *above* paras. 15-20, 22 (the Chamber conducted the proper *in concreto* assessment), 23-24 (the Chamber did not need to find that he had advance/contemporaneous knowledge of the crimes).

⁸² [Judgment](#), paras. 1188, 1189 (stating that Ntaganda meant for UPC/FPLC troops to commit rape, and that he was aware of the relevant circumstances), 1199 (concluding that Ntaganda is individually criminally responsible for, *inter alia*, the rape of women and girls in Mongbwalu, of girls in Kilo, of men and women in Kobu, of women in Sangi, and of P-0113 in Buli). *Contra* [Sentencing Appeal](#), paras. 39, 42, 44.

- The Chamber did not state that he had no knowledge of any of the “21 specific victims of rape”, it merely observed that the precise number of rape victims was larger than this number, on a scale that was “significant”,⁸³
- The Chamber expressly found that women were raped at the *Appartements* camp and that Ntaganda was aware of this.⁸⁴

31. *Second*, the Chamber correctly assessed Ntaganda’s participation with respect to these crimes. The Chamber relied on Ntaganda’s contributions to the military operations more generally,⁸⁵ and his specific participation in the rape of civilian women at the *Appartements* camp.⁸⁶ On these bases, it correctly concluded that his degree of participation in the rape of civilians was substantial.⁸⁷ Ntaganda repeats his unsuccessful sentencing arguments⁸⁸ and shows no error in the Chamber’s approach.

32. *Third*, Ntaganda again misunderstands the *mens rea* findings made by the Chamber that were necessary to convict him based on a substantial degree of culpability.⁸⁹ The Chamber correctly found, based on direct and indirect evidence, that Ntaganda meant for his troops to engage in the conduct and to cause the consequences, namely the rape of civilians in Mongbwalu and Kilo in the First Operation, and the rape of civilians in Kobu, Sangi and Buli in the Second Operation, and that he was aware of the relevant circumstances.⁹⁰ This does not mean that he had to know or intend the specific details of the underlying incidents,⁹¹ or that he had to know the identity of the victims,⁹² to be found to have had a substantial—or indeed *any*—degree of culpability for them.

⁸³ *Contra* [Sentencing Appeal](#), paras. 41, 43-44. See [Sentencing Judgment](#), para. 98.

⁸⁴ *Contra* [Sentencing Appeal](#), paras. 40-41. See [Judgment](#), para. 535 and fn. 1601 (stating that Ntaganda brought women there himself, and discussing the coercive/intimidating circumstances in which women were brought to the camp, and the visible distress with which they were seen leaving the camp), 1186 (rape occurred at the *Appartements* camp and Ntaganda was personally involved in some of them), 1189 (Ntaganda meant for the UPC/FPLC troops to engage in the conduct causing the commission of rape, and was aware of the relevant circumstances).

⁸⁵ [Sentencing Judgment](#), para. 115, citing paras. 32-38, 60, 65, 71-73, 75-77. See also above paras. 9-10.

⁸⁶ [Sentencing Judgment](#), paras. 115-117.

⁸⁷ [Sentencing Judgment](#), paras. 115 (“In addition to his contribution in relation to the commission of these crimes, as described above, [...]”), 114 (recalling that Ntaganda and his co-perpetrators conceived the common plan by which they meant, *inter alia*, for civilians to be raped).

⁸⁸ [Defence Sentencing Submissions](#), paras. 47-53, 94.

⁸⁹ See above para. 23. *Contra* [Sentencing Appeal](#), paras. 43-44.

⁹⁰ [Judgment](#), paras. 940, 1189.

⁹¹ See above para. 24.

⁹² [Šainović et al. AJ](#), para. 558 (holding that convictions may be entered for unidentified victims). See e.g. [Sesay et al. AJ](#), para. 454 (upholding a conviction for forced marriage notwithstanding that some of the victims were unidentified).

33. For the reasons set out above, Ground 2 should be dismissed.

III. THE CHAMBER CORRECTLY ASSESSED NTAGANDA'S DEGREE OF CULPABILITY WHEN SENTENCING HIM FOR RAPE AND SEXUAL SLAVERY UNDER COUNTS 6, 7, 8 AND 9 (GROUND 3)

34. The Chamber correctly assessed that Ntaganda had a substantial degree of intent for and participation in the sexual slavery of two civilians (counts 7 and 8);⁹³ and a lesser degree of intent for and a significant degree of participation in the rape and sexual slavery of three child soldiers (counts 6 and 9).⁹⁴ Ntaganda's challenge to these findings repeats many of his unpersuasive arguments from Grounds 1 and 2.⁹⁵ These arguments should be summarily dismissed.

35. *First*, Ntaganda—again⁹⁶—challenges and mischaracterises the Chamber's findings regarding his knowledge of the crimes. While repeatedly claiming that the Chamber made no findings regarding his knowledge of or intent for these specific crimes,⁹⁷ Ntaganda ignores that the Chamber expressly found that he had the requisite *mens rea* for the crimes of rape and sexual slavery under counts 6, 7, 8 and 9.⁹⁸ Moreover, Ntaganda has already challenged this finding with respect to the crimes against child soldiers in his Conviction Appeal-Part II.⁹⁹ His attempt to challenge it again in his Sentencing Appeal should be dismissed *in limine*.

36. As the Prosecution stated in response to Ntaganda's Conviction Appeal-Part II,¹⁰⁰ the Chamber found that Ntaganda was aware that UPC/FPLC child soldiers would be raped and sexually enslaved based on its findings that, *inter alia*: male UPC/FPLC soldiers and commanders,¹⁰¹ including Ntaganda's chief escort¹⁰² regularly perpetrated rape and sexual violence against female members of the UPC/FPLC (including child soldiers under the age of

⁹³ [Sentencing Judgment](#), para. 117.

⁹⁴ [Sentencing Judgment](#), para. 120.

⁹⁵ [Sentencing Appeal](#), paras. 46-52.

⁹⁶ [Sentencing Appeal](#), para. 47. *See above* para. 30.

⁹⁷ [Sentencing Appeal](#), paras. 46-49.

⁹⁸ [Judgment](#), paras. 1188, 1189 (stating that Ntaganda meant for UPC/FPLC troops to commit sexual slavery and that he was aware of the relevant circumstances), 1197 (finding that Ntaganda knew that rapes and sexual violence were occurring against female child soldiers in the UPC/FPLC), 1198 (concluding that Ntaganda meant for UPC/FPLC troops to engage in the conduct which, in the ordinary course of events, would lead to the rape and sexual slavery of child soldiers, and that he was aware of the relevant circumstances), 1199 (concluding that Ntaganda is individually criminally responsible for, *inter alia*, the sexual slavery of P-0113 and an 11-year old girl in Kobu in the Second Operation, and the rape and sexual slavery of child soldiers).

⁹⁹ [Conviction Appeal-Part II](#), paras. 272-277.

¹⁰⁰ [Prosecution Response Conviction Appeal-Part II](#), paras. 212-215.

¹⁰¹ [Judgment](#), paras. 407-411, 792, 1196.

¹⁰² [Judgment](#), paras. 407, 1196.

15);¹⁰³ these crimes were left largely unpunished by Ntaganda and Kisembo;¹⁰⁴ and that Ntaganda played an important role in creating the conditions that led to the sexual abuse of the children under 15 who the Chamber found to have been subjected to rape and sexual slavery.¹⁰⁵ Ntaganda fails to mention these findings.

37. *Second*, the Chamber properly assessed Ntaganda's degree of culpability for these crimes *in concreto*.¹⁰⁶ In relation to the sexual slavery of civilians, the Chamber found his degree of participation to be substantial based on his contributions to the crimes committed in both operations, which had been reasonably assessed, as set out above.¹⁰⁷ Notably, the Chamber recalled that the acts of sexual violence against the Lendu were, "like the acts of killings and other acts of physical violence, a tool used by UPC/FPLC soldiers and commanders alike to achieve their objective to destroy the Lendu community in the localities under assault".¹⁰⁸

38. *Third*, there was no legal or factual basis for the Chamber to *reduce* his 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 with respect to those incidents.¹⁰⁹ Ntaganda repeats his sentencing submissions without showing any error in the Chamber's approach.¹¹⁰ As noted above, Ntaganda's incorrect "reverse approach" misunderstands the Chamber's obligation to determine a sentence which is proportionate to the gravity of the crime and the culpability of the convicted person.¹¹¹ He also improperly challenges—and misunderstands—the Chamber's findings regarding his *mens rea* for those crimes.¹¹²

39. *Finally*, the Chamber was not required to find a causal impact of his conduct on the perpetration of rape and sexual slavery of the three child soldiers in the way Ntaganda

¹⁰³ [Sentencing Judgment](#), para. 119.

¹⁰⁴ [Sentencing Judgment](#), para. 119; [Judgment](#), paras. 792, 1196. *See also* paras. 411-412.

¹⁰⁵ [Sentencing Judgment](#), para. 119; [Judgment](#), para. 1195.

¹⁰⁶ *See above* paras. 15-18.

¹⁰⁷ [Sentencing Judgment](#), paras. 115 ("In addition to his contribution in relation to the commission of these crimes, as described above, [...]"), 114 (recalling that Ntaganda and his co-perpetrators conceived the common plan by which they meant, *inter alia*, for civilians to be raped). *See also above* paras. 9-10, 15-16.

¹⁰⁸ [Sentencing Judgment](#), para. 116, referring to [Judgment](#), paras. 805, 809.

¹⁰⁹ *Contra* [Sentencing Appeal](#), paras. 46-50.

¹¹⁰ [Defence Sentencing Submissions](#), paras. 47-53, 94, cited in [Sentencing Judgment](#), para. 115 (fn. 322).

¹¹¹ *See above* paras. 15-20 (the Chamber conducted a proper *in concreto* assessment), 21-24 (the Chamber did not need to discount Ntaganda's culpability because of his lack of physical proximity to or knowledge of the crimes), 25 (the Chamber correctly assessed Ntaganda's participation cumulatively).

¹¹² *See above* paras. 23-24, 35-36.

suggests.¹¹³ This argument misapplies the law of co-perpetration according to which, as a matter of evidence, causation can be shown by establishing that the accused provided an essential contribution to the common criminal plan, the implementation of which resulted in the commission of the agreed crimes. The Chamber held that Ntaganda provided an essential contribution to the crimes and thus had the power to frustrate their commission,¹¹⁴ meaning that “the crime could not have been committed or would have been committed in a significantly different way”.¹¹⁵ Accordingly, the Chamber found that there was a causal link between Ntaganda’s conduct and the commission of the crimes. The absence of specific and direct actions by Ntaganda regarding the rape and sexual slavery of the three child soldiers does not automatically render his participation limited, for the reasons set out above.¹¹⁶

40. For the reasons set out above, Ground 3 should be dismissed.

IV. THE CHAMBER CORRECTLY CONSIDERED NTAGANDA’S APPROVAL OF AND FAILURE TO DISCIPLINE MULENDA WHEN ASSESSING NTAGANDA’S DEGREE OF PARTICIPATION AND INTENT IN THE SECOND OPERATION (GROUND 4)

41. The Chamber reasonably found Ntaganda’s degree of participation and intent in the murders committed during the Second Operation to be substantial.¹¹⁷ It found that Ntaganda took part in the planning of the operation, oversaw its unfolding, remained in contact with the commanders in the field and ensured that the plan was carried out.¹¹⁸ Although Ntaganda did not personally commit or directly order any murder or attempted murder during the Second Operation, the Chamber recalled that after the conclusion of the operation he indicated his approval of—and failed to discipline—Mulenda, who commanded the troops responsible for the killings in Kobu.¹¹⁹ Contrary to Ntaganda’s submission, this conclusion is factually and legally sound.¹²⁰

42. *First*, the Chamber made the necessary finding that Ntaganda had the capacity to

¹¹³ *Contra* [Sentencing Appeal](#), para. 49.

¹¹⁴ [Judgment](#), para. 856.

¹¹⁵ [Bemba et al. AJ](#), para. 820. *See also* para. 825.

¹¹⁶ *See above* paras. 21-22.

¹¹⁷ [Sentencing Judgment](#), para. 67.

¹¹⁸ [Sentencing Judgment](#), para. 65; [Judgment](#), paras. 554, 565, 837, 846.

¹¹⁹ [Sentencing Judgment](#), para. 66; [Judgment](#), paras. 638-639, 1185.

¹²⁰ [Sentencing Appeal](#), paras. 53-56.

discipline Mulenda for the crimes committed in Kobu.¹²¹ It first found that Ntaganda—who was effectively in charge of deployment and operations of the FPLC and had no problems exercising his role¹²²—had the power to order disciplinary measures in relation to his subordinates.¹²³ Ntaganda acknowledged he had this power,¹²⁴ which he selectively exercised.¹²⁵ The Chamber further noted that Mulenda was a brigade commander with an important role in the UPC/FPLC’s First and Second Operations.¹²⁶ Thus, by finding that “Salumu Mulenda was not ‘disciplined’, including not by Mr Ntaganda, for the killings in Kobu during the Second Operation, in the period before he left the UPC/FPLC following the 6 March 2003 clashes with the UPDF in Bunia”,¹²⁷ the Chamber recognised that Ntaganda had the power to discipline Mulenda when he was still one of his subordinates but did not exercise it. To the contrary, Ntaganda had no intention of disciplining Mulenda; he “was glad with how things had turned out. He also said [...], that Salumu Mulenda was a ‘gentleman’, ‘a brave, a fine person’, and a ‘real man’”.¹²⁸ Moreover, the Chamber did not find that “Mr. Ntaganda was in Fataki during the period of the Second Operation”.¹²⁹ Ntaganda misapprehends the Trial Judgment and improperly seeks to challenge its findings in his sentencing appeal.¹³⁰

43. *Second*, 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.¹³¹ The Chamber correctly considered Ntaganda’s behaviour *after* the Kobu crimes as an additional indicator of his degree of participation and intent when sentencing him for the crimes for which he was convicted, and not as forms of *ex post facto* participation

¹²¹ [Judgment](#), paras. 323, 639. *Contra* [Sentencing Appeal](#), para. 54.

¹²² [Judgment](#), para. 322.

¹²³ [Judgment](#), para. 323.

¹²⁴ [Defence Sentencing Submissions](#), para. 122 (Ntaganda asked that the Chamber consider in mitigation his purported actions to punish UPC/FPLC misconduct).

¹²⁵ See [Judgment](#), para. 332 (fns. 895-896, noting that in December 2002, Ntaganda ordered the imprisonment of three UPC/FPLC commanders who were suspected of raping the wives of civilians); [Sentencing Judgment](#), para. 216 (rejecting these measures in mitigation because they were “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”).

¹²⁶ See e.g. [Judgment](#), paras. 802, 803, 843.

¹²⁷ [Judgment](#), para. 639.

¹²⁸ [Judgment](#), paras. 638, 1185.

¹²⁹ *Contra* [Sentencing Appeal](#), para. 54 (fn. 65, citing [Judgment](#), para. 552).

¹³⁰ See [Judgment](#), para. 552 (simply noting that “Mr Ntaganda was to go to Fataki for a graduation ceremony” but not indicating the exact timing nor the total timeframe); see also paras. 565 (fn. 1720 (citing P-0055’s testimony that Ntaganda followed the developments relating to the failed attack on Lipri on 17 February 2003 from Fataki) and fn. 1723), para. 638 (fn. 2035).

¹³¹ *Contra* [Sentencing Appeal](#), para. 55.

in those crimes.¹³² Indeed, Ntaganda's expression of approval for the Kobu crimes was consistent with his overall planning, coordinating and monitoring role in the Second Operation.¹³³ Moreover, the Chamber's conclusion was legally sound "because 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. [...] [T]he 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".¹³⁴

44. For the reasons set out above, Ground 4 should be dismissed.

V. THE CHAMBER CORRECTLY TREATED DEATHS RESULTING FROM THE UNLAWFUL DIRECTING OF ATTACKS AGAINST CIVILIANS AS AN AGGRAVATING CIRCUMSTANCE (GROUND 5)

45. Ntaganda's individual sentence for the crime of unlawfully directing attacks against civilians was appropriately aggravated because "in some instances persons [...] were killed as a result of attacks that the UPC/FPLC intentionally launched at civilians."¹³⁵ Since proof of death or serious harm is not an element required by this crime under article 8(2)(e)(i) of the Statute, the Chamber's approach was legally correct.¹³⁶ Ntaganda misunderstands the applicable law when he asserts that "murder [...] is the crime that properly addresses unlawful deaths arising from intentionally directing attacks against civilians".¹³⁷

46. Nor in any event is it correct to say that the absence of a legal element in the definition of a crime means that the drafters of the Statute "expressly excluded" such an occurrence "from the scope of the crime", such that it cannot properly be taken into account in sentencing.¹³⁸ This logic could largely eliminate the legal possibility of ever finding an aggravating circumstance, in contradiction to the plain implication of rule 145(1)(b), (2)(b) and (3). What matters instead—as the Chamber correctly found—is whether the allegation in question was established beyond reasonable doubt, and whether it is sufficiently linked to the

¹³² [Sentencing Judgment](#), para. 66. See [Judgment](#), paras. 1185, 1187-1189 (where the Chamber referred to these facts to determine, together with other facts, that Ntaganda had the required *mens rea* for the crimes committed against civilian population)

¹³³ [Sentencing Judgment](#), para. 65, citing [Judgment](#), paras. 551, 552, 554, 565, 638, 837, 846, 1185.

¹³⁴ [Bemba et al. SAJ](#), para. 114.

¹³⁵ [Sentencing Judgment](#), para. 85.

¹³⁶ *Contra* [Sentencing Appeal](#), para. 57.

¹³⁷ *Contra* [Sentencing Appeal](#), para. 58.

¹³⁸ *Contra* [Sentencing Appeal](#), para. 58.

crime or crimes that formed the basis of the conviction.¹³⁹

47. Finally, since the individual sentence pronounced by the Chamber for the crime of unlawfully directing attacks against civilians was 14 years, Ntaganda could only show that his joint sentence was materially affected by any error in the individual sentence (for the purpose of argument) if he could *also* show error in 7 of the 12 other individual sentences imposed. He fails to do so. Nor even if he made such a showing would this necessarily mean that the joint sentence was disproportionate, given the number of other crimes for which he was convicted and the individual sentences imposed for them. Accordingly, there is no proper basis to consider that anything in Ground 5 could possibly have led to the imposition of a disproportionate sentence.

V.A. The penalty for a crime may be aggravated by proof of conduct not subsumed within the elements of that crime

48. As the Chamber properly recalled, “[a] legal element of the crime or mode of liability cannot be considered as an aggravating circumstance.”¹⁴⁰ But subject to this restriction, the Court is entitled to take into account in aggravation of sentence any factor which is established beyond reasonable doubt, is similar in nature to the examples in rule 145(2)(b), and is sufficiently linked to the crime or crimes that formed the basis of the conviction.¹⁴¹

49. The Chamber further correctly recalled that “[a]rticle 8(2)(e)(i) of the Statute does not require any actual harm to civilians to ensue from the attack and the crime may therefore be committed by the mere *launching* of an attack.”¹⁴² As a consequence, it was entirely permissible for the Chamber to take into account the harm that did in fact result from such attacks—the deaths of at least seven people—as an aggravating circumstance. Specifically:

- the Chamber made the necessary findings beyond reasonable doubt;

¹³⁹ See [Sentencing Judgment](#), paras. 17-19.

¹⁴⁰ [Sentencing Judgment](#), para. 20. See also e.g. [Bemba et al. SAJ](#), para. 129.

¹⁴¹ [Sentencing Judgment](#), paras. 17-18. See also [rule 145\(2\)\(b\)\(vi\)](#).

¹⁴² [Judgment](#), para. 904 (citing [Katanga TJ](#), para. 799, emphasis supplied). See also e.g. [Katanga Confirmation Decision](#), para. 270; Cross, pp. 194-195. In rejecting the inclusion of a ‘result’ requirement in the Elements of Crime for article 8(2)(b)(i) and (e)(i), the drafters specifically considered whether such a “requirement [...] belonged to the established framework of international law, which ha[s] to be taken into account according to the wording of the *chapeau* of article 8(2)(b) [and (e)] of the Statute” but “a vast majority of delegations concluded that it did not. Rather, they took the view that “the elements”, as they were adopted, “express in full conformity with the Statute that the overall wrong of this crime is the attacks against protected persons or objects in itself, and not any actual damage”: Frank, pp. 141-142. Cf. [Ntaganda Jurisdiction AD](#), paras. 53-55.

- the findings related to the degree of victimisation caused by the crime, and thus are similar in nature to aggravating circumstances such as those recognised in rule 145(2)(b)(iii) and (iv); and
- the material circumstance was proximate to the crime for which Ntaganda was convicted insofar as it was a direct and foreseeable consequence of it.

50. Provided these requirements are satisfied, it is immaterial that charges could have been brought which would have captured such conduct as a separate crime.¹⁴³

V.B. The theoretical possibility of an alternative charge does not preclude the determination that the charged crime is aggravated by such conduct

51. Ntaganda concedes that “separate but related conduct” to the crime for which a conviction is entered may properly be taken into account as an aggravating circumstance, but suggests that this does not apply to “a different consequence [...] that could have been separately charged”.¹⁴⁴ Yet he presents no authority—or indeed any argument—in support of this proposition, which must be rejected.

52. As the Appeals Chamber has recalled, it is inherent in the Statute’s design that there may potentially be some overlap between the kinds of conduct proscribed by the various crimes in article 8(2).¹⁴⁵ As such, the abstract possibility that an alternative charge might have been brought for the same conduct cannot limit a Chamber’s power to determine the appropriate penalty for a charge for which it has entered a conviction. Since all the crimes under the Statute are stigmatised as the most serious crimes of international concern,¹⁴⁶ there is little risk that the existence of alternative technical characterisations of criminal conduct will lead to substantive unfairness in light of the culpability principle.

53. In *Bemba et al.*, the Appeals Chamber confirmed that a “convicted person is sentenced for the crime or offence *for which he or she was convicted*, not for *other* crimes or offences that person may also have committed but in relation to which no conviction was entered”,

¹⁴³ *Contra* [Sentencing Appeal](#), paras. 58-60.

¹⁴⁴ [Sentencing Appeal](#), para. 60.

¹⁴⁵ See [Ntaganda Jurisdiction AD](#), para. 48. Consistent with the following observations, however, the Prosecution submits that such overlaps may nonetheless be exceptional. See also [Elements of Crimes](#), General Introduction, para. 9.

¹⁴⁶ See [Statute](#), art. 5.

even if responsibility for such uncharged crimes may have been established at trial.¹⁴⁷ But it made this finding to emphasise that the sentence for charged *conduct* cannot be aggravated based on entirely separate uncharged *conduct*, which is not sufficiently proximate to the charged conduct.¹⁴⁸ This does not mean that a person may not be appropriately penalised for charged conduct, and the direct and foreseeable consequences of that charged conduct, merely because that *same* conduct might conceivably have been framed with reference to a different charge. This is underscored by the Appeals Chamber’s explanation that “the sentencing phase” should not be used “to *enlarge* the scope of the trial”,¹⁴⁹ and its express conclusion that:

conduct—including criminal conduct—that occurred after the offence for which the convicted person is convicted 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.¹⁵⁰

54. The “natural limitation” to this principle is simply whether the conduct beyond the legal requirements of the charged crime is “sufficiently proximate” to that crime.¹⁵¹ The Appeals Chamber has further explained that this case-specific assessment takes into account “considerations of procedural fairness and the rights of the defence” including the right of “the convicted person to be sufficiently put on notice of the facts that are taken into account to aggravate the sentence.”¹⁵² But it is *not* necessary for potential aggravating circumstances “to be specifically set out in the document containing the charges”, and indeed there can be no concern about adequate notice “[i]f a trial chamber relies upon facts in aggravation that were established in its decision on conviction”.¹⁵³ This approach is consistent with the separate penalty phase provided under the Statute, which allows the accused person a further opportunity to present “additional evidence or submissions relevant to the sentence”, after the

¹⁴⁷ [Bemba et al. SAJ](#), para. 113 (emphasis supplied).

¹⁴⁸ For example, if a person is charged with a single count of robbery, and evidence is incidentally elicited at trial establishing that the accused is also responsible for an uncharged and unrelated murder, it is not possible to aggravate the robbery sentence on account of the murder.

¹⁴⁹ [Bemba et al. SAJ](#), para. 113 (emphasis supplied).

¹⁵⁰ [Bemba et al. SAJ](#), para. 114. See also [Lubanga SJ](#), paras. 67-68 (“The prosecution’s failure to charge Mr Lubanga with rape and other forms of sexual violence as separate crimes within the jurisdiction of the Court is not determinative of the question of whether that activity is a relevant factor in the determination of the sentence”).

¹⁵¹ [Bemba et al. SAJ](#), para. 115.

¹⁵² [Bemba et al. SAJ](#), para. 116. The Appeals Chamber stressed that “it is impossible to describe in the abstract how close this link has to be; this is a question of the circumstances of each case.”

¹⁵³ [Bemba et al. SAJ](#), para. 116. *Contra* [Sentencing Appeal](#), para. 59 (suggesting that an aggravating factor such as that identified by the Chamber in this case “would undermine proper notice of the crimes for which a person is in jeopardy of punishment”).

trial judgment has been received.¹⁵⁴

55. As explained below, the Chamber made findings in the Judgment that certain civilians who were unlawfully made the object of the attack consequently died.¹⁵⁵ This ensured that Ntaganda had the requisite notice. Moreover, the causing of death—although not required by the legal elements of the crime of unlawfully directing attacks against civilians—is nonetheless sufficiently proximate to be a valid aggravating circumstance, insofar as this consequence was “directly related” to the criminal conduct in question.¹⁵⁶ The unlawful attacks were the immediate cause of death, and this consequence was (at the very least) a readily foreseeable possibility. Moreover, Ntaganda’s complaint about uncharged conduct is entirely formalistic since murder *was* also charged in this case. The question for the Chamber was simply whether—for those persons identified uniquely as victims of unlawful attacks—it could take their deaths into account for the purpose of sentencing.

56. In any event, Ntaganda is wrong in law to suggest that unlawful attacks against civilians—which occur in the conduct of hostilities—may properly be charged as murder contrary to common article 3 of the Geneva Conventions.¹⁵⁷ As such, and even if it were to be accepted that an aggravating circumstance cannot be entered if it could have formed the subject matter of a more specific alternative charge—which the Prosecution rejects—this would not have been legally possible in this case.

V.C. The crime of unlawfully directing attacks against civilians is not interchangeable with the crime of murder contrary to common article 3 of the Geneva Conventions

57. Ntaganda assumes that “murder [...] is the crime that properly addresses unlawful deaths arising from intentionally directing attacks on civilians.”¹⁵⁸ But this is incorrect. The crimes of unlawfully directing attacks against civilians and murder contrary to common article 3 of the Geneva Conventions each contain distinct elements, not contained within the

¹⁵⁴ [Statute](#), art. 76(2).

¹⁵⁵ See *below* para. 68.

¹⁵⁶ See [Bemba et al. SAJ](#), para. 117. Furthermore, it is necessary that such consequences are recognised as aggravating circumstances in light of the Trial Chamber’s observation that, otherwise, the crime of unlawfully directing attacks against civilians is *per se* “less serious than crimes against life that require the actual occurrence of harm, such as murder”: [Sentencing Judgment](#), para. 88. Cf. para. 129 (finding that the commission of uncharged sexual offences against UPC/FPLC members over the age of 15 “cannot be regarded as having a sufficient link to the crimes for which Mr Ntaganda was convicted, for the purpose of aggravation”).

¹⁵⁷ Contra [Sentencing Appeal](#), paras. 58, 60.

¹⁵⁸ [Sentencing Appeal](#), para. 58.

other. Consequently, the only proper way to take into account the fact that civilians were actually killed as a result of an unlawful attack is to take this matter into account as an aggravating circumstance. Such conduct could not properly be charged as murder contrary to common article 3. While the underlying legal reasoning was not expressly set out, the Chamber's findings are almost entirely in conformity with this approach.¹⁵⁹

V.C.1. Common article 3 murder is not a 'conduct of hostilities' crime

58. The *chapeau* of article 8(2)(c) requires that “murder” for the purpose of article 8(2)(c)(i) is a “serious violation of article 3 common to the four Geneva Conventions”. Consequently, acts of murder which are not violations of common article 3 are not prohibited under article 8(2)(c), even though the requirements of common article 3 are not exhaustively set out in the applicable Elements of Crime.¹⁶⁰

59. As the ICRC has recalled, in commentary which has previously been cited with approval by the Appeals Chamber,¹⁶¹ common article 3 “does not address the conduct of hostilities” and the “substantive protections [...] envision a certain level of control over the persons concerned: they are *in the power of a Party to the conflict*”—a view which “finds support in the preparatory work for the Geneva Conventions and in military manuals and case law”, as well as “academic literature”.¹⁶² While recognising that this view has been subject to occasional doubt in the context of the prohibition of murder, the ICRC has re-emphasised that, in its view:

[I]t follows from the context of the 1949 Geneva Conventions in which common Article 3 is placed, however, that it was not intended to govern the conduct of hostilities. Common Article 3 as ultimately adopted evolved from drafts proposing the application of the principles of the Geneva Conventions—or of the provisions of the Conventions as such—to non-international armed conflict. The primary concern of the Conventions is the protection of the victims of international armed conflicts in the power of a Party to the conflict, but not the regulation of the conduct of

¹⁵⁹ As explained below, two possible exceptions (relating to three victims) may be identified. These may be explained as drafting slips, notwithstanding the underlying evidence, or otherwise would appear to be technical oversights which can be revised by the Appeals Chamber, if it considers necessary: *see below* para. 67.

¹⁶⁰ *See* [Elements of Crime](#), art. 8(2)(c)(i). *See further* [Statute](#), arts. 8(2)(c), 21(1)(b); [Ntaganda Jurisdiction AD](#), paras. 53-55.

¹⁶¹ *See e.g.* [Ntaganda Jurisdiction AD](#), para. 61.

¹⁶² 2017 Commentary to GCII, p 197 (mn. 562, emphasis added). *See also e.g.* Casey-Maslen, pp. 52 (“It is widely accepted (though it is not a consensus position) that Common Article 3 does not regulate the conduct of hostilities. In fact, the provision is Geneva law in its purest form”), 78; Pinzauti, p. 256; Sivakumaran, p. 336; Arai-Takahashi, p. 299; Melzer, p. 216. *See further* ICRC DPH Interpretive Guidance, p. 62 (describing war crimes or other violations of international humanitarian law outside the conduct of hostilities, in terms redolent of common article 3).

hostilities as such. The same should therefore apply for common Article 3, which was adopted to extend the essence of the Conventions to non-international armed conflicts.

That hostilities may lead to the death or injury of persons who are taking no active part in hostilities is a reality of non-international armed conflict, be it because such persons are unlawfully made the target of attacks or because they become the incidental victims of attacks. However, common Article 3 is not suited to assessing the lawfulness of the conduct of hostilities, which is governed by specific rules of humanitarian law. For non-international armed conflicts, these can be found in Additional Protocol II and customary international law.¹⁶³

60. It follows that, where the death of a civilian is intentionally caused in the conduct of hostilities in non-international armed conflict, the proper charge is not common article 3 murder, but the distinct and more specific crime of unlawfully directing attacks against civilians under article 8(2)(e)(i).¹⁶⁴

61. The Judgment does not refer expressly to any of this law in discussing the elements of murder under article 8(2)(c)(i) of the Statute.¹⁶⁵ However, it does acknowledge the corollary to this principle when discussing the elements of unlawfully directing attacks against civilians under article 8(2)(e)(i) of the Statute,¹⁶⁶ stating that:

The war crime of attacking civilians belongs to the category of offences committed during the actual conduct of hostilities. This means that the crime must be committed against civilians ‘*before* [they] have fallen into the hands of the attacking party.’¹⁶⁷

62. This principle was previously spelled out even more clearly in the *Katanga* Confirmation Decision, which the Chamber expressly cited. The *Katanga* Pre-Trial Chamber

¹⁶³ See 2017 Commentary to GCII, pp. 197-199 (mns. 563-565).

¹⁶⁴ In this context, and while common article 3 does not itself regulate the conduct of hostilities, the Statute reflects that the triggering of common article 3 also marks the triggering of (separate) customary international law rules which *do* regulate the conduct of hostilities, which are given effect in article 8(2)(e): see e.g. 2017 Commentary to GCII, p. 149 (mn. 410: “[i]f a situation of violence amounts to a non-international armed conflict, the applicability of common Article 3 *and other provisions of international humanitarian law applicable in non-international armed conflict* ensures that the Parties to that conflict are under an international legal obligation to grant certain fundamental protections to the victims of the conflict *and to respect the rules on the conduct of hostilities*”, emphasis added); [Tadić Jurisdiction AD](#), para. 127; Sivakumaran, pp. 428-429. In particular, article 8(2)(f) of the Statute makes clear that it is a war crime to intentionally direct attacks against civilians even in non-international armed conflicts which do not meet the threshold of application of Additional Protocol II, for example if a party to the conflict is not shown to have exercised territorial control. Compare Statute, art. 8(2)(f), with [Additional Protocol II](#), art. 1. See further [Tadić Jurisdiction AD](#), para. 70; Sivakumaran, pp. 160-167, 182-195, 210-211; Casey-Maslen, pp. 55-61; Melzer, p. 261. See also [Prosecution Response Conviction Appeal-Part II](#), para. 111 (fn. 495).

¹⁶⁵ See [Judgment](#), paras. 858-860.

¹⁶⁶ See [Judgment](#), paras. 902-904.

¹⁶⁷ [Judgment](#), para. 904 (emphasis added, quoting [Confirmation Decision](#), para. 45; [Katanga Confirmation Decision](#), para. 267).

held that:

The war crime provided for in article 8(2)(b)(i) of the Statute is the first in the series of war crimes for which one essential element is that the crime must be committed during the conduct of hostilities [...]. Accordingly, this crime is applicable only to attacks (acts of violence) directed against individual civilians not taking direct part in the hostilities, or a civilian population, that has not yet fallen into the hands of the adverse or hostile party to the conflict to which the perpetrator belongs.

The Chamber notes that the jurisprudence of the ICTY has emphasised that an individual civilian, or a civilian population, falls into the hands of an adverse or hostile party to the conflict when it comes under the control of its members.

In the view of the Chamber, *after an individual civilian not taking an active part in the hostilities or the civilian population falls into the hands of such an adverse or hostile party to the conflict, an act of violence against them does not fall under article 8(2)(b)(i) of the Statute but under other provisions of the Statute, which are addressed below.*¹⁶⁸

63. The *Katanga* Pre-Trial Chamber subsequently continued to reason, in the context of the crime of wilful killing as a grave breach of the Geneva Conventions under article 8(2)(a)(i) of the Statute (international armed conflict)—which is materially analogous to common article 3 murder under article 8(2)(c)(i) (non-international armed conflict),¹⁶⁹ charged in this case—that:

[A]rticle 8(2)(a)(i) of the Statute applies to those cases in which protected civilians are killed ‘in the hands of’ a party to the conflict. Under the case law of the international tribunals, an individual civilian falls ‘into the hands of’ a party to the conflict when that individual is in the territory under the control of such a party.

Therefore, in the view of the Chamber, *as the attacking forces of a party to the conflict gradually gain control of a targeted village, individual civilians in these successive areas automatically become protected persons [...] Article 8(2)(a)(i) thus prohibits the wilful killing of those civilians in such a circumstance.*

Additionally, article 8(2)(a)(i) of the Statute also applies to the wilful killing of the protected persons by an attacking force, *when such killings occur after the overall attack has ended, and defeat or full control of the targeted village has been secured.*¹⁷⁰

64. In the Confirmation Decision in this case, the Pre-Trial Chamber likewise underlined the need to distinguish the conduct of hostilities from other “acts of violence (such as murder,

¹⁶⁸ [Katanga Confirmation Decision](#), paras. 267-269 (emphasis added). See also Frank, p. 140 (referring to this crime as one of a number “dealing with conduct of hostilities”).

¹⁶⁹ See e.g. [Tadić TJ](#), para. 615 (noting that common article 3 applies, at least, to all persons protected by the grave breaches regime of the Geneva Conventions).

¹⁷⁰ [Katanga Confirmation Decision](#), paras. 292-294 (emphasis added).

rape, pillage or destruction of property) [...] committed against civilians that have *fallen into the hands of the attacking party* or are committed far from the combat area”, which would “not constitute the war crime of attacking civilians pursuant to article 8(2)(e)(i) of the Statute [...] without prejudice to these acts being classified under other appropriate legal provisions, provided that the nexus to the armed conflict existed at the time of their commission.”¹⁷¹

65. In this way, it is clear that the statutory prohibition on intentionally directing attacks against civilians is separate and distinct from the prohibition of the wilful killing or murder of a person. These crimes are distinguished (among other requirements) by the question whether the perpetrator’s interaction with the victim occurs in the conduct of hostilities, or whether the victim is in the hands of (or in the power of) the perpetrator at the material time.¹⁷² Accordingly, at such point as the victim does fall into the hands of the perpetrator in this sense, the intentional infliction of violence against them is properly captured (in non-international armed conflict) by the various crimes under article 8(2)(c) of the Statute and not article 8(2)(e)(i).¹⁷³ But for civilians who are unlawfully killed in the conduct of hostilities,

¹⁷¹ [Confirmation Decision](#), para. 47 (emphasis added). As examples of circumstances beyond the conduct of hostilities, the Pre-Trial Chamber further referred, to “the case of violent acts committed in a detention camp located away from the frontline or *at a location that has fallen under the control of the attacking party* following an actual combat action against the adverse party” (emphasis added).

¹⁷² See e.g. [Naletilić et al. TJ](#), paras. 203, 209 (the expression ‘in the hands of’ is not confined to its literal interpretation, but also extends to persons in territory under the control of a party to the conflict); 1958 Commentary to GCIV, p. 47 (discussing article 4 of GCIV, “[t]he expression ‘in the hands of’ is used in an extremely general sense. It is not merely a question of being in enemy hands directly, as a prisoner is. The mere fact of being in the territory of a Party to the conflict or in occupied territory implies that one is in the power or ‘hands’ of the Occupying Power. It is possible that this power will never actually be exercised [...] In other words, the expression ‘in the hands of’ need not necessarily be understood in the physical sense; it simply means that the person is in territory which is under the control of the Power in question”). See also 2017 Commentary to GCII, p. 197 (mn. 562: defining the concept of a person being “in the power of a Party to the conflict”, for the purpose of common article 3, as including “civilians living in areas under the control of a Party to the conflict but not with respect to actions by Parties governed by the rules on the conduct of hostilities”).

¹⁷³ The Prosecution acknowledges that the principled legal distinction identified by the *Katanga* Pre-Trial Chamber was not clearly acknowledged by the *Katanga* Trial Chamber, and its findings on the circumstances of the various killings established beyond reasonable doubt are nuanced and situated in the evidence received at trial: see e.g. [Katanga TJ](#), paras. 783-808, 856-879. Nonetheless, and to any extent (for the sake of argument) the *Katanga* Trial Chamber may have made any technical legal error—i.e., if it did not establish that the persons in respect of whom Katanga was convicted of murder as a grave breach of the Geneva Conventions were ‘in the power of’ Ngiti fighters at the material time—it was still a harmless one. Specifically, it remains correct that convictions for directing unlawful attacks, resulting in death, and murder *as a crime against humanity* may both properly be entered, if the relevant *chapeaux* requirements are met: see below fn. 184. Nor did the *Katanga* Trial Chamber impose any additional penalty on Katanga in respect of his conviction under article 8(2)(c)(i) that he did not otherwise receive as a consequence of his convictions under articles 7(1)(a) and 8(2)(e)(i). To the contrary, even if the conviction under article 8(2)(c)(i) had not been entered at all, Katanga would not—as a matter of law under article 78(3) of the Statute—have been permitted any lower sentence. See e.g. [Katanga SJ](#), paras. 143, 145 (explaining that it “distinguish[ed] between the crimes of murder and attack against a civilian population, on the one hand, and the crimes of destruction and pillaging, on the other hand, as the former amount to violence against life whereas the latter, although significant, amount to damage to property” and considering that, “in the instant case, there should be a more severe penalty for the former”), 146-147 (setting individual sentences for murder as a crime against humanity, murder as a war crime, and unlawfully directing attacks

the only proper charge is article 8(2)(e)(i).

V.C.2. Determining whether a charged act of violence actually occurred in the conduct of hostilities is a question of fact

66. As the Prosecution has previously observed, it is a question of fact whether a given act of violence occurred in the conduct of hostilities,¹⁷⁴ and thus whether it falls under article 8(2)(e)(i) ('Hague' law) or occurred when the victim was in the power of the perpetrator, and therefore article 8(2)(c) ('Geneva' law) applies. The Confirmation Decision in this case likewise supports this view, by observing that liability under article 8(2)(e)(i) requires that the perpetrator directs "one or more acts of violence [...] against civilians not taking direct part in hostilities, before the civilians have fallen into the hands of the attacking party, thus establishing a *sufficiently close link* between the 'attack' against civilians and the conduct of the hostilities."¹⁷⁵ Implicit in this concept is the fact-sensitive nature of the inquiry, within the boundaries of the applicable law.¹⁷⁶ Accordingly, the Chamber's determination as to which

against the civilian population of 12 years each, and imposing the minimum joint sentence permitted under article 78(3) of 12 years). The Prosecution and the Defence both discontinued their appeals against the *Katanga* Judgment: see [Katanga Notice of Discontinuance \(Defence\)](#); [Katanga Notice of Discontinuance \(Prosecution\)](#). Nor did either Party seek to appeal the *Katanga* Sentencing Judgment.

¹⁷⁴ See [Prosecution Response to LRV \(Prosecution Appeal\)](#), paras. 10-11. See further e.g. ICRC DPH Interpretive Guidance, pp. 41 ("even during armed conflict, not all conduct constitutes part of the hostilities"), 43 ("the concept of 'hostilities' refers to the (collective) resort by the parties to the conflict to means and methods of injuring the enemy"); Casey-Maslen, pp. 73-76 ("there are many circumstances in which it may be unclear which of the two legal regimes ['Geneva' law or 'Hague' law] applies. [...] Nowhere in Hague law (or elsewhere in the law of armed conflict) are 'hostilities' formally defined or explained. [...] In sum, hostilities are the use, during and in direct connection with an armed conflict of means and methods of warfare by one party to the conflict against the armed forces or other military objective of an adverse party, or against civilians or civilian objects in that party's territory (insofar as those acts are not governed by Geneva law)"); Longobardo, pp. 194-196 ("most military manuals and domestic legislation pertaining to armed conflict fail to define what constitutes hostilities" [...]) The concept of hostilities refers to the resort to means and methods of warfare. Even if hostilities may occur only in the framework of an armed conflict, it is clear that a number of activities occurring in an armed conflict are *not* acts of hostility: this is the case with such law-enforcement operations as those aimed at restoring and ensuring public order in occupied territory, or those pertaining to the detention of prisoners of war. [...] Rather, the term 'hostilities' appears similar to the concept of 'military operations', which is broader than 'attack' and is not defined by international humanitarian law. [...] [O]ne may define hostilities as the collective resort to means and methods of warfare against the enemy"); Melzer, pp. 243-244 ("Although positive international law does not provide an express definition of 'hostilities', conventional IHL makes extensive use of the term and contains numerous provisions specifically designed to regulate the conduct of hostilities"), 269-276 ("the concept of 'hostilities' is both narrower than the concept of 'armed conflict' and wider than that of 'attack' and [...] approximately corresponds to the sum of all 'military operations' or 'hostile acts' conducted against an adversary by a party to an armed conflict. Admittedly, neither conventional IHL nor the legal doctrine provide precise definitions [...] and, in view of the great and evolving variety of means and methods that may be employed in situations of armed conflict, the concrete interpretation of these notions may well require a measure of flexibility [...] [I]n short, the concept of 'hostilities' essentially comprises all activities which are designed to support one party to the conflict by harming another, either through the direct causation of harm of a specifically military nature, or through the direct and extra-custodial infliction of death, injury or destruction on persons or objects protected against direct attack").

¹⁷⁵ [Confirmation Decision](#), para. 45 (emphasis added).

¹⁷⁶ See *above* paras. 57-64.

particular killings occurred in the conduct of hostilities (and thus potentially constituted incidents of unlawful attack), and which occurred outside that context (and thus potentially constituted incidents of murder), should be reviewed on a ‘reasonableness’ standard, based on the evidence.

V.C.3. The Chamber reasonably determined which killings occurred in the conduct of hostilities, and which did not

67. The factual findings in the Judgment demonstrate that almost all of the persons identified by the Chamber as victims of murder under common article 3 (a ‘Geneva law’ crime) were indeed killed outside the conduct of hostilities and when they were under the power of the perpetrator(s). The relevant findings are set out in Annex B. For example, the Chamber found that murders and attempted murders took place as part of *ratissage* (once the UPC/FPLC had taken control of a location, and searched it house-to-house),¹⁷⁷ or once victims had been captured and/or interrogated,¹⁷⁸ or captured and subject to sexual violence.¹⁷⁹ While it is true that the Chamber did describe 3 incidents of murder, affecting 13 victims, as occurring “during the assault”,¹⁸⁰ this does not undermine its approach more generally, and appears to be simply a consequence of inapposite terminology or a technical but harmless oversight.

- One of these incidents (affecting ten victims) occurred when UPC/FPLC soldiers entered a hospital after the medical staff (and everyone else who was able) had fled. The soldiers killed nine patients who were too sick to move, and wounded another.¹⁸¹ In these circumstances, while the “assault” may have continued at other locations in Bambu, it seems clear that the perpetrators’ conduct could not reasonably be considered as an act in the conduct of hostilities.
- For the remaining two incidents (affecting three victims), although the Chamber likewise refers to the victims being killed “during the assault”,¹⁸² the underlying evidence may nonetheless suggest that the UPC had obtained control of the relevant

¹⁷⁷ See e.g. Annex B, incidents #2, #8. See also #4, #6.

¹⁷⁸ See e.g. Annex B, incidents #2, #3, #5, #8, #10, #11, #12, #13, #14, #15, #16, #17.

¹⁷⁹ See e.g. Annex B, incidents #11, #12, #14, #15, #16. See also [Confirmation Decision](#), para. 79 (reasoning that the commission of acts of sexual violence generally presupposes that the victim is in the power of the perpetrator at the material time).

¹⁸⁰ See e.g. Annex B, incidents #1, #7, #9, #18.

¹⁸¹ See Annex B, incidents #9, #18.

¹⁸² See Annex B, incidents #1, #7. See also [Judgment](#), paras. 506, 573.

areas at the material time.¹⁸³ In any event, even if the Chamber did make a technical error of law in treating these incidents as murders rather than unlawful attacks causing death, it is a harmless one. The Appeals Chamber may, if it considers necessary, substitute these findings accordingly. In doing so, the underlying facts—and Ntaganda’s culpability arising from those facts—would remain unchanged, causing no detriment to Ntaganda, and so no question under article 83(2) (*reformatio in peius*) arises.¹⁸⁴

68. Likewise, the Chamber made clear that the individuals who it identified as victims of murder were not the same individuals as those who it identified as having been killed as a consequence of being unlawfully made the object of an attack. Thus, in a footnote, it clarified that its finding that “in some instances persons who did not constitute legitimate targets [...] were killed as a result of attacks that the UPC/FPLC intentionally launched at civilians”¹⁸⁵ related to “six people, amongst them two children, [who] were killed in Bambu when a shell hit a civilian compound located in Bambu-Yalala” and, “in Buli[,] at least one person [who] was killed by a member of the UPC/FPLC while being chased into the surrounding bush”.¹⁸⁶ None of these people was identified by the Chamber as a victim of murder.¹⁸⁷

69. These careful findings show that the Chamber properly distinguished between the victims of unlawful attacks causing death, and the victims of murder—and that indeed the number of victims of unlawful attacks causing death taken into account for the purpose of sentencing (count 3) was relatively small compared to the number of victims of murder or attempted murder (counts 1 and 2).¹⁸⁸ Ntaganda fails to address any of these considerations, or to show any error in the Chamber’s approach.

¹⁸³ See e.g. for incident 7: [REDACTED]; see also [Judgment](#), para. 574 (“Kobu was taken over by the UPC/FPLC within a few hours”). For incident 1: [REDACTED].

¹⁸⁴ Furthermore, since murder as a crime against humanity, under article 7(1)(a) of the Statute, encompasses *both* those incidents in which civilians are unlawfully made the object of attack, causing death, and in which they are killed while in the power of the perpetrator, it remains true to say that Ntaganda is guilty of “murder” with respect to these two incidents—and, notably, the Chamber calculated a single individual sentence for murder encompassing both murder as a war crime *and* murder as a crime against humanity: see Annex C (counts 1 and 2). It is well established that murder as a crime against humanity and murder as a war crime are different crimes each defined by unique elements, and thus it is permissible to convict cumulatively for both these crimes when the requisite elements are met: see e.g. [Katanga TJ](#), para. 1696; [Bemba TJ](#), paras. 749-751.

¹⁸⁵ [Sentencing Judgment](#), para. 85.

¹⁸⁶ [Sentencing Judgment](#), para. 85 (fn. 233, citing [Judgment](#), paras. 586, 605). This also seems to be accepted by the Defence: see [Sentencing Appeal](#), para. 58.

¹⁸⁷ See Annex B.

¹⁸⁸ See also Annex C.

V.C.4. The alleged error does not materially affect the joint sentence imposed

70. Taking into account the aggravating circumstance of the deaths of at least seven persons resulting from the unlawful attacks directed against civilians by members of the UPC/FPLC, the Chamber imposed an individual sentence for this crime of 14 years' imprisonment.¹⁸⁹ This was substantially less than the minimum joint sentence it could legally have imposed on Ntaganda which, by operation of article 78(3) and given its other findings, was 30 years.¹⁹⁰

71. Accordingly, even if (for the sake of argument) the Chamber had erred in calculating the individual sentence for the crime of unlawfully directing attacks against civilians, the Appeals Chamber may not automatically "reduce Mr Ntaganda's joint sentence accordingly".¹⁹¹ Without more, Ntaganda cannot show that any error in calculating this individual sentence materially affected his joint sentence, so as to render it disproportionate to the overall culpability of his conduct. For this reason too, Ground 5 should be dismissed.

72. In particular, to show even the possibility that an error in his individual sentence for unlawfully directing attacks on civilians could have the necessary impact on his joint sentence, Ntaganda would also need to show error in each of the seven other (higher) individual sentences imposed by the Chamber, comprising:

- Counts 1 and 2 (murder): 30 years
- Counts 4 and 5 (rape): 28 years
- Count 6 (rape of children in the UPC/FPLC): 17 years
- Count 9 (sexual slavery of children in the UPC/FPLC): 14 years
- Count 10 (persecution): 30 years
- Counts 14-16 (enlistment and conscription of children into the UPC/FPLC, and use of these children to participate actively in hostilities): 18 years; and
- Count 18 (destruction of property): 15 years.¹⁹²

¹⁸⁹ [Sentencing Judgment](#), paras. 88-89, 246.

¹⁹⁰ See further below para. 84.

¹⁹¹ Contra [Sentencing Appeal](#), para. 61.

¹⁹² See [Judgment](#), para. 246. See also Annex C.

73. Without showing error in each of these other individual sentences, article 78(3) prohibits any reduction in Ntaganda's joint sentence consequent upon any alleged error in calculating his individual sentence for unlawfully directing attacks against civilians.

74. Moreover, even if Ntaganda did show these additional errors, he still fails to show—or even to argue—that a joint sentence of 14 years or more would actually be disproportionate. For example, even assuming *arguendo* that the seven individual sentences for counts 1-2, 4-6, 9-10, 14-16, and 18 were *all* to be reduced by the Appeals Chamber to the range of 10-13 years—a highly unlikely occurrence—then the question remains whether a 14-year joint sentence would even be adequate bearing in mind the number of crimes for which Ntaganda was convicted, and the facts underlying these convictions.¹⁹³

75. Accordingly, for all these reasons, the Appeals Chamber should dismiss Ground 5, and affirm the individual sentence imposed by the Chamber in respect of count 3. Furthermore, even if it were to reduce this individual sentence, it should maintain the joint sentence imposed, which was proportionate to Ntaganda's criminal conduct as a whole.

VI. THE CHAMBER CORRECTLY ASSESSED THE GRAVITY OF THE MATERIAL CONDUCT WHEN CALCULATING NTAGANDA'S INDIVIDUAL SENTENCE FOR PERSECUTION (GROUND 6)

76. In calculating Ntaganda's "individual sentence of 30 years for persecution", the Chamber took into account the discriminatory intent that had also been taken into account in calculating Ntaganda's individual sentence of 30 years for murder. This was entirely correct. It would have been erroneous for the Chamber to have done anything else, since it was required to apply the unique 'two step' process for sentencing established by article 78(3), in which an individual sentence for each crime (based on the circumstances of that crime alone) is calculated *before* determination of an appropriate joint sentence (based on the number and character of the individual sentences, and their underlying facts). Adherence to the Statute's requirements in this manner does not amount to impermissible 'double-counting'. If anything, in the exercise of its discretion, the Chamber took a *conservative* approach in *declining* to increase Ntaganda's joint sentence to exceed 30 years, notwithstanding his multiple additional convictions for other crimes.

¹⁹³ See further below paras. 85-86.

77. Nor in any event can the error claimed by Ntaganda, for the sake of argument, materially affect the joint sentence imposed. Even if the Chamber had imposed an individual sentence for persecution that was substantially less than 30 years, it was *still* required by law to impose a joint sentence of 30 years or more—because this was the individual sentence for murder, which Ntaganda does not squarely challenge.¹⁹⁴

VI.A. The Chamber correctly applied article 78(3) of the Statute

78. Article 78(3) creates a unique regime for sentencing at this Court that is dissimilar to the regime applied by other international tribunals, such as the ICTR or the ICTY.¹⁹⁵ Under article 78(3), the Chamber must first calculate an appropriate *individual* “sentence for each crime” for which convictions are entered,¹⁹⁶ and then separately determine the “*joint* sentence specifying the total period of imprisonment”¹⁹⁷ which is appropriate to “reflect the culpability of the convicted person”.¹⁹⁸ This process is mandatory—as the Appeals Chamber has recalled, “if a person is convicted of more than one crime or offence in the same case, the trial chamber is required to pronounce a sentence for each of them and, on that basis, impose a joint sentence, respecting the limitations of the second sentence of article 78 (3) of the Statute.”¹⁹⁹ Ntaganda’s complaint is based on an apparent misunderstanding of this law.

VI.A.1. Individual sentences reflect the culpability for a particular crime, assessed separately from other crimes for which convictions may have been entered

79. Ntaganda’s appeal assumes that it is a “textbook case of double-counting” if the same factual conduct is reflected in more than one individual sentence.²⁰⁰ But this overlooks that

¹⁹⁴ The Prosecution notes that Ground 4 of the Sentencing Appeal does relate to murder, but that the arguments presented go to the merits of Ntaganda’s conviction and not as such to the individual sentence imposed. See *above* paras. 41-44.

¹⁹⁵ See e.g. [ICTR rule](#) 87(C); [ICTY rule](#) 87(C); [IRMCT rule](#) 105(C). Under this approach, trial judges have a discretion *either* to impose multiple individual sentences which may only be served consecutively or concurrently, *or* a single global sentence reflecting the totality of the criminal conduct. See further [Bemba et al. SAJ](#), para. 238 (observing that “jurisprudence of the ICTY concerning the imposition of consecutive or concurrent sentences” is “inapposite and of limited, if any, guidance” for this Court “in light of the textual interpretation of article 78 (3) of the Statute, and considering the different legal provisions governing sentencing proceedings before the ICTY”); [Sentencing Judgment](#), para. 8 (recalling the jurisprudence of the Appeals Chamber that the Court’s legal texts “establish a comprehensive scheme for the determination of a sentence”).

¹⁹⁶ [Statute](#), art. 78(3).

¹⁹⁷ [Statute](#), art. 78(3) (emphasis added).

¹⁹⁸ [Rule](#) 145(1)(a). See further [Bemba et al. SAJ](#), para. 57 (“the determination of the total culpability [...] must indeed be reflected in the ultimate joint sentence”).

¹⁹⁹ [Bemba et al. SAJ](#), para. 238. See also [Sentencing Judgment](#), para. 25.

²⁰⁰ [Sentencing Appeal](#), para. 69 (“Having fully taken into account the underlying act and the discriminatory dimension of the underlying act in the individual sentence for the crime of murder, there was no room for any

the calculation of the individual ‘sentence’ is, in reality, *merely a step in the Chamber’s reasoning*, which the law requires to be made expressly.²⁰¹ It is not the same as the joint sentence, which reflects the actual penalty to be imposed, but merely establishes some of the factors relevant to its subsequent calculation.

80. Since each individual sentence reflects the Chamber’s assessment of the culpability of a particular crime, it is naturally assessed separately from other crimes for which convictions have been entered. Reconciling these individual sentences is a matter for the assessment of the joint sentence. Thus, as outlined in Annex C, the Chamber properly recognised that the commission of certain crimes with discriminatory intent could be taken into account in determining the relevant individual sentences, notwithstanding that it also entered a conviction for persecution as a crime against humanity.²⁰² This was necessary and appropriate to determine the appropriate penalty for each of those crimes. Likewise, since it was entitled to enter a conviction for persecution as a crime against humanity—which Ntaganda expressly acknowledges²⁰³—the Chamber could hardly have failed to take account of the discriminatory nature of that crime in setting the appropriate individual sentence for it.

VI.A.2. The joint sentence reflects the totality of the culpability of the convicted person

81. Having calculated the various individual sentences, as required by article 78(3), the determination of the joint sentence will generally be informed by the number and character of individual sentences, and potentially the degree of relation between the underlying factual findings.²⁰⁴ As the Chamber expressly recalled, notwithstanding its view “that cumulative convictions are permissible”, it took into account that Ntaganda was convicted “of certain crimes that are wholly or in part based on the same conduct”.²⁰⁵ This included the discriminatory nature of the crimes. As explained below, it was partly due to this factual

additional sentence to be imposed for persecution. The only appropriate sentence was not a sentence equal to that previously imposed for the same conduct but rather a sentence of zero to avoid double-counting”).

²⁰¹ See e.g. [Sentencing Appeal](#), para. 71 (“the Chamber erred in sentencing Mr. Ntaganda to an individual 30 years sentence for the crime of persecution. This sentence double-counted not only the criminality underlying the persecution conviction, but also the discriminatory dimension of that criminality, which the Chamber had previously taken into consideration in pronouncing individual sentences for Counts 1 to 5, 7 to 8, 11 to 13, and 17 to 18. The only appropriate sentence for persecution, in these circumstances was zero”). See also paras. 72-73 (repeating this same paragraph).

²⁰² See Annex C (noting that the Chamber, in determining individual sentences, took account of the perpetrators’ discriminatory intent—either as part of the gravity of the crime or an aggravating circumstances—for counts 1-5, 7-8, 11-13, and 17-18).

²⁰³ [Sentencing Appeal](#), para. 70.

²⁰⁴ See e.g. [Sentencing Judgment](#), paras. 31, 42, 176, 249.

²⁰⁵ [Sentencing Judgment](#), para. 26. See also para. 31 (“the Chamber has taken into account the fact that some of the conduct underlying the convictions for different crimes is also the same”).

overlap that it imposed the minimum possible sentence on Ntaganda, amounting to the tariff for just *one* of his individual sentences.²⁰⁶ Ntaganda fails to address this point, or to show any impermissible double-counting in the Chamber's assessment of his joint sentence.

VI.A.3. Impermissible double-counting generally entails the same factual conduct being considered twice in the calculation of an individual sentence

82. Ntaganda generally mistakes the concept of impermissible 'double-counting'.²⁰⁷ The term reflects the well-established 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",²⁰⁸ or as mitigating circumstances.²⁰⁹ In the context of this Court's statutory framework, this means that the danger of double-counting arises primarily in the calculation of the appropriate *individual sentence(s)*, where the Chamber determines the gravity of the relevant crime (including the degree of participation and intent of the convicted person) and any aggravating or mitigating circumstances arising from the material facts.²¹⁰

83. There is no doubt that the Chamber was appropriately alert to the danger of double-counting in calculating the individual sentences, and did not fall into error. It not only

²⁰⁶ See below paras. 83-86.

²⁰⁷ Contra [Sentencing Appeal](#), paras. 62, 69, 71-73.

²⁰⁸ [D. Milošević AJ](#), para. 306; [M. Nikolić SAJ](#), para. 58; [Deronjić SAJ](#), para. 106.

²⁰⁹ [Limaj AJ](#), paras. 143-144.

²¹⁰ See e.g. [Bemba et al. SAJ](#), para. 112 (noting that factors relating to the gravity of the crime and potential aggravating circumstances are "not nearly distinguishable and mutually exclusive categories" and that indeed "[c]ertain facts may reasonably be considered under more than one of the categories"; consequently, "[w]hat is of importance [...] is not so much in which category a given factor is placed, but that the Trial Chamber identifies all relevant factors and attaches reasonable weight to them in its determination of the sentence, carefully avoiding that the same factor is relied upon more than once"). Indeed, there may also be aggravating or mitigating circumstances which do not pertain to the specific crimes for which convictions are entered (see e.g. [Sentencing Judgment](#), paras. 18, 22-23), and therefore may not be amenable to assessment in the context of determining the appropriate individual sentences. These may instead potentially be taken into account in determining the appropriate joint sentence. Compare e.g. [Sentencing Judgment](#), paras. 78-85 (discussion of any aggravating circumstances relevant to individual sentences for counts 1-3), 121-129 (discussion of any aggravating circumstances relevant to individual sentences for counts 4-9), 151-154 (discussion of any aggravating circumstances relevant to individual sentences for counts 11, 17, and 18), 169-171 (discussion of any aggravating circumstances relevant to individual sentences for counts 12-13), 176 (discussion of any aggravating circumstances relevant to individual sentence for count 10), 193-196 (discussion of any aggravating circumstances relevant to individual sentence for counts 14-16), with paras. 199-245 (discussion of any aggravating or mitigating circumstances not arising directly from the circumstances of the specific crimes). See also para. 28. However, precisely because these more general individual circumstances do not relate to the specific crimes in question, the risk of double-counting is much lower. However, it would of course be an error to double-count factors taken into account in aggravating or mitigating an individual sentence, and then to rely upon the same factor to aggravate or mitigate the joint sentence a second time.

recalled that legal elements required for liability cannot be aggravating circumstances,²¹¹ but specifically observed and gave effect to this prohibition in practice, as Ntaganda acknowledges, with regard to murder under counts 1 and 2.²¹² In considering all other individual sentences, the Chamber was careful to consider the discriminatory nature of the crimes as part of their gravity, but not as an aggravating circumstance.²¹³ Ntaganda shows no error in this approach.

VI.A.4. The alleged error does not materially affect the joint sentence imposed

84. It is true that, in appeals seeking to *increase* the joint sentence imposed, “any error in the determination of an individual sentence—even if not the highest one—may, in principle have an impact on the determination of the joint sentence”.²¹⁴ But this is not so for appeals seeking to *decrease* the joint sentence imposed, such as the one at hand.²¹⁵ In this scenario, it is not necessarily the case that an error in any of the individual sentences would materially affect the joint sentence, if the Chamber has only imposed the *minimum* possible sentence allowed under article 78(3)—and thus the discretion afforded to a chamber in setting the joint sentence is replaced by operation of law. This is just what the Chamber did in this case. In such circumstances, to show the necessary impact, it matters *which* individual sentence is allegedly erroneous. Specifically, the appellant must show error in the highest individual sentence(s).

85. As the Appeals Chamber has recalled, article 78(3) specifies that “the highest individual sentence constitutes the *minimum* possible joint sentence.”²¹⁶ This means that, even if Ntaganda could show an error in the Chamber’s calculation of his individual sentence for persecution, such an error, alone, could not materially affect the joint sentence. This is because the 30-year individual sentence for persecution was not the *only* individual sentence

²¹¹ [Sentencing Judgment](#), para. 20.

²¹² See e.g. [Sentencing Judgment](#), para. 84 (recalling that, “[s]ince the discriminatory element has been considered by the Chamber as part of the common plan [...], and as such in Mr Ntaganda’s degree of participation and intent, the Chamber has not considered it separately as an aggravating circumstance”, but that where Ntaganda is not responsible for criminal conduct by virtue of his participation in the common plan it would take account of intentional targeting on ethnic grounds as an aggravating circumstance). See also para. 83 (fn. 229). See further [Sentencing Appeal](#), para. 63.

²¹³ See Annex C.

²¹⁴ [Bemba et al. SAJ](#), para. 57.

²¹⁵ This is because, for appeals seeking to increase the joint sentence, a challenge to *any* individual sentence has the potential to increase the tariff in that respect so that it becomes the highest individual sentence, requiring a corresponding uplift in the joint sentence as a matter of law, or otherwise potentially affecting the overall calculus as to whether a discretionary uplift in the joint sentence is nonetheless required.

²¹⁶ [Bemba et al. SAJ](#), para. 57 (emphasis supplied).

which the Chamber thought merited 30 years' imprisonment. Specifically, to establish that the joint sentence could have been materially affected, Ntaganda would have to show error *both* in the individual sentence for persecution (30 years) *and* the individual sentence for murder (30 years).²¹⁷ He fails to do so. Indeed, he does not squarely challenge the individual sentence for murder at all.²¹⁸ Rather, Ntaganda simply requests the Appeals Chamber to “reduce the individual sentence for Count 6 [sic] to zero; and reduce Mr Ntaganda’s joint sentence substantially”²¹⁹—but fails to recognise that, as a matter of law, the Appeals Chamber cannot reduce the joint sentence solely based on an alleged error in the individual sentence for persecution.

86. Furthermore, and in any event, even if the Appeals Chamber found error in the individual sentences for persecution *and* for murder (which, in this latter respect, Ntaganda does not even argue), it could still properly maintain the 30-year joint sentence as proportionate.²²⁰ This is because the Chamber found it appropriate to impose the minimum possible joint sentence under article 78(3)—30 years—because any discretionary increase would in these circumstances have required the imposition of life imprisonment,²²¹ which the Chamber did not consider to be warranted.²²²

87. Yet if, for the sake of argument, the individual sentences for both persecution and murder should properly have been lower, the minimum joint sentence which could consequently have been imposed would then have been 28 years (the individual sentence for rape, as charged in counts 4 and 5).²²³ This would have left the Chamber with the option of a discretionary two-year increase, without requiring it to impose a life sentence at which it demurred. And given the Chamber’s specific recognition that an increase was appropriate in

²¹⁷ See also Annex C.

²¹⁸ See above fn. 194.

²¹⁹ [Sentencing Appeal](#), para. 74. The Prosecution understands the reference to “Count 6” (rape of child soldiers, which is not addressed in Ground 6 of the appeal) to be a typographic error intended to refer to “Count 10” (persecution), which is the individual sentence Ntaganda otherwise suggests in Ground 6 should have been “zero”: e.g. paras. 69, 71.

²²⁰ See [Lubanga SAJ](#), para. 45 (“the material effect” of an error in sentencing, required by article 83(2) of the Statute, “is only established if the Trial Chamber’s exercise of discretion led to a disproportionate sentence”).

²²¹ [Statute](#), art. 77(1) (allowing for the Court to impose sentences of imprisonment up to 30 years, or otherwise a “term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person”).

²²² [Sentencing Judgment](#), paras. 249-251 (concluding that, “in the particular circumstances of this case, as a result of the highest individual sentence and the statutorily mandated maximum term of imprisonment for the joint sentence being the same, no further discretion is given to the Chamber in the determination of the overall joint sentence, which shall therefore be 30 years of imprisonment”).

²²³ See Annex C. The individual sentences for the crimes against children were 14 years, 17 years, and 18 years: see counts 6, 9, 14-16.

principle—to “further reflect Mr Ntaganda’s conviction of the additional crimes committed vis-à-vis children under the age of 15 who were recruited into the UPC/FPLC [...] so as to properly account for the multiplicity of crimes and his overall culpability”—it can only reasonably be considered that the Chamber *would* have made such an increase. Consequently, there can be no doubt that the discretionary increase would have exceeded two years, and thus the Chamber would still have imposed a joint sentence of 30 years.

88. For all these reasons, the Appeals Chamber should dismiss Ground 6 and affirm the Chamber’s individual sentence in respect of count 10. Furthermore, even if it were to reduce this individual sentence, it should maintain the joint sentence imposed, which was proportionate to Ntaganda’s criminal conduct as a whole.

VII. THE CHAMBER CORRECTLY REJECTED NTAGANDA’S ACTIONS TO ALLEGEDLY “SAVE” 64 ENEMY SOLDIERS AS A MITIGATING CIRCUMSTANCE (GROUND 7)

89. The Chamber properly rejected Ntaganda’s actions to allegedly “save” 64 enemy soldiers as a mitigating circumstance, based on the evidence before it.²²⁴ The Chamber considered P-0016’s testimony that “Mr Ntaganda preferred to integrate and train him and the aforementioned 63 soldiers into the UPC/FPLC because at that time the armed group did not have any trained soldiers of its own”²²⁵ and correctly concluded that “Mr Ntaganda’s actions appear to have been aimed at using the soldiers for the benefit of the common plan.”²²⁶ It also noted the “scarcity of details in [D-0251’s] testimony on this subject” and “[c]onsidering these factors together”, correctly concluded that this matter was not established on a balance of probabilities.²²⁷ Contrary to Ntaganda’s submission, there is no legal or factual error in the Chamber’s approach and conclusion.²²⁸

VII.A. The Chamber correctly assessed the evidence

90. Ntaganda submits that the Chamber’s description of his actions as “appearing” to have been aimed at using the soldiers for the benefit of the common plan “demonstrates the speculative nature of its inference concerning Mr. Ntaganda’s ‘aim’, and was not a proper

²²⁴ [Sentencing Judgment](#), para. 212.

²²⁵ [Sentencing Judgment](#), para. 212.

²²⁶ [Sentencing Judgment](#), para. 212.

²²⁷ [Sentencing Judgment](#), para. 212.

²²⁸ *Contra* [Sentencing Appeal](#), para. 76.

basis on which to dismiss this substantial humanitarian act.”²²⁹ His argument lacks merit.

91. *First*, the 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.²³⁰ Indeed, his motive to integrate the 64 soldiers into the UPC/FPLC for the benefit of the common plan was apparent from the evidence. Witness P-0016 specifically stated that in intervening to save him and the other 63 enemy soldiers, Ntaganda “reasoned that they needed real soldiers to integrate into the new army and to ensure the training and the proper functioning of the FPLC, since the FPLC did not have trained soldiers.”²³¹

92. *Second*, the Chamber properly determined that Ntaganda’s actions were not established as a mitigating factor on a balance of probabilities.²³² Ntaganda mistakes how mitigating factors are determined. A chamber must establish a mitigating circumstance to the threshold of a balance of probabilities,²³³ which means that “the circumstances in question must have existed or exist *more probably* than not.”²³⁴ Here, the Chamber correctly considered that, in light of *all* the relevant evidence before it, including its reservations about D-0251’s credibility and the lack of detail in his testimony, this mitigating circumstance was not established to the required threshold.²³⁵ Hence, the Chamber’s assessment of P-0016’s testimony was not the sole basis of its decision not to consider this circumstance as mitigating.²³⁶ Rather, it was based on the totality of the evidence before it.

93. *Third*, Ntaganda disregards the common plan which forms the basis of his conviction,²³⁷ and his own contributions to it. Ntaganda had a key role in setting up an efficient military group²³⁸ and devising its military tactic,²³⁹ which led UPC/FPLC soldiers to commit the crimes in implementing the common plan.²⁴⁰ Against this backdrop and regardless of his

²²⁹ [Sentencing Appeal](#), paras. 81-82 referring to [Sentencing Judgment](#), para. 212 (emphasis added).

²³⁰ The Oxford Thesaurus, p. 16 (defining “appear” to mean, among others, “be clear or evident or plain or manifest”); [Merriam-Webster Dictionary](#) (“4. to become evident or manifest”).

²³¹ P-0016: DRC-OTP-0126-0422, para. 47; [Sentencing Judgment](#), para. 212.

²³² [Sentencing Judgment](#), para. 212; *contra* [Sentencing Appeal](#), paras. 75, 76, 81, 82.

²³³ [Bemba SJ](#), para. 19; [Lubanga SJ](#), para. 34; *contra* [Sentencing Appeal](#), paras. 81-82.

²³⁴ [Babić SAJ](#), para. 43 (emphasis added).

²³⁵ [Sentencing Judgment](#), para. 212, referring to [Judgment](#), para. 103 and fns. 213 and 1157 (finding, among others, that the witness’s testimony was contradicted by a number of other witnesses who the Chamber found credible).

²³⁶ *Contra* [Sentencing Appeal](#), para. 76.

²³⁷ [Judgment](#), paras. 808-809.

²³⁸ [Judgment](#), paras. 830-833.

²³⁹ [Judgment](#), paras. 834-846.

²⁴⁰ [Judgment](#), paras. 797 (“during and immediately after these military assaults, UPC/FPLC soldiers committed a large number of different crimes, in many localities, and over an extended period of time”), 810-811.

motive, 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. The Chamber's refusal to accord Ntaganda's intervention any mitigating value thus reveals no error.

94. To the extent that Ntaganda now claims that he sought to convince Kisembo to spare the lives of the soldiers because they could be useful to the FPLC as trained soldiers but that this might not have reflected his own "internal" reasoning (suggesting that Ntaganda acted altruistically to save innocent lives),²⁴¹ he provides no evidence of his assertion. To the contrary, P-0016 testified clearly about why Ntaganda decided to spare the lives of the APC soldiers:

[w]hen we arrived in Mandro, Bosco who arrived later on said, No. We have a young army which needs useful people. We have weapons which have come from the UPC. We need experienced people who are going to teach young soldiers how to use these weapons. So these people are still necessary. There was a heated discussion, but after some time Bosco succeeded in convincing them. We stayed in Mandro.²⁴²

95. Considering that mitigating factors are "more a matter of grace than of defence,"²⁴³ it would plainly defeat the purpose of mitigation if an alleged mitigating circumstance reveals a motive to promote a crime or criminality.

96. *Finally*, even if a more altruistic motive for Ntaganda's intervention to "save" enemy soldiers and integrate them into the FPLC had been proven, this would not constitute what other international tribunals have called 'selective assistance' to victims. In any event, such 'selective assistance' has been considered "of limited, if any, relevance" to the sentence."²⁴⁴ For example, as an ICTR Chamber stated when rejecting an accused's "selective assistance" to some victims as a mitigating circumstance, "his power to save was more than matched by his power to kill."²⁴⁵ Ntaganda equally had the power to save lives, but he instead used it to

²⁴¹ [Sentencing Appeal](#), para. 81.

²⁴² DRC-OTP-2054-1447, p. 11, lns. 4-24.

²⁴³ [Hostage Trial](#), p. 1317, also referred to in Schabas (1997), p. 485. See also [Kambanda TJ](#), paras. 37, 56; [Ruggiu TJ](#), para. 80.

²⁴⁴ [Bemba SJ](#), para. 72.

²⁴⁵ [Nahimana et al. AJ](#), para. 1106. See also [Nahimana et al. TJ](#), para. 1101; [Niyitegeka AJ](#), para. 266 ("[a]lthough the Appellant was found to have saved the lives of certain refugees on one occasion, he also took the lives of others, and deliberately committed crimes of a heinous nature against civilians prior to and after this episode"); [Krajišnik AJ](#), para. 817 (finding that the "sporadic assistance" the accused provided to some non-Serb individuals had only a limited impact on the sentence); [Rukundo TJ](#) para. 602 (and upheld in [Rukundo AJ](#), para. 256; even if Rukundo had evacuated some Tutsi, "the assistance provided by Rukundo to a selected number of Tutsi carries only limited, if any, weight as a mitigating factor").

kill, rape and perpetrate serious and violent crimes. Even when he intervened on an isolated occasion, he did so to further his own criminal plans. Accordingly, the Chamber properly found his intervention did not warrant consideration as a mitigating circumstance.

VII.B. The cases Ntaganda cites are inapposite

97. None of the cases that Ntaganda cites are on point as the convicted persons in those cases were not found to have acted to further promote the criminal activity inherent in the common criminal enterprise.²⁴⁶ The circumstances in which they intervened to save some victims are distinguishable from the circumstances in which Ntaganda acted.

98. For instance, in *Popović et al.*, Pandurević’s motivation in opening the corridor included military considerations and protecting Serb lives. It was not aimed at furthering crimes.²⁴⁷ Moreover, not only did Pandurević’s intervention involve the saving of thousands of lives, but given the circumstances in which his acts occurred, the ICTY Trial Chamber found them a “clear and compelling instance of assistance to potential victims.”²⁴⁸ In particular:

At 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.²⁴⁹

99. Moreover, unlike Ntaganda, who led others in perpetrating crimes, Pandurević only played a limited role in the crimes,²⁵⁰ and the Chamber found that his “brave acts”²⁵¹ “represent[ed] the sole instance where a senior member of the VRS, in writing challenged the Superior Command about the murder operation.”²⁵²

100. Nor in *Blagojević et al.* was Jokić’s intervention to ensure safe passage for certain individuals through a minefield aimed at furthering crime.²⁵³ Rather, Jokić acted in

²⁴⁶ *Contra* [Sentencing Appeal](#), paras. 77-80.

²⁴⁷ [Popović et al. TJ](#), para. 2220; *contra* [Sentencing Appeal](#), paras. 77-79.

²⁴⁸ [Popović et al. TJ](#), para. 2220.

²⁴⁹ [Popović et al. TJ](#), para. 2219. *See also* [Popović et al. AJ](#), para. 459. *But see* para. 2223, fn. 6365 (the Trial Chamber according only limited weight to other limited interventions by Pandurević).

²⁵⁰ [Popović et al. TJ](#), para. 2219.

²⁵¹ [Popović et al. TJ](#), para. 2221.

²⁵² [Popović et al. TJ](#), para. 2221.

²⁵³ [Blagojević & Jokić AJ](#), para. 342; *contra* [Sentencing Appeal](#), para. 80.

compliance with the law to save persons belonging to the group that was being subjected to persecution.²⁵⁴ He did so “in the midst of ongoing fighting.”²⁵⁵ The Trial Chamber found that while “mere compliance with the law is not ordinarily a factor in assessing an accused’s good conduct, (...) a Trial Chamber, in exercise of its discretion, may credit an accused for fully complying with certain obligations.”²⁵⁶ In contrast, Ntaganda’s intervention was aimed in the opposite direction, namely of promoting further crime.

101. Similarly, Karadžić’s decision to withdraw from politics and public life—which the Trial Chamber credited as a mitigating factor²⁵⁷—was not aimed at furthering crimes. Moreover, Karadžić’s decision had a “positive influence on the establishment of peace and stability,” in Bosnia and Herzegovina and in the region.²⁵⁸

102. That guilty pleas are widely recognised in mitigation even where the convicted person may also have self-interested motives, is immaterial to Ntaganda’s situation.²⁵⁹ A guilty plea not only includes “an admission by the accused of his guilt”²⁶⁰ but may also “have a deterrent effect on others tempted to commit similar crimes.”²⁶¹ It may encourage others to come forward to accept responsibility, thereby contributing to national peace and reconciliation, relieve witnesses and victims from the stressful burden of giving evidence in court, and save resources and time that may then be used to investigate and prosecute other cases.²⁶² In contrast, Ntaganda’s actions in sparing the lives of 64 enemy soldiers in order to integrate them into his own army and further his criminal plan has no mitigating value. The Chamber correctly gave it none.

103. For the reasons set out above, Ground 7 should be dismissed.

VIII. THE CHAMBER CORRECTLY ACCORDED NO WEIGHT TO NTAGANDA’S EXPERIENCE OF THE RWANDAN GENOCIDE (GROUND 8)

104. The Chamber properly rejected Ntaganda’s argument that his traumatic experience

²⁵⁴ [Blagojević & Jokić AJ](#), para. 342.

²⁵⁵ [Blagojević & Jokić TJ](#), para. 854.

²⁵⁶ [Blagojević & Jokić AJ](#), para. 342.

²⁵⁷ [Karadžić TJ](#), para. 6057; [Karadžić AJ](#), para. 754; *contra* [Sentencing Appeal](#), para. 80.

²⁵⁸ *Contra* [Sentencing Appeal](#), para. 80.

²⁵⁹ *Contra* [Sentencing Appeal](#), para. 80.

²⁶⁰ [Nikolić SAJ](#), para. 89.

²⁶¹ [Al Mahdi TJ](#), para. 100.

²⁶² [Al Mahdi TJ](#), para. 100. See also [Bralo SJ](#), para. 64; [Plavšić SJ](#), paras. 73.

during the Rwandan genocide was a mitigating factor.²⁶³ The Chamber correctly understood and considered Ntaganda's sentencing submissions regarding the alleged impact of Ntaganda's traumatic experience in Rwanda.²⁶⁴ It correctly gave this matter no mitigating weight in light of Ntaganda's criminal conduct and his crimes.²⁶⁵ The Chamber's decision was reasonable and fell squarely within its discretion. Based on its intimate knowledge of the case²⁶⁶ and its duty to individualise a sentence proportionate to the gravity of the crimes and the culpability of the convicted person, a chamber has broad discretion to determine what constitutes a mitigating factor,²⁶⁷ and the weight, if any, to attribute to it.²⁶⁸ Since the Chamber's decision evinces no error, the Appeals Chamber need not conduct a *de novo* determination of this matter.²⁶⁹

VIII.A. The Chamber adequately addressed Ntaganda's sentencing submissions

105. Ntaganda incorrectly argues that the Chamber misunderstood his arguments regarding the Rwandan genocide.²⁷⁰ To the contrary, it is Ntaganda's arguments which have shifted on appeal. Before the Trial Chamber, Ntaganda sought to explain his criminal actions in Ituri—and thereby diminish his culpability—based on his experiences in Rwanda. For example, he argued that the “reason that a person falls into criminal conduct is relevant to sentencing”;²⁷¹ that he saw in Ituri an “imminent threat of genocide”;²⁷² that “his perception of the situation and his reaction cannot be divorced from the hard lessons that he had just lived through in Rwanda”;²⁷³ and that this had “caused him to associate in 2000 with his co-perpetrators.”²⁷⁴ While he argued that “[n]one of this excuses or justifies even a single crime of which Mr. Ntaganda has been convicted”, he also submitted that “[his were] not venal or vicious motives [and] the impact that the genocide must have had on Mr. Ntaganda – and of the

²⁶³ [Sentencing Judgment](#), paras. 209-210; *contra* [Sentencing Appeal](#), paras. 83-96. See [Defence Sentencing Submissions](#), paras. 103-110.

²⁶⁴ [Sentencing Judgment](#), para. 209 (fn. 535).

²⁶⁵ [Sentencing Judgment](#), para. 210.

²⁶⁶ [Lubanga SAJ](#), para. 34 (“The Appeals Chamber considers that [...] in order to determine a sentence, the Trial Chamber, based on its intimate knowledge of the case, will have to balance all factors it considers relevant. Therefore, the Trial Chamber’s determination involves an exercise of discretion with the aim to impose a proportionate sentence that reflects the culpability of the convicted person”).

²⁶⁷ [Bemba et al. SAJ](#), para. 188.

²⁶⁸ [Lubanga SAJ](#), para. 111 (“[T]he weight given to a mitigating factor falls within the discretion of the Trial Chamber”); [Bemba SJ](#), para. 19. See also [Bemba et al. Second SAJ](#), paras. 29, 128, 138 (recalling a Chamber’s broad discretion in determining the appropriate sentence).

²⁶⁹ *Contra* [Sentencing Appeal](#), para. 96.

²⁷⁰ [Sentencing Appeal](#), para. 83.

²⁷¹ [Defence Sentencing Submissions](#), para. 103.

²⁷² [Defence Sentencing Submissions](#), para. 106.

²⁷³ [Defence Sentencing Submissions](#), para. 108.

²⁷⁴ [Defence Sentencing Submissions](#), para. 103.

measures that might be necessary to stop a genocide – should not be under-estimated”.²⁷⁵

106. The Chamber correctly addressed and rejected Ntaganda’s arguments. 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”²⁷⁶ and recalled that it had found Ntaganda’s “testimony regarding his suffering during the Rwandan genocide credible, as well as his experience of the discrimination against the Tutsi during his youth, notably in the region of Eastern Congo”.²⁷⁷ However, the Chamber recalled that it did not find credible Ntaganda’s testimony that “he always fought and acted [...] for the liberation and freedom of the civilian population in general in Ituri” and that it “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”.²⁷⁸ The Chamber correctly noted 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”.²⁷⁹ It fell squarely within the Chamber’s discretion to consider the gravity and discriminatory nature of Ntaganda’s crimes to decide whether his past experience in Rwanda could mitigate his sentence. It reasonably found that it could not. Rather than taking steps to even-handedly protect all groups (in line with what he claimed the genocide experience had taught or impacted upon him),²⁸⁰ Ntaganda used the military skills he learned while in the Rwandan Patriotic Front (“RPF”) to destroy another group.²⁸¹

107. On appeal, Ntaganda repeats his sentencing submissions but argues that this “evidence was not invoked to justify [his] actions, but to explain and contextualize the motivations and personal circumstances that led him into his criminal conduct”.²⁸² He appears to suggest that his traumatic experience (and “[t]his background”) should be a mitigating factor *per se* since “[d]ifficult or traumatic family circumstances of an offender are routinely taken into

²⁷⁵ [Defence Sentencing Submissions](#), para. 109.

²⁷⁶ [Sentencing Judgment](#), para. 210.

²⁷⁷ [Sentencing Judgment](#), para. 210.

²⁷⁸ [Sentencing Judgment](#), para. 210.

²⁷⁹ [Sentencing Judgment](#), para. 210.

²⁸⁰ [Defence Sentencing Submissions](#), paras. 109, 110.

²⁸¹ [Judgment](#), paras. 808-809; [Sentencing Judgment](#), para. 210.

²⁸² [Sentencing Appeal](#), paras. 94-95. *See also* para. 87.

consideration in mitigation”.²⁸³

108. Yet he did not make this argument before the Chamber, where instead he sought to explain—and to a certain extent justify—his criminal actions to diminish his culpability. To the extent that Ntaganda modifies his arguments on appeal, these arguments should be dismissed *in limine*. The Trial Chamber cannot be criticised for not addressing arguments not before it and the Appeals Chamber should not consider arguments in mitigation which were not submitted at trial.²⁸⁴

VIII.B. The cases cited by Ntaganda are inapposite

109. Ntaganda cites cases that are factually distinct from his case. Moreover, they do not establish that traumatic experiences automatically mitigate a sentence.

110. *First*, his reference to the *Wagner* case is actually a reference to *Porter v. McCollum*.²⁸⁵ In any event, Ntaganda’s case is not comparable to that case. The US Supreme Court reversed a death sentence imposed upon the convicted person Porter because his counsel had failed properly to investigate and present evidence of Porter’s “abusive childhood, his heroic military service and [associated] trauma [...], his long-term substance abuse, and his impaired mental health and mental capacity”.²⁸⁶ Porter’s circumstances and the expert evidence adduced in his case were very different from Ntaganda’s. Porter did not merely suffer “likely trauma of war-time combat”;²⁸⁷ in fact, he had sustained severe brain damage from fighting. An expert in neuropsychology attested that this “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”.²⁸⁸ This is very different from Ntaganda’s case where no evidence or argument was put forward that he suffered brain damage or any other form of mental illness.

111. *Second*, Ntaganda has not shown that his formative years were marred by his traumatic

²⁸³ [Sentencing Appeal](#), paras. 85, 95.

²⁸⁴ See e.g. [Deronjić SAJ](#), para. 150 (the Appeals Chamber refused to consider evidence of a mitigating circumstance not offered at trial).

²⁸⁵ [Porter v. McCollum](#). Wagner was the reporter collating the US Supreme Court cases in the 2009 October Term. See [Sentencing Appeal](#), para. 84 (fn. 100: [US Supreme Court, 2009 October term](#)).

²⁸⁶ [Porter v. McCollum](#), p. 33.

²⁸⁷ *Contra* [Sentencing Appeal](#), para. 84.

²⁸⁸ [Porter v. McCollum](#), p. 36.

experience in Rwanda.²⁸⁹ Moreover, the cases that he cites are factually distinct.²⁹⁰ The sentenced persons in those cases had been sexually abused as children²⁹¹ or had abused alcohol and drugs at a very young age.²⁹² Ntaganda was already 17 years old when he joined the RPF, and was even older during the Rwanda genocide.²⁹³ He was already 28 to 30 years old when he committed his crimes.²⁹⁴ Ntaganda admitted that he knew about the laws of war and prohibitions on attacking civilians,²⁹⁵ and thus understood the difference between right and wrong. The cases he relies on cannot be compared with his own.

112. For the reasons set out above, Ground 8 should be dismissed.

IX. THE CHAMBER CORRECTLY REJECTED NTAGANDA'S ALLEGED ACTIONS TO PROTECT CIVILIANS AND PUNISH CRIMES AS MITIGATING FACTORS (GROUND 9)

113. The Chamber correctly decided not to consider in mitigation three allegedly positive actions that Ntaganda claimed he took.²⁹⁶ Ntaganda failed to show on a balance of probabilities that he protected Lendu civilians in June 2002;²⁹⁷ that he tried to protect civilians after he secured areas²⁹⁸ or that he punished crimes against civilians.²⁹⁹ Ntaganda shows no error in the Chamber's approach.

IX.A. Ntaganda did not protect Lendu civilians in Mandro

114. *First*, Ntaganda misreads the Sentencing Judgment and misapprehends the evidence when he claims that the Chamber "erred in refusing to accept the evidence of D-0054 and

²⁸⁹ *Contra* [Sentencing Appeal](#), para. 85.

²⁹⁰ [Sentencing Appeal](#), para. 85 (fn. 101).

²⁹¹ [R v. Williams](#), paras. 23 (The applicant left school in year 9, aged 15. By this time he had developed a drug problem with associated behavioural difficulties arising from his having been abused at the age of 11), 28 (By the age of 17, the applicant was an alcoholic); [R v. B.V.T.](#), paras. 10 (His upbringing was very dysfunctional with his parents' alcohol abuse featuring prominently in the violent way they treated each other and him), 20 (He states that he was a victim of sexual abuse at the hand of an older female who stood in a position of trust when he was a child between age of seven and 13).

²⁹² [Bugmy v. The Queen](#), para. 12 ("He started drinking alcohol and taking prohibited drugs when he was 13 years old. He reports having witnessed his father stabbing his mother 15 times. He and his siblings all have records for violence").

²⁹³ [Sentencing Appeal](#), para. 88.

²⁹⁴ [Sentencing Judgment](#), para. 208; [Judgment](#), paras. 1, 33, 208 (Ntaganda was born in 1973, and he perpetrated the crimes from on or about 6 August 2002 to on or about 31 December 2003).

²⁹⁵ [T-242](#), 21:2-10; [Prosecution Sentencing Submissions](#), para. 61.

²⁹⁶ [Sentencing Judgment](#), paras. 213-216. *Contra* [Sentencing Appeal](#), paras. 97-110.

²⁹⁷ [Sentencing Judgment](#), para. 214. *Contra* [Sentencing Appeal](#), paras. 99-103.

²⁹⁸ [Sentencing Judgment](#), para. 215. *Contra* [Sentencing Appeal](#), paras. 104-105.

²⁹⁹ [Sentencing Judgment](#), para. 216. *Contra* [Sentencing Appeal](#), paras. 106-108.

others that Mr. Ntaganda welcomed and protected Lendu civilians at Mandro after fleeing from attacks by Lendu civilians.”³⁰⁰ The Chamber was correct to discount this evidence. It found that “[w]hile D-0054 mentions ‘Bosco’ as being part of the delegation sent by Chief Kahwa to collect the Lendu civilians, *the witness provides no other details on this person’s role in the events*”.³⁰¹ Nor is it correct that the Chamber refused to accept this evidence solely because Ntaganda’s identification was not conclusive or because it could not be reconciled with the Chamber’s findings on his participation in the criminal common plan.³⁰² Instead, the Chamber recalled its finding that, shortly after this incident, Ntaganda agreed to a common plan to drive out all the Lendu from the localities targeted in the UPC/FPLC military campaign, and “[c]onsidering this, as well as the limited concrete evidence on [Ntaganda’s] actual role in the event described by D-0054, if any, [it] does not consider this matter to be established on a balance of probabilities”.³⁰³ Thus, the Chamber considered its findings regarding the common plan as one factor that, together with the limited concrete evidence on Ntaganda’s actual role in the event described by D-0054, led it to conclude that Ntaganda’s claim had not been established on a balance of probabilities.³⁰⁴

115. That the Prosecution did not cross-examine D-0054 on this matter does not mean it “tacit[ly] accept[ed] that the ‘Bosco’ to whom D-0054 was referring was, in fact, Mr Ntaganda”.³⁰⁵ As the Prosecution already explained in response to the Defence’s same argument in its sentencing submissions, it did not cross-examine D-0054 because the witness gave no substantive evidence that required any cross-examination.³⁰⁶ Nor did the Defence explore the identity of “Bosco” during its direct examination of D-0054. In any case, this is immaterial. As noted above, even assuming *arguendo* that this individual was Ntaganda, D-0054 gave no evidence regarding his alleged role in protecting these civilians.

116. Finally, Ntaganda’s testimony on this matter was vague and lacked details about his alleged actions.³⁰⁷ Moreover, the Chamber did not find credible Ntaganda’s testimony that he fought and acted for the liberation and freedom of the civilian population in Ituri.³⁰⁸ Nor are

³⁰⁰ [Sentencing Appeal](#), para. 99.

³⁰¹ [Sentencing Judgment](#), para. 214 (emphasis added).

³⁰² [Sentencing Appeal](#), para. 99.

³⁰³ [Sentencing Judgment](#), para. 214 (emphasis added), referring to [Judgment](#), paras. 808-809.

³⁰⁴ *Contra* [Sentencing Appeal](#), para. 102 (arguing that findings regarding the common plan were “incompatible with instances of protection of civilians”).

³⁰⁵ [Sentencing Appeal](#), para. 100.

³⁰⁶ [Prosecution Sentencing Response](#), para. 32 (fn. 126).

³⁰⁷ [Sentencing Appeal](#), para. 101 (fn. 135).

³⁰⁸ [Sentencing Judgment](#), para. 215 (fn. 559 citing [Judgment](#), para. 261).

the ICTR cases that Ntaganda cites comparable to his case.³⁰⁹ In those cases, the Defence clearly established that the accused person had taken concrete actions to save the lives of civilians.³¹⁰ In contrast, D-0054 testified that an individual named “Bosco” was simply present when Chief Kahwa collected Lendu civilians, but D-0054 said nothing about Bosco’s actual role.³¹¹

IX.B. Ntaganda did not protect other civilians

117. *Second*, the Chamber did not “improperly rel[y] on several findings in the Judgment to contradict” alleged incidents of protection of civilians by Ntaganda.³¹² Ntaganda cannot use his sentence appeal to challenge the Chamber’s findings in its Trial Judgment.³¹³ Nor, obviously, is the Chamber prevented from relying on its findings in the Judgment to determine an appropriate sentence. Since in its Judgment a chamber establishes the crimes and the convicted person’s culpable actions, it must necessarily rely on those findings to establish the appropriate sentence. Accordingly, the Chamber was correct to rely on its findings that Ntaganda and the UPC/FPLC did not protect civilians (and in particular Lendu civilians) both before and after the assaults. These included in particular its findings that:

- “Lendu did not return to Mongbwalu after the UPC/FPLC’s takeover [...] because of the risk of being killed”,³¹⁴
- after the assault in Mongbwalu the UPC/FPLC sought to hamper the return of the Lendu,³¹⁵ and
- after the assaults on Lipri, Tsili, Kobu, and Bambu the UPC/FPLC deterred the

³⁰⁹ [Sentencing Appeal](#), para. 102 and fn. 136.

³¹⁰ [Serugendo TJ](#), paras. 68-69 (where the Defence called a Tutsi witness who testified that he was chased by armed attackers and was rescued by Serugendo, who took him in his car and refused to relinquish him to the angry mob; [Nzabirinda SJ](#), paras. 75-77 (where the Defence called three witnesses to testify about Nzabirinda’s role in saving lives and the Prosecution did not dispute this evidence. The Chamber found that there was sufficient evidence that he gave moral, financial, and material support to Tutsi refugees, and assisted in organising the departure of certain refugees to Burundi); [Rugambarara SJ](#), paras. 36-37 (where the Defence called four witnesses to support its contention that he assisted Tutsi refugees and the Chamber accepted the evidence that he personally provided material support to them, which contributed to saving some of their lives.

³¹¹ [Sentencing Judgment](#), para. 214 (fns. 554-555).

³¹² [Sentencing Appeal](#), para. 104 referring to [Sentencing Judgment](#), para. 251 (although this is likely a typographical error and is meant to be a reference to para. 215).

³¹³ [Bemba et al. SAI](#), para. 138 (“even though a decision on sentence will, to a certain extent, rely on findings made in the conviction decision the appropriate avenue to challenge these findings is in an appeal against the conviction decision [...] and not in an appeal against sentence.”). See also paras. 139-140, 170, 176.

³¹⁴ [Judgment](#), para. 536, cited in [Sentencing Judgment](#), para. 215.

³¹⁵ [Judgment](#), para. 1061, cited in [Sentencing Judgment](#), para. 215.

population from returning.³¹⁶

118. On this basis, the Chamber reasonably 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 decided to give this factor no weight in mitigation.³¹⁷

119. Finally, Ntaganda’s reference to two items of evidence and five extracts of his testimony does not assist his claim.³¹⁸ The video extracts that he cites do not show that Ntaganda had any significant role in the peace negotiations between the UPC and the Lendu in Ngongo that led to opening a road in Nyangaray.³¹⁹ Ntaganda testified that he was not even present at this event.³²⁰ Moreover, this meeting took place only weeks before the UPC/FPLC attacked the predominantly Lendu areas immediately north of Ngongo, including Nyangaray, and targeted civilians.³²¹ Nor did the Chamber err by not mentioning the testimony of D-0038 (a former UPC/FPLC soldier). D-0038 did not testify that Ntaganda protected civilians in Risasi. Rather, he said that [REDACTED] the Lendu had killed a Hema village chief in Risasi in 2002.³²²

IX.C. Ntaganda did not meaningfully punish crimes

120. *Third*, Ntaganda misrepresents the Sentencing Judgment when he argues that the Chamber dismissed evidence regarding his punishment of crimes solely “on the basis that the victims were not necessarily Lendu persons”.³²³ Instead, the Chamber considered that most of the instances of punishment 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”.³²⁴ Based on all of these factors, the Chamber concluded that these acts of punishment “cannot be properly qualified as efforts to reduce the scale or mitigate the impact of crimes against the Lendu, or to prevent others from

³¹⁶ [Judgment](#), para. 1067, cited in [Sentencing Judgment](#), para. 215.

³¹⁷ [Judgment](#), para. 215.

³¹⁸ [Defence Sentencing Submissions](#), fns. 234-239. *Contra* [Sentencing Appeal](#), para. 105 referring to [Sentencing Judgment](#), para. 215 (referring to [Defence Sentencing Submissions](#), para. 121).

³¹⁹ [Sentencing Appeal](#), para. 105 (fn. 139).

³²⁰ D-300: [T-218](#), 85:17-20; [T-219](#), 12:10-11.

³²¹ See [Prosecution Closing Brief](#), para. 911 and fns. 2852-2853.

³²² D-0038: T-249-Conf, 74:21-77:12; T-251-Conf, 15:3-16:22; [T-251](#), 40:19-41:5.

³²³ [Sentencing Appeal](#), para. 106.

³²⁴ [Sentencing Judgment](#), para. 216 (fns. 566 to 568 referring to [Judgment](#), para. 332 (fns. 893, 885-886)).

committing criminal acts against the Lendu.”³²⁵ On this basis, it decided to give them no weight in mitigation.³²⁶ Although mitigating factors need not relate to the crimes,³²⁷ it falls within a chamber’s discretion (and is not an error) to require such connection. Even more so where the underlying evidence of the alleged mitigating action is weak and the convicted person—like Ntaganda—was in a position to prevent all crimes.³²⁸ The Chamber’s decision was reasonable.

121. Ntaganda also improperly repeats his challenges to findings in the Judgment when he argues that the Chamber “minimized Mr. Ntaganda’s specific acts of punishment”³²⁹ or “erred in rejecting a separate execution by firing squad, in public, in Mongbwalu [...] due to a lack of credibility in [Ntaganda’s] testimony”.³³⁰ Ntaganda has already appealed these findings in his appeal against his conviction and the proper place to resolve such challenges is in that appeal.³³¹ Accordingly, they must be rejected in this sentence appeal.

122. Finally, Ntaganda fails to place in context the Chamber’s findings regarding his purported punitive measures.³³² Not only were those actions “isolated”, but the Chamber also considered other factors, such as “(i) the fact that looted items of high value were usually given to the commanders [...]; and (ii) the nature of the orders given to the troops before combat [...]”.³³³ Nor did the Chamber fail to consider the evidence regarding the execution of Liripa, a UPC/FPLC soldier³³⁴—which was not “highly relevant.” Instead, the Chamber considered both the logbooks and P-0859’s testimony³³⁵ but noted additional reasons for the soldier’s execution, apart from the killing of a civilian.³³⁶

³²⁵ [Sentencing Judgment](#), para. 216 (fns. 566 to 568 referring to [Judgment](#), para. 332 (fns. 893, 885-886)).

³²⁶ [Sentencing Judgment](#), para. 216 (fns. 566 to 568 referring to [Judgment](#), para. 332 (fns. 893, 885-886)).

³²⁷ [Sentencing Judgment](#), para. 24.

³²⁸ [Judgment](#), para. 856 (“the Chamber considers that Mr Ntaganda had the power to frustrate the commission of the crimes”). See [Krajišnik TJ](#), paras. 1162-1163 (where the Chamber disregarded alleged isolated, benevolent acts – against non-Serb individuals - given “the magnitude of the crimes of which [Krajišnik] is found responsible”. The Chamber held that “sporadic benevolent acts or ineffective assistance may be disregarded” as a mitigating factor if “the convicted person is shown to have been in a position to take steps to control or prevent all acts of violence.”).

³²⁹ [Sentencing Appeal](#), para. 107.

³³⁰ [Sentencing Appeal](#), para. 108.

³³¹ See [Conviction Appeal-Part II](#), para. 126. With respect to the impropriety of challenging a Trial Judgment in an appeal against the [Sentencing Judgment](#): see [Bemba et al. SAJ](#), paras. 138.

³³² *Contra* [Sentencing Appeal](#), para. 107.

³³³ [Judgment](#), para. 332 (fn. 893 referring to [Judgment](#), paras. 415 and 515).

³³⁴ [Sentencing Judgment](#), para. 216, footnote 567.

³³⁵ *Contra* [Sentencing Appeal](#), para. 108; [Judgment](#), para. 332 (fn. 893).

³³⁶ [Judgment](#), para. 332 (fn. 893 : “Regarding the execution of a UPC/FPLC soldier called Liripa after the First Operation, the Chamber notes: (i) the reasons why the victim could apparently return to Mongbwalu; and (ii) that this execution was based on a number of reasons, inter alia, non-authorised exit, premeditation, failure to observe

123. For the reasons set out above, Ground 9 should be dismissed.

X. NTAGANDA DID NOT CONTRIBUTE TO RECONCILIATION WITH THE LENDU COMMUNITY OR FACILITATE DEMOBILISATION OF UPC/FPLC MEMBERS (GROUND 10)

124. The Chamber correctly rejected Ntaganda's alleged contributions to reconciliation and demobilisation as mitigating circumstances. The Chamber was not satisfied on the balance of probabilities that Ntaganda contributed concretely or genuinely to peace and reconciliation or to demobilisation and disarmament.³³⁷ Ntaganda misapprehends the record and the Sentencing Judgment. He simply disagrees with the Chamber's reasonable assessment of the evidence and shows no error in the Chamber's reasonable exercise of discretion in assessing mitigating factors. His arguments should be dismissed.

X.A. Ntaganda did not contribute to peace and reconciliation with the Lendu community

125. The Chamber reasonably found that, considering the totality of the evidence, Ntaganda's alleged contribution to peace and reconciliation between the Lendu and Hema communities was not established on a balance of probabilities.³³⁸ Ntaganda's actions (which did not involve any of the villages affected in this case) were far from "phenomenal" or "extraordinary".³³⁹ Instead, Ntaganda's involvement in the FNI-triggered awareness raising campaign was very limited, and its genuineness was undercut by overwhelming evidence.³⁴⁰ Ntaganda's sudden change of heart less than one year after he had sought to drive out the Lendu and meant their destruction is simply not supported by the evidence.³⁴¹ Ntaganda shows no error in the Chamber's reasonable assessment.

X.A.1. The Chamber considered the evidence that Ntaganda claims it did not

126. Ntaganda's claim that the Chamber failed to consider "highly relevant evidence" is

instructions, abusive use of weapon, waste of war ammunitions, public drunkenness, in addition to killings. Further, and having had regard to the way the First Operation was found to have unfolded, the Chamber considers that Mr Ntaganda's testimony on this point lacks credibility").

³³⁷ [Sentencing Judgment](#), para. 224.

³³⁸ [Sentencing Judgment](#), para. 224.

³³⁹ *Contra* [Sentencing Appeal](#), para. 127; [Defence Sentencing Response](#), para. 86.

³⁴⁰ [Sentencing Judgment](#), paras. 221, 223, 224.

³⁴¹ [Judgment](#), paras. 808-809.

incorrect.³⁴² Although the Chamber found that the evidence was not “highly relevant” to its determination, it still considered it:

- With regard to Ntaganda’s “own words” during a meeting at Sali, urging Hema and Lendu to recognise they were the same people,³⁴³ the Chamber considered this meeting and D-0306’s related testimony.³⁴⁴
- With regard to Ntaganda’s “address to the population in Largu”,³⁴⁵ the Chamber considered this event and related evidence.³⁴⁶
- With regard to D-0306’s testimony that Ntaganda “really wanted to restore peace”,³⁴⁷ the Chamber considered this evidence.³⁴⁸
- With regard to the speech of the FNI President (Mr Ndjabu) at a July 2004 rank-giving ceremony,³⁴⁹ the Chamber considered this fact,³⁵⁰ including D-0305’s³⁵¹ and D-0047’s related evidence.³⁵²
- With respect to “[e]vidence related to another *Collation des grades* ceremony held in Katoto”,³⁵³ the Chamber considered the Defence submissions that pacification meetings were held in Katoto.³⁵⁴

127. Accordingly, Ntaganda’s submission that the Chamber did not consider the above evidence is incorrect.

X.A.2. The Chamber reasonably considered Defence submissions and evidence

128. Ntaganda merely disagrees with the Chamber’s assessment of the Defence evidence, but

³⁴² [Sentencing Appeal](#), paras. 124, 133.

³⁴³ [Sentencing Appeal](#), para. 124 (citing D-0306: T-267-Conf, 20:15-19).

³⁴⁴ [Sentencing Judgment](#), para. 219(v) and fn. 581 (citing D-0306: T-267-Conf, 20).

³⁴⁵ [Sentencing Appeal](#), para. 124, citing D-0303: DRC-D18-0002-0001, p. 0007, para.39.

³⁴⁶ [Sentencing Judgment](#), para. 219(v) and fn. 582 (citing D-0303: DRC-D18-0002-0001, p. 0007, paras. 37-40).

³⁴⁷ [Sentencing Appeal](#), para. 124 and fn. 165 referring to D-0306: T-267-Conf, 15:20-24.

³⁴⁸ [Sentencing Judgment](#), para. 219(iv) (where it referred to Ntaganda having “encouraged the peace initiative”) and fn. 579 (citing D-0306: T-267-Conf, 15-16).

³⁴⁹ *Contra* [Sentencing Appeal](#), para. 133.

³⁵⁰ [Sentencing Judgment](#), para. 219 (vii) (fns. 586, 587).

³⁵¹ [Sentencing Judgment](#), para. 219 (fn. 586, citing D-0305: [T-266](#), 27-28, 32, 34).

³⁵² [Sentencing Judgment](#), para. 219 (fn. 586, citing D-0047: [T-267](#), 56-57).

³⁵³ [Sentencing Appeal](#), para. 124 and fn. 166.

³⁵⁴ [Sentencing Judgment](#), para. 219 (fn. 577, citing D-0306: T-267-Conf, 12-15, 18-19). The Defence did not refer to the other two documents (DRC-OTP-165-0349 and DRC-OTP-0165-0276) nor to a *Collation des grades* ceremony in its [Defence Sentencing Submissions](#) and [Defence Sentencing Response](#). See [Defence Sentencing Submissions](#), para. 132 (fn. 274, referring to D-0306 and DRC-OTP-0127-0064).

shows no error in the Chamber's reasonable and correct approach.

X.A.2.a. The Chamber reasonably considered the existence of a strategic alliance between the UPC/FPLC and the FNI, as opposed to a broader reconciliation

129. The Chamber did not err “in considering that the nature of the activities established by the evidence suggest a strategic alliance between the UPC/FPLC and the FNI”.³⁵⁵ Ntaganda's arguments misapprehend the Sentencing Judgment and the record.

130. *First*, contrary to Ntaganda's suggestion, the MONUC weekly report (DRC-OTP-0009-0146-R01) indicating, *inter alia*, that the majority of the Lendu community were dismissive of the “rapprochement” between the FNI President and Ntaganda in early 2004, was admitted in full.³⁵⁶ The Defence did not submit the report in part or for a limited purpose during the cross-examination of P-0190,³⁵⁷ and the Presiding Judge did not rule that it was admitted in part or for a limited purpose.³⁵⁸ Although subsequently some paragraphs of the report were inadvertently admitted *again* upon the Prosecution's request,³⁵⁹ the Parties treated the report as an item admitted without reservation. Thus, the Defence and the Prosecution jointly listed it as an item admitted in full, for the truth of its contents, in the “Final List of admitted evidence Agreed by OTP and Defence” that they submitted to the Registry.³⁶⁰ On the basis of the Parties' Final List, the Registry listed the report as an item that was admitted twice, first in full by the Defence during the cross-examination of P-0190 and then specific paragraphs by the Prosecution from the bar table.³⁶¹ In fact, the Defence relied on the report (and one of the same paragraphs that Ntaganda now submits were not admitted) in its sentencing submissions.³⁶²

131. *Second*, the existence of such a strategic political alliance (as opposed to broader

³⁵⁵ [Sentencing Appeal](#), para. 125.

³⁵⁶ See [Sentencing Judgment](#), para. 220 (fn. 593). *Contra* [Sentencing Appeal](#), para. 126 (“it is unclear whether paragraphs 2 (c) and (d) were even admitted in evidence”).

³⁵⁷ T-99-Conf, 93:11-12. This is in contrast, for example, with the admission status and scope of another document used by the Defence during P-0190's cross examination, DRC-OTP-2090-0089, for which the Defence did specifically request admission for the purpose of impeachment only (See T-99-Conf, 93:19-24).

³⁵⁸ T-99-Conf, 93:16-17. The document is referred to as DRC-OTP-2009-0146 instead of DRC-OTP-0009-0146, but the error is corrected at T-99-Conf, 30:25-31:3.

³⁵⁹ [Documentary Evidence Decision](#), para. 7, p. 38 (admitting paras. 1, 10(b)). See also [Bar Table Sentencing Decision](#), paras. 27-29 (finding as moot the Prosecution request to admit extracts of this report to rebut Defence document DRC-OTP-0004-0047 because the Chamber declined to admit the Defence document).

³⁶⁰ See email from Defence and Prosecution Case Managers to CMS in Annex D (item 131).

³⁶¹ ICC-01/04-02/06-2311-Anx-Corr, item 136 (DRC-OTP-0009-0146-R01). See P-0190: T-99-Conf, 93:11-17, 30:25-31:3; [Documentary Evidence Decision](#), para. 7, p. 38.

³⁶² [Defence Sentencing Response](#), para. 86 (fn. 195, citing DRC-OTP-0009-0146, paras. 2(c) and 3(e)); see also paras. 88 (fns. 196-198, 200) and 89 (fn. 203).

reconciliation efforts among the civilian population) was a relevant factor used by the Chamber to determine the “genuineness” of the alleged peace efforts.³⁶³ The strategic interests of two political factions do not necessarily entail peace and reconciliation for the civilian population. Clearly, neither Ntaganda nor the UPC/FPLC pursued these goals during the period of the charges. Moreover, the Chamber reasonably drew this conclusion from the evidence which suggested that Mr Ndjabu (FNI President) sided with the UPC/FPLC to secure a high position at the national level.³⁶⁴ The Chamber’s conclusion was reasonable and, in any event, the strategic interests of the FNI and the UPC/FPLC was only one of the factors relied upon by the Chamber to reach its conclusion.

X.A.2.b. The Chamber correctly considered the July 2004 event held in Langu

132. The Chamber correctly assessed the evidence regarding the rank-giving ceremony held in Langu in July 2004.³⁶⁵ It correctly noted that “the Lendu Djugu territory administrator Tchachu Lylo was also a former UPC and FNI official”, that “the majority of the Lendu community was reportedly dismissive in early 2004 of the FNI leader Floribert Ndjabu’s ‘rapprochement’ with Mr Ntaganda”, and reasonably concluded that the Defence was incorrect in describing the event as “not just a private affair between the FNI and the UPC/FPLC”.³⁶⁶ The Chamber considered the Defence submissions³⁶⁷ and related evidence,³⁶⁸ but correctly rejected the Defence’s interpretation. Ntaganda merely disagrees with the Chamber’s assessment but shows no error.

133. *First*, the event does not show—nor can it be interpreted as showing—reconciliation between ethnic communities. There is scant evidence that the Lendu population attended the rank-giving ceremony, or the celebration that followed, let alone of its views being represented there.³⁶⁹ Those receiving ranks were all UPC officers,³⁷⁰ and Tchachu Lylo could

³⁶³ *Contra* [Sentencing Appeal](#), para. 127.

³⁶⁴ DRC-OTP-0009-0146-R01, p. 0147, para. 2(c). See [Sentencing Judgment](#), para. 220 (fn. 588 citing, *inter alia*, [Prosecution Sentencing Submissions](#), para. 107 and [Prosecution Sentencing Response](#), paras. 43-44). *Contra* [Sentencing Appeal](#), para. 126 (“contrary to the Chamber’s observations, the bid to secure a high position at the national level is clearly attributed personally to Ndjabu for siding with Lubanga’s group, not to the UPC/FPLC and even less so to Mr. Ntaganda.”)

³⁶⁵ [Sentencing Appeal](#), paras. 128-130.

³⁶⁶ [Sentencing Judgment](#), para. 220.

³⁶⁷ [Sentencing Judgment](#), para. 220 (fn. 591).

³⁶⁸ [Sentencing Judgment](#), para. 220 (fn. 592).

³⁶⁹ Langu was a predominantly Hema locality: D-0300: T-250, 44:10-11; P-0121: [T-173](#), 79:11-12. Compare D-0047: [T-267](#), 52:3-5 (not mentioning the Lendu) with D-0047: [T-267-FR](#), 48:26-28 (referring to the presence of Lendu, without further precision, as being present during the rank-giving ceremony outdoors). See D-0047: [T-267](#), 56:3-11. [REDACTED], and Tshayu Lylo, both present, were Lendu.

³⁷⁰ See D-0306: T-267-Conf, 27:20-24. See also [Prosecution Sentencing Response](#), para. 44.

not, given his previous roles as a member of the UPC and the FNI, be considered to represent the interests of the Hema and Lendu communities. Nor could his deputy. Merely because they were “State” officials does not mean that they represented the wider interests of the ethnic communities. They were not appointed by the two communities.³⁷¹ The video depicts—at most—an alliance between certain leaders of the UPC/FPLC and FNI, but says nothing about the Hema-Lendu relations in Ituri in 2004.³⁷²

134. *Second*, the presence of the incumbent FNI president (Mr Ndjabu) at this ceremony does not “clearly outweigh any rumours of the Lendu community being reportedly dismissive of him”.³⁷³ To the contrary, Ndjabu’s presence tends to confirm the MONUC report³⁷⁴ that *he* was in favour of the alliance with the UPC, while other high-level FNI leaders (who like Pitchu Iribi—reported by MONUC to oppose the alliance³⁷⁵—were not present at Largu)³⁷⁶ opposed the alliance, as did the community.³⁷⁷ The FNI President was not a representative of the Lendu community and his presence at Largu was not reflective of that community’s views.

135. *Third*, Ntaganda does not demonstrate that the signatures in the document “[REDACTED]” show an “overwhelming support for the dialogue between FN/FRPI and UPC/RP [...] which could only take place” with Ntaganda ensuring security.³⁷⁸ This is only Ntaganda’s interpretation. The significance of most of the document’s signatories is unclear.³⁷⁹ Moreover, Ntaganda was not one of the signatories, nor was the awareness raising campaign reflected in the document his initiative.³⁸⁰ In any event, the Chamber considered

³⁷¹ The Chamber considered the fact that there were State representatives: see [Sentencing Judgment](#), paras. 219(vii), 220 (noting “the presence of the head and deputy head of the Djugu territorial administration...”). *Contra* [Sentencing Appeal](#), para. 129 (“...the Chamber failed to consider the presence of Kiza Mateso...”). Tshayu Lylo was appointed by the DRC President: T-267-Conf, 29:20-22 (where Tshayu Lylo’s speech during the recorded celebration is read out).

³⁷² [Prosecution Sentencing Response](#), para. 43. See D-0047: [T-267](#), 52:1-5 (“[M]ainly officials of various sorts were present. And we had representatives of public power”). D-0047 referred to the presence of Lendu, without further precision (T-267-Conf-FR ET, 48:26-27, 49:28, 53:11-13), (Largu was a predominantly Hema locality: D-0300: [T-250](#), 44:10-11; P-0123: [T-173](#), 79:11-12)).

³⁷³ [Sentencing Appeal](#), para. 130.

³⁷⁴ The Chamber referred to this report to support its proposition that “the majority of the Lendu community was reportedly dismissive in early 2004 of the FNL leader Floribert Njabu’s ‘rapprochement’ with Mr Ntaganda”: see [Sentencing Judgment](#), para. 220 (fn. 593).

³⁷⁵ DRC-OTP-0009-0146-R01, 0147, para. 2(c).

³⁷⁶ D-306: [T-267](#), 39:21-25.

³⁷⁷ *Contra* [Sentencing Appeal](#), para. 130.

³⁷⁸ *Contra* [Sentencing Appeal](#), para. 130 (referring to the document DRC-D18-0001-6754).

³⁷⁹ D-0306: T-267-Conf, 13:22-15:3. [REDACTED], signed the document (DRC-D18-0001-6754) [REDACTED]. [REDACTED] other individuals signed it [REDACTED] but no evidence was led on their views, or whether they were representative of the Lendu community more generally.

³⁸⁰ D-0306: T-267-Conf, 12:11-13. See [Prosecution Sentencing Response](#), para. 42.

the Defence's submission that "Ntaganda had a role in ensuring the security of FNI representatives while they were travelling to the locations where such meetings were held".³⁸¹ However, in light of the overall evidence, it reasonably found that Ntaganda's "limited involvement"³⁸² was not sufficient to establish this factor as a mitigating factor to the required threshold.³⁸³

X.A.2.c. The Chamber reasonably considered that Ntaganda did not personally visit any of the villages affected by the events

136. The Chamber reasonably considered, among other factors, that Ntaganda did not personally visit any of the villages mentioned in the charges.³⁸⁴ Although this factor may not always be an overriding consideration, it is still relevant to determine any genuine and concrete contribution by Ntaganda to peace and reconciliation. Even more so in this case, where some of the purported peace efforts were mandatory requirements triggered by national law and international intervention, rather than made upon a UPC/FPLC initiative.³⁸⁵ Against this context, the Chamber reasonably considered Ntaganda's personal actions.

137. Moreover, Ntaganda misapprehends the evidence of the purported "reconciliation activities" at Kobu and Mongbwalu.³⁸⁶ They were not "reconciliation meetings and activities between *the Hema and Lendu communities*", but rather meetings between delegations of UPC and FNI officers.³⁸⁷

X.A.2.d. The Chamber reasonably considered that the pacification campaign was an FNI initiative

138. The Chamber reasonably considered that the pacification campaign was an FNI

³⁸¹ [Sentencing Judgment](#), para. 219 (iv) (fn. 580: citing D-0306: T-267-Conf, 13).

³⁸² [Sentencing Judgment](#), para. 221.

³⁸³ [Sentencing Judgment](#), para. 224.

³⁸⁴ [Sentencing Judgment](#), para. 220. *Contra* [Sentencing Appeal](#), para. 131.

³⁸⁵ [Prosecution Sentencing Response](#), para. 45 (referring to the context: "(i) the Ituri interim administration was in place, backed by the international community; (ii) by late 2003, recruitment by armed groups was prohibited; (iii) the IMEF and MONUC's Ituri Brigade had been given a mandate to use force, and deployed to the interior of Ituri, threatening the UPC/FPLC's grip on territory and illegal tax revenues; (iv) UPC/FPLC's leaders were regarded as blocks to peace; and (v) MONUC sought Mr Ntaganda's arrest.").

³⁸⁶ [Sentencing Appeal](#), para. 131.

³⁸⁷ [Sentencing Appeal](#), para. 131 (emphasis added) (fns. 177 and 178 citing to D-0047: [T-267](#), 49:19-24 (testifying about his visit to Kobu along with a person representing the UPC deputy army chief of staff, Linganga) and T-267-Conf, 27:18 (where Ndjabu says in a recorded speech that he "already met people of the UPC in Mongbwalu").

initiative.³⁸⁸ D-0047's testimony, saying that the two parties wanted to "be together," does not contradict it.³⁸⁹ In fact, the Chamber considered this aspect of his testimony but noted that "according to the witness, Mr Ntaganda was not present [in these activities] and that there is no concrete evidence of his role [...], apart from D-0047 stating that he received a report of the visit".³⁹⁰ The Chamber correctly assessed the evidence.

X.A.2.e. The Chamber reasonably assessed Ntaganda's limited involvement in the FNI initiative

139. Further, the Chamber understood D-0306's testimony and correctly concluded that "[w]itness D-0306 specifically rejected the suggestion that the FNI collaborated with Mr Ntaganda in the awareness raising mission".³⁹¹ D-0306 ([REDACTED]) testified that Ntaganda provided security to the FNI delegation conducting the awareness raising campaign³⁹² and that he expressed support for the initiative.³⁹³ The Chamber expressly considered this evidence.³⁹⁴ However, aside from this, the witness clearly stated that:

"[REDACTED]"³⁹⁵

140. Likewise, the Chamber considered the evidence that "Mr Ntaganda made speeches about peace in Sali, Lopa and Largu and invited Lendu to a meeting in Lopa"³⁹⁶ and found that this evidence suggested "some, but limited, involvement of Mr Ntaganda in the pacification campaign".³⁹⁷ Here too, Ntaganda does not indicate any particular error committed by the Chamber.³⁹⁸ He merely disagrees with the weight ultimately assigned by the Chamber to individual items of evidence.

X.A.2.f. The Chamber reasonably assessed the evidence showing lack of genuineness

141. Ntaganda does not demonstrate that "the Chamber erred in holding that the genuine

³⁸⁸ [Sentencing Judgment](#), para. 221. *Contra* [Sentencing Appeal](#), para. 135.

³⁸⁹ [Sentencing Appeal](#), para. 135.

³⁹⁰ [Sentencing Judgment](#), para. 220 (fn. 594, citing D-0047: [T-267](#), 49). *Compare* [Sentencing Appeal](#), para. 135 (fn. 190, citing D-0047: [T-267](#), 49:5-11).

³⁹¹ [Sentencing Judgment](#), para. 221(citing fn. 596, citing D-0306: T-267-Conf, 40-41). *Contra* [Sentencing Appeal](#), para 136.

³⁹² D-0306: T-267-Conf, 12:25-13:14.

³⁹³ D-0306: T-267-Conf, 15-16, 18:23-25.

³⁹⁴ [Sentencing Judgment](#), paras. 219(iii) and (iv) (fns. 578 to 580) and 221.

³⁹⁵ D-0306: T-267-Conf, 40:25-41:2. *See* original French: T-267-Conf-FR, 36:17-20 ("[REDACTED]").

³⁹⁶ [Sentencing Judgment](#), para. 221 (fns. 597-598).

³⁹⁷ [Sentencing Judgment](#), para. 221.

³⁹⁸ [Sentencing Appeal](#), para. 137.

nature of Mr. Ntaganda's actions is placed in doubt by other evidence".³⁹⁹ The Chamber reasonably relied on testimonial and documentary evidence to reach its conclusion. Ntaganda fails to show error in the Chamber's approach.

142. *First*, although it is correct that "document DRC-OTP-2057-0099, at page 0099, was not admitted into evidence,"⁴⁰⁰ it is evident that the reference to page 0099⁴⁰¹ is a typographical error: the handwritten letter contained on that page is dated 20 November 2003. By contrast, the letter dated 24 January 2004 from the UN Special Representative to the Secretary-General ("SRSG") William Swing to DRC President Kabila contained at pages 0101-0103 of the same item of evidence (which was admitted into evidence)⁴⁰² specifically addressed the occurrence of "*toutes sortes d'exactions graves contre les populations civiles*" by certain armed groups,⁴⁰³ the "*actes inacceptables*" by the UPC and the FNI/FRPI, including "*accusations graves de violations des droits de l'homme*" and "*exactions contre les populations civiles*", including rape, torture, and kidnapping of children, ascribed directly to Ntaganda.⁴⁰⁴ In any event, any oversight by the Chamber was harmless. This letter was one of the three sources on which the Chamber relied for its relevant finding that throughout 2004 the UPC continued to harass the civilian population of Ituri.⁴⁰⁵ The other two sources were the testimony of D-0306⁴⁰⁶ and a MONUC military daily report.⁴⁰⁷ Thus, the Chamber's conclusion was well supported and reasonable.

143. *Second*, Ntaganda's claim that "DRC-OTP-0185-0843, a MONUC military daily report, [...] can be attributed very little or no probative value" and that the Chamber "itself held that this document falls in the category of material being of a relatively low probative value in terms of the actual conduct of Mr. Ntaganda" is unclear.⁴⁰⁸ As is evident from Ntaganda's own submissions, the Chamber already factored the weakness of this document into its

³⁹⁹ [Sentencing Appeal](#), para. 139.

⁴⁰⁰ [Sentencing Appeal](#), para. 140.

⁴⁰¹ [Sentencing Judgment](#), para. 221 (fn. 603).

⁴⁰² [Sentencing Preliminary Ruling](#), p. 23.

⁴⁰³ DRC-OTP-2057-0099, p. 0101 (final paragraph).

⁴⁰⁴ DRC-OTP-2057-0099, pp. 0101 (final paragraph), 0102 (first, third and fourth paragraphs). Notably, this same letter from SRSG Swing referring to the crimes against the civilian population of Ituri was given weight elsewhere in the Sentencing Judgment, in support of findings that the UPC/FPLC, with Ntaganda as its Deputy Chief of Staff, was "uncooperative with MONUC and other key institutions working for the pacification of Ituri at that time, and that according to MONUC, Mr Ntaganda was a threat to peace and security" in 2004 ([Sentencing Judgment](#), para. 223).

⁴⁰⁵ [Sentencing Judgment](#), para 221, fns. 602, 603.

⁴⁰⁶ [Sentencing Judgment](#), fn. 602.

⁴⁰⁷ [Sentencing Judgment](#), fn. 603.

⁴⁰⁸ [Sentencing Appeal](#), para. 141 (fn. 199), citing [Sentencing Judgment](#), para. 223 (fn. 610).

analysis.⁴⁰⁹ However, in light of this and other evidence, the Chamber found that Ntaganda's actions lacked genuineness. Ntaganda merely disagrees with the Chamber's conclusion.

144. *Finally*, the Chamber did not require a "complete result" (that Lendu and Hema reconciled) in order to consider Ntaganda's actions in mitigation.⁴¹⁰ Instead, it found that Ntaganda's *contribution* to peace and reconciliation was not genuine and concrete.⁴¹¹ Nor did the Chamber solely rely on the UPC's harassment of civilians in Ituri in 2004 to determine his lack of genuineness.⁴¹² The Chamber also found "clear indications that the UPC/FPLC with Mr Ntaganda as its Deputy Chief of Staff was uncooperative with MONUC and other key institutions working for pacification in Ituri at that time, and that according to MONUC, Mr Ntaganda was a threat to peace and security during this period".⁴¹³ Notably, in November 2003 the UPC/FPLC withdrew all cooperation with MONUC and all participation in the institutions established by the Ituri Pacification Commission.⁴¹⁴ Ntaganda also declined to demobilise and integrate himself into the FARDC for many years.⁴¹⁵

145. In conclusion, the Chamber reasonably found that Ntaganda's contribution to peace and reconciliation was not genuine and concrete.

X.B. Ntaganda did not contribute to the demobilisation of UPC/FPLC members and their integration into the national armed forces

146. The Chamber reasonably found that Ntaganda's role in the demobilisation of UPC/FPLC members and their integration into the FARDC was "fairly limited" and declined to consider it as a mitigating circumstance.⁴¹⁶ Ntaganda does not show any error. He simply disagrees with the weight that the Chamber gave to the evidence.

X.B.1. Ntaganda's contribution was very limited

147. As Ntaganda concedes,⁴¹⁷ "the Chamber acknowledged based on the testimony of D-

⁴⁰⁹ [Sentencing Judgment](#), para. 223 (finding that "much of the material relied on in support thereof to be of relatively low probative value in terms of the actual conduct of Mr Ntaganda").

⁴¹⁰ *Contra* [Sentencing Appeal](#), paras. 142-143.

⁴¹¹ [Sentencing Judgment](#), para. 224.

⁴¹² *Contra* [Sentencing Appeal](#), para. 143.

⁴¹³ [Sentencing Judgment](#), para. 223.

⁴¹⁴ [Sentencing Judgment](#), para. 223 (fn. 611).

⁴¹⁵ [Sentencing Judgment](#), para. 222 (fn. 608).

⁴¹⁶ [Sentencing Judgment](#), paras. 222-224. *Contra* [Sentencing Appeal](#), para. 147.

⁴¹⁷ [Sentencing Appeal](#), para. 148.

0020 that Mr. Ntaganda appointed an officer to oversee the demobilisation of 500 soldiers”⁴¹⁸ and “noted D-0047’s testimony that ‘Mr. Ntaganda worked with a government committee responsible for demobilisation and was responsible for preparing lists of those who wanted to either demobilize or integrate’”.⁴¹⁹ It is therefore apparent that the Chamber considered Ntaganda’s arguments and evidence. It need not have referred to every line of the witness’s testimony, and it was well aware of Ntaganda’s position within the UPC/FPLC.⁴²⁰ Moreover, Ntaganda omits that D-0020 also testified that it was Ntaganda’s secretary (not Ntaganda himself) who was in charge of compiling the lists for reintegration.⁴²¹

148. Further, Ntaganda does not explain why the Chamber erred by relying on the 7 April 2005 communiqué of CIAT (*Comité International d’Accompagnement de la Transition*, which was the oversight body working with institutions assisting in disarmament).⁴²² The communiqué condemned violence by Ntaganda and his men against soldiers who chose to demobilise and Hema community *notables* working for peace.⁴²³ It is irrelevant that D-0047 was incarcerated at that time.

149. The Chamber reasonably found that Ntaganda’s concrete role in demobilisation and disarmament was fairly limited.⁴²⁴ The evidence also demonstrated that disarmament and reintegration was a legal requirement; that Ntaganda was uncooperative with MONUC; that in November 2003 the UPC/FPLC formally withdrew all cooperation with MONUC and all institutions established by the Ituri Pacification Commission; and that Ntaganda himself declined to integrate into the FARDC for a number of years.⁴²⁵ Accordingly, the Chamber reasonably declined to give Ntaganda credit for this matter.⁴²⁶

X.B.2. Ntaganda did not cooperate with MONUC and was a threat to peace and security

150. The Chamber reasonably found that there were “clear indications that the UPC/FPLC, with Mr Ntaganda as its Deputy Chief of Staff, was uncooperative with MONUC and other

⁴¹⁸ [Sentencing Appeal](#), para. 148, referring to [Sentencing Judgment](#), para. 222, fn. 605.

⁴¹⁹ [Sentencing Appeal](#), para. 149, referring to [Sentencing Judgment](#), para. 202 [sic], fn. 604.

⁴²⁰ [Sentencing Judgment](#), para. 60; [Judgment](#), paras. 32, 321 and fn. 847 (noting that following the dismissal of Floribert Kisembo on 8 December 2003, Thomas Lubanga appointed Ntaganda as Chief of Staff *ad interim*), 322.

⁴²¹ [Sentencing Judgment](#), para. 222, and fn. 604.

⁴²² [Sentencing Appeal](#), para. 151 (referring to DRC-OTP-2103-1205); see [Sentencing Judgment](#), para. 222 (fn. 604).

⁴²³ DRC-OTP-2103-1205 p.1267 (second paragraph).

⁴²⁴ [Sentencing Judgment](#), para. 222. *Contra* [Sentencing Appeal](#), paras. 147-150.

⁴²⁵ [Sentencing Judgment](#), paras. 222-223 and fn. 611.

⁴²⁶ [Sentencing Judgment](#), para. 222. *Contra* [Sentencing Appeal](#), para. 150.

key institutions [...] and that according to MONUC, Mr Ntaganda was a threat to peace and security during this period.”⁴²⁷ Ntaganda fails to show the Chamber erred in so finding.

151. *First*, and as noted above, the MONUC weekly report DRC-OTP-0009-0146-R01 was admitted in full and the Chamber correctly relied on it.⁴²⁸ The probative value and weight of reports of international organisations is case-specific and depends on a number of factors, such as the characteristics of each report (including authorship, sources or its contemporaneous nature), the facts that the report is relied upon to establish and whether it is corroborated.⁴²⁹ Nor was this one of the documents which the Chamber found had relatively low probative value with respect to Ntaganda’s conduct.⁴³⁰ In any event, the Chamber relied on this report only to find that MONUC considered Ntaganda a threat and an obstacle to peace, security and disarmament,⁴³¹ and Ntaganda has not shown the Chamber erred in doing so.

152. *Second*, the Chamber expressly considered the consequences of Ntaganda’s decision to side with Kisembo.⁴³²

153. *Third*, Ntaganda mischaracterises the Chamber’s finding that on 7 November 2003, the UPC/FPLC formally withdrew all cooperation with MONUC and all participation in the institutions established by the Ituri Pacification Commission.⁴³³ The Chamber relied on D-0047, who confirmed the withdrawal—which was documented in a letter sent by the UPC to the director of MONUC at that time.⁴³⁴ Ntaganda speculates that the withdrawal was conditional and was due to the bad relations between the UPC/FPLC and certain MONUC individuals –which the Chamber considered in any event.⁴³⁵ However, the motivation behind the UPC/FPLC’s withdrawal is irrelevant. Rather, what is relevant is that the UPC/FPLC

⁴²⁷ [Sentencing Judgment](#), para. 223. *Contra* [Sentencing Appeal](#), para 152.

⁴²⁸ *Contra* [Sentencing Appeal](#), para 153 referring to [Sentencing Judgment](#), para. 222 (fn. 606).

⁴²⁹ See e.g. [Judgment](#), fns. 1282, 1751; [Gbagbo & Blé Goudé Reasons of Judge Geoffrey Henderson](#), paras. 285, 1321; see also [Ntaganda Judgment Summary](#), para. 15 (The Chamber has given more weight to the daily reports by MONUC which were made contemporaneously with the events that took place during the charged period):

⁴³⁰ See [Sentencing Judgment](#), para. 223 (fn. 610). *Contra* [Sentencing Appeal](#), para. 154.

⁴³¹ [Sentencing Judgment](#), paras. 222 (fn. 606) and 223 (fn. 612).

⁴³² [Sentencing Appeal](#), para 154. See [Sentencing Judgment](#), para. 223 (fn. 610).

⁴³³ [Sentencing Judgment](#), para. 223 (fn. 610). *Contra* [Sentencing Appeal](#), paras. 156-159.

⁴³⁴ [Sentencing Judgment](#), para. 223 (fns. 610 and 611). See in particular fn. 611 citing D-0047: T-267, 80-81 (confirming the UPC/FPLC’s 7 November 2003 letter announcing the withdrawal: DRC-OTP-0089-0047, which is the signed version of DRC-OTP-0014-0245). The Chamber also considered the MONUC weekly report (DRC-OTP-0009-0146-R01) at para. 12 and the [Prosecution Sentencing Submissions](#), para. 108 (referring to DRC-OTP-0014-0245 cited by Ntaganda, and D-0047’s testimony about the UPC/FPLC’s 7 November 2003 letter).

⁴³⁵ [Sentencing Judgment](#), para. 223 (fn. 610, citing D-0047: [T-267](#), 70, 80-81).

ceased any (limited) action aimed at peace in Ituri, as the Chamber found.

154. *Fourth*, the Chamber did not err by admitting eight MONUC daily reports.⁴³⁶ In any event, as Ntaganda acknowledges, the Chamber did not rely on two of these reports, and placed no significant weight on four of them.⁴³⁷ Accordingly, even assuming *arguendo* that their admission was erroneous (which it was not), it would not have materially impacted the sentence. Moreover, Ntaganda's complaint that he did not have an opportunity to challenge document DRC-OTP-1029-0591 is inaccurate.⁴³⁸ In response to the Prosecution's request to admit the document,⁴³⁹ Ntaganda requested its dismissal *in limine* because it was filed after the deadline set by the Chamber. He made no alternative argument about the document in the event the Chamber admitted it.⁴⁴⁰

155. *Fifth*, the Chamber reasonably relied on the five MONUC documents (or their extracts) to conclude that there were "clear indications" that "*according to MONUC*, Mr Ntaganda was a threat to peace and security during this period".⁴⁴¹ Those reports were not among the documents that the Chamber found had low probative value to establish Ntaganda's conduct.⁴⁴² As noted, not all reports from international organisations have the same characteristics.⁴⁴³ Moreover, the Chamber did not rely on these reports to establish Ntaganda's conduct, but to determine *MONUC's* (informed) position regarding Ntaganda's impact on peace and security in Ituri.⁴⁴⁴ In any event, this was only one of several factors the Chamber considered to conclude that Ntaganda's contribution to demobilisation and disarmament was not established to the required threshold.

156. *Sixth*, Ntaganda further alleges that the Chamber "failed to take into consideration Defence submissions that in *Katanga*, the Trial Chamber gave credit to Mr. Katanga for his

⁴³⁶ [Sentencing Appeal](#), para 160.

⁴³⁷ [Sentencing Appeal](#), para. 160. The Chamber placed *no* weight on four of these five documents, mentioning them only to point out that their sources were unconfirmed or required corroboration. [Sentencing Judgment](#), para. 223 (fn. 610, citing DRC-OTP-2066-0380, DRC-OTP0007-0314, DRC-OTP-0004-0372 and DRC-OTP-1029-0465). The fifth document, DRC-OTP-0185-0843, was relied on in para. 221 (fn. 603) in corroboration of witness testimony. DRC-OTP-0204-0236 and DRC-OTP-1029-0579 were not cited.

⁴³⁸ [Sentencing Appeal](#), para 160. See [Sentencing Judgment](#), para 223 (fn. 612).

⁴³⁹ [Prosecution Request](#), para 11 (see fn. 23) and [Defence Response](#), paras 1, 9-12.

⁴⁴⁰ [Bar Table Sentencing Decision](#), paras. 11-12 and 42.

⁴⁴¹ [Sentencing Judgment](#), para. 223 (fn. 612).

⁴⁴² [Sentencing Judgment](#), para. 223 (fn. 610).

⁴⁴³ See *above* para. 151. For example three of the documents in fn. 612 are signed by MONUC high-level officials (such as the Bunia head of office, and the SRSg himself).

⁴⁴⁴ [Sentencing Judgment](#), para. 223 (fn. 612). In addition, the Chamber did not rely on DRC-OTP-2057-0099 at 99 (which was not specifically not admitted into evidence, as Ntaganda notes elsewhere in his brief; instead the Chamber relied on 0102-0103). *Contra* [Sentencing Appeal](#), para. 162.

demobilisation efforts despite MONUC reports noting that Mr. Katanga had also “been quite uncooperative with the MONUC [...]”.⁴⁴⁵ However, Ntaganda fails to note that Trial Chamber II found that Katanga’s actions regarding demobilisation were “both palpable and genuine”⁴⁴⁶ and that he had a “positive role” and contribution in the process of demobilising child soldiers from his group.⁴⁴⁷ In contrast to Ntaganda (who declined to demobilise and integrate into the FARDC for many years),⁴⁴⁸ (i) Katanga “led by example”, as “the first person to demobilise”,⁴⁴⁹ “alongside a child at the beginning of the process” which, “in the mind of the Chamber, sent a strong message to other combatants”;⁴⁵⁰ (ii) MONUC confirmed Katanga’s involvement in the demobilisation process and his personal expression of willingness to cooperate with MONUC and IMEF;⁴⁵¹ and (iii) Katanga’s contribution to demobilisation was a *sine qua non*, including by his physical presence at a demobilisation centre he set up.⁴⁵² The two cases are not comparable.

157. *Seventh*, Ntaganda’s claim that the Chamber erred by admitting certain documents for the purpose of showing “Mr. Ntaganda’s involvement with the FARDC or the CDNP” is erroneous and immaterial.⁴⁵³ As conceded by Ntaganda,⁴⁵⁴ the Chamber did not refer to these documents in the Sentencing Judgment. Ntaganda’s further claim that they were “inevitably considered” is pure speculation.⁴⁵⁵

158. *Finally*, Ntaganda’s request to admit two documents on appeal (which the Trial Chamber had refused to admit) must be rejected.⁴⁵⁶ The requirements under regulation 62 of the Regulations of the Court are not met.⁴⁵⁷ The Defence sought to admit these documents during the sentencing phase⁴⁵⁸ and the Trial Chamber gave a reasoned decision for refusing

⁴⁴⁵ [Sentencing Appeal](#), para. 165.

⁴⁴⁶ [Katanga SJ](#), para. 91.

⁴⁴⁷ [Katanga SJ](#), para. 115.

⁴⁴⁸ [Sentencing Judgment](#), para. 222 (fn. 608).

⁴⁴⁹ [Katanga SJ](#), para. 109.

⁴⁵⁰ [Katanga SJ](#), para. 111.

⁴⁵¹ [Katanga SJ](#), para. 112.

⁴⁵² [Katanga SJ](#), paras. 109-110, referring to witness testimony corroborated by documentary evidence.

⁴⁵³ [Sentencing Appeal](#), para. 166 (referring to DRC-OTP-2102-1032, DRC-OTP-2102-1093, DRC-OTP-2102-1220, DRC-OTP-2102-1247, DRC-OTP-2102-1560, DRC-OTP-2102-1535).

⁴⁵⁴ [Sentencing Appeal](#), para. 166.

⁴⁵⁵ [Sentencing Appeal](#), para. 166.

⁴⁵⁶ [Sentencing Appeal](#), para. 168.

⁴⁵⁷ See [RoC](#), reg. 62. See also [Lubanga AJ](#), para. 58; [Bemba et al. AJ](#), para. 509; [Bemba et al. Second SAJ](#), para. 21.

⁴⁵⁸ [Defence Additional Evidence Request](#), with the statements annexed as 2403-Conf-AnxB and 2403-Conf-AnxC.

their admission, explaining that they were not relevant.⁴⁵⁹ Ntaganda shows no discernible error in that decision.

159. For the reasons set out above, Ground 10 should be dismissed.

XI. THE TRIAL CHAMBER CORRECTLY GAVE NO WEIGHT TO NTAGANDA'S ALLEGED GOOD CONDUCT AND COOPERATION (GROUND 11)

160. The Chamber correctly accorded no weight to Ntaganda's alleged good conduct and cooperation during his trial, and gave a reasoned decision.⁴⁶⁰ Ntaganda misreads the Sentencing Judgment. His request to consider this issue *de novo* should be rejected.⁴⁶¹

161. *First*, Ntaganda does not dispute the Chamber's legal finding that "good behaviour and compliance with the law are expected of any accused or convicted person and are not normally taken into account in mitigation unless exceptional".⁴⁶² This approach accords with established jurisprudence.⁴⁶³

162. *Second*, the Chamber addressed the Defence's sentencing submissions, and gave a reasoned opinion.⁴⁶⁴ It "recall[ed] with appreciation that, with the exception of his hunger strike, Mr Ntaganda was consistently respectful and cooperative during court proceedings, including notably consenting to absenting himself from the courtroom to facilitate the testimony of certain witnesses".⁴⁶⁵ It also found that an accused's choice to testify "does not, in and of itself, qualify as a mitigating circumstance" and that this "depends on the circumstances and content of the testimony".⁴⁶⁶ In Ntaganda's case, the Chamber noted that, while he gave a lengthy and detailed testimony and answered all questions, he was not found credible on numerous issues and made no sincere demonstrations of remorse towards his victims.⁴⁶⁷ The Chamber concluded that "[a]ll of the above considered, while noting with

⁴⁵⁹ [T-266](#), 7:23-8:23.

⁴⁶⁰ [Sentencing Judgment](#), para. 229. *Contra* [Sentencing Appeal](#), paras. 173-175.

⁴⁶¹ [Sentencing Appeal](#), para. 175.

⁴⁶² [Sentencing Judgment](#), para. 229.

⁴⁶³ [Sentencing Judgment](#), fn. 628, citing [Bemba SJ](#), para. 81; [Katanga SJ](#) paras. 127-129. *See also* [Naletilić & Martinović AJ](#), para. 630 ("[N]ot every incidental act that facilitates the Tribunal's process, such as an accused's non-hindrance of his trial, entitles him to mitigation").

⁴⁶⁴ *Contra* [Sentencing Appeal](#), para. 174.

⁴⁶⁵ [Sentencing Judgment](#), para. 229.

⁴⁶⁶ [Sentencing Judgment](#), para. 230.

⁴⁶⁷ [Sentencing Judgment](#), para. 230. For an expression of genuine and sincere remorse to amount to a mitigating factor, *see e.g.* [Nchamihigo AJ](#), para. 396; [Strugar AJ](#), paras. 365-366.

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".⁴⁶⁸

163. Thus, Ntaganda's reliance on his hunger strike is misconceived.⁴⁶⁹ Since his behaviour during trial was not found to be "exceptional", the Chamber reasonably considered that his hunger strike did not "diminish" any behaviour which merited mitigation.⁴⁷⁰ Moreover, Ntaganda's reliance on the allegedly "difficult circumstances" which led him to go on a hunger strike was considered by the Chamber elsewhere in the Sentencing Judgment, in the section entitled "Mr Ntaganda's family circumstances and the conditions of his detention."⁴⁷¹ This was consistent with the Defence's sentencing submissions.⁴⁷²

164. In sum, the Chamber's conclusion was reasonable and fell squarely within the Chamber's broad discretion to determine what constitutes a mitigating factor, and the weight, if any, to attribute to such a factor.⁴⁷³ Ntaganda merely disagrees with the Chamber's reasonable decision, without showing a discernible error.

165. For the reasons set out above, Ground 11 should be dismissed.

XII. THE TRIAL CHAMBER CORRECTLY GAVE LIMITED WEIGHT TO NTAGANDA'S ALLEGED EFFORT TO ASSIST [REDACTED] (GROUND 12)

166. Ntaganda's claim that the Chamber erred by "failing to decide whether Mr Ntaganda (...) had substantially contributed [REDACTED] (...)",⁴⁷⁴ misreads both the Registry Report and the Sentencing Judgment. The Chamber expressly considered the Defence's submissions regarding Ntaganda's alleged intervention [REDACTED], but correctly accorded limited

⁴⁶⁸ [Sentencing Judgment](#), para. 230 (emphasis added).

⁴⁶⁹ *Contra* [Sentencing Appeal](#), para. 174.

⁴⁷⁰ What constitutes "exceptional cooperation" is a case-specific determination. See e.g. [Bralo SAI](#), para. 44 (finding that "the Trial Chamber, having considered the provision of information of further crimes committed by the Appellant when assessing the mitigating value of his guilty plea and having found his guilty plea to be a 'significant mitigating factor', did not commit a discernible error when not giving any additional weight to this mitigating circumstance going beyond the substantial weight accorded to the guilty plea").

⁴⁷¹ [Sentencing Judgment](#), para. 241 (fn. 653-654 referring to [Defence Sentencing Submissions](#), paras. 151-154, 156).

⁴⁷² [Defence Sentencing Submissions](#), paras. 151-154 (claiming that Ntaganda has endured a long period of pre-conviction detention, much of it under very difficult conditions, warranting a reduction of sentence) and 156 (arguing that Ntaganda is a family man, whose family will be impacted heavily by his lengthy detention).

⁴⁷³ See above para. 104.

⁴⁷⁴ [Sentencing Appeal](#), para. 176.

weight to it.⁴⁷⁵ Ntaganda again disagrees with the Chamber's reasonable decision without showing a discernible error.

167. *First*, Ntaganda overstates his actions.⁴⁷⁶ The Addendum to the Registry's report merely suggests that Ntaganda was concerned [REDACTED] and informed the Detention Centre staff about this on two occasions, almost two years apart from each other,⁴⁷⁷ neither of which the Chief Custody Officer deemed necessary to include in his overview. Ntaganda's actions did not "substantially contribute to [REDACTED] going way beyond what can be expected from a detained person".⁴⁷⁸ In fact, it was the bare minimum to be expected of any person.

168. Moreover, that Ntaganda's name was mentioned in the ICC Detention Centre's [REDACTED] does not show that his assistance [REDACTED] was substantial.⁴⁷⁹ [REDACTED].⁴⁸⁰ The Chamber reasonably found this did not constitute a mitigating factor to reduce Ntaganda's sentence for the crimes he committed.

169. *Second*, and contrary to Ntaganda's claims,⁴⁸¹ the Chamber provided a reasoned decision. It referred to the relevant parts of the Registry Report detailing Ntaganda's alleged intervention,⁴⁸² and specifically considered his "appropriate[e] intervention with the management of the ICC DC on behalf of other detainees" which it described as "commendable".⁴⁸³

170. Notwithstanding, after "considering [this] against the overall gravity and aggravating circumstances established ... for the crimes of which he has been convicted,"⁴⁸⁴ the Chamber

⁴⁷⁵ [Sentencing Judgment](#), paras. 234-235; *contra* [Sentencing Appeal](#), paras. 176-185.

⁴⁷⁶ *Contra* [Sentencing Appeal](#), paras. 178, 180, 182.

⁴⁷⁷ [Registry Report Annex I](#), paras. 10-15. *Contra* [Sentencing Appeal](#), para. 181 (claiming that the assistance continued over an extended period of time).

⁴⁷⁸ *Contra* [Sentencing Appeal](#), para. 178. *See also* para. 182.

⁴⁷⁹ *Contra* [Sentencing Appeal](#), paras. 181-182. The Chamber did not reject admission of this document on the sole basis that "the equivalent information was summarised in the report of the DJSS, which was before the Chamber." *Contra* [Sentencing Appeal](#), para. 181. To the contrary, the Chamber considered additional factors, including the *ex parte* nature of the document as "it relates to matters concerning the private life of an accused person in another case before the Court" and the corresponding impact on its probative value: [Bar Table Sentencing Decision](#), paras. 29, 30.

⁴⁸⁰ *See* [Prosecution Sentencing Submissions](#), para. 93; *see* DRC-D18-0002-0069 (fourth and fifth columns).

⁴⁸¹ [Sentencing Appeal](#), paras. 176, 177, 184.

⁴⁸² [Sentencing Judgment](#), para. 234, fns. 640-641. *See also* [Babić SAI](#), para. 43 (noting, in the context of mitigating factors, that trial chambers "are not required to 'articulate every step' of their reasoning in reaching particular findings, and failure to list in a judgement 'each and every circumstance' placed before them and considered 'does not necessarily mean that [they] either ignored or failed to evaluate the factor in question'. For instance, a Trial Chamber's express reference to the parties' written submissions concerning mitigating circumstances is *prima facie* evidence that it was cognisant of these circumstances and took them into account").

⁴⁸³ [Sentencing Judgment](#), paras. 234-235.

⁴⁸⁴ [Sentencing Judgment](#), para. 235.

concluded that its weight was “too limited to impact on the individual and overall sentence.”⁴⁸⁵ The Chamber “identif(ied) which facts it found to be relevant in coming to its conclusion,”⁴⁸⁶ and was not required to enter further findings with respect to the Defence submissions which in any event it said it took at its highest.⁴⁸⁷ Notably, the Chamber dismissed the Prosecution’s criticism of the Registry Report, and considered the information contained therein about Ntaganda’s behaviour in detention.⁴⁸⁸

171. In sum, Ntaganda merely disagrees with the weight the Chamber gave to his alleged efforts with respect to [REDACTED], without showing a discernible error.⁴⁸⁹ 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.⁴⁹⁰ Moreover, the existence of a mitigating circumstance does not automatically reduce a sentence⁴⁹¹ and it is entirely reasonable for a Trial Chamber to conclude that aggravating factors overwhelm any mitigating factors.⁴⁹²

172. For the reasons set out above, Ground 12 should be dismissed.

CONCLUSION

173. For all the reasons above, the Prosecution respectfully requests the Appeals Chamber to dismiss Ntaganda’s Sentencing Appeal.



Fatou Bensouda, Prosecutor

Dated this 14th day of April 2020

At The Hague, The Netherlands

⁴⁸⁵ [Sentencing Judgment](#), para. 235.

⁴⁸⁶ [Lubanga First Redactions AD](#), para. 20; [Lubanga Second Redactions AD](#), para. 30.

⁴⁸⁷ *Contra* [Sentencing Appeal](#), paras. 176-178.

⁴⁸⁸ [Sentencing Judgment](#), paras. 231-233.

⁴⁸⁹ *Contra* [Sentencing Appeal](#), paras. 178-185.

⁴⁹⁰ [Sentencing Judgment](#), para. 235.

⁴⁹¹ [Bralo SAJ](#), para. 83; [Stakić AJ](#), para. 407; [Nahimana et al. AJ](#), para. 1038; [Muhimana AJ](#), para. 234.

⁴⁹² [Niyitegeka AJ](#), para. 268; [Akayesu AJ](#), paras. 416-417.