

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/04-02/06**

Date: **22 May 2020**

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

**Public Redacted Version of “Prosecution Response to the “Defence request for
leave to reply to the
‘Prosecution Response to Sentencing Appeal Brief’”, 8 May 2020, ICC-01/04-02/06-
2527-Conf-Corr**

Source: Office of the Prosecutor

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

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Introduction

1. The Prosecution opposes Ntaganda's request to reply on all issues except one aspect of the Prosecution's response to Ground 5 of his Sentencing Appeal.¹ Ntaganda identifies confined issues which are not novel and have been sufficiently addressed by the Parties and participants. In these circumstances, further submissions are not in the interests of justice, nor will they assist the Appeals Chamber in resolving Ntaganda's appeal against the Sentencing Judgment. However, with respect to Ground 5—and bearing in mind that Ntaganda did not previously elaborate on the basis for his assertion that “murder”, contrary to common article 3 of the Geneva Conventions, is “the crime that properly addresses unlawful deaths arising from intentionally directing attacks on civilians”²—the Prosecution does not oppose the granting of leave to reply in part, on this limited matter, if the Appeals Chamber considers that this may be of assistance in resolving the appeal.

Confidentiality

2. Pursuant to regulation 23bis(2) of the Regulations of the Court, the Prosecution files this response as confidential since it responds to a document with the same confidentiality level.

Submissions

3. The Chamber may order an appellant to file a reply whenever it considers it necessary in the interests of justice.³ The ordering of a reply lies within the Appeals Chamber's discretion and is to be decided on a case-by-case basis.⁴ In this respect, the Appeals Chamber has considered whether further submissions on the issues identified will assist the Appeals Chamber in its determination of the appeals.⁵ In particular, the Appeals Chamber has granted leave to reply to novel arguments raised by the respondent⁶ or when the issues are of importance for the consideration of the appeal as a whole.⁷ Conversely, it has rejected

¹ ICC-01/04-02/06-2521-Conf (“Request”). See also ICC-01/04-02/06-2509-Red (“[Prosecution Response](#)” or “[Response](#)”); ICC-01/04-02/06-2468-Red (“[Sentencing Appeal](#)”); ICC-01/04-02/06-2442 (“[Sentencing Judgment](#)”).

² [Sentencing Appeal](#), para. 58.

³ Regulation 60(1), [Regulations of the Court](#); ICC-01/04-02/06-2488 (“[Decision Reply Part I Conviction Appeal](#)”), para. 8.

⁴ [Decision Reply Part I Conviction Appeal](#), para. 8; [Bemba et al. July 2017 Leave to Reply Decision](#), para. 20; [Bemba et al. August 2017 Leave to Reply Decision](#), para. 18.

⁵ [Bemba et al. July 2017 Leave to Reply Decision](#), paras. 8, 22; [Bemba et al. August 2017 Leave to Reply Decision](#), para. 18.

⁶ See ICC-01/04-02/06-2522 (“[Decision Reply Part II Conviction Appeal](#)”), paras. 16, 18.

⁷ [Decision Reply Part II Conviction Appeal](#), paras. 10, 12, 24.

requests to reply when the parties had sufficiently briefed the issues.⁸ While the Prosecution acknowledges that it falls within the Appeals Chamber’s discretion to authorise a reply, it respectfully submits that the principles developed in the context of replies under regulation 24(5) are still of guidance and should not be disregarded altogether,⁹ including whether the requesting party seeks to provide arguments on matters that it could have reasonably anticipated or should have included in its original brief.¹⁰ While in some cases the importance or novelty of the arguments raised by the respondent may forego strategic considerations and oversights in the appellant’s pleading, in other cases it may not. It is a case-by-case determination.

4. In line with these principles, the Prosecution opposes Ntaganda’s Request with the exception of his request to reply to aspects of the Prosecution’s submissions in response to Ground 5. The Parties have sufficiently addressed the other issues and the Prosecution’s Response does not advance novel arguments. In these circumstances, further submissions would not assist the Appeals Chamber in its consideration of the appeal.

I. Reply to the Prosecution’s Response to Ground 1 is not warranted

5. Ntaganda’s request to reply to four submissions by the Prosecution regarding Ground 1 of Ntaganda’s appeal (Ntaganda’s degree of participation in the Second Operation) should be rejected. The Parties have sufficiently addressed these issues which are not novel. In these circumstances, Ntaganda should not be permitted to repeat or supplement his arguments.

6. *First*, the Prosecution’s submission that Ntaganda’s Ground 1 “separates the two operations without factual basis” and “contradicts the Chamber’s findings that the First and

⁸ [Decision Reply Part II Conviction Appeal](#), paras. 14 (“these matters have been adequately addressed by the parties and further submissions would not assist it in determining the questions”), 20 (“the Appeal Brief adequately argues the first two matters identified above and a reply will not assist the Appeals Chamber in determining these issues”),

⁹ *Contra* Request, para. 11.

¹⁰ Leave to reply will generally be granted only after a showing of good cause (See e.g. [ICC-01/05-01/08-294](#), para. 3; [ICC-02/04-01/15-252](#), p. 3). If permitted, replies must be “narrowly tailored to only address new issues” ([ICC-01/05-01/08-3165-Red](#), para. 5; [ICC-01/05-01/13-893-Red](#), para. 10), raised in a response which “could not have been foreseen” ([ICC-02/11-01/15-284 OA7](#), para. 11), and “may not be used to strengthen the arguments” previously advanced ([ICC-01/04-02/12-296-tENG](#), para. 7; [ICC-01/05-01/08-3480 A](#), para. 8). The Appeals Chamber will generally not be assisted by submissions which are irrelevant or unnecessary to assist the Chamber’s deliberations, or which fall reasonably within the scope of the moving party’s original arguments (see [ICC-01/04-01/06-824 OA7](#), para. 67 finding that leave to reply was “unnecessary” and “not relevant to the deliberations of the Appeals Chamber”, and [ICC-01/09-01/11-1417 OA7 OA8](#), para. 13 rejecting a request to make additional submissions—albeit under regulation 28, rather than as a reply—on the basis that the issues for which leave was sought fell “within the ambit of the issues on appeal”, that the arguments in response were “foreseeable” in the circumstances, and that the applicants had already received the material possibility of presenting “all arguments” within the scope of their appeals).

Second Operations were part of one and the same military campaign” does not warrant a reply.¹¹ The Prosecution simply summarised the flawed basis of Ntaganda’s arguments in Ground 1. Nor does the Prosecution’s request to dismiss Ntaganda’s arguments because he challenges aspects of his conviction require reply.¹² Ntaganda mischaracterises, and disputes, the import of the Trial Chamber’s findings regarding his essential contribution to the implementation of the common plan during both operations.¹³ For example, Ntaganda posits that “the Chamber could not find that he had operational level communication and control over the Second Operation as a whole”;¹⁴ he also refers to paragraphs of the Conviction Decision to argue that those “demonstrate the truly limited nature of Mr. Ntaganda’s participation in the Second Operation”;¹⁵ and submits that “the so-called ‘relevant planning’ for the Second Operation [...] was minimal”.¹⁶ The Prosecution respectfully submits that the Appeals Chamber has the relevant information before it to decide on this issue. The Parties have sufficiently briefed it on this topic and no further submissions are necessary.

7. *Second*, Ntaganda’s request to reply to the Prosecution’s submission that “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” is likewise not warranted.¹⁷ The Prosecution responded to Ntaganda’s submission that the Chamber ignored his less intense involvement in the Second Operation.¹⁸ In the sentences following that quoted by Ntaganda, the Prosecution explained that “the Chamber found that while [Ntaganda’s] 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. 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”.¹⁹ No further submissions on this issue are necessary.

¹¹ Request, para. 12 (Ground 1, first bullet point) referring to [Response](#), para. 11.

¹² Request, para. 12 (Ground 1, first bullet point) referring to [Response](#), para. 11.

¹³ [Judgment](#), paras. 852-857.

¹⁴ [Sentencing Appeal](#), para. 26.

¹⁵ [Sentencing Appeal](#), para. 27.

¹⁶ [Sentencing Appeal](#), para. 34.

¹⁷ Request, para. 12 (Ground 1, second bullet point) referring to [Response](#), para. 17.

¹⁸ [Sentencing Appeal](#), paras. 22, 28-29.

¹⁹ [Response](#), para. 17.

8. *Third*, Ntaganda's request to reply to the Prosecution's submission that pursuant to rule 145(1)(c) "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" is also not justified.²⁰ The Prosecution responded to Ntaganda's submission that the "Chamber's categorical disregard of 'previous, contemporaneous, or subsequent knowledge of the specifics of the crimes committed' was also an error".²¹ The Prosecution explained that "[t]here is no [...] requirement in rule 145(1)(c) [to make such finding], which instead refers to the *degree* of participation and of intent."²² It submitted that "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, the absence of these factors does not automatically diminish a convicted person's degree of participation in those crimes and his/her culpability. Such a presumption would violate the requirement of conducting a case-specific, *in concreto* assessment of a proportionate sentence".²³ No further submissions on this matter are needed. The Appeals Chamber can rule with the information and submissions before it.

9. *Fourth*, Ntaganda's request to reply to the Prosecution's submission that "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 [Mr.] Ntaganda's advance or contemporaneous knowledge of the crimes" is not warranted.²⁴ The Prosecution responded to Ntaganda's suggestion that the crimes of the First and Second Operations were committed "in very different circumstances" because of, *inter alia*, "the 'particular cruelty' with which some of the Second Operation crimes were committed, and which the Chamber took into account as enhancing gravity or in aggravation".²⁵ The Prosecution clarified that the alleged differences between the two operations did not assist Ntaganda's claim that the two operations constituted two distinctive set of events.²⁶ Indeed, the Chamber found that certain crimes were committed with "particular cruelty" in *both*

²⁰ Request, para. 12 (Ground 1, third bullet point) referring to [Response](#), para. 23.

²¹ [Sentencing Appeal](#), para. 29, referring to [Sentencing Judgment](#), para. 36.

²² [Response](#), para. 23.

²³ [Response](#), para. 21 (fns. omitted).

²⁴ Request, para. 12 (Ground 1, fourth bullet point), referring to [Response](#), para. 26.

²⁵ [Sentencing Appeal](#), para. 30 (fns. 27-29, referring to [Sentencing Judgment](#), paras. 79-82).

²⁶ [Response](#), para. 13.

operations and that Ntaganda himself engaged in such conduct.²⁷ The Prosecution also explained that the Chamber correctly considered the particular cruelty of the Kobu and other murders in assessing the gravity of these crimes.²⁸ No further submissions are necessary on this issue, which Ntaganda raised himself in his sentencing submissions.²⁹

10. *Finally*, Ntaganda's request to reply to the "Prosecution's mischaracterisation of certain findings, which impact the core of its submissions in response to Ground 1" is also unwarranted. Ntaganda only refers to "para.9, fns.9,10 and 12; and para.16, fn.39" of the Prosecution's Response without identifying any concrete issue.³⁰ This is insufficient to assess whether leave is warranted.³¹

11. In conclusion, Ntaganda's request to reply to the Prosecution's response to Ground 1 should be rejected. Ntaganda does not identify any novel argument. Moreover, the Parties have sufficiently briefed the Appeals Chamber on these issues.

II. Reply to the Prosecution's Response to Grounds 2 and 3 is not warranted

12. Ntaganda's request to reply to two issues in Grounds 2 and 3 (Ntaganda's participation and knowledge of rape in counts 4 and 5, and rape and sexual slavery in counts 6 to 9) is similarly not warranted and should be rejected.

13. Ntaganda seeks to reply to "the Prosecution's misunderstanding of the law applicable to sentencing and coperpetration in asserting that [...] [Mr. Ntaganda] [did not have] to know or intend the specific details of the underlying incidents" and to the Prosecution's submission that "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."³²

14. The Prosecution's Response did not involve novel arguments, and the Parties have sufficiently briefed the Appeals Chamber on their positions. In his sentencing submissions

²⁷ [Sentencing Judgment](#), paras. 78-81, 99 and fn. 256, 123. See further e.g. [Judgment](#), paras. 513, 519-521, 525 528, 532, 588.

²⁸ [Response](#), para. 26 (fn. 70, referring to [Sentencing Judgment](#), para. 77 (fn. 213)).

²⁹ ICC-01/04-02/06-2438-Red ("Defence Sentencing Response"), para. 68 (arguing that "[w]ith one exception, none of the crimes cited by the Prosecution as crimes having been committed with particular cruelty involved the direct participation or contemporaneous knowledge of Mr. Ntaganda. The absence of his direct participation in these events is a relevant consideration in assessing gravity"); see [Sentencing Judgment](#), para. 77 (fn. 213).

³⁰ Request, para. 12 (Ground 1, fifth bullet point), fn. 18.

³¹ See similarly [Decision Reply Part II Conviction Appeal](#), para. 28.

³² Request, para. 12 (Grounds 2-3, first bullet point), referring to [Response](#), paras. 32 and 38.

and in his appeal, Ntaganda has argued that his culpability for the crimes of rape and sexual slavery should be reduced due to his lack of physical proximity to the specific victims, or lack of specific findings regarding his advanced or contemporaneous knowledge with respect to the concrete incidents.³³ The Prosecution rejected Ntaganda's suggestion that he was somehow "less culpable" because purportedly he was not at the site of the crimes, or allegedly he had no advanced or contemporaneous knowledge of the specific incidents.

- *First*, the Prosecution recalled the relevant Chamber's findings that Ntaganda had either disregarded or minimised. In particular, it recalled that some of the rapes of civilian victims that took place during the First Operation occurred at Ntaganda's base (the *Appartements* camp) and that Ntaganda was present and aware that civilian women were brought there by UPC/FPLC soldiers and commanders, and even brought women himself.³⁴ It further recalled 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, including Ntaganda's chief escort, regularly perpetrated rape and sexual violence against female members of the UPC/FPLC (including child soldiers under the age of 15), 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.³⁵
- *Second*, the Prosecution explained that Ntaganda's physical presence and knowledge of the concrete incidents were not required to establish his *mens rea* as co-perpetrator for those crimes.³⁶
- *Third*, it explained that the absence of these factors does not automatically reduce Ntaganda's culpability.³⁷ Like in Ground 1, in Grounds 2 and 3 Ntaganda incorrectly proposes a "reverse approach", by which the Chamber should have automatically reduced his culpability due to the absence of certain findings at the level of the specific crimes. Ntaganda's approach misunderstands the Chamber's obligation to

³³ ICC-01/04-02/06-2424-Red ("Defence Sentencing Submissions"), paras. 47-53, 94 (cited in [Sentencing Judgment](#), para. 115 (fn. 322)); see also [Sentencing Appeal](#), paras. 39-52.

³⁴ [Response](#), para. 31; [Sentencing Judgment](#), para. 115.

³⁵ [Response](#), para. 36.

³⁶ [Response](#), para. 32; see also paras. 35-36.

³⁷ [Response](#), para. 38.

determine a sentence *in concreto* which is proportionate to the gravity of the crime and the culpability of the convicted person.³⁸

15. Thus, since the Parties have sufficiently briefed the Appeals Chamber on these confined issues, Ntaganda's request to reply to these aspects of the Prosecution's Response to Grounds 2 and 3 should be rejected.

III. Reply to the Prosecution's Response to Ground 4 is not warranted

16. Ntaganda's request to reply to the Prosecution's assertions that "the Chamber did not find that 'Mr. Ntaganda was in Fataki during the period of the Second Operation'" and that "the Chamber correctly considered Ntaganda's behaviour *after* the Kobu crimes as an additional indicator of his degree of participation and intent [...]" should likewise be rejected.³⁹

17. *First*, the Prosecution responded to Ntaganda's claim that the Chamber had accepted that "Mr. Ntaganda was in Fataki during the period of the Second Operation" by noting that Ntaganda's proposition was not supported by the paragraphs of the Conviction Decision that he cited in support.⁴⁰

18. *Second*, the Prosecution responded to Ntaganda's ill-founded submission that the Chamber erred in considering his expression of approval for Mulenda's troops having committed the Kobu massacre and other murders.⁴¹ The Prosecution explained that the Chamber had made the necessary findings regarding Ntaganda's capacity to discipline Mulenda for the crimes committed in Kobu,⁴² and that it was immaterial 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.⁴³

³⁸ [Response](#), para. 38; *see also* paras. 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).

³⁹ Request, para. 12 (Ground 4), referring to [Response](#), paras. 42 and 43.

⁴⁰ [Response](#) para. 42 (fn. 129; referring to [Sentencing Appeal](#), para. 54 (fn. 65, citing [Judgment](#), para. 552); *see also* fn. 130; referring to [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)).

⁴¹ [Sentencing Appeal](#), para. 53

⁴² [Response](#), para. 42.

⁴³ [Response](#), para. 43.

19. Ntaganda disagrees; yet, this does not warrant a reply. The position of both Parties is clear and they have sufficiently briefed the Appeals Chamber on these confined issues. Therefore, Ntaganda's request to reply to the Prosecution's Response to Ground 4 should be rejected.

IV. The Prosecution does not oppose that Ntaganda replies to aspects of the Prosecution's response to Ground 5

20. Ntaganda seeks leave to reply to two issues arising from the Prosecution's response to Ground 5 (the Chamber's assessment of the war crime of attacking civilians). The Prosecution does not oppose Ntaganda's reply to the first issue (the elements of the war crime of attacking civilians), if the Appeals Chamber considers it to be of assistance, but it opposes his reply to the second (the lack of impact of this purported error).

21. *First*, the Prosecution does not object to Ntaganda's request to reply to the Prosecution's submission that "based on common article 3 to the Geneva Conventions and articles 8(2)(e)(i) and 8(2)(c)(i) of the Statute, that, *inter alia*, '[...] 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)'."⁴⁴

22. Since Ntaganda argued in Ground 5 that the Chamber had legally erred in considering as aggravating factors the deaths of persons killed during the attacks,⁴⁵ he could reasonably foresee that the Prosecution would address the law of the war crime of attacking civilians under article 8(2)(e)(i). In particular, he should have foreseen that the Prosecution might challenge his underlying assumption that "murder", contrary to common article 3 of the Geneva Conventions, is "the crime that properly addresses unlawful deaths arising from intentionally directing attacks on civilians".⁴⁶ As the appellant, Ntaganda has the burden to "set out the legal and/or factual reasons in support of each ground of appeal", and he should have developed his arguments in support of this ground of appeal at the proper time.⁴⁷ Moreover, the Appeals Chamber need not necessarily resolve this issue to decide this ground of appeal. It suffices that the Appeals Chamber confirms that a trial chamber is entitled to consider the consequences (and harm) of a crime as an aggravating factor, as long as it has

⁴⁴ Request, para. 13 (Ground 5, first bullet point) referring to [Response](#), para. 60.

⁴⁵ [Sentencing Appeal](#), paras. 57-58.

⁴⁶ [Sentencing Appeal](#), para. 58.

⁴⁷ Regulation 58(2) of [Regulations of the Court](#).

been established beyond reasonable doubt.⁴⁸ Nonetheless, considering the nature and length of the Prosecution’s submissions, and if the Appeals Chamber considers that it may benefit from further written submissions by Ntaganda on this topic, the Prosecution makes no objection. The Prosecution respectfully requests that these submissions do not exceed ten pages of length.

23. *Second*, the Prosecution opposes Ntaganda’s reply to the Prosecution’s submission that “[...] there is no proper basis to consider that anything in Ground 5 could possibly have led to the imposition of a disproportionate sentence”, and “[...] 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’.”⁴⁹ The Prosecution merely responded to Ntaganda’s claim that “[t]his error materially contributed to a disproportionate individual sentence for Count 3”, and request to “reduce the individual sentence for Count 3; and reduce Mr. Ntaganda’s joint sentence”.⁵⁰ The Prosecution does not consider that further submissions on this confined issue would assist the Appeals Chamber in consideration of the appeal as a whole, or of Ground 5. The Appeals Chamber is well-equipped to determine itself the potential impact of a non-existent error.

V. Reply to the Prosecution’s response to Ground 6 is not warranted

24. Ntaganda’s request to reply to “[t]he Prosecution erroneous legal arguments that article 78(3) of the Statute allows a Trial Chamber to double count discriminatory intent under more than one charge in setting individual sentences for different charges, and “[...] the Appeals Chamber cannot reduce the joint sentence solely based on an alleged error in the individual sentence for persecution”” is not warranted and should be denied.⁵¹

25. Ntaganda’s position and that of the Prosecution on the Trial Chamber’s assessment of the discriminatory element when determining individual sentences for the crime of persecution *and* for other crimes has been sufficiently addressed in their briefs. Ntaganda has argued that the Chamber erred in considering the discriminatory element when determining the individual sentences for the crimes of murder (rape and sexual slavery) *and* for the crime

⁴⁸ [Response](#), paras. 48-50.

⁴⁹ Request, para. 13 (Ground 5, second bullet point), referring to [Response](#), paras. 47 and 71.

⁵⁰ [Sentencing Appeal](#), para. 61.

⁵¹ Request, para. 13 (Ground 6), referring to [Response](#), para. 85.

of persecution.⁵² He defined the Chamber's approach as a "textbook case of double-counting".⁵³ Conversely, the Prosecution submitted that the Chamber's approach was consistent with the "two-step" process enshrined in article 78(3), which requires a Chamber to first calculate an appropriate *individual* "sentence for each crime", and then separately determine the "*joint* sentence specifying the total period of imprisonment."⁵⁴ The Prosecution noted that impermissible double-counting generally entails the same factual conduct being considered twice in the calculation of an individual sentence, but not in the calculation of separate individual sentences.⁵⁵

26. Further, Ntaganda should have specified in his appeal brief the purported impact of the alleged error in the joint sentence. Regulation 57(e) requires him to do so.⁵⁶ Instead, Ntaganda requested the Appeals Chamber to "reduce the individual sentence for Count 6 [sic] to zero; and reduce Mr Ntaganda's joint sentence substantially".⁵⁷ The Prosecution correctly pointed out that article 78(3) indicates that "the highest individual sentence constitutes the *minimum* possible joint sentence."⁵⁸ Since Ntaganda was sentenced to individual sentences of 30 years for persecution and for murder, in order to establish that the joint sentence could have been materially affected, Ntaganda would have to show error in both individual sentences. It is not appropriate to permit Ntaganda to complement this oversight in a Reply.

27. Based on the foregoing, Ntaganda's request to reply to the Prosecution's Response to Ground 6 should be rejected.

VI. Reply to the Prosecution's Response to Grounds 7, 9, 11 and 12 is not warranted

28. Ntaganda's request to reply to the Prosecution's response to Grounds 7, 9, 11 and 12 (mitigating factors) should similarly be denied. Ntaganda identifies matters regarding the Trial Chamber's assessment of alleged mitigating factors which have been sufficiently

⁵² [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 additional sentence to be imposed for persecution").

⁵³ [Sentencing Appeal](#), para. 69.

⁵⁴ [Response](#), paras. 79-81.

⁵⁵ [Response](#), paras. 82-83.

⁵⁶ Regulation 57(e) of the [Regulations of the Court](#) ("The grounds of appeal, cumulatively or in the alternative, specifying the alleged errors and how they affect the appealed decision").

⁵⁷ [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.

⁵⁸ [Bemba et al. SAJ](#), para. 57 (emphasis supplied).

briefed by the Parties. The Appeals Chamber would not benefit from further submissions on these confined issues.

29. *First*, Ntaganda's request to reply to the Prosecution's response to Ground 7 should be rejected.⁵⁹ The Appeals Chamber can assess the "relevance" of the jurisprudence cited by the Prosecution to support its submission that chambers have afforded limited (if any) weight to acts of 'selective assistance' to victims by convicted persons.⁶⁰ Moreover, Ntaganda has already expressed his disagreement with the Chamber's consideration that "Mr Ntaganda's actions appear to have been aimed at using the soldiers for the benefit of the common plan".⁶¹ Further submissions on this confined issue are not necessary.

30. *Second*, Ntaganda's request to reply to three submissions made by the Prosecution in response to Ntaganda's Ground 9 should be rejected:

- Ntaganda argued that the Prosecution's lack of cross-examination of D-0054 was a "tacit acceptance that the 'Bosco' to whom D-0054's was referring was [...] Mr Ntaganda".⁶² The Prosecution responded that it did not cross-examine D-0054 because the witness gave no substantive evidence that required any cross-examination.⁶³ No further submissions are required to rule on this confined issue.⁶⁴ The Appeals Chamber has sufficient information to draw its conclusions.
- Ntaganda argued that the Chamber erred in refusing to accept evidence of D-0054 and others that 'Bosco' had welcomed and protected Lendu civilians at Mandro.⁶⁵ The Prosecution submitted that the Chamber correctly concluded that D-0054 "provide[d] no other details on this person's [Bosco's] role in the events".⁶⁶ No further submissions are required to decide on this confined issue.⁶⁷ The Appeals Chamber is well-equipped to draw its conclusions.

⁵⁹ Request, para. 13 (ground 7).

⁶⁰ Request, para. 13 (ground 7) ("additional submissions are warranted in relation to the Prosecution submissions on the concept of "selective assistance" to victims", including the relevance of the cases cited in support), referring to [Response](#), para. 96 (fn. 245).

⁶¹ Request, para. 13 (ground 7) ("whether the Prosecution can reasonably assert that saving the lives of these soldiers 'contributed to the implementation of the common plan and the resulting crimes'"), referring to [Response](#), para. 93. See [Sentencing Appeal](#), paras. 81-82.

⁶² [Sentencing Appeal](#), para. 100.

⁶³ [Response](#), para. 115.

⁶⁴ *Contra* Request, para. 13 (Ground 9, first bullet point), referring to [Response](#), para. 115.

⁶⁵ [Sentencing Appeal](#), para. 99.

⁶⁶ [Response](#), paras. 114-115, referring to [Sentencing Judgment](#), para. 214.

⁶⁷ *Contra* Request, para. 13 (Ground 9, first bullet point), referring to [Response](#), para. 115.

- In his appeal against the Conviction Decision, Ntaganda argued that the Chamber failed to consider the “the impact of the two instances when the punishment of death by firing squad, in public, was imposed by the highest UPC/FPLC authorities” and that “the Chamber rejected numerous examples of disciplinary measures imposed based on the purported ‘isolated character of these incidents’”.⁶⁸ In his appeal against the Sentencing Judgment, Ntaganda similarly argued that the Chamber “minimized Mr. Ntaganda’s specific acts of punishment”⁶⁹ and “erred in rejecting a separate execution by firing squad, in public, in Mongbwalu”.⁷⁰ Against this backdrop, the Prosecution reasonably noted that in his appeal against the Sentencing Judgment, Ntaganda repeated challenges against findings in the Conviction Decision.⁷¹ No further submissions on this matter are necessary.⁷² The Appeals Chamber has the relevant information to decide this issue.

31. *Third*, Ntaganda’s request to reply to one submission made by the Prosecution in its response to Ground 11 should be rejected. Ntaganda argued that the Chamber erred by considering the absence of evidence that Ntaganda personally visited any of the villages mentioned in his conviction, and added that reconciliation meetings took place in several locations including Kobu and Mongbawalu, owing to the security provided by UPC/RP through Ntaganda.⁷³ The Prosecution responded that the Chamber reasonably considered, among other factors, that Ntaganda did not personally visit any of these villages.⁷⁴ It further noted that the evidence identified by Ntaganda did not assist him, since it suggested that the purported “reconciliation meetings and activities” between Hema and Lendu communities in Kobu and Mongbwalu were in fact meetings between delegations of UPC and FNI officers.⁷⁵ No additional submissions are necessary.⁷⁶ The Appeals Chamber has been sufficiently briefed on this confined issue.

⁶⁸ See [Conviction Appeal-Part II](#), para. 126.

⁶⁹ [Sentencing Appeal](#), para. 107.

⁷⁰ [Sentencing Appeal](#), para. 108.

⁷¹ [Response](#), para. 121.

⁷² *Contra* Request, para.13 (Ground 9, second bullet point), referring to [Response](#), para. 121.

⁷³ [Sentencing Appeal](#), para. 131.

⁷⁴ [Response](#), para. 136 referring to [Sentencing Judgment](#), para. 220.

⁷⁵ [Response](#), para. 137 (fn. 387: referring to [Sentencing Appeal](#), para. 131, 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”).

⁷⁶ *Contra* Request, para. 13 (Ground 11).

32. *Fourth*, Ntaganda's request to reply to the Prosecution's characterisation of the '[REDACTED]' of [REDACTED] of the ICC Detention Center (DC) should be rejected.⁷⁷ Ntaganda argued that the Chamber erred by failing to decide whether he had substantially contributed [REDACTED], and to consider it in mitigation.⁷⁸ It further submitted that the Chamber erroneously denied admission of the [REDACTED] on the basis that the equivalent information was summarised in the report of the Division of Judicial Support Services (DJSS), and that the [REDACTED] "provides additional evidence of Mr. Ntaganda's unique and concrete role in relation to [REDACTED]"⁷⁹. The Prosecution responded that the Chamber in fact considered Ntaganda's alleged intervention [REDACTED], but it correctly accorded limited weight to this factor.⁸⁰ The Prosecution further explained that the fact that Ntaganda's name was mentioned in the ICC Detention Centre's [REDACTED] did not show that [REDACTED] was substantial because the [REDACTED] (containing information provided by [REDACTED]) is merely a [REDACTED] and the steps that the individual or staff could take to address them.⁸¹ It also noted that 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."⁸² To the contrary, the Chamber considered additional factors, including the *ex parte* nature of the document as "it relates to matters concerning [REDACTED]" and the corresponding impact on its probative value.⁸³

33. The Parties have sufficiently briefed the Appeals Chamber on this confined issue. No further submissions are required to assist the Appeals Chamber in its determination of this matter and the overall appeal.

34. *Finally*, Ntaganda's general assertion that a reply is necessary to correct purported inaccuracies in the Prosecution's characterisation of the Trial Chamber's findings and evidentiary record of the case is too vague to meaningfully assess how a reply will be of further assistance to the Chamber.⁸⁴ It should be rejected.

⁷⁷ *Contra* Request, para. 13 (Ground 12).

⁷⁸ [Sentencing Appeal](#), paras. 176-185.

⁷⁹ [Sentencing Appeal](#), para. 181.

⁸⁰ [Response](#), para. 166 referring to [Sentencing Judgment](#), paras. 234-235.

⁸¹ [Response](#), para. 168.

⁸² *Contra* [Sentencing Appeal](#), para. 181; Request, para. 13 (Ground 12).

⁸³ [Response](#), para. 168 (fn. 479).

⁸⁴ Request, para. 14. See [Decision Reply Part II Conviction Appeal](#), para. 28.

Conclusion and relief sought

35. For the reasons set out above, the Prosecution does not object to Ntaganda's request to reply to aspects of the Prosecution's response to Ground 5. It respectfully requests the Appeals Chamber to dismiss the remainder of Ntaganda's Request.



Fatou Bensouda, Prosecutor

Dated this 22nd day of May 2020

At The Hague, The Netherlands