Cour
Pénale
Internationale

International
Criminal
Court

Original: **English**

No.: **ICC-01/04-02/06**
Date: **27 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 Document**

**Public redacted version of "Observations of the Common Legal Representative of the Former Child Soldiers on Mr Ntaganda's Appeal against the Sentencing judgment" (ICC-01/04-02/06-2531-Conf A3)**

**Source:** **Office of Public Counsel for Victims (CLR1)**

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

**The Office of the Prosecutor**
Ms Fatou Bensouda
Mr James Stewart
Ms Helen Brady

**Counsel for the Defence**
Mr Stéphane Bourgon
Ms Kate Gibson

**Legal Representatives of the Victims**
Ms Sarah Pellet
Ms Anna Bonini

Mr Dmytro Suprun
Ms Anne Grabowski

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants (Participation/Reparation)**

**The Office of Public Counsel for Victims**

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

**States' Representatives**

**Amicus Curiae**

**REGISTRY**

**Registrar**
Mr Peter Lewis

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Section**

**Other**

## I. INTRODUCTION

1. The Common Legal Representative of the Former Child Soldiers (the "Legal Representative") hereby files her Observations with respect to issues in the Defence's appeal against the Sentencing Judgment,[1] as instructed by the Appeals Chamber in its Decision on Victim Participation.[2] Due to the very stringent page limit imposed, the Legal Representative will focus her observations on two grounds of appeal, namely Grounds 3 and 10,[3] which directly concern the personal interests of her clients.

2. With respect to Ground 3, contrary to the Defence's submission, Trial Chamber IV (the "Trial Chamber" or the "Chamber") did in fact find that Mr Ntaganda had the required level of knowledge of the crimes of rape and sexual slavery of child soldiers under the age of 15. Such a finding is not contradicted by the Defence's assertion that the crimes did not occur in his physical proximity, nor that he may not have been aware of the identity of the victims or the specifics of each incident. Further, the Defence misapprehends the mode of liability resorted to by the Trial Chamber when it submits that the acts attributed to Mr Ntaganda had no causal impact on the perpetration of the crimes of rape and sexual slavery against the three victims for which convictions were entered. All relevant circumstances were duly taken into account by the Trial Chamber in the determination of the sentence for Counts 6 and 9.

3. With regard to Ground 10, the Chamber's conclusion that Mr Ntaganda's concrete role in the demobilisation and integration into the FARDC of UPC/FPLC members was limited is sound and consistent with the available evidence. The Defence merely disagrees with the evidentiary analysis undertaken by the Trial

[1] See the "Sentencing judgment" (Trial Chamber VI), No. ICC-01/04-02/06-2442, 7 November 2019 (the "Sentencing Judgment").
[2] See the "Decision on victim participation" (Appeals Chamber), No. ICC-01/04-02/06-2471 A3, 13 February 2020.
[3] See the "Public Redacted Version of 'Sentencing Appeal Brief', 10 February 2020, ICC-01/04-02/06-2468-Conf", No. ICC-01/04-02/06-2468-Red A3, 10 February 2020, (the "Sentencing Appeal Brief"), paras. 46-52 and 111-172.

Chamber, but fails to show a discernible error. The Defence further submits that the Trial Chamber erred in admitting certain documents, but fails to substantiate this argument and to prove that such alleged error materially affected the Sentencing Judgment, which does not refer to any of the documents in question. The Chamber also properly concluded that Mr Ntaganda's involvement in the peace process was limited. The Defence alleges, however, that even if the steps taken by Mr Ntaganda in this respect were inconsistent, they should have been taken into account in mitigation given the importance of providing an incentive to former wrongdoers to contribute to peace and security. The Legal Representative rejects this proposition, which undermines the victims' right to justice, and notes that it fails to take into account the jurisprudence of the Court providing that mitigating factors must relate directly to the convicted person.

## II. CONFIDENTIALITY

4. Pursuant to regulation 23*bis*(1) of the Regulations of the Court, the Legal Representative files the present Observations as confidential since they refer to information with the same confidentiality level. A public redacted version will be filed in due course.

## III. PROCEDURAL BACKGROUND

5. On 8 July 2019, Trial Chamber VI convicted Mr Ntaganda of five counts of crimes against humanity and thirteen counts of war crimes.[4]

6. On 7 November 2019, Trial Chamber IV issued the Sentencing Judgment, imposing individual sentences for each of the counts of which Mr Ntaganda had been convicted and a joint sentence of 30 years.[5]

7. On 9 November 2019, the Defence filed its Notice of Appeal against the Sentencing Judgment before the Appeals Chamber.[6]

[4] See the "Judgment" (Trial Chamber VI), No. ICC-01/04-02/06-2359, 8 July 2019 (the "Judgment").
[5] See the Sentencing Judgment, *supra* note 1.

8. On 10 February 2020, the Defence filed its Sentencing Appeal Brief.[7]

9. On 13 February 2020, the Appeals Chamber issued its decision on victim participation, setting out deadlines and page limits for the victims' observations with respect to the issues on appeal.[8]

10. On 16 March 2020, the Prosecutor indicated that, despite the disruptions resulting from the COVID-19 outbreak, it intended to comply with the pending deadlines in the *Ntaganda* appeal proceedings.[9]

11. On 9 April 2020, the Defence submitted the public redacted version of its sentencing appeal brief,[10] following the Order on filing of public version of sentencing appeal brief issued by the Appeal Chamber on 25 March 2020.[11]

12. On 14 April 2020, the Prosecution Response to the Sentencing Appeal Brief was filed.[12]

13. On 28 April 2020, the Defence filed its Request for Leave to Reply to the Prosecution Response.[13]

14. On 6 May 2020, the Prosecution filed its Response to the Defence Request for Leave to Reply, opposing said request.[14]

---

[6] See the "Notice of Appeal against Sentencing Judgment (ICC-01/04-02/06-2442)", No. ICC-01/04-02/06-2448, 9 December 2019 (the "Notice of Appeal").
[7] See the "Sentencing appeal brief", No. ICC-01/04-02/06-2468-Conf A3, 10 February 2020
[8] See the "Decision on victim participation", *supra* note 2, paras. 6-8.
[9] See the "Prosecution notice of intention regarding deadlines" (Prosecution), No. ICC-01/04-02/06-2491 A, 16 March 2020, para. 1.
[10] See the Sentencing Appeal Brief, *supra* note 3.
[11] See the "Order on filing of public version of sentencing appeal brief" (Appeals Chamber), No. ICC-01/04-02/06-2494 A3, 25 March 2020.
[12] See the "Prosecution Response to 'Sentencing Appeal Brief'", No. ICC-01/04-02/06-2509-Conf A3, 10 February 2020. A public redacted version was filed on the same date, see the "Public redacted version of Prosecution response to 'Sentencing Appeal Brief'", No. ICC-01/04-02/06-2509-Red A3, 14 April 2020 (the "Prosecution Response").
[13] See the "Public Redacted Version of 'Defence request for leave to reply to the 'Prosecution Response to Sentencing Appeal Brief'', 28 April 2020, No. ICC-01/04-02/06-2521-Conf", No. ICC-01/04/-02/06-2521-Red A3, 20 May 2020.

## IV. PRELIMINARY CONSIDERATION

15. The Legal Representative has been invited to file "*observations presenting the victims' views and concerns with respect to the issues on appeal insofar as their personal interests are affected*".[15] Of the 12 grounds of appeal set out in the Defence Appeal Brief, the personal interests of the former child soldiers represented in the present observations are particularly affected by Grounds 3, 8, 10, 11 and 12. However, in light of the stringent page limit imposed by the Appeals Chamber – *i.e.* 20 pages, the Legal Representative will only focus on Grounds 3 and 10.

16. This forced course of action should not, however, be considered as a tacit acceptance of the arguments developed by the Defence in its Sentencing Appeal Brief. Rather, for the avoidance of repetition, the Legal Representative endorses the persuasive arguments by the Prosecution for the remaining arguments.

## V. SUBMISSIONS

### 1. Ground 3: The Trial Chamber duly conducted an *in concreto* analysis of Mr Ntaganda's degree of participation and intent in determining individual sentences for Counts 6 and 9

17. The Trial Chamber convicted Mr Ntaganda for the rape and sexual slavery of female UPC/FPLC members under the age of 15 (Counts 6 and 9).[16] While the Chamber found that "*female members of the UPC/FPLC were regularly raped and subjected to sexual violence during their service and that this was a common practice generally known and discussed within the UPC/FPLC*",[17] convictions were entered in relation to three individuals for the purposes of rape (P-0883, Mave and Nadège), and two for the purposes of sexual slavery (P-0883 and Mave).[18] The Trial Chamber assessed the

---

[14] See the "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, No. ICC-01/04-02/06-2527-Conf-Corr", No. ICC-01/04-02/06-2527-Corr-Red, 22 May 2020.
[15] See the "Decision on victim participation", *supra* note 2, para. 7.
[16] See the Judgment, *supra* note 4, pp. 536-537.
[17] See the Sentencing Judgment, *supra* note 1, para. 108.
[18] *Ibid.*

gravity of Mr Ntaganda's crimes under Counts 6 and 9 by reference to these three individuals.[19]

18. In assessing the gravity of said crimes, the Chamber noted the inherently grave nature of sexual violence,[20] the coercive environment in which the crimes occurred,[21] and the extent of the damage caused to the victims,[22] as well as Mr Ntaganda's degree of intent and participation.[23] It also took into account, in aggravation, the particular defencelessness of the victims and, for the charge of rape, the repeated nature of their victimisation.[24] On that basis, Mr Ntaganda was sentenced to 17 years of imprisonment for rape (Count 6) and 14 years of imprisonment for sexual slavery (Count 9).[25]

19. The Defence requests the Appeals Chamber substantially reduce Mr Ntaganda's individual sentence under these counts, as well as his joint sentence.[26] It argues that the Chamber failed to take into account Mr Ntaganda's alleged "*lack of knowledge or concrete participation*" in said crimes and thus "*misapplied the concept of 'degree of participation'; failed to take into account relevant facts; failed to give a reasoned opinion; and arrived at manifestly disproportionate individual sentences for the crimes under Counts 6, 7, 8 and 9*".[27]

20. The Legal Representative recalls that, pursuant to article 81(2)(a) of the Rome Statute a sentence may be appealed "*on the ground of disproportion between the crime and the sentence*". Proportionality in the determination of the sentence is generally measured by reference the degree of harm caused by the crime and the culpability of

---

[19] *Ibid*.
[20] *Idem*, paras. 95-96.
[21] *Idem*, paras. 109-110.
[22] *Idem*, paras. 111-113.
[23] *Idem*, paras. 118-120.
[24] *Idem*, paras. 126-130.
[25] *Idem*, para. 246. The Sentencing Judgment indicates that "*the Chamber has taken into account the fact that some of the conduct underlying the convictions for rape and sexual slavery is the same. Its assessment of sexual slavery* […] *therefore encompasses only the additional element of the exercise of a power of ownership*" (para. 94).
[26] See the Sentencing Appeal Brief, *supra* note 3, para. 52.
[27] *Idem*, para. 51. See also the Notice of Appeal, *supra* note 6, para. 26.

the perpetrator.[28] However, the Trial Chamber has broad discretion in the determination of a sentence[29] and is not required to specifically address each item of evidence it took into account in its sentencing decision.[30] As confirmed by the Appeals Chamber:

> "*the Appeals Chamber's review of a Trial Chamber's exercise of its discretion in determining the sentence must be deferential and it will only intervene if: (i) the Trial Chamber's exercise of discretion is based on an erroneous interpretation of the law; (ii) the discretion was exercised based on an incorrect conclusion of fact; or (iii) as a result of the Trial Chamber's weighing and balancing of the relevant factors, the imposed sentence is so unreasonable as to constitute an abuse of discretion*".[31]

21. To the extent the Defence's appeal alleges errors of fact on the part of the Trial Chamber, the Legal Representative recalls that the standard of review to be applied by the Appeals Chamber with respect to such errors is deferential,[32] meaning that the Appeals Chamber shall intervene only where there is a "*patently incorrect*"[33] conclusion of fact; or where no reasonable trier of fact could have reached that same conclusion.[34]

22. In the submission of the Legal Representative, the Defence failed to show that the Chamber incurred a discernible error in its determination of the sentence. The Defence disagrees with the sentence imposed with respect to the rape and sexual slavery of child soldiers under the age of 15, repeating arguments it advanced during

---

[28] See the "Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the 'Decision on Sentence pursuant to Article 76 of the Statute'" (Appeals Judgment), No. ICC-01/04-01/06-3122 A4 A6, 1 December 2014 (the "*Lubanga* Appeals Sentencing Judgment").
[29] See ICTY, *The Prosecutor v. Blagojević and Jokić* (IT-02-60-A), "Appeal Judgment" (Appeals Chamber), 9 May 2007, para. 321, noting that "*Trial Chambers are vested with a broad discretion in determining an appropriate sentence, due to their obligation to individualize penalties to fit the circumstances of the accused and the gravity of the crime. As a rule, the Appeals Chamber will not revise a sentence unless the Trial Chamber has committed a discernible error in exercising its discretion or has failed to follow the applicable law. It is for the appealing party to demonstrate how the Trial Chamber erred in imposing the sentence*".
[30] See the *Lubanga* Appeals Sentencing Judgment, *supra* note 28, paras. 70-72.
[31] *Idem*, para. 45.
[32] *Idem*, para. 44.
[33] *Idem*, paras. 41-42.
[34] *Idem*, para. 93.

the sentencing proceedings before the Trial Chamber,[35] but falls well short of demonstrating that the Chamber's factual conclusions were "*patently incorrect*" or that its weighing and balancing of the relevant factors was so unreasonable as to constitute an abuse of discretion.[36] Contrary to the Defence's contentions, the Chamber correctly assessed and weighted (a) Mr Ntaganda's degree of intent and (b) his degree of participation for the purposes of sentencing.

### *(a) The Chamber correctly assessed Mr Ntaganda's degree of intent*

23. Rule 145(1)(c) of the Rules of Procedure and Evidence provides that the "*degree of intent*" is one of the factors to be taken into account in the determination of the sentence. The Defence argues that the Chamber erred in failing to reduce Mr Ntaganda's culpability for sentencing purposes on the basis of his purported lack of "*advance, contemporaneous or subsequent knowledge*" of the incidents of rape and sexual slavery perpetrated against Mave, Nadège and P-0883.[37] The Legal Representative submits that the Chamber correctly assessed Mr Ntaganda's degree of intent and that the Defence's unpersuasive arguments ignore the Chamber's finding on the merits, which cannot be relitigated as part of the present appeal.

24. In particular, Mr Ntaganda was convicted on Counts 6 and 9, involving rape and sexual enslavement of child soldiers, as an indirect co-perpetrator.[38] As explored in further detail in the Legal Representative's Observations concerning the Defence's appeal against Mr Ntaganda's conviction,[39] indirect co-perpetration is a form of co-perpetration whereby a common plan is executed through other persons who act as

---

[35] See the "Submissions on sentence on behalf of Mr. Ntaganda", No. ICC-01/04-02/06-2424-Red, 30 September 2019, paras. 85-88.
[36] See the *Lubanga* Appeals Sentencing Judgment, *supra* note 28, para. 40.
[37] See the Sentencing Appeal Brief, *supra* note 3, para. 49; and the Notice of Appeal, *supra* note 6, para. 24. While the Defence separately discusses the case of Mave, the Legal Representative considers that the arguments raised in this respect do not differ, in substance, from those advanced for other victims and suffer from same flaws. Therefore the Legal Representative addresses said arguments jointly.
[38] See the Judgment, *supra* note 4, para. 1199 (in particular pp. 528, and 536-537).
[39] See the "Public Redacted Version of 'Observations of the Common Legal Representative of the Former Child Soldiers on Part II of Mr Ntaganda's Appeal against the Judgment pursuant to Article 74 of the Rome Statute of 6 May 2020'", No. ICC-01/04-02/06-2526-Red A, 27 May 2020, paras. 79-82.

tools. It requires, as a basis for the mutual attribution of liability, an agreement or common plan entailing a "*critical element of criminality*" and an essential contribution to the common plan.

25. The Judgment found beyond reasonable doubt that "*as of at least the beginning of August 2002*", Mr Ntaganda and his co-perpetrators were aware that the implementation of their criminal plan would lead to the rape and sexual slavery of children under the age of 15 within the UPC/FPLC as a matter of "*virtual certainty*".[40] The Chamber noted, in particular, that Mr Ntaganda knew that recruits, including those under 15 years of age, were regularly raped by male members of the UPC/FPLC, including commanders, as well as his own chief escort, and indeed Mr Ntaganda himself.[41] He knew that these crimes were left largely unpunished,[42] and female recruits were particularly vulnerable and not able to leave the militia.[43] Accordingly, the Chamber concluded that Mr Ntaganda knew that rapes and sexual violence were occurring within the UPC/FPLC ranks, and that female recruits and soldiers under the age of 15 were not excluded from said practice.[44]

26. Indeed, although the sentence rests upon findings, entered beyond reasonable doubt, related to three victims of rape and two victims of sexual enslavement,[45] the Sentencing Judgment emphasised that:

> "*the fact that female members of the UPC/FPLC were regularly raped and subjected to sexual violence during their service was generally known and discussed within the UPC/FPLC, as well as that Mr Ntaganda himself, and his chief escort, were among those who inflicted rape on his female bodyguards. In addition, sexual violence crimes against female members of the UPC/FPLC, including those under the age of 15, was left largely unpunished, notably within Mr Ntaganda's escort*".[46]

---

[40] See the Judgment, *supra* note 4, para. 811.
[41] *Idem*, paras. 407, 1196-1198; and the Sentencing Judgment, *supra* note 1, paras. 118-119.
[42] See the Judgment, *supra* note 4, paras. 411-412, 792 and 1196; and the Sentencing Judgment, *supra* note 1, para. 119.
[43] See the Judgment, *supra* note 4, para. 792; and the Sentencing Judgment, *supra* note 1, para. 109.
[44] See the Judgment, *supra* note 4, para. 1197.
[45] See the Sentencing Judgment, *supra* note 1, para. 108.
[46] *Idem*, para. 119.

27. The Chamber duly took into account, as part of the sentencing determination, its findings concerning Mr Ntaganda's *mens rea* for each count. In particular, it found that Mr Ntaganda and his co-perpetrator "*conceived a common plan by virtue of which* [they] *meant*, inter alia, *for civilians to be raped and subjected to sexual slavery*",[47] and that they were "*aware that, in the ordinary course of events, and during the relevant period, the implementation of the UPC/FPLC's common plan would lead to,* inter alia, *the rape and sexual slavery of children under the age of 15 within UPC/FPLC ranks*".[48] Accordingly, the Trial Chamber proceeded to impose a sentence for Counts 6 and 9 on the basis that these crimes against child soldiers entailed "*a lower degree of intent than for the sexual crimes against civilians*".[49]

28. The Defence's argument that there was "*no finding that Mr. Ntaganda had any advance, contemporaneous or subsequent knowledge of these crimes*"[50] discloses, therefore, a fundamental misunderstanding of the Chamber's findings. Had Mr Ntaganda had "*no knowledge*" of said crimes, he would not have satisfied the mental element required for his conviction as a co-perpetrator. By challenging the existence of the requisite knowledge, the Defence appears to relitigate findings made in the Judgment,[51] which is impermissible in the context of an appeal against a sentencing decision. Indeed, the Appeals Chamber has previously dismissed *in limine* arguments raised by convicted persons in the context of sentencing appeal proceedings where they amounted to attempts to relitigate aspects of the person's conviction.[52]

---

[47] *Idem*, para. 114 (emphasis added).
[48] *Idem*, para. 118 (emphasis added). See also the "Decision on Sentence pursuant to Article 76 of the Statute" (Trial Chamber I), No. ICC-01/04-01/06-2901, para. 52.
[49] See the Sentencing Judgment, *supra* note 1, para. 118.
[50] See the Sentencing Appeal Brief, *supra* note 3, para. 49; and the Notice of Appeal, *supra* note 6, para. 24.
[51] Indeed, the Defence raised similar arguments in the context of its appeal against Mr Ntaganda's conviction. It argued, under Ground 11, that "[n]*o reasonable chamber could have found that Child soldiers were raped and sexually enslaved, or that Mr Ntaganda was aware of any of the rapes*". See the "Defence Appeal Brief – Part II", No. ICC-01/04-02/06-2465-Red A, 31 January 2020, paras. 258-271.
[52] See *e.g.* the "Judgment on the appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled 'Decision on Sentence pursuant to Article 76 of the Statute'" (Appeals Chamber), No. ICC-01/05-01/13-2276-Red A6 A7 A8 A9, 8 March 2018, para. 138 (the "*Bemba* et al. Sentencing Appeal Judgment").

29. To the extent the Defence is arguing that Mr Ntaganda's degree of intent and culpability was reduced due to the fact that he may not have been aware of the identity of the three victims and the specific incidents of rape and sexual slavery to which they were subjected, the Legal Representative submits that these arguments are misplaced. The type of knowledge envisaged by the Defence, *i.e.* actual knowledge about the specific incidents and victims, may be applicable to the direct perpetrators of the crimes,[53] but Mr Ntaganda's alleged absence and remoteness from the scene of the crime neither excludes nor decreases his responsibility as indirect co-perpetrator. The execution of the specific rapes and instances of sexual slavery by direct perpetrators for which he has been convicted was a consequence of his acts and omissions. Such crimes are properly covered by the mental element if it is shown that the co-perpetrator was aware that the implementation of the common plan would, in the ordinary course of events, result in the commission of the relevant *type* of crimes,[54] as in the present case.

30. The Defence failed to provide any authority in support of its claim that Mr Ntaganda's degree of culpability as an indirect co-perpetrator for the rape and sexual slavery of child soldiers should be regarded as reduced by reason of his purported lack knowledge of the specific incidents and victims involved. There is no reason in principle why such factors should decrease the subjective culpability or blameworthiness of a convicted person who – like Mr Ntaganda – "*meant for the UPC/FPLC soldiers and commanders to engage in the relevant conducts, and was aware that, in the ordinary course of events, and during the relevant period, in relation to the consequence, children under the age of 15 years* […] *would be raped and subjected to sexual slavery (Counts 6 and 9), and was aware of the relevant circumstances*".[55]

---

[53] See the Sentencing Judgment, *supra* note 1, para. 45.
[54] See *e.g.* the "Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled 'Judgment pursuant to Article 74 of the Statute'" (Appeals Chamber), No. ICC-01/05-01/13-2275-Red A A2 A3 A4 A5, 8 March 2018, para. 1308 (the "*Bemba* et al. Appeal Judgment").
[55] See the Judgment, *supra* note 4, para. 1198.

31. As for the Defence's related argument that "*none of these victims* [Mave, P-0883 and Nadège] *was in proximity to Mr Ntaganda at the time of the crimes*",[56] the Legal Representative notes that physical proximity to the crimes is not a legal requirement for liability, and indeed often no such proximity exists in cases of indirect co-perpetration. In the Sentencing Judgment, the Chamber specifically referred to Mr Ntaganda's proximity to some of the crimes for which he was convicted as a factor *increasing* his culpability for those crimes.[57] For other crimes, including those of rape and sexual slavery against child soldiers, no such physical proximity was proved at trial, and the Chamber duly refrained from regarding Mr Ntaganda's culpability as increased on that basis.[58] The Sentencing Appeal Brief fails to identify any discernible error vitiating the Chamber's approach in this respect, nor does it call into question the Chamber's conclusion that, depending on the circumstances, Mr Ntaganda's culpability for certain crimes may be "*high, irrespective of whether he was in close physical proximity to the locations where the crimes were physically carried out, and even in instances where he did not have previous, contemporaneous, or subsequent knowledge of the specifics of the crimes committed*".[59]

32. The Legal Representative notes, for instance, the conclusion reached by Trial Chamber II in the *Katanga* case concerning the convicted person's degree of intent. Mr Katanga had been found guilty as an accessory to war crimes and crimes against humanity including murder committed during an attack on Bogoro, Ituri district, on 24 February 2003.[60] The Chamber was unable to establish beyond reasonable doubt that Mr Katanga was present during the attack,[61] but noted the importance of his contribution and his high-ranking position.[62] It found, *inter alia*, that Mr Katanga

---

[56] See the Sentencing Appeal Brief, *supra* note 3, para. 49; and the Notice of Appeal, *supra* note 6, para. 24.
[57] See *e.g.* the Sentencing Judgment, *supra* note 1, paras. 62, 67, 77, 86, 88, and 117.
[58] *Idem*, paras. 118-120.
[59] *Idem*, para. 36.
[60] See the "Decision on Sentence pursuant to article 76 of the Statute" (Trial Chamber II), No. ICC-01/04-01/07-3484-tENG-Corr, 23 May 2014.
[61] *Idem*, para. 62.
[62] *Idem*, paras. 64-67.

knew "*that the Ngiti militia would commit the crime of killing, murder, attack against civilians as well as the crimes of destruction of property and pillaging*".[63] It concluded on this basis, and without considering Mr Katanga's proximity or awareness of the details of specific incidents and victims involved,[64] that Mr Katanga's "*degree of participation and intent* […] *must not be underrated*".[65]

***(b) The Chamber correctly assessed Mr Ntaganda's degree of participation***

33. Rule 145(1)(c) of the Rules of Procedure and Evidence provides that the "*degree of intent of the convicted preson*" is one of the factors to be taken into account in the determination of the sentence. The Defence alleges that the Chamber erred in failing to address Mr Ntaganda's "*concrete participation*" in the crimes of rape and sexual slavery against UPC/FPLC child soldiers.[66] It argues, in particular, that "*the Chamber failed to discuss whether the actions imputed to Mr. Ntaganda as purportedly tolerating or approving rape with in the FPLC at other locations* […] *had any causal impact on the perpetration of crimes against the three victims of Counts 6 and 9*".

34. The Legal Representative recalls that co-perpetration requires, as a basis for the mutual attribution of liability, an agreement or common plan, as well as an essential contribution to the common plan, with the resulting power to frustrate the commission of the crime.[67] With regard to the commission of a crime though another person, the Judgment resorted to the notion of '*use of an organization*',[68] requiring that the defendant acted through other persons in that he exercised control over the '*the*

[63] *Idem*, para. 68.
[64] *Idem*, paras. 61-69.
[65] *Idem*, para. 69. See also *e.g.* the *Bemba* et al. Sentencing Appeal Judgment, *supra* note 51, para. 140 and *mutatis mutandis*, the conclusion of Trial Chamber III in the *Bemba* case that, in cases of responsibility of commanders and other superiors under Article 28 of the Rome Statute, "[a]*lthough once or several times physically removed from the acts of his or her subordinates, the culpability of a superior and his or her degree of moral blameworthiness might, depending on the concrete circumstances, be greater than that of his or her subordinates*". See the "Decision on Sentence pursuant to Article 76 of the Statute" (Trial Chamber III), No. ICC-01/05-01/08-3399, 21 June 2016, para. 17 (the "*Bemba* Sentencing Decision").
[66] See the Sentencing Appeal Brief, *supra* note 3, paras. 49-50; and the Notice of Appeal, *supra* note 6, paras. 24-25.
[67] See the Judgment, *supra* note 4, paras. 774 and 779. See also the *Lubanga* Appeals Sentencing Judgment, *supra* note 28, paras. 445, 473 and 722.
[68] See the Judgment, *supra* note 4, para. 778.

*will*' of the direct perpetrators.[69] For a defendant to be convicted as an indirect co-perpetrator, it must therefore be proved *inter alia* that, without the defendant's essential contribution, the crimes would not have been committed or would have been committed in a significantly different way.[70]

35. Mr Ntaganda's conviction as an indirect co-perpetrator under Counts 6 and 9 was therefore based on a finding that he provided an essential contribution to the relevant crimes and had the power to frustrate their commission.[71] He was amongst the group's highest authorities, being in charge of operations and the organisation of the UPC/FPLC, including in particular the recruitment and training of troops.[72] He organised recruitment activities, established training centres, was responsible for the training of recruits, attended and spoke at ceremonies in the various camps, and decided on the deployment of soldiers after training.[73] As part of this framework, harsh conditions of living were inflicted upon recruits, including the youngest ones.[74] Their movements were monitored and severe punishments inflicted, including beatings, executions and imprisonment in underground prisons.[75] Those who tried to escape were brought back to face other recruits before being seriously beaten up.[76] Child soldiers were victims of rampant sexual violence during their captivity, a practice that, left unpunished,[77] meant in the circumstances that it would continue to occur in the ordinary course of events. Taken cumulatively, the various forms of Mr Ntaganda's contribution were essential to the commission of the crimes.[78] The causal connection between Mr Ntaganda's conduct and the crimes for which he was convicted was therefore properly established in the Judgment, and any attempt to

[69] *Idem*, paras. 774 and 777.
[70] See the *Bemba* et al. Appeal Judgment, *supra* note 54, para. 820.
[71] See the Judgment, *supra* note 4, para. 856.
[72] *Idem*, paras. 827 *et seq*.
[73] *Idem*, paras. 831-832.
[74] *Idem*, para. 817.
[75] *Idem*, paras. 331, 376, 790 and 1120.
[76] *Idem*, para. 789.
[77] *Idem*, paras. 412, 792, 818 and 1190.
[78] *Idem*, para. 856.

relitigate the issue as part of the present sentencing appeal should be dismissed *in limine*.[79]

36. More broadly, the Legal Representative submits that the Trial Chamber properly assessed Mr Ntaganda's degree of participation in the crimes of rape and sexual slavery against child soldiers *in concreto* for the purposes of sentencing. Within the Sentencing Judgment, the Chamber found, in particular, that Mr 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 or sexual slavery*" through his participation in the recruitment of individuals under the age of 15 and the establishment of the UPC/FPLC's training camp's system.[80] The Chamber noted that children under the age of 15 were raped and sexually enslaved during the course of the UPC/FPLC's military campaign, that Mr Ntaganda himself, and his chief escort, were among those who inflicted rape on his female bodyguards, and that sexual violence crimes against female members of the UPC/FPLC were left largely unpunished, notably within Mr Ntaganda's escort.[81] On this basis, the Chamber found that Mr Ntaganda, together with other UPC/FPLC military leaders, failed to "*ensure a safe environment for the female members of the UPC/FPLC, in which they would not be sexually abused by other members of the group*".[82] Accordingly, while Mr Ntaganda's degree of intent in relation to the crimes pertaining to Counts 6 and 9 was found to be lower than for other Counts, the Chamber also took into account for the purposes of sentencing that "*his degree of involvement and participation in their commission was significant*".[83]

37. In conclusion, the Trial Chamber reasonably – and correctly – assessed Mr Ntaganda's degree of participation and intent in relation to Counts 6 and 9 properly weighed and balanced all the relevant factors in imposing a sentence that

[79] See *supra*, para. 28.
[80] See the Sentencing Judgment, *supra* note 1, paras. 119 and 186-192.
[81] *Idem*, para. 119.
[82] *Ibid*.
[83] *Idem*, para. 120.

reflects his culpability, as required by rule 145(1)(a) of the Rules of Procedure and Evidence. For all these reasons, Ground 3 of the Defence's appeal should be dismissed.

## 2. Ground 10: The Chamber correctly found that Mr Ntaganda did not genuinely and concretely contribute to peace and reconciliation

38. The Defence submits that the Chamber erred in fact and in law in finding that "*a genuine and concrete contribution to peace and reconciliation, or demobilisation and disarmament on the part of Mr Ntaganda* [had not been] *established overall, on a balance of probabilities*".[84] The Defence argues that the Chamber erred in its assessment of the evidence; failed to take into consideration highly relevant and probative evidence; considered irrelevant facts; and incorrectly applied the 'balance of probabilities' standard.[85] As a result, the Defence claims, "*no reasonable Chamber could have failed to accord high mitigation value to Mr. Ntaganda's genuine and objective contribution to peace and reconciliation with the Lendu community as well as to the demobilisation and integration the armed forces of the* [DRC] *of UPC/FPLC members*".[86]

39. The Legal Representative submits that the Trial Chamber reasonably – and correctly – declined to consider Mr Ntaganda's alleged contribution to peace and reconciliation and to demobilisation efforts in Ituri as a mitigating circumstance.[87] The evidence on the record indicates that Mr Ntaganda's involvement in the peace process and his role in the UPC/FPLC's demobilisation were "*limited*"[88] and fails to establish on the balance of probabilities that his contribution was sufficiently "*genuine and concrete*"[89] to constitute a mitigating circumstance.[90] The Legal Representative's

---

[84] See Sentencing Appeal Brief, *supra* note 3, para. 113.
[85] *Idem,* para. 114.
[86] *Ibid*.
[87] See the Sentencing Judgment, *supra* note 1, paras. 217- 224.
[88] *Idem*, paras. 221-222.
[89] *Idem*, para. 218. See also the *Bemba* Sentencing Decision, *supra* note 65, para. 72; and the "Decision on Sentence pursuant to article 76 of the Statute" (Trial Chamber II), No. ICC-01/04-01/07-3484-tENG-Corr, 23 May 2014, para. 87.
[90] See the Sentencing Judgment, *supra* note 1, para. 224.

submissions in this respect will focus on three of the arguments raised in the Sentencing Appeal Brief.

40. First, the Defence argues that Mr Ntaganda's contribution to the demobilisation and integration process was "*substantial*"[91] and quotes, for this purpose, portions of the testimony of witnesses D-0020 and D-0047. However, the Chamber did consider this material, providing a thorough analysis thereof at footnote 604 of the Sentencing Judgment. The Chamber found as follows:

> "*D-0020 testified that in mid-2004 Mr Ntaganda met with officers and informed them that they must disarm, demobilise or integrate in the FARDC (D-0020: ICC-01/04-02/06-2397-Conf-AnxA, page 3, para. 15), and attended a demobilisation ceremony with MONUC representatives (D-0020: ICC-01/04-02/06-2397-Conf-AnxA, pages 3-4, para. 17). D-0047 testified that Mr Ntaganda worked with a government committee responsible for demobilisation and was responsible for preparing lists of those who wanted to either demobilise or integrate (D-0047: T-267, pages 62-63). However, in assessing D-0047's evidence, the Chamber notes that D-0020 testified that in fact it was Mr Ntaganda's secretary who was in charge of compiling the lists for reintegration (D-0020: ICC-01/0402/06-2397-Conf-AnxA, page 4, para. 19), and information in a report from* the Comité International d'Accompagnement de la Transition, *the oversight body working with institutions set up to assist in disarmament, that later – in 2005 – Mr Ntaganda, Thomas Lubanga, and the UPC were not cooperating with authorities in respect of the demobilisation program and raised allegations of assassinations and tortures on the orders of the UPC hierarchy, in particular Mr Ntaganda, vis-à-vis combatants who chose to hand in their weapons (D-0047: T-267, pages 85-86 and 88-90; and DRC-OTP-2103-1205, at 1267, second paragraph)*".[92]

41. The Sentencing Judgment confirms therefore that the Chamber considered the testimonies relied on by the Defence but, in light of other evidence on the record, found that the role played by Mr Ntaganda with regard to demobilisation was fairly limited. For instance, the Defence relies on the testimony of D-0047 in support of Mr Ntaganda's strong role in the demobilisation process,[93] but these statements are

[91] See Sentencing Appeal Brief, *supra* note 3, para. 148.
[92] See the Sentencing Judgment, *supra* note 1, footnote 604.
[93] See the Sentencing Appeal Brief, *supra* note 3, paras. 149 *et seq*.

too general in character and add nothing to those explicitly commented upon by the Chamber.[94]

42. The Defence fails to identify any discernible error vitiating the Chamber's conclusion in this respect, and simply disagrees with the Chamber's assessment of the evidence presented during the sentencing proceedings. Said disagreement is insufficient to substantiate the present appeal.[95] As set out *supra*,[96] the Defence needs to demonstrate that no reasonable trier of fact could have reached the conclusion, on the balance of probabilities, that Mr Ntaganda's the role in demobilisation was fairly limited, or otherwise insufficient to constitute a mitigating circumstance.

43. Second, the Defence challenges the Chamber's treatment of specific items of documentary evidence. Some such arguments are entirely unsubstantiated. For instance, the Defence refers to a *communiqué* of the *Comité international d'accompagnement de la transition* (CIAT) indicating that [REDACTED].[97] While D-0047 may have been incarcerated in Kinshasa in 2005,[98] the Legal Representative fails to see how this would imply that "*no weight can be attributed to information drawn from*" said document, as suggested by the Defence, or that the Chamber erred in considering such information, including for purposes of D-0047's impeachment.[99]

44. Further, the Defence submits that the Chamber erred by admitting into evidence six excerpts of reports issued by the United Nations Group of Experts on the Democratic Republic of the Congo.[100] Said documents demonstrated that – contrary to the Defence's argument that Mr Ntaganda contributed to the integration of FPLC members in to the FARDC – he only assumed a position within the FARDC many

---

[94] See the Sentencing Judgment, *supra* note 1, footnote 604.
[95] See the *Lubanga* Appeals Sentencing Judgment, *supra* note 28, para. 33, noting that "*repetitions of submissions made before the Trial Chamber as to how the evidence should be assessed are insufficient if such submissions merely put forward a different interpretation of the evidence*".
[96] See *supra*, paras. 20-21.
[97] See DRC-OTP-2103-1205, at 1267.
[98] See Sentencing Appeal Brief, *supra* note 3, para. 151.
[99] *Ibid*.
[100] See DRC-OTP-2102-1032; DRC-OTP-2102-1093; DRC-OTP-2102-1220; DRC-OTP-2102-1247; DRC-OTP-2102-1560; and DRC-OTP-2102-1535.

years after his alleged appointment, if at all.[101] The Defence's argument, during the sentencing proceedings,[102] that the six documents were irrelevant and inappropriate for admission were duly rejected by the Trial Chamber, which admitted specific sentences contained in said documents "*to show Mr Ntaganda's involvement with the FARDC or the CDNP*".[103] The Legal Representative recalls that the remaining portions of the documents, including information suggesting that Mr Ntaganda was part of the leadership of an armed group responsible for serious human rights abuses and international crimes after the period covered by the charges in the present case, was not admitted by the Chamber on the basis that it was "*unduly prejudicial to Mr Ntaganda and* […] *irrelevant for the stated purpose*".[104] Except for a generic references to the arguments advanced in its submissions before the Trial Chamber,[105] the Defence fails to articulate how the Chamber erred in its treatment of the six documents in question.

45. Even assuming, *arguendo*, that the admission of said documents was erroneous, there is no indication that this affected the Chamber's sentencing decision in any way. The Defence acknowledges that none of the six documents was referred to in the Sentencing Judgment, but speculates that "*they were inevitably considered*" by the Chamber in reaching its finding that Mr Ntaganda declined to integrate into the FARDC for a number of years. According to the established jurisprudence of the Appeals Chamber, "*pursuant to article 83(2) of the Statute, the appellant is required to show that the sentence 'was materially affected by error of fact or law or procedural error'*".[106] The Appellant must "*demonstrate that, in the absence of the procedural error, the judgment*

[101] See the "Prosecution's request for the admission of additional documentary evidence on sentencing", No. ICC-01/04-02/06-2389, 30 August 2019, and [REDACTED].
[102] See the "Defence response to 'Prosecution's request for the admission of additional documentary evidence on sentencing'", No. ICC-01/04-02/06-2392, 6 September 2019, paras. 13-17.
[103] See the "Decision on requests for admission of evidence related to sentencing from the bar table", No. ICC-01/04-02/06-2402, para. 32.
[104] *Ibid.*
[105] See the Sentencing Appeal Brief, *supra* note 3, para. 166.
[106] See the *Bemba* et al. Sentencing Appeal Judgment, *supra* note 51, para. 25.

*would have substantially differed from the one rendered*".[107] The Legal Representative submits that the Defence has provided no evidence that this alleged error materially affected the Sentencing Judgment – it did not. It follows that this line of argument must be rejected.

46. Finally, the Defence appears to invoke misplaced policy considerations. It repeats *verbatim* the argument advanced in its submissions before the Trial Chamber[108] that "[t]*he importance of providing an incentive to former wrongdoers to contribute to peace and security is so great that even inconsistent steps towards that process should be taken into consideration in sentencing*".[109] The Legal Representative rejects this broad assertion, for which the Defence offers no support or authority,[110] suggesting that the pursuit of peace and security prevail over the victim's right to justice to such an extent as to justify that the sentence for crimes as grave as those that Mr Ntaganda committed should be reduced, even only marginally, on the basis of the wrongdoer's "*inconsistent steps*" towards reconciliation and stability.

47. Further, the Defence's argument demonstrates a fundamental misunderstanding of the scope of mitigating circumstances before the Court. Rule 145(2)(a)(ii) of the Rules of Procedure and Evidence indicates that mitigating circumstances need not directly relate to the crimes of which the person was convicted and are, thus, not limited by the scope of the confirmed charges or the judgment. However, as confirmed by the consistent jurisprudence of the Court, such circumstances must *relate directly* to the convicted person.[111] The purported desirability of providing incentives to potential "*former wrongdoers*" to contribute to

---

[107] See the *Bemba* et al. Appeal Judgment, *supra* note 54, para. 99.
[108] See the Submissions on sentence on behalf of Mr. Ntaganda, *supra* note 35, para. 141.
[109] See the Sentencing Appeal Brief, *supra* note 3, para. 165.
[110] While the Defence seeks to draw a parallel between the present case and the *Katanga* case, the Legal Representative concurs with the Prosecution that these cases are clearly distinguishable, see the Prosecution Response, *supra* note 12, para. 156.
[111] See the *Bemba* Sentencing Decision, *supra* note 89, para. 19; the "Judgment and Sentence" (Trial Chamber VIII), No. ICC-01/12-01/15-171, 27 September 2016, para. 74; and the "Decision on Sentence pursuant to Article 76 of the Statute" (Trial Chamber VII), No. ICC-01/05-01/13-2123-Corr, 22 March 2017, para. 24.

peace processes does not meet this requirement, as it does not directly relate to Mr Ntaganda.[112]

48. For all these reasons, Ground 10 of the Defence's appeal should be dismissed.

## VI. CONCLUSION

49. For the reasons stated *supra*, the Legal Representative respectfully requests the Appeals Chambers to dismiss the Defence's appeal as far as Grounds 3 and 10 are concerned. She regrets that the stringent page limit imposed on the victims' observations precludes her from exploring in detail the reasons why Grounds 8, 11 and 12 should also be dismissed, and endorses the Prosecution's arguments on those grounds of appeal.[113]

Sarah Pellet
Common Legal Representative of the
Former Child Soldiers

Dated this 27th day of May 2020

At The Hague, The Netherlands

[112] To the extent the Defence is suggesting that Mr Ntaganda himself (as opposed to other potential wrongdoers) should benefit from a sentencing mitigation so that there is an incentive for *him* to contribute to peace and security, this position is wholly unpersuasive. Mr Ntaganda cannot be incentivised retroactively through the application of a mitigating circumstance.

[113] See the Prosecution Response, *supra* note 12, paras. 104-112 (Ground 8); paras. 160-165 (Ground 11); and paras. 166-172 (Ground 12).