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International
Criminal
Court

Original: **English** No.: **ICC-01/04-02/06**
Date: **28 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 the "Observations of the Common Legal Representative of the Victims of the Attacks on the Defence Sentencing Appeal" (ICC-01/04-02/06-2529-Conf)

Source: **Office of Public Counsel for Victims (CLR2)**

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I. INTRODUCTION

1. The Common Legal Representative of the Victims of the Attacks (the "Legal Representative") hereby submits his observations on the Defence Sentencing Appeal[1] (the "Defence Appeal" or the "Appeal").

2. The Defence Appeal should be dismissed in its entirety. Many of the challenges raised by the Defence are attempts to re-litigate matters relating to the substantive Judgment, *i.e.* the conviction decision, rather than falling within the scope of sentencing proceedings. Other challenges do not rise beyond mere disagreement with the Trial Chamber's assessment of the evidence. The Defence has failed to demonstrate any discernible error of law, fact or procedure that would warrant the intervention of the Appeals Chamber.

3. As the Legal Representative generally concurs with the Prosecution's submissions, he will limit his own submissions to additional observations, so as to avoid the duplication of arguments, as well as to some points of disagreement with the Prosecution's position.

4. Where applicable, he will indicate specific differences of view with the Prosecution's submissions. For the remainder of the grounds of appeal, his support for the Prosecution's position should be presumed.

II. PROCEDURAL BACKGROUND

5. On 8 July 2019, Trial Chamber VI (the "Trial Chamber") rendered its judgment (the "Trial Judgment"), whereby it found Mr Ntaganda guilty on all 18 counts of war crimes and crimes against humanity.[2]

[1] See the "Sentencing Appeal Brief", No. ICC-01/04-02/06-2468-Conf, 10 February 2020 (the "Defence Appeal"). A public redacted version was filed on 8 April 2020 as No. ICC-01/04-02/06-2468-Red.
[2] See the "Judgment" (Trial Chamber VI), No. ICC-01/04-02/06-2359, 8 July 2019 (the "Trial Judgment").

6. On 7 November 2019, the Trial Chamber issued its Sentencing Judgment[3] (the "Sentencing Judgment") whereby Mr Ntaganda was sentenced to 30 years imprisonment.

7. On 9 December 2019, the Defence filed its notice of appeal against the Sentencing Judgment,[4] indicating that the appeal would be directed against the whole decision and setting out twelve grounds of appeal.

8. On 10 February 2020, the Defence filed its Appeal.[5]

9. On 13 February 2020, the Appeals Chamber issued its decision on victim participation in the appeal against the Sentencing Judgment,[6] whereby each of the legal representatives of victims was instructed to file observations of 20 pages within 30 days of the notification of the Prosecution's responses to the Defence appeal brief.[7]

10. On 14 April 2020, the Prosecution filed its response to the Defence Appeal.[8]

III. CONFIDENTIALITY

11. Pursuant to regulation 23*bis*(1) and (2) of the Regulations of the Court, the present submissions are classified as confidential, since they refer to the content of documents likewise classified as confidential. A public redacted version of these submissions will be filed in due course.

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[3] See the "Sentencing Judgment", No. ICC-01/04-02/06-2442, 7 November 2019 (the "Sentencing Judgment").
[4] See the "Notice of Appeal against Sentencing Judgment (ICC-01/04-02/06-2442)", No. ICC-01/04-02/06-2448, 9 December 2019.
[5] See the Defence Appeal, *supra* note 1.
[6] See the "Decision on victim participation" (Appeals Chamber), No. ICC-01/04-02/06-2471 A3, 13 February 2020.
[7] *Idem*, p. 3.
[8] See the "Prosecution's response to "Sentencing Appeal Brief", No. ICC-01/04-02/06-2509-Conf, 14 April 2020 (the "Prosecution's Response"). A public redacted version was filed the same date as No. ICC-01/04-02/06-2509-Red.

IV. SUBMISSIONS

A. GROUND 7: THE CHAMBER ERRONEOUSLY DISREGARDED THE FACT THAT MR NTAGANDA SAVED THE LIVES OF 64 ENEMY SOLDIERS

12. The Defence contends that the Trial Chamber erred in law, or misappreciated the facts, in considering that saving the lives of 64 enemy combatants did not constitute a mitigating factor.[9] It argues that the fact that the Trial Chamber accorded to this fact no weight was an error.[10] The Defence claims that saving lives is a substantial humanitarian act and deserves credit in mitigation in any event,[11] even where, as in the instant case, the enemy soldiers were integrated into the UPC/FPLC forces and used "*for the benefit of the common plan*"[12] as found by the Trial Chamber.

13. The Legal Representative notes that in support of its contentions, the Defence relies on a finding of the ICTY Trial Chamber in the *Popović et al*. case,[13] but omits to mention that the accused Mr Pandurević to whom this extract of the judgment relates, saved the lives of civilians who were able to flee through the corridor he opened. Mr Pandurević did not capture and force the persons concerned to serve in his force, in contrast to what Mr Ntaganda did. Moreover, the ICTY Trial Chamber found that Mr Pandurević was neither a participant to the JCE to forcibly remove the population, nor was he found to have been involved in the planning or design of the operation,[14] which is also to be contrasted with Mr Ntaganda's conviction as a principal in the common plan.

14. As regards the other authorities cited by the Defence,[15] the Prosecution has advanced sufficiently detailed submissions thereon[16] with which the Legal

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[9] See the Defence Appeal, *supra* note 1, para. 75.
[10] *Idem*, para. 76.
[11] *Idem*, para. 77.
[12] See the Sentencing Judgment, *supra* note 3, para. 212.
[13] See the Defence Appeal, *supra* note 1, para. 77, referring to ICTY, *Popović et al*., Case No. IT-05-88-T, Trial Judgment, 10 June 2010 (the "*Popović et al*. Trial Judgment"), para. 2220.
[14] *Idem*, para. 2211.
[15] See the Defence Appeal, *supra* note 1, para. 80, referring to ICTY, *Blagojević and Jokić*, Case No. IT-02-60-A, Appeals Judgment, 9 May 2007, and ICTY, *Karadžić*, Case No. MICT-13-55-A, Appeals Judgment, 20 March 2019.
[16] See the Prosecution's Response, *supra* note 8, paras. 100-101.

Representative concurs. It is further submitted that since the persons the Defence claims to have been 'saved' by Mr Ntaganda have been subsequently compelled to fight for his group, this conduct of compelling prisoners of war to fight in one's own group may even constitute a crime in itself,[17] and a grave breach of article 130 of the Third Geneva Convention. For this reason alone, it is averred that the Defence's contention that Mr Ntaganda's *saving* 64 combatants constituted a "*substantial humanitarian act*"[18] irrespective of his ulterior motive, must necessarily be rejected. The commission of another crime, *i.e.* such as compelling a prisoner of war to fight in the forces of the hostile power, cannot constitute a mitigating factor under any circumstance.

15. Thus, the Trial Chamber did not err when it declined to ascribe weight to Mr Ntaganda's conduct in mitigation. It further did not err in expressing its decision in the way it did, namely, by stating that Mr Ntaganda's actions "*appear*[ed] *to have been aimed*" at using the soldiers for the benefit of the common plan.[19] Indeed, the Trial Chamber's formulation must be seen in the context of its summary of the Defence's submissions on two alleged instances of Mr Ntaganda saving the lives of enemy combatants, it did not find it established on the basis of probabilities *because*, according to the testimony of P-0016, that Mr Ntaganda indeed sought to save their lives but rather that he wanted to integrate these combatants into the UPC/FPLC.[20] It therefore *appeared* to the Trial Chamber that rather than saving lives he in fact wanted to further the common plan. As such, the Defence does not demonstrate any error in this finding. As correctly pointed out by the Prosecution, Mr Ntaganda's motive was clear, manifest or evident to the Trial Chamber.[21]

16. It is submitted that since it was not the Trial Chamber's task in the context of the sentencing proceedings to make determinative, beyond-reasonable-doubt-findings on what Mr Ntaganda *did* in relation to the 64 captured soldiers, it was

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[17] See e.g, articles 8(2)(a)(v) of the Statute. See also article 8(2)(b)(xv) of the Statue and 130 of the Third Geneva Convention.
[18] See the Defence Appeal, *supra* note 1, para. 78.
[19] See the Sentencing Judgment, *supra* note 3, para. 81.
[20] *Idem*, paras. 211-212.
[21] See the Prosecution's Response, *supra* note 8, para. 91.

entirely sufficient and legally sound to merely conclude that the Defence had not discharged the burden that, on the balance of probabilities, Mr Ntaganda intervened to save the lives of the captured combatants out of pure altruism. It was therefore correct for the Trial Chamber to simply ascribe no weight in mitigation in this regard.

17. Accordingly, Ground 7 should be dismissed.

B. GROUND 8: THE CHAMBER MISUNDERSTOOD, OR ERRONEOUSLY REJECTED, THE SIGNIFICANCE OF MR NTAGANDA'S RECENT PERSONAL EXPERIENCE OF GENOCIDE, WHICH HE FOUGHT TO END, IN RWANDA

18. The Defence argues that the Trial Chamber erred in determining Mr Ntaganda's traumatic personal experience in the Rwandan genocide was irrelevant to sentencing.[22] It avers that the Trial Chamber misunderstood its argument which merely sought to contextualise and explain Mr Ntaganda's conduct.[23] According to the Defence, the Trial Chamber failed to treat Mr Ntaganda's traumatic experiences as a relevant factor that should have been taken into account when assessing his culpability.[24] In support of its argument, the Defence cites US American case law according to which the traumatic experiences of war veterans must be taken into consideration in sentencing.[25] It argues that an offender's past trauma diminishes the culpability of criminal conduct, and that the Trial Chamber erred in not finding accordingly in Mr Ntaganda's case.[26] Finally, the Defence requests that the Appeals Chamber assess the issue *de novo*, arguing that there is no indication in the Sentencing Judgment that the Trial Chamber assessed the relevant evidence and Defence's submissions in this regard. It contends that the evidence on Mr Ntaganda's experiences in relation to the Rwandan genocide and the associated killing of his close relatives "*must be taken into consideration in substantial mitigation of* [sic] *sentence*".[27]

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[22] See the Defence Appeal, *supra* note 1, para. 83.
[23] *Ibid*.
[24] *Idem*, para. 84.
[25] *Idem*, paras. 84-85.
[26] *Idem*, paras. 87 and 94.
[27] *Idem*, para. 96.

19. The Prosecution posits that the matter of ascribing weight in mitigation falls within the Trial Chamber's discretion; that it committed no discernible error, and that the authorities cited by the Defence are inapposite.[28] According to the Prosecution, there is no basis for the Appeals Chamber to assess the matter *de novo*.[29]

20. The Legal Representative submits, first and foremost, that the Defence failed to establish on a balance of probabilities standard the alleged *traumatisation* that would have *impacted* on Mr Ntaganda's acts and decisions in relation to the crimes he went on to commit. Relying exclusively on the Accused recounting the traumatic experiences he witnessed in Rwanda as a 17 year-old to establish a mitigating circumstance is not sufficient to demonstrate to the requisite standard the *traumatisation* and the *entailing effects* thereof, given in particular that, according to Mr Ntaganda's own statements, he voluntarily joined the army, was trained as a soldier, subsequently became military instructor,[30] and "[i]*n any event,* […] *loved the army very much*".[31] Further, as submitted in his Observations on the Defence Appeal II, the Legal Representative posits that when evaluating the evidence of any witness, especially that of the accused, the Trial Chamber must carefully consider the person's motive or incentive.[32] In order to establish on the balance of probabilities that the alleged traumatic experiences caused Mr Ntaganda lasting trauma and did in fact impact on his conduct and motivations, the Defence should have presented at least some additional evidence to support Mr Ntaganda's statements, just as it called evidence on other factors it raised in mitigation, such as the pacification efforts. The Defence presented none.

21. It is submitted that only if the alleged trauma resulting from Mr Ntaganda's experiences in Rwanda would have been demonstrated on the balance of probabilities and had it been shown that his conduct was affected thereby, would he

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[28] See the Prosecution's Response, *supra* note 8, paras. 106 and 109-110.
[29] *Idem*, para. 104.
[30] See the transcript of the hearing held on 14 June 2017, No. ICC-01/04-02/06-T-209-Red-ENG-WT, p. 49, line 4 to p. 54, line 20.
[31] *Idem*, p. 54, line 10.
[32] See the "Observations of the Legal Representative of the Victims of the Attack on the Defence Appeal Part II", No. ICC-01/04-02/06-2525-Conf , 6 May 2020, para. 60 and references contained therein.

have been entitled to a mitigation of his sentence. Mr Ntaganda talking about himself was not sufficient to establish on the balance of probabilities that this experience impacted on the specific conduct he was found guilty for.

22. This is also what the Trial Chamber ultimately found. Indeed, although the Trial Chamber found Mr Ntaganda's testimony on his experience during the Rwandan genocide credible and did not doubt the traumatic impact thereof on Mr Ntaganda,[33] however, it did not find the part of Mr Ntaganda's testimony credible where he stated that he always fought and acted, including in 2002 and 2003, for the liberation and freedom of the civilian population in general.[34]

23. In contrast to more developed arguments put forward in its Appeal, in its Sentencing Submissions, the Defence advanced more general and rather abstract contentions incapable of demonstrating a link between the *trauma* allegedly suffered and the *conduct* that would have concretely been affected by said trauma. In particular, according to the Defence's earlier rather generic submissions, Mr Ntaganda's "*view of the world and human nature*" would have been "*profoundly affected*"[35] by his experience and his "*perception of the situation and his reaction*" would have been informed by the same.[36] The Defence, at the time, stated that Mr Ntaganda did not have "*vicious motives*" and that the "*impact that the genocide* ***must have had*** *on Mr Ntaganda* […] *should not* [have been] *underestimated*."[37] There was thus nothing assertively concrete in the Defence's contentions.

24. In the circumstances of the submissions at the time, the Trial Chamber reached an entirely reasonable conclusion on the evidence that was before it, namely Mr Ntaganda's testimony on his experiences in Rwanda at the time, and the Defence's interpretation of that evidence in its sentencing submissions. Having found some parts of Mr Ntaganda's evidence credible and other parts of it not credible, it reached

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[33] See the Sentencing Judgment, *supra* note 3, para. 210.
[34] *Ibid*.
[35] See the "Public Redacted Version of 'Sentencing Submissions on behalf of Mr Ntaganda'", No. ICC-01/04-02/06-2424-Red, 30 September 2019, para. 105.
[36] *Idem*, para. 108.
[37] *Idem*, para. 109.

a conclusion that was open to it on the evidence provided, and namely 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*".[38] Accordingly, the Trial Chamber did not reach a manifestly unreasonable decision. It also did not disregard relevant evidence or take irrelevant evidence into account.

25. In this regard, the ICTR Appeals Chamber found:

> "*Pursuant to Rule 101(B)(ii) of the Rules, a Trial Chamber is required to take into account any mitigating circumstances in determining a sentence. The accused, however, bears the burden of establishing mitigating factors by a preponderance of the evidence. The Appeals Chamber notes that the Appellant made no sentencing submissions at trial. In such circumstances, the Trial Chamber's determination that there were no mitigating circumstances was within its discretion and does not constitute a legal error. If an accused fails to put forward relevant information, the Appeals Chamber considers that, as a general rule, a Trial Chamber is not under an obligation to seek out information that counsel did not see fit to put before it at the appropriate time. Rule 86(C) of the Rules clearly indicates that sentencing submissions shall be addressed during closing arguments, and it was therefore the Appellant's prerogative to identify any mitigating circumstances instead of directing the Trial Chamber's attention to the record in general. The Appellant is simply advancing arguments on appeal that he failed to put forward at the trial stage, and the Appeals Chamber does not consider itself to be the appropriate forum at which such material should first be raised*".[39]

26. Despite general differences in the statutory framework of the international *ad hoc* tribunals and the Court, it is submitted that the above principles equally hold true for the Court, and should apply to the present instance. The Defence does not demonstrate that the Trial Chamber's findings were so unreasonable that no reasonable Chamber could have decided that way. Further, as rightly pointed out by the Prosecution, "[t]*he 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*".[40]

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[38] See the Sentencing Judgment, *supra* note 3, para. 210.
[39] See ICTR, *Muhimana*, Case No. ICTR-95-1B-A, Judgement (Appeals Chamber), 21 May 2007, para. 231. See also ICTR, *Rukundo*, Case No. ICTR-2001-70-A, Judgement (Appeals Chamber), 20 October 2010, para. 255.
[40] See the Prosecution's Response, *supra* note 8, para. 108.

27. In light of all of the above, Ground 8 should be dismissed accordingly.

C. GROUND 10: The Chamber Erred in Fact, Law and Procedure in Failing to Find that Mr Ntaganda Contributed to Reconciliation with the Lendu Community and Facilitated the Demobilisation of UPC/FPLC Members

28. Under Ground 10, the Defence is challenging the Trial Chamber's findings on Mr Ntaganda's alleged contribution to the reconciliation process with the Lendu ethnic group in Ituri. It argues that the Trial Chamber erred in fact or in law in finding that it "*does not consider a genuine or concrete contribution to peace and reconciliation, or demobilisation and disarmament on the part of Mr Ntaganda to be established overall, on a balance of probabilities*".[41] The Defence contends that the Trial Chamber erred in the assessment of the evidence, erred in the application of the standard of 'balance of probabilities' and reached a manifestly unreasonable decision.[42]

29. In particular, the Defence relies on the part of the *Katanga* Sentencing Judgment in which Trial Chamber II considered Mr Katanga's submissions on his involvement in peace and reconciliation efforts,[43] contrasting that Judgment's finding with the Trial Chamber's finding on the genuine efforts of reconciliation. However, a closer review of the *Katanga* Sentencing Judgment reveals that Trial Chamber II was unable to conclude on the balance of probabilities that Mr Katanga actually sought, through his alleged efforts, to promote the peace process.[44] It only found his genuine efforts in the process of disarming and demobilising child soldiers to be established on the balance of probabilities on the basis of "*several documents and testimonies*".[45]

30. It is submitted that determining mitigating circumstances is highly fact-sensitive. One case cannot readily be compared with another. The only comparable

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[41] See the Defence Appeal, *supra* note 1, para. 113 referring to the Sentencing Judgment, *supra* note 3, para. 224.
[42] *Idem*, paras. 113-114.
[43] *Idem*, para. 121.
[44] See the "Decision on Sentence pursuant to article 76 of the Rome Statute", No. ICC-01/04-01/07-3484-tENG-CORR, 23 October 2015 (the "*Katanga* Sentencing Judgment"), para. 114.
[45] *Idem*, para. 115.

similarity between the two cases is that both Trial Chambers engaged in assessing whether the alleged efforts and contributions were both genuine and palpable[46] *viz.* concrete.[47] The Defence's contention that the *Katanga* Trial Chamber did not make results a precondition[48] is misconceived, as the determination on the 'genuine' and 'palpable' nature of the conduct necessarily implies enquiring into *concrete* and *result-oriented* efforts. This is what both Trial Chambers effectively did.

31. The Prosecution rightly submits that the Defence misapprehends the trial record and the Sentencing Judgment.[49] The Prosecution further correctly points out that the Trial Chamber did in fact consider the evidence that the Defence claims was highly relevant and which it alleges the Trial Chamber failed to consider.[50] The Legal Representative agrees with the Prosecution's submissions in this regard.

32. The Legal Representative will only address the Defence's argument that the Trial Chamber's consideration of the absence of evidence of Mr Ntaganda having travelled to the villages of Mongbwalu, Lipri and Kobu was erroneous as it, in the Defence's submission, constituted the taking into consideration irrelevant factors.[51] The Defence submits that whether Mr Ntaganda visited these villages had no impact on an assessment of whether the efforts were genuine.[52] The Legal Representative disagrees.

33. Contrary to the Defence's contentions, the Trial Chamber properly assessed *all* factors raised before it as regards the alleged efforts in pacification and reconciliation, including, *inter alia*, the Legal Representative's previous submissions that no outreach and pacification efforts were undertaken in the affected villages, such as

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[46] See the Sentencing Judgment, *supra* note 3, para. 218. See also the *Katanga* Sentencing Judgment, *supra* note 44, para. 91. Instead of stating "concrete", the Chamber employed the term "palpable".
[47] *Ibid*. See also 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. 72.
[48] See the Defence Appeal, *supra* note 1, para. 121.
[49] See the Prosecution's Response, *supra* note 8, para. 124.
[50] *Idem*, para. 126.
[51] See the Defence Appeal, *supra* note 1, para. 131.
[52] *Ibid*.

Mongbwalu, Lipri, and Kobu.[53] The aforementioned locations are not only significant in that they represent some of the larger settlements in the region; they were also the arguably most and severely affected communities during the First and Second Operations and, therefore, Mr Ntaganda's alleged reconciliation efforts at the exclusion of these locations can hardly be described as his genuine efforts for reconciliation and peace between the Lendu and Hema communities at the time. In light of all of the evidence before it, it was not unreasonable for the Trial Chamber to consider the fact that Mr Ntaganda did not personally travel to the most affected villages for the purpose of reconciliation. Further, the Trial Chamber correctly pointed to the limited political purpose the alleged reconciliation efforts had.[54]

34. It is submitted that the Defence fails to demonstrate any discernible error the Trial Chamber would have committed in the assessment of Mr Ntaganda's role in the alleged reconciliation and pacification efforts. The Defence's challenges do not rise beyond mere disagreement with the Trial Chamber's assessment of the evidence.

35. Accordingly, Ground 10 should be dismissed.

D. GROUND 11: THE CHAMBER ERRED BY FAILING TO GIVE WEIGHT TO MR NTAGANDA'S CONDUCT DURING THE TRIAL AND COOPERATION WITH THE COURT, AND BY FAILING TO GIVE A REASONED OPINION IN TAKING MR NTAGANDA'S HUNGER STRIKE INTO ACCOUNT TO DIMINISH THE MITIGATING VALUE OF HIS COOPERATION WITH THE COURT

36. The Defence argues that the Trial Chamber erred by failing to give a reasoned opinion, and misappreciated the facts, relating to Mr Ntaganda's conduct during the trial.[55] In particular, the Defence contends that the Trial Chamber failed to give credit to Mr Ntaganda for his 'consistently respectful and cooperative' behaviour at trial, including its finding – without explanation or reasons – that his cooperation was diminished by the 'exception' to this behaviour arising from his hunger strike.[56] The Defence contends that the Trial Chamber reached this finding without addressing the

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[53] See the Sentencing Judgment, *supra* note 3, para. 221.
[54] *Idem*, para. 220.
[55] See the Defence Appeal, *supra* note 1, para. 173.
[56] *Idem*, paras. 173-174.

statement Mr Ntaganda read out in court after terminating his hunger strike at the time.[57] The Defence argues that the Appeals Chamber should address the matter *de novo*.[58]

37. The Prosecution submits that the Defence misreads the Sentencing Judgment, which – contrary to the Defence's contention – did provide reasons and correctly accorded no weight to Mr Ntaganda's good behaviour, and further argues that Defence request for a *de novo* review should therefore be rejected.[59]

38. The Legal Representative recalls that the Court's jurisprudence sets out that good and compliant behaviour does not carry any weight in mitigation. In the *Katanga* case, Trial Chamber II set out that "*to be considered as a mitigating circumstance, cooperation need not be substantial. However, it must exceed mere good behaviour, which, albeit welcome, cannot on its own amount to a circumstance that could mitigate the sentence to be imposed*".[60] In the *Bemba* case, Trial Chamber III also found that "*good behaviour and compliance with the law are expected of any accused or convicted person and therefore do not constitute mitigating circumstances, unless exceptional*".[61] Although, in the *Al Mahdi* case, Trial Chamber VII did find that good behaviour constituted one of the mitigating factors in determining the sentence, it also underlined the "*limited importance*" of the convicted person's "*good behaviour in detention despite his family situation*".[62]

39. As regards the evaluation of Mr Ntaganda's hunger strike, it is submitted that the Trial Chamber was entitled to treat it as a lack of cooperation, thus affecting the overall assessment of his behaviour, as it did. Indeed, ICTY Chambers have viewed hunger strikes as disruptive behaviour, reasoning that it had an impact on the

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[57] *Idem*, para. 174.
[58] *Idem*, para. 175.
[59] See the Prosecution's Response, *supra* note 8, para. 160.
[60] See the *Katanga* Sentencing Judgment, *supra* note 44, para. 127.
[61] 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. 81.
[62] See the "Judgment and Sentence" (Trial Chamber VII), No. ICC-01/12-01/15-171, 27 September 2016, para. 109.

exercise of the Chamber's judicial function and the tribunal's mission.[63] Thus, having considered the hunger strike as un-cooperative behaviour accorded with the relevant international jurisprudence.

40. The Defence further appears to argue that because the Trial Chamber erroneously considered this one factor, Mr Ntaganda did not receive the 'credit' for his behaviour he would otherwise have received.[64] However, as held by the ICTR Appeals Chamber, "[p]*roof of mitigating circumstances does not automatically entitle the Appellant to a 'credit' in the determination of the sentence; rather, it simply requires the Trial Chamber to consider such mitigating circumstances in its final determination*".[65]

41. The Defence does not demonstrate any discernible error in the Trial Chamber's reasoning, but rather disagrees with the Trial Chamber's assessment of the relevant factors. Therefore, Ground 11 should be dismissed.

E. GROUND 12: NO REASONABLE CHAMBER COULD HAVE FAILED TO CONCRETELY TAKE INTO ACCOUNT MR NTAGANDA'S SUBSTANTIAL EFFORTS TO [REDACTED] IN MITIGATION

42. The Defence claims that the Trial Chamber erred in making no finding on the fact that Mr Ntaganda had substantially contributed to [REDACTED], which, had it done so, would have been deserving of mitigation.[66] It argues that the Trial Chamber merely stated that his conduct had been commendable without further specifying what this determination meant.[67] The Defence avers that the Trial Chamber then proceeded to giving this factor no weight and simply concluded that "*considering this against the overall gravity and aggravating circumstances established above for the crimes of which he has been convicted, the Chamber considers the weight accorded to be too limited to impact on the individual and overall sentences*".[68]

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[63] See ICTY, *Šešelj*, Case 03-67-T, Urgent Order to the Dutch Authorities Regarding Health and Welfare of the Accused, 6 December 2006, para. 2.
[64] See the Defence Appeal, *supra* note 1, para. 175.
[65] See ICTR, *Niyitegeka*, Case No. ICTR-96-14-A, Appeal Judgment, 9 July 2004, para. 267.
[66] See the Defence Appeal, *supra* note 1, para. 176.
[67] *Ibid*.
[68] *Ibid*., referring to the Sentencing Judgment, *supra* note 3, para. 235.

43. The Defence further argues that the Trial Chamber erred in [REDACTED] stating that the relevant information was already before it in form a report from the Registry, and therefore not taking additional, relevant information into account.[69]

44. The Prosecution submits that Mr Ntaganda misreads the Trial Judgment and overstates his actions.[70] According to the Prosecution, Mr Ntaganda [REDACTED].[71] It states that the Trial Chamber considered Mr Ntaganda's alleged [REDACTED] and reached a reasonable decision with which the Defence simply disagrees.[72]

45. In line with his previous submissions on the matter,[73] the Legal Representative cannot entirely agree with the Prosecution's characterisation of the conduct in question. Indeed, he submits that while Mr Ntaganda's positive involvement did deserve some recognition in mitigation, this factor could only have been given limited weight by the Trial Chamber, this is what the Trial Chamber properly did. Therefore, the Legal Representative can also not agree with the Defence's contention that Mr Ntaganda's conduct was given no weight. Furthermore, contrary to the Defence's argument, the Trial Chamber did not err in deciding [REDACTED].

46. It is submitted that both, the decision on whether or not to admit the document and on the weighing of the specific conduct in question are discretionary decisions and may only be disturbed on appeal if they constitute abuses of said discretion. The Defence fails to demonstrate any abuse of discretion. Indeed, the Trial Chamber, while not explaining further its assessment of "*commendable*" conduct, *did* consider it as a mitigating factor and *did* attach credit, although limited, to this factor. This is clear from the Trial Chamber's reasoning where it states that "*notwithstanding, considering **this** against the overall gravity and aggravating circumstances established above* […] *the Chamber considers **the weight to be accorded** to be **too limited** to impact on the*

[69] *Idem*, para. 181.
[70] See the Prosecution's Response, *supra* note 8, para. 167.
[71] *Ibid*.
[72] *Idem*, para. 166.
[73] See the "Sentencing Submissions of the Common Legal Representative of the Victims of the Attacks", No. ICC-01/04-02/06-2422-Conf, 30 September 2019, para. 62.

individual and overall sentences".[74] Thus, it is incorrect to state that the Trial Chamber did not give Mr Ntaganda *any* weight to his specific behaviour; the issue is rather that the Defence does not agree with the *amount* of credit given in mitigation. However, since the specific weighing and attaching of weight to specific factors is within the discretionary power of the Trial Chamber and in the absence of a showing of a material error, the Appeals Chamber may not interfere with the Trial Chamber's decision. The Trial Chamber did not err.

47. As the Legal Representative has previously argued, the crimes for which Mr Ntaganda has been found guilty are of the gravest kind and the punishment therefore had to be severe to reflect the gravity of the crimes and, in particular, to render justice to the victims.[75] Even though Mr Ntaganda's conduct [REDACTED] deserved to be recognised in mitigation, the Legal Representative firmly agrees with the way in which the Trial Chamber exercised its discretion, namely that, overall, this factor could not have significantly impacted on the individual and overall sentences.[76]

V. CONCLUSION

48. The Legal Representative submits that the Defence failed to demonstrate any discernible errors in the Sentencing Judgment that would call upon the Appeals Chamber to overturn any findings contained therein. Accordingly, the Defence Appeal should be dismissed in its entirety.

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[74] See the Sentencing Judgment, *supra* note 3, para. 235.

[75] See the "Sentencing Submissions of the Common Legal Representative of the Victims of the Attacks", *supra* note 73.

[76] See the Sentencing Judgment, *supra* note 3, para. 235.

RESPECTFULLY SUBMITTED

Dmytro Suprun
Common Legal Representative of the Victims of the Attacks

Dated this 28th Day of May 2020

At The Hague, The Netherlands