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**International
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Date: **22 June 2020**

THE APPEALS CHAMBER

Before:

**Judge Howard Morrison, Presiding
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 with Public Annex A and Annex B

Public Redacted Version of “Defence response to CLR1 and CLR2 Observations on Sentencing Appeal Brief”, 2 June 2020, ICC-01/04-02/06-2541-Conf

Source: Defence Team of Mr. Bosco Ntaganda

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Further to the “Observations of the Common Legal Representative of the Victims of the Attacks on the Defence Sentencing Appeal”¹ and the “Observations of the Common Legal Representative of the Former Child Soldiers on Mr Ntaganda’s Appeal against the Sentencing judgment”,² Counsel for Mr. Ntaganda (“Defence” or “Mr. Ntaganda”) hereby submit this:

Defence response to CLR1 and CLR2 Observations on Sentencing Appeal Brief

INTRODUCTION³

1. Mr. Ntaganda responds herein to the observations of the CLR1 and the CLR2 to his appeal against the Sentencing Judgment.
2. Together, in addition to the 52 pages of submissions on sentence submitted at first instance,⁴ the CLRs have now filed a combined 40 pages of submissions challenging Mr. Ntaganda’s appeal against a 30-year prison sentence. Like the Prosecution, the CLRs remain unwaveringly in support of Mr. Ntaganda receiving the maximum sentence, and urge the Appeals Chamber to dismiss the errors raised on appeal in their entirety.
3. Each of the submissions of the CLRs is contested. Those novel arguments which warrant a reply are addressed, for the Appeals Chamber’s assistance, herein. Both CLR1 and CLR2 have made submissions on Ground 10. As such, Mr. Ntaganda responds to both observations in the present response to address this partial overlap, and for reasons of efficiency.
4. Despite Mr. Ntaganda’s commendable attitude towards, and behaviour during, the proceedings; his genuine and concrete contributions to peace and reconciliation in the region of Ituri; his genuine and concrete contributions to demobilization; and his actions to protect life in the ICC DC; the CLRs take the position that this is the kind of case, and Mr. Ntaganda is the kind of defendant, that warrant the imposition of the maximum sentence at the ICC. What is missing from their observations is any explanation as to why the imposition of this

¹ [CLR2-Observations-2529](#).

² [CLR1-Observations-2531](#).

³ The reply as well as Annex B are filed confidentially pursuant to regulation 23bis(1) of the RoC, as they refer to confidential material and evidence on the record. The Defence undertakes to submit a public redacted version in due course.

⁴ [CLR2-Submissions-2422](#); [CLR1-Observations-2423](#).

particular sentence is in the personal interests of the victims they represent, or any indication that their views were sought on this question in this phase of the proceedings.

5. Mr. Ntaganda maintains his submissions on appeal in their entirety, and the errors identified therein. A 30-year sentence is disproportionate. The errors committed by the Trial Chamber in its determination warrant its substantial reduction.

GROUND 3 – THE CHAMBER FAILED TO CONDUCT AN *IN CONCRETO* ANALYSIS OF MR. NTAGANDA’S LIMITED PARTICIPATION AND KNOWLEDGE OF RAPE AND SEXUAL SLAVERY IN COMING TO INDIVIDUAL SENTENCES FOR COUNTS 6, 7, 8 AND 9 – CLR 1⁵

I. Degree of intent

6. The CLR1 submissions are 10 pages in length. Over five pages are spent arguing against Mr. Ntaganda’s alleged position that the Trial Chamber incorrectly assessed his **degree of intent** under rule 145(1)(c) of the Rules.⁶ Mr. Ntaganda did not raise this as an error. Rather, he submitted that the Trial Chamber misapplied the concept of **degree of participation** under rule 145(1)(c) and in doing so failed to take into account relevant facts and give a reasoned opinion.⁷ As such, the majority of CLR1’s submissions under Ground 3 are in response to an error that was not raised on appeal, and should be disregarded.

II. Degree of participation

7. Although Mr. Ntaganda did not submit that “physical proximity to the crimes” is a legal requirement for liability,⁸ he agrees with CLR1 to the extent that physical proximity may not always exist in co-perpetration cases. This does not mean that a Trial Chamber is entitled to ignore the degree of proximity between the defendant and the crimes, or indeed whether he or she had any knowledge of them in assessing the degree of participation for the purpose of sentencing.

8. When assessing Mr. Al-Mahdi’s degree of participation in the intentional attacking of protected objects, for which he was convicted as a co-perpetrator, Trial Chamber VIII took into account his proximity to the attacks, despite it not being a legal requirement for liability.⁹

⁵ [CLR1-Observations-2531](#), paras.17-37.

⁶ [CLR1-Observations-2531](#), paras.23-32.

⁷ [Sentencing Appeal Brief](#), paras.48,50-51.

⁸ [CLR1-Observations-2531](#), para.31.

⁹ [Bemba-TJ-3343](#), para.69; [Lubanga-TJ-2842](#), para.1003; [Lubanga-AJ-3121](#), paras.458,460,465-466.

Trial Chamber VIII considered that Mr. Al-Mahdi “oversaw the entire operation”, “supervised its execution”, “collected and distributed the necessary tools”, “provided logistical and moral support to the direct perpetrators and supervised them” and “**was present at every site.**”¹⁰ These considerations were separate from those taken into account in assessing his “degree of intent”.¹¹

9. Had Mr. Al-Mahdi been in a different region of Mali at the time of the attacks, or indeed had no knowledge that they had even occurred, these would also have been factors relevant to his degree of participation, and a failure to consider them would have been an error. The “ultimate assessment” of the level of culpability of the convicted person and its impact on sentence “always depends on an *in concreto* assessment of the degree of participation”.¹²

10. This *in concreto* assessment was missing in Mr. Ntaganda’s case. A sweeping introductory statement that Mr. Ntaganda’s culpability for both the First and Second Operation crimes was considered to be high, irrespective of physical proximity or knowledge,¹³ does not suffice. Mr. Ntaganda was convicted of 11 different crimes. For some he was found to be present. For others there are no findings that he knew that they occurred. For Counts 6, 7, 8 and 9, there are no findings that he was aware of the incidents for which he was convicted of rape, or was aware of any instance of sexual enslavement. This should have been considered in an assessment of his “degree of participation”, and its impact explained. The statutory duty incumbent on a Trial Chamber to provide a reasoned opinion is not limited to crimes for which the degree of participation is being relied upon to increase his liability.¹⁴

11. CLR1’s reliance on the *Katanga* case is misplaced. She argues that Trial Chamber II found that Mr. Katanga’s “degree of participation and intent [...] must not be underrated”, and did so “without considering Mr. Katanga’s proximity or awareness of the details of specific incidents and victims involved”.¹⁵ Mr. Katanga was convicted, not as an indirect co-perpetrator under article 25(3)(a), but as an accessory under article 25(3)(d) of the Statute, with its different subjective and objective elements. Regardless, under the heading “*Degree of participation and intent of Germain Katanga*”, Trial Chamber II recalled that it had been

¹⁰ [Al-Mahdi-TJ-171](#), para.84 (emphasis added).

¹¹ [Al-Mahdi-TJ-171](#), para.85.

¹² [SJ](#), para.15, citing [Bemba-et-al-SAJ-2276](#), para.60; [Katanga-SJ-3484](#), para.61.

¹³ [CLR1-Observations-2531](#), para.31, citing to [SJ](#), para.36.

¹⁴ [CLR1-Observations-2531](#), para.31.

¹⁵ [CLR1-Observations-2531](#), para.32.

“unable to establish beyond reasonable doubt that Germain Katanga was present in Bogoro on 24 February 2003.”¹⁶ The charges against Mr. Katanga related **only** to this attack on Bogoro on 24 February 2003.¹⁷ As such, Trial Chamber II’s proximity discussion, short as it was, covered all the charges. If the Chamber could not establish that Mr. Katanga was at Bogoro on 24 February 2003, this was relevant to the proximity of all the charged crimes, all the specific incidents, and all the involved victims.

12. The Defence has not suggested that the *mens rea* threshold for liability as a co-perpetrator is or should equate to “actual knowledge”.¹⁸ However, the requirement that a co-perpetrator provide an “essential contribution with the resulting power to frustrate the commission of the crime”¹⁹ does not mean that once this essential contribution is established, there can be no subsequent differentiation in the defendant’s degree of participation in the different crimes for which he or she was convicted.²⁰ The CLR1’s position that a Trial Chamber can ignore proximity and level of knowledge when it comes to an assessment of “degree of participation” would equate the sentences of an indirect co-perpetrator who had no knowledge of the underlying acts which were committed in a region he had never visited, with the sentence of another who was present and observing during their commission. “Degree of participation” must mean something.

13. And of course it does. In all likelihood, the ICC will face cases where the degree of participation of an indirect co-perpetrator in these crimes is far greater than that of Mr. Ntaganda. This increased degree of participation will warrant a higher sentence. There must be some kind of scale, and some differentiation on the basis of degree of participation in the crimes. The error identified here is not that the Trial Chamber didn’t reasonably weigh these factors;²¹ it ignored them in respect of Counts 6, 7, 8 and 9.²²

¹⁶ [Katanga-SJ-3484](#), para.62.

¹⁷ [Katanga-Documents-Summarising-Charges-1588](#); [Katanga-Documents-Summarising-Charges-1588-Anx1](#).

¹⁸ [CLR1-Observations-2531](#), para.29. See [Defence Appeal Brief – Part II](#), para.300. [CLR1-Observations-2531](#), para.29. See [Defence Appeal Brief – Part II](#), para.300. See [Defence Appeal Brief – Part II](#), para.300.

¹⁹ [Defence Appeal Brief – Part II](#), para.369, citing to [Lubanga-AJ-3121](#), para.469.

²⁰ [CLR1-Observations-2531](#), para.35.

²¹ [CLR1-Observations-2531](#), para.22.

²² [Sentencing Appeal Brief](#), paras.51-52.

GROUND 7 – THE CHAMBER ERRONEOUSLY DISREGARDED THE FACT THAT MR. NTAGANDA SAVED THE LIVES OF 63 ENEMY SOLDIERS – CLR2²³

14. CLR2 misunderstands the discernible error of law and fact committed by the Trial Chamber, which disregarded the significant mitigating value of Mr. Ntaganda having saved the lives of 64 APC members, on the sole basis that “Mr Ntaganda’s actions **appear** to have been aimed at using the soldiers for the benefit of the common plan”.²⁴

15. In its Sentencing Submissions, the Defence highlighted two instances in which Mr. Ntaganda saved the lives of enemy soldiers, the first in Mandro²⁵ and the second in Mongbwalu.²⁶ While the Trial Chamber disregarded the latter on the basis of its assessment of D-0251’s testimony,²⁷ it admitted P-0016’s evidence pursuant to rule 68(2)(c) – over Defence objections²⁸ - and relied on it. Accordingly, the Trial Chamber was bound to consider and assess the second event in Mandro based on the testimony of P-0016. Ground 7 challenges only the Trial Chamber’s conclusion related to Mandro.²⁹

16. Refusing to accord any mitigating value to Mr. Ntaganda for saving the lives of 64 enemy soldiers on the basis that it **appeared** to the Trial Chamber that Mr. Ntaganda’s motive was to use them for the benefit of the common plan, was so unreasonable as to constitute an abuse of discretion. The Trial Chamber heard no evidence that Mr. Ntaganda’s motive was to use the APC enemy soldiers for the purpose of committing crimes. It did, however, hear evidence that, when Mr. Ntaganda saved the lives of 64 enemy soldiers, his focus was on creating a disciplined armed force and the opportunity to acquire experienced soldiers was welcome precisely for this purpose.³⁰ Mr. Ntaganda testified to having set up an ideology training camp for APC deserters³¹ and that “it was about getting them to understand military ideology according to which each soldier had to be disciplined, they needed military discipline. They had to be taught that soldier ensure the safety and security of civilians and

²³ [CLR2-Observations-2529](#), paras.12-17.

²⁴ [SJ](#), para.212 (emphasis added).

²⁵ [Defence-Submissions-2424](#), para.111.

²⁶ [Defence-Submissions-2424](#), para.112.

²⁷ [SJ](#), para.212.

²⁸ [Defence-Response-1788](#), [Defence-LtA-1816](#).

²⁹ [Sentencing Appeal Brief](#), para.75.

³⁰ [DRC-OTP-0126-0422-R02](#), para.47.

³¹ [T-214](#),5:15-16.

property.”³² The Trial Chamber’s failure to consider this relevant evidence, which contradicts its basis for refusing to accord mitigating weight to this incident, was an error.

17. The Trial Chamber also failed to consider that P-0016 was [REDACTED]³³ [REDACTED]³⁴ was to “*organiser l’armée de l’UPC*”.³⁵ Following their ideology training, the other former APC members were given a uniform and a weapon,³⁶ before being sent to reinforce the UPC/FPLC.³⁷ The Trial Chamber also failed to consider its finding that the UPC/FPLC was engaged in a military campaign against RCD-KML/APC,³⁸ an endeavour for which the former APC members’ experience was necessarily of high value, which also contradicts the Trial Chamber’s basis for not according any mitigating value to this event.

18. CLR2’s attempt to draw a distinction between Mr. Ntaganda’s actions and those of Vinko Pandurević in the *Popović* case, on the basis that he neither captured nor forced the persons concerned to serve in his force, is baseless.³⁹ *First*, as previously recognized and accepted in that case, actions that protect human life on a large scale must be acknowledged, accorded weight and encouraged, even when those actions may be tainted by some ulterior motive.⁴⁰ *Second*, Mr. Ntaganda was not charged with compelling prisoners of war to fight in the forces of the hostile power⁴¹ – a crime not found in the material jurisdiction of the ICC in the context of a non-international armed conflict⁴² – and there is no evidence that the 64 former APC soldiers, whose lives were saved, were either compelled or forced to serve in the UPC/FPLC. *Third*, P-0016 for one, [REDACTED],⁴³ following which he joined the UPC/FPLC. *Lastly*, the evidence does not allow for an inference that the 64 former APC members were detained during their ideology training. It is thus incorrect to claim, and there is no basis to infer, that the former APC soldiers were forced to serve in the UPC/FPLC or that Mr. Ntaganda, by saving their lives, engaged in a further crime.⁴⁴

³² [T-214](#), 4:23-5:1.

³³ [DRC-OTP-0126-0422-R02](#), para.70.

³⁴ [DRC-OTP-0126-0422-R02](#), para.70.

³⁵ [DRC-OTP-0126-0422-R02](#), para.85.

³⁶ [DRC-OTP-0126-0422-R02](#), para.59.

³⁷ [DRC-OTP-0126-0422-R02](#), para.58.

³⁸ [TJ](#), para.793.

³⁹ [CLR2-Observations-2529](#), para.13.

⁴⁰ [Sentencing Appeal Brief](#), para.77.

⁴¹ [Statute](#), articles 8(2)(a)(v) and 8(2)(b)(xv).

⁴² [Statute](#), articles 8(2)(c) and 8(2)(e).

⁴³ [DRC-OTP-0126-0422-R02](#), para.47.

⁴⁴ [CLR2-Observations-2529](#), paras.13-14.

19. The Trial Chamber found that Mr. Ntaganda saved the lives of 64 former APC members. There is no evidence that these former APC members were either used or engaged in the commission of crimes. Pursuant to the balance of probability standard, the Trial Chamber committed a discernible error in refusing to accord any mitigating value to Mr. Ntaganda's actions, and CLR2's arguments must be rejected.

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 – CLR2⁴⁵

20. CLR2 misunderstands the discernible error committed by the Trial Chamber by giving no weight in mitigation to “Mr Ntaganda's personal circumstances and motivations connected to his experience of the Rwandan genocide”.⁴⁶

21. The Trial Chamber erred in fundamentally misunderstanding the Defence's argument concerning the significance of these experiences.⁴⁷ The Defence's argument was not that “‘the alleged protection of one group through acts aimed at the destruction and disintegration of another’, could be a reason for mitigating sentence”⁴⁸ but rather that “the horrible and traumatizing experience of genocide endured by Mr. Ntaganda helps contextualize and explain Mr. Ntaganda's criminal conduct.”⁴⁹

22. Having found that it “does not doubt the traumatic impact on Mr Ntaganda of having lived through the Rwandan genocide, including the loss of his close family members”,⁵⁰ the Trial Chamber erred by giving weight to irrelevant considerations, in particular, Mr. Ntaganda's testimony “that he always fought and acted, including in 2002 and 2003, for the liberation and freedom of the civilian population in general in Ituri and that this revolutionary ideology was governing the functioning of the UPC/FPLC.”⁵¹ CLR2 merely repeats the Trial Chamber's error without engaging with the Defence's arguments.⁵²

⁴⁵ [CLR2-Observations-2529](#), paras.18-27.

⁴⁶ [SJ](#), para.209.

⁴⁷ [Sentencing Appeal Brief](#), para.83.

⁴⁸ [Sentencing Appeal Brief](#), para.83.

⁴⁹ [Sentencing Appeal Brief](#), para.83.

⁵⁰ [SJ](#), para.210.

⁵¹ [SJ](#), para.210.

⁵² [CLR2-Observations-2529](#), para.22.

23. CLR2 is also wrong to assert that “the Defence failed to establish on a balance of probabilities standard the alleged *traumatisation* and that **would have impacted Mr Ntaganda’s acts and decision** in relation to the crimes he went on to commit.”⁵³ Again, this is not the argument put forward by the Defence in this ground. Nor was it necessary to adduce more evidence to establish that his experiences during the Rwandan genocide had an impact on Mr. Ntaganda.⁵⁴ Indeed, the Trial Chamber found that it did.⁵⁵ Contrary to CLR2’s submissions, the Trial Chamber was in possession of all information required to pronounce on the Defence’s argument and there was no further production burden on the Defence.⁵⁶

24. Lastly, the CLR2’s reference to the ICTR Appeals Chamber’s pronouncement in *Muhimana*, does not find application in the present case.⁵⁷ First, before the ICTR mitigation evidence had to be led at trial. More importantly, Mr. Ntaganda testified about the relevant mitigating circumstances.

25. CLR2’s arguments must be rejected. The Appeals Chamber is requested to address this issue *de novo* and to find that Mr. Ntaganda’s unique and exceptional background warrants substantial mitigation of sentence.⁵⁸

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 – CLR1⁵⁹ AND CLR2⁶⁰

26. Ground 10 of Mr. Ntaganda’s Sentencing Appeal Brief addresses two distinct errors;⁶¹ the Trial Chamber’s finding that Mr. Ntaganda’s genuine and concrete contribution to peace and reconciliation was not established overall on a balance of probabilities;⁶² and the Trial Chamber’s finding that Mr. Ntaganda’s genuine and concrete contribution to demobilisation and disarmament was not established overall on a balance of probabilities.⁶³ In both cases, the

⁵³ [CLR2-Observations-2529](#), para.20 (emphasis added, italics in original).

⁵⁴ [CLR2-Observations-2529](#), para.20.

⁵⁵ [SJ](#), para.210.

⁵⁶ [CLR2-Observations-2529](#), para.20.

⁵⁷ [CLR2-Observations-2529](#), para.25.

⁵⁸ [Sentencing Appeal Brief](#), para.96.

⁵⁹ [CLR1-Observations-2531](#), paras.38-48.

⁶⁰ [CLR2-Observations-2529](#), paras.28-35.

⁶¹ [Sentencing Appeal Brief](#), Ground 10, paras.111-172.

⁶² [SJ](#), paras.218-221,224.

⁶³ [SJ](#), para.224.

Trial Chamber's failure to take these issues into account in mitigation of sentence was so unreasonable as to constitute an abuse of discretion.⁶⁴

27. Both CLR1 and CLR2 address Ground 10 in their observations. While CLR2 addresses discrete findings related to Mr. Ntaganda's genuine and concrete contribution to peace and reconciliation,⁶⁵ CLR1 focuses on isolated findings concerning Mr. Ntaganda's genuine and concrete contribution to demobilization and disarmament.⁶⁶ For the reasons set out below, the arguments put forward by both should be rejected.

I. Mr. Ntaganda's genuine contribution to peace and reconciliation – CLR2

28. Mr. Ntaganda agrees with CLR2 that the determination of mitigating circumstances is a fact-sensitive exercise and that comparing cases is of limited assistance.⁶⁷ However, the Defence neither attempted to compare the facts of this case with those in *Katanga* nor relied on the facts in that case.⁶⁸ The references to *Katanga* were to underline the importance of **“efforts undertaken to promote peace and reconciliation [which] can and must be taken into account in the sentencing [as they] could potentially mitigate the sentence”** and the fact that, although efforts to promote peace and reconciliation must be both palpable and genuine, results are not a pre-condition,⁶⁹ i.e. **“[...] without the need to demand results.”**⁷⁰

29. CLR2 is wrong to claim that the *Katanga* Sentencing Judgment made results a precondition when assessing efforts undertaken to promote peace and reconciliation.⁷¹ It did not.⁷² Notably, when assessing the evidence in this case, the Trial Chamber failed to consider that results are not a precondition in assessing efforts to promote peace and reconciliation. In the context of considering whether Mr. Ntaganda's genuine and concrete contribution to peace and reconciliation was established overall on a balance of probabilities, this was in and of itself a discernible error.

30. CLR2's next argument that “[t]he Prosecution rightly submits that the Defence misapprehends the trial record and the Sentencing Judgment” because “the Trial Chamber did

⁶⁴ [SJ](#), para.224; [Sentencing Appeal Brief](#), paras.113-114.

⁶⁵ [CLR2-Observations-2529](#), paras.28-35.

⁶⁶ [CLR1-Observations-2531](#), paras.38-48.

⁶⁷ [CLR2-Observations-2529](#), para.30.

⁶⁸ [CLR2-Observations-2529](#), paras.29-30.

⁶⁹ [Sentencing Appeal Brief](#), para.121 (emphasis added).

⁷⁰ [Katanga-SJ-3484](#), para.91 (emphasis added).

⁷¹ [CLR2-Observations-2529](#), para.30.

⁷² [Katanga-SJ-3484](#), para.91.

in fact consider the evidence that the Defence claims [...] [it] failed to consider”⁷³ misses the point. Although the Trial Chamber did refer to the evidence related to concrete efforts deployed by the UPC/FPLC and Mr. Ntaganda to reach out and contribute to reconciliation with the Lendu community, it failed to provide a reasoned opinion. The Trial Chamber did not explain why the concrete efforts highlighted by this evidence, considered along with the evidence noted at paragraph 219 of the Sentencing Judgment, did not meet the applicable threshold pursuant to the balance of probabilities standard, *i.e.* is it more likely than not that Mr. Ntaganda genuinely and concretely contributed to peace and reconciliation with the Lendu community.⁷⁴

31. More importantly, the Trial Chamber misappreciated the evidence related to the significance of Mr. Ntaganda’s contribution to peace and reconciliation with the Lendu community.⁷⁵ In fact, the Trial Chamber missed what was most obvious; that without Mr. Ntaganda’s genuine and concrete contribution, in his capacity as the UPC/FPLC *Chef d’état-major général*, none of the efforts deployed by the UPC/FPLC to reach out and contribute to reconciliation with the Lendu community could have taken place.⁷⁶

32. Considering the context in which these efforts were deployed, including *inter alia*, the Trial Chamber’s finding (strongly opposed by the Defence)⁷⁷ that a few months before Mr. Ntaganda and other military leaders of the UPC/FPLC “meant the destruction and disintegration of the Lendu community,”⁷⁸ the Trial Chamber’s erroneous assessment of the evidence, failure to provide a reasoned opinion and decision not to take these efforts into account in mitigation of sentence was so unreasonable as to constitute an abuse of discretion.

33. CLR2’s argument “that no outreach and pacification efforts were undertaken in the affected villages, such as Mongbwalu, Lipri and Kobu”⁷⁹ must also be rejected. *First*, while the Trial Chamber noted CLR2’s submission,⁸⁰ it failed to explain or provide reasons as to how this impacted the evidence adduced regarding the concrete and palpable reconciliation

⁷³ [CLR2-Observations-2529](#), para.31.

⁷⁴ [SJ](#), paras.219-220.

⁷⁵ [Sentencing Appeal Brief](#), paras.134-143.

⁷⁶ [Sentencing Appeal Brief](#), para.138.

⁷⁷ [Defence Appeal Brief – Part II](#), Ground 13.

⁷⁸ [TJ](#), para.809.

⁷⁹ [CLR2-Observations-2529](#), para.33.

⁸⁰ [SJ](#), para.220.

taking place between the UPC/FPLC/Hema community and the FNI/Lendu community in which Mr. Ntaganda was personally involved and instrumental in making possible.

34. *Second*, the evidence establishes that reconciliation meetings and activities involving the UPC/FPLC/Hema community on the one hand, and the FNI/Lendu community on the other, took place in many locations affected by the events that gave rise to the charges in this case, including Katoto, Lopa, Iga Barrière and Muhito.⁸¹ These places have one point in common, they were under the control of the UPC/FPLC, which made it possible for Mr. Ntaganda to ensure the security necessary for these activities to take place. To be sure, Mr. Ntaganda cannot be blamed for the FNI/Lendu community not ensuring the same level of security in areas under their control, thereby precluding reconciliation activities therein. Neither the Trial Chamber nor CLR2 addressed this issue.

35. *Lastly*, even if it was not unreasonable for the Trial Chamber to consider that Mr. Ntaganda did not personally travel to the most affected villages for the purpose of reconciliation and pacification, it is not a consideration that could tip the balance of probabilities and allow the Trial Chamber to reach a finding adverse to Mr. Ntaganda.

36. The contemporaneous efforts towards reconciliation in the region were nothing short of remarkable. The Trial Chamber's finding that Mr. Ntaganda's contribution to them was not established on the balance of probabilities constitutes a reversible error warranting the intervention of the Appeals Chamber. The sentence imposed on Mr. Ntaganda should be significantly reduced.

II. Mr. Ntaganda's genuine contribution to demobilisation and disarmament – CLR1

37. CLR1 is wrong to claim that the Trial Chamber did address the testimony of D-0020 and D-0047 in determining whether Mr. Ntaganda's contribution to the demobilisation and integration process was substantial.⁸² While the Trial Chamber referred to certain excerpts of the testimony of D-0020 and D-0047,⁸³ it either ignored or gave no weight to other relevant factors. The Trial Chamber failed to consider D-0020's evidence: confirming that many UPC/FPLC members were demobilized or integrated in the national army, following orders

⁸¹ [REDACTED].

⁸² [CLR1-Observations-2531](#), para.40.

⁸³ [SJ](#), para.222, fns.604-608.

issued by Mr. Ntaganda;⁸⁴ providing names of UPC/FPLC officers who were integrated;⁸⁵ confirming the relationship between Arthur, MONUC's intelligence officer and Mr. Ntaganda⁸⁶ (thereby corroborating D-0047's evidence);⁸⁷ confirming the presence of MONUC's Director, Ms. McAdams, when [REDACTED] along with a group of 500 UPC/FPLC members on the orders of Mr. Ntaganda;⁸⁸ and that Mr. Ntaganda facilitated the integration of many UPC/FPLC members in the national army.⁸⁹

38. With respect to D-0047, the Trial Chamber failed to consider his evidence: confirming that UPC/FPLC members were demobilized and that others were integrated;⁹⁰ and explaining that in his view as UPC President *ad interim*, Mr. Ntaganda, in his capacity as FPLC Chief of staff, was the highest ranking member in the field responsible for overseeing and implementing UPC/RP demobilisation and integration undertakings.⁹¹ This failure to consider this relevant evidence undermines the Trial Chamber's finding that Mr. Ntaganda's contribution to demobilisation and disarmament was not established overall on a balance of probabilities.⁹²

39. Moreover, in assessing D-0047's evidence that Mr. Ntaganda worked with a government committee on demobilisation and prepared lists of those who wanted to either demobilise or integrate,⁹³ the Trial Chamber misappreciated D-0020's testimony. According to the Trial Chamber, D-0020 "testified that in fact it was Mr Ntaganda's secretary who was in charge of compiling the lists for integration".⁹⁴ In fact, D-0020 testified that even though 'Peter' was the person responsible for compiling the lists, 'Peter' was Mr. Ntaganda's personal secretary, and compiled lists as part of Mr. Ntaganda's actions to facilitate the integration of UPC/FPLC members in the FARDC.⁹⁵ Other evidence corroborates that Mr. Ntaganda's personal secretary was indeed 'Peter'.⁹⁶

⁸⁴ [DRC-D18-0002-0013](#), paras.16-17.

⁸⁵ [DRC-D18-0002-0013](#), para.16.

⁸⁶ [DRC-D18-0002-0013](#), para.17.

⁸⁷ [D-0047:T-267](#),84,100.

⁸⁸ [DRC-D18-0002-0013](#), paras.17-18; [Sentencing Appeal Brief](#), para.148.

⁸⁹ [DRC-D18-0002-0013](#), para.19.

⁹⁰ [Sentencing Appeal Brief](#), para.150; [DRC-OTP-0138-0027](#); [D-0047:T-267](#),62-63.

⁹¹ [Sentencing Appeal Brief](#), paras.149-150; [D-0047:T-267](#),62-63.

⁹² [SJ](#), paras.222-223.

⁹³ [D-0047:T-267](#),62-63.

⁹⁴ [DRC-D18-0002-0013](#), para.19.

⁹⁵ [DRC-D18-0002-0013](#), para.19.

⁹⁶ [SJ](#), para.222, fn.604. [D-0300:T-215](#),71:21-25-72:1;[T-229](#),5:3-6.

40. The Trial Chamber also erred by taking in consideration and attaching weight to document DRC-OTP-2103-1205.⁹⁷ This unsigned *communiqué*, erroneously characterised by the Trial Chamber as a “report”,⁹⁸ was purportedly issued by “the CIAT”, about which the Trial Chamber heard no other evidence. It is dated 7 May 2005, and therefore long after the events being considered in the determination of Mr. Ntaganda’s sentence. While the Trial Chamber established a procedure for the admission of additional evidence for the sentencing phase,⁹⁹ the Prosecution did not seek admission of this document,¹⁰⁰ despite knowing of the Defence’s intention to call D-0047.¹⁰¹ When the Prosecution was provided with a second opportunity to seek to admit evidence,¹⁰² it made no mention of DRC-OTP-2103-1205. The Prosecution only informed the Defence of its intention to use this document when it was added to its list of documents to be used during the cross examination of D-0047, 16.5 hours before his testimony. This was one of 64 documents to be used in cross-examination, including 45 documents that were not admitted in evidence despite procedure put in place for that purpose. Consequently, this limited the Defence’s ability to oppose the use of document DRC-OTP-2103-1205 until the cross-examination of D-0047.

41. The Trial Chamber initially sustained the Defence objection to the document’s use,¹⁰³ before proposing and then deciding that it could be used for impeachment purposes only.¹⁰⁴ This was despite the fact that the source of the document and its author were unknown.

42. Significantly, D-0047 denied any knowledge of DRC-OTP-2103-1205 on the basis that he was detained in Kinshasa at the time.¹⁰⁵ In addition, D-0047’s response s in cross-examination did not make it possible to either impeach him or to lend any probative value to the document.¹⁰⁶ In these circumstances, the Trial Chamber’s reliance on this document in determination of whether Mr. Ntaganda made a genuine contribution to demobilisation and disarmament is a discernible error.

⁹⁷ [SJ](#), fn.604.

⁹⁸ [SJ](#), fn.604.

⁹⁹ [Order-2360](#); [Prosecution-Request-2368](#); [Defence-Request-2369](#); [Prosecution-Response-2375](#); [Decision-2384](#); [Preliminary-Ruling-2385](#); [Defence-Request-2388](#); [Prosecution-Request-2389](#); [Decision-2402](#); [Defence-Request-2403](#).

¹⁰⁰ [Prosecution-Response-2375](#); [Prosecution-Request-2389](#).

¹⁰¹ [Defence-Request-2369](#), para.2.

¹⁰² [Preliminary-Ruling-2385](#); [Prosecution-Request-2389](#); [Defence-Response-2392](#).

¹⁰³ [D-0047:T-267](#),88:8-9.

¹⁰⁴ [D-0047:T-267](#),92:19-22.

¹⁰⁵ [D-0047:T-267](#),90:15-92:5.

¹⁰⁶ [D-0047:T-267](#),90:15-25.

43. The Trial Chamber also erred by taking into consideration irrelevant facts, namely that “[...] Mr Ntaganda himself declined to integrate into the FARDC for a number of years”, which is unrelated, or of very low probative value in determining whether **is it more likely than not** that Mr. Ntaganda made a genuine and concrete contribution to the demobilisation and reintegration process. Notably, D-0047 explained why Mr. Ntaganda and other senior UPC officials initially did not report to Kinshasa. D-0047 believed “that there was a crisis in terms of trust or assurances. The facts speak for themselves. People went to Kinshasa and quite often were then arrested and incarcerated. I'm quite sure that if he did not -- you see, if he hadn't been -- if he didn't integrate immediately, it's because he wanted assurances. But I know later he integrated the armed forces”.¹⁰⁷

44. In failing to give weight to relevant evidence, and in taking into account irrelevant considerations, combined with the discernible errors in assessing the evidence before it, the Trial Chamber's finding that Mr. Ntaganda's genuine and concrete contribution to demobilisation and disarmament was not established overall on a balance of probabilities¹⁰⁸ was so unreasonable as to constitute an abuse of discretion.

45. CLR1 is wrong¹⁰⁹ that the Defence “fails to articulate how the Chamber erred in its treatment of” excerpts of reports issued by the United Nations Group of Experts on the Democratic Republic of the Congo (“Six Reports”).¹¹⁰ The Prosecution requested the admission of the Six Reports – concerning alleged events in 2008, 2009 and 2010 – in purported rebuttal of a claim the Defence did not make in relation to the admission of document DRC-OTP-0086-0036.¹¹¹ The Prosecution argued that the documents were proffered to show that “Bosco Ntaganda only assumed a position within the FARDC many years after his alleged appointment (if he actually assumed the position at all).”¹¹² Neither the Defence's submissions or Mr. Ntaganda's testimony indicated otherwise.¹¹³ The Prosecution further claimed that the purpose of admission of the Six Reports was to “(i) show that “Bosco Ntaganda only assumed a position within the FARDC many years after his alleged appointment” referred to in document DRC-OTP-0086-0036; and (ii) **to allow the Chamber**

¹⁰⁷ D-0047:T-267,93:21-25.

¹⁰⁸ SJ, paras.222-223.

¹⁰⁹ CLR1-Observations-2531, paras.44-45.

¹¹⁰ [DRC-OTP-2102-1032](#); [DRC-OTP-2102-1093](#); [DRC-OTP-2102-1220](#); [DRC-OTP-2102-1247](#); [DRC-OTP-2102-1535](#); [DRC-OTP-2102-1560](#).

¹¹¹ [Defence-Response-2392](#), para.13.

¹¹² [Defence-Response-2392](#), para.13.

¹¹³ [Defence-Response-2392](#), para.13.

to undertake a “complete evaluation of the Defence’s evidence, including Bosco Ntaganda’s testimony, regarding the roles he played and positions he occupied from 2004 onwards.”¹¹⁴

46. The Defence objected to the admission of the Six Reports, submitting that “[t]he documents are not probative of the former, and the latter is not a subject-matter that arises from the evidence tendered in mitigation”.¹¹⁵ Indeed, at this point, neither the parties nor the participants had requested the admission of any evidence post-dating 2004. The Defence submitted that:

“The real purpose of the admission of these documents, of course, is to tarnish Mr Ntaganda with unsubstantiated, anonymous and hearsay allegations of what the Prosecution characterizes as ‘serious human rights abuses and international crimes.’ This is not rebuttal or mitigation, but rather a disguised attempt to introduce aggravating evidence. Not only are these events too remote to be considered aggravating circumstances, but the allegations are entirely unsourced and anonymous. The evidence is entirely unsuitable for proof of any fact beyond a reasonable doubt, as is required for an aggravating circumstance. No lower standard of admission of evidence is justified in respect of proof of such a fact, unlike in respect of evidence showing mitigation, which need only be proven to the standard of balance of probabilities.”¹¹⁶

47. The Trial Chamber admitted excerpts of the Six Reports, over Defence objections, on the basis that: “[t]o the extent the Prosecution aims to rely on the items to show Mr Ntaganda’s involvement with the FARDC or the CDNP, the Chamber considers that the items are relevant”.¹¹⁷ This was an error. The Chamber had heard Mr. Ntaganda’s testimony that he had joined the FARDC in 2009 and the Prosecution’s claim related to the admission of Defence document DRC-OTP-0086-0036 was unsubstantiated.¹¹⁸ Even though the Chamber limited the admission of the Six Reports to certain excerpts, this ruling opened the door for the Prosecution to elicit evidence relating events of 2004 until 2010. The Six Reports had no proper place in the sentencing procedure, either in rebuttal of evidence in mitigation, nor as evidence of aggravation, which would require proof beyond a reasonable doubt.¹¹⁹ The Trial

¹¹⁴ [Defence-Response-2392](#), para.14 (emphasis added).

¹¹⁵ [Defence-Response-2392](#), para.14.

¹¹⁶ [Defence-Response-2392](#), para.16.

¹¹⁷ [Decision-2402](#), para.32.

¹¹⁸ [Defence-Response-2392](#), para.13.

¹¹⁹ [Defence-Response-2392](#), para.17.

Chamber's error was then compounded by its refusal to admit two statements submitted by the Defence to counter the information contained in the Six Reports excerpts.¹²⁰ Contrary to CLR1's argument, admission of these two statements, which provided detailed information on the events that led Mr. Ntaganda to join the FARDC in 2009, choosing peace over war for the well-being of his men and the civilian population, materially affected the Sentencing Judgment.

48. CLR1 then argues that the Defence appears to invoke misplaced policy considerations",¹²¹ and accuses it of "repeating *verbatim*" the argument advanced in its submissions before the Trial Chamber 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 in consideration in sentencing"¹²². Rather than repetition, Mr. Ntaganda raised this argument in order to demonstrate the Trial Chamber's failure to consider it.¹²³

49. Moreover, in making this submission, Mr. Ntaganda referred to the *Katanga* Sentencing Decision, in which Mr. Katanga was given credit for his demobilisation efforts despite (i) MONUC reports noting that Mr. Katanga had also been quite uncooperative with the MONUC and had been involved in numerous incidents involving FNI/FRPI combatants; (ii) the discovery of prison camps where female detainees had apparently been subject to sexual violence; and (iii) the discovery of a large FNI/FRPI stockpile of weapons.¹²⁴

50. In this regard, CLR1 makes the same mistake as CLR2 when asserting that the Defence seeks to draw a parallel between distinguishable cases.¹²⁵ The Defence neither attempted to compare the facts of this case with that in *Katanga* nor relied on the facts in that case.¹²⁶ Rather, the Defence underscored the *Katanga* Trial Chamber's rationale for finding Mr. Katanga's genuine efforts in the process of disarming and demobilising child soldiers to be established on the balance of probabilities, despite the contrary evidence noted above.¹²⁷

¹²⁰ [Sentencing Appeal Brief](#), para.167. See also, [Annex D, Sentencing Appeal Brief](#) and [Annex E, Sentencing Appeal Brief](#).

¹²¹ [CLR1-Observations-2531](#), para.46.

¹²² [Defence-Submissions-2424](#), para.141; [Sentencing Appeal Brief](#), para.165.

¹²³ [SJ](#), para.224; [Sentencing Appeal Brief](#), paras.113-114.

¹²⁴ [Katanga-SJ-3484](#), para.113.

¹²⁵ [CLR1-Observations-2531](#), para.46, fn.110.

¹²⁶ [CLR2-Observations-2529](#), paras.29-30.

¹²⁷ [CLR2-Observations-2529](#), para.29; [Katanga-SJ-3484](#), para.115.

III. Conclusion

51. The two findings reached by the Trial Chamber in respect of Mr. Ntaganda's genuine and concrete contribution to (i) peace and reconciliation and (ii) demobilisation and disarmament; and its decision not to take these issues into account in mitigation of sentence was so unreasonable as to constitute an abuse of discretion.¹²⁸ Mr. Ntaganda's sentence must be significantly reduced.

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 – CLR2¹²⁹

52. CLR2 referred to the Defence position "that the Trial Chamber erred by failing to give a reasoned opinion"¹³⁰ but otherwise failed to engage with it.

53. The Trial Chamber "recall[ed] with appreciation that, **with the exception of his hunger strike**, Mr Ntaganda was consistently respectful and cooperative during court proceedings including notably consenting to absenting himself from the courtroom to facilitate the testimony of certain witnesses".¹³¹ The Trial Chamber also noted that "Mr Ntaganda gave lengthy and detailed testimony and generally answered all questions put to him"¹³² The Trial Chamber made a similar finding in the Judgment:

Mr Ntaganda's testimony was detailed and comprehensive, and touched on all matters relevant for this case. Taking into account its length and complexity, the Chamber found the testimony of Mr Ntaganda to be internally consistent, and notes that only a limited number of discrepancies on discrete issues were identified.¹³³

¹²⁸ [SJ](#), para.224; [Sentencing Appeal Brief](#), paras.113-114; [Lubanga-SAJ-3122](#), para.45.

¹²⁹ [CLR2-Observations-2529](#), paras.36-41.

¹³⁰ [CLR2-Observations-2529](#), para.36.

¹³¹ [SJ](#), para.229 (emphasis added).

¹³² [SJ](#), para.230.

¹³³ [TJ](#), para.258.

54. Although the Trial Chamber found Mr. Ntaganda not credible in relation to certain issues – an error addressed elsewhere¹³⁴ – at no time did the Trial Chamber find that Mr. Ntaganda misled the Court.

55. In light of the foregoing, CLR2 fails to consider that, but for Mr. Ntaganda's hunger strike, the Trial Chamber's assessment of his consistent and respectful good conduct and cooperation with the Court met the threshold to qualify as mitigating circumstances pursuant to the Court's case law, *i.e.* "need not be substantial [...] must exceed mere good behaviour",¹³⁵ "unless exceptional".¹³⁶

56. More importantly, CLR2 fails to address the main issue raised under this ground, being the Trial Chamber's failure to provide reasons as to how Mr. Ntaganda's hunger strike impacted its assessment of his consistent respectful good conduct and cooperation with the Court, which constitutes a discernible error.

57. In the absence of such reasons, CLR2's argument that the Trial Chamber was entitled to treat Mr. Ntaganda's hunger strike "as a lack of cooperation, thus affecting the overall assessment of his behaviour, as it did"¹³⁷ is without merit. CLR2 then submits that "the Defence contends that the Trial Chamber reached this finding without addressing the statement Mr Ntaganda read out in court".¹³⁸ Although this misstates the Defence position, the statement read by Mr. Ntaganda in court reveals his state of mind at the time and as such was relevant to the question before the Trial Chamber.

58. Mr. Ntaganda's consistent and respectful conduct and cooperation with the Court exceeded what can be expected from an accused person, particularly in the circumstances of this case, and was thereby deserving of mitigating value. The Trial Chamber erred in affording no weight in mitigation, and both CLR2's and Prosecution's arguments must be rejected.¹³⁹

¹³⁴ [Defence Appeal Brief – Part II](#), Ground 7. *See also, inter alia*, Grounds 8, 14.

¹³⁵ [Katanga-SJ-3484](#), para.127.

¹³⁶ [Bemba-SJ-3399](#), para.81.

¹³⁷ [CLR2-Observations-2529](#), para.39.

¹³⁸ [CLR2-Observations-2529](#), para.36.

¹³⁹ [CLR2-Observations-2529](#), paras.36-41; [Prosecution-Sentencing-Submissions-2425](#), para.160.

GROUND 12 – NO REASONABLE CHAMBER COULD HAVE FAILED TO CONCRETELY TAKE INTO ACCOUNT MR. NTAGANDA’S SUBSTANTIAL EFFORTS TO PROTECT [REDACTED] FROM HARM IN MITIGATION – CLR2¹⁴⁰

59. Having considered CLR2’s arguments in relation to this ground of appeal, the Defence does not see a need for additional arguments and respectfully refers the Appeals Chamber to the arguments set out in its Sentencing Appeal Brief.¹⁴¹

60. Notwithstanding the above, of relevance to this ground is the disagreement between CLR2 and the Prosecution.¹⁴² Contrary to the Prosecution, CLR2 agrees that Mr. Ntaganda’s contribution to saving the life of a [REDACTED] is a mitigating factor.¹⁴³ CLR2 wrongly asserts, however, that the Trial Chamber did accord Mr. Ntaganda’s actions some mitigating value.¹⁴⁴ Clearly, the Trial Chamber did not.¹⁴⁵ Denying the mitigating value of an event on the basis of its comparison with the gravity of the crimes committed, constituted an error.

61. CLR2’s argument that “the Trial Chamber did not err in deciding not to admit the [REDACTED] into evidence”,¹⁴⁶ without more, is unconvincing. The [REDACTED] contained mitigating evidence going beyond the [REDACTED] and the Trial Chamber abused its discretion in refusing to admit this document, which met all criteria for admission, including the additional measures requested by the Trial Chamber.¹⁴⁷ [REDACTED] together provide a more comprehensive account of Mr. Ntaganda’s exceptional actions.

62. CLR2’s observations must be rejected and significant mitigating value should be attributed to Mr. Ntaganda’s altruistic humanitarian actions which went beyond what can reasonably be expected from a [REDACTED] person.

¹⁴⁰ [CLR2-Observations-2529](#), paras.42-47.

¹⁴¹ [Sentencing Appeal Brief](#), paras.176-185.

¹⁴² [Prosecution-Response-2509](#), para.167; [CLR2-Observations-2529](#), para.45.

¹⁴³ [CLR2-Observations-2529](#), para.45.

¹⁴⁴ [CLR2-Observations-2529](#), para.46.

¹⁴⁵ [SJ](#), para.235. See also [Sentencing Appeal Brief](#), paras.176-177.

¹⁴⁶ [CLR2-Observations-2529](#), para.45.

¹⁴⁷ [Decision-2402](#), para.30.

RESPECTFULLY SUBMITTED THIS 22ND DAY OF JUNE 2020

A handwritten signature in dark ink, appearing to read 'StB' with a stylized flourish at the end.

Me Stéphane Bourgon, *Ad.E* Counsel representing Bosco Ntaganda

The Hague, The Netherlands