

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: **11 April 2014**

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Hans-Peter Kaul
Judge Cuno Tarfusser

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
*THE PROSECUTOR v. BOSCO NTAGANDA***

Public

Prosecution's Request to File a Reply

Source: Office of the Prosecutor

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The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Ms Nicole Samson

Counsel for the Defence

Mr Marc Desalliers
Ms Caroline Buteau

Legal Representatives of the Victims

Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

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

States' Representatives

Amicus Curiae

Other

REGISTRY

Registrar

Mr Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Detention Section

Introduction

1. The Prosecution seeks leave to file a reply to the Defence's closing brief, as provided under Regulations 24(5) and 34(c), in order to assist Pre-Trial Chamber II ("Chamber") in its decision regarding the confirmation of charges.

Procedural Background

2. On 4 February 2014, the Single Judge issued a decision on the schedule of the confirmation hearing.¹ On 14 February 2014, the Chamber granted the parties and participants the right to submit written observations limited to issues discussed at the confirmation hearing.² The parties and participants "are not allowed to raise new issues, and if they do so, the Chamber shall not consider the relevant part of said submissions in its decision confirming or not confirming the charges."³ The Chamber ordered the Prosecution and the Legal Representatives of Victims to submit their observations by 7 March 2014.⁴ The Defence was originally required to submit its observations by 4 April 2014,⁵ but was then granted until 8 April 2014 to submit its final observations.⁶
3. On 7 March 2014, the Prosecution⁷ and Legal Representatives of Victims⁸ submitted their respective observations.
4. On 8 April 2014, the Defence submitted its observations ("Defence's Closing Brief").⁹

¹ ICC-01/04-02/06-245.

² ICC-01/04-02/06-T-11-ENG ET WT, p.11, lines 9-12.

³ ICC-01/04-02/06-T-11-ENG ET WT, p.11, lines 12-14.

⁴ ICC-01/04-02/06-T-11-ENG ET WT, p.11, lines 15-17.

⁵ ICC-01/04-02/06-T-11-ENG ET WT, p.11, lines 17-19.

⁶ ICC-01/04-02/06-289-Conf, p.8, para.21.

⁷ ICC-01/04-02/06-276-Conf ("Prosecution's Closing Brief").

⁸ ICC-01/04-02/06-273; ICC-01/04-02/06-275.

Application for Leave to Reply

5. The Prosecution requests that the Chamber grant it leave to reply to the Defence's Closing Brief, pursuant to Regulations 24(5) and 34(c), in order to address specific mischaracterisations of evidence and/or of the law in the Defence's submissions. In particular, the Prosecution wishes to address the Defence's descriptions pertaining to (a) the decisions of the Pre-Trial Chamber I ("PTC I") and Appeals Chamber in the *Prosecutor v. Gbagbo*, regarding the manner in which the Chamber should assess evidence of the widespread or systematic "attack" directed against the civilian population;¹⁰ (b) the law in relation to cumulative charging;¹¹ and (c) aspects of the evidence of witnesses P-0016 and P-0017, that are not fully depicted, and which therefore may induce the Chamber into error.¹²

6. First, the Defence has asserted that in *The Prosecutor v. Gbagbo*, PTC I held that each separate incident must be proven at the same requisite standard of proof,¹³ and it implies that PTC I considered it is not appropriate to rely on certain incidents to establish the contextual elements of the crimes where the underlying acts arising during those incidents are not charged (and that the Appeals Chamber agreed with PTC I).¹⁴

7. As the Prosecution will develop if leave is granted, this is not accurate. The Appeals Chamber considered that PTC I did not require that each of the 45 incidents be proven to the requisite standard; but instead considered that there must be a sufficient number of incidents to establish that the attack took place.¹⁵

⁹ ICC-01/04-02/06-292-Conf-Exp ("Defence's Closing Brief").

¹⁰ ICC-02/11-01/11-432; ICC-02/11-01/11-572 OA5.

¹¹ Defence's Closing Brief, paras. 246-249.

¹² ICC-01/04-02/06-69-Red, paras.21, 44-46.

¹³ Defence's Closing Brief, paras.79, 196-197, 201-202.

¹⁴ Defence's Closing Brief, paras.192-194.

¹⁵ ICC-02/11-01/11-572 OA5, para.47.

8. Moreover, contrary to what the Defence suggests, PTC I and the Appeals Chamber did not state that it is only possible to rely on incidents where the underlying acts that occurred are charged.¹⁶
9. Second, the Defence argues that the crime of rape is encompassed within the crime of sexual slavery, and that the two crimes cannot be cumulatively charged.¹⁷ As the Prosecution will elaborate upon if leave to reply is granted, the Defence fails to refer to all relevant ICC jurisprudence on this issue, including in the *Prosecutor v. Katanga*, that found that crimes of rape and sexual slavery were committed based on the same underlying facts; which satisfy each of the distinct elements of those crimes.¹⁸
10. Third, the Prosecution seeks leave to address certain mischaracterisations of the evidence of witnesses P-0016 and P-0017. First, contrary to what the Defence suggests, P-0016 did not state that the UPC militia were not involved in the battle in Bunia in August 2002. The Defence only refers to his evidence where he says that only the UPDF attacked the residence of former Governor Lomondo and that this was done without Hema militia support.¹⁹ However, as the Prosecution will develop if granted leave to reply, the Defence fails to refer to other aspects of P-0016's evidence.²⁰ The Defence further refers to P-0016's evidence that the

¹⁶ See e.g. ICC-02/11-01/11-432, para.22; ICC-02/11-01/11-572 OA5, para.47.

¹⁷ Defence's Closing Brief, paras. 246-249.

¹⁸ ICC-01/04-01/07-3436, paras. 961-1023.

¹⁹ Defence's Closing Brief, para.85, footnote 90.

²⁰ The Defence does not refer to the following additional parts of P-0016's prior witness statement EVD-PT-OTP-002701, regarding the implication of the Hema community and UPC in the attack on Lomondo/the APC, Lendu and *non-originaires* in Bunia (see paras. 38, 39, 40, 43, 47 of EVD-PT-OTP-002701; EVD-PT-OTP-06141 (DRC-OTP-2054-1447) at 1456. See also Prosecution's Closing Brief, para. 37, footnote 63; Prosecution Presentation on Contextual Elements of Crimes against Humanity and War Crimes, para. 16

FPLC did not formally exist.²¹ This is also misleading, as P-0016 explained that the military structure already existed prior to the Bunia 2002 attack.²²

11. Fourth, the Defence refers to P-0017's evidence, where he says the civilians had fled with the military enemy when they first arrived in Kobu, to suggest that the UPC fighters were not ordered to chase or target Lendu civilians.²³ However, this is misleading as P-0017 provided further evidence directly on this point.²⁴

12. The Prosecution submits that its reply will assist the Chamber in its assessment of the decision on confirmation of charges. Should the Chamber grant leave, the Prosecution will set out its substantive submissions in its reply.

Request

13. Based on the foregoing and pursuant to Regulations 24(5) and 34(c), the Prosecution requests that the Chamber grant leave to file a reply.



Fatou Bensouda, Prosecutor

Dated this 11th day of April 2014
At The Hague, The Netherlands

²¹ Defence's Closing Brief, para.85, footnote 91.

²² Prosecution's Closing Brief, para.108, footnote 230.

²³ Defence's Closing Brief, paras.185, 276.

²⁴ Prosecution's Closing Brief, para.25, footnotes 39, 40-43 and para.142, footnotes 297, 300.