

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: ICC-01/04-02/06
Date: **6 September 2019**

TRIAL CHAMBER VI

Before: Judge Robert Fremr, Presiding Judge
Judge Kuniko Ozaki
Judge Chang-ho Chung

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

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

Public

**Defence response to “Prosecution’s request for the admission of additional
documentary evidence on sentencing”**

Source: Defence Team of Mr Bosco Ntaganda

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

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Other

Further to the *Prosecution's request for the admission of additional documentary evidence on sentencing* ("Prosecution's Request"),¹ Counsel representing Mr Ntaganda ("Defence") hereby submit this:

Defence response to the "Prosecution's request for the admission of additional documentary evidence on sentencing"

("Response")

INTRODUCTION

1. The Defence opposes the Prosecution's Request to admit 26 documents for the purpose of sentencing.
2. First, documents 8 through 26 should be rejected *in limine* as they have been submitted after the deadline set out in the Trial Chamber's 8 July order for notification of supplemental sentencing evidence. Second, documents 1 through 7, of which the Prosecution previously provided notice, relate to events long after the conduct of Mr. Ntaganda raised by the Defence in mitigation, are irrelevant to sentencing, and are of insufficient probative value as evidence of aggravation, which is subject to same standard of proof as proof of the charges. Third, documents 10, 11 and 12 are likewise manifestly unreliable and unsuitable to be admitted as evidence otherwise given credence for any purpose whatsoever. Fourth, document 8, and documents 13 through 26, are unreliable and irrelevant to the evidence tendered as mitigation. These documents – all of which relate to events in January and February 2004 – all relate to MONUC's close collaboration with Floribert Kisembo and reactions thereto. They do not detract from, nor disprove, the evidence submitted in mitigation that Mr. Ntaganda undertook significant efforts to reconcile ethnic communities in 2004. Fifth, document 9 is irrelevant to any sentencing issue.

¹ ICC-01/04-02/06-2389, 30 August 2019.

3. If any of these documents are admitted, especially those concerning prejudicial allegations in relation to events many years after the events that they purportedly rebut, the Defence indicates that it may seek to tender additional evidence in rebuttal.

PROCEDURAL HISTORY

4. On 8 July 2019, the Chamber ordered that the parties and participants “shall file any requests to submit further evidence or to call witnesses (‘Sentencing Requests’) by 29 July 2019.” The Chamber also set the deadline for any responses thereto as 5 August 2019.²
5. On 29 July 2019, the Prosecution requested the admission of one *viva voce* expert witness and four statements for admission under rule 68(2)(b).³ The Defence sought the admission of witness testimony, excerpts of videos, including transcripts and translations, and four documents.⁴
6. On 5 August 2019, the Prosecution filed its response to the Defence’s request for admission of supplemental sentencing evidence. This Response included a section entitled “Request to admit additional evidence,” seeking the admission of some 11 documents meant to rebut or contextualize the evidence that had been proposed by the Defence.⁵
7. On 23 August 2019, the Trial Chamber issued a Preliminary ruling on prior recorded testimony pursuant to Rule 68(2)(b) in relation to sentencing.⁶ In addition to ruling on the admissibility of testimony by way of rule 68(2)(b), the Trial Chamber made certain rulings in respect of documentary evidence that

² Order on the sentencing procedure, ICC-01/04-02/06-2360, 8 July 2019 (‘8 July Order’), para. 2.

³ Prosecution’s request to submit additional evidence on sentencing, ICC-01/04-02/06-2368-Conf, 29 July 2019.

⁴ Defence request for admission of sentencing evidence, ICC-01/04-02/06-2369-Conf-Exp, Annex B.

⁵ Prosecution’s response to the “Defence request for admission of sentencing evidence”, ICC-01/04-02/06-2375-Conf (‘Prosecution’s Response’), paras. 28-35.

⁶ Preliminary ruling on prior recorded testimony pursuant to Rule 68(2)(b) in relation to sentencing, ICC-01/04-02/06-2385-Conf, 23 August 2019 (‘23 August Decision’).

had been notified by the parties in their submissions of 29 July and 5 August 2019. Specifically, the Trial Chamber invited the parties to tender for admission documents that they had notified for admission in their filings of 29 July and 5 August:

The Chamber further notes that, in the Defence Request, the Defence refers to a number of documents which it intends to tender in support of Mr Ntaganda's alleged efforts and undertakings towards peace and reconciliation, ensuring security, demobilisation and the maintenance of military discipline and which are meant to corroborate and contextualise the evidence of the witnesses proposed by the Defence. Some of these items are not specifically referred to in the summaries of the expected evidence of the proposed Defence witnesses. The Prosecution further requests that the Chamber admit one additional document and excerpts of six others, should the Chamber admit one of the documents mentioned by the Defence. In relation to such documents that relate to witnesses who will testify *viva voce*, the Chamber expects the Defence to tender them through these witnesses. Noting the parties' intention to seek the admission of certain documents other than through a witness, the Chamber further directs the parties and the participants to file any requests for admission of documentary evidence other than through witnesses by 30 August 2019.⁷

8. On 30 August 2019, the Prosecution submitted its Prosecution's request, whereby it requested the admission of 26 documents for the purpose of sentencing.⁸

SUBMISSIONS

1. **The submission of items 8 through 26 should be rejected *in limine* as not having been tendered in accordance with the Trial Chamber's 8 July Order**
9. The Trial Chamber's 8 July Order expressly required the parties to "file any requests to submit further evidence or to call witnesses ('Sentencing Requests')

⁷ 23 August Decision, para.54.

⁸ The deadline for response to the Prosecution's Request has been shortened to 6 September 2019 at noon. See email from Trial Chamber Communication to the parties and participants, 2 September 2019 at 11:02.

by 29 July 2019.”⁹ This order necessarily encompassed documentary evidence, and both parties notified documentary evidence in compliance with this deadline, or in the responses to filings submitted by that deadline.¹⁰

10. The Trial Chamber’s 23 August Decision gives no indication that this deadline was meant to be modified, or that the period for submitting supplementary sentencing evidence was meant to be re-opened. On the contrary, the portion of the 23 August Decision quoted above makes clear that the parties are invited to seek admission of documents already notified.
11. Nineteen of the documents now tendered as part of the Prosecution’s Request were not previously notified in compliance with the Trial Chamber 8 July Order. The Prosecution has made no request pursuant to regulation 35 of the Regulations of the Court (“RoC”) for modification of that deadline. In any event, no such justification exists since the Prosecution had ample time to notify any documents in response to the Defence’s supplemental evidence in accordance with the Trial Chamber’s 5 August 2019 deadline.
12. The Prosecution’s request to tender items 8 to 26 is, accordingly, untimely, and should be dismissed *in limine*. The deadline should be strictly enforced given the importance, as previously expressed by the Trial Chamber,¹¹ of an expeditious sentencing procedure.

2. Items 1 to 7 are irrelevant and inappropriate for sentencing

13. The Prosecution tenders documents 1 through 7 – concerning alleged events in 2008, 2009 and 2010 – in purported rebuttal of a claim that the Defence is not making. The Prosecution persists¹² in its claim that these documents are proffered to show that “Bosco Ntaganda only assumed a position within the

⁹ 8 July Order, para. 2(i).

¹⁰ Defence request for admission of sentencing evidence, ICC-01/04-02/06-2369-Conf-Exp, 29 July 2019; Prosecution Response.

¹¹ 8 July Order, para.2 (“[i]n order to facilitate the fair and expeditious conduct of the sentencing proceedings in the *Ntaganda* case [...]”).

¹² Prosecution Response, para.25, 32.

FARDC many years after his alleged appointment (if he actually assumed the position at all)."¹³ Neither the Defence's submissions in relation to the sentencing evidence, nor Mr. Ntaganda's testimony says otherwise. The closest the Prosecution can come is Mr. Ntaganda's use of the word "we" in stating – in reference to the former FPLC forces – that "we had also joined the FARDC";¹⁴ the Prosecution simply disregards Mr. Ntaganda's statement that he joined the FARDC in 2009.¹⁵

14. The Prosecution claims that the purpose of the admission of Items 1 to 7 is 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;¹⁶ and (ii) to allow the Chamber 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."¹⁷ The documents are not probative of the former, and the latter is not a subject-matter that arises from the evidence tendered in mitigation. Notably, the Prosecution does not claim that there was no policy or effort to integrate FPLC members into the FARDC in 2004, which is the purpose for which DRC-OTP-0086-0036 is tendered.
15. Even assuming that Mr. Ntaganda's own integration into the FARDC was in any way in issue, the most that the documents show is whether or not Mr. Ntaganda was integrated in 2008, 2009 or 2010. The documents say nothing about 2004. They are, accordingly, not even probative on the basis advanced by the Prosecution.

¹³ Prosecution's Request, Annex A, p. 1.

¹⁴ T-225, 35:7.

¹⁵ T-223, 18:14.

¹⁶ The Defence requests the admission of document DRC-OTP-0086-0036 as supplementary sentencing evidence. *See* Defence request for admission of sentencing evidence, ICC-01/04-02/06-2369-Conf-Exp, 29 July 2019; Defence request for the admission of supplementary sentencing evidence, ICC-01/04-02/06-2388-Conf, 30 August 2019.

¹⁷ Annex A, pp.2-3.

16. 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.”¹⁸ This is not rebuttal of 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.¹⁹ 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.²⁰
17. The documents have 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.

3. Documents 10, 11 and 12 are forgeries, and do not meet even the *minimum* standard for admission

18. A letter of Ambassador Swing appearing at pages DRC-OTP-2057-0101 – DRC-OTP-2057-0103 of Tab 12 has already been admitted.²¹ The Prosecution now seeks to tender the pages preceding Mr. Swing’s letter, which is cited in the letter as one of the main factual grounds for the letter itself.
19. The Defence submits the handwritten document is manifestly a forgery that is not appropriate for admission for any purpose at any stage of trial.

¹⁸ Annex A, p.1.

¹⁹ *Bemba et al.* Sentencing Decision, para.25; *Bemba* Sentencing Decision, para.18; ICTY, *Prosecutor v. Hadzihasanović*, Judgement, 15 March 2006, para.2069.

²⁰ The Prosecution mischaracterizes the Defence’s submissions as justifying a categorically lower standard of admissibility, which ignores the fundamental distinction between standard of proof required for aggravation and mitigation. See Prosecution’s Request, para.8-10; Response and request for leave to reply to Prosecution’s response to the “Defence request for admission of sentencing evidence”, ICC-01/04-02/06-2377-Conf, 7 August 2019, para.9.

²¹ 23 August Decision, para. 53.

20. First, no expertise is required to see that the handwriting on this document manifestly does not correspond to other documents that the Prosecution has asserted were written by Mr. Ntaganda, and whose admission was not opposed by the Defence.²²
21. Second, the content of the document shows that it is a fabrication. The notion that Mr. Ntaganda would allegedly order his G3 to assassinate his own G2 and 22 other individuals, including Hema business people, Mr. Tinanzabo, and several UN officials, is simply ridiculous. No evidence has been heard at trial suggesting such an unheard-of plot orchestrated by Mr. Ntaganda or anyone else.
22. Third, this very same document has previously been denied admission by the Trial Chamber, which noted that it:

lacks an official letterhead or stamp, although it appears to be dated and signed. Moreover, the content of the message is somewhat cryptic and the Prosecution does not specify the 'contemporaneous hand written documents' which it asserts this document is consistent with. No other information in the admitted evidence or case record has been presented to confirm the provenance of this document, and the Chamber additionally notes that the source of the document appears to be different from the other documents tendered by way of the Prosecution Request. In the circumstances, the Chamber finds that the authenticity of the document has been inadequately supported.²³

23. Given the prejudicial and inflammatory content of the document and the inferences that the Prosecution is inviting the Trial Chamber to draw for the purposes of sentencing, no lower standard of admissibility could be justified for this document. Admission should be denied now just as it was during trial.

²² See DRC-OTP-0016-0047, DRC-OTP-0016-0049. Prosecution's first request for the admission of documentary evidence, ICC-01/04-02/06-1064, 18 December 2015, Annex A; Response on behalf of Mr Ntaganda to "Prosecution's first request for the admission of documentary evidence", ICC-01/04-02/06-1078-Conf, 11 January 2016, para.2-4.

²³ Decision on Prosecution's first request for the admission of documentary evidence, ICC-01/04-02/06-1181, 19 February 2016, paras.17-18.

4. Documents 8 and 13 through 26 have no probative value and do not rebut the evidence in mitigation

24. These documents, all of which are confined to the first two months of 2004, concern issues related to MONUC's support for General Kisémbó at a time when the UPC had split into two factions. MONUC's support even extended to transporting him in UN convoys.²⁴ The Defence does not contest that this led to friction between elements of the FPLC and MONUC, and the documents openly acknowledge that MONUC's neutrality was called into question by such a close affiliation with General Kisémbó.²⁵ This situation improved over the course of 2004 and, in any event does not rebut Mr. Ntaganda's efforts in 2004 to encourage reconciliation with Lendu leaders.

5. Document 9 is irrelevant to any sentencing issue

25. No reference is made in this document to Mr. Ntaganda or to anyone under his control. The reference to "*miliciens de Bembeyi*" is ambiguous and not attributable to Mr. Ntaganda. No source of the alleged information is given. The document is not suitable for admission, nor probative of any issue relevant to sentencing.

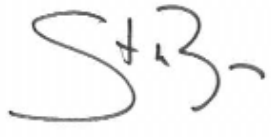
CONCLUSION

26. The Defence opposes the Prosecution's Request in its entirety. None of the documents satisfy the minimum requirements for admission, or are relevant to any proper sentencing issue.
27. If the Trial Chamber admits any of the documents proposed for admission by the Prosecution, in particular documents pertaining to events long after the evidence tendered for mitigation, the Defence indicates that it intends to file any necessary motion to introduce evidence in rebuttal.

²⁴ DRC-OTP-0010-0024, p. 0026.

²⁵ DRC-OTP-0010-0024, p. 0027 ("General Bosco's group would take PAKBAT troops as close ally of General Kasimbo as he has already expressed his reservation about the neutrality of PAKBAT at number of occasions.")

RESPECTFULLY SUBMITTED ON THIS 6TH DAY OF SEPTEMBER 2019

A handwritten signature in dark ink, appearing to read 'StB-' with a horizontal line extending from the end.

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands