

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-02/06
Date: 17 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

Public redacted version of “Prosecution’s Request for leave to Reply to “Defence response to ‘Prosecution’s request to submit additional evidence on sentencing’”, ICC-01/04-02/06-2373-Conf”, 7 August 2019, ICC-01/04-02/06-2379

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Ms Nicole Samson

Counsel for the Defence

Mr Stéphane Bourgon
Mr Christopher Gosnell

Legal Representatives of Victims

Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

The Office of Public Counsel for Victims

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations Other
Section**

Introduction

1. The Prosecution seeks leave to reply to three issues raised in the “Defence response to ‘Prosecution’s request to submit additional evidence on sentencing’”.¹ There is good cause justifying the Prosecution’s reply. The Prosecution could not anticipate that Mr Ntaganda (“the Convicted Person”) would overlook facts relevant to an assessment of the potential overlap between evidence in the record of this case and the Prosecution’s proposed evidence for sentencing, or that he would overlook important authorities and misinterprets the jurisprudence of the Court. The Prosecution’s reply will assist the Chamber’s decision regarding the relevance of the proposed Prosecution witnesses’ evidence and its assessment of the gravity of the Convicted Person’s crimes.

Level of Confidentiality

2. The Prosecution files this submission as “Confidential” pursuant to regulation 23*bis*(1) and (2) of the Regulations of the Court, because it seeks leave to reply to a document with the same confidentiality level and it contains confidential information regarding prospective witnesses who are the subject of requests for protective measures.

Procedural History

3. On 8 July 2019, Trial Chamber VI (the “Chamber”) convicted Mr Bosco Ntaganda of 18 counts of war crimes and crimes against humanity.²
4. On the same day, the Chamber issued an order on the sentencing procedure and directed the Parties and Legal Representatives of Victims to file any requests to submit further evidence or to call witnesses by 29 July 2019.³

¹ ICC-01/02-02/06-2373-Conf (“Defence Response”).

² ICC-01/02-02/06-2359.

³ ICC-01/02-02/06-2360.

5. On 29 July 2019, the Prosecution filed its request to submit additional evidence on sentencing.⁴ The Prosecution requested the testimony of one *viva voce* expert witness and the admission of four statements under rule 68(2)(b).
6. On the same day, the Defence filed its “Defence request for admission of sentencing evidence”.⁵ The Defence requested the testimony of eight witnesses and 21 documents.
7. On 5 August 2019, the Prosecution responded to the Defence Request and partially opposed it.⁶
8. On the same day, the Defence responded to the Prosecution Request and opposed it in its entirety.⁷
9. Also on 5 August 2019, the Common Legal Representative of the Victims of the Attacks and the Common Legal Representative of the Former Child Soldiers (jointly the “Legal Representatives”) submitted a joint response to the Prosecution Request and the Defence Request.⁸ The Legal Representatives supported the totality of the Prosecution Request and noted that the evidence of the five witnesses proposed by the Prosecution is not duplicative of the evidence admitted in the case record and will assist the Chamber in assessing the extent of the harm caused.⁹ The Legal Representatives opposed the Defence Request, because the requested evidence was cumulative in nature and pertains to matters already litigated and adjudicated upon by the Chamber.¹⁰

⁴ ICC-01/02-02/06-2368-Conf (“Prosecution Request”).

⁵ ICC-01/04-02/06-2369-Conf-Red.

⁶ ICC-01/04-02/06-2375-Conf.

⁷ ICC-01/02-02/06-2373-Conf.

⁸ ICC-01/02-02/06-2374-Conf (“Legal Representatives Response”).

⁹ Legal Representatives Response, paras. 2, 12-18.

¹⁰ Legal Representatives Response, paras. 3, 19-34.

Submissions

10. Pursuant to regulations 24(5) and 34(c) of the Regulations of the Court, the Prosecution seeks leave to reply to three issues raised in the Defence Response. In particular, the Prosecution seeks leave to reply to the Convicted Person's submissions regarding:

- *First*, whether the evidence of three proposed Prosecution witnesses – [REDACTED], Ms PAPINUTTO, and [REDACTED] – is duplicative of other evidence on the record of the case and could have been elicited from other witnesses.
- *Second*, the Chamber's authority to consider criminal conduct for which the Convicted Person was not convicted in determining his sentence.
- *Third*, the link required between the Convicted Person's crimes and the harm in assessing "the extent of the damage caused, in particular the harm caused to the victims and their families" pursuant to rule 145 (1)(c) of the Rules.

11. The Prosecution submits that there is good cause justifying the Prosecution's reply. The Prosecution could not anticipate that the Convicted Person would overlook, alternatively ignore, facts relevant to an assessment of the potential overlap between the evidence in the case record and the Prosecution's proposed sentencing witnesses, or that he would misinterprets relevant ICC jurisprudence. The Prosecution's reply would assist the Chamber's decision regarding the relevance of the proposed Prosecution witnesses and the Chamber's assessment of the gravity of the crimes.

1. The testimony of the Prosecution's proposed sentencing witnesses is not duplicative of evidence in the record of the case

12. *First*, the Prosecution seeks leave to reply to submissions by the Convicted Person which overlook, alternatively ignore, important differences between the testimony of trial witnesses and the testimony of the Prosecution's proposed sentencing witnesses. In particular:

- Whether Witnesses P-0046 and P-0317 would have been in a position to give the proposed evidence of [REDACTED] during their testimony at trial, given that Witness P-0046 was a child protection officer who left Ituri in 2004 and P-0317 was an investigator who conducted specific missions in Ituri from 2002-2006, but was not permanently based there, [REDACTED].¹¹
- Whether the proposed evidence of [REDACTED] is, as argued by the Convicted Person, substantially duplicative of the testimony of witnesses P-0859, P-0800, P-0190, P-0315, and P-0317 about [REDACTED], given that none of these witnesses were in a [REDACTED] or testified about [REDACTED].¹²
- Whether Mirella PAPINUTTO's proposed evidence, stemming from her work inside a *centre de transit et d'orientation* ("CTO") that specifically targeted young girls¹³ and gave them psychological assistance,¹⁴ and her extensive work with both child *and* adult victims of sexual violence within the UPC/FPLC, "substantially overlaps" with that of Witnesses P-

¹¹ Defence Response, para. 14.

¹² Defence Response, paras. 21-22.

¹³ P-0046: T-100-Red-ENG WT 21:14-15.

¹⁴ P-0031: T-174, p. 41, lns. 1-6.

0046, who did not work for a CTO, and who focussed almost exclusively on crimes against children; and of [REDACTED].¹⁵

2. Other criminal conduct may be considered in aggravation

13. *Second*, the Prosecution seeks leave to reply to the Convicted Person's submission, in the context of Ms PAPINUTTO's prospective testimony, that "[a]llowing evidence of the impact of crimes of which he has not been convicted beyond a reasonable doubt would be inappropriate and prejudicial".¹⁶ The Convicted Person overlooks important authorities and misinterprets¹⁷ the jurisprudence of the Court in a manner that could not be anticipated by the Prosecution.

14. If leave is granted, the Prosecution will elaborate on the Appeals Chamber's ruling that criminal conduct established beyond reasonable doubt, other than the crimes for which a person has been convicted, can be considered to aggravate the sentence, as long as there is a "sufficiently proximate link" with the crimes for which the person has been convicted¹⁸ and the convicted person is sufficiently on notice.¹⁹ The Prosecution would also address the Appeals Chamber's finding that it is impossible to describe in the abstract how close this link has to be and that this must be done on a case-by-case basis.²⁰

¹⁵ [REDACTED].

¹⁶ Defence Response, para. 20.

¹⁷ Defence Response, para. 20: "This would inappropriately widen the sentencing evidence beyond the crimes of which Mr. Ntaganda has been convicted beyond a reasonable doubt."

¹⁸ ICC-01/05-01/13-2276-Red ("[Bemba et al. SAJ](#)"), para. 115.

¹⁹ [Bemba et al. SAJ](#), para. 116. See also ICC-01/04-01/06-2901 ("[Lubanga SJ](#)"), paras. 29-30 (finding that evidence from the trial or penalty phases which "exceed[s] the facts and circumstances set out in the Confirmation Decision" may be relied upon to aggravate the sentence provided "[t]he defence has had a sufficient opportunity to challenge the evidence and the allegations relevant to the sentence as advanced during the trial", and "an opportunity to respond to all the submissions and evidence that have been relied on for the purposes of sentence following [...] conviction."). Although the *Lubanga* Trial Chamber did not ultimately aggravate Lubanga's sentence based on uncharged crimes related to the charged crimes for which he was convicted, this was due only to evidentiary difficulties ([Lubanga SJ](#), paras. 59, 69, 74-75). It expressly confirmed that "[t]he Prosecution's failure to charge Mr Lubanga with rape and other forms of sexual violence as separate crimes within the jurisdiction of the Court is not determinative of the question of whether that activity is a relevant factor in the determination of the sentence." (paras. 67-68). See also ICC-01/04-01/06-3122 ("[Lubanga SAJ](#)"), paras. 117-118 (dismissing *in limine* Defence arguments in this respect because they were not raised "formally").

²⁰ [Bemba et al. SAJ](#), para. 116.

3. The nexus between the crimes of the Convicted Person and the harm

15. *Third*, the Prosecution seeks leave to reply to the Convicted Person's suggestion²¹ that certain harm, to be addressed in [REDACTED]'s and [REDACTED]'s testimony, lacks the required causal nexus with the crimes of which he was convicted. Instead of articulating the nexus required in order for the harm to be properly taken into account by the Chamber in sentencing, the Convicted Person refers to a decision of Trial Chamber II in the reparation proceedings in the *Katanga* case without explanation as to the applicability or otherwise of this decision to sentencing proceedings.²² The Prosecution could not anticipate the Convicted Person's reliance on this decision handed down in different proceedings.
16. If leave is granted, the Prosecution will clarify the meaning of a "sufficiently proximate link" between the crime and the harm,²³ including whether the harm must manifest itself shortly after the commission of the crimes, or whether the crime must be the sole contributing factor to the harm.²⁴
17. The Prosecution will further elaborate on the case law cited by the Convicted Person²⁵ concerning the nexus required in ICC reparation proceedings (a "but/for" relationship between the crime and the harm, and that the crimes be the

²¹ Defence Response, para. 23 (in the context of [REDACTED]'s prospective testimony): "the Trial Chamber should carefully consider the limits of the consequences that can be attributed to a crime, or to the perpetrator of a crime" and para. 26 (in the context of [REDACTED]'s prospective testimony): "trans-generational harm is a very complex phenomenon that requires specific proof in order to be established even according to the lower threshold of proof applicable to reparations proceedings".

²² Defence Response, fns. 46-47.

²³ In the *Bemba et al.* case the Appeals Chamber found that "what must be established is a sufficiently proximate link between the factor being considered as aggravating and the offences that formed the basis for the conviction", and once the link has been identified, "a 'nexus between the particular conduct [...] and the harm occasioned' is properly established". See [Bemba et al. SAJ](#), para. 151 (rejecting Mr Bemba's contention that the Trial Chamber failed to establish beyond reasonable doubt "[t]he nexus between the particular conduct relied upon, and the harm occasioned by the Article 70 offences").

²⁴ See similarly ICC-01/04-01/07-3484-tEng, paras. 44, 55-65 (considering the current visible 'scars' of the Bogoro attack).

²⁵ Defence Response, fns. 2, 45, and 46, citing the *Katanga* Transgenerational Harm Decision, paras. 9-14, 141 and 142.

“proximate cause” of the harm for which reparations are sought),²⁶ and whether in fact it applies in sentencing, despite the different purpose of the sentencing and reparations proceedings.²⁷

18. Finally, if leave is granted, the Prosecution will address whether the existence of a nexus between the crimes and the harm requires a fact-specific determination in light of the specific characteristics of a particular case, and accordingly, whether Trial Chamber II’s finding that a causal nexus had not been established between Germain Katanga’s crimes and the transgenerational harm suffered by five applicants in that case is irrelevant to this Chamber’s determination of a link between the Convicted Person’s crimes and the harm suffered by other victims.²⁸

Conclusion

19. Based on the foregoing, the Prosecution requests leave to reply to the Defence Response.



Fatou Bensouda
Prosecutor

Dated this 17th day of September 2019
At The Hague, The Netherlands

²⁶ See in *Lubanga*: ICC-01/04-01/06-2904, para. 250 and ICC-01/04-01/06-3129, paras. 124-129 and ICC-01/04-01/06-3129-AnxA (“Lubanga Reparations AO”), para. 59; *but see* Lubanga Reparations AO, para. 11 (“The causal link between the crime and the harm for the purposes of reparations is to be determined in light of the specificities of a case”). See in *Al-Mahdi*: ICC-01/12-01/15-236 (“Al-Mahdi Reparations Order”), para. 44. See in *Katanga*: ICC-01/04-01/07-3728-tENG, paras. 162-167 and ICC-01/04-01/07-3804-Red-tENG (“Katanga Transgenerational Harm Decision”), paras. 15-16.

²⁷ In sentencing proceedings the damage and the harm caused are relevant to the Chamber’s determination of the gravity of the crime (see article 78(1) of the Statute and rule 145(1)(c) of the Rules); in reparations proceedings the harm suffered by the victims is relevant to a determination of the amount of the convicted person’s liability (see ICC-01/04-01/06-3466-Red, paras. 36 and 107 (regarding the overall purpose of the reparations proceedings) and para. 108 (underscoring the acute importance of the harm suffered by the victims in determining the amount of the convicted person’s liability in reparations proceedings)).

²⁸ *Contra* Defence Response, para. 26 referring to Katanga Transgenerational Harm Decision.