

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 3 February 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

**Defence request for leave to file a reply to the
“Prosecution Response to ‘Defence Appeal Brief – Part I’”**

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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**Victims Participation and Reparations
Section**

Further to the “Prosecution Response to ‘Defence Appeal Brief – Part I’” submitted on 27 January 2020 (“Prosecution Response – Part I”),¹ Counsel for Mr. Ntaganda (“Defence”) hereby submit this:

**Defence request for leave to file a reply to the
“Prosecution Response to ‘Defence Appeal Brief – Part I’”**

INTRODUCTION

1. Pursuant to regulation 60(1) of the Regulations of the Court (“RoC”), the Defence respectfully seek leave to reply to the Prosecution Response – Part I in relation to the six issues set out below.

PROCEDURAL BACKGROUND

2. On 8 July 2019, Trial Chamber VI rendered its Judgment under article 74 of the Rome Statute (“Statute”). The Judgment found Mr. Ntaganda guilty of all eighteen charges against him.²

3. On 9 September 2019, the Defence gave notice of its intention to appeal the Judgment on 15 grounds.³

4. On 1 October 2019, the Appeals Chamber ordered the Defence to file its appeal brief in relation to the first and third grounds of appeal identified in the Defence Notice of Appeal by 11 November 2019.⁴

¹ Prosecution Response to “Defence Appeal Brief – Part I”, 27 January 2020, [ICC-01/04-02/06-2464](#) (“Prosecution Response – Part I”).

² Judgment, 8 July 2019, [ICC-01/04-02/06-2359](#) (“TJ” or “Judgment”).

³ Mr. Ntaganda’s Notice of Appeal against the Judgment pursuant to Article 74 of the Statute, 9 September 2019, [ICC-01/04-02/06-2396](#) (“Defence Notice of Appeal”).

⁴ Decision on Mr Ntaganda’s request for reconsideration of the decision on time and page extensions, 1 October 2019, [ICC-01/04-02/06-2426](#).

5. On 11 November 2019, the Defence submitted its “Defence Appeal Brief – Part I”.⁵

6. On 27 January 2020, the Prosecution filed its Prosecution Response – Part I.

APPLICABLE LAW

7. Pursuant to regulation 60(1) of the RoC, the Appeals Chamber may order the appellant to file a reply within a specified time-limit, should it “consider it necessary in the interests of justice”.

8. In *Lubanga*, the Appeals Chamber noted that “[a]lthough not specifically mentioned in regulation 60 of the Regulations of the Court, an appellant may request, and accordingly, trigger the powers of the Appeals Chamber to order the filing of a reply under said regulation.”⁶

9. Accordingly, the Appeals Chamber granted the appellants’ requests for leave to reply in *Lubanga* and *Bemba*, on the basis that, *inter alia*: it may assist the Appeals Chamber’s determination of the appeal; “the issues to which [the appellant] wishes to reply are pertinent to the proper adjudication of the appeal”;⁷ and “[the appellant] wishes to correct alleged inaccuracies and provide additional submissions.”⁸

SUBMISSIONS

10. The Defence hereby seeks leave to reply to three issues in relation to Ground 1, and three issues in relation to Ground 3. Additional submissions on these six issues are relevant to the proper adjudication of the appeal, in the interests of justice and may assist the Appeals Chamber’s determination of the appeal.

⁵ Defence Appeal Brief – Part I, 11 November 2019, [ICC-01/04-02/06-2443](#) (“Defence-Brief-I-2443”).

⁶ Order on the filing of a reply under regulation 60 of the Regulations of the Court, 21 February 2013, [ICC-01/04-01/06-2982](#), para.6 (“*Lubanga-Order-2982*”) (footnote omitted).

⁷ Decision on Mr Bemba’s request for leave to reply to the Prosecutor’s Response to the Document in Support of the Appeal, 7 December 2016, [ICC-01/05-01/08-3480](#), para.8.

⁸ [Lubanga-Order-2982](#), para.7.

I. Issues related to Ground 1

11. If authorized, the Defence Reply will address the following three issues in relation to Ground 1:

- The meaning, and accuracy, of the Prosecution's assertion that Ground 1 "amounts to" an appeal from the plenary's decision on Judge Ozaki's judicial independence";
- The correctness – and application to Ground 1 – of the Prosecution's novel test that issues of judicial independence can be raised on appeal only where they implicate the fairness of the proceedings (as if they could ever do otherwise), and only where new arguments are advanced by the appellant (as if they could have been where the appellant was not permitted to be heard on the issue at trial); and
- The correctness of the assertion that the separation of the executive and judicial functions does not apply where the overlap is between a national executive office and an international judicial office.

12. The Prosecution's argument that the Defence's request "amounts to" an appeal from the Article 40 Plenary Decision is ambiguous and was unforeseeable, as is the novel suggestion that such a ground of appeal is permissible, but only if it implicates trial fairness or raises "grounds of appeal [that] differed from those in their previous disqualification requests".⁹ The Prosecution's particular reliance on the *Čelebići* case to assert that separation of powers principles are inapplicable, or do not arise in the present case, misreads the *ratio decidendi* of that case, is inapplicable to the present circumstances, and is highly pertinent to the resolution of this ground of appeal.

⁹ [Prosecution Response – Part I](#), para.7 (footnote omitted).

II. Issues related to Ground 3

13. If authorized, the Defence Reply will address the following three issues in relation to Ground 3:

- The role which underlying criminal acts play in the pleading of charges at this Court (as opposed to the *ad hoc* tribunals) and, more specifically, in the *Ntaganda* case, and whether charges can competently be framed by reference to narrow temporal and geographical parameters,¹⁰ with details of underlying criminal acts being provided on a “non-exhaustive” basis within these confined locations and timeframes;¹¹
- The relevance, or otherwise, of the Prosecution’s argument that Mr Ntaganda received adequate notice of the charges and the challenged acts (article 67) in the context of a defence appeal concerning the scope of the confirmed charges (article 74); and
- The correctness of: (i) the Prosecution’s submission that “[a]lthough rape is ordinarily not considered a continuous crime, in this case it is appropriate to treat it as such because the perpetrators and victims (UPC/FPLC) were continuously on the move and the victims were raped repeatedly during their recruitment”,¹² and, consequently (ii) the assertion that the continuing nature of being a child soldier circumvents the need to plead discrete acts of rape.

¹⁰ [Prosecution Response – Part I](#), para.27.

¹¹ [Prosecution Response – Part I](#), para.28.

¹² [Prosecution Response – Part I](#), para.38.

14. In relation to the three proposed issues under Ground 3, it is noteworthy that the *Ntaganda* case is only the second occasion on which the Appeals Chamber will consider the scope of the charges under article 74(2) of the Statute.¹³ However, the proper approach to article 74(2) is fundamental to the way “in which the Prosecutor formulates the charges [...], the Pre-Trial Chamber confirms the charges [...] and the Trial Chamber convicts or acquits, based on the “facts and circumstances described in the charges””.¹⁴ It is evident from the parties’ arguments that there are significant disagreements on basic points of principle regarding the detail which is required to be provided in formulating the charges and whether deficiencies can be “cured” by notice. In view of these significant and fundamental points of departure, it is submitted that further briefing in relation to the three proposed issues will assist the Appeals Chamber’s determination of Ground 3.

15. This further briefing is particularly merited as it will permit the Defence, in the context of addressing the three proposed issues, to respond to Annex B of the Prosecution Response – Part I. The Defence notes regulation 36(2)(b) of the RoC which excludes from the page count of court documents “[a]ny appendix containing references, authorities, copies from the record, exhibits and other relevant, non-argumentative material” and stipulates that “[a]n appendix shall not contain submissions”. Annex B contains argumentative material, repeatedly noting “Defence challenges” and setting out the Prosecution’s responses thereto. Permitting the Defence leave to reply would mitigate any prejudice to the Defence posed by the Prosecution’s use of Annex B and provide the Appeals Chamber with the fullest briefing on this important ground concerning the Court’s procedural architecture.

¹³ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Separate opinion Judge Christine Van den Wyngaert and Judge Howard Morrison, 8 June 2018, [ICC-01/05-01/08-3636-Anx2](#), paras.19-20 (*Bemba-Separate-Opinion-3636-Anx2*).

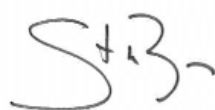
¹⁴ [Bemba-Separate-Opinion-3636-Anx2](#), para.19.

CONCLUSION AND RELIEF SOUGHT

16. For the reasons set out above, the Defence respectfully requests the Appeals Chamber to:

GRANT the Defence request for leave to file a reply to the Prosecution Response – Part I.

RESPECTFULLY SUBMITTED ON THIS 3rd DAY OF FEBRUARY 2020

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

Me Stéphane Bourgon, Counsel representing Bosco Ntaganda

The Hague, The Netherlands