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

**Prosecution Response to the Defence Request for Leave to File a Reply to the
“Prosecution Response to ‘Defence Appeal Brief – Part I’”**

Source: Office of the Prosecutor

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

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Introduction

1. Mr Ntaganda seeks to supplement the first part of his appeal against the Conviction Decision¹ by repeating his previous submissions and belatedly providing arguments that should have been included in his appeal brief. That Ntaganda failed to develop and substantiate his arguments in his appeal within the pages allocated by the Appeals Chamber should not justify granting him leave to do so in a reply. On this basis alone, the Appeals Chamber should dismiss Ntaganda's request for leave to reply to the Prosecution's response to the first part of his appeal against the Conviction Decision on the six issues he identifies.² However, given that the first and second issues Ntaganda identifies under Ground 3 were not addressed comprehensively, or at all, in his appeal brief,³ the Prosecution recognises that the Chamber may consider it would be assisted by receiving further submissions from Ntaganda in relation to those two issues. In that case, it would be open to the Chamber to permit further submissions on those issues under regulation 60(1) of the Regulations of the Court, or by ordering Ntaganda under regulation 28 to address specific issues or provide additional details.

Submissions

2. A reply is not an opportunity for an appellant to address shortcomings in their appeal. Regulation 58 requires the appellant to "set out the legal and/or factual reasons in support of each ground of appeal". A party cannot strategically keep its original submissions general and vague to trigger a detailed response on all possible matters potentially touched upon, to then rely on a reply to supplement and amend its original submissions. This disregards regulation 58(2) and the page limits established in the Court's legal framework or instructed by the Chambers. It also contradicts the rationale of regulation 60(1), which is intended to confine replies to circumstances where the Appeals Chamber considers that a reply would be in the interests of justice.⁴

3. The decision to permit a reply is a discretionary one, to be decided on a case-by-case basis.⁵ In this respect, the Appeals Chamber has considered whether further submissions on

¹ ICC-01/04-02/06-2443 ("Appeal – Part I").

² See ICC-01/04-02/06-2466 ("Request"). See also ICC-01/04-02/06-2464 ("[Prosecution Response](#)").

³ Request, para. 13, first and second bullet points. See also [Appeal - Part I](#), paras. 18-23.

⁴ ICC-01/05-01/13-2333 ("[Bemba et al. July 2017 Leave to Reply Decision](#)"), para. 20; ICC-01/05-01/13-2197 ("[Bemba et al. August 2017 Leave to Reply Decision](#)"), para. 18.

⁵ [Bemba et al. July 2017 Leave to Reply Decision](#), para. 20; [Bemba et al. August 2017 Leave to Reply Decision](#), para. 18.

the issues identified will assist the Appeals Chamber in its determination of the appeals.⁶ The Prosecution respectfully submits that the Chamber should be guided by the principles developed in the context of replies under regulation 24(5), including whether the requesting party seeks to provide arguments on matters that it could have reasonably anticipated or should have included in its original brief.⁷

A. Ntaganda repeats arguments regarding his first ground of appeal

4. Ntaganda's requested reply with respect to his first ground of appeal is repetitive of arguments that he already made in his appeal brief. The first and second issues relate to Ntaganda's standing to appeal the Article 40 Plenary Decision in the context of a final appeal against a Conviction Decision. The third issue relates to Article 40's interpretation. Ntaganda provided arguments on these matters—which are therefore neither new nor unforeseeable—in his appeal brief:

- He argued that “[t]his ground of appeal, in substance, raises the same issues that were adjudicated in the Plenary’s Decision on independence”.⁸
- He relied on the *Čelebići* case to justify his appeal of the Article 40 Plenary Decision.⁹
- He argued that article 40 does not permit a part-time ICC judge to hold concurrent employment with the executive of a State.¹⁰

5. The Prosecution responded to these arguments. It argued that: (1) a Plenary decision is not appealable *per se*;¹¹ (2) the *Čelebići* case does not support Ntaganda's submissions,¹² and

⁶ [Bemba et al. July 2017 Leave to Reply Decision](#), paras. 8, 22; [Bemba et al. August 2017 Leave to Reply Decision](#), para. 18.

⁷ Leave to reply will generally be granted only after a showing of good cause (See e.g. [ICC-01/05-01/08-294](#), para. 3; [ICC-02/04-01/15-252](#), p. 3). If permitted, replies must be “narrowly tailored to only address new issues” ([ICC-01/05-01/08-3165-Red](#), para. 5; [ICC-01/05-01/13-893-Red](#), para. 10), raised in a response which “could not have been foreseen” ([ICC-02/11-01/15-284 OA7](#), para. 11), and “may not be used to strengthen the arguments” previously advanced ([ICC-01/04-02/12-296-tENG](#), para. 7; [ICC-01/05-01/08-3480 A](#), para. 8). The Appeals Chamber will generally not be assisted by submissions which are irrelevant or unnecessary to assist the Chamber’s deliberations, or which fall reasonably within the scope of the moving party’s original arguments (see [ICC-01/04-01/06-824 OA7](#), para. 67 finding that leave to reply was “unnecessary” and “not relevant to the deliberations of the Appeals Chamber”, and [ICC-01/09-01/11-1417 OA7 OA8](#), para. 13 rejecting a request to make additional submissions—albeit under regulation 28, rather than as a reply—on the basis that the issues for which leave was sought fell “within the ambit of the issues on appeal”, that the arguments in response were “foreseeable” in the circumstances, and that the applicants had already received the material possibility of presenting “all arguments” within the scope of their appeals).

⁸ [Appeal - Part I](#), para. 5.

⁹ [Appeal - Part I](#), fns. 2 and 6. See generally [Appeal-Part I](#), paras. 2- 5.

¹⁰ [Appeal - Part I](#), para. 7.

(3) article 40 does not include an absolute prohibition for non-full-time judges to perform certain professional activities.¹³ Moreover the Prosecution did not provide a “novel test”; instead, it argued that an appellant must show the impact of errors raised on appeal.¹⁴ Ntaganda seeks to repeat and expand on his original arguments. These submissions would not assist the Appeals Chamber in its determination of the appeal.

B. Ntaganda seeks to substantiate and supplement his arguments regarding his third ground of appeal

6. None of the three issues to which Ntaganda seeks to reply under his third ground of appeal are new, nor were they unforeseeable to Ntaganda. The third issue (concerning the correctness of the Prosecution’s submission that in this case, rape against child soldiers should be treated as a continuous crime) is not new to Ntaganda. The Prosecution made the same argument in its closing oral submissions before the Trial Chamber, and referred to jurisprudence in support of its submissions.¹⁵ Moreover, Ntaganda misrepresents the Prosecution submissions. The Prosecution did not argue that “the continuing nature of being a child soldier circumvents the need to plead discrete acts of rape”;¹⁶ rather it argued that the temporal and geographical parameters for the charges of these crimes could be akin to those of continuing crimes.¹⁷ Ntaganda merely seeks to repeat and develop the submissions he has already made on this issue in his appeal brief.¹⁸ His failure to elaborate any further at that stage does not warrant an opportunity to do so now in reply.

7. In relation to the first and second issues under Ground 3, the Prosecution already provided arguments regarding those issues (concerning the role of underlying criminal acts in the charges, and the relevance of notice of the charges to Ntaganda’s appeal) in its response to the Defence Closing Brief and in its closing oral submissions at trial.¹⁹ Ntaganda was

¹¹ [Prosecution Response](#), paras. 4-7. The Prosecution did not provide a “novel test”; instead, it argued that an appellant must show the impact of errors raised on appeal: article 83(2). *Contra* Request, para. 11, second bullet point. See [Prosecution Response](#), para. 7.

¹² [Prosecution Response](#), para. 7.

¹³ [Prosecution Response](#), paras. 8-12.

¹⁴ *Contra* Request, para. 11, second bullet point. See Article 83(2), Rome Statute; [Prosecution Response](#), para. 7.

¹⁵ [Hearing 28 August 2018](#), 27:12-29:9.

¹⁶ Request, para. 13, third bullet point.

¹⁷ [Prosecution Response](#), para. 38.

¹⁸ [Appeal – Part I](#), para. 22(xii).

¹⁹ ICC-01/04-02/06-2306-Red, (“[Prosecution Response to the Defence Closing Brief](#)”) paras. 8-12, 14 (stating that relevant to the requirements of article 74(2) is the degree of detail required to inform Ntaganda of the charges and enable him to prepare his defence, that all documents must be considered to determine whether they had sufficient information, and specifying the further documents through which Ntaganda received further notice of the charges); ICC-01/04-02/06-T-262-Eng (“[Hearing 28 August 2018](#)”), 24:16-27:11.

therefore already well aware of the Prosecution's views regarding these issues and would have been able to anticipate that the Prosecution would raise them again in its response to his submissions on Ground 3.

8. Fundamentally, Ntaganda seeks to utilise a reply to correct his decision not to address issues comprehensively in his appeal. In Ground 3, Ntaganda outlined his position in no more than one sentence for each challenged act by simply arguing that they “do not fall within the ‘facts and circumstances described in the charges’”.²⁰ However, his brief submissions did not accurately present the Confirmation Decision, the UDCC and the record of the case. By merely quoting the *Bemba* appeal judgment, Ntaganda ignored the characteristics of this case and selectively read—and disregarded—jurisprudence. He repeated arguments already made without even attempting to explain why the Chamber erred. The Prosecution could not be expected to respond in the same manner; it had to unpack, correct, clarify and address Ntaganda's vague and general assertions in a clear and comprehensive manner. In addition, annex B to the Prosecution's Response attempts to assist the Chamber by setting out the record of the case in a non-argumentative manner. As noted,²¹ the Prosecution identified whether the Challenged Acts (which each related to several victims) were referenced in the Confirmation Decision and UDCC, when the related evidence was notified to the Defence, and whether the Defence had already raised those very same arguments at trial (*i.e.* whether the Defence had already “challenged” those incidents).

9. Ntaganda's failure to substantiate his arguments on his third ground of appeal warrants the rejection of his Request in respect of this ground. But notwithstanding this, given the paucity of submissions from Ntaganda in relation to the first and second issues under Ground 3, the Prosecution recognises that the Chamber may consider it would be assisted by further submissions from Ntaganda on those issues. If the Chamber is of the same view, it would be open to the Chamber to permit further submissions under Regulation 60(1) of the Regulations of the Court—if the submissions are considered necessary in the interests of justice—or by ordering Ntaganda under Regulation 28 to address specific issues or provide additional details. The same does not hold true for the third issue relating to Ground 3 of Ntaganda's appeal, however. As stated above, Ntaganda misrepresents and seeks to repeat arguments he

²⁰ [Appeal – Part I](#), para. 22(i) to (xv).

²¹ See [Prosecution Response](#), fn. 152, and Annex B.

already made in his appeal in relation to the third issue.²² Ntaganda should not be granted an opportunity to reply on the third issue of Ground 3.

Conclusion and relief sought

10. For the reasons set out above, the Prosecution respectfully requests the Appeals Chamber to dismiss Ntaganda's Request in respect of the three issues under Ground 1, and the third issue under Ground 3. In the event the Chamber considers it would be assisted by further submissions in relation to the first and second issues under Ground 3, the Prosecution notes that the Chamber may permit a reply on those issues if it considers it necessary in the interests of justice under Regulation 60(1), or through the issuance of questions under Regulation 28.



Fatou Bensouda, Prosecutor

Dated this 6th day of February 2020

At The Hague, The Netherlands

²² See above, para. 6