

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **5 March 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***

Confidential

**Prosecution Request for an extension of the page limit for its response to the
"Defence Appeal Brief - Part II"**

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. The Prosecution respectfully requests an extension of 40 pages to respond to Part II of Mr Ntaganda's Appeal Brief.¹ The nature and wide-ranging scope of Ntaganda's appeal, which raises numerous legal issues and challenges the Chamber's factual findings and evidentiary assessments throughout the Conviction Decision, constitute "exceptional circumstances" under regulation 37(2) of the Regulations of the Court justifying an extension of 40 pages. This extension of pages will facilitate the expeditious conduct of the appeal and ensure that any further appellate discussion of these matters proceeds on a sound basis.²

PROCEDURAL BACKGROUND

2. On 20 September 2019, upon Ntaganda's request, the Appeals Chamber: (i) directed Ntaganda to file his appeal brief in relation to the first two grounds of appeal by 7 October 2019; (ii) extended Ntaganda's time limit for filing his appeal brief in relation to the remaining 13 grounds to 14 January 2020; and (iii) extended the page limit for Ntaganda's appeal by 50 pages to a total of 150 pages, to be distributed between the two filings; and also extended the page limit for the Prosecutor's response by 50 pages to a total of 150 pages.³

3. On 1 October 2019, upon Ntaganda's request to reconsider the previous decision, the Appeals Chamber: (i) "on an exceptional basis" allowed Ntaganda to file the first and third ground of appeal by 11 November 2019; (ii) and extended the time limit for the filing of the Prosecutor's response to the first part of Ntaganda's appeal to 27 January 2020; and (iii) rejected Ntaganda's request for a further extension of 50 pages.⁴

¹ See e.g. ICC-01/04-02/06-2465-Conf ("Appeal Brief-Part II").

² Pursuant to regulation 23*bis*(2) of the Regulations of the Court, this filing is confidential because it refers to extracts of the Appeal Brief-Part II, which remains confidential.

³ ICC-01/04-02/06-2415.

⁴ ICC-01/04-02/06-2426.

4. On 11 November 2020, Ntaganda filed the first part his appeal brief (comprising 11 pages of submission).⁵
5. On 17 January 2020, and after some delays of the translation of the Conviction Decision into Kinyarwanda, the Appeals Chamber: (i) extended the time limit for the filing of Ntaganda's second part of his appeal to 31 January 2020, and (ii) permitted him to file a corrected version within 14 days of receipt of the remaining translated sections.⁶
6. On 27 January 2020, the Prosecution responded to the first part of Ntaganda's appeal brief (amounting to 26 pages of submissions).⁷ On 31 January 2020, Ntaganda filed the second part of his appeal brief (amounting to 139 pages of submissions).⁸
7. On 3 February 2020, Ntaganda requested leave to reply to the Prosecution's response to the first part of his appeal brief⁹ and on 6 February 2020, the Prosecution partially opposed the request.¹⁰
8. On 3 March 2020, having received the remaining translated sections of the Conviction Decision, Ntaganda notified that he would make no changes to the second part of his appeal brief.¹¹

SUBMISSIONS

9. The Prosecution respectfully requests an extension of 40 pages to respond to Part II of Mr Ntaganda's Appeal Brief. The Prosecution has 124 pages left of its allotted pages to respond to thirteen grounds of appeal challenging almost the entirety of the Conviction Decision and the fair conduct of the trial proceedings. Although the Prosecution is striving to confine its submissions to the allocated

⁵ ICC-01/04-02/06-2443 ("Appeal-Part I").

⁶ ICC-01/04-02/06-2461.

⁷ ICC-01/04-02/06-2464.

⁸ Appeal Brief-Part II.

⁹ ICC-01/04-02/06-2466.

¹⁰ ICC-01/04-02/06-2467.

¹¹ ICC-01/04-02/06-2481.

pages, it has now become apparent that it will require more pages to adequately respond to Ntaganda's submissions and meaningfully assist the Appeals Chamber in its appellate review. As shown by the examples below, the nature of Ntaganda's submissions coupled with the wide-ranging scope of his appeal constitute "exceptional circumstances" under regulation 37(2) of the Regulations justifying an extension of 40 pages.

10. *First*, while Ntaganda's arguments in his second ground of appeal (fair trial violations) are developed in approximately 19 pages, they encompass a wide variety of determinations made by the Trial Chamber and trial litigation throughout the trial, including with regard to specific *ex parte* submissions, the circumstances in which the Chamber received the evidence of various witnesses (including but not limited to P-55, P-290; P-790), the adequacy of Prosecution disclosure, the manner in which Ntaganda's 'no case to answer' motion was addressed, the opening of the trial, the measures to ensure the integrity of the trial, the scheduling of witnesses and the resolution of applications under article 82(1)(d).¹²

11. To respond to Ntaganda's submissions, the Prosecution must place his arguments in their context and provide the Appeals Chamber with all the relevant circumstances and the procedural history of a trial lasting three years with hundreds of interlocutory decisions.

12. *Second*, Ntaganda makes submissions on several legal issues such as the standard of appellate review for factual errors,¹³ the Chamber's approach to assessing evidence (which Ntaganda labels as the "either/or" approach to fact finding),¹⁴ "accomplice" witnesses,¹⁵ failure to issue a reasoned decision pursuant to

¹² See *e.g.* Appeal Brief-Part II, paras. 5-57. Ntaganda argued that he had to drop a number of arguments under this ground due to the page limit (Appeal Brief-Part II, para. 5 (fn. 10)); yet, he also added a new sub-ground not mentioned in his notice: paras. 48-57.

¹³ While Ntaganda requests the Appeals Chamber to apply the "well established" standard of appellate review for errors of law and procedure, he "underscores that the 'margin of deference to the factual findings of the trial chamber must be approached with extreme caution'": see Appeal-Part II, para. 4.

¹⁴ Appeal-Part II, paras. 139, 154-155, 158, 169-170, 179, 197-198, 229-230, 295, 352-353, 358.

¹⁵ Appeal-Part II, paras. 159, 172, 181, 202, 210, 226, 344.

article 74(5),¹⁶ the elements of the war crime of ordering displacement of the civilian population,¹⁷ reliance on rule 68(2)(c) statements,¹⁸ the notions of credibility and reliability¹⁹ and the law on co-perpetration.²⁰

13. Although Ntaganda's submissions on these issues are brief (at times a sentence or two), to answer them the Prosecution needs to devote proportionally more text than the few lines or paragraphs used by Ntaganda. It must first unpack and develop Ntaganda's submissions in order to respond to them and then state the Prosecution's position.

14. *Third*, Ntaganda challenges the Chamber's factual findings and assessment of the evidence throughout the Conviction Decision. Some of his grounds of appeal have different sub-grounds (and some sub-grounds even have sub-sub grounds) with distinct thematic arguments.²¹ Ntaganda argues that the Chamber failed to consider some of his trial arguments and evidence,²² erroneously assessed Ntaganda's testimony²³ and the credibility and reliability of numerous Defence and Prosecution's witnesses, such as D-0017,²⁴ P-0010,²⁵ P-0014,²⁶ P-0017,²⁷ P-0041,²⁸ P-0055,²⁹ P-0758,³⁰ P-0768,³¹ P-0883,³² P-0888,³³ P-0898,³⁴ P-0901,³⁵ P-0907³⁶ and P-0963.³⁷

¹⁶ Appeal-Part II, paras. 210, 305; *see also* paras. 68, 88, 163, 198, 230, 237, 243, 247, 260, 269, 291-292, 309, 313, 315, 364.

¹⁷ Appeal-Part II, paras. 130-135.

¹⁸ Appeal-Part II, paras. 148-150.

¹⁹ Appeal-Part II, para. 328.

²⁰ Appeal-Part II, paras. 365-388, 389-398.

²¹ *See e.g.* ground 5 (with five sub-grounds and further sub-sub grounds); ground 8 (with six sub-grounds); grounds 13 and 14 (with five sub-grounds each) and ground 15 (with three sub-grounds and multiple sub-sub grounds).

²² *See e.g.* Appeal-Part II, paras. 116-120, 190, 296-299, 353-358.

²³ *See e.g.* Appeal-Part II, paras. 136-141.

²⁴ Appeal-Part II, para. 145.

²⁵ Appeal-Part II, paras. 243, 324-339.

²⁶ Appeal-Part II, paras. 111, 285.

²⁷ Appeal-Part II, paras. 85, 197-224.

²⁸ Appeal-Part II, para. 285.

²⁹ Appeal-Part II, paras. 381- 383, 399-411.

³⁰ Appeal-Part II, paras. 259, 262-266, 271.

³¹ Appeal-Part II, paras. 95, 154-155, 158, 169-170, 179, 340-347.

³² Appeal-Part II, paras. 251-252, 267, 271.

³³ Appeal-Part II, paras. 63, 173.

³⁴ Appeal-Part II, paras. 247, 254.

³⁵ Appeal-Part II, paras. 381- 383.

³⁶ Appeal-Part II, para. 89.

Some of Ntaganda's submissions are brief but sweeping. For example, in a single footnote Ntaganda refers to 26 documents without elaboration,³⁸ and in two footnotes he cites over 146 footnotes from the Conviction Decision, also without elaboration.³⁹ He attaches pictures of individuals without providing context⁴⁰ and makes general statements on the basis of domestic case law.⁴¹

15. Yet, the Prosecution must respond to these submissions, clarify them and place the disputed evidence against the complete evidentiary record and the Chamber's detailed reasoning. Notably, Ntaganda testified over 30 days and many of the findings that Ntaganda challenges refer to witnesses who testified over several days (such as P-0055, P-0963, P-0010, P-0014, P-0017, P-0030, P-0768, P-0898, P-0883, P-0907, P-0888, P-0901) and/or had their statements and/or transcript interviews in this case (in some cases, more than one) and where applicable *Lubanga* trial transcripts admitted into evidence (P-0014, P-0041, P-0016, P-0030) and as such, responding to Ntaganda's challenges requires reference to numerous documents. The Prosecution therefore needs proportionally more text than Ntaganda to respond to these factual and evidentiary challenges.

16. In conclusion, the Prosecution wishes to comprehensively respond to Ntaganda's legal submissions and evidentiary challenges by apprising the Appeals Chamber, in a concise yet accurate and complete manner, of all relevant information.⁴² The extension of pages will facilitate the resolution of this appeal and ensure that the Prosecution's response is presented in the soundest possible way for the Appeals Chamber to deliberate on this case.

³⁷ Appeal-Part II, paras. 85-86, 97-98, 102.

³⁸ Appeal-Part II, para. 110, fn. 285.

³⁹ Appeal -Part II, fns. 374-375.

⁴⁰ Appeal-Part II, para. 238.

⁴¹ Appeal-Part II, para. 238; fns. 372, 419.

⁴² The Appeals Chamber has previously considered "the necessity for the proper presentation of the case" to grant an extension of pages: ICC-01/04-01/06-177, para. 6.

CONCLUSION

17. For all these reasons, the Prosecution respectfully requests an extension of 40 pages to respond to Ntaganda's Appeal-Part II.



Fatou Bensouda, Prosecutor

Dated this 5th day of March 2020

At The Hague, The Netherlands