

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

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

Date: 10 March 2020

THE APPEALS CHAMBER

Before:

**Judge Howard Morrison, Presiding
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

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

Source: Defence Team of Mr. Bosco Ntaganda

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. Helen Brady

Counsel for the Defence

Me Stéphane Bourgon, *Ad.E.*
Ms. Kate Gibson

Legal Representatives of Victims

Ms. Sarah Pellet
Mr. Dmytro Suprun

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
(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
Section**

Further to the submission of the Prosecution Request for an extension of the page limit for its response to the "Defence Appeal Brief - Part II" on 5 March 2020¹ ("Prosecution Request") and the Appeals Chamber's Order on the filing of a response to 'Prosecution Request for an extension of the page limit for its response to the "Defence Appeal Brief – Part II"' issued on 9 March 2020 ("Chamber" and "9 March Order"), Counsel for Mr. Ntaganda ("Defence" or "Mr. Ntaganda") hereby submit this:

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

("Defence Response")

INTRODUCTION

1. The Defence opposes the Prosecution Request seeking an extension of 40 pages to respond to Part II of Mr. Ntaganda's Appeal Brief.² The Prosecution Request fails to demonstrate the existence of "exceptional circumstances" as required under regulation 37(2) of the Regulations of the Court ("RoC") and none exist to justify the extension sought. There is no need for the Prosecution to "unpack and develop" Ntaganda's submissions in order to respond to them and then state the Prosecution's position. Considering the 150-page limit imposed on and adhered to by Mr. Ntaganda for the filing of his Appeal Brief – Parts I and II, granting the Prosecution any extension of pages at this time would necessarily impact the fairness of the appeals proceedings. Like the Defence, the Prosecution will be given an opportunity to amplify its written submissions at the oral hearing scheduled for 29 June to 01 July 2020.³

¹ Prosecution Request for an extension of the page limit for its response to the "Defence Appeal Brief – Part II", 5 March 2020, [ICC-01/04-02/06-2482](#) ("Prosecution Request").

² Defence Appeal Brief, 31 January 2020, [ICC-01/04-02/04-2465-Conf](#) ("Defence Appeal Brief – Part II").

³ Scheduling order for a hearing before the Appeals Chamber, 9 March 2020, [ICC-01/04-02/06-2486](#) ("9 March Order").

PROCEDURAL BACKGROUND

2. On 9 September 2019, the Defence submitted its Notice of appeal, comprising 15 grounds of appeal.⁴

3. On 11 September 2019, the Defence submitted its "Request for extension of page limit and time to file appeal brief" requesting an extension of time for the filing of Mr. Ntaganda's Appeal Brief as well as an extension of 150 pages to the prescribed page limit pursuant to regulation 37(2) RoC, for a total of 250 pages.⁵

4. On 17 September 2019, the Prosecution opposed the Defence request for an extension of 150 pages to the prescribed page limit, arguing *inter alia* that "an extension of 50 pages (amounting to a 150-page brief) would appear reasonable in the circumstances. Any extension which would exceed 100 pages (*i.e.* a brief which is more than 200 pages) would be overly excessive."⁶

5. On 20 September 2019, the Chamber extended the page limit for Mr. Ntaganda's Appeal Brief by 50 pages (for a total of 150 pages), to be distributed between the first and second parts of his Appeal Brief,⁷ taking into consideration that "the scope and range of the arguments anticipated in the present appeal constitute exceptional circumstances justifying the grant of a reasonable extension of the page limit" and that "a page extension of 50 pages should be sufficient to allow Mr Ntaganda to clearly and concisely articulate his arguments and considers that the

⁴ Mr. Ntaganda's Notice of Appeal against the Judgment pursuant to Article 74 of the Statute, ICC-01/04-02/06-2359, 9 September 2019, [ICC-01/04-02/06-2396](#) ("Notice of Appeal").

⁵ Request for extension of page limit and time to file appeal brief, 11 September 2019, [ICC-01/04-02/06-2398](#).

⁶ Prosecution response to Mr Ntaganda "Request for extension of page limit and time to file appeal brief" (ICC-01/04-02/06-2398), 17 September 2019, [ICC-01/04-02/06-2408](#), para.5 ("17 September Prosecution Response").

⁷ Decision on Mr Ntaganda's request for an extension of the page and time limit for the filing of the appeal brief and related matters, 20 September 2019, [ICC-01/04-02/06-2415](#) ("20 September Decision").

additional pages requested by Mr Ntaganda would not contribute to the clarity or focus of his arguments.”⁸

6. Having expressly argued that the Prosecution and victims should be granted matching extensions of the page limits for their responses to Mr. Ntaganda’s Appeal Brief, the Prosecution was granted an equivalent 50-page extension for its response.⁹

7. On 23 September 2019, the Defence submitted an “Urgent request for reconsideration of the ‘Decision on Mr Ntaganda’s request for an extension of the page and time limit for the filing of the appeal brief and related matters’”¹⁰ in which it requested *inter alia* an extension of 50 pages, for a total of 200 pages, for Mr Ntaganda’s entire Appeal Brief. The Defence submitted that: “considering the scope, range and complexity of the arguments anticipated in support of its 15 grounds of appeal, the Defence would necessarily have to drop certain grounds of appeal, thereby resulting in an injustice”.¹¹

8. On 24 September 2019, the Prosecution opposed the Defence request for reconsideration¹² arguing that “Mr Ntaganda has not shown a clear error of reasoning by the Appeals Chamber or that reconsideration is necessary to prevent an injustice. Nor has he identified new facts or arguments that are relevant to this assessment.”¹³

⁸ *Ibid.*, para.20.

⁹ *Ibid.*, para.21.

¹⁰ Urgent request for reconsideration of the “Decision on Mr Ntaganda’s request for an extension of the page and time limit for the filing of the appeal brief and related matters”, 23 September 2019, [ICC-01/04-02/06-2417](#) (“Urgent Defence Request”).

¹¹ *Ibid.*, para.11.

¹² Prosecution response to Mr Ntaganda’s “Urgent request for reconsideration of the ‘Decision on Mr Ntaganda’s request for an extension of the page and time limit for the filing of the appeal brief and related matters’” (ICC-01/04-02/06-2417), 24 September 2019, [ICC-01/04-02/06-2418](#) (“24 September Prosecution Response”).

¹³ *Ibid.*, para.1 (footnote omitted).

9. On 1 October 2019, the Chamber rejected the Defence request for reconsideration,¹⁴ holding that: “[i]f counsel, acting upon the instructions of their client, are of the view that it would be more beneficial to drop certain grounds of appeal rather than argue all grounds concisely, that is a matter that is entirely within their discretion.”¹⁵

10. On 11 November 2019, the Defence submitted Mr. Ntaganda's Appeal Brief – Part I, comprising 11 pages in support of Grounds 1 and 3.¹⁶

11. On 31 January 2020, the Defence submitted Mr. Ntaganda's Appeal Brief – Part II, comprising 139 pages in support of the remaining 13 grounds of appeal.¹⁷

12. On 27 January 2020, the Prosecution submitted its response to Mr. Ntaganda's Appeal Brief – Part I, comprising 26 pages in response to Grounds 1 and 3.¹⁸ Notably, the Prosecution attached an annex to its response comprising 32 pages related to its arguments in response to Ground 3. As submitted in its Defence request for leave to file a reply to the “Prosecution Response to ‘Defence Appeal Brief – Part I’”,¹⁹ the Defence underscored the nature of the submissions in the annex as including submissions contrary to regulation 36(2)(b) RoC.

SUBMISSIONS

13. None of the arguments raised in the Prosecution Request warrant a finding of “exceptional circumstances” as required by regulation 37 RoC. Moreover, granting the Prosecution Request would necessarily impact the fairness of the appeals proceedings, in particular considering the filing of Mr. Ntaganda's Appeal Brief Parts

¹⁴ Decision on Mr Ntaganda's request for reconsideration of the decision on time and page extension, 1 October 2019, [ICC-01/04-02/06-2426](#) (“1st October Decision”).

¹⁵ *Ibid.*, para.13.

¹⁶ Defence Appeal Brief – Part I, 11 November 2019, [ICC-01/04-02/06-2443](#).

¹⁷ [Defence Appeal Brief – Part II](#).

¹⁸ Prosecution Response to “Defence Appeal Brief – Part I”, 27 January 2020, [ICC-01/04-02/06-2464](#).

¹⁹ Defence request for leave to file a reply to the “Prosecution Response to ‘Defence Appeal Brief – Part I’”, 3 February 2020, [ICC-01/04-02/06-2466](#).

I and II comprising a total of 150 pages and the Chamber's 9 March Order scheduling a hearing from 29 June to 1 July 2020 in order to hear submissions and observations by the parties and participants in the appeals of Mr. Ntaganda against the 8 July 2019 Judgment and the 7 November 2019 Sentencing judgment.²⁰

14. *First*, "the nature of Ntaganda's submissions coupled with the wide-ranging scope of his appeal"²¹ does not constitute exceptional circumstances justifying a 40-page extension of the Prosecution's response to the Defence Appeal Brief – Part II. Indeed, the Prosecution has been on notice of the extent and scope of Mr. Ntaganda's appeal since 9 September 2019, when the Defence submitted its Notice of Appeal. Accordingly, there are no new circumstances, let alone exceptional ones.

15. In addition, the Prosecution has known since 20 September 2019 that it was required to respond to Mr. Ntaganda's Appeal Brief Parts I and II in two responses totalling 150 pages.²² On two occasions, while it was already privy to the Defence Notice of Appeal, the Prosecution opposed the Defence request for extension of the page limit as well as the related Defence request for reconsideration of the Chamber's decision,²³ arguing *inter alia* that any extension of more than 50 pages would be "overly excessive."²⁴ Notably, in urging the Appeals Chamber to reject the Defence's initial request for additional pages, the Prosecution – having had an opportunity to assess the Notice of Appeal – argued that "[t]he Prosecution and Victims should also be granted **matching extensions of the page limits** for their response to Mr. Ntaganda's appeal brief."²⁵ This was of course done.²⁶

16. Moreover, the Prosecution made a deliberate choice to dedicate 26 pages to respond to the 11-page Defence Appeal Brief – Part I. The fact that the Prosecution is

²⁰ [9 March Order](#), para.1.

²¹ [Prosecution Request](#), para.9.

²² [20 September Decision](#), para.21.

²³ [17 September Prosecution Response](#) and [24 September Prosecution Response](#).

²⁴ [17 September Prosecution Response](#), para.5.

²⁵ [17 September Prosecution Response](#), para.5 (emphasis added).

²⁶ [20 September Decision](#), para.21.

left with 124 pages to respond to the remaining grounds of appeal does not amount to exceptional circumstances pursuant to regulation 37(2) RoC. Rather, it is the result of the Prosecution's own strategic choices.²⁷

17. *Second*, the Prosecution seems to argue that its response to Part II of Mr. Ntaganda's Appeal Brief should be longer than the Defence brief on the basis that it: "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";²⁸ "unpack and develop Ntaganda's submissions in order to respond to them and then state the Prosecution's position";²⁹ and "must respond to these submissions, clarify them and place the disputed evidence against the complete evidentiary record and the Chamber's detailed reasoning."³⁰

18. In doing so, rather than describing exceptional circumstances, the Prosecution merely describes the process of responding to an appeal brief, an undertaking it is very familiar with. Moreover, it can respectfully be presumed that the Chamber is capable of understanding the Defence's arguments as drafted, without the need for the Prosecution to "unpack and develop"³¹ them. The Prosecution should certainly be able to set out its position on the remaining grounds of appeal in the 124 pages it still has for this purpose.

19. *Third*, granting a 40-page extension for the Prosecution would necessarily impact the fairness of the appeals proceedings. The Defence was granted 150 pages to brief 15 grounds of appeal. As stated in its request for reconsideration, "considering the scope, range and complexity of the arguments anticipated in support of its 15 grounds of appeal, the Defence would necessarily have to drop

²⁷ [Prosecution Request](#), para.9.

²⁸ *Ibid.*, para.11.

²⁹ *Ibid.*, para.13.

³⁰ *Ibid.*, para.15.

³¹ *Ibid.*, para.13.

certain grounds of appeal, thereby resulting in an injustice".³² While the Defence managed in the end to brief all of its 15 grounds of appeal, doing so required the Defence to concisely articulate its arguments in line with the Chamber's guidance. Like the Prosecution is now required to do, the Defence has also had to make strategic choices in drafting its grounds of appeal; deleting certain arguments and briefing others more succinctly. In these circumstances, altering the number of pages allocated to the Prosecution at this stage, especially in the absence of exceptional circumstances pursuant to regulation 37(2) RoC, would be prejudicial to Mr. Ntaganda.

20. In addition, granting the Prosecution request would constitute a marked departure from the practice at the ICC, whereby responses to appeal briefs comprise both in law and in practice, the same number of pages as the related appeal briefs.

21. *Fourth*, when rejecting the Defence's request for reconsideration, the Chamber informed the parties and participants of its intention to: "schedule an oral hearing at which the parties will be given an opportunity to amplify their written submissions. The Appeals Chamber is confident that Mr Ntaganda will have ample opportunity to fully develop his arguments in written and oral form."³³ Such ample opportunity is equally available to the Prosecution to do so, in particular since the Chamber issued the 9 March Order confirming that a hearing before the Appeals Chamber will be held from 29 June to 01 July 2020.

CONFIDENTIALITY

22. Pursuant to regulation 23*bis* (1) and (2) RoC, the present response is classified confidential because it responds to a document with the same confidentiality level.

³² [Urgent Defence Request](#), para.11.

³³ [1st October Decision](#), para.13.

RELIEF SOUGHT

23. In light of the submissions and arguments presented herein, the Defence respectfully requests the Chamber to:

REJECT the Prosecution Request.

RESPECTFULLY SUBMITTED ON THIS 10TH DAY OF MARCH 2020

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

Me Stéphane Bourgon, *Ad.E* Counsel representing Bosco Ntaganda

The Hague, The Netherlands