

**Cour  
Pénale  
Internationale**

**International  
Criminal  
Court**



Original: English

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

Date: 15 April 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***

**Public**

**Defence request for leave to reply to the  
Prosecution Response to 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:**

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**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**

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**Registrar**

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**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

Further to the submission of the Prosecution Response to Defence Appeal Brief – Part II on 3 April 2020 (“Prosecution Response – Part II”),<sup>1</sup> Counsel for Mr. Ntaganda (“Defence” or “Mr. Ntaganda”) hereby submit this:

**Defence request for leave to reply to the  
Prosecution Response to Defence Appeal Brief – Part II**

**I. INTRODUCTION**

1. Pursuant to regulation 60(1) of the Regulations of the Court (“RoC”), the Defence respectfully seeks leave to reply to the Prosecution Response – Part II.

**II. PROCEDURAL BACKGROUND**

2. On 8 July 2019, Trial Chamber VI (“Trial Chamber”) delivered its Judgment pursuant to article 74 of the Rome Statute (“Statute”). Mr. Ntaganda was found guilty of all 18 charges laid against him.<sup>2</sup>

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

4. On 20 September 2019, the Appeals Chamber ordered Mr. Ntaganda to file Part II of his appeal brief by 14 January 2020.<sup>4</sup>

5. On 9 January 2020, the Defence sought an extension of time to submit the Defence Appeal Brief - Part II due to the unavailability of the Judgment’s translation in Kinyarwanda.<sup>5</sup>

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<sup>1</sup> Prosecution Response to “Defence Appeal Brief – Part II”, 3 April 2020, [ICC-01/04-02/06-2500](#) (“Prosecution Response – Part II”).

<sup>2</sup> Judgment, 8 July 2019, [ICC-01/04-02/06-2359](#).

<sup>3</sup> 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](#).

<sup>4</sup> 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](#) (“Decision-2415”).

<sup>5</sup> Motion seeking extension of time to submit Appeal Brief due to unavailability of translation of Judgment, 9 January 2020, [ICC-01/04-02/06-2453](#).

6. On 10 January 2020, the Appeals Chamber ordered the suspension of the time limit for the filing of the Defence Appeal Brief – Part II due to the unavailability of the Judgment’s translation in Kinyarwanda.<sup>6</sup>

7. On 16 January 2020, the Defence notified the Appeals Chamber that, subject to the implementation of certain measures, it would be ready to file the Defence Appeal Brief – Part II no later than 31 January 2020.<sup>7</sup>

8. On 17 January 2020, the Appeals Chamber extended the time limit for the filing of the Defence Appeal Brief – Part II to 31 January 2020.<sup>8</sup>

9. On 31 January 2020, the Defence filed the Defence Appeal Brief – Part II.<sup>9</sup>

10. On 3 February 2020, the Defence filed a request for leave to reply to the Prosecution Response– Part I.<sup>10</sup>

11. On 9 March 2020, the Appeals Chamber scheduled an appeal hearing to be held from 29 June to 1 July 2020.<sup>11</sup>

12. On 11 March 2020, the Appeals Chamber granted the Defence request for leave to reply to the Prosecution Response– Part I “in the interest of justice” and ordered the reply “to be delivered orally at the hearing scheduled from 29 June to 1 July 2020.”<sup>12</sup>

13. On 3 April 2020, the Prosecution filed its Prosecution Response –Part II.

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<sup>6</sup> Order regarding the ‘Motion seeking extension of time to submit Appeal Brief due to unavailability of translation of Judgment’, 10 January 2020, [ICC-01/04-02/06-2454](#).

<sup>7</sup> Defence Notice further to “Prosecution Response to the Defence Motion Seeking Extension of Time to Submit Appeal Brief”, 16 January 2020, [ICC-01/04-02/06-2458](#).

<sup>8</sup> Decision on the request for extension of time, 17 January 2020, [ICC-01/04-02/06-2461](#).

<sup>9</sup> Defence Appeal Brief – Part II, 31 January 2020, [ICC-01/04-02/06-2465](#) (“Defence Appeal Brief – Part II”).

<sup>10</sup> 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](#).

<sup>11</sup> Scheduling order for a hearing before the Appeals Chamber, 9 March 2020, [ICC-01/04-02/06-2486](#).

<sup>12</sup> Decision on request for leave to reply, 11 March 2020, [ICC-01/04-02/06-2488](#) (“Decision-2488”).

### III. APPLICABLE LAW

14. Pursuant to regulation 60(1) 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”.

15. 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.”<sup>13</sup>

16. 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”;<sup>14</sup> and “[the appellant] wishes to correct alleged inaccuracies and provide additional submissions.”<sup>15</sup>

### IV. SUBMISSIONS

#### A. Request for leave to reply

17. The Defence hereby seeks leave to reply on the following limited issues.

18. *First*, the standard of appellate review for errors of fact is discussed in the Defence Appeal Brief – Part II in five lines.<sup>16</sup> The Prosecution Response – Part II runs over seven pages<sup>17</sup> and asserts a departure at the International Criminal Court (“ICC”) from the standard established in the *Tadić* case and applied “ever since for

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<sup>13</sup> 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 (footnote omitted) (“*Lubanga-Order-2982*”).

<sup>14</sup> 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 (“*Bemba-Decision-3480*”).

<sup>15</sup> [Lubanga-Order-2982](#), para.7.

<sup>16</sup> [Defence Appeal Brief – Part II](#), para.4.

<sup>17</sup> [Prosecution Response - Part II](#), paras.4-17.

over 20 years”.<sup>18</sup> Given this attempt to re-litigate the standard of appellate review for factual errors in the context of this appeal, Mr. Ntaganda respectfully seeks leave to reply to the Prosecution’s arguments on this point, which would assist the Appeals Chamber’s determination of the appeal.

19. *Second*, the proper definition and scope of “corroboration” and “accomplice evidence” in criminal proceedings<sup>19</sup> are recurrent themes in the Prosecution Response – Part II. Given their now amplified importance in the context of this appeal, their impact on a number of grounds, and the significant disagreements between the parties on basic points of principle, Mr. Ntaganda seeks leave to address whether the Trial Chamber adopted and applied the correct legal standards, or whether “[Mr.] Ntaganda misunderstands evidentiary principles”.<sup>20</sup>

20. *Third*, the Trial Chamber’s application of the presumption of innocence and its overall approach to fact finding have assumed a prominent position in the Prosecution Response – Part II. Reacting to Mr. Ntaganda’s submissions that the Trial Chamber consistently disregarded Defence evidence, including the testimony of Mr. Ntaganda, on the basis of its preliminary conclusions about the credibility of Prosecution evidence; the Prosecution asserts that this neither represents a “burden shift” nor an “either/or” approach to fact finding and that the Trial Chamber did nothing more than apply an “established process” for reaching findings of fact.<sup>21</sup> Given its central relevance to this appeal, in particular regarding the Prosecution’s submissions about assumptions, which can be made on the basis of introductory statements made by the Trial Chamber in the Judgment, Mr. Ntaganda respectfully seeks leave to reply to the Prosecution’s assertions.<sup>22</sup>

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<sup>18</sup> [Prosecution Response - Part II](#), para.6.

<sup>19</sup> [Prosecution Response – Part II](#), paras.83,84,85,86-87,131,133,136-143,147,151,155,158,162-164,168,183,187, 230,233,250,252,254; fns.807,816.

<sup>20</sup> [Prosecution Response – Part II](#), p.61.

<sup>21</sup> See, e.g. [Prosecution Response – Part II](#), para.123.

<sup>22</sup> [Prosecution Response – Part II](#), paras.107,122-128,150-151,156-157,164,170,263; fns.539,544.

21. In addition, the Defence has identified a limited number of remaining legal issues warranting a reply. Additional submissions on these 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. Each identified issue responds directly to an argument raised by the Prosecution and submissions thereon will not replicate any argument already contained in the Defence Appeal Brief - Part II.

(1) Grounds 4 and 5

- The proper interpretation of an “attack directed against any civilian population” pursuant to article 7(1) of the Statute and in particular, whether the civilian population must be the primary object, purpose or motive of the attack;<sup>23</sup> and
- The proper interpretation, scope, and application of “State or organizational policy” under article 7(2)(a) of the Statute,<sup>24</sup> including whether Mr. Ntaganda's submissions on the meaning of *kupiga na kuchaji* are implausible, as alleged.<sup>25</sup>

(2) Ground 6

- The proper interpretation of the “nature and degree of the perpetrator's control over victims” and the correctness of the Prosecution's assertion that such control was exercised by UPC/FPLC fighters.<sup>26</sup>

(3) Ground 7

- The applicable legal standard for entering convictions against an accused on the basis of uncorroborated prior recorded statements.<sup>27</sup>

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<sup>23</sup> [Prosecution Response – Part II](#), para.71.

<sup>24</sup> [Prosecution Response – Part II](#), paras.95-97.

<sup>25</sup> [Prosecution Response – Part II](#), paras.82-87.

<sup>26</sup> [Prosecution Response – Part II](#), paras.109-114.

<sup>27</sup> [Prosecution Response – Part II](#), paras.131-134.

(4) Ground 13

- The correctness of the Prosecution’s claim that the Trial Chamber’s finding that the co-perpetrators meant “the destruction and disintegration” of an ethnic group, merely demonstrates that the common plan includes “an element of criminality” and as such does not exceed the plan as charged;<sup>28</sup>
- The line between “direct” and “circumstantial” evidence, and the proper limits on the Trial Chamber’s ability to infer a common plan from a circumstantial case;<sup>29</sup> and
- The correctness of supporting a submission on appeal that the Trial Chamber’s conclusion is the only reasonable one with findings that fell outside the Trial Chamber’s own analysis.<sup>30</sup>

(5) Ground 14

- The proper distinction between (i) the legal requirement that a Trial Chamber give reasons in support of findings of fact, and (ii) the legal standard for a Trial Chamber inferring a conclusion on which a conviction relies from circumstantial evidence.<sup>31</sup>

(6) Ground 15

- The correctness of the Prosecution submissions on the law on indirect co-perpetration pursuant to article 25(3)(a), in particular regarding the Trial Chamber’s approach to the assessment of Mr. Ntaganda’s *mens rea* for the second operation, across both operations *in globo*, without concluding that Mr. Ntaganda

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<sup>28</sup> [Prosecution Response – Part II](#), paras.216-218.

<sup>29</sup> [Prosecution Response – Part II](#), paras.220-223.

<sup>30</sup> [Prosecution Response – Part II](#), paras.235,237-238,242.

<sup>31</sup> [Prosecution Response – Part II](#), paras.264-267.

was aware of the factual circumstances that enabled him to exercise control over the crimes;<sup>32</sup> and

- The correctness of the Prosecution submissions regarding the Trial Chamber's finding that "Mr. Ntaganda was monitoring the unfolding of the Second Operation", in particular concerning Mr. Ntaganda's radio communications and the conclusions drawn from the logbooks.<sup>33</sup>

22. Lastly and more generally, a review of the Prosecution Response – Part II has revealed: (i) certain inaccuracies in the Prosecution's characterization of both the Trial Chamber's findings and Defence submissions; (ii) errors in the application and interpretation of the law; and (iii) assertions, which are inconsistent with the evidentiary record of the case. Mr. Ntaganda accordingly requests an opportunity to complete and correct the inaccuracies in the Prosecution Response – Part II, which would assist the Appeals Chamber in the determination of the appeal, without repeating the arguments made in the Defence Appeal Brief – Part II.

## **B. Form of the Reply**

23. In its decision granting leave to reply to the Prosecution Response – Part I, the Appeals Chamber ordered that Mr. Ntaganda's reply "be delivered orally at the hearing scheduled from 29 June to 1 July 2020."<sup>34</sup> For the reasons set out below, Mr. Ntaganda requests the Appeals Chamber to grant leave to submit a written reply to the Prosecution Response – Part II.

24. The briefing of appellate proceedings in international criminal trials has consistently included a written reply on behalf of the appellant. In appeal proceedings before the ICTY, ICTR, SCSL, ECCC, STL, and now at the IRMCT, the

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<sup>32</sup> [Prosecution Response – Part II](#), paras.269-285.

<sup>33</sup> [Prosecution Response – Part II](#), paras.291-294.

<sup>34</sup> [Decision-2488](#), para.8 (emphasis added).

appellant was (and is) entitled to file a written reply brief as of right.<sup>35</sup> Before the ICC, with the exception of article 70 proceedings, all appellants have also been authorized to file written submission when granted leave to reply.<sup>36</sup>

25. The previously-universal practice of written reply briefs may reflect the fact that, by the reply stage, parties to an appeal are no longer making broad legal and factual submissions, but are focused on more narrow disputes over precise items of evidence, legal principles, and the interpretation of jurisprudence. These outstanding disputes, which can be succinctly set out in written form (and supported with footnotes and references for the purpose of assisting the Appeals Chamber), do not lend themselves easily to oral advocacy.

26. While oral hearings certainly allow for the amplification and expansion of central arguments and extremely useful exchanges between the parties and the bench, they are not naturally suited to detailed and in-depth submissions about the minutiae of now “drilled down” legal and evidential disputes. For these reasons, Mr. Ntaganda respectfully submits that the Appeals Chamber is less likely to be assisted in determining the appeal by oral submissions in reply, presented in conjunction with the presentation of oral arguments, as opposed to the filing of a reply in written form at this stage.

27. The circumstances surrounding the present appeal also mitigate in favour of a written reply. Oral hearings are currently scheduled to run from 29 June to 1 July 2020. Given current travel restrictions and social distancing requirements stemming from the COVID-19 pandemic, there appears to be little certainty whether it will be

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<sup>35</sup> [ICTY, Rules of Procedure and Evidence](#), rule 113; [ICTR, Rules of Procedure and Evidence](#), rule 113; [SCSL, Rules of Procedure and Evidence](#), rule 113; [ECCC, Practice Direction ECCC/01/2007/Rev.8](#), article 8.4; [STL, Rules of Procedure and Evidence](#), rule 184; [MICT, Rules of Procedure and Evidence](#), rule 140. At the ECCC, article 8.4(a) conditions the granting of replies on the absence of an oral hearing on appeal.

<sup>36</sup> [Lubanga-Order-2982](#); [Bemba-Decision-3480](#); *The Prosecutor v. Mathieu Ngudjolo Chui*, Second Public Redacted Version of “Prosecution Reply to the Defence Response to the Prosecution’s Appeal Brief”, 29 July 2013, ICC-01/04-02/12-126-Conf, 15 October 2014, [ICC-01/04-02/12-126-Red2](#).

possible for the Appeals Chamber, Mr. Ntaganda, the Prosecution and the participants to attend the scheduled hearing, beginning on 29 June. The right to expeditious proceedings extends to the appeals phase,<sup>37</sup> which cannot indefinitely extend. In such circumstances, the Defence submits that there is merit in the parties advancing the proceedings as far as they can remotely with a view to completing the briefing of the appeal as soon as possible, without reference to the present situation. As such, the filing of a written reply would assist in mitigating the obstacles being posed by the present circumstances.

## V. RELIEF SOUGHT

28. For the foregoing reasons, the Defence respectfully requests the Appeals Chamber to:

**GRANT** the Defence request for leave to reply to the Prosecution Response – Part II; and

**AUTHORIZE** the Defence to submit a written reply.

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<sup>37</sup> [ICC, Rules of Procedure and Evidence](#), rule 101; [Decision-2415](#), para.15: “Regarding the appropriate schedule for the filing of the appeal brief, the Appeals Chamber notes that the translation issue does not appear to impact on the first two grounds of appeal. In order to allow Mr Ntaganda adequate time to prepare his arguments, **while ensuring the expeditious conduct of proceedings and a timely consideration of the appeal**, the Appeals Chamber considers it appropriate to maintain the briefing schedule set out in the Regulations [...]” (emphasis added); *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, 1 December 2014, [ICC-01/04-01/06-312-Conf](#), para.61; *Prosecutor v. Vojislav Šešelj*, [Order in relation to the appeal hearing](#), 18 September 2017, MICT-16-99-A, p.2; *Prosecutor v. Radovan Karadžić*, [Decision on Motion for Extension of Time to File Notice of Appeal](#), 21 April 2016, MICT-13-55-A, p.2; *Prosecutor v. Mićo Stanišić & Stojan Župljanin*, [Decision on Joint Motion on behalf of Mićo Stanišić and Stojan Župljanin seeking Expedited adjudication of their respective grounds of appeal 1bis and 6](#), 22 October 2014, IT-08-91-A, para.17; *Prosecutor v. Prlić et al.*, [Decision on Praljak’s Request to Stay Proceedings](#), 27 June 2014, IT-04-74-A, para.16; *Prosecutor v. Popović et al.*, [Decision on Prosecution Motion for the Appointment of Independent Counsel to Review Material Potentially Subject to Lawyer-Client privilege](#), 16 July 2012, IT-05-88-A, para.8; *Bagosora et al. v. The Prosecutor* (Military I), [Decision on Aloys Ntabakuze’s Motion for Severance, Retention of the Briefing Schedule and Judicial Bar to the Untimely Filing of the Prosecution’s Response Brief](#), 24 July 2009, ICTR-98-41-A, para.38.

**RESPECTFULLY SUBMITTED ON THIS 15<sup>th</sup> DAY OF APRIL 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