



Original: **English**

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

Date: 20 April 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 Reply to the
“Prosecution Response to Defence Appeal Brief – Part II”**

Source: Office of the Prosecutor

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Introduction

1. Mr Ntaganda's request to reply to the Prosecution's response to his Appeal Brief – Part II ("Request")¹ should be rejected. Ntaganda identifies no new issues arising from the Prosecution's response that would merit a reply, let alone any that he could not have reasonably anticipated. Ntaganda instead seeks to utilise a reply to supplement and elaborate on certain issues and to repeat arguments that were already raised in his appeal. These are not grounds to justify a reply. The proposed reply—whether written or oral—is not in the interests of justice, nor will it assist the Chamber in expeditiously resolving Ntaganda's appeal. The Chamber is already comprehensively briefed on Ntaganda's appeal; indeed, Ntaganda has already briefed the Chamber on his appeal with 50% more than the usual allocation of pages permitted under the Regulations of the Court. Moreover, while Ntaganda proposes a written reply as a pre-emptive measure in the event that the hearing scheduled from 29 June to 1 July is cancelled or postponed due to the COVID-19 pandemic, this possibility is hypothetical at this stage. If the hearing is eventually cancelled, the Appeals Chamber may order written submissions with sufficient advanced notice to the Parties so that the appeal proceedings may be expeditiously concluded. In any event, a reply is not a necessary or justified pre-emptive measure in this case.

Submissions

2. The Chamber may order an appellant to file a reply whenever it considers it necessary in the interests of justice.² The ordering of a reply lies within the Appeals Chamber's discretion and is to be decided on a case-by-case basis.³ In this respect, the Appeals Chamber has considered whether further submissions on the issues identified will assist the Appeals Chamber in its determination of the appeals.⁴ 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.⁵

¹ ICC-01/04-02/06-2512 ("Request").

² Regulation 60(1), [Regulations of the Court](#); ICC-01/04-02/06-2488 ("Decision on Request for Leave to Reply"), para. 8.

³ [Decision on Request for Leave to Reply](#), para. 8; [Bemba et al. July 2017 Leave to Reply Decision](#), para. 20; [Bemba et al. August 2017 Leave to Reply Decision](#), para. 18.

⁴ [Bemba et al. July 2017 Leave to Reply Decision](#), paras. 8, 22; [Bemba et al. August 2017 Leave to Reply Decision](#), para. 18.

⁵ 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"

3. In line with these principles, an appellant should not be permitted to utilise a reply to address shortcomings in their appeal brief, which should have “set out the legal and/or factual reasons in support of each ground of appeal”, in accordance with regulation 58. Nor should an appellant utilise a reply as an opportunity to repeat submissions already made in the appeal brief.⁶ Ntaganda’s proposed reply seeks to do both; his Request should be rejected.

4. *First*, Ntaganda seeks to supplement his submissions on the standard of appellate review for factual errors that were underdeveloped in his appeal brief.⁷ In his appeal brief, Ntaganda implied that the standard of review for factual errors was not well-established,⁸ yet without setting out what he considered to be the correct standard, he cited only to limited pronouncements from the *Bemba* Appeal Judgment that the Appeals Chamber should approach the margin of deference it gives a trial chamber with “extreme caution”.⁹ Ntaganda’s failure to propose a workable alternative,¹⁰ while having raised doubt about the existence of an established standard, foreseeably necessitated a response from the Prosecution.¹¹ Ntaganda should not now be permitted to advance a more concrete view of the standard when he failed to do so in the first instance.

5. *Second*, Ntaganda’s claim that the Prosecution’s response has now amplified the importance of certain evidentiary approaches of the Chamber (regarding corroboration, “accomplice evidence”, and the presumption of innocence when assessing the evidence)¹² ignores that these were the very themes that Ntaganda himself amplified in his appeal, as demonstrated in the introduction to the brief,¹³ and in the recurrence of these themes

([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).

⁶ [Decision on Request for Leave to Reply](#), para. 8.

⁷ [Request](#), para. 18.

⁸ ICC-01/04-02/06-2465-Red (“[Appeal-Part II](#)”), para. 4 (stating that the standard of review for errors of law and procedure is well-established, without making a similar statement regarding the standard of review for errors of fact).

⁹ [Appeal-Part II](#), para. 4.

¹⁰ ICC-01/04-02/06-2500-Red (“[Response](#)”), para. 4.

¹¹ [Response](#), paras. 4-22.

¹² [Request](#), para. 19.

¹³ [Appeal-Part II](#), para. 2.

throughout the brief. Ntaganda alleged that the Trial Chamber erred in relying on uncorroborated evidence to make factual findings in circumstances where corroboration could or should have been obtained, identifying numerous specific instances where he alleged the Chamber made this error.¹⁴ He further stated that the error was particularly relevant regarding the evidence of so-called “accomplice witnesses”.¹⁵ The Prosecution responded in kind: first, by setting out the principles regarding corroboration and the assessment of the evidence of “accomplice witnesses”;¹⁶ then by responding to each of Ntaganda’s specific allegations of error by the Chamber in its assessment of uncorroborated or accomplice evidence.¹⁷ This was not an amplification or expansion of these evidentiary issues.

6. The same can be said for Ntaganda’s claim regarding the Chamber’s application of the presumption of innocence and its approach to fact finding. Whereas Ntaganda repeatedly asserted in his appeal brief that the Chamber erroneously shifted the burden of proof and applied an “either/or” approach to fact-finding,¹⁸ the Prosecution responded to Ntaganda’s interpretation of the jurisprudence and criticism of the Chamber’s approach,¹⁹ and to each specific allegation of error by the Chamber.²⁰

7. *Third*, none of the legal issues that Ntaganda identifies in Grounds 4-7 and 13-15 of his appeal are new, nor were they unforeseeable to Ntaganda.²¹ Ntaganda instead recites certain topics that were raised in those grounds of appeal, to which the Prosecution squarely responded. While these topics remain points of disagreement between the Parties, this alone does not necessitate further written submissions, which are only likely to add to the volume of material before the Chamber without providing the Chamber with any further assistance in resolving them. Moreover, apart from assuring the Chamber that he will not replicate any arguments already contained in the appeal brief, Ntaganda gives no actual indication as to what *new* aspect of those topics he intends to provide submissions on, or how those submissions are likely to assist the Chamber. Specifically (adopting Ntaganda’s enumeration of the issues in paragraph 21 of his Request):

¹⁴ See e.g. [Appeal-Part II](#), paras. 63, 64, 93, 96, 102, 148-150, 151, 159, 164, 167, 178, 184, 193, 194, 223, 247, 258, 265, 268, 285, 324, 327, 332, 339, 344, 349, 364, 411.

¹⁵ [Appeal-Part II](#), para. 2. See e.g. paras. 101, 151, 159, 181, 205, 210, 226-230, 247, 344, 349.

¹⁶ [Response](#), paras. 133, 137-139, 141-142.

¹⁷ See e.g. [Response](#), paras. 83, 131, 147, 155, 156, 158, 162, 164, 168, 183, 230-233, 254.

¹⁸ See e.g. [Response](#), paras. 139, 154, 169, 198.

¹⁹ [Response](#), paras. 123-127.

²⁰ See e.g. [Response](#), paras. 128, 107, 150, 157, 164, 252, 263.

²¹ [Request](#), para. 21.

(1) Grounds 4 and 5 (first bullet point): The proper interpretation of an “attack directed against any civilian population” and whether the civilian population must be the primary object, purpose or motive of the attack were issues directly arising from Ntaganda’s claim that the Chamber failed to give sufficient weight to the legitimate purpose of the military operations that it considered.²² The Prosecution, in response, cited the relevant jurisprudence to support the principle that the attack need only be primarily, and not exclusively, directed against the civilian population.²³ Relevantly, the Prosecution had already made submissions along these lines in its closing and response briefs at trial, citing the relevant jurisprudence.²⁴ Ntaganda was 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 appeal.

Grounds 4 and 5 (second bullet point): The Prosecution’s submissions on the proper interpretation, scope and application of “State or organisational policy”, including the possibility of it co-existing with parallel legitimate goals such as attempt to secure peace,²⁵ directly responded to Ntaganda’s claim that there was no organisational policy pursuant to article 7(1) of the Statute, and that the UPC/FPLC sought the legitimate goal of pursuing peace in Ituri.²⁶ Also directly responsive were the Prosecution’s submissions regarding Ntaganda’s interpretation of the phrase “*kupiga na kuchaji*”:²⁷ the Prosecution examined the evidence considered by the Chamber in interpreting the phrase, in support of its view that the Chamber did not err.²⁸ The Prosecution’s submissions were consistent with the submissions it made on the interpretation of the phrase in its closing written and oral submissions at trial.²⁹

(2) Ground 6: The proper interpretation of the “nature and degree of the perpetrator’s control over victims” and the Prosecution’s assertion that such control was exercised by UPC/FPLC fighters arose foreseeably from Ntaganda’s claim that *territorial*

²² [Appeal-Part II](#), paras. 61-74.

²³ [Response](#), para. 71.

²⁴ ICC-01/04-02/06-2277-Conf-Anx1-Corr (“[Prosecution Closing Brief](#)”), paras. 192-193; ICC-01/04-02/06-2306-Red (“[Prosecution Closing Response](#)”), para. 39.

²⁵ [Response](#), paras. 95-97.

²⁶ [Appeal-Part II](#), paras. 104-109, 113, 115-116, 120, 125.

²⁷ [Appeal-Part II](#), paras. 75-82, 88-90.

²⁸ [Response](#), paras. 82-87.

²⁹ [Prosecution Closing Brief](#), paras. 87, 497-499; ICC-01/04-02/06-T-262-Eng (“[Prosecution Closing Oral Submissions](#)”), 38:14-39:19.

control is a necessary condition for the war crime of ordering displacement.³⁰ The Prosecution challenged the existence of such a requirement, referring to the Court's legal texts, the relevant jurisprudence and academic opinion, and applied its interpretation of "control over victims" to the facts to demonstrate that the Chamber did not err in its findings.³¹

(3) Ground 7: The applicable legal standard for entering convictions on the basis of uncorroborated prior recorded statements is a recitation of an issue that already formed an entire sub-ground of Ntaganda's appeal,³² to which the Prosecution foreseeably responded by correcting Ntaganda's interpretation of the evidence and the law.³³

(4) Ground 13: The three issues that Ntaganda raises under Ground 13 merely repeat topics on which the Parties have made opposing submissions: (i) The Prosecution's submission that the Trial Chamber did not convict Ntaganda on the basis of a common plan that exceeded the charges³⁴ squarely responded to Ntaganda's sub-ground of appeal that it did;³⁵ (ii) The difference between direct and circumstantial evidence and the Trial Chamber's ability to infer the existence of a common plan were central issues to Ground 13 that Ntaganda and the Prosecution have comprehensively addressed in their briefs. Whereas Ntaganda argued that the Trial Chamber erred in relying solely on circumstantial evidence to prove the common plan and challenged the Chamber's assessment of that evidence,³⁶ the Prosecution responded that there was direct evidence and, in any event, that the characterisation of the evidence is not determinative and what matters instead is whether the totality of the evidence supported the Trial Chamber's finding;³⁷ (iii) The Prosecution's reference to the totality of the evidence to support the Trial Chamber's findings was in line with the principle that evidence is to be assessed holistically³⁸ and responded to Ntaganda's

³⁰ [Appeal-Part II](#), paras. 130-133.

³¹ [Response](#), paras. 109-111.

³² [Appeal-Part II](#), Ground 7, sub-ground III ("Error in relying on uncorroborated uncontested evidence to convict the Accused"); paras. 148-150.

³³ [Response](#), paras. 131-134.

³⁴ [Response](#), paras. 216-218.

³⁵ [Appeal-Part II](#), paras. 278-282.

³⁶ [Appeal-Part II](#), paras. 284, 287.

³⁷ [Response](#), paras. 220-221.

³⁸ [Response](#), paras. 222-235.

claim that the Chamber erred in relying upon “any evidence of criminal behaviour, at any point in time, by any member of the UPC/FPLC”.³⁹

(5) Ground 14: The level of reasoning required in support of findings of fact, and the legal standard for a Chamber to draw inferences from circumstantial evidence were issues directly raised by Ntaganda in his appeal.⁴⁰ Ntaganda alleged that “[a] Chamber is not entitled to simply cite the evidence which supports its conclusion, and then enter a finding. It must also eliminate any other reasonable possibility, having considered all the relevant evidence”.⁴¹ The Prosecution foreseeably responded by setting out the principles regarding the drawing of inferences, and the sufficient level of reasoning that a Chamber is required to provide in doing so.⁴²

(6) Ground 15 (first bullet point): The Prosecution’s submissions on the law on indirect co-perpetration and the approach to assessing Ntaganda’s *mens rea* for the first and second operations *in globo* directly arose from, and responded to, Ntaganda’s submissions on the law and his claim that the Chamber erred in assessing Ntaganda’s *mens rea* for both operations collectively.⁴³ Ntaganda merely disagrees with the Prosecution’s argument that, while the Trial Chamber did not expressly articulate its conclusion that Ntaganda was aware of the factual circumstances that enable him and his co-perpetrators to exercise control over the crime, there was no error as the Chamber made the necessary factual findings to establish that this was the case.⁴⁴

Ground 15 (second bullet point): The Trial Chamber’s assessment of the evidence and its factual findings regarding Ntaganda’s role in monitoring the unfolding of the Second Operation are issues on which the Parties have already made comprehensive submissions reflecting their disagreement in both Ntaganda’s appeals against his conviction and his sentencing.⁴⁵

8. *Fourth*, Ntaganda’s general assertion that a reply is necessary to correct purported inaccuracies in the Prosecution’s characterisation of the Trial Judgment and Defence

³⁹ [Appeal-Part II](#), para. 288 (emphasis in original).

⁴⁰ [Appeal-Part II](#), paras. 353-358.

⁴¹ [Appeal-Part II](#), para. 353.

⁴² [Response](#), para. 264.

⁴³ [Appeal-Part II](#), paras. 360-398; [Response](#), paras. 269-295.

⁴⁴ [Response](#), para. 273.

⁴⁵ [Appeal-Part II](#), paras. 372-388; [Response](#), paras. 288-295; ICC-01/04-02/06-2468-Red (“[Sentencing Appeal](#)”), paras. 21-38, 42-45, 47; ICC-01/04-02/06-2509-Red (“[Response to Sentencing Appeal](#)”), paras. 8-27, 30-32, 37.

submissions, and to correct errors in the Prosecutions interpretation of the law and the evidentiary record,⁴⁶ is too vague to meaningfully assess how a reply will be of further assistance to the Chamber.

9. Ntaganda's failure to substantiate that his reply would be in the interests of justice in this case, or that his further submissions would assist the Chamber, warrants the rejection of his Request.

10. However, in the event the Chamber considers it otherwise appropriate to allow Ntaganda to develop his submissions further, he can do so in his oral submissions at the hearing, scheduled to take place over three days on 29 June to 1 July 2020. The practice of other chambers of this Court, or of other international criminal tribunals, in ordering written replies is not prescriptive given the Chamber's discretion as to how it wishes to receive submissions in order to fairly and expeditiously determine the issues.⁴⁷ In this case, the Chamber is already extensively briefed with written submissions,⁴⁸ having granted Ntaganda an opportunity to file an appeal brief 50% longer than usually permitted under the Regulations of the Court.⁴⁹ Accordingly, and in line with the Chamber's previously expressed preference of streamlining these proceedings,⁵⁰ it would be appropriate that a reply—if the Chamber deems one necessary—be delivered orally at the hearing.

11. In that regard, Ntaganda's concern regarding the possibility of a cancellation or postponement of the hearing due to the current COVID-19 pandemic is hypothetical at this stage.⁵¹ If the hearing is cancelled, the Appeals Chamber may, with due notice, instruct the Parties to make their submissions in writing by the same dates. However, it is too early at this stage to determine whether or not the hearing, scheduled to take place on 29 June to 1 July 2020, will be cancelled or postponed. In any event, a reply to the Prosecution Response is neither necessary nor justified.

⁴⁶ [Request](#), para. 22.

⁴⁷ *Contra* [Request](#), paras. 24-25.

⁴⁸ To date, the Chamber has received 313 pages in written submissions on Ntaganda's appeal, not including annexes: Defence Appeal Brief – Part I and Part II, amounting to 150 pages; Prosecution responses, amounting to 150 pages; observations of the Common Legal Representative of the Former Child Soldiers on Part I of Ntaganda's appeal, amounting to 11 pages; Ntaganda's response to the Common Legal Representative's observations, amounting to 13 pages. The Common Legal Representative of the Former Child soldiers is due to file observations on Part II of Ntaganda's appeal on 6 May 2020, not exceeding 39 pages, to which the Ntaganda and the Prosecution may respond, in no more than 47 and 60 pages each, respectively.

⁴⁹ ICC-01/04-02/06-2415 (“[Decision on Ntaganda's Request for Time and Page Limit Extension](#)”), paras. 16, 20-21; [Regulations of the Court](#), regulation 58(3).

⁵⁰ [Decision on Request for Leave to Reply](#), para. 8.

⁵¹ [Request](#), para. 27.

Conclusion and relief sought

12. For the reasons set out above, the Prosecution respectfully requests the Appeals Chamber to dismiss Ntaganda's Request.



Fatou Bensouda, Prosecutor

Dated this 20th day of April 2020

At The Hague, The Netherlands