



Original: English

**No. ICC-01/04-02/06 A
Date: 4 May 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 document

Decision on request for leave to reply

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

The Office of the Prosecutor

Ms Fatou Bensouda, Prosecutor

Ms Helen Brady

Counsel for the Defence

Mr Stéphane Bourgon

Ms Kate Gibson

Legal Representatives of Victims

Ms Sarah Pellet

Mr Dmytro Suprun

Registrar

Mr Peter Lewis

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Bosco Ntaganda against the ‘Judgment’ of Trial Chamber VI of 8 July 2019 (ICC-01/04-02/06-2359),

Having before it the ‘Defence request for leave to reply to the Prosecution Response to Defence Appeal Brief – Part II’ of 15 April 2020 (ICC-01/04-02/06-2512),

Pursuant to regulation 60(1) of the Regulations of the Court,

Renders the following

DECISION

Mr Bosco Ntaganda is granted leave to file a written reply no longer than twenty pages on the second, third, fourth, sixth, seventh and tenth issues as specified in paragraphs 9, 11, 15, 17 and 23 below by 16h00 on Tuesday, 19 May 2020.

REASONS

I. PROCEDURAL HISTORY

1. On 31 January 2020, Mr Ntaganda filed the second part of his appeal brief (the ‘Appeal Brief’).¹
2. On 3 April 2020, the Prosecutor filed her response to the Appeal Brief (the ‘Response to the Appeal Brief’).²
3. On 15 April 2020, Mr Ntaganda filed his request for leave to file a reply to the Response to the Appeal Brief (the ‘Request’).³

¹ Public Redacted version of “Defence Appeal Brief - Part II”, 31 January 2020, ICC- ICC-01/04-02/06-2465, 27 March 2020, ICC-01/04-02/06-2465-Red (confidential version registered on 31 January 2020).

² [Public Redacted Version of “Prosecution response to ‘Defence Appeal Brief - Part II’”](#), 14 April 2020, ICC-01/04-02/06-2500-Red (confidential version registered on 3 April 2020).

³ [Defence request for leave to reply to the Prosecution Response to Defence Appeal Brief – Part II](#), ICC-01/04-02/06-2512.

4. On 20 April 2020, the Prosecutor filed her response to the Request (the ‘Response’).⁴

II. MERITS

6. The Appeals Chamber recalls that, pursuant to regulation 60(1) of the Regulations of the Court, it may order an appellant to file a reply whenever it considers it necessary in the interests of justice. The ordering of a reply lies within the Appeals Chamber’s discretion and is to be decided on a case-by-case basis.⁵ Mr Ntaganda requests leave to reply to a number of issues arising from the Prosecutor’s Response to the Appeal Brief. These issues will be considered in turn below. He also requests leave to submit a written reply rather than to present submissions in reply at the oral hearing.⁶

7. First, Mr Ntaganda requests leave to reply to the Prosecutor’s submissions on the standard of appellate review for errors of fact (the ‘First Issue’), which is discussed in five lines in the Defence Appeal Brief and in seven pages of the Response to the Appeal Brief.⁷ He argues that the Prosecutor ‘attempt[s] to re-litigate the standard of appellate review for factual errors’.⁸ The Prosecutor submits that leave to reply on this issue should not be granted as Mr Ntaganda made ‘underdeveloped’ submissions on this question in his Appeal Brief and a response from the Prosecutor was foreseeable.⁹ She argues that Mr 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’.¹⁰

⁴ [Prosecution Response to the Defence Request for Leave to Reply to the ‘Prosecution Response to Defence Appeal Brief – Part II’](#), ICC-01/04-02/06-2514.

⁵ *Prosecutor v. Jean-Pierre Bemba Gombo et al.*, [Decision on requests for leave to reply to the Prosecutor’s consolidated response to the appeal briefs](#), 24 January 2018, ICC-01/05-01/13-2259 (A6 A7 A8 A9), para. 9, referring to *Prosecutor v. Jean-Pierre Bemba Gombo*, [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 (A), para. 8 and the reference cited therein.

⁶ [Request](#), paras 23, 26-28.

⁷ [Request](#), para. 18.

⁸ [Request](#), para. 18.

⁹ [Response](#), para. 4.

¹⁰ [Response](#), para. 4.

8. The Appeals Chamber considers that it will not be assisted by further submissions on the applicable standard of review for factual errors. Therefore, the request for leave to file a reply on the First Issue is rejected.

9. Second, Mr. Ntaganda seeks leave to address ‘whether the Trial Chamber adopted and applied the correct legal standards’ to the notions of ‘corroboration’ and ‘accomplice evidence’ in criminal proceedings (the ‘Second Issue’).¹¹ Third, he submits that the ‘Trial Chamber’s application of the presumption of innocence and its overall approach to fact finding have assumed a prominent position’ in the Response to the Appeal Brief and requests leave to respond to the Prosecutor’s arguments (the ‘Third Issue’).¹² The Prosecutor argues that Mr Ntaganda himself amplified these issues in the introduction to the Appeal Brief and throughout his arguments.¹³

10. The Appeals Chamber accepts the Prosecutor’s submission that these issues were the focus of many of Mr Ntaganda’s arguments on appeal and notes that the Prosecutor simply responded to these arguments in a more detailed manner. At the same time, the Appeals Chamber recognises the importance of these issues to the consideration of the appeal as a whole. Therefore, it considers that further submissions will assist the Appeals Chamber’s determination of these issues. Accordingly, it finds it necessary in the interests of justice to grant Mr Ntaganda leave to reply on the Second Issue and the Third Issue.

11. Fourth, Mr Ntaganda requests leave to reply to the Prosecutor’s submissions on ‘[t]he 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’ (the ‘Fourth Issue’).¹⁴ The Prosecutor argues that her submissions on this issue arose directly from Mr ‘Ntaganda’s claim that the Chamber failed to give sufficient weight to the legitimate

¹¹ [Request](#), para. 19, referring to [Response to the Appeal Brief](#), paras 83-87, 131, 133, 136-143, 147, 151, 155, 158, 162-164, 168, 183, 187, 230, 233, 250, 252, 254; fns 807, 816; p. 61.

¹² [Request](#), para. 20, referring to [Response to the Appeal Brief](#), para. 123.

¹³ [Response](#), paras 5-6.

¹⁴ [Request](#), para. 21(1), referring to [Response to the Appeal Brief](#), para. 71.

purpose of the military operations that it considered’ and should have been anticipated by Mr Ntaganda.¹⁵

12. The Appeals Chamber accepts that the Prosecutor simply responded to arguments raised by Mr Ntaganda in a more detailed manner and that the argument in response could have been anticipated by Mr Ntaganda. At the same time, the Appeals Chamber recognises the importance of this issue to the consideration of the appeal as a whole. Therefore, it considers that further submissions will assist the Appeals Chamber’s determination of this issue. Accordingly, it finds it necessary in the interests of justice to grant Mr Ntaganda leave to reply on the Fourth Issue.

13. Fifth, Mr Ntaganda requests leave to reply to the Prosecutor’s submissions on ‘[t]he proper interpretation, scope, and application of “State or organizational policy” under article 7(2)(a) of the Statute, including whether Mr. Ntaganda’s submissions on the meaning of *kupiga na kuchaji* are implausible’ (the ‘Fifth Issue’).¹⁶ The Prosecutor argues that her submissions on this point were directly responsive to Mr Ntaganda’s arguments in the Appeal Brief.¹⁷

14. The Appeals Chamber notes that Mr Ntaganda did not challenge the Trial Chamber’s legal interpretation of the ‘policy requirement’ in the Appeal Brief. Therefore, the Appeals Chamber does not consider it necessary to receive further submissions on this matter. To the extent that Mr Ntaganda may intend to address factual and evidential matters discussed in the relevant part of the Response to the Appeal Brief, including the interpretation of *kupiga na kuchaji*, the Appeals Chamber considers that these matters have been adequately addressed by the parties and further submissions would not assist it in determining the questions. Therefore, the request for leave to file a reply on the Fifth Issue is rejected.

15. Sixth, Mr Ntaganda requests leave to reply to the Prosecutor’s submissions on ‘[t]he 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

¹⁵ [Response](#), para. 7.

¹⁶ [Request](#), para. 21(1) (footnote omitted).

¹⁷ [Response](#), para. 7(1).

exercised by UPC/FPLC fighters’ (the ‘Sixth Issue’).¹⁸ The Prosecutor argues that her legal and factual submissions regarding ‘control over victims’ ‘arose foreseeably from Ntaganda’s claim that *territorial* control is a necessary condition for the war crime of ordering displacement’.¹⁹

16. The Appeals Chamber considers that the Prosecutor’s submissions raise novel issues that merit a reply from Mr Ntaganda and that a reply on this issue may assist it in determining the matter. Accordingly, it finds it necessary in the interests of justice to grant Mr Ntaganda leave to reply on the Sixth Issue.

17. Seventh, Mr Ntaganda requests leave to reply to the Prosecutor’s submissions on ‘[t]he applicable legal standard for entering convictions against an accused on the basis of uncorroborated prior recorded statements’ (the ‘Seventh Issue’).²⁰ The Prosecutor argues that her submissions arose from ‘an issue that already formed an entire sub-ground of Ntaganda’s appeal, to which the Prosecution foreseeably responded by correcting Ntaganda’s interpretation of the evidence and the law’.²¹

18. The Appeals Chamber considers that the Prosecutor’s submissions raise novel issues that merit a reply from Mr Ntaganda and that a reply on this issue may assist it in determining the matter. Accordingly, it finds it necessary in the interests of justice to grant Mr Ntaganda leave to reply on the Seventh Issue.

19. Eighth, Mr Ntaganda requests leave to reply to the Prosecutor’s submissions regarding: (i) whether ‘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’; (ii) ‘[t]he 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’; and (iii) ‘[t]he correctness of supporting a submission on appeal that the Trial Chamber’s conclusion is the only reasonable one with findings that fell

¹⁸ [Request](#), para. 21(2), referring to [Response to the Appeal Brief](#), paras 109-114.

¹⁹ [Response](#), para. 7(2) (emphasis in original omitted).

²⁰ [Request](#), para. 21(3), referring to [Response to the Appeal Brief](#), paras 131-134.

²¹ [Response](#), para. 7(3) (footnotes omitted).

outside the Trial Chamber's own analysis' (the 'Eighth Issue').²² The Prosecutor submits that these three issues 'merely repeat topics on which the Parties have made opposing submissions'.²³

20. The Appeals Chamber considers that the Appeal Brief adequately argues the first two matters identified above and a reply will not assist the Appeals Chamber in determining these issues. The third matter identified appears to be more general and concerns how the appellate review should be done. The Appeals Chamber does not require submissions on this point. Therefore, the request for leave to file a reply on the Eighth Issue is rejected.

21. Ninth, Mr Ntaganda requests leave to reply to the Prosecutor's submissions regarding '[t]he 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' (the 'Ninth Issue').²⁴ The Prosecutor argues that her submissions arose from issues raised in the Appeal Brief to which she foreseeably responded.²⁵

22. To the extent that Mr Ntaganda may intend to address factual and evidential matters discussed in the relevant part of the Response to the Appeal Brief, the Appeals Chamber considers that these matters have been adequately addressed by the parties and further submissions would not assist in determining the questions. To the extent that Mr Ntaganda may intend to address matters relating to the requisite reasoning for a conviction decision, the standard for drawing inferences and the applicable standard of appellate review, the Appeals Chamber's determination of these issues would not be assisted by further submissions. Therefore, the request for leave to file a reply on the Ninth Issue is rejected.

23. Tenth, Mr Ntaganda requests leave to reply to the Prosecutor's 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

²² [Request](#), para. 21(4) (footnotes omitted).

²³ [Response](#), para. 7(4).

²⁴ [Request](#), para. 21(5) (footnote omitted).

²⁵ [Response](#), para. 7(5).

second operation, across both operations *in globo*, without concluding that Mr. Ntaganda was aware of the factual circumstances that enabled him to exercise control over the crimes’ (the ‘Tenth Issue’).²⁶ The Prosecutor argues that Mr Ntaganda ‘merely disagrees’ with her submissions, which arose from issues raised in the Appeal Brief.²⁷

24. The Appeals Chamber accepts that the Prosecutor’s arguments in the Response to the Appeal Brief merely addressed arguments raised in Mr Ntaganda’s Appeal Brief in a more detailed manner.²⁸ At the same time, the Appeals Chamber recognises the importance of these issues to the consideration of the appeal as a whole. Therefore, it considers that further submissions will assist the Appeals Chamber’s determination of these issues. Accordingly, it finds it necessary in the interests of justice to grant Mr Ntaganda leave to reply on the Tenth Issue.

25. Eleventh, Mr Ntaganda requests leave to reply to the Prosecutor’s submissions ‘regarding the Trial Chamber’s finding that “[he] was monitoring the unfolding of the Second Operation”, in particular concerning Mr. Ntaganda’s radio communications and the conclusions drawn from the logbooks’ (the ‘Eleventh Issue’).²⁹ The Prosecutor argues that ‘the Parties have already made comprehensive submissions reflecting their disagreement [on this point] in both Ntaganda’s appeals against his conviction and his sentencing’.³⁰

26. The Appeals Chamber considers that this matter has been adequately addressed by the parties and further submissions would not assist it in determining the question. Therefore, the request for leave to file a reply on the Eleventh Issue is rejected.

27. Finally, Mr Ntaganda requests leave to complete and correct: (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

²⁶ [Request](#), para. 21(6), referring to [Response to the Appeal Brief](#), paras 269-285.

²⁷ [Response](#), para. 7(6).

²⁸ [Response to the Appeal Brief](#), paras 269-285.

²⁹ [Request](#), para. 21.

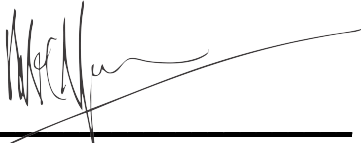
³⁰ [Response](#), para. 7(6) (footnote omitted).

case’.³¹ The Prosecutor argues that this aspect of the Request ‘is too vague to meaningfully assess how a reply will be of further assistance to the Chamber’.³²

28. The Appeals Chamber notes that the final aspect of the Request does not identify any specific issue(s) arising from the Response to the Appeal Brief. In the absence of more specific information, it is not in a position to assess whether a reply is warranted and this aspect of the Request is rejected.

29. In conclusion, the Appeals Chamber grants Mr Ntaganda leave to file a written reply no longer than twenty pages on the Second Issue, Third Issue, Fourth Issue, Sixth Issue, Seventh Issue and Tenth Issue by 16h00 on Tuesday, 19 May 2020. All remaining aspects of the Request are rejected.

Done in both English and French, the English version being authoritative.



Judge Howard Morrison
Presiding

Dated this 4th day of May 2020

At The Hague, The Netherlands

³¹ [Request](#), para. 22.

³² [Response](#), para. 8.