



Original: English

**No. ICC-01/04-02/06 A3
Date: 15 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

REGISTRY

Registrar

Mr Peter Lewis

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Bosco Ntaganda against Trial Chamber VI's 'Sentencing judgment' of 7 November 2019 (ICC-01/04-02/06-2442),

Having before it the 'Defence request for leave to reply to the "Prosecution Response to 'Sentencing Appeal Brief'"' of 28 April 2020 (ICC-01/04-02/06-2521-Conf),

Pursuant to regulations 23*bis* and 60(1) of the Regulations of the Court,

Renders the following

DECISION

1. Mr Bosco Ntaganda is granted leave to file a written reply no longer than 15 pages on the Ninth and Eleventh Issues as specified in paragraphs 16-20 of this decision by 16h00 on Friday, 22 May 2020.
2. Mr Bosco Ntaganda shall file a public redacted version of the 'Defence request for leave to reply to the "Prosecution Response to 'Sentencing Appeal Brief'"' (ICC-01/04-02/06-2521-Conf) or request its reclassification as public by 16h00 on Wednesday, 20 May 2020.
3. The Prosecutor shall file a public redacted version of the 'Prosecution Response to the "Defence request for leave to reply to the 'Prosecution Response to Sentencing Appeal Brief'"' (ICC-01/04-02/06-2527-Conf-Corr) or request its reclassification as public by 16h00 on Monday, 25 May 2020.

REASONS

I. PROCEDURAL HISTORY

1. On 8 July 2019, Trial Chamber VI issued the 'Judgment' (the 'Conviction Decision').¹

¹ [ICC-01/04-02/06-2359](#).

2. On 7 November 2019, the Trial Chamber rendered the ‘Sentencing judgment’ (the ‘Sentencing Decision’).²
3. On 10 February 2020, Mr Ntaganda filed his appeal brief against the Sentencing Decision (the ‘Appeal Brief’).³
4. On 14 April 2020, the Prosecutor filed her response to the Appeal Brief (the ‘Response to the Appeal Brief’).⁴
5. On 28 April 2020, Mr Ntaganda filed his request for leave to reply to the Response to the Appeal Brief (the ‘Request’).⁵
6. On 6 May 2020, the Prosecutor filed her response to the Request (the ‘Response’).⁶

II. MERITS

7. 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.⁷ 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.⁸

² [ICC-01/04-02/06-2442](#).

³ [Public Redacted Version of ‘Sentencing Appeal Brief’, 10 February 2020, ICC-01/04-02/06-2468-Conf](#), 9 April 2020, ICC-01/04-02/06-2468-Red (confidential version registered on 10 February 2020).

⁴ [Prosecution response to ‘Sentencing Appeal Brief’](#), ICC-01/04-02/06-2509-Red (confidential version registered on the same date).

⁵ Defence request for leave to reply to the ‘Prosecution Response to “Sentencing Appeal Brief”’, ICC-01/04-02/06-2521-Conf.

⁶ Prosecution Response to the ‘Defence request for leave to reply to the “Prosecution Response to Sentencing Appeal Brief”’, ICC-01/04-02/06-2527-Conf; corrigendum dated 8 May 2020 and registered on 11 May 2020 (ICC-01/04-02/06-2527-Conf-Corr).

⁷ *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.

⁸ Request, paras 15-18.

8. In relation to the first ground of appeal, Mr Ntaganda seeks leave to reply to the Prosecutor's submissions that: (i) he 'artificially separates the [First and Second Operations] without factual basis' thereby contradicting the findings made in the Conviction Decision and 'challeng[ing] this aspect of his conviction *via* his Sentencing Appeal' (the 'First Issue');⁹ (ii) the Trial Chamber examined Mr Ntaganda's '*specific* involvement in each crime, appropriately finding that the type and intensity of his involvement for certain crimes increased his culpability' (the 'Second Issue');¹⁰ (iii) pursuant to rule 145(1)(c) of the Rules of Procedure and Evidence, the Trial Chamber was not required 'to expressly find that [Mr.] Ntaganda had advance or contemporaneous knowledge of specific incidents' (the 'Third Issue');¹¹ and (iv) the Trial Chamber 'did not err in taking into account the particular cruelty of the Kobu massacre as an aggravating circumstance, notwithstanding that it had made no express finding' on Mr Ntaganda's 'advance or contemporaneous knowledge of the crimes' (the 'Fourth Issue').¹² He also seeks leave to reply to the Prosecutor's alleged 'mischaracterisation of certain findings' (the 'Fifth Issue').¹³

9. The Prosecutor responds that leave to reply on the five issues identified in relation to the first ground of appeal should be rejected as the parties 'have sufficiently addressed these issues which are not novel'.¹⁴ She avers that the Appeals Chamber has the relevant information before it to decide on the First Issue, Second Issues and Fourth Issues.¹⁵ In relation to the Third Issue, the Prosecutor clarifies that in her Response to the Appeal Brief, she did not oppose the proposition that presence at the location of the crimes and advance or contemporaneous knowledge of them may be relevant factors in determining a convicted person's degree of participation and intent.¹⁶ As to the Fifth Issue, the Prosecutor submits

⁹ Request, para. 12, p. 6.

¹⁰ Request, para. 12, p. 6 (emphasis in original).

¹¹ Request, para. 12, p. 6.

¹² Request, para. 12, pp 6-7.

¹³ Request, para. 12, p. 7.

¹⁴ Response, paras 1, 5, 11.

¹⁵ Response, paras 6-7, 9.

¹⁶ Response, para. 8.

that Mr Ntaganda fails to identify any concrete issue thereby providing insufficient information to determine whether leave to reply is warranted.¹⁷

10. The Appeals Chamber considers that a reply on the five issues related to the first ground of appeal will not assist it in the determination of the matter and it would not be in the interests of justice to grant the Request in relation thereto. The parties have presented their submissions on the First, Second and Fourth Issues and the Appeals Chamber does not deem it necessary to receive further observations thereon. As to the Third Issue, the Appeals Chamber notes that the parties do not disagree with the proposition that advance or contemporaneous knowledge of the commission of crimes may be relevant factors in determining a convicted person's degree of participation and intent when determining the appropriate sentence. In these circumstances, it finds it unnecessary to receive further submissions on the Third Issue. Finally, in relation to the Fifth Issue, the Appeals Chamber notes that Mr Ntaganda has not sufficiently identified the Prosecutor's alleged mischaracterisation of certain findings. In these circumstances, it rejects the request for leave to reply on the Fifth Issue.

11. In relation to the second and third grounds of appeal, Mr Ntaganda seeks leave to reply to the Prosecutor's submission that there was no basis for the Trial Chamber 'to reduce his degree of culpability due to his lack of proximity to the specific victims or the lack of specific findings regarding his advance or contemporaneous knowledge' of the relevant incidents (the 'Sixth Issue').¹⁸

12. The Prosecutor responds that in her Response to the Appeal Brief, she rejected Mr Ntaganda's argument that he was less culpable due to his alleged absence at the site of the crimes or his alleged lack of advance or contemporaneous knowledge of the specific incidents.¹⁹ The Prosecutor refers to specific instances where Mr Ntaganda 'was present and aware' of rapes by UPC/FPLC commanders and maintains that Mr Ntaganda's presence and knowledge of the concrete incidents 'were not required to establish his *mens rea* as co-perpetrator for those crimes'.²⁰ In

¹⁷ Response, para. 10.

¹⁸ Request, para. 12, p. 7.

¹⁹ Response, para. 14.

²⁰ Response, para. 14.

her view, the parties have sufficiently briefed the Appeals Chamber and the Request in relation to these issues should be rejected.²¹

13. Considering the submissions of the parties, the Appeals Chamber finds that it will not be assisted by further submissions on the Sixth Issue. The Appeals Chamber considers that the parties sufficiently addressed the matter and further submissions would not assist it in its determination of the matter. Accordingly, it does not find it necessary in the interests of justice to grant Mr Ntaganda leave to reply on the Sixth Issue and rejects the Request in relation thereto.

14. In relation to the fourth ground of appeal, Mr Ntaganda seeks leave to reply to the Prosecutor's submissions that the Trial Chamber 'did not find that "Mr. Ntaganda was in Fataki during the period of the Second Operation"' and was correct in considering Mr Ntaganda's behaviour after the crimes in Kobu 'as an additional indicator of his degree of participation and intent' (the 'Seventh Issue').²² The Prosecutor responds that the parties have sufficiently briefed the Appeals Chamber on the Seventh Issue and that Mr Ntaganda merely disagrees with her submissions.²³ She argues that the Request in relation to this issue should be rejected.²⁴

15. The Appeals Chamber considers that the parties sufficiently addressed the matter and further submissions would not assist it in its determination of the matter. Therefore the request for leave to file a reply on the Seventh Issue is rejected.

16. In relation to the fifth ground of appeal, Mr Ntaganda submits that the Prosecutor presents 'legal and factual submissions' that 'should have properly been included in its response' to the second part of his appeal brief in relation to his appeal against his conviction.²⁵ In his view, '[t]hese new and lengthy arguments' merit a reply (the 'Eighth Issue').²⁶ He also seeks leave to reply to the Prosecutor's submissions that: 'where the death of a civilian is intentionally caused in the conduct of hostilities in non-international armed conflict, the proper charge is not

²¹ Response, paras 12, 15.

²² Request, para. 12, p. 7.

²³ Response, para. 19.

²⁴ Response, para. 19.

²⁵ Request, para. 13.

²⁶ Request, para. 13.

common article 3 murder, but the distinct and more specific crime of unlawfully directing attacks against civilians under article 8(2)(e)(i)' (the 'Ninth Issue');²⁷ the lack of basis to consider that the fifth ground of appeal 'could possibly have led to the imposition of disproportionate sentence' and the 'Appeals Chamber may not automatically "reduce Mr Ntaganda's joint sentence" even if an error is identified in the Trial Chamber's calculation of the 'individual sentence for the crime of unlawfully directing attacks against civilians' (the 'Tenth Issue').²⁸

17. The Prosecutor responds that although Mr Ntaganda could have anticipated that she would be making submissions on the law of the war crime of attacking civilians under article 8(2)(e)(i) of the Statute, given the 'nature and length' of her submissions, she does not oppose the Request on the Ninth Issue.²⁹ She opposes however Mr Ntaganda's request for leave to reply on the Tenth Issue arguing that further submissions would not assist the Appeals Chamber.³⁰

18. The Appeals Chamber notes that Mr Ntaganda does not identify the specific arguments to which he intends to file a reply in relation to the Eighth Issue. In these circumstances, the Appeals Chamber rejects his request. As to the Ninth Issue, the Appeals Chamber considers that the Prosecutor raises a novel issue in her response on which further submissions may assist the Appeals Chamber in its determination of the matter. Accordingly, it finds it necessary in the interests of justice to grant Mr Ntaganda leave to reply on the Ninth Issue. Turning to the Tenth Issue, the Appeals Chamber considers that it will not be assisted by receiving further submissions and therefore it rejects Mr Ntaganda's request to file a reply on that issue.

19. In relation to the sixth ground of appeal, Mr Ntaganda seeks leave to reply to the Prosecutor's argument that under article 78(3) of the Statute it is legally permissible 'to double count discriminatory intent under more than one charge in setting individual sentences for different charges' and it is not possible for the Appeals Chamber to 'reduce the joint sentence solely based on an alleged error in

²⁷ Request, para. 13.

²⁸ Request, para. 13.

²⁹ Response, paras 20-22.

³⁰ Response, paras 20, 23.

the individual sentence for persecution’ (the ‘Eleventh Issue’).³¹ The Prosecutor responds that the parties position on the assessment of ‘the discriminatory element when determining individual sentences for the crime of persecution *and* for other crimes has been sufficiently addressed’.³² She further submits that since Mr Ntaganda did not specify in the Appeal Brief ‘the purported impact of the alleged error in the joint sentence’, he should not be permitted ‘to complement this oversight’ in a reply.³³ The Prosecutor requests the Appeals Chamber to reject the Request in relation to the Eleventh Issue.³⁴

20. The Appeals Chamber considers that a reply on the limited question of whether it may be possible to double count discriminatory intent under more than one charge in setting individual sentences for different charges may assist it in the determination of the matter. Accordingly, it finds it necessary in the interests of justice to grant Mr Ntaganda leave to reply on this discrete aspect of the Eleventh Issue. The remaining aspect concerning the alleged material impact is rejected as it will not assist the Appeals Chamber in determining the matter and would not be in the interests of justice to grant leave to reply thereon.

21. In relation to the seventh ground of appeal, Mr Ntaganda seeks leave to reply to the Prosecutor’s submissions ‘on the concept of “selective assistance” to victims’ and whether she can maintain that ‘saving the life of [64] enemy soldiers “contributed to the implementation of the common plan and the resulting crimes”’ (the ‘Twelfth Issue’).³⁵ The Prosecutor responds that further submissions on this issue are unnecessary.³⁶

22. The Appeals Chamber considers that the parties sufficiently addressed the matter and further submissions would not assist it in its determination of the matter. Accordingly, it does not find it necessary in the interests of justice to grant Mr Ntaganda leave to reply on the Twelfth Issue and rejects the Request in relation thereto.

³¹ Request, para. 13, pp 8-9.

³² Response, para. 25 (emphasis in original).

³³ Response, para. 26.

³⁴ Response, para. 27. *See also* para. 24.

³⁵ Request, para. 13, p. 9.

³⁶ Response, paras 28-29.

23. In relation to the ninth ground of appeal, Mr Ntaganda seeks leave to reply to the Prosecutor's submissions on the testimony of witness D-0054 (the 'Thirteenth Issue'); and that Mr Ntaganda improperly challenges findings made in the Conviction Decision in relation to alleged acts of punishment undertaken by Mr Ntaganda in Mongbwalu (the 'Fourteenth Issue').³⁷ The Prosecutor responds that further submissions on the Thirteenth and Fourteenth Issues are not required as '[t]he Appeals Chamber has sufficient information to draw its conclusions'.³⁸

24. The Appeals Chamber considers that the parties have sufficiently briefed it on the Thirteenth and Fourteenth Issues and therefore it will not be assisted by further submissions. Accordingly, the request for leave to file a reply on the Thirteenth and Fourteenth Issues is rejected.

25. With respect to the tenth ground of appeal, Mr Ntaganda seeks leave to reply to the Prosecutor's alleged 'misunderstanding of the relationship between "reconciliation meetings and activities between the Hema and Lendu communities" and "meetings between delegations of UPC and FNI officers"' (the 'Fifteenth Issue').³⁹ The Prosecutor responds that '[t]he Appeals Chamber has been sufficiently briefed on this confined issue' and should therefore reject Mr Ntaganda's request for leave to reply.⁴⁰

26. The Appeals Chamber considers that it has sufficient information to dispose of the issue raised by Mr Ntaganda and therefore will not be assisted by further submissions. Accordingly, the request for leave to file a reply on the Fifteenth Issue is rejected.

27. In relation to the twelfth ground of appeal, Mr Ntaganda seeks leave to reply to the Prosecutor's arguments regarding the Trial Chamber's refusal to admit as evidence a document related to Mr Ntaganda's behaviour in the Court's Detention Centre (the 'Sixteenth Issue').⁴¹ The Prosecutor responds that the Trial Chamber 'in

³⁷ Request, para. 13, pp. 9-10.

³⁸ Response, para. 30.

³⁹ Request, para. 13, p. 10 (emphasis in original omitted; footnote omitted)

⁴⁰ Response, para. 31. The Appeals Chamber notes that while the Prosecutor refers to ground "11" in her Response, her submissions are meant for ground 10. See Response, paras 28, 31.

⁴¹ Request, para. 13, p. 10.

fact’ considered Mr Ntaganda’s behaviour but ‘correctly afforded limited weight to this factor’.⁴² She further argues that the Trial Chamber provided more reasons than those pointed by Mr Ntaganda to reject the admission of the said document.⁴³ The Prosecutor avers that the parties have presented sufficient arguments on this issue and requests the Appeals Chamber to reject request for leave to reply on this issue.⁴⁴

28. The Appeals Chamber considers that it has sufficient information to determine the issue raised by Mr Ntaganda and therefore it will not be assisted by further submissions. Accordingly, the request for leave to file a reply on the Sixteenth Issue is rejected.

29. In addition, Mr Ntaganda seeks to respond to alleged inaccuracies in the Response (the ‘Seventeenth Issue’).⁴⁵ The Prosecutor responds that Mr Ntaganda’s argument ‘is too vague to meaningfully assess how a reply will be of further assistance to the Chamber’.⁴⁶ The Appeals Chamber notes that Mr Ntaganda fails to provide any specific reference to the alleged inaccuracies in the Prosecutor’s Response to the Appeal Brief. In these circumstances, his request for leave to reply on the Seventeenth Issue is rejected.

30. In conclusion, the Appeals Chamber grants Mr Ntaganda leave to file a written reply no longer than 15 pages on the Ninth and Eleventh Issues as specified in paragraphs 16-20 by 16h00 on Friday, 22 May 2020. The reply shall not repeat submissions already made in the Appeal Brief. All remaining aspects of the Request are rejected.

31. Finally, pursuant to regulation 23*bis* of the Regulations of the Court, the Appeals Chamber directs Mr Ntaganda to file a public redacted version of the Request or request its reclassification by 16h00 on Wednesday, 20 May 2020. The Prosecutor shall file a public redacted version of the Response or request its reclassification as public by 16h00 on Monday, 25 May 2020.

⁴² Response, para. 32.

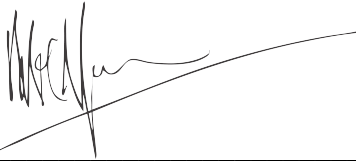
⁴³ Response, para. 32.

⁴⁴ Response, para. 33.

⁴⁵ Request, para. 14.

⁴⁶ Response, para. 34.

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



Judge Howard Morrison
Presiding

Dated this 15th day of May 2020

At The Hague, The Netherlands