

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 20 May 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

**Public Redacted Version of “Defence request for leave to reply to the
‘Prosecution Response to ‘Sentencing Appeal Brief’”, 28 April 2020, ICC-01/04-
02/06-2521-Conf**

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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**Victims Participation and Reparations
Section**

Further to the submission of the “Prosecution Response to ‘Defence Sentencing Appeal Brief’” on 14 April 2020,¹ Counsel for Mr. Ntaganda (“Defence” or “Mr. Ntaganda”) hereby submit this:

**Defence request for leave to reply to the
“Prosecution Response to ‘Sentencing Appeal Brief’”**

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 to ‘Defence Sentencing Appeal Brief’”.

II. CLASSIFICATION

2. Pursuant to regulation 23bis(1) and (2) of the RoC, the Defence files this leave to reply as confidential as it responds to a document bearing the same confidentiality level and which contains confidential information. A public redacted version will be filed forthwith.

III. PROCEDURAL BACKGROUND

3. On 7 November 2019, Trial Chamber VI (“Trial Chamber”) delivered its Sentencing Judgment pursuant to articles 76, 77 and 78 of the Rome Statute (“Statute”) and rules 145 to 147 of the Rules of Procedure and Evidence (“Rules”). Mr. Ntaganda was sentenced to 30 years of imprisonment.²

¹ Prosecution Response to “Defence Sentencing Appeal Brief”, 14 April 2020, [ICC-01/04-02/06-2509](#), (“Prosecution Response”).

² Sentencing Judgment, 7 November 2019, [ICC-01/04-02/06-2442](#).

4. On 9 December 2019, the Defence filed its Notice of Appeal against Sentencing Judgment.³

5. On 10 February 2020, the Defence filed its Sentencing Appeal Brief.⁴

6. On 14 April 2020, the Prosecution filed its Prosecution Response to the Defence Sentencing Appeal Brief.⁵

7. On 9 March 2020, the Appeals Chamber scheduled an oral hearing to be held from 29 June to 1 July 2020, in which it made reference to “the appeal of Mr Bosco Ntaganda against the ‘Sentencing judgment’ of Trial Chamber VI of 7 November 2019”.⁶

IV. APPLICABLE LAW

8. Pursuant to regulation 60(1) of the 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”.

9. 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.”⁷

10. 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

³ Notice of Appeal against Sentencing Judgment (ICC-01/04-02/06-2442), 9 December 2019, [ICC-01/04-02/06-2448](#).

⁴ Sentencing Appeal Brief, 10 February 2020, [ICC-01/04-02/06-2468](#) (“Sentencing Appeal Brief”).

⁵ [Prosecution Response](#).

⁶ Scheduling order for a hearing before the Appeals Chamber, 9 March 2020, [ICC-01/04-02/06-2486](#).

⁷ 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”).

pertinent to the proper adjudication of the appeal”;⁸ and “[the appellant] wishes to correct alleged inaccuracies and provide additional submissions.”⁹

11. The Defence respectfully submits that the right to file a reply to documents relating to the appeal of a Judgment pursuant to article 74 of the Statute and a Sentencing Judgment is not governed by regulation 24(5) of the RoC and the principles developed under this provision. Consequently and contrary to the Prosecution’s submissions, whether “the requesting party seeks to provide arguments on matters that it could have reasonably anticipated or should have included in its original brief”,¹⁰ is not a relevant criteria to be considered when adjudicating on a request to file a reply. Notably, the Appeals Chamber did not rely on this criteria to grant the Defence Request for leave to reply to the Prosecution Response to the Appeal Brief – Part I.¹¹

V. SUBMISSIONS

A. Request for leave to reply

12. The Defence hereby seeks leave to reply on the following specific issues related to Grounds 1-7, 9-10 and 12. Additional submissions on these limited identified issues are relevant to the proper adjudication of the appeal and will assist the Appeals Chamber’s determination of the appeal. It is also submitted that it is in the interests of justice to allow the Defence to ensure the Appeals Chamber is presented with a fully briefed appeal on sentence. As such, the Defence has identified

⁸ 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.

⁹ [Lubanga-Order-2982](#), para.7.

¹⁰ Prosecution Response to the Defence Request for Leave to File a Reply to the “Prosecution Response to ‘Defence Appeal Brief – Part I’”, 6 February 2020, [ICC-01/04-02/06-2467](#), para.2; Prosecution Response to the Defence Request for Leave to Reply to the “Prosecution Response to Defence Appeal Brief – Part II”, 20 April 2020, [ICC-01/04-02/06-2514](#), para.3 (citation omitted) (“Defence-Request-LtR-2514”).

¹¹ Decision on the Request for Leave to Reply, 11 March 2020, [ICC-01/04-02/06-2488](#) (“Decision-2488”).

the following legal and mixed legal and factual issues for which it submits a reply is warranted:

GROUND 1

- The Prosecution's erroneous claims based on its misunderstanding of the applicable law and misreading of the Trial Judgment that Mr. Ntaganda "artificially separates the two operations without factual basis";¹² and "contradicts the Chamber's findings that the First and Second Operations were part of one and the same military campaign and constituted a logical succession of events [...] formed part of the same course of conduct"¹³ and that in doing so, Mr. Ntaganda attempts to "[...] challenge this aspect of his conviction *via* his Sentencing Appeal [...]";¹⁴
- The Prosecution's erroneous claim that "the 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";¹⁵
- The Prosecution's erroneous submission that pursuant to rule 145(1)(c) of the Rules, which refers to the degree of participation and of intent, "the Chamber did not need to expressly find that [Mr.] Ntaganda had advance or contemporaneous knowledge of specific incidents, such as the Kobu massacre or the Bambu hospital murders [...]";¹⁶
- The Prosecution erroneous submission that "the Chamber did not err in taking into account the particular cruelty of the Kobu massacre as an aggravating

¹² [Prosecution Response](#), para.11 (footnote omitted).

¹³ *Ibid.*

¹⁴ *Ibid* (footnote omitted) (emphasis in original).

¹⁵ [Prosecution Response](#), para.17 (emphasis in original).

¹⁶ [Prosecution Response](#), para.23.

circumstance, notwithstanding that it had made no express finding regarding [Mr.] Ntaganda's advance or contemporaneous knowledge of the crimes";¹⁷ and

- The Prosecution's mischaracterisation of certain findings, which impact the core of its submissions in response to Ground 1.¹⁸

GROUND 2 AND 3

- The Prosecution's misunderstanding of the law applicable to sentencing and co-perpetration in asserting that "[t]his does not mean that [Mr. Ntaganda] had to know or intend the specific details of the underlying incidents, or that he had to know or intend the specific details of the underlying incidents..."¹⁹ and "there was no legal or factual basis for the Chamber to reduce his degree of culpability due to his lack of physical proximity to the specific victims or the lack of specific findings regarding his advance or contemporaneous knowledge with respect to those incidents."²⁰

GROUND 4

- The Prosecution's unfounded assertions that "the Chamber did not find that 'Mr. Ntaganda was in Fataki during the period of the Second Operation'"²¹ and "the Chamber correctly considered Ntaganda's behaviour *after* the Kobu crimes as an additional indicator of his degree of participation and intent [...]"²²

GROUND 5

¹⁷ [Prosecution Response](#), para.26.

¹⁸ [Prosecution Response](#), para.9, fns.9,10 and 12; and para.16, fn.39.

¹⁹ [Prosecution Response](#), para.32 (footnote omitted).

²⁰ [Prosecution Response](#), para.38 (footnote omitted).

²¹ [Prosecution Response](#), para.42 (footnote omitted).

²² [Prosecution Response](#), para.43.

13. The length of the Prosecution submissions in relation to Ground 5 (14 pages as compared to Mr. Ntaganda's two)²³ are a result of its decision to use the sentencing appeal to present legal and factual submissions, which should have properly been included in its response to the Defence Appeal Brief Part II. These new and lengthy arguments warrant leave to reply. In addition, the Defence seeks leave to reply on the following specific issues:

- The Prosecution's erroneous legal submissions, based on common article 3 to the Geneva Conventions and articles 8(2)(e)(i) and 8(2)(c)(i) of the Statute, that, *inter alia*, "[...] where the death of a civilian is intentionally caused in the conduct of hostilities in non-international armed conflict, the proper charge is not common article 3 murder, but the distinct and more specific crime of unlawfully directing attacks against civilians under article 8(2)(e)(i)."²⁴
- The Prosecution erroneous submissions, linked to the individual sentence imposed by the Trial Chamber for Count 3, that "[...] there is no proper basis to consider that anything in Ground 5 could possibly have led to the imposition of a disproportionate sentence"²⁵ and "[...] even if (for the sake of argument) the Chamber had erred in calculating the individual sentence for the crime of unlawfully directing attacks against civilians, the Appeals Chamber may not automatically 'reduce Mr. Ntaganda's joint sentence accordingly'."²⁶

GROUND 6

- The Prosecution erroneous legal arguments that article 78(3) of the Statute allows a Trial Chamber to double count discriminatory intent under more than

²³ [Sentencing Appeal Brief](#), pp.25-27.

²⁴ [Prosecution Response](#), para.60 (footnote omitted).

²⁵ [Prosecution Response](#), para.47.

²⁶ [Prosecution Response](#), para.71 (footnote omitted).

one charge in setting individual sentences for different charges, and “[...] the Appeals Chamber cannot reduce the joint sentence solely based on an alleged error in the individual sentence for persecution.”²⁷

GROUND 7

- Noting that the Prosecution does not dispute that the lives of 64 enemy soldiers were saved, additional submissions are warranted in relation to the Prosecution submissions on the concept of “‘selective assistance’ to victims”,²⁸ including the relevance of the cases cited in support,²⁹ and whether the Prosecution can reasonably assert that saving the lives of these soldiers “contributed to the implementation of the common plan and the resulting crimes.”³⁰

GROUND 9

- Noting that the Prosecution acknowledges that Lendu civilians who fled an attack by a group of Lendu combatants were given shelter in Mandro, additional submissions are warranted on the Prosecution’s erroneous assertions that its failure to cross-examine D-0054 on this matter “does not mean it ‘tacit[ly] accepted that the ‘Bosco’ to whom D-0054 was referring was, in fact Mr. Ntaganda’”,³¹ and that “[...] even assuming *arguendo* that this individual was [Mr.] Ntaganda, D-0054 gave no evidence regarding his alleged role in protecting these civilians”.³²
- The Prosecution’s incorrect claim that “[Mr.] Ntaganda also improperly repeats his challenges to findings in the Judgment when he argues that the Chamber

²⁷ [Prosecution Response](#), para.85.

²⁸ [Prosecution Response](#), para.96.

²⁹ [Prosecution Response](#), para.96, fn.245.

³⁰ [Prosecution Response](#), para.93.

³¹ [Prosecution Response](#), para.115 (footnote omitted).

³² *Ibid.*

‘minimized Mr. Ntaganda’s specific acts of punishment’ or ‘erred in rejecting a separate execution by firing squad, in public, in Mongbwalu [...]’.³³

GROUND 10

- The Prosecution’s misunderstanding of the relationship between “reconciliation meetings and activities between *the Hema and Lendu communities*”³⁴ and “meetings between delegations of UPC and FNI officers.”³⁵

GROUND 12

- Whether the Prosecution mischaracterises the [REDACTED],³⁶ thereby bolstering the argument that the Trial Chamber erred in refusing to admit the document.³⁷

14. In addition to submissions on these limited issues, a reply would also allow the Defence to respond to and correct inaccuracies in the Prosecution’s characterisation of the Trial Chamber’s findings, and evidentiary record of the case.

B. Form of the Reply

15. The Defence recalls that the Appeals Chamber, in granting leave to reply to the Prosecution Response to Part I of Mr. Ntaganda’s appeal from the Trial Judgment, ordered that Mr. Ntaganda’s reply “be delivered **orally** at the hearing scheduled from 29 June to 1 July 2020.”³⁸

16. In his request for leave to reply to the Prosecution Response to Part II of his appeal from the Trial Judgment, Mr. Ntaganda made submissions as to why, in his

³³ [Prosecution Response](#), para.121 (footnote omitted).

³⁴ [Prosecution Response](#), para.137 (emphasis in original).

³⁵ *Ibid* (footnote omitted).

³⁶ [Prosecution Response](#), para.168.

³⁷ [Sentencing Appeal Brief](#), para.181.

³⁸ [Decision-2488](#), para.8 (emphasis added).

view, the normal practice of a **written** reply should be adopted in that appeal.³⁹ With respect, he makes the same submissions in relation to his appeal from the Sentencing Judgment.

17. By this stage of the appeal proceedings, and as demonstrated by the above points of reply, the parties disputes have focused their arguments to the interpretation of identified legal principles, and discrete pieces of evidence. Although setting out these remaining submissions in written form can be done in a precise manner, arguing the same points orally is necessarily more difficult.⁴⁰

18. Moreover, ongoing travel restrictions and social distancing requirements stemming from the COVID-19 pandemic also mitigate in favour of a written filing. Given the uncertainties of the present situation, it is submitted 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 sentencing appeal as soon as possible.⁴¹

VI. RELIEF SOUGHT

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

GRANT the Defence request for leave to reply to the Prosecution Response;
and

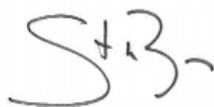
AUTHORIZE the Defence to submit a written reply.

³⁹ [Defence-Request-LtR-2512](#), para.24.

⁴⁰ [Defence-Request-LtR-2512](#), paras.24-25.

⁴¹ [Defence-Request-LtR-2512](#), para.27.

RESPECTFULLY SUBMITTED ON THIS 20th DAY OF MAY 2020

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

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

The Hague, The Netherlands