

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: ICC-01/04-02/06
Date: 30 October 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 “Prosecution Response to the “Defence Request for Leave to Reply to the Prosecution’s Response to ‘Defence request for admission of additional evidence on appeal’”, ICC-01/04-02/06-2599-Conf

Source: Office of the Prosecutor

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

The Office of the Prosecutor

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REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

Submissions

1. Mr Ntaganda requests leave to reply to the Prosecution's response to his request to admit additional evidence on appeal on one discrete issue: the Prosecution's submission that the witness who is the subject of the additional evidence request [REDACTED].¹ Mr Ntaganda further seeks to present evidence to demonstrate that the Prosecution's submission is incorrect.²
2. Mr Ntaganda incorrectly bases his Request on regulation 60 of the Regulations of the Court ("RoC") and its related jurisprudence.³ That regulation concerns requests for leave to reply to responses to appeal briefs—which his Request is not. Instead, and as the Appeals Chamber has previously determined in the context of additional evidence applications in an appeal, regulation 24(5) of the RoC applies.⁴ Mr Ntaganda must therefore demonstrate that his reply is limited to new issues raised in the response that he could not reasonably have anticipated.⁵
3. In that context, the issue on which Mr Ntaganda seeks to reply is not strictly a "new issue" or one that he could not reasonably have anticipated. The question of whether the proposed witness [REDACTED], as [REDACTED] claims in [REDACTED] statement, concerns [REDACTED]. Moreover, it is information that [REDACTED] testimony in the appeal proceedings.⁶ Mr Ntaganda could reasonably have expected that the Prosecution would verify this aspect of the witness proposed testimony.
4. Further, the Appeals Chamber need not resolve this issue (that is, whether the proposed witness [REDACTED]) to decide on Mr Ntaganda's request to allow [REDACTED] testimony on appeal or have [REDACTED] statement (and voter's card) admitted into evidence. This is because, as the Prosecution has demonstrated, that request can be rejected for failing to meet the other criteria applicable to additional evidence requests. Specifically, the information that the witness purports to provide was available at trial and Mr Ntaganda

¹ ICC-01/04-02/06-2595-Conf ("Request"), paras. 12-14, referring to ICC-01/04-02/06-2582-Conf ("Prosecution Response to Additional Evidence Request"), para. 4 and Annex II.

² Request, para. 14.

³ Request, paras. 9-11.

⁴ See ICC-01/05-01/13-2351 ("*Bemba et al.* Re-Sentencing AJ"), para. 18 (applying regulation 24(5) of the RoC to Mr Bemba's request to reply to the Prosecutor's response to his additional evidence application).

⁵ Regulation 24(5) of the RoC.

⁶ Prosecution Response to Additional Evidence Request, para. 19.

was not diligent at trial;⁷ the evidence is unreliable and only partially relevant to the grounds of appeal and the voter's card has low probative value;⁸ and the evidence could not and would not have any impact on Mr Ntaganda's conviction and sentence.⁹ There are no compelling reasons to justify its admission either, in the sense that its rejection would cause a miscarriage of justice.¹⁰ In addition, the proposed witness's statement cannot be admitted because Ntaganda had not complied with—nor even cited—rule 68(2).¹¹

5. However, if the Chamber considers it necessary to resolve this issue and allows Mr Ntaganda to reply, the Prosecution respectfully requests that he be required to reply in writing by 25 September 2020. An expedited time-frame is warranted because Mr Ntaganda should already have the necessary information. It is expected that he would have sought to verify the proposed witness's assertion that [REDACTED] before seeking to adduce [REDACTED] testimony as additional evidence on appeal. Further, the hearing of the appeals in this case is scheduled to commence in less than three weeks' time, and the Chamber has resolved to decide on the admissibility of the additional evidence request before the hearing pursuant to regulation 62(2)(a) of the RoC.¹² In the circumstances, the Prosecution considers that a reply, if allowed, should be filed expeditiously to permit the Prosecution to conduct further enquiries and to ensure the timely resolution of the admissibility of the additional evidence request before the hearing date.

Confidentiality

6. This response is classified as "confidential", pursuant to regulation 23*bis*(2) of the RoC. The Prosecution will file a public redacted version of this response in due course.

⁷ Prosecution Response to Additional Evidence Request, paras. 13-17.

⁸ Prosecution Response to Additional Evidence Request, paras. 18-21.

⁹ Prosecution Response to Additional Evidence Request, paras. 22-53.

¹⁰ Prosecution Response to Additional Evidence Request, paras. 12, 54.

¹¹ Prosecution Response to Additional Evidence Request, paras. 6, 12.

¹² ICC-01/04-02/06-2574-Conf ("Additional Evidence Directions"), p. 3, para. 4.

Conclusion

7. The Prosecution respectfully submits that the Appeals Chamber need not resolve the proposed witness's [REDACTED] in order to decide (and reject) Mr Ntaganda's request to adduce additional evidence on appeal. However, in the event the Chamber is minded to grant the Request, the Prosecution requests that Mr Ntaganda be required to file his reply in writing by 25 September 2020.



Fatou Bensouda, Prosecutor

Dated this 30th day of October 2020

At The Hague, The Netherlands