

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **5 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**

**Defence submissions on the scheduled oral hearing**

**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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(Participation / Reparation)**

**The Office of Public Counsel for  
Victims**

**The Office of Public Counsel for the  
Defence**

**States' Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

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**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

Further to the Scheduling Order issued by the Appeals Chamber on 9 March 2020<sup>1</sup> and the filing by the Parties of their appeal briefs and responses thereto, Counsel for Mr. Ntaganda (“Defence” or “Mr. Ntaganda”) hereby submit these Defence submissions on the scheduled oral hearing.

## **I. INTRODUCTION**

1. The COVID-19 pandemic raises unavoidable issues and obstacles for Mr. Ntaganda and his Defence team. Indeed, the Defence recognises that the pandemic is causing difficulties and raising concerns for all those involved in the present appeal proceedings<sup>2</sup> and that it will likely continue to do so for some time. In these circumstances, the Defence deems it appropriate to set out in the present filing, *proprio motu*, the particular issues and obstacles, which it is currently facing given their bearing on the future conduct of the appeal.

## **II. PROCEDURAL BACKGROUND**

2. On 8 July 2019, Trial Chamber VI rendered its Judgment under article 74 of the Rome Statute (“Statute”). The Judgment found Mr. Ntaganda guilty of all eighteen charges against him.<sup>3</sup> On 9 September 2019, the Defence gave notice of its intention to appeal the Judgment on 15 grounds.<sup>4</sup> On the same day, the Prosecution did the same, advancing two grounds of appeal.<sup>5</sup>

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<sup>1</sup> Scheduling order for a hearing before the Appeals Chamber, 9 March 2020, [ICC-01/04-02/06-2486](#).

<sup>2</sup> See, e.g. Prosecution notice of intention regarding deadlines, 16 March 2020, [ICC-01/04-02/06-2491](#), paras.2,3 (“Prosecution-Notice-2491”).

<sup>3</sup> Judgment, 8 July 2019, [ICC-01/04-02/06-2359](#).

<sup>4</sup> Mr. Ntaganda’s Notice of Appeal against the Judgment pursuant to Article 74 of the Statute, 9 September 2019, [ICC-01/04-02/06-2396](#).

<sup>5</sup> Prosecution notice of appeal, 9 September 2019, [ICC-01/04-02/06-2395](#).

3. On 7 October 2019, the Prosecution submitted its “Prosecution Appeal Brief”<sup>6</sup> and on 9 December 2019, the Defence submitted its “Defence Response to Prosecution Appeal Brief.”<sup>7</sup>
4. On 7 November 2019, the Trial Chamber VI rendered its Sentencing Judgment, sentencing Mr. Ntaganda to 30 years of imprisonment.<sup>8</sup>
5. On 11 November 2019, the Defence filed its “Defence Appeal Brief – Part I”.<sup>9</sup> On 27 January 2020, the Prosecution filed its “Prosecution Response to Defence Appeal Brief – Part I”.<sup>10</sup>
6. On 9 December 2019, the Defence gave notice of its intention to appeal the Sentencing Judgment on 12 grounds.<sup>11</sup>
7. On 31 January 2020, the Defence filed its “Defence Appeal Brief – Part II”.<sup>12</sup>
8. On 10 February 2020, the Defence filed its Sentencing Appeal Brief.<sup>13</sup>
9. On 9 March 2020, the Appeals Chamber scheduled an appeal hearing from 29 June 2020 to 1 July 2020, stating that “[f]urther directions on the schedule of the hearing, conduct of the proceedings and subject matter will be issued in due course.”<sup>14</sup>
10. On 11 March 2020, the Appeals Chamber granted the Defence’s request for

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<sup>6</sup> Prosecution Appeal Brief, 7 October 2019, [ICC-01/04-02/06-2432](#).

<sup>7</sup> Defence Response to Prosecution Appeal Brief, 7 October 2019 (ICC-01/04-02/06-2432), 9 December 2019, [ICC-01/04-02/06-2449](#).

<sup>8</sup> Sentencing judgment, 7 November 2019, [ICC-01/04-02/04-2442](#).

<sup>9</sup> Defence Appeal Brief – Part I, 11 November 2019, [ICC-01/04-02/06-2443](#).

<sup>10</sup> Prosecution Response to “Defence Appeal Brief – Part I”, 27 January 2020, [ICC-01/04-02/06-2464](#) (“Prosecution Response – Part I”).

<sup>11</sup> Notice of Appeal against Sentencing Judgment (ICC-01/04-02/06-2442), 9 December 2019, [ICC-01/04-02/06-2448](#).

<sup>12</sup> Defence Appeal Brief – Part II, 31 January 2020, [ICC-01/04-02/06-2465](#).

<sup>13</sup> Sentencing Appeal Brief, 10 February 2020, [ICC-01/04-02/06-2468](#).

<sup>14</sup> Scheduling order for a hearing before the Appeals Chamber, 9 March 2020, [ICC-01/04-02/06-2486](#), para.2.

leave to reply to the Prosecution Response – Part I and ordered the reply “to be delivered orally at the hearing scheduled between 29 June 2020 and 1 July 2020.”<sup>15</sup>

11. On 3 April 2020, the Prosecution filed its “Prosecution Response – Part II”.<sup>16</sup> On 15 April 2020, the Defence filed its Request for Leave to Reply to the Prosecution Response – Part II.<sup>17</sup> On 4 May 2020, the Appeals Chamber rendered its “Decision on request for leave to reply”<sup>18</sup> partially granting the Defence leave to reply to the Prosecution Response – Part II, in writing, by 19 May 2020.

12. On 14 April 2020, the Prosecution filed its “Prosecution response to ‘Sentencing Appeal Brief’”.<sup>19</sup> On 28 April 2020, the Defence filed its Request for leave to reply to the “Prosecution Response to ‘Sentencing Appeal Brief’”.<sup>20</sup>

### III. SUBMISSIONS

#### A. **Timing of further directions on the conduct of the hearing**

13. On 16 March 2020, the Prosecution submitted *proprio motu* its “Prosecution notice of intention regarding deadlines”<sup>21</sup> in which it made reference to “the disruptions which will be caused by staff now being required to work from home in difficult circumstances” and “the closure of schools and universities”.<sup>22</sup> Members of Mr. Ntaganda's Defence team are in similarly difficult circumstances, with the care of family members and young children necessarily taking significant periods of time

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<sup>15</sup> Decision on request for leave to reply, 11 March 2020, [ICC-01/04-02/06-2488](#), para.8.

<sup>16</sup> Prosecution response to “Defence Appeal Brief – Part II”, 3 April 2020, [ICC-01/04-02/06-2500 \(Prosecution Response – Part II\)](#).

<sup>17</sup> Defence request for leave to reply to the Prosecution Response to Defence Appeal Brief – Part II, 15 April 2020, [ICC-01/04-02/06-2512](#).

<sup>18</sup> Decision on request for leave to reply, 4 May 2020, [ICC-01/04-02/06-2522](#).

<sup>19</sup> Prosecution response to “Sentencing Appeal Brief”, 14 April 2020, [ICC-01/04-02/06-2509](#).

<sup>20</sup> Defence request for leave to reply to the “Prosecution Response to ‘Sentencing Appeal Brief’”, 28 April 2020, [ICC-01/04-02/06-2521](#).

<sup>21</sup> [Prosecution-Notice-2491](#).

<sup>22</sup> Prosecution notice of intention regarding deadlines, 16 March 2020, [ICC-01/04-02/06-2491](#), paras.2,3.

which would otherwise be dedicated to work, with childcare or other assistance no longer available.

14. Communications within the team and with Mr. Ntaganda are now more limited, and conducted under more difficult circumstances. The UN Detention Facility has been closed to outside visitors since 16 March 2020. As such, taking Mr. Ntaganda's instructions is more complicated, time-consuming, and less effective. Members of Mr. Ntaganda's legal team are sheltering in place in their countries of residence, in four different time zones. This means shorter windows of overlapping working (or even waking) hours among the team and with Mr. Ntaganda, which also hampers communication.

15. Accessing ICC systems externally is now more difficult. If the Defence has access to CITRIX - which is not always the case - the use of digital tools is extremely slow. Loading the External Counsel website, for example, regularly takes up to an hour. CITRIX itself is often inaccessible for hours at a time. Downloading documents from the Court Records Database is also extremely slow, and the system regularly crashes. As a result, the Defence has reduced access to exhibits, transcripts, and court records. The e-portal filing system experiences similar delays, and again is sometimes unavailable, meaning that there are periods during which it is not possible to file documents with the Court. Other legal resources are similarly unavailable. The Prosecution Response briefs, for example, make reference to over 20 books or articles, which are presumably held in the ICC library, but are unavailable online.<sup>23</sup> The Defence is unable to verify the Prosecution's reliance on these sources. Its ability to conduct additional legal research is similarly limited.

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<sup>23</sup> See e.g. [Prosecution Response – Part II](#), para.495 citing to Y. Sandoz (ed.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva/Leiden: ICRC/Martinus Nijhoff, 1987) and S. Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford: OUP, 2012); [Prosecution Response – Part II](#), paras.11,431,432 citing to D. Guilfoyle, *International Criminal Law* (Oxford: OUP, 2016); [Prosecution Response – Part II](#), paras.11,49 citing to H. Brady,

16. The Defence requests that these circumstances be taken into account when determining the timing of the circulation of any further directions on the conduct of the appeal hearing, including any lists of questions, given that normal preparation time is now significantly reduced, and preparation itself significantly more difficult.

#### **B. Considerations relevant to a virtual hearing**

17. Within an appeal, oral hearings provide a unique opportunity for the parties to engage directly with the Appeals Chamber and explain or even adjust their positions in the face of direct questions from the bench. This process of spontaneous interaction and exchange cannot easily be replicated by written submissions, which may be why appellate hearings have formed part of the practice of international criminal adjudication, even when not mandatory.

18. While a virtual hearing would alleviate the need for the parties, participants, the Appeals Chamber and court staff to be physically present at the ICC premises, it gives rise to other logistical issues, and fair trial considerations. The Defence takes this opportunity to raise these with the Appeals Chamber, in the event that a virtual hearing is being contemplated in this case.

19. The ICC Statute draws a distinction between actual hearings and remote hearings, by distinguishing between actual presence (to which an accused has a right), and constructive presence via video-link.<sup>24</sup> The latter is an “exceptional circumstance” under article 63(2) of the Statute, which can be instituted if an accused “continues to disrupt the trial” and only “after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.”<sup>25</sup> There is no provision in the ICC’s statutory documents for defendants attending hearings via video-link in any circumstances other than as a sanction for continual disruption.

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“Appeal and Revision”, in R. Lee *et al.* (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsey: Transnational, 2001).

<sup>24</sup> [ICC Statute](#), article 63.

<sup>25</sup> [ICC Statute](#), article 63(2).

20. This may be because virtual hearings in criminal cases risk incompatibility with the right of the accused to a public trial;<sup>26</sup> to have adequate time and facilities for the preparation of the defence;<sup>27</sup> to be tried in his or her presence,<sup>28</sup> and are “likely to have an impact on [a defendant’s] ability to participate fully and effectively in their own criminal proceedings.”<sup>29</sup>

21. Pre COVID-19 studies into remote criminal hearings consistently highlighted the disadvantage at which virtual hearings put defendants. Virtual hearings impair a defendant’s access to counsel because lawyers and defendants are not in the same place, which leads to a “disconnect” in the relationship between the lawyer and the client.<sup>30</sup> Judges may be more punitive towards defendants they see on screen.<sup>31</sup> Studies have also highlighted the detrimental effect on the defendants themselves, noting that “sitting in a remote video link facility for a lengthy period could be

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<sup>26</sup> [ICC Statute](#), article 67(1).

<sup>27</sup> [ICC Statute](#), article 67(1)(b).

<sup>28</sup> [ICC Statute](#), article 67(1)(d), article 63. See *Protais Zigiranyirazo v. The Prosecutor*, ICTR-2001-73-AR73, [Decision on Interlocutory Appeal](#), 30 October 2006.

<sup>29</sup> Fair Trials, [Safeguarding the right to a fair trial during the Coronavirus pandemic: remote criminal justice proceedings](#), 30 March 2020, p.20.

<sup>30</sup> P. Gibbs, [Defendants on video – conveyor belt justice or a revolution in access?](#) (2017), p.33: “The hidden story of virtual justice is of the harm the disconnect does to the relationship between lawyer and client. The rigid timetable leads to “stopwatch” justice, in which lawyers try to beat the clock to get instructions from their clients, many of whom have challenges understanding the basics of the criminal justice process”. D. Tait, B. McKimmie, R. Sarre, D. Jones, L. W. McDonald, K. Gelb, [Towards a distributed courtroom](#), (2017) Western Sydney University, p.17: “Defendants’ access to counsel might be impaired by being located away from their lawyer.”

<sup>31</sup> D. Tait, B. McKimmie, R. Sarre, D. Jones, L. W. McDonald, K. Gelb, [Towards a distributed courtroom](#), (2017) Western Sydney University, p.17. See also P. Gibbs, [Defendants on video – conveyor belt justice or a revolution in access?](#) (2017): A 10-year study on the outcome of defendants appearing by video in England and Wales found that defendants who appeared on video from police stations were more likely to get prison sentences and less likely to get community sentences; See also p.33: “Video justice does defendants a disservice – it facilitates and encourages inappropriate or disengaged behaviour, the impact of which the defendant cannot see, and deprives defendants of the choice to appear on video or not.” See also M. Simonato, [Defence rights and the use of information technology in criminal procedure](#), *Revue internationale de droit pénal*, 2014/1 (Vol. 85), p.261 at pp.295-296: “the ‘judge’s overall perception of the defendant could be affected, however subtly or subconsciously, by viewing the defendant only by video’: as for instance, ‘if the defendant is nervous because of the presence of the camera focused on him, his behaviour may reflect that nervousness, and such behaviour could negatively affect the judge’s perceptions of his credibility.’”



mentally exhausting and alienating”.<sup>32</sup>

22. As such, despite the circumstances of the COVID-19 pandemic, fair trial advocates have recommended in the last weeks that “non urgent criminal trials, in particular, should not take place if the defendant cannot be physically presented in court for public health reasons”, particularly in a situation where the postponement of hearings will not cause “an unprecedented backlog of cases that could harm the effective administration of justice in the future”.<sup>33</sup> These considerations apply equally to appeal hearings, where the defendant maintains his rights to be present, and to have adequate time and facilities to prepare for what must be a public hearing.

23. In addition, a platform for a virtual ICC appeal hearing in the *Ntaganda* case would need to facilitate at a minimum: (i) public access to the hearings; (ii) display of multiple images simultaneously; (iii) real-time French-English interpretation; (iv) real-time transcription in French and English; (v) privileged consultations between the Defence and Mr. Ntaganda; (vi) closed sessions for reference to confidential evidence or information; and (vii) the ability for Mr. Ntaganda to be held in a location where he could participate in both open and closed sessions, and potentially address the Appeals Chamber directly.<sup>34</sup> Given these technical requirements, it is unclear whether any Defence team members have, or will be able to acquire, the IT software and hardware required to install a platform of this

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<sup>32</sup> D. Tait, B. McKimmie, R. Sarre, D. Jones, L. W. McDonald, K. Gelb, [Towards a distributed courtroom](#), (2017) Western Sydney University, p.17.

<sup>33</sup> Fair Trials, [Safeguarding the right to a fair trial during the Coronavirus pandemic: remote criminal justice proceedings](#), 30 March 2020, p.4. See also M. Rossner, D. Tait, [Courts are moving to video during coronavirus, but research shows it's hard to get a fair trial remotely](#), 8 April 2020, The Conversation; J. Townend, [Covid-19, the UK's Coronavirus Act and emergency 'remote' court hearings: what does it mean for open justice?](#), 9 April 2020, Information Law and Policy Centre; P. K. Dubey, [Virtual Courts, a sustainable option?](#), 12 April 2020, Bar and Bench.

<sup>34</sup> Both Mr. Bemba and Mr. Lubanga were given the opportunity to address the Appeals Chamber directly. *The Prosecutor v. Jean-Pierre Bemba Gombo*, Scheduling order for a hearing before the Appeals Chamber, 7 November 2017, [ICC-01/05-01/08-3568](#); *The Prosecutor v. Mathieu Ngudjolo Chui*, Scheduling order for a hearing before the Appeals Chamber, 18 September 2014, [ICC-01/04-02/12-199](#); *The Prosecutor v. Thomas Lubanga Dyilo*, Scheduling order and decision in relation to the conduct of the hearing before the Appeals Chamber, 30 April 2014, [ICC-01/04-01/06-3083](#).

complexity, or sufficient broadband or Wi-Fi connections to run it. It may also be similarly impossible to maintain the confidentiality of the proceedings where parties are pleading from their homes, given the current obstacles to hiring external office space or rooms.

24. Technical obstacles aside, the appeal hearing is a unique opportunity for the parties to interact with the Appeals Chamber, and engage in unscripted and spontaneous exchanges. A virtual hearing, regardless of the sophistication of the technology employed, can hardly replicate these exchanges. Virtual communication is necessarily more stilted. This is because “subtle facial movements, non-verbal cues and peripheral actions, important for interpreting speech, are hard to detect in video-mediated communication”, while responses, essential for assessing how a message is received, are similarly hard to gauge.<sup>35</sup> This may be why, although some judicial systems have resorted to virtual hearings for routine or urgent matters, other international courts have chosen to postpone their hearings.<sup>36</sup>

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<sup>35</sup> D. Tait, B. McKimmie, R. Sarre, D. Jones, L. W. McDonald, K. Gelb, [Towards a distributed courtroom](#), (2017) Western Sydney University. See also A. Bowen Poulin, [Criminal Justice and Videoconferencing Technology: The Remote Defendant](#), 78 Tul. L. Rev. 1089 (2004) at p.1108: “There are three areas in which technology inevitably skews the perception of others. First, choices about camera shots influence perceptions of others. Second, video presentations always either strip some nonverbal cues from the communication or overemphasize them. Finally, video presentations do not replicate normal eye contact.” See also E. Rowden, A. Wallace, D. Tait, M. Hanson, D. Jones, [Gateways to Justice: design and operational guidelines for remote participation in court proceedings](#), University of Western Sydney (2013), p.30: “Key findings from observations and experiences: The image of remote participant is often distorted; There are difficulties with simulating eye-contact; There are difficulties displaying multiple images; There is often an unnatural dislocation of the sound of the voice from image of speaker; Audio quality is often poor with voices sounding unnatural and lacking in clarity.”

<sup>36</sup> [IRMCT STATEMENT ON OPERATIONS DURING COVID-19](#), 31 mars 2020; ICJ, [Press Release 7 April 2020](#), The ICJ extends the period during which no hearings will be held; *Le Procureur c. Ayyash*, 8 avril 2020, [Troisième ordonnance en suspension des délais](#), para.3; [Press release issued by the Registrar of the Court](#) [Press release issued by the Registrar of the Court](#), ECHR 094 (2020) 16.03.2020; [Press Release issued from the Registrar of the Court](#), ECHR 108 (2020), 09.04.2020; [The Court of Justice of the European Union adapts in order to guarantee the continuity of the European public administration of justice](#), 3 April 2020; INTER-AMERICAN COURT OF HUMAN RIGHTS AGREEMENT OF THE COURT 2/20, APRIL 16, 2020, [Extension of the suspension of time limits due to the health emergency caused by COVID-19](#).

**C. Final observations**

25. The Defence welcomes the opportunity to enter into a constructive dialogue with the Appeals Chamber, the parties and the participants and the Registry with a view to facilitating the oral hearings in the present appeal, whether as scheduled or at a later date. Should the COVID-19 pandemic make it impossible for the parties and participants to be present at the ICC premises as scheduled, the Defence is ready to mitigate this delay by answering any questions from the Appeals Chamber in writing, prior to appearing in person.

**RESPECTFULLY SUBMITTED ON THIS 5<sup>th</sup> DAY OF MAY 2020**

A handwritten signature in black ink, appearing to read 'S+B', with a horizontal line extending from the end of the 'B'.

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

The Hague, The Netherlands