

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **27 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 *with* Public Annex A**

**Defence reply to “Prosecution Response to ‘Sentencing Appeal Brief’”**

**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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**States' Representatives**

**Amicus Curiae**

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**Detention Section**

**Victims Participation and Reparations  
Section**

Further to the submission of the “Defence request for leave to reply to the ‘Prosecution Response to ‘Sentencing Appeal Brief’” on 28 April 2020<sup>1</sup> and the “Decision on request for leave to reply” rendered by the Appeals Chamber on 15 May 2020,<sup>2</sup> Counsel for Mr. Ntaganda (“Defence” or “Mr. Ntaganda”) hereby submit this:

## **Defence reply to “Prosecution Response to ‘Sentencing Appeal Brief’”**

### **INTRODUCTION**

1. Pursuant to the Decision, the Defence was granted leave to reply to the Ninth and Eleventh Issues raised in the Defence Request. Regarding the Ninth Issue, having further considered the parties’ respective submissions in relation to Ground 5 of the Defence Sentencing Appeal Brief,<sup>3</sup> and in the light of the nature of the issue for which leave to reply was granted,<sup>4</sup> Mr. Ntaganda elects not to reply to the Ninth Issue.<sup>5</sup> Accordingly, Mr. Ntaganda herein replies solely to the Eleventh Issue which relates to Ground 6 in the Sentencing Appeal Brief.

### **ELEVENTH ISSUE<sup>6</sup>**

2. On the limited question of “whether it may be possible to double count discriminatory intent under more than one charge in setting individual sentences”,<sup>7</sup> the answer is straightforward. The prohibition on double counting is well-established, and “flows from the basic rationale of achieving a just and adequate punishment.”<sup>8</sup> Contrary to the Prosecution’s submissions,<sup>9</sup> the “unique” two-step sentencing process set out in article 78(3) of the Rome Statute (“Statute”) does not circumvent this well-established prohibition. A “just and adequate punishment” is not achieved if a sentence is imposed twice for the same conduct at step one of the International Criminal Court (“ICC”) sentencing process, and then those separate sentences form part of step two.

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<sup>1</sup> [Defence-Request-2521](#).

<sup>2</sup> [Decision-2530](#).

<sup>3</sup> [Sentencing Appeal Brief](#), paras.57-61; [Prosecution-Response-2509](#), paras.45-75.

<sup>4</sup> [Decision-2530](#), paras.16-18

<sup>5</sup> That Mr. Ntaganda opts not to reply to the Ninth issue should not be construed in any way as accepting the Prosecution’s submissions in its [Prosecution-Response-2509](#).

<sup>6</sup> [Defence-Request-2521](#), para.13 (3<sup>rd</sup> bullet point); [Decision-2530](#), paras.18-20.

<sup>7</sup> [Decision-2530](#), para.20.

<sup>8</sup> Ambos, p.266.

<sup>9</sup> [Prosecution-Response-2509](#), paras.76-83.

3. In relation to step one, the Prosecution's approach is erroneously narrow. Double counting does not arise solely where the same factual conduct is considered twice in the calculation of an individual sentence imposed for an individual crime.<sup>10</sup> Rather, "[f]airness [...] requires double counting to be understood in a broad sense to include any factor, and not merely constituting elements of the offence".<sup>11</sup> Put another way "[t]he prohibition simply bans any factor from being considered twice in sentencing, to the detriment of the accused".<sup>12</sup> That this is a more flagrant and obvious example than in other cases where Trial Chambers double counted factors in determining gravity and aggravating circumstances,<sup>13</sup> does not distinguish it in terms of the unfairness of the outcome to the defendant being sentenced.

4. The Prosecution submission that the Trial Chamber VI ("Trial Chamber") was appropriately alert to the danger, and did not fall into error,<sup>14</sup> is not correct. As the Trial Chamber itself acknowledged:

"the conduct which underlies Mr Ntaganda's conviction for persecution and his conviction for the crimes underlying Counts 1 to 5, 7 to 8, 11 to 13, and 17 to 18 is the same. What differentiates the crimes underlying Counts 1 to 5, 7 to 8, 11 to 13, and 17 to 18 from persecution is the discriminatory dimension of the latter."<sup>15</sup>

5. The discriminatory dimension was then taken into account by the Trial Chamber: (i) when assessing the gravity of the crimes underlying Counts 1 to 5, 7 to 8, 11 to 13, and 17 to 18 (in so far as commission as an indirect co-perpetrator was concerned); and (ii) as an aggravating circumstance when assessing the crimes underlying Counts 1 and 2 (in so far as commission as a direct perpetrator was concerned).<sup>16</sup> Therefore, when the Trial Chamber imposed individual sentences for the individual crimes set out in Counts 1 to 5, 7 to 8, 11 to 13, and 17 to 18, it was punishing Mr. Ntaganda for the underlying criminal conduct plus the discriminatory element found to be present in it.

6. By imposing an individual sentence for the umbrella crime of persecution, *i.e.* 30 years, the Trial Chamber punished Mr. Ntaganda for the same conduct in respect of which he had already been punished *via* the imposition of the individual sentences for each underlying

<sup>10</sup> [Prosecution-Response-2509](#), para.82.

<sup>11</sup> Triffterer, p.1895.

<sup>12</sup> Book, J.P., p.100.

<sup>13</sup> [Prosecution-Response-2509](#), para.82.

<sup>14</sup> [Prosecution-Response-2509](#), para.83.

<sup>15</sup> [SJ](#), para.176.

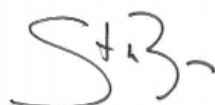
<sup>16</sup> [SJ](#), para.176.

crime. Nowhere, either in the Sentencing Judgment or the Prosecution's Response, is it explained what additional criminality is being addressed by the sentence imposed for Count 10 which has not already been addressed elsewhere. The only logical conclusion is that Mr. Ntaganda is being unfairly and improperly punished for the same conduct twice.

7. In this particular instance, the Trial Chamber's error concerning Count 10 is compounded by the single sentence entered by the Trial Chamber for Count 1 (murder as a crime against humanity) and Count 2 (murder as a war crime) – two different crimes as acknowledged the Trial Chamber<sup>17</sup> – contrary to article 78(3) of the Statute, which requires ICC Trial Chambers to assess the sentence for each particular crime separately from the others for which convictions have been entered.<sup>18</sup>

8. Mr. Ntaganda received an individual sentence of 30 years for murder which fully encompassed the discriminatory element of those murders; then also received an individual sentence of 30 years for persecution, by way or murder. This was double counting, which constitutes an error, and warrants the intervention of the Appeals Chamber, and the granting of the remedy sought on appeal.<sup>19</sup>

**RESPECTFULLY SUBMITTED THIS 27<sup>TH</sup> DAY OF MAY 2020**



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

The Hague, The Netherlands

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<sup>17</sup> [TJ](#), para.1203.

<sup>18</sup> [Prosecution-Response-2509](#), paras.76-83.

<sup>19</sup> [Sentencing Appeal Brief](#), para.74: "The appropriate remedy is to reverse the error committed by the Chamber; reduce the individual sentence for Count 6 to zero; and reduce Mr. Ntaganda's joint sentence substantially."