

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 31 January 2014

THE APPEALS CHAMBER

Before: Judge Erkki Kourula, Presiding Judge
Judge Sang-Hyun Song
Judge Sanji Mmasenono Monageng
Judge Anita Ušacka
Judge Ekaterina Trendafilova

SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO

**IN THE CASE OF
THE PROSECUTOR *v.* THOMAS LUBANGA DYILO**

Public

With Public Redacted Annexes A to F

Public redacted version of « Prosecution's Response to the "Requête de la Défense aux fins d'admission d'éléments de preuve supplémentaires dans le cadre des appels à l'encontre du 'Jugement rendu en application de l'Article 74 du Statut' et de la 'Décision relative à la peine, rendue en application de l'article 76 du Statut' et aux fins de présentation d'un moyen nouveau au soutien de ces appels'" », 17 January 2014, ICC-01/04-01/06-3058-Conf

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

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Introduction

1. On 23 December 2013, Mr Thomas Lubanga (“the Appellant”) applied (i) to submit two documents and an incomplete e-mail exchange between the Prosecution and Counsel for both the Appellant and for Mr Bosco Ntaganda as additional evidence on appeal, (ii) to include an additional ground of appeal, and (iii) to invalidate the Trial Chamber’s findings with respect to child soldiers among the Appellant’s guard (“Request”). The Appellant’s Request should be dismissed.

2. First, the four e-mails and the two documents do not meet the requirements for admission of additional evidence on appeal pursuant to Regulation 62 of the Regulations of the Court. The Appellant selectively attached part of a larger e-mail exchange thus providing an incomplete presentation of the facts. The Prosecution did not deliberately withhold or fail to disclose the two documents. The two documents were determined to be incriminatory but, as the Prosecution did not intend to use them as evidence at trial, they did not fall within the scope of Article 67(2) and Rule 77. Further, the information encompassed in the documents, namely the composition of the Presidential Guard, is information within the personal knowledge of the Appellant which was available at trial by duly diligent Counsel. Moreover, the documents would not have been a decisive factor in the Judgment.

3. Second, the new ground of appeal related the purported violation of the Appellant’s rights resulting from the lack of disclosure of the two documents should similarly be dismissed on the same grounds as the purported new evidence should be rejected: there is no infringement of the Prosecution’s obligations that resulted in a violation of the Appellant’s rights. Nor is there prejudice resulting from the absence of disclosure: the Appellant was in possession of the information and could have conducted the desired investigative enquiries. As a result, the remedy requested by the Appellant should be rejected.

Confidential Filing

4. The Prosecution files this document confidentially because it responds to a document with the same level of confidentiality. The Prosecution will file a public redacted version without delay.

Procedural Background

5. On 14 March 2012, Trial Chamber I found Mr Thomas Lubanga guilty of the war crimes of conscripting and enlisting children under the age of 15 into the “Forces Patriotiques pour la Libération du Congo” (“FPLC”) and using them to participate actively in hostilities within the meaning of Articles 8(2)(e)(vii) and 25(3)(a) (the “Judgment”).¹
6. On 10 July 2012, Trial Chamber I rendered its “Decision on Sentence pursuant to article 76 of the Statute” in which the Majority imposed a joint sentence of 14 years’ imprisonment for Thomas Lubanga’s crimes (the “Sentencing Decision”).²
7. On 26 November 2012, the Appellant submitted a “*Requête de la Défense aux fins de présentation d’éléments de preuve supplémentaires dans le cadre des appels à l’encontre du « Jugement rendu en application de l’Article 74 du Statut » et de la « Décision relative à la peine, rendue en application de l’article 76 du Statut »*”.³
8. On 3 December 2012, the Appellant filed two appeal briefs, against the conviction⁴ and the sentence.⁵ On the same day, the Prosecution filed its appeal brief against the sentence.⁶
9. On 4 February 2013, the Prosecution responded to the Appellant’s appeal brief against the Judgment⁷ and against the sentence.⁸ On the same date, the Appellant responded to the Prosecution’s appeal brief against the sentence.⁹
10. On 28 February 2013, the Appellant replied to the Prosecution responses.¹⁰
11. On 23 December 2013, the Appellant filed his “*Requête de la Défense aux fins d’admission d’éléments de preuve supplémentaires dans le cadre des appels à l’encontre du ‘Jugement rendu en application de l’Article 74 du Statut’ et de la ‘Décision relative à la peine, rendue en application de l’article 76 du Statut’ et aux fins de présentation d’un moyen nouveau au soutien de ces appels*” (“Request”).¹¹ The Appellant seeks to introduce as additional evidence on his appeal against the Judgment and the Sentencing Decision two documents that the Prosecution disclosed in the Bosco Ntaganda case and e-mail exchanges between the Prosecution and Defence Counsel for the Appellant and Mr

¹ ICC-01/04-01/06-2842.

² ICC-01/04-01/06-2901.

³ ICC-01/04-01/06-2942-Conf.

⁴ ICC-01/04-01/06-2948-Conf.

⁵ ICC-01/04-01/06-2949.

⁶ ICC-01/04-01/06-2950 A4.

⁷ ICC-01/04-01/06-2969-Red A5.

⁸ ICC-01/04-01/06-2968-Red A6.

⁹ ICC-01/04-01/06-2967 A4.

¹⁰ ICC-01/04-01/06-2989-Red A5 A6.

¹¹ ICC-01/04-01/06-3056-Conf A5 A6. A public redacted version was filed on 7 January 2014.

Ntaganda. The Appellant argues that the additional evidence supports three of his grounds of appeal, namely, (i) failure by the Prosecution to meet its obligation to investigate, (ii) failure by the Prosecution to meet its obligation to disclose, and (iii) factual errors by the Chamber regarding the age of the soldiers belonging to the Presidential Guard during the relevant period of the charges.¹² The Appellant also seeks to add an additional ground to both appeals regarding the purported infringement of the Appellant's rights to prepare his defence.¹³ Finally, the Appellant requests as a remedy that the Appeals Chamber invalidate the Trial Chamber's findings regarding the age of the Appellant's bodyguards.¹⁴

Submissions

A. Requirements to admit evidence on appeal

12. Regulation 62 sets out the requirements governing admissibility of evidence on appeal and, in particular, in appeals against convictions or sentence. According to the regulation, the party seeking additional evidence must file an application setting out (a) the evidence to be presented, and (b) the ground of appeal to which the evidence relates and the reasons why the evidence was not adduced before the Trial Chamber.

13. As the Prosecution has already submitted,¹⁵ the admissibility of additional evidence on appeal must be governed by the corrective nature of the appellate process. The Appeals Chamber has repeatedly stated that its review of interlocutory decisions is "corrective in nature and not *de novo*".¹⁶ An appeal against an Article 74 decision is not a new evidentiary hearing or an opportunity for a party to remedy its earlier failings or oversights during the pre-trial and trial phases.¹⁷ The duty on every party is to "put forward its best case in the first instance".¹⁸ It necessarily follows that Regulation 62 is not designed or intended to authorize a re-opening of the evidentiary phase of the trial or allow for the liberal admission at the appellate level of evidence related to the merits of

¹² Request, paras.11, 13-42. The Prosecution will refer to Presidential Guard, the Appellant's bodyguards or guards or personal escort indistinctively.

¹³ Request, paras.11, 43-53. In particular, the Appellant argues that the non-timely disclosure of the two documents deprived the Defence of essential elements which would have allowed it to investigate thoroughly and specifically the age of the military component of the presidential guard of Mr Lubanga, and to prove that none of them were younger than 15 years old.

¹⁴ Request, paras.48-53.

¹⁵ ICC-01/04-01/06-2969-Red A5, para. 38 et seq.

¹⁶ See, *inter alia*, ICC-02/05-03/09-295 OA2, para.20.

¹⁷ *Nahimana*, Decision on Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence Pursuant to Rule 115, ICTR-99-52-A, 8 December 2006, para.4 (hereinafter, *Nahimana* Decision).

¹⁸ *Prosecutor v. Kupreskic et al*, Decision on the Motions of Drago Josipovic, Zoran Kupreskic and Vlatko Kupreskic to Admit Additional Evidence Pursuant to Rule 115 and for Judicial Notice to be Taken Pursuant to Rule 94 (B), IT-95-16-A, 8 May 2001, para.10 (hereinafter, Second *Kupreskic* Decision).

the case. The corrective nature of the appeal process and the requirements of finality¹⁹ mean that the admission of evidence on appeal should be exceptional and governed by strict requirements.

14. The admission of additional evidence is accordingly dependent on the *unavailability* of the evidence at trial and its particular *quality*. Under existing international practice, additional evidence will only be admitted if: (a) it was not available at trial to duly diligent Counsel; (b) it is relevant and credible; and (c) it could have been a decisive factor in the decision.²⁰

15. These factors ensure that the admission of additional evidence on appeal will preserve the corrective nature of the appellate process.²¹ The burden is on the applicant to establish that all requirements for admissibility of the newly-proffered evidence have been met.²² As the Prosecution describes below, these requirements are not met in the instant case. Further, even if the Appeals Chamber were to admit the additional evidence, the Appellant has similarly failed to establish a miscarriage of justice. The Appellant has not demonstrated that no reasonable tribunal of fact could have reached a conclusion of guilt based upon the evidence before the Trial Chamber, together with the additional evidence.²³

¹⁹ See *Prosecutor v. Tadic*, Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, IT-94-1-A, 15 October 1998, para.35, emphasizing the importance of the "principle of finality" (hereinafter, *Tadic* Decision).

²⁰ Archbold, *International Criminal Courts*, 3rd edition (2009), pp.1460-1461; see also L. Bianchi and I. Onsea, *Additional Evidence on Appeal, Review Proceedings, and the Remedy of Reconsideration* in: K. Khan, C. Buisman and C. Gosnell, *Principles of Evidence in International Criminal Justice* (2010), p.726.

²¹ The Prosecution notes that the first version of ICTY Rule 115 was framed in very general terms, not unlike the current version of Regulation 62. This, however, did not prevent the ICTY Appeals Chamber from developing in its first decision on additional evidence the corrective requirements that have governed the admissibility of such evidence in the ICTY/R appellate proceedings until now. See *Tadic* Decision. This means that any difference in language between the current version of ICTY Rule 115 and Regulation 62 is not really relevant. It also shows that it is perfectly appropriate for the Appeals Chamber to include the ICTY/R Rule 115 requirements in its interpretation of Regulation 62 (on the Appeals Chamber's authority to consider ICTY/R practice and jurisprudence, see ICC-01/09-02/11-425 OA4, para.37 and ICC-01/09-01/11-414, para.31).

²² *Tadic* Decision, para.52.

²³ *Kupreskic* Appeal Judgment, paras.75-76. The Prosecution notes that in a subsequent case, the ICTY Appeals Chamber appears to have endorsed a different standard, whereby the Appeals Chamber must determine on the basis of the evidence on the record and any additional evidence whether "it is itself convinced beyond a reasonable doubt as to the finding of guilt" (*Blaskic* Appeals Judgment, para.24 (c) (ii)); this standard, however, has been very controversial and its compatibility with the corrective nature of the appeals process and the limited function of the Appeals Chamber is doubtful (see Partial Dissenting Opinion of Judge Weinberg de Roca in the same *Blaskic* Appeals Judgment, paras. 3-9, inter alia, emphasizing that even in cases with additional evidence the question for the Appeals Chamber remains "whether a reasonable trier of fact could have reached the Trial Chamber's factual conclusion" (para.47)).

B. Chronology of facts and incriminatory nature of the two documents

(a) Chronology of facts and correspondence

16. The two documents, one purportedly containing the names and photographs of 11 soldiers in the “Union des Patriotes Congolais” (“UPC”) Presidential Guard²⁴ and the other containing a “liste nominative” of 33 soldiers to the Presidential Guard,²⁵ were obtained under conditions of confidentiality in 2004 under Article 54(3)(e). The Prosecution assessed that these documents contained information of incriminating value. The Prosecution did not consider that the documents contained exculpatory information pursuant to Article 67(2) or information relevant to the preparation of the Defence under Rule 77. The Prosecution requested lifting of the conditions of confidentiality for both documents in October 2007. Lifting of conditions was refused in January 2008. The Prosecution could not, therefore, rely on these documents for trial and did not deem it necessary since it was calling witnesses who could directly speak to the age of children within the Presidential Guard.
17. A renewed request for lifting of conditions was made on 7 June 2013 in the context of the case against *Bosco Ntaganda* and conditions were lifted on 30 August 2013. The Prosecution disclosed these documents to the Defence as they contained information of incriminating value and the Prosecution wished to rely on them at confirmation and at trial.
18. The Appellant does not submit before the Appeals Chamber the complete correspondence between the Prosecution and Counsel for the Appellant and for Mr Ntaganda. The full record of the e-mail exchange indicates that, contrary to the Appellant’s submissions, the Prosecution did not “inappropriately resist[...] the disclosure” of these two documents to the Appellant.²⁶ On 8 November 2013, Counsel for Mr Ntaganda, who had been part of the Appellant’s Defence team, informed the Prosecution that these two documents ought to be disclosed to the Appellant and that, if the Prosecution agreed, he would directly provide them to the Appellant.²⁷ On 11 November 2013, the Prosecution opposed the direct disclosure by Mr Ntaganda’s Counsel to the Appellant’s. The Prosecution considered it inappropriate for Counsel to share with persons outside his team confidential material disclosed to him in the course of the *Ntaganda* case when there was no investigative purpose. The Prosecution further indicated that it was looking into the

²⁴ DRC-OTP-0003-0032.

²⁵ DRC-OTP-0014-0280.

²⁶ Request, para.43.

²⁷ Annex A. Email from Counsel of Mr Ntaganda of 8 November 2013.

matter.²⁸ On 13 November, Counsel for Mr Ntaganda took note of the Prosecution's position and rejected any allegation of conflict of interest. He also copied Counsel for the Appellant in that e-mail exchange.²⁹ On 14 November 2013, Counsel for the Appellant requested the two documents.³⁰ On 15 November, the Prosecution indicated that it had no objection in allowing Counsel to inspect these documents.³¹ The inspection took place and, on 26 November, the Prosecution disclosed the documents following the Appellant's request for disclosure.³² Nothing in this correspondence can be in good faith presented as "inappropriate resistance of the Prosecution".³³

(b) The Prosecution considered that the two documents contained incriminating information and did not intend to use them at trial

19. The Prosecution does not have the obligation to disclose all the materials that it has in its possession. Its disclosure obligations are prescribed in the basic texts of the Court. In particular, Article 67(2) requires the Prosecution to disclose "evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which affect the credibility of prosecution evidence". Rule 77 requires disclosure of information in any form which is "material to the preparation to the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial [...] or were obtained from or belonged to the person".³⁴ The Prosecution did not consider that these two documents fell in either category because the documents, although containing information of incriminatory value, were not intended to be used at trial.

20. Document DRC-OTP-0003-0032 purportedly contains the names and photographs of 11 soldiers in the UPC Presidential Guard. The author of the document is unknown. Document DRC-OTP-0014-0280 purportedly contains a hand-written "liste nominative" of 33 soldiers to the Presidential Guard. The source appears to be the UPC/RP FPLC. Both documents are undated and do not include any additional information on the individuals named, such as their age, with the exception of the rank of one person in

²⁸ Annex B. Email from Prosecution dated 11 November 2013.

²⁹ Annex 1 to the Request.

³⁰ Annex 2 to the Request.

³¹ Annex 3 to Request. On the same date, the Prosecution responded to Counsel for Mr Ntaganda and reiterated that the Prosecution is unable to comment on the state of disclosure of evidence in a different case. See Annex C. Email from Prosecution dated 15 November 2013, 13:46.

³² Annex D. Email from Prosecution dated 26 November 2013, 14:21.

³³ Request, para.43.

³⁴ See also Article 61(3), which refers to disclosure of the document containing the charges and the evidence to be relied upon at confirmation, and Rule 76, which refers to disclosure regarding Prosecution witnesses.

document DRC-OTP-0003-0032 and two persons in DRC-OTP-0014-0280. The Prosecution classified the documents as having incriminating value and corroborating information from Prosecution witnesses on the existence of a Presidential Guard, the organized military structure of the UPC, and the overlap between the political and military wings of the UPC and FPLC because some of the persons depicted had ranks.³⁵ The Defence did not contest any of these issues at trial.

C. The four e-mails do not meet the requirements of Regulation 62

21. As described above, the Appellant has only attached four e-mails of a larger exchange. This selection does not accurately represent the facts: the Prosecution did not disclose the two documents in the *Lubanga* case because it considered that they were incriminatory and it did not intend to use them at trial; the Prosecution decided to use them in the *Ntaganda* case and the provider lifted the confidentiality agreement for those purposes; the Prosecution opposed that Counsel for Ntaganda provided the documents to the Appellant but did not oppose its disclosure to the Appellant.
22. Further, the Appellant has failed to indicate the relevance and how this correspondence impacts on the Judgment and the Sentencing Decision. This is because it has no bearing and there is no impact.³⁶ The Appellant's request for admission of the four e-mails as additional evidence should therefore be rejected.

D. The two documents do not meet the requirements of Regulation 62

(a) The composition of the Presidential Guard was available to Counsel at trial

23. Under the test for admission of new evidence on appeal uniformly accepted in international criminal practice, the applicant must show that (a) the evidence was unavailable at trial in any form³⁷ and (b) it could not have been discovered through the timely exercise of due diligence.³⁸ The test requires that the applicant explain how and when he or she became aware of the evidence and why it could not have been discovered

³⁵ Annex D. Email from the Prosecution dated 26 November 2013, 14:21, which responds to Maitre Mabilille's email dated 22 November 2013, 10:57 and attached as Annex 4 to the Request.

³⁶ See Judgment, paras.119 - 123 where the Chamber addresses the Appellant's allegations with respect to the purported Prosecution's failures. The Prosecution has responded to the Appellant's argument in this matter: ICC-01/04-01/06-2969-Red A5 paras.116-130.

³⁷ *Krstic*, Decision on Applications for Admission of Additional Evidence on Appeal, IT-98-33-A, 5 August 2003, p.3.

³⁸ *Tadic* Decision, paras. 36-45. This aspect of the test has been consistently followed in subsequent ICTY/R case-law. See Archbold at pp. 1461-1462.

previously.³⁹ The application must detail the steps taken at trial to discharge the duty of due diligence.⁴⁰ In the *Krstic* case, the ICTY Appeals Chamber held that :

“[i]n order to have those statements admitted into evidence on appeal in any such case, the defence is required primarily to establish that, although the statement itself clearly ‘was not available at trial’, the evidence which it reveals was also not available at trial *in any form*. The defence often seeks to satisfy this requirement by asserting that an attempt had been made before or during the trial to ascertain from such prospective witnesses what evidence they could give, but that the prospective witnesses had either failed or declined to cooperate.”⁴¹

24. A limited exception to this rule has been accepted in extraordinary instances where, even though it would have been available to Counsel acting with due diligence, the evidence is of such substantial importance that its exclusion “would lead to a miscarriage of justice, in that if it had been available at trial it *would* have affected the verdict”.⁴² In such an exceptional case, the interests of justice “require that an appellant not be held responsible for the failures of counsel”.⁴³

25. The Appellant does not demonstrate that the information contained in the documents (the composition of the Presidential Guard) could not be obtained at trial, or that it is of such importance that its exclusion would lead to a miscarriage of justice. In fact, such information could have been available to the Defence by simply asking the Appellant who, as Commander in Chief of the FPLC, a status never disputed by him,⁴⁴ was best-placed to access information related to his *own* personal guard including the names of its members. During the Appellant’s cross-examination of Prosecution witness P-0299, the Presiding Judge noted that the Appellant ought to indicate – and put to the witness – whether he challenged the fact that P-0299 was a member of the Appellant’s guard as he claimed, given that this information was, on its face, within the Appellant’s personal knowledge.⁴⁵ In response, the Appellant did not challenge the fact that P-0299 was his bodyguard when he was Minister of Defence, but he did challenge that P-0299 was his

³⁹ Bianchi and Onsea at p. 729, with additional authorities.

⁴⁰ *Ibid.*

⁴¹ *Prosecutor v Krstic*, IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003, para.4. Emphasis added.

⁴² *Milosevic, Decision on Dragomir Milosevic’s Third Motion to Present Additional Evidence*, IT-98-29/1-A, 8 September 2009, para.10 (emphasis in the original).

⁴³ *Nahimana* Decision, para.31.

⁴⁴ Judgment, para.1142.

⁴⁵ ICC-01/04-01/06-T-122-CONF-ENG CT, page 42, line 16 to page 43 line 3; page 44, lines 2 to 20.

bodyguard when the Appellant was president of the UPC.⁴⁶ Therefore, the Appellant purported to be aware at trial of the composition of his guard at the relevant time.

26. Further, the same reasoning applies to Defence witnesses who, given their position and relationship with the Appellant, could have provided the Defence with documents and information regarding the composition of the Presidential Guard. Witnesses D-0011 and D-0019, for example, were called by the Defence to rebut the Prosecution's allegation that children under the age of 15 were part of the Presidential Guard. They testified that they did not see any children under the age of 15 in the Presidential Guard when they were at the Appellant's side or during regular visits to the Appellant's office, respectively, during most of the relevant period.⁴⁷ The Defence could have elicited the information contained in these documents from those witnesses. Similarly, there is no explanation as to why the Appellant did not ask his investigator at the time of trial, Mr Deudone Mbuna, himself a high-ranking member of the UPC, to provide the relevant information. These are only some examples of actions that diligent Counsel could have taken at trial to obtain the information that, according to the Appellant,⁴⁸ the two documents would have led to.

(b) The Appellant has not demonstrated that the evidence is relevant to material findings to, and could have been a decisive factor in, the Judgment and the Sentencing Decision

27. The Appellant argues that these documents corroborate his submissions regarding the Prosecution's purported failures to disclose and to investigate and the Chamber's alleged error regarding the age of the soldiers in the Presidential Guard.⁴⁹ This is not correct. As it is developed below, the premise of the Appellant's submissions is wrong: there is no violation of the Prosecution's obligations. Moreover, the Appellant does not demonstrate how the evidence is relevant to a material finding "in the sense that those findings were crucial or instrumental to the decision",⁵⁰ and it could have an impact on the judgment and show that a conviction was unsafe.⁵¹

⁴⁶ ICC-01/04-01/06-T-122-CONF-ENG CT, page 45, lines 7-20. See page 49, line 5 to page 50, line 15.

⁴⁷ ICC-01/04-01/06-T-347-ENG, page 29, line 19 to page 30, line 11; page 69, lines 15-19 (D-0011) ; T-341-ENG, page 12, lines 2-18 (D-0019).

⁴⁸ Request, paras.24, 49.

⁴⁹ Request, paras.11,19,34,40.

⁵⁰ *Haradinaj et al*, Decision on LahiBrahimaj's request to Present Additional Evidence under Rule 115, IT-04-84-AR65.2, 3 March 2006, para.26. "Relevance" means in this context that the evidence must relate to material findings The evidence cannot relate to a general issue but must relate directly to a specific finding of fact made by a Trial Chamber. Bianchi and Onsea, p.731.

⁵¹ *Nahimana* Decision, para.6; see also *Kristic*, Decision on Applications for Admission of Additional Evidence on Appeal, IT-98-33-A, 5 August 2003, p.3. This has been interpreted to mean that had the Trial Chamber had the evidence before it, "*it probably would have come to a different result*". The burden is on the applicant to demonstrate this potential impact on the decision. Bianchi and Onsea, pp.732-3.

(i) *The Prosecution did not fail to discharge its disclosure and investigation obligations*

28. First, and as noted above, the Prosecution did not infringe its disclosure obligations pursuant to Article 67(2) and Rule 77.⁵² Document DRC-OTP-0003-0032 contains the photographs and names of 11 purported soldiers of the Presidential Guard, but there is no reference to their age and the authorship of the document is unknown. Document DRC-OTP-0014-0280 contains a list of 33 names with no additional information except the ranks of two persons, and appears to be an UPC/RP FPLC document. Both documents are undated. The Appeals Chamber has indicated that “the Prosecutor’s ordinarily unfettered duty to disclose must necessarily be based, *inter alia*, on the Prosecutor’s understanding of the case as a whole, including what is known or anticipated about possible defence(s).”⁵³ The Prosecution considered the materials relevant to support the Prosecution’s allegation regarding the existence of a Presidential Guard, the organized military structure of the UPC, and the overlap between the political and military wings of the UPC/ FPLC. The Prosecution did not consider that this material was exculpatory or relevant to the preparation of the Appellant’s case, in particular, given that the Appellant did not contest these matters at trial.⁵⁴ On the contrary, the Prosecution considered that the documents contained incriminating information. However, as the Prosecution did not intend to use the documents at trial, it was not compelled to disclose them pursuant to Rule 77.

29. The Appellant further argues that the Prosecution should have disclosed these documents in response to several of his requests for disclosure. On 8 September 2009, the Appellant requested the disclosure of documents from the UPC or from himself and, on 26 April 2010, he requested disclosure of all the statements or documents relating to witnesses who appeared, or who would later appear, as Defence witnesses.⁵⁵ As noted above, although document DRC-OTP-0014-0280 appears to be an UPC document, the Prosecution did not provide it to the Defence because it determined that it did not fall within the scope of Article 67(2) and Rule 77. Although it was incriminating, the Prosecution did not intend to use it at trial. Further, neither of the two documents refer to witnesses relied upon by

⁵² A contrario, Request, paras.23-24.

⁵³ ICC-01/04-01/06-1433 OA11, para. 36.

⁵⁴ D-0011 and D-0019 were called by the Defence to challenge the Prosecution’s allegation that children under the age of 15 were members of the Presidential Guard but not to rebut the Prosecution’s allegation that the Appellant had a Presidential Guard. This is why the Prosecution did not seize the Trial Chamber with respect to these documents nor did it apply for alternative measures to resolve the tension that disclosure, had it been required under the statutory texts, would create. See ICC-01/04-01/06-1486OA13, para.44.

⁵⁵ Request, paras.26-27.

the Defence at trial: D-0040 (Agustin Mbogo) was called by the Defence to give evidence in the Sentencing hearing in June 2012. The Trial Chamber refused to permit his evidence at the sentencing stage since it went directly to the merits of the Judgment and should have been brought during the trial.⁵⁶ The Appellant has sought to admit his statement as evidence on appeal.⁵⁷ The Prosecution has opposed this request.⁵⁸ D-0030 [REDACTED] was originally listed by the Appellant as a witness, but he was subsequently dropped.⁵⁹ In any event, D-0030's name does not appear in document DRC-OTP-0014-0280, as the Appellant suggests;⁶⁰ the name listed as number 30 is that of [REDACTED]. Moreover, the Appellant did not request disclosure of information relating a person named only [REDACTED] or [REDACTED], as the Appellant similarly suggests.⁶¹ At trial, the Appellant requested disclosure of material regarding [REDACTED] (e-mail 8 October 2010) and subsequently "la photographie de l'individu nommé [REDACTED], ou [REDACTED] ou [REDACTED], en possession du Bureau du Procureur, qui aurait été montrée au témoin W-0015" (e-mail 15 November 2010).⁶² The name depicted in documents DRC-OTP-0003-0032 and DRC-OTP-0014-0280 is that of [REDACTED] and not [REDACTED] or [REDACTED].

30. Second, the documents do not show that the Prosecution failed in its obligation to investigate incriminating and exonerating evidence pursuant to Article 54(1)(a).⁶³ The fact that the Prosecution did not obtain information regarding the age of the persons listed in the documents from the Congolese authorities does not mean that the Prosecution did not investigate whether members of the Presidential Guard, at the time of the charges, were under 15 years old. And the fact that the Prosecution did not conduct its enquiries in the manner desired by the Appellant does not mean that the Prosecution infringed its statutory obligations of investigation. The Prosecution vigorously pursued investigative steps in relation to exculpatory evidence. P-0582, a former investigating magistrate⁶⁴ and the investigation team leader at the time,⁶⁵ stated that the Office at times focused more resources on investigating exculpatory evidence to ensure that the Defence would be able

⁵⁶ T-360, p.24, lines 21-23, p.27, lines 12-20 and p.28, lines 17-20.

⁵⁷ Request, para.30.

⁵⁸ ICC-01/04-01/06-2969-Red A5, paras.48-71.

⁵⁹ Request, para.31. See footnote 18.

⁶⁰ Request, para.31.

⁶¹ Request, para.32.

⁶² See footnote 19. The Prosecution attaches as Annexes E and F the Appellant's e-mails dated 8 October and 15 November 2010, respectively, as well as the Prosecution's disclosure in response.

⁶³ Request, paras.34-38.

⁶⁴ Rule 68 Deposition, 16/11/2010, page 4 line 21 to page 5, line 3.

⁶⁵ Rule 68 Deposition, 16/11/2010, page 13 line 7.

to fulfil its role at trial.⁶⁶ While Article 54(1)(a) imposes an obligation on the Prosecution to investigate exonerating circumstances, this provision should not, and cannot, be understood as requiring the Prosecution to replace and assume in full the functions of Defence Counsel. The Prosecution's obligations are guided by its duty to establish the truth.⁶⁷ Defence Counsel still needs to take all the measures, and carry out the necessary investigative steps, to adequately represent the interests of his or her client. In this case, the Prosecution, after assessing the totality of its evidence, concluded that children under the age of 15 were part of the Appellant's guard.

31. The Prosecution further notes that the Appellant adduces new facts (namely, that documents were not disclosed at trial and that the Prosecution did not pursue certain lines of enquiries) and not new evidence pertaining to a finding made by the Trial Chamber. The use of additional evidence on appeal should primarily be confined to material relevant to the guilt or innocence of an accused.⁶⁸ This is not the case. In any event, these new facts constitute post-Judgment developments, which do not appear capable of demonstrating an error in the Chamber's finding regarding the Prosecution's obligations of disclosure and investigation.⁶⁹ The lack of relevance and impact of the documents *vis-à-vis* the Judgment and the Sentencing Decision (and the findings enclosed therein regarding the Prosecution's statutory obligations) is evidenced by the fact that the Appellant does not identify a single material finding in the Judgment and in the Sentencing Decision that could be affected by the two documents.⁷⁰

32. Even if the Appeals Chamber considers that the Prosecution failed in its obligations of disclosure and investigation with respect to these particular documents at trial (a conclusion that the Prosecution contests), there is no prejudice for the Appellant, or if there was, it is minimal.⁷¹ As reiterated above, the Appellant disposed of the information

⁶⁶ Rule 68 Deposition, 18/11/2010, pages 24-26. P-0582 provided an example of "the very principle of investigating incriminating and exculpatory evidence. See Rule 68 Deposition, 18/11/2010, page 22, lines 17-25.

⁶⁷ Article 54(1)(a) reads "The Prosecutor shall in order to establish truth [...]".

⁶⁸ Archbold, p.1460.

⁶⁹ See Judgment, paras.119 - 123 where the Chamber addresses the Appellant's allegations with respect to the purported Prosecution's failures. The Prosecution has responded to the Appellant's argument in this matter in its Response, paras.116-130.

⁷⁰ The Appellant only refers to four footnotes where the Trial Chamber referred to video EVD-OTP-00574. See Request, fn. 16. The Appellant argues that one of the persons appearing in that video is D-0040, whose statement the Appellant is seeking to admit in appeal.

⁷¹ For example, the Appeals Chamber of the ICTR considered in one case where the Prosecution had failed to disclose one potentially exculpatory document at trial that "this prejudice [was] minimal [because] the information contained in the UNAMIR Situation Report was available at trial and therefore that there were other means open to Setako to impugn the credibility of Witnesses SLA and SAT on this particular issue". *Ephrem Setako v. The Prosecutor*, ICTR-04-81-A, Decision on Ephrem Setako's motion to amend his notice of appeal and motion to admit evidence, 23 March 2011, para.42. In that case Setako sought leave to admit additional evidence on appeal and to amend his notice of appeal. The Appeals Chamber found that the issues raised in the

contained in the documents⁷² and could have carried out the same investigative steps that now he claims are essential.⁷³

(ii) The two documents do not affect the Chamber's findings regarding the presence of children under 15 in the Presidential Guard

33. Contrary to the Appellant's submissions,⁷⁴ the documents do not show that the Chamber erred in determining that soldiers in the Presidential Guard were under the age of 15. Although the Appellant refers to certain paragraphs of the Judgment,⁷⁵ he fails to demonstrate, once more, the relevance of the two documents with respect to the Chamber's assessment of the evidence and ensuing finding regarding the age of the members of the Presidential Guard.⁷⁶ Further, he makes no reference to the Sentencing Decision. As noted above, the documents are undated and do not provide information on the age of the persons named. Assuming *arguendo* that the documents were credible, they would only indicate that those persons were part of the Presidential Guard at some point in time. Thus, even if the Trial Chamber had addressed these documents at trial, the Judgment would have remained unaltered and the Chamber would have still concluded that the Appellant used children under the age of 15 within his personal escort and as his bodyguards between September 2002 and 13 August 2003.⁷⁷ Moreover, the documents do not corroborate the Appellant's submission that D-0040 was 18 years old at the time of the charges.⁷⁸ As repeatedly stated, none of the documents provide information related to the age the persons listed.

two motions were intertwined and ruled on the two requests simultaneously thus rejecting the amendment of the notice of appeal because the request to admit additional evidence was rejected. Similarly, in the ICTR Appeals Judgment of *Justin Mugenzi and Prosper Mugiraneza v. The Prosecutor*, ICTR-99-50-A, para.62, the Appeals Chamber found that the Prosecution had breached its disclosure obligations by not disclosing at trial the testimony of another witness in another proceeding. The Appeals Chamber however found that the prejudice to the accused was minimal because the Trial Chamber had already considered evidence of cumulative nature which was on the record.

⁷² See above, para. 25.

⁷³ Request, paras.45-46.

⁷⁴ Request, paras.39-40.

⁷⁵ See Request, fn. 25 referring to Judgment, paras.712-718, 858-869, 915, 1247-1262, 1277.

⁷⁶ As the Prosecution submitted in its Response in paragraph 44, the applicant must establish that the evidence offered for the first time on appeal is both highly relevant and credible. "Relevance" means in this context that the evidence must relate to material findings "in the sense that those findings were crucial or instrumental to the decision". (*Haradinaj et al*, Decision on LahiBrahimaj's request to Present Additional Evidence under Rule 115, IT-04-84-AR65.2, 3 March 2006, para.26). The evidence cannot relate to a general issue but must relate directly to a specific finding of fact made by a Trial Chamber. (Bianchi and Onsea, p.731).

⁷⁷ Judgment, paras.858-869; 1247-1262.

⁷⁸ Request, paras.41-42.

(iii) The additional evidence does not establish a miscarriage of justice

34. Finally, even if the Appeals Chamber decides to admit into evidence the two documents, together with the statement of D-0040 and rely on D-0040's submission that he was bodyguard to the Appellant and was 18 years old at the time of the charges, the Chamber's findings as to the age of the Appellant's bodyguards would similarly remain unmodified. The Trial Chamber relied on the evidence proffered by four witnesses who were considered "consistent, credible and reliable witnesses", and the video footage was only considered alongside and as corroborating evidence.⁷⁹
35. Further, the Chamber's findings as regards the presence of children below the age of 15 within the ranks of the UPC/FPLC refer to, but go beyond, the Appellant's guard;⁸⁰ the Chamber also concluded that children under the age of 15 years old were used in other roles such as, the participation in battles and presence on the battlefield,⁸¹ as military guards,⁸² bodyguards and escorts of commanders and other high-ranking UPC/FPLC officials,⁸³ in the Kadogo unit⁸⁴ and in domestic work.⁸⁵ The Trial Chamber's findings were based on the "sheer volume" of credible evidence presented and discussed at trial.⁸⁶ The Trial Chamber relied on the testimonies of both Prosecution and Defence witnesses,⁸⁷ including insider witnesses, witnesses who were in Bunia during relevant periods and who worked closely with the UPC/FPLC, and witnesses who worked with demobilized child soldiers in and around Bunia, as well as UPC documents.⁸⁸ Thus, the fact that one person purportedly appearing at a concrete time stamp in one video might not be under 15 years old does not disrupt the Chamber's overall finding on this matter. In sum, the Appellant has failed to establish that no reasonable trier of fact could have reached a conclusion of

⁷⁹ Judgment, paras.858-869, 1247-1262.

⁸⁰ Judgment, paras.858-869, 1247-1262.

⁸¹ Judgment, paras.821-834.

⁸² Judgment, paras.835-838.

⁸³ Judgment, paras.839-857.

⁸⁴ Judgment, paras.870-877.

⁸⁵ Judgment, paras.878-882.

⁸⁶ Judgment, para.643.

⁸⁷ Prosecution witnesses: e.g. P-0038 (Judgment, paras.688-691, 801, 814, 821-824), P-0016 (Judgment, paras.687, 807-808, 864), P-0017 (Judgment, paras.668, 680-682, 809, 813, 845, 872), P-0046 (Judgment, paras.831), P-0012 (Judgment, paras.826-830), P-0014 (Judgment, paras.707-709, 789, 832), P-0024 (Judgment, paras.663, 836-838), P-0041 (Judgment, paras.695-698). Defence witnesses: e.g. D-0004 (Judgment, paras.767), P-0030 (Judgment, paras.713, 717-718).

⁸⁸ See other corroborating evidence of the presence of children under the age of 15 in the UPC/FPLC (Judgment, paras.741-748), including one document emanating from the UPC/FPLC in February 2003 noting the presence of child soldiers under the age of 15: EVD-OTP-00518.

guilt based upon the evidence before the Trial Chamber, together with the additional evidence.⁸⁹

E. The additional ground of appeal should be rejected

36. The Appellant further requests the addition of a new ground of appeal regarding the violation of the Defence rights and the invalidation of certain conclusions of the Trial Chamber.⁹⁰ The Appellant argues that the Prosecution has deliberately obstructed Defence investigations which were necessary to prove that there were no soldiers under 15 years old in the Presidential Guard during the relevant period of the charges,⁹¹ and that, had the Appellant learnt about the documents in question, he would have been able to identify, locate, and call as witnesses more guards and proceed to verify their age with the Congolese authorities.⁹² The Appellant reiterates that the Prosecution had deliberately omitted to disclose the two documents.⁹³

37. At the outset, the Prosecution notes that the Appellant does not refer to Regulation 61 in his Request,⁹⁴ nor does he refer to the addition of a new ground of appeal in the title of the filing and in the Relief Sought. The Prosecution understood the Request as an application to admit new evidence on appeal, which logically entailed the addition of submissions related to this evidence, in support of three pre-existing grounds of appeal. The Appellant himself argues that the evidence relates to three pre-existing grounds of appeal and refers to his appeal briefs against the Judgment and the Sentencing Decision.⁹⁵ Moreover, as the addition of the new ground of appeal is premised on the prior admission of the evidence and the arguments underlying that request,⁹⁶ it is difficult to respond to the “reasons in support” of the variation of the ground of appeal,⁹⁷ and to determine whether there is “good cause”,⁹⁸ without responding to the application for admission of new evidence.

⁸⁹ See above fn. 23.

⁹⁰ Request, para.43.

⁹¹ Request, paras.44, 47.

⁹² Request, paras.45-46.

⁹³ Request, paras.43,44,47.

⁹⁴ Request, para.12: “The present application is based on the provisions of Article 54-1, indicating the extent of the duties of the Prosecutor's Office investigation, the provisions Rule 67(2) and Rule 77 governing the disclosure requirements of Prosecution in respect of Defence as well as those of the Standard 62 of the Rules of Court governing additional evidence presented before the Appeals Chamber.”

⁹⁵ Request, paras.19,34,40-41.

⁹⁶ Request, para.43.

⁹⁷ Regulation 61.

⁹⁸ ICC-01/04-01/06-3057 A5A6, para.7.

Further, the Appellant has also argued in his appeal briefs that his right to prepare the defence had been violated as a result of the Prosecution's violations.⁹⁹

38. In any event, the Prosecution will respond now to the Appellant's request for the addition of a new ground of appeal as instructed.¹⁰⁰ The Appellant's submissions related to the purported violation of his rights should be dismissed for the same reasons as those set out above in opposing the admission of evidence. There is no Prosecution's violation or infringement of the Appellant's rights. The Prosecution's disclosure obligations are regulated in the statutory texts of the Court and the Prosecution has no duty to disclose incriminating material that it does not intend to use at trial.¹⁰¹ Further, the information encompassed in the two documents was available to the Appellant because it was within his personal knowledge. At trial, the Appellant purported to know the composition of his guard and, as commander in chief of the UPC/FPLC, he would have known how to obtain internal documents of his own group listing its members.¹⁰² Further, the Appellant's investigator, with a higher position within the UPC, and Defence witnesses D-0011 and D-0019, who claimed to be aware of the age of the Appellant's guards at the time of the charges, could have also provided the same information.¹⁰³ In fact, the Defence exhibited at trial UPC and FPLC internal documents which had not been obtained by the Prosecution during the course of its investigations.¹⁰⁴

39. Further, the Appellant's submission that, had he been provided with the documents, he would have conducted certain investigations and obtained exculpatory evidence as a result are speculative and unfounded.¹⁰⁵ The Appellant could have taken exactly the same investigative steps despite not being in physical possession of the two documents: as already said, he knew the composition of his guard at the time of the charges and he could have enquired with the Congolese authorities their age. Hence, there is no prejudice resulting from the lack of disclosure of the two documents.¹⁰⁶

40. The Appellant further requests as a remedy that the Appeals Chamber not accept "the evidence particularly uncertain (videos and testimonies)" relating to the presence of

⁹⁹ ICC-01/04-01/06-2948, paras.14-20 (in the context of the Appellant's claim that he was not properly informed of the charges), paras.67,71 (in the context of late disclosure). ICC-01/04-01/06-2949, paras.41-48 (as a result of the purported Prosecution's violations of investigation and disclosure).

¹⁰⁰ ICC-01/04-01/06-3057 A5A6, para.13.

¹⁰¹ See above, paras. 19-20.

¹⁰² See above, para. 25.

¹⁰³ See above, para. 26.

¹⁰⁴ See DRC-D01-0003-2176 (EVD-D01-0109), DRC-D01-0003-5894 (EVD-D01-01096), DRC-D01-0003-5896 (EVD-D01-01097), DRC-D01-0003-5900 (EVD-D01-01098).

¹⁰⁵ Request, paras.45-46.

¹⁰⁶ See above, para.32.

children under 15 among the guards of the Appellant.¹⁰⁷ This request should also be rejected for the reasons noted above: the Appellant's right to prepare his defence has not been violated because he disposed of the necessary information to conduct his investigation¹⁰⁸ and, most notably, the two documents do not relate nor do they put into question the Chamber's finding that "between September 2002 and 13 August 2003, Thomas Lubanga, as President and Commander-in-Chief of the UPC/FPLC, used a significant number of children under the age of 15 within his personal escort and as his bodyguards".¹⁰⁹ To reach that finding, the Chamber relied on the testimony of P-0016, P-0030, P-0041 and P-0055, which was considered alongside videos submitted by the Prosecution.¹¹⁰ As noted above,¹¹¹ the two documents, even if admitted, have no impact on the overall assessment of that evidence and, therefore, in the Judgment and the Sentencing Decision. The requested remedy is thus inadequate and disproportionate and should be rejected.

Relief Sought

41. For all the above-stated reasons, the Prosecution asks that the Appellant's Request be dismissed in its entirety.



Fatou Bensouda, Prosecutor

Dated this 31st January 2014

At The Hague, The Netherlands

¹⁰⁷ Request, para.51. Considering the corrective nature of the Appeals Chamber's jurisdiction (ICC-02/05-03/09-295 OA2, para.20), the Prosecution understands that the Appellant requests the Appeals Chamber to dismiss the Trial Chamber's findings related to the existence of children under 15 years old in the Appellant's guard.

¹⁰⁸ See above, paras. 25-26.

¹⁰⁹ Judgment, para.869.

¹¹⁰ Judgment, paras.858-869.

¹¹¹ See above, paras.33-35.