

**Cour  
Pénale  
Internationale**

**International  
Criminal  
Court**



Original: **English**

No.: **ICC-01/04-02/06**  
Date: **11 September 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 Confidential Annexes A, B and C**

**Public redacted version of “Defence request for admission of additional evidence on appeal”, 27 August 2020, ICC-01/04-02/06-2570-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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## INTRODUCTION AND OVERVIEW<sup>1</sup>

1. Counsel for Mr Ntaganda (“Defence”) hereby seeks the admission of additional evidence on appeal. The evidence for which admission is sought was recently obtained from [REDACTED], referred to in the record of this case as [REDACTED].<sup>2</sup>

2. [REDACTED] evidence meets the standard for admission on appeal. It was not available at trial despite the exercise of due diligence; is *prima facie* credible; is relevant and undermines findings material to the conviction or sentence; and could have had an impact on the verdict, in the sense that, if considered in the context of the evidence presented at trial, it could show that the verdict was unsafe.

3. The Defence requests that [REDACTED] be called to testify before the Appeals Chamber. Hearing the testimony of [REDACTED] is in the interest of justice and will not unduly delay the proceedings or the appeals oral hearing now scheduled for 12-14 October 2020.<sup>3</sup>

4. The additional evidence sought to be admitted reveals, *inter alia*, that:

- [REDACTED] joined the *Union des Patriotes Congolais* (“UPC”) in [REDACTED] 2002 when [REDACTED] was already 15 years old. [REDACTED] remained with the UPC until they were chased from Bunia in March 2003;
- [REDACTED];
- [REDACTED] participated in the First Operation [REDACTED]. They reached Mongbwalu by vehicle and by foot, after passing through Mabanga. The UPC had [REDACTED] when they arrived;
- [REDACTED] remained in Mongbwalu for one week and returned to Bunia [REDACTED]. In Mongbwalu, [REDACTED] close to [REDACTED]. [REDACTED] did not see any prisoners, nor any civilian women being taken there by UPC commanders, including Bosco Ntaganda. [REDACTED] has no knowledge of

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<sup>1</sup> The Request as well as Annexes A, B and C are filed confidentially pursuant to regulation 23bis (1) of the Regulations of the Court (“RoC”), as they refer to confidential material and evidence on the record. The Defence undertakes to submit a public redacted version in due course.

<sup>2</sup> Confidential witness statement, [REDACTED], Annex A, enclosed.

<sup>3</sup> Second order scheduling a hearing, 20 August 2020, [ICC-01/04-02/06-2568](#).

any mines having been used by the UPC or of any civilians having been injured by mines;

- [REDACTED]. [REDACTED];
- [REDACTED], there was no female [REDACTED] and [REDACTED] knows of no UPC member called [REDACTED]. [REDACTED] also confirms that no female member of the UPC named [REDACTED] travelled to Mongbwalu [REDACTED];
- [REDACTED] affirms that Bosco Ntaganda never [REDACTED]. [REDACTED] also states categorically that Mr Ntaganda did not [REDACTED]; and
- Following the events of March 2003, [REDACTED] left the UPC and never had any contact with the UPC thereafter.

5. The evidence provided by [REDACTED], in and of itself, renders many findings reached by the Trial Chamber unsafe.

6. [REDACTED] the Trial Chamber erred in finding that the evidence provided by Prosecution witness P-0010 was credible in respect of (i) her experience as one of Bosco Ntaganda's escorts during the First Operation in Mongbwalu;<sup>4</sup> and (ii) the sexual violence she witnessed and personally experienced during the time she was part of Mr Ntaganda's escort during the First Operation.<sup>5</sup> Indeed, [REDACTED] P-0010 was not a member of Mr Ntaganda's escort during the First Operation or at any other time before March 2003. Consequently, numerous findings reached by the Trial Chamber on the basis of P-0010's testimony are also undermined.

7. Furthermore, considered together with P-0010's lack of credibility, the evidence provided by [REDACTED] undermines the Trial Chamber's decision to consistently disregard Mr Ntaganda's testimony and rely instead on the uncorroborated testimony of a single Prosecution witness.<sup>6</sup>

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<sup>4</sup> Judgment, 8 July 2019, [ICC-01/04-02/06-2359](#) ("TJ"), paras.91,99-101.

<sup>5</sup> [TJ](#), para.102.

<sup>6</sup> Defence Appeal Brief – Part II, 31 January 2020, [ICC-01/04-02/06-2465-Conf-Corr](#) ("Defence Appeal Brief – Part II"), paras.136-141.

8. The findings impacted by [REDACTED] evidence are directly related to Mr Ntaganda's Grounds of Appeal 4, 5, 7, 8, 9, 11, 14 and 15.<sup>7</sup>

9. More importantly, the findings impacted by the additional evidence were instrumental to the verdicts entered by the Trial Chamber and the sentence imposed on Mr Ntaganda. Indeed, [REDACTED] evidence is such that, if considered in the context of the evidence presented at trial, the Trial Chamber's verdicts could have been different had [REDACTED] evidence been heard.

## APPLICABLE LAW

10. Regulation 62 of the RoC provides, in relevant part:

1. A participant seeking to present additional evidence shall file an application setting out:

(a) The evidence to be presented;

(b) The ground of appeal to which the evidence relates and the reasons, if relevant, why the evidence was not adduced before the Trial Chamber.

11. In *Lubanga*, the Appeals Chamber set out the standard to be applied to the admission of additional evidence in the context of final appeal proceedings.<sup>8</sup> Taking into consideration the established jurisprudence of *ad hoc* tribunals,<sup>9</sup> the Appeals Chamber summarised the applicable standard to admit additional evidence on appeal comprising three criteria:<sup>10</sup>

(i) the party proposing the evidence must substantiate that the evidence was not available at trial despite the exercise of due diligence; (ii) the evidence must be *prima facie* credible and relevant to findings material to the conviction or sentence, in the sense that those findings were crucial or instrumental to the conviction or sentence; and (iii) the evidence could have had an impact on the verdict, in the sense that, if considered in the context of the evidence presented at trial, it could show that the verdict was unsafe.

12. The Appeals Chamber further held that "the criteria of relevance, probative value and potential prejudicial effect also apply to the admission of evidence at the appellate stage of proceedings"<sup>11</sup> adding that "[a]s to relevance, the Appeals Chamber, noting regulation

<sup>7</sup> [Defence Appeal Brief – Part II](#), paras.58-102,104-128,137-150,151-225,231-248,258-270,317-358,360-410.

<sup>8</sup> *Lubanga*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, 1 December 2014, [ICC-01/04-01/06-3121-Red](#) ("*Lubanga-AJ-3121*"), para.42.

<sup>9</sup> [Lubanga-AJ-3121](#), para.49.

<sup>10</sup> [Lubanga-AJ-3121](#), para.50 (emphasis in original, footnotes omitted).

<sup>11</sup> [Lubanga-AJ-3121](#), para.54.

62 (1) (a) of the Regulations of the Court, considers that the proposed additional evidence must be shown to be relevant to a ground of appeal raised pursuant to article 81 (1) and (2) of the Statute.”<sup>12</sup>

13. Lastly, the Appeals Chamber held that “it is necessary to introduce the criterion that it must be demonstrated that the additional evidence could have led the Trial Chamber to enter a different verdict, in whole or in part.”<sup>13</sup>

## ARGUMENT

14. [REDACTED] evidence, in the form of a written statement [REDACTED] provided on [REDACTED], meets the standard for admission as additional evidence on appeal.

### I. The evidence was not available at trial

15. [REDACTED] was identified as a potential Defence witness early in the proceedings. Instructions were given to the Defence team member responsible for field investigations to locate [REDACTED] and conduct a screening interview.<sup>14</sup> Due to the fact that [REDACTED] could not be found or contacted, [REDACTED] was not included on the Defence List of Witnesses communicated to the Prosecution and the participants.<sup>15</sup>

16. [REDACTED], the Defence nonetheless informed the Trial Chamber, before the beginning of the presentation of the case for the Defence, that it may [REDACTED] at a later time.<sup>16</sup>

17. On 15 August 2017, pursuant to the Trial Chamber’s request,<sup>17</sup> the Defence filed its [REDACTED].<sup>18</sup> The aim of this filing was [REDACTED]. [REDACTED].<sup>19</sup>

<sup>12</sup> [Lubanga-AJ-3121](#), para.54.

<sup>13</sup> [Lubanga-AJ-3121](#), para.59. *Bemba et al.*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”, 8 March 2018, [ICC-01/05-01/13-2275-Red](#), para.509.

<sup>14</sup> Confidential affidavit, [REDACTED], paras.4-5, Annex B, enclosed.

<sup>15</sup> [REDACTED], [ICC-01/04-02/06-1881-Conf-Corr](#); [REDACTED], [ICC-01/04-02/06-2045-Conf](#); Updated Defence List of Witnesses, 12 October 2017, [ICC-01/04-02/06-2060](#).

<sup>16</sup> [REDACTED], [ICC-01/04-02/06-1886-Conf-Exp](#), para.6. A confidential redacted version will be submitted as soon as practically possible.

<sup>17</sup> Decision on further matters related to the presentation of evidence by the Defence, 11 May 2017, [ICC-01/04-02/06-1900](#), para.27.

<sup>18</sup> [REDACTED], [ICC-01/04-02/06-2009-Conf-Exp](#). A confidential redacted version will be submitted as soon as practically possible.

<sup>19</sup> [REDACTED], [ICC-01/04-02/06-2009-Conf-Exp-AnxA](#).

18. During the period from November 2015 until the presentation of final oral arguments before the Trial Chamber, the Defence continued to try to find [REDACTED]. On many occasions, instructions were transmitted to the Defence team member responsible for field investigations to take measures to find [REDACTED]. Despite numerous and consistent efforts, both of the Defence local resource persons to whom these instructions were transmitted, were unable to find [REDACTED].<sup>20</sup>

19. In May 2020, one of the Defence team local resource persons obtained information, which was immediately transmitted to the Defence, that [REDACTED] was still alive and living in Ituri, Democratic Republic of Congo (“DRC”).<sup>21</sup> Steps were immediately taken, including the submission of a request to the Registry [REDACTED] to allow the Defence to reactivate one of its local resource persons to try to find [REDACTED].

20. On or about [REDACTED], [REDACTED] was located in [REDACTED]. Measures were taken to allow the Defence local resource person to travel to [REDACTED] to meet with [REDACTED].<sup>22</sup> Due to COVID-19 restrictions imposed in the DRC, the local resource person was only able to travel [REDACTED],<sup>23</sup> following which a meeting with [REDACTED] was organized and a screening interview conducted on [REDACTED].<sup>24</sup>

21. In light of the foregoing, the Defence submits that the additional evidence recently obtained from [REDACTED] was not available at trial despite the exercise of the utmost due diligence.

22. Moreover, even if the Appeals Chamber were to consider that [REDACTED] evidence was available at trial or could have been obtained through the exercise of due diligence, it should nonetheless exercise its discretionary powers to admit [REDACTED] evidence.<sup>25</sup> Indeed, for the reasons set out below, the Defence posits that compelling reasons exist to admit [REDACTED] evidence at the appeals stage.

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<sup>20</sup> Annex B, paras.4-5; Confidential affidavit, [REDACTED], Annex C, enclosed, paras.8-9.

<sup>21</sup> Annex C, para.10.

<sup>22</sup> Annex C, para.13.

<sup>23</sup> Annex C, para.15.

<sup>24</sup> Annex C, paras.16-17.

<sup>25</sup> [Lubanga-AJ-3121](#), para.62: “The Appeals Chamber finds that, even beyond those criteria, it enjoys discretion to admit additional evidence, which should be done on a case-by-case basis and in light of the specific circumstances of each case. In this respect, the Appeals Chamber finds that it is within its discretion to admit additional evidence on appeal despite a negative finding on one or more of the above-mentioned criteria, if there are compelling reasons for doing so.”

## **II. [REDACTED] evidence is *prima facie* credible**

23. Evidence is credible if it appears to be reasonably capable of belief or reliance.<sup>26</sup>

24. [REDACTED] was interviewed for the first time, for screening purposes, on [REDACTED]. At this interview, [REDACTED] produced [REDACTED] electoral card, which confirms *inter alia*, [REDACTED] name, date of birth and age. A copy of this card is annexed to [REDACTED] statement.<sup>27</sup>

25. The evidence on the record establishes that [REDACTED]. During the time [REDACTED] was a member of the UPC, [REDACTED] with Bosco Ntaganda and thus well placed to observe his acts and conduct.

26. [REDACTED].<sup>28</sup> During [REDACTED] interview, when [REDACTED] had no recollection of an event [REDACTED] said so.<sup>29</sup>

27. It stems from the above that [REDACTED]'s evidence is *prima facie* credible and that allowing [REDACTED] to testify before the Appeals Chamber is in the interest of justice.

## **III. The proposed additional evidence is relevant and impacts findings material to the conviction or sentence**

28. The evidence provided by [REDACTED] is relevant and undermines findings material to Bosco Ntaganda's conviction(s) or sentence in three separate ways as set out below.

### **A. [REDACTED] evidence directly undermines findings of Trial Chamber**

29. *First*, [REDACTED] evidence establishes that [REDACTED] was 15 years old when [REDACTED] joined the UPC/FPLC.<sup>30</sup> As such it undermines the Trial Chamber's finding [REDACTED].<sup>31</sup> It also directly contradicts the Trial Chamber's finding that [REDACTED], around February 2003.<sup>32</sup>

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<sup>26</sup> *Popović et al.*, Case No.IT-05-88-A, [Decision on Vujadin Popović's Motion for Admission of Additional Evidence on Appeal Pursuant to Rule 115](#), 20 October 2011, para.8.

<sup>27</sup> Annex A.

<sup>28</sup> Annex A, paras.37-44.

<sup>29</sup> Annex A, paras.27,35,38.

<sup>30</sup> Annex A, para.22.

<sup>31</sup> [REDACTED].

<sup>32</sup> [REDACTED].

30. *Second*, [REDACTED] evidence establishes that [REDACTED].<sup>33</sup> [REDACTED] on this issue accordingly renders unsafe the Trial Chamber’s findings – based solely on the testimony of P-0010 – [REDACTED].<sup>34</sup> In addition, [REDACTED] evidence that (i) Mr Ntaganda respected male and female [REDACTED] alike; (ii) that he would not have had intimate relations with [REDACTED], and (iii) [REDACTED], strengthens this conclusion.<sup>35</sup>

**B. [REDACTED]’s evidence undermines certain findings reached by the Trial Chamber on the basis of the evidence provided by P-0010**

31. The evidence provided by [REDACTED] undermines the credibility of P-0010 to such an extent that it defeats and/or renders unsafe all findings, which rest on P-0010’s testimony.

32. [REDACTED] P-0010 was not a member of Mr Ntaganda’s escorts during the First Operation – or at any other time before at least March 2003 – and that she lied about accompanying Bosco Ntaganda to the Rwampara training camp in February 2003. The Trial Chamber thus erred in finding that the evidence provided by P-0010 was credible in respect of: (i) her experience as one of Bosco Ntaganda’s escorts during the First Operation in Mongbwalu;<sup>36</sup> and (ii) the sexual violence she witnessed and personally experienced during the time she was part of Mr Ntaganda’s escort during the First Operation.<sup>37</sup>

33. Consequently, numerous findings reached by the Trial Chamber on the basis P-0010’s testimony on these two issues are either plainly wrong and/or rendered unsafe, including:

(i) The Trial Chamber’s finding that on his way to Mongbwalu for the First Operation, “Mr Ntaganda called upon the people to enroll in the UPC/FPLC and undergo training to fight for their country, including ‘children’ and ‘kadogos’”;<sup>38</sup>

(ii) The Trial Chamber’s finding, relying solely on the testimony of P-0010 that on 12 February 2003 Mr Ntaganda visited the Rwampara training camp, “accompanied by a number of bodyguards, including at least two individuals who were under 15”;<sup>39</sup>

(iii) The Trial Chamber’s finding [REDACTED];<sup>40</sup>

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<sup>33</sup> [REDACTED], para.59.

<sup>34</sup> [REDACTED].

<sup>35</sup> Annex A, paras.57-58.

<sup>36</sup> [TJ](#), paras.91,99-101.

<sup>37</sup> [TJ](#), para.102.

<sup>38</sup> [TJ](#), para.359, fn.993.

<sup>39</sup> [TJ](#), para.394 (footnotes omitted).

- (iv) The Trial Chamber's finding, based solely on P-0010's evidence that the youngest bodyguard of Mr Ntaganda was so small "that he had to roll his sleeves up twice"<sup>41</sup> and that "he was really young, around 9 years old";<sup>42</sup>
- (v) The Trial Chamber's finding, relying on P-0010's evidence,<sup>43</sup> that "Mr Ntaganda's escorts, regardless of their age, performed various tasks, and individuals under 15 generally carried out the same tasks as the older ones";<sup>44</sup>
- (vi) The Trial Chamber's finding, relying on the testimony of P-0010, that Mr Ntaganda's escorts were not free to leave;<sup>45</sup>
- (vii) The Trial Chamber's finding, based solely on the testimony of P-0010, that "a female soldier part of Mr Ntaganda's escort was ordered by his chief escort to 'act as if [she] were a prostitute' and, in accordance with this order, performed sexual activity with the 'enemy'";<sup>46</sup>
- (viii) The Trial Chamber's finding, based solely on P-0010's evidence that Mr Ntaganda had sexual intercourse with many female members of his own bodyguards, such as "Janine, Patience, Lamama, Ani, Lotsove, Caroline. There were many of them. There was also Vero [...]"<sup>47</sup> and that "nobody did it of their own volition"<sup>48</sup> as well as P-0010 herself,<sup>49</sup> and that female bodyguards of Mr Ntaganda were subjected to rape and sexual violence by himself;<sup>50</sup>
- (ix) The Trial Chamber's finding, based exclusively on the uncorroborated testimony of P-0010 despite available evidence to the contrary,<sup>51</sup> that Bosco Ntaganda raped P-0010 during the First Operation;<sup>52</sup>

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<sup>40</sup> [REDACTED].

<sup>41</sup> [TJ](#), para.391.

<sup>42</sup> [TJ](#), para.1115 referring to **P-0010:T-47**,6:20-24.

<sup>43</sup> **P-0010:T-47**,7:12-20.

<sup>44</sup> [TJ](#), para.392.

<sup>45</sup> [TJ](#), para.397.

<sup>46</sup> [TJ](#), para.404.

<sup>47</sup> **P-0010:T-47**,33:11-13.

<sup>48</sup> **P-0010:T-47**,33:23-25.

<sup>49</sup> **P-0010:T-47**,32-33;[T-50](#),38-42,62-63.

<sup>50</sup> [TJ](#), para.407, fn.1158.

<sup>51</sup> **D-0251:T-260**,33:13-34:4; **D-0017:T-253**,61:5-6.

<sup>52</sup> [TJ](#), paras.102,407, fn.1158.

(x) The Trial Chamber's finding, based on P-0010's evidence that she got pregnant with Mr Ntaganda's child,<sup>53</sup> that "[a] number of these female members of the UPC/FPLC became pregnant during their time in the UPC/FPLC";<sup>54</sup> and

(xi) The Trial Chamber's finding, based solely on P-0010's evidence that the night she left Bunia [REDACTED] to go to Mongbwalu, that Mr Ntaganda gave instructions to spare no Lendu, to strike them and loot;<sup>55</sup> and that "the night before leaving Bunia for the First Operation, Mr Ntaganda spoke to some of the UPC/FPLC troops, telling them that they were going to Mongbwalu to fight against the Lendu and ordering them to attack using the term '*kupiga na kuchaji*'".<sup>56</sup>

**C. [REDACTED] evidence renders unsafe certain findings, which rest on the Trial Chamber's assessment of Mr Ntaganda's evidence and credibility**

34. [REDACTED] evidence contradicts and undermines central aspects of P-0010, P-0017 and P-0768's evidence. Difficulties with the credibility of these witnesses were raised at trial, and are central to this appeal. [REDACTED] evidence, considered against the evidence of these witnesses, impacts findings reached by the Trial Chamber on the basis of its analysis of Mr Ntaganda's testimony, in particular when it found Bosco Ntaganda not credible on certain points and/or compared Bosco Ntaganda's testimony with that of *one* uncorroborated Prosecution witness and chose to rely on the latter.

35. *First*, having found that the expression '*kupiga na kuchaji*' was commonly used during deployments<sup>57</sup> and relying solely on P-0010's evidence, the Trial Chamber found that Mr Ntaganda gave a speech the night before leaving Bunia to go to Mongbwalu and used the expression '*kupiga na kuchaji*'.<sup>58</sup> On this basis, the Trial Chamber found that Mr Ntaganda was not credible when testifying that he would not use the expression '*kupiga na kuchaji*' in order to maintain an exemplary army.<sup>59</sup> It stems from [REDACTED] evidence that Bosco Ntaganda did not use the expression '*kupiga na kuchaji*' that night. This undermines

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<sup>53</sup> P-0010:T-47,34.

<sup>54</sup> TJ, para.407.

<sup>55</sup> [REDACTED].

<sup>56</sup> TJ, para.484.

<sup>57</sup> TJ, para.415.

<sup>58</sup> TJ, para.484, fn.993.

<sup>59</sup> TJ, para.415.

and renders unsafe the Trial Chamber's rejection of Bosco Ntaganda's evidence on this issue, which was already significantly more detailed.<sup>60</sup>

36. *Second*, having found on the basis of the uncorroborated testimony of P-0017<sup>61</sup> that Bosco Ntaganda gave the order to kill two prisoners detained at the *Appartements*,<sup>62</sup> the Trial Chamber rejected Mr Ntaganda's testimony that only one person was detained at the *Appartements*.<sup>63</sup> [REDACTED], who was in Mongbwalu [REDACTED] did not see prisoners being brought to [REDACTED]. Not only does this undermine the Trial Chamber's assessment of Bosco Ntaganda's testimony, it renders its related findings unsafe.

37. *Third*, relying exclusively on the uncorroborated testimony of P-0768,<sup>64</sup> without considering major deficiencies in his evidence,<sup>65</sup> the Trial Chamber rejected the detailed testimony of Mr Ntaganda, who denied that anti-personnel mines were used in Mongbwalu, and denied having ordered their placement.<sup>66</sup> [REDACTED], who was in Mongbwalu [REDACTED], was never told or heard that mines were either used or injured civilians in Mongbwalu. Not only does this undermine the Trial Chamber's assessment of Bosco Ntaganda's testimony, it renders unsafe its related findings.

38. *Fourth*, relying exclusively on the testimony of P-0010<sup>67</sup> despite evidence to the contrary,<sup>68</sup> the Trial Chamber found that Mr Ntaganda had sexual intercourse with many of his escorts, including P-0010 during the First Operation.<sup>69</sup> [REDACTED]; and that P-0010 was not one of Bosco Ntaganda's escorts [REDACTED].<sup>70</sup> Not only does this cripple the Trial Chamber's assessment of Bosco Ntaganda's credibility and evidence, it renders unsafe its related findings, including in respect of Bosco Ntaganda's *mens rea* for *inter alia*, sexual violence crimes.

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<sup>60</sup> D-0300:T-213,9:5-11.

<sup>61</sup> TJ, para.528, fns.1578-1579.

<sup>62</sup> TJ, fn.1573.

<sup>63</sup> TJ, para.528.

<sup>64</sup> TJ, para.524.

<sup>65</sup> Annex 1 to the Defence Closing Brief, 2 July 2018, [ICC-01/04-02/06-2298-Conf-Corr-Anx1](#) ("Defence Closing Brief"), paras.254-258.

<sup>66</sup> TJ, fns.906,1558; D-0300:T-218,40:1-41:4.

<sup>67</sup> TJ, fn.1158.

<sup>68</sup> D-0251:T-260,33:13-34:4; D-0017:T-253,61:5-6.

<sup>69</sup> TJ, fn.1158.

<sup>70</sup> [REDACTED], paras.66-70.

39. *Fifth*, relying solely on the testimony of P-0017, the Trial Chamber disregarded Mr Ntaganda's exculpatory evidence,<sup>71</sup> finding that UPC/FPLC commanders bearing weapons, including Mr Ntaganda, took civilian women to the *Appartements*, where they were sexually abused.<sup>72</sup> [REDACTED], who was in Mongbwalu [REDACTED], did not see any civilian women being taken to [REDACTED] by commanders and states that [REDACTED].<sup>73</sup> This undermines the Trial Chamber's assessment of Bosco Ntaganda's evidence and credibility and renders unsafe its related findings.<sup>74</sup>

40. *Lastly*, relying solely on the uncorroborated evidence of P-0002<sup>75</sup> despite available evidence to the contrary<sup>76</sup> and without considering deficiencies in his evidence,<sup>77</sup> the Trial Chamber rejected Mr Ntaganda's testimony that he left Mongbwalu on 28 November 2002.<sup>78</sup> [REDACTED], who traveled to Mongbwalu [REDACTED], recalls staying in Mongbwalu for one week before returning to Bunia [REDACTED]. Not only does this undermine the Trial Chamber's assessment of Bosco Ntaganda's testimony, it renders its related findings unsafe. In particular, the Trial Chamber's omission to pronounce on the date of Mr Ntaganda's departure from Mongbwalu<sup>79</sup> also renders unsafe findings that are based on the duration of Mr Ntaganda's stay in Mongbwalu.<sup>80</sup>

#### **IV. The proposed additional evidence is relevant to Mr Ntaganda's grounds of appeal 4-5, 7, 8, 9, 11, 14 and 15**

41. The additional evidence sought to be admitted is relevant to the adjudication of grounds of appeal raised on behalf of Mr Ntaganda:

42. **Grounds 4-5** The proposed additional evidence undermines the Trial Chamber's assessment of witness P-0010's credibility in relation to her experience as one of Bosco Ntaganda's escorts. It invalidates the Trial Chamber's finding that Mr Ntaganda instructed the UPC/FPLC troops in Bunia, the night before leaving for the First Operation, to

<sup>71</sup> [D-0300:T-223](#), 39:7-40:12.

<sup>72</sup> [TJ](#), para.535, fns.1600-1601.

<sup>73</sup> Annex A, para.31.

<sup>74</sup> [TJ](#), para.535.

<sup>75</sup> [TJ](#), fn.1412.

<sup>76</sup> [DRC-D18-0001-5748](#), p.5774 (Transl.[DRC-D18-0001-5778](#), p.5804); [DRC-D18-0001-5748](#), p.5776(Transl.[DRC-D18-0001-5778](#), p.4033); [DRC-OTP-0017-0033](#), p.0211(Transl.[DRC-OTP-2102-3854](#), p.4033); [D-0300:T-218](#), 4:19-5:1.

<sup>77</sup> [Defence Closing Brief](#), paras.557,642-643.

<sup>78</sup> [TJ](#), para.489, fn.1412.

<sup>79</sup> *Id.*

<sup>80</sup> [TJ](#), fn.1412, paras.510(killings in Nzebi); 535(women being brought to the *Appartements*).

attack the ‘Lendus’, including the civilian population. As such it is relevant to the Trial Chamber’s errors, argued in Grounds 4 and 5, when finding that the UPC/FPLC launched an attack directed against a civilian population pursuant to an organizational policy, the chapeau elements of article 7 of the Statute.<sup>81</sup>

43. **Ground 7** The proposed additional evidence impacts and undermines findings of the Trial Chamber, in particular when it found Mr Ntaganda not credible and rejected his evidence; or compared his evidence to the uncorroborated evidence of a single Prosecution witness and chose to rely on the latter. As such it is relevant to the Trial Chamber’s errors, argued in Ground 7, regarding its assessment of Mr Ntaganda’s testimony and credibility.<sup>82</sup>

44. **Ground 8** The proposed additional evidence impacts and undermines findings of the Trial Chamber related to the commission of crimes by the UPC/FPLC during the First Operation, in particular in Mongbwalu. The impugned findings concern in particular the killing of prisoners at the *Appartements*, the sexual mistreatment of civilian women taken at the *Appartements* by commanders, including by Mr Ntaganda and the placement of anti-personal mines at different entry points of Mongbwalu. As such, the proposed additional evidence is relevant to the Trial Chamber’s errors, argued in Ground 8.<sup>83</sup>

45. **Ground 9** The proposed additional evidence impacts and undermines findings of the Trial Chamber related to [REDACTED], the presence of UPC/FPLC members below the age of 15 [REDACTED] and Mr Ntaganda’s knowledge of UPC/FPLC members having less than 15 years old. As such the proposed additional evidence is relevant to the Trial Chamber’s errors argued in Ground 9.<sup>84</sup>

46. **Ground 11** The proposed additional evidence impacts and undermines findings of the Trial Chamber related to rapes and sexual violence against female members within UPC/FPLC ranks, including in respect of UPC/FPLC members having less than 15 years old and Mr Ntaganda’s knowledge thereof. The impugned findings concern in particular Mr Ntaganda’s own conduct towards his female escorts. As such, the proposed additional

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<sup>81</sup> [Defence Appeal Brief – Part II](#), paras.58-128.

<sup>82</sup> [Defence Appeal Brief – Part II](#), paras.136-141.

<sup>83</sup> [Defence Appeal Brief – Part II](#), paras.151-225.

<sup>84</sup> [Defence Appeal Brief – Part II](#), paras.231-248.

evidence is relevant to the Trial Chamber's errors, argued in Ground 11 regarding the rape of UPC/FPLC members and Mr Ntaganda's knowledge thereof.<sup>85</sup>

47. **Ground 14** The proposed additional evidence impacts and undermines findings of the Trial Chamber related to Mr Ntaganda's *mens rea* for crimes committed by the UPC/FPLC members during the First Operation. The impugned findings rest *inter alia* on the testimony of P-0010 and the Trial Chamber's assessment of Mr Ntaganda's evidence and credibility, concerning in particular the use of the expression '*kupiga na kuchaji*', sexual violence against civilian women taken at the *Appartements* by UPC/FPLC commanders, the presence/killing of prisoners at the *Appartements*, the use of anti-personnel mines injuring civilians and the targeting of civilians. As such, the proposed additional evidence is relevant to the Trial Chamber's errors argued in Ground 14.<sup>86</sup>

48. **Ground 15** In light of the Trial Chamber's finding that Mr Ntaganda intended the UPC/FPLC to continue from the First Operation towards the Second Operation with the same criminal intent,<sup>87</sup> the proposed additional evidence impacts and undermines findings of the Trial Chamber related to Mr Ntaganda's *mens rea* for crimes committed during the Second Operation. As such, it is relevant to the Trial Chamber's errors argued in Ground 15.<sup>88</sup>

**V. The proposed additional evidence could have had an impact on the Trial Chamber's verdict(s) and could show that the Trial Chamber's verdict is unsafe**

49. Had the proposed additional evidence been admitted and available to the Trial Chamber, it could have had an impact on the verdict.

50. Indeed if [REDACTED] evidence is considered in the context of the evidence presented at trial, it undermines critical findings material to the convictions entered against Mr Ntaganda under Counts 1-2, 3, 4-5, 6 and 9. Thus, the Trial Chamber's verdicts could have been different had [REDACTED] evidence been heard at trial.

51. The Trial Chamber found that "Mr Ntaganda's presence, actions, and directives illustrates how he intended the troops to behave in the field, notably in the context of the

<sup>85</sup> [Defence Appeal Brief – Part II](#), paras.258-270.

<sup>86</sup> [Defence Appeal Brief – Part II](#), paras.317-358.

<sup>87</sup> [TJ](#), para.1187.

<sup>88</sup> [Defence Appeal Brief – Part II](#), paras.360-410.

First Operation.”<sup>89</sup> Mr Ntaganda’s personal involvement in those particular events are referred to by the Trial Chamber to establish the mental element for the crimes committed during the First Operation as an indirect co-perpetrator, including:<sup>90</sup>

- (i) The order to attack all Lendus using the expression ‘*kupiga na kuchaji*’ while addressing some of the UPC/FPLC troops the night before leaving Bunia for the First Operation, intending his troops to attack the Lendus without distinction between the civilian population and the combatants;<sup>91</sup>
- (ii) Murders and rapes committed in Mongbwalu at the *Appartements*, in particular the two prisoners’ murder at the *Appartements* personally ordered by Mr Ntaganda’s, the shooting of the *Abbé* by Mr Ntaganda at the *Appartements* and the civilian women brought to the *Appartement* to have sexual intercourse with UPC/FPLC soldiers and commanders, including Mr Ntaganda himself. The Trial Chamber stated that Mr Ntaganda was present and aware of the women being brought to the *Appartements*;<sup>92</sup> and
- (iii) Mr Ntaganda informed the G2 that he approved the behavior of Salumu Mulenda’s troops for the ‘Kobu massacre’ in the context of the Second Operation.<sup>93</sup>

52. The Trial Chamber found, after having referred to those precise actions and instructions, that:<sup>94</sup>

1186. In the Chamber’s view, the above demonstrates that Mr Ntaganda did not only consider RCD-K/ML and APC to be the enemies of the UPC/FPLC, but also the Lendu. In giving orders for troops to attack using the term ‘*kupiga na kuchaji*’, **Mr Ntaganda necessarily meant for his subordinates to attack everyone and everything, targeting Lendu civilians and their property specifically. Rapes and murders were committed in the *Appartements*, which was his base during the First Operation. He was personally involved in some of them.**

1187. For the Chamber, all this demonstrates that Mr Ntaganda willingly sent his troops to attack and kill Lendu civilians, to engage in sexual

<sup>89</sup> [TJ](#), para.1180.

<sup>90</sup> [TJ](#), paras.1176-1198.

<sup>91</sup> [TJ](#), para.1181.

<sup>92</sup> [TJ](#), para.1184.

<sup>93</sup> [TJ](#), para.1185.

<sup>94</sup> [TJ](#), paras.1186-1187 (emphasis added).

violence against this population, and to loot and destroy their belongings during the First Operation. By way of these acts, Mr Ntaganda also intended for civilians to be chased out of the assaulted localities. Noting that the criminal acts performed by UPC/FPLC troops during the First Operation were reproduced during the course of the Second Operation, which culminated in particular violent events, *i.e.* the ‘Kobu massacre’, and having found that Mr Ntaganda approved of the behaviour of the troops in this context, the Chamber considers that he intended the troops to continue with the same criminal conduct during the course of the Second Operation.

53. The Trial Chamber’s reasoning concerning the intent of Mr Ntaganda for his troops to commit crimes during the First Operation is based on the presence of Mr Ntaganda at the *Appartements* and his personal involvement in the commission of the crimes.

54. When considered alongside the errors committed by the Trial Chamber in the assessment of P-0010’s evidence,<sup>95</sup> and in its evaluation of Mr Ntaganda’s testimony,<sup>96</sup> [REDACTED] additional evidence further highlights how manifestly unsafe these findings really are.

55. As a result, the Trial Chamber’s finding on the liability of Mr Ntaganda in relation to the following crimes committed during the First Operation are unsafe and had the Trial Chamber been in possession of the additional evidence, it could have entered different verdicts:

- the killing of persons at the *Appartements* camp following interrogation as an indirect co-perpetrator (Counts 1-2);<sup>97</sup>
- intentionally attacking civilians as a war crime as an indirect co-perpetrator during the First Operation in Mongbwalu (Count 3);<sup>98</sup> and
- rape and crime against humanity and as a war crime as an indirect co-perpetrator (Count 4-5) on the basis that during and in the aftermath of the First Operation on Mongbwalu, women were brought to the *Appartements* to have sexual intercourse.<sup>99</sup>

56. In addition, as regards Counts 6 and 9, the Trial Chamber found that female members of the UPC/FPLC were regularly raped and subjected to sexual violence, including girls under

<sup>95</sup> [Defence Appeal Brief – Part II](#), paras.93,235-245.

<sup>96</sup> [Defence Appeal Brief – Part II](#), paras.136-141.

<sup>97</sup> [TJ](#), para.873.

<sup>98</sup> [TJ](#), para.906.

<sup>99</sup> [TJ](#), para.940.

the age of 15, underlining the fact that Mr Ntaganda knew about this practice, in particular since he was among the commanders who committed rapes against members of his own escorts.<sup>100</sup> In finding that this knowledge was established, the Trial Chamber relied largely on Mr Ntaganda own conduct towards the female members of his escorts,<sup>101</sup> on the basis of P-0010's testimony.<sup>102</sup>

57. In light of [REDACTED] additional evidence, and the challenges to P-0010's credibility with regards to [REDACTED], the Defence contends that the Trial Chamber's finding as regards Mr Ntaganda's knowledge of and sexual violence committed against female members of the UPC/FPLC, in particular under the age of 15,<sup>103</sup> is unsafe.

58. Notably, the three events the Trial Chamber relied upon to convict Mr Ntaganda of Counts 6 and 9 are the rape of P-0883, a girl named Maeve and a girl named Nadege. However, the Trial Chamber did not establish Mr Ntaganda's knowledge of the occurrence of those rapes and acts of sexual enslavement. As a result, the Trial Chamber's finding on the liability of Mr Ntaganda in relation to the following crimes are unsafe and had the Trial Chamber had the additional evidence in its possession, it could have entered different verdict:

- the rape and sexual slavery against child soldiers as a war crime as an indirect co-perpetrator (Counts 6 and 9).<sup>104</sup>

## **VI. The proposed additional evidence is relevant to findings material to the sentence imposed**

59. As outlined above, the Defence submits that [REDACTED] additional evidence renders unsafe the verdicts entered under Counts 1-2, 3, 4-5, 6 and 9. This necessarily also impacts the sentence entered by the Trial Chamber against Mr Ntaganda.

60. Mr Ntaganda was sentenced to 30 years of imprisonment on the basis that article 78(3) of the Statute provides that the total period of imprisonment shall be "no less than the highest individual sentence pronounced", which in Mr Ntaganda's case was 30 years of imprisonment for the crime of persecution as a crime against humanity (Count 10); and 30 years of

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<sup>100</sup> [TJ](#), para.1196.

<sup>101</sup> [TJ](#), fn.3228.

<sup>102</sup> [TJ](#), para.407.

<sup>103</sup> [REDACTED].

<sup>104</sup> [TJ](#), para.1198.

imprisonment for murder and attempted murder as a crime against humanity and as a war crime (Counts 1 and 2).<sup>105</sup>

61. [REDACTED] additional evidence renders unsafe the findings upon which Mr Ntaganda's conviction as an indirect co-perpetrator for Counts 1 and 2 are based, namely the killing of persons [REDACTED].

62. Moreover, the Trial Chamber was explicit that the sentence imposed for the crime against humanity of persecution "combine[d] Mr. Ntaganda's culpability and the aggravating circumstances for the underlying crimes (i.e. the crimes that Mr Ntaganda was convicted for under Counts 1 to 5, 7 to 8, 11 to 13 and 17 to 18)".<sup>106</sup> The overlap in conduct that underlies the various crimes was therefore "taken into account" by the Trial Chamber.<sup>107</sup> The Trial Chamber then held that the total sentence to be imposed on Mr Ntaganda "must further reflect Mr Ntaganda's conviction of the additional crimes committed vis-à-vis children under the age of 15 who were recruited into the UPC/FPLC (i.e. the crimes he was convicted for under Counts 6, 9 and 14 to 16)" so as to properly account for the multiplicity of crimes and his overall culpability.<sup>108</sup>

63. Accordingly, additional evidence which undermines the verdicts entered under Counts 1-2, 3, 4-5, 6 and 9 will necessarily also invalidate a 30 year sentence for persecution which was explicitly found to rely on these convictions, and in particular "additional crimes committed vis-à-vis children under the age of 15 who were recruited into the UPC/FPLC."<sup>109</sup> The Trial Chamber found that [REDACTED],<sup>110</sup> [REDACTED].<sup>111</sup> [REDACTED]. That [REDACTED], or that [REDACTED] is, [REDACTED], pure fabrication. Just as Mr Ntaganda has always maintained.

## CONCLUSION

64. [REDACTED]. [REDACTED] to which the Trial Chamber ascribed a particular gravity; crimes it found were committed vis-à-vis children under the age of 15 who it found were recruited into the UPC/FPLC. [REDACTED] when the key "*kupiga na kuchagi*" speech

<sup>105</sup> Sentencing Judgment, 7 November 2019, [ICC-01/04-02/06-2442](#) ("SJ").

<sup>106</sup> [SJ](#), para.249.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> [REDACTED].

<sup>111</sup> [REDACTED].

was found to have been given by Mr Ntaganda which is essential to the Trial Chamber's findings on his intent.<sup>112</sup> [REDACTED] as to the credibility of P-0010's testimony, [REDACTED].<sup>113</sup> [REDACTED] corroborates Mr Ntaganda's discarded testimony about central events at [REDACTED],<sup>114</sup> and further demolishes P-0768's already fragile story about the planting and use of landmines in Mongbwalu.<sup>115</sup> As such, [REDACTED] is not simply a Defence witness who could not be found before the close of the proceedings. [REDACTED] whose additional evidence touches not only many of the convictions for which Mr Ntaganda has now been imprisoned, but the main arguments as to the assessment of evidence which run through his current appeal.

65. [REDACTED] additional evidence meets the criteria for admission on appeal. It was not available at trial despite the exercise of due diligence; is *prima facie* credible; is relevant and undermines findings material to the conviction and sentence; and could have had an impact on the verdict, in the sense that, if considered in the context of the evidence presented at trial, it could show that the verdict was unsafe.<sup>116</sup> Even if the Appeals Chamber were to consider that [REDACTED] evidence was available at trial or could have been obtained through the exercise of due diligence, compelling reasons nonetheless exist for its admission.<sup>117</sup>

66. In light of the above, the Defence respectfully requests the Appeals Chamber to:

**GRANT** the Defence Request;

**ADMIT** the evidence tendered by [REDACTED] as additional evidence in the context of its appeal against the Judgment pursuant to article 74 of the Statute and its appeal of the Judgment against the Decision on Sentence pursuant to article 76 of the Statute, through [REDACTED] examination as a witness before the Court; or, in the alternative

**AUTHORISE** the admission of [REDACTED] written statement (Annex A) and voting card (Annex to the written statement) as additional evidence on appeal; and

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<sup>112</sup> [TJ](#), paras.484,1181.

<sup>113</sup> [TJ](#), para.387, fns.1098-1099.

<sup>114</sup> [REDACTED]

<sup>115</sup> [Defence Appeal Brief – Part II](#), paras.178-184.

<sup>116</sup> [Lubanga-AJ-3121](#), para.50 (emphasis in original, footnotes omitted).

<sup>117</sup> [Lubanga-AJ-3121](#), para.62.

**AUTHORISE** the parties to file limited supplemental briefs addressing the impact of the additional evidence.

**RESPECTFULLY SUBMITTED ON THIS 11<sup>th</sup> DAY OF SEPTEMBER 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