

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/04-02/06**
Date: **17 September 2020**

THE APPEALS CHAMBER

Before: Judge Howard Morrison, Presiding Judge
Judge Chile Eboe-Osuji
Judge Piotr Hofmański
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
*THE PROSECUTOR v. BOSCO NTAGANDA***

Public

Public redacted version of the “Response to the ‘Defence request for admission of additional evidence on appeal’ (No. ICC-01/04-02/06-2570-Conf) of 28 August 2020 on behalf of the Former Child Soldiers”

Source: Office of Public Counsel for Victims (CLR1)

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I. PROCEDURAL HISTORY

1. On 8 July 2019, Trial Chamber VI (the “Trial Chamber”) convicted Mr Ntaganda of five counts of crimes against humanity and thirteen counts of war crimes,¹ for which he was sentenced to 30 years of imprisonment.²
2. Appeals against the judgment³ and the sentence⁴ are currently pending before the Appeals Chamber, with oral hearings scheduled for 12-14 October 2020.⁵
3. On 27 August 2020, the Defence filed its “Request for admission of additional evidence on appeal”, seeking the admission of evidence obtained from [REDACTED] (the “Request”).⁶ On 2 September 2020, following a request by the Common Legal Representative of the former Child Soldiers (the “Legal Representative”),⁷ the Defence provided an electronic copy of [REDACTED] *carte d’électeur*.⁸
4. On 9 September 2020, the Appeals Chamber issued its directions regarding the Request, instructing the Prosecutor to respond by 16 September 2020 and the legal representatives of the victims to respond by 17 September 2020.⁹

¹ See the “Judgment” (Trial Chamber VI), [No. ICC-01/04-02/06-2359](#), 8 July 2020.

² See the “Sentencing judgment” (Trial Chamber VI), [No. ICC-01/04-02/06-2442](#), 7 November 2020.

³ See the “Prosecution Appeal Brief”, [No. ICC-01/04-02/06-2432 A2](#), 7 October 2020; the “Defence Appeal Brief – Part I”, [No. ICC-01/05-02/06-2443 A](#), 11 November 2019 and the “Corrigendum* of the ‘Public Redacted Version of ‘Defence Appeal Brief – Part II’, 31 January 2020, ICC-01/04-02/06-2465’, 27 March 2020, ICC-01/04-02/06-2465-Red”, [No. ICC-01/04-02/06-2465-Red-Corr](#), 30 June 2020.

⁴ See the “Public Redacted Version of ‘Sentencing Appeal Brief’, 10 February 2020, ICC-01/04-02/06-2468-Conf”, [No. ICC-01/04-02/06-2468-Red A](#), 9 April 2020.

⁵ See the “Second order scheduling a hearing” (Appeals Chamber), [No. ICC-01/04-02/06-2568 A A2 A3](#), 20 August 2020.

⁶ See the “Defence request for admission of additional evidence on appeal”, [No. ICC-01/04-02/06-2570-Conf A A2 A3](#), 28 August 2020 (dated 27 August 2020). A public redacted version of the Request was filed on 11 September 2020, see “Public redacted version of ‘Defence request for admission of additional evidence on appeal’, 27 August 2020, ICC-01/04-02/06-2570-Conf”, [No. ICC-01/04-02/06-2570-Red](#), 11 September 2020.

⁷ See the “Public redacted version of the ‘Request for a higher-resolution version of electoral card annexed to the ‘Defence request for admission of additional evidence on appeal’ of 27 August 2020 (No. ICC-01/04-02/06-2570-Conf)’”, [No. ICC-01/04-02/06-2571-Red A A2 A3](#), 16 September 2020.

⁸ See the “Addendum to ‘Defence request for admission of additional evidence on appeal’, 27 August 2020, ICC-01/04-02/06-2570-Conf”, [No. ICC-01/04-02/06-2572-Conf A A2 A3](#), 2 September 2020.

⁹ See the “Directions regarding the application for additional evidence on appeal” (Appeals Chamber), [No. ICC-01/04-02/06-2574-Conf](#), 9 September 2020.

II. CONFIDENTIALITY

5. Pursuant to regulation 23bis(2) of the Regulations of the Court, the present submissions are classified as “confidential” since they respond to the Request, which was filed with the same classification. A public redacted version thereof will be filed forthwith.

III. INTRODUCTION

6. The Legal Representative opposes the Defence’s eleventh-hour attempt to present the evidence of [REDACTED], which does not meet the stringent standard for admission on appeal. The Request alleges that the proposed additional evidence undermines the credibility of P-0010 and that it renders unsafe the convictions entered under *inter alia* Counts 6 and 9, affecting therefore the personal interests of the victims represented by the Legal Representative.

7. The Request and its annexes fail to demonstrate that the Defence acted diligently in seeking to locate and contact [REDACTED] at trial, providing no details whatsoever as to the efforts undertaken for this purpose. The Defence did not apprise the Trial Chamber of the difficulties it allegedly faced in locating and contacting [REDACTED] and does not explain why it initially identified this individual, which it now claims to be [REDACTED], as [REDACTED].

8. Several [REDACTED] who appeared on the Defence’s Witness List could have testified at trial as to the same matters covered in [REDACTED]’s declaration, but for the Defence’s decision not to call them and to focus, instead, on the testimony of Mr Ntaganda himself. Against this background, the Legal Representative underscores that the exceptional procedure for the admission of additional evidence on appeal should not be abused in an attempt to rectify an unsuccessful trial strategy.

9. Further, [REDACTED]’s evidence does not appear to be reasonably capable of belief or reliance. Significant doubts remain as to whether [REDACTED] is indeed [REDACTED], given unexplained discrepancies as to [REDACTED]. Further, [REDACTED] declaration – entirely exculpatory – faithfully retraces the evidence provided by Mr Ntaganda in his public testimony and has been confuted by the evidence of several witnesses, including Defence witnesses.

10. Finally, the Defence has not proved that [REDACTED]'s evidence could have led the Trial Chamber to enter a different verdict in whole or in part. Said evidence could not have changed the Trial Chamber's assessment of P-0010's credibility, nor could it have impacted Mr Ntaganda's conviction for the crimes against child soldiers under Counts 6, 9, and 14-16.

IV. SUBMISSIONS

1. Legal Framework for the admission of additional evidence on appeal

11. The admission of additional evidence on appeal is exceptional and highly circumscribed. The applicable legal framework is set out in articles 69(4) and 83 of the Rome Statute, rule 149 of the Rules of Procedure and Evidence, and regulation 62 of the Regulations of the Court. It requires the simultaneous fulfilment of three requirements:

- (a) the evidence must be “*additional*”, meaning it must not have been “*available*” at trial;
- (b) it must be *prima facie* credible and relevant to findings that were “*crucial or instrumental*” to the conviction or sentence, as well as to a ground of appeal raised pursuant to article 81 of the Statute; and
- (c) it could have had an impact on the verdict, in the sense that, if considered in the context of the totality of the evidence presented at trial, it could show that the verdict was unsafe and could have led the Trial Chamber to enter a different verdict in whole or in part.¹⁰

12. The distinct features of the appellate stage of proceedings before the Court warrant a restrictive application of these requirements. As recalled by the Appeals Chamber:

“the evaluation of the evidence, which includes the assessment of the credibility of witnesses, its reliability and ensuing weight, is the primary responsibility of the relevant Trial Chamber, which has heard all the evidence. In this regard, the Appeals Chamber also highlights the Statute’s express preference for testimony to be given in person, as provided for in article 69(2) of the Statute. In the Appeals Chamber’s view, this means that the Trial Chamber is much better positioned to assess a piece of evidence in light of all

¹⁰ See the “Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction” (Appeals Chamber), [No. ICC-01/04-01/06-3121-Red A5](#) (the “*Lubanga Appeal Judgment*”), paras. 50-59. See also AMBOS (K.), *Treatise on International Criminal Law, Volume III: International Criminal Procedure*, Oxford University Press, Oxford, 2015, p. 565 (with further references).

*the other evidence presented at trial than the Appeals Chamber. Accordingly, evidence relevant to a decision pursuant to article 74(2) of the Statute should, with only limited exceptions, be presented before that decision is taken. The Appeals Chamber therefore considers that allowing the admission of additional evidence on appeal, without further restriction, entails a real risk of litigation strategies that contemplate the presentation of evidence for the first time on appeal, even if such evidence was available at trial or, with due diligence, could have been produced”.*¹¹

13. The burden of proving that each of the applicable requirements is met rests on the party seeking to adduce the additional evidence on appeal.¹² In the present case, the Defence has failed to prove that [REDACTED]’s evidence was not available at trial, that it is *prima facie* credible and that it would – or indeed could – have led the Trial Chamber to enter a different verdict in whole or in part.

2. The Defence failed to prove due diligence in securing [REDACTED]’s evidence

14. The Request nakedly asserts that “*the additional evidence recently obtained from [REDACTED] was not available at trial despite the exercise of the utmost due diligence*”.¹³ The Defence is required to prove not only that [REDACTED]’s evidence was not in its possession during the trial “*in any form whatsoever*”,¹⁴ but also that it acted with due diligence in trying to secure such evidence by providing details as to any efforts that were undertaken to that end.¹⁵

¹¹ See the *Lubanga* Appeal Judgment, *supra* note 10, para. 57 (footnotes omitted). See also the “Decision on the ‘Filing of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber’s Decision on Admissibility’” (Appeals Chamber), [No. ICC-01/09-01/11-234 OA](#), 28 July 2011, paras. 9-14 and the “Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled ‘Decision on the admissibility of the case against Saif Al-Islam Gaddafi’” (Appeals Chamber), [No. ICC-01/11-01/11-547 OA4](#), 21 May 2014, para. 43.

¹² See STAKER (C.) & ECKLEMANS (F.), “Article 83”, in TRIFFTERER (O.) & AMBOS (K.) (Eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd ed., Beck/Hart Publishing, Munich / Oxford, 2016, pp. 1982-1983; ICTR, *Prosecutor v. Nahimana et al.*, ICTR-99-52-A, [Decision on Appellant Jean-Bosco Barayagwiza’s Motions for Leave to Present Additional Evidence pursuant to Rule 115 of the Rules of Procedure and Evidence](#), 8 December 2006 (the “*Barayagwiza* Decision”), para. 25. On the applicability *mutatis mutandis* of the approach of the *ad hoc* Tribunals in this context, see the *Lubanga* Appeal Judgment, *supra* note 10, para. 63.

¹³ See the Request, *supra* note 6, para. 21.

¹⁴ See the *Barayagwiza* Decision, *supra* note 12, para. 40.

¹⁵ See the *Lubanga* Appeal Judgment, *supra* note 10, paras. 1 and 57. See also e.g. ICTY, *Prosecutor v. Tadić*, IT-94-1-A, [Decision on Appellant’s Motion for the Extension of the Time-Limit and Admission of Additional Evidence](#), 15 October 1998 (the “*Tadić* Decision”), paras. 52-53; ICTR, *Semanza v. Prosecutor*, ICTR-97-20-A, [Decision](#), 31 May 2000, para. 37; ICTR, *Kayishema and Ruzindana v. Prosecutor*, ICTR-95-1-A, [Decision on Appellants’ Motions for Admission of Additional Evidence on Appeal](#), 26 September 2000, p. 8 (the “*Kayishema* Decision”); ICTY, *Prosecutor v. Krstić*, IT-98-33-A, [Decision on Applications for Admission of Additional Evidence on Appeal](#), 5 August 2003 (the “*Krstić* Decision”); ICTR, *Kajelijeli v. Prosecutor*, ICTR-98-44A-A, [Decision on Second Defence Motion for the Admission of Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence](#), 7 March 2005, p. 3; ICTY, *Prosecutor v. Popović et al.*, IT-05-88-A, [Decision on Drago Nikolić’s First Motion for Admission of Additional Evidence on Appeal Pursuant to Rule](#)

15. The Defence presented an affidavit by [REDACTED], stating that [REDACTED].¹⁶ A further affidavit by [REDACTED] simply indicates that [REDACTED].¹⁷

16. The Defence, however, provided no details whatsoever as to the actions allegedly taken during the trial phase to find the potential witness known as [REDACTED]; the obstacles encountered in locating [REDACTED]; and the additional steps undertaken in recent months that ultimately allowed members of the Defence team to locate [REDACTED] a few weeks before the Appeals hearing originally scheduled for 29 June to 1 July 2020¹⁸ and to subsequently contact [REDACTED]. The vague, generic, and unsubstantiated nature of [REDACTED]'s affidavits, which the Defence effectively asks the Appeals Chamber to blindly rely on, fail to prove that the Defence's alleged efforts met the 'due diligence' standard required to justify the exceptional admission of evidence on appeal. Mere assertions, without support, by the tendering party that additional evidence could not be previously located have been found insufficient to demonstrate due diligence, leading to findings that the relevant evidence was 'available' at trial and could thus not be admitted on appeal.¹⁹

17. With respect to allegedly unavailable witnesses in particular, the consistent practice of the *ad hoc* Tribunals has been to refuse the admission of additional testimony on appeal unless the moving party can show that it sought to make "*appropriate use of all mechanisms of protection and compulsion available under the Statute and the Rules of the International Tribunal to bring evidence [...] before the Trial Chamber*".²⁰ In this regard, "*Counsel is expected to apprise the Trial Chamber of all the difficulties he or she encounters in obtaining the evidence in question, including [...] his or her inability to locate certain witnesses. The obligation to apprise the Trial Chamber constitutes not only a first step in exercising due*

[115 of the Rules](#), 19 November 2013 (the "*Nikolić Decision*"), p. 2. More generally: STAKER (C.) & ECKLEMANS (F.), *op. cit. supra* note 12, pp. 1982-1983; AMBOS (K.), *op. cit. supra* note 10, p. 565 and BIANCHI (L.) & ONSA (I.), "Additional Evidence on Appeal, Review Proceedings, and the Remedy of Reconsideration", in KHAN (K.A.A.), BUISMAN (C.) & GOSNELL (C.), *Principles of Evidence in International Criminal Justice*, Oxford University Press, Oxford, 2010, pp. 729 *et seq.*

¹⁶ See the Annex B to the Request, [No. ICC-01/04-02/06-2570-Conf-AnxB](#), 28 August 2020 [REDACTED].

¹⁷ See the Annex C to the Request, [No. ICC-01/04-02/06-2570-Conf-AnxC](#), 28 August 2020 [REDACTED] (unofficial translation).

¹⁸ See the "Scheduling order for a hearing before the Appeals Chamber" (Appeals Chamber), [No. ICC-01/04-02/06-2486 A A2 A3](#), 9 March 2020.

¹⁹ See *e.g.* the *Kayishema Decision*, *supra* note 15, p. 5; ICTR, *Prosecutor v. Ntagerura*, ICTR-99-46-A, [Decision on Prosecution Motion for Admission of Additional Evidence](#), 10 December 2004 (the "*Ntagerura Decision*"), para. 24; and ICTY, *Prosecutor v. Šainović et al.*, IT-05-87-A, [Decision on Sreten Lukić's Second Motion to Admit Additional Evidence on Appeal](#), 29 April 2010, para. 20.

²⁰ See the *Tadić Decision*, *supra* note 15, para. 47; the *Ntagerura Decision*, *supra* note 19, para. 9; and the *Barayagwiza Decision*, *supra* note 12, paras. 5 and 25-27.

diligence but also a means of self-protection in that non-cooperation of the prospective witness is recorded contemporaneously”.²¹

18. While the “*mechanisms of protection and compulsion*” available before the Court differ from those of the *ad hoc* Tribunals,²² the requirement of notification to the Trial Chamber of difficulties in locating a witness applies *mutatis mutandis* to the Court. And indeed, the Defence claims to have fulfilled said requirement by reference to a communication filed to the Trial Chamber on 15 August 2017. The Request argues that “*the aim of [that] filing was [REDACTED]*”.²³ However, the Defence’s *ex parte* filings before the Trial Chamber – at least to the extent they have been made available to the Legal Representative – only indicate that:

- (a) One individual named [REDACTED] was among [REDACTED].²⁴
- (b) The Defence subsequently clarified, upon the Trial Chamber’s request,²⁵ that it [REDACTED],²⁶ but did not indicate whether any attempts to contact [REDACTED] had been made or that any difficulties had arisen in locating [REDACTED]. In particular, while the Defence stated that [REDACTED],²⁷ it only stated that [REDACTED].²⁸

19. The Defence fails therefore to demonstrate that it acted with due diligence by apprising the Trial Chamber of the difficulties it allegedly encountered in obtaining the evidence in question.

20. The Request also omits to provide any explanation as to [REDACTED] referred to in the proceedings as [REDACTED] – and whom the Defence now claims to be [REDACTED]

²¹ See the *Tadić* Decision, *supra* note 15, paras. 36-45, 47 and 62; ICTY, *Prosecutor v. Kupreškić et al.*, IT-95-16-A, [Appeal Judgement](#), 23 October 2001, para. 50; the *Ntagerura* Decision, *supra* note 19, para. 9; and the *Barayagwiza* Decision, *supra* note 12, para. 5.

²² See *e.g.* the “Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation” (Trial Chamber V(a)), [No. ICC-01/09-01/11-1274-Corr2](#), 17 April 2014; and the “Judgment on the appeals of William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V(A) of 17 April 2014 entitled ‘Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation’” (Trial Chamber V(a)), [No. ICC-01/09-01/11-1598](#), 9 October 2014.

²³ See the Request, *supra* note 6, para. 17.

²⁴ See [REDACTED], [No. ICC-01/04-02/06-1886-Conf-Red](#), 28 August 2020; and [REDACTED], [No. ICC-01/04-02/06-1886-Conf-AnxA-Red](#), 28 August 2020.

²⁵ See the “Decision on further matters related to the presentation of evidence by the Defence” (Trial Chamber VI), [No. ICC-01/04-02/06-1900](#), 11 May 2017, para.27.

²⁶ See [REDACTED], [No. ICC-01/04-02/06-2009-Conf](#), 15 August 2017; and [REDACTED] [No. ICC-01/04-02/06-2009-Conf-AnxA-Red](#), 28 August 2020.

²⁷ *Idem*, footnote 1.

²⁸ *Idem*, footnote 2.

– was identified in [REDACTED] with the entirely different name of [REDACTED]. This unexplained discrepancy not only impacts negatively on [REDACTED]’s credibility,²⁹ but also calls into question the extent and genuineness of efforts – if any – by the Defence to locate this witness during trial.

21. The Legal Representative recalls that, in the *Lubanga* case, Mr Lubanga’s Defence sought to introduce on appeal the testimony of two members of his Presidential Guard who appeared in video excerpts relied on by Trial Chamber I in its judgment.³⁰ The Appeals Chamber denied the request, finding that Mr Lubanga could have presented this evidence at trial:

*“Mr Lubanga, as the former commander-in-chief, was well-placed to know or to identify these two witnesses depicted on the video excerpts, particularly as they were part of his Presidential Guard, apparently during the time when this group was relatively small. The Appeals Chamber considers that these facts are crucial in determining whether Mr Lubanga could have discovered and presented this evidence at the trial phase. Indeed, as pointed out by the Prosecutor, it is notable that Mr Lubanga managed to identify, trace and obtain statements from witnesses D-0040 and D-0041 by September 2012, within six months of the issuance of the Conviction Decision”.*³¹

22. Similarly, given his role within the UPC/FPLC and [REDACTED],³² Mr Ntaganda was ideally placed to identify and trace [REDACTED].

23. The Legal Representative further notes that, while the Defence initially presented at trial witness lists including approximately 150 defence witnesses,³³ it ultimately chose to prioritize Mr Ntaganda’s testimony, which lasted over 30 days,³⁴ supplemented only by a handful fact witnesses.³⁵ In light of the number of proposed defence witnesses, including at least nine [REDACTED]³⁶ and several more UPC/FPLC members,³⁷ who were ultimately not

²⁹ See *infra* section IV.3.

³⁰ See the “Public redacted version: Defence application to present additional evidence in the appeals against the Judgment pursuant to Article 74 of the Statute and the Decision on sentence pursuant to Article 76 of the Statute”, [No. ICC-01/04-01/06-2942-Red-tENG](#), 26 November 2012.

³¹ See the *Lubanga* Appeal Judgment, *supra* note 10, para.78.

³² See the Judgment, *supra* note 1, paras. 380-397. See also [REDACTED], [No. ICC-01/04-02/06-2570-Conf-AnxA](#) ([REDACTED]), paras. 45 *et seq.*

³³ See *e.g.* [REDACTED], [No. ICC-01/04-02/04-1881-Conf-Corr](#), 2 May 2017, including 114 witnesses; and [REDACTED] listing 26 further witnesses.

³⁴ See the Judgment, *supra* note 1, para. 257.

³⁵ 11 defence witnesses ultimately testified *viva voce* during trial, while the prior recorded testimonies of 6 further witnesses were admitted pursuant to Rule 68(2) of the Rules of Procedure and Evidence.

³⁶ See *e.g.* [REDACTED], [No. ICC-01/04-02/06-1881-Conf-AnxB](#), 26 April 2017, particularly in relation to defence witnesses [REDACTED]. The Defence confirmed, upon the Trial Chamber’s request, [REDACTED]. See [REDACTED] and the [REDACTED].

called to testify, serious doubts arise as to whether the Defence would have decided to call [REDACTED] as a witness, even if [REDACTED] had been located during trial. This is all the more unlikely given [REDACTED]'s claim that [REDACTED] had turned [REDACTED] before joining the UPC/FPLC in [REDACTED],³⁸ which would have undermined Mr Ntaganda's consistent position, during trial, that there were simply no children under the age of 18 in the UPC/FPLC's ranks.³⁹

24. In addition, several [REDACTED] who appeared on the Defence's Witness List could have testified as to the same matters covered in [REDACTED]'s declaration.⁴⁰ For instance, [REDACTED] claims that [REDACTED].⁴¹ [REDACTED]⁴² and [REDACTED],⁴³ as well as [REDACTED],⁴⁴ [REDACTED],⁴⁵ but the Trial Chamber concluded, based on a number of considerations, that "[n]otwithstanding the challenges to [P-0010's] self-identification by certain other witnesses, the Chamber finds P-0010's self-identification and her account concerning the visit to Rwampara training camp credible".⁴⁶ [REDACTED] herself, as well as [REDACTED],⁴⁷ who would have been ideally placed to testify as to this matter, appeared on the Defence's Witness List but were eventually not called to testify at trial.⁴⁸

25. The Legal Representative wishes to emphasise that the exceptional procedure for admission of additional evidence on appeal⁴⁹ – and the appeal proceedings more generally – should not be used as an occasion to rectify a defective or otherwise unsuccessful defence strategy.⁵⁰

³⁷ See e.g. [REDACTED], particularly in relation to defence witnesses [REDACTED].

³⁸ See the Request, *supra* note 6, para. 4 and [REDACTED].

³⁹ See e.g. D-0300: [No. ICC-01/04-02/06-T-239-Red2-ENG CT2 WT](#), p. 83, lines 4-7.

⁴⁰ See [REDACTED], [No. ICC-01/04-02/06-1881-Conf-AnxB](#), 26 April 2017, particularly in relation to defence witnesses [REDACTED].

⁴¹ [REDACTED].

⁴² [REDACTED].

⁴³ [REDACTED].

⁴⁴ [REDACTED].

⁴⁵ [REDACTED].

⁴⁶ See the Judgment, *supra* note 1, para. 104.

⁴⁷ [REDACTED]. See [REDACTED]; and [REDACTED].

⁴⁸ See the reference to [REDACTED] and [REDACTED] in [REDACTED], [No. ICC-01/04-02/06-1881-Conf-AnxA](#), 28 April 2017; and [REDACTED].

⁴⁹ There is no indication that the Defence's alleged efforts to locate [REDACTED] continued until the end of the trial. See the confidential Annex B to the Request, *supra* note 16; and the confidential Annex C to the Request, *supra* note 17.

⁵⁰ See the *Lubanga* Appeal Judgment, *supra* note 10, para. 75. See also ICTR, *Bikindi v. Prosecutor*, ICTR-01-72-A, [Decision on Simon Bikindi's Motion to Admit Additional Evidence Pursuant to Rule 115 of the Rules](#), 16 September 2009, paras. 10 and 25; and the *Tadić* Decision, *supra* note 15, para. 50. See also, in the same vein, the "Observations of the Common Legal Representative of the Former Child Soldiers on Part II of Mr Ntaganda's Appeal against the Judgment pursuant to Article 74 of the Rome Statute", [No. ICC-01/04-02/06-2526-Red A](#), 27 May 2020, para. 6.

26. Accordingly, the Defence has failed to establish that [REDACTED]’s evidence was unavailable and could not have been produced through the exercise of due diligence during trial. The Request suggests, in addition, that even if said evidence could have been obtained through the exercise of due diligence, the Appeals Chamber “*should nonetheless exercise its discretionary powers to admit [it]*”.⁵¹ It should be noted, however, that where the proposed additional evidence was available at trial or could have been discovered through the exercise of due diligence, the moving party is required to establish that the exclusion of said evidence on appeal would lead to a miscarriage of justice, *i.e.* that it *would* have affected the verdict⁵² – a more stringent standard compared to the “*could have led to a different verdict in whole or in part*” requirement applicable to previously unavailable evidence.⁵³ As detailed *infra*,⁵⁴ [REDACTED]’s evidence falls well short of meeting either of these thresholds.

3. [REDACTED]’s evidence is not reasonably capable of belief or reliance

27. Additional evidence can only be admitted on appeal if it is *prima facie* credible.⁵⁵ [REDACTED]’s declaration, by contrast, does not appear to be reasonably capable of belief or reliance.⁵⁶

28. First, the arguments adduced by the Defence to support [REDACTED]’s credibility are entirely circular.⁵⁷ For instance, while the electoral card produced by [REDACTED] reflects the name and date of birth provided in [REDACTED] declaration,⁵⁸ no independent evidence confirms that [REDACTED] is indeed [REDACTED].⁵⁹ This is particularly concerning given the unexplained discrepancy between [REDACTED]’s name and the entirely different name of [REDACTED] [REDACTED].⁶⁰

⁵¹ See the Request, *supra* note 6, paras. 22 and 65.

⁵² See STAKER (C.) & ECKLEMANS (F.), *op. cit.* *supra* note 12, p. 1981.

⁵³ See *supra* para. 11.

⁵⁴ See *infra* section IV.4.

⁵⁵ See the *Lubanga* Appeal Judgment, *supra* note 10, paras. 50 and 54; and the *Barayagwiza* Decision, *supra* note 12, paras. 28 and 40.

⁵⁶ See *e.g.* ICTY, *Prosecutor v Kupreškić et al.*, No. IT-95-16-A, [Decision on the Motions of Appellants to Admit Additional Evidence](#), 26 February 2001, para. 28.

⁵⁷ See the Request, *supra* note 6, paras. 23-27.

⁵⁸ As noted by Trial Chamber, the information on electoral cards is based on the interested person’s own declaration, see the Judgment, *supra* note 1, para. 152.

⁵⁹ The fact that [REDACTED] purportedly [REDACTED] is inconclusive, given that this information was already in the public domain. The Judgment refers in fact to, *inter alia*, [REDACTED]. See the Judgment, *supra* note 1, [REDACTED]. The Legal Representative also notes the Defence’s position, at trial, that [REDACTED], an argument rejected by the Trial Chamber on the basis that [REDACTED]. See the Judgment, *supra* note 1, [REDACTED]. There is no indication that [REDACTED]. [REDACTED].

⁶⁰ See *supra* paras. 15 *et seq.*

29. Further, [REDACTED]’s personal details and circumstances differ significantly from those referred to [REDACTED]. In particular, [REDACTED] was called [REDACTED],⁶¹ was [REDACTED] at the time of the relevant events and that [REDACTED].⁶² None of this information corresponds to the details provided by [REDACTED], who stated [REDACTED],⁶³ and thus allegedly [REDACTED], and that [REDACTED].⁶⁴

30. The Legal Representative also notes that the timing of the Request, filed only six weeks prior to the hearing scheduled for 12-14 October 2020,⁶⁵ coupled with restrictions arising from the COVID-19 pandemic, make it impossible for the parties and participants to take meaningful steps to verify [REDACTED]’s identity, [REDACTED] age and indeed several other aspects of [REDACTED] declaration.

31. Finally, [REDACTED]’s declaration is entirely exculpatory and faithfully reflects the evidence given by Mr Ntaganda during his public testimony. For instance, in the last of a long series of attempts by the Defence to discredit P-0010,⁶⁶ [REDACTED] claims that [REDACTED] does not know anyone called [REDACTED]⁶⁷ and [REDACTED].⁶⁸ This far-fetched denial, reflecting Mr Ntaganda’s testimony,⁶⁹ has been confuted by the evidence of several witnesses, including Defence witnesses, who confirmed that [REDACTED].⁷⁰

4. [REDACTED]’s evidence could not and would not have changed the verdict

32. [REDACTED]’s evidence, assessed in the context of the evidence presented at trial as a whole, and not in isolation,⁷¹ could not have led the Trial Chamber to enter a different verdict, in whole or in part.⁷² In particular, depending on the Appeals Chamber’s conclusion on the availability of the relevant evidence at trial,⁷³ the moving party is required to prove that the Trial Chamber would – or could – have opted for the evidence the party now proffers

⁶¹ [REDACTED].

⁶² [REDACTED].

⁶³ [REDACTED].

⁶⁴ [REDACTED].

⁶⁵ See “Second order scheduling a hearing” (Appeals Chamber), [No. ICC-01/04-02/06-2568](#), 20 August 2020.

⁶⁶ See *e.g.* the evidence of D-0251, D-0211 and D-0017, as well as the testimony of Mr Ntaganda himself (D-0300).

⁶⁷ [REDACTED].

⁶⁸ [REDCATED].

⁶⁹ See *e.g.* D-0300: [REDACTED]. See also the Judgment, *supra* note 1, footnote 1158, noting that “Mr Ntaganda denied that P-0010 was ever in his bodyguard, which the Chamber finds not credible. In light of all of the above, the Chamber accepts P-0010’s account as credible”.

⁷⁰ See *e.g.* [REDACTED], and [DRC-D18-0001-6276](#), para. 50; and [REDACTED], and [DRC-D18-0001-6291](#), para. 229. See also, in relation to proposed defence witness [REDACTED], the [REDACTED], p. 96, para. 12.

⁷¹ See *e.g.* the *Barayagwiza* Decision, *supra* note 12, para. 7; and the *Krstić* Decision, *supra* note 15, para. 2.

⁷² See the *Lubanga* Appeal Judgment, *supra* note 10, para. 59.

⁷³ See *supra* para. 26.

instead of the totality of the evidence that it chose to rely on to reach its findings.⁷⁴ The Defence has failed to meet either of these standards based on the contents of [REDACTED]'s declaration.

33. With respect to the findings affecting the personal interests of her client, the Legal Representative submits that [REDACTED]'s evidence could not have changed (a) the Trial Chamber's assessment of P-0010's credibility; (b) Mr Ntaganda's convictions under Counts 6 and 9; and (c) his convictions under Counts 14, 15 and 16.

(a) [REDACTED]'s evidence could not have changed the Trial Chamber's assessment of P-0010's credibility

34. The Defence calls into question P-0010's credibility⁷⁵ based on [REDACTED] claims that [REDACTED],⁷⁶ that she was not among the escorts who took part in the First Operation,⁷⁷ and that [REDACTED].⁷⁸ As noted *supra*, [REDACTED]'s evidence in this respect conflicts with the testimony several witnesses, including Defence witnesses.⁷⁹ Further individuals appearing on the Defence's Witness List, but whom the Defence elected not to call, would have been ideally placed to testify as to these matters, had they been true.⁸⁰

35. It is not enough for the Defence to submit, on appeal, an additional witness purportedly contradicting P-0010's testimony to demonstrate that such evidence could have led the Trial Chamber to enter a different verdict, in whole or in part. The Judgment found P-0010's testimony to have been detailed and coherent with respect to her experiences in Mr Ntaganda's escort; and generally in line with, or corroborated by, other evidence in the case record.⁸¹ P-0010 provided detailed information concerning her participation in the First Operation, as she was able to remember:

(a) the names of other UPC/FPLC commanders who were present;

⁷⁴ See *e.g.* the *Barayagwiza* Decision, *supra* note 12, para. 30.

⁷⁵ The Legal Representative notes that doubts have been raised as to whether the Appeals Chambers should admit new evidence which simply raises questions about the credibility of an important witness, see *e.g.* SCHABAS (W.), *The UN International Criminal Tribunals*, Cambridge University Press, Cambridge, 2006, p. 484. In particular, the Appeals Chamber is likely to encounter difficulties in determining this question in the absence of any opportunity to examine and assess the demeanour of witnesses who testified at trial, see BOAS (G.) *et al.*, "Appeals, Review and Reconsideration", in SLUITER (G.) *et. al.* (eds.), *International Criminal Procedure: Principles and Rules*, Oxford University Press, Oxford, 2013, p. 952. See also *supra* para. 12.

⁷⁶ [REDACTED].

⁷⁷ *Idem*, paras. 26-36.

⁷⁸ *Idem*, paras. 37-44 and 67.

⁷⁹ See *supra* para. 31.

⁸⁰ These include, for instance, [REDACTED] and [REDACTED]. See *supra* para. 24.

⁸¹ See the Judgment, *supra* note 1, para. 99.

- (b) the weapons used;
- (c) communications of Mr Ntaganda;
- (d) the residence of Mr Ntaganda and the soldiers in Mongbwalu; and
- (e) what was referred to as the *Appartements* area.⁸²

36. P-0010 also provided detailed information concerning her experience in Mr Ntaganda's escort, as she was able to remember:

- (a) how she was chosen as Mr Ntaganda's bodyguard;
- (b) the names of other bodyguards and their respective age range;
- (c) the name of the chief escort;
- (d) the location of Mr Ntaganda's residence;
- (e) the specific operations she participated in, including reconnaissance missions; and
- (f) details concerning other trips she made with Mr Ntaganda in her capacity as his bodyguard.⁸³

37. These considerations are not undermined by the fact that [REDACTED] does not mention P-0010 as one of the persons who participated in the First Operation,⁸⁴ or as one of Mr Ntaganda's escorts.⁸⁵

38. It follows that [REDACTED]'s evidence does not undermine the credibility of P-0010, because such credibility was established primarily on the basis of the internal consistency and abundance of details the witness was able to provide during her testimony.

⁸² *Idem*, para. 100.

⁸³ *Idem*, para. 99.

⁸⁴ [REDACTED].

⁸⁵ *Idem*, paras. 45-59.

(b) [REDACTED]’s evidence could not have changed Mr Ntaganda’s conviction under Counts 6 and 9

39. With regard to sexual and gender-based violence crimes against child soldiers, the charges in the present case describe a pattern of ongoing criminality against UPC/FPLC members under the age of 15 who were victimised continuously (for sexual enslavement) and repeatedly (for rape), by a number of perpetrators and in various locations, tracing the movements of the UPC/FPLC forces in Ituri.⁸⁶ Given the scope of the conviction, [REDACTED]’s evidence, if available to the Trial Chamber, could not have led it to issue a different verdict in whole or in part.

40. Based on the totality of the evidence presented at trial, the Trial Chamber found that “female members of the UPC/FPLC were regularly raped and subjected to sexual violence [...] by male UPC/FPLC soldiers and commanders”,⁸⁷ and convicted Mr Ntaganda as an indirect perpetrator of rape as a war crime against a nine-year-old child soldier named Nadège, and rape and sexual slavery of P-0883 and Mave, both UPC/FPLC members under the age of 15.⁸⁸ [REDACTED]’s evidence does not touch upon these crimes, and has no impact on the Trial Chamber’s finding that they occurred.⁸⁹

41. The Defence argues, however, that [REDACTED]’s claim that [REDACTED] by Mr Ntaganda, combined with [REDACTED] categorical denial that [REDACTED], undermines the Trial Chamber’s conclusion that “Mr Ntaganda knew that rapes and sexual violence were occurring within the UPC/FPLC ranks, and that female recruits and soldiers under the age of 15 were not excluded from this practice”,⁹⁰ and thus excludes his *mens rea* in relation to Counts 6 and 9.

42. First, the Trial Chamber’s *mens rea* finding mentioned *supra* was based on several concurrent elements, in addition to Mr Ntaganda’s own sexual violence against his escorts, such as:

⁸⁶ See the “Observations of the Common Legal Representative of the Former Child Soldiers on Part I of Mr Ntaganda’s Appeal against the Judgment pursuant to Article 74 of the Rome Statute”, [No. ICC-01/04-02/06-2473](#), 27 February 2020, para. 21.

⁸⁷ See the Judgment, *supra* note 1, para. 407.

⁸⁸ *Idem*, p. 528.

⁸⁹ Said conclusion was reached based on the evidence of P-0883, P-0887, P-0758, and P-0768.

⁹⁰ See the Judgment, *supra* note 1, para. 1197

- (a) that female members of the UPC/FPLC were “*regularly raped and subjected to sexual violence*” and that this was “*common practice*”;⁹¹
- (b) the “*pattern of daily sexual violence*” perpetrated by Mr Ntaganda’s chief escort Claude Uzauakiliho against other members of his escort;⁹²
- (c) the fact that sexual violence crimes, notably against Mr Ntaganda’s escort, were left “*largely unpunished*”;⁹³
- (d) the absence of any particular protection given to the UPC/FPLC youngest members;⁹⁴ and
- (e) that the practice of sexual violence was “*generally known and discussed within the UPC/FPLC*”.⁹⁵

43. It was “*on the basis of all the above circumstances*” that the Trial Chamber concluded beyond reasonable doubt that “*Mr Ntaganda meant for the UPC/FPLC soldiers and commanders to engage in the relevant conducts, and was aware that, in the ordinary course of events, and during the relevant period, in relation to the consequence, children under the age of 15 years [...] would be raped and subjected to sexual slavery (Counts 6 and 9), and was aware of the relevant circumstances*”.⁹⁶ Accordingly, even if [REDACTED]’s evidence was capable of proving that [REDACTED], which it is not, it could not have led the Trial Chamber to a different conclusion in respect of his *mens rea*.

44. [REDACTED].⁹⁷

45. [REDACTED]. [REDACTED],⁹⁸ [REDACTED].⁹⁹ This [REDACTED] was rejected by the Trial Chamber and the testimony of D-0251 was found not credible on this issue in light of the other evidence on the record.¹⁰⁰ Similarly, categorical statements such as those

⁹¹ *Idem*, paras. 407 and 1196.

⁹² *Ibid.*

⁹³ *Idem*, paras. 332, 411-412, and 1196.

⁹⁴ *Idem*, para. 1197.

⁹⁵ *Idem*, paras. 407 and 1197.

⁹⁶ *Idem*, para. 1198.

⁹⁷ [REDACTED] (unofficial translation).

⁹⁸ [REDACTED]: [REDACTED] and [REDACTED].

⁹⁹ See D-0251: [REDACTED].

¹⁰⁰ See the Judgment, *supra* note 1, [REDACTED].

provided by [REDACTED]¹⁰¹ that Mr Ntaganda [REDACTED] were similarly rejected as not credible by the Trial Chamber.¹⁰²

46. It follows that, had [REDACTED]’s evidence been available to the Trial Chamber, it would not have led it to issue a different judgment in whole or in part in relation to Counts 6 and 9.

(c) *[REDACTED]’s evidence could not have changed Mr Ntaganda’s conviction under Counts 14, 15 and 16*

47. The convictions entered against Mr Ntaganda under Counts 14, 15 and 16 do not appear among those which, according to the Defence, may be rendered unsafe by the proposed additional evidence.¹⁰³ In fact, [REDACTED]’s evidence does not affect the Trial Chamber’s findings, based on the totality of the evidence presented to it, that Mr Ntaganda was guilty of conscripting and enlisting children under the age of 15 in an armed group and using them to participate actively in hostilities.¹⁰⁴

48. As maintained throughout the trial, the charges concerning crimes against child soldiers have been pleaded and confirmed by reference to confined parameters and not, as suggested by the Defence, specific criminal acts.¹⁰⁵ Mr Ntaganda has been found responsible as an indirect co-perpetrator for conscripting and enlisting children under the age of 15 years into the UPC/FPLC between on or about 6 August 2002 and 31 December 2003¹⁰⁶ and for using children under the age of 15 to participate actively in hostilities between on or about 6 August 2002 and 30 May 2003; in the First Operation and in the UPC/FPLC assault on Bunia in May 2003,¹⁰⁷ as bodyguards for UPC/FPLC soldiers and commanders, including for Mr Ntaganda himself, and for UPC President Thomas Lubanga,¹⁰⁸ and to gather information about the opposing forces and MONUC personnel.¹⁰⁹

¹⁰¹ [REDACTED].

¹⁰² See *e.g.* the Judgment, *supra* note 1, [REDACTED].

¹⁰³ See the Request, *supra* note 6, paras. 50, 59, and 63.

¹⁰⁴ See the Judgment, *supra* note 1, p. 529.

¹⁰⁵ See the “Response to the Defence Closing Brief on behalf of the Former Child Soldiers”, [No. ICC-01/04-02/06-2304-Red](#), 7 November 2018, para. 22. See also the “Observations of the Common Legal Representative of the Former Child Soldiers on Part I of Mr Ntaganda’s Appeal against the Judgment pursuant to Article 74 of the Rome Statute”, *supra* note 86, para. 16.

¹⁰⁶ See the Judgment, *supra* note 1, paras. 1116-1124, 1133, and 1199.

¹⁰⁷ *Idem*, paras. 1125, 1128, 1133, and 1199.

¹⁰⁸ *Idem*, paras. 1126, 1129, 1133, and 1199.

¹⁰⁹ *Idem*, paras. 1127, 1130, 1133, and 1199.

49. [REDACTED]’s evidence as to [REDACTED] does not impact the Trial Chamber’s findings concerning his *mens rea* for crimes committed against children under the age of 15. The Legal Representative submits that the Trial Chamber could not and would not have accepted [REDACTED] blanket denial as to [REDACTED].¹¹⁰ Serious doubts exist as to the credibility of [REDACTED]’s declaration, including whether [REDACTED] is indeed the person [REDACTED].¹¹¹ Further, [REDACTED]. The date of birth is based primarily on [REDACTED]’s own declaration, with the *carte d’électeur* provided by [REDACTED] having limited if any corroborative value.¹¹² The date on which [REDACTED] allegedly joined the UPC/FPLC [REDACTED],¹¹³ while the Request states that “[REDACTED] *joined the [UPC] in [REDACTED] 2002*”.¹¹⁴ Coincidentally, this would mean that [REDACTED] joined the UPC/FPLC a few days after [REDACTED] at most.

50. Even assuming *arguendo* that the Trial Chamber could have found the newly-proffered evidence in this respect to be credible, and concluded that [REDACTED] was 15 years old at the relevant time, this would only discredit one of several items of corroborating evidence underlying its finding that [REDACTED] included individuals under the age of 15.¹¹⁵ [REDACTED]. [REDACTED].¹¹⁶ [REDACTED].¹¹⁷

51. [REDACTED].¹¹⁸ There is no basis for the Defence to suggest that the Trial Chamber could or would have opted for the uncorroborated blanket denials proffered by [REDACTED] instead of the totality of evidence that it chose to rely on to conclude that “*Mr Ntaganda’s escort comprised kadogos, including individuals under 15 years of age*”.¹¹⁹

52. Further, the presence of individuals under the age of 15 within Mr Ntaganda’s escort was just one of several elements taken into account by the Trial Chamber in concluding that he had the required *mens rea* for the crimes committed against child soldiers.¹²⁰ For instance, the Judgment refers to children under 15 years of age being trained as radio

¹¹⁰ [REDACTED].

¹¹¹ See *supra* paras. 27-31.

¹¹² The Trial Chamber found that the date of birth listed in electoral cards was based exclusively on information provided by the interested person to the relevant authorities and that child soldiers had an incentive to provide an inaccurate, earlier date of birth in order to obtain an electoral card and avoid difficulties. See the Judgment, *supra* note 1, para. 177 and footnote 211.

¹¹³ [REDACTED] (unofficial translation).

¹¹⁴ See the Request, *supra* note 6, para. 4.

¹¹⁵ See the Judgment, *supra* note 1, [REDACTED].

¹¹⁶ *Idem*, [REDACTED].

¹¹⁷ [REDACTED].

¹¹⁸ See the Judgment, *supra* note 1, [REDACTED].

¹¹⁹ *Idem*, para. 389.

¹²⁰ *Idem*, paras. 1190-1198.

operators at Mr Ntaganda's residence,¹²¹ and to his involvement in large scale recruitment drives, included by calling for young people to join the UPC/FPLC ranks and inviting individuals of all ages and sizes to join.¹²² Against this background, the Legal Representative submits that the Trial Chamber would not and could not have arrived at a different conclusion as to Mr Ntaganda's *mens rea* concerning the crimes under Counts 14, 15 and 16 upon examination of [REDACTED]'s proposed evidence.

V. CONCLUSION

53. The Defence submits that [REDACTED]'s additional evidence renders unsafe the verdicts entered under Counts 1-2, 3, 4-5, 6 and 9, which necessarily impacts the sentence imposed on Mr Ntaganda.¹²³ As demonstrated *supra*, the verdict would not be rendered unsafe by the recently-proffered evidence, which would thus have no impact on Mr Ntaganda's sentence. Accordingly the Legal Representative respectfully requests the Appeals Chamber to reject the Request.



Sarah Pellet
Common Legal Representative of the
Former Child Soldiers

Dated this 17th Day of September 2020
At The Hague, The Netherlands

¹²¹ *Idem*, para. 1191.

¹²² *Idem*, para. 1193.

¹²³ See the Request, *supra* note 6, para. 59.