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No.: ICC-01/04-02/06
Date: 30 October 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 with Confidential Annex I and Public Annex II

Public redacted version of “Prosecution response to ‘Defence request for admission of additional evidence on appeal’”, ICC-01/04-02/06-2582-Conf, 16 September 2020

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I. INTRODUCTION

1. Admitting additional evidence on appeal is an extraordinary remedy, reserved for exceptional cases where new evidence that could have had an impact on the Judgment becomes available only after trial despite the exercise of due diligence. Where such evidence was available or discoverable at trial, the evidence may only be admitted if compelling reasons are shown, such as that it would lead to a miscarriage of justice if the evidence were not admitted. This is so due to the corrective nature of appeals proceedings and the principle of finality. It is not a remedy intended to supplement the same evidence adduced during trial, or to correct strategic decisions such as deciding not to call witnesses who could provide the same testimony. Ntaganda's request to call [REDACTED] to testify—an alleged [REDACTED] who purportedly was 15 years of age at the time of the charges—and to admit [REDACTED] voter's card, seeks to do just that and should be rejected.¹ The Request does not meet the stringent requirements for admitting evidence on appeal under regulation 62 of the Regulations of the Court ("RoC").

2. *First*, the witness's anticipated evidence was available during trial. On 2 May 2017, Ntaganda informed Trial Chamber VI ("Chamber") that [REDACTED], who Ntaganda states is the same person as the witness whose evidence he now seeks to tender. Yet three months later on 15 August 2017 he said that [REDACTED]. Regardless, the same information was adduced during trial: Ntaganda called two [REDACTED] (D-0017 and D-0251) as well as one UPC soldier (D-0038), one UPC [REDACTED] (D-0080) and one [REDACTED] (D-0211) who gave the same information as this new witness is expected to provide. Further, on his list of anticipated trial witnesses, Ntaganda included a further nine [REDACTED] and more than 40 additional UPC soldiers, who, according to their summary of anticipated testimony, were going to provide the same information as this witness. In the end, Ntaganda chose not to call his other UPC escorts, soldiers and commanders as witnesses, submitting that it would be unnecessary since Ntaganda would testify, which he did. Ntaganda cannot make up for his trial decisions on appeal.

3. Further, Ntaganda fails to show that he acted with due diligence. Ntaganda's Request is devoid of any detail on the steps that he allegedly took to locate this witness during trial. The available record does not show that he apprised the Chamber of any particular difficulty in locating the witness or that he requested its assistance to ensure [REDACTED] testimony.

¹ ICC-01/04-02/06-2570-Red ("[Request](#)"); see ICC-01/04-02/06-2574-Conf (deciding to rule on the admissibility of the evidence under regulation 62(2)(a) and instructing the Prosecution to respond).

Ntaganda has equally failed to show diligence in the appeal proceedings. He allegedly located the witness on 20 May 2020, yet did not advance with a telephone or video screening of the witness until he could have a physical meeting on 18 August 2020, and then filed the Request very shortly before the scheduled appeals hearing.

4. *Second*, Ntaganda overstates the relevance of the witness's testimony to his grounds of appeal. [REDACTED] evidence is only minimally relevant to grounds 8, 9 and 11, and is irrelevant to the remaining grounds. The fact that this witness did not observe or know about certain events does not mean that they did not happen, as testified by other witnesses. Further, the witness lacks credibility. While [REDACTED] claims to be [REDACTED] in the [REDACTED], the [REDACTED] have confirmed that after a thorough search in its files, no trace of any individual with the name [REDACTED] has been found, and that consequently [REDACTED] is not [REDACTED]. If the witness is untruthful about this basic fact, the Appeals Chamber should have serious reason to doubt the remainder of [REDACTED] evidence. Moreover, the witness's account is also unreliable because it is contradicted by a wealth of credible evidence on the record. Similar testimony from other Defence witnesses was duly and carefully assessed by the Chamber before being rejected for lack of credibility. Further, [REDACTED] election card has low probative value. Such a card can be obtained based on a person's own account to the relevant authorities without supporting material or further verification. In fact, actual [REDACTED].

5. *Third*, even if this witness's evidence had been admitted at trial, it *could not*—and *would not*—have impacted the verdict, or Ntaganda's sentence. Evidence similar to that of this witness was submitted by the Defence, considered by the Chamber and found to lack credibility in light of the totality of the evidence. Ntaganda misrepresents the trial record and the Judgment. The Chamber found Ntaganda criminally responsible on the basis of several findings based on a solid foundation of credible evidence which it heard and assessed.

6. Accordingly, the regulation 62 requirements are not met and there are no compelling reasons to call the witness to testify and to admit [REDACTED] voter's card. Nor should [REDACTED] statement be admitted.² It does not meet the requirements under rule 68(2)—

² *Contra* [Request](#), p. 22 (alternative request).

the only vehicle to submit testimonial evidence at this stage other than *viva voce*,³ and Ntaganda has not cited this provision. The Request should be rejected.

II. CONFIDENTIALITY

7. Pursuant to regulations 23bis(2) of the RoC, the present response is classified as “confidential”. A public redacted version of this response will be filed in due course.

III. SUBMISSIONS

8. Ntaganda accepts the requirements for admission of evidence on appeal as developed by the Appeals Chamber.⁴ Yet he fails to meet them. In order to admit additional evidence on appeal, the ICC Appeals Chamber—and the Appeals Chambers of other international criminal tribunals—has required the following cumulative conditions to be met:⁵

9. *First*, the evidence must have been ‘unavailable’ at trial *in any form* and the Appeals Chamber must be convinced of the applicant’s diligence in attempting to obtain it.⁶ This requirement avoids disruptive and inefficient litigation strategies.⁷ In this case, the evidence was available (in this and other forms), and Ntaganda was not diligent.

10. *Second*, the proposed additional evidence must be shown to be relevant to a ground of appeal.⁸ While this witness’s testimony might be considered minimally relevant to grounds 8, 9 and 11, it is irrelevant to the other grounds. In addition, the witness lacks credibility and [REDACTED] election card is not reliable as to [REDACTED] age and has low probative value.⁹

³ [Bemba et al. AJ](#), para. 581.

⁴ [Request](#), para. 11.

⁵ Since the criteria for admission of evidence on appeal at the ICC are largely similar to the criteria in the *ad hoc* tribunals, ICC Chambers can seek guidance from that jurisprudence: [Lubanga AJ](#), para. 63. See rules 115 ([ICTY](#), [ICTR](#), [SCSL](#)), rule 142 ([MICT](#)) and Internal Rule 108(7) ([ECCC](#)).

⁶ See Bianchi and Onsea, ‘Additional Evidence on Appeal, Review Proceedings, and the Remedy of Reconsideration’, in Khan, Buisman and Gosnell, *Principles of Evidence in International Criminal Justice* (OUP, 2010) (“Bianchi/Onsea”), p. 729 (“The test regarding availability is two-fold, requiring the moving party to demonstrate that the evidence was not available at trial in any form whatsoever and that it could not have been discovered through the exercise of due diligence”).

⁷ [Case 002/01 Appeal Judgement](#), para. 23.

⁸ [Bemba et al. AJ](#), para. 509 (citing [Lubanga AJ](#), para. 54); [Bemba Second SAJ](#), para. 22.

⁹ The Appeals Chamber has 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: [Lubanga AJ](#), para. 54.

11. *Third*, Ntaganda must demonstrate that the additional evidence, had it been presented at trial, could have led the Trial Chamber to enter a different verdict, in whole or in part.¹⁰ The evidence must be of such importance that, considered in the context of the entirety of the evidence at trial, it could demonstrate that the conviction was unsafe.¹¹ In this case, there is no such possibility, and much less a realistic one.¹² The witness's evidence *could not*—and *would not*—have had an impact on the conviction. The Chamber thoroughly considered similar evidence and found it to be unreliable. Moreover, Ntaganda's convictions do not depend on a single finding or item of evidence.

12. Absent meeting the above criteria, Ntaganda must show that compelling reasons exist to nevertheless admit the evidence, such as that it would cause a miscarriage of justice.¹³ As shown below, Ntaganda has not demonstrated this: the evidence *could not*, and *would not*, have led to a different outcome. In sum, Ntaganda has failed to discharge his burden of establishing that the requirements under regulation 62 are met,¹⁴ and there are no compelling reasons to admit the evidence.¹⁵ Ntaganda has been properly tried and duly convicted and sentenced. His bald attempt to re-open the evidentiary phase of the trial shortly before the appeals hearing should not be allowed.¹⁶ Consistently with the corrective nature of appeal proceedings¹⁷ and the principle of finality¹⁸ the Request must be rejected, the proposed

¹⁰ [Bemba et al. AJ](#), para. 509 (citing [Lubanga AJ](#), para. 58-59); [Bemba Second SAJ](#), para. 21; [Kupreškić AJ](#), paras. 68-69.

¹¹ [Nahimana Additional Evidence Decision](#), 12 Jan 2007, para. 8 (“To satisfy this requirement, the evidence must be such that it could have had an impact on the verdict, i.e. it could have shown that a conviction was unsafe. Accordingly, the additional evidence must be directed at a specific finding of fact related to a conviction or to the sentence”); [Sesay Additional Evidence Decision](#), para. 9.

¹² [Simić AJ](#), para. 226 (“In making this determination, the Appeals Chamber has had to ascertain whether—considered in the context of the evidence which was given at the Appellant’s trial and not in isolation—there is a realistic possibility that the verdict might have been different if the additional evidence had been before the Trial Chamber”); see also [Popović Additional Evidence Decision](#), 20 Oct 2011, para. 9; [Nahimana Decision on Motion for Leave](#), 8 Dec 2006, para. 6; [Case 002/01 Appeal Judgement](#), paras. 27-30; [Kupreškić Additional Evidence Second Decision](#), 11 April 2001, para. 6 (“The Appeals Chamber has interpreted this latter criterion to mean that had the Trial Chamber had such evidence before it, it probably would have come to a different result”).

¹³ [Lubanga AJ](#), para. 62; similarly, the *ad hoc* tribunals have admitted evidence on appeal if the applicant establishes that the exclusion of the evidence would amount to a miscarriage of justice; that is: had the additional evidence been adduced at trial, it *would* have had an impact on the verdict: [Popović Additional Evidence Decision](#), 20 Oct 2011, para. 10. The Appeals Chamber has however underscored that it would only admit evidence available or discoverable with the exercise of due diligence in ‘wholly exceptional situations: [Kupreškić Additional Evidence First Decision](#), 26 Feb 2001, para. 18.

¹⁴ [Tadić Additional Evidence Decision](#), 15 Oct 1998, para. 52; *contra* [Request](#), paras. 15-65.

¹⁵ *Contra* [Request](#), para. 65.

¹⁶ Bianchi/Onsea, p. 724 (“The process underlying Rule 115 has been said to be a sharply delineated proceeding for entering discrete, specific evidence into the record, and is not intended to be a trial within a trial that opens the door to the exploration of every issue that might be raised during the hearing”).

¹⁷ The Appeals Chamber has consistently underscored: ‘due consideration shall be given to the distinct features of the appellate stage of proceedings, in particular, as concerns the corrective nature of appeal proceedings and

witness should not be allowed to testify and the voter's card should not be admitted. Nor can [REDACTED] statement be admitted.¹⁹ It does not meet the requirements under rule 68(2), and Ntaganda has not cited this provision.²⁰

II.A. The information was available at trial and Ntaganda was not diligent

13. *First*, the information that Ntaganda seeks to admit as additional evidence on appeal was *available* at trial. On 2 May 2017, Ntaganda informed the Trial Chamber that “[REDACTED]” (allegedly the same person whose evidence Ntaganda now seeks to admit on appeal) was potential witness [REDACTED].²¹ He stated that [REDACTED].²² Yet in a second filing on 15 August 2017,²³ Ntaganda stated—[REDACTED].

14. Regardless of these inconsistencies, the same information that the proposed witness provides was *available in other forms* from similarly situated witnesses. As described below, other Defence witnesses—who held similar positions [REDACTED]—testified on the same topics as this witness.²⁴ Moreover, Ntaganda included in his (final) trial witness list (with 111 witnesses) *nine* [REDACTED] members of his escort (D-0005, D-0010, D-0020, D-0022, D-0025, D-0027, D-0104, D-0112) and more than 40 additional UPC soldiers²⁵ who were supposed to testify along the same lines as this witness, such as to the absence of sexual violence among the UPC ranks, their travel [REDACTED] to Mongbwalu and participation in the assault, what they observed at the *Appartements*, their visit to [REDACTED], their experience as Ntaganda's escorts and knowledge of other escorts, living conditions and discipline in the UPC, knowledge of P-0010 and Ntaganda's attitude towards his escorts.²⁶ Yet, Ntaganda decided not to call these witnesses, and stated that it was on the basis of his

the principle that evidence should, as far as possible, be presented before the Trial Chamber, which has the primary responsibility for evaluating the evidence': see *Bemba et al. AJ*, para. 509 (citing *Lubanga AJ*, paras. 55-57); *Bemba Second SAJ*, para. 21; see also *Case 002/01 Appeal Judgement*, para. 29.

¹⁸ *Tadić Additional Evidence Decision*, 15 Oct 1998, para. 35; see also *ICC-02/11-01/15-1376-Anx*, para. 9 (referring to “the unique principle of public policy which requires that litigation must stop at some point”).

¹⁹ *Contra Request*, p. 22 (alternative request).

²⁰ *Bemba et al. AJ*, para. 581 (“Evidence which is testimonial in nature is thus inadmissible—irrespective of the “purpose” for which it would be relied upon by a party—when not elicited orally or when the conditions for the introduction of the prior recorded testimony specifically provided for in the Court's applicable law are not met.”)

²¹ Ntaganda does not explain how the reference to two different names in fact refers to one and the same person.

²² ICC-01/04-02/06-1886-Conf-Red, para. 13; cited in *Request*, para. 16.

²³ ICC-01/04-02/06-2009-Conf, para. 4 and ICC-01/04-02/06-2009-Conf-AnxA-Red; see *Request*, fns. 18-19.

²⁴ See below paras. 23-30. The Prosecution would use “UPC” to refer to “UPC/FPLC”.

²⁵ D-0004, D-0012, D-0018, D-0019, D-0021, D-0023, D-0024, D-0026, D-0034, D-0035, D-0036, D-0040, D-0041, D-0046, D-0050, D-0051, D-0065, D-0067, D-0068, D-0069, D-0070, D-0071, D-0072, D-0073, D-0077, D-0078, D-0079, D-0089, D-0092, D-0093, D-0097, D-0099, D-0103, D-0105, D-0107, D-0110, D-0111, D-0113, D-0125, D-0132, D-0142, D-0147, D-0170.

²⁶ ICC-01/04-02/06-1881-Conf-AnxB, pp. 5-6 (D-0005), 7-8 (D-0010), 18 (D-0020), 20 (D-0022), 23 (D-0025), 26-27 (D-0027), 92 (D-0104), 99 (D-0112).

own testimony—therefore a strategic choice.²⁷ Ntaganda cannot now amend his defence trial strategy, and should accept the consequences of his trial decisions. Admitting the proposed testimony or statement would allow for litigation strategies that the Appeals Chamber in *Lubanga* sought to avoid.²⁸

15. *Second*, Ntaganda was not diligent. Although he claims that he was unable to locate the witness,²⁹ he does not set out the steps that he allegedly took at trial to call the witness and to discharge his duty of diligence.³⁰ The two affidavits do not provide any such information.³¹ Merely alleging “numerous and consistent efforts” until April 2018 is not sufficient for the Appeals Chamber to find that he was diligent.³² Ntaganda could have resorted to existing mechanisms to bring this evidence before the Chamber.³³ He could have sought cooperation from the DRC authorities and/or an order from the Chamber pursuant to article 57(3)(b). He does not state that he did so, nor does the record available to the Prosecution show that he ever apprised the Chamber of difficulties in locating the witness or obtaining [REDACTED] testimony.³⁴

16. Ntaganda shows a similar lack of due diligence on appeal. Having located the witness around [REDACTED],³⁵ it is unclear why he only contacted [REDACTED] by telephone on [REDACTED]³⁶ and then waited to screen [REDACTED] in person on [REDACTED].³⁷ Even bearing in mind the Covid-19 situation, he could have contacted [REDACTED] or screened [REDACTED] remotely by telephone or video conference earlier than he did.³⁸

²⁷ The Defence reduced the number of witnesses it intended to call on 6 and 27 September 2017 stating that it was done “on the basis of Mr Ntaganda’s testimony heard thus far”: ICC-01/04-02/06-2045-Conf, paras.12-14.

²⁸ [Lubanga AJ](#), para. 75; *see also* paras. 57-58.

²⁹ [Request](#), para. 18.

³⁰ [Kupreškić AJ](#), para. 60.

³¹ Annexes B and C to the [Request](#).

³² [Request](#), para. 18; *see* Annex B, para. 5 (the person responsible for field investigations left in April 2018).

³³ Bianchi/Onsea, p. 729 (“The moving party must detail the steps taken by counsel at trial to fulfil the duty of due diligence, demonstrating that appropriate use was made of all mechanisms of protection and compulsion available under the ICTY and ICTR Statutes and [...] Rules to bring evidence before the trial chamber” citing [Milošević Additional Evidence Decision](#), 8 Sept 2009, para. 7); [Sesay Additional Evidence Decision](#), para. 7.

³⁴ [Ntagerura Additional Evidence Decision](#), 10 Dec 2004, para. 9; [Sesay Additional Evidence Decision](#), para. 14.

³⁵ Annex C to [Request](#), para. 12.

³⁶ Annex C to [Request](#), para. 13.

³⁷ Annex C to [Request](#), para. 16.

³⁸ Annex C to [Request](#), para. 12.

17. In sum, since the witness's evidence was available and Ntaganda has not shown he was diligent, the Request should be rejected on this basis alone.³⁹

III.B. The proposed evidence is partially relevant to the grounds of appeal, lacks credibility, is unreliable and is of low probative value

18. Ntaganda argues that the proposed statement is relevant to grounds 4 to 5 (widespread/systematic attack against civilian population and organisational policy), 7 (assessment of Ntaganda's testimony), 8 (crimes during the First Operation), 9 (children under 15 in Ntaganda's escort), 11 (rapes and sexual violence of UPC members, including children under 15) and 14-15 of his appeal (Ntaganda's *mens rea*).⁴⁰ While the statement may be somewhat related to grounds 8, 9 and 11, it is irrelevant to the remaining grounds. That the witness did not observe certain events and/or has no knowledge about them does not mean that [REDACTED] testimony supports Ntaganda's account and is thereby relevant to his grounds of appeal. To the contrary, it shows that the witness' testimony is irrelevant to his arguments on appeal.

19. Further, the proposed evidence lacks *prima facie* credibility, is unreliable and is of low probative value. *First*, the witness' credibility is in serious doubt. While [REDACTED] states that [REDACTED] is a [REDACTED],⁴¹ as set out in Annex I, the DRC authorities have confirmed that after comprehensive verification in their records, they can find no trace of a person with this identity [REDACTED], and that consequently, [REDACTED].⁴² If [REDACTED] is untruthful on this basic fact, the Appeals Chamber should have serious reason to doubt the remainder of [REDACTED] statement, including the request for protective measures and confidential testimony. Before putting forward [REDACTED] evidence due diligence dictates that the Defence ought to have verified with the [REDACTED] that [REDACTED]. Furthermore, as developed below, [REDACTED] evidence is contradicted by a wealth of credible evidence that the Chamber heard and accepted at trial.

³⁹ The *Lubanga* Appeals Chamber rejected the two Defence requests for additional evidence on this basis: [Lubanga AJ](#), paras. 78-79 (finding that the two proposed witnesses could have been presented at trial), 92.

⁴⁰ [Request](#), paras. 41-48.

⁴¹ Proposed Statement (Annex A to [Request](#)), para. 12; *see also* 64.

⁴² Annex I. *See also* para. 20. DRC law prohibits active members of the military being able to vote and to be registered on the voters' list. [REDACTED] voter's card is further evidence that [REDACTED] is not in the FARDC.

20. *Second*, the voter's card is not reliable and thus not probative of [REDACTED] age. As a letter by the DRC Ministry of the Interior in Annex II explains, the information in election cards is purely declaratory, does not require written proof to corroborate it and cannot be considered as sufficiently reliable to establish an individual's civil status, in particular the date of birth.⁴³ The Chamber in *Ntaganda* afforded very low probative value to birth dates provided in official documents—such as election cards—produced on the basis of the witness' account alone (or that of their parents) without further verification of the information provided.⁴⁴ The Trial Chamber in *Lubanga* likewise found that the UPC had recruited children under 15 years of age without relying on official documents,⁴⁵ after the Parties and participants submitted that election cards had low probative value because they were provided on the basis of the person's account without verification of their date of birth.⁴⁶ In addition, if the proposed witness were indeed [REDACTED], as [REDACTED] alleges, [REDACTED] should not have obtained a voter's card given the prohibition under DRC law on [REDACTED].⁴⁷

21. Thus, since the proposed evidence lacks *prima facie* credibility, the Request should be rejected on this basis too.

II.C. The evidence has no impact on the convictions and sentence

22. The gist of the Request is that the witness's evidence undermines certain findings of Ntaganda's direct participation in the commission of crimes, which were considered by the Chamber to establish his *mens rea*. According to Ntaganda, his convictions for counts 1 to 6 and 9 are therefore unsafe and the sentence is likewise affected.⁴⁸ This is incorrect. The proposed evidence *could not*, and even if admitted, *would not*, have any impact on Ntaganda's convictions and sentence. This evidence is repetitive of other Defence evidence found by the Trial Chamber to lack credibility when considered against the volume of credible Prosecution evidence. Further, Ntaganda's convictions were based on several

⁴³ Annex II. This letter was adduced as rebuttal in the *Lubanga* appeal ([ICC-01/04-01/06-2969-Anx2-Red](#)). See English translation: [ICC-01/04-01/06-2969-Conf-Anx2-tENG](#). Ntaganda has access to the *Lubanga* case record.

⁴⁴ [Judgment](#), para. 86; see also, paras. 93 (fn. 211: regarding P-0010 and D-0172, who obtained electoral cards on the basis of incorrect information provided by P-0010 and D-0172's father, respectively), 152 (fn. 357: based on P-0768's own account).

⁴⁵ [Lubanga AJ](#), para. 188.

⁴⁶ [Lubanga TJ](#), fn. 441; see [ICC-01/04-01/06-2748-Red](#), paras. 425 (fn. 1244), 368 (fn. 1017), 399 (fn. 1153).

⁴⁷ [Loi n° 06/006 du 09 mars 2006](#), art. 7 (prohibiting members from the armed forces and police from voting); [Loi n° 04/028 du 24 décembre 2004](#), art. 9 (providing that active military and police personnel cannot be registered in the voters' list).

⁴⁸ [Request](#), paras. 49-66.

findings founded on numerous corroborating pieces of evidence, and not only on the testimony of witnesses P-0010, P-0017 and P-0768 whose credibility Ntaganda unsuccessfully seeks to impugn with this Request. Nor was Ntaganda's *mens rea* determined solely from his direct participation in crimes.

(a) The proposed evidence is repetitive of evidence considered at trial

23. The proposed evidence is repetitive of the following Defence evidence, which was found to lack credibility in light of the totality of the evidence presented.

24. **D-0251** was one of Ntaganda's female escorts who allegedly knew P-0010⁴⁹ and [REDACTED].⁵⁰ Although she testified that P-0010 and [REDACTED] were small and she did not know their ages, she said that neither P-0010⁵¹ nor any of the persons staying with Ntaganda were under 15 years of age⁵² and that she never heard of rape committed by UPC soldiers.⁵³ The Chamber considered "D-0251's categorical statements on these issues not credible, notably in light of the other evidence on the record".⁵⁴

25. **D-0017** was a UPC member who worked as a bodyguard for a UPC commander and for Ntaganda.⁵⁵ He testified, *inter alia*, about his role and activities as Ntaganda's bodyguard and his involvement in various operations,⁵⁶ including his departure from Bunia to Mongbwalu with Ntaganda.⁵⁷ He stated that the minimum age for recruits was 18 years.⁵⁸ He presented the living conditions in the Mandro camp as very positive⁵⁹ and denied any UPC crimes.⁶⁰ He denied that Ntaganda had sexual relations with escorts,⁶¹ challenged P-0010's self-identification in the Rwampara video,⁶² [REDACTED].⁶³ The Chamber found that his

⁴⁹ [Judgment](#), para. 103 (fn. 213)

⁵⁰ [T-260-Conf](#), 20 (see [REDACTED]). See D-0251 summary: ICC-01/04-02/06-2052-Conf-AnxC, pp. 2-3.

⁵¹ [Judgment](#), para. 94 (fn. 213, further noting that "D-0251's evidence on other aspects of the case is contradicted by a number of other witnesses whom the Chamber has found credible. Accordingly, the aforementioned statements did not affect the Chamber's conclusion concerning P-0010's date of birth").

⁵² [Judgment](#), fn. 1099 (noting "D-0251's categorical denial of the presence of people under the age of 15 in Mr Ntaganda's compound"); see [T-260](#), 23:1-16 and 20:1-7.

⁵³ [Judgment](#), para. 103, fn. 248 ([T-260-Conf](#), 33-34)

⁵⁴ [Judgment](#), para. 103, fn. 248 ([T-260-Conf](#), 33-34)

⁵⁵ ICC-01/04-02/06-1881-Conf-AnxB, pp. 13-14.

⁵⁶ [Judgment](#), para. 250.

⁵⁷ See e.g. [T-253](#), 43:3-21.

⁵⁸ [Judgment](#), para. 253.

⁵⁹ [Judgment](#), paras. 253 and 375 (at fn. 1057).

⁶⁰ [Judgment](#), para. 254.

⁶¹ [Judgment](#), para. 103 (fn. 246 referring to [Defence Closing Brief](#), paras. 1275-1276, referring to [T-254](#), 39).

⁶² [Judgment](#), para. 104 (fn. 260 referring to [T-253](#), 59-60).

⁶³ [REDACTED].

evidence contradicted “the consistent evidence provided by a number of credible witnesses”⁶⁴ and noted D-0017’s concern not to provide incriminating evidence with respect to Ntaganda, whom he considered to be an ‘elder brother’.⁶⁵ The Chamber found that D-0017’s evidence was not credible,⁶⁶ except when he spontaneously named P-0010 as being one of the people present during the first assault in Mongbwalu.⁶⁷

26. **D-0038** was a UPC member.⁶⁸ The Chamber did not rely on D-0038’s challenge to P-0010’s self-identification in the Rwampara video.⁶⁹ It likewise did not accept his testimony that recruits were asked about their age and those under 18 years were sent away.⁷⁰ D-0038 corroborated Ntaganda regarding the meaning of the expression ‘*kupiga na kuchaji*’, but the Chamber did not find it credible in light of evidence that soldiers understood this expression to mean “attacking all the Lendu, including civilians, and to loot their property”.⁷¹

27. **D-0080** was a UPC member from [REDACTED] and became [REDACTED]⁷² whose statement was admitted under rule 68(2)(c).⁷³ He gave evidence on Ntaganda’s visit to the Rwampara camp on 12 February 2003.⁷⁴ The Chamber did not consider D-0080’s account that the living conditions at Rwampara were good and that they were ‘*une grande famille*’ to be credible; instead it found that the conditions were as harsh as in the other camps.⁷⁵ Similarly, the Chamber did not consider D-0080’s evidence credible that sexual relations among recruits or instructors were prohibited, and that he had no knowledge of any failure to respect this policy.⁷⁶

28. **D-0211** was an [REDACTED].⁷⁷ She testified that P-0010 was not under 15 years when she was in the UPC.⁷⁸ The Chamber considered D-0211’s account but did not rely on it. With respect to P-0010’s age, the Chamber did not find beyond reasonable doubt that P-0010 was under 15 at the time of the events “independently of the testimony of [D-0251 and D-0211]”

⁶⁴ [Judgment](#), para. 254.

⁶⁵ [Judgment](#), para. 252.

⁶⁶ [Judgment](#), para. 255.

⁶⁷ [Judgment](#), para. 251 (fn. 631).

⁶⁸ ICC-01/04-02/06-1881-Conf-AnxB, p. 35.

⁶⁹ [Judgment](#), para. 104 (fn. 260 referring to T-250-Conf, 7-8 and [Defence Closing Brief](#), para. 1277 (fn. 3692)).

⁷⁰ [Judgment](#), para. 361 (fn. 998).

⁷¹ [Judgment](#), para. 415; see fn. 1189.

⁷² ICC-01/04-02/06-1881-Conf-AnxB, pp. 79-80.

⁷³ [ICC-01/04-02/06-2242-Red](#), para. 32; see also [ICC-01/04-02/06-2100-Red](#).

⁷⁴ [Judgment](#), para. 369 (fn. 1025).

⁷⁵ [Judgment](#), para. 375 (fn. 1056).

⁷⁶ [Judgment](#), para. 407 (fn. 1157).

⁷⁷ ICC-01/04-02/06-1881-Conf-AnxB, pp. 137-138.

⁷⁸ [Judgment](#), para. 94 (fn. 213).

because the related documentary evidence referred to five different dates of birth.⁷⁹ D-0211 testified that P-0010 did not tell her she was raped; yet the Chamber assessed the nature of their friendship, the fact that they never discussed certain topics, and delayed reporting of rape and found it understandable that P-0010 may not have told D-0211 of her rape.⁸⁰

29. **D-0300** (Ntaganda) testified, *inter alia*, that his escort did not include persons under 18 years of age,⁸¹ that sexual relations and rape were not accepted,⁸² that P-0010 was not in his escort,⁸³ that the expression ‘*kupiga na kuchaji*’ was a legitimate military expression without criminal meaning,⁸⁴ that he did not order the killing of two civilians, that he did not kill the *Abbé* in the *Appartements*,⁸⁵ that the UPC did not use anti-personnel mines,⁸⁶ and that he never discussed the killings in Kobu with G2.⁸⁷ The Chamber considered his testimony on these points to lack credibility.

30. In sum, the Chamber heard from a number of Defence witnesses and considered their evidence about the conditions at the UPC camps, the age of the recruits, sexual violence among UPC ranks (including rape perpetrated by Ntaganda), the UPC operations and assaults, challenges to P-0010’s experiences as Ntaganda’s escort, and her testimony regarding Ntaganda’s visit to the Rwampara camp. However, and in light of other credible evidence, the Chamber did not rely on these Defence witnesses’ accounts. Had this “new” witness evidence on the same topics been admitted at trial, it *could not*—and *would not*—have impacted Ntaganda’s conviction and sentence. Moreover, Ntaganda had more than 50 UPC soldiers, commanders and his former escorts on his witness list, waiting to be called to provide the same evidence. Ultimately, he chose not to call them. Calling a “new” witness only to supplement evidence he opted not to call—or did call—is impermissible. The Request must be rejected on this basis.

(b) Ntaganda’s convictions were based on numerous items of credible evidence

31. Further, Ntaganda misrepresents the Judgment and the trial record. Ntaganda’s convictions were based on several findings premised on a wide range of credible evidence

⁷⁹ [Judgment](#), paras. 93-94.

⁸⁰ [Judgment](#), para. 103.

⁸¹ [Judgment](#), para. 387 (fn. 1099).

⁸² [Judgment](#), para. 407 (fn. 1158).

⁸³ [Judgment](#), para. 407 (fn. 1158).

⁸⁴ [Judgment](#), para. 415 (fns. 1189-1191).

⁸⁵ [Judgment](#), paras. 528 (fn. 1574), 533 (fns. 1594-1596).

⁸⁶ [Judgment](#), paras. 524 (fn. 1558) and 334 (fn. 906).

⁸⁷ [Judgment](#), para. 638 (fn. 2035).

(documentary and testimonial).⁸⁸ Ntaganda's bare assertions that this witness's evidence "undermines", "defeats" or "renders unsafe" the following findings of the Chamber is plainly wrong.⁸⁹ In particular:

(i) *The UPC (and Ntaganda's escort) included recruits under 15 years old*

32. Ntaganda misrepresents the Chamber's findings regarding the presence of recruits under 15 years of age among the UPC ranks, including those accompanying Ntaganda during his visit to the Rwampara camp on 12 February 2003.⁹⁰ The witness's evidence that [REDACTED]⁹¹ and that [REDACTED] could not impact the Chamber's findings⁹²—and is unreliable.

33. *First*, the Chamber relied on a large volume of corroborating evidence to conclude that children under the age of 15 were among the UPC ranks:⁹³ namely, (a) testimony from P-0010 and P-0888, both members of Ntaganda's escort;⁹⁴ testimony from P-0898, a boy under 15 years old when recruited by the UPC, who personally knew three of Ntaganda's escorts who were also under 15 years old;⁹⁵ and testimony from nine other witnesses who had been in regular contact with, or who had sufficient opportunities to observe, those serving in Ntaganda's escort;⁹⁶ and (b) the Chamber's own assessment of four video extracts (including of three video extracts of Ntaganda's visit to the Rwampara camp) in which P-0010 and P-0898 identified three individuals in Ntaganda's escort as under the age of 15.⁹⁷

34. *Second*, the Chamber considered (and rejected) Defence evidence that there were no escorts under 15 years with Ntaganda during his visit to the Rwampara camp in February

⁸⁸ *Gbao* Additional Evidence Decision, 5 Aug 2009, paras. 24, 31 (noting that none of Gbao's convictions were based on the witness's testimony alone); [Popović Additional Evidence Decision](#), 20 Oct 2011, para. 39 ("These findings were made on the basis of numerous pieces of evidence, none of which are directly contradicted by the contents of the tendered Report. The fact that this Report does not mention that it was intended to murder the Bosnian Muslim men does not, in and of itself, prove that there was no such plan or that Popović did not know about it").

⁸⁹ [Request](#), paras. 28-40.

⁹⁰ [Request](#), paras. 29, 33(ii)-(iv) (referring to [Judgment](#), paras. 387, 391, 394); fn. 42 of the [Request](#) erroneously refers to para. 1115 of the [Judgment](#); instead, it should refer to fn. 1185.

⁹¹ Proposed Statement, paras. 66-70.

⁹² Proposed Statement, paras. 37-51.

⁹³ [Judgment](#), paras. 386-391. In *Lubanga*, Trial Chamber I followed the same approach: [Lubanga AJ](#), para. 188.

⁹⁴ [Judgment](#), para. 386. The Chamber noted that the testimony of the two witnesses cannot alone support a finding that Ntaganda's escort included individuals under 15.

⁹⁵ [Judgment](#), paras. 388, 391.

⁹⁶ P-0290, P-0017, P-0016, P-0768, P-0055, P-0901, P-0030, P-0014; P-0041. [Judgment](#), paras. 389-391.

⁹⁷ [Judgment](#), paras. 387-388.

2003 (D-0017, D-0251 and D-0300).⁹⁸ Likewise, the Chamber considered (and rejected) Defence evidence challenging P-0010's account that she was in Ntaganda's escort including during the period of the First Attack in November 2002 and her self-identification in the Rwampara video, preferring P-0010's testimony over the unreliable Defence evidence.⁹⁹ Ntaganda had on his witness list the [REDACTED] whom he claims is the person [REDACTED],¹⁰⁰ but he chose not to call her. Accordingly, the proposed witness's evidence could not, and would not, impact the Chamber's findings.

(ii) *Female UPC members were raped and sexually abused, including by Ntaganda*

35. Ntaganda misrepresents the Chamber's findings on sexual violence in the UPC.¹⁰¹ The witness's account that the living conditions in UPC camps was good and that Ntaganda did not rape [REDACTED] or any of his escorts has no impact on the Chamber's findings¹⁰²— and is unreliable. P-0010's testimony that Ntaganda [REDACTED] other female escorts, and that sexual violence was prevalent, is fully consistent with the evidence of at least 18 other witnesses who testified that female UPC members (including children under 15 years) were regularly raped and subjected to sexual violence by male UPC members.¹⁰³ The Chamber considered (and rejected) Defence evidence denying sexual violence by Ntaganda and in the UPC ranks generally (D-0251, D-0017, D-0080 and D-0300).¹⁰⁴ The proposed witness's testimony could not, and would not, impact these findings.

(iii) *Ntaganda participated in recruitment rallies*

36. Ntaganda argues that P-0010's evidence that Ntaganda called upon people to enrol in the UPC (including children) on his way to Mongbwalu is 'wrong' or 'unsafe', based on the "new" statement.¹⁰⁵ However, the witness does not contradict such finding, nor does [REDACTED] appear to even have been questioned on this topic. The bare fact that [REDACTED] allegedly [REDACTED] to Mongbwalu, without more, does not mean that

⁹⁸ [Judgment](#), para. 387 (fn. 1099, referring to D-0017, D-0251 and D-0300 and [Defence Closing Brief](#), paras. 1306, 1327 and 1529); *contra* [Request](#), paras. 32 and 33(ii).

⁹⁹ [Judgment](#), paras. 91, 99-101 (fn. 239: citing D-0017) and 104 (fn. 260: citing D-0017, D-0038 and D-0300).

¹⁰⁰ ICC-01/04-02/06-1881-Conf-AnxB, pp. 7-8 (D-0010).

¹⁰¹ [Request](#), paras. 30, 38, 56-59.

¹⁰² Proposed Statement (Annex A to [Request](#)), paras. 52-59, 68.

¹⁰³ [Judgment](#), para. 407 (fns. 1155-1160) and 408-411 (fns: 1161-1175): P-0901, P-0907, P-0365, P-0887, P-0901, P-0898, P-0888, P-0963, P-0010, P-0016, P-0758, P-0883, P-0017, P-0963, P-0031, P-0046, P-0768, P-0055; *contra* [Request](#), para. 33 (viii) and (ix).

¹⁰⁴ [Judgment](#), para. 407 (fns. 1157-1158: citing D-0080, D-0251 and D-0300; the Chamber did not rely on P-055's account that he only heard of one case of rape); *see also* paras. 102-103 (considering D-0211 and D-0251).

¹⁰⁵ [Request](#), para. 33(i) referring to [Judgment](#), para. 359 (fn. 993).

Ntaganda did not recruit in the manner described.¹⁰⁶ Moreover, the Chamber's finding that Ntaganda participated in recruitment rallies is based on several incidents and witnesses.¹⁰⁷ This "new" evidence therefore could not, and would not, impact this finding.

(iv) *Ntaganda issued instructions to attack the Lendu in Mongbwalu*

37. The Chamber relied on P-0010's evidence to find that "the night before leaving Bunia for the First Operation, Mr Ntaganda spoke to some of the UPC 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*'".¹⁰⁸ Ntaganda argues that the proposed evidence undermines this finding.¹⁰⁹ However, that [REDACTED]¹¹⁰ does not detract from the speech heard by P-0010 the night before their departure.¹¹¹ Nor does the proposed witness actually deny that it took place (as [REDACTED] says nothing at all on the point). The Defence equally opted not to ask D-0017 about it during his testimony, a witness who allegedly accompanied Ntaganda from Bunia to Mongbwalu.¹¹² Ntaganda cannot amend his trial shortcomings on appeal.

38. Further, Ntaganda ignores that P-0010's evidence is consistent with the Chamber's findings on Ntaganda's role as the overall commander in the Mongbwalu operation on the basis of corroborated reliable evidence, where he issued similar instructions ("to attack 'the Lendu' [...] without making a difference between 'Lendu civilians' and the militia")¹¹³ and issued orders to fire heavy weapons and which objects to shoot.¹¹⁴ The "new" evidence could not, and would not, impact this finding.

(v) *Murders and rapes committed in Mongbwalu at the Appartements*

39. In suggesting that the proposed statement confirms that no crimes occurred in the *Appartements*, Ntaganda misrepresents the evidence and the Judgment.¹¹⁵ The witness's

¹⁰⁶ Proposed Statement, para. 27.

¹⁰⁷ The Chamber found that "on at least three occasions, [Ntaganda] made public calls to the population to join the UPC/FPLC" and also relied on P-0918 and P-0769. See [Judgment](#), para. 830 citing paras. 356-359.

¹⁰⁸ [Judgment](#), para. 484.

¹⁰⁹ [Request](#), paras. 33 (xi), 35, 51(i).

¹¹⁰ Proposed Statement (Annex A to [Request](#)), para. 27.

¹¹¹ [Judgment](#), para. 484.

¹¹² See e.g. [T-253](#), 32:11-40:6.

¹¹³ See [Judgment](#), paras. 493, 1181.

¹¹⁴ [Judgment](#), para. 491; see also paras. 485, 488, 494-499, 560-561, 671, 688.

¹¹⁵ *Contra* [Request](#), paras. 36, 39, 51(ii)-(iii) and 55(i), (iii).

vague account that “[REDACTED]”¹¹⁶ could not, and would not, impact the Chamber’s findings on the crimes committed in the *Appartements*.

40. *First*, P-0017 was uniquely placed to testify about Ntaganda’s order to kill two civilians in the *Appartements*: [REDACTED].¹¹⁷ Other witnesses (P-0907, P-0963, P-0887, and P-0898)¹¹⁸ reliably and consistently testified about the murder of prisoners at the *Appartements*.¹¹⁹ The Chamber considered and rejected Ntaganda’s testimony that only one person was taken prisoner during the First Operation.¹²⁰

41. *Second*, Ntaganda incorrectly asserts that the Chamber only relied on P-0017 to find that “UPC/FPLC soldiers and commanders, including Mr Ntaganda, who were openly carrying their weapons, brought women that witnesses referred to as ‘civilians’ back to the *Appartements* camp.”¹²¹ The Chamber also relied on the consistent evidence of three additional witnesses (P-0907, P-0888, P-0887)¹²² who testified that women were being brought against their will to ‘sexually satisfy’ the soldiers, stayed for a short time and then left or were ‘thrown out’ and were seen crying when they left.¹²³

42. *Finally*, the proposed witness’s claim that [REDACTED]¹²⁴ is irrelevant and could have no impact on the Chamber’s finding that “Ntaganda shot the *Abbé* dead”.¹²⁵ The Chamber found that while P-0768 was the only eyewitness, he gave a detailed and consistent account of the event.¹²⁶ Moreover, P-0768’s evidence is partly corroborated by other witnesses: (i) evidence from insider witness P-0963 who saw the *Abbé* at the *Appartements* and learned he had been killed in Mongbwalu from other UPC soldiers; (ii) hearsay evidence of two witnesses (P-0901 and P-0315) that the *Abbé*’s body had been removed and buried near the *Appartements*; and (iii) other hearsay evidence of three witnesses (P-0859, P-0901 and P-0041) that the *Abbé* was killed.¹²⁷ Further, the Chamber rejected Ntaganda’s denial of his

¹¹⁶ Proposed Statement (Annex A to [Request](#)), para. 31.

¹¹⁷ T-59-Conf, 21:16-21, 25:2-3.

¹¹⁸ [Judgment](#), para. 528 (fns. 1574 and 1577).

¹¹⁹ See [Judgment](#), para. 528 (fn. 1576).

¹²⁰ [Judgment](#), para. 528 (fn. 1574).

¹²¹ [Request](#), para. 39 (referring to [Judgment](#), para. 535); see also paras. 51(ii) and 55(iii).

¹²² [Judgment](#), para. 535 (fns. 1600-1603). The Chamber considered P-0010’s testimony that no women came in to the *Appartements* camp but it did not accept it because she was a low-ranking member with a limited opportunity to know about what happened. The same reasoning would apply to the “new” witness.

¹²³ [Judgment](#), para. 535 (fn. 1601). The Chamber also noted the consistent pattern in UPC camps in Mongbwalu.

¹²⁴ Proposed Statement (Annex A to [Request](#)), para. 32.

¹²⁵ [Judgment](#), para. 533; contra [Request](#), para. 51(i).

¹²⁶ [Judgment](#), para. 533 (fns. 1590-1593).

¹²⁷ [Judgment](#), para. 533 (fn. 1593).

personal involvement in the *Abbé*'s death as "implausible", and ultimately, not credible.¹²⁸ Thus, the proposed evidence could not, and would not, impact the Chamber's findings regarding the UPC crimes in the *Appartements*.

(vi) *Ntaganda's order to place anti-personal landmines in Mongbwalu*

43. Ntaganda erroneously argues that the proposed evidence undermines the Chamber's finding that he ordered the placement of anti-personal mines in Mongbwalu.¹²⁹ Yet the witness' lack of knowledge of this event does not mean that it did not occur.¹³⁰ The Chamber correctly concluded that it did, on the basis of P-0768's testimony (a UPC military insider).¹³¹ The Chamber carefully assessed P-0768's evidence¹³² and considered other evidence that anti-personnel mines were part of the UPC's inventory as well as logbook entries recording explicit messages between Ntaganda and Salong Ndekezi.¹³³ Against this backdrop, the Chamber correctly considered Ntaganda's denial of this event, and his testimony that the use of these mines was forbidden, as not credible.¹³⁴ The proposed evidence could not, and would not, impact this finding.

(vii) *Ntaganda's expression of approval after the 'Kobu massacre'*

44. The proposed evidence does not even mention this event, and accordingly has no bearing on the Chamber's finding that Ntaganda told G2 that he was aware of the 'Kobu massacre' and that he was glad how things turned out, and noted that Salumu Mulenda was a 'gentleman', 'a brave, a fine person', or 'a real man'.¹³⁵ The Chamber did not accept Ntaganda's denial of this account.¹³⁶

(viii) *Persons under 15 years old generally carried out the same tasks as older escorts*

45. On the basis of the evidence of P-0010, P-0768 and P-0016, the Chamber correctly found that that "Ntaganda's escorts, regardless of their age, performed various tasks, and

¹²⁸ [Judgment](#), para. 533 (fn. 1589, 1594-1596).

¹²⁹ [Request](#), para. 37 (referring to [Judgment](#), para. 524).

¹³⁰ Proposed Statement (Annex A to [Request](#)), para. 33; see [Judgment](#), paras. 171, 334 and 524.

¹³¹ [Judgment](#), para. 171.

¹³² [Judgment](#), para. 171; see also fn. 413 (the Chamber was mindful that this aspect of P-0768's testimony was not corroborated but it reasonably found it reliable).

¹³³ [Judgment](#), para. 171 (fns. 411-412); see also para. 334.

¹³⁴ [Judgment](#), paras. 171 (fn. 413); 334 (fn. 906); 524 (fn. 1558).

¹³⁵ [Judgment](#), paras. 638, 1185; contra [Request](#), para. 51(iii).

¹³⁶ [Judgment](#), para. 638.

individuals under 15 generally carried out the same tasks as the older ones”.¹³⁷ The proposed evidence (that [REDACTED]) does not affect the Chamber’s finding.¹³⁸ Ntaganda disregards the credible corroborating evidence establishing that recruits under 15 years were deployed to the battlefields, acted as bodyguards and were used to gather evidence.¹³⁹

(ix) *Kadogos were sent on reconnaissance missions to gather information*

46. The Chamber’s finding (relying on P-0010) that a female UPC soldier was forced to have sex with the enemy¹⁴⁰ was made in the context of its broader finding that *kadogos* were sent on reconnaissance missions to gather information.¹⁴¹ The Chamber relied on three other witnesses to reach that conclusion.¹⁴² The proposed evidence could not, and would not, impact this finding.¹⁴³

(x) *Ntaganda’s escorts were not free to leave*

47. The Chamber relied on P-0010 and P-0888 to conclude that Ntaganda’s escorts were not free to leave.¹⁴⁴ It further relied on P-0883, P-0907, P-0888, P-0898 and P-0963 to find that recruits were told that they would be killed if they tried to flee and those who attempted to escape and were caught, were seriously punished.¹⁴⁵ The proposed evidence from the witness [REDACTED] cannot impact—these findings.¹⁴⁶ The Chamber considered similar Defence evidence and deemed it to be unreliable¹⁴⁷ in light of overwhelming contradictory evidence establishing beyond reasonable doubt that the UPC recruits lived in a very harsh and coercive environment.¹⁴⁸ The witness’ proposed evidence could not, and would not, impact these findings.

¹³⁷ [Judgment](#), para. 392 (fn. 1116).

¹³⁸ Proposed Statement, paras. 25, 53; *contra* [Request](#), para. 33(v) referring to [Judgment](#), para. 392.

¹³⁹ [Judgment](#), paras. 414, 1125-1130.

¹⁴⁰ [Judgment](#), para. 404 (fn. 1150).

¹⁴¹ [Judgment](#), para. 404.

¹⁴² [Judgment](#), para. 404 (fn. 1149, citing evidence of P-0010, P-0055, P-0898, P-0014).

¹⁴³ *Contra* [Request](#), para. 33(vii).

¹⁴⁴ [Judgment](#), para. 397.

¹⁴⁵ [Judgment](#), para. 376 (fns. 1064-1066).

¹⁴⁶ Proposed Statement (Annex A to [Request](#)), para. 53; *contra* [Request](#), para. 33(vi).

¹⁴⁷ *See above*, paras. 23-30; *see also* [Judgment](#), para. 376 (fn. 1065: citing D-0300).

¹⁴⁸ [Judgment](#), paras. 374-377.

(xi) *Female UPC members became pregnant during their time in the UPC*

48. The Chamber relied on P-0010 and five additional witnesses to conclude that female UPC members became pregnant during their time in the UPC.¹⁴⁹ The Chamber did not accept Ntaganda's claim that no one became pregnant at UPC training camps and that he told recruits not to get pregnant.¹⁵⁰ The witness' proposed evidence could not, and would not, impact the Chamber's finding.¹⁵¹

(xii) *Ntaganda's stay in and departure from Mongbwalu*

49. The witness' proposed evidence could have no bearing on the Chamber's conclusion that Ntaganda remained in Mongbwalu until at least one week after the UPC took it over¹⁵² and that crimes were committed during this period in Nzebi and the *Appartements*.¹⁵³ Ntaganda conflates two issues,¹⁵⁴ that is, the date of his departure from Mongbwalu and the duration of his stay in Mongbwalu. Since P-0002 specifically contradicted it, the Chamber did not accept Ntaganda's statement that he left on 28 November 2002 by plane, and found that the exact date of his departure could not be established.¹⁵⁵ On the separate issue of how long Ntaganda stayed in Mongbwalu, the Chamber correctly found that he remained "at a minimum one week",¹⁵⁶ a finding which is supported by the evidence of three witnesses who all testified that Ntaganda stayed in Mongbwalu longer than a week.¹⁵⁷ The witness' proposed evidence could not, and would not, have an impact on this finding.

(xiii) *Ntaganda had the required mens rea with respect to counts 1 to 6 and 9*

50. Ntaganda's argument that the witness' proposed evidence undermines the Chamber's findings regarding his *mens rea* for the crimes committed during the First Operation (counts 1 to 5) and the rape and sexual slavery of child soldiers (counts 6 and 9) is flawed.¹⁵⁸ [REDACTED] evidence could not, and would not, impact the Chamber's findings regarding the commission of the crimes and Ntaganda's direct involvement in them. The Chamber's

¹⁴⁹ [Judgment](#), para. 407 (fn. 1160: citing P-0010, P-0055, P-0883, P-0901, P-0031 and P-0046)

¹⁵⁰ [Judgment](#), para. 407 (fn. 1160).

¹⁵¹ *Contra* [Request](#), para. 33(x).

¹⁵² *Contra* [Request](#), para. 40 (referring to [Judgment](#), para. 489 (fn. 1412)); see Annex A, para. 29.

¹⁵³ [Judgment](#), para. 489 (fn. 1412: referring to paras. 510 and 535).

¹⁵⁴ See [Prosecution Response to Appeal-Part II](#), para. 171.

¹⁵⁵ [Judgment](#), fn. 1412.

¹⁵⁶ [Judgment](#), fn. 1412.

¹⁵⁷ T-34-Conf, 7:9-12; T-28-Conf, 57:19-22; T-79-Conf, 25:25-26:3; T-82-Conf, 40:9-16.

¹⁵⁸ *Contra* [Request](#), paras. 49-58.

conclusion regarding Ntaganda's *mens rea* is based on several findings and a substantial body of evidence, and not only on his direct participation in crimes.

51. *First*, the Chamber's conclusion that Ntaganda knew, as an indirect co-perpetrator (and as a direct perpetrator of the murder and persecution of the *Abbé*), about the crimes committed during the First and Second Operation was based on: (i) Ntaganda's agreement and execution jointly with others to achieve their plan to drive out all the Lendu from the localities targeted, which directly involved the perpetration of the crimes;¹⁵⁹ (ii) the *modus operandi* of the crimes perpetrated during and in the aftermath of the military assaults;¹⁶⁰ (iii) Ntaganda's high ranking position within the UPC (with knowledge of its features) and his role as overall commander in the Mongbwalu assault;¹⁶¹ (iv) Ntaganda's "presence, actions, and directives" notably in the context of the First Operation;¹⁶² (v) Ntaganda's instructions and actions before, during and after the assault in Mongbwalu (also using the expression '*kupiga na kuchaji*' which meant to attack everyone and everything, specifically Lendu civilians and their property), as well as during the Sayo assault;¹⁶³ (vi) that looting of Lendu property was not considered a punishable offence and goods looted from Mongbwalu were brought to Ntaganda's residence in Bunia;¹⁶⁴ (vii) the crimes committed in the *Appartements* in Mongbwalu, where Ntaganda had his base and with his personal involvement in some of them (rape of civilian women, his order to kill two civilians and his killing of the *Abbé*);¹⁶⁵ and (viii) Ntaganda's approval of Mulenda's actions in Kobu after the Second Operation.¹⁶⁶

52. *Second*, the Chamber's conclusion that Ntaganda knew, as an indirect co-perpetrator, about the crimes committed against child soldiers was based on: (i) Ntaganda's proximity and daily contact with his own escorts (who guarded him, accompanied him, were trained at his residence and participated in combat with him);¹⁶⁷ (ii) his participation in recruitment initiatives, calling to enrol persons of all ages, gender and size and asking parents to give their children;¹⁶⁸ (iii) the consistent inhuman treatment of all UPC soldiers (including child soldiers

¹⁵⁹ [Judgment](#), para. 1177.

¹⁶⁰ [Judgment](#), para. 1178.

¹⁶¹ [Judgment](#), para. 1179.

¹⁶² [Judgment](#), para. 1180.

¹⁶³ [Judgment](#), paras. 1181, 1182, 1186.

¹⁶⁴ [Judgment](#), para. 1183.

¹⁶⁵ [Judgment](#), paras. 1184, 1186.

¹⁶⁶ [Judgment](#), para. 1185.

¹⁶⁷ [Judgment](#), paras. 371 (fn. 1040), 385 (fn. 1096), 387, 388, 390, 392-394, 396, 1126, 1191, 1192.

¹⁶⁸ [Judgment](#), paras. 355 (fns. 987, 988), 357-359, 1193. *See also* paras. 1117-1132 (on child soldiers).

under 15 years);¹⁶⁹ (iv) the sexual violence and regular rape of female UPC members (including child soldiers under 15 years) by male UPC members,¹⁷⁰ including by Ntaganda,¹⁷¹ and his own chief escort;¹⁷² and (v) the fact that these crimes were left largely unpunished by Ntaganda or Kisembo,¹⁷³ and that instead Ntaganda took advantage of the vulnerability of these children and the coercive environment in which the UPC operated.¹⁷⁴

53. Given the totality of the evidence at trial, the proposed evidence could not—and would not—have affected the finding on his *mens rea* and nor the verdict and the sentence.¹⁷⁵

IV. CONCLUSION AND RELIEF SOUGHT

54. Based on the foregoing, the Appeals Chamber should reject the Request. The witness' evidence does not meet any of the requirements under regulation 62, and there are no compelling reasons to admit it. The witness should not be called to testify in the appeal proceedings and [REDACTED] voter's card should not be admitted. Further, [REDACTED] statement cannot be admitted since it does not meet the requirements under rule 68(2) nor has Ntaganda relied on this (or any) provision to request its admission.



Fatou Bensouda, Prosecutor

Dated this 30th day of October 2020

At The Hague, The Netherlands

¹⁶⁹ [Judgment](#), paras. 376-377, 1195. *See also* para. 790.

¹⁷⁰ [Judgment](#), paras. 407-411, 792, 1196.

¹⁷¹ [Judgment](#), para. 407, 1196.

¹⁷² [Judgment](#), para. 407, 1196.

¹⁷³ [Judgment](#), paras. 792, 1196. *See also* paras. 411-412.

¹⁷⁴ [Judgment](#), para. 1195; *see also* [Prosecution Response to Appeal-Part II](#), para. 213.

¹⁷⁵ [Sesay Additional Evidence Decision](#), 14 Oct 2009, para. 18.