



Original: English

**No. ICC-01/04-02/06 A
Date: 13 November 2020**

THE APPEALS CHAMBER

Before:

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF THE PROSECUTOR V. BOSCO NTAGANDA

**Public redacted version of
Decision on request for the admission of additional evidence on appeal of 22
October 2020 (ICC-01/04-02/06-2617-Conf)**

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

The Office of the Prosecutor

Ms Fatou Bensouda, Prosecutor

Ms Helen Brady

Counsel for the Defence

Mr Stéphane Bourgon

Ms Kate Gibson

Legal Representatives of Victims

Ms Sarah Pellet

Mr Dmytro Suprun

Registrar

Mr Peter Lewis

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Bosco Ntaganda against the ‘Judgment’ of Trial Chamber VI of 8 July 2019 (ICC-01/04-02/06-2359),

Having before it the ‘Defence request for admission of additional evidence on appeal’ of 28 August 2020 (ICC-01/04-02/06-2570-Red),

Having before it the ‘Defence request for leave to reply to “Prosecution Response to ‘Defence request for admission of additional evidence on appeal’” of 21 September 2020 (ICC-01/04-02/06-2595-Conf),

Having before it the ‘Prosecution request for reclassification of ICC-01/04-02/06-2582-Conf-AnxII’ of 22 September 2020 (ICC-01/04-02/06-2598-Conf),

Pursuant to regulations 24(5) and 62 of the Regulations of the Court,

Renders the following

DECISION

1. Mr Ntaganda’s request for the admission of additional evidence on appeal is rejected.
2. Mr Ntaganda’s request for leave to reply to the Prosecutor’s response to the additional evidence request is rejected.
3. Mr Ntaganda shall file public redacted versions of document ICC-01/04-02/06-2595-Conf and document ICC-01/04-02/06-2596-Conf or request their reclassification as public by 29 October 2020.
4. The Prosecutor shall file public redacted versions of document ICC-01/04-02/06-2582-Conf and document ICC-01/04-02/06-2599-Conf by 30 October 2020.
5. The Registrar shall reclassify document ICC-01/04-02/06-2582-Conf-AnxII as public.
6. The Prosecutor shall file a public redacted version of document ICC-01/04-02/06-2598-Conf or request its reclassification as public by 30 October 2020.

REASONS

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 (the ‘Conviction Decision’).¹

2. On 9 September 2019, Mr Ntaganda lodged an appeal against the Conviction Decision.² He filed the first part of his appeal brief on 11 November 2019³ and the second part of his appeal brief on 31 January 2020.⁴

3. On 28 August 2020, Mr Ntaganda filed a request for admission of additional evidence on appeal (the ‘Additional Evidence Application’),⁵ in which he requested that the Appeals Chamber admit the additional evidence of [REDACTED] (the ‘Proposed Witness’), otherwise referred to in the record of the present case as [REDACTED], through [REDACTED] examination as a witness or, in the alternative, admit [REDACTED] written statement and voting card.⁶

4. On 9 September 2020, the Appeals Chamber decided to first rule on the admissibility of the additional evidence following the procedure set out in regulation 62(2)(a) of the Regulations of the Court.⁷

¹ [Judgment](#), ICC-01/04-02/06-2359.

² [Mr. Ntaganda’s Notice of Appeal against the Judgment pursuant to Article 74 of the Statute](#), ICC-01/04-02/06-2359, ICC-01/04-02/06-2396.

³ [Defence Appeal Brief – Part I](#), ICC-01/04-02/06-2443, with [annex A](#) (ICC-01/04-02/06-2443-AnxA), [annex B](#) (ICC-01/04-02/06-2443-AnxB), [annex C](#) (ICC-01/04-02/06-2443-AnxC), [annex D](#) (ICC-01/04-02/06-2443-AnxD) and [annex E](#) (ICC-01/04-02/06-2443-AnxE).

⁴ [Defence Appeal Brief – Part II](#), ICC-01/04-02/06-2465-Red-Corr; with [annex A](#) (ICC-01/04-02/06-2465-AnxA), [annex B](#) (ICC-01/04-02/06-2465-AnxB), annex C (ICC-01/04-02/06-2465-Conf-AnxC), [annex D](#) (ICC-01/04-02/06-2465-AnxD-Red) and [annex E](#) (ICC-01/04-02/06-2465-AnxE).

⁵ [Defence request for admission of additional evidence on appeal](#), dated 27 August 2020 and registered on 28 August 2020, ICC-01/04-02/06-2570-Red, with annex A (ICC-01/04-02/06-2570-Conf-AnxA), annex B (ICC-01/04-02/06-2570-Conf-AnxB) and annex C (ICC-01/04-02/06-2570-Conf-AnxC); *Addendum to ‘Defence request for admission of additional evidence on appeal’*, 27 August 2020, ICC-01/04-02/06-2570-Conf, 2 September 2020, ICC-01/04-02/06-2572-Conf (filed following 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 \(No. ICC-01/04-02/06-2570-Conf\)](#), filed by the Common Legal Representative of the Former Child Soldiers (‘Victims Group 1’) on 31 August 2020, ICC-01/04-02/06-2571-Red).

⁶ [Additional Evidence Application](#), paras 1, 3, 66.

⁷ Directions regarding the application for additional evidence on appeal, ICC-01/04-02/06-2574-Conf.

5. On 16 September 2020, Victims Group I filed their observations on the Additional Evidence Application, in which they objected to ‘the Defence’s eleventh-hour attempt to present the evidence of [REDACTED]’ because it ‘does not meet the stringent standard for admission on appeal’ (the ‘Victims’ Observations’).⁸

6. On 16 September 2020, the Prosecutor responded to Mr Ntaganda’s Additional Evidence Application (the ‘Response’), arguing that: (i) the anticipated evidence was available during trial in this or other forms and Mr Ntaganda fails to show that he acted with due diligence in locating this witness; (ii) Mr Ntaganda ‘overstates the relevance of the witness’s testimony to his grounds of appeal’ and the witness lacks credibility *inter alia* because [REDACTED] is not [REDACTED] as [REDACTED] claims to be; and (iii) ‘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’.⁹

7. On 21 September 2020, Mr Ntaganda requested ‘leave to reply to the Prosecution’s submission that the witness in question is [REDACTED], and present further evidence to demonstrate that this submission is incorrect’ (the ‘Request for Leave to Reply’).¹⁰ He argues that the ‘Response contains new information communicated to the Appeals Chamber’ that ‘goes to the heart of one of the criteria for the admission of new evidence on appeal – the credibility of the evidence in question’.¹¹

8. On 21 September 2020, Mr Ntaganda responded to the Victims’ Observations asserting that they misunderstand ‘the applicable test for the admission of additional evidence on appeal’ (‘Mr Ntaganda’s Response to Victims’ Observations’).¹²

9. On 22 September 2020, the Prosecutor responded to Mr Ntaganda’s Request for Leave to Reply, arguing that it should be rejected as: (i) the issue in relation to which

⁸ [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](#), ICC-01/04-02/06-2583-Red, para. 6.

⁹ Prosecution response to ‘Defence request for admission of additional evidence on appeal’, ICC-01/04-02/06-2582-Conf, paras 2-5.

¹⁰ Defence request for leave to reply to “Prosecution Response to ‘Defence request for admission of additional evidence on appeal’”, ICC-01/04-02/06-2595-Conf, para. 14.

¹¹ Request for Leave to Reply, para. 14.

¹² Defence reply to “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”, ICC-01/04-02/06-2596-Conf, para. 1.

leave to reply is sought is not a “new issue” or one that he could not reasonably have anticipated’; and (ii) the Appeals Chamber need not resolve this issue to decide on Mr Ntaganda’s Additional Evidence Application.¹³

10. On 22 September 2020, the Prosecutor requested that annex II to her Response be reclassified as public (the ‘Reclassification Request’).¹⁴

II. MERITS

1. Submissions

11. Mr Ntaganda submits that the Proposed Witness ‘was identified as a potential Defence witness early in the proceedings’ and ‘[i]nstructions were given to the Defence team member responsible for field investigations to locate [REDACTED]’.¹⁵ He contends that ‘[d]espite numerous and consistent efforts, [...] the Defence local resource persons to whom these instructions were transmitted, were unable to find [REDACTED]’ until on or about [REDACTED].¹⁶ Mr Ntaganda highlights that he informed the Trial Chamber twice that he intended to rely on the Proposed Witness and would potentially [REDACTED] at a later stage.¹⁷ He submits affidavits from the [REDACTED].¹⁸

12. The Prosecutor argues that ‘the information that Ntaganda seeks to admit as additional evidence on appeal was *available* at trial’.¹⁹ She highlights that, in his filings before the Trial Chamber, he first indicated that [REDACTED] the Proposed Witness and then stated that [REDACTED].²⁰ The Prosecutor further submits that the same information that the Proposed Witness provides was available in other forms from defence witnesses who held similar positions and testified on the same topics as this witness and from more than 40 additional UPC soldiers and nine [REDACTED] members of Mr Ntaganda’s escort who were supposed to testify along the same lines

¹³ Prosecution Response to the “Defence Request for Leave to Reply to the Prosecution’s Response to ‘Defence request for admission of additional evidence on appeal’”, ICC-01/04-02/06-2599-Conf, paras 3-4.

¹⁴ Prosecution request for reclassification of ICC-01/04-02/06-2582-Conf-AnxII, ICC-01/04-02/06-2598-Conf.

¹⁵ [Additional Evidence Application](#), para. 15.

¹⁶ [Additional Evidence Application](#), paras 18-20.

¹⁷ [Additional Evidence Application](#), paras 16-17.

¹⁸ Annex B and annex C to Additional Evidence Application.

¹⁹ Response, para. 13 (emphasis in original).

²⁰ Response, para. 13.

as this witness but were ultimately not called.²¹ Finally, the Prosecutor contends that Mr Ntaganda has ‘not set out the steps that he allegedly took at trial to call the witness and to discharge his duty of diligence’ and the available record does not ‘show that he ever apprised the Chamber of difficulties in locating the witness or obtaining [REDACTED] testimony’.²²

13. Victims Group I submit that Mr Ntaganda has not shown that he exercised due diligence in trying to secure the evidence at trial and has provided ‘no details whatsoever as to the actions allegedly taken during the trial phase to find the potential witness’.²³ They argue, by reference to the jurisprudence of the *ad hoc* tribunals, that ‘[t]he vague, generic, and unsubstantiated nature of’ the affidavits do not ‘prove that the Defence’s alleged efforts met the “due diligence” standard required to justify the exceptional admission of evidence on appeal’.²⁴ They further submit that at trial Mr Ntaganda chose to prioritise his own testimony, which lasted over 30 days, supplemented only by a handful of fact witnesses and question whether the Proposed Witness would have been called to testify at trial even if [REDACTED] had been located.²⁵ They submit that several other witnesses who were ultimately not called could have testified as to the same matters covered by the proposed additional testimony.²⁶

14. In response to Victims Group I, Mr Ntaganda contends that the affidavits produced and the filings before the Trial Chamber are sufficient to establish that he exercised due diligence in trying to locate the Proposed Witness.²⁷ He argues that ‘[t]here is no indication in the wealth of decisions addressing the “due diligence” standard in the context of additional evidence on appeal, that the Defence is required to produce the details of every step of every attempt to find a witness; the phone numbers that were called, the messages sent, the emails written, to whom, why, when, and how many times’ and that such a level of detail would be incompatible ‘with the

²¹ Response, para. 14.

²² Response, para. 15.

²³ [Victims’ Observations](#), paras 14-16.

²⁴ [Victims’ Observations](#), paras 16-19.

²⁵ [Victims’ Observations](#), para. 23.

²⁶ [Victims’ Observations](#), para. 24.

²⁷ Mr Ntaganda’s Response to Victims’ Observations, paras 14-15.

confidentiality of a party's investigations or the security of its sources'.²⁸ Mr Ntaganda submits that the cases identified by Victims Group I are inapposite as the problem was not that Mr Ntaganda could not identify [REDACTED], or that [REDACTED] was unwilling to testify or had concerns for [REDACTED] security that could have been remedied through mechanisms for protection or compulsion, but rather that [REDACTED] was impossible to find.²⁹

2. *Determination by the Appeals Chamber*

15. Regulation 62(1) of the Regulations of the Court provides that '[a] participant seeking to present additional evidence shall file an application setting out: (a) The evidence to be presented; (b) The ground of appeal to which the evidence relates and the reasons, if relevant, why the evidence was not adduced before the Trial Chamber'. The Appeals Chamber has previously found that such applications must be considered in light of 'the distinct features of the appellate stage of proceedings, in particular as concerns the corrective nature of appeal proceedings and the principle that evidence should, as far as possible, be presented before the Trial Chamber, which has the primary responsibility for evaluating the evidence'.³⁰ Accordingly, it set out the following principles relevant to the assessment of applications for the admission of additional evidence on appeal:

- (i) additional evidence on appeal will generally not be admitted unless such evidence was unavailable at trial or, with due diligence, could not have been produced;³¹
- (ii) it must be demonstrated that the additional evidence could have led the trial chamber to enter a different verdict, in whole or in part;³²

²⁸ Mr Ntaganda's Response to Victims' Observations, para. 16.

²⁹ Mr Ntaganda's Response to Victims' Observations, paras 18-19.

³⁰ *The Prosecutor v. Jean-Pierre Bemba et al*, [Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute"](#), 8 March 2018, ICC-01/05-01/13-2275-Red, para. 509, referring to *The Prosecutor v. Thomas Lubanga Dyilo*, [Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction](#), 1 December 2014, ICC-01/04-01/06-3121-Red ('Lubanga Appeals Chamber Judgment'), paras 55-57.

³¹ [Lubanga Appeals Chamber Judgment](#), paras 57-58.

³² [Lubanga Appeals Chamber Judgment](#), para. 59.

- (iii) the criteria of relevance, probative value and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness under article 69(4) of the Statute also apply to the admission of evidence at the appellate stage of proceedings;³³ and
- (iv) it is within the Appeals Chamber's discretion to admit additional evidence on appeal despite a negative finding on one or more of the above-mentioned criteria, if there are compelling reasons for doing so.³⁴

The Appeals Chamber will assess Mr Ntaganda's Additional Evidence Application in light of these principles.

16. The Appeals Chamber notes that Mr Ntaganda [REDACTED] that [REDACTED].³⁵ He stated that [REDACTED].³⁶ On [REDACTED], Mr Ntaganda [REDACTED].³⁷

17. The name of the witness whose testimony Mr Ntaganda seeks to introduce as additional evidence on appeal is [REDACTED], referred to in the record of the case as [REDACTED]; [REDACTED] confirms in [REDACTED] statement that [REDACTED] name is [REDACTED] and that [REDACTED] in the UPC.³⁸ No other names were recorded as being used by this witness and [REDACTED] did not mention the name [REDACTED].³⁹ Mr Ntaganda does not offer any explanation as to why he would have referred to this witness as [REDACTED] in the filings informing the Trial Chamber of his intention to locate [REDACTED] and to [REDACTED]. In addition, the Appeals Chamber notes that Mr Ntaganda did not indicate during the course of the trial that he had encountered any difficulties in locating this witness and the First Notification to the Trial Chamber suggests that [REDACTED].

³³ [Lubanga Appeals Chamber Judgment](#), para. 54.

³⁴ [Lubanga Appeals Chamber Judgment](#), para. 62.

³⁵ Defence confidential *ex parte* notice concerning the presentation of the case for the Defence, ICC-01/04-02/06-1886-Conf-Exp (the 'First Notification to the Trial Chamber'), para. 6. See Annex A to First Notification to the Trial Chamber, ICC-01/04-02/06-1886-Conf-Exp-AnxA, item 20.

³⁶ First Notification to the Trial Chamber, para. 8.

³⁷ Communication of the list of persons appearing on its Witnesses List that the Defence has not yet had the opportunity to contact, ICC-01/04-02/06-2009-Conf. See Annex A to the Communication of the list of persons appearing on its Witnesses List that the Defence has not yet had the opportunity to contact, ICC-01/04-02/06-2009-Conf-Exp-AnxA.

³⁸ [Additional Evidence Application](#), para. 1; Annex A to the Additional Evidence Application, ICC-01/04-02/06-2570-Conf-AnxA, para. 8.

³⁹ Annex A to the Additional Evidence Application, ICC-01/04-02/06-2570-Conf-AnxA, p. 2.

18. Mr Ntaganda provided the Appeals Chamber with an affidavit from [REDACTED] to the effect that [REDACTED].⁴⁰ A similar affidavit was provided by [REDACTED].⁴¹ The Appeals Chamber notes, however, that these affidavits fall short of explaining what steps were taken to locate this witness or the circumstances that led to the defence team successfully locating [REDACTED] in May 2020 while they could not in 2017.

19. The Appeals Chamber further notes the Prosecutor and Victims Group I's argument that similar evidence was available from other witnesses and was either submitted during the trial and considered by the Trial Chamber or was not submitted during the trial as a defence strategic choice.⁴² The essential elements of the Proposed Witness's testimony are that: (i) P-0010 was not in the UPC at the time that she claims to have been; (ii) [REDACTED] was 15 when [REDACTED] joined the UPC and that [REDACTED]; (iii) [REDACTED] was not [REDACTED] Mr Ntaganda and that [REDACTED] by Mr Ntaganda; and (iv) [REDACTED] Mr Ntaganda to Mongbwalu during the first operation and did not see civilian women or prisoners being brought to [REDACTED] and did not know anything about an [REDACTED] or mines being placed in Mongbwalu.⁴³ The Appeals Chamber notes that these elements were covered by the testimony of other witnesses, which was considered by the Trial Chamber, and that Mr Ntaganda proposed to call numerous former escorts who could have provided the same information as the Proposed Witness, but ultimately decided not to do so.⁴⁴

20. In these circumstances, the Appeals Chamber is not convinced that the proposed evidence was unavailable at trial or, with due diligence, could not have been produced. As noted above, Mr Ntaganda did not inform the Trial Chamber at any time that he had encountered difficulties in locating this witness. In addition, similar evidence was considered by the Trial Chamber or was available and not led at trial at Mr Ntaganda's choice. The Appeals Chamber also finds that there are no compelling

⁴⁰ Annex B to the Additional Evidence Application, ICC-01/04-02/06-2570-Conf-AnxB.

⁴¹ Annex C to the Additional Evidence Application, ICC-01/04-02/06-2570-Conf-AnxC.

⁴² Response, paras 14, 23-30; [Victims' Observations](#), paras 23-24.

⁴³ Annex A to the Additional Evidence Application, ICC-01/04-02/06-2570-Conf-AnxA.

⁴⁴ Response, para. 14. [REDACTED].

reasons for it to exercise its discretion to admit the proposed evidence. Therefore, the Additional Evidence Application is rejected.

III. REQUEST FOR LEAVE TO REPLY

21. Mr Ntaganda requested leave to reply to the Prosecutor's submission that the Proposed Witness is [REDACTED] as [REDACTED] claims, and argues that this affects the credibility of the proposed additional evidence.⁴⁵ As the Additional Evidence Application has been rejected on grounds other than the credibility of the Proposed Witness, the Appeals Chamber considers that there is no need for a reply on the question of whether [REDACTED] is [REDACTED]. Accordingly, the Request for Leave to Reply is rejected.

IV. RECLASSIFICATION

22. The Appeals Chamber notes that a number of documents related to the Additional Evidence Application are confidential and that public redacted versions of these documents have not yet been filed. Therefore, it orders: (i) Mr Ntaganda to file public redacted versions of document ICC-01/04-02/06-2595-Conf and document ICC-01/04-02/06-2596-Conf by 29 October 2020 or request their reclassification as public by 29 October 2020; and (ii) the Prosecutor to file public redacted versions of document ICC-01/04-02/06-2582-Conf and document ICC-01/04-02/06-2599-Conf by 30 October 2020.

23. The Appeals Chamber also notes that the Prosecutor has requested that document ICC-01/04-02/06-2582-Conf-AnxII be reclassified as public.⁴⁶ As there are no reasons justifying the continued confidentiality of this document, the Registrar is directed to reclassify it as public. In addition, noting that the Reclassification Request itself is confidential, the Prosecutor is directed to file a public redacted version of this document (ICC-01/04-02/06-2598-Conf) or request its reclassification as public by 30 October 2020.

Done in both English and French, the English version being authoritative.

⁴⁵ Request for Leave to Reply, para. 14.

⁴⁶ Reclassification Request.



Judge Howard Morrison
Presiding

Dated this 13th day of November 2020

At The Hague, The Netherlands