

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/04-02/06**
Date: **20 October 2017**

TRIAL CHAMBER VI

Before: Judge Robert Fremr, Presiding Judge
Judge Kuniko Ozaki
Judge Chang-ho Chung

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
*THE PROSECUTOR v. BOSCO NTAGANDA***

Public

**Decision on Defence Request to add Witnesses D-0251 and D-0257 to its
List of Witnesses**

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Ms Nicole Samson

Counsel for Bosco Ntaganda

Mr Stéphane Bourgon
Mr Christopher Gosnell

Legal Representatives of Victims

Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber VI ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Bosco Ntaganda*, having regard to Articles 64(2) and (9)(a), 67, and 69(2), (3), and (4) of the Rome Statute and Regulation 35 of the Regulations of the Court ('Regulations'), issues the following 'Decision on Defence Request to add Witnesses D-0251 and D-0257 to its List of Witnesses'.

I. Procedural history

1. On 30 January 2017, the Chamber directed the defence team for Mr Ntaganda ('Defence') to finalise its lists of witnesses and evidence and disclose all remaining materials it intends to rely upon during its presentation of evidence by 26 April 2017.¹
2. On 26 April 2017, in line with the Chamber's direction, the Defence filed the final list of witnesses it intended to call ('List of Witnesses')² and a list of evidence.³
3. On 19 May 2017, the Chamber issued its 'Decision on Defence request to modify the schedule for the first two evidentiary blocks', in which, further to a Defence request to that effect,⁴ it considered it appropriate to allow Mr Ntaganda to testify during the second evidentiary block.⁵
4. On 28 August 2017, referring to Defence indications that the hearing of Mr Ntaganda's testimony may result in a shorter presentation of evidence by

¹ Decision supplementing the Decision on the Conduct of Proceedings (ICC-01/04-02/06-619) and providing directions related to preparations for the presentation of evidence by the Defence, ICC-01/04-02/06-1757, paras 11 and 14.

² ICC-01/04-02/06-1881-Conf-AnxA.

³ ICC-01/04-02/06-1881-AnxC-Corr.

⁴ Urgent Defence Request on behalf of Mr Ntaganda seeking modification of the schedule for the first two evidentiary blocks, 12 May 2017, ICC-01/04-02/06-1903.

⁵ ICC-01/04-02/06-1914, para. 14. This decision had been previously communicated via email, *see* email communication from the Chamber to the parties and participants on 17 May 2017, at 15:05.

the Defence, the Chamber directed the Defence to file an updated list of witnesses within two weeks of the completion of Mr Ntaganda's testimony.⁶

5. On 27 September 2017, in line with the aforementioned direction,⁷ the Defence filed an updated list of witnesses,⁸ comprised of a total of 40 witnesses, including eight witnesses for whom the Defence announced that it would submit requests pursuant to Regulation 35(2) of the Regulations to have them added to its List of Witnesses.⁹
6. The Chamber directed the Defence to file any such requests by 16 October 2017.¹⁰
7. On 4 October 2017, the Defence filed its 'Request to add D-0251 and D-0257 to the Defence List of Witnesses' ('Request').¹¹
8. On 16 October 2017, the Office of the Prosecutor ('Prosecution')¹² and the Legal representative of the former child soldiers ('LRV')¹³ filed their respective responses ('Prosecution Response' and 'LRV Response', respectively), both opposing the Request.

⁶ Transcript of hearing on 28 August 2017, ICC-01/04-02/06-231-CONF-ENG ET, page 4, line 24 to page 5, line 5.

⁷ Mr Ntaganda completed his testimony on 13 September 2017, *see* transcript of hearing on 13 September 2017, ICC-01/04-02/06-T-243-CONF-ENG ET.

⁸ Updated Defence List of Witnesses, ICC-01/04-02/06-2045-Conf and confidential Annex A.

⁹ ICC-01/04-02/06-2045-Conf, paras 15 and 16(c) and (a).

¹⁰ Email communication from the Chamber to the parties and participants on 3 October 2017, at 10:16.

¹¹ ICC-01/04-02/06-2052-Conf and confidential Annexes A, B and C.

¹² Prosecution response to the Defence "Request to add D-0251 and D-0257 to the Defence List of Witnesses", ICC-01/04-02/06-2052-Conf, ICC-01/04-02/06-2064-Conf.

¹³ Response to the Request to add D-0251 and D-0257 to the Defence List of Witnesses, ICC-01/04-02/06-2063-Conf.

II. Submissions and Analysis

i. Applicable law

9. The Chamber incorporates by reference the applicable law for additions to lists of witnesses after the relevant deadline as previously set out by it.¹⁴

ii. Whether the terms of Regulation 35(2) of the Regulations are met

10. With respect to Witness D-0251, the Defence submits that it ‘has long been aware’ of her existence, but ‘[d]espite its best efforts’ it has had difficulty establishing contact, and a meeting between counsel and the witness could only be arranged recently. Therefore, the Defence submits that it was, ‘even within the definition of Regulation 35(2) [of the Regulations]’, unable to list Witness D-0251 as a witness by the 26 April 2017 deadline.¹⁵
11. The Prosecution and the LRV argue that the terms of Regulation 35(2) of the Regulations are not met for either Witness D-0251 or D-0257.¹⁶
12. The Chamber recalls its previous finding, in a decision on a Prosecution request for the addition of a witness to its list of witnesses 20 months after the expiration of the relevant deadline (‘Decision 1733’), that the conditions under Regulation 35(2) of the Regulations will ‘generally not be satisfied’ when a party or participant requests to add evidence ‘many months after the expiration of a deadline set in accordance with Rule 84 of the Rules’.¹⁷ While noting that, in the present case, the Request was filed five months after the expiration of the relevant deadline, the Chamber has considered the Defence’s submissions concerning its inability to meet the time limit for Witness D-0251, and the

¹⁴ Decision on Prosecution application under Rule 68(2)(b) and Regulation 35 for admission of prior recorded testimony of Witness P-0551, 19 January 2017, ICC-01/04-02/06-1733 (‘Decision 1733’), paras 6-8.

¹⁵ Request, ICC-01/04-02/06-2052-Conf, para. 11.

¹⁶ Prosecution Response, ICC-01/04-02/06-2064-Conf, paras 2 and 17-26; LRV Response, ICC-01/04-02/06-2063-Conf, paras 19-24.

¹⁷ Decision 1733, ICC-01/04-02/06-1733, para. 7.

absence of justification for Witness D-0257, and finds that the required standard according to that provision is not met for either witness sought to be added.

- iii. Whether the addition of the proposed witnesses to the List of Witnesses is warranted in the interests of justice or for the determination of the truth*

Submissions

Defence

13. The Defence argues that the addition of Witnesses D-0251 and D-0257 (collectively, 'Proposed Witnesses') to its List of Witnesses is warranted in the interests of justice and for the determination of the truth, on the basis that: (i) it does not deprive the Prosecution of a 'reasonable opportunity to prepare'; (ii) the anticipated testimony 'poses no unfair surprise for the Prosecution', is limited in scope, and addresses issues of specific relevance; and (iii) in the context of the substantial number of witnesses being withdrawn by the Defence following the testimony of Mr Ntaganda, the addition will cause no delay to the proceedings.¹⁸
14. With respect to Witness D-0251, the Defence submits that the witness's testimony is expected to contradict purportedly incriminating Prosecution evidence in relation to, *inter alia*, the age of specific individuals who were 'within Mr Ntaganda's knowledge', the treatment of female soldiers and escorts by Mr Ntaganda, the absence of rape or sexual abuse of Mr Ntaganda's escorts, as well as the witness's knowledge of specific Prosecution witnesses who have made allegations about rape and sexual abuse. As such, the Defence claims that her evidence is 'relevant and exculpatory to issues of core importance to this case'.¹⁹ It further argues that the Prosecution has been generally aware that the Defence would seek to adduce evidence in respect of these issues and that the

¹⁸ Request, ICC-01/04-02/06-2052-Conf, para. 1.

¹⁹ Request, ICC-01/04-02/06-2052-Conf, para. 9.

time until the start of the fifth block, when Witness D-0251 is scheduled to testify, gives the Prosecution 'more than adequate' time to conduct the necessary biographical investigations, which are further facilitated by the disclosure of a statement of the witness, which gives the Prosecution precise notice of the content of her anticipated testimony.²⁰ Moreover, the Defence submits that the difficulties in establishing contact with Witness D-0251 are relevant to the Chamber's evaluation of 'the reasons provided for not seeking addition of the evidence at an earlier stage'.²¹ Finally, the Defence explains that it intends to seek leave to tender the witness's testimony pursuant to Rule 68(3) of the Rules which 'will save court time'. In view of the foregoing, the Defence posits that any difficulties arising from the late addition of Witness D-0251 to the List of Witnesses are 'more than outweighed by the importance of her testimony'.²²

15. Concerning Witness D-0257, the Defence submits that his anticipated testimony concerns a very specific issue and serves to corroborate Mr Ntaganda's testimony on the reasons for his visit to Kigali, which were challenged by the Prosecution during cross-examination. The Defence argues that his testimony is directly relevant to Mr Ntaganda's credibility, and that the fact that the issue gained importance 'as trial unfold[ed]' is a factor that weighs in favour of permitting the addition.²³ Finally, it argues that, 'given the narrow and limited scope of the testimony', no undue delay will be caused, and investigations will not be impeded.²⁴

²⁰ Request, ICC-01/04-02/06-2052-Conf, para. 10.

²¹ Request, ICC-01/04-02/06-2052-Conf, para. 11, referring to Decision 1733, ICC-01/04-02/06-1733, para. 8.

²² Request, ICC-01/04-02/06-2052-Conf, para. 12.

²³ Request, ICC-01/04-02/06-2052-Conf, paras 13-15.

²⁴ Request, ICC-01/04-02/06-2052-Conf, para. 16.

Prosecution

16. The Prosecution argues that granting the Request would not be in the interests of justice or needed for the determination of the truth. It submits that doing so would cause potential prejudice to the Prosecution and the victims that would 'far outweigh[...] the justifications contained in the Request'.²⁵ Specifically, the Prosecution argues that: (i) the Request was filed over five months after the expiration of the relevant deadline and after the major part of the Defence case, including the accused's testimony, had passed, and the Defence failed to provide a valid justification for this delay;²⁶ (ii) the Defence failed to provide valid reasons for not seeking to add the Proposed Witnesses to its List of Witnesses at an earlier stage;²⁷ (iii) the proposed evidence would be duplicative of evidence already presented by the Defence and not bring to light any previously unknown facts having a significant bearing upon the case;²⁸ and (iv) Witness D-0257's proposed evidence is not relevant or significant to any matters to be determined, given that his limited evidence is irrelevant to the accused's actual whereabouts in February 2003 or his responsibility for crimes committed at that time.²⁹
17. Moreover, the Prosecution submits that granting the Request would be 'unduly prejudicial',³⁰ noting that: (i) the Prosecution has been deprived of the 'crucial opportunity' to cross-examine the accused, and potentially other Defence witnesses, in relation to the information expected to be provided by the Proposed Witnesses;³¹ (ii) 'significant' investigations, not limited to biographical

²⁵ Prosecution Response, ICC-01/04-02/06-2064, para. 27.

²⁶ Prosecution Response, ICC-01/04-02/06-2064, paras 28-30.

²⁷ Prosecution Response, ICC-01/04-02/06-2064, para. 31.

²⁸ Prosecution Response, ICC-01/04-02/06-2064, paras 32-36.

²⁹ Prosecution Response, ICC-01/04-02/06-2064, paras 37-39.

³⁰ Prosecution Response, ICC-01/04-02/06-2064, page 16.

³¹ Prosecution Response, ICC-01/04-02/06-2064, para. 41.

matters, would be required in relation to the Proposed Witnesses;³² (iii) the Request should be evaluated in the context of all requests for addition of witnesses made by the Defence;³³ and (vii) no weight should be given to the Defence's argument that it has withdrawn a number of witnesses, since the List of Witnesses included persons with whom the Defence had never been in contact.³⁴

18. Finally, were the Chamber to grant the Request, the Prosecution requests that any witnesses added to the List of Witnesses at this stage be heard in a sixth evidentiary block to be scheduled in January 2018, in order to 'allay some of the prejudice caused to the Prosecution', and further 'reserves its right' to request recalling the accused and/or other Defence witnesses.³⁵

LRV

19. The LRV also argues that the Defence has failed to demonstrate that adding the Proposed Witnesses to its List of Witnesses would serve the interests of justice or the determination of the truth,³⁶ submitting that: (i) the Defence had many months to anticipate the need to bring the proposed evidence and should have predicted the importance of these issues at an earlier stage;³⁷ (ii) the withdrawal of witnesses expected to testify to issues to be addressed by Witness D-0251 cannot justify the addition of a new witness to the List of Witnesses at this stage;³⁸ (iii) the alleged relevance and significance of Witness D-0251's testimony is 'clearly jeopardised' by the fact that the Defence intends to tender her testimony under Rule 68(3) of the Rules;³⁹ and (iv) the Defence does not

³² Prosecution Response, ICC-01/04-02/06-2064, paras 42- 44.

³³ Prosecution Response, ICC-01/04-02/06-2064, para. 45.

³⁴ Prosecution Response, ICC-01/04-02/06-2064, para. 46.

³⁵ Prosecution Response, ICC-01/04-02/06-2064, paras 47- 48.

³⁶ LRV Response, ICC-01/04-02/06-2063-Conf, para. 30.

³⁷ LRV Response, ICC-01/04-02/06-2063-Conf, para. 26.

³⁸ LRV Response, ICC-01/04-02/06-2063-Conf, para. 27.

³⁹ LRV Response, ICC-01/04-02/06-2063-Conf, para. 28.

provide any information as to how the Proposed Witnesses would contribute to the Defence case by coming forward with a significant and new fact.⁴⁰

20. Finally, were the Chamber to grant the Request, the LRV ‘reserves her right to oppose the anticipated leave to tender [Witness] D-0251’s testimony pursuant to Rule 68(3) [of the Rules]’.⁴¹

Analysis

21. The Chamber notes that the addition of the Proposed Witnesses to the List of Witnesses was requested more than five months after the deadline and four months after the commencement of the Defence’s presentation of evidence. With respect to Witness D-0251, the Chamber is not convinced by the justification provided by the Defence for its failure to request her addition to the list at an earlier stage, notably in light of the Defence submission that it ‘has long been aware’ of her existence,⁴² and the fact that the List of Witnesses includes other individuals whom the Defence had not contacted at the time the list was filed. Likewise, the Chamber considers that the reported need for corroboration of Mr Ntaganda’s visit to Kigali could have been anticipated at an earlier stage, prior to this account being challenged in cross-examination.
22. Concerning the nature of the Proposed Witnesses’ testimony, the Chamber notes the Prosecution’s and the LRV’s submissions that the Proposed Witnesses’ testimony does not appear to bring to light a previously unknown fact which has a significant bearing upon the case.⁴³ The Chamber recalls that it previously considered this factor to be relevant for its assessment of requests to

⁴⁰ LRV Response, ICC-01/04-02/06-2063-Conf, para. 29.

⁴¹ LRV Response, ICC-01/04-02/06-2063-Conf, para. 31.

⁴² Request, ICC-01/04-02/06-2052-Conf, para. 11.

⁴³ See Prosecution Response, ICC-01/04-02/06-2064, para. 32; and LRV Response, ICC-01/04-02/06-2063-Conf, para 29.

add witnesses to a party's list of witnesses,⁴⁴ and, in the present case, finds some merit in the Prosecution's and LRV's submissions in this regard. That notwithstanding, the Chamber recalls that it '*may* consider a broad variety of factors' in its assessment of this matter.⁴⁵ Accordingly, the Chamber emphasises that the factors it previously identified are neither exhaustive, nor determinative on their own, and considers that, accordingly, failure to satisfy one of them is not, on its own, fatal to a request for a witness to be added.

23. In the circumstances at hand, the Chamber notes that Witness D-0251 is expected to provide exculpatory evidence on a number of issues of significance to the case, including Mr Ntaganda's treatment of – especially female – escorts, his attitude towards relationships between soldiers and escorts and measures taken in this respect, directions on the treatment of the civilian population and prisoners, and the age of escorts. With regard to Witness D-0257's anticipated testimony, the Chamber considers that it may be of relevance to a contested issue in the case, namely Mr Ntaganda's testimony in relation to his visit to Kigali. While neither the witness's summary of expected testimony nor his witness statement provide any explicit indication that he is expected to provide evidence on Mr Ntaganda's whereabouts in February 2003, the Chamber is satisfied that, on the basis of Witness D-0257's statement, it can reasonably be expected that this issue will be explored during the witness's testimony. In view of the foregoing, the Chamber is of the view that the Proposed Witnesses' testimony would be of assistance to the Chamber in its assessment of other evidence presented in this case and the determination of the truth.

24. Turning to the issue of potential prejudice, the Chamber notes that the Proposed Witnesses' statements were disclosed by the Defence on

⁴⁴ Decision 1733, ICC-01/04-02/06-1733, para. 8.

⁴⁵ Decision 1733, ICC-01/04-02/06-1733, para. 8 (emphasis added).

4 October 2017, which is more than seven weeks prior to the commencement of the fifth evidentiary block, during which they are sought to be called. Noting further the connection of the two witnesses' anticipated evidence to other evidence already presented, the Chamber finds that the Prosecution will have sufficient time to prepare. Accordingly, the Chamber considers that a postponement of the proposed Witnesses' testimony until the sixth evidentiary block, as requested by the Prosecution, is not warranted. However, in order to increase the time available for any necessary investigations, the Chamber directs the Defence to schedule the appearance of the Proposed Witnesses as the last two witnesses of the fifth evidentiary block.

25. Concerning the alleged prejudice resulting from the lack of opportunity to cross-examine previous witnesses in relation to the content of the Proposed Witnesses' testimonies, the Chamber notes that this decision is without prejudice to any future request to recall previous witnesses, were this considered to be necessary after having heard the testimony of the Proposed Witnesses.
26. Finally, while the Chamber finds that withdrawal of other witnesses should not, in itself, be a factor weighing in favour of granting the Request, the Chamber recalls that on a number of occasions, it emphasised that it would remain attentive to any difficulties the Defence may face during the course of its presentation of evidence, and, where necessary, retain a flexible approach to facilitate the Defence's preparations.⁴⁶
27. Having balanced all of the aforementioned factors, the Chamber considers that it would be appropriate in the interest of justice and for the determination of the

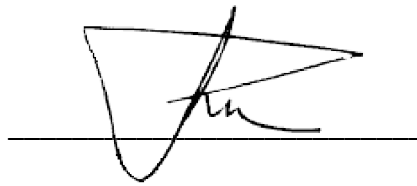
⁴⁶ See, e.g., Decision on Request for Extension of Time, 22 May 2017, ICC-01/04-02/06-1832, para. 23; Decision on further matters related to the presentation of evidence by the Defence, ICC-01/04-02/06-1900, para. 46.

truth to grant the requested addition of the Proposed Witnesses to the List of Witnesses.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

GRANTS the Defence's request for the addition of Witnesses D-0251 and D-0257 to its List of Witnesses.

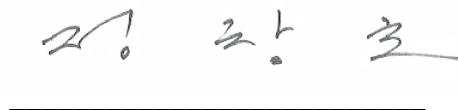
Done in both English and French, the English version being authoritative.

A handwritten signature in black ink, appearing to be 'R. Fremr', written over a horizontal line.

Judge Robert Fremr, Presiding Judge

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Judge Kuniko Ozaki

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Judge Chang-ho Chung

Dated this 20 October 2017

At The Hague, The Netherlands