

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 6 November 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 Requests to add D-0185, D-0207, and D-0243 to its List of
Witnesses and for the admission of prior recorded testimony pursuant to Rule
68(2)(b)**

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

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Mr Stéphane Bourgon
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REGISTRY

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Victims and Witnesses Unit

Mr Nigel Verrill

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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 of the Rome Statute, Rule 68(2) of the Rules of Procedure and Evidence ('Rules'), and Regulations 24(5) and 35 of the Regulations of the Court ('Regulations'), issues the following 'Decision on Defence Requests to add D-0185, D-0207, and D-0243 to its List of Witnesses and for the admission of prior recorded testimony pursuant to Rule 68(2)(b)'.

I. Background

1. On 30 January 2017, the Chamber directed the defence team for Mr Ntaganda ('Defence') to finalise its lists of witnesses and evidence and to disclose all remaining materials it intends to rely upon during its presentation of evidence by 26 April 2017.¹
2. On 26 April 2017, the Defence filed the final list of witnesses it intended to call ('List of Witnesses')² as well as 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 it granted the Defence request⁴ to allow Mr Ntaganda to testify during the second evidentiary block.⁵
4. On 28 August 2017, the Chamber directed the Defence to file an updated list of witnesses within two weeks of the completion of Mr Ntaganda's testimony.⁶

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 1 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 was first communicated via email communication from the Chamber to the parties and participants on 17 May 2017, at 15:05.

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.

5. On 27 September 2017, in accordance with the aforementioned direction, the Defence filed an updated list of witnesses, which included eight witnesses for whom the Defence indicated it would submit requests to add these individuals to its List of Witnesses pursuant to Regulation 35(2) of the Regulations.⁷
6. The Chamber directed the Defence to file any such requests by 16 October 2017.⁸
7. On 4 October 2017, the Defence filed a request to add D-0251 and D-0257 to the Defence List of Witnesses.⁹ The Chamber granted the request on 20 October 2017.¹⁰
8. On 16 October 2017, the Defence requested the addition of D-0185, D-0207 and D-0243 ('Proposed Witnesses') to the Defence List of Witnesses' ('Request').¹¹ On the same date, the Defence also filed a request to admit the prior recorded testimony of eleven witnesses pursuant to Rule 68(2), including D-0185 and D-0207 ('Rule 68(2) Request').¹²
9. On 27 October 2017, the Office of the Prosecutor ('Prosecution') filed its response opposing the Request¹³ ('Prosecution Response'), and on the same date, filed its response opposing, *inter alia*, the Rule 68(2) Request in relation to D-0185 and D-0207).¹⁴

⁷ ICC-01/04-02/06-2045-Conf, paras 15 and 16(a) and (c).

⁸ Email communication from the Chamber to the parties and participants on 3 October 2017, at 10:16.

⁹ Request to add D-0251 and D-0257 to the Defence List of Witnesses, ICC-01/04-02/06-2052-Conf and confidential Annexes A, B and C.

¹⁰ Decision on Defence Request to add Witnesses D-0251 and D-0257 to its List of Witnesses, ICC-01/04-02/06-2079.

¹¹ ICC-01/04-02/06-2065-Conf.

¹² Request to admit prior recorded testimony of eleven witnesses under Rule 68(2), ICC-01/04-02/06-2066-Conf. The Defence filed a corrected version of the request on 27 October 2017, ICC-01/04-02/06-2066-Conf-Corr.

¹³ Prosecution response to the Defence "Request to Add Witnesses D-0185, D-0207 and D-0243 to the Defence List of Witnesses", ICC-01/04-02/06-2065-Conf, ICC-01/04-02/06-2084-Conf.

¹⁴ Prosecution response to the Defence "Request to admit prior recorded testimony of eleven witnesses under Rule 68(2)", ICC-01/04-02/06-2066-Conf.

10. On 2 November 2017, the Defence sought leave to reply to the Prosecution Response ('Request for Leave to Reply').¹⁵

II. Submissions and analysis

i. Applicable Law

11. The Chamber incorporates by reference the applicable law in regard to adding individuals to List of Witnesses after the applicable deadline, as previously set out by it.¹⁶

ii. Request for Leave to Reply

12. The Defence seeks leave to reply to the Prosecution Response in respect of three issues in relation to the addition of D-0243.¹⁷ The Chamber does not consider that a reply to any of the identified issues would be of assistance, and rejects the Request for Leave to Reply on this basis.

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

13. The Defence does not claim that it was unable to comply with the deadline to add D-0185 or D-0207.¹⁸ As regards D-0243, the Defence submits that it originally intended to adduce testimony from a different witness who passed away several months ago. As a result of this individual's passing, the Defence has decided to renew its efforts to contact D-0243. The Defence contacted D-0243 for the first time on 8 May 2017, met him for the first time on 10 May 2017, and first met the witness with a lawyer on 21 August 2017. In light of the above, the Defence

¹⁵ Request for leave to reply to the "Prosecution response to the Defence 'Request to Add Witnesses D-0185, D-0207 and D-0243 to the Defence List of Witnesses'", ICC-01/04-02/06-2065-Conf, ICC-01/04-02/06-2094-Conf.

¹⁶ 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.

¹⁷ Request for Leave to Reply, ICC-01/04-02/06-2094-Conf.

¹⁸ Request, ICC-01/04-02/06-2065-Conf, paras. 8 and 13.

argues that it was unable to include D-0243 on its List of Witnesses by the 26 April 2017 deadline.¹⁹

14. The Prosecution argues that the Request does not meet the requirements of Regulation 35(2). Specifically, the Prosecution submits that: (i) the Defence has not provided the identity of the alleged other witness who died a few months ago, and based on the summaries provided by the Defence, there is no one on the List of Witnesses who could provide information comparable to D-0243's proposed evidence;²⁰ and (iii) the Defence does not explain why it failed to indicate its intention to call D-0243 when it met him on 10 May 2017.²¹
15. The Chamber recalls its previous finding 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'.²² The Chamber notes that in the present case, the Request was filed more than five months after the expiration of the relevant deadline. The Chamber further notes the absence of justification for the late addition of D-0185 and D-0207.²³ In regard to D-0243, the Chamber notes that the Defence was in contact with the individual in May 2017,²⁴ and has not provided an explanation as to why the request to add this witness was not made at an earlier date. In light of the above, the Chamber finds that the requirements of Regulation 35(2) have not been satisfied for D-0185, D-0207, or D-0243.

¹⁹ Request, ICC-01/04-02/06-2065-Conf, para. 16.

²⁰ Prosecution Response, ICC-01/04-02/06-2084-Conf, para. 25.

²¹ Prosecution Response, ICC-01/04-02/06-2084-Conf, para. 26.

²² Decision 1733, ICC-01/04-02/06-1733, para. 7.

²³ Request, ICC-01/04-02/06-2065-Conf, paras 8 and 13.

²⁴ Request, ICC-01/04-02/06-2065-Conf, para. 16.

- iv. 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

16. The Defence argues that adding the Proposed Witnesses to its List of Witnesses is warranted in the interests of justice and for the determination of the truth, and would not cause unfairness to the Prosecution. To this end, the Defence submits that: (i) the anticipated testimony of the Proposed Witnesses is limited in scope and relevant to specific issues; (ii) no delay will be caused by entertaining the Proposed Witnesses, particularly in light of the substantial number of witnesses the Defence has already removed from its List of Witnesses; (iii) the testimony of the Proposed Witnesses responds directly to Prosecution evidence and therefore causes no surprise; and (iv) the Prosecution would not be deprived of a 'reasonable opportunity to prepare'.²⁵
17. With regard to D-0185, the Defence submits that this witness's testimony concerns the age, appearance, and level of education of two children, and relates to the identity and age of a child who appears on a photograph that has been admitted as an exhibit.²⁶ Further, the Defence argues that this would provide 'contextual evidence that is important to understanding the weight that can be accorded to two of the main indicators of age advanced by the Prosecution: (i) physical appearance; and (ii) level of education attain[ed]'.²⁷
18. As to D-0207, the Defence argues that the witness's testimony directly contradicts the testimony of Prosecution Witness P-0898, and is thus relevant to P-0898's overall credibility.²⁸

²⁵ Request, ICC-01/04-02/06-2065-Conf, paras 1-2.

²⁶ Request, ICC-01/04-02/06-2065-Conf, para. 7.

²⁷ Request, ICC-01/04-02/06-2065-Conf, para. 7.

²⁸ Request, ICC-01/04-02/06-2065-Conf, para 10-11.

19. Concerning D-0243, the Defence submits that the witness's knowledge and practical experience in relation to communications in Ituri is relevant to specific assertions by certain Prosecution witnesses about the communication capabilities of the UPC, as well as to the general capacity of UPC personnel, including Mr Ntaganda, to communicate.²⁹
20. The Prosecution argues that granting the Request would not be in the interests of justice, nor would it be necessary for the determination of the truth or to ensure the fairness of proceedings.³⁰ Specifically, the Prosecution submits that: (i) the proposed evidence of D-0185 and D-0207 is not relevant or significant to matters for determination by the Chamber;³¹ (ii) the proposed evidence of D-0185 and D-0207 relates to collateral issues and the Defence should not be authorised to submit additional information in this regard,³² and furthermore, D-0207's proposed evidence does not directly contradict Witness P-0898's testimony as the Defence has argued;³³ (iii) the Defence has already put suggestions to Prosecution witnesses on the basis of information obtained from D-0185 and D-0207,³⁴ D-0243's proposed evidence has largely been addressed during the testimony of other witnesses,³⁵ and the anticipated evidence of the Proposed Witnesses is duplicative of evidence already before the Chamber³⁶ – as a result, adding the Proposed Witnesses would fail to bring to light a previously unknown fact which has significant bearing on the case;³⁷ (iv) the Prosecution has not alleged that D-0185's children were in the UPC/FPLC or below the age of 15;³⁸ (v) when the photograph of D-0185's son³⁹ was shown to Witness P-0014, the Witness did not

²⁹ Request, ICC-01/04-02/06-2065-Conf, paras 14-15.

³⁰ Prosecution Response, ICC-01/04-02/06-2084-Conf, paras 1, and 18-21.

³¹ Prosecution Response, ICC-01/04-02/06-2084-Conf, paras 3 and 34.

³² Prosecution Response, ICC-01/04-02/06-2084-Conf, paras 3, 35-38, and 46.

³³ Prosecution Response, ICC-01/04-02/06-2084-Conf, para. 45.

³⁴ Prosecution Response, ICC-01/04-02/06-2084-Conf, para. 4.

³⁵ Prosecution Response, ICC-01/04-02/06-2084-Conf, para. 4.

³⁶ Prosecution Response, ICC-01/04-02/06-2084-Conf, paras 47-56.

³⁷ Prosecution Response, ICC-01/04-02/06-2084-Conf, para. 4, 48.

³⁸ Prosecution Response, ICC-01/04-02/06-2084-Conf, para. 40.

³⁹ DRC-D18-0001-1337, page 1338.

dispute the Defence's assertion as to the age of the individual in the photograph;⁴⁰ (vi) the Chamber has queried, based on the aforementioned Defence line of questioning, whether showing a photograph of someone who looks younger than his actual age truly proves anything;⁴¹ (vii) the addition of the Proposed Witnesses would be unduly prejudicial as, for the majority of the Defence case, the Prosecution was unaware of the Defence's intention to rely on them, and it would require the Prosecution to conduct additional investigations into D-0207 and D-0243, as well as to address 'irrelevant information' from the testimony of D-0185 in its final submissions;⁴² and (viii) the Chamber should give no weight to the fact that the Defence has withdrawn a number of witnesses from its List of Witnesses, as the Defence's 26 April 2017 list included persons 'with whom the Defence had never even been in contact'.⁴³

21. The Prosecution asks, should the Chamber grant the Request in relation to D-0243, that the witness be heard no earlier than January 2018, in order to allow sufficient time for investigations, and in light of the Chamber's previous decision authorising the addition of D-0251 and D-0257 to the List of Witnesses.⁴⁴

Analysis

22. The Chamber notes the Prosecution's submission that the anticipated testimony of the Proposed Witnesses would not bring to light previously unknown facts that would have significant bearing upon the case.⁴⁵ The Chamber recalls that it previously considered this factor to be relevant for its assessment of proposed additions to lists of witnesses.⁴⁶ At the same time, the Chamber has previously noted that it 'may consider a broad variety of factors in its assessment of this

⁴⁰ Prosecution Response, ICC-01/04-02/06-2084-Conf, para. 35.

⁴¹ Prosecution Response, ICC-01/04-02/06-2084-Conf, para. 38.

⁴² Prosecution Response, ICC-01/04-02/06-2084-Conf, para. 5 and 57-61.

⁴³ Prosecution Response, ICC-01/04-02/06-2084-Conf, para. 62.

⁴⁴ Prosecution Response, ICC-01/04-02/06-2084-Conf, para. 6.

⁴⁵ Prosecution Response, ICC-01/04-02/06-2084-Conf, paras 4 and 34.

⁴⁶ Decision 1733, ICC-01/04-02/06-1733, para. 8.

matter',⁴⁷ and considered that the factors previously identified are neither exhaustive, nor determinative on their own.⁴⁸

23. The Chamber notes that D-0185's proposed testimony relates to the respective ages of two children, as well as their ages while in primary school. As to the potential relevance and significance of this proposed testimony, the Chamber notes that the Prosecution has not alleged that either child was in the UPC/FPLC, nor that the children were under the age of 15 at the relevant time. While a photograph of one of the children was tendered and admitted for the Defence in the context of its cross-examination of Witness P-0014, that witness, when faced with questions concerning this child and other individuals in photos, did not contest the Defence assertions regarding age, and indicated that he would not be surprised to hear that the individuals were 16 years of age.⁴⁹
24. As to the Defence submission that the proposed testimony provides contextual evidence towards understanding the weight to be given to certain indicia of age, the Chamber notes that it has previously indicated that such lines of questioning are of questionable relevance.⁵⁰ In light of the above, the Chamber considers that the proposed testimony would not be sufficiently relevant or significant to matters for determination by the Chamber.
25. Regarding D-0207, the Chamber notes the Defence's submission that his proposed testimony is expected to contradict the testimony provided by Witness P-0898. As such, the Chamber considers this to be of relevance and significance to matters for determination by the Chamber, and that it is in the interests of justice and the determination of the truth to allow the proposed testimony.

⁴⁷ Decision 1733, ICC-01/04-02/06-1733, para. 8.

⁴⁸ See Decision on Defence Request to add Witnesses D-0251 and D-0257 to its List of Witnesses, ICC-01/04-02/06-2079, para. 22

⁴⁹ ICC-01/04-02/06-T-138-CONF-ENG ET, p. 88, lines 16-24 p. 89, line 24 – page 90, line 2, and p. 91, line 11 – p. 92, line 2.

⁵⁰ ICC-01/04-02/06-T-146-CONF-ENG ET, p. 67, lines 16-20, p.69, lines 15-21; and ICC-01/04-02/06-T-153-CONF-ENG ET, p. 9, lines 1-24.

26. Concerning D-0243, the Chamber notes that the proposed testimony relates to issues of communications in Ituri during the period from September 2002 to March 2003. The Chamber considers that D-0243, by virtue of his knowledge and practical experience in this area, could provide relevant contextual and background information in relation to communications. Noting that this has been an issue addressed during the testimony of a number of witnesses in this case,⁵¹ the Chamber is of the view that D-0243's proposed testimony may be of assistance to the Chamber in its assessment of other evidence.
27. Furthermore, the Chamber recalls that it has emphasised on previous occasions that it would remain attentive to any difficulties the Defence may face during its presentation of evidence, and retain a flexible approach when necessary to facilitate the Defence's preparations.⁵²
28. Upon careful consideration of the aforementioned factors, the Chamber considers that it would be appropriate in the interests of justice and for the determination of the truth to grant the requested addition of D-0207 and D-0243 to the List of Witnesses.
- v. Whether Rule 68(2)(b) is appropriate for the admission of D-0207's prior recorded testimony*
29. The Defence submits that the admission of Witness D-0207's prior recorded testimony pursuant to Rule 68(2)(b) is appropriate on the basis that, *inter alia*: (i) the statement does not go to proof of the acts and conduct of the accused, and meets the relevant statutory criteria;⁵³ (ii) the proposed testimony is narrow in

⁵¹ See, for example, the testimony of witnesses P-0290, P-0901, and P-0017.

⁵² See, for example, 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.

⁵³ Rule 68(2) Request, ICC-01/04-02/06-2066-Conf-Corr, para. 1.

scope;⁵⁴ and (iii) admission pursuant to Rule 68(2)(b) will safeguard the expeditiousness of proceedings.⁵⁵

30. The Prosecution argues that Witness D-0207's prior recorded testimony should not be admitted pursuant to Rule 68(2)(b), stating, *inter alia*, that: (i) the proposed testimony is irrelevant, and the fact that Defence Counsel put suggestions to Witness P-0898 based on information stemming from Witness D-0207 does not render the proposed testimony relevant;⁵⁶ (ii) should the Chamber deem that Witness D-0207's proposed testimony is relevant to Witness P-0898's credibility, the Chamber should nevertheless decline to admit the statement since the credibility of Prosecution witnesses is an issue that is materially in dispute;⁵⁷ (iii) paragraph 17 of Witness D-0207's statement contains an assertion relating to the testimony of Witness P-0190, which in turn implicates Mr Ntaganda and thus relates to the acts and conduct of the Accused;⁵⁸ (iv) if the proposed testimony is admitted, the Prosecution should be authorised to test Witness D-0207's credibility and any potential bias through cross-examination;⁵⁹ and (v) now that the Prosecution's case is closed, if the proposed testimony is admitted pursuant to Rule 68(2)(b), the only other avenue for the Prosecution to test the evidence of Witness D-0207 would be to call evidence in rebuttal, which would not be as effective as cross-examination.⁶⁰

31. The Chamber notes that Witness D-0207's prior recorded testimony relates to the evidence provided by Prosecution Witness P-0898, and considers that the prior recorded testimony does not relate to the acts and conduct of the accused. The Chamber further notes the Prosecution's argument that it should be authorised to test Witness D-0207's credibility and any potential bias through cross-

⁵⁴ Rule 68(2) Request, ICC-01/04-02/06-2066-Conf-Corr, para. 51.

⁵⁵ Rule 68(2) Request, ICC-01/04-02/06-2066-Conf-Corr, para. 51.

⁵⁶ Prosecution Response to Rule 68(2) Request ICC-01/04-02/06-2066-Conf, paras 90 and 92.

⁵⁷ Prosecution Response to Rule 68(2) Request, ICC-01/04-02/06-2066-Conf, para. 93.

⁵⁸ Prosecution Response to Rule 68(2) Request, ICC-01/04-02/06-2066-Conf, para. 94.

⁵⁹ Prosecution Response to Rule 68(2) Request, ICC-01/04-02/06-2066-Conf, paras 95-96.

⁶⁰ Prosecution Response to Rule 68(2) Request, ICC-01/04-02/06-2066-Conf, para. 96.

examination. Noting that the proposed evidence of Witness D-0207 may challenge certain aspects of Witness P-0898's testimony, the Chamber finds that it would be appropriate for the testimony to be subject to cross-examination. As such, the Chamber finds that it would not be appropriate to admit Witness D-0207's testimony pursuant to Rule 68(2)(b), and that *viva voce* testimony would be more suitable.

vi. Scheduling

32. As regards the timing of the testimony of D-0243 and D-0207, the Chamber notes that the Proposed Witnesses' statements were disclosed by the Defence on 16 October 2017, which is more than five weeks prior to the commencement of the fifth evidentiary block, during which Witness D-0243 is sought to be called. Noting the above, the Chamber directs the appearance of Witness D-0243 to be scheduled in the fifth evidentiary block, and for Witness D-0207's appearance to be scheduled in the sixth evidentiary block.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

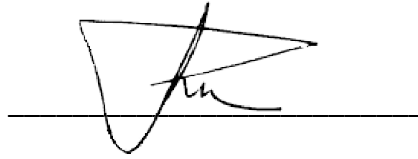
REJECTS the Request for Leave to Reply;

GRANTS the request for the addition of Witnesses D-0207 and D-0243 to the Defence List of Witnesses;

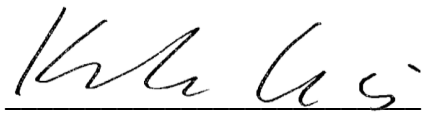
REJECTS the request for the addition of Witness D-0185 to the Defence List of Witnesses; and

DIRECTS that the testimony of Witness D-0243 be scheduled in the fifth evidentiary block, and that the testimony of Witness D-0207 be scheduled in the sixth evidentiary block.

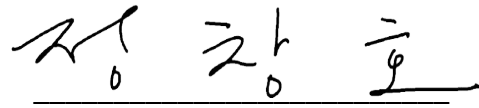
Done in both English and French, the English version being authoritative.

A handwritten signature in black ink, consisting of a large, stylized 'F' followed by 'remr', written over a horizontal line.

Judge Robert Fremr, Presiding Judge

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

Judge Kuniko Ozaki

A handwritten signature in black ink, consisting of Korean characters '정창호', written over a horizontal line.

Judge Chang-ho Chung

Dated 6 November 2017

At The Hague, The Netherlands