

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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No.: **ICC-01/04-02/06**  
Date: **12 December 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**

**Public redacted version of "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", 27 October 2017, ICC-01/04-02/06-2084-Conf**

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

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## Introduction

1. The Defence Request to add Witnesses D-0185, D-0207 and D-0243 to its list of witnesses<sup>1</sup> fails to meet the requirements of regulation 35(2) of the Regulations.<sup>2</sup> Moreover, granting the Defence Request is neither in the interests of justice and the determination of the truth, nor is it necessary to ensure the fairness of the proceedings.<sup>3</sup> Accordingly, the Defence Request should be rejected.
  
2. First, by its own admission, the Defence was able to include D-0185 and D-0207 in its final list of witnesses. Through the exercise of due diligence, the Defence could also have included D-0243 in its final list, having known of him as early as 2015. The Defence has been aware of what it purports to be the potential relevance of the proposed evidence of all three witnesses since at least 9 June 2014 when the charges against the Accused were confirmed.
  
3. Second, the proposed evidence of D-0185 and D-0207 is not relevant or significant to matters for determination by the Chamber. D-0185's proposed evidence relates to the age and level of education of two of his children, neither of whom are alleged to have been UPC/FPLC child soldiers and only one of whose photograph was used by the Defence in an exercise aptly described by the Presiding Judge as "useless".<sup>4</sup> D-0207's proposed evidence could at best establish that this person did not know that Prosecution Witness P-0898, allegedly an acquaintance of D-0207, was part of an armed group and that D-0207 is unable to recognise an image of Witness P-0898. Evidentiary rules prohibit the admission of evidence on such collateral matters.
  
4. Third, authorising the addition of these three witnesses to the Defence's list would fail to bring to light a previously unknown fact which has a significant

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<sup>1</sup> ICC-01/04-02/06-2065-Conf ("Defence Request").

<sup>2</sup> Regulations of the Court.

<sup>3</sup> See ICC-01/04-02/06-1733, para. 6.

<sup>4</sup> ICC-01/04-02/06-T-146-CONF-ENG ET, p.67, lns.16-20 (open session).

bearing upon the case. The Defence has already put suggestions to Prosecution witnesses on the basis of information that it obtained from D-0185 and D-0207. D-0243's proposed evidence has largely been addressed during the testimony of other witnesses, including the Accused.

5. Fourth, authorising the addition of these witnesses would also be unduly prejudicial to the Prosecution and the participants since, for the major part of the Defence case which has now passed, including, most significantly, the Accused's testimony, the Prosecution was unaware of the Defence's intention to rely on them. The Prosecution has been deprived of the possibility to cross-examine the Accused and other Defence witnesses in relation to the proposed testimony of D-0243. The Prosecution would also need to conduct additional investigations into D-0207 and D-0243 and be given sufficient time to do so. The prejudice that would arise from the addition of D-0185 is the admission of entirely irrelevant information that the Prosecution would have to address in its final submissions.
6. The Chamber has authorised the addition of D-0251 and D-0257 to the Defence's list of witnesses and ordered that they be heard as the last two witnesses in the fifth evidentiary block.<sup>5</sup> Should the Chamber grant the Defence Request in relation to D-0243, the Prosecution asks that this witness be heard, at the earliest, in January 2018 in order to allow sufficient time for investigations.<sup>6</sup> The Prosecution may seek to recall the Accused and other witnesses for further examination relevant to the issues upon which any additional witness may testify.

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<sup>5</sup> ICC-01/04-02/06-2079, para. 24.

<sup>6</sup> In a separate response, the Prosecution opposes the admission of D-0207's prior recorded testimony pursuant to rule 68(2)(b). Should the Chamber decide that this witness's evidence is to be heard in person, the Prosecution asks that this also take place in January 2018 at the earliest.

## Confidentiality

7. In accordance with regulation 23bis(1) and (2) of the Regulations, this response is classified as “Confidential” as it refers to material not yet available to the public and responds to a request bearing the same classification. The Prosecution will file a public redacted version of this response.

## Background

8. On 15 July 2016, the Presiding Judge noted that “the Chamber emphasises that the Defence should also be making ongoing preparations for any Defence case it may wish to present, including identifying potential witnesses”<sup>7</sup> and that “[l]ater this year the Chamber will be requiring the Defence to indicate its intentions in that regard.”<sup>8</sup>
9. On 19 October 2016, the Defence was ordered to file notice as to whether it intended to call evidence, together with a preliminary list of witnesses, on an *ex parte* basis, by 16 December 2016.<sup>9</sup>
10. On 30 January 2017, the Chamber ordered the Defence, *inter alia*, to provide a further provisional list of witnesses as well as a summary of the anticipated testimony of the witnesses by 31 March 2017<sup>10</sup> and provide the final version of its list of witnesses and summaries of anticipated testimony, as well as its final list of evidence by 26 April 2017.<sup>11</sup> The Chamber also set 26 April 2017 as the final deadline for all disclosure by the Defence.<sup>12</sup>

<sup>7</sup> ICC-01/04-02/06-T-122-CONF-ENG ET, p. 65, ln. 24 – p. 66, ln. 2 (open session).

<sup>8</sup> ICC-01/04-02/06-T-122-CONF-ENG ET, p. 66, lns. 3-4 (open session).

<sup>9</sup> See ICC-01/04-02/06-1588-Corr, paras. 10-11.

<sup>10</sup> ICC-01/04-02/06-1757, para. 10.

<sup>11</sup> ICC-01/04-02/06-1757, para. 11.

<sup>12</sup> ICC-01/04-02/06-1757, para. 14.

11. The Defence did not include the Accused on its list of trial witnesses, either on 31 March 2017<sup>13</sup> or on 26 April 2017.<sup>14</sup> However, on 12 May 2017, the Defence filed an urgent request to call the Accused to testify starting on 12 June 2017.<sup>15</sup> The Prosecution opposed this request on 16 May 2017.<sup>16</sup>
12. On 17 May 2017, the Chamber partially granted the Defence's 12 May 2017 request and ordered that the Accused's testimony commence on 14 June 2017.<sup>17</sup>
13. On 28 August 2017, the Chamber ordered the Defence to file an updated list of witnesses within two weeks of the completion of the Accused's testimony.<sup>18</sup>
14. On 27 September 2017, the Defence provided an updated list of witnesses and indicated that it would be filing requests to add several new witnesses to its list.<sup>19</sup>
15. On 3 October 2017, the Chamber set 16 October 2017 as the deadline by which the Defence must file any requests pursuant to regulation 35(2) of the Regulations and/or rule 68(2) of the Rules.<sup>20</sup>
16. On 4 October 2017, the Defence requested the addition of D-0251 and D-0257 to its list of witnesses.<sup>21</sup> The Chamber granted this request on 20 October 2017.<sup>22</sup>
17. On 16 October 2017, the Defence filed the Defence Request.

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<sup>13</sup> ICC-01/04-02/06-1843-Conf-Red.

<sup>14</sup> ICC-01/04-02/06-1881-Conf-AnxA.

<sup>15</sup> ICC-01/04-02/06-1903.

<sup>16</sup> ICC-01/04-02/06-1909.

<sup>17</sup> Email from the Chamber to the Parties and participants dated 17 May 2017 at 15:05. On 19 May 2017, the Chamber provided its reasons for the 17 May 2017 decision, *see* ICC-01/04-02/06-1914, paras. 19-20.

<sup>18</sup> ICC-01/04-02/06-T-231-CONF-ENG ET, p. 4, ln. 24 – p. 5, ln. 5 (open session).

<sup>19</sup> ICC-01/04-02/06-2045-Conf, para. 16 (c) and (e).

<sup>20</sup> Email from the Chamber to the Parties and participants dated 3 October 2017 at 10:17.

<sup>21</sup> Defence Request, para. 2.

<sup>22</sup> ICC-01/04-02/06-2079.

## Prosecution Submissions

18. In order to obtain an extension of time pursuant to regulation 35(2) of the Regulations after the applicable deadline has expired, this Chamber has held that “in addition to showing ‘good cause’ for a variation of the time limit, the [calling party] is required to demonstrate that it was ‘unable to file the application within the time limit for reasons outside [its] control’”.<sup>23</sup> Absent such grounds, the applying party must show that granting its request is in the interests of justice and the determination of the truth and is consistent with the Chamber’s obligations to ensure the fairness of the proceedings.<sup>24</sup> The Defence Request does not meet these criteria.

### I. The Defence Request fails to meet the requirements of regulation 35(2)

19. The Defence Request does not meet the requirements of regulation 35(2): it does not establish that the Defence was unable to file its request before the 26 April 2017 deadline<sup>25</sup> for reasons outside its control and fails to establish “good cause”.<sup>26</sup> The Defence concedes as much in relation to D-0185 and D-0207.<sup>27</sup> The Chamber set clear deadlines for the Defence to provide its provisional and final lists of witnesses and provided ample time for the Defence to do so. There is nothing exceptional about the circumstances that led the Defence to file its Request over five months late.

20. The Defence asserts that the proposed evidence of all three witnesses is relevant to the charges against the Accused yet these charges have not changed since the time that they were confirmed on 9 June 2014.<sup>28</sup> Further, no new issue has arisen

<sup>23</sup> ICC-01/04-02/06-1733, para. 7.

<sup>24</sup> See ICC-01/04-02/06-1733, para. 6; See also ICC-01/04-02/06-1785-Conf, para. 6.

<sup>25</sup> ICC-01/04-02/06-1757, para. 11.

<sup>26</sup> See ICC-01/04-02/06-1733, para. 7; See also ICC-01/04-02/06-1785-Conf, paras. 6, 9.

<sup>27</sup> Defence Request, paras. 8, 13.

<sup>28</sup> ICC-01/04-02/06-309.

since the confirmation decision that has in any way altered the charges or the key elements at issue in the proceedings.

21. It is reasonable to assume that the Defence has been preparing its case for over three years. The Defence was explicitly reminded that it should be doing so on 15 July 2016,<sup>29</sup> and on 19 October 2016 it was ordered to file notice as to whether it intended to call evidence, together with a preliminary list of witnesses, on an *ex parte* basis, by 16 December 2016.<sup>30</sup>

#### **D-0185 and D-0207**

22. By its own admission, the Defence was able to include D-0185 and D-0207 in its final list of witnesses.<sup>31</sup> Accordingly, the Defence fails to satisfy the requirements of regulation 35(2) in relation to these two proposed witnesses. Indeed, D-0185's statement was taken on [REDACTED] 2016,<sup>32</sup> [REDACTED] before the Defence disclosed photographs referred to in this statement and over [REDACTED] before using one such photograph in Court.<sup>33</sup> D-0207's statement was obtained on [REDACTED] 2017;<sup>34</sup> however, the Defence previously met D-0207 on [REDACTED] 2016.<sup>35</sup> Critically, the Defence specifically mentioned D-0207 by name [REDACTED] on [REDACTED] 2016.<sup>36</sup> The Defence only provided the statements of D-0185 and D-0207 to the Prosecution on 16 October 2017 as annexes to the Defence Request.

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<sup>29</sup> See para. 7, above.

<sup>30</sup> See ICC-01/04-02/06-1588-Corr, paras. 10-11.

<sup>31</sup> Defence Request, paras. 8, 13.

<sup>32</sup> Defence Request, Annex A.

<sup>33</sup> [REDACTED].

<sup>34</sup> D-0207 statement, p. 1.

<sup>35</sup> D-0207 statement, p. 1.

<sup>36</sup> [REDACTED].



**D-0243**

23. Despite the Defence assertion that it was unable to include D-0243 on its final list of witnesses,<sup>37</sup> it is clear that it could have done so through the exercise of due diligence.
24. The Defence states that it “had sought out Witness D-0243 as early as 2015, but intended to adduce testimony on these subjects from another witness who died a few months ago.”<sup>38</sup> Therefore, the Defence was aware of D-0243 as early as 2015 and, prior to providing its final list of witnesses, was also fully aware of the subjects in relation to which D-0243 could testify.
25. The Defence fails to state the identity of the other witness who died a few months ago and from whom it allegedly had intended to adduce testimony on the same subjects as D-0243. In any event, this fact is only relevant if the deceased witness was already on the Defence’s witness list; without the witness code the Chamber cannot hold this to be the case. Based on the summaries of anticipated testimony provided by the Defence,<sup>39</sup> no witness who would provide information comparable to D-0243’s proposed evidence appears in the Defence’s final list of witnesses. Nor did the Defence withdraw any witnesses from its list in May 2017, around the time that the Defence seems to have found out about the death of such other witness.<sup>40</sup>
26. The Defence fails to explain why it did not alert the Chamber, Prosecution and participants that it intended to rely on D-0243 when it met him on [REDACTED] 2017, at which time it already knew that it could no longer rely on the other witness.<sup>41</sup> Neither does the Defence explain why a lawyer from its team was only

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<sup>37</sup> Defence Request, para. 16.

<sup>38</sup> Defence Request, para. 16.

<sup>39</sup> ICC-01/04-02/06-1881-Conf-AnxB.

<sup>40</sup> See Defence Request, para. 16.

<sup>41</sup> Defence Request, para. 16.

able to meet D-0243 over three months later on [REDACTED] 2017,<sup>42</sup> and again why no notice of its intention to add D-0243 was provided at that stage.

27. Trial Chamber III has held that a Chamber does not need to assess whether a Party has demonstrated good cause for requesting the submission of evidence after the expiry of the applicable time limit once it establishes that a Party failed to demonstrate that the late submission of its application was due to reasons outside its control.<sup>43</sup>

28. The Defence itself conceded that it was able to include D-0185 and D-0207 on its final list of witnesses. Through the exercise of due diligence, it could have also included D-0243 on that list. Should the Chamber deem that the Defence did demonstrate that it was unable to include D-0243 in its final list for reasons beyond its control, the Defence Request should nevertheless be rejected since it fails to establish the cumulative requirement of good cause, including for the additional reasons set out below.

**II. Granting the Defence Request would not be in the interests of justice and the determination of the truth and would be inconsistent with the Chamber's obligation to ensure the fairness of the proceedings**

29. The Chamber has held that “[w]hen the terms of Regulation 35 are not met, a case-by-case assessment which balances the justification for the addition of new evidence against the potential prejudice which may be caused to the other party is required.”<sup>44</sup> The Chamber then referred to a non-exhaustive list of factors that it may consider in such cases.<sup>45</sup> As demonstrated below, the Defence Request fails to satisfy these requirements. In the circumstances, the required case-by-case assessment should lead the Chamber to conclude that the potential prejudice that

<sup>42</sup> Defence Request, para. 16.

<sup>43</sup> ICC-01/05-01/08-3029, para. 21.

<sup>44</sup> See ICC-01/04-02/06-1733, para. 8; See also ICC-01/04-02/06-1785-Conf, para. 6.

<sup>45</sup> See ICC-01/04-02/06-1733, para. 8; See also ICC-01/04-02/06-1785-Conf, para. 6.

granting the Defence Request would cause to the Prosecution and the victims far outweighs the justifications contained in the Request. The following reasons also further demonstrate that the Defence fails to establish that there is good cause to grant its Request in relation to D-0243.

**(a) The Defence Request is late and was filed after the major part of the Defence case was heard**

30. Among the factors that the Chamber has stated that it may consider in determining a request to add witnesses to a Party's list when the terms of regulation 35(2) have not been met, is "the time elapsed since the original deadline and the stage of the proceedings at which admission of new evidence is sought".<sup>46</sup> The Defence Request was filed over five months after the expiration of the 26 April 2017 deadline<sup>47</sup> and the Defence case is very close to its end.
31. In rejecting a Prosecution request to add a witness to its list after the expiration of the applicable deadline, the Chamber referred, *inter alia*, to the fact that the Defence was not aware of the Prosecution's intention to rely on that witness for the major part of the Prosecution case, which would mean that the Defence might need to conduct additional investigations in his regard.<sup>48</sup> The latter is entirely applicable to the Defence Request since the major part of the Defence case, including, most significantly, the Accused's testimony that lasted for over 120 hours, has passed and the Prosecution was unaware of the possibility that any of the three proposed witnesses would be called, and the Prosecution would certainly need to conduct investigations in relation to D-0207 and D-0243.
32. Further, since the Prosecution did not know that there was even the slightest possibility that the Defence would call D-0243, it did not cross-examine the Accused or other Defence witnesses about their potential knowledge of this

<sup>46</sup> ICC-01/04-02/06-1733, para. 8(i).

<sup>47</sup> ICC-01/04-02/06-1757, para.11.

<sup>48</sup> ICC-01/04-02/06-1785-Conf, para. 15.

proposed witness and/or specific aspects of the issues upon which he would testify. While, should the Chamber grant the Defence Request, the Prosecution would have the opportunity to cross-examine D-0243 himself, it would still have been deprived of testing D-0243's credibility and proposed evidence through the cross-examination of *other* witnesses. The latter is an important opportunity that is available to Parties in all instances other than when witnesses are added to a Party's list after the applicable deadline.

**(b) The Defence Request fails to provide valid reasons for not seeking to add the proposed witnesses to its list at an earlier stage**

33. In determining a request to add witnesses to a Party's list after the expiration of the applicable deadline when the terms of regulation 35(2) have not been met, the Chamber may also consider "the reasons provided for not seeking addition of the new evidence at an earlier stage".<sup>49</sup> As argued above,<sup>50</sup> the Defence provides no valid reason for its failure to seek the addition of the proposed evidence at an earlier stage of the proceedings.

**(c) The proposed evidence of D-0185 and D-0207 is not relevant or significant to matters for determination by the Chamber**

34. The Chamber must also consider the relevance and significance of the proposed additional evidence to matters for determination by the Chamber.<sup>51</sup> While the Prosecution does not contest that certain aspects of D-0243's proposed testimony are relevant or significant to matters for determination by the Chamber, the proposed evidence of both D-0185 and D-0207 fails in this regard and would not bring to light any previously unknown facts having a significant bearing upon the case.

<sup>49</sup> ICC-01/04-02/06-1733, para. 8(ii).

<sup>50</sup> See paras. 20-26, above.

<sup>51</sup> ICC-01/04-02/06-1733, para. 8 (iv); See also ICC-01/04-02/06-1785-Conf, para. 14.

**D-0185**

35. The Defence states that D-0185's proposed evidence is relevant, *inter alia*, because it "confirms the identity and age of a child appearing on a photograph that is an admitted exhibit in this case".<sup>52</sup> This photograph is contained in [REDACTED] and was shown to Prosecution Witness P-0014 along with two other photographs.<sup>53</sup> Asked whether the person in this photograph is under 15, 15 or over 15, Witness P-0014 responded that the person is "15 and over".<sup>54</sup> Defence Counsel then asked Witness P-0014 whether he would be surprised if Defence Counsel informed the Witness that the people in the three photographs shown to him were 16; the Witness responded that if Defence Counsel has evidence that could be shown to the Witness, he would believe Defence Counsel.<sup>55</sup> In response to further similar questions, the Witness responded that he would not be surprised to learn that all the persons in the photographs were 16 years old.<sup>56</sup>

36. Therefore, Witness P-0014 did not contradict the information provided by the Defence at the time - the same information now contained in D-0185's statement - that D-0185's son was 16 years old when the photograph was taken. The witness's answers accepting the Defence suggestion now preclude the Defence from adducing evidence to prove its suggestion. As held by an ICTR Trial Chamber in *Nahimana*, "when an attack is made upon the veracity of a witness by reference to particular facts, 'the matter is collateral, and a denial cannot be rebutted'".<sup>57</sup>

<sup>52</sup> Defence Request, para. 7. The Defence provides the incorrect ERN for the photograph at issue, referring to [REDACTED].

<sup>53</sup> [REDACTED].

<sup>54</sup> ICC-01/04-02/06-T-138-CONF-ENG ET, p. 88, lns. 16-24 (open session).

<sup>55</sup> ICC-01/04-02/06-T-138-CONF-ENG ET, p. 89, ln. 24 – p. 90, ln. 2 (open session).

<sup>56</sup> See ICC-01/04-02/06-T-138-CONF-ENG ET, p. 91, ln. 11 – p. 92, ln. 2 (open session).

<sup>57</sup> *Prosecutor v. Nahimana et al.*, ICTR-99-52-T, Decision of 9 May 2003 on the Prosecutor's Application for Rebuttal Witnesses as Corrected According to the Order of 13 May 2003, 13 May 2003, para.51, fn.21 citing *R v Hamilton* (1998) Times, 25 July, reaffirming *R v Wood* [1951] 2 All ER 112n, 35 Cr App Rep 61, *R v Redgrave* (1981) 74 Cr App Rep 10, *Cross and Tapper*, p.332. Similarly, in *Ntagerura*, an ICTR Trial Chamber described evidence challenging the credibility of a witness as a collateral matter, *Prosecutor v. Ntagerura et al.*, ICTR-99-46-T, Decision on the Prosecutor's Motion for Leave to Call Evidence in Rebuttal Pursuant to Rules 54, 73, and 85 (A) (iii) of the Rules Of Procedure and Evidence, 21 May 2003, para.33.

37. [REDACTED].<sup>58</sup>

38. D-0185's proposed evidence is irrelevant to matters in issue, and collateral to matters related to the credibility of Witness P-0014. Importantly, the Presiding Judge described the Defence exercise in asking witnesses to guess the age of persons in photographs as "useless"<sup>59</sup> and the Chamber has already expressed "strong doubts" as to the probative value of this exercise.<sup>60</sup> The Presiding Judge himself queried whether showing a photograph of somebody who really looks very young even though he is actually older proves anything.<sup>61</sup> The Chamber should not allow the record to be cluttered with D-0185's patently irrelevant evidence.

39. The Defence also argues that D-0185's proposed evidence is relevant because D-0185 states that both of his children were over the age of 15 while still in primary school; the Defence argues that this "provides 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 attainment."<sup>62</sup> Physical appearance and level of educational attainment are but two of several factors the Prosecution advanced as considerations in determining age - other such factors include the person's behaviour, level of maturity, voice, in particular in relation to boys, and intellectual capacity.

40. In any event, the fact that D-0185 may have two children who are over the age of 15 but still in primary school is completely irrelevant to the proceedings. First, the Prosecution has not alleged that D-0185's children were in the UPC/FPLC during

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<sup>58</sup> [REDACTED].

<sup>59</sup> ICC-01/04-02/06-T-146-CONF-ENG ET, p.67, lns.16-20 (open session).

<sup>60</sup> ICC-01/04-02/06-T-103-CONF-ENG ET, p.22, ln.24 – p.23, ln.3 (open session); ICC-01/04-02/06-T-146-CONF-ENG ET, p.69, lns.15-17 (open session).

<sup>61</sup> ICC-01/04-02/06-T-153-CONF-ENG ET, p.9, lns.1-24 (private session); *see also* ICC-01/04-02/06-T-146-CONF-ENG ET, p.71, lns.18-25 (open session).

<sup>62</sup> Defence Request, para. 7. [REDACTED].

the temporal scope of the charges and were below the age of 15 at the time; nor does D-0185 state that they were in the UPC/FPLC. Accordingly, none of the charges against the Accused rest on any information concerning these two persons. Second, the photograph of only one of the two children was used in the proceedings, which, for the reasons stated above, does not mean that the age or educational level of this child is at all relevant to the proceedings. The irrelevant nature of the proposed evidence applies all the more to the child whose image was never even seen or commented on by any Prosecution witness.

41. For these reasons, D-0185's evidence can in no way be considered "exculpatory".<sup>63</sup> The "truth"<sup>64</sup> that is being sought in this case concerns the Accused's alleged actions as charged in the Updated Document Containing the Charges, and not the age and educational level of two persons whom the Defence decided to photograph while in costume.

#### **D-0207**

42. [REDACTED]<sup>65</sup> [REDACTED].<sup>66</sup> [REDACTED];<sup>67</sup> [REDACTED].<sup>68</sup>

43. D-0207's proposed evidence is not relevant or significant to matters for determination by the Chamber.<sup>69</sup>

44. The fact that Witness P-0898 was in a military group is not incompatible with D-0207's testimony since D-0207 may not have known about this. [REDACTED],<sup>70</sup> which is one of the innumerable reasons that could account for the fact that D-0207 did not know that Witness P-0898 was [REDACTED].

<sup>63</sup> *Contra* Defence Request, para. 8.

<sup>64</sup> *See* Defence Request, para. 8.

<sup>65</sup> D-0207 Statement, para. 7.

<sup>66</sup> [REDACTED].

<sup>67</sup> [REDACTED].

<sup>68</sup> [REDACTED].

<sup>69</sup> *Contra* Defence Request, para. 11.

<sup>70</sup> D-0207 Statement, para. 11.

45. Contrary to the Defence assertion, D-0207's proposed evidence does not directly contradict Prosecution Witness P-0898's testimony.<sup>71</sup> [REDACTED].

46. Similar to the situation in relation to D-0185, D-0207's proposed evidence relates to a collateral issue. The Defence should not be authorised to submit further information in this regard, in particular since it is seeking to do so over five months after the deadline.

**(d) The proposed evidence would be duplicative of Defence evidence already before the Chamber**

47. The evidence that is already before the Chamber is another relevant consideration in the determination of the Defence Request.<sup>72</sup> The cumulative nature of evidence that a Party seeks to admit after the expiration of the applicable deadline is a factor militating *against* its admission.<sup>73</sup> Indeed, in rejecting a request to add a witness to the Prosecution's list, the Chamber noted, *inter alia*, that it had heard evidence about one of the issues that the proposed evidence related to and also noted submissions that certain aspects of the proposed evidence had been largely addressed during the testimony of other witnesses.<sup>74</sup>

48. As set out below, the anticipated evidence of the three proposed witnesses is duplicative of evidence that is already before the Chamber. As such, it would not bring to light any previously unknown facts having a significant bearing upon the case and would be of limited to no relevance to matters for determination by the Chamber.

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<sup>71</sup> Defence Request, paras. 10-11.

<sup>72</sup> See ICC-01/04-02/06-1733, para. 8 (iii).

<sup>73</sup> See ICC-01/04-02/06-1785-Conf, paras. 13-14.

<sup>74</sup> ICC-01/04-02/06-1785-Conf, para. 14 ; See also ICC-01/04-02/06-1733, para. 8 (iii).



**D-0185**

49. As noted above, the Defence has already put specific suggestions to Witness P-0014 based on the information obtained from D-0185.<sup>75</sup> As such, D-0185's proposed evidence would be cumulative of evidence that is already on record.

**D-0207**

50. The Defence contends that D-0207's proposed evidence is cumulative of other evidence that the Chamber has already heard, citing [REDACTED].<sup>76</sup>

51. [REDACTED]. [REDACTED].<sup>77</sup> [REDACTED].<sup>78</sup> [REDACTED].<sup>79</sup> Since this evidence is already in the record [REDACTED], it is added reason not to authorise the addition of D-0207 as it would be duplicative of evidence already before the Chamber.

52. Further, the Defence has already put its suggestion to Witness P-0898 that D-0207 [REDACTED].<sup>80</sup>

53. Other information in D-0207's Statement is also duplicative of information already before the Chamber. D-0207 states that the Accused had a good reputation,<sup>81</sup> which is duplicative of the testimony of the Accused himself,<sup>82</sup> and of D-0038's testimony.<sup>83</sup> [REDACTED].<sup>84</sup> The latter is duplicative of [REDACTED].<sup>85</sup>

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<sup>75</sup> See para. 35, above.

<sup>76</sup> Defence Request, para. 12, fn. 18.

<sup>77</sup> D-0207 Statement, paras. 18-19.

<sup>78</sup> [REDACTED].

<sup>79</sup> [REDACTED].

<sup>80</sup> [REDACTED].

<sup>81</sup> D-0207 Statement, para. 12.

<sup>82</sup> See, e.g. ICC-01/04-02/06-T-222-ENG ET, p. 71, lns. 1-8 (open session).

<sup>83</sup> ICC-01/04-02/06-T-250-CONF-ENG ET, p. 6, ln. 24 – p. 7, ln. 8 (open session).

<sup>84</sup> D-0207 Statement, para. 17.

<sup>85</sup> [REDACTED].

**D-0243**

54. As acknowledged by the Defence, a number of Prosecution witnesses have testified about various aspects of the means of communication available to the UPC/FPLC during the temporal scope of the charges.<sup>86</sup> This means that the Defence has had every opportunity to test this evidence through cross-examination. It also means that D-0243's proposed evidence on this subject would be duplicative- not only of the testimony of Prosecution Witnesses, but also of the testimony of the Accused who testified at length about these issues.<sup>87</sup>

55. In its request, the Defence makes no reference to other topics included in D-0243's summary of anticipated testimony.<sup>88</sup> These issues have already been addressed by the Accused and other Defence Witnesses. For example, the Accused and other Defence Witnesses have already testified about: (i) the ethnic conflict in Ituri;<sup>89</sup> (ii) attacks by the RCD-K/ML/APC against civilians;<sup>90</sup> (iii) the creation of the UPC;<sup>91</sup> (iv) the Accused's role in protecting civilians;<sup>92</sup> (v) the death of Claude;<sup>93</sup> and (vi) the departure of Lompondo.<sup>94</sup> The Chamber must consider, and authorise, all the anticipated topics of evidence for which the Defence seeks to call the D-0243.

56. Since the proposed evidence of all three witnesses is duplicative of evidence already before the Chamber, it would not bring to light any previously unknown

<sup>86</sup> Defence Request, para.15.

<sup>87</sup> See, e.g. ICC-01/04-02/06-T-222-ENG ET, p. 82, ln. 19 – p. 39, ln. 5 (open session); ICC-01/04-02/06-T-215-ENG ET, p. 81, ln. 7 – p. 86, ln. 5 (open session); ICC-01/04-02/06-T-212-CONF-ENG ET, p. 44, ln. 3 – p. 46, ln.18 (open session); ICC-01/04-02/06-T-213-CONF-ENG ET, p. 10, ln. 15 – p. 12, ln. 1 (open session); ICC-01/04-02/06-T-214-CONF-ENG ET, p. 42, lns. 10-21 (open session) ; ICC-01/04-02/06-T-216-ENG ET, p. 85, ln. 20 – p. 86, ln. 9 (open session); ICC-01/04-02/06-T-217-CONF-ENG ET, p. 71, lns. 5-21 (open session).

<sup>88</sup> See Defence Request, Annex C, points 2-5 and 13.

<sup>89</sup> D-0243 summary, point 2; see D-0300: ICC-01/04-02/06-T-224-CONF-ENG ET, p. 46, ln. 8 – p. 47, ln. 1 (open session).

<sup>90</sup> D-0243 summary, point 2; see D-0300: ICC-01/04-02/06-T-212-CONF-ENG ET, p. 22, ln. 22 – p. 23, ln. 13 (open session).

<sup>91</sup> D-0243 summary, point 3; see D-0300: ICC-01/04-02/06-T-215-ENG ET, p. 35, lns. 3 – 24 (open session).

<sup>92</sup> D-0243 summary, point 4; see D-0054: ICC-01/04-02/06-T-244-CONF-ENG ET, p. 16, ln. 7 – p. 18, ln. 25 (private session).

<sup>93</sup> D-0243 summary, point 5; see D-0300: ICC-01/04-02/06-T-213-CONF-ENG ET, p. 37, ln. 22 – p. 40, ln. 21 (open session).

<sup>94</sup> D-0243 summary, point 5; see D-0300: ICC-01/04-02/06-T-214-CONF-ENG ET, p. 64, ln. 11 – p. 65, ln. 8, p. 74, ln. 16 – p. 75, ln.3 (open session)

facts having a significant bearing upon the case.<sup>95</sup> Accordingly, the Defence would suffer no undue prejudice should the Chamber dismiss its request.

**(e) Granting the Defence Request would be unduly prejudicial**

57. The Chamber must ensure procedural fairness for *both* Parties as well as for the participants.<sup>96</sup> Indeed, Trial Chamber V(A) stated that “the concept of a fair trial must include the principle of expeditiousness of proceedings: not only for the accused, but also for the prosecution, the victims and the public—all of whom have an interest in bringing the litigation to an end.”<sup>97</sup>

58. Whether the Prosecution can be given adequate time to investigate the proposed new witnesses, bearing in mind the need to conduct the trial fairly and expeditiously, is a relevant consideration in the determination of the Defence Request, as is the Prosecution’s ability to cross-examine other witnesses in relation to the evidence that the proposed new witnesses would provide.<sup>98</sup>

59. As noted above, had the Prosecution been aware that D-0243 may be called to testify, it would also have cross-examined the Accused, and possibly other Defence Witnesses, about the information that D-0243 is expected to provide. As such, granting the Defence Request would be unduly prejudicial to the Prosecution since it has been deprived of this crucial opportunity to test the Defence’s evidence. Although the opportunity to recall such other witnesses for further examination may alleviate some of the prejudice, this would entail a further unnecessary prolongation of the proceedings and should be avoided given that the Defence Request fails to meet the necessary requirements.

<sup>95</sup> See ICC-01/04-02/06-1733, para. 8 (vi).

<sup>96</sup> See ICC-02/04-01/05-20, para. 31; ICC-01/04-135-tEn, para. 38; ICC-01/04-02/12-271-Corr, para. 256.

<sup>97</sup> ICC-01/09-01/11-1776-Conf, para.19.

<sup>98</sup> See ICC-01/04-02/06-1733, paras. 8, 17-18; See also *Prosecutor v. Setako*, ICTR-04-81-I, Decision on Defence Motion to Vary its Witness List, 25 May 2009, paras. 4-5.

60. The Defence asserts that the addition of D-0243 would still provide the Prosecution with adequate time to conduct any necessary investigations.<sup>99</sup> The Fifth Evidentiary block is scheduled to commence on 27 November 2017. Should D-0207<sup>100</sup> and/or D-0243 be authorised to testify, the Prosecution would need to carry out significant investigations in their regard. The prejudice in relation to D-0243 would be even more acute since the Defence has not provided any statement for this proposed witness. Indeed, the Defence has not even provided D-0243's basic biographical information other than his name.

61. Further, the Defence has already been authorised to add Witnesses D-0251 and D-0257 to its list, so D-0207 and D-0243 would not be the only witnesses in relation to whom the Prosecution will need to commence investigations afresh. The fact that the Defence has also already been authorised to add the Accused with only one month's notice, should also be taken into account, in particular in light of the unparalleled duration of his testimony and the preparation required for it when compared to other witnesses in this case. The more witnesses the Defence is allowed to add, the higher the degree of prejudice to the Prosecution.

62. The Chamber should give no weight, in its determination of the Defence Request, to the fact that the Defence has withdrawn a number of witnesses from its list<sup>101</sup> as the Defence's 26 April 2017 list included persons with whom the Defence had never even been in contact.<sup>102</sup>

63. Should the Chamber grant the Defence Request in relation to D-0243, the Prosecution asks that he testify in January 2018 in order to allow sufficient time for investigations.<sup>103</sup> The Prosecution also reserves its right to request the recall of

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<sup>99</sup> Defence Request, para. 16.

<sup>100</sup> Should the Chamber authorise the Defence to add D-0207 to its list, the Prosecution objects to the admission of his prior recorded testimony pursuant to rule 68(2)(b).

<sup>101</sup> Defence Request, para. 1.

<sup>102</sup> See ICC-01/04-02/06-T-204-CONF-ENG ET, p. 34, lns. 8-10 (private session).

<sup>103</sup> See fn. 6, above.

the Accused and/or any other relevant Defence witnesses should the Chamber authorise the addition of any new witness to the Defence's list.<sup>104</sup>

### **Conclusion**

64. For the foregoing reasons, the Chamber should reject the Defence Request.



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**Fatou Bensouda**  
**Prosecutor**

Dated this 12<sup>th</sup> day of December 2017  
At The Hague, The Netherlands

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<sup>104</sup> See *Prosecutor v. Nahimana et al.*, ICTR-99-52-T, Decision on the Prosecutor's Oral Motion for Leave to Amend the List of Selected Witnesses, 26 June 2001, para. 32.