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**International
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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 D-0251 and D-0257 to the Defence List of Witnesses’, ICC-01/04-02/06-2052-Conf”, 16 October 2017, ICC-01/04-02/06-2064-Conf

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Introduction

1. The Defence Request to add Witnesses D-0251 and D-0257 to its list of witnesses¹ fails to meet the requirements of regulation 35(2) of the Regulations.² 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.³

2. First, the Defence Request fails to establish that exceptional circumstances exist requiring the addition of two witnesses over five months after the expiry of the Defence deadline to submit its final list of witnesses. Through the exercise of due diligence, the Defence could have included Witnesses D-0251 and D-0257 in its final list. These witnesses [REDACTED] and the Defence has been aware of the potential relevance of their proposed evidence since at least 9 June 2014 when the charges against the Accused were confirmed. Moreover, Witness D-0251 is specifically mentioned in material disclosed to the Defence as far back as March 2015. As for Witness D-0257, the Defence has intended to provide information related to the Accused's whereabouts in February 2003 at least since it submitted its final list of witnesses, which included [REDACTED] who was expected to testify about this issue.

3. Second, authorising the addition of these two witnesses to the Defence's list would fail to bring to light a previously unknown fact which has a significant bearing upon the case: the proposed evidence of both witnesses has largely been addressed during the testimony of other Defence witnesses, in particular the Accused. Accordingly, the proposed evidence is of limited relevance to matters for determination by the Chamber. D-0257's proposed evidence, which solely

¹ ICC-01/04-02/06-2052-Conf. The Prosecution makes no observations about the Defence's indication, at paragraph 12 of the Defence Request, that it will be seeking to admit D-0251's statement pursuant to rule 68(3) of the Rules of Procedure and Evidence ("Rules") pending an actual application to this effect.

² Regulations of the Court.

³ See ICC-01/04-02/06-1733, para. 6.

deals with the alleged reasons for which the Accused may have travelled to Rwanda at some point in 2003 and not whether the Accused in fact did undertake such travel, is not relevant or significant to the matters for determination by the Chamber.

4. Third, 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. As such, the Prosecution has been deprived of the possibility to cross-examine the Accused and other Defence witnesses in relation to the proposed testimony of the two witnesses. The Prosecution would also need to conduct additional investigations into both witnesses and be given sufficient time to do so. While every Defence request to add witnesses to its list should be determined on its own merit, the fact that, as the Defence indicated,⁴ the Defence will be filing such requests in relation to a total of six witnesses should also be a factor that the Chamber considers in determining the prejudice to the Prosecution since the extent to which the Chamber may grant any such requests has a direct impact on the degree of undue prejudice to the Prosecution and the need for adequate time to prepare.
5. Should the Chamber grant the Defence Request in whole or in part, the Prosecution: (i) asks that any witnesses added to the Defence's list be heard, at the earliest, in January 2018 in order to allow sufficient time for investigations; and (ii) provides advance notice that it may seek to recall the Accused and other witnesses for further examination relevant to the issues upon which any additional witness may testify.

⁴ [REDACTED], *see* ICC-01/04-02/06-2045-Conf, para. 16(c) and (e), Defence Request, para. 2, and the email from Stéphane Bourgon to the Chamber, Prosecution and participants dated 6 October 2017 at 15:19.

Confidentiality

6. 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

7. 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”⁵ and that “[l]ater this year the Chamber will be requiring the Defence to indicate its intentions in that regard.”⁶
8. 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 2016.⁷
9. 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 2017⁸ 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 2017.⁹ The Chamber also set 26 April 2017 as the final deadline for all disclosure by the Defence.¹⁰

⁵ ICC-01/04-02/06-T-122-CONF-ENG ET, p. 65, ln. 24 – p. 66, ln. 2 (open session).

⁶ ICC-01/04-02/06-T-122-CONF-ENG ET, p. 66, lns. 3-4 (open session).

⁷ See ICC-01/04-02/06-1588-Corr, paras. 10-11.

⁸ ICC-01/04-02/06-1757, para. 10.

⁹ ICC-01/04-02/06-1757, para. 11.

¹⁰ ICC-01/04-02/06-1757, para. 14.

10. The Defence did not include the Accused on its list of trial witnesses, either on 31 March 2017¹¹ or on 26 April 2017.¹² However, on 12 May 2017, the Defence filed an urgent request to call the Accused to testify starting on 12 June 2017.¹³ The Prosecution opposed this request on 16 May 2017.¹⁴
11. 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 2017.¹⁵
12. 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.¹⁶
13. On 27 September 2017, the Defence provided an updated list of witnesses and indicated that it would be filing requests to add eight new witnesses to its list.¹⁷
14. 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.¹⁸
15. On 4 October 2017, the Defence filed the Defence Request, also indicating that it will no longer be seeking the addition of [REDACTED] to its list of witnesses.¹⁹
16. On 6 October 2017, the Defence provided further information concerning its list of witnesses, indicating that it would no longer be seeking the addition of [REDACTED] to its list of witnesses.²⁰

¹¹ ICC-01/04-02/06-1843-Conf-Red.

¹² ICC-01/04-02/06-1881-Conf-AnxA.

¹³ ICC-01/04-02/06-1903.

¹⁴ ICC-01/04-02/06-1909.

¹⁵ 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.

¹⁶ ICC-01/04-02/06-T-231-CONF-ENG ET, p. 4, ln. 24 – p. 5, ln. 5 (open session).

¹⁷ D-0117, D-0183, D-0185, D-0207, D-0240, D-0243, D-0251, and D-0257, *see* ICC-01/04-02/06-2045-Conf, para. 16 (c) and (e).

¹⁸ Email from the Chamber to the Parties and participants dated 3 October 2017 at 10:17.

¹⁹ Defence Request, para. 2.

²⁰ Email from Stéphane Bourgon to the Chamber, Prosecution and participants dated 6 October 2017 at 15:19.

Prosecution Submissions

17. Once a deadline has expired, an extension of time pursuant to regulation 35(2) of the Regulations will only be granted where “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’”.²¹ 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.²² The Defence Request does not meet these criteria.

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

18. The Defence Request fails to meet the requirements of regulation 35(2) since it does not establish “good cause” or that the Defence was unable to file its request before the 26 April 2017 deadline²³ for reasons outside its control.²⁴ There is nothing exceptional about the circumstances that led the Defence to file its request over five months late.

19. The Defence has been aware of the potential relevance of the issues in relation to which it proposes D-0251 and D-0257 to testify since at least 9 June 2014, the date of the confirmation of the charges against the Accused.²⁵ The Accused and his team would have been alive to the fact that any testimony from his former [REDACTED] that, in their view, could exculpate the Accused or support his credibility would be relevant to his case. No new issue has arisen since the confirmation decision that has in any way altered the charges or the key elements at issue in the proceedings.

²¹ ICC-01/04-02/06-1733, para. 7.

²² See ICC-01/04-02/06-1733, para. 6; See also ICC-01/04-02/06-1785-Conf, para. 6.

²³ ICC-01/04-02/06-1757, para. 11.

²⁴ See ICC-01/04-02/06-1733, para. 7; See also ICC-01/04-02/06-1785-Conf, paras. 6, 9.

²⁵ ICC-01/04-02/06-309.

20. It is reasonable to expect that the Defence has been preparing for any Defence case for over three years. The Defence was explicitly reminded that it should be doing so on 15 July 2016,²⁶ 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 2016.²⁷
21. Both witnesses were allegedly known to the Accused for a very long time: D-0251 [REDACTED]²⁸ while D-0257 [REDACTED].²⁹ As such, the Accused was certainly aware of both of these witnesses and their potential relevance to his case and would have been in a position to inform his Defence team about them when preparations for the Defence case were initially underway.

Witness D-0251

22. Indeed, by its own admission, the Defence “has long been aware of the existence of D-0251, not least because [REDACTED].”³⁰ [REDACTED]. But this was not the first time Witness D-0251’s name and relevance was known to the Defence: this information was squarely available to the Defence in March 2015 when the Prosecution disclosed [REDACTED].³¹ In April 2015, the Prosecution disclosed further material to the Defence specifically referring to someone named [REDACTED].³²
23. 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. The fact that D-0251 may live in [REDACTED]³³ is no justification for the Defence

²⁶ See para. 7, above.

²⁷ See ICC-01/04-02/06-1588-Corr, paras. 10-11.

²⁸ Defence Request, para. 9.

²⁹ Defence Request, Annex B, p. 4/6, para. 12.

³⁰ Defence Request, para. 11.

³¹ [REDACTED].

³² [REDACTED].

³³ Defence Request, para. 11.

assertion that it was only able to initiate contact with her “on or about [REDACTED] 2017”.³⁴ Neither can the witness’s location justify the three-month lapse between the first contact with her and the taking of the witness’s statement.³⁵ No explanation is provided as to why the statement could not have been taken when three members of the Defence team met this witness on [REDACTED] 2017 and/or on [REDACTED] 2017.³⁶ Instead, the Defence waited until the end of the testimony of the Accused³⁷ to obtain D-0251’s statement and make the first mention to the Chamber, Prosecution and participants of its intention to rely on her as a witness. The Defence could have, at a minimum, provided some advance notice that it was attempting to secure D-0251 as a witness.

24. The Defence’s argument that it was unable to include D-0251 on its 26 April 2017 list of witnesses because it was unable to meet with her³⁸ runs counter to the fact that it included at least four persons on its final list whom the Defence acknowledged it had never previously met.³⁹

Witness D-0257

25. Moreover, contrary to the Defence’s assertion, the issues that D-0257’s testimony seeks to address did not first arise during the Prosecution’s cross-examination of the Accused.⁴⁰ The issue of the Accused’s alleged visit to his son in Rwanda in February 2003 actually arose for the first time [REDACTED]. Only at that moment

³⁴ Defence Request, para. 11. The Defence also states that a first meeting with members of the team was conducted on [REDACTED] 2017 (Defence Request, para. 11). However, according to D-0251’s statement, it seems that members of the Defence team also met with this witness on [REDACTED] 2017 (Defence Request, Annex A, p. 2/16).

³⁵ The statement was signed on [REDACTED] 2017, *see* Defence Request, Annex C, p. 16/16.

³⁶ Defence Request, Annex A, p. 2/16. It is unclear which Defence team members met with the witness on which of these dates.

³⁷ ICC-01/04-02/06-T-239-CONF-ENG ET, p. 38, ln. 22 – p. 39, ln. 13 (open session).

³⁸ Defence Request, para. 11.

³⁹ *See*, ICC-01/04-02/06-T-204-CONF-ENG ET, p. 34, lns. 8-10 (private session). The Prosecution notes that it is not privy to the information that the Chamber ordered the Defence to provide, on an *ex parte* basis, concerning any other witnesses on the Defence’s list that the Defence had not yet contacted, *see* ICC-01/04-02/06-1900, para. 27, ICC-01/04-02/06-T-231-CONF-ENG ET, p. 5, lns. 6-11 (open session).

⁴⁰ *See* Defence Request, paras. 1, 14.

did the Defence notify the Chamber, Prosecution and participants the Accused intended to adduce evidence of his alleged whereabouts in Rwanda in February 2003.⁴¹ The matter was thereafter raised by the Accused's own Counsel during his examination-in-chief.⁴² In any event, the Chamber has held that the fact that the importance of a proposed witness's evidence only becomes clear after another witness's testimony does not constitute an exceptional circumstance and, consequently, does not satisfy the requirements of regulation 35(2).⁴³

26. 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.⁴⁴ Given that the Defence has failed in this regard, the Chamber should dismiss the request on this basis alone. Should the Chamber deem that the Defence did demonstrate that it was unable to include the two witnesses 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.

⁴¹ [REDACTED].

⁴² ICC-01/04-02/06-T-220-CONF-ENG ET, p. 44, ln. 22 – p. 45, ln. 4 (open session).

⁴³ See ICC-01/04-02/06-1733, para. 12; ICC-01/04-02/06-1785-Conf, para. 9.

⁴⁴ ICC-01/05-01/08-3029, para. 21.

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

27. 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.”⁴⁵ The Chamber then referred to a non-exhaustive list of factors that it may consider in such cases.⁴⁶ 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 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.

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

28. 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”.⁴⁷ The Defence Request was filed over five months after the expiration of

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

⁴⁶ The Chamber referred to: “(i) the time elapsed since the original deadline and the stage of the proceedings at which admission of new evidence is sought; (ii) the reasons provided for not seeking addition of the new evidence at an earlier stage; (iii) the evidence already before the Chamber; (iv) the relevance and significance of the additional evidence to matters for determination by the Chamber; (v) whether the new evidence would bring to light a previously unknown fact which has a significant bearing upon the case; and (vi) the impact of the addition of the new evidence on the fairness and expeditiousness of the trial and rights of the accused”, ICC-01/04-02/06-1733, para. 8 (footnotes omitted); See also ICC-01/04-02/06-1785-Conf, para. 6.

⁴⁷ ICC-01/04-02/06-1733, para. 8(i).

the 26 April 2017 deadline,⁴⁸ and, as argued above, provides no valid justification for this delay.

29. 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.⁴⁹ 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 D-0251 and D-0257 would be called, and the Prosecution would certainly need to conduct additional investigations in regard to both witnesses.

30. Since the Prosecution did not know that there was even the slightest possibility that the Defence would call D-0251 and/or D-0257, it did not cross-examine the Accused or other Defence witnesses about the issues upon which these witnesses are expected to testify.

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

31. "[T]he reasons provided for not seeking addition of the new evidence at an earlier stage" is another factor that the Chamber may consider 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.⁵⁰ As argued above,⁵¹ the

⁴⁸ ICC-01/04-02/06-1757, para.11.

⁴⁹ ICC-01/04-02/06-1785-Conf, para. 15. In the Defence Request (para. 8, fn.15 citing ICC-01/04-02/06-1785-Conf, paras. 13-14) the Defence fails to mention that these were among the reasons why the Chamber dismissed the Prosecution's request in relation to Witness P-0045.

⁵⁰ ICC-01/04-02/06-1733, para. 8(ii).

⁵¹ See paras. 19-25, above.

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 would be duplicative of Defence evidence already before the Chamber and would not bring to light any previously unknown facts having a significant bearing upon the case

32. The evidence that is already before the Chamber is another relevant consideration in the determination of the Defence Request.⁵² Indeed, in rejecting a request to add a witness to the Prosecution's list, the Chamber noted, *inter alia*, submissions that certain aspects of the proposed evidence had been largely addressed during the testimony of other witnesses.⁵³

Witness D-0251

33. The majority of D-0251's proposed evidence would be duplicative of evidence that has already been provided by other Defence witnesses. In particular, Defence witnesses have already testified about: (i) killings by Lendu combatants, including in [REDACTED];⁵⁴ (ii) training in [REDACTED];⁵⁵ (iii) recruits joining the UPC voluntarily;⁵⁶ (iv) the Accused's presence in [REDACTED];⁵⁷ (v) the Accused's [REDACTED];⁵⁸ (vi) the Accused traveling to Mongbwalu to regain control of that town, the UPC/FPLC's capture of Mongbwalu, and the Accused's relocation to Centrale;⁵⁹ (vii) information concerning the Accused's escorts and his relationship with them, including that the Accused did not sexually abuse any of

⁵² See ICC-01/04-02/06-1733, para. 8 (iii).

⁵³ ICC-01/04-02/06-1785-Conf, para. 14 ; See also ICC-01/04-02/06-1733, para. 8 (iii).

⁵⁴ [REDACTED].

⁵⁵ [REDACTED].

⁵⁶ [REDACTED].

⁵⁷ [REDACTED].

⁵⁸ [REDACTED].

⁵⁹ [REDACTED].

the escorts;⁶⁰ (viii) the Accused's use of discipline in the UPC/FPLC;⁶¹ and (ix) the absence of children under the age of 15, [REDACTED].⁶²

34. Although D-0251's summary of anticipated testimony fails to specifically refer to [REDACTED],⁶³ D-0251's statement makes extensive reference to this witness.⁶⁴ Such proposed evidence would be duplicative of that already provided by [REDACTED].⁶⁵ The Accused also already provided evidence about [REDACTED].⁶⁶

Witness D-0257

35. The Defence itself acknowledges that D-0257's evidence would be duplicative of evidence given during the Accused's testimony.⁶⁷

36. Since the proposed evidence of both of these witnesses would be largely duplicative of evidence already before the Chamber, neither the proposed evidence of D-0251 nor that of D-0257 would bring to light any previously unknown facts having a significant bearing upon the case.⁶⁸ Accordingly, the Defence would suffer no undue prejudice should the Chamber dismiss its request.

⁶⁰ [REDACTED].

⁶¹ [REDACTED].

⁶² [REDACTED].

⁶³ See Defence Request, Annex C, pp. 2-3/4.

⁶⁴ [REDACTED].

⁶⁵ [REDACTED].

⁶⁶ [REDACTED].

⁶⁷ Defence Request, para. 13.

⁶⁸ See ICC-01/04-02/06-1733, para. 8 (vi).

(d) D-0257's proposed evidence is not relevant or significant to matters for determination by the Chamber

37. The relevance and significance of the proposed additional evidence to matters for determination by the Chamber is another relevant consideration in the Chamber's determination of the Defence Request.⁶⁹ While the Prosecution does not contest that certain aspects of D-0251's proposed testimony are relevant or significant to matters for determination by the Chamber, D-0257's proposed evidence fails in this regard.

38. During his examination-in-chief, the Accused testified that he spent two or three days with his son in Kigali between 14 and 17 February 2003.⁷⁰ During cross-examination, the Prosecution suggested that the Accused was not in Rwanda for the personal reasons that he described during his testimony, a suggestion that the Accused did not accept.⁷¹

39. Neither the summary of D-0257's expected testimony,⁷² nor his statement,⁷³ provide any indication that D-0257 is expected to provide evidence to the effect that the Accused was actually in Kigali in February 2003 or at any other specific time.⁷⁴ D-0257's limited evidence is irrelevant to the Accused's actual whereabouts in February 2003, or to the Accused's responsibility as charged for crimes committed by his armed group at that time, regardless of his whereabouts.

⁶⁹ ICC-01/04-02/06-1733, para. 8 (iv); *See also* ICC-01/04-02/06-1785-Conf, para. 14.

⁷⁰ ICC-01/04-02/06-T-220-CONF-ENG ET, p. 46, ln. 1 – p. 47, ln. 16 (open session), p. 58, ln. 21 – p. 59, ln. 11 (open session).

⁷¹ ICC-01/04-02/06-T-238-CONF-ENG CT2, p. 38, lns. 11-15 (open session).

⁷² Defence Request, Annex C, p. 4/4.

⁷³ Defence Request, Annex B.

⁷⁴ In this regard, the Prosecution notes that the Defence Request states that D-0257's anticipated testimony "concerns a very specific issue: the reason for Mr Ntaganda's visit to Kigali on or about 17 February 2003", Defence Request, para. 13. However, the summary of this witness's expected testimony and his statement are both silent as to the specific date of any such visit, *see* Defence Request, Annexes B and C.

(e) Granting the Defence Request would be unduly prejudicial

40. The Chamber must ensure procedural fairness for *both* Parties as well as for the participants.⁷⁵ 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.⁷⁶

41. As noted above, had the Prosecution been aware that D-0251 and/or D-0257 may be called to testify, it would have cross-examined the Accused, and possibly other Defence witnesses, about the information that D-0251 and D-0257 are expected to provide.⁷⁷ 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.

42. The Prosecution would be further prejudiced because, contrary to the situation when the Chamber authorised the addition of Witness P-0551 to the Prosecution's list, the proposed testimony of neither D-0251 nor D-0257 would be "largely factual and related to background information which would be accessible

⁷⁵ 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; *Prosecutor v. Marti*, IT-95-11-AR73.2, Decision on Appeal against the Trial Chamber's Decision on the Evidence of Witness Milan Babi, 14 September 2006, para. 13 citing *Prosecutor v. Zlatko Aleksovski*, IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para. 25; *Prosecutor v. Tadić*, IT-94-1-A, Judgment, 15 July 1999, para. 48.

⁷⁶ 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.

⁷⁷ The Prosecution notes that, during its cross-examination of the Accused, the Prosecution spent valuable time asking questions based, for example, on information that the Defence had provided in relation to now withdrawn Defence Witness [REDACTED], see ICC-01/04-02/06-T-238-CONF-ENG CT2, p. 25, ln. 23 – p. 38, ln. 10 (open session).

through other sources”.⁷⁸ This means that significant investigation would be required in relation to the two witnesses.

43. Despite the fact that the scope of D-0257’s proposed evidence is relatively narrow, should he be allowed to testify, the Prosecution would need to undertake considerable investigations. The fact that [REDACTED]⁷⁹ is a further obstacle requiring more time for investigations.

44. The Defence asserts, in relation to D-0251, that “more than adequate time is available to the Prosecution between now and the start of the Fifth Evidentiary block to conduct necessary biographical investigations.”⁸⁰ The Fifth Evidentiary block is scheduled to commence on 27 November 2017. Should D-0251 and/or D-0257 be authorised to testify, the Prosecution’s investigations would not be limited to “biographical” investigations⁸¹ since the identity of both witnesses would not be the only matters at issue. Several other avenues of investigation would need to be pursued before the Prosecution is able to effectively test the evidence of these witnesses. Further, since the Defence intends to request the addition of a total of six new witnesses, D-0251 and D-0257 may not be the only new witnesses that the Defence may be authorised to add and, in turn, not the only witnesses in relation to whom the Prosecution will need to commence investigations afresh.

45. Indeed, despite the fact that the Defence Request concerns the addition of two witnesses to the Defence’s list, when it comes to assessing the prejudice to the Prosecution, the Request should be evaluated in the context of all such requests that the Defence has indicated that it will be making for a total of six new

⁷⁸ See ICC-01/04-02/06-1733, para. 18.

⁷⁹ Defence Request, Annex B, p. 3/6, para. 11.

⁸⁰ Defence Request, para. 10.

⁸¹ Defence Request, para. 10.

witnesses.⁸² The fact that the Defence has already been authorised to call one witness who was not on any of its lists, the Accused, 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.

46. Further, the Chamber should give no weight, in its determination of the Defence Request and any other such request to add new witnesses, to the fact that the Defence has withdrawn a number of witnesses from its list⁸³ since it seems that the Defence's 26 April 2017 list had included persons with whom the Defence had never even been in contact.⁸⁴

47. Should the Chamber grant the Defence Request in whole or in part, the Prosecution asks that any witnesses added to the Defence list of witnesses at this late stage be heard in a sixth evidentiary block in January 2018 in order to allay some of the prejudice caused to the Prosecution by the late addition(s).

48. The Prosecution also reserves its right to request the recall of the Accused and/or any other relevant Defence witnesses should the Chamber authorise the addition of any new witness to the Defence's list.⁸⁵ In this regard, the Prosecution notes that given the extensive references in D-0251's statement to [REDACTED],⁸⁶ the Prosecution may also seek to recall that witness. The inefficiency and unnecessary prolongation of the proceedings due to the potential need to recall witnesses could be avoided by rejecting the Defence Request.

⁸² See fn. 4, above.

⁸³ Defence Request, para. 1.

⁸⁴ See ICC-01/04-02/06-T-204-CONF-ENG ET, p. 34, lns. 8-10 (private session).

⁸⁵ In granting requests for the addition of witnesses to a party's list, chambers of other courts have noted that, in view of the lost opportunities to cross-examine earlier witnesses on matters arising from the testimonies of the new proposed witnesses, the opposite party may apply for leave to recall witnesses for further cross-examination, 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.

⁸⁶ See fn. 64, above.

Conclusion

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



Fatou Bensouda
Prosecutor

Dated this 29th day of November 2017
At The Hague, The Netherlands