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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

**With confidential, *ex parte* Annex A – only available to the Chamber, Registry and
Defence**

**Public redacted version of “Final Observations on Prosecution Requests for
Restrictions on Mr Ntaganda’s Communications”, ICC-01/04-02/06-759-Conf-Exp,
3 August 2015**

Source: Defence Team of Mr Bosco Ntaganda

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

The Office of the Prosecutor

Ms Fatou Bensoudat
Mr James Stewart
Ms Nicole Samson

Counsel for the Defence

Me Stéphane Bourgon
Me Luc Boutin
Me Christopher Gosnell

Legal Representatives of Victims

Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants (Participation / Reparation)

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Further to the “*Order requesting final submissions on restrictions on Mr Ntaganda’s contacts and related matters*” issued by Trial Chamber VI on 3 July 2015,¹ Counsel representing Mr Ntaganda (“Defence”) hereby submit this:

Final Observations on Prosecution Requests for Restrictions on Mr Ntaganda’s Communications

I. INTRODUCTION

1. Bosco Ntaganda opposes the Prosecution request for additional temporary restrictions on his communications. The Registrar has reported no disclosure of protected information by Mr Ntaganda since active monitoring began on 18 March 2015. On the contrary, Mr Ntaganda has exhorted his interlocutors, even in discussions having nothing to do with his case, not to use coded language – conduct the Registry describes as “commendable.”² The Prosecution’s allegation that three references to “[REDACTED]” in Mr Ntaganda’s conversations over the last five months³ constitute an indirect reference to an allegedly improper conversation fifteen months previous is baseless. Mr Ntaganda’s proper conduct during active monitoring, whatever transgressions may have occurred in 2014, demonstrates that no additional restrictions are now necessary, and certainly not the Prosecution’s draconian request that he be held, in effect, *incommunicado*.
2. Mr Ntaganda acknowledges that in 2014 he referred to the identity of two (not four) Prosecution protected witnesses – but only when his interlocutor was already independently informed that the person was a Prosecution

¹ Order requesting final submissions on restrictions on Mr Ntaganda’s contacts and related matters, 3 July 2015, ICC-01/04-02/06-697-Conf-Exp-Red (“Submissions Order”). *See also* Confidential redacted version of ‘Decision on Defence request seeking access to confidential documents in the Katanga and Ngudjolo case’, 29 July 2015, ICC-01/04-02/06-739-Conf-Exp, (modifying the deadline for submissions to 3 August 2015).

² Report on the Active Monitoring Review of Mr Ntaganda’s Telephone Conversations pursuant to Trial Chamber VI’s Order ICC-01/04-02/06-697 dated 3 July 2015, 13 July 2015, ICC-01/04-02/06-714-Conf-Exp, para.8 (“Active Monitoring Report”).

³ Prosecution final observations on the need for further restrictions to NTAGANDA’s contacts, 21 July 2015, ICC-01/04-02/06-738-Conf-Exp, para.37 (“Prosecution Final Observations”).

witness. The participation of the two persons in question was widely known long before Mr Ntaganda had any such knowledge. Further, with one exception, the interlocutor was [REDACTED], and whom he had forbidden to contact any Prosecution witness. The passages of Mr Ntaganda's conversations that the Prosecution believes refer to [REDACTED] and [REDACTED] were, in fact, references to two entirely different individuals whom Mr Ntaganda was discussing as potential Defence witnesses.

3. Mr Ntaganda's conversations reflect no "broad scheme of witness interference",⁴ nor can any such alleged interference be attributed to Mr Ntaganda merely because they were allegedly contacted by other persons. [REDACTED]'s identity is widely known in the community and, as is confirmed by the Prosecution's own submissions, was threatened long before he was a witness against Mr Ntaganda. [REDACTED]'s own family members know and apparently disapprove of his appearance as a Prosecution witness in this case.
4. The use of coded language is probative of no misconduct, let alone indicative of an attempt to hide intimidation efforts: the use of codes is not prohibited by general Detention Unit regulations; Kinyarwanda is an inherently coded language; and its use, particularly in discussions about Defence strategy is hardly surprising in a world of rampant electronic surveillance, as well as previous disclosure of detainee conversations to the Prosecution.
5. The current surveillance regime is unnecessary and unjustified. However, in order to preclude any further unfounded and potentially prejudicial allegations, Mr Ntaganda requests the continuation of active monitoring, but increased to three hours per week. All further disclosure should be sent exclusively to an *amicus curiae*, rather than to the Prosecution, and all further

⁴ Prosecution Final Observations, paras.2,23,35.

litigation referred to a Pre-Trial Judge, rather than to Trial Chamber VI (“Chamber”).

II. PROCEDURAL BACKGROUND

6. Mr Ntaganda surrendered voluntarily to the International Criminal Court (“ICC”) on 26 March 2013.⁵
7. The Prosecution, by way of requests and submissions on 8 August 2014 (“Initial Request”),⁶ 10 June 2015 (“Further Request”),⁷ and 21 July 2015 (“Prosecution Final Observations”),⁸ requested restrictions on Mr Ntaganda’s communications from the ICC Detention Centre, including: (i) a ban on all personal visits;⁹ (ii) a ban on telephone communications with anyone other than his designated legal representatives;¹⁰ (iii) a ban on telephone communications with anyone until the completion of testimony of the Prosecution’s “insider witnesses” or, in the alternative, to restrict such communications to recorded messages;¹¹ (iv) contemporaneous (i.e. “active”) monitoring of any communications with non-privileged contacts;¹² and (v) disclosure as to whether any actively-monitored communications are interrupted, and why.¹³
8. On 8 December 2014, following various submissions from the parties and the Registry, the Chamber ordered: (i) the prohibition of all but consular and legal visits to Mr Ntaganda; (ii) that Mr Ntaganda be informed that his telephone communications are being monitored; (iii) that the Registry review

⁵ Decision on Setting the Date for the Initial Appearance and Related Issues, 22 March 2013, ICC-01/04-02/06-41, para.7.

⁶ Confidential Redacted Version of Prosecution's urgent request for measures under regulation 101(2) of the Regulations of the Court, 8 August 2014, ICC- 01/04-02/06-349.

⁷ Confidential Redacted version of “Prosecution request for further restrictions to the Accused’s communications”, 9 June 2015, ICC-01/04-02/06-635-Conf-Red (“Further Request”).

⁸ Prosecution Final Observations.

⁹ Initial Request, para.54.

¹⁰ Initial Request, para.54.

¹¹ Further Request, para.7.

¹² Initial Request, para.54.

¹³ Further Request, para.7.

all non-privileged conversations of Mr Ntaganda since December 2013, based on criteria provided by the Prosecution, and submit reports with conclusions about the Prosecution's allegations; and (iv) provide lists of all non-privileged contacts, and all of Mr Ntaganda's communications and visits since December 2013.¹⁴

9. On 10 March 2015, the Chamber received the Registry's first report of its retrospective review of Mr Ntaganda's communications, based on instructions received from the Prosecution.¹⁵ The communications analysed by the Registry focused exclusively on communications in February 2014 – i.e. during or around the date of confirmation hearings.
10. The Chamber promptly, on 13 March 2015, ordered active monitoring of Mr Ntaganda's communications.¹⁶ This active monitoring involves a Registry official listening to Mr Ntaganda's conversations as they occur, and terminating any calls that violate specific prescribed modalities.¹⁷ Those modalities include a prohibition on speaking in any language other than Kinyarwanda, French or Swahili, and a prohibition "*de faire usage de codes comme de termes qui seraient incompréhensibles*."¹⁸ Under this regime, which remains applicable to this day, Mr Ntaganda is permitted one hour of communications with the outside world per week.¹⁹
11. A series of Registry reports were circulated amongst the parties in the following months, including: (i) an addendum to the First Registry Report,

¹⁴ Decision on the Prosecution request for restrictions on contact and the Defence request for access to logs, 8 December 2014, ICC-01/04-02/06-410, pp.26-27.

¹⁵ First Report on the *post-factum* review of the phone conversations made by Mr Ntaganda, 10 March 2015, ICC-01/04-02/06-504-Conf-Exp ("First Report").

¹⁶ Order instructing the Registry to put in place additional temporary restrictions on contact, 13 March 2015, ICC-01/04-02/06-508-Conf-Exp., para.7 ("Order Additional Temporary Restriction").

¹⁷ Order Additional Temporary Restriction, para.7.

¹⁸ Annex 1 to "Report on an incident that occurred during the active monitoring of M. Ntaganda's telephone communications", 12 June 2015, ICC-01/04-02/06-640-Exp-Anx1, p.1 ("Annex 1 to Interruption Report").

¹⁹ Annex 1 to Interruption Report, p.1.

filed 20 April;²⁰ (ii) the distribution of the First Registry Report and addendum to the Prosecution in redacted form, on 30 April 2015;²¹ (iii) the distribution of a second Registry report analysing Mr Ntaganda's non-privileged telephone communications between December 2013 and early May 2014, to the Defence and the Chamber on 22 May 2015, and the Prosecution in redacted form on 16 July 2015;²² and (iv) a Victim Witness Unit ("VWU") report on alleged witness intimidation of 9 June 2015.²³

12. The Prosecution, based primarily on its analysis of the materials disclosed in the First Registry Report, requested on 9 June 2015 the replacement of the active monitoring regime with a ban on real-time communications "until the conclusion of the Prosecution's insider witnesses."²⁴ The exact duration of that ban is indefinite, but may reasonably be expected to continue well into 2016.²⁵ The Prosecution does not specify whether the regime following the occurrence of that event should revert to the normal regime for detainees, or the active monitoring regime.
13. On 29 June 2015, the Trial Chamber suspended the deadline for the Defence to respond to the Further Restrictions Request and, in light of the various other information that had since been provided, ordered the Prosecution and Defence to provide final and consolidated responses on the requested restrictions by 21 and 30 July 2015, respectively.²⁶ The latter deadline was

²⁰ Addendum to the "First Report on the *post-factum* review of the phone conversations made by Mr Ntaganda" (ICC-01/04-02/06-504-Conf-Exp), 20 April 2015, ICC-01/04-02/06-563-Conf-Exp ("Addendum to First Report").

²¹ Further Request, para.27.

²² Second Report on the *post-factum* review of the phone conversations made by Mr Ntaganda, 22 May 2015, ICC-01/04-02/06-607-Conf-Exp ("Second Report").

²³ Victims and Witnesses Unit's report on potential interferences with some Prosecution witnesses and other individuals, 9 June 2015, ICC-01/04-02/06-634-Conf-Exp.

²⁴ Further Request, para.7.

²⁵ Confidential redacted version of Decision on Prosecution request to change the order of appearance of the first witnesses, 22 June 2015, ICC-01/04-02/06-661-Conf-Red.

²⁶ Submissions Order, p.7.

extended to 3 August 2015,²⁷ in light of the recent disclosure, upon the Defence's request²⁸ and Trial Chamber's order,²⁹ of the audio-recordings of the communications analysed by the Registry.

III. APPLICABLE LAW

(i) *The standard for restricting a detainee's communications and visits*

14. The Prosecution has sought³⁰ the imposition of restrictions on Mr Ntaganda's contacts pursuant to Regulation 101(2) of the Regulations of Court ("RoC"), which permits requests to "prohibit, regulate or set conditions for contact between a detained person and any other person" where the Prosecution has reasonable grounds to believe that such contact, *inter alia*, "[c]ould prejudice or otherwise affect the outcome of the proceedings against a detained person, or any other investigation"; "[c]ould be harmful to a detained person or any other person"; or "[c]ould be used by a detained person to breach an order for non-disclosure made by a judge."
15. The imposition of restrictions on communication between a detainee and the outside world, in particular family members, abridges important human rights. Rule 37 of the United Nations *Standard Minimum Rules for Treatment of Prisoners* provides that "prisoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits."³¹ Principle 19 of *The Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment* elevates family visitation to a "right" in itself: "A

²⁷ Decision on the Defence request for variation of time limit for submissions on restrictions to Mr Ntaganda's contacts, 22 July 2015 ICC-01/04-02/06-739-Conf-Exp, para.16.

²⁸ ICC-01/04-02/06-719-Conf-Exp, 15 July 2015.

²⁹ Email from Legal Officer of the Chamber to the Registry on 21 July 2015 at 9:17 am.

³⁰ Initial Request, p.1, paras.4,11,50,53.

³¹ *Standard Minimum Rules for Treatment of Prisoners* of 1957, U.N. Doc. E/5988, (1977).

detained or imprisoned person shall have the *right* to be visited by and to correspond with, in particular, members of his family.”³²

16. Such rights can be abridged – but not lightly. The *Katanga* Trial Chamber required that any restrictions on detainee communications “have a legitimate aim and are *absolutely necessary*.”³³ Extensions of any measures must, likewise, “continue [...] to be *absolutely necessary*.”³⁴ The conduct allegedly justifying the restrictions must also involve “*violations spécifiques du régime de détention préalablement commises par les détenus à l’encontre desquels ce type de mesures à été sollicité*.”³⁵

(ii) *Obligations of non-disclosure*

17. The Prosecution asserts, relying on the alleged content of Mr Ntaganda’s conversations with [REDACTED] while confirmation hearings were ongoing in February 2014, that Mr Ntaganda has “routinely disclosed confidential case information.”³⁶ This routine disclosure, in terms of specific allegations, is limited to the allegation that he exposed the identities of four protected witnesses.³⁷
18. The Prosecution implicitly defines “confidential case information” in its Initial Request, where it invokes Articles 57(3)(c) and Article 68 of the Statute,

³² *Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment* of 1988, U.N. Doc.A/45/49(1990). (emphasis added). The right to maintain family relations has been protected particularly scrupulously. See *Moiseyev v. Russia*, 62936/00 (2008), para.255 (finding a violation where the detainee was limited to a maximum of two family visits per month, and was otherwise unable to have any family visits at all for two periods of eight months, and for two periods of one-month each, over a total of three years).

³³ *Katanga*, Decision on request 1200 of the Prosecutor for Prohibition and Restrictive Measures Against Mathieu Ngudjolo with Respect to Contacts Both Outside and Inside the Detention Centre, 24 June 2009, ICC-01/04-01/07-1243-tENG-Red, para.25 (italics added).

³⁴ *Katanga*, Fourth decision on measures of prohibition and restriction of contacts outside and inside the Detention Centre in respect of Mathieu Ngudjolo, 4 Dec 2009, ICC-01/04-01/07-1709-tENG-Red, para.18 (italics added).

³⁵ *Katanga*, Decision levant l’interdiction des contacts et des communications entre German Katanga et Mathieu Ngudjolo Chui, 13 march 2008, ICC-01/04-01/07-322-tFRA, p.11.

³⁶ Further Request, para. 43.

³⁷ Prosecution Final Observations, para.24; Further Request, para.32.

and Rule 87 of the Rules.³⁸ The Prosecution also cites a number of ICC instruments regulating the conduct of counsel³⁹ but fails to explain how these oblige Mr Ntaganda.

19. The obligation of an accused not to disclose the identity of protected witnesses usually flows from a witness protection order issued pursuant to Rule 87(3)(b) of the Rules, which permits a Trial Chamber to order “[t]hat the Prosecutor, the defence *or any other participant in the proceedings* be prohibited from disclosing such information to a third party.”⁴⁰ The Prosecution, despite failing to cite the specific witness protection decisions issued pursuant to [REDACTED],⁴¹ [REDACTED]. [REDACTED].⁴²
20. [REDACTED].⁴³ [REDACTED].⁴⁴
21. Nothing prohibits an accused person from discussing with non-privileged contacts: (i) the identity of individuals who could be *potential* witnesses, or as potential sources of information (even those who may have been Prosecution witnesses in previous cases); (ii) asking whether *potential* witnesses can be contacted about meeting with his legal team or to provide useful information; or (iii) mentioning the names of *actual* witnesses as long as there is no disclosure, direct or indirect, of their role as a protected witness in the case.⁴⁵ An accused person, moreover, is not prohibited from discussing his case in general with his friends and family.

³⁸ Initial Request, para.42.

³⁹ Initial Request, para.43.

⁴⁰ Italics added.

⁴¹ [REDACTED].

⁴² [REDACTED].

⁴³ *Katanga*, Decision on interim measures to prohibit and restrict Germain Katanga’s contacts with the outside and within the Detention Centre, ICC-01/04-01/07-1792-Conf-Exp-tENG-Red2, para 36.

⁴⁴ *Nchamihigo*, ICTR-2001-63-T, Decision on Defence Motion on Contempt of Court and Reconsideration of Protective Measures for Defence Witnesses, 9 August 2007, para.5. (applying a substantively identical provision, defining the obligation as being “not to disclose in the course of its investigations the identifying information of protected Defence witnesses or the fact that they are featured in the list of prospective Defence witnesses or their intention to testify for the Defence before this Tribunal. The Prosecution must also ascertain that it does not expose, share, discuss or reveal, directly or indirectly, any protected information to any person or entity other than the Prosecution.”)

⁴⁵ The latitude to do so is somewhat qualified for Counsel: ICC-01/04-02/06-412-AnxA, paras.20-22.

22. A scenario that may complicate the practical application of the preceding rules is where an accused has already, prior to disclosure that a person is a protected witness against him, discussed a person as a *potential* witness. The obligation to avoid revealing that person's designation as a Prosecution witness might even be violated, for example, by stating to a non-privileged friend or family member that "we are not permitted to discuss that person anymore." Conversely, continued discussions about that person are not prohibited, as long as it is not implied that the person is a protected witness, and as long as there is no encouragement that the person be contacted. The transition from *potential* person of interest to *actual* witness for the opposing party, in a situation where previous discussions have taken place about that same person, is one that would need to be handled with great care in order to avoid disclosure.

(iii) *Interference with witnesses*

23. The Prosecution has not cited the witness protection orders that presumably prohibit any contact by the Defence with a protected witness without first notifying the Prosecution. Independent of those witness protection obligations, however, Article 70(1)(c) of the Statute defines the offence of "[c]orruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence." This offence has been interpreted as encompassing:

[...] any conduct that may have (or is expected by the perpetrator to have) an impact or influence on the testimony to be given by a witness, inducing the witness to falsely testify or withhold information before the Court. As the use of the word "corruptly" suggests, the relevant conduct is aimed at contaminating the witness's testimony.⁴⁶

⁴⁶ *Bemba et al.*, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/05-01/13-749, 11 November 2014, para.30.

IV. ACTIVE MONITORING DEMONSTRATES THAT MR NTAGANDA HAS SCRUPULOUSLY AVOIDED CODED LANGUAGE FOR FIVE MONTHS, AND THAT ADDITIONAL RESTRICTIONS ARE UNJUSTIFIED

- (i) *Mr Ntaganda's conduct during the active monitoring phase shows no attempt to reveal any protected information or to contact any Prosecution witness*

24. Mr Ntaganda's non-privileged telephone conversations have been actively-monitored since 18 March 2015.⁴⁷ Those conversations are subject to restrictions that are not normally applied to detainees' non-privileged conversations, including a prohibition on the use of codes and restrictions on the languages that can be used. The Registry monitoring, despite being criticized as inadequate by the Prosecution,⁴⁸ can reasonably be relied upon as being intense and thorough:

- Registry officials are fully informed of the seriousness of the allegations against Mr Ntaganda;
- the Registry's previous reports demonstrate an absence of impartiality towards Mr Ntaganda – in fact, they evince bias against him;⁴⁹
- the Registry's previous reports demonstrate an alertness to the use of codes and potential disclosure of protected witness information;
- the conversations being monitored are of very limited duration per week (a maximum of one hour); and
- the two conversations that were interrupted show the (over)-abundance of caution with which monitoring is conducted.

⁴⁷ Active Monitoring Report.

⁴⁸ Prosecution Final Observations, paras.35,48,40-41.

⁴⁹ See e.g. First Report, para.28 (referring to "[c]oded terms which could refer to Mr. Ntaganda's friends/henchmen.") The term "henchmen" is highly pejorative, implying criminal conduct: Concise Oxford English Dictionary, 10th ed., p.663 ("henchman: n. (pl. -men) 1. *chiefly derogatory* a faithful follower or political supporter; especially one prepared to engage in crime or dishonest practices").

25. The Registry's Active Monitoring Report does not suggest any attempt to reveal protected witness information or to circumvent restrictions on his communications since 18 March 2015. Mr Ntaganda has also, according to the Registry, proactively instructed his interlocutors not to use expressions that could be interpreted as coded language that cannot be understood by the monitors. Three incidents where Mr Ntaganda's interlocutors potentially used coded language were "within the context of family and general discussions,"⁵⁰ and had nothing to do with the case against him. On these three occasions, the interlocutor was "instantly reprimanded by Mr Ntaganda each time."⁵¹ The Registry states that "Mr Ntaganda's reactions to the mentions of codes were commendable."⁵²
26. One incident of alleged use of codes, that resulted in the interruption of a conversation, was reported in detail to the Trial Chamber by the Registry.⁵³ The Registry cut off the conversation on the basis that "the words '*Bande Rouge*' and [REDACTED] – as used by Mr Ntaganda's interlocutor and not Mr Ntaganda himself – were "seen as coded words."⁵⁴ [REDACTED],⁵⁵ which is consistent with the context of the conversation. The French expression "*Bande Rouge*," [REDACTED],⁵⁶ is a common expression for "General" in Congo because of the red band on their uniforms.⁵⁷ Mr Ntaganda was referring to a General who has nothing to do with this case, [REDACTED]. Nothing in this conversation demonstrates any disclosure of protected witness information, let alone any effort to intimidate or have improper contact with witnesses.

⁵⁰ Active Monitoring Report, para.8.

⁵¹ Active Monitoring Report, para.6.

⁵² Active Monitoring Report, para.8.

⁵³ Interruption Report.

⁵⁴ Interruption Report, para.3.

⁵⁵ Request on behalf of Bosco Ntaganda seeking the Registrar to reverse the Chief Custody Officer's Decision of 5 June 2015, 19 June 2015, ICC-01/04-02/06-660-Conf-Exp ("Request to Reverse"), para.19.

⁵⁶ Interruption Report, Anx5 [REDACTED]

⁵⁷ [REDACTED].

27. The Prosecution, contrary to the Registry, alleges that Mr Ntaganda has engaged in misconduct during the Active Monitoring Phase. Its basis for this allegation is Mr Ntaganda's use of the term "[REDACTED]" on 8, 22 and 26 May 2015.⁵⁸ The Prosecution claims that these references were part of an effort to interfere with witnesses that the Registry has failed to apprehend.⁵⁹ The Prosecution hypothesizes that the use of the term "[REDACTED]" was meant by Mr Ntaganda as a reference to two conversations which also used the term "[REDACTED]" on 12 and 16 February 2014 – i.e. fifteen months previous.
28. The term "[REDACTED]" in Kinyarwanda is a generic term referring to an elder of the family, or to an elderly person, depending on the context. Even assuming for the sake of argument that there was some impropriety in the discussion from February 2014 – which is disputed – the use of this generic term fifteen months later is indicative of no impropriety. Any impropriety would have had to be conveyed by other terms or by the context, of which there is no suggestion by the Registry other than to state that these references were "rather unclear."⁶⁰
29. The Prosecution claims that:

[t]he Registry's reports on the active monitoring of the Accused's telephone communications confirm that he has (i) disseminated confidential information about Prosecution witnesses to third parties; (ii) instructed [REDACTED] and associates to interfere with Prosecution witnesses; (iii) sought to coach potential Defence witnesses; and (iv) discussed producing or obtaining evidence, contrary to counsel's advice. The Registry's reports show that the Accused has persistently sought to circumvent the restrictions imposed by Trial Chamber VI ("Chamber") on his communications by speaking to unregistered callers, speaking in coded language, and deliberately using unauthorised languages to prevent the Detention Centre staff from effectively monitoring his conversations.⁶¹

⁵⁸ Active Monitoring Report, Annex, pp.4,6.

⁵⁹ Prosecution Final Observations, para.37.

⁶⁰ Active Monitoring Report, para.10.

⁶¹ Prosecution Final Observations, para. 2. See also para.41 ("He has been able to give instructions to [REDACTED] and associates, including for the purposes of witness interference; he has been able to speak to unregistered callers,

The Prosecution also claims that, during the period of active monitoring, Mr Ntaganda “has been able to speak to unregistered callers.”⁶²

30. Each of these allegations is serious, and each and every one is baseless. The Registry’s Active Monitoring Report and Interruption Report give no indication that Mr Ntaganda ever spoke to any unregistered caller; give no indication that he ever disseminated confidential information; give no indication that he ever instructed anyone to interfere with witnesses; give no indication that he ever encouraged coaching of Defence witnesses; and give no indication that he ever discussed procuring evidence – which, incidentally, he is not prohibited from doing. Mr Ntaganda has, contrary to the Prosecution’s allegations, proactively instructed his interlocutors not to use coded language. The Registry reports, which reflect close attention to the few suspected incidents of use of codes, flatly contradict the Prosecution’s allegations.

(ii) *Mr Ntaganda’s conduct over the last five months outweighs any previous infractions*

31. The Registry’s First and Second Reports refer to conversations that occurred between December 2013 and early May 2014 – *i.e.* more than a year ago. Mr Ntaganda vigorously contests, with two exceptions, that he disclosed protected witness information; that he did so with intent to breach any confidentiality obligation; or that he encouraged any interference with witnesses. Even if the Trial Chamber finds that any such transgressions did occur, his impeccable conduct over the last five months should be accorded greater weight in determining whether additional restrictions are necessary.
32. The importance of corrections in behaviour is illustrated by the case of Mathieu Ngudjolo who, between 1 October 2008 and 31 January 2009, was found to have:

⁶² Prosecution Final Observations, para.41.

enter[ed] or attempt[ed] to enter into contact, even if only indirectly, with certain witnesses or their close relations; enquire about the position other witnesses intent to adopt when testifying; facilitate the disclosure of information about witnesses, particularly at secret meetings in the Democratic Republic of Congo (DRC); seek out persons, other than the members of his Defence team, who will take steps to identify or approach witnesses or their close relations.⁶³

33. The *Katanga* Trial Chamber, based on these findings, imposed restrictions on Mr Ngudjolo's contacts with the outside world, including suspending non-privileged telephone contacts, on 24 June 2009.⁶⁴ A month later, despite having further information from the Registry confirming the past misconduct, the *Katanga* Trial Chamber imposed an active monitoring regime similar to that currently in place against Mr Ntaganda.⁶⁵ This regime authorized telephone contacts with his wife and children for 40 minutes a week "strictly confined to private matters."⁶⁶ This regime, despite the additional findings of misconduct, was apparently deemed necessary to "maintain family bonds."⁶⁷
34. On 25 September 2009, "following three months of particularly rigorous measures of prohibition" on contacts with co-detainees and the outside world, the Trial Chamber noted that the Registry reports revealed no further "evidence of reprehensible conduct apart from that on which its previous decisions were based."⁶⁸ The Trial Chamber consequently expanded the number of individuals with whom Mr Ngudjolo could have actively-monitored non-privileged contact, subject to the same restrictions as before.⁶⁹ On 4 December 2009, the Trial Chamber relaxed these restrictions further to permit family and conjugal visits in light of "international case law on the rights of detainees to maintain some family contact."⁷⁰ On 16 March 2010, the

⁶³ *Katanga*, ICC-01/04-01/07-1243-tENG-Red, para.26.

⁶⁴ *Katanga* ICC-01/04-01/07-1243-tENG-Red, para.33.

⁶⁵ *Katanga* ICC-01/04-01/07-1334-tENG-Red, para.20.

⁶⁶ *Katanga* ICC-01/04-01/07-1334-tENG-Red, para.22.

⁶⁷ *Katanga* ICC-01/04-01/07-1334-tENG-Red, para.22.

⁶⁸ *Katanga*, ICC-01/04-01/07-1498-tENG-Red, para.19.

⁶⁹ *Katanga*, ICC-01/04-01/07-1498-tENG-Red, para.21.

⁷⁰ *Katanga*, ICC-01/04-01/07-1709-tENG-Red, para.22.

Trial Chamber determined that it is in “possessed of sufficient information to conclude that Mathieu Ngudjolo has ceased the misconduct that led to the imposition of restrictions on his communication with the outside as from 18 June 2009.”⁷¹

35. Mr Ntaganda has never had a family visit, and was last visited by his wife in [REDACTED]. He has now been subject to very limited communications with the outside world for almost five months. Those communications, as closely monitored by the Registry, demonstrate that Mr Ntaganda is now doing his best to avoid any conduct that is, or could be perceived as, a violation of any confidentiality obligation or prison regulation. He has not, contrary to the Prosecution’s unfounded assertion, violated any of the restrictions imposed upon him by the Trial Chamber.
36. Mr Ntaganda does not ask for the removal of active monitoring. On the contrary, continued active monitoring by the Registry is now a necessary safeguard against further allegations of misconduct. Whereas Mr Ngudjolo’s conduct over the course of nine months led to the complete removal of active monitoring, Mr Ntaganda requests only that the period of active monitoring be modestly increased to three hours per week. Further, he asks that he only be permitted to speak to [REDACTED], [REDACTED] and [REDACTED].⁷²

V. THE ALLEGATIONS OF DISCLOSURE AND WITNESS INTIMIDATION IN 2014 ARE UNFOUNDED

(i) Use of coded language is not probative of disclosure of witness identities

37. The use of “coded” language in non-privileged telephone conversations, which is not prohibited by ICC Detention Centre rules, is not indicative of any attempt to disclose protected witness information or of a scheme of

⁷¹ *Katanga*, Decision on the Registrar’s report on the monitoring of some of Mathieu Ngudjolo’s conversations following the Registrar’s decision on monitoring dated 22 January 2010, 16 March 2010, ICC-01/04-01/07-1966-tENG-Red, para.16.

⁷² [REDACTED].

witness intimidation. Resort to such language can be attributable to other purposes, including:

- a concern that such conversations might be disclosed to the Prosecution, as occurred in the *Katanga* case;⁷³
- concealing potential financial resources of Mr Ntaganda's family from the Registry because of a misplaced concern that this would jeopardize legal aid (as addressed in more detail below); and
- a concern, not unreasonable for a man with military experience or who simply reads the news, that third parties could intercept conversations with telephones in sub-Saharan Africa and interfere with efforts to identify potential Defence witnesses – which is a normal and permissible subject of communication by accused persons in their non-privileged communications, especially when confirmation hearings are ongoing.

38. Further, Kinyarwanda is a language in which speaking in metaphors or “codes” is common.⁷⁴ Some expressions that seem encoded to an English or French speaker are figures of speech in common parlance in Kinyarwanda and do not constitute a special use of code. There is even a Kinyarwanda expression – *inshobera mahanga* – to describe how Kinyarwanda can be

⁷³ ICC-01/04-02/12-3-tENG, para. 280.

⁷⁴ See e.g. *Bizimungu et al.*, ICTR-99-50-T, Trial Judgement, 30 September 2011, para.1350 (“Kinyarwanda is a dynamic language that often employs indirect communication and may require full context for full extrapolation”); *Akayesu*, ICTR-96-4-T, Trial Judgment, 2 September 1998, para.145 (“syntax and everyday modes of expression in the Kinyarwanda language are complex and difficult to translate into French or English [...] Dr. Ruzindana stated in his testimony that in ascertaining the specific meaning of certain words and expressions in Kinyarwanda, it is necessary to place them contextually, both in time and in space”); *Bagosora et al.*, ICTR-98-41-T, Trial Judgment, 18 December 2008, para.683 (“[t]he witness agreed, however, that there is a phrase in Kinyarwanda, ‘*muhere ruhande*’, which is an agricultural metaphor and means to start from one side and move progressively on to the other”); *Bizimungu et al.*, Expert Witness Report by Dr. Alison Desforges, Exhibit P101(E), p.2 (“All Rwandans spoke a single language, Kinyarwanda, a tongue whose sophistication matched the complexity of the political culture. Kinyarwanda was used in highly ambiguous ways to convey many levels of nuance, to hide the real intent of the speaker, or to deliver a message that was best not expressed openly.”)

understood literally, particular by foreigners, while the essence of the message conveyed is misinterpreted.

39. Mr Ntaganda was not prohibited from using coded language in his conversations, was reasonably motivated by concerns having nothing to do with revealing protected witness information, and was often merely using Kinyarwanda in a way considered natural to a native speaker. The premise that the use of “codes”, in itself, is a preliminary indication of intent to reveal protected witness information, or to intimidate witnesses, is incorrect.

(ii) *Mr Ntaganda never disclosed [REDACTED]’s identity*

40. The Prosecution⁷⁵ (but not the Registry) alleges that Mr Ntaganda, in a conversation of [REDACTED], revealed the identity of protected Prosecution witness [REDACTED], whose real name is “[REDACTED]”, through the following words:

[REDACTED].⁷⁶

41. [REDACTED].⁷⁷ [REDACTED]. [REDACTED].⁷⁸
42. The conversation as a whole is about [REDACTED]. At least six different persons are identified. For example, in addition to [REDACTED] and the person incorrectly identified by the Prosecution as [REDACTED], there is also a reference to [REDACTED]. [REDACTED]. [REDACTED].
43. The word [REDACTED] in the context of this conversation seeking out Defence witnesses is a generic reference to witnesses, not to [REDACTED].⁷⁹ Although [REDACTED], as discussed in section (v) below, does sometimes refer to a specific person, its meaning depends on the surrounding context.

⁷⁵ Further Request, para.35; Prosecution Final Observations, para.37.

⁷⁶ ICC-01/04-02/06-504-Conf-Exp-Anx8-Red, ll. 719-721.

⁷⁷ ICC-01/04-01/06-2842, para.853.

⁷⁸ [REDACTED].

⁷⁹ Further Request, para.34 (“[REDACTED]”)

Most often, it is used in a generic sense as a reference to witnesses, or as referring to a person as a witness – *i.e.* “Witness X.” [REDACTED].⁸⁰ The reference in this conversation to [REDACTED]⁸¹ is incompatible, based on any possible interpretative acrobatics, with the Prosecution’s theory⁸² that this is a reference to [REDACTED].

44. Variability of word-meaning depending on context is extremely common in Kinyarwanda. Indeed, the disagreement between the Prosecution and the Registry – whether [REDACTED] refers to [REDACTED]⁸³ or to all Prosecution witnesses⁸⁴ – demonstrates the lack of reasonable certainty as to its meaning, as well as the absence of a single meaning.
45. The Prosecution also does not explain how the description of [REDACTED]’s country of residence is compatible with the description that it “[REDACTED].”⁸⁵ [REDACTED]. This is corroborated by the additional reference to [REDACTED].⁸⁶ [REDACTED].
46. The Prosecution’s interpretation of this entire passage as being “an example of NTAGANDA’s reliance upon a network of associates to interfere with witnesses”⁸⁷ overlooks the obvious possibility – confirmed by its misidentification of [REDACTED] – [REDACTED]. Such a discussion is both normal and permissible, as is requesting assistance in locating such individuals. The Prosecution’s allegation of a reference to [REDACTED] – or any other Prosecution witness during this conversation – is baseless and wrong.

⁸⁰ ICC-01/04-02/06-504-Conf-Exp-Anx8-Red, ll. 704-738. (“First Report, Annex 8”)

⁸¹ First Report, Annex 8, 730.

⁸² Further Request, para.34

⁸³ Further Request, para.34.

⁸⁴ Further Request, para.25;

⁸⁵ Further Request, para.35; First Report, Annex 8, ll. 723-724. The Prosecution submissions are not clear, possibly because of redactions, as to whether they allege that it is [REDACTED].

⁸⁶ First Report, Annex 8, [REDACTED].

⁸⁷ Further Request, para.41, fn. 71.

(iii) *Mr Ntaganda never disclosed [REDACTED]'s identity*

47. The Prosecution (but not the Registry) asserts that in this same conversation,⁸⁸ Mr Ntaganda disclosed [REDACTED]'s identity:

In one conversation [REDACTED] during which he tried to remind [REDACTED] of the name of these two witnesses, he explained [REDACTED] that the name of one of the two individuals "[REDACTED]". [REDACTED]. [REDACTED]'s name is [REDACTED].⁸⁹

48. The Registry official summarizing the conversation does not, unlike the Prosecution, place quotation marks around [REDACTED].⁹⁰ The letters actually spoken by Mr Ntaganda are [REDACTED], which were meant as a reference to [REDACTED]. [REDACTED].
49. The reference to "[REDACTED]" is indeed a reference to a person's name, but has no connection to [REDACTED], let alone to [REDACTED]. Another word for "[REDACTED]" in Swahili is [REDACTED]. The name [REDACTED] appears in Defence submissions filed *before* the Prosecution first alleged that this passage is a veiled reference to [REDACTED],⁹¹ disproving that this explanation is a fabrication designed to respond to this allegation.
50. The Prosecution speculation that this passage refers to [REDACTED] is based on erroneous inferences and ignores the broader context of the conversation. The allegation is not only false, but completely devoid of foundation when considered in light of the words actually spoken by Mr Ntaganda.

(iv) *Mr Ntaganda only referred to Witness [REDACTED]'s identity after his interlocutor already referred to him as a Witness*

⁸⁸ First Report, Annex 8, ll. 725-727.

⁸⁹ Further Request, para. 35.

⁹⁰ First Report, Annex 8, ll. 725-726.

⁹¹ Notice on behalf of Mr. Ntaganda setting out difficulties encountered in relation to the conduct of investigations, ICC-01/04-02/06-555-Conf-Exp-AnxB, 13 April 2015. [REDACTED].

51. Mr Ntaganda indirectly refers to [REDACTED]'s identity as a Prosecution witness, but only did so in the belief that his interlocutors possessed this information already. [REDACTED]. [REDACTED]. [REDACTED]'s status as a Prosecution witness thereafter apparently became well-known in the witness's community. Mr Ntaganda heard of this event prior to [REDACTED]'s status as a witness being disclosed to him in [REDACTED].⁹² The Prosecution's own submission that [REDACTED] was threatened on [REDACTED] – long before he was a witness in this case – demonstrates that [REDACTED]'s potential or previous involvement as a witness was already known to those who might want to threaten him, without either his identity or the threats originating from Bosco Ntaganda.
52. Mr Ntaganda does refer indirectly to [REDACTED]'s identity in a conversation on [REDACTED].⁹³ Mr Ntaganda sincerely regrets having done so. On the other hand, as is quite apparent from the conversation itself, Mr Ntaganda's interlocutor *already knew the information*.⁹⁴ Further, Mr Ntaganda had been previously informed that this information was widely known. Although these circumstances do not excuse the breach of confidentiality, Mr Ntaganda had not at that time been instructed on how to handle such a situation, or distinctly told that this constituted *revealing* confidential information. The circumstances do not excuse the violation, but nor do they constitute the kind of egregious or contumacious violation as to indicate an intent to breach disclosure obligations or malicious intent, let alone the existence of a "broad scheme of witness interference." Even the ICTR Prosecutor has engaged in more overt and widespread violations of witness protection rules without having been found to have done so intentionally.⁹⁵

⁹² Initial Request, para.19.

⁹³ First Report, Annex 8, ll.961.

⁹⁴ First Report, Annex 8, ll.960-961 [REDACTED]

⁹⁵ *Nchamihigo*, ICTR-2001-63-T, Decision on Defence Motion, 9 August 2007, para.10 ("the Chamber concludes that the Prosecution did not intend to disclose the fact that the Defence was intend[ing] to call those witnesses to testify before the Tribunal and therefore breach the Chamber's order").

53. The rest of the conversation, significantly, reflects no encouragement by Mr Ntaganda to retaliate against [REDACTED], or even encouragement that [REDACTED] should be contacted by anyone. On the contrary, his interlocutor merely gives an account of [REDACTED].⁹⁶ The reference to “[REDACTED]” in that context appears to be a reference to [REDACTED], not [REDACTED]. There is no suggestion in this passage that Mr Ntaganda encouraged this contact with [REDACTED] nor, in any event, does the content of the conversation constitute intimidation.⁹⁷ This account directly contradicts that provided by the Prosecution in its original request for restrictive measures,⁹⁸ which was the basis for the Trial Chamber to authorize the monitoring of Mr Ntaganda’s conversations in the first place.

54. Further, there is no indication of Mr Ntaganda encouraging [REDACTED] to contact [REDACTED], as the Prosecution has alleged she did in its initial request seeking a review of Mr Ntaganda’s non-privileged conversations.⁹⁹

(v) *Mr Ntaganda only discussed [REDACTED]’s identity to [REDACTED], who already knew of his role as a Prosecution Witness*

55. [REDACTED] of Mr Ntaganda. [REDACTED] know of his collaboration with the Office of the Prosecutor. They knew of this collaboration before Mr Ntaganda did, and long before he was formally notified to Mr Ntaganda as a Prosecution witness. The diffusion of this information does not indicate a “broad scheme of witness interference,” but simply [REDACTED]. It would be highly surprising if this information was not known to [REDACTED].

56. Mr Ntaganda has indeed discussed [REDACTED]’s testimony against him with [REDACTED], and has made references to him using the expression “[REDACTED]”. There is no indication that Mr Ntaganda made any such

⁹⁶ First Report, Annex 8, ll. 967-968 (“[REDACTED]”) (italics added). The Registry incorrectly asserts that Mr Ntaganda’s interlocutor is the one himself spoke [REDACTED]. Annex 9 to First Report, para.4.

⁹⁷ First Report, Annex 8, ll.962-975.

⁹⁸ Initial Request, para.19.

⁹⁹ Initial Request, para.21.

reference to anyone other than [REDACTED], who was already well aware – [REDACTED] – that [REDACTED] was a Prosecution witness.

57. Mr Ntaganda has now been informed, as he was not in 2014, that referring to someone who is already known to his interlocutor as a witness nevertheless constitutes a violation of his confidentiality obligations. As stated above, Mr Ntaganda was not so informed in 2014. Mr Ntaganda has suffered severe sanctions as a result of these conversations. The circumstances do not warrant further or continuing sanctions for three reasons. First, [REDACTED]'s identity was, indeed, already well known and to a certainty. Second, the witness's own conduct, given [REDACTED], may be the basis for his identity becoming known. Third, Mr Ntaganda shared the information only with [REDACTED],¹⁰⁰ knowing that [REDACTED] was already informed, and at a time – concurrent with the time of confirmation hearings – when the stresses of isolation and the criminal proceedings would have been at their highest. Mr Ntaganda would have had a human and legitimate psychological need to reach out and discuss his case with [REDACTED]. Although none of these circumstances excuse the breach of confidentiality, they nevertheless should be taken into account in considering whether further measures – for conduct that occurred fifteen months ago – are proportionate to the violation.

(vi) References to "Finishing" and "Grass" relate to ongoing disputes concerning land ownership in Congo, not bribery of witnesses

58. The Registry relies on a conversation [REDACTED] to assert that Mr Ntaganda refers "to the intent to 'give some grass' to the [REDACTED], which could mean exercising some form of pressure (incentive, bribing) or threat on the witnesses."¹⁰¹ The Prosecution likewise relies on the conversation for the allegation that "NTAGANDA also discussed the bribing of witnesses."¹⁰² Similar language used in conjunction with the expression "all

¹⁰⁰ [REDACTED].

¹⁰¹ First Report, Annex 9, para.1.

¹⁰² Further Request, para.39, fn.70.

can be finished” in a conversation of [REDACTED] is interpreted as an encouragement to seek out and intimidate or bribe witnesses.¹⁰³

59. The summary of the [REDACTED] conversation relied on for these allegations is the following:

[REDACTED].¹⁰⁴

60. The summarizer of this conversation omits at least two important elements of the conversation. First, he or she failed to record that around [REDACTED] of the audio, which may correspond to the lapse of time covered by the expression “Later on”,¹⁰⁵ Mr Ntaganda states in Kinyarwanda “let’s move on to a new subject.” The conversation that follows from [REDACTED], which is purportedly reflected in lines 580-586, then addresses disputes over land owned by Mr Ntaganda’s family that *four* individuals have tried to occupy or appropriate. This issue comes up throughout Mr Ntaganda’s conversations, as the Registry itself recognizes.¹⁰⁶ [REDACTED]. The reference to “building those houses” at line 585 is a reference to construction on this land. [REDACTED].
61. The proposal to “give grass”¹⁰⁷ is, indeed, a proposal to give money in order to settle the land dispute. The first three sentences after “Later on”, which exemplifies the metaphorical nature of Kinyarwanda, refer to three geographic locations using metaphors: Kinshasa/DRC (“[REDACTED]”), Europe (“[REDACTED]”); and Bunia (“[REDACTED]”). [REDACTED]. As surprising and indirect a method as this may seem to describe a geographic location, the tripartite enumeration of three geographic locations one after the

¹⁰³ Further Request, para.37, fn.65.

¹⁰⁴ First Report, Annex 8, ll.576-582 (emphasis added).

¹⁰⁵ First Report, Annex 8, ll.579.

¹⁰⁶ First Report, Annex 8, ll.41 (“[REDACTED]”); 102 (“[REDACTED]”); 117-118 (“[REDACTED]”); 174 (“[REDACTED]”); 544-545 (“[REDACTED]”); 1012 (“[REDACTED]”);

¹⁰⁷ First Report, Annex 8, ll.581.

other shows that this is, indeed, the only plausible meaning of “[REDACTED]” – as a reference to a geographic location rather than people.

62. The essence of the passage following “Later on” can be totally misunderstood based on the mistranslation of the pronoun. The third-person plural “they” appears three times, implying other persons. The pronoun used in Kinyarwanda was third person singular, but as a formalized way of referring to oneself. This is not uncommon in French, particularly in Africa, where individuals often refer to themselves in the third person singular. Somehow this has been erroneously translated into the English “they”, which the Prosecution presumably interprets as being part of this “broad scheme of witness interference.” All that is meant by these three references is that Mr Ntaganda has legal resources in three geographic locations – Kinshasa/DRC, Europe and Bunia – and, hence, is equal to the task of defending himself against the attempts to appropriate his property by these four individuals. Nothing in this discussion has anything to do with witnesses, let alone bribing witnesses.
63. The passage between lines 573-579¹⁰⁸ does appear to refer to the confirmation proceedings. Negative things are, indeed, said about witnesses and purported victims, who are alleged to be lying in return for money. The reference to “[REDACTED]” is believed to be a reference to Mr Ntaganda himself, expressing the view that if he were to lie as they do, or to have acted as he is alleged to have acted, then all would be finished. Whatever negative sentiments are expressed about the testimony of Prosecution witnesses and victims being motivated by money does not indicate any intent or plan to bribe witnesses.
64. An obvious reason that Mr Ntaganda would conceal the nature of this conversation is the misplaced concern that land belonging to his family

¹⁰⁸ First Report, Annex 8.

members might nevertheless be taken into account in assessing whether he qualifies for legal aid.

(vii) The Prosecution and Registry fail to distinguish between discussions concerning the land dispute and judicial proceedings at the ICC

65. The Prosecution relies on the following passage as meaning that [REDACTED] witnesses should be sought out and intimidated:

[REDACTED].¹⁰⁹

66. Even the summarizer of this passage is able to discern that immediately prior thereto, there is an extensive discussion about livestock and about other matters having nothing to do with ICC proceedings. The lines above are likewise concerned with the dispute over land discussed in the previous section. The “song” is a document related to [REDACTED]. This misunderstanding is not entirely unreasonable considering that Mr Ntaganda’s conversation often involved switching of subjects which, especially in Kinyarwanda, is not always easily apprehended.

(viii) The Prosecution Erroneously Presumes That Words of Disapproval or Dislike, Or Hopes that Witnesses Will Not Testify, Imply Bribery or Coercion

67. General expressions of disapproval or dislike or witnesses or victims, or hopes that witnesses will not testify, are relied on by the Prosecution in support of its supposed “broad scheme of witness interference.” The inferences drawn are unreliable, exaggerated and inaccurate, especially considering that in almost all cases they are based on summaries that do not convey the exact words expressed by Mr Ntaganda himself or, with one exception, translations without any original transcription.
68. One of the Prosecution’s “examples” of “bribing of witnesses” and “intent to interfere with witnesses”¹¹⁰ is based on nothing more than Mr Ntaganda

¹⁰⁹ Further Request, para.37; First Report, Annex 8, ll.896-901.

¹¹⁰ Further Request, para.40.

saying that it would be “helpful” if a particular witness did not testify, and then later saying to his interlocutor that he “knew that you would do what you were capable of.”¹¹¹ The Prosecution identifies no witness whose identity is revealed and cites no example of this person subsequently being contacted by anyone, whether to offer a bribe or intimidate them.

69. Such statements of antipathy or aspiration are hardly surprising in the (supposedly) private conversations of a detainee who considers that he is unjustly accused and is the object of false testimony. They do not constitute proof of witness intimidation or bribery.

(ix) References to “Silencing” and “Songs” are unrelated to prosecution witnesses

70. The Prosecution claims that the following passage – which is the only one for which an original language transcription has been provided – to Mr Ntaganda refers to intimidation of Prosecution witnesses:

[REDACTED].¹¹²

71. The individuals being discussed, as reported earlier in this conversation, are “[REDACTED]” and as people who made “[REDACTED].”¹¹³ The Prosecution, despite these indications of identity, has not identified these individuals as Prosecution witnesses. Not even the Prosecution, accordingly, excludes the reasonable possibility that the individuals being referred to were not Prosecution witnesses, but rather potential Defence witnesses. There is no rule, incidentally, against seeking out Prosecution witnesses from former cases to ascertain whether they would be willing to be Defence witnesses – as long and until they have not been designated as Prosecution witnesses in the case in question.

¹¹¹ First Report, Annex 6, ll.103-123.

¹¹² Addendum to First Report, Annex 2, ll.185-188.

¹¹³ Addendum to First Report. Annex 2, ll.182-183.

72. The expression “silence” – which could easily be a product of bravado, exaggeration, or refer to something entirely different than preventing them from testifying – does not indicate intimidation or bribery. While these words might indicate pressure or bribery, they might also describe entirely lawful efforts to recruit witnesses other than Prosecution witnesses. The Prosecution hypothesis, without additional circumstantial evidence such as an indication of who the individuals are and whether they were pressured, is speculation.

(x) *The record of Mr Ntaganda’s conversation is not accurate or reliable enough to substantiate the Prosecution’s allegations, or the Registry’s suspicions*

73. The Registry, unlike the Prosecution, is at least to be commended for qualifying its analysis being sufficiently to state only what “could” or “possibly” be the case, or “suggesting” certain conclusions.¹¹⁴ With one exception,¹¹⁵ no original language transcripts have been provided. For a language like Kinyarwanda, whose meaning is so dependent on context, this is a deficient evidential basis on which to request the severe measures now being imposed against Mr Ntaganda.

74. The belated provision of audio-files to Mr Ntaganda does not remedy the deficiency of the materials placed before the Chamber. Mr Ntaganda is neither obliged nor capable, given the volume of material, to review and refute each and every passage that has been given a sinister interpretation by the Registry. The foregoing sections have addressed the key passages relied on by the Prosecution. Nothing more is possible given current circumstances. The serious misinterpretations of those passages already demonstrate that the interpretations offered by the Registry are unreliable, insufficiently attuned to context, presume that coded language implies intent to intimidate witnesses, and presume that any reference to witnesses is a reference to Prosecution witnesses. These presumptions are unsubstantiated and fallacious.

¹¹⁴ See e.g. Second Report, paras. 15-20,24; First Report, paras.25-28.

¹¹⁵ Addendum to First Report, Annex 2.

75. These deficiencies are compounded by the Prosecution's failure, to this day, to lift the heavy redactions contained in its Initial Request, which conceals the content and source of many of the Prosecution's allegations. Previous cases have illustrated how erroneous such submissions can be, and how serious may be the consequences of denying the opposite party the opportunity to correct mistakes¹¹⁶ such as those discussed previously in respect of the Prosecution's mis-characterization of the Active Monitoring Report.¹¹⁷

(xi) *Conversations with third parties does not warrant the draconian remedies sought*

76. Detainees are prohibited from speaking directly to third parties while on the telephone with a non-privileged contact, but there is no prohibition on the non-privileged contact relaying the detainee's words *verbatim* to a third party. Accordingly, although speaking to a third party on the phone of a registered non-privileged contact is prohibited by Detention Unit regulations, it does not constitute an egregious violation that warrants severe measures,¹¹⁸ such as being held *incommunicado*.

VI. THE CURRENT MATTER SHOULD BE REFERRED TO A PRE-TRIAL JUDGE, AND THE PROSECUTION SHOULD RECEIVE NO FURTHER DISCLOSURE OF CONVERSATIONS OF MR NTAGANDA

77. Any further adjudication as may be required in respect of the current allegations should, pursuant to Article 64 of the Statute, be referred to a Pre-Trial Judge; and any further information derived from monitoring of prison communications should only be given to an *amicus curiae* in place of the Office of the Prosecutor.

¹¹⁶ *Katanga*, Decision on interim measures to prohibit and restrict Germain Katanga's contacts with the outside and within the Detention Centre, ICC-01/04-01/07-1792-Conf-Exp-tENG-Red2, 28 January 2010 ("*Katanga* Interim Measures", para.36 ("The Chamber notes with regret that the Prosecutor did not explicitly mention this important detail in his application of 23 December, so that it could have reached an appropriate conclusion."))

¹¹⁷ See *supra* section IV(ii).

¹¹⁸ *Id.* para.37 ("although this contact does indeed reveal a disciplinary breach of the rules, governing recipients of phone calls, the contact cannot in itself warrant the continued application of the type of restrictive measure the Chamber was led to order.")

78. The Prosecution's allegation of Mr Ntaganda's participation in a "broad witness interference scheme" is tantamount to an allegation of commission of an offense under Article 70(1)(c) of the Statute. As stated by the *Bemba* Trial Chamber in respect of a request by the Prosecutor seeking instructions to the Registry for disclosure of information:

Therefore, in line with Articles 54 to 58, 60 and 61 of the Statute, applicable in accordance with Rule 163(1) of the Rules, a combined reading of paragraphs 3 and 4 of Rule 165 of the Rules demonstrates that any requests in relation to an investigation into alleged Article 70 offences should first be brought before a Pre-Trial Chamber.¹¹⁹

79. The *Bemba* Trial Chamber specifically justified this approach on the basis of the need to ensure "a fair trial for an accused," and "to ensure that the impartiality of the Trial Chamber judges may not 'reasonably be doubted.'"¹²⁰ This approach accords with the well-established practice at the *ad hoc* tribunals. Further, this Trial Chamber should issue an order precluding the disclosure to the Prosecution of any further records of Mr Ntaganda's conversations. Any such further disclosure could, if deemed necessary and appropriate, be provided to an *amicus curiae*.¹²¹
80. This concern is particularly acute given the circumstances of the present litigation. The conversations that have been disclosed to the Prosecution, while not privileged, are sometimes case-related.¹²² Frequent reference is made to potential Defence witnesses. The Prosecution, based on this disclosure, may now be able to discern the identity of many potential Defence

¹¹⁹ *Bemba*, Public Redacted Version of "Decision on the prosecution's request relating to Article 70 investigation" of 26 April 2013, ICC-01/05-01/09-2606-Red, 2 May 2014, para.14.

¹²⁰ *Id.* para.19.

¹²¹ Referral to an *amicus curiae* is the dominant practice at the *ad hoc* international tribunals, especially when a member of a party is involved. See e.g. *Ngirabatware*, ICTR-99-54-T, Decision on Allegations of Contempt, 21 February 2013, p. 6 ("DIRECTS the Registry to inform the MICT that an *amicus curiae* should be appointed to prosecute Maximilien Turinabo and Deogratias Sebureze in accordance with Rule 77(D)(ii); *Hartmann*, IT-02-54-R77.5, Judgement on Allegations of Contempt, 14 September 2009, para.6; *Brdjanin*, IT-99-36/R77, Order instigating proceedings against Milka Maglov, 8 May 2003.

¹²² *Katanga* Interim Measures, para.44.

witnesses. This is already highly prejudicial to Mr Ntaganda's defence and any further disclosure is likely to exacerbate that prejudice.

81. Further, not even the most rigorous concept of impartiality – as recognized by the *Bemba* Trial Chamber – could prevent judges from being tainted by an appearance of bias in entertaining the auxiliary litigation concerning alleged witness interference.

CONFIDENTIALITY

82. Pursuant to Regulations 23*bis* (1) and (2) of the Regulations of the Court, these Defence Final Observations are submitted on a confidential *ex parte* basis – only available to the Chamber, Registry and Defence – as they refer to issues related to the Defence investigations and filings bearing the same classification. Although they are submitted *via* the Registry, this Defence Final Observations are not to be communicated to VWU. An *ex parte* confidential redacted version – only available to the Chamber, Registry, Prosecution, VWU and Defence – will be submitted separately.

VII. CONCLUSION AND REMEDY REQUESTED

83. The Trial Chamber is respectfully requested to:
 - (i) increase the period of active monitoring per week to three hours, on the same terms as conditions as presently exist;
 - (ii) authorize the communication only with [REDACTED], [REDACTED] and [REDACTED];
 - (iii) permit family visits, with any modality of surveillance deemed fit and appropriate;
 - (iv) permit conjugal visits, with any modality of surveillance deemed fit and appropriate; and

- (v) direct that any further judicial requests in relation to the present matter be filed before a Pre-Trial Judge, and that no further records of Mr Ntaganda's conversations be disclosed to the Office of the Prosecutor.

RESPECTFULLY SUBMITTED ON THIS 12TH DAY OF JANUARY 2016

A handwritten signature in dark ink, appearing to read 'StB' with a stylized flourish at the end.

Me Stéphane Bourgon, Counsel for Bosco Ntaganda
The Hague, The Netherlands