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Pénale
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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 final observations on the need for
further restrictions to NTAGANDA’s contacts”, 21 July 2015,
ICC-01/04-02/06-738-Conf-Exp**

Source: The Office of the Prosecutor

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Ms Nicole Samson

Counsel for the Defence

Mr Stéphane Bourgon
Mr Luc Boutin
Mr Christopher Gosnell

Legal Representatives of the Victims

Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of the 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 Section

Detention Section

Mr Patrick Craig

**Victims Participation and Reparations
Section**

Other

Introduction

1. The Accused's non-privileged contacts are currently restricted, due to his abuse of the right to communication afforded to him at the Detention Centre. Confirmed reports establish that the Accused passed confidential information about Prosecution witnesses to his [REDACTED] and associates, for the suspected purpose of intimidating witnesses and their families. The records of the Accused's telephone calls from the Detention Center, together with other evidence obtained by the Office of the Prosecutor ("Prosecution"), establish reasonable grounds to believe that the Accused's actions "[c]ould prejudice or otherwise affect the outcome of the proceedings ..."¹

2. The 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. According to reports by Prosecution witnesses, the Accused's associates have actively tried to implement a broad scheme of witness interference.

3. The Registry's reports² show that active monitoring is inadequate to prevent the Accused from disseminating confidential information or interfering with witnesses. The Registry has been unable to interrupt conversations that breach the

¹ Regulation 101(2)(b), Regulations of the Court.

² ICC-01/04-02/06-504-Conf-Exp; ICC-01/04-02/06-607-Conf-Exp; ICC-01/04-02/06-714-Conf-Exp.

Chamber's orders or otherwise violate Detention Centre rules in a timely manner, and has failed to detect the use of codes during the Accused's conversations.

4. The Prosecution submits that the only feasible measure in the circumstances is to restrict all of the Accused's live, non-privileged contacts, or to limit them to pre-recorded messages on a digital recording device subject to monitoring, until the conclusion of the testimony of all Prosecution's [REDACTED] witnesses. The restrictions to the Accused's visits should also remain in place. These measures are lawful, necessary, and proportionate to ensure the safety of Prosecution witnesses, the confidentiality of information and the integrity of the proceedings.

Confidentiality

5. These observations are classified as "Confidential, *EX PARTE* – only available to the Prosecution, Defence and Registry", pursuant to regulation 23*bis*(2) of the Regulations of the Court in line with filings bearing the same designation. The Prosecution submits that it is appropriate to file a public redacted version of this filing.³

Procedural History

6. On 8 August 2014, the Prosecution requested restrictions to the Accused's non-privileged contacts pursuant to regulation 101(2) of the Regulations ("Request for Restrictions"),⁴ because it suspected him of passing confidential information about Prosecution witnesses to his [REDACTED] and associates to intimidate and threaten Prosecution witnesses and their families.⁵ The Prosecution's suspicions stemmed from reports by its witnesses of intimidation and threats by

³ ICC-01/04-02/06-725-Conf-Exp.

⁴ ICC-01/04-02/06-349-Conf-Exp, with Confidential redacted version at ICC-01/04-02/06-349-Conf-Red and lesser redacted Confidential version ICC-01/04-02/06-349-Conf-Red2.

⁵ ICC-01/04-02/06-349-Conf-Red2; ICC-01/04-02/06-431-Conf-Exp, para.17.

[REDACTED] and others close to him, who urged the witnesses to recant and cease cooperation with the Court.

7. On 8 December 2014, the Chamber imposed the first restrictions on the Accused's contacts.⁶ Citing "serious concerns" about the reported approaches to Prosecution witnesses.⁷ It restricted the Accused's visits to those by his counsel or counsel's assistants and diplomatic and consular representatives. It also ordered the Registry to notify the Accused that the Registry may listen to all his non-privileged telephone conversations. It further ordered the Registry to conduct *post factum* review of some of the Accused's telephone communications and report its findings to the Chamber.
8. On 10 March 2015, the Registry filed its first report on the *post factum* review of the Accused's phone conversations ("First Report").⁸ The First Report focused on calls covering the period between 9 and 17 February 2014.
9. On 13 March 2015, on the basis of the information contained in the First Report and its annexes, the Chamber found that the Accused had abused the right to communication afforded to him at the Detention Centre. It ordered the Registry to actively monitor all of his non-privileged telephone communications until further notice, and to restrict them to two time-slots per week. It also limited the languages which the Accused was permitted to use in his non-privileged telephone communications. The Chamber further ordered the Registry to restrict contact with persons through whom the Accused had breached the Detention

⁶ ICC-01/04-02/06-410-Conf-Exp, unavailable to the Prosecution. A *corrigendum* of the Decision, ICC-01/04-02/06-410-Conf-Exp-Corr, was made available to the Prosecution on 16 February 2015. See also ICC-01/04-02/06-410-Conf-Exp-Red-Corr.

⁷ ICC-01/04-02/06-410-Conf-Exp-Corr, para.49.

⁸ ICC-01/04-02/06-504-Conf-Exp. The main submission and annexes 1, 2, 4, 5, and 6, as well as redacted annexes 3, 8 and 9, were made available to the Prosecution on 30 April 2015. Redacted annex 7 was made available on 16 July 2015.

Centre's instructions, and limited the languages which the Accused was permitted to use in his non-privileged telephone communications.⁹

10. On 18 March 2015, the Registry began actively monitoring the Accused's telephone communications.¹⁰
11. On 22 May 2015, the Registry submitted its second report on the *post factum* review of the Accused's phone conversations ("Second Report").¹¹ The Second Report focused on (i) calls in the period of 27-30 April 2014 and 5-8 May 2014; (ii) calls between the Accused and [REDACTED] or between the Accused and [REDACTED] in the period between 1 December 2013 and 15 December 2014.¹²
12. On 8 June 2015, the Prosecution sought authorisation to change the order of appearance of the first witnesses at trial, in light of new information regarding alleged attempts to interfere with certain witnesses.¹³
13. On 9 June 2015, the Victims and Witnesses Unit filed a report on potential interferences with Prosecution witnesses and other individuals.¹⁴
14. On 10 June 2015, the Prosecution requested further restrictions to the Accused's communications ("Request for Further Restrictions").¹⁵ It requested that the Chamber prohibit the Accused from having any live non-privileged telephone calls to the Accused until the conclusion of the testimony of the Prosecution's

⁹ ICC-01/04-02/06-508-Conf-Exp.

¹⁰ ICC-01/04-02/06-714-Conf-Exp, para.2. This report was communicated to the Prosecution on 16 July 2015.

¹¹ ICC-01/04-02/06-607-Conf-Exp. The Second Report was submitted *ex parte*. The Prosecution received advance copies of Annexes 9 and 15 on 13 July 2015 and of the Second Report and annexes 1, 2, 3, 5-8, 11, 12, 14, 16-18 on 15 July 2015 at 17:41. See ICC-01/04-02/06-607-Conf-Exp-Red2. The Prosecution received a courtesy copy of the *corrigendum* of Annex 5 to the Second Report on 20 July; it was subsequently filed on 21 July 2015. ICC-01/04-02/06-607-Conf-Exp-Anx-Red-Corr.

¹² From the phone calls between the Accused and [REDACTED] on the one hand and [REDACTED] and the other, the Registry stated that it "only referred to conversations that were deemed relevant", in a period of approximately seven to eight months, ICC-01/04-02/06-607-Conf-Exp-Red2, para.4. It is unclear to the Prosecution how the Registry selected the time period and the "relevant" calls. Moreover, the annexes to the Second Report to which the Prosecution has access appear to span a shorter period of time.

¹³ ICC-01/04-02/06-630-Conf-Exp with Confidential redacted version at ICC-01/04-02/06-630-Conf-Red-Exp.

¹⁴ ICC-01/04-02/06-634-Conf-Exp and ICC-01/04-02/06-634-Conf-Exp-Anx. The Chamber instructed that the Prosecution be granted access on 17 June 2015 and the Defence on 18 June 2015.

¹⁵ ICC-01/04-02/06-635-Conf-Exp with confidential redacted version at ICC-01/04-02/06-635-Conf-Red.

[REDACTED] witnesses, or alternatively, limit such communications to pre-recorded messages on a digital recording device subject to monitoring. It also requested the Chamber to prohibit all calls by any individual at the Detention Centre to certain named individuals believed to be part of the witness interference scheme. Finally, the Prosecution requested to be informed should any of the Accused's actively monitored calls be terminated, and of the reasons therefor.

15. On 12 June 2015, the Registry reported to the Chamber, in an *ex parte* filing, that it had interrupted NTAGANDA's communications on the grounds that coded language was used.¹⁶
16. On 22 June 2015, the Chamber partially granted the Prosecution's application to change the order of appearance of the first witnesses, finding that "potential security concerns exist" in relation to [REDACTED] witnesses.¹⁷
17. On 29 June 2015, the Chamber imposed interim restrictions on contact with [REDACTED] named individuals who are suspected of interfering with Prosecution witnesses in the case.¹⁸ It ordered the Prosecution to submit, by 16 July, further observations on the ongoing necessity of restricting any ICC detainee's contacts with those individuals.¹⁹
18. On 10 July 2015, the Chamber issued its decision on the reclassification of the Second Report on the *post factum* review of NTAGANDA's conversations ("Reclassification Decision").²⁰

¹⁶ ICC-01/04-02/06-640-Conf-Exp. This filing was made available to the Prosecution on 16 July 2015.

¹⁷ ICC-01/04-02/06-661-Conf-Exp, para.8 with Confidential redacted version at ICC-01/04-02/06-661-Conf-Red.

¹⁸ ICC-01/04-02/06-683-Conf-Exp, ICC-01/04-02/06-683-Conf-Exp-Red and ICC-01/04-02/06-683-Conf-Exp-Red2.

¹⁹ ICC-01/04-02/06-683-Conf-Exp-Red, p.9.

²⁰ ICC-01/04-02/06-710-Conf-Exp-Red.

19. On 13 July 2015, pursuant to the Chamber's order²¹, the Registry filed a report on the active monitoring review of the Accused's telephone conversations ("Active Monitoring Report").²²
20. On 16 July 2015, the Prosecution filed additional observations for further restrictions to detainee communications.²³
21. The same day, the Registry filed the confidential redacted version of the second report on the *post-factum* review of the phone conversations made by Mr NTAGANDA ("Second Report").²⁴
22. On 21 July 2015, the Registry filed a *corrigendum* of Annex 5 to the Second Report.²⁵

Prosecution's Submissions

23. The Prosecution's Request for Restrictions and Request for Further Restrictions were motivated by suspicions about the existence of a broad witness interference scheme led by the Accused and involving [REDACTED] and associates. The Registry's reports of the Accused's monitored telephone communications confirmed these suspicions.
24. The conversations dealt with in the First Report revealed that the Accused disclosed confidential information to his contacts, including names of witnesses, how to locate them and their family members, and discussed plans to "silence" or bribe witnesses. These include [REDACTED] and [REDACTED] – who are

²¹ ICC-01/04-02/06-697-Conf-Exp-Red.

²² ICC-01/04-02/06-714-Conf-Exp. This filing and annex were made available to the Prosecution on 16 July 2015.

²³ ICC-01/04-02/06-727-Conf-Exp and Confidential redacted version ICC-01/04-02/06-727-Conf-Exp-Red.

²⁴ ICC-01/04-02/06-607-Conf-Exp-Red2. Annexes 9 and 15 and the redacted version of annexes 1, 2, 3, 5-8, 11, 12, 14, 16-18 were made available to the Prosecution on 16 July 2015.

²⁵ ICC-01/04-02/06-607-Conf-Anx5-Red-Corr. The Prosecution received a courtesy copy of the *corrigendum* of Annex 5 to the Second Report on 20 July 2015.

[REDACTED] Prosecution witnesses.²⁶ The conversations confirmed that the Accused identified these [REDACTED] witnesses as prime targets for threats and interference.²⁷ Additionally, some of these witnesses have themselves reported security incidents concerning themselves and their families.²⁸ Those incidents revealed that the Accused's associates were actively trying to implement a broad scheme of witness interference.²⁹ The Chamber has stated that it was satisfied as to the existence of potential security concerns in relation to the [REDACTED].³⁰

25. The Prosecution only received the Second Report on 15 July 2015. It has not been able to fully analyse the Second Report or the Active Monitoring Report given the short period between their notification and the submission of these observations and also because the use of coded language makes the analysis complex.³¹ However, the information in these reports is consistent with previous evidence of a witness interference scheme and sufficient for discrete purposes of these observations. Both reports lend further support to the Request for Further Restrictions.

I. Conduct justifying further restrictions revealed by the Second Report

26. The First Report revealed that the Accused and his registered callers had abused the telephone privileges by disclosing confidential information about Prosecution witnesses³² and allowing non-registered callers to speak to the Accused.³³ It also

²⁶ ICC-01/04-02/06-630-Conf-Exp, para.26.

²⁷ The First Report dealt with [REDACTED]. The conversations dealt with in the First Report let the Registry to state that [REDACTED]. ICC-01/04-02/06-504-Conf-Exp, paras.29 and 33. For the Prosecution's allegations about the targeting of the [REDACTED] Prosecution [REDACTED] witnesses, see ICC-01/04-02/06-630-Conf-Exp and ICC-01/04-02/06-630-Conf-Red-Exp, paras.26-44 and ICC-01/04-02/06-635-Conf-Exp and ICC-01/04-02/06-635-Conf-Red-Exp, paras.30 ss and the specific monitored conversations referred to therein.

²⁸ ICC-01/04-02/06-630-Conf-Exp, paras.46-49.

²⁹ ICC-01/04-02/06-349-Conf-Exp and ICC-01/04-02/06-349-Conf-Red2; ICC-01/04-02/06-371-Conf-Exp and ICC-01/04-02/06-371-Conf-Red; ICC-01/04-02/06-565-Conf-Exp; ICC-01/04-02/06-630-Conf-Exp and ICC-01/04-02/06-630-Conf-Red-Exp; ICC-01/04-02/06-635-Conf-Exp, para.42 and ICC-01/04-02/06-635-Conf-Red-Exp.

³⁰ ICC-01/04-02/06-661-Conf-Exp, para.8

³¹ The Chamber set 21 July 2015 as the deadline for the Prosecution's final observations.

CC-01/04-02/06-697-Conf-Exp-Red and ICC-01/04-02/06-T-21-CONF-EXP-ENG, p.3, lns.15-16.

revealed that the Accused made extensive use of coded language in order to conceal his activities, including his efforts to interfere with [REDACTED] Prosecution [REDACTED] witnesses.

27. The Second Report lends further support to the allegation that the Accused has violated Detention Centre rules that require him to limit his communications to registered callers;³⁴ that he has used codes to make the monitoring of his communications difficult;³⁵ and that he has urged his interlocutors to speak to him in languages not spoken by Detention Centre staff tasked with monitoring his phone calls.³⁶ The Prosecution submits that the purpose, again, is clearly to frustrate the monitoring of his conversations and avoid detection of attempts to interfere with Prosecution witnesses.

28. The Second Report also suggests the Accused was likely circumventing the restrictions imposed on his communications by using [REDACTED] ability to communicate with the outside world without being actively monitored. The Accused's communications with [REDACTED] suggest that the Accused is using [REDACTED] to exchange information with third parties. In a conversation on 14 December 2013, the Accused told [REDACTED] that [REDACTED].³⁷ He also told [REDACTED] that [REDACTED] told him (the Accused) to get in touch with

³³ See, for example, ICC-01/04-02/06-504-Conf-Exp-Anx8-Red, [REDACTED] ICC-01/04-02/06-504-Conf-Exp-Anx9-Red, para.4 and footnote 4; ICC-01/04-02/06-504-Conf-Exp-Anx8-Red, ll.962-975.

³⁴ [REDACTED]: ICC-01/04-02/06-607-Conf-Exp-Anx1-Red, ICC-01/04-02/06-607-Conf-Exp-Anx2-Red; [REDACTED]: ICC-01/04-02/06-607-Conf-Exp-Anx5-Red-Corr; [REDACTED]: ICC-01/04-02/06-607-Conf-Exp-Anx16-Red; [REDACTED]: ICC-01/04-02/06-607-Conf-Exp-Anx17-Red. [REDACTED]. ICC-01/04-02/06-607-Conf-Exp-Anx1, lns.23-28, 59-62. [REDACTED]. ICC-01/04-02/06-607-Conf-Exp-Anx2, lns.61-63. [REDACTED]. ICC-01/04-02/06-607-Conf-Exp-Anx2, lns.47-48. [REDACTED]. ICC-01/04-02/06-607-Conf-Exp-Anx2, *esp.* lns.15-18, 197. [REDACTED]. ICC-01/04-02/06-607-Conf-Exp-Anx16, lns.334 ss, 434 ss. [REDACTED]. ICC-01/04-02/06-607-Conf-Exp-Anx18, lns.299, 361-362 [REDACTED]. [REDACTED]. ICC-01/04-02/06-607-Conf-Exp-Anx17, lns.14 ss. [REDACTED]. ICC-01/04-02/06-607-Conf-Exp-Anx17, lns.381 ss.

³⁵ See ICC-01/04-02/06-607-Conf-Exp-Red2, paras.6-19.

³⁶ [REDACTED]. ICC-01/04-02/06-607-Conf-Exp-Anx1, lns.59-62.

³⁷ ICC-01/04-02/06-607-Conf-Exp-Anx3, lns.279-280.

[REDACTED].³⁸ The Prosecution notes that in the *Lubanga* Judgment, Trial Chamber I relied on the evidence that [REDACTED].³⁹

29. The Second Report also confirms the Accused's intention to interfere and actual interference with Prosecution witnesses. In two conversations with [REDACTED],⁴⁰ the Accused provides his interlocutor with coded information identifying an individual the Prosecution believes to be Prosecution witness [REDACTED].⁴¹ The Accused identifies an individual in coded language, including by referring to the fact that he [REDACTED] and [REDACTED].⁴² Three days after this conversation took place, the Accused explained to [REDACTED] that [REDACTED] for [REDACTED], which the Prosecution submits is a reference to [REDACTED],⁴³ and instructs him to warn [REDACTED], through others, that "what he is doing is not good".⁴⁴

30. The Second Report also lends further support to the Prosecution's allegations that the Accused's associates have tried to coach potential Defence witnesses. This is consistent with information obtained by the Prosecution and the Victims and Witnesses Unit about the involvement of [REDACTED] and other individuals who present themselves as [REDACTED] and potentially engaged in coaching and witness interference.⁴⁵

31. Annex 2 to the Second Report, a transcript of a conversation dated 12 January 2014, reveals that the Accused caused a group of individuals to be brought together by [REDACTED] and arranged for them to tell the "same" story to his lawyers: "Now, most important I wanted you to remind each other the whole

³⁸ ICC-01/04-02/06-607-Conf-Exp-Anx3, lns.17-18. See also lns.62-63, 167-168, 197-198.

³⁹ [REDACTED].

⁴⁰ ICC-01/04-02/06-607-Conf-Exp-Anx5-Red-Corr.

⁴¹ ICC-01/04-02/06-607-Conf-Exp-Anx5-Red-Corr, ll.1618, 33-35.

⁴² The Prosecution believes [REDACTED] to be a reference to the Accused. ICC-01/04-02/06-607-Conf-Exp-Red2, para.14 and footnote 20. See also ICC-01/04-02/06-607-Conf-Exp-Anx6-Red, ll.13-29, where the Accused explains that [REDACTED]. ICC-01/04-02/06-563-Conf-Exp-Anx2-Red, ll.248-301, [REDACTED].

⁴³ See ICC-01/04-02/06-504-Conf-Exp-Anx8-Red, ll.703-738 and ICC-01/04-02/06-635-Conf-Exp, para.35.

⁴⁴ ICC-01/04-02/06-607-Conf-Exp-Anx5-Red-Corr, ll.33-35 and 45-51.

⁴⁵ ICC-01/04-02/06-658-Conf-Exp, paras.23, 28-30; ICC-01/04-02/06-634-Conf-Exp-Anx.

history... Any time you will meet my lawyers, they will ask you about that history".⁴⁶ His interlocutor confirms that he has understood: "okay, there is no problem at all, let us sit together and organise well, and come up with one thing so that we speak one same things and have one position".⁴⁷

32. As noted by the Chamber, parts of the conversation transcribed in Annex 2, suggest that the Accused was "coaching his counterpart on certain factual matters pertaining to the case".⁴⁸

33. The Second Report also suggests that the Accused is willing to produce evidence contrary to the advice of his lawyers:

[REDACTED].⁴⁹

II. Conduct justifying further restrictions revealed by the Active Monitoring Report

34. The Active Monitoring Report indicates that the Accused has continued using coded language to conceal his activities. The Accused has persisted in this conduct despite knowing that his telephone communications would be monitored,⁵⁰ suggesting a calculated effort to circumvent the restrictions on his communications imposed by the Chamber.

35. The Accused's attempts to circumvent the Chamber's restrictions have at times gone unnoticed by the Registry. While the Registry noted, in the Second Report, certain instances of the use of coded language (including on occasions when the Accused directed [REDACTED] to abstain from using it), it failed to notice other examples of coded language. In some of these instances, the terms used appeared

⁴⁶ ICC-01/04-02/06-607-Conf-Exp-Anx2, lns.103-104. See also lns.109-110 ("That one knows everything he can tell you... you ask him... tell him the whole history... and speak the same thing"); 152 ("I can see you know the entire history...discuss...so that a person"); 173 ("Discuss with others and speak one thing").

⁴⁷ ICC-01/04-02/06-607-Conf-Exp-Anx2, lns.105-106.

⁴⁸ ICC-01/04-02/06-710-Conf-Exp-Red, para.13; ICC-01/04-02/06-607-Conf-Exp-Anx2, lns. 103-110, 160-173.

⁴⁹ Conversation with [REDACTED]. ICC-01/04-02/06-607-Conf-Exp-Anx3, lns.336-375.

⁵⁰ ICC-01/04-02/06-714-Conf-Exp, para.2. This report was communicated to the Prosecution on 16 July 2015.

to be in plain language. The fact that the same terms were used in conversations referred to in the First Report did not assist the Registry to identify their subsequent use. In other instances the Registry failed to react to references to individuals who had already been identified by the Prosecution as playing a role in the witness interference scheme. These examples are set out below.

36. As recently as [REDACTED], the Registry concluded that the Accused was using codes in a conversation [REDACTED]. According to the Active Monitoring Report, the interpreter only realized that they were using codes once the conversation was essentially over.⁵¹

37. In conversations with [REDACTED] on [REDACTED] (which are set out in the Active Monitoring Report), the Accused referred to the “problem” and “issue” faced by an [REDACTED], and instructed [REDACTED] to solve them before the start of his trial scheduled for early June.⁵² Referring to a further conversation on [REDACTED], the Registry reports that [REDACTED] was to meet the [REDACTED] that day.⁵³ Though the Registry found these conversations “rather unclear”, it did not interrupt them. It appears that the Registry made no link between the [REDACTED] mentioned in these conversations and the [REDACTED] referred to numerous times in the conversations covered in the First Report,⁵⁴ including in two conversations between the Accused and [REDACTED] that are of particular concern:

⁵¹ ICC-01/04-02/06-714-Conf-Exp-Anx-Red, p.6.

⁵² ICC-01/04-02/06-714-Conf-Exp-Anx-Red, pp.5-7.

⁵³ ICC-01/04-02/06-714-Conf-Exp-Anx-Red, p.7.

⁵⁴ ICC-01/04-02/06-504-Conf-Exp-Anx1, lns. 35-40, ; ICC-01/04-02/06-504-Conf-Exp-Anx2, lns.33-38, 42-45; ICC-01/04-02/06-504-Conf-Exp-Anx4, lns. 63-82; ICC-01/04-02/06-504-Conf-Exp-Anx8, lns.702-734. According to ICC-01/04-02/06-504-Conf-Exp-Anx4, ln.63, the [REDACTED] may also be the [REDACTED]. [REDACTED] is referred to at ICC-01/04-02/06-504-Conf-Exp-Anx1, lns. 35-39, 238-240, 246-257, 197 and 41; ICC-01/04-02/06-504-Conf-Exp-Anx2, lns.33-38, 66-75, 83, 89; ICC-01/04-02/06-504-Conf-Exp-Anx4, lns. 46-47, 63-82; ICC-01/04-02/06-504-Conf-Exp-Anx5, lns.144-148; ICC-01/04-02/06-504-Conf-Exp-Anx8, lns.489-495.

[REDACTED] referred to as [REDACTED] in a conversation that is part of the Second Report may be the same [REDACTED], as both individuals appear to be assisting the Accused. See ICC-01/04-02/06-607-Conf-Exp-Anx3, lns.274 ss.

- in a discussion about the “easiest solution” to the Accused’s “problem”: the Accused instructs [REDACTED] to speak to [REDACTED], and to tell him that [REDACTED]. The Accused then tells [REDACTED] that if these witnesses “get the papers” “they can even give up” and “things can just come to an end very well”;⁵⁵ and
- in a conversation in which the Accused asks [REDACTED] to confirm whether [REDACTED] has given [REDACTED] the names of the [REDACTED] witnesses and [REDACTED] confirms that [REDACTED] gave two of those names but [REDACTED] does not know the names of the other two, to which the Accused responds by saying that the one who lives in [REDACTED] has the same name as [REDACTED].⁵⁶ The Accused also instructs [REDACTED] to meet with the [REDACTED] tomorrow and tells [REDACTED] must have those names with [REDACTED]; he tries to assist [REDACTED] to recollect the other two witnesses’ names, by providing some of the letters in their names: [REDACTED] and [REDACTED] together with [REDACTED], whose first name means [REDACTED] in [REDACTED].⁵⁷

38. In a conversation with [REDACTED] on [REDACTED], which the Registry noted as “nothing special to report”,⁵⁸ the Accused gave [REDACTED] instructions to handle a matter with the help of [REDACTED]. The Registry seems not to have noticed the fact that [REDACTED] is an unregistered caller to whom the Accused had spoken –as reported in the First Report⁵⁹– in violation of Detention Centre rules. That conversation between the Accused and [REDACTED], according to

⁵⁵ ICC-01/04-02/06-504-Conf-Exp-Anx4, lns.56-99. The Prosecution submits that [REDACTED] is a reference to Prosecution witnesses. See ICC-01/04-02/06-635-Conf-Exp, para.34 and fn.49.

⁵⁶ ICC-01/04-02/06-504-Conf-Exp-Anx8-Red, lns.704-707.

⁵⁷ ICC-01/04-02/06-504-Conf-Exp-Anx8-Red, lns.702-734.

⁵⁸ ICC-01/04-02/06-714-Conf-Exp-Anx-Red, p.6.

⁵⁹ ICC-01/04-02/06-504-Conf-Exp, paras.8, 18.

the Registry's report, "was about preventing someone 'from committing abominations' by exercising direct threat against the person and his/her family".⁶⁰

Conclusion

39. The First Report, Second Report, Active Monitoring Report and many of their annexes are extensively redacted – in some instances on the basis of Defence representations that the information contained in the conversations was of a private nature or related specifically to "Defence matters".⁶¹ The Accused's use of coded language further complicates the analysis of his conversations. In some parts of these observations, the Prosecution has referred to passages in the Accused's conversations which give the Prosecution cause for concern, despite the fact that their full significance remains somewhat unclear due to the redactions and the use of coded language. To the extent that the Chamber has unredacted material before it, the Prosecution submits that the Chamber must review it carefully and draw the relevant conclusions.

40. The Registry's reports all suggest that the Accused is able to continue communicating with third parties in contravention of the existing restrictions on his communications. There are references in the conversations set out in these reports to "the other path",⁶² to the fact that the Accused and his interlocutors "do not need to say much on the phone",⁶³ and to the possibility of conveying information so long as [REDACTED].⁶⁴ All of this suggests that the Accused is prepared to circumvent the restrictive measures in place and retain contact with individuals with whom the Chamber has ordered him not to have any further contact.

⁶⁰ ICC-01/04-02/06-504-Conf-Exp-Anx9-Red, para.4

⁶¹ ICC-01/04-02/06-710-Conf-Exp-Red, para.13, bullet points referring to Annexes 7, 8, 19 and 20.

⁶² ICC-01/04-02/06-504-Conf-Exp-Anx3-Red, l.104-119; ICC-01/04-02/06-607-Conf-Exp-Anx5-Red-Corr, l.49.

⁶³ ICC-01/04-02/06-607-Conf-Exp-Anx3, lns.279-280.

⁶⁴ ICC-01/04-02/06-607-Conf-Exp-Anx3, lns.17-18, 279-280. *See also* lns.62-63, 167-168, 197-198.

41. Active monitoring has been shown to be an ineffective measure to control the Accused. 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, and to use coded language in his communications. Despite its efforts,⁶⁵ the Registry has been unable to thwart with the Accused's resolve to circumvent the restrictions imposed by the Chamber.

Relief

42. For the foregoing reasons, the Prosecution submits that further measures are required to ensure that the Accused does not communicate confidential information to third parties and does not coach and interfere with witnesses.

43. The Prosecution accordingly requests the Chamber to prohibit all non-privileged visits to the Accused and all live non-privileged telephone calls with the Accused until the conclusion of the testimony of the Prosecution's insider witnesses.⁶⁶

44. Alternatively, the Prosecution requests the Chamber to limit the Accused's non-privileged communications to pre-recorded messages on a digital recording device subject to monitoring. The Prosecution also maintains its request to be informed of any telephone calls that the Registry has terminated, and the basis therefor.

⁶⁵ See eg ICC-01/04-02/06-640-Conf-Exp and ICC-01/04-02/06-714-Conf-Exp where the Registry reports that it interrupted two telephone calls, on 7 April and 5 June 2015, because code words were used. In ICC-01/04-02/06-714-Conf-Exp-Anx-Red there are further references to the use of coded language, for instance, on page 5.

⁶⁶ P-0005, P-0010, P-0016, P-0017, P-0038, P-0055, P-0067, P-0190, P-0290, P-0758, P-0768, P-0769, P-0875, P-0883, P-0888, P-0898, P-0901, P-0907, P-0911.

45. The restrictions to the Accused's right to family and private life are warranted, lawful, proportionate, and allow for adequate alternative means of communication.⁶⁷



Fatou Bensouda
Prosecutor

Dated this 15th day of January 2016
At The Hague, The Netherlands

⁶⁷ ICC-01/04-02/06-635-Conf-Exp.