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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 "Response to the 'Observations on behalf of Mr Ntaganda on restrictions on his contacts in detention'", 13 June 2016,
ICC-01/04-02/06-1390-Conf-Exp**

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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 Christopher Gosnell

Legal Representatives of the Victims

Mr Dmytro Suprun
Ms Sarah Pellet

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
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

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. The Defence requests the lifting of the restrictions imposed to the Accused's non-privileged communications and visits and, alternatively, proposes a modified restrictions regime, arguing that (1) there are changed circumstances in that the Prosecution's four [REDACTED] witnesses have completed their testimony and that the Accused's conduct since the Chamber imposed the current restrictions has been "commendable"; and (2) that the current restrictions are disproportional to the actual risk that the Accused would engage in witness interference should the restrictions be lifted.
2. The Defence's request should be rejected in its entirety. *First*, the Defence mischaracterises the Prosecution's position, which has consistently submitted that the threat risk extends, at minimum, to all Prosecution [REDACTED] witnesses. A high risk continues to exist that the Accused attempt to interfere with witnesses should the current restrictions be lifted or modified. This risk extends, in particular, but not only, to the [REDACTED] Prosecution [REDACTED] witnesses and five of their family members who are yet to testify. Beyond those witnesses, an equally high risk exists that the Accused engage in the coaching of potential Defence witnesses. This risk will continue to exist until the end of the Defence case.
3. *Second*, that the Accused has, apparently, not used his non-privileged communications to engage in witness interference is simply the result of a lack of opportunity, which demonstrates the necessity and effectiveness of the current restrictions.
4. *Third*, the current restrictions are proportionate to the high risk of witness interference. The Chamber, in imposing the current restrictions, appropriately balanced the Accused's right to family life with the need to protect Prosecution

witnesses and safeguard the integrity of the proceedings. And whereas the Chamber would have been justified in prohibiting any contact between the Accused and [REDACTED], [REDACTED] involvement in the alleged witness interference, the Accused is still entitled to family contact and visits.

5. *Lastly*, the alternative restrictions regime proposed by the Defence, which it presents as “less stringent”, differs very little from the over-permissive regime that created the conditions which led to the imposition of the restrictions currently in place. As such, this alternative proposal differs equally little from the Defence’s request to lift the restrictions *in full*. The alternative restrictions regime would not effectively prevent the Accused from attempting to interfere with witnesses and should be rejected.

Confidentiality

6. This filing and annexes A to D are classified as “Confidential, EX PARTE – only available to the Prosecution and Victims and Witnesses Unit” pursuant to regulation 23*bis*(1) of the Regulations of the Court (“RoC”), as [REDACTED].¹ The Prosecution will file a confidential, *ex parte*, redacted version of these submissions that will be made available to the Defence. The Prosecution will also file a public redacted version of this filing.

Procedural History

7. On 1 April 2016, the Chamber invited the Parties to “file any submissions they have on: (a) the inclusion of [REDACTED] amongst Mr Ntaganda’s authorised contacts for the purposes of active monitoring; and (b) the continuation, lifting

¹ [REDACTED].

or adjustment of the other restrictions on Mr Ntaganda's contacts which are currently in force".²

8. On 29 April the Registry submitted the "Fourth Report on the post-factum review of the phone conversations made by Mr Ntaganda" ("Fourth Registry Report").³
9. On 9 May 2016, the Prosecution⁴ and the Defence⁵ filed their submissions on the restrictions of the Accused's contacts.

Prosecution's Submissions

I. There are no changed circumstances that warrant a modification of the current restrictions, which are proportionate to the high risk of witness interference

10. The Defence submits that there are changed circumstances that warrant the lifting of the restrictions on the Accused's contacts in full. The Defence puts forward two purported changed circumstances, namely that: (1) the "[t]he four [REDACTED] Prosecution [REDACTED] witnesses have now completed their testimony";⁶ and (2) that the Accused's "commendable conduct" since his communications are being actively monitored demonstrates the absence of "reasonable grounds to believe" that he would engage in witness interference should the restrictions to his communications be lifted.⁷ The Defence further submits that the current restrictions regime is disproportionate to the actual risk that the Accused engage in witness interference should the restrictions be lifted.

² E-mail from Trial Chamber VI of 1 April 2016, at 20:56.

³ [REDACTED]. The Prosecution does not have access to this report.

⁴ ICC-01/04-02/06-1313-Conf-Exp and ICC-01/04-02/06-1313-Conf-Exp-Red.

⁵ ICC-01/04-02/06-1312-Conf-Exp.

⁶ ICC-01/04-02/06-1312-Conf-Exp, paras. 12(a) and 14-19.

⁷ ICC-01/04-02/06-1312-Conf-Exp, paras. 12(b) and 20-24.

11. These arguments should be rejected. *First*, as the Prosecution has consistently submitted, the threat risk exists beyond the four Prosecution witnesses referred to by the Defence and extends, at minimum, to all the Prosecution's [REDACTED] witnesses. A high risk of interference with these witnesses still exists. *Second*, that the Accused appears not to have continued engaging in witness interference in his non-privileged conversations can be better explained as a lack of opportunity. Further, whilst it does not have access to the Registry's report on the active monitoring of the Accused's conversations, the Prosecution notes that at least four phone conversations were interrupted by the Registry, because the Accused attempted to conceal the nature of his conversations using coded language. Contrary to the Defence's assertion, this demonstrates that the current restrictions are necessary and effective. *Lastly*, the current restriction regime is proportionate, as it adequately balances the Accused's rights to privacy and family life, which are not absolute rights, with the need to protect Prosecution witnesses as well as the integrity of the proceedings.

A. The risk of continued interference extends to all Prosecution [REDACTED] witnesses

1) The Defence mischaracterises the Prosecution's position

12. The Defence mischaracterises the Prosecution's position by arguing that its request for restrictions to the Accused's contacts was limited to four witnesses.⁸ The Prosecution recalls that, on 9 June 2015, it requested the imposition of restrictions "until the end of the testimony of *the last* [REDACTED] *witness*" (emphasis added), referring to both "[REDACTED] witnesses".⁹ On 16 and 22

⁸ ICC-01/04-02/06-1312-Conf-Exp, para. 12 (a) and 14.

⁹ See ICC-01/04-02/06-635-Conf-Exp, paras. 7 and 47.

July 2015, the Prosecution repeated this position and specifically listed the relevant [REDACTED] witnesses, namely Witnesses [REDACTED].¹⁰

13. Whilst, in its request for further restrictions, the Prosecution indeed mainly relied upon evidence of the Accused's plans and actions to interfere with four specific witnesses, namely Witnesses [REDACTED],¹¹ this is merely because its request was based on the very limited evidence of the Accused's phone conversations available at that time, which concerned a period in time – [REDACTED] – when these four witnesses were the Prosecution's [REDACTED] witnesses and the Prosecution had not yet interviewed its additional [REDACTED] witnesses.

14. In reality, the reports of interference the Prosecution has received extend well beyond these four witnesses. The Prosecution has indeed previously reported incidents of attempted interference with the testimony of Witnesses [REDACTED],¹² [REDACTED],¹³ [REDACTED]¹⁴ and [REDACTED],¹⁵ which can all be linked to a network of the Accused's associates. The Prosecution reiterates its position that the threat of witness interference posed by the Accused extends, at minimum, to all Prosecution [REDACTED] witnesses. Indeed, the Prosecution has previously submitted that the Detention Centre records indicate that there may be a risk posed to Prosecution witnesses in general.¹⁶

15. However, as argued in the Prosecution's submissions, the risk of witness interference also extends to coaching of Defence witnesses.¹⁷ In order to

¹⁰ See ICC-01/04-02/06-727-Conf-Exp, para. 8 and fn. 6; ICC-01/04-02/06-738-Conf-Exp, para. 43 and fn. 66.

¹¹ See ICC-01/04-02/06-635-Conf-Exp, paras. 32-38.

¹² See [REDACTED].

¹³ See ICC-01/04-02/06-1224-Conf-Exp, paras. 6-9 and 12-15.

¹⁴ See [REDACTED]; ICC-01/04-02/06-1310-Conf-Exp, paras. 9-19.

¹⁵ See ICC-01/04-02/06-1212-Conf-Exp, para. 41.

¹⁶ ICC-01/04-02/06-635-Conf-Exp, paras. 5(a) and 45.

¹⁷ See ICC-01/04-02/06-1212-Conf-Exp, paras. 2, 4, 35-49 and 56.

prevent the further coaching of potential Defence witnesses and safeguard the integrity of the proceedings, the Prosecution requests that the current restrictions be maintained until the end of the Defence case.

16. As further evidence of the Accused's intention to influence both Prosecution and Defence witnesses, the Prosecution refers to [REDACTED].¹⁸

2) The Defence's suggestion that the Prosecution is required to establish a direct link between the Accused's conversations and incidents reported by Prosecution witnesses is incorrect

17. The Defence further submits that "no 'reasonable grounds to believe' exist that Mr Ntaganda could interfere with and/or disseminate confidential information about any other witness should his non-privileged communications be reinstated", because: (1) "no evidence has been adduced that those who allegedly interfered and/or were likely to interfere with its witnesses are linked to Mr Ntaganda or acted/would act pursuant to his instructions"; and, (2) "there is no evidence that the so-called 'supporters' of the Accused [...] have ever received any directive from Mr Ntaganda to intimidate Prosecution witnesses".¹⁹

18. This argument should be rejected. *First*, the Defence's assertion that, in order to maintain the current restrictions regime, the Prosecution must establish a direct link between the Accused's telephone conversations and the specific incidents reported by Prosecution witnesses is incorrect. The restrictions currently in place were imposed by the Chamber because it found that reasonable grounds existed to believe that the Accused attempted "to disclose confidential information or to interfere with witnesses, including [...] by way of coaching".

¹⁸ [REDACTED].

¹⁹ ICC-01/04-02/06-1312-Conf-Exp, paras. 17-18.

The Chamber made this finding on the sole basis of the contents of the Accused's telephone conversations, which in themselves, regardless of the incidents reported by the same witnesses referred to by the Accused in these conversations, constitute serious breaches warranting the imposition of a strict communication regime.

19. *Second*, the Prosecution [REDACTED]:

- The Prosecution recalls that, in its initial request for measures under regulation 101(2) of the RoC, it reported several incidents related to Prosecution Witness [REDACTED], namely that, in [REDACTED].²⁰ [REDACTED].²¹
- In support of the same request for measures under regulation 101 of the RoC, the Prosecution reported that, the Accused's associates made several attempts to dissuade Witness [REDACTED] from testifying against the Accused, namely: (1) [REDACTED]; (2) [REDACTED]; (3) [REDACTED]; and (4) [REDACTED].²² [REDACTED].²³ [REDACTED].²⁴
- More recently, on 15 March 2016, the Prosecution submitted to the Chamber reports by [REDACTED] that [REDACTED].²⁵ [REDACTED].²⁶ [REDACTED].²⁷

20. The Defence further argues that there is no evidence that the individuals alleged to be involved in the incidents of witness interference reported by the Prosecution "have ever been in contact with Mr Ntaganda since he is in

²⁰ ICC-01/04-02/06-349-Conf-Exp, paras. 15-26.

²¹ [REDACTED].

²² ICC-01/04-02/06-349-Conf-Exp, paras. 27-36 and ICC-01/04-02/06-371-Conf-Exp, paras. 8-14.

²³ [REDACTED].

²⁴ [REDACTED].

²⁵ ICC-01/04-02/06-1212-Conf-Exp, paras. 6-7, 34, 39 and 46-47.

²⁶ ICC-01/04-02/06-1212-Conf-Exp, para. 47.

²⁷ [REDACTED].

detention or are even known to him”, adding that “these individuals appear to have acted on their own behalf”.²⁸

21. This argument should be discarded. *First*, the Defence omits to refer to several individuals on the Accused’s list of contacts, including [REDACTED] and [REDACTED], with whom he was in regular contact, and were personally involved in incidents of witness interference that were notified to this Chamber.²⁹ *Second*, that no evidence is currently available that the Accused was in direct contact with the individuals involved in the recent incidents of witness interference reported by Prosecution witnesses does not mean that such evidence does not exist among the vast amount of the Accused’s conversations which remain unreviewed, especially given the extent to which he appears to have communicated with unauthorised contacts and that he has registered individuals on his contact list under false identities.³⁰ *Third*, there is abundant information before this Chamber that the Accused used his registered contacts to act as intermediaries between him and those individuals who pressured Prosecution witnesses on the ground.³¹ *Lastly*, as previously submitted,³² whilst maintaining the current restrictions is necessary to prevent the Accused from giving further instructions aimed at preventing witnesses from testifying, it is [REDACTED]³³ [REDACTED].³⁴

²⁸ ICC-01/04-02/06-1312-Conf-Exp, para. 18. The Defence refers, in particular, to [REDACTED], [REDACTED], [REDACTED] and [REDACTED].

²⁹ For [REDACTED], see ICC-01/04-02/06-349-Conf-Exp, paras. 20-21, 30, 38 and 40; ICC-01/04-02/06-1313-Conf-Exp, para. 28. For [REDACTED], see [REDACTED]; ICC-01/04-02/06-782-Conf-Exp, para. 9.

³⁰ See ICC-01/04-02/06-1313-Conf-Exp, para. 53.

³¹ See ICC-01/04-02/06-630-Conf-Exp, para. 33 and ICC-01/04-02/06-504-Conf-Exp-Anx8-Red, p.25, lns. 707-734.

³² ICC-01/04-02/06-1313-Conf-Exp, para. 32.

³³ See ICC-01/04-02/06-635-Conf-Exp, paras. 29 and 36.

³⁴ See ICC-01/04-02/06-630-Conf-Exp, paras. 32-33.

B. The Accused's "commendable conduct" demonstrates that the current restrictions are necessary and effective

22. The Defence argues that "[i]t can reasonably be inferred from Mr Ntaganda's commendable conduct for more than nine months that there exists no 'reasonable grounds to believe' that Mr Ntaganda would engage in witness interference and/or communication of confidential information should his non-privileged contacts be reinstated."
23. At the outset, the Prosecution observes that it does not have access to the Fourth Registry's Report and is, therefore, not in a position to verify that its contents match the Defence's description. The Prosecution notes, however, that the Registry terminated four conversations since 13 November 2015, because the Accused's or his interlocutor's "[u]se of coded language or unusual use of vocabulary indicating an attempt to conceal the nature of the conversation",³⁵ a conduct that can hardly be described as "commendable" or "irreproachable".³⁶ That the Accused attempted, on four occasions, to conceal the nature of his conversations whilst being actively monitored gives an indication of what his conduct would be should the active monitoring be lifted or modified, and demonstrates that the current restrictions are necessary and effective.
24. Even if, *arguendo*, the Accused's conduct has been faultless, as submitted by the Defence, that the Accused has not continued to engage in witness interference in his Detention Centre communications would by no means demonstrate that he would not do so, should the restrictions be lifted or modified. It would simply be the result of a lack of opportunity and of the effectiveness of the restrictions currently in place.

³⁵ ICC-01/04-02/06-1312-Conf-Exp, para. 23.

³⁶ ICC-01/04-02/06-1312-Conf-Exp, paras. 20 and 24.

25. The Defence previously requested a modification of the restrictions regime on the basis of the Accused's purported "impeccable conduct" over the first five months of active monitoring.³⁷ The Chamber rejected this request, holding that it "[did] not consider that the ceasing of misconduct during this limited period of active monitoring warrants the relaxing of measures imposed to prevent the continuation and consequences of misconduct prior to the taking of these measures". As further held by the Chamber, "[n]ot engaging in misconduct should be the norm and the fact that restrictive measures have been effective does not necessarily lead to the conclusion that the need to continue these measures has diminished or disappeared".³⁸ The Defence's renewed request should be rejected for the same reasons.

C. The current restrictions regime is proportionate to the high risk of witness interference

26. The Defence argues that the current restrictions regime is disproportionate to the risk of witness interference or leakage of confidential information on the part of the Accused.

27. *First*, there is still a high risk of interference with Prosecution witnesses. As previously submitted, despite the Prosecution's changes to its initial order of appearance in order to call all of its [REDACTED] witnesses – and not just Witnesses [REDACTED] – as early as possible, at least four [REDACTED] witnesses, one [REDACTED] witness, five [REDACTED] and [REDACTED] of their family members are yet to testify. These witnesses are particularly vulnerable to interference. Furthermore, the risk that the Accused use his non-privileged communications to coach potential Defence witnesses will not disappear until the end of the Defence case.

³⁷ ICC-01/04-02/06-759-Conf-Exp-Red, para. 31.

³⁸ ICC-01/04-02/06-785-Conf-Exp, para. 59.

28. *Second*, restrictions currently in place appropriately balance this high risk with the Accused's right to family life. Neither the Accused's entitlement to communicate with his family, nor his right to family life are absolute.³⁹ Whereas the Chamber considered that the findings it made with respect to the [REDACTED] would have justified ordering the cessation of the Accused's contacts with [REDACTED],⁴⁰ it took into consideration the fact that [REDACTED], and, accordingly, permitted them to continue contact.⁴¹

II. The Defence's proposed Modified Regime would not effectively mitigate the continued risk of witness interference

29. As an alternative to the lifting of all restrictions to the Accused's contacts, the Defence proposes a modified restriction regime ("Modified Regime"), putting forward a number of modifications to the restrictions applied to the Accused's non-privileged telephone contacts and visits.

30. The Prosecution opposes this Modified Regime in its entirety. The Defence presents its proposed alterations as a "less stringent restriction regime", yet, it differs very little from the over-permissive regime that allowed the Accused to have the very telephone conversations that led to the imposition of the restrictions currently in place. As such, the proposed Modified Regime differs equally little from the Defence's principal request to lift the restrictions *in full*. The Modified Regime would not effectively prevent the Accused from breaching the Chamber's orders and from attempting to interfere with Prosecution witnesses or to coach potential Defence witnesses.

³⁹ ICC-01/04-02/06-785-Conf-Exp, paras. 39 and 42. See also ICC-01/04-02/06-635-Conf-Exp, para. 48 and fn.75-77.

⁴⁰ ICC-01/04-02/06-785-Conf-Exp, para. 62.

⁴¹ ICC-01/04-02/06-785-Conf-Exp, paras. 62-63.

31. *First*, the Prosecution opposes the Defence's request to lift the active monitoring and replace it with a system of weekly random monitoring.⁴² The Defence essentially proposes to return to the passive monitoring system provided for by regulation 174 of the Regulations of the Registry. This system, which was in place when the Accused had the phone conversations which led the Chamber to impose the current restrictions regime, has proven to be particularly ineffective, as it did not deter the Accused, fully aware that his conversations were being recorded,⁴³ from having conversations in relation to which the Chamber found that "reasonable grounds exist to believe that the use of codes was meant to disguise attempts to disclose confidential information or to interfere with witnesses, including [...] by way of coaching".⁴⁴ The Prosecution disagrees with the Defence's suggestion that it would allow for "the Registry to promptly detect [...] any misuse of Mr Ntaganda's non-privileged calls", as, precisely, under this system, the Accused's breaches have remained entirely undetected for years. Consequently, the Prosecution requests that the active monitoring of the Accused's telephone conversations be maintained, as it is the only measure that permits the detection and ending of potential breaches in real-time and before any damage is done.

32. *Second*, should the Chamber consider granting the Defence's request to add certain individuals to his list of contacts, as requested by the Defence,⁴⁵ the Prosecution requests prior access to the said list as well as an opportunity to make observations. It also requests that the Chamber order the Registry to conduct thorough identity verifications. As previously submitted,⁴⁶ the Accused has previously listed an individual under a false identity on at least one occasion. This individual, [REDACTED], is believed to be at the heart of

⁴² ICC-01/04-02/06-1312-Conf-Exp, paras. 30-31.

⁴³ See ICC-01/04-02/06-635-Conf-Exp, para. 29.

⁴⁴ ICC-01/04-02/06-785-Conf-Exp, para. 50.

⁴⁵ ICC-01/04-02/06-1312-Conf-Exp, para. 29.

⁴⁶ ICC-01/04-02/06-1313-Conf-Exp, para. 53.

the witness interference scheme in this case. Accordingly, any new name or telephone number provided by the Accused for inclusion on his list of authorised contacts cannot be taken at face value and should be thoroughly checked. If such verifications are not feasible, the new contacts should simply not be added to the Accused's list of contacts.

33. *Third*, the Prosecution opposes the Defence's request to allow the Accused to refer to trial dates,⁴⁷ as this would give him an opportunity to warn his associates that particular Prosecution witnesses are going to testify. This risk is particularly high in the present circumstances where, as submitted above, it is likely that the [REDACTED].

34. *Fourth*, whilst the Defence does not explicitly request an increase of the time the Accused is allowed to have non-privileged phone conversations, it indicates that it "is ready to explore with the Registry the modalities of the proposed mechanism, in particular the number of hours of non-privileged communications that could be allowed per day".⁴⁸ As a preliminary matter, the Prosecution recalls that the Chamber restricted the Accused's non-privileged communications to "a maximum of one hour a week".⁴⁹ As such, contrary to what the Defence seems to imply, the duration of the Accused's non-privileged conversations is not an issue that can simply be "explored" with the Registry and it requires the Chamber's intervention. The Prosecution opposes any increase of the duration of the Accused's non-privileged conversations, as this would increase Accused's opportunities to pass confidential information or give instructions to his associates. Furthermore, the duration of his conversations should not be extended in order to preserve the possibility of any necessary post-factum review thereof.

⁴⁷ ICC-01/04-02/06-1312-Conf-Exp, para. 33.

⁴⁸ ICC-01/04-02/06-1312-Conf-Exp, para. 32.

⁴⁹ ICC-01/04-02/06-785-Conf-Exp, para. 66.

35. *Fifth*, the Prosecution opposes the Defence's request to lift the restrictions to the Accused's private and family visits.⁵⁰ In its decision imposing the current restrictions, the Chamber appropriately balanced the Accused's right to family life with the need to protect witnesses and the integrity of the proceedings, and allowed the Accused to receive family visits, subject to certain conditions, including the active monitoring of the visits.⁵¹ If the Accused has not received any visit from his wife and children since the imposition of these restrictions, it is not because he cannot receive such visits, but because his family has opted not to do so (at least whilst the issue of restrictions on the Accused's current contacts is still being deliberated by this Chamber). The Prosecution further recalls that the Chamber imposed these restrictions on the basis of telephone conversations that the Accused had [REDACTED] that suggested that the Accused used his [REDACTED] visits to pass confidential information to his contacts without being detected.⁵² Lastly, the Prosecution notes that the lifting of the restrictions to the Accused's visits, in particular the active monitoring thereof, would render meaningless any monitoring, be it active or passive, of the Accused's telephone conversations.

36. *Sixth*, the Defence requests that "the members of the Defence team who are not entitled to privileged communications with Mr Ntaganda be allowed to visit him in detention", as "[s]uch visits have been banned by the custody authorities in application of the restrictions ordered by the Chamber".⁵³ However, there is no prohibition to visits by non-privileged members of the Defence team visits to the Accused as long as the visits are monitored. In any case, the Defence offers no justification or rationale for the lifting of the restriction requiring the monitoring of non-privileged members of the Defence

⁵⁰ ICC-01/04-02/06-1312-Conf-Exp, paras. 36-37.

⁵¹ ICC-01/04-02/06-785-Conf-Exp, para. 69.

⁵² *Ibid.*

⁵³ ICC-01/04-02/06-1312-Conf-Exp, para. 38.

team. The Defence is effectively asking for an extension of legal privilege to non-privileged members of the team.

37. In the past, the Accused has used non-privileged members of his Defence team (i.e. investigators) to circumvent the Detention Centre monitoring system, to allegedly coach potential Defence witnesses, and to disclose the identities of Prosecution witnesses;⁵⁴ all apparently without his lawyers' knowledge. The risk that he would repeat these actions is high considering he may have an increased motive to do so in preparation for the potential presentation of Defence witnesses. The Accused's right to freely speak to counsel in unmonitored and privileged communications suffices to give effect to his rights. To provide more than his rights require would unnecessarily imperil the integrity of these proceedings and the protection of witnesses.

Conclusion

38. For the foregoing reasons, the Prosecution requests that the current restrictions to the Accused's contacts should be maintained until the end of the Defence case and that the Defence's Modified Regime be rejected in its entirety.



Fatou Bensouda
Prosecutor

Dated this 26th day of September 2016
At The Hague, The Netherlands

⁵⁴ See ICC-01/04-02/06-635-Conf-Exp, para. 39 and fn. 68; and ICC-01/04-02/06-Conf-Exp, paras. 38, 39-43 and 47-48.