

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

No.: ICC-01/04-02/06
Date: **21 November 2016**

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’s response to the Defence “Urgent Request for Stay of Proceedings” (ICC-01/04-02/06-1629-Conf)”, 15 November 2016, ICC-01/04-02/06-1636-Conf

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 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 Prosecution opposes the Defence request for a stay of proceedings.¹
2. First, the Accused is not prejudiced by the fact that the Prosecution may have uncovered a scheme of witness interference and coaching that he directed, nor can it be argued that the Prosecution's investigation into such serious misconduct has made the trial proceedings unfair. To the contrary, by coaching witnesses and/or fabricating evidence, the Accused bears all responsibility for the position in which he now finds himself.
3. Second, the fairness of the proceedings *for the Accused* has not been affected. The Trial Chamber has consistently ensured that the trial is fair. It safeguarded the integrity of these proceedings by deferring to an independent Pre-Trial Chamber on investigative measures associated with alleged article 70 offences.² This enabled the Chamber to focus on its core mission: ensuring that *these* proceedings remained fair at all times, both procedurally and substantively. Trial Chambers of this Court have held that an accused must be cautioned against making unconsidered or factually unsubstantiated claims of a lack of fair trial.³ Indeed, the Accused's own alleged misconduct could create unfairness *for the Prosecution* and undermine the principle that neither party should be put at a disadvantage when presenting its case.⁴ His conduct also hinders the Trial Chamber's determination of the truth.

¹ ICC-01/04-02/06-1629-Conf, ("Defence Request").

² ICC-01/04-02/06-777-Conf-Exp, para. 38.

³ ICC-01/05-01/08-3204-Red, para. 28.

⁴ *Ngudjolo*, Joint Dissenting Opinion of Judge Ekaterina Trendafilova and Judge Cuno Tarfusser (ICC-01/04-02/12-271-AnxA), para.6. See also para.12 : "It is our strong conviction that the judicial duty to ensure fairness of the trial, as enjoined by virtue of article 64(2) of the Statute, encompasses the obligation of the Trial Chamber to safeguard the rights of the accused and equally the procedural rights of the Prosecutor, acting in public interest. It is further the responsibility of the Trial Chamber to prevent both a disruptive procedural conduct by either of the parties and the abuse of their statutory rights."

4. Third, Defence counsel has been aware of issues that could amount to Article 70 offences since August 2014, when the Prosecution first applied to restrict the Accused's communications from the Detention Centre. Thereafter, the Defence obtained access to alarming telephone conversations between the Accused and third parties including the Accused's instructions to "silence the singers". In March 2015, during *inter partes* meetings between Prosecution and Defence counsel, the Prosecution raised allegations of inappropriate conduct [REDACTED]. In June 2015, the Prosecution requested the [REDACTED] due to potential coaching and payment to Defence witnesses and interference with Prosecution witnesses. On 23 June 2015, the Chamber [REDACTED] as a result of his illicit conduct and cautioned the Defence to revise its working methods. And Prosecution filings referred to the Article 70 investigation.
5. There were sufficient indications of alleged impropriety for the Defence to have requested access to the Accused's telephone communications and to have put in place sufficient safeguards and checks to ensure the accuracy of Defence lines and evidence long before 7 November 2016. If it failed to do so, or if the Accused created blocks to these safeguards, this is neither the fault of the Prosecution nor amounts to prejudice to the Accused.
6. Fourth, the Defence Request speculates that Defence strategy has been affected without providing any concrete details. As such, the Defence Request is premature. After reviewing the summaries of conversations and any other conversations of relevance, the Defence will better understand what impact, if any, these conversations have on its list of potential Defence witnesses or its case as a whole. Until such assessments are made, the trial should proceed as planned. While waiting for the Prosecution to disclose summaries of the Accused's conversations, the Defence team can ask the Accused himself what he said or did

not say during his own telephone calls. In any case, even assuming that Defence strategy has been affected, it causes no prejudice to *the Accused* as all the disclosed materials relate to *his own* attempts to frustrate the process.

7. Fifth, the Defence contention that the Article 70 investigation lasted too long, or that the *ex parte* submissions were inappropriate, lacks factual and legal foundation. The scope of interference in this case over several years, the Accused's insistence to use coded and local dialects to speak to unauthorised callers, and the large volume of calls are all relevant factors in assessing the length of the investigation. *Ex parte* submissions in Article 70 investigations are appropriate and necessary, and were extremely limited in this case.

8. Lastly, issues related to interference first arose when witnesses informed the Prosecution of inappropriate approaches by [REDACTED], threats and intimidation by the Accused's associates, disclosure of confidential witness statements and cooperation with the Prosecution that compromised their safety and security. It was incumbent on the Prosecution team to investigate these allegations to ensure the protection of its witnesses and the integrity of the proceedings under article 68(1). It was appropriate for the same Prosecution team to review the telephone conversations with a view to protecting its witnesses and deciphering the coded communications used by the Accused and his network, and in considering whether to join any charges under Article 70 to the main case. Additionally the Accused's use of codes and references to the main case investigation and Prosecution witnesses requires a vast knowledge of the case that is not easily gained by Prosecution staff unfamiliar with the case. The Accused's suggestion that the Prosecution team should not have access to this information in the circumstances is unfounded.

Confidentiality

9. Pursuant to regulation 23*bis* (2) of the Regulations of the Court, this response is classified as “*Confidential*” as it is in response to a Defence filing of the same classification. The Prosecution will file a public redacted version of this filing.

Statement of facts

I. Restrictions on the Accused's communications [REDACTED]

10. 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”),⁵ because it suspected him of passing confidential information about Prosecution witnesses to his relatives and associates in order to intimidate and threaten Prosecution witnesses and their families.⁶ The Prosecution's suspicions and serious concerns stemmed from reports by its witnesses of intimidation and threats by [REDACTED] and others close to him, who urged the witnesses to recant and cease cooperation with the Court. The Defence was notified of a confidential redacted version of the request.
11. On 8 December 2014, the Chamber imposed the first restrictions on the Accused's contacts.⁷ Citing “serious concerns” about the reported approaches to Prosecution witnesses,⁸ the Chamber 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

⁵ 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.

⁶ ICC-01/04-02/06-349-Conf-Red2; ICC-01/04-02/06-431-Conf-Exp, para.17.

⁷ 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.

⁸ ICC-01/04-02/06-410-Conf-Exp-Corr, para.49.

conduct *post factum* review of some of the Accused's telephone communications and report its findings to the Chamber.

12. On 10 March 2015, the Registry filed its first report on the *post factum* review of the Accused's phone conversations ("First Report").⁹ The Defence was given full, unredacted access to the First Report and its annexes. The Prosecution received redacted versions of the First Report and eight of its annexes on 30 April 2015.¹⁰
13. On 11 March 2015, Prosecution and Defence representatives met to discuss reports of interference received by the Prosecution from Prosecution witnesses.
14. On 13 March 2015, on the basis of the information contained in the First Report and its annexes, the Chamber *proprio motu* 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 Centre's instructions.¹¹
15. On 18 March 2015, the Registry began actively monitoring the Accused's telephone communications.¹²
16. On 27 March 2015, Prosecution and Defence representatives met to discuss reports of interference received by the Prosecution from Prosecution witnesses and [REDACTED].

⁹ 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.

¹⁰ Implementation of Decision ICC-01/04-02/06-578-Conf-Exp where the Registry granted the Prosecution access to ICC-01/04-02/06-504-Conf-Exp-(and its annexes 1-6, 8-and-9).

¹¹ ICC-01/04-02/06-508-Conf-Exp.

¹² ICC-01/04-02/06-714-Conf-Exp, para.2. This report was communicated to the Prosecution on 16 July 2015.

17. On 20 May 2015, the Prosecution filed a request with the Trial Chamber for access to Lubanga's list of non-privileged contacts, as well as his call and visitation logs for the period of January to May 2015.¹³
18. On 22 May 2015, the Registry submitted its second report on the *post factum* review of the Accused's phone conversations ("Second Report").¹⁴ The Defence was given full, unredacted access to the Second Report and its annexes. On 9 June 2015, the Victims and Witnesses Unit filed a report on potential interference with Prosecution witnesses and other individuals.¹⁵ On 10 June 2015, the Prosecution requested further restrictions to the Accused's communications.¹⁶
19. [REDACTED].¹⁷ [REDACTED].¹⁸
20. [REDACTED].¹⁹ [REDACTED].²⁰ [REDACTED].²¹
21. On 29 June 2015, Trial Chamber VI ordered, *proprio motu* and on an interim basis, the active monitoring of Lubanga's calls.²² The Chamber also restricted all telephone communication between any individual in the Detention Centre and the 11 individuals named in the decision.²³ On the same day, the Chamber granted the Prosecution's request for access to Lubanga's Detention Centre call records and recordings.²⁴

¹³ ICC-01/04-02/06-603-Conf-Exp.

¹⁴ 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.

¹⁵ 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.

¹⁶ ICC-01/04-02/06-635-Conf-Exp with confidential redacted version at ICC-01/04-02/06-635-Conf-Red.

¹⁷ [REDACTED].

¹⁸ [REDACTED].

¹⁹ [REDACTED].

²⁰ [REDACTED].

²¹ [REDACTED].

²² ICC-01/04-02/06-683-Conf-Exp, paras.13-14.

²³ ICC-01/04-02/06-683-Conf-Exp, para.11.

²⁴ ICC-01/04-02/06-684-Conf-Exp.

22. On 3 July 2015, during a status conference in the Accused's presence, the Chamber issued guidance to the Parties with regard to the litigation concerning restrictions to the Accused's communications, and advised the Prosecution that if it required anything further, such a request should be the subject of separate proceedings before a different Chamber.²⁵
23. [REDACTED].²⁶ [REDACTED]. On 18 August 2015, the Chamber maintained the active monitoring of the Accused's non-privileged telephone conversations and ordered additional restrictions, including the restrictions of the Accused's contacts to two persons.²⁷

II. Article 70 investigation

24. On 13 August 2015, the Prosecution filed an *ex parte* request with Pre-Trial Chamber II for judicial assistance to access the Accused's and Lubanga's non-privileged call logs, visitors logs and the recordings of their non-privileged telephone conversations from 22 March 2013 to date and on an on-going basis.²⁸
25. On 21 August 2015, the Presidency reassigned the Situation in the Democratic Republic of the Congo to Pre-Trial Chamber I.²⁹ On 3 September 2015, Pre-Trial Chamber I designated Judge Tarfusser as Single Judge.³⁰ On 18 September 2015, the Single Judge granted the Prosecution's request to obtain recorded materials from the ICC Detention Centre.³¹
26. From 30 September 2015 onwards, the Prosecution was given access to the ICC Detention Centre non-privileged contact and visitors logs, as well as the recordings of non-privileged telephone conversations from 22 March 2013

²⁵ ICC-01/04-02/06-T-22-CONF-ENG, p.2, ln.23 to p.3, ln.6.

²⁶ [REDACTED].

²⁷ ICC-01/04-02/06-785-Conf-Exp and ICC-01/04-02/06-785-Red. paras.46, 50, 60, 62-65 and 70.

²⁸ ICC-01/04-638-Conf-Exp.

²⁹ ICC-01/04-639.

³⁰ ICC-01/04-728.

³¹ ICC-01/04-729-Conf-Exp.

onwards for both the Accused and Lubanga. From 2 February 2016 to date, the Prosecution completed summaries of over 450 telephone conversations, some 50 new summaries every month.

27. On 9 May 2016, the Prosecution filed its observations on the periodic review of the restrictions imposed on the Accused's contacts and submitted, on an *ex parte* basis, with ten supporting summaries of his communications ("*Ex Parte* annexes"). On 11 May 2016, the Defence requested the disclosure, *inter alia*, of the *Ex Parte* annexes. On 16 May 2016, the Prosecution opposed the disclosure of the *Ex Parte* annexes, arguing, *inter alia*, that their disclosure would compromise ongoing investigations related to potential article 70 offences.³²
28. On 3 June 2016, the Chamber held that "to the extent that such information may be material to the preparation of the Defence, [it] considers that Rule 81 would justify non-disclosure at this stage".³³ The Chamber added, however, "that Article 70 investigations cannot be permitted to continue indefinitely in a manner which could impact proceedings in Ntaganda case" and "encouraged [the Prosecution] to conclude relevant portions of its investigations as promptly as possible" and "disclose all resulting information which may be material to the preparation of the Defence as soon as possible."³⁴
29. On 7 September 2016, in its decision reviewing the restrictions, the Chamber recalled "its prior guidance to the Prosecution that any Article 70 investigations should be concluded as expeditiously as possible, and that any related applicable disclosure of information to the Defence be made as soon as possible".³⁵
30. On 2 November 2016, the Prosecution requested the Single Judge to order the Registry to provide the Accused with access to the TRIM folder containing his

³² ICC-01/04-02/06-1318-Conf-Exp, paras.16-22.

³³ ICC-01/04-02/06-1364-Conf-Exp, para.22.

³⁴ ICC-01/04-02/06-1364-Conf-Exp, para.22.

³⁵ ICC-01/04-02/06-1494-Conf-Exp-Red, para.24.

and Lubanga's ICC Detention Centre call records and recordings ("Request").³⁶
On 4 November 2016, the Single Judge granted the Prosecution's Request.³⁷

31. On 7 November 2016, the Prosecution disclosed the Accused's and Lubanga's ICC Detention Centre call logs and recordings, *via* a folder in TRIM, and offered to discuss this disclosure with the Defence. On the same day, the Prosecution filed a notice of the disclosure of evidence obtained under Article 70.³⁸

Prosecution's Submissions

There is no prejudice to the Accused

32. The Defence Request attempts to shift the blame for the Accused's alleged wrongdoing away from the Accused and onto the Prosecution, because it uncovered a scheme hatched by the Accused with his associates that may impact the veracity of lines of defence proffered to date.³⁹ The Defence Request fails to acknowledge that the Accused himself chose to run a defence that he knows may be untrue in whole or in part. Indeed, the Defence states that the requested stay of proceedings is "unfortunate" but "squarely attributable to the Prosecution's decision to withhold disclosure for as long as it has".⁴⁰ Evidently, the issue lies not in the *Prosecution's disclosure* of the Accused's telephone conversations but in the fact that *the Accused* entered into these discussions in the first place: instructing his associates to coach witnesses and fabricate evidence, and coaching witnesses himself, while trying to conceal the true nature of his discussions.

33. This may, indeed, put Defence counsel in a difficult position but this Trial Chamber must evaluate whether the Accused, not Defence counsel, has suffered prejudice. He has not. If the Chamber were to consider this as prejudice, then any

³⁶ ICC-01/04-737-Conf-Exp.

³⁷ ICC-01/04-738-Conf-Exp.

³⁸ ICC-01/04-02/06-1616.

³⁹ Defence Request, paras.3, 7, 11, 18, 20, 22, 25.

⁴⁰ Defence Request, para.25.

Accused person could seek to tamper with evidence and, once discovered, could claim that he suffered prejudice and his trial was unfair. The result would not only be absurd but it would also encourage all accused persons to commit offences against the administration of justice in order to obtain a stay of proceedings, negotiate more time to prepare for the Defence case, and suggest that the trial proceedings have been fundamentally unjust.

34. An Accused cannot engage in criminal conduct aimed at interfering with the course of justice and subsequently claim that he has a right to advance notice as to whether his conduct has been discovered in the form of disclosure. This is the principle *Nemo auditur propriam turpitudinem allegans* or *Ex turpi causa non oritur action*.⁴¹ The Accused, by his personal participation in the conversations, is fully aware of their content. Defence counsel has been aware of allegations against the Accused of calls relating to witness interference and witness coaching. Nothing prevented the Defence from seeking access to the records of the Accused's conversations directly from the Registry, should it have viewed these as generally relevant to their preparation given the information available to Defence counsel.⁴²

The Defence has been aware of alleged impropriety since August 2014

35. The Defence asserts that it was not informed of the existence of information regarding a broad scheme of witness interference until the Prosecution filed a disclosure communication notice on 7 November 2016.⁴³ This claim completely ignores the numerous, serious indications of potential wrongdoing that should have resulted in enhanced measures by the Defence to ensure the accuracy and

⁴¹Two judges of the Appeals Chamber have held that a Trial Chamber must differentiate between an accused's rights as provided for by law and a clear abuse of rights on the part of an accused by engaging in illicit behaviour from the Detention Centre. When an accused employs abusive means to mount his defence and to define his strategy, a Chamber is "duty bound to discipline an abusive conduct in pursuit of illicit objectives".
ICC-01/04-02/12-271-AnxA Para. 13 and 20.

⁴² See, ICC-01/04-02/06-1318-Conf.

⁴³ Defence Request, para.2.

veracity of the evidence it collected. There have also been references in Prosecution filings to the Accused's conduct and an Article 70 investigation.⁴⁴

36. The Defence fails entirely to address the information it received since August 2014 regarding potential interference by the Accused and his associates, or provide any indication of the measures it implemented in the face of such clear information.

The Prosecution's response to the specific Defence questions

37. On 7 November 2016, the Prosecution provided *inter partes* confirmation of the disclosure of the Detention Centre telephone calls and logs *via* the Registry.⁴⁵ The Defence does not explain why it waited a full 7 days before raising the issue of its ability to access the TRIM folder. Once it raised the issue, the Registry immediately resolved the problem.⁴⁶

38. In the same *inter partes* communication on 7 November 2016, the Prosecution offered to discuss the disclosure with the Defence, if it had any questions. To date, the Defence has not sought to ask any questions directly to the Prosecution. Many of the Defence queries could have been answered immediately had it done so.

39. The Defence further complains that the Prosecution had access to the Accused's Detention Centre calls since 30 September 2015.⁴⁷ The Defence ignores that it took significant time for the Prosecution to organize the information in a useable format and several months before the Prosecution received summaries of the conversations it identified as a priority for review. Indeed, the first summaries were finalized in February 2016. The review was made cumbersome by the

⁴⁴ See, ICC-01/04-02/06-960-Conf-Exp-Red, 29 October 2015 and notified to the Defence: «[...] *these allegations relate to an article 70 investigation.* » ; ICC-01/04-02/06-1592-Conf-Exp-Red, 24 October 2016 : « *Witness coaching, as in this case, is illegal, potentially punishable as an article 70 offence, and was covertly conducted by Mr Ntaganda and his unauthorised interlocutors.* »

⁴⁵ Email from N. Samson to S. Bourgon on 7 November 2016 at 16:04.

⁴⁶ Email from S. Bourgon to Trial Chamber VI on 14 November 2016 at 14:24.

⁴⁷ Defence Request, para.7.

Accused's frequent use of coded language and his insistence to use local dialects, which according to his interlocutors on the phone, he does not speak well. Often, after a particular summary was prepared, the Prosecution had to request supplementary summaries to understand fully the import of the initial telephone call. The Defence will not face the same challenges since they can speak directly to the Accused to explain the content of all calls, decipher the codes he and others are using and identify his (unauthorised) interlocutors.

40. The Trial Chamber imposed restrictions to the Accused's communications on 29 June and 18 August 2015. The Prosecution has not reviewed any calls made since the start of trial. The Prosecution did not seek orders to conduct telephone surveillance on any members of the Defence team or access privileged calls.

41. The Defence incorrectly asserts that the Prosecution obtained the Detention Centre calls "without any judge being appraised of the potential dangers to the fairness of the trial proceedings or to the merits of the requests".⁴⁸ The Prosecution made a well-founded and detailed request to the Pre-Trial Chamber for access to the Detention Centre recordings and logs.⁴⁹ The Single Judge approved the request with due consideration to all relevant factors.⁵⁰

42. The Defence also complains of a "secret" Article 70 investigation and the length of such an investigation in this case.⁵¹ First, an investigation into potential offences against the administration of justice, where those offences are ongoing, is rarely notified to the alleged perpetrator(s) at the time of the investigation, precisely to protect the integrity of that ongoing investigation. The Defence asserts that at the ICTY and ICTR, the Prosecution raised allegations of serious contempt *inter partes* from the outset.⁵² First, all three of the cases cited by the Defence relate to

⁴⁸ Defence Request, para.7.

⁴⁹ ICC-01/04-638-Conf-Exp.

⁵⁰ ICC-01/04-729-Conf-Exp.

⁵¹ Defence Request, paras.11, 18, 20, 21, 22.

⁵² Defence Request, para.18.

instances in which Chambers ordered disclosure of *allegations and/or charges* made by the Prosecution when investigation into the matter were complete. The decisions cited by the Defence do not indicate that the Chambers had ordered the disclosure of material obtained *during* the Prosecution's investigation of the contemptuous conduct.

43. Second, great caution is necessary in assuming that the cases cited (where the public information may be partial) reflect a principle of disclosing contempt investigations to the possible targets of the investigation. To the contrary, those cases equally show that the proper procedural course is dictated by the prevailing circumstances when the allegations come to light, their complexity, and the extent to which they appear well-founded.
44. Third, the facts of the cases cited by the Defence also greatly differ from those in the present case, in particular in relation to the breadth and scope of the alleged conduct at issue. By way of example, the allegations referred to in *Simić et al.*, concerned alleged harassment and bribery of *one* potential defence witness who had herself contacted the Prosecution and seems to have provided the Prosecution with statements. It did not relate to a broad scheme of alleged witness coaching of Defence witnesses, interference with Prosecution witnesses and investigations covering a period of several years, and as the allegations arose before trial, the entire matter could be settled before the trial started. In *Nyiramasuhuko*, the issue was sufficiently straightforward that it could be promptly decided in a single reasoned motion. In *Lukić*, the Trial Chamber appears to have ordered the disclosure of *ex parte* documents *after* it had determined that it "was not satisfied that there were sufficient grounds to proceed against any of the suspects being investigated" and "that the Prosecution

had presented no evidence to the Chamber to substantiate the claim that the integrity of the Accused's defence was in question".⁵³

45. The Defence further asserts that, to its knowledge, the Prosecution at the ICTY and ICTR has never been permitted to pursue an investigation concurrent with a trial for more than a very short period, and that Trial Chambers at these tribunals have consistently instructed that serious contempt allegations be disclosed to the Defence promptly.⁵⁴ As set out above, the three cases cited by the Defence⁵⁵ in support of this contention do not concern circumstances comparable to those in the present case. Nor does the Defence either demonstrate that the investigative measures were disproportionate or show how actual prejudice ensued. The implicit suggestion that the investigation could have been concluded more quickly ignores all the facts surrounding the review and is unfounded.

46. Today, the Prosecution will disclose approximately 70 draft summaries of the Accused's calls. The remaining summaries will be disclosed on an ongoing basis between now and 25 November 2016. The Prosecution is reviewing its records to determine whether any other information is relevant for disclosure.

47. In relation to *ex parte* submissions, the Defence fails to show that their limited use to address a discrete procedural matter occasioned unfairness or were in any way inappropriate. This Court's law on the use of *ex parte* submissions is clear. Chambers have "discretion" to "determine, within the framework of the applicable law, whether applications are kept *ex parte* [...] and whether or not to hold proceedings on an *ex parte* basis."⁵⁶ There may well be circumstances where it is "inappropriate" for a Party even to be aware of some applications, and such matters must "be determined on [their] own facts and consistently with

⁵³ Lukić Report, para. 17.

⁵⁴ Defence Request, para.18.

⁵⁵ Defence Request, footnote 10.

⁵⁶ Lubanga Rule 81 Appeal Decision, ICC-01/04-01/06-568 OA3, para. 66.

internationally recognized human rights standards”.⁵⁷ Thus, *ex parte* procedures should only be “used exceptionally when they are truly necessary and when no other, lesser, procedures are available, and the [C]ourt must ensure that their use is proportionate given the potential prejudice”.⁵⁸ Even when the reasons for the *ex parte* proceeding no longer apply, it may not be appropriate to make available *inter partes* the entirety of the *ex parte* submissions.⁵⁹

48. The Chambers’ approach to the Prosecution’s *ex parte* submissions concerning the article 70 investigation conformed entirely to these principles. Moreover, Judges of this Court are professional judges, who are well able to differentiate between inadmissible and admissible information in carrying out their functions. Consistent with the Appeals Chamber’s guidance, chambers must consider the nature of the application, on its facts, and apply the Court’s procedural law consistent with international human rights law accordingly.

49. In this case, *ex parte* procedures were necessary, and their use was proportionate to the potential prejudice. Initial *ex parte* submissions were justified because they contained sensitive information that, if disclosed, would compromise an ongoing investigation. *Ex parte* submissions were thus legitimate, especially when the investigation was prompted by the Prosecutor’s unique role in protecting witnesses and ensuring the integrity of the Court’s proceedings by detecting, investigating, and prosecuting article 70 violations.

50. Moreover, the Trial Chamber approved the non-disclosure of summaries used in the restrictions litigation under rule 81 of the Rules of Procedure and Evidence.⁶⁰ While the Prosecution could have sought a blanket order from the Chamber for non-disclosure of all the Detention Centre recordings and logs until such time as

⁵⁷ *Lubanga* Rule 81 Appeal Decision, ICC-01/04-01/06-568 OA3, para. 67. Also *Lubanga Ex Parte* Proceedings Decision, ICC-01/04-01/06-1058, para. 12 (“Complete secrecy” may be justified “if providing information about the procedure would risk revealing the very thing that requires protection”).

⁵⁸ *Lubanga Ex Parte* Proceedings Decision, ICC-01/04-01/06-1058, para. 12.

⁵⁹ *Lubanga Ex Parte* Proceedings Decision, ICC-01/04-01/06-1058, para. 14.

⁶⁰ ICC-01/04-02/06-1364-Conf-Exp, para. 22.

it had a fuller understanding of the scope of the alleged misconduct, it disclosed the information as soon as possible and well before the start of the Defence case.

51. The Prosecution will file confidential and public redacted versions of its few submissions to the Trial Chamber⁶¹ and Pre-Trial Chamber⁶² and will request reclassification of relevant decisions.⁶³
52. The Defence further asserts that in “most” national and international systems an independent counsel would carry out the investigation and prosecution as a whole of potential offences against the administration of justice, yet fails to cite any such jurisprudence. In any event, the practice of other tribunals in using an *amicus curiae* prosecutor is immaterial since the Rules of this Court allow no such recourse. The Defence’s preference for an *obiter dictum* of the Appeals Chamber is immaterial.⁶⁴ The Appeals Chamber held in *Bemba* that the involvement of Prosecution staff members in the Article 70 investigation who have case knowledge did not on its own give rise to reasonable doubts as to the Prosecutor’s impartiality.⁶⁵ Indeed, the fact that an Article 70 prosecution can be joined to the main charges acknowledges that the same team can both investigate and prosecute such offences.
53. Importantly, the facts of this case differ in critical respects from those of the *Bemba* case. First, the Prosecution’s initial investigation related primarily to the protection of its witnesses under article 68(1) from unlawful interference, threat and harm. This is squarely within the purview of the trial team. Second, the use of coded language made the review more difficult and the need to have people familiar with the parameters of the case is critical. Third, the Prosecution was not investigating Defence counsel or reviewing any privileged communications. No

⁶¹ ICC-01/04-02/06-1313-Conf-Exp; ICC-01/04-02/06-1318-Conf-Exp ; and, ICC-01/04-02/06-1390-Conf-Exp.

⁶² ICC-01/04-638-Conf-Exp; ICC-01/04-737-Conf-Exp.

⁶³ ICC-01/04-729-Conf-Exp; ICC-01/04-02/06-1364-Conf-Exp; ICC-01/04-02/06-1494-Conf-Exp-Red; ICC-01/04-738-Conf-Exp.

⁶⁴ Defence Request, para.15.

⁶⁵ ICC-01/05-01/-8-3255, para.83.

privileged communications are recorded at the Detention Centre and the Prosecution received no such information. Accordingly, there was no need to screen the Detention Centre calls or to engage a separate entity for this review.

The Defence Request is premature

54. The Defence states, without any concrete details, that it is “very likely suffering from ongoing prejudice” and, accordingly, requires a stay of proceedings.⁶⁶ Yet, it fails to explain what precisely the prejudice is that can only be remedied by a stay of proceedings. It suggests that there *might* be an impact on its future cross-examinations if members of the Defence team have been telephonically surveilled and admits that this information “may be relevant to cross-examination in ways that are, as yet, unknown”.⁶⁷ It also notes that the information “may well” have a pervasive, ongoing and immediate impact on Defence strategy and cross-examinations.⁶⁸ These speculations are not sufficient to meet the stringent test to grant a stay of proceedings. The Appeals Chamber has held that a stay of proceedings is an exceptional remedy and that “the power of a court of law to stay proceedings should be sparingly exercised”.⁶⁹ It is a remedy limited to conduct that would “make it otiose, repugnant to the rule of law to put the accused on trial”.⁷⁰ Such is not the case, nor is a stay of proceedings warranted.

55. Undoubtedly, the Defence must assess whether the information contained in the Accused’s telephone conversations actually impacts Defence lines or potential Defence witnesses, and to what extent.⁷¹ As such, the request for a stay is premature. While the Defence may be guided by the Prosecution’s summaries of

⁶⁶ Defence Request, para.4.

⁶⁷ Defence Request, para.9.

⁶⁸ Defence Request, para.10.

⁶⁹ ICC-01/04-01/06-772 OA4, 14 December 2006, para.31.

⁷⁰ ICC-01/04-01/06-772 OA4, 14 December 2006, para.30.

⁷¹ Defence Request, para.27.

some of the Accused's telephone conversations, it should also obtain information directly from the main interlocutor in the conversations: the Accused himself.

Relief Requested

56. The Prosecution requests the Chamber to reject the Defence Request.



Fatou Bensouda
Prosecutor

Dated this 21st day of November 2016
At The Hague, The Netherlands