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TRIAL CHAMBER VI

Before: Judge Robert Fremr, Presiding Judge
Judge Kuniko Ozaki
Judge Chang-ho Chung

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
*THE PROSECUTOR v. BOSCO NTAGANDA***

Public

With public Annex A and confidential Annexes 1-10

Public redacted version of “Prosecution’s request for additional Defence disclosure”, 10 February 2017, ICC-01/04-02/06-1783-Conf

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

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Introduction

1. Through his telephone communications from the Detention Centre, Bosco NTAGANDA set in motion a scheme to coach potential Defence witnesses by instructing his associates to brief or prepare potential witnesses before their Defence interview, by personally providing his version of the facts to potential witnesses, by rehearsing their answers with them and by instructing them to *"harmonise their ideas"*, to *"agree on one version"* and *"use the same language"*. He also refers to *"preparing"* documents. This scheme was initiated within days of the Accused's arrest; the Prosecution suspects it is ongoing.

2. The Defence case is about to commence. In light of the Accused's efforts to coach Defence witnesses and fabricate evidence, the Prosecution requires sufficient time and sufficient disclosure to investigate Defence evidence properly. The Accused's actions warrant robust measures to safeguard the integrity of the proceedings and the Chamber's ability to establish the truth. Without timely and meaningful disclosure of meetings with Defence witnesses (dates/ times of meetings, persons present, previous times met, intermediaries/ persons who facilitated contact with witnesses), a detailed record of what was said during each meeting including which documents/ items were commented upon, identity documents for Defence witnesses, timely disclosure of documentary/ tangible evidence and accurate chain of custody information, the Prosecution will not be in a position to conduct complete investigations or fully test the veracity of Defence evidence.

3. The Chamber has the authority to grant this request. Moreover, as noted in *Bemba et al.*, it is never in the interest of justice to tolerate actions that *"potentially*

*undermine the very efficacy and efficiency of the rule of law and of the courts entrusted to administer it.”*¹ Nor should the Accused benefit from his illicit conduct.

4. Accordingly, the Prosecution requests that the Chamber order the Defence to disclose, two months prior to the start of the Defence case: (i) the identity of the witnesses it intends to call as well as any material on which the Defence intends to rely in relation to such witnesses; (ii) signed statements, with dates of all interviews and persons present, including interpreters; (iii) detailed records, including a log of all prior meetings with Defence witnesses by the (current and former) Defence team, dates and persons present and documents/ items discussed during the meeting; (iv) a list of all persons who facilitated the witness's contacts with the Defence team; (v) any records in the possession of the Defence of prior meetings between the witnesses and specific individuals known to have been involved in the coaching scheme, (vi) any purported contemporaneous documents the Defence intends to rely upon, together with the necessary information on its provenance/source and chain of custody,² and (vii) official identity documents for Defence witnesses.³

5. Although the Prosecution seeks signed statements such as that disclosed for Defence Witness D-18-0001,⁴ if not feasible in all cases, the Prosecution requests a detailed and comprehensive record of anticipated evidence from each meeting. To the extent that the Chamber's recent decision sets a final disclosure deadline of one month before the Defence presentation of evidence, the Prosecution seeks a variation of that deadline and asks for two months,⁵ bearing in mind that the

¹ ICC-01/05-01/13-876, para. 9.

² Further to Section III D of the E-Court Protocol (ICC-01/04-02/06-47-Anx1, pages 7-13), the Defence is already required to disclose its evidence together with specific metadata, including the “Source Identity” and the “Chain of Custody”. However, when the Defence disclosed [REDACTED] prior to the cross-examination of Prosecution Witness [REDACTED], it did so without this important metadata and resisted the disclosure of its source (see ICC-01/04-02/06-1026-Conf, paras.22-24) until the Chamber ordered it to do so (see ICC-01/04-02/06-1070-Conf, para.16).

³ Some information can be compiled in a form such as that attached at Annex A.

⁴ DRC-D18-0001-0418.

⁵ ICC-01/04-02/06-1757, paras.10 and 11.

Prosecution had to disclose its final witness list and materials to the Defence three months before the initial trial date.⁶

Confidentiality

6. This filing and its annexes are classified as “Confidential” pursuant to regulation 23bis(1) of the Regulations of the Court as they refer to confidential information. The Prosecution will file a public redacted version of this filing.

Background

7. On 30 January 2017, the Chamber directed the Defence to disclose a list of witnesses and their statements, or a detailed and comprehensive summary of their anticipated testimony, by 31 March 2017.⁷ Final disclosure is to take place by 26 April 2017.⁸

Request for additional Defence disclosure

8. The requested measures are necessary to safeguard the integrity of the proceedings and the Chamber’s ability to establish the truth. They also allow the Prosecution to investigate fully Defence evidence. On the basis of far fewer of the Accused’s conversations, the Chamber found reasonable grounds to believe that the Accused intended to engage in a serious form of witness interference and coached potential witnesses,⁹ noting that these actions that “*may have a serious and ongoing impact on both the witnesses in the Ntaganda case, and on the proceedings more*

⁶ ICC-01/04-02/06- 382-Corr. The initial trial date was 2 June 2015, but it was postponed to 2 September 2015.

⁷ ICC-01/04-02/06-1757, para.10.

⁸ ICC-01/04-02/06-1757, paras. 6-14.

⁹ *I.e.* The Chamber found reasonable grounds to believe the Accused “(ii) used coded language ‘to disguise attempts to disclose confidential information or to interfere with witnesses’; (iii) disclosed the identity of Prosecution witnesses in circumstances which the Chamber found to be of ‘grave concern’; (iv) ‘intended to engage in a serious form of witness interference’; and (v) ‘instructed his interlocutors to coach witnesses, or directly told his interlocutors which story to tell, stressing the need to tell the story in the manner as described by [him] and the necessity of synchronising the stories.’” (ICC-01/04-02/06-1494-Red3, para.22 (footnotes omitted), citing ICC-01/04-02/06-785-Red, paras.46-47, 50-55, 57).

generally.”¹⁰ Having now reviewed nearly 600 of the Accused’s calls, the Prosecution has found further alarming evidence of the extent to which the Accused is attempting to tamper with evidence.

(i) The Accused’s direct and indirect coaching scheme

9. The Detention Centre communications¹¹ reveal that, since March 2013, the Accused coached potential Defence witnesses on what he perceived to be contentious issues in his case,¹² that he engaged his associates to brief and prepare potential witnesses before their interviews by the Defence,¹³ that he dictated and rehearsed answers with potential witnesses before Defence interviews,¹⁴ and that he instructed associates to tell witnesses to change aspects of their accounts.¹⁵
10. The Accused used his non-privileged telephone line to communicate with his associates and potential Defence witnesses.¹⁶ He also used LUBANGA’s non-

¹⁰ ICC-01/04-02/06-1494-Red3, para.22.

¹¹ Confidential Annex 1 to this request contains an analysis of the codes and terms used by the Accused to conceal his witness interference and coaching scheme, which are necessary to understand the evidence supporting this request.

¹² Such as [REDACTED]. See e.g. DRC-OTP-2099-1516, a conversation during which the Accused instructs a potential Defence witness called [REDACTED] to tell the story that [REDACTED]. See also DRC-OTP-2099-1625; and DRC-OTP-2099-1037, a conversation in which the Accused asks a potential Defence witness called [REDACTED] through [REDACTED]’s phone, whether he remembers the story of [REDACTED] and explains: “[REDACTED]”; DRC-OTP-2099-1679, a conversation between the Accused and [REDACTED] in which the Accused instructs him to [REDACTED], during his interview with his Defence team.

¹³ See e.g. DRC-OTP-2099-1883, a conversation during which the Accused refers to potential Defence witnesses and explains to [REDACTED] that “[REDACTED]” and that “[REDACTED]”; Summary of DRC-OTP-2095-0767 (Confidential Annex 2), where the Accused tells [REDACTED] that [REDACTED]. The Accused then instructs [REDACTED] to “[REDACTED]”; See also DRC-OTP-2099-1317, where [REDACTED] explains to the Accused that he and “[REDACTED]” and “[REDACTED]”.

¹⁴ There is evidence that the Accused personally coached at least twelve potential Defence witnesses on factual matters relevant to the case, namely: [REDACTED]. See DRC-OTP-2099-1516; DRC-OTP-2099-1508; DRC-OTP-2099-1504; DRC-OTP-2099-0682; DRC-OTP-2099-1186; DRC-OTP-2099-0670; DRC-OTP-2099-1037; DRC-OTP-2099-0943; DRC-OTP-2099-1676, DRC-OTP-2099-1679, DRC-OTP-2099-1687, DRC-OTP-2099-1685, DRC-OTP-2099-1683 and DRC-OTP-2099-1690; and Summary of DRC-OTP-2101-0007 (Confidential Annex 4).

¹⁵ See paras. 19-21 below.

¹⁶ See e.g. DRC-OTP-2099-1516, DRC-OTP-2099-1508, DRC-OTP-2099-1504, DRC-OTP-2099-0682, DRC-OTP-2099-1186, DRC-OTP-2099-0670, DRC-OTP-2099-1037, DRC-OTP-2099-0943, DRC-OTP-2099-1676, DRC-OTP-2099-1679, DRC-OTP-2099-1687, DRC-OTP-2099-1685, DRC-OTP-2099-1683 and DRC-OTP-2099-1690.

privileged telephone line to do so.¹⁷ LUBANGA equally supported him in his coaching scheme by advising that witnesses should be prepared and their ideas aligned, that they need a number of witnesses who all speak the same language.¹⁸

11. The Accused's network also includes: (i) [REDACTED];¹⁹ (ii) [REDACTED];²⁰ and (iii) [REDACTED].²¹ They appear further supported by [REDACTED],²² including [REDACTED],²³ and [REDACTED],²⁴ through [REDACTED]: [REDACTED],²⁵ [REDACTED],²⁶ and others. This support includes distributing confidential information about Prosecution witnesses and investigations,²⁷ instructing interference with Prosecution insider witnesses²⁸ and supporting a broad witness coaching scheme.²⁹

12. The Accused attempted to conceal his scheme by: (i) using coded language³⁰ or Kihema language;³¹ (ii) listing associates on his list of contacts under a false

¹⁷ See e.g. DRC-OTP-2099-0702, DRC-OTP-2099-0914, DRC-OTP-2099-0920, DRC-OTP-2099-1514, and DRC-OTP-2099-1511.

¹⁸ See DRC-OTP-2099-1588: on [REDACTED], LUBANGA explains to [REDACTED] the version of events that should be told by the Accused's Defence witnesses, that the ideas should be well aligned, and that it is important that witnesses be prepared well in time for the Accused's case; DRC-OTP-2099-1511: in another conversation in the presence of the Accused, LUBANGA explains to [REDACTED] that for the story to be credible, they need a number of witnesses and all must speak the same language. See also DRC-OTP-2099-1625.

¹⁹ [REDACTED].

²⁰ [REDACTED].

²¹ [REDACTED].

²² See, e.g. DRC-OTP-2099-0710.

²³ [REDACTED].

²⁴ [REDACTED].

²⁵ [REDACTED].

²⁶ [REDACTED].

²⁷ See, e.g. DRC-OTP-2062-0858 to DRC-OTP-2062-1172. See also DRC-OTP-2067-2068, p.2069, DRC-OTP-2068-0125, paras.19-26 and DRC-OTP-2072-0037, paras.3-8 and DRC-OTP-2072-0039; and DRC-OTP-2099-0710, DRC-OTP-2099-0697 and DRC-OTP-2099-1053.

²⁸ See, e.g. DRC-OTP-2099-1929, DRC-OTP-2099-1909 and DRC-OTP-2099-1560.

²⁹ See e.g. DRC-OTP-2099-1322, a conversation between the Accused and [REDACTED], mentioning that [REDACTED]; DRC-OTP-2099-1450, where [REDACTED]. See also, DRC-OTP-2099-0710; DRC-OTP-2099-0697; DRC-OTP-2099-1294, DRC-OTP-2099-1938, DRC-OTP-2099-1781, DRC-OTP-2099-1853, DRC-OTP-2099-1856; and DRC-OTP-2099-1199, a conversation the Accused had [REDACTED].

³⁰ See, e.g. the Accused's conversation with [REDACTED] on [REDACTED]: "BN: You understand that I am using a coded language, don't you" (DRC-OTP-2099-1305); See also the Accused's instruction to [REDACTED] to change a code, because he believes it is not strong enough (DRC-OTP-2099-1322).

³¹ See, e.g. the Accused's instructions to potential Defence witnesses: "Je vais parfois te parler en swahili, mais il faut que tu me répondes en kihema. Est-ce que tu comprends mon kihema ?" (DRC-OTP-2099-1504) and "BN: I'll try to speak Kihema, even if I don't speak it well, as they are listening to us" (DRC-OTP-2099-0682). See also, the Accused's conversations with potential Defence witnesses in Kihema: DRC-OTP-2099-0641, DRC-

identity;³² (iii) speaking to unauthorised callers through the telephone line of his authorised callers;³³ and (iv) using the unmonitored non-privileged visits at the Detention Centre [REDACTED];³⁴ and (v) relying on his associates on the ground to coach and prepare witnesses.³⁵

13. He also coached witnesses himself. On [REDACTED], the Accused rehearses with potential witness [REDACTED], whom the Prosecution believes is [REDACTED].³⁶ The Accused asks [REDACTED]: “[REDACTED]”. [REDACTED] replies: “[REDACTED]”.³⁷ Then the Accused and [REDACTED] discuss “[REDACTED]”, which the Prosecution believes is a reference to [REDACTED].³⁸ Two further conversations on the same day confirm that [REDACTED] met with the Defence,³⁹ and it was further confirmed by the Defence during [REDACTED].⁴⁰

14. A series of conversations on [REDACTED] further evidence coaching prior to Defence interviews of potential witnesses [REDACTED] and [REDACTED]. On [REDACTED], [REDACTED] inquired whether the Accused wanted him to “prepare” [REDACTED] in order to “avoid that there be confusion during the

OTP-2099-0670, DRC-OTP-2099-0682, DRC-OTP-2099-1037, DRC-OTP-2099-1186, DRC-OTP-2099-1504 and DRC-OTP-2099-1516.

³² [REDACTED].

³³ See e.g. DRC-OTP-2099-1516, DRC-OTP-2099-1508, DRC-OTP-2099-1504, DRC-OTP-2099-0682, DRC-OTP-2099-1186 and DRC-OTP-2099-0670.

³⁴ See e.g. a conversation the Accused had with [REDACTED] on [REDACTED], where he explains, referring to [REDACTED], that “[REDACTED]” (DRC-OTP-2099-0691); a conversation the Accused had with [REDACTED] on [REDACTED], where [REDACTED] “[REDACTED]” (DRC-OTP-2099-1722); and a further conversation between the Accused and [REDACTED] on [REDACTED], where the Accused explains to [REDACTED] that “[REDACTED]”, a code for the Accused himself, “[REDACTED]” and that, “[REDACTED]” (DRC-OTP-2099-1095).

³⁵ See below, paras.13-22.

³⁶ [REDACTED].

³⁷ DRC-OTP-2099-1508.

³⁸ [REDACTED].

³⁹ Two further conversations of [REDACTED] between the Accused and [REDACTED], at [REDACTED] and [REDACTED], show that [REDACTED] met the Accused’s Defence team on that day and that they “spoke for a long time” (DRC-OTP-2099-1503 and DRC-OTP-2099-1501).

⁴⁰ [REDACTED].

interview".⁴¹ Two days later, on the morning of [REDACTED], the Accused spoke with [REDACTED] through [REDACTED]'s telephone. In this conversation, the Accused asks [REDACTED] whether he has "*the list*" and instructs him to respond in the local Kihema language⁴² before proceeding to coach him on factual matters [REDACTED], providing [REDACTED] with his version of the events and telling him that "[REDACTED]".⁴³

15. This pattern of direct and indirect coaching is repeated in the Accused's conversations between [REDACTED] with [REDACTED],⁴⁴ [REDACTED].⁴⁵ In these conversations, the Accused instructs [REDACTED] to prepare for his interview with his Defence team, including by "*discuss[ing] the important things*"⁴⁶ with the Accused's associates on the ground,⁴⁷ by "*exchang[ing] thoughts*"⁴⁸ with them, and by "*remind[ing] each other of the story*".⁴⁹ The Accused personally coaches [REDACTED] on several facts such as [REDACTED].⁵⁰ The Accused's communications also show that he followed-up with the potential witness after his interview and asked him which answers he had given to the Defence team.⁵¹

⁴¹ See DRC-OTP-2099-1514, a conversation of [REDACTED], between [REDACTED] and [REDACTED]. [REDACTED] asks [REDACTED] whether he and the Accused had had a chance to talk about a person called [REDACTED] and whether the Accused wants him to "*prepare*" him before his meeting with "*the men*", a reference to the Accused's Defence team, adding that he wants to "avoid confusion during the interview": "[REDACTED]".

⁴² See DRC-OTP-2099-1504: "[REDACTED]".

⁴³ See DRC-OTP-2099-1504: "[REDACTED]". The conversations further suggest that the Defence interview of [REDACTED] took place on [REDACTED]: See DRC-OTP-2099-1501, a conversation of [REDACTED], during which [REDACTED] explains to the Accused that his Defence team met with [REDACTED] on that day and that the plan was for them to meet [REDACTED] after [REDACTED]: "[REDACTED]".

⁴⁴ See DRC-OTP-2099-1669, DRC-OTP-2099-1676, DRC-OTP-2099-1679, DRC-OTP-2099-1683, DRC-OTP-2099-1685 and DRC-OTP-2099-1687.

⁴⁵ See ICC-01/04-01/06-T-349-ENG and ICC-01/04-01/06-T-350-ENG.

⁴⁶ DRC-OTP-2099-1676.

⁴⁷ See e.g. DRC-OTP-2099-1676: "[REDACTED]"; and DRC-OTP-2099-1669: "[REDACTED]".

⁴⁸ DRC-OTP-2099-1669.

⁴⁹ DRC-OTP-2099-1679.

⁵⁰ In a conversation dated 28 June 2013, the Accused instructs his interlocutor to "*start preparing [his] memory well about everything that happened*", telling him about his case that "[a] lot of things are lies and [he] [REDACTED] will show that it wasn't true" (DRC-OTP-2099-1676). In two further conversations, on [REDACTED], the Accused coaches [REDACTED] regarding [REDACTED], telling his interlocutor that [REDACTED]. In this conversation, the Accused instructs [REDACTED]. See, DRC-OTP-2099-1669 and DRC-OTP-2099-1679. On [REDACTED], the Accused informs [REDACTED] that his lawyers intend to meet him soon and reminds him of what to say when they will ask him [REDACTED] (DRC-OTP-2099-1685).

⁵¹ DRC-OTP-2099-1683.

16. The scale and nature of the Accused's scheme to coach potential witnesses is again shown by conversations he had with three potential Defence witnesses⁵² on [REDACTED], contact made possible through [REDACTED]'s telephone. In these conversations, the Accused explains that he will tell them what to do, that they should work with [REDACTED] and they should *"come to an agreement"* and *"be ready for the interview with his lawyers"*. The Accused further tells them to *"only talk about what is useful in this case"*, to *"cooperate with each other"*, to *"speak the same language"* and to *"use the same terms"*.⁵³ In the same conversation, the Accused coaches [REDACTED] on [REDACTED], telling him that [REDACTED] and adding that [REDACTED].⁵⁴

17. In another example, on [REDACTED], [REDACTED] spoke with potential Defence witness [REDACTED]⁵⁵ using [REDACTED]'s telephone.⁵⁶ [REDACTED] explains to [REDACTED] that [REDACTED].⁵⁷ Then [REDACTED] asks [REDACTED] to *"prepare accordingly"* and explains to him that he will have to: (1) describe in detail [REDACTED];⁵⁸ (2) remember [REDACTED];⁵⁹ and (3) deny the Prosecution's version [REDACTED].⁶⁰ A conversation between the Accused and [REDACTED] on [REDACTED] suggests that [REDACTED] was indeed interviewed by the Defence following his conversation with [REDACTED].⁶¹

⁵² [REDACTED].

⁵³ See DRC-OTP-2099-067: (1) the Accused's conversation with [REDACTED]: "[REDACTED]"; (2) the Accused's conversation with [REDACTED]: "[REDACTED]"; and (3) the Accused's conversation with [REDACTED]: "[REDACTED]".

⁵⁴ See DRC-OTP-2099-0670.

⁵⁵ The Prosecution believes that [REDACTED] is the individual called [REDACTED] who was "[REDACTED]" of [REDACTED] (See DRC-OTP-0091-0709).

⁵⁶ [REDACTED].

⁵⁷ [REDACTED] tells [REDACTED] that [REDACTED] (DRC-OTP-2099-1625).

⁵⁸ [REDACTED] instructs [REDACTED] to provide evidence about [REDACTED] (DRC-OTP-2099-1625).

⁵⁹ DRC-OTP-2099-1625.

⁶⁰ DRC-OTP-2099-1625.

⁶¹ In this conversation of [REDACTED], [REDACTED] explains to the Accused that [REDACTED]. The Accused then asks whether [REDACTED] refers to [REDACTED] (DRC-OTP-2099-1520).

18. [REDACTED]⁶² [REDACTED].⁶³ [REDACTED],⁶⁴ [REDACTED]. [REDACTED].⁶⁵
[REDACTED].⁶⁶ [REDACTED].⁶⁷

19. [REDACTED]⁶⁸ [REDACTED].⁶⁹ [REDACTED].⁷⁰

20. [REDACTED]⁷¹ [REDACTED].⁷² [REDACTED].⁷³ [REDACTED].⁷⁴ [REDACTED].

21. [REDACTED],⁷⁵ [REDACTED].⁷⁶ [REDACTED].⁷⁷ [REDACTED]⁷⁸ [REDACTED].⁷⁹
[REDACTED].⁸⁰

22. Between [REDACTED], the Accused continues to coach witnesses. In one such conversation, [REDACTED] updates the Accused, explaining that: *“there are things being done to make sure people do well in that football match”*; *“[t]he coach [...] is training them on a regular daily basis”* and is *“teach[ing] them how to play football in the morning, at noon and in the afternoon”*.⁸¹ In another conversation, the Accused explains that *“[f]ootball players shouldn’t play if they haven’t been trained”*, and instructs [REDACTED] to *“speak with [REDACTED] and tell him to keep training them”*, as *“it would not be good for them to play randomly”*.⁸² In a further telling example of the Accused’s instructions, dated [REDACTED], the Accused refers to

⁶² ICC-01/04-02/06-T-91, p.9, lns.1-7. See also, ICC-01/04-02/06-1313, para.47.

⁶³ ICC-01/04-02/06-T-92, p.84, line 17 to p.85, line 3.

⁶⁴ [REDACTED].

⁶⁵ [REDACTED].

⁶⁶ [REDACTED].

⁶⁷ [REDACTED].

⁶⁸ [REDACTED].

⁶⁹ [REDACTED].

⁷⁰ [REDACTED].

⁷¹ [REDACTED].

⁷² [REDACTED].

⁷³ DRC-OTP-2099-1157.

⁷⁴ See, Confidential Annex 1.

⁷⁵ DRC-OTP-2099-0979

⁷⁶ See, Confidential Annex 1.

⁷⁷ [REDACTED].

⁷⁸ [REDACTED].

⁷⁹ [REDACTED].

⁸⁰ DRC-OTP-2099-0979.

⁸¹ See DRC-OTP-2099-1450.

⁸² See DRC-OTP-2099-1412.

[REDACTED] and instructs [REDACTED] to “[t]ell him to get closer to them before they meet with [REDACTED]” a reference to his Defence team, adding: “[h]e has to train them so that they play football very well [...] [h]e knows how to do it because he is a coach”. [REDACTED] confirms: “You’re right. He has the habit of doing it”.⁸³

23. The Accused and his associates increased their use of codes following the Prosecution’s initial request on 8 August 2014 for restrictions to the Accused’s communications.⁸⁴ Neither this request, nor the Chamber’s first warning on 8 December 2014,⁸⁵ deterred the Accused from personally coaching a potential witness on [REDACTED]. On that day, the Accused spoke to an individual [REDACTED], whom the Prosecution believes is [REDACTED],⁸⁶ a [REDACTED]. In this conversation, the Accused appears to coach [REDACTED] on [REDACTED].⁸⁷ The Accused instructs [REDACTED] to [REDACTED].⁸⁸

24. Active monitoring was imposed in March 2015. There are a number of factors that point to the substantial likelihood that the scheme is ongoing, that coached witnesses may be called or that “prepared” documents may be tendered. Detailed instructions and discussions have been ongoing over two years (March 2013 to March 2015) and the network on the ground is fully briefed and experienced.

⁸³ See DRC-OTP-2099-1413: “[REDACTED]”.

⁸⁴ ICC-01/04-02/06-349-Conf-Red2.

⁸⁵ On 8 December 2014, the Chamber instructed “the Registry to inform Mr Ntaganda that from 19 December 2014 onwards, and until otherwise ordered by the Chamber, all his non-privileged telephone conversations may be listened to, pursuant to Regulations 174(2) and 175(1) of the Regulations of the Registry (ICC-01/04-02/06-410-Conf-Exp-Corr, p.26).

⁸⁶ See in Confidential Annex 1.

⁸⁷ See e.g. DRC-OTP-2099-0914, a conversation referred to in a previous filing (ICC-01/04-02/06-1313-Conf-Exp, paras.44-45), wherein the Accused explains to [REDACTED] that he wants [REDACTED].

⁸⁸ Summary of DRC-OTP-2101-0007 (Confidential Annex 4).

(ii) Forging of documents and tampering with chain of custody

25. On [REDACTED], the Accused explains to [REDACTED] that he told his lawyers that [REDACTED]. The Accused further explains that his lawyers asked [REDACTED]. Yet, the Accused tells [REDACTED]: “[REDACTED]”.⁸⁹
26. On [REDACTED], the Accused explains to [REDACTED] that “[REDACTED]” and adds that [REDACTED]”.⁹⁰ The Prosecution believes that [REDACTED]. The Accused goes on to explain to [REDACTED] that “[REDACTED]”, which is believed to be a coded term for preparing a document. Then the Accused refers to “[REDACTED]” and instructs [REDACTED] to show him “*how to prepare it*”.⁹¹
27. The danger that false documents were created to defend the Accused is real. The Prosecution notes that [REDACTED]⁹² and that the Prosecution suspects are false, based on the information recently obtained on [REDACTED],⁹³ and [REDACTED],⁹⁴ as well as due to important inconsistencies.⁹⁵
28. Moreover, the conversations reveal curious omissions in the chain of custody of certain items. On [REDACTED], the Accused discusses a [REDACTED]. It appears from the content of the conversation⁹⁶ and the Defence submissions in Court⁹⁷ that the [REDACTED] provided by [REDACTED] is [REDACTED].⁹⁸ However, neither [REDACTED] nor [REDACTED] appear in the chain of custody of the [REDACTED]. Indeed, the source of [REDACTED] is [REDACTED], a

⁸⁹ DRC-OTP-2099-1786. The Prosecution believes that [REDACTED].

⁹⁰ “[REDACTED]” (Summary of DRC-OTP-2095-0793, Confidential Annex 5).

⁹¹ “[REDACTED]” (Summary of DRC-OTP-2095-0793, Confidential Annex 5).

⁹² [REDACTED].

⁹³ See above, para.15; See also, DRC-OTP-2099-1320, a conversation between [REDACTED] and the Accused, where the former explains that “[REDACTED]”, who “[REDACTED]”, and refers to “[REDACTED]”. The Prosecution believes that this is a reference to [REDACTED].

⁹⁴ [REDACTED].

⁹⁵ [REDACTED].

⁹⁶ Summary of DRC-OTP-2095-0766, Confidential Annex 6.

⁹⁷ ICC-01/04-02/06-T-48-Conf-Eng, p.34, lns 17-23.

⁹⁸ [REDACTED]: Summary of DRC-OTP-2095-0766, Confidential Annex 6).

[REDACTED],⁹⁹ and not [REDACTED].¹⁰⁰ A further conversation that the Accused had with [REDACTED] on [REDACTED] suggests that [REDACTED] provided [REDACTED] to [REDACTED].¹⁰¹ The metadata should be accurate and complete; the Prosecution requests that this requirement be strictly adhered to by way of a clear order from the Chamber.

(iii) *The Chamber has the authority to order the requested measures*

29. The Court's regulatory framework envisages the requested measures. In *Lubanga*, Trial Chamber I held that *"there are important provisions contained in the Rome Statute framework which define the obligations that can be imposed on the defence in order to secure a fair and expeditious trial and to assist the Chamber in its determination of the truth. These obligations...do not infringe the rights of the accused."*¹⁰²

30. Article 64(3)(a) of the Statute provides that a Chamber shall adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings. Article 64(3)(c) provides that a Chamber shall *"Subject to any other relevant provisions of this Statute, provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial."* Article 64(6)(d) provides that a Chamber may order the production of evidence presented during the trial by the parties.

31. Rule 84 of the Rules provides mandates that the Trial Chamber shall make any necessary orders for the disclosure of documents or information not previously disclosed and for the production of additional evidence, in accordance with

⁹⁹ ICC-01/04-01/06-T-346 to ICC-01/04-01/06-T-348.

¹⁰⁰ The source of [REDACTED] in e-Court is [REDACTED] and its chain of custody reads as follows: [REDACTED].

¹⁰¹ In a conversation of [REDACTED], three days after [REDACTED] was provided to the Defence by [REDACTED], [REDACTED] and [REDACTED] discuss [REDACTED]: "[REDACTED]" In this context, [REDACTED] and [REDACTED] discuss certain [REDACTED], which [REDACTED] describes as "[REDACTED]" and explains: "[REDACTED]" (DRC-OTP-2099-1498).

¹⁰² ICC-01/04-01/06-1235-Corr-Anx1, para.28.

article 64(3)(c) and 64(3)(d), to enable the parties to prepare for trial and to facilitate the fair and expeditious conduct of the proceedings.

32. Rule 79(4) governing Defence disclosure states that *“This rule does not prevent a Chamber from ordering disclosure of any other evidence.”* In *Lubanga*, Trial Chamber I held that this rule *“reveals the Chamber has the power to order advance disclosure of any evidence outwith those defences that the accused intends to rely on”*.¹⁰³ It noted that this is supported by Regulation 54 of the Regulations of the Court,¹⁰⁴ which provides that the Trial Chamber may issue any order in the interests of justice for the purposes of the proceedings, including *“(b) A summary of the evidence the participants intend to rely on;...(e) The number and identity (including any pseudonym) of the witnesses to be called;...(f) The production and disclosure of the statements of the witnesses on which the participants propose to rely;...(l) [t]he disclosure of evidence”*.

33. In *Lubanga*, Trial Chamber I held that an accused's right to a fair trial *“is not necessarily compromised by the imposition on him or her of an obligation to reveal in advance and in appropriate circumstances, details of the defences and the evidence to be presented, and the issues that are to arise.”*¹⁰⁵ The issue is the extent of this obligation and use of these powers: *“It is of paramount importance that they are deployed only on the basis of their relevance and applicability to the known facts and issues, against the background of the interests of justice and the circumstances of the case.”*¹⁰⁶

34. In *Bemba*, Trial Chamber III acknowledged the *“prosecution’s right to adequately prepare for the defence’s presentation of evidence.”* It stressed that *“the Court’s legal framework provides a wide range of mechanisms for the Chamber or its Presiding Judge to rule on the submission, admissibility or relevance of any type of evidence, give any directions for the conduct of the proceedings and testimony, and issue orders on, among*

¹⁰³ ICC-01/04-01/06-1235-Corr-Anx1, para.35.

¹⁰⁴ ICC-01/04-01/06-1235-Corr-Anx1, para.35.

¹⁰⁵ ICC-01/04-01/06-1235-Corr-Anx1, para.31.

¹⁰⁶ ICC-01/04-01/06-1235-Corr-Anx1, paras.32-33.

*other things, the length of the evidence to be relied upon, the length of questioning of witnesses, and the number and identity of witnesses to be called by the parties. This range of powers entrusted to the Chamber and its Presiding Judge are necessary tools for the Chamber's full compliance with its obligation to ensure a fair and expeditious trial conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses."*¹⁰⁷ The Chamber also noted that Rule 73^{ter} of the ICTY's Rules of Procedure and Evidence does not exist in the ICC texts; such restrictions on the Chamber's ability to issue orders on the defence do not apply.¹⁰⁸

35. While Trial Chamber I in *Lubanga* did not order the Defence to provide signed statements, it reviewed the quality and quantity of the information provided in Defence summaries, stating that *"if there are to be substantive areas of which you have not received any warning, then the downside for the Defence may be that the evidence of their witnesses is going to be constantly peppered with applications by you to adjourn so that you have adequate time to prepare...it may be in Mr Lubanga's own interests to provide you with more information in advance so that you can properly prepare for cross-examination, or questioning, without having to ask for an adjournment"*.¹⁰⁹

36. Critically, in this case unlike previous cases, there is early, clear evidence of the Accused's attempts to coach potential witnesses, reinforcing the need for more stringent Defence disclosure prior to the start of its presentation of evidence. The Prosecution requires the identity of Defence witnesses, signed statements or comprehensive summaries, information regarding meetings with the Defence and Accused's associates, and of those who facilitated contact with the Defence at sufficiently in advance to conduct meaningful investigations. This will safeguard the integrity of the trial and the Chamber's ability to establish the truth.

¹⁰⁷ ICC-01/05-01/08-2221, para.14 (footnote omitted). The Chamber cited articles 64(8)(b), 67(6)(f), (8)(b), (9)(a), 69(2), (3) and (4) of the Statute; Rules 63(2), 79(4), 134(3) and 140(1) of the Rules; and Regulation 43, 44(5) and 54 of the Regulations, see ICC-01/05-01/08-2221, fn.20.

¹⁰⁸ ICC-01/05-01/08-2221, para.14.

¹⁰⁹ ICC-01/04-01/06-T-239-Conf-Eng, p.50, lines 4-13.

Relief requested

37. Based on the foregoing, the Prosecution asks the Chamber to grant its Request.



Fatou Bensouda
Prosecutor

Dated this 15th day of February 2017
At The Hague, The Netherlands