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No.: **ICC-01/04-02/06**

Date: **22 March 2017**

**TRIAL CHAMBER VI**

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

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO**

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

**Public with confidential Annex A**

**Public Redacted Version of "Response on behalf of Mr Ntaganda to Prosecution's request for additional Defence disclosure" filed on 1 March 2017, ICC-01/04-02/06-1811-Conf**

**Source:** Defence Team of Mr Bosco Ntaganda

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

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**The Office of Public Counsel for  
Victims**

**The Office of Public Counsel for the  
Defence**

**States' Representatives**

**Amicus Curiae**

**REGISTRY**

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**Counsel Support Section**

**Victims and Witnesses Unit**

Mr Nigel Verrill

**Detention Section**

**Victims Participation and Reparations  
Section**

Further to the “Prosecution’s request for additional Defence disclosure” dated 10 February 2017 and its corrected version filed on 15 February 2017 (“Prosecution Request”),<sup>1</sup> Counsel representing Mr Ntaganda (“Defence”) hereby submit this:

**Response on behalf of Mr Ntaganda to Prosecution’s request for additional  
Defence disclosure**

**“Defence Response”**

**OVERVIEW**

1. The Defence hereby responds to the Prosecution Request, in which the Prosecution moves Trial Chamber VI (“Chamber”) to impose additional disclosure obligations on the Defence prior to the start of the presentation of the case for the Defence. The Prosecution argues that the Chamber has the authority to grant the Prosecution Request, which in its view, is warranted to protect the integrity of the trial and the Chamber’s ability to establish the truth.<sup>2</sup>
2. The Defence opposes the Prosecution Request.
3. First, the Prosecution Request is, in effect, a request to reconsider the Chamber’s decision of 30 January 2017 (“Chamber Directions”), in which the Chamber imposed on the Defence a number of disclosure obligations related to the preparation and presentation of its case.<sup>3</sup> The Prosecution fails to argue, let alone establish, that the Chamber committed a clear error of reasoning or that reconsideration of the Chamber Directions is necessary to prevent an injustice. On this basis alone, the Prosecution Request should be rejected.

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<sup>1</sup> ICC-01/04-02/061783-Conf and ICC-01/04-02/06-1783-Conf-Corr. A public redacted version was also submitted on 15 February 2017, ICC-01/04-02/06-1783-Red.

<sup>2</sup> Prosecution Request, paras.29-36.

<sup>3</sup> Decision supplementing the Decision on the Conduct of Proceedings (ICC-01/04-02/06-619) and providing directions related to preparations for the presentation of evidence by the Defence, ICC-01/04-02/06-1757 (“Chamber Directions”).

4. Second, the additional Defence disclosure obligations sought are a marked departure from the statutory and regulatory framework of the Court as consistently interpreted by this Chamber and by other Trial Chambers. As such, they can only be imposed in the presence of the most compelling reasons determined pursuant to the balance of probabilities standard.
5. Third, contrary to the Prosecution's claims, the additional disclosure obligations sought are neither necessary to safeguard the integrity of the trial or the Chamber's ability to establish the truth nor justified in the circumstances. On the contrary, imposing on the Defence the additional disclosure obligations requested would further undermine the fairness of the trial, which has already been gravely put into question by the Prosecution's access to all of Mr Ntaganda's and Mr Lubanga's non-privileged conversations from the Court's Detention Centre ("Detention Centre"). The requested measures would place an impracticable and disproportionately heavy burden on the Defence not warranted in the current circumstances.
6. Following the Chamber's guidance, this Defence Response focuses on the relief sought by the Prosecution rather than on a detailed analysis of the individual summaries provided in support of the Prosecution Request.

## **CONFIDENTIAL**

7. Pursuant to Regulation 23*bis* (1) and (2) of the Regulations of the Court ("RoC"), this Defence Response is submitted on a confidential basis as it responds to a filing bearing the same classification and contains information related to confidential filings. For the same reason, Annex A is also filed on a confidential basis.

## **INTRODUCTION**

8. Shortly before the start of trial, on 2 June 2015, the Chamber issued a "Decision on the conduct of proceedings", in which it notified the Defence

that towards the end of the presentation of evidence by the Prosecution, it would be instructed to file a notice as to whether it intends to call evidence. The Chamber further noted that, in the affirmative, it would issue a decision setting out the procedure to be followed for any applicable disclosure by the Defence, and that such decision may include “the provision of a list of witnesses the Defence intends to call, if any, and the filing of an outline of the legal and factual issues it intends to raise during the presentation of its evidence.”<sup>4</sup>

9. On 30 January 2017, the Chamber set out, *proprio motu*, directions and deadlines for disclosure by the Defence in preparation for the start of the presentation of its evidence. The Chamber first noted that “the disclosure obligations of the Prosecution and Defence differ significantly under the statutory framework.”<sup>5</sup> In relation to the content and timeframe for Defence disclosure obligations, the Chamber ordered the following:

- i. “By March 2017, the Defence must provide a further provisional list of witnesses. This should include estimates for the number of hours it intends to examine each witness, as well as a summary of the anticipated testimony of the witness. Noting that witness statements may not be available in all cases, the Defence is requested to prepare the summaries in a sufficiently detailed and comprehensive manner to enable the parties, participants and Chamber to prepare meaningfully. The Defence is to simultaneously file a confidential redacted version of the provisional list of witnesses”;<sup>6</sup> and
- ii. “By 26 April 2017, the Defence must provide the final version of its list of witnesses, together with accompanying estimates for length of

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<sup>4</sup> Decision on the Conduct of Proceedings, ICC-01/04-02/06-619, 2 June 2015, para.18, fn.15.

<sup>5</sup> Chamber Directions, para.6.

<sup>6</sup> Chamber Directions, para.10. The Chamber further ordered the Defence to disclose, by 31 March 2017, all material in its possession which falls under its disclosure obligations, *see* Chamber Directions, para.13.

examination and statements or summaries of anticipated testimony as described above, as well as its final list of evidence. The Defence shall also indicate any intention to raise an alibi or grounds for excluding criminal liability in accordance with Rule 79 of the Rules.”<sup>7</sup>

10. Strikingly, in the Prosecution Request, the Prosecution seeks the imposition of additional disclosure obligations on the Defence that go far beyond those ordered by the Chamber. 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; and (vii) official identity documents for Defence witnesses.”<sup>8</sup>

11. On 20 February 2017, by way of email to the Chamber and pursuant to Regulation 34 RoC, the Defence requested an extension of time in which to file its response to the Prosecution Request until 6 March 2017.<sup>9</sup> On 21 February 2017, the Chamber by way of email notified the Defence that an

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<sup>7</sup> Chamber Directions, para.11. The Chamber’s further ordered the Defence to disclose, by 26 April 2017, all remaining materials it intends to rely upon during the presentation of its evidence, *see* Chamber Directions, para.14.

<sup>8</sup> Prosecution Request, para.4 (fn.2, 3 omitted).

<sup>9</sup> Email from Defence to Chamber’s legal officer dated 20 February 2017, at 12:49.

extension of time in which to submit its response to the Prosecution Request was granted until 1 March 2017.<sup>10</sup>

## SUBMISSIONS

12. As a preliminary matter, the Defence submits that the Prosecution Request exceeds the page limit set out in Regulation 37 RoC. Confidential Annex 1 is 28 pages long and contains the Prosecution's submissions as to what it claims are codes used by Mr Ntaganda in the course of approximately 90 non-privileged telephone conversations from the Detention Centre.<sup>11</sup> As such, it contains argumentative material, which according to Regulation 36(2)(b) RoC, and should be counted towards the page limit in Regulation 37(1). Given that the Prosecution has not moved the Chamber for an extension of the page limit in accordance with Regulation 37(2), the Defence submits that Confidential Annex 1 should be struck from the record and not considered by the Chamber in adjudicating the Prosecution Request.

**I. The Prosecution Request is in effect a request to reconsider the Chamber Directions and the Prosecution fails to demonstrate a clear error of reasoning therein or that reconsideration is necessary to prevent an injustice**

13. This Chamber has held that "[r]econsideration is exceptional, and should only be done if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice. New facts and arguments arising since the decision was rendered may be relevant to this assessment."<sup>12</sup>

14. By seeking measures that go far beyond those imposed by the Chamber, the Prosecution seeks, in effect, a reconsideration of the Chamber Directions. However, the Prosecution Request fails to even argue the existence of a clear

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<sup>10</sup> Email from Chamber's Legal Officer dated 21 February 2017 at 15:10.

<sup>11</sup> The Defence notes that almost none of these 90 conversations overlap with the 57 conversations already identified in the Prosecution Request *per se* in support of the requested relief.

<sup>12</sup> Decision on the Defence request for reconsideration and clarification, ICC-01/04-02/06-483, 27 February 2015, para.13 (footnotes omitted).

error of reasoning on the part of the Chamber. The Defence submits, as will be detailed below, that the types of measures imposed by the Chamber are very much in harmony with the legal framework of the Court as interpreted by other Trial Chambers. There is therefore no clear error of reasoning on the part of the Chamber in the Chamber Directions.

15. It is significant in this regard that when issuing the Chamber Directions, the Chamber was cognisant of the fact that the Prosecution would seek additional disclosure obligations by the Defence as a result of its Article 70 investigation and was fully appraised of the existence and the contents of the Conversations, which were added to the Prosecution's list of evidence on 23 November 2016,<sup>13</sup> and of the contents of the summaries which were also added to the Prosecution's list of evidence on 30 January 2017.<sup>14</sup>

16. The Prosecution argues that the additional measures sought are necessary to safeguard the integrity of the proceedings and the Chamber's ability to establish the truth as well as to allow the Prosecution to investigate fully Defence evidence.<sup>15</sup> The Prosecution, however, omits to explain how the measures imposed in the Chamber Directions will lead to an injustice. The Prosecution Request does not even attempt to analyse the insufficiency of the measures imposed by the Chamber. Rather, it focuses on broad allegations related to 57 non-privileged telephone conversations of Mr Ntaganda and Mr Lubanga from the Detention Centre ("Conversations") and merely argues that the requested measures are necessary in that context, without detailing the reasons why those imposed by the Chamber are insufficient contrary to those it requests.

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<sup>13</sup> Prosecution's Updated List of Evidence, ICC-01/04-02/06-1646, public with public Annex A, 23 November 2016 (wherein the Prosecution added 589 audio-recordings of conversations by Mr Ntaganda and Mr Lubanga from the Detention Centre to its list of evidence).

<sup>14</sup> Prosecution's Updated List of Evidence, ICC-01/04-02/06-1762, public with public Annex A, 30 January 2017 (wherein the Prosecution added 506 summaries of conversations by Mr Ntaganda and Mr Lubanga from the Detention Centre to its list of evidence). The Defence notes the exception of DRC-OTP-2101-0007.

<sup>15</sup> Prosecution Request, para.8.

17. In sum, the Prosecution Request is a veiled request for reconsideration of the Chamber Directions. On this basis alone, it should be denied given that the Prosecution has failed to demonstrate the existence of a clear error of reasoning or that reconsideration is necessary to prevent an injustice.

**II. The Prosecution Request is a marked departure from the statutory and regulatory framework of the Court—as consistently interpreted in the jurisprudence—which can only be justified in the presence of the most compelling reasons**

**A. Statutory and regulatory framework**

*a. Statute*

18. The Statute of the Court (“Statute”) does not contain any provision identifying specific disclosure obligations by the Defence, unlike Article 67(2) with regard to the Prosecution. Article 64(3)(c) refers to a general power of the Chamber “to 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.”

*b. Rules of Procedure and Evidence*

19. In terms of disclosure by the Defence, the Rules of Procedure and Evidence of the Court (“Rules”) only contemplate two very specific situations: the existence of an alibi (Rule 79(1)(a)) and the submission of a ground for excluding criminal responsibility as provided for in Article 31 of the Statute (Rule 79(1)(b)). Outside of these two limited situations, the Rules do not identify specific disclosure obligations by the Defence, unlike the set of pre-trial disclosure obligations born by the Prosecution pursuant to Rule 76. The Rules do envision more generally, that the Chamber, subject to its duty to ensure the accused’s right to a fair and impartial hearing in which his rights are fully safeguarded,<sup>16</sup> is not prevented from ordering disclosure of any other evidence (Rule 79(4)) and is allowed to “make any necessary orders for the

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<sup>16</sup> See para.25 *infra*.

disclosure of documents or information not previously disclosed and for the production of additional evidence” (Rule 84).

20. Finally, although not coined as disclosure specifically, Rule 78 instructs the Defence to “permit the Prosecutor to inspect any books, documents, photographs and other tangible objects in the possession or control of the defence, which are intended for use by the defence as evidence [...] at trial”.

*c. RoC*

21. Regulation 54 further allows a Chamber, at a status conference, to “issue any order in the interests of justice for the purposes of the proceedings” on a number of issues, including: (i) the production and disclosure of the statements of the witnesses on which the participants propose to rely; (ii) the presentation of evidence in summary form; and (iii) the disclosure of evidence.
22. These provisions, in particular those which are more generally worded, must be viewed in light of the manner in which they have been previously interpreted at the Court.

**B. Trial Chambers’ consistent interpretation of the legal framework on Defence disclosure obligations**

23. Other Trial Chambers have been consistent in stressing that the framework under the Statute does not provide for a reciprocal disclosure regime and that the significantly different disclosure obligations born by the Prosecution and the Defence can be explained by the two very particular roles the parties each have at trial.<sup>17</sup> The Defence posits that the Prosecution bears the burden of establishing, beyond a reasonable doubt, the accused’s criminal responsibility

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<sup>17</sup> *Prosecutor v. Katanga and Chui*, Decision on the ‘Prosecution’s Application concerning disclosure by the defence pursuant to Rules 78 and 79(4)’, ICC-01/04-01/07-2388, 14 September 2010 (“Katanga Decision”), para.36. *See also* *Prosecutor v. Lubanga*, ICC-01/04-01/06-2192-Conf, Second Decision on disclosure by the defence and Decision on whether the prosecution may contact defence witnesses, 19 November 2009 (“Lubanga Decision”), para.54.

for the crimes charged, and has to investigate both incriminating and exonerating circumstances pursuant to Article 54(1)(a) of the Statute.<sup>18</sup>

24. The *Lubanga* Trial Chamber has stressed that the divergence in the role of the Prosecution and that of the Defence, in the length of their respective investigative involvement in the case and, in the resources available to each of them “is an important factor that the Court must bear in mind, so as to ensure that the requirements which a Chamber imposes are fair and proportionate.”<sup>19</sup>

25. When assessing whether to impose disclosure obligations on the Defence outside of the purview of the specific situations provided for in Rules 78 and 79(1), the Chamber has a “duty to ensure that any discretionary order it makes regarding defence disclosure does not derogate from the accused’s right to a fair and impartial hearing in which his rights are fully safeguarded.”<sup>20</sup>

26. In the exercise of this duty, Trial Chambers have imposed disclosure obligations on the Defence which are largely similar to those ordered by the Chamber in this case. Indeed, other Trial Chambers have not gone beyond ordering measures consistent with the rights of the accused, such as the disclosure of full witness statements *or* summaries of witnesses’ testimony prior to the start of the presentation of the evidence for the Defence.<sup>21</sup> In *Katanga*, the Trial Chamber was of the view that these summaries would allow the Prosecution to sufficiently prepare for the Defence case.<sup>22</sup> In *Lubanga*, the Trial Chamber rejected the Prosecution’s request for the

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<sup>18</sup> Katanga Decision, para.36.

<sup>19</sup> Lubanga Decision, para.54.

<sup>20</sup> Katanga Decision, para.40.

<sup>21</sup> *Prosecutor. v. Bemba*, Decision on defence disclosure and related issues, ICC-01/-5-01/08-2141, 24 February 2012 (“Bemba 2012 Decision”), paras.28-29; Katanga Decision, para.60; *Prosecutor. v. Bemba*, Decision on Defence Presentation of Evidence, ICC-01/-5-01/13-1450, 24 February 2012 (“Bemba 2015 Decision”), paras.11-12.

<sup>22</sup> Katanga Decision, para.60.

production by the Lubanga Defence of supplemental summaries or witness statements, finding “that it would be disproportionate and in any event unnecessary.”<sup>23</sup>

27. This consistent practice makes it clear that in terms of Defence disclosure obligations, Trial Chambers are particularly cognisant of their duty to safeguard the rights of the accused and are thus reluctant to deviate from the statutory and regulatory framework of the Court in the absence of the most compelling reasons.

### C. The applicable standard

28. The measures requested in the Prosecution Request constitute a striking deviation from the Court’s legal framework on Defence disclosure obligations– as consistently interpreted by this and other Trial Chambers–and the Prosecution has not demonstrated any compelling reason to do so.

29. In this regard, the Defence underscores that the applicable standard by which the Prosecution’s arguments and material submitted in support thereof must be adjudicated is that of ‘balance of probabilities’. This standard is both higher and different from the ‘reasonable grounds to believe’ used by the Chamber when imposing restrictions on Mr Ntaganda’s non-privileged communication rights.<sup>24</sup>

### III. The Prosecution Request fails to demonstrate that the additional disclosure obligations sought are necessary and justified

30. In addition to what has been ordered by the Chamber, the Prosecution requests that the Defence be ordered to produce: (i) signed statements for all witnesses; (ii) “detailed records, including a log of all prior meetings with Defence witnesses by the current and former Defence team, dates and persons

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<sup>23</sup> Lubanga Decision, para.58.

<sup>24</sup> Decision on the Prosecution request for restrictions on contact and the Defence request for access to logs, ICC-01/04-02-06-410-Conf-Exp-Red, 8 December 2014, para.49; *see also* Regulation 101(2) RoC.

present and documents/items discussed during the meeting”; (iii) a list of all persons who facilitated the witness’s contacts with the Defence team; (iv) 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; and (v) official identity documents for all Defence witnesses.

31. Save for acknowledging that the requested measures would allow the Prosecution to fully investigate Defence evidence, the Prosecution Request fails to demonstrate why these measures are necessary to safeguard the integrity of the proceedings and the Chamber’s ability to ascertain the truth, and how they will achieve this aim.

32. Significantly, the Prosecution offers submissions on the contents of only 23 of the Conversations. As for the summaries of the other 34 Conversations, they are listed in footnotes by their ERN without any substantive submission, thereby leaving the onus on the Chamber to identify what in the summaries of the Conversations is relevant to the Prosecution Request.

**A. The requested measures are not founded on any contemporaneous allegations which justify the imposition of such measures**

33. No argument in support of the Prosecution Request warrants the imposition of the requested measures.

34. All of the Conversations referred to in the Prosecution Request date from 2013 and 2014, save for two of the Conversations, which are from February and March 2015. Thus, for the greater part, the occurrence of the conduct the Prosecution claims as a justification for the imposition of the requested measures dates back to more than three years.

35. Since then, severe restrictions have been imposed on Mr Ntaganda’s non-privileged communications from the Detention Centre, both in terms of the

number of calls he can make and who he can speak to; further, active monitoring of his calls has been implemented.<sup>25</sup> As to whether the alleged conduct continued after the imposition of active monitoring in March 2015 and is ongoing, the Prosecution merely speculates that “the network on the ground is fully briefed and experienced” but fails to bring any concrete contemporaneous information in support thereof.

36. In addition to the restrictions imposed on Mr Ntaganda’s non-privileged communications from the Detention Centre, significant developments have taken place which demonstrate that the measures sought are not necessary to preserve the integrity of the trial. First, since August 2014, Mr Ntaganda is represented by a different Counsel and supporting staff.<sup>26</sup> Second, since December 2014, [REDACTED]. Third, [REDACTED]. Fourth, at the time of the Conversations—the bulk of which were conducted well before the start of the presentation of evidence by the Prosecution—no Defence witnesses had been selected. Lastly, since the last of these Conversations, the new Defence team has met with a number of individuals that it may ultimately decide to call as witnesses.

**B. The Prosecution has been in possession for 18 months of abundant information about the Defence case and has failed to demonstrate that the additional measures sought are necessary**

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<sup>25</sup> Order instructing Registry to put in place additional temporary restrictions on contact, ICC-01/04-02/06 -508-Conf-Exp; Redacted Version of Order imposing interim restrictions on detainees’ contacts with certain individuals and related measures dated 29 June 2015, ICC-01/04-02/06-683-Conf-Exp, available to the Prosecution and the Registry. Two redacted versions, available to the Ntaganda and the Lubanga Defence, respectively, were filed on 30 June 2015 (ICC-01/04- 02/06-683-Conf-Exp-Red and ICC-01/04-02/06-683-Conf-Exp-Red2.); Public redacted version of Decision on Prosecution requests to impose restrictions on Mr Ntaganda’s contacts, ICC-01/04-02/06-785-Red, 8 August 2015 ;Public redacted version of Decision on restrictions in relation to certain detainees, ICC-01/04-02/06-786-Red4, 18 August 2015; Second public version of Decision reviewing the restrictions placed on Mr Ntaganda’s contacts issued on 7 September 2016, ICC-01/04-02/06-1494-Red4, 21 November 2016.

<sup>26</sup> Only one member of the former Defence team remains with the current Defence team.

37. The Prosecution claims that additional Defence disclosure is required in order to fully investigate Defence evidence.<sup>27</sup> However, the Prosecution does not explain how or why ‘fully investigating Defence evidence’ would assist in safeguarding the integrity of the proceedings. Nor does it explain how the additional Defence disclosure sought would allow the Prosecution to fully investigate Defence evidence. Indeed, since 30 September 2015, the Prosecution is in possession of the totality of Mr Ntaganda’s and Mr Lubanga’s non-privileged conversations from the Detention Centre. These conversations have made it possible for the Prosecution to become aware of, *inter alia*, elements of the Defence strategy, names or descriptions of potential witnesses, information concerning material documents, and details of Mr Ntaganda’s own recollection of events.

38. This information already goes way beyond what is ordinarily accessible to any Prosecution team. In fact, the Defence posits that this information obtained by the Prosecution at the very beginning of the presentation of its case on an *ex parte* basis, has already severely undermined the fairness of the proceedings. In these circumstances, the Prosecution therefore cannot argue that it needs more information from the Defence.

**C. The summaries provided in support of the Prosecution Request are inherently unreliable and cannot form the basis of any decision by the Chamber**

39. In support of the Prosecution Request, the Chamber is referred to the summaries in English or in French of 57 Conversations - conducted in Swahili, Kinyarwanda, Kihema, and/or Kilendu – which were prepared by personnel in the Office of the Prosecutor.

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<sup>27</sup> Prosecution Request, para.8.

40. The Defence submits that these summaries are inherently unreliable such that the Chamber is precluded from making findings and/or drawing inferences adverse to Mr Ntaganda on the basis thereof.

41. First, amongst the 57 summaries referred to by the Prosecution, 8 relate to conversations that were initially listened to by personnel in the Registry; while the other 49 relate to conversations obtained by the Prosecution in the course of its Article 70 investigation.

42. With respect to the conversations first listened to and summarised by the Registry, the Defence has previously highlighted the flaws in the ‘summarising’ process whereby the Registry’s summaries were prepared from audio recordings – which in and of themselves reveal discrepancies attributed to technical difficulties – in one of the above languages directly in English or French, without the production of a transcript in the original language.<sup>28</sup> Significantly, the Registry itself had expressed concerns in relation to the difficulty of understanding certain colloquial language.<sup>29</sup> Consequently, the Chamber is unable to address any Defence challenge to these summaries in relation to their content, the order in which words are spoken and attributed to various speakers and/or the different meanings that can be attributed to words actually used by the various speakers.

43. When reviewing the summaries prepared within the Registry, the Chamber noted their limitations<sup>30</sup> but nonetheless proceeded to make findings pursuant to the reasonable grounds to believe standard. The Defence respectfully submits that the lack of reliability of the summaries precludes the Chamber from relying on this material for the purpose of imposing additional

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<sup>28</sup> Public redacted version of “Observations on behalf of Mr Ntaganda on the post-factum review of the phone conversations made by Mr Ntaganda, ICC-01/04-02/06-533-Conf-Exp, 24 March 2015”, ICC-01/04-02/06-533-Red2, 13 January 2016, para.16.

<sup>29</sup> Preliminary report of the Registry on the post factum review of the non-privileged conversations made by Mr Ntaganda since December 2013, ICC-01/04-02/06-417-Conf-Exp, para.11.

<sup>30</sup> Public redacted version of Decision on Prosecution requests to impose restrictions on Mr Ntaganda’s contacts, ICC-01/04-02/06-785-Red, 18 August 2015, para.45.

disclosure obligations on the Defence pursuant to the balance of probabilities standard. Due process standards require reliable transcripts and translations making it possible for the Chamber to consider challenges and rule on the contents of the Conversations.

44. Turning to the other 49 summaries the Chamber is referred to, the Defence underscores that in addition to the defects which impact the Registry summaries, the fact that they were prepared by personnel in the Office of the Prosecutor, on the basis of the Prosecution's theory, further undermines their reliability. Moreover, no information is provided on the actual procedure and/or the identity of the persons involved in the preparation of these summaries.
45. Annex A (confidential and *ex parte*, only available to the Chamber and Defence) appended to this response contains two examples, which highlight the dangers associated with relying on Prosecution summaries both in terms of their substance, as well as, more importantly, for the purpose of ascribing any 'intention' to Mr Ntaganda.
46. Regarding the first example, the Defence is particularly alarmed at the manner in which part of this summary appears to have been influenced by the Prosecution's theory as opposed to simply being an accurate and objective synopsis of the conversation heard. The Defence is also gravely concerned by the fact that material facts appearing in the Prosecution summary are not found in either in the Registry Transcription or in the Defence Transcription. Furthermore, the Defence underscores that the Prosecution summary in this example, as with many, does not refer to any of the overlapping or the inaudibility problems that seem to plague the audio-recording of this conversation.
47. As for the second example, a conversation in Swahili, the Defence is troubled by the fact that when faced with two equally correct translations of a phrase,

the transcriber chose in each occasion the translation that was more favourable to the Prosecution, without any reference to the other possible meaning.

48. Lastly, the Defence underscores that out of the 57 Conversations referred to in the Prosecution Request, the Prosecution offers submissions only in respect of 23 of those. The remaining 34 Conversations are but listed in footnotes by their ERN without any substantive submission, thereby leaving the onus on the Chamber to identify what in the summaries of the Conversations is relevant to the Prosecution Request. Due process standards preclude the Chamber from embarking on such an evaluation of these Conversations in the absence of submissions from the parties.

**D. The requested measures would place an unnecessary and impracticable burden on the Defence**

49. The additional disclosure obligations sought in the Prosecution Request would place an unnecessary and impracticable burden on the Defence.

50. First, pursuant to the calendar currently in place for the preparation of the presentation of the case for the Defence, without any prejudice to any alteration thereto, it is not possible to implement the measures requested by the Prosecution by 26 March 2017, *i.e.*: ‘two months prior to the start of the Defence case’.

51. Second, the implementation of measures requested in the Prosecution Request would place a disproportionately heavy burden on the Defence. The first deadline imposed by the Chamber for the Defence disclosure obligations is less than one month away. At a time when the Defence should be focusing, in the short amount of time it has at its disposal, on its investigations and the preparations for the presentation of its case, it would have to use its scarce resources to gather and create the material requested. This is impracticable,

in particular, for instance with regard to the far-fetched request to obtain the listing of each and every document ever discussed during any meeting with potential witnesses.

52. As much as the requested measures would place a particularly heavy burden on the Defence, the benefits gained from the imposition of such measures in terms of safeguarding the integrity of the proceedings and the Chamber's ability to ascertain the truth are imperceptible. As such, the heavy burden associated with the imposition of the requested measures is entirely disproportionate, whereby the strain put on the Defence far outweighs any benefit that may or may not result therefrom.

#### **IV. Conclusion**

53. The Chamber should assess the Prosecution Request as a request to reconsider the Chamber Directions and, as such, it should be denied since the Prosecution failed to show a clear error of reasoning on the part of the Chamber or that reconsideration was necessary to prevent an injustice.
54. Further, the additional measures requested are a marked departure from the legal framework of the Court as consistently interpreted by this Chamber and by other Trial Chambers.
55. Finally, contrary to the claims advanced in the Prosecution Request, these additional obligations are not justified to safeguard the integrity of the trial in light of some purported circumstances specific to this case. On the contrary, they would place a disproportionately heavy and unjust burden on the Defence not warranted by the current circumstances.
56. The Prosecution Request must therefore be denied.

**RELIEF SOUGHT**

In light of the above submissions, the Defence respectfully requests the Chamber to:

**STRIKE** Confidential Annex 1 as being in excess of the page limit in Regulation 37 RoC; and

**DENY** the Prosecution Request.

**RESPECTFULLY SUBMITTED ON THIS 22<sup>ND</sup> DAY OF MARCH 2017**

A handwritten signature in dark ink, appearing to read 'S+B' with a flourish at the end.

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands