



Original: **English**

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

Date: **4 April 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**

**Public redacted version of “Prosecution’s response to the ‘Request on behalf of Mr Ntaganda seeking an extension of time for the preparation of the case for the Defence’, 6 March 2017, ICC-01/04-02/06-1815-Conf”, 13 March 2017, ICC-01/04-02/06-1822-Conf**

**Source:** The Office of the Prosecutor

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## Introduction

1. The Prosecution opposes the Defence request to vary the disclosure deadlines in advance of the Defence case and to commence its case in September 2017.<sup>1</sup>
  
2. The Defence claims that, without a delay, the Accused's right to have adequate time and facilities for the preparation of his defence will have been violated: *first*, because he needs more time to review how much of his alleged involvement in a scheme to coach witnesses and interfere with evidence has been uncovered by the Prosecution; *second*, because the preparation for cross-examination of three victims on limited issues will seriously impact the time needed for the preparation of his defence; and, *third*, because he was never ready to start the trial in the first place and litigation on the extent to which he may have interfered with evidence took up more time than he expected.
  
3. None of these reasons justify a delay to the start of the Defence case. On the first point, it appears that the Defence opted not to consider - throughout its investigations and preparations - the serious allegations of interference of which it was notified nearly three years ago when the Prosecution first applied to restrict the Accused's communications from the Detention Centre. Nor, it appears, did the Defence make adjustments to its case strategy when [REDACTED], or, when nearly two years ago, in August 2015, the Chamber found reasonable grounds to believe *"that Mr Ntaganda 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 Mr Ntaganda and the necessity of synchronizing the stories"*.<sup>2</sup> Not a single justification is provided for the Defence's failure to have considered the impact of these allegations when the issues first arose. Moreover, the Defence Request ignores the Accused's central role in potentially coaching witnesses, and

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<sup>1</sup> ICC-01/04-02/06-1815-Conf, ("Defence Request").

<sup>2</sup> ICC-01/04-02/06-785-Conf-Exp.

minimises the critical assistance he can provide about *his own telephone calls* and alleged involvement in a scheme to tamper with evidence. The Defence decision not to deal with the potential consequences of the Accused's conduct at the relevant time is an insufficient basis to delay trial proceedings now.

4. On the second point, the Chamber notified the Parties and participants as early as July 2016 that the Prosecution's presentation of evidence was expected to end in early 2017, and that the Defence should prepare its case accordingly. Thereafter, the Chamber authorised the testimony of three victims, adopting the Defence's own estimate for disclosure and necessary preparation time. The victims' evidence will be focused and limited. The Defence investigation and cross-examination should follow suit; with experienced Counsel and proper planning, the evidence of three victims on confined points should not derail the Defence's case preparation which has, undoubtedly, been developing since 2013.
5. Lastly, the Accused previously sought adjournments to the trial on the basis that he was not ready to start trial, not ready to cross-examine certain witnesses and that it was unfair and time-consuming for him to respond to allegations that he interfered with evidence. He also argued that the Prosecution's disclosure of his Detention Centre records and alleged interference was unfair and warranted a suspension of proceedings. The Chamber assessed these arguments and found on each occasion that neither the Accused's rights nor the fairness of the proceedings were violated if the trial advanced as scheduled, and that his own alleged involvement in an interference scheme should speed up his review. Repeating the same, unsuccessful arguments does not justify a delay to start the Defence case.

## Confidentiality

6. 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

7. 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”),<sup>3</sup> 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.<sup>4</sup> The Defence was notified of a confidential redacted version of the request.
8. On 8 December 2014, citing “*serious concerns*” about reported approaches to Prosecution witnesses,<sup>5</sup> the Chamber imposed restrictions on the Accused’s contacts<sup>6</sup> and ordered the Registry to conduct a post factum review of some of the Accused’s telephone communications and report its findings to the Chamber.
9. On 10 March 2015, the Registry filed its first report on the post factum review of the Accused’s phone conversations (“First Report”).<sup>7</sup>
10. 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

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<sup>3</sup> 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.

<sup>4</sup> ICC-01/04-02/06-349-Conf-Red2; ICC-01/04-02/06-431-Conf-Exp, para. 17.

<sup>5</sup> ICC-01/04-02/06-410-Conf-Exp-Corr, para. 49.

<sup>6</sup> 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.

<sup>7</sup> 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.

right to communication afforded to him at the Detention Centre, and imposed further restrictions to the Accused's contacts, including the active monitoring of all of his non-privileged telephone communications until further notice.<sup>8</sup>

11. On 22 May 2015, the Registry submitted its second report on the post factum review of the Accused's phone conversations ("Second Report").<sup>9</sup>

12. On 2 June 2015, the Chamber issued a decision on the conduct of proceedings, wherein it directed the Defence to file a notice as to whether it intends to call evidence and indicated that it would "subsequently [...] issue a decision setting out the procedure to be followed for any applicable disclosure by the Defence".<sup>10</sup>

13. [REDACTED].<sup>11</sup> [REDACTED].<sup>12</sup>

14. [REDACTED].<sup>13</sup>

15. 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 further relief, such a request should be the subject of separate proceedings before a different Chamber.<sup>14</sup>

16. On 10 July 2015, the Chamber issued its "Decision on reclassification of the second Registry's report on *post-factum* review", wherein the Chamber, referring to a specific non-privileged conversation of the Accused, "*note[d] with concern that*

<sup>8</sup> ICC-01/04-02/06-508-Conf-Exp.

<sup>9</sup> 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.

<sup>10</sup> ICC-01/04-02/06-619.

<sup>11</sup> [REDACTED].

<sup>12</sup> [REDACTED].

<sup>13</sup> [REDACTED].

<sup>14</sup> ICC-01/04-02/06-T-22-CONF-ENG, p. 2, ln.23 to p. 3, ln.6.

*in places Mr Ntaganda appears to be coaching his counterpart on certain factual matters pertaining to the case.”<sup>15</sup>*

17. [REDACTED].<sup>16</sup> [REDACTED].<sup>17</sup>

18. 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.<sup>18</sup>

19. On 14 August 2015, the Prosecution requested the Chamber to order the transfer of certain parts of the case record relevant to witness interference and coaching to Pre-Trial Chamber II.<sup>19</sup> On 19 August 2015, the Chamber granted the Prosecution’s request.<sup>20</sup>

20. On 18 August 2015, the Chamber held that “[m]indful of the limitations of the Registry Reports, [...] the Chamber nonetheless finds there to be reasonable grounds to believe that Mr Ntaganda 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 Mr Ntaganda and the necessity of synchronizing the stories”.<sup>21</sup>

21. On 18 September 2015, the Single Judge of Pre-Trial Chamber II granted the Prosecution’s request to obtain recorded materials from the Detention Centre.<sup>22</sup>

22. From 30 September 2015, the Prosecution obtained access to the Detention Centre non-privileged contact and visitors logs, and the recordings of non-privileged

<sup>15</sup> ICC-01/04-02/06-710-Conf-Exp-Red, para. 13.

<sup>16</sup> [REDACTED].

<sup>17</sup> [REDACTED].

<sup>18</sup> ICC-01/04-638-Conf-Exp.

<sup>19</sup> ICC-01/04-02/06-781-Conf.

<sup>20</sup> ICC-01/04-02/06-788.

<sup>21</sup> ICC-01/04-02/06-785-Conf-Exp.

<sup>22</sup> ICC-01/04-729-Conf-Exp.

telephone conversations from 22 March 2013 for both the Accused and Lubanga. The Prosecution completed the first summary of these conversations on 2 February 2016. To date, the Prosecution completed summaries of over 600 telephone conversations.

23. 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, ten supporting summaries of his communications ("*Ex Parte annexes*"). 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*".<sup>23</sup> 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*."<sup>24</sup>
24. On 15 July 2016, the Chamber indicated that it "*envisage[d] the Prosecution completing its case within the first couple of months of 2017*" and "*emphasise[d] that the Defence should also be making ongoing preparations for any Defence case it may wish to present, including identifying potential witnesses*".<sup>25</sup>
25. 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*".<sup>26</sup>

<sup>23</sup> ICC-01/04-02/06-1364-Conf-Exp, para. 22.

<sup>24</sup> ICC-01/04-02/06-1364-Conf-Exp, para. 22.

<sup>25</sup> ICC-01/04-02/06-T-122-CONF-ENG, pp. 65-66.

<sup>26</sup> ICC-01/04-02/06-1494-Conf-Exp-Red, para. 24.

26. On 19 October 2016, the Chamber recalled its 15 July 2016 directions and instructed the Defence to file a notice as to whether it intended to call evidence by 16 December 2016.<sup>27</sup> The Chamber further instructed the Defence to provide, by the same deadline and on an *ex parte* basis, a preliminary list of witnesses it intends to call, indicating the time estimates for the examination of the witnesses.<sup>28</sup>

27. 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 and Lubanga's Detention Centre call records and recordings ("Request").<sup>29</sup> On 4 November 2016, the Single Judge granted the Prosecution's Request.<sup>30</sup>

28. On 7 November 2016, the Prosecution disclosed the Accused's and Lubanga's Detention Centre call logs and recordings. On the same day, the Prosecution filed a notice of the disclosure of evidence obtained under Article 70, in which it announced its intention to request additional Defence disclosure, and "*to use the evidence obtained under article 70 during and after the Defence case, in particular for the establishment of the truth, the fair evaluation of the evidence, witness impeachment purposes, rebuttal and for sentencing, if applicable*".<sup>31</sup>

29. Between 15 and 24 November 2016, the Prosecution provided the Defence with advance copies of 414 summaries of the Accused's and Lubanga's Detention Centre communications.<sup>32</sup>

30. On 14 November 2016, the Defence requested an immediate suspension of proceedings,<sup>33</sup> which the Chamber rejected on 16 November 2016.<sup>34</sup>

<sup>27</sup> ICC-01/04-02/06-1588-Corr, para. 10.

<sup>28</sup> ICC-01/04-02/06-1588-Corr, para. 11.

<sup>29</sup> ICC-01/04-737-Conf-Exp.

<sup>30</sup> ICC-01/04-738-Conf-Exp.

<sup>31</sup> ICC-01/04-02/06-1616.

<sup>32</sup> These summaries were formally disclosed on 25 January 2017.

31. On 17 November 2016, the Prosecution filed an addendum to its notice on the disclosure of evidence obtained under Article 70, clarifying the nature and volume of the materials disclosed to the Defence, including over 4500 audio files of the Accused's telephone conversations.<sup>35</sup>
32. On 23 November 2016, the Prosecution added 590 audio recordings of the Accused's and Lubanga's Detention Centre communications to its List of Evidence.<sup>36</sup>
33. On 14 December 2016, the Defence sought reconsideration of the Chamber's order to provide it with a provisional list of witnesses by 16 December 2016, arguing that *"the disclosure of Prosecution Article 70 investigations related material as well as the allegations raised by the Prosecution (including inter alia the coaching of potential Defence witnesses) [...] impact the preparation of the case for the Defence, in particular the selection of Defence witnesses"*, and that it could not produce such a list *"without knowledge, whether any potential Defence witness was the object of any coaching, by whom, in what circumstances as well as the nature of such coaching"*.<sup>37</sup> On 16 December 2016, the Chamber rejected the Defence's request for reconsideration, indicating that the Defence failed to acknowledge that it would not be bound by the preliminary list of witnesses, that no deadline had yet been set for the filing of the Defence's final list, and, accordingly, the Defence was still able to make modifications to the witness list in the interim.<sup>38</sup>

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<sup>33</sup> ICC-01/04-02/06-1629-Conf.

<sup>34</sup> ICC-01/04-02/06-T-159-CONF-ENG, p. 2, ln.13 to p. 7, ln.24.

<sup>35</sup> ICC-01/04-02/06-1637.

<sup>36</sup> ICC-01/04-02/06-1646-AnxA, pp. 259-274.

<sup>37</sup> ICC-01/04-02/06-1683, paras. 13 and 15.

<sup>38</sup> ICC-01/04-02/06-1688, paras. 5-6.

34. On 16 December 2016, the Defence notified the Chamber of its intention to present evidence on “*at least some of the charges*”<sup>39</sup> and provided a provisional list of witnesses to the Chamber.<sup>40</sup>
35. On 23 January 2017, the Legal Representative of Victims of the Attacks (“LRV”) requested leave to present evidence and victims’ views and concerns.<sup>41</sup>
36. On 24 January 2017, the Prosecution provided the Defence with advance copies of 90 additional summaries of the Accused’s and Lubanga’s Detention Centre communications.<sup>42</sup>
37. On 30 January 2017, the Prosecution added 505 summaries of the Accused’s and Lubanga’s Detention Centre communications to its List of Evidence.<sup>43</sup>
38. On 30 January 2017, the Chamber set the schedule leading up to the commencement of the presentation of evidence by the Defence, directing the Defence to (1) disclose, on a rolling basis, “*all material in its possession which falls under its disclosure obligations*” and complete such disclosure by 31 March 2017; (2) provide a further provisional list of witnesses, with time estimates, summaries of expected testimony and statements, where possible, by 31 March 2017; (3) to provide a final list of witnesses and disclose “*all remaining materials it intends to rely upon during the presentation of its evidence*” by 26 April 2017; and (4) to commence the presentation of its evidence within one month following the final Defence disclosure deadline.<sup>44</sup>

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<sup>39</sup> ICC-01/04-02/06-1689.

<sup>40</sup> ICC-01/04-02/06-1690-Conf-Exp.

<sup>41</sup> ICC-01/04-02/06-1739-Conf-Red.

<sup>42</sup> These summaries were formally disclosed on 30 January 2017.

<sup>43</sup> ICC-01/04-02/06-1762-AnxA, pp. 277-289.

<sup>44</sup> ICC-01/04-02/06-1757, paras. 6-14.

39. On 3 February 2017, the Prosecution sought a variation of the deadline to submit into evidence transcriptions and translations of ten of the Accused's Detention Centre communications.<sup>45</sup>
40. On 3 February 2017, the Defence responded to the LRV's request to present evidence and victims' views and concerns, arguing that the Chamber should deny the request and, in the alternative, order a one-month adjournment between the end of the Prosecution case and the presentation of the LRV's evidence, in order to allow it to investigate this evidence. The Defence also requested that the adjournment "*should not be calculated in the time period allotted to the Defence [...] to prepare the presentation of the case of the Defence*".<sup>46</sup> The Prosecution filed its response to the LRV's request on the same day.<sup>47</sup> On 10 February 2017, the Chamber authorised three victims to present evidence and six victims to present their views and concerns.<sup>48</sup>
41. On 10 February 2017, the Prosecution sought additional Defence disclosure, on the basis of evidence that the Accused was involved in a broad scheme to coach potential Defence witnesses.<sup>49</sup>
42. On 23 February 2017, the Chamber rejected the Prosecution's request for an extension of time to seek admission of the transcriptions and translations of five of the Accused's Detention Centre communications.<sup>50</sup>
43. On 27 February 2017, the Prosecution provided the Defence with advance copies of 48 transcriptions and translations of the Accused's Detention Centre communications.

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<sup>45</sup> ICC-01/04-02/06-1769-Conf.

<sup>46</sup> ICC-01/04-02/06-1773-Conf.

<sup>47</sup> ICC-01/04-02/06-1772-Conf.

<sup>48</sup> ICC-01/04-02/06-1780-Conf.

<sup>49</sup> ICC-01/04-02/06-1783-Conf-Corr.

<sup>50</sup> ICC-01/04-02/06-1799.

44. On 1 March 2017, the Defence responded to the Prosecution's request for additional Defence disclosure.<sup>51</sup>

45. On 6 March 2017, the Defence requested that the Chamber grant an extension of three months for the preparation of the Defence case, by delaying: (i) the submission of the further provisional list of witnesses until 30 June 2017, (ii) the submission of the final list of witnesses and final disclosure until 31 July 2017 and, (ii) the presentation of evidence until 4 September 2017.<sup>52</sup>

46. On 10 March 2017, the Chamber rejected the Prosecution's request for additional Defence disclosure.<sup>53</sup>

### **Prosecution's Submissions**

#### *There is no justification to vary disclosure deadlines or grant a three-month delay*

47. Neither the disclosure of the Accused and Thomas Lubanga's telephone calls, nor the presentation of evidence by three victims or the timing and pace of the trial proceedings justifies the Defence Request.

48. First, the Defence primarily grounds its request on the November 2016 disclosure of the Accused's recorded conversations from the Detention Centre, and argues the point as though the Accused has to conduct a *de novo* review of calls that he neither participated in nor had prior knowledge of. In fact, these are the Accused's *own telephone calls* and those, to a more limited extent, of his associate / co-detainee assisting him in an interference scheme. The Accused, by his personal participation in the conversations, is fully aware of their content. The Defence Request entirely fails to acknowledge this important reality, or that the Defence team has been on notice of these allegations for nearly three years.

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<sup>51</sup> ICC-01/04-02/06-1811-Conf.

<sup>52</sup> ICC-01/04-02/06-1815-Conf.

<sup>53</sup> ICC-01/04-02/06-1818.

49. Indeed, the numerous, serious indications of potential wrongdoing should have resulted in enhanced measures by the Defence to ensure the accuracy and veracity of the evidence it collected, the Defence lines it proffered and the witnesses it may call. Yet, the Defence Request fails to address the significant amount of time it has been on notice of these allegations, or provide any indication of the measures it implemented in the face of such clear information. Nor does the Defence explain why it only started to review the disclosed Detention Centre calls in January 2017, two months after the calls were disclosed<sup>54</sup> or why the Accused was not reviewing the calls earlier with the existing Defence team.

50. It is of paramount importance for the Defence to obtain information directly from the main interlocutor in the conversations: the Accused himself. The Accused can guide the Defence team through these conversations with ease and efficiency. While the Prosecution and the Registry have, indeed, noted the time-consuming nature of the analysis of the Accused's conversations due to various factors including the use of codes, the mixing of different languages and the intelligibility and structure of speech,<sup>55</sup> the Defence will not face *any* of the same constraints with the Accused at its disposal. There can be no comparison between the time needed for the Prosecution and the Registry to complete its analysis of the Accused's calls *versus* the time it would take the Accused to do so.

51. As previously submitted,<sup>56</sup> if the Chamber were to consider that the Accused's own alleged involvement in a scheme of interference warranted a three-month delay to review the extent to which his scheme has been uncovered, then any Accused person could seek to tamper with evidence and, once discovered, could

<sup>54</sup> ICC-01/04-02/06-1815-Conf, para. 38.

<sup>55</sup> ICC-01/04-02/06-1815-Conf, paras. 47-51.

<sup>56</sup> ICC-01/04-02/06-1636-Conf, para. 33.

claim that his right to prepare his defence has been violated absent a lengthy delay before the Defence case.

52. The Defence also misconstrues the extent of the Chamber's acknowledgment that the Defence must have the opportunity to conduct a "full" review of the disclosed Detention Centre records,<sup>57</sup> when the Chamber found this review to be necessary only "to the extent relevant".<sup>58</sup> Contrary to the Defence's assertions, it is not necessary to review "each and every audio-recording"<sup>59</sup> before deciding which witnesses to call and which evidence to present. In any case, the Accused himself can advise the Defence team *immediately* whether it would be advisable to call a particular witness or not, based on his conversations that are available to the Prosecution or any other fact. If the Accused intends to argue that none of the interference allegations are true, as he appears to do by arguing that the summaries are inherently unreliable and deficient,<sup>60</sup> then he need not fear calling his current list of witnesses as it would follow from the Accused's position that they will not be undermined by any of the conversations.

53. As a further aid, the Prosecution specified which witnesses it considers were coached directly by the Accused based on its current review of the conversations.<sup>61</sup> This information should be of assistance to the Accused and his team when determining which witnesses they decide to call, thus reducing the need to review "each and every audio recording". Nor is it a "prerequisite"<sup>62</sup> to review all conversations before the Defence can submit a witness list or start its case; the Chamber rejected the Prosecution's request to admit into evidence ten of the Accused's conversations that allegedly show his attempts to coach witnesses.

<sup>57</sup> ICC-01/04-02/06-1815-Conf, para. 11.

<sup>58</sup> ICC-01/04-02/06-T-159-CONF-ENG, p. 5, lns. 8-11 ("it is undisputed that the Defence must have the opportunity to review the material to the extent relevant").

<sup>59</sup> ICC-01/04-02/06-1815-Conf, paras. 11, 13, 36.

<sup>60</sup> ICC-01/04-02/06-1815-Conf, paras. 38-40.

<sup>61</sup> ICC-01/04-02/06-1783-Conf-Corr.

<sup>62</sup> ICC-01/04-02/06-1815-Conf, para. 12.

The Accused does not, at this time, need to defend against Article 70 charges; accordingly, his review of the allegations and material in support should be proportionate to the issues he must address at trial.<sup>63</sup>

54. The Defence's further suggestion that the Prosecution's summaries are "inherently unreliable" because "they were prepared by personnel in the Office of the Prosecutor, on the basis of the Prosecution's theory" should be rejected. The Prosecution's certified interpreters are fully cognisant of their duties to perform their work ethically and to prepare summaries, transcriptions and translations in an independent manner. The Prosecution's theory of the Accused's involvement in witness interference and coaching developed as a result of the information contained in the Accused's telephone conversations; it was not concocted out of any desire to frame the Accused. Moreover, the review of the Accused's telephone conversations prepared by the Prosecution's certified staff is consistent with the independent analysis conducted by the Registry and the conclusions of the Chamber. The Defence has not indicated what certification or qualification - if any - its new resources have in interpretation and translation, but any challenge to the interpretation and translation of certified staff members should only be considered if the challenge emanates from a review conducted by equally certified personnel.

55. The Defence also seeks to justify its request for more time, and an alleged need to review each and every conversation, by reference to a general and sweeping assertion that the Prosecution's summaries contain "troubling deficiencies". It is noteworthy that the Defence points solely to two of over 500 summaries that it claims contain such alleged "troubling deficiencies".<sup>64</sup> The Appeals Chamber recently ruled that the Trial Chamber did not err in relying on draft translations

<sup>63</sup> Contrary to the Defence point in para. 33 of the Defence Request, the Chamber has ruled that the Prosecution may rely on summaries of the Accused's conversations in support of requests for relief to safeguard the integrity of the proceedings or in submissions on continued detention *See*, ICC-01/04-02/06-670, para. 4.

<sup>64</sup> ICC-01/04-02/06-1815-Conf, para.39, referring to its filing ICC-01/04-02/06-1811-Conf.

in the context of the litigation to restrict the Accused's contacts from the Detention Centre.<sup>65</sup>

56. Similarly, in May 2016, the Defence referred to the Registry's summaries of the Accused's conversations and made a sweeping accusation that the Defence's review "appear[ed] to reveal significant discrepancies that might warrant reconsideration of the Chamber's findings".<sup>66</sup> Nearly a year later, the Defence has yet to provide the Chamber with a single example of such "significant discrepancies".

*The testimony of three victims does not justify a delay*

57. As a second basis to justify its request for more time, the Defence argues that the Accused's right to prepare his case will be violated without a delay<sup>67</sup> because of the upcoming testimony of three victims. It is inconceivable that the testimony of three victims, testifying to confined events, will cripple the Defence case preparations to such an extent that it cannot submit its list of witnesses and the materials upon which it will rely by the ordered disclosure date. The Defence has, presumably, been preparing for the Defence case since Counsel was first appointed in 2013, and new Counsel in 2014. The Defence has also known since 15 July 2016 that the Chamber envisaged the Prosecution completing its case "*within the first couple of months of 2017*" and emphasised that the Defence team should make ongoing preparations for any Defence case it may wish to present, including the identification of witnesses.<sup>68</sup> Moreover, the Defence has had substantial notice of the victim testimony: on 10 February 2017, the Chamber authorised the three victims to testify between 10 and 13 April 2017. The LRV provided the anticipated order of appearance on 3 March 2017 and has been

<sup>65</sup> ICC-01/04-02/06-1817-Conf OA4, para. 93.

<sup>66</sup> ICC-01/04-02/06-1312-Conf-Exp, paras. 7-11.

<sup>67</sup> ICC-01/04-02/06-1815-Conf, paras. 3 and 75.

<sup>68</sup> Transcript of Hearing on 15 July 2016, ICC-01/04-02/06-T-122-CONF-ENG, pp. 65-66.

ordered to disclose relevant material no later than one month in advance of the scheduled appearances, following the Defence proposal.<sup>69</sup>

*Repeating unsuccessful arguments does not justify a delay*

58. The Defence urges the Chamber to find that its previous, unsuccessful submissions on alleged violations of the Accused's right to have adequate time and facilities for the preparation of the Defence case, including the time it has taken to litigate issues as a result of the Accused's own alleged involvement in interference schemes, should be considered "extraordinary circumstances" that justify a delay to the start of the Defence case.<sup>70</sup> The Chamber assessed, but rejected, these claims when they were submitted and determined that the trial could proceed, in full compliance with fairness and the rights of the Accused. The Defence has had ample notice of the Prosecution's case and of the scheduling of Prosecution witnesses, and it has had the luxury of meaningful breaks – up to six weeks in some cases - between evidentiary blocks, as opposed to the standard trial that runs continuously with minimal gaps.

59. Repeating rejected arguments cannot justify a delay to the start of the Defence case. Nor should the time needed to respond to legitimate requests for the Accused to cease interfering with evidence validate a postponement of the start of the Defence case. The Accused's alleged interference created the need to mount the litigation. The Prosecution, the Registry and the Chamber each had to shift resources and take on extra work to deal with these serious allegations to ensure the integrity of these proceedings. The Accused should not benefit from a delay of proceedings as the result of his own alleged misconduct.

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<sup>69</sup> ICC-01/04-02/06-1773.

<sup>70</sup> ICC-01/04-02/06-1815-Conf, paras. 70-72.

### Relief Requested

60. The Prosecution requests the Chamber to reject the Defence Request for a variation of the disclosure deadlines and for a delay until September 2017 to start the Defence case.



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**Fatou Bensouda**  
**Prosecutor**

Dated this 4<sup>th</sup> day of April 2017  
At The Hague, The Netherlands