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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

**Request on behalf of Mr Ntaganda for an order precluding the use during the
Defence case of Mr Ntaganda's non-privileged telephone conversations from the
Detention Centre**

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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**Victims Participation and Reparations
Section**

Counsel representing Mr Ntaganda (“Defence”) before Trial Chamber VI (“Chamber”) of the International Criminal Court (“Court”) hereby submit this:

Request on behalf of Mr Ntaganda for an order precluding the use during the Defence case of Mr Ntaganda’s non-privileged telephone conversations from the Detention Centre

“Defence Request”

INTRODUCTION

1. The Office of the Prosecutor (“Prosecution”) is in possession of at least 4,684 non-privileged telephone conversations of Mr Ntaganda (“Conversations”) from the Court’s Detention Centre (“Detention Centre”). These Conversations were disclosed to the Defence in November 2016 as being material to the preparation of the Defence case under Rule 77 of the Court’s Rules of Procedure and Evidence (“RPE”), with an indication that the Prosecution intended to rely on them. The Prosecution also purported to reserve its right to use the evidence obtained under Article 70 of the Court’s Statute (“Statute”) during and after the Defence case.

2. The Chamber has held, however, that it is a matter of speculation whether the Prosecution will be permitted to use these conversations during the cross-examination of Defence witnesses.

3. Without prejudice to its Defence request for stay of proceedings with prejudice to the Prosecutor, the Defence hereby requests that the Chamber preclude *in limine* the use of the Conversations during its cross-examination of any Defence witnesses in this case.

4. Allowing the Prosecution to use the Conversations during the course of the Defence case would seriously infringe on Mr Ntaganda’s fundamental rights and improperly shift the course of the trial from a fact-finding exercise on the Accused’s responsibility for the charges brought against him for allegations under Article 5 of

the Statute to an inappropriate evaluation of the propriety of his conduct in the Detention Centre.

5. The Chamber should accordingly preclude the Prosecution from using the Conversations for any purpose, including (i) to support broad allegations of coaching of Defence witnesses, even when the witness on the stand is not a participant in a said Conversation; and (ii) to challenge the credibility of witnesses on the stand who are participants in a said Conversation.

PROCEDURAL HISTORY

6. On 8 August 2014, the Prosecution requested that restrictive measures be imposed on Mr Ntaganda's non privileged communications from the Detention Centre pursuant to Regulation 101(2) of the Regulations of the Court ("RoC").¹

7. On 8 December 2014, the Chamber issued a decision in which it ordered, *inter alia*, the *post-factum* review of Mr Ntaganda's telephone conversations from December 2013, imposed certain restrictions on his non-privileged contacts, and ordered that his non-privileged telephone conversations may be monitored from December 2014 onwards pursuant to Regulations 174(2) and 175(2) RoC.²

8. On 13 March 2015, the Chamber ordered the active monitoring of all of Mr Ntaganda's non-privileged telephone calls.³

9. On 13 August 2015, the Prosecutor filed a "Request for judicial assistance to obtain evidence for investigation under article 70" ("Article 70 Request").⁴ The Prosecutor indicated that it was investigating suspected offences against the administration of justice under Article 70 of the Statute in the case against Mr Ntaganda. In order to obtain material necessary to this investigation, the Prosecutor requested Pre-Trial Chamber II to issue an order pursuant to Article 57(3) of the

¹ ICC-01/04-02/06-349-Red3.

² ICC-01/04-02/06-410-Conf-Exp-Red-Corr.

³ ICC-01/04-02/06-508-Conf-Exp (referred to in ICC-01/04-02/06-410-Conf-Exp-Red-Corr, para.17).

⁴ ICC-01/04-638-Conf-Red (referred to in ICC-01/04-02/06-1616).

Statute to the Registry to provide her with all of the Detention Centre non-privileged telephone recordings, call logs, and visitor logs of Mr Ntaganda and Mr Lubanga from 22 March 2013 until the time of the Article 70 Request and on an ongoing basis.⁵

10. On 18 August 2015, the Chamber issued its "Decision on Prosecution requests to impose restrictions on Mr Ntaganda's contacts" ("First Decision on Restrictions"), wherein it deemed it necessary to continue the active monitoring of Mr Ntaganda's non-privileged telephone conversations with a limited number of persons for a maximum of one hour per week solely on private or family matters.⁶

11. On 18 September 2015, the Single Judge designated for this matter, granted the Article 70 Request "with a view to allowing [the Prosecutor] to duly pursue her investigations on the alleged violations of article 70 of the Statute pursuant to her statutory duties".⁷ On that basis, from 30 September 2015 onwards, the Registry provided the Prosecution with access to the requested audio files of all of Mr Ntaganda's non-privileged telephone conversations from the Detention Centre.⁸

12. On 7 September 2016, the Chamber issued a "Decision reviewing the restrictions placed on Mr Ntaganda's contacts" ("7 September 2016 Decision on Restrictions"), in which it decided that the restrictions imposed remained necessary.⁹

13. On 2 November 2016, the Prosecution requested the Single Judge to order the Registry to provide Mr Ntaganda with immediate access to his and Mr Lubanga's non-privileged Detention Centre call records and recordings.¹⁰ In support, the

⁵ ICC-01/04-638-Conf-Red, para.1.

⁶ ICC-01/04-02/06-785-Red, paras.60-63.

⁷ ICC-01/04-729-Conf, para.7(referred to in ICC-01/04-02/06-1616).

⁸ ICC-01/04-02/06-1616, para.9.

⁹ A confidential, *ex parte*, redacted version, available to the Defence and the Registry was filed that day, *see* ICC-01/04-02/06-1494-Red4. A public version was filed on 21 September 2016, *see* ICC-01/04-02/06-1494-Red4, paras. 31-33.

¹⁰ ICC-01/04-02/06-1616, para.12, referring to ICC-01/04-737-Conf-Exp (having been now reclassified as public by the Chamber).

Prosecution indicated that the Conversations were material to the preparation of the Defence case and intended to rely on some of them.¹¹

14. On 4 November 2016, the Single Judge granted the request.¹²

15. On 7 November, the Prosecution disclosed the material to the Defence.¹³ It stated that it “further reserves its right 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”.¹⁴

16. On 14 November 2016, the Defence submitted an urgent request seeking immediate adjournment of the proceedings in order to assess the extremely large volume of Rule 77 material disclosed by the Prosecution and evaluate the associated prejudice.¹⁵

17. On 16 November, the Chamber rendered an oral decision rejecting the Defence request (“16 November Decision”).¹⁶ The Chamber recognised the ‘resource demands likely to be placed on the Defence team in reviewing the disclosure’ and invited the Defence to first address any request for additional resources to the Registry.¹⁷ The Chamber had further noted that while the disclosure of the Conversations did not provide a ground for immediate adjournment, “such considerations could also, for example, be factored into the time granted for preparation of the Defence case.”¹⁸

18. On the same day, the Defence applied orally for suspensive effect of the 16 November Decision for the purpose of seeking leave to appeal the same, until

¹¹ ICC-01/04-737, paras.3, 12.

¹² ICC-01/04-02/06-1616, para.13, referring to ICC-01/04-738-Conf-Exp.

¹³ ICC-01/04-02/06-1616, para.15.

¹⁴ ICC-01/04-02/06-1616, para.18.

¹⁵ ICC-01/04-02/06-1629.

¹⁶ T-159 p.7 ln.18-21.

¹⁷ T-159, p.6 ln.12-17.

¹⁸ T-159, p.5 ln.24-p.6 ln.3.

adjudication of its request. The Chamber rejected the Defence oral application, holding that the Defence “has not established a risk of irreparable harm.”¹⁹

19. On 22 November 2016, the Defence filed a request for leave to appeal the 16 November Decision.²⁰

20. On 25 November 2016, the Defence filed an “Urgent Request for Reconsideration of Decision Denying Adjournment”.²¹

21. On 12 December 2016, the Chamber issued its decision, denying the Defence’s request for leave to appeal the 16 November Decision, and considering that the Defence’s submissions were “based on speculation as to the content of the disclosed material and its relevance to the conduct of specific cross-examinations”.²²

22. On 14 December 2016, the Defence filed an expedited request for reconsideration²³ of the order issued by the Chamber on 19 October 2016 (“19 October Order”),²⁴ in which the Chamber had set certain deadlines for the parties and participants in relation to the conclusion of the presentation of the evidence by the Prosecution. The Defence submitted that significant new facts, including the disclosure of material as a result of the Article 70 investigations, had arisen since the 19 October Order.²⁵

23. On 16 December 2016, the Chamber denied the Defence request for reconsideration of the 19 October Order.²⁶ The Chamber held, *inter alia*, that simultaneous preparations for cross-examination of the remaining Prosecution witnesses, review of the recently disclosed Conversations, and continuation of preparations for the Defence case would not place an unfair burden on the Defence.²⁷

¹⁹ T-159, p.17 ln.7-8.

²⁰ ICC-01/04-02/06-1645 (as referred to in ICC-01/04-02/06-1677, para.4).

²¹ ICC-01/04-02/06-1655.

²² ICC-01/04-02/06-1677, para.18.

²³ ICC-01/04-02/06-1683-Red.

²⁴ ICC-01/04-02/06-1588-Corr.

²⁵ ICC-01/04-02/06-1683-Red, para.6.

²⁶ ICC-01/04-02/06-1688.

²⁷ ICC-01/04-02/06-1688, para.8.

24. On 19 December 2016, the Defence request to the Registrar for additional resources was granted on a preliminary basis of four months.²⁸ On the basis of this decision, additional team members started working in January 2017.

25. On 30 January 2017, the Chamber issued directions and a schedule leading-up to the presentation of evidence by the Defence ('Chamber's Directions'),²⁹ informing the parties, *inter alia*, that the presentation of the case for the Defence was to begin no later than one month following the date set for the submission by the Defence of its final list of witnesses, *i.e.* 26 May 2017. In addition, the Chamber ordered the Defence to disclose by 31 March 2017 a further provisional list of witnesses and statements or summaries of the anticipated testimonies, together with a confidential redacted version of the list and to provide, by 26 April 2017, the final Defence list of witnesses, together with accompanying estimates for the length of examination and statements or summaries, and its final list of evidence.

26. On 6 March 2017, the Defence requested an extension of three months for the preparation of the case for the Defence. Both the Prosecution and the Legal Representatives of Victims ("LRVs") responded on 13 March 2017, opposing the Defence Request for Extension of Time.³⁰

27. On 20 March 2017, the Defence filed the Defence Request for stay of proceedings with prejudice to the Prosecutor.³¹ Therein, the Defence argued that the Prosecution gaining access to all the Conversations, without restrictions, and thereby to a large volume of confidential Defence information it should not have had obtained, constitutes a definite undue advantage. This Defence request must be taken into consideration by the Chamber in determining whether to allow the Prosecution to use the Conversations.

²⁸ See ICC-01/04-02/06-1648-Conf-Exp; Decision of Director of Division of Judicial Support *per* delegation of Registrar, 19 December 2016.

²⁹ ICC-01/04-02/06-1757.

³⁰ ICC-01/04-02/06-1822-Conf [Prosecution] & ICC-01/04-02/06-1821-Conf [LRVs].

³¹ ICC-01/04-02/06-1830-Red.

28. On 22 March 2017, the Chamber rendered the Decision on Defence request for extension of time to prepare for its presentation of evidence, rejecting the Defence Request for Extension of Time.³² The Chamber considered in part “that the Conversations must be considered in their appropriate context, noting that they do not relate directly to the charges and, are, for a large part, devoid of any direct materiality to these proceedings or relate to peripheral issues.”³³

29. On 27 March 2017, the Defence sought leave to appeal this decision and, on 14 April 2017, the Chamber denied the Defence request. The Chamber held, *inter alia*, that the Defence’s statement that “[i]n the absence of directions issued by the Chamber regarding the use that can or cannot be made of the Conversations, it must be presumed that the Prosecution’s intended use of the Conversations at trial significantly increases their materiality”³⁴ was unduly speculative. Similarly, it stated that the impact of the Decision on Defence request for extension of time to prepare for its presentation of evidence on the fairness and expeditiousness of the proceedings was speculative, as it considered that the “Defence submission that the Conversations are material if the Prosecution would be permitted to use them during the trial is based on the mere speculation that the Chamber may allow such use.”³⁵

SUBMISSIONS

I. Applicable law

A. Admission of evidence under the Court’s legal framework

30. The legal framework of the Court provides that when deciding on the admissibility of a piece of evidence, a Trial Chamber may take into account the probative value of that evidence as well as any prejudice that such evidence may

³² ICC-01/04-02/06-1832, p.13.

³³ ICC-01/04-02/06-1832, p.17.

³⁴ ICC-01/04-02/06-1836-Conf, para. 31.

³⁵ ICC-01/04-02/06-1860, para.24.

cause to a fair trial.³⁶ Further, evidence ruled irrelevant or inadmissible shall not be considered by the Trial Chamber.³⁷ While the Chamber enjoys a significant degree of discretion when it comes to the admissibility of evidence, the dictates of fairness must always be born in mind in weighing the competing prejudicial and probative potential of the evidence in question.³⁸

31. One of the fundamental rights to consider when determining the existence of a prejudice is the Accused's right not to be compelled to testify and to remain silent.³⁹ Admitting a piece of evidence that infringes on an accused person's right to remain silent would be antithetical to the integrity of the proceedings.

B. Admission of monitored telephone conversations of a detained accused person as evidence in the Court's case-law

32. The present issue, as a matter of international practice, is almost a matter of first impression. Audio-recordings of telephone conversations of an accused person in detention have only been admitted into evidence before international courts on one occasion. The Trial Chamber in the *Katanga and Ngudjolo* case denied a Prosecution request for access to Mr Ngudjolo's non-privileged conversations from the Detention Centre on the basis that "the Prosecutor cannot use the content of these conversations to make a determination of the truth".⁴⁰ The Trial Chamber denied access to these conversations on the basis of the confidentiality of Mr Ngudjolo's correspondence and the fact that the monitoring thereof had sought to facilitate the *post factum* gathering of new evidence in support of the Prosecution. For the *Ngudjolo* Trial Chamber, the fact that the monitoring measures ordered under Regulations 174

³⁶ Article 69(4) RPE; Decision on Admissibility of Evidence and Other Procedural Matters, ICC-01/04-02/06-308, 8 June 2014, para.14.

³⁷ Rule 64(3) RPE.

³⁸ *Prosecutor v. Thomas Lubanga*, Decision on the admissibility of four documents, ICC-01/04-02/06-1399,

13 June 2008, para.24; *see also Id.*, para.31.

³⁹ Article 67(1)(g) of the Statute.

⁴⁰ *Prosecutor v. Katanga and Ngudjolo*, Decision on Request 1200 of the Prosecutor for Prohibition and Restrictive Measures Against Mathieu Ngudjolo with Respect to Contacts Both Outside and Inside the Detention Centre, ICC-01/04-01/07-1243, 24 June 2009 ("*Ngudjolo* Trial Decision on Conversations"), para.40.

and 175 of the Regulations of the Registry ("RoR") sought an entirely different aim and could be challenged on the basis of a possible abuse of process, meant that the Prosecution could not "use the content of these conversations to make a determination of the truth."⁴¹

33. A bench of the Appeals Chamber, Judge Song dissenting,⁴² reversed the *Ngudjolo* Trial Decision on Conversations, on the basis that the Chamber's finding that the conversation could not be admissible was premature. Denying access to the materials on the basis of lack of admissibility meant that the Trial Chamber had failed to conduct a case-by-case determination, instead making a blanket categorical statement on inadmissibility.⁴³ The Appeals Chamber further held that it was insufficient for the *Ngudjolo* Trial Chamber to have relied on the purpose for which the monitoring measures had been ordered, namely "for the sole purpose of ensuring that the communication facilities provided to the accused were being used appropriately", particularly "if the information is related to the case at hand or is of great significance to the parties".⁴⁴ Finally, the Appeals Chamber held that denying the Prosecution's request for access hindered it from fulfilling its duty under Article 54(1) of the Statute "to establish the truth". In the event, it was the Defence, not the Prosecution, that introduced an audio-recording of a non-privileged telephone conversation in which the witness on the stand was a participant.⁴⁵

⁴¹ *Ngudjolo* Trial Decision on Conversations"), para.40.

⁴² Judge Song dissented, *inter alia*, on the fact that the Prosecution had indeed sought access to information obtained through monitoring that was ordered for another purpose, as opposed to having requested a judicial order for the monitoring of the accused's telephone conversations for the purposes of its investigation, *see* ICC-01/04-01/07-OA 9, Judgement on the Appeal of the Prosecutor against the "Decision on Request 1200 of the Prosecutor for Prohibition and Restrictive Measures Against Mathieu Ngudjolo with Respect to Contacts Both Outside and Inside the Detention Centre" – Dissenting Opinion of Judge Sang-Hyun Song, 16 December 2009, para.3.

⁴³ ICC-01/04-01/07- OA9, Judgement on the Appeal of the Prosecutor against the "Decision on Request 1200 of the Prosecutor for Prohibition and Restrictive Measures Against Mathieu Ngudjolo with Respect to Contacts Both Outside and Inside the Detention Centre", 9 December 2009 ("*Ngudjolo* Appeal Decision on Conversations"), paras.45, 47.

⁴⁴ *Ngudjolo* Appeal Decision on Conversations, para.49.

⁴⁵ *Prosecutor v. Katanga*, ICC-01/04-01/07-3436, Judgement pursuant to Article 74 of the Statute, 7 March 2014, para.176.

34. Notwithstanding the above, the present situation is different from that addressed by the *Ngudjolo* Appeals Chamber. First, the issue of access, evidently, does not arise in current circumstances. The Prosecution possesses the materials and has already announced its intention to use them. The issue of admissibility is, accordingly, now ripe for determination. Waiting until the moment of tendering is not in the interests of judicial certainty and impedes the Defence's ability to prepare its case. Indeed, since the Prosecution disclosed these recordings on the express basis that this material is relevant to the Defence's choice of witnesses, it follows that the Defence must know whether and in what circumstance the Chamber will permit the use of these recordings in order to make an informed choice of witnesses.

35. Second, the Chamber has already held that the Conversations "are for the large part devoid of any direct materiality to these proceedings or relate to peripheral issues".⁴⁶ The Chamber has, accordingly, apprised itself sufficiently of the content of the recordings to determine that they are, in general, irrelevant. Information must be relevant to be admitted, and documents must have some prospect of being admissible to be used in the cross-examination of a witness. In the absence of any prospect of admission, the Chamber can rule *in limine* that the documents may not be used during cross-examination.

36. Third, this Chamber is not bound to follow the Majority decision in the *Ngudjolo* case, to the extent that it in any way can be interpreted as precedent in favour of the use of the recordings during the cross-examination of Defence witnesses. Under Article 21(2) of the Statute, "[t]he Court *may* apply principles and rules of law as interpreted in its previous decisions".⁴⁷ It is not uncommon for Trial Chambers to reject existing jurisprudence when they disagree.⁴⁸ There is thus no rule

⁴⁶ ICC-01/04-02/06-1832, para.17.

⁴⁷ Emphasis added.

⁴⁸ *Katanga and Ngudjolo*, Situation in the Democratic Republic of Congo, ICC-01/04-01/07-621-PTCI, Decision on Art 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence's Preparation for the Confirmation Hearing, 20 June 2008, para.59; Situation in the Democratic Republic of Congo, ICC-01/04-374-PTCI, Decision on the Requests of the Legal Representative of Application Process for Victims' Participation and Legal Representation, 17 August 2007, paras.37-8.

of *stare decisis* at such at the Court,⁴⁹ and no hierarchy among the decisions of the Court's three divisions.⁵⁰

37. In this context, the Defence submits that the Chamber should follow the approach adopted in the *Ngudjolo* Trial Decision on Conversations, which appropriately safeguarded the rights of the accused in that case, and rule consequently that the Prosecution cannot use the Conversations to make a determination of the truth.

II. Allowing the Prosecution to use the Conversations during the Defence case would be antithetical to, and seriously damage, the integrity of the proceedings, in the sense of Article 69(4) of the Statute

38. The Defence expects that the Prosecution, in light of its previous submissions, will attempt to make use of the Conversations during the Defence case at least in two ways: (i) in general to support broad allegations of coaching of Defence witnesses, even when the witness on the stand is not a participant in the said Conversation; and (ii) to challenge the credibility of specific witnesses on the stand who are participants in the said Conversation.

39. In both situations, the prejudice caused to the Accused from the use of the Conversations far outweighs the probative value these Conversations may have in the context of this trial on the charges for which Mr Ntaganda stands accused.

40. In relation to the use of Conversations with witnesses who are not participants therein, the Defence posits that there is absolutely no foundation for such use. The Prosecution will have an opportunity, in the time granted by the Chamber, to cross-examine Defence witnesses on the substance of their examination

⁴⁹ Bitti, "Article 21 of the Statute of the International Criminal Court and the Treatment of Sources of Law in the Jurisprudence of the ICC", in C. Stahn and G. Sluiter (eds), *The Emerging Practice of the International Criminal Court* (2009) 285, at 286.

⁵⁰ *Prosecutor v. Bemba Gombo*, ICC-01/05-01/08-2138, Decision on the Supplemented Applications by the Legal Representatives of Victims to Present Evidence and the Views and Concerns of Victims, 22 February 2012, para.11 ("The Chamber has further considered the relevant jurisprudence of the Appeals Chamber, which, while not binding upon this Chamber, is of relevance in the present context").

in chief and to test their credibility. Using a specific Conversation for the purpose of demonstrating, for instance, a broad coaching scheme if the witness on the stand is not a participant in the Conversation is inappropriate, disserves the interests of justice, and should be disallowed. This applies even in situations where the participants in a Conversation mention a witness but the witness has no knowledge of the Conversation. All questions about coaching that the Chamber deems relevant in order to ascertain the truth can be posed without resorting to the Conversations of which the witness on the stand has no knowledge.

41. Even conversations in which the witness is a participant are not suitable for use during cross-examination. The Prosecution should not be permitted to use such recordings for the purpose of showing a prior inconsistent statement of the witness on the stand, since this is not the purpose for which the recordings were obtained. Even to the extent that such recordings are used for the purpose of showing that a witness was coached, the prejudice of using the conversations for this purpose far outweighs their probative value. Whether coaching has taken place will, in almost every case, depend on the Chamber's view as to whether what is being discussed is true or untrue. The Chamber can only come to a view of the truth or falsity of such discussions based on objective evidence, not based on lengthy conversations that are often interactive and highly ambiguous in character. Allowing the Prosecution to embark on playing excerpts of recordings will necessarily cause the Defence to play other excerpts showing that the import of the Conversations is not coaching but a discussion of a truthful account of events.

42. Along the way, the Prosecution will introduce volumes of statements by Mr Ntaganda. This will seriously infringe his right to remain silent, and divert the trial away from what should be the focus of the evidence. The prejudice to Mr Ntaganda of using the Conversations is substantial. Mr Ntaganda's substantive positions on a host of subjects will be heard in court, despite no advice of rights having been provided.

43. The Defence recalls that upon arrival at the Detention Centre, Mr Ntaganda as all incoming detainee, was provided with a documentation package which contained the RoC and the RoR, as well as a summarised compilation of all relevant provisions pertaining to telephone calls to and from the Detention Centre. While these provisions do refer in certain circumstances to the possible monitoring of non-privileged telephone calls by the Chief Custody Officer,⁵¹ no mention is made of the possible disclosure of the contents of the non-privileged conversations to the Prosecution. On the contrary, Regulation 175(10) RoR provides: “Any offending conversation which is transcribed shall be retained by the Registrar. Such transcripts shall not be handed over as evidence of contempt of court without prior notice and disclosure to counsel for the detained person.” In all other respects, the Court’s legal framework is silent as to the disclosure to the Prosecution of non-privileged conversations of an accused person from the Detention Centre. Until the Defence was made aware in November 2016 of the disclosure of the Conversations to the Prosecution, Mr Ntaganda simply had no way of knowing that everything he had said in non-privileged conversations from the Detention Centre had been and continued to be provided to the Prosecution and that the Prosecution may seek to tender the contents of the Conversation in evidence.

44. Second, in the context of the restrictions litigation before it, the Chamber put in place a screening mechanism to ensure that the Prosecution did not come into possession of information to which it was not entitled and that might undermine trial fairness. Being aware of this Chamber’s practice in the context of the restrictions litigation of partially disclosing the contents of his non-privileged telephone conversations from the Detention Centre that pertained to family and private matters as well as to Defence strategy, Mr Ntaganda had no reason to imagine that the totality of the Conversations would in fact be provided to the Prosecution.

45. Given that the Accused was not informed that the statements he made in private discussions, including with family members and friends, could be disclosed

⁵¹ Regulation 101 RoC; Regulations 173, 174, 175 RoR.

to the Prosecution and later used in the determination of the charges pending against him, the Defence submits that the Conversations cannot be used against him. For the standard applicable to the notice of rights necessary to use the Conversations as evidence at trial, the Defence refers for instance to Rules 111 and 112 of the RPE and to the case-law of other international courts in relation to the admission into evidence of recorded interviews of accused persons as suspects. In that context, Trial Chambers assessed whether the accused person was clearly informed of his rights in the presence of Defence counsel at the outset of the interview, and at repeated intervals during the interview, whether the interview was fully voluntary, and observed his right to remain silent, and whether the accused was informed that the statements he made were recorded and could be used as evidence.⁵²

46. There is no reasonable justification to depart from those minimum, but stringent, standards, when it comes to the use and later admission of the Conversations in evidence. Yet, the circumstances in which the Conversations were gathered and later obtained by the Prosecution are much different in that absolutely no advice of rights was given to Mr Ntaganda, including the critical notification that his statements may be used as evidence. The prejudice to him thus far outweighs any probative value that the Conversations may bear, which render them inadmissible. The only possible conclusion should therefore be to preclude the Prosecution from using them.

III. Allowing the Prosecution to use the Conversations would derail the trial from its ordinary course

47. The Conversations were obtained pursuant to a request for judicial assistance made pursuant to Article 70 of the Statute. As a basis for granting access to the Prosecution to the Conversations, the Single Judge referred to the Prosecutor's

⁵² *Prosecutor v. Halilović*, Case No. IT-01-48-T, Decision on admission into evidence of interview of the Accused, 20 June 2005, paras.10–18; *Prosecutor v. Halilović*, Case No. IT-01-48-AR73.2, Decision on interlocutory appeal concerning admission of record of interview of the accused from the bar table; 19 August 2005; *Prosecutor v. Orić*, Case No. IT-03-68-T, Decision on Defence motion to exclude interview of the Accused pursuant to Rules 89(D) and 95, 7 February 2006, para.21; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on the Prosecutor's motion for the admission of certain materials under Rule 89(C), 14 October 2004, paras.16-21.

investigations pursuant to Article 70. No reference was made to the use of the Conversations as evidence in this trial.

48. The proper forum in which to discuss allegations of coaching or of witness interference that the Prosecution claims stem from the Conversations is a trial for offences against the administration of justice pursuant to Article 70 of the Statute. This was the Prosecution's stated aim in seeking the Conversations in the first place back in August 2015. However, 19 months after it received the Conversations, and despite making repeated references to the existence of a broad scheme of witness coaching,⁵³ no charges against Mr Ntaganda for these allegations have been brought.

49. Instead, using the Conversations, the Prosecution will seek to derail the course of the Defence case and turn it into an exercise where the Chamber is asked to rule on the propriety of Mr Ntaganda's conduct from the Detention Centre. On the contrary, the focus of the trial should remain on the merits, as established through the usual methods of cross-examination.

50. Furthermore, in essence, the justification for using the Conversations in court depends on a finding that the propositions discussed therein were falsehoods, rather than true. In this regard, the Defence notes that the Prosecution has already attempted to dismiss the contents of the Conversations as 'illegitimate' or 'false Defence strategy'.⁵⁴ The truth or falsity of those propositions, however, can only be decided in the Chamber ultimate findings on the material facts of the case. Allowing the Conversations to be discussed on the basis that the propositions therein are falsehoods puts the cart before the horse, and will drive this trial into a host of collateral issues, far removed from the charges pending against Mr Ntaganda. This serves neither the interests nor the expediency of justice.

⁵³ ICC-01/04-02/06-1769-Red, para.4; ICC-01/04-02/06-1783-Red, para.11; ICC-01/04-02/06-1840, para.51.

⁵⁴ ICC-01/04-02/06-1830, paras.79, 81.

RELIEF SOUGHT

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

ORDER that the Prosecution may not use the Conversations – whether in their audio recording or their written form – at any point with witnesses during the Defence case.

RESPECTFULLY SUBMITTED ON THIS 25TH DAY OF APRIL 2017

A handwritten signature in black ink, appearing to read 'StB' with a flourish at the end.

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands