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**International
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Court**

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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

Public redacted version of the “Joint Response by the Common Legal Representative for the Victims of the Attacks and the Common Legal Representative for the Former Child Soldiers to the Defence ‘Request for stay of proceedings with prejudice to the Prosecutor’”

Source: Office of Public Counsel for Victims

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

The Office of the Prosecutor

Ms Fatou Bensouda

Mr James Stewart

Ms Nicole Samson

Counsel for the Defence

Mr Stéphane Bourgon

Mr Christopher Gosnell

Legal Representatives of the Victims

Ms Sarah Pellet

Ms Vony Rambolamanana

Legal Representatives of the Applicants

Mr Dmytro Suprun

Ms Anne Grabowski

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. The Common Legal Representative for the Victims of the Attacks and the Common Legal Representative for the Former Child Soldiers (the “Legal Representatives”) hereby submit a joint response to the “Defence Request for stay of proceedings with prejudice to the Prosecutor” (the “Defence Request” or the “Request”), filed on 20 March 2017.¹ The Legal Representatives oppose the request. Not only does the Defence fail to demonstrate that the current proceedings lack the essential preconditions for a fair trial, but, moreover, a permanent stay of proceedings would completely quash the legitimate rights and interests of the participating victims in this case.

2. The Defence submits that the Article 70 Investigation initiated by the Prosecutor violates due process and fair trial rights to such an extent that it causes irreparable prejudice to Mr Ntaganda which can only be remedied by the immediate stay of proceedings.²

3. According to the Defence, the due process requirements were ignored, when the Prosecutor gained complete access to non-privileged conversations as a result of an *ex parte* decision by the Single Judge of the Pre-Trial Chamber II,³ which resulted in access to sensitive information on the Defence’s strategy. It argues that the Prosecutor gained an undue advantage, which she did not seek to remedy by, for instance, informing the Trial Chamber or the Defence.⁴ The Defence further submits that the *ex parte* conduct of the investigation was not legitimate.⁵

¹ See the “Defence Request for stay of proceedings with prejudice to the Prosecutor”, No. ICC-01/04-02/06-1830-Conf, 20 March 2017 (the “Defence Request”). A public redacted version of the Request was filed on 21 March 2017.

² *Idem*, paras. 41-59.

³ See the “Decision on the Prosecutor’s ‘Request for judicial assistance to obtain evidence for investigation under Article 70’” (Pre-Trial Chamber I, Single Judge), No. ICC-04/04-279-Conf, 18 September 2015, reclassified as confidential by order Pre-Trial Chamber I dated 25 January 2017.

⁴ See the Defence Request, *supra* note 1, paras. 60-65.

⁵ *Idem*, paras. 5, 11 and 43.

4. Finally, the Defence contends that the restrictions litigation that was brought before Trial Chamber VI (the “Chamber”) provided the Judges with access to information that could be evidence of wrong-doings and witnesses interference on the accused’s part, thus creating an irremediable situation of apprehension of bias.⁶

5. It is submitted that the Defence fails to show that the alleged impact of the Prosecution’s as well as the Judges’ access to the non-privileged conversations resulted in vitiating the fairness of the proceedings to such a degree that a stay of proceedings was the only available remedy.

II. PROCEDURAL BACKGROUND

6. On 8 December 2014, upon the Prosecution’s request,⁷ the Chamber issued a decision on restrictions on Mr Ntaganda’s communications.⁸

7. On 13 August 2015, the Prosecutor filed its “Request for judicial assistance to obtain evidence for investigation under Article 70”.⁹ On 18 September 2015, the Single Judge ruled that the Prosecutor should be provided with non-privileged contact and visitor logs, as well as with recordings of telephone registrations pertaining to Mr Lubanga and Mr Ntaganda from 22 March 2013 onwards and on an on-going basis.¹⁰

⁶ *Ibid.*, paras. 82-89.

⁷ See the “Request for restrictions on contact and the Defence request for access to logs”, No. ICC-01/04-02/06-349-Conf-Red, 8 August 2014.

⁸ See the “Decision on the Prosecution request for restrictions on contact and the Defence request for access to logs” (Trial Chamber VI), No. ICC-01/04-02/06-410-Conf-Exp-Red, 8 December 2014. The Legal Representatives will omit to refer to litigation on the imposition and continuation of restrictions to Mr Ntaganda communications that ensued in the present response.

⁹ See the “Request for judicial assistance to obtain evidence for investigation under Article 70”, No. ICC-01/04-638-Conf-Exp, 13 August 2015.

¹⁰ See the “Decision on the Prosecutor’s “request for judicial assistance to obtain evidence for investigation under Article 70” (Pre-trial Chamber I), No. ICC-01/04-729-Conf, 18 September 2015.

8. On 7 November 2016, the Prosecution publicly filed the “Prosecution’s Communication of the Disclosure of Evidence obtained pursuant to Article 70”.¹¹ The material included records of non-privileged conversations involving the accused and other persons (the “Conversations”).

9. On 14 November 2016, the Defence submitted an urgent request for stay of proceedings (the “First Request”), seeking an immediate adjournment in arguing that the newly disclosed material was of such volume and nature that it needed adequate time and facilities to review it so as to, *inter alia*, prevent on-going prejudice in respect of cross-examinations of Prosecution witnesses.¹² It also sought the suspension of proceedings pending the Chamber’s decision thereon.¹³ The latter was opposed by the Prosecution and the Legal Representatives.¹⁴

10. The Chamber denied the request for suspension and directed that responses to the First Request be filed by 16:00 on 15 November 2016.¹⁵

11. On 16 November 2016, the Chamber, after receiving the responses from the Prosecution¹⁶ and the Legal Representatives,¹⁷ denied the Defence request for stay of the proceedings.¹⁸ The Chamber found that “*a substantiated submission of ongoing prejudice which would be remedied by immediate adjournment – as opposed to possible other*

¹¹ See the “Prosecution’s Communication of Disclosure of Evidence obtained pursuant to Article 70”, No. ICC-01/04-02/06-1616, 7 November 2016.

¹² See email from the Defence to the Chamber, Prosecution and Participants dated 14 November 2016 at 9:26. The request was formally filed later on that day, see the “Urgent Request for Stay of Proceedings”, No. ICC-01/04-02/06-1629-Conf, 14 November 2016.

¹³ See the transcript of the hearing held on 14 November 2016, No. ICC-01/04-02/06-T-157-Red-ENG WT, p. 3, line 2-11.

¹⁴ *Idem*, p. 4, lines 24, 25, p. 5, lines 9-21, p. 5, line 25 to p. 6, lines 1-2.

¹⁵ *Ibid.*, p. 7, lines 22-25, p. 8, lines 1-5.

¹⁶ See the “Prosecution’s response to the Defence’s ‘Urgent request for stay of proceedings’”, No. ICC-01/04-02/06-1636-Conf, 15 November 2016.

¹⁷ See the “Joint response by the Common Legal Representative of the Attacks and the Common Legal Representative of the Former Child Soldiers to the Defence’s ‘Urgent request for stay of proceedings’”, No. ICC-01/04-02/06-1635-Conf, 15 November 2016.

¹⁸ See the transcript of the hearing held on 16 November 2016, No. ICC-01/04-02/06-T-159-CONF-ENG ET, p. 2, line 13 to p. 7, line 24 (open session).

remedial measures – has not been established at this time and the Defence request is therefore rejected".¹⁹ The Chamber directed the Prosecution to assist the Defence in disclosing the material it had gathered in an identified, categorised way.²⁰ Following the decision, the Defence (i) gave notice that it would seek leave to appeal the decision,²¹ and (ii) made an application for suspensive effect of the Decision pending the filing of its request for leave to appeal.²² The latter was opposed by the Prosecution²³ and the Legal Representatives²⁴ and rejected by the Chamber on the same day.²⁵

12. On 17 November 2016, the Prosecution filed an "Addendum to the 'Prosecution's Communication of the Disclosure of Evidence obtained pursuant to Article 70', 7 November 2016, ICC-01/04-02/06-1616".²⁶

13. On 22 November 2016, the Defence filed the "Request on behalf of Mr Ntaganda seeking leave to appeal oral decision on 'Urgent request for stay of proceedings'".²⁷

14. On 24 November 2016, the Prosecution filed the "Prosecution's Communication of the Disclosure of Evidence".²⁸

15. On 28 November 2016, the Defence filed an "Urgent Request for Reconsideration of Decision Denying Adjournment"²⁹ which was rejected by the Chamber on 1st December 2016.³⁰

¹⁹ *Idem*, p. 2, line 13 to p. 7, line 24 (open session).

²⁰ *Ibid.*, p. 7, lines 6-17.

²¹ *Ibid.*, p. 8, line 14 to p. 11, line 11.

²² *Ibid.*

²³ *Ibid.*, p. 11, line 14 to p. 12, line 19.

²⁴ *Ibid.*, p. 12, line 22 to p. 13, line 20.

²⁵ *Ibid.*, p. 16 line 24 to p. 17, line 20.

²⁶ See the "Addendum to the 'Prosecution's Communication of the Disclosure of Evidence obtained pursuant to Article 70', 7 November 2016, ICC-01/04-02/06-1616", No. ICC-01/04-02/06-1637, 17 November 2016.

²⁷ See the "Request on behalf of Mr Ntaganda seeking leave to appeal oral decision on Urgent request for stay of proceedings'", No. ICC-01/04-02/06-1645, 22 November 2016.

²⁸ See the "Prosecution's Communication of Disclosure of Evidence", No. ICC-01/04-02/06-1649, 24 November 2016.

16. On 12 December 2016, the Chamber denied the Defence's request for leave to appeal.³¹

17. On 6 March 2017, the Defence filed the "Request on behalf of Mr Ntaganda seeking an extension of time for the preparation of the case for the Defence"³² which was rejected by the Chamber on 22 March 2017.³³ On 27 March 2017, the Defence filed a request seeking leave to appeal the Decision.³⁴

18. On 20 March 2017, the Defence filed its Request.³⁵

III. CONFIDENTIALITY

19. Pursuant to regulations 23bis(1) and (2) of the Regulations of the Court, this filing is filed confidentially, as it constitutes a response to a request bearing the same classification. A public redacted version of this response will be filed in due course.

IV. JOINT OBSERVATIONS

1. The legal requirements for a stay of proceedings are not met

20. The jurisprudence of the Court acknowledges that a Chamber has the inherent power to order a stay of proceedings,³⁶ *"a power assumed by the guardians of the judicial process, the judges, to see that the stream of justice flows unpolluted"*.³⁷

²⁹ See the "Urgent Request for Reconsideration of Decision Denying Adjournment", No. ICC-01/04-02/06-1655-Conf, 28 November 2016.

³⁰ See the transcript of the hearing held on 1st December 2016, ICC-01/04-02/06-T-169-CONF-ENG ET, pp. 3, line 2 to p. 7 line 8.

³¹ See the "Decision on request for leave to appeal the Chamber's decision rejecting the Defence request for a stay of proceedings" (Trial Chamber VI), No. ICC-01/04-02/06-1677, 12 December 2016.

³² See the "Request on behalf of Mr Ntaganda seeking an extension of time for the preparation of the case for the Defence", No. ICC-01/04-02/06-1815-Conf, 6 March 2017.

³³ See the "Decision on Defence request for extension of time to prepare for its presentation of evidence" (Trial Chamber VI), No. ICC-01/04-02/06-1832-Conf, 22 March 2017.

³⁴ See the "Request on behalf of Mr Ntaganda seeking leave to appeal 'Decision on Defence request for extension of time to prepare for its preparation of evidence'", No. ICC-01/04-02/06-1836-Conf, 27 March 2017.

³⁵ See the Defence Request, *supra* note 1.

21. A Chamber may decline jurisdiction in a judicial cause³⁸ where the moving party can show that (a) the rights of the accused have been violated to such an extent that the essential preconditions of a fair trial are missing, and (b) there is no sufficient indication that this will be resolved during the trial process.³⁹ Such a measure is only justified where the situation is such that it would be ‘repugnant’ or ‘odious’ to the administration of justice to allow the case to continue.⁴⁰ Accordingly, this remedy can only be granted as a measure of last resort.⁴¹

22. According to Trial Chamber V(B), in the *Kenyatta* case, it is not warranted to “stay the proceedings because of the alleged difficulties encountered in the Defence’s trial preparation, particularly when those difficulties have been aggravated by the Defence’s own conduct”⁴² or to remedy any difficulties encountered in accessing information or facilities during trial preparation.⁴³

23. Even where the action or omission that forms the basis of the Request can be directly attributed to the Prosecution, there is a high threshold to be reached before a

³⁶ See the “Decision on Defence request for stay of proceedings and further disclosure” (Trial Chamber III), No. ICC-01/05-01/08-3335, 7 March 2016 (the “*Bemba* 2016 Decision”), para. 17; the “Decision on ‘Defence Request for Relief for Abuse of Process’” (Trial Chamber III), No. ICC-01/05-01/08-3255, 17 June 2015 (the “*Bemba* 2015 Decision”), para. 8 and the “Decision on the defence request for a temporary stay of proceedings” (Trial Chamber IV), No. ICC-02/05-03/09-410, 26 October 2012 (the “*Banda and Jerbo* Decision”), para. 74.

³⁷ See the “Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006” (Appeals Chamber), No. ICC-01/04-01/06-772, 14 December 2006 (the “*Lubanga* 2006 Judgment”), para. 28.

³⁸ *Idem*, para. 27.

³⁹ See the “Decision on Defence Application for a permanent stay of proceedings due to abuse of process” (Trial Chamber V(B)), No. ICC-01/09-02/11-868-Red, 5 December 2013 (“the *Kenyatta* Decision”), para. 14. See also *Banda and Jerbo* Decision, *supra* note 36, para. 79.

⁴⁰ See the *Bemba* 2016 Decision, *supra* note 36, para. 17. See also the “Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU” (Appeals Chamber), No. ICC-01/04-01/06-2582, 10 October 2010 (the “*Lubanga* 2010 Judgment”), para. 55.

⁴¹ See the *Kenyatta* Decision, *supra* note 39, para. 99.

⁴² *Idem*, para. 100.

⁴³ *Ibid.*, para. 14.

permanent stay may be granted. Trial Chamber I, in the *Lubanga* case, also emphasised that it is a drastic remedy⁴⁴ and held that:

*“Not every example of suggested prosecutorial misconduct will lead to a permanent stay of the proceedings; instead, this is a matter of fact and degree [...]. For instance, a stay of proceedings may well be the appropriate remedy if actions by the Prosecutor threaten basic human rights, the foundations of a fair trial or the rule of law. Clear examples of situations where a stay may be necessary include the material mistreatment of the accused in order to obtain evidence (e.g. by use of torture) or the nondisclosure of significant exculpatory evidence”.*⁴⁵

24. The Legal Representatives note that the Defence has been aware of the exact extent of the Prosecution’s access to confidential information since 25 January 2017.⁴⁶ It waited more than two months before filing a request for stay of proceedings,⁴⁷ although, according to the Defence, a fair trial has become impossible since then, because of the *“egregious violations of the fundamental rights of Mr Ntaganda”*.⁴⁸ Therefore, it is highly doubtful that the due process violations raised by the Defence have reached the required threshold that would inevitably warrant a stay of proceedings.

25. Moreover, on 6 March 2017 — *i.e.* two weeks prior to the submission of the Request — the Defence requested an extension of three months for the preparation of its case.⁴⁹ The reason underlying said request was, *inter alia*, the need to fully review the Conversations disclosed to the Defence in November 2016 pursuant to the

⁴⁴ See the “Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU” Appeals Chamber, No. ICC-01/04-01/06-2582, 10 October 2010, para. 55.

⁴⁵ See the “Redacted Decision on the ‘Defence Application Seeking a Permanent Stay of Proceedings’” (Trial Chamber I), No. ICC-01/04-01/06-2690-Red2, 8 March 2011, para. 195.

⁴⁶ See the email communication from Court Records to the parties and participants in this case of 25 January 2017 granting access to the “Decision on the Prosecutor’s ‘Request for judicial assistance to obtain evidence for investigation under Article 70’”, *supra* note 3.

⁴⁷ The Defence filed a request for stay for proceedings in November 2016 which was in fact a request for an immediate adjournment. See the “Urgent request for Stay of Proceedings”, No. ICC-01/04-02/06-1629, 14 November 2016.

⁴⁸ See the Defence Request, *supra* note 1, para 12.

⁴⁹ See the “Request on behalf of Mr Ntaganda seeking an extension of time for the preparation of the case for the Defence”, *supra* note 32.

Article 70 investigation before providing its final list of witnesses and evidence.⁵⁰ Indeed, regarding the summaries of the Conversations provided by the Prosecutor, the Defence considered that they were unreliable and that, consequently, they would need more time to review these elements.⁵¹ The Legal Representatives cannot help but observe that the Defence seems to have had enough time to review and select the conversations that were prejudicial to its case preparation. Although the Defence indicates that referring to the Prosecution summaries cannot be considered an acceptance of their accuracy or reliability,⁵² it remains surprising that the important issues raised in the Request, namely the Prosecutor's access to sensitive information and the alleged prejudice to the accused that resulted therefrom, are actually based on a considerable amount of said summaries.⁵³ In other words, the Defence demonstrates the Prosecutor's alleged misconduct with elements that it does not find either accurate or reliable in another context.

26. It can reasonably be concluded that the granting of new resources in December 2016 as requested by the Defence,⁵⁴ coupled with the extension of time were, until now, considered by the Defence possible remedies to any alleged undue advantage of the Prosecution.

27. It is even clearer since in its Request, the Defence makes no mention of this previous request for an extension of time, which was still pending before the Chamber at the time the former was filed. The request for an extension of time should have been withdrawn by the Defence or declared moot in its submissions, had it *only then* transpired that, by virtue of the Prosecution's unhindered access to non-privileged conversations since March 2013, the fairness of the proceedings had been tainted to an irreparable degree and no other remedy than a stay of proceedings

⁵⁰ *Idem*, paras.41-54.

⁵¹ *Ibid.*, paras. 38-40.

⁵² See the Defence Request, *supra* note 1, footnote 57.

⁵³ *Idem*, footnotes 57-62 and 64-70.

⁵⁴ See the "Request on behalf of Mr Ntaganda seeking an extension of time for the preparation of the case for the Defence", No. ICC-01/04/-02/06-1815-Conf, 6 March 2017, paras. 10 and 29.

could appropriately counter this prejudice. Far from it, the Defence rather considered that both requests could be filed almost simultaneously, and even sought leave to appeal⁵⁵ the Chamber's decision rejecting the Defence request for an extension of time.⁵⁶ It, therefore, appears that the Defence is trying to obtain (in that order) either a time extension, or a stay of proceedings. Accordingly, the stay of proceedings does not constitute the *only* remedy to the alleged prejudice.

28. Moreover, the fact that the Defence filed its Request for stay of proceedings without waiting for the Chamber's decision on the request for an extension of time demonstrates that the Defence acted prematurely. This Request was clearly not considered as seriously as such a drastic remedy requires, thus suggesting that it was only used as a delaying strategy rather than based on a genuine intention to obtain a stay of proceedings.

29. Besides, when rejecting the request for extension of time, the Chamber, once again, recalled "*that the Defence has been on notice of allegations of the coaching of potential Defence witnesses since prior to the commencement of the trial in the context of the litigation on restrictions on Mr Ntaganda's contacts. [...] the Defence must be presumed to have discussed the issue with Mr Ntaganda and to have been conscious of it in conducting its investigations and preparations to date*".⁵⁷ Thus, at this stage, the Chamber does not consider that the damage caused to the accused because of the Article 70 investigation has reached a degree that would justify the Defence to not proceed with the trial.

⁵⁵ See the "Request on behalf of Mr Ntaganda seeking leave to appeal 'Decision on Defence request for extension of time to prepare for its preparation of evidence'", *supra* note 34.

⁵⁶ See the "Decision on Defence request for extension of time to prepare for its presentation of evidence", *supra* note 33.

⁵⁷ *Idem*, para. 17.

2. The Trial Chamber adopted measures to safeguard the due process

30. The Defence argues that the material arising from the Article 70 investigation was submitted to the Judges for their consideration on the merits.⁵⁸ However, as the Defence acknowledges, the Chamber stressed on numerous occasions that it will not consider this material, stating that it “[...] *considers that the Material is not admissible through the ‘bar table’, as its probative value at this stage, due its nature and lack of direct materiality to the charges in the case, is low when balanced with the potential prejudice to the accused*”,⁵⁹ and later stated that “*it would not be appropriate to consider this material in deciding on the Prosecution’s request*”.⁶⁰ Contrary to what the Defence asserts, the Chamber has not been contaminated by these submissions.⁶¹ Lately, the Chamber recalled 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*”.⁶² Thus, this cannot constitute a reason to apprehend bias on the part of the Judges.

31. When adjudicating the restrictions litigation, the Chamber constantly assessed the prejudice potentially caused to the accused and took steps to remedy any prejudice that may have occurred. [REDACTED].⁶³ [REDACTED].⁶⁴ [REDACTED].⁶⁵ [REDACTED].⁶⁶ [REDACTED].⁶⁷ In addition, when reviewing Mr Ntaganda’s restrictions in light of the Fourth Registry Report, the Chamber took the “*opportunity to recall its prior guidance to the Prosecution that any Article 70 investigations should be*

⁵⁸ See the Defence Request, *supra* note 1, para. 84.

⁵⁹ See the “Decision on Prosecution’s request pursuant to Regulation 35 for an extension of time to submit evidence” (Trial Chamber VI), No. ICC-01/04-02/06-1799, 23 February 2017, para 6.

⁶⁰ See the “Decision on Prosecution request for additional Defence disclosure” (Trial Chamber VI), No. ICC-01/04-02/06-1818, 10 March 2017, para. 20.

⁶¹ See the Defence Request, *supra* note 1, para. 92.

⁶² See the “Decision on Defence request for extension of time to prepare for its presentation of evidence”, *supra* note 33, para. 17.

⁶³ [REDACTED].

⁶⁴ [REDACTED].

⁶⁵ [REDACTED].

⁶⁶ [REDACTED].

⁶⁷ [REDACTED].

*concluded as expeditiously as possible, and that any related applicable disclosure of information to the Defence be made as soon as possible.”*⁶⁸

32. Furthermore, the Prosecution Request for Extension of Time⁶⁹ – whereby it sought an extension of the time limit to submit the transcriptions and translations of some of the Conversations to the Defence – and the Prosecution Request for Additional Disclosure Obligations⁷⁰ – whereby it sought to impose additional obligations on the Defence prior to the presentation of its case – were both rejected.⁷¹ In this regard, the Chamber held that *“compliance with the schedule and additional obligations sought by the Prosecution would place an additional burden on the Defence which outweighs any potential benefits of the requested measures”*.⁷² The Chamber recalled recently that *“[it] will remain attentive to any difficulties that the Defence may face during the course of its presentation of evidence, and, where necessary, retain a flexible approach to facilitate the Defence’s preparations, including by accommodating requests for changes in the order of witnesses or extended breaks between evidentiary blocks”*.⁷³ Accordingly, the Chamber clearly balanced the accused’s rights against the Prosecutor’s interests.

33. The Legal Representatives submit that, on every opportunity and when necessary, the Chamber used its inherent powers in order to provide the Defence with remedial measures. It further demonstrates that tools are available to deal with

⁶⁸ See the “Decision reviewing the restrictions placed on Mr Ntaganda’s contacts” (Trial Chamber VI), No. ICC-01/04-02/06-1494-Conf-Exp, 7 September 2016, para.24. See also the Chamber’s oral Decision on urgent defence request for stay of the proceedings during the hearing held on 16 November 2016, No ICC-01/04-02/06-T-159-CONF-ENG ET, 16 November 2016, p. 2.

⁶⁹ See the “Prosecution’s request pursuant to regulation 35 to submit evidence”, *supra* note 59.

⁷⁰ See the “Prosecution’s request for additional Defence disclosure”, No. ICC-01/04-02/06-1783-Conf, 10 February 2017.

⁷¹ See the “Decision on Prosecution’s request pursuant to Regulation 35 for an extension of time to submit evidence”, *supra* note 59 and the “Decision on Prosecution request for additional Defence disclosure”, *supra* note 60.

⁷² See the “Decision on Prosecution request for additional Defence disclosure”, *supra* note 60, para. 27.

⁷³ See the “Decision on Defence request for extension of time to prepare for its presentation of evidence”, *supra* note 33, para. 23.

the matters raised by the Defence and thus that the potential damage caused to the accused can adequately be remedied during the trial process.⁷⁴

3. There is no requirement for an independent prosecutor to be appointed

34. The Defence avers that “[f]rom the time of the Article 70 Request, the Prosecutor should have built walls between the main trial and the Article 70 investigation”, such as, for instance, requesting that independent counsel be appointed to conduct the investigation.⁷⁵ It contends that, at a minimum, the Prosecutor should have ensured that different staff from her office would handle the two procedures.⁷⁶ Citing to a decision of the Appeals Chamber, the Defence further avers that “[a]lthough not categorically prohibited at the Court, the involvement of a prosecuting trial team in a parallel Article 70 case against the same accused has been specifically disapproved”.⁷⁷ In further support of its argument that the Prosecution should have erected “Chinese walls” between the two procedures so as to preserve the integrity of the proceedings in the *Ntaganda* case,⁷⁸ the Defence contends that before other international courts, the practice was to appoint *amici curiae* investigators to handle an Article 70 investigation in parallel to a main trial.⁷⁹

35. The Defence argument that the involvement of prosecuting staff from the main case has irreparably damaged the integrity of the proceedings before this Chamber must, necessarily, be looked at in the context of the applicable rules and case law of this Court before seeking guidance in the rules and practice established

⁷⁴ The Trial Chamber in *Kenyatta* enumerated all the steps that could be taken to demonstrate that other remedies are available, such as (i) ruling certain materials inadmissible, (ii) determining that certain evidence be given little to no weight at the end of the trial, (iii) making evidentiary inferences to counterbalance the fact that the Defence may have been wrongfully deprived of access to specific evidence. See the *Kenyatta* Decision, *supra* note 39, para. 101.

⁷⁵ See the Defence Request, *supra* note 1, para. 46.

⁷⁶ *Idem*, para. 46.

⁷⁷ *Ibid.*, para. 47, referring to the “Decision on the requests for the Disqualification of the Prosecutor, the Deputy Prosecutor and the entire OTP staff” (Appeals Chamber), No. ICC-01/05-01/13-648-Red3, 21 October 2014 (the “*Bemba et al.* Decision”), para. 40.

⁷⁸ *Ibid.*, para. 50

⁷⁹ *Ibid.*, para. 49.

by other international courts. While it is true that both Trial Chamber I and the Appeals Chamber have expressed a *general preference* for the investigation and prosecution of Article 70 offences by appointing staff members uninvolved in the main case,⁸⁰ unlike at the international *ad hoc* tribunals,⁸¹ the statutory framework of this Court does not, as such, foresee the appointment of independent prosecutors to conduct Article 70 investigations. Indeed, Rule 165(1) of the Rules stipulates that “[t]he Prosecutor may initiate and conduct investigations with respect to the offences defined in article 70 on his or her own initiative [...]”.⁸² As discussed by the Appeals Chamber in the *Bemba et al.* Decision, investigation by the Prosecutor is the norm; an independent investigator would only have to be appointed if a conflict of interest on the part of the Prosecutor – as narrowly defined by the Appeals Chamber – can be shown. The mere involvement of the Prosecutor in the main case was not found to constitute

⁸⁰ See the *Bemba et al.* Decision, *supra* note 77, para 40. See also the transcript of the hearing of 14 January 2011 in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-T-350-Red2-ENG-CT3 WT, p. 17, lines 7-19 where the Chamber reiterates that within the Rome Statute framework it is clear that the Judges have not been given power to remove responsibility from the Prosecution by appointing an independent investigator. See *idem*, lines. 12-14.

⁸¹ Rule 77 of the 50th amended version of the Rules of Procedure and Evidence of the ICTY (8 July 2015) stipulates in relevant part that: “(A) *The Tribunal in the exercise of its inherent power may hold in contempt those who knowingly and wilfully interfere with its administration of justice [...]* (C) *When a Chamber has reason to believe that a person may be in contempt of the Tribunal, it may: (i) direct the Prosecutor to investigate with a view to the preparation and submission of an indictment for contempt; (ii) where the Prosecutor, in the view of the Chamber, has a conflict of interest in respect to the relevant conduct, direct the Registrar to appoint an amicus curiae to investigate the matter and report back to the Chamber as to whether there are sufficient grounds for instigating contempt proceedings; [...]*” (emphasis added). The ICTR Rules of Procedure and Evidence contains a similar provision (see Rule 77). The Rules of Procedure and Evidence of the ICTY and of the ICTR are available at the following addresses:

http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev50_en.pdf and <http://unictr.unmict.org/sites/unictr.org/files/legal-library/150513-rpe-en-fr.pdf>.

An analogous provision is also contained in the most recently amended Rules of Procedure and Evidence of the Mechanism for International Criminal Tribunals (the “MICT”) of 26 September 2016. MICT Rule 90 of Rules of Procedure and Evidence provide that “(A) *The Mechanism in its exercise of its inherent power may, with respect to proceedings before the ICTY, the ICTR, or the Mechanism, hold in contempt those who knowingly and wilfully interfere with the administration of justice, [...]* (C) *When a Chamber or a Single Judge has reason to believe that a person may be in contempt of the ICTY, the ICTR, or the Mechanism, it shall refer the matter to the President who shall designate a Single Judge who may: (i) direct the Prosecutor to investigate the matter with a view to the preparation and submission of an indictment for contempt; (ii) where the Prosecutor, in the view of the Single Judge, has a conflict of interest with respect to the relevant conduct, direct the Registrar to appoint an amicus curiae to investigate the matter and report back to the Single Judge to whether there are sufficient grounds for instigating contempt proceedings; [...]*”. The Rules of Procedure and Evidence of the MICT are available at the following address:

<http://www.unmict.org/sites/default/files/documents/160926-rules-rev2-en.pdf>.

⁸² See Rule 165(1) of the Rules of Procedure and Evidence.

such conflict of interest, as, in the view of the Appeals Chamber, the main case and the Article 70 proceedings were “*separate and independent*” for the purposes of Article 47(2) of the Rome Statute.⁸³ Although every case must, of course, be looked at on its own merits, it is submitted that the circumstances are very similar; no conflict of interest of the Prosecutor is alleged as such; the allegation is rather that knowledge of information pertaining to the main case unfairly skews the scale of the equality of arms in favour of the Prosecutor.

36. It should further be borne in mind that the newly amended Rule 165(4) of the Rules of Procedure and Evidence⁸⁴ provides for the possibility of a joinder of Article 70 proceedings with the case from which they originate, thereby also clearly contradicting the Defence assertion that involvement of the same prosecution team is “*specifically disapproved*” before this Court.⁸⁵ In fact, it was the Appeals Chamber which stated in the very same decision referred to by the Defence that the possibility of a joinder of charges under Article 70 with charges under Articles 5 to 8 of the Rome Statute “*suggests that the drafters of the Rules of Procedure and Evidence envisaged that charges under article 70 of the Statute may be dealt with in the same proceedings as charges for crimes under articles 6 to 8, including by the same Prosecutor*”.⁸⁶ The amendment of the Rule 165 of the Rules of Procedure and Evidence clearly demonstrates this possibility of a joinder.

37. Whereas the new Rule explicitly refers to the duty of the relevant Trial Chamber to, “*as appropriate [...] [take] into the account the rights of the defence before directing that there be a joinder of the charges*”, it follows that the fact that Article 70

⁸³ *Idem*.

⁸⁴ As amended on 10 February 2016, see resolution ICC-ASP/15/Res.5, para. 125. See also the “Report on the Adoption by the Judges of Provisional Amendments to Rule 165 of the Rules of Procedure and Evidence”, 29 February 2016. The report is available at the following address: https://www.icc-cpi.int/iccdocs/PIDS/press/01-03-16_Report-Adoption-by-Judges-Provisional-Amendments_ENG.pdf.

⁸⁵ See the Defence Request, *supra* note 1, para. 47.

⁸⁶ See the *Bemba et al.* Decision, *supra* note 77, para. 35. It should be noted that, at the time this decision was rendered, Rule 165(4) of the Rules had not yet been amended. The Appeals Chamber indeed referred to the provisions of possible joinder under the then applicable Rules 162(2)(c) and 165(4) of the Rules.

investigations – and thus necessarily access to relevant material – are dealt with by the same prosecution team does not, in and of itself, frustrate the principle of due process which “*would undermine the integrity of the judicial process to proceed*”.⁸⁷ The practice of the international *ad hoc* Tribunals to appoint *amici curiae* to investigate allegations of offences against the administration of justice⁸⁸ is therefore of limited guidance in the context of this Court.

38. Moreover, the Defence relies on the Prosecutor’s request in the *Bemba et al.* case to refer intercepted material to independent counsel, yet it selectively quotes the Single Judge’s finding. Indeed, in that instance, the Single Judge concluded that “[t]he Prosecutor seems to have taken the view that the parties to the [telephone calls] might have nurtured a reasonable expectation of privacy or confidentiality and that therefore, at the very minimum, ‘it is not sufficiently clear whether the [telephone calls] are in fact legally non-privileged’. In doing so, she seems to place the case manager on a par with counsel, at least for the purposes of the right to privilege. [...]”.⁸⁹ The Single Judge further considered that the parties to the telephone calls “*were not entitled to any legitimate expectation of privacy or confidentiality*” knowing that the medium they were using was not

⁸⁷ See ICTR, *The Prosecutor v. Jean-Bosco Barayagwiza*, Case No. ICTR-97-19-AR72, Decision (Appeals Chamber), 3 November 1999, para. 73. This decision is available at the following address: <http://opil.ouplaw.com/view/10.1093/law-icl/123ictr99.case.1/law-icl-123ictr99?prd=OPIL#law-icl-123ictr99-judgment-1>.

⁸⁸ See *e.g.* ICTY, *The Prosecutor v. Radislav Brđanin*, Case No. IT-99-36/R77, Order Instigating Proceedings against Milka Maglov, 8 May 2003, p. 2; ICTY, *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.2, Decision on Allegations of Contempt, 21 January 2009, paras. 12 and 14. In the circumstances of the allegations of the accused publishing confidential witness information, the Chamber, after being persuaded that it should initiate proceedings for contempt of the Tribunal considered that it was in the interests of justice that the matter be prosecuted by an *amicus curiae*. See also ICTR, *The Prosecutor v. Augustin Ndirabatswe*, Case No. ICTR-99-54-54-T, Decision on Prosecution Oral Motion for Rule 77 Investigation Related to Witness ANAF, 30 October 2009. It should be noted that while the Chamber found that “*the appointment of an independent investigator would, in the circumstances, best protect the interests of justice*” (para. 14), the parties in that case agreed to an independent investigator being appointed to investigate allegations of interference with a Prosecution witness. See *idem*, paras. 3 and 13.

⁸⁹ See the “Decision on the ‘Prosecution’s request for recordings of telephone calls between Messrs Bemba and Mangenda to be referred to Independent Counsel” (Single Judge), No. ICC-01/05-01/13-147, 17 December 2013, para. 4.

privileged and ultimately found that the measures requested by the Prosecutor were not warranted by the nature and legal status of the telephone calls.⁹⁰

39. The circumstances of the present case also concern the Prosecutor's access to non-privileged telephone conversations, and a similar rationale can undoubtedly be applied. The parties to the conversations purportedly referred to information containing the defence case strategy, Mr Ntaganda's defence, and other confidential information,⁹¹ using means of communication for which they had no legitimate expectation of privacy or confidentiality. Against the background of the Single Judge's determination in the *Bemba et al.* decision referred to *supra* – to date the only guiding case on offences against the administration of justice before the ICC – it was, at the very minimum, legitimate for the Prosecutor in this case to proceed the way she did, namely by investigating the matter internally rather than requesting the material to be referred to independent counsel, as the Defence claims she should have done.⁹²

40. The Prosecutor's way of proceeding in the present case did not offend the applicable rules. It is therefore hard to fathom how, in the absence of any specific reproachable or improper conduct, the accused could have been prejudiced to an extent that a fair trial is no longer feasible. Even if this Chamber were to take a view that it would have been preferable for Prosecution staff involved in these proceedings not to be involved in the Article 70 investigation, such a finding could not, in the submission of the Legal Representatives, rise to the level of a lack of the essential preconditions for a fair trial as required by the applicable standards for ordering a permanent stay of proceedings.⁹³

⁹⁰ *Idem*, para. 3.

⁹¹ See the Defence Request, *supra* note 1, para. 55.

⁹² *Idem*.

⁹³ See *supra* IV-1), paras. 20-29.

41. Likewise, the Legal Representatives submit that the fact that the extent to which the Prosecutor was given access to intercepted telephone calls was unknown to the Chamber and to the Defence for a significant amount of time, does not, in and of itself, amount to a grave breach of the accused's rights to such an extent as to make the proceedings inherently flawed. The material was disclosed to the Prosecution pursuant to the order of the Single Judge assigned to deal with that matter.⁹⁴ Being a professional Judge, it must be assumed that he took all relevant considerations – including any potential prejudice to the Defence – into account before ruling that the Prosecution be provided with *“the totality of the recordings of non-privileged telephone conversations [...] as of 22 March 2013 [...]”*.⁹⁵ Although it may have been unfortunate that even this Chamber was unaware of the extent of the material disclosed, the Prosecution was provided with the material pursuant to proper judicial procedure and for the purpose of *“allowing her to duly pursue her investigations on the alleged violations of article 70 of the Statute pursuant to her statutory duties”*.⁹⁶

4. The interests of justice and the victims

42. Trial Chamber I, in the *Lubanga* case, held that, when considering a request for stay of proceedings, *“[...] the Chamber must weigh the nature of the alleged abuse of process against the fact that only the most serious crimes of concern for the international community as a whole fall under the jurisdiction of the Court”*.⁹⁷

43. In the same vein, it is the responsibility of a relevant Chamber to *“remedy breaches of the process in the interest of justice.”*⁹⁸ It is therefore for *“a Trial Chamber, using the tools available within the trial process itself, to cure the underlying obstacles to a fair trial,*

⁹⁴ See the Defence Request, *supra* note 1, para. 52

⁹⁵ See the “Decision on the Prosecutor’s ‘Request for judicial assistance to obtain evidence for investigation under Article 70’”, *supra* note 3, para. 7.

⁹⁶ *Idem*, para. 7.

⁹⁷ See the “Redacted Decision on the ‘Defence Application Seeking a Permanent Stay of Proceedings’”, *supra* note 45, para. 195 (emphasis added).

⁹⁸ See the *Banda and Jerbo* Decision, *supra* note 36, para. 74. See also the *Lubanga* 2006 Judgment, *supra* note 37, para. 24.

thereby allowing the trial to proceed speedily to a conclusion on its merits. Doing so, rather than resorting to the significantly more drastic remedy of a stay of proceedings, is in the interests, not only of the victims and of the international community as a whole who wish to see justice done, but also of the accused, who is potentially left in limbo, awaiting a decision on the merits of the case against him by the International Criminal Court”.⁹⁹ Moreover, the “fair trial” guarantees shall apply throughout the proceedings and in respect to all the parties and participants, including victims.¹⁰⁰ In this regard, the general approach of the European Court of Human Rights (the “ECtHR”) in the evaluation of complaints of violation of fair trial rights under article 6(1) of the European Convention on Human Rights should also be considered.¹⁰¹

44. The Legal Representatives stress once again that granting the accused a stay of proceedings on the grounds that an Article 70 investigation was initiated by the Prosecution based on the accused’s own conduct, would result in the irreparable prejudice to the victims awaiting justice in this case. Not only would they have awaited prosecution of the accused for many years, but their hopes of seeing this trial conclude would be shattered and any reasonable expectation to remedial justice buried with this case.

⁹⁹ See the *Lubanga* 2010 Judgment, *supra* note 40, para. 60.

¹⁰⁰ In this regard, the Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power adopted by the UN General Assembly on 29 November 1985 calls for enabling victims to access to Justice and to obtain redress and for providing them with fair treatment in this regard. See the Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power adopted by the UN General Assembly on its 96th plenary meeting, UN Doc. A/RES/40/34, 29 November 1985, Principles 4 to 7. The document is available at the following address: <http://www.un.org/documents/ga/res/40/a40r034.htm>.

¹⁰¹ As restated by the Grand Chamber: “[T]he Court’s primary concern under Article 6(1) is to evaluate the overall fairness of the criminal proceedings. [...] In making this assessment the Court will look at the proceedings as a whole having regard to the rights of the defence but also to the interests of the public and the victims that crime is properly prosecuted [...] and, where necessary, to the rights of witnesses [...]. In doing so, the Court will have ‘regard to such factors as the way in which statutory safeguards have been applied, the extent to which procedural opportunities were afforded to the defence to counter handicaps that it laboured under and the manner in which the proceedings as a whole have been conducted by the trial judge’”. See ECtHR, *Al-Khawaja and Tahery v. UK*, Applications Nos. 26766/05 and 22228/06, 15 December 2011, paras. 118 and 144. This decision is available at the following address : <http://hudoc.echr.coe.int/eng?i=001-108072>.

45. Furthermore, the victims have suffered significant disadvantage by being informed of these proceedings only recently. If the accused was allegedly trying to coach or interfere with witnesses, the issue is of high importance for the victims. Indeed, not only the result of these interferences has an impact on the victims, but it also potentially puts the victims at risk.

FOR THE FOREGOING REASONS the Legal Representatives respectfully request that the Chamber dismiss the Defence Request in its entirety.



Dmytro Suprun
Common Legal Representative of the
Victims of the Attacks



Sarah Pellet
Common Legal Representative of the
Former Child soldiers

Dated this 2nd Day of May 2017
At The Hague, The Netherlands