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Date: **11 July 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 'Response to "Prosecution's request to use non-privileged Detention Centre communications during the testimony of Bosco Ntaganda" (ICC-01/04-02/06-1925-Conf) and "Prosecution's supplemental request to use non-privileged Detention Centre communications during the testimony of Bosco Ntaganda" (ICC- ICC-01/04-02/06-1930-Conf)', 6 June 2017, ICC-01/04-02/06-1940

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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Counsel representing Bosco Ntaganda (the "Defence") hereby submit this:

Response to "Prosecution's request to use non-privileged Detention Centre communications during the testimony of Bosco Ntaganda" (ICC-01/04-02/06-1925-Conf)[1] and "Prosecution's supplemental request to use non-privileged Detention Centre communications during the testimony of Bosco Ntaganda" (ICC- ICC-01/04-02/06-1930-Conf)[2]

INTRODUCTION

1. None of the 153 summaries and transcripts of Mr. Ntaganda's telephone conversations recorded at the ICC Detention Centre ("Conversations") are suitable for use during cross-examination.

2. First, the 125 non-*verbatim* summaries are not appropriate for use in court because they are not an exact or accurate record of the words spoken by Mr Ntaganda. These summaries are not accompanied by underlying transcripts which, accordingly, makes it impossible for the Chamber to assess whether Mr Ntaganda did or did not speak certain words, or whether there may be other relevant words not included in the summary. Prior statements of witnesses, as the practice of this and other international courts shows, must be presented in court exactly as spoken or written by the witness. The summaries do not provide that information and, accordingly, are not suitable for use in court.

3. Second, the Prosecution's attempt to reserve the right to use 21 transcripts not yet disclosed, and to use five transcripts disclosed after the deadline prescribed by the Trial Chamber, is inappropriate and prejudicial. The Prosecution is even attempting to reserve the right to use transcripts disclosed only after Mr Ntaganda has made the testimonial affirmation.[3] The

[1] Filed 26 May 2017 ("Request").
[2] Filed 31 May 2017 ("Supplemental Request").
[3] Supplemental Request, para. 20 ("will be completed and disclosed by the end of June").

Prosecution has had more than ample time to select and prepare proper transcripts of the conversations by the deadline set by the Trial Chamber.

4. Third, the Prosecution has not – as required by the Trial Chamber[4] – identified the specific passages to be used, the manner in which they will be used, how those passages are probative of the charges in *this* case, and why resort to the Conversations is necessary. The relevance may be to establish that coaching is probative of "consciousness of guilt" for crimes allegedly committed in 2002 and 2003. Even assuming that the Prosecution establishes any such efforts by Mr Ntaganda in 2013 or 2014, the probative value of such a finding in relation to proof of the crimes charged in this case would be very low. The Prosecution's true purpose appears to be different: purporting to show that Mr Ntaganda has made prior inconsistent statements concerning the *merits* of the case. This is a purpose that was rejected by the *Ngudjolo* Appeals Chamber as inappropriate; was never the purpose for which the Prosecution was given access to the audio-recordings; and is a purpose that would bring the administrative of justice into disrepute.

5. Fourth, the Prosecution has never revealed the criteria used for its so-called "judicious"[5] selection of conversations. No indication has been given of the criteria of selection, let alone how the Prosecution has discharged its duty under Article 54(1)(a) of the Statute to "investigate incriminating and exonerating circumstances equally." The Prosecution has produced transcripts for only 28 out of some 4,500 Conversations – a degree of selectivity that should raise serious concerns that relevant and exculpatory passages will not be identified and presented to the Chamber. Meanwhile, the manner in which the Prosecution has proceeded with its investigation has deprived the Defence of any fair opportunity to review this material. The Prosecution's conduct includes: obtaining unfiltered access to all Conversations at a time when this

[4] Decision, para. 27.
[5] Request, para. 6.

Trial Chamber had imposed a filtering mechanism for such disclosure; making that application *ex parte* at a time when Mr Ntaganda was already under full active monitoring, thereby unjustifiably depriving the Defence of any opportunity to make submissions on the propriety of that access to preserve *this* trial's fairness; failing to disclose that *ex parte* application, or the Conversations, for 15 months; not ensuring a segregation between the Article 70 lawyers and the "Main Case" lawyers, thus defying the guidance on the issue provided by the *Bemba* Appeals Chamber's guidance on the issue;[6] and apparently ignoring this Trial Chamber's similar instruction.[7] The only appropriate remedy in these circumstances, especially when considered in conjunction with the Prosecution's failure to offer specific information and justification about the passages of the Conversations to be used in cross-examination, is to disallow the use of any transcript during the cross-examination of Mr Ntaganda.

6. Fifth, these same considerations apply in respect of the Registry's First and Second Reports, and their underlying materials. In fact, the Prosecution has not identified the specific portions of those materials that it seeks to use; the manner in which it would be used; the purpose for which it would be used; or why it is necessary for the determination of the truth and cannot be replaced using regular cross-examination techniques.

PROCEDURAL HISTORY

7. The Defence hereby adopts by reference the procedural history set out in its request for an order precluding the use of Mr Ntaganda's non-privileged telephone conversations from the Detention Centre.[8] The Chamber decided on 23 May 2017 that a "general ruling allowing or precluding any use of the

[6] *Prosecutor v. Bemba et al.*, Decision on the requests for the Disqualification of the Prosecutor, the Deputy Prosecutor and the entire OTP staff, ICC-01/05-01/13-648-Red3, 21 October 2014, para. 40.
[7] Decision on Defence Request for stay of proceedings with prejudice to the Prosecution, 28 April 2017, ICC-01/04-02/06-1883, para. 61.
[8] ICC-01/04-02/06-1878, paras. 6-29.

Conversations" was at that stage not appropriate, and finding that the issue "should be assessed on a case-by-case basis, in light of the material intended to be used and the specific scope of the purpose of the intended use."[9] On 24 May 2017, the Chamber decided that "any request for the use of the Conversations during the testimony of Mr Ntaganda is to be submitted by Friday 26 May 2017," which could be "supplement[ed]" by 31 May 2017, if necessary, in order to provide any further information on the intended use.

8. The Prosecution has requested permission to use transcripts and translations of 28 Conversations to show that Mr Ntaganda sought to "prevent" unfavourable Prosecution evidence and to "coach potential Defence witnesses";[10] to use 21 further transcripts yet to be created or disclosed;[11] and to use 104 summaries of Conversations, unaccompanied by any *verbatim* record, "necessary to understand the coded language used by the Accused".[12]

SUBMISSIONS

I. <u>Use of Non-Verbatim Summaries is Inappropriate</u>

9. The Prosecution has not explained how the "summaries" that it proposes to use in court have been created. These "summaries," which are written in English or French, are not accompanied by any transcript of the original language recording.

10. A random comparison of the summaries produced in respect of the Conversations for which the Prosecution subsequently produced (purported) *verbatim* transcripts shows the unreliability of the summaries in general. The discrepancies include: a reference in a summary to "I am not in town" with the words "I didn't forget";[13] leaving out words attributed to an interlocutor

[9] Decision, para. 26.
[10] Request, para. 22; Supplemental Request, para. 20.
[11] Request, para. 22; Supplemental Request, para. 20.
[12] Request, para. 22; Supplemental Request para. 20. This response is filed confidential pursuant to Regulation 23 *bis*(2) of the Regulations of the Court as it responds to a filing bearing the same classification.
[13] DRC-OTP-2099-1669, p.1 vs. DRC-OTP-2101-1420, l.6.

in a transcript;[14] leaving out relevant place names in a summary that are reflected in a transcript;[15] wrong translations or wrong interpretations of words, and insertions of words and concepts that do not exist in the transcript;[16] inserting editorial comments about tone and failing to interpret all words in an exchange that change meaning fundamentally;[17] inserting names in the summary that do not exist in the transcript and imputing meanings that are not evident from the words themselves;[18] inserting words or codes in the summaries that do not exist in the transcription;[19] inexplicable changes of sense;[20] and adding the places where people are said to come from.[21] The summaries often leave out substantial portions of the Conversations,[22] raising the possibility that relevant passages have been omitted. This random sampling of discrepancies shows just how unreliable are the summaries, even for the alleged purpose of establishing the meaning of "codes".

11. Further indications of unreliability are provided by the Defence's random comparison of summaries with audios of Conversations for which the Prosecution has produced no transcription. The summary of DRC-OTP-2099-0659 attributes to Mr Ntaganda the words "[REDACTED]", "[REDACTED]", and "[REDACTED]", yet none of these words are to be heard in the audio-recording itself based on the Defence's review.[23]

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[14] DRC-OTP-2099-1669, p. 3 vs. DRC-OTP-2101-1420, l.138-158.
[15] DRC-OTP-2099-1669, p. 4 (summary) vs. DRC-OTP-2101-1420, l. 193-214 (transcript).
[16] DRC-OTP-2099-1433, 00:08:36 -00:09:33 (summary) vs. DRC-OTP-2101-1346, l. 185-189 (transcript).
[17] DRC-OTP-2099-1433, 00:16:01-00:21:25 (summary) ("[REDACTED]. [REDACTED]") vs. DRC-OTP-2101-1346, l. 358-366 (transcript) ("[REDACTED].")
[18] DRC-OTP-2099-0766, p. 1, starting 00:01:00 (summary) inserting "[REDACTED]" vs. DRC-OTP-2101-1224, l.24-42 (transcript). This summary also adds the following comments: [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED] vs. DRC-OTP-2099-0766, p. 2, starting 00:04:46 (summary) inserting brackets at the word "file" vs. DRC-OTP-2101-1224, l.127-132 (transcript).
[19] DRC-OTP-2099-0766, p. 4, starting 00:09:53 (summary) (inserting the term "[REDACTED]" as an apparent code that does not exist in the transcript) vs. DRC-OTP-2101-1224, l.238, 239 (transcript).
[20] DRC-OTP-2099-0766, p. 4, starting 00:11:23 (summary) ("[REDACTED]") vs. DRC-OTP-2101-1224, l.271, 272 (transcript) ("[REDACTED]").
[21] DRC-OTP-2099-0766, p. 7, starting 00:20:40 (summary) vs. DRC-OTP-2101-1224, l. 501, 502 (transcript).
[22] DRC-OTP-2101-1054 vs. DRC-OTP-2099-1320; DRC-OTP-2101-1160 vs. DRC-OTP-2099-1833.
[23] DRC-OTP-2010-0659.

12. The absence of a transcript makes it impossible to accurately or expeditiously verify in court whether particular words were used in the Conversation or to verify whether other words have been left out that may be highly relevant. The absence of a transcript means that no single Conversation can be reviewed in its entirety to ensure that a relevant passage or words has not been left out. The Conversations took place so long ago, and are so numerous, that there is no way that Mr Ntaganda will be able to spontaneously recall the exact words he used. In fact, reading an inaccurate summary is likely to lead to confusion based on inaccurate attribution to him of specific words or propositions. The Prosecution may then be relied upon to accuse Mr Ntaganda of evasiveness on the basis of what may be misrepresentations of his prior words. The Chamber will be unable to verify what words were actually used, let alone know whether relevant words have been left out. Using summaries without a transcript would, accordingly, be unfair and liable to mislead.

13. International courts prohibit use of non-*verbatim* records of words previously spoken by a witness. As stated in *Seselj*, "[w]hen presenting evidence to a witness which he has already mentioned in his testimony or written statement, the parties must avoid paraphrasing what that witness said but must instead directly quote the hearing transcript or the previous deposition and also indicate the page numbers and the relevant lines."[24] The *Stanisic & Zupljanin* Trial Chamber likewise directed the parties to "avoid paraphrasing previous testimony or statements of witnesses" and to instead "quote the directly relevant passage and indicate the exact page numbers and relevant lines."[25] This practice has also been followed in this trial, even when statements of other witnesses are put to a witness on the stand.[26]

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[24] *Prosecutor v. Šešelj*, Order Setting out the Guidelines for the Presentation of Evidence and the Conduct of the Parties During the Trial, 15 November 2007, Annex, para. 18.

[25] *Prosecutor v. Stanišić & Župljanin*, Order on Guidelines on the Admission of Evidence, 10 September 2009, Annex A, para. 17. See also *Popović et al.*, Ordering Concerning Guidelines on the Presentation of Evidence and the Conduct of the Parties During Trial Proceedings, 14 July 2006, para. II(d); *Prlić et al.*, Revised Version of the Decision Adopting Guidelines on Conduct of Trial Proceedings, 28 April 2006, para. II (d); *Karadžić*, Order on the Procedure for the Conduct of Trial, 8 October 2009, Appendix A,

14. The Prosecution's request to use summaries, unaccompanied by any *verbatim* transcript or translation, is improper and should be rejected. Putting those summaries to Mr Ntaganda as if they are an accurate record of his words is misleading. Disputes about what was actually said will be unresolvable. Neither the Defence nor Mr Ntaganda will have any way of knowing if important or relevant words in the same Conversation have been left out of the summary, or expeditiously determining in court whether the summary is accurate. This distorts, rather than contributing, to the truth.

II. The Prosecution Should Not Be Permitted to Add Transcripts and Translations That Were Not Available as of the Deadline Prescribed By the Trial Chamber: 25 That Have Not Yet Been Disclosed, and Five That Were Not Disclosed as of the Trial Chamber's Deadline

15. The Prosecution has possessed the Conversations since September 2015 – almost two years ago. The Prosecution has also long known that it might wish to use the Conversations in cross-examination of witnesses.[27] The testimony of the person who is being prosecuted in this case, which the Prosecution has tried to characterize as an unforeseeable event, offers no justification for the failure to have produced transcripts by the deadlines prescribed by the Chamber.

16. The Chamber has underscored that those deadlines, given the nature of the Conversations and manner in which they were obtained, are critical to preserving the fairness of these proceedings:

> Having considered the totality of the submissions made in relation to the Request, the Chamber considers that it is possible to continue

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para. K; *Tolimir*, Revised Order Concerning Guidelines on the Presentation of Evidence and Conduct of the Parties During Trial, 4 February 2011, Annex, para. 9; *Perišić*, Order for Guidelines on the Admission and Presentation of Evidence and Conduct of Counsel in Court, 29 October 2008, Annex, paras. 4-5; *Stanišić & Simatović*, Order on the procedure for the Conduct of Trial, 6 December 2016, Annex A, para. 17 ("parties shall not interpret or paraphrase what a testifying witness has either previously stated or testified but must quote from the relevant statement or transcript.")

[26] Decision on the conduct of proceedings, 2 June 2015, ICC-01/04-02/06-619, para. 34 ("the parties and participants shall quote directly the relevant passages and give the precise references, including the relevant lines.")

[27] ICC-01/04-02/06-1616, para. 18.

> conducting a fair trial in the present case. Accordingly, the Chamber finds that the threshold required to justify a stay of proceedings has not been met. However, as an alternative measure *to ensure the fair and expeditious conduct of proceedings*, the Chamber decides that the Prosecution shall not be allowed to use the material obtained in the context of the Article 70 proceedings during the Defence's presentation of evidence unless specifically authorised by the Chamber as necessary for the determination of the truth pursuant to its duty under Article 69(3) of the Statute, upon receipt of a substantiated request *to be filed sufficiently in advance of the intended use*.[28]

17. The Trial Chamber subsequently specified that this meant "within five days of notification of the forthcoming witnesses list in which any of the witnesses with whom the Prosecution intends to use any of the Conversations is listed."[29] On 24 May 2017, the Trial Chamber imposed a deadline for the Prosecution to provide notice of the materials to be used during evidential block 2:

> [A]ny request for the use of the Conversations during the testimony of Mr Ntaganda is to be submitted by Friday 26 May 2017. However, noting the circumstances of the testimony of the accused, as well as the Prosecution's intention to incorporate the further directions provided in the "Decision on the Defence request to preclude the use of certain material" (ICC-01/04-02/06-1918) in its request, the Chamber decides that the Prosecution may supplement its request by 31 May 2017, if necessary, in order to provide any further information on the intended use.[30]

18. The purpose of this deadline is evidently to ensure that the Chamber has enough time, given the threat posed to the fairness of the proceedings, to carefully scrutinise and appropriately curtail the use of the Conversations. Directly contrary to this purpose, the Prosecution has now announced that 21 additional transcripts and translations will be disclosed "by the end of June".[31] The Prosecution has also requested that the Defence be embargoed from having any discussions with Mr Ntaganda as of the start of his testimony on

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[28] Decision on Defence request for stay of proceedings with prejudice to the Prosecution, 28 April 2017, ICC-01/04-02/06-1883 ("Decision on Request for Stay of Proceedings"), para. 61 (italics added).
[29] Decision, para. 28.
[30] Trial Chamber email to the parties, 24 May 2017, 11.46 am.
[31] Supplemental Request, para. 20.

14 June 2017.[32] The timing of the disclosure, accordingly, appears to be a calculated attempt to obstruct the Defence's ability to assess the translations, or Mr Ntaganda's ability to review any purported transcript.

19. The scale of the obstruction is substantial: the number of transcripts that the Prosecution has not yet disclosed is 43% of the total. A further five transcripts were disclosed after the 26 May 2017 deadline.[33] This means that, in total, more than **half** of all the transcripts of Conversations have been – or will be – disclosed after the deadline set by the Chamber. The degree of non-compliance seriously impairs the Defence's opportunity to prepare. None of these twenty-six late-disclosed transcripts should, accordingly, be permitted to be used.

20. The Prosecution's attempt to blame its late disclosure on the Defence[34] is inappropriate and unwarranted. First, the additional photos and maps to be used with Mr Ntaganda provide no information of which the Prosecution should not already be aware. They are, in any event, manifestly irrelevant to the selection of Conversations. Second, the impossibility of setting out in detail all aspects of Mr Ntaganda's testimony in a summary does not give the Prosecution *carte blanche* to ignore the Chamber's deadlines. The Prosecution should know its case, and should have long ago prepared and disclosed any relevant Conversations.

21. Third, the Prosecution asserts that there have been disclosure violations in respect of Witness D-0210 – in particular, asserting that the Chamber found D-0210's summary deficient.[35] The contrary is true.[36] The Defence went beyond

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[32] Public redacted version of "Prosecution's request for orders concerning the Accused's testimony", 26 May 2017, ICC-01/04-02/06-1924-Red, 26 May 2017, paras. 26-27.

[33] DRC-OTP-2091-0432, DRC-OTP-2094-0463, DRC-OTP-2094-0466, DRC-OTP-2094-0467, DRC-OTP-2094-0468, disclosed in Trial INCR Package 124, on 29 May 2017.

[34] Request, paras. 6, 41, 42.

[35] T-206 10:25-11:3 ("And second, the Chamber issued very specific instruction on the level of detail that the summaries should the Defence choose to disclose summaries rather than statements should contain and the directions and orders of the Chamber are to provide level of detail than the Defence's summaries provided.")

its obligations and produced a statement for Witness D-0210 signed on [REDACTED] May 2017. The Defence decided the next day, upon reviewing the witness's statement, that the statement and the witness's electoral card might be used as evidence. The statement and the electoral card, accordingly, became disclosable under Rule 78. Courtesy disclosure of the statement and electoral card was effected that very day, along with the list of documents to be used with the witness. The document list and disclosure for D-0210 was provided as soon as practically possible, and four full days before the start of D-0210's testimony. The Prosecution, by way of comparison, **frequently** amended its lists of exhibits to be used with witnesses after the five-day deadline set out in the Conduct of Proceedings decision; **frequently** disclosed those documents for the first time after the five-day deadline; and **sometimes** even disclosed highly relevant documents on the morning of a witness's testimony.[37] The Prosecution, for example, added (and disclosed for the first time) important documents relevant to P-0883 on the morning of the day of her testimony.[38] The Prosecution added 2,251 documents to its exhibit list after the 2 March 2015 deadline for filing its exhibit list.

22. The Prosecution also, without any foundation at all, suggested that there were grounds to suspect that Defence investigators had pressured Witness D-0210 in the same way that Witness P-0907 claimed he had been pressured by a different Defence investigator.[39] It then waited until 11.27 am on the day of D-0210's cross-examination[40] to notify the Defence of its intention to use two documents on the basis of which it sought the lifting of the redaction of D-

[36] Email from the Chamber to the Parties and Participants, 9 May 2017, 08:40 ("is now sufficient to enable the Prosecution to prepare meaningfully for its cross examinations and that no further order from the Chamber is required.")
[37] *See e.g.* T-167 79:3 – 86:12. (adding and disclosing at least four important documents to the list to be used with Witness P-0883).
[38] T-167 79:3 – 86:12.
[39] T-206 7:17-21("given the issues that rose in relation to P-907 having felt some amount of pressure by bring interviewed in those circumstances and having the sole interpretation be done in that manner and that a qualified interpretation be provided.")
[40] Email from OTP to Trial Chamber VI Communications, 11:27 am, 30 May 2017.

0210's [REDACTED]'s name. The delay was deliberate, as the Prosecution offered submissions to the Chamber about the document 24 minutes before the Prosecution amended its list of documents.[41]

23. The Prosecution's allegations of late disclosure in respect of D-0172 are likewise without any merit. The Defence obtained D-0172's electoral card on [REDACTED] May 2017. The card was disclosed on [REDACTED] May 2017. This was still seven days before the start of the witness's anticipated testimony. The surname by which the Defence had previously known the witness – and which was repeated in a Defence email to the Prosecution on [REDACTED] May 2017 in absence of information having yet been transmitted back from the field – had come from the Prosecution's own witness.[42] The Prosecution, by comparison, disclosed P-0761's electoral card three days before the start of her testimony.[43]

24. The Prosecution's attempt to justify non-compliance with the Chamber's deadline on the basis of these trivial disclosure issues demonstrates a lack of regard of the importance of the deadlines imposed by the Chamber in respect of the Conversations. The Prosecution has had the Conversations since September 2015. The Trial Chamber has underscored that it needs adequate time to carefully scrutinise and constrain the use of material that poses a danger to the integrity of these proceedings. The Defence also needs substantial time to attempt to verify the transcriptions and translations. The Prosecution's disregard of the Chamber's deadline, combined with its apparent defiance of the Chamber's instruction to segregate its Article 70 investigation from this case, undermines the fairness of the trial and

[41] *See* T-207 24:14-23.
[42] *See e.g.* DRC-OTP-0174-0025, para. 41.
[43] Email from OTP to Defence, 17 November 2016, 18:32; email from OTP to Trial Chamber VI Communications, 18 November 12:36. The witness commenced her testimony on 20 November 2016. Item 18 on the Prosecution's list – "Identifying Document" – was added to the Prosecution's list after the expiry of the five day deadline set out in ICC-01/04-02/06-619 at paragraph 32. Courtesy disclosure of DRC-OTP-2098-0115 was disclosed on 22 November 2016.

undermines the procedures whose purpose is to contribute to the truth. The appropriate remedy is to deny the Prosecution's attempt to use any of the twenty-six late disclosed transcripts.

III. The Prosecution Has Failed to Articulate the Purpose, Manner or Specific Content of the Conversations to be Used and Has Implied that it Wishes to Use the Conversations for the Improper Purpose of Establishing Prior Inconsistent Statements

25. The Prosecution's submissions are ambiguous as to the purpose for which it wishes to use the Conversations. The Conversations could be used for two potential purposes: (i) as evidence that Mr Ntaganda coached or intimidated witnesses which, in turn, could be treated as circumstantial evidence of consciousness of guilt; or (ii) as containing prior inconsistent statements on the merits of the case which, in turn, could be used to impeach his credibility.

26. These two purposes are addressed in the *Ngudjolo* Appeals Judgment. The Appeal Chamber found that the Trial Chamber had erred in not allowing reports of conversations to be used in respect of the former purpose.[44] The purpose of the Prosecution's questions that had been prevented, according to the Appeals Chamber, was to "to elicit from Mr Ngudjolo and Witness D03-88 whether witnesses had been intimidated, coached or otherwise induced to testify in a certain way."[45] The Prosecution's complaint was that it had been:

> unable to question [Ngudjolo] "on his (and his associates) efforts" to locate protected Prosecution witnesses and their family members "in order to pressure them to recant or refuse to cooperate" or on "his efforts to ensure that Defence witnesses presented a consistent and approved line when testifying on his behalf."[46]

The Appeals Chamber held, accordingly, that the Trial Chamber had erred in so far as it had not permitted the Prosecutor to use the records of Mr Ngudjolo's conversations for this purpose.

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[44] *Ngudjolo* AJ, ara. 274.
[45] *Ngudjolo* AJ, para. 276.
[46] *Ngudjolo* AJ, para. 274.

27. The Appeal's Chamber's finding of error was premised on the understanding that the records of the conversations "had previously been screened as regards their content and information considered to relate to Mr Ngudjolo's private life or his defence strategy was withheld from the Prosecutor *and consequently could therefore not have been used during cross-examination*."[47] The Appeals Chamber specifically upheld the Trial Chamber's decision to withhold that information.[48] Accordingly, the twin findings of the *Ngudjolo* Appeal Judgment is that the Trial Chamber erred by declining to allow conversations strictly confined to coaching to be used during cross-examination, but did not err in refusing to allow the Prosecution to cross-examine on – or even have access – portions of the transcripts concerning "defence strategy."

28. The Prosecution in this case is attempting to go further than it sought to go in the *Ngudjolo* case, and further than the *Ngudjolo* Appeals Chamber would have allowed. The Prosecution – unlike in *Ngudjolo* – has unfiltered versions of Mr Ntaganda's telephone conversations. Indeed, it has some 4,500 such Conversations, comared to the handful in *Ngudjolo*. The Prosecution implies that it wishes to use these recordings as prior inconsistent statements in relation to the merits of this case, claiming that it must be allowed to "challenge the Accused's version of events using the underlying Conversations when it can show – through use of the Accused's own words – that he is presented a distorted version of events to the Chamber."[49] The meaning of the phrase "distorted version of events" becomes clearer in the Supplemental Request, which asserts that the Prosecution must be granted wide latitude in the choice of Conversations because "[w]hile the Prosecution anticipates that the Accused may provide evidence that runs counter to the evidence elicited by the Prosecution, it is not clear precisely what version of events he will proffer.[50] The implication, accordingly, is that the Prosecution wishes to use the

[47] *Ngudjolo* AJ, para. 276 (italics added).
[48] *Ngudjolo* AJ, para. 269.
[49] Request, para, 33. Supplemental Request, para. 30.
[50] Request, para. 41.

Conversations not in order to show coaching, but in order to contracit the "version of events" that he offers in his testimony.

29. This should not be permitted. The Single Judge did not authorize unfiltered access to the Conversations for the purposes of investigating the charges in the Main Case. Access was granted to investigate offences under Article 70. The Prosecution is, of course, entitled to pursue any Article 70 investigation it wishes; what should not be permitted, however, is for an Article 70 investigation to be used as a means to gather Main Case evidence. The lack of Chinese walls within the Prosecution increases this danger. Allowing the Prosecution to now use the information gathered in the Article 70 investigation as prior inconsistent statements in relation to the charges in the Main Case – not Article 70 charges – would be unprecedented in the annals of international criminal justice and would be antithetical to, and would seriously damage, the integrity of the proceedings.

30. This Trial Chamber has already recognised this danger:

> The Chamber is of the view that, particularly in light of the approach adopted by the Chamber in the context of the restrictions litigation, and notably its decision to prevent information that appeared to relate "solely to the Defence case, or Defence investigations, with no relevance to the [said] litigation" from going to the Prosecution, *it would have been preferable for the Prosecution to have engaged a separate team to conduct the Article 70 investigations flowing from the Ntaganda case*.[51]

The Trial Chamber went on to "urge[] the Prosecution to have any further review of the Conversations conducted by members of the Prosecution who are not, or are no longer, part of the trial team of the *Ntaganda* case."[52] No indication has been provided that the Prosecution has taken any such steps.

31. The only remedy now available, in light of the Prosecution's non-compliance with this Trial Chamber's guidance and the evident unrestricted flow of information between the Article 70 and Article 5 cases, is to stop the

[51] Decision on Stay of Proceedings, para. 32 (italics added).
[52] Decision on Stay of Proceedings, para. 61.

Prosecution from using any Conversation where the real purpose is to show that Mr Ntaganda made a prior inconsistent statement in relation to the merits of the case.

32. This is likely to often or always be the Prosecution's real purpose. Indeed, whether coaching has occurred will – in many if not all circumstances – depend on establishing whether Mr Ntaganda believed the propositions he was discussing with his interlocutors were true or untrue. For example, in the conversation of [REDACTED] August 2013, Mr Ntaganda talks to D-0004 about a number of events. Mr Ntaganda is not sure about the timing of certain events, who was present, or how events unfolded. He does indicate a narrative of events of which he is aware and openly asks D-0004 for assistance in recalling more specific details. Whether or not this conversation amounts to coaching cannot be resolved independent of the truth or falsity of the various propositions under discussion: if the propositions are believed by the conversants to be truthful, then it is not an offence under Article 70; if, however, the conversants know that the propositions under discussion are false, then it could constitute an offence under Article 70.

33. The Prosecution, accordingly, will undoubtedly try to persuade the Trial Chamber to be allowed to put these passages to Mr Ntaganda on the basis of the assertion that they are false and that, accordingly, the passages are probative of coaching. The problem, however, is that the Prosecution can be relied upon to skilfully highlight – even if only implicitly – any inconsistencies between the factual propositions in the Conversation and testimony that Mr. Ntaganda gives in the courtroom. This will achieve an improper purpose by way of an ostensibly permissible purpose.

34. Precision is required to avoid the cross-examination devolving into this improper exercise. For example, if the Prosecution can point to specific passages of the Conversations that do not depend on any evaluation of the

truth or falsity of the propositions under discussion, then such passages might be considered more suitable for use during cross-examination. The Prosecution, however, has not done so. For example, in relation to the conversation of [REDACTED] August 2013, the Prosecution declares only that the "specific purpose" is "Accused's instructions to coach a potential Defence witness; Witness coaching by the Accused; Credibility of Defence witness D-0004."[53] As with many of the other transcripts, the Prosecution does not specify any passages from the Conversation of [REDACTED] August 2013 for use, and merely gives a citation for almost the entire transcript.

35. Any claim by the Prosecution that discussions about the merits of the Main Case are probative of coaching should also be rejected. The conversation between Mr Ntaganda and D-0004 is only coaching if the Chamber finds that the content of their conversations is false, and that they knew it was false at the time, rather than a genuine attempt to piece together information about a long ago event. The Chamber is simply not in a position to make this determination until it makes a determination about the merits of the Main Case – which is the very purpose of the trial. The cart is placed before the horse and, while that traffic jam is being cleared away, the Prosecution will do all it can – as it has even suggested in its filings – to achieve its primary purpose – attempting to prove prior inconsistent statements on the merits.

36. Finally, theven if the allegations of intimidation and coaching are proven, the probative value of that fact is extremely low, for several reasons. First, Mr Ntaganda in 2013 and 2014 was in the hands of an unfamiliar legal system charged with crimes that occurred more than a decade before. Resorting to misguided measures of investigation or obtaining information may reflect those circumstances, rather than a consciousness of guilt. Second, the lapse of time between the charged events and the acts alleged to show consciousness of guilt is so great that it has virtually no probative value. Finally,

[53] Supplemental Request, Annex A, line 21.

consciousness of guilt evidence is notoriously liable to induce error and is often far more prejudicial than probative.[54] Indeed, the Trial Chamber has already recognized its low probative value:

> The Chamber therefore considers that the Material is not admissible through the 'bar table", as its probative value at this stage, due to its nature and lack of direct materiality to the charges in the case, is low when balanced with the potential prejudice to the accused.[55]

37. The Prosecution has not shown that any of the transcripts that it proposes are suitable for use on cross-examination. The potential truth-finding benefit of using the Conversations is extremely low, whereas the prejudice is high. The absence of specific submissions that the Prosecution has not discharged the burden placed on it by the Chamber of identifying specific passages for use, or why the use of those passages is justified.

IV. The Selectivity of the Records Is Potentially Highly Misleading and, Given the Extended Concealment of the Article 70 Investigation, the Defence Is Not In a Position to Counter-Act This Prejudice

38. The Prosecution claims that it has made "a judicious selection of the Conversations that reveal the Accused's coaching and interference scheme, which will impact upon the Chamber's assessment of his credibility."[56] The Prosecution has not, however, revealed the criteria applied in making this "judicious" selection of a tiny sample from the some 4,500 Conversations that it has in its possession. The Prosecution has also not revealed whether it has produced any transcripts of Conversations that are "exonerating," or what effort is had made, if any, to comply with its obligation to search for exonerating Conversations under Article 54(1)(a). The Prosecution has not disclosed to the Defence a single transcript of a Conversation that it says it will

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[54] *R. v. White*, [1998] 2 S.C.R. 72 (Supreme Court of Canada), para.22 ("[i]t has been recognized, however, that when evidence of post-offence conduct is introduced to support an inference of guilt it is highly ambiguous and susceptible to jury error.")

[55] Decision on Prosecution's request pursuant to Regulation 35 for an extension of time to submit evidence, 23 February 2017, ICC-01/04-02/06-1799, para. 6.

[56] Requests, para. 6.

not use during Mr. Ntaganda, but that is disclosed as exculpatory information under Article 67(2).

39. The extremely selective nature of the Conversations that have been transformed into transcripts – to say nothing of the selectivity inherent in the summaries – creates a serious risk of prejudice and of giving a misleading and distorted picture of the Conversations as a whole. The Defence has no way, for example, of conducting word searches to determine whether any alleged coaching was followed or preceded by conversations that might show that what was intended was not coaching. The danger of prejudice is heightened by the Prosecution conduct in this case that has impeded the Defence's capacity to master the content of the Conversations: making an *ex parte* application to a Single Judge at a time when the Accused was already subject to active monitoring; keeping that investigation secret from the Defence August 2015 until November 2016; failing to disclose the fruits of that investigation to the Defence from September 2015 until November 2016 despite recognizing that the information obtained was disclosable under Rule 77; and not ensuring a segregation between the Article 70 lawyers and the "Main Case" lawyers despite the *Bemba* Appeals Chamber's and this Trial Chamber's guidance on the issue.[57]

40. It is no answer to these concerns to say that the Defence or Mr Ntaganda can review the Conversations themselves. The Conversations are too numerous and the time available to the Defence too short to be in a position to do so, and Defence requests for more time for this purpose have been rejected.[58] Even if the Defence were able to do so, the ability to produce transcripts is even less

[57] *Prosecutor v. Bemba et al.*, Decision on the requests for the Disqualification of the Prosecutor, the Deputy Prosecutor and the entire OTP staff, ICC-01/05-01/13-648-Red3, 21 October 2014, para. 40; Decision on Defence Request for stay of proceedings with prejudice to the Prosecution, 28 April 2017, ICC-01/04-02/06-1883, para. 61 ("[t]he Chamber also urges the Prosecution to have any further review of the Conversations conducted by members of the Prosecution who are not, or are no longer, part of the trial team of the *Ntaganda* case.")

[58] Decision on Defence request for extension of time to prepare for its presentation of evidence, 22 March 2017, ICC-01/04-02/06-1832, paras. 17-18.

than the capacity of the Prosecution – which has only managed to produce 28 transcripts to date. This places Mr Ntaganda at a severe disadvantage and risks the Defence not being able to identify and present exculpatory information that may exist.

41. The Prosecution claims that it is only "acting in the public interest", that this is "an issue of establishing the truth",[59] and purports to quote the *Ngudjolo* Appeals Judgment as saying that the Trial Chamber is under a "'heightened duty'" to treat Mr Ntaganda's testimony with "scepticism."[60] The Prosecution, in effect, is saying that the allegations of coaching mean that Mr Ntaganda's testimony about the merits of this should be treated with a higher level of mistrust, and that the Prosecution should be given more latitude than usual to attack Mr Ntaganda's character and conduct. The Prosecution misquotes the *Ngudjolo* Appeals Judgment which reads as follows:

> As noted above, the Appeals Chamber considers that the determination of the truth is a central aspect of any criminal trial to which not only the Prosecutor, but also a Trial Chamber is under an obligation to actively contribute. The Appeals Chamber further considers that a Trial Chamber's role in this regard is heightened in circumstances where the Chamber is aware of possible efforts to distort witness testimony or the truth finding process.[61]

The *Ngudjolo* Appeals Judgment found that the Trial Chamber's "heightened" "role" militated in favour of allowing the Prosecution to present the basis for allegations of coaching. The *Ngudjolo* Appeals Chamber does not use the expression "heightened duty," let alone a "heightened duty" to treat the Accused's testimony with scepticism. These submissions are no more than an unwarranted attempt to induce the Chamber to have a pre-conception of mistrust of Mr. Ntaganda which, in turn, would be based on a wholly exaggerated reliance on "consciousness of guilt" evidence.

[59] Request, para.36
[60] Requests, para. 34.
[61] *Ngudjolo* AJ, para. 275.

42. The Prosecution's failure to promptly disclose its Article 70 investigations and the Conversations, the highly selective nature of the transcripts that it has produced, the failure to reveal any criteria selecting transcripts, the failure to produce a single transcript as exonerating or exculpatory, its failure to segregate the Article 70 and Main Case teams despite clear guidance from the Appeals Chamber and the Trial Chamber to do so, the lack of specificity in its submissions – as required by the Chamber – concerning the excerpts that its wishes to use, and its failure to forthrightly declare its intention to use the Conversations as prior inconsistent statements, have all undermined reliance on the Conversations as a means of discovering the truth.

43. This Trial Chamber is adjudicating the charges concerning events in 2002 and 2003. It is not adjudicating the alleged Article 70 offences from 2013 and 2014. The Appeals Chamber has correctly held that trial chambers should be alert to the possibility of testimony having been coached, and that information narrowly-tailored to that purpose may be put to a witness. The Appeals Chamber has not encouraged a trial being hijacked by Article 70 allegations and evidence; has not encouraged treating an Accused's testimony on the merits with "scepticism" because of such allegations; and has not encouraged indulging procedures that exaggerate *post facto* "consciousness of guilt" conduct. The truth is best served, instead, by hearing direct evidence about those events and testing the evidence according to the usual techniques of cross-examination that show whether that testimony is reliable or not.

V. The Prosecution Has Not Justified the Use the Registry Reports

44. The Prosecution has offered no submissions on which specific portions of the First or Second Registry reports it wishes to use, or why such use is justified.[62] The Prosecution's request to use these materials, accordingly, should be rejected *in limine*.

[62] Supplemental Request, para. 20.

45. In any event, the same reasons described above militate against permitting the use of the Registry reports or summaries attached thereto. In many if not all cases, the Registry has not produced a transcript in the original language of the Conversation. This makes it impossible for the parties and the Accused to follow the Conversations in the same language; raises doubts about the reliability of the translations; and makes it impossible to put the specific words of Mr Ntaganda to him accurately. This consideration alone, for the reasons previously described, precludes their use in the courtroom.

46. The same reasons of substance described above also militate against the use of the Registry reports and related reports. Allowing the Prosecution to put those discussions about the merits of the case to Mr Ntaganda will, in practice, turn the exercise into an effort to impeach Mr Ntaganda's testimony based on prior inconsistent statements. This will divert the Trial Chamber's fact-finding function from its proper focus, allow the Conversations to be used for a purpose that was never intended, and take the Trial Chamber far outside of the purpose foreseen as proper by the *Ngudjolo* Appeals Chamber.

VI. The Duty to Put the Case Is Irrelevant to the Issue At Hand

47. The Prosecution misunderstands the scope and purpose of the requirement that a party "put its case" to a witness on cross-examination.[63] The requirement of putting a proposition to a witness does not alter or eliminate the usual rules regarding what may permissibly be presented to a witness. For example, the Prosecution would not be permitted to put manifestly inadmissible information to a witness based merely on the principle set out in ICTY Rule 90(H)(ii). The purpose of this rule, rather, is to ensure that a witness has an opportunity to comment upon information that is *properly* admissible that is *contrary* to his or her testimony. Rule 90(H)(ii) and its correlative practice at the ICC is not a rule of evidence, nor is it a rule expanding the

[63] Request, paras. 24-32.

usual rules governing what documents or information may be put to a witness on the stand, or in what form.

48. The Prosecution's reliance on the *Bemba et al*. case[64] is misplaced. The alleged "cover-up" in that case was concurrent with the commission of the offences of which they were supposedly probative. Further, the cover-up in the *Bemba et al.* case was, according to the Trial Chamber, integral to the continuing execution and the *modus operandi* of the alleged Article 70 offences in the *Bemba et al*. case.[65] The "cover-up" alleged against Mr Ntaganda, on the other hand, is alleged to have occurred ten years later, cannot be deemed integral to the execution of the crimes, and evidently is not probative of any *modus operandi* by which the crimes are alleged to have been committed. The Prosecution's reliance on the *Bemba et al*. case is, accordingly, misplaced.

VII. Six Transcripts, In Whole or In Part, Are In a Language that the Defence Cannot Analyse

49. The Defence has not been provided with any translation capacity by the Registry in respect of Kihema. Mr Ntaganda does not master this language, despite having attempted to use this language in these six Conversations that the Prosecution now wishes to use during cross-examination.[66] The Defence requires a properly qualified interpreter to be in a position to assess the accuracy of the transcriptions and translations, and to be in a position to discuss their content with Mr Ntaganda. In the absence of these resources, the Prosecution request to use these six Conversations should be denied.

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[64] Supplemental Request, para. 28.
[65] *Bemba et al*. TJ, paras. 770-801.
[66] DRC-OTP-2089-1233, Kihema/Swahili (3); DRC-OTP-2089-1238, Kihema/Swahili (4); DRC-OTP-2091-0432, Kihema/Swahili (9); DRC-OTP-2091-0482, Kihema/Swahili (12); DRC-OTP-2094-0217, Kihema (17); DRC-OTP-2094-0222, Kihema (19).

CONCLUSION

50. Finding the truth is not always served by disregarding proper procedures and rules. On the contrary, the rules of procedure and evidence, and the principles of relevance and probative value, are designed to ensure that the focus remains on information and evidence that actually helps in determining – rather than distracting from or obscuring – the truth. Some rules and rights also exist in order to preserve the dignity and the basic autonomy of the accused person which are essential to the fairness of the proceedings and, in the long run, to the institutional integrity of any justice system.

51. This Trial Chamber is here to adjudicate the crimes alleged to have occurred in 2002 and 2003. This is not a trial about whether Article 70 offences occurred. Even assuming Mr Ntaganda committed any Article 70 offence, this would have very low probative value in relation to the crimes charged. Meanwhile, allowing the Prosecution to use the Conversations risks diverting the proper focus of this trial and damaging its integrity. The Prosecution's submissions have done nothing to allay those concerns. On the contrary, the Prosecution has offered none of the specific submissions that were required by the Trial Chamber in order to preserve trial fairness. The only appropriate remedy in the circumstances, given the burden on the Prosecution to comply with the Chamber's orders, is to deny the Prosecution's request to use any of the Conversations.

RELIEF SOUGHT

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

DENY the Prosecution request to use summaries of the Conversations as they do not constitute a *verbatim* record of Mr. Ntaganda's words and conversations;

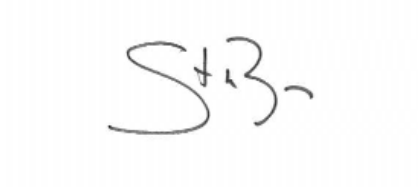
DENY the Prosecution request to use any of the twenty-one Conversations for which a transcript has not yet been produced,[67] or the five Conversations[68] for which transcripts were disclosed after the deadline imposed by the Trial Chamber;

DENY the Prosecution request to use six Conversations for which the Defence does not have the capacity of accurate translation;[69]

DENY the use of any of the Conversations for which a verbatim transcript was not disclosed to the Defence as of the 26 May 2017 deadline;

DENY the Prosecution request to use any of the twenty-eight conversations for which a *verbatim* transcript was disclosed by the deadline of 26 May 2017, but whose use has not been justified by the Prosecution, and which would otherwise damage the integrity of the proceedings, as described above.

RESPECTFULLY SUBMITTED ON THIS 11TH DAY OF JULY 2017



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[67] Supplemental Request, Annex A, Items 29 through 49.
[68] DRC-OTP-2091-0432, DRC-OTP-2094-0463, DRC-OTP-2094-0466, DRC-OTP-2094-0467, DRC-OTP-2094-0468.
[69] DRC-OTP-2089-1233; DRC-OTP-2089-1238; DRC-OTP-2091-0432; DRC-OTP-2091-0482; DRC-OTP-2094-0217; DRC-OTP-2094-0222.