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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 "Request on behalf of Mr Ntaganda seeking an extension of time for the preparation of the case for the Defence" dated 6 March 2017 (ICC-01/04-02/06-1815-Conf)

Source: Defence Team of Mr Bosco Ntaganda

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

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Section**

Further to the “Decision supplementing the Decision on the Conduct of Proceedings (ICC-01/04-02/06-619) and providing directions related to preparations for the presentation of evidence by the Defence” issued by Trial Chamber VI (“Chamber”) of the International Criminal Court (“Court”) on 30 January 2017 (“Decision”),¹ Counsel representing Mr Ntaganda (“Defence”) hereby submit this:

Request on behalf of Mr Ntaganda seeking an extension of time for the preparation of the case for the Defence

“Defence Request”

OVERVIEW

1. The Defence hereby moves the Chamber, pursuant to Regulation 35(1) of the Regulations of the Court (‘RoC’), to grant an extension of time for the preparation of the case for the Defence.
2. Although the date on which the Prosecution will rest its case is not known, on 30 January 2017, the Chamber informed the parties and participants that the presentation of the case for the Defence is to begin no later than one month following the date set for the submission by the Defence of its final list of witnesses, *i.e* 26 May 2017.
3. The date set by the Chamber, *proprio motu* and without consulting the parties, impedes on the right of the Accused to have adequate time and facilities for the preparation of the defence as it does not allow Mr Ntaganda the minimum time necessary to fulfil applicable disclosure obligations and accomplish essential tasks before beginning the presentation of his defence.
4. In particular, it is not possible for the Defence to review and analyse the material disclosed by the Prosecution as a result of its Article 70 investigation, which constitutes an imperative task that must be completed before a decision can be made

¹ ICC-01/04-02/06-1757.

regarding the witnesses to be called and before disclosing its final list of witnesses by 26 April 2017.

5. The time available pursuant to the current schedule is also insufficient to finalise the statements or summaries of the evidence expected to be adduced by the witnesses selected, before the date set for disclosure of this material to the Prosecution.

6. This situation is further compounded by the review, analysis, and investigation of the information disclosed by the Legal Representative of Victims ('LRV') that must be conducted before the testimony of the first victim on 10 April 2017.

7. A minimum period of three additional months is necessary to allow the Defence to complete the imperative, necessary, and reasonable tasks to be performed before the beginning of the presentation of the case for the Defence.

8. Adjudication of this Defence Request must take into consideration the circumstances in which the Defence has had to perform the reasonable and necessary tasks associated with the effective representation of Mr Ntaganda since the Chamber issued its "Order Scheduling a Status Conference and Setting the Commencement Date for the Trial" setting 2 June 2015 as the date for the start of trial.²

9. This Defence Request should not be adjudicated according to the standard of reconsideration, if only because the Defence has never been heard on these issues. In any event, should the Chamber so decide, the Defence submits that reconsideration would be justified as the Chamber Decision arises from new facts and is necessary to prevent an injustice.

² ICC-01/04-02/06-382-Corr.

SUBMISSIONS

I. Reasons related to the disclosure of the conversations

10. The review and analysis of all non-privileged telephone conversations of Mr Lubanga and Mr Ntaganda from the Court's Detention Centre from 22 March 2013 onwards ('Conversations' and 'Detention Centre', respectively), commenced in January 2017 with the arrival of new Defence team members and is on-going. As previously noted by the Registry and the Office of the Prosecutor ('Prosecution'), this review exercise is extremely time-consuming and resource intensive. As such, it is now evident that this review will not be completed by the time the presentation of evidence for the Defence is currently scheduled to commence, [REDACTED].³

11. The Defence submits, however, that a full review of the Conversations is essential before the Defence can start calling its first witness. The Chamber itself has acknowledged that "[i]t is undisputed that the Defence must have the opportunity to review the material to the extent relevant, as well as to consider the circumstances of the Prosecution's access to the material, and thereafter, to seek remedies for any such concrete prejudice which may have arisen".⁴ The Defence cannot select the witnesses to be called, let alone communicate this information to the Prosecution, until the full review of all material disclosed as a result of its Article 70 investigation.

12. Such prerequisite became concrete and inescapable when the Prosecution took active steps to introduce the Conversations it obtained as a result of the Article 70 investigation, and summaries thereof, into the ambit of this trial.⁵

13. Furthermore, the highly unreliable nature of the summaries produced by the Prosecution makes it absolutely critical for the Defence to i) review and analyse each and every audio-recording in the original language; and ii) where summaries have

³ [REDACTED].

⁴ ICC-01/04-02/06-T-159-CONF-ENG ("T-159"), p.5 ln.8-11.

⁵ ICC-01/04-02/06-1769; ICC-01/04-02/06-1783-Red.

been prepared by the Prosecution, review these summaries against the relevant audio-recording.

A. Procedural background

14. On 2 September 2015, the trial of Mr Ntaganda began. 28 days later, the Prosecution obtained access to all of the Conversations. Access to this material was ordered pursuant to a decision of the Single Judge of Pre-Trial Chamber I without the knowledge of this Chamber⁶ and without the implementation of any independent screening mechanism to ensure that only information relevant to the alleged Article 70 breaches was being transmitted to the Prosecution team in this case.⁷

15. On 7 November 2016, the Prosecution informed the Defence of the material in its possession and that an Article 70 investigation had been underway for the previous 13 months. The Prosecution indicated that it would shortly be disclosing more than 20,000 audio recordings, contact and visitors logs, and summaries. On the same day, the Prosecution filed its Communication of the Disclosure of Evidence (“Prosecution Notice”).⁸

16. On 14 November 2016, the Defence submitted an urgent request seeking immediate adjournment of the proceedings in order to assess the extremely large volume of Rule 77 material disclosed by the Prosecution and evaluate the associated prejudice.⁹

17. On 15 November 2016, pursuant to the Chamber’s order, the Prosecution¹⁰ and LRV¹¹ filed their responses.

⁶ T-159, p.2 ln.15-16.

⁷ ICC-01/04-02/06-1616, para.9.

⁸ ICC-01/04-02/06-1616.

⁹ ICC-01/04-02/06-1629.

¹⁰ ICC-01/04-02/06-1636-Red.

¹¹ T-159, p.2 ln.15-16.

18. On 15 November 2016, the Defence received the first batch of summaries of the Conversations prepared by the Prosecution.¹² Subsequent batches were provided until 24 November 2016.¹³ An additional batch was disclosed on 24 January 2017.¹⁴

19. On 16 November, the Chamber rendered its oral decision rejecting the Defence request (“16 November Decision”), holding that “a substantiated submission of ongoing prejudice which would be remedied by immediate adjournment – as opposed to possible other remedial measures – has not been established at this time.”¹⁵ The Chamber acknowledged that “[i]t is undisputed that the Defence must have the opportunity to review the material”¹⁶, recognised the ‘resource demands likely to be placed on the Defence team in reviewing the disclosure’, and invited the Defence to first address any request for additional resources to the Registry.¹⁷ The Chamber had further noted that while the disclosure of the Conversations did not provide a ground for immediate adjournment, ‘such considerations could also, for example, be factored into the time granted for preparation of the Defence case’.¹⁸

20. On the same day the Defence applied orally for suspensive effect of the 16 November Decision for the purpose of seeking leave to appeal the same, until adjudication of its request. The Chamber rejected the Defence oral application, holding that the Defence “has not established a risk of irreparable harm.”¹⁹

¹² See email from Prosecution Senior Trial Attorney dated 15 November 2016 at 17:37.

¹³ See emails from Prosecution Senior Trial Attorney dated 19 November 2016 at 22:00, 23 November 2017 at 09:07, 24 November 2016 at 09:02, 25 November 2016 at 18:30 and 18:34.

¹⁴ See email from Prosecution Senior Trial Attorney dated 24 January 2017 at 17:47.

¹⁵ T-159 p.7 ln.18-21.

¹⁶ T-159, p.5 ln.8-9.

¹⁷ T-159, p.6 ln.12-17.

¹⁸ T-159, p.5 ln.24-p.6 ln.3.

¹⁹ T-159, p.17 ln.7-8.

21. On 22 November 2016, the Defence filed a request for leave to appeal the 16 November Decision.²⁰ On 28 November 2016, responses were filed by the Prosecution²¹ and the LRV.²²

22. On 23 November 2016, the Defence sought additional resources from the Registrar, for an initial period of four months to be reviewed depending on progress achieved at that time.²³

23. On 25 November 2016, having been notified of the Prosecution's addition to its list of evidence on which it intends to rely at trial of 589 Conversations, the Defence filed a request for reconsideration of the 16 November Decision.²⁴ The Prosecution responded on 29 November,²⁵ and the Defence filed a supplement to its request the following day.²⁶

24. On 1 December 2016, the Chamber orally rejected the Defence's request for reconsideration of the 16 November Decision.²⁷

25. On 12 December 2016, the Chamber issued its decision, denying the Defence's request for leave to appeal the 16 November Decision.²⁸

26. On 14 December 2016, the Defence filed an expedited request for reconsideration²⁹ of the order issued by the Chamber on 19 October 2016 ("19 October Order"),³⁰ in which the Chamber had set certain deadlines for the parties and participants in relation to the conclusion of the presentation of the evidence by the Prosecution. The Defence submitted that significant new facts,

²⁰ ICC-01/04-02/06-1245.

²¹ ICC-01/04-02/06-1660-Conf. A public redacted version was filed on 29 November 2016, *see* ICC-01/04-02/06-1660-Red.

²² ICC-01/04-02/06-1656.

²³ ICC-01/04-02/06-1648-Conf-Exp.

²⁴ ICC-01/04-02/06-1655-Conf.

²⁵ ICC-01/04-02/06-1661-Conf; ICC-01/04-02/06-1661-Red.

²⁶ ICC-01/04-02/06-1665-Conf.

²⁷ T-169, p.6, ln.1-4.

²⁸ ICC-01/04-02/06-1677.

²⁹ ICC-01/04-02/06-1683-Conf.

³⁰ ICC-01/04-02/06-1588-Corr.

including the disclosure of material as a result of the Article 70 investigations, had arisen since the 19 October Order.³¹

27. Having been so directed,³² on 15 December, the LRV³³ and the Prosecution³⁴ submitted their responses.

28. On 16 December 2016, the Chamber denied the Defence request for reconsideration of the 19 October Order.³⁵

29. On 19 December 2016, the Defence request for additional resources was granted for a limited period of four months.³⁶ On the basis of this decision, five additional team members started working in mid-January 2017.

B. The Prosecution's stated intention to make use at trial of the Conversations and the summaries thereof

30. In November 2016, the Chamber noted, based on its own review of a limited number of the Conversations, that "significant portions of the recordings will not have any direct materiality to these proceedings. To the extent that certain information may be relevant, it appears at this stage, on the basis of the information currently before the Chamber, that such relevance would relate to peripheral issues".³⁷

31. Since then, however, the Prosecution has taken active steps to use the Conversations at trial, as proffered evidence or otherwise in support of its case. As such, the Conversations do bear direct materiality to the proceedings. Indeed, when communicating the disclosure of the Conversations to the Defence, the Prosecution clearly stated that "these communications are material to the Defence's preparation

³¹ ICC-01/04-02/06-1683-Conf, para.6.

³² See email from Chamber's Legal Officer to the parties and participants dated 15 December 2016 at 9:19 a.m.

³³ ICC-01/04-02/06-1685-Conf.

³⁴ ICC-01/04-02/06-1683-Conf, ICC-01/04-02/06-1684-Conf.

³⁵ ICC-01/04-02/06-1688.

³⁶ See Decision of Director of Division of Judicial Support *per* delegation of Registrar, 10 December 2016.

³⁷ T-159, p.5 ln.21-24.

of its case, which is set to start in 2017, and to the selection of its witnesses. The Prosecution also intends to rely on these communications.”³⁸ Furthermore, in the course of its motion practice, the Prosecution has cited to, and at times quoted from, numerous Conversations and summaries thereof, thereby directly placing the contents before the Chamber for its review and consideration.

32. On 3 February 2017, the Prosecution sought an extension of the time limit to submit the transcriptions and translations of ten of the Conversations from the bar table (“Prosecution Request for Extension of Time”).³⁹ The Prosecution argued that this material is relevant to show the ‘level of circumspection with which the Defence evidence must be viewed’.⁴⁰ While the Chamber ultimately denied the Prosecution’s request,⁴¹ it became clear from the filing of this motion that the Prosecution will attempt to make use of the Conversations in support of its case at trial.

33. What is more, on 10 February 2017, the Prosecution moved the Chamber to impose additional disclosure obligations on the Defence prior to the start of the presentation of the case for the Defence (“Prosecution Request for Additional Disclosure Obligations”).⁴² Referring to broad allegations drawn from the contents of 57 of the Conversations, the Prosecution alleged that the additional measures sought are necessary to safeguard the integrity of the proceedings and the Chamber’s ability to establish the truth as well as to allow the Prosecution to investigate fully Defence evidence.⁴³ In this motion, the Prosecution quoted extracts from the summaries of the Conversations it produced. The motion is currently before the Chamber for adjudication, the Defence having filed a response on 1 March 2017. This was a second clear indication since the issuance of the Chamber Decision that the

³⁸ ICC-01/04-02/06-1616, para.14.

³⁹ ICC-01/04-02/06-1769.

⁴⁰ ICC-01/04-02/06-1769, para.22.

⁴¹ ICC-01/04-02/06-1799.

⁴² ICC-01/04-02/06-1783-Conf-Corr. A public redacted version was also submitted on 15 February 2017, ICC-01/04-02/06-1783-Red.

⁴³ ICC-01/04-02/06-1783-Red, para.8.

Prosecution will attempt to make use of the Conversations, and their summaries, in support of its case at trial.

34. In this regard, it is worthy of attention that the Prosecution added more than 580 audio-recordings of Conversations and 500 summaries of these Conversations onto its list of evidence on 23 November 2016 and 30 January 2017, respectively.⁴⁴

35. In light of such displayed intention on the part of the Prosecution as to the extent it will seek to use the Conversations, the Defence is required to ensure that its review of the Conversations and the summaries made by the Prosecution is exhaustive and thorough.

36. Indeed, the Prosecution alleges a broad scheme of coaching involving not only Mr Ntaganda and Mr Lubanga but also many persons they were in contact with and many more they made reference to in the exercise of their non-privileged conversation rights. No witness can be selected without first determining if that person was mentioned directly or indirectly in one of the Conversations and the extent to which that person would have been involved in the alleged coaching scheme.

37. In these circumstances, taking into consideration: i) the total number and duration of Mr Ntaganda's and Mr Lubanga's non-privileged communications; ii) the known number of Mr Ntaganda's and Mr Lubanga's non-privileged communications that the Prosecution has actively reviewed, *i.e.* approximately 600; iii) the time elapsed since the bulk of these conversations took place; and iv) the high number of interlocutors and persons referred to in the Conversations; contrary to the Chamber's previous holding,⁴⁵ it is simply not possible for time to be saved by

⁴⁴ Prosecution's Updated List of Evidence, ICC-01/04-02/06-1646, public with public Annex A, 23 November 2016 (wherein the Prosecution added 589 audio-recordings of conversations by Mr Ntaganda and Mr Lubanga from the Detention Centre to its list of evidence); Prosecution's Updated List of Evidence, ICC-01/04-02/06-1762, public with public Annex A, 30 January 2017 (wherein the Prosecution added 506 summaries of conversations by Mr Ntaganda and Mr Lubanga from the Detention Centre to its list of evidence).

⁴⁵ See ICC-01/04-02/06-T-169-Red-ENG, p.6 ln.18-21.

Mr Ntaganda expeditiously identifying telephone calls for priority review without him first listening to all of the Conversations.

C. The ongoing review of the Conversations by the Defence has revealed severe flaws in the summaries prepared by the Prosecution which make it imperative for the Defence to review all of the Conversations before the beginning of the Defence case

38. The Defence started reviewing the Conversations in January 2017 with the arrival of the new team members. To avoid duplication of effort, the Defence initially focused on the audio-recordings of Conversations not summarised by the Prosecution. However, as a result of the Prosecution Request for Extension of Time and the Prosecution Request for Additional Disclosure Obligations, the Defence shifted the focus of its review to the summaries prepared by the Prosecution and reviewed them against the audio-recordings of the Conversations.

39. As mentioned in its response to the Prosecution Request for Additional Disclosure Obligations, the Defence submits that the “summaries are inherently unreliable such that the Chamber is precluded from making findings and/or drawing inferences adverse to Mr Ntaganda on the basis thereof”.⁴⁶ The Defence therefore refers to its arguments in the said response, in particular with regard to the inherent flaws in the summarising process, the fact that the summaries appear to have been influenced by the Prosecution’s theory as opposed to simply being an accurate and objective synopsis of the conversation heard, and the fact that when faced with two equally correct translations, the Prosecution summariser chose the term that was more favourable to the Prosecution without any reference to the other possible meaning.⁴⁷

40. The troubling deficiencies and inherent unreliability of the summaries prepared by the Prosecution make it absolutely critical that the Defence review each and every one of the Conversations in the original language before any of the witnesses it decides to call appear before the Chamber.

⁴⁶ ICC-01/04-02/06-1811-Conf, para.40.

⁴⁷ ICC-01/04-02/06-1811-Conf, paras.40-47.

D. Varying the time limits set out in the Chamber Decision in order to preserve the rights of the Accused is essential

41. Without even taking into consideration Mr Lubanga's conversations that the Prosecution also obtained as a result of its Article 70 investigation – which have also been disclosed to the Defence as well as used and referred to by the Prosecution – Mr Ntaganda's conversations alone last more than 893 hours.

42. It is imperative for due process and the rights of the Accused to be safeguarded that the Defence has a *bona fide* opportunity to review adequately each of the Conversations and to factor in the results of this review into its preparations before starting the presentation of its evidence.

1. Sufficient time for an adequate review of the Conversations by the Defence is imperative to safeguard due process and the rights of the Accused

43. The Defence has already noted why, in light of the intended use of the Conversations by the Prosecution as well as the inherent unreliability of the summaries, it is essential that the Defence be provided with sufficient time to review the Conversations prior to the start of the presentation of its evidence. In fact, the Defence has a duty as well as an obligation to review and analyse this material.

44. The Defence cannot submit its list of witnesses to the Chamber and the Prosecution as instructed while the review of the Conversations is ongoing. More importantly, it cannot call any witness on the stand before having finished that exercise. Pursuant to Article 67(1)(e) of the Statute of the Court ("Statute"), Mr Ntaganda is entitled to obtain the examination of witnesses on his behalf under the same conditions as witnesses against him. Pursuant to Article 67(1)(b), Mr Ntaganda is also entitled to have adequate time and facilities for the preparation of the defence. The Defence posits that, at a minimum, it should be permitted to review all of the Conversations prior to calling its first witness.

45. In addition, it is noteworthy that the Prosecution has had the benefit since September 2015 of having an insight into the Defence strategy, names or descriptions

of potential witnesses, information concerning material documents, and details of Mr Ntaganda's own recollection of events. This information obtained by the Prosecution at the very beginning of the presentation of its case on an *ex parte* basis, has already severely undermined the fairness of the proceedings. Without prejudice to the potential submission of a request seeking an appropriate remedy, the Defence underscores that to start the presentation of its evidence without having completed the review of the Conversations would further deepen this breach of due process.

46. The Defence needs to determine the scope, and assess the impact of, the Prosecution's access to details of the Defence strategy as a result of its Article 70 investigation before the commencement of the case for the Defence. The Chamber itself had noted the potential issue in November 2016 when it had held the following: "The information may of course, as already mentioned, impact aspects of Defence strategy. This, however, does not provide a ground for immediate adjournment, and such considerations could also, for example, be factored into the time granted for preparation of the Defence case."⁴⁸ The Defence respectfully submits that the time limits imposed by the Chamber do not make such an exercise possible.

2. A full review of the Conversations is time consuming and resource intensive

47. [REDACTED].⁴⁹

48. [REDACTED]⁵⁰

49. [REDACTED]⁵¹

50. [REDACTED].⁵² [REDACTED].⁵³

⁴⁸ T-159, p.5 ln.24-p.6 ln.3.

⁴⁹ [REDACTED].

⁵⁰ [REDACTED].

⁵¹ [REDACTED].

⁵² [REDACTED].

⁵³ [REDACTED].

51. It is also telling that as of 3 February 2017, having been in their possession for more than 18 months, the Prosecution had only reviewed 13% of Mr Ntaganda's Conversations. Indeed, the Prosecution has confirmed the 'laborious' and 'time-consuming' nature of the process.⁵⁴ Strikingly, it took the Prosecution more than four months to translate and transcribe 10 of the Conversations.⁵⁵

52. The Defence has initially estimated, on a preliminary basis, that the review of the Conversations would take at least four months. Even if four months were sufficient, the review would not be completed before mid-May 2017, which leaves absolutely no time for the Defence to factor the results of its review into the preparation of the case for the Defence.

53. Since that preliminary estimate was made, it has become clear that four months is simply insufficient to review the 893 hours of Mr Ntaganda's Conversations, let alone all of the Conversations. Working at full speed, the additional Defence team members have been able to review about 10% in the one and a half month they have been working. It is thus reasonable to expect that continuing to work efficiently and at full capacity, the review will be completed in mid-July 2017, two months later than the preliminary estimation.

54. The Defence requires at least one month to incorporate the results of its review of the Conversations into its case preparation and to confirm its choice of witnesses and/or other evidence. The Defence would therefore be ready to start the presentation of the case for the Defence at the end of August 2017.

II. An extension of time limits is also necessary in order to prepare for the cross-examination of LRV Witnesses.

55. On 23 January 2017, the LRV filed a request seeking leave to present evidence and victims' views and concerns. The LRV requested, *inter alia*, leave to call one

⁵⁴ Prosecution Request for Extension of Time, paras.17-18.

⁵⁵ Prosecution Request for Extension of Time, para.19.

witness who is not a participating victim in the present case and seven participating victims to present evidence.⁵⁶

56. On 10 February 2017, the Chamber issued its “Decision on the request by the Legal Representative of the Victims of the Attacks for leave to present evidence and victims’ views and concerns” (“LRV Decision”), whereby it authorised the presentation of evidence by three participating victims (“LRV Witnesses”) between 10 and 13 April 2017.⁵⁷

57. The Chamber also ordered the LRV to disclose their identity, statements and lesser redacted versions of their victim application form no later than 20 February 2017 to the parties and to the Legal representative for former child soldiers.

58. On 20 February 2017, the LRV disclosed the identity and the redacted versions of the statements and victim application forms of the three LRV Witnesses.⁵⁸

59. In authorising three victims to present evidence, the Chamber took into consideration, *inter alia*, the fact that their evidence would be necessary for the determination of the truth and would not be cumulative of the Prosecution’s evidence presented so far.⁵⁹

A. The events described by the LRV Witnesses are not cumulative with Prosecution evidence and are not part of the charges laid against Mr Ntaganda.

60. As noted by the Chamber, Victim a/00256/13 is expected to testify on several crimes alleged to have been committed in [REDACTED] as part of the second attack.⁶⁰ Moreover, the Prosecution submitted that his account is not cumulative of

⁵⁶ ICC-01/04-02/06-1739-Conf-Red.

⁵⁷ ICC-01/04-02/06-1780-Conf.

⁵⁸ ICC-01/04-02/06-1795-Conf, paras.9-10.

⁵⁹ ICC-01/04-02/06-1780-Conf, paras.9, 22, 25 and 34.

⁶⁰ ICC-01/04-02/06-1780-Conf, para.34.

the Prosecution evidence,⁶¹ while the Chamber stated that “he may be in a position to provide additional information of relevance”.⁶²

61. The Document containing the charges does not contain any allegation of using heavy weapons during the second attack, including using a rocket [REDACTED].⁶³

62. Victim a/30012/15 is expected to testify on the arrival of UPC troops in the Kilo area at the end of 2002 and the beginning of 2003. Moreover, he is expected to provide “relevant and potentially unique information on the conduct of Mr Ntaganda and Kisembo” in the same period.⁶⁴

63. The Defence notes that the events described by Victim a/30012/15 and, in particular, the alleged killing [REDACTED] by Mr Ntaganda are not part of the DCC or of the Pre-trial brief. In particular, these events are not mentioned in the events constituting crimes for which Mr Ntaganda would have been responsible as a direct perpetrator.⁶⁵

64. Victim a/30365/15 is expected to testify on UPC troops attacking [REDACTED] between the end of 2002 and the beginning of 2003, as well as [REDACTED] by UPC soldiers.⁶⁶ The Chamber noted that “[a]lthough in part cumulative of evidence already presented, the expected testimony covers a wide range of crimes charged and is therefore potentially representative of a larger group of victims”.⁶⁷

65. The Defence notes that the locality of [REDACTED] is not part of the geographical scope of the charges laid against Mr Ntaganda. This locality is neither

⁶¹ ICC-01/04-02/06-1780-Conf, para.33 referring to ICC-01/04-02/06-1772-Conf, paras.28-29.

⁶² ICC-01/04-02/06-1780-Conf, para.34.

⁶³ See Updated document containing the charges, ICC-01/04-02/06-458-AnxA, from para.76.

⁶⁴ ICC-01/04-02/06-1780-Conf, para.22.

⁶⁵ See Document containing the charges, from para.109 and Pre-trial brief, from para.467.

⁶⁶ ICC-01/04-02/06-1780-Conf, para.23.

⁶⁷ ICC-01/04-02/06-1780-Conf, para.25.

mentioned in the Document containing the charges⁶⁸ nor in the Pre-Trial brief.⁶⁹ In particular, it is not mentioned in the localities identified by the Prosecution where [REDACTED] and or murder (count 1 and 2) would have been committed.

B. The Defence must meaningfully investigate these events as they are deemed relevant by the Chamber

66. Even though the events described by the LRV Witnesses are not included in the charges laid against Mr Ntaganda, it follows from the Chamber LRV Decision that they might have some kind of relevance to the said charges. Until 20 February 2017, the Defence was not on notice of neither these events nor their importance. The Defence must now meaningfully investigate these events and prepare for the cross-examination of these three witnesses.

67. While the Defence acknowledges that the time limits imposed by the Chamber allow the Defence to perform these tasks, the problem lies in the fact that this will impact the available time remaining for the preparation of the case for the Defence.

68. In particular, significant Defence resources will have to be allocated to preparations for the cross-examination of the three LRV witnesses during the period from 10 to 13 April 2017.

69. This significantly impacts the ability of the Defence to provide its further list of witnesses on 31 March 2017 as well as its final list of witnesses on 26 April 2017, as ordered by the Chamber.⁷⁰ This also impacts the ability of the Defence to meet the final disclosure deadline set by the Chamber, *i.e.* 26 April 2017.⁷¹

III. The circumstances associated with the effective representation of Mr Ntaganda since 9 October 2014 must be taken into consideration

⁶⁸ ICC-01/04-02/06-458-AnxA.

⁶⁹ ICC-01/04-02/06-503-Conf-AnxA.

⁷⁰ Decision, paras.10-11.

⁷¹ Decision, para.13.

70. Since the Chamber issued its 9 October order, a number of factors and changes in circumstances have significantly affected the ability of the Defence to fulfil its duties and obligations for the purpose of representing Mr Ntaganda.

71. The Defence underscores in particular: i) the submission by the Prosecution of its request to have restrictions imposed on Mr Ntaganda's non-privileged communication rights as well as the complex and time-consuming litigation that followed; ii) the hiring of members of the new Defence team, which was only completed in November 2014; iii) the number of witnesses and exhibits added by the Prosecution in January 2015 less than five months before the scheduled date for the start of the trial; iv) the suspension of two resource persons in June 2015; v) the fact that the Defence was not able to effectively investigate the Prosecution's case until January 2016; vi) the litigation involving the Defence and the Registry to obtain additional resources required to effectively represent the Accused; and vii) the unparalleled tempo of trial proceedings since June 2016.

72. As a result of these and other events beyond its control, the Defence was not ready to start the trial on 2 August 2015 – a situation that was made clear to the Chamber on numerous occasions – and has been struggling to meet its obligations ever since. The appropriate time for the Chamber to provide the Defence with the adequate time to prepare is now, after the close of the Prosecution's case and before the start of the presentation of the case for the Defence. This Defence Request must be adjudicated in light of these extraordinary circumstances.

IV. Reconsideration

73. The Chamber has an inherent discretion to reconsider its previous decisions, in particular, where a new fact has arisen since the time of the original decision.⁷²

⁷² *Prosecutor v. Ruto & Sang*, Decision on the Sang Defence's Request for Reconsideration of Page and Time Limits, ICC-01/09-01/11-1813, 10 February 2015, para.19; *Prosecutor v. Kenyatta*, Decision on the Prosecution's motion for reconsideration of the decision excusing Mr. Kenyatta from continuous presence at trial, ICC-01/09-02/11-863, 26 November 2013, para.11 (“[t]he Chamber finds support, as was also done by Trial Chamber I, in the relevant jurisprudence of the International Criminal Tribunals for the former Yugoslavia (‘ICTY’) and Rwanda (‘ICTR’) whose statutory provisions are

Reconsideration may also be appropriate “to prevent an injustice,”⁷³ or simply where “there is reason to believe that [a Trial Chamber’s] original Decision was erroneous.”⁷⁴

74. On 30 January 2017, the Chamber indicated its “intention that the presentation of evidence by the Defence should commence within one month following the final Defence disclosure deadline”,⁷⁵ namely 26 April 2017.⁷⁶

75. Should the Chamber decide to adjudicate this Defence Request pursuant to the reconsideration test, the Defence submits that the above requirements are met. First, this Defence Request arises from new facts since the Chamber Decision was issued. In particular, the Defence refers to its argument above on the Prosecution’s Request for Extension of Time and the Prosecution Request for Additional Disclosure Obligations.⁷⁷ The leave granted to the LVR to present evidence via three witnesses as well as the scheduling of their testimony during the period of 10 to 13 April 2017 also constitute new facts. The Defence also submits that the gravity and the impact of the violations of Mr Ntaganda’s right to have adequate time and facilities for the preparation of his defence are such, if the time limits imposed by the Chamber are not extended, that reconsideration of the Chamber Decision is necessary to prevent an injustice.

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equally silent as to the power of reconsideration, that those circumstances can include ‘new facts or new arguments’”); *Prosecutor v. Prlić et al.*, Case No. IT-04-74-A, Decision on Motions for Reconsideration, 5 September 2014, p. 4; *Prosecutor v. Stanišić & Župljanin*, Case No. IT-08-91-T, Decision Denying Joint Defence Motion for Reconsideration or Certification of the Decision of 18 April 2012 and Allowing the Defence to Reply to the Prosecution Response to the Joint Defence Final Submissions on the CHS, 10 May 2012.

⁷³ ICC-01/04-02/06-611, 27 May 2015, para.12.

⁷⁴ *Prosecutor v. Nizeyimana*, Decision on Defence Motion to Reconsider the June 15 Decision on the Extremely Urgent Motion for Reconsideration of Trial Chamber 7 June 2011 Decision on Prosecutor’s Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence, Case No. ICTR-00-55C-T, 1 July 2011, para.13.

⁷⁵ Decision, para.16.

⁷⁶ Decision, para.14.

⁷⁷ Paras.33-37 *supra*.

76. Pursuant to Regulation 23*bis* (1) and (2) of the Regulations of the Court (“RoC”), this Defence Notice is submitted on a confidential basis as it: (i) provides detailed confidential and sensitive information directly related to the conduct of investigations by the Defence; and (ii) it refers to confidential submissions and decisions.

RELIEF SOUGHT

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

GRANT an extension of three months to the current time limits imposed for the preparation of the case for the Defence; and

DELAY the submission of the further list of witnesses and initial disclosure until 30 June 2017, the submission of the final list of witnesses and final disclosure until 31 July 2017, and the presentation of evidence until 4 September 2017.

RESPECTFULLY SUBMITTED ON THIS 5TH DAY OF APRIL 2017



Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands