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Date: **26 May 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
With public Annex 1**

**Public redacted version of "Prosecution's request for orders concerning the
Accused's testimony", 26 May 2017**

Source: Office of the Prosecutor

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

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Introduction

1. The Accused is scheduled to start his testimony on 14 June 2017. In order to ensure the fair and expeditious conduct of the proceedings and to facilitate the preparations of the Chamber, the Parties and the Legal Representatives of Victims, it is essential that a number of matters related to his testimony be settled in advance of this date.
2. Accordingly, pursuant to the Chamber's 19 May 2017 directions¹ as well as to articles 64(2), (3)(a) and (c), 64(8)(b), and 69(3) and (4) of the Statute,² rules 79(4) and 134(3) of the Rules,³ and regulation 54 of the Regulations,⁴ the Prosecution requests that the Chamber:⁵ (i) rule that the Witness Preparation Protocol applies to the Accused as a witness; (ii) prohibit the Accused and his Defence team from communicating for the duration of the Accused's testimony; (iii) prohibit the Accused from discussing his testimony with any non-privileged contacts at any time during his testimony; (iv) find that the assurances set out in article 93(2) of the Statute and rule 74 of the Rules are inapplicable to the Accused, as his answers may be used against him during the trial, and order the Accused to answer all questions put to him once he commences his testimony and draw adverse inferences, as appropriate, should the Accused decline to answer any such questions.; (v) order the Defence to provide the list of items that it intends to use with the Accused during its examination-in-chief 10 days before the start of the Accused's testimony; and (vi) order the Defence to instruct Defence witnesses appearing after the Accused has testified not to follow the Accused's testimony in any manner ("Request").

¹ ICC-01/04-02/06-1914.

² Rome Statute.

³ Rules of Procedure and Evidence.

⁴ Regulations of the Court.

⁵ Trial Chamber VI.

3. The Prosecution also provides notice that, should the need arise, it will make requests to hear certain parts of the Accused's testimony in private session in order not to allow him to further attempt to influence the testimony of Defence witnesses as he has been doing from the Detention Centre.
4. Pursuant to the Chamber's 24 May 2017 order,⁶ the Prosecution will file a separate request for authorisation to use certain material obtained in the context of article 70 proceedings during the Accused's cross-examination.

Confidentiality

5. This filing is classified as "Confidential" pursuant to regulation 23bis(2) of the Regulations since it refers to the content of a filing bearing that classification. The Prosecution will file a redacted version of this filing.

Background

6. On 30 January 2017, the Chamber ordered the Defence to provide a further provisional list of witnesses to the Chamber, Prosecution and participants by 31 March 2017 with statements or summaries of anticipated evidence and disclosure of all material in its possession which falls under its disclosure obligations.⁷ It also ordered the Defence to disclose, by 26 April 2017, all remaining material upon which it intends to rely, with the final version of its list of witnesses, final statements or summaries and final list of evidence.⁸
7. The Defence did not include the Accused on its list of trial witnesses, either on 31 March 2017 or on 26 April 2017. Nor did the Defence file a statement or summary of anticipated evidence for the Accused. However, on 12 May 2017, the Defence filed an urgent request to modify the first and second evidentiary

⁶ Trial Chamber VI decision communicated *via* email to the Parties and participants on 24 May 2017 at 11:46.

⁷ ICC-01/04-02/06-1757.

⁸ ICC-01/04-02/06-1757.

blocks and to call the Accused to testify for six weeks starting on 12 June 2017.⁹ The Prosecution opposed this request on 16 May 2017 and indicated that it would be filing a number of requests in relation to the Accused's testimony.¹⁰

8. On 17 May 2017, the Chamber partially granted the Defence's 12 May 2017 request and ordered that the Accused's testimony shall take place from 14 to 16 June, and 27 June to 21 July 2017.¹¹
9. On 19 May 2017, the Chamber provided its reasons for the 17 May 2017 decision and, *inter alia*, ordered the Defence to provide a summary of the anticipated testimony of the Accused and to effect any further related disclosure associated with his anticipated testimony by 24 May 2017.¹² The Chamber also invited the Prosecution to file any further submissions related to the Accused's upcoming testimony no later than 26 May 2017, with any responses due by 31 May 2017.¹³
10. On 19 May 2017, the Defence requested the Chamber to either lengthen the scheduled duration of the Accused's testimony by three days or to schedule the re-examination, Prosecution additional questions and questions from the Bench after the summer recess.¹⁴
11. On 24 May 2017, the Defence submitted a list of the general topics upon which the Accused will testify.¹⁵ It also admitted that it will not comply with the Chamber's orders, stating that it has not yet disclosed [REDACTED].¹⁶ The Chamber first ordered that all documents upon which the Accused intended to rely should be disclosed by 26 April 2017; the Chamber later amended this

⁹ ICC-01/04-02/06-1903.

¹⁰ ICC-01/04-02/06-1909.

¹¹ Email from the Chamber to the Parties and participants dated 17 May 2017 at 15:05.

¹² ICC-01/04-02/06-1914, paras. 19-20.

¹³ ICC-01/04-02/06-1914, para. 21.

¹⁴ ICC-01/04-02/06-1915.

¹⁵ ICC-01/04-02/06-1920-Conf-AnxA.

¹⁶ ICC-01/04-02/06-1920-Conf, paras. 2, 6, 8 and 9.

decision to order disclosure no later than 24 May 2017.¹⁷ The majority of these items cannot be disclosed, according to the Defence, until one week before the Accused's testimony.¹⁸

Prosecution's Submissions

I. The Witness Preparation Protocol applies to the Accused's testimony

12. The Chamber authorised witness preparation in this case in order to, *inter alia*, "advance the fairness and expeditiousness of trial".¹⁹ The Witness Preparation Protocol²⁰ makes no distinction in relation to the witnesses to whom the Protocol applies. As such, both the stated purpose and the plain language of the Protocol confirm its applicability to the Accused since he has now decided to testify. Indeed, in its 19 May 2017 decision, the Chamber noted that the Accused "*shall, in principle, be subject to the same rules that are applicable to other witnesses.*"²¹

13. In order for there to be no misconceptions about the Protocol's applicability, the Prosecution requests the Chamber to issue an order affirming that the Witness Preparation Protocol applies in its entirety, to the Accused as a witness. This means that any witness preparation session should be recorded, and a witness preparation log and note should be disclosed; in turn, the Chamber will entertain submissions on the disclosability of the video recording should this become necessary. As requested further below, the Prosecution also seeks an order that the Defence team cannot share or discuss with the Accused the list of documents that the Prosecution may use during the Accused's cross-examination.

¹⁷ ICC-01/04-02/06-1914, paras. 19-20.

¹⁸ ICC-01/04-02/06-1920-Conf, paras. 3,-6 and 8.

¹⁹ ICC-01/04-02/06-652, para. 17.

²⁰ ICC-01/04-02/06-652-Anx.

²¹ ICC-01/04-02/06-1914, para. 18, fn. 30 citing to ICC-01/04-01/07-1665-Corr, para. 51.

14. Should the Chamber deem the Protocol inapplicable to the Accused, the Prosecution requests, in the alternative, that the Chamber issue an order specifically prohibiting the conduct described at paragraphs 28²² and 29²³ of the Protocol in any discussions carried out between the Accused and his Defence team prior to the start of his testimony.

II. The Accused and his Defence team should not be allowed to communicate during the Accused's testimony

15. This Chamber has restricted contact between the calling Party or participant and its witnesses from the time the witness begins to testify until the end of the witness' testimony, save for contact in-Court to conduct the examination of the witness.²⁴ The Presiding Judge further informs every witness, at the conclusion of each day of testimony (both in examination-in-chief and cross-examination) that they are forbidden from discussing their testimony with *anyone*. The Chamber has noted that the Accused "*shall, in principle, be subject to the same rules that are applicable to other witnesses.*"²⁵

16. In this sense, it is important to stress that the Accused has *not* chosen to make an unsworn statement in his defence under article 67(1)(h). Instead, he has decided to take the stand as a witness, which necessarily triggers all evidentiary and procedural rules applicable to witness testimony. Accordingly, the Prosecution requests that the Chamber issue an order prohibiting the Accused and his Defence team from communicating from the moment that the Accused is under oath until the completion of his testimony.

²² "During preparation sessions, the questioning lawyer shall not...Seek to influence the substance of the witness' answers, either directly or indirectly (including, for instance, by informing the witness of the type of evidence that would assist the calling party's case, by suggesting whether or not the witness' answers are right, or leading the witness in an inappropriate way)".

²³ "During preparation sessions, the questioning lawyer shall not...Undertake to train the witness or practice the questions and answers expected during the witness's in-court testimony so that the witness memorises those questions and answers."

²⁴ Protocol on the practices to be used to familiarise witnesses for giving testimony at trial, ICC-01/04-02/06-656-AnxA, para. 31.

²⁵ ICC-01/04-02/06-1914, para. 18, fn. 30 citing to ICC-01/04-01/07-1665-Corr, para. 51.

17. Should the Defence team need to communicate with the Accused about matters other than his testimony during this period of time, they should inform the Prosecution of the nature of the issue that needs to be addressed. Should the Prosecution object, the Chamber will adjudicate. However, if the request emanates *from the Accused* to communicate with his Defence team while his testimony is ongoing and when he cannot directly contact the Defence team himself, the Accused will need to inform the Registry about the nature of the request and the Registry will relay any such requests to the Chamber for adjudication, following advance notice to the Parties for submissions.
18. In a number of cases at other international courts and tribunals, Trial Chambers have prohibited all contact between an accused and his Defence team from the moment that the accused started testimony until its conclusion, unless such communication was exceptionally authorised.²⁶
19. In *Norman et al.*, Trial Chamber I of the SCSL ruled that “*once the accused has taken an oath or affirmation and commenced testifying he has then become the witness of the Court and the Prosecution and the Defence must not communicate with the witness on the content of the witness testimony because he is a witness in the Court, except with leave of the Court at that particular moment. If the Defence wishes to communicate with the witness at that particular moment, they shall inform the other parties of their intent and what is the matter that they wish to raise and this matter may be raised with the Chamber if need be*”.²⁷ In *Krajišnik*, Trial Chamber I of the ICTY found that “[l]ike any witness who has made a solemn declaration pursuant to Rule 90(B) of the Tribunal’s Rules, Mr Krajišnik may not speak to anyone with respect to testimony he

²⁶ *Prosecutor v. Norman et al.*, SCSL-2004-14-T, Transcript of 18 January 2006, p. 17, ln. 22 – p. 19, ln. 25; *Prosecutor v. Krajišnik*, IT-00-39-T, Finalized Procedure on Chamber Witnesses; Decisions and Orders on Several Evidentiary and Procedural Matters, 24 April 2006, paras. 30-31; *Prosecutor v. Kordi and Erkez*, IT-95-14/2, Decision on Prosecutor’s Motion on Trial Procedure, 19 March 1999; *Prosecutor v. Šainovi et al.*, IT-05-87, Transcript of 25 October 2007, p. 17638, ln. 24 – p. 17639, ln. 7; *Prosecutor v. Rukundo*, ICTR-2001-70-T, Decision on Defence Request to Meet the Accused During His Examination-in-Chief, 3 October 2007.

²⁷ *Prosecutor v. Norman et al.*, SCSL-2004-14-T, Transcript of 18 January 2006, p. 17, ln. 22 – p. 19, ln. 25.

has given, is giving, or is about to give” and went on to direct the UN Detention Unit to disconnect the accused’s privileged-communication telephone lines until the end of his testimony.²⁸ That Chamber allowed for exceptions to this rule when communication about matters not related to the accused’s evidence was necessary.²⁹

20. The restrictions on communication with witnesses safeguard the integrity of the proceedings, even when the witness is the accused who otherwise has a right to counsel. Indeed, when the ICTY Trial Chamber in *Kordić and Čerkez* restricted communication between witnesses and the calling party once testimony begins, including between the accused and his counsel, its reasoning was based in practical, sound judgment that *“permitting either Party to communicate with a witness after he or she has commenced his or her testimony may lead both witness and Party, albeit unwittingly, to discuss the content of the testimony already given and thereby to influence or affect the witness’s further testimony in ways which are not consonant with the spirit of the Statute and Rules of the International Tribunal”*.³⁰

21. Domestic jurisdictions may also restrict such communications. The Code of Conduct for the Bar of England and Wales provides that *“unless you have the permission of the representative for the opposing side or of the court, you must not communicate with any witness (including your client) about the case while the witness is giving evidence”*.³¹ In *Perry v. Leeke*, the United States Supreme Court held that *“when a defendant becomes a witness, he has no constitutional right to consult with his lawyer while he is testifying”*.³² The Court reasoned that an accused who receives

²⁸ *Prosecutor v. Krajišnik*, IT-00-39-T, Finalized Procedure on Chamber Witnesses; Decisions and Orders on Several Evidentiary and Procedural Matters, 24 April 2006, paras. 30-31.

²⁹ *Prosecutor v. Krajišnik*, IT-00-39-T, Finalized Procedure on Chamber Witnesses; Decisions and Orders on Several Evidentiary and Procedural Matters, 24 April 2006, paras. 30-31.

³⁰ *Prosecutor v. Kordić and Čerkez*, IT-95-14/2, Decision on Prosecutor's Motion on Trial Procedure, 19 March 1999.

³¹ Rule rC9.5 of the 9th Edition as set out in the Bar Standards Board Handbook, 3rd Edition, April 2017.

³² The Court went on to state that *“The reason for the rule is one that applies to all witnesses -- not just defendants. It is a common practice for a judge to instruct a witness not to discuss his or her testimony with third parties until the trial is completed...Such nondiscussion orders are a corollary of the broader rule that*

counsel during the examination undermines the effectiveness of the cross-examination and the Chamber's ability to discover the truth:

Nevertheless, when he assumes the role of a witness, the rules that generally apply to other witnesses -- rules that serve the truth-seeking function of the trial - are generally applicable to him as well. Accordingly, it is entirely appropriate for a trial judge to decide, after listening to the direct examination of any witness, whether the defendant or a nondefendant, that cross-examination is more likely to elicit truthful responses if it goes forward without allowing the witness an opportunity to consult with third parties, including his or her lawyer. In other words, the truth-seeking function of the trial can be impeded in ways other than unethical 'coaching.' Cross-examination often depends for its effectiveness on the ability of counsel to punch holes in a witness' testimony at just the right time, in just the right way. Permitting a witness, including a criminal defendant, to consult with counsel after direct examination, but before cross-examination, grants the witness an opportunity to regroup and regain a poise and sense of strategy that the unaided witness would not possess. This is true even if we assume no deceit on the part of the witness; it is simply an empirical predicate of our system of adversary, rather than inquisitorial, justice that cross-examination of a witness who is uncounseled between direct examination and cross-examination is more likely to lead to the discovery of truth than is cross-examination of a witness who is given time to pause and consult with his attorney.³³

22. Based on the jurisprudence cited above and the importance of ensuring that the Accused testifies spontaneously and without counsel on strategy and poise, the Prosecution requests that the Chamber preclude all communication between the Accused and his Counsel from the start of his testimony to its conclusion.
23. Even when other Trial Chambers of this and other international courts and tribunals have decided not to restrict all communication between the accused and their Defence teams during the course of the accused's testimony,³⁴ they

witnesses may be sequestered to lessen the danger that their testimony will be influenced by hearing what other witnesses have to say, and to increase the likelihood that they will confine themselves to truthful statements based on their own recollections. The defendant's constitutional right to confront the witnesses against him immunizes him from such physical sequestration." *Perry v. Leeke*, 488 U.S. 272 (1989), pp.281-282.

³³ *Perry v. Leeke*, 488 U.S. 272 (1989), pp.281-282.

³⁴ ICC-01/04-01/07-3171; *Prosecutor v. Taylor*, SCSL-03-01-T, Decision on Prosecution Motion for an Order Restricting Contact Between the Accused and Defence Counsel During Cross-Examination, 20 November 2009.

nevertheless recalled that it is forbidden for counsel to coach the accused or even to discuss his testimony with counsel or anyone else while it is going on.³⁵

24. Although the ICTY Appeals Chamber in *Prlić* found that the Trial Chamber did not err in ruling that an accused who testifies as a witness may communicate with counsel at any stage of the proceedings,³⁶ that Appeals Chamber acknowledged that “a decision on the extent of contact between an accused who chooses to testify and his counsel is vested in the Trial Chamber and is therefore discretionary”.³⁷ Indeed, the Presiding Judge of ICTY Trial Chamber II in *Popović et al.* ordered that communications between counsel and that accused during cross-examination and redirect shall not include discussions on the substance of his testimony.³⁸ The Trial Chamber in *Hadžić* ordered the same prohibition.³⁹

25. Further, in their Joint Declaration to the *Prlić* Appeals Chamber decision, Judges Shahabuddeen and Vaz noted that “counsel is not permitted to advise an accused,

³⁵ In *Katanga and Ngudjolo*, Trial Chamber II recalled that “il est interdit au conseil d'un accusé qui témoigne sous serment de faire à ce dernier des recommandations sur la manière dont il doit répondre aux questions qui lui sont posées et, d'une manière plus générale, de discuter de son témoignage avec lui au cours de sa déposition. Il ne serait notamment pas envisageable que soit communiquée à l'accusé la liste des documents que le Procureur entend utiliser lors du contre-interrogatoire de ce dernier”, ICC-01/04-01/07-3171, para. 15; In *Taylor*, Trial Chamber II of the Special Court for Sierra Leone found that the integrity of the proceedings was protected, *inter alia*, by the Trial Chamber's standing Order to the Accused “not to discuss his evidence with any other person”, *Prosecutor v. Taylor*, SCSL-03-01-T, Decision on Prosecution Motion for an Order Restricting Contact Between the Accused and Defence Counsel During Cross-Examination, 20 November 2009.

³⁶ *Prosecutor v. Prlić et al.*, IT-04-74-AR73.10, Decision on Prosecution's Appeal against Trial Chamber's Order on Contact between the Accused and Counsel during an Accused's Testimony pursuant to Rule 85(C), 5 September 2008.

³⁷ *Prosecutor v. Prlić et al.*, IT-04-74-AR73.10, Decision on Prosecution's Appeal against Trial Chamber's Order on Contact between the Accused and Counsel during an Accused's Testimony pursuant to Rule 85(C), 5 September 2008, para. 15.

³⁸ The Presiding Judge instructed Counsel for the accused to apply to the Chamber for leave to discuss any matter of substance with that accused, and for the accused to do the same, *via* his Counsel, should he wish to speak to his Counsel on substantive matters. No restrictions were put in place in relation to communication of filings, including exhibit lists. The access and restrictions on communication applied to the entire Defence team, *Prosecutor v. Popović et al.*, IT-05-88-T, Transcript of 26 January 2009, p.30637, ln.10 – p.30638, ln.20.

³⁹ *Prosecutor v. Hadžić*, IT-04-75-T, Decision on Request for Access to and Communication with Counsel During Goran Hadžić's Testimony, 2 July 2014, para. 15.

testifying on the witness stand, how he should reply to a question or line of questioning."⁴⁰

26. The requested measures will ensure that the principle of fairness to *both* Parties⁴¹ is respected and will assist in safeguarding the spontaneity of the Accused's testimony thereby better enabling the Chamber to assess his credibility. The fact that Counsel at the Court are bound by a number of ethical obligations does not render the requested measures unnecessary. Indeed, the Witness Preparation Protocol, which similarly prohibits certain conduct by Counsel in relation to witnesses, stands despite Counsels' ethical obligations as enshrined in other documents. As articulated by the Chamber in *Kordić and Čerkez*, permitting *any* communication between Counsel and the Accused could unwittingly lead to discussions about the Accused's testimony thereby influencing the course of the Accused's testimony and is, therefore, best avoided.

27. Should the Chamber decline the Prosecution's request to prohibit all communication between the Accused and the Defence for the duration of the Accused's testimony, the Prosecution asks, in the alternative, that the Chamber issue an order prohibiting communication between the Accused and his Defence team regarding the Accused's testimony while it is ongoing and prohibiting

⁴⁰ *Prosecutor v. Prlić et al.*, IT-04-74-AR73.10, Decision on Prosecution's Appeal against Trial Chamber's Order on Contact between the Accused and Counsel during an Accused's Testimony pursuant to Rule 85(C), Joint Declaration of Judge Shahabuddeen and Judge Vaz, 5 September 2008.

⁴¹ In *Marti*, the ICTY Appeals Chamber rejected "*the Appellant's claim that the fairness of a trial is uniquely predicated on the fairness accorded to the Accused*" and recalled that the Appeals Chamber has previously observed that the "*application of a fair trial in favour of both parties is understandable because the Prosecution acts on behalf of and in the interests of the community, including the victims of the offences charged (in cases before the Tribunal the Prosecutor acts on behalf of the international community) [...] Seen in this way, it is difficult to see how a trial could ever be considered fair where the accused is favoured at the expense of the Prosecution beyond a strict compliance with those fundamental protections*", *Prosecutor v. Martić*, IT-95-11-AR73.2, Decision on Appeal against the Trial Chamber's Decision on the Evidence of Witness Milan Babić, 14 September 2006, para. 13 citing *Prosecutor v. Zlatko Aleksovski*, IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para. 25; In *Tadić*, the ICTY Appeals Chamber found that "*[i]t can safely be concluded from the ECHR jurisprudence, as cited by the Defence, that equality of arms obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case*", *Prosecutor v. Tadić*, IT-94-1-A, Judgment, 15 July 1999, para. 48.

disclosure of and discussions with the Accused about the Prosecution's list of items that it intends to use during cross-examination, as set out below.

The Defence team and the Accused should be prohibited from discussing any items that the Prosecution intends to use during the Accused's cross-examination

28. Should the Chamber allow the Defence team and the Accused to communicate while his testimony is ongoing, it should nevertheless order the Defence not to communicate the list of items that the Prosecution may use during the cross-examination of the Accused to the Accused and prohibit the Defence from discussing any such item with the Accused upon receipt of such list. This would mirror the approach followed by Trial Chamber II in *Katanga and Ngudjolo*⁴² and by the ICTY Trial Chamber in *Hadžić*⁴³ and ensure that at least some of the Accused's responses during cross-examination are spontaneous.

29. Similarly, should the Chamber allow the Defence team and the Accused to communicate while his testimony is ongoing, it should nevertheless order the Defence not to communicate the Prosecution's upcoming request for authorisation to use certain material obtained in the context of article 70 proceedings during the Accused's cross-examination to the Accused. Discussions of such a request between the Accused and his Defence team should also be prohibited. Other witnesses would not be put on notice of any material that may be used during their cross-examination, and there is no reason for the

⁴² ICC-01/04-01/07-3171, para. 15: "*Il ne serait notamment pas envisageable que soit communiquée à l'accusé la liste des documents que le Procureur entend utiliser lors du contre-interrogatoire de ce dernier.*"

⁴³ In this case, the Trial Chamber stated: "*As to the issue of provision of the Prosecution's Document List, the Trial Chamber considers that this list is created based on the substance and strategy of the Prosecution's cross-examination of the Accused. The Trial Chamber considers that whilst Hadži is aware of the evidence and case against him, he is not necessarily aware of the line of questioning that the Prosecution intends to pursue on cross-examination. In this regard, the Trial Chamber considers that the Prosecution's Document List forms part of the substance of Hadži's testimony and will therefore prohibit counsel from providing Hadži with the Prosecution's Document List or discussing with Hadži the documents on that list, save by leave of the Trial Chamber. However, the Trial Chamber recognises that there may be overlap between the Defence's Document List and the Prosecution's Document List, and considers that such overlapping documents would properly form part of the examination-in-chief, during which time the Accused and his counsel are at liberty to communicate routinely*", *Prosecutor v. Hadži*, IT-04-75-T, Decision on Request for Access to and Communication with Counsel During Goran Hadži's Testimony, 2 July 2014, para. 16.

Accused to receive special treatment in this regard. This measure is particularly important in view of the sensitivity of the issues to which the material relates—the Accused’s attempts to interfere with the course of justice.

The Prosecution should be allowed to cross-examine the Accused on the appropriateness of any discussions with his Defence team during his witness preparation and testimony

30. Should the Chamber allow the Defence team and the Accused to communicate while his testimony is ongoing, or should the Chamber allow them to discuss his testimony, the Prosecution should be allowed to cross-examine the Accused on the nature and scope of any such discussions and whether they were appropriate in the circumstances. The Prosecution should also be allowed to cross-examine the Accused concerning his witness preparation sessions or any other discussions with the Defence team regarding the substance of his testimony before its commencement.

31. Defence Counsel routinely questioned Prosecution witnesses during trial about the witness preparation sessions conducted prior to their testimony and about their discussions during prior interviews and meetings with the Prosecution. The principle of equality of arms dictates that the Prosecution be allowed to do the same with the Accused, should the need arise.

32. In a number of cases at this and other courts and tribunals where Trial Chambers did not prohibit communication between the accused and counsel during all/part of the accused’s testimony, those Chambers noted that the Prosecution was entitled to cross-examine the accused regarding any instructions or inappropriate preparation.⁴⁴

⁴⁴ In *Katanga and Ngudjolo*, Trial Chamber II stated “Elle relève au surplus que le Procureur a la possibilité de contre-interroger l'accusé et, par-là même, d'éventuellement mettre en évidence toute instruction ou préparation inappropriée”, ICC-01/04-01/07-3171, para. 17; In *Prli et al.*, the Appeals Chamber stated that

III. The Accused should be prohibited from discussing his testimony with any non-privileged contacts

33. Witnesses are prohibited from discussing their testimony with anyone and are warned of this at the conclusion of each day of their testimony. The Accused is, generally, not only able to communicate with his Defence team, but also benefits from non-privileged communication with other persons. There is no reason why the prohibition on discussing testimony with anyone should not be issued to the Accused.

34. This prohibition is increasingly necessary in light of the Chamber's 19 May 2017 decision to ease certain restrictions on the Accused's non-privileged communications⁴⁵ since the Accused will now be given more opportunities within which to seek to directly or indirectly influence the testimony of Defence witnesses. In that decision, the Chamber noted that it considers that its previous findings, including that there are reasonable grounds to believe that the Accused, *inter alia*, "instructed his interlocutors to coach witnesses, or directly told his interlocutors which story to tell, stressing the need to tell the story in the manner as

"If the Prosecution fears that counsel will subsequently coach the accused in order to tailor his testimony, then it is reminded that under the system in place before this International Tribunal, it has the opportunity to carefully cross-examine the accused. Accordingly, the Prosecution might well establish that the accused's reliability and/or credibility is in doubt or even destroyed because it appears from his testimony that during the course of his examination he was improperly coached by counsel on how to respond to certain questions", *Prosecutor v. Prli et al.*, IT-04-74-AR73.10, Decision on Prosecution's Appeal against Trial Chamber's Order on Contact between the Accused and Counsel during an Accused's Testimony pursuant to Rule 85(C), 5 September 2008, para. 17; The Trial Chamber in *Prli et al.* noted that "if the Prosecution fears that, by having prior knowledge of these lists of documents, the Accused Praljak is preparing his answers, the Prosecution should be in a position, in particular through a 'careful' cross-examination, to identify if the Accused Praljak has indeed prepared his answers in advance or if he has been coached by his counsel, and thereby draw the Chamber's attention to this fact and possibly cast doubt on the reliability and credibility of the statements made by the Accused who is testifying.", *Prosecutor v. Prli et al.*, IT-04-74-T, Order Clarifying the Relationship between Counsel and an Accused Testifying within the meaning of rule 85(c) of the Rules, 11 June 2009, pp. 3-4 (footnote omitted); In *Taylor*, the Trial Chamber noted that "should the Prosecution suspect that inappropriate or unethical communication has occurred between the Accused and his Counsel, the Prosecution may test the credibility of the Accused in cross-examination" whilst recalling that "the Trial Chamber has held that it would rule on particular issues as they arise and has indicated that the scope of cross-examination on contact between the Accused and his counsel would be looked at on a case-by-case basis", *Prosecutor v. Taylor*, SCSL-03-01-T, Decision on Prosecution Motion for an Order Restricting Contact Between the Accused and Defence Counsel During Cross-Examination, 20 November 2009, p. 5.

⁴⁵ ICC-01/04-02/06-1913-Red2.

described by [him] and the necessity of synchronising the stories”,⁴⁶ continue to stand.⁴⁷ The Chamber also stated that it “considers the risk of further Defence witness coaching linked to the accused to remain a pertinent consideration” and noted that at least one individual alleged to have been coached by the Accused appears on the Defence list of witnesses.⁴⁸ It is essential that the Chamber ensure that these risks are averted.

35. Accordingly, the Prosecution requests that the Chamber issue an order prohibiting the Accused from discussing his testimony with any non-privileged contacts. The Chamber should grant this request regardless of its decision in relation to the Prosecution’s requests to prohibit or, in the alternative, restrict, communication between the Accused and his Defence team during his testimony.

IV. Assurances do not apply to the Accused who must answer the questions put to him once he commences his testimony

36. As Trial Chamber II held in *Katanga and Ngudjolo*, “the assurance provided for in article 93(2) of the Statute is meant to facilitate the appearance of witnesses before the Court” and, as such, “providing such assurances would be irreconcilable with the status of accused.”⁴⁹ That Chamber also found that accused persons do not require the assurances provided for in rule 74 of the Rules since they benefit from protection against self-incrimination.⁵⁰ However, that Chamber went on to note that “once an accused voluntarily testifies under oath, he waives his right to remain

⁴⁶ ICC-01/04-02/06-1913- Red2, para. 18(v), fn. 46 citing ICC-01/04-02/06-785-Red, para. 57.

⁴⁷ ICC-01/04-02/06-1913-Red2, para. 18, fn. 47 citing ICC-01/04-02/06-1494-Red4, para. 22.

⁴⁸ ICC-01/04-02/06-1913-Red2, para. 22.

⁴⁹ ICC-01/04-01/07-3153, para. 6 (footnote omitted).

⁵⁰ ICC-01/04-01/07-3153, para. 7; Trial Chamber II also noted that “the assurances under Rule 74 are meant to compel witnesses to answer questions when they object to do so on the ground that answering might tend to incriminate them. The Chamber is of the view that it would thus be inappropriate to apply this rule to an accused who has knowingly chosen to commit himself to answer all questions falling within the scope of cross-examination”, ICC-01/04-01/07-3153, para. 9.

silent and must answer all relevant questions, even if the answers are incriminating."⁵¹

This means that once an accused person decides to become a witness in his or her own case, his or her testimony may be used as evidence against him or her in that case.⁵²

37. Trial Chamber II also found that if accused persons "*decline to answer a permissible question, the Chamber may draw any adverse inferences as appropriate.*"⁵³

38. In view of the above principles, the Prosecution asks that the Chamber find that the assurances set out in article 93(2) of the Statute and rule 74 of the Rules are inapplicable to the Accused, order the Accused to answer all questions put to him once he commences his testimony and draw adverse inferences, as appropriate, should the Accused decline to answer any questions put to him. The Prosecution also asks that the Chamber rule that the Accused's answers may be used against him during the trial.

V. The list of items that the Defence intends to use with the Accused during its examination-in-chief should be provided 10 days in advance of his testimony

39. The Chamber's Decision on the conduct of proceedings requires the calling party to submit, *via* email, a list of documents that it intends to use with a witness during examination-in-chief no later than five days prior to the start of the witness's testimony.⁵⁴

40. Given the inevitability that the Defence will seek to use significantly more items during the examination-in-chief of the Accused than either Party has used or will seek to use with any other witness, the Prosecution requests that the Chamber order the Defence to file such a list no later than 10 days prior to the

⁵¹ ICC-01/04-01/07-3153, para. 7.

⁵² ICC-01/04-01/07-3153, para. 8.

⁵³ ICC-01/04-01/07-3153, para. 8.

⁵⁴ ICC-01/04-02/06-619, para. 32.

start of the Accused's testimony. This would provide the Prosecution with some additional time to try to carefully review the items and determine whether it has any objections to their use. This would allay the need for adjournments during the Accused's testimony to allow the Prosecution to review the material.

VI. Defence witnesses appearing after the Accused has testified should not be allowed to follow the Accused's testimony in any manner

41. The Prosecution requests the Chamber to order the Defence to instruct the Defence witnesses who will appear after the Accused has testified not to listen to, watch, attend or in any other manner read or follow part or all of the Accused's testimony until after they have completed their testimony. Such a measure would assist in alleviating the risk of contamination of the witnesses' testimonies and would be consistent with the purpose of rule 140(3) of the Rules. Although the latter seems to refer to the physical presence of a witness during the testimony of another witness, the aim of the sub-article is, clearly, to avoid the contamination of evidence. Evidence can equally be contaminated when a witness who is not physically present in the courtroom follows the testimony of another witness in some other manner. The risk of contamination is exacerbated when the testimony at issue is that of the Accused who, through his words, intentionally or otherwise, may influence what subsequent witnesses will say.

VII. Certain areas of the Accused's testimony may need to be heard in private session

42. The Accused is scheduled to testify as either the second or the third witness out of 111 Defence witnesses of fact and up to four expert witnesses. In view of the Prosecution's well-founded allegations that the Accused and other persons have coached and otherwise interfered with persons, including a number of persons that the Defence has included on its final witness list, and the Chamber's finding

that it “considers the risk of further Defence witness coaching linked to the accused to remain a pertinent consideration” at this stage,⁵⁵ the Prosecution provides notice that it may request that certain portions of the Accused’s testimony be heard in private session.

43. This would ensure that the Accused is not provided with a platform through which to circumvent the restrictions which have been placed upon him by coaching, through his own testimony, the witnesses scheduled to appear after him. The latter would constitute special circumstances justifying an exception to the principle that the trial shall be held in public as set out in article 64(7) of the Statute since the measure would be necessary to protect sensitive information.

Conclusion

44. Based on the foregoing, the Prosecution asks that the Chamber grant its Request.



Fatou Bensouda
Prosecutor

Dated this 26th day of May 2017
At The Hague, The Netherlands

⁵⁵ ICC-01/04-02/06-1913-Red2, para. 22 (footnotes omitted).