

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-02/06

Date: 28 April 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

**Decision on Defence request for stay of proceedings with prejudice to the
Prosecution**

To be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Ms Nicole Samson

Counsel for Bosco Ntaganda

Mr Stéphane Bourgon
Mr Christopher Gosnell

Legal Representatives of Victims

Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Others

Table of contents

I. Background	4
II. Applicable law.....	11
III. Submissions and analysis	13
A. Preliminary matter: Prosecution request to disregard Confidential Annexes A and C to the Request.....	13
B. Merits of the Request	13
1. Alleged failure to segregate the Prosecution team investigating Article 70 offences from the team dealing with the Ntaganda case	14
2. Allegation that through its conduct, the Prosecution gained an undue and unfair advantage causing grave prejudice to the accused and the fairness of the proceedings	19
3. Allegation that the prolonged ex parte nature of the Article 70 proceedings was not justified and was prejudicial to the accused	24
4. Allegation that the Prosecution’s conduct created an irremediable apprehension of bias on the part of the Chamber	29
IV. Conclusion.....	33

Trial Chamber VI ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Bosco Ntaganda* ('Ntaganda case'), having regard to Articles 40, 64 and 67 of the Rome Statute ('Statute'), Rule 165 of the Rules of Procedure and Evidence ('Rules'), and Regulations 24, 36 and 37 of the Regulations of the Court ('Regulations'), issues this 'Decision on Defence request for stay of proceedings with prejudice to the Prosecution'.

I. BACKGROUND

1. On 8 August 2014, the Office of the Prosecutor ('Prosecution') filed a request for restrictive measures pursuant to Regulation 101(2) of the Regulations in relation to Mr Ntaganda's communications, on the basis that it had 'reasonable grounds to believe' that Mr Ntaganda had 'improperly disclosed confidential information' concerning Prosecution witnesses, which 'may be part of a broader practice of violating non-disclosure obligations, and interfering with and/or intimidating witnesses'.¹ On 18 September 2014, the Prosecution submitted additional information in support of its request.²
2. On 8 December 2014, the Chamber issued an interim decision on restrictions to the communications of Mr Ntaganda ('First Restrictions Decision'),³ in which it, *inter alia*: (i) found that on a *prima facie* basis, there appeared to be 'reason to believe' that Prosecution witnesses had been approached and asked to cease cooperation with the Court, and that confidential material had been

¹ Prosecution's urgent request for measures under regulation 101(2) of the Regulations of the Court, ICC-01/04-02/06-349-Conf-Exp, only available to the Prosecution and the VWU, with confidential *ex parte* Annexes A-F, only available to the Prosecution. A confidential redacted version was filed on the same day, ICC-01/04-02/06-349-Conf-Red. A lesser redacted confidential version was filed on 19 December 2014, ICC-01/04-02/06-349-Conf-Red2. A public redacted version was filed on 15 January 2016, ICC-01/04-02/06-349-Red3.

² Prosecution's Submission of Additional Evidence in Support of "Prosecution's urgent request for measures under regulation 101(2) of the Regulations of the Court" dated 8 August 2014, ICC-01/04-02/06-371-Conf-Exp, with confidential *ex parte* Annexes A and B, only available to the Prosecution and the VWU. A public redacted version was filed on 15 January 2016, ICC-01/04-02/06-371-Red2.

³ Decision on the Prosecution request for restrictions on contact and the Defence request for access to logs, ICC-01/04-02/06-410-Conf-Exp, only available to the Prosecution and Registry. A confidential redacted, *ex parte* – only available to the Prosecution, Defence and Registry – version was issued the same day, ICC-01/04-02/06-410-Conf-Exp-Red. Corrigenda to both versions were filed on 16 February 2015, ICC-01/04-02/06-410-Conf-Exp-Corr and Annex and ICC-01/04-02/06-410-Conf-Exp-Red-Corr and Annex.

provided to persons who were not supposed to have access to that material;⁴ (ii) considered that certain interim restrictions pursuant to Regulation 101(2) of the Regulations were necessary;⁵ (iii) ordered the Registry to conduct a *post factum* review of Mr Ntaganda's non-privileged phone conversations from December 2013 and submit a report thereon;⁶ (iv) imposed certain restrictions on Mr Ntaganda's contacts; and (v) ordered that Mr Ntaganda's non-privileged phone calls be monitored from 19 December 2014 onwards pursuant to Regulations 174(2) and 175(1) of the Regulations of the Registry.⁷

3. On 13 March 2015, following the filing of the 'First Report on the post-factum review of the phone conversations made by Mr Ntaganda', pursuant to a decision issued on 16 February 2015,⁸ the Chamber imposed additional temporary restrictions and instructed, *inter alia*, the Registry to implement a system of active monitoring of Mr Ntaganda's non-privileged phone calls.⁹
4. On 13 August 2015, the Prosecution filed with Pre-Trial Chamber II ('Pre-Trial Chamber')¹⁰ an *ex parte* 'Request for judicial assistance to obtain evidence for investigation under article 70'¹¹ ('Article 70 Request'), in which it, *inter alia*: (i) indicated that it was investigating suspected offences against the administration of justice pursuant to Article 70 of the Statute in the *Ntaganda*

⁴ First Restrictions Decision, ICC-01/04-02/06-410-Conf-Exp-Red-Corr, para. 49.

⁵ First Restrictions Decision, ICC-01/04-02/06-410-Conf-Exp-Red-Corr, paras 49-50.

⁶ First Restrictions Decision, ICC-01/04-02/06-410-Conf-Exp-Red-Corr, paras 55-56.

⁷ First Restrictions Decision, ICC-01/04-02/06-410-Conf-Exp-Red-Corr, para. 51.

⁸ First Report on the *post-factum* review of the phone conversations made by Mr Ntaganda, 10 March 2015, ICC-01/04-02/06-504-Conf-Exp, only available to the Defence, Registry and (pursuant to Decision ICC-01/04-02/06-578-Conf-Exp) the Prosecution, with seven confidential *ex parte* Annexes, only available to the Defence and Registry and two confidential *ex parte* Annexes, only available to the Registry.

⁹ Order instructing the Registry to put in place additional temporary restrictions on contact, ICC-01/04-02/06-508-Conf-Exp, only available to the Prosecution, Registry and Defence.

¹⁰ On 21 August 2015, the Presidency reassigned the Situation in the Democratic Republic of the Congo to Pre-Trial Chamber I: Decision Re-assigning the Situation in the Democratic Republic of the Congo, ICC-01/04-639.

¹¹ Request for judicial assistance to obtain evidence for investigation under article 70, ICC-01/04-638-Conf-Exp and confidential *ex parte* Annexes A-N, only available to the Prosecution and Registry. A confidential redacted version was filed on 28 November 2016, ICC-01/04-638-Conf-Red and confidential Annexes A-K and confidential *ex parte* Annexes L-N, only available to the Prosecution and Registry.

case;¹² and (ii) requested that the Pre-Trial Chamber order the Registry to provide it with access to Mr Ntaganda's and Mr Lubanga's non-privileged call logs, non-privileged visitor logs, and recordings of non-privileged telephone conversations recordings from 22 March 2013 until the time of the Article 70 Request and on an on-going basis.¹³ The request was granted by the judge designated for that matter ('Single Judge') on 18 September 2015.¹⁴

5. On 18 August 2015, the Chamber issued a decision, in which it, *inter alia*, found it necessary to continue the active monitoring of Mr Ntaganda's non-privileged telephone conversations.¹⁵
6. On 7 September 2016, the Chamber issued a decision reviewing the restrictions placed on Mr Ntaganda's contacts, finding that certain of the restrictions imposed remained necessary.¹⁶ In this context, the Chamber recalled its prior guidance to the Prosecution that any Article 70 investigations should be concluded as expeditiously as possible, and that any related applicable disclosure of information to the Defence be made as soon as possible.¹⁷ The decision was upheld by the Appeals Chamber on 8 March 2017.¹⁸

¹² Article 70 Request, ICC-01/04-638-Conf-Red, para. 1.

¹³ Article 70 Request, ICC-01/04-638-Conf-Red, para. 68.

¹⁴ Decision on the Prosecutor's "Request for judicial assistance to obtain evidence for investigation under Article 70", 18 September 2015, ICC-01/04-729-Conf. The decision was originally filed *ex parte*, only available to the Prosecution and the Registry, and subsequently reclassified confidential pursuant to Pre-Trial Chamber I's instruction dated 25 January 2017.

¹⁵ Decision on Prosecution requests to impose restrictions on Mr Ntaganda's contacts, ICC-01/04-02/06-785-Conf-Exp, only available to the Prosecution, Defence and Registry. A public redacted version was filed on the same day, ICC-01/04-02/06-785-Red.

¹⁶ Decision reviewing the restrictions placed on Mr Ntaganda's contacts, ICC-01/04-02/06-1494-Conf-Exp. Confidential *ex parte* redacted and public versions were filed on the same day, ICC-01/04-02/06-1494-Conf-Exp-Red2 (only available to the Defence and Registry), ICC-01/04-02/06-1494-Conf-Exp-Red (only available to the Prosecution and Registry), and ICC-01/04-02/06-1494-Red3, and a second public redacted version was filed on 22 November 2016, ICC-01/04-02/06-1494-Red4.

¹⁷ ICC-01/04-02/06-1494-Red4, para. 24.

¹⁸ Judgment on Mr Bosco Ntaganda's appeal against the decision reviewing restrictions on contacts of 7 September 2016, ICC-01/04-02/06-1817-Conf. A public redacted version was filed on the same day, ICC-01/04-02/06-1817-Red.

7. On 7 November 2016, the Prosecution disclosed to the Defence the non-privileged contact and visitor logs, and the recordings of non-privileged telephone conversations from 22 March 2013 onwards for Mr Ntaganda and Mr Lubanga ('Conversations'), obtained pursuant to Article 70 of the Statute ('Notice').¹⁹ In its Notice, the Prosecution submitted that its review of certain of the Conversations reveals 'serious and concerning attempts to interfere with Prosecution investigations and witnesses, and to coach potential Defence witnesses'.²⁰ It further assessed the Conversations as being 'material to the Defence's preparation of its case' and the selection of witnesses,²¹ and indicated that it 'reserves its right to use the [Conversations] during and after the Defence case, in particular for the establishment of the truth, the fair evaluation of the evidence, witness impeachment purposes, rebuttal and for sentencing, if applicable.'²² Moreover, the Prosecution provided information on the proceedings pursuant to Article 70 of the Statute which it had initiated with the Pre-Trial Chamber.²³
8. On 16 November 2016, the Chamber rejected a Defence request for a stay of proceedings,²⁴ which the Chamber considered was more appropriately characterised as a request for adjournment of the proceedings, in order to assess the disclosed Conversations and the prejudice resulting therefrom ('16 November 2016 Decision').²⁵ On the same day, the Chamber rejected an oral Defence request for suspensive effect of the 16 November 2016 Decision,²⁶

¹⁹ Prosecution's Communication of the Disclosure of Evidence obtained pursuant to Article 70, ICC-01/04-02/06-1616.

²⁰ Notice, ICC-01/04-02/06-1616, para. 14. See also para. 2.

²¹ Notice, ICC-01/04-02/06-1616, para. 3.

²² Notice, ICC-01/04-02/06-1616, para. 18.

²³ Notice, ICC-01/04-02/06-1616, paras 5-13.

²⁴ Urgent Request for Stay of Proceedings, 14 November 2016, ICC-01/04-02/06-1629-Conf. A public redacted version was filed on the same day, ICC-01/04-02/06-1629-Red.

²⁵ Transcript of hearing on 16 November 2016, ICC-01/04-02/06-T-159-Red-ENG, pages 2-7.

²⁶ ICC-01/04-02/06-T-159-Red-ENG, pages 16-17.

and subsequently, the Chamber rejected the Defence's request²⁷ for leave to appeal the 16 November 2016 Decision.²⁸

9. On 23 November 2016, the Prosecution added 590 recordings of the Conversations to its List of Evidence.²⁹
10. On 23 February 2017, the Chamber rejected a Prosecution request for admission into evidence from the 'bar table' of material from the Article 70 proceedings on the basis that its 'probative value at this stage, due its nature and lack of direct materiality to the charges in the case, is low when balanced with the potential prejudice to the accused'.³⁰
11. On 20 March 2017, after having been granted an extension to the page limit,³¹ the Defence requested that the Chamber '[order] the stay of the proceedings against Mr Ntaganda with prejudice to the Prosecutor' ('Request').³² The Request is premised on the assertion that '[t]he acquisition by the Prosecution team in [the *Ntaganda*] case of 4,684 conversations of Mr Ntaganda, concurrent with trial proceedings, given the high relevance of those conversations to Defence strategy as well as to Mr Ntaganda's personal knowledge of the case amounts to an abuse of the Court's process, as a result of which Mr Ntaganda cannot receive a fair trial'.³³

²⁷ Request on behalf of Mr Ntaganda seeking leave to appeal oral decision on "Urgent request for stay of proceedings", 22 November 2016, ICC-01/04-02/06-1645.

²⁸ Decision on request for leave to appeal the Chamber's decision rejecting the Defence request for a stay of proceedings, 12 December 2016, ICC-01/04-02/06-1677.

²⁹ Prosecution's Updated List of Evidence, ICC-01/04-02/06-1646 and Annex A.

³⁰ 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. See also Decision on Defence request for extension of time to prepare for its presentation of evidence, 22 March 2017, ICC-01/04-02/06-1832, para. 17. The decision was originally filed confidential and subsequently reclassified public pursuant to the Chamber's instruction dated 7 April 2017.

³¹ Email from the Defence to the Chamber on 16 March 2017 at 12:25 and email from the Chamber to the Defence on 16 March 2017 at 17:28, granting, pursuant to Regulation 37(2) of the Regulations, an extension of the page limit by 10 pages.

³² Defence Request for stay of proceedings with prejudice to the Prosecutor, ICC-01/04-02/06-1830-Conf, page 32, with confidential Annexes A and C and confidential *ex parte*, only available to the Defence, Annexes B and D. A public redacted version of the Request was filed on 21 March 2017, ICC-01/04-02/06-1830-Red.

³³ Request, ICC-01/04-02/06-1830-Red, para. 2.

12. On 30 March 2017, after having also been granted an extension to the page limit,³⁴ the Prosecution opposed the Request ('Prosecution Response'),³⁵ on the basis that it 'fails to articulate any facts that would amount to an abuse of process or that warrant the exceptional remedy of a stay of proceedings', 'misconstrues' the factual context of the Article 70 investigation, advances 'speculative and unfounded' arguments, and 'ignores rulings of [the] Chamber and the Appeals Chamber on some of these very issues'.³⁶
13. On 31 March 2017, the Legal representatives of victims ('LRVs') filed a joint response, also opposing the Request ('LRVs Response').³⁷ The LRVs submit that the Defence fails to show that the alleged impact of the Prosecution's and the Judges' access to the Conversations 'resulted in vitiating the fairness of the proceedings to such a degree that a stay of the proceedings [would be] the only available remedy',³⁸ and further assert that granting the Request would result in 'irreparable prejudice to the victims awaiting justice in this case'.³⁹
14. On 3 April 2017, the Defence sought leave to reply to a number of issues raised in the Prosecution Response ('Request for leave to reply').⁴⁰
15. On 5 April 2017, the Prosecution responded to the Request for leave to reply, opposing it ('Response to Request for leave to reply').⁴¹

³⁴ Email from the Prosecution to the Chamber on 27 March 2017 at 13:14 and email from the Chamber to the Prosecution on 27 March 2017 at 17:57, granting pursuant to Regulation 37(2) of the Regulations an extension of the page limit by 10 pages.

³⁵ Prosecution's response to the "Defence Request for stay of proceedings with prejudice to the Prosecutor" (ICC-01/04-02/06-1830-Conf), 30 March 2017, ICC-01/04-02/06-1840-Conf. A public redacted version was filed on 6 April 2017, ICC-01/04-02/06-1840-Red.

³⁶ Prosecution Response, ICC-01/04-02/06-1840-Red, paras 1-2.

³⁷ Joint Response by the Common Legal Representative for the Victims of the Attacks and the Common Legal Representative for the Former Child Soldiers to the Defence "Request for stay of proceedings with prejudice to the Prosecutor", ICC-01/04-02/06-1841-Conf.

³⁸ LRVs Response, ICC-01/04-02/06-1841-Conf, para. 5.

³⁹ LRVs Response, ICC-01/04-02/06-1841-Conf, para. 44. See also paras 42-45.

⁴⁰ Request on behalf of Mr Ntaganda for leave to reply to "Prosecution's response to the 'Defence Request for Stay of proceedings with prejudice to the Prosecutor' (ICC-01/04-02/06-1830-Conf)", 30 March 2017, ICC-01/04-02/06-1840, ICC-01/04-02/06-1848 with confidential Annexes A and B. The request was originally filed confidential and subsequently reclassified public pursuant to the Chamber's instruction dated 10 April 2017.

16. On 6 April 2017, the Chamber granted the Request for leave to reply on Sections I, II, V and VI identified therein, considering that it would not be assisted by further submissions on the other issues identified in the Request for leave to reply.⁴²
17. On 10 April 2017, in line with the time limit and directions imposed by the Chamber, the Defence replied to the Prosecution Response ('Reply').⁴³ The Defence posits that the Prosecution 'misconstrues the overall premise for the [Request], namely the abuse of process resulting from the Prosecution team knowingly requesting and obtaining confidential Defence information during the presentation of its case without the Defence being informed'.⁴⁴
18. On 25 April 2017, after the Chamber had completed its deliberations on the Request, the Defence filed a request for an order precluding the use during the Defence case of Mr Ntaganda's non-privileged telephone conversations from the Detention Centre ('Request for an order precluding the use of certain material').⁴⁵ The submissions made therein have not been considered for the purpose of the present decision.

⁴¹ Response to the Defence request for leave to reply to the "Prosecution's response to the 'Defence Request for Stay of proceedings with prejudice to the Prosecutor' (ICC-01/04-02/06-1830-Conf), 30 March 2017, ICC-01/04-02/06-1840-Conf", (ICC-01/04-02/06-1848-Conf), ICC-01/04-02/06-1850-Conf.

⁴² Email from the Chamber on 6 April 2017, at 13:03.

⁴³ Reply on behalf of Mr Ntaganda to "Prosecution's response to the 'Defence Request for Stay of proceedings with prejudice to the Prosecutor' (ICC-01/04-02/06-1830-Conf)", 30 March 2017, ICC-01/04-02/06-1840-Red, ICC-01/04-02/06-1857-Conf. A public redacted version was filed on the same day, ICC-01/04-02/06-1857-Red.

⁴⁴ Reply, ICC-01/04-02/06-1857-Red, page 5. See also paras 4-18.

⁴⁵ Request on behalf of Mr Ntaganda for an order precluding the use during the Defence case of Mr Ntaganda's non-privileged telephone conversations from the Detention Centre, 25 April 2017, ICC-01/04-02/06-1878.

II. APPLICABLE LAW

19. At the outset, the Chamber notes that the Defence seeks, as a remedy for the alleged abuse of process, 'the stay of the proceedings against Mr Ntaganda *with prejudice to the Prosecutor*'.⁴⁶ On the basis of the Defence's submissions⁴⁷ and the decision of the Appeals Chamber of the International Criminal Tribunal for Rwanda ('ICTR') cited by the Defence in that context,⁴⁸ the Chamber understands this requested remedy to imply a stay of proceedings without possibility for the Prosecution to initiate a new trial against the accused. Accordingly, the Chamber considers that the relief sought implies a permanent stay of proceedings and it will therefore set out the law applicable to a request for a permanent stay of proceedings.
20. The Chamber observes that, while not explicitly provided for in the Statute, various chambers of this Court have consistently confirmed the availability of the remedy of a permanent stay of proceedings where it would be 'repugnant or odious to the administration of justice to allow the case to continue, or where the rights of the accused have been breached to such an extent that a fair trial has been rendered impossible'.⁴⁹

⁴⁶ Request, ICC-01/04-02/06-1830-Red, paras 3, 12-13, 93-94 and page 31 (emphasis added).

⁴⁷ In this respect, the Chamber notes in particular the Defence's submission that '[o]rdering a new trial would cause irreparable damage to the integrity of the international criminal justice system', Request, ICC-01/04-02/06-1830-Red, para. 94.

⁴⁸ The Defence refers to ICTR, *Jean-Bosco Barayagwiza v. The Prosecutor*, Case No. ICTR-97-19-AR72, Appeals Chamber, Decision, 3 November 1999.

⁴⁹ *The Prosecutor v. Uhuru Muigai Kenyatta*, Trial Chamber V(B), Public redacted version of Decision on Defence application for a permanent stay of the proceedings due to abuse of process, 5 December 2013, ICC-01/09-02/11-868-Red ('Kenyatta 5 December 2013 Decision'), para. 14, citing to *The Prosecutor v. Uhuru Muigai Kenyatta*, Trial Chamber V, Decision on defence application pursuant to Article 64(4) and related requests, 26 April 2013, ICC-01/09-02/11-728 ('Kenyatta 26 April 2013 Decision'), paras 74-77; see also generally *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006, 14 December 2006, ICC-01/04-01/06-772 ('Lubanga Appeals Chamber Decision of 14 December 2006'); *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008", 21 October 2008, ICC-01/04-01/06-1486; *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, Redacted Decision on the "Defence Application Seeking a Permanent Stay of the Proceedings", 7 March 2011, ICC-01/04-01/06-2690-Red2 (filed 8 March 2011).

21. According to the Court's jurisprudence on stays of proceedings, it is not necessary to find that the Prosecution acted in bad faith. It is sufficient to show that: (i) the rights of the accused have been violated to such an extent that the essential preconditions of a fair trial are missing; and (ii) there is no sufficient indication that this will be resolved during the trial process.⁵⁰
22. It has also been underlined that a stay of proceedings constitutes 'an exceptional remedy to be applied as a last resort', and that 'not every violation of fair trial rights will justify the imposition of a stay'.⁵¹ Indeed, the Appeals Chamber has emphasised that the threshold for a trial chamber to impose a stay of proceedings is high,⁵² and that a trial chamber 'enjoys a margin of appreciation, based on its innate understanding of the process thus far, as to whether and when the threshold meriting a stay of proceedings has been reached.'⁵³ The Chamber will assess the Request in accordance with the standard established in the aforementioned jurisprudence.

⁵⁰ *Kenyatta* 5 December 2013 Decision, ICC-01/09-02/11-868-Red, para. 14, citing to *Kenyatta* 26 April 2013 Decision, ICC-01/09-02/11-728, para. 76 and *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, 13 June 2008, ICC-01/04-01/06-1401, para. 91.

⁵¹ *Kenyatta* 5 December 2013 Decision, ICC-01/09-02/11-868-Red, para. 14, citing to *Kenyatta* 26 April 2013 Decision, ICC-01/09-02/11-728, para. 77.

⁵² *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled "Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU", 8 October 2010, ICC-01/04-01/06-2582 ('*Lubanga* Appeals Chamber Decision of 8 October 2010'), para. 55.

⁵³ *Lubanga* Appeals Chamber Decision of 8 October 2010, ICC-01/04-01/06-2582, para. 56.

III. SUBMISSIONS AND ANALYSIS

A. Preliminary matter: Prosecution request to disregard Confidential Annexes A and C to the Request

23. As a preliminary matter, the Chamber notes the Prosecution's request for the Chamber to disregard Confidential Annexes A and C to the Request, on the basis that they contain 'argumentative material', which, according to Regulation 36(2)(b) of the Regulations, counts towards the page limit.⁵⁴ Confidential Annex A contains a detailed 26-page procedural history on the issue of restrictions to the accused's communications and the Article 70 proceedings. Confidential Annex C is a three-paragraph overview of the timing when the Defence was notified of the relevant filings and decisions related to the Article 70 proceedings. The Chamber does not consider the information in these documents to constitute submissions within the meaning of Regulation 36(2)(b). Accordingly, the Prosecution's submissions on these documents do not require any further consideration.

B. Merits of the Request

24. At the outset, the Chamber notes that certain of the Defence's submissions relate to measures that were taken in the context of the Article 70 proceedings under supervision of the Single Judge of the Pre-Trial Chamber. In this regard, the Chamber notes that the trial chamber in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* ('Bemba case') held that a pre-trial chamber was the competent judicial authority to make determinations on any investigative measures requested by the Prosecution in relation to an Article 70

⁵⁴Prosecution Response, ICC-01/04-02/06-1840-Red, para. 13.

investigation.⁵⁵ As a result, the trial chamber found that it was not competent to make any determination on such measures and that it would be inappropriate for it to review the legality of investigative measures ordered by the single judge of the pre-trial chamber. Notwithstanding, the trial chamber underlined that it was still bound by its duty to ensure that the proceedings in the *Bemba* case were fair and that the rights of the accused were respected.⁵⁶ In the present case, for those issues related to measures taken in the context of Article 70 proceedings, the Chamber considers it appropriate to adopt the aforementioned approach.

25. The request for a stay as a remedy for the alleged abuse of process by the Prosecution is based on a number of partly interrelated and overlapping arguments and allegations, which can be divided into four categories. The Chamber will address the arguments in each category in turn, in order to determine whether any of them, in isolation or combination, reach the threshold warranting a stay of proceedings.

1. *Alleged failure to segregate the Prosecution team investigating Article 70 offences from the team dealing with the Ntaganda case*

i. Submissions

26. The Defence asserts that when requesting that the Pre-Trial Chamber grant unrestricted access to all Conversations without proposing any safeguard mechanism, the Prosecution was already aware that it would obtain confidential Defence information and thereby gain ‘an undue advantage contrary to the most basic principles of fairness’.⁵⁷ It further avers that the

⁵⁵ See for example *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Defence Request for Interim Relief, ICC-01/05-01/08-3059, para. 15, citing to *The Prosecutor v. Jean-Pierre Bemba Gombo*, Public Redacted version of “Decision on the prosecution’s request relating to Article 70 investigation” of 26 April 2013, 2 May 2014, ICC-01/05-01/08-2606-Red, para. 21.

⁵⁶ For a similar approach, see ICC-01/05-01/08-3059, paras 15-19.

⁵⁷ Request, ICC-01/04-02/06-1830-Red, para. 41.

Prosecution, upon receipt of the Conversations in September 2015, failed to ‘build the necessary safeguards to protect the integrity of the main proceedings’, for example, by ‘segreat[ing]’ the information or appointing independent counsel.⁵⁸ Further, the Defence contends that by assigning staff from the main case to the Article 70 proceedings, rather than appointing independent counsel, *amici curiae* investigators or different staff members, the Prosecution failed to erect the necessary ‘Chinese walls’ between the Article 70 proceedings and the *Ntaganda* case, which was specifically disapproved of in the *Bemba et al.* Appeals Chamber Decision.⁵⁹

27. The Prosecution underlines that under Rule 165 of the Rules, the responsibility to initiate and conduct investigations under Article 70 of the Statute lies with the Prosecution,⁶⁰ and, in the present case, was based on the Chamber’s ‘serious findings of potential criminal misconduct’.⁶¹ It further argues that there is no legal requirement for a separate review team, noting that the *obiter dictum* in the *Bemba et al.* Appeals Chamber Decision acknowledges that the same team can both investigate and prosecute Article 70 offences, and that the facts in the *Bemba et al.* case ‘differ in critical respects’ from the *Ntaganda* case, where ‘it was incumbent on the Prosecution trial team to investigate these allegations to ensure the protection of its witnesses and the integrity of the proceedings under [A]rticle 68(1)’.⁶²

⁵⁸ Request, ICC-01/04-02/06-1830-Red, para. 55.

⁵⁹ Request, ICC-01/04-02/06-1830-Red, paras 46-50. The Defence refers to *The Prosecutor v. Jean-Pierre Bemba et al.* (‘*Bemba et al.* case’), Appeals Chamber, Decision on the requests for the Disqualification of the Prosecutor, the Deputy Prosecutor and the entire OTP staff, 21 October 2014, ICC-01/05-01/13-648-Red3, para. 40. The decision was originally filed confidential *ex parte* on 22 August 2014, ICC-01/05-01/13-648-Conf-Exp. Confidential *ex parte* redacted and confidential redacted versions were filed on the same day, ICC-01/05-01/13-648-Conf-Exp-Red and ICC-01/05-01/13-648-Conf-Red2 (‘*Bemba et al.* Appeals Chamber Decision’). In this decision, the Appeals Chamber ‘consider[ed] that it is generally preferable that staff members involved in a case are not assigned to related article 70 proceedings [...]’.

⁶⁰ Prosecution Response, ICC-01/04-02/06-1840-Red, para. 61.

⁶¹ Prosecution Response, ICC-01/04-02/06-1840-Red, para. 62.

⁶² Prosecution Response, ICC-01/04-02/06-1840-Red, paras 71- 74.

28. The LRVs argue that the reference to the *ad hoc* tribunals' practice of appointing *amici curiae* is of limited guidance, noting that unlike at the *ad hoc* tribunals, the statutory framework of the Court does not foresee the appointment of independent counsel to conduct Article 70 investigations, and even allows a joinder of Article 70 proceedings with the main case.⁶³ They also stress that, contrary to the facts underlying the *Bemba et al.* Appeals Chamber Decision, there was no allegation of a conflict of interest warranting consideration of recourse to an independent counsel.⁶⁴

29. In its Reply, the Defence urges the Chamber to reject the Prosecution's argument that there was no requirement for a separate review team. It notes that the Prosecution merely focuses on its duty to investigate crimes within its competence, but fails to acknowledge that the *Bemba et al.* Appeals Chamber Decision provides for a determination on a case-by-case basis, which, in the present circumstances, clearly shows that segregation was 'imperative'. According to the Defence, segregation was all the more crucial given that, under Article 70 of the Statute, the Prosecution is bestowed with the sole responsibility to investigate offences against the administration of justice, and, as such, bears the responsibility to ensure the fairness of the proceedings it initiates.⁶⁵ It also challenges the Prosecution's arguments as to the purported differences between the *Ntaganda* and the *Bemba* cases, stressing that while not including privileged communications with counsel, the Conversations 'nonetheless provided the Prosecution with a colossal amount of detailed confidential Defence information' and that the fact that Conversations were not privileged 'has no bearing on the extent of the prejudice suffered by the [a]ccused' as a result therefrom.⁶⁶

⁶³ LRVs Response, ICC-01/04-02/06-1841-Conf, paras 34-37.

⁶⁴ LRVs Response, ICC-01/04-02/06-1841-Conf, para. 35.

⁶⁵ Reply, ICC-01/04-02/06-1857-Red, para. 20. See also paras 19 and 21-23.

⁶⁶ Reply, ICC-01/04-02/06-1857-Red, paras 21 and 24.

ii. Analysis

30. The Chamber observes that, unlike the provisions applicable at the *ad hoc* tribunals,⁶⁷ the Court's statutory framework does not prohibit Article 70 proceedings from being initiated and conducted by the same Prosecution team as the one involved in the related main proceedings. This was confirmed in the *Bemba et al.* Appeals Chamber Decision, when the Appeals Chamber considered that in initiating investigations under Article 70, the Prosecution 'merely acted in compliance with the Court's legal framework' and pursuant to its duties under Articles 42 and 54(1)(b) to investigate and prosecute crimes within the jurisdiction of the Court, including offences against the administration of justice under Article 70 of the Statute which 'will almost always be related to other cases that [it] is investigating or prosecuting'.⁶⁸ The Appeals Chamber further noted that Rules 162(2)(c) and 165(4) of the Rules allow for a joinder of charges under Article 70 with charges under Articles 5

⁶⁷ See, for example, Rule 77 of the United Nations International Criminal Tribunal for the former Yugoslavia Rules of Procedure and Evidence (as amended 8 July 2015), and Rule 77 of the ICTR Rules of Procedure and Evidence (as amended 13 May 2015), which both relevantly provide, '(A) The Tribunal in the exercise of its inherent power may hold in contempt those who knowingly and wilfully interfere with its administration of justice ... (C) When a Chamber has reason to believe that a person may be in contempt of the Tribunal, it may: (i) direct the Prosecutor to investigate with a view to the preparation and submission of an indictment for contempt; (ii) where the Prosecutor, in the view of the Chamber, has a conflict of interest with respect to the relevant conduct, direct the Registrar to appoint an *amicus curiae* to investigate the matter and report back to the Chamber as to whether there are sufficient grounds for instigating contempt proceedings; or (iii) initiate proceedings itself. [...]' ; Rule 60 *bis* of the Special Tribunal For Lebanon Rules of Procedure and Evidence (amended and corrected on 3 April 2017) which relevantly provides, '(A) The Tribunal, in the exercise of its inherent power, may hold in contempt those who knowingly and wilfully interfere with its administration of justice... (E) When the Contempt Judge has reason to believe that a person may be in contempt of the Tribunal, he may: (i) invite the Prosecutor to consider investigating the matter with a view to the preparation and submission of an indictment for contempt; (ii) where the Prosecutor indicates a preference not to investigate the matter or submit an indictment himself, or where in the view of the Contempt Judge, the Prosecutor has a conflict of interest with respect to the relevant conduct, direct the Registrar to appoint an *amicus curiae* to investigate the matter and report back to the Contempt Judge as to whether there are sufficient grounds for instigating contempt proceedings; or (iii) initiate proceedings himself. [...]' ; and Rule 77 of the Special Court for Sierra Leone Rules of Procedure and Evidence (amended on 31 May 2012), which relevantly provides, '(A) The Special Court, in the exercise of its inherent power, may punish for contempt any person who knowingly and wilfully interferes with its administration of justice... (C) When a Judge or Trial Chamber has reason to believe that a person may be in contempt of the Special Court, it may: (i) deal with the matter summarily itself; (ii) refer the matter to the appropriate authorities of Sierra Leone; or (iii) direct the Registrar to appoint an experienced independent counsel to investigate the matter and report back to the Chamber as to whether there are sufficient grounds for instigating contempt proceedings. If the Chamber considers that there are sufficient grounds to proceed against a person for contempt, the Chamber may issue an order in lieu of an indictment and direct the independent counsel to prosecute the matter. [...]'.

⁶⁸ *Bemba et al.* Appeals Chamber Decision, para. 35.

to 8, which ‘suggests that the drafters of the Rules of Procedure and Evidence envisaged that charges under [A]rticle 70 of the Statute may be dealt with in the same proceedings as charges for crimes under [A]rticles 6 to 8, including by the same Prosecutor, without this necessarily giving rise to a conflict of interest’.⁶⁹

31. The Appeals Chamber’s finding that ‘it is generally preferable that staff members involved in a case are not assigned to related [A]rticle 70 proceedings of this kind’⁷⁰ needs to be seen in light of the aforementioned considerations, and its applicability needs to be determined on a case-by-case basis, in light of the circumstances at hand.⁷¹

32. In the present case, the Chamber notes that the granting of the Article 70 Request follows a number of procedural steps taken before this Chamber in relation to the restrictions litigation in the *Ntaganda* case. 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,⁷² 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. However, while noting that the Prosecution may not have followed best practice in this regard, the Chamber does not consider that, without more, it amounts to an abuse of process rendering a fair trial

⁶⁹ *Bemba et al.* Appeals Chamber Decision, para. 35.

⁷⁰ *Bemba et al.* Appeals Chamber Decision, para. 40.

⁷¹ See also Reply, ICC-01/04-02/06-1857-Red, para. 20.

⁷² See Decision on reclassification of the Registry’s report on *post factum* review, 29 April 2015, ICC-01/04-02/06-578-Conf-Exp, only available to the Registry, Defence and Prosecution, para. 7. See also Decision on reclassification of the second Registry’s report on *post-factum* review, 10 July 2015, ICC-01/04-02/06-710-Conf-Exp, only available to the Registry and Defence, paras 12-13. A confidential redacted *ex parte* version of the latter decision, only available to the Registry, Defence and Prosecution, was filed on the same day, ICC-01/04-02/06-710-Conf-Exp-Red.

impossible. Accordingly, the Chamber will proceed to assess, on the basis of the submissions and supporting material received, whether the Prosecution gained any actual advantage, and whether any undue prejudice resulting therefrom amounts to a violation of the rights of the accused to such an extent that the essential preconditions of a fair trial are missing, and is such that it cannot be remedied during the course of the trial.

2. *Allegation that through its conduct, the Prosecution gained an undue and unfair advantage causing grave prejudice to the accused and the fairness of the proceedings*

i. Submissions

33. The Defence contends that the Prosecution's possession of confidential Defence information, absent the awareness of the accused, created an 'unfair and undue advantage for the Prosecution'.⁷³ According to the Defence, the breadth of the advantage thus gained is 'colossal' and is illustrated by a number of examples showing that the Prosecution obtained sensitive information on Defence leads on material facts and events, sources, documents, and potential witnesses, including the identities of at least 11 individuals who had been referred to in the Conversations as persons who could potentially provide information in support of the Defence case.⁷⁴ The Defence posits that the advantage gained by the Prosecution caused 'grave prejudice to Mr Ntaganda as well as to the integrity of the proceedings', as, noting that 'the full scope of the ways in which this information was used by the Prosecution is difficult to assess', the Defence postulates that the Prosecution may have used the information to contact sources identified in

⁷³ Request, ICC-01/04-02/06-1830-Red, paras 55-56.

⁷⁴ Request, ICC-01/04-02/06-1830-Red, paras 57-64.

the Conversations, alter its examinations-in-chief or towards determining its choice of evidence.⁷⁵

34. The Defence underlines that the prejudice ‘goes way beyond’ the names of potential Defence witnesses in the Prosecution’s alleged coaching scheme, but results mainly from ‘the sum and the nature of the detailed Defence confidential information in the possession of the Prosecution’.⁷⁶

35. The Prosecution asserts that the Defence’s submissions as to the ‘colossal’ ‘undue advantage’ obtained by the Prosecution are speculative and based on ‘general and inaccurate blanket assertions about the Prosecution’s access to Defence strategy without concretely identifying what legitimate information the Prosecution obtained’.⁷⁷ Specifically, it refutes the Defence assertion that witness-related decisions were taken with detailed knowledge of confidential Defence information, noting that its selection of witnesses and examination of at least the witnesses of the first three blocks were completed prior to obtaining access to the Conversations.⁷⁸ It also challenges the Defence’s argument that it could have ‘reconceptualised’ its strategy, stressing that no further detail in support of this argument is provided, that the accused was aware that he discussed ‘a false line of defence’ – which ‘should not be confused with legitimate defence strategy’⁷⁹ - and that the Defence has been aware of the accused’s ‘abus[e]’ of the Detention Centre communications since prior to the start of the trial.⁸⁰

36. The Prosecution further argues that the ‘illustrative sample’ of Defence strategy that the Prosecution is held to have inappropriately accessed

⁷⁵ Request, ICC-01/04-02/06-1830-Red, para. 65.

⁷⁶ Request, ICC-01/04-02/06-1830-Red, para. 69.

⁷⁷ Prosecution Response, ICC-01/04-02/06-1840-Red, para. 77.

⁷⁸ Prosecution Response, ICC-01/04-02/06-1840-Red, para. 77.

⁷⁹ Prosecution Response, ICC-01/04-02/06-1840-Red, paras 60, 78-79.

⁸⁰ Prosecution Response, ICC-01/04-02/06-1840-Red, para. 79.

comprises only general statements which fail to convey that ‘each of these conversations is aimed at interfering with the course of justice by coaching witnesses and fabricating evidence’ and relate to 11 individuals whom the Prosecution identifies as having been coached by the accused, and that the Defence fails to clarify what legitimate Defence strategy the Prosecution allegedly accessed and used to its advantage regarding those 11 individuals.⁸¹ With reference to the Defence ‘speculation’ as to how the Prosecution may have used confidential Defence information, it states that such assertions are unsubstantiated and ‘insufficient to meet the stringent test to grant a stay of proceedings’.⁸² In relation to the ‘one concrete instance in which [the Defence] allege[d] that the Prosecution gained knowledge of information through the conversations’,⁸³ namely a video discussed during the testimony of a specific witness,⁸⁴ the Prosecution submits that the example is incorrect, noting that it knew of the video ‘long before’ having had access to the Conversations and that it only received the relevant conversations after completion of the relevant witness’s testimony.⁸⁵

37. In its Reply, the Defence challenges the Prosecution’s submissions on the nature of the information accessed, arguing that: (i) it does not matter whether the information was true or false;⁸⁶ (ii) qualifying the contents of the confidential information which does not constitute evidence is ‘wholly inappropriate and should be disregarded by the Chamber’;⁸⁷ (iii) the Prosecution’s reference to ‘false Defence strategy’ in describing the contents of the Conversations provided to the Chamber ‘further deepens the abuse of

⁸¹ Prosecution Response, ICC-01/04-02/06-1840-Red, paras 80-81.

⁸² Prosecution Response, ICC-01/04-02/06-1840-Red, para. 83.

⁸³ Prosecution Response, ICC-01/04-02/06-1840-Red, para. 84 (emphasis in original).

⁸⁴ Request, ICC-01/04-02/06-1830-Red, para. 81.

⁸⁵ Prosecution Response, ICC-01/04-02/06-1840-Red, paras 84-85.

⁸⁶ Reply, ICC-01/04-02/06-1857-Red, paras 27-28.

⁸⁷ Reply, ICC-01/04-02/06-1857-Red, para. 29.

process to which Mr Ntaganda has been subjected’;⁸⁸ (iv) the Prosecution failed to address the Defence arguments related to the extent and substance of the confidential Defence information it received;⁸⁹ and (v) the Prosecution’s assertion that it did not use the Conversations to select witnesses or make any other litigation-related assessment is ‘simply inconceivable in light of the volume and substance of the material received’.⁹⁰

38. The LRVs argue that the Conversations occurred through a means of communication for which there was ‘no legitimate expectation of privacy or confidentiality’.⁹¹

ii. Analysis

39. As a preliminary matter, the Chamber underlines that it does not consider it relevant to assess whether the information accessed through the Conversations constitutes so-called ‘legitimate’ or ‘false’ Defence strategy. Instead, the Chamber will assess whether, on the basis of the Request and supporting material, there is any indication that this access afforded the Prosecution an unfair advantage or caused undue prejudice to the Defence. The Chamber also observes that the Conversations were non-privileged telephone conversations made by the accused.

40. In this regard, the Chamber notes that the Defence lists a number of examples of ‘detailed confidential Defence information’ contained in the Conversations,⁹² and requests that the Chamber evaluate the Conversations,

⁸⁸ Reply, ICC-01/04-02/06-1857-Red, para. 30.

⁸⁹ Reply, ICC-01/04-02/06-1857-Red, para. 31.

⁹⁰ Reply, ICC-01/04-02/06-1857-Red, para. 32.

⁹¹ LRVs Response, ICC-01/04-02/06-1841-Conf, paras 38-39, referring to *The Prosecutor v. Bemba et al.*, Decision on the "Prosecution's request for recordings of telephone calls between Messrs Bemba and Mangenda to be referred to Independent Counsel", 17 December 2013, ICC-01/05-01/13-48, paras 3 and 4.

⁹² See Request, ICC-01/04-02/06-1830-Red, page 19, paras 58-64, including footnotes, and confidential *ex parte* Annexes B and D.

in order to 'detect the full extent and nature of the information obtained by the Prosecution'.⁹³

41. The Chamber recalls that the Conversations are not evidence in the present case. Accordingly, the Chamber's evaluation of the Conversations relied upon by the Defence in support of its Request will be limited to the purpose of assessing the extent of Defence information obtained by the Prosecution and any resulting prejudice to the accused.

42. Having assessed the Defence's arguments in light of the supporting material provided, the Chamber notes that the extracts identified by the Defence indeed include information on the whereabouts of the accused and other individuals at the relevant times, names of individuals who could have provided information for the Defence and potential witnesses, and which may therefore be relevant to defence strategy. The Chamber recalls that, in the context of the restrictions litigation, it has decided that information that appeared to relate 'solely to the Defence case, or Defence investigations, with no relevance to the [said] litigation' should not be transmitted to the Prosecution.⁹⁴ It further notes the adversarial nature of the proceedings, and that the disclosure obligations of the Prosecution and the Defence differ significantly under the statutory framework, including in terms of strategy-related information.⁹⁵ In view of the foregoing, the Chamber finds that the fact that the Prosecution has had access to such information is prejudicial to

⁹³ Reply, ICC-01/04-02/06-1857-Red, para. 32.

⁹⁴ See Decision on reclassification of the Registry's report on *post factum* review, 29 April 2015, ICC-01/04-02/06-578-Conf-Exp, only available to the Registry, Defence and Prosecution, para. 7. See also Decision on reclassification of the second Registry's report on *post-factum* review, 10 July 2015, ICC-01/04-02/06-710-Conf-Exp, only available to the Registry and Defence, paras 12-13. A confidential redacted *ex parte* version of the latter decision, only available to the Registry, Defence and Prosecution, was filed on the same day, ICC-01/04-02/06-710-Conf-Exp-Red.

⁹⁵ See also Decision on the conduct of proceedings, 2 June 2015, ICC-01/04-02/06-619; 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, ICC-01/04-02/06-1757; Decision on Prosecution request for additional Defence disclosure, 10 March 2017, ICC-01/04-02/06- 1818.

the accused as it places the Prosecution in an unduly advantageous position vis-à-vis the Defence.

43. While the Chamber is of the view that the Prosecution's access to such information is in itself prejudicial, the Chamber considers that, on the basis of the submissions made so far, the information which may be relevant to defence strategy appears to be limited. In addition, with respect to the presentation of evidence thus far, the Chamber finds that the Defence has not identified concrete instances of the Prosecution having used the information in a manner resulting in undue prejudice to the accused. The Chamber also notes the Prosecution's claim that the information obtained in the context of the Article 70 proceedings was 'used to assess whether the [a]ccused and others were engaged in criminal misconduct, and not to select witnesses or make any other litigation-related assessment'.⁹⁶ In these circumstances, on the basis of the information available at this stage, the Chamber is not convinced that the prejudice identified above reaches the threshold for a stay of proceedings. Indeed, the Chamber finds that any prejudice may be remedied, retroactively and prospectively, through alternative, less drastic measures, as considered in Section IV.

3. *Allegation that the prolonged ex parte nature of the Article 70 proceedings was not justified and was prejudicial to the accused*

i. Submissions

44. The Defence submits that the *ex parte* classification of the Article 70 Request and ensuing proceedings was not justified, and deprived the Defence of the opportunity to: (i) challenge the classification; (ii) ensure that no confidential Defence information be given to the Prosecution; or (iii) request that any conversation obtained by the Prosecution in the context of the Article 70

⁹⁶ Prosecution Response, ICC-01/04-02/06-1840-Red, para. 77.

proceedings not be given to the Prosecution team in the *Ntaganda* case.⁹⁷ It also argues that on the basis of the information received upon arrival at the Court's Detention Centre, and in light of the Chamber's practice in the context of the restrictions litigation - where the Chamber put in place a 'screening mechanism' to exclude information on, *inter alia*, Defence strategy from transmission to the Prosecution - the accused was 'plainly unaware' that all of his conversations were, or could be, disclosed to the Prosecution in an unfiltered manner.⁹⁸

45. Further, the Defence submits that when the Chamber sought submissions on the need to maintain the restrictions on Mr Ntaganda's communications, the Prosecution again failed to 'redress the situation and salvage the integrity of the proceedings', by choosing to provide summaries of 10 conversations it had obtained through its Article 70 investigations on an *ex parte* basis to the Chamber.⁹⁹ The Defence submits that it was 'severely prejudiced' by the withholding of the 10 conversations and by not being informed that the Prosecution had obtained access to all Conversations, because it was again deprived of the ability to challenge the nature of the information obtained by the Prosecution team in the *Ntaganda* case, and to react to and adjust its strategy and lines of cross-examination of the remaining Prosecution witnesses.¹⁰⁰ With reference to the Chamber's repeated *ex parte* guidance to the effect that the Article 70 investigations should not last indefinitely in a manner which could impact the proceedings in the *Ntaganda* case,¹⁰¹ the

⁹⁷ Request, ICC-01/04-02/06-1830-Red, paras 43-44.

⁹⁸ Request, ICC-01/04-02/06-1830-Red, paras 51-53.

⁹⁹ Request, ICC-01/04-02/06-1830-Red, paras 66-67.

¹⁰⁰ Request, ICC-01/04-02/06-1830-Red, para. 69.

¹⁰¹ The Defence refers to Decision on Defence request seeking certain material relating to review of restrictions places on Mr Ntaganda's contacts, 3 June 2016, ICC-01/04-02/06-1364-Conf-Exp, only available to the Prosecution and Registry, para. 22 and ICC-01/04-02/06-1494-Conf-Exp-Red, para. 24. Regarding the Defence's note that both paragraphs remain redacted, the Chamber notes that para. 22 of ICC-01/04-02/06-1364-Conf-Exp is unredacted in the public redacted version of this decision filed on 21 November 2016, ICC-01/04-02/06-1364-Red2 and para. 24 of ICC-01/04-02/06-1494-Conf-Exp-Red is unredacted in the second public redacted version of this decision filed 22 November 2016, ICC-01/04-02/06-1494-Red4.

Defence posits that the Prosecution maintaining its ‘undue’ advantage ‘illustrates wilful disregard for due process requirements’ and is ‘antithetical to the principles of a fair trial’.¹⁰²

46. Finally, the Defence argues that by disclosing the Conversations in November 2016, the Prosecution did not ‘cure’ its abuse, since: (i) the materiality of the Conversations was already apparent and ‘self-evident’ on previous occasions;¹⁰³ (ii) if there existed ‘any possibility to salvage the integrity of the proceedings’ at the time of the disclosure of the Conversations in November 2016, the Defence was ‘deprived of such opportunity’ when its requests for adjournment, reconsideration and leave to appeal were denied;¹⁰⁴ and (iii) the fact that the Defence was on notice of the allegations of coaching and interference as part of the restrictions litigation does not mitigate the undue advantage obtained by the Prosecution in the main trial through its access to important details of defence strategy and the resulting ‘gross violation of equality of arms’ in the proceedings.¹⁰⁵

47. The Prosecution challenges the Defence’s claim that the accused was ‘plainly unaware’ that his conversations were or could be transmitted to the Prosecution, noting that: (i) the ‘screening mechanism’ put in place in the restrictions litigation was not applicable to the Article 70 investigations;¹⁰⁶ (ii) it contradicts the Defence’s previous arguments that the accused used codes in his conversations because of a concern that such conversations might be disclosed to the Prosecution;¹⁰⁷ and (iii) there can be ‘very little expectation

¹⁰² Request, ICC-01/04-02/06-1830-Red, paras 70-72.

¹⁰³ Request, ICC-01/04-02/06-1830-Red, paras 73-75.

¹⁰⁴ Request, ICC-01/04-02/06-1830-Red, para. 76.

¹⁰⁵ Request, ICC-01/04-02/06-1830-Red, paras 77-81.

¹⁰⁶ Prosecution Response, ICC-01/04-02/06-1840-Red, para. 63.

¹⁰⁷ Prosecution Response, ICC-01/04-02/06-1840-Red, para. 64, referring to Confidential Redacted Version of ‘Final Observations on Prosecution Requests for Restrictions on Mr Ntaganda’s Communications’, 3 August 2015, ICC-01/04-02/06-759-Conf-Exp, 3 August 2015, ICC-01/04-02/06-759-Conf-Exp-Red, only available to the Registry, Prosecution, VWU and Defence, para. 37, with confidential, *ex parte* Annex A, only available to the Registry and Defence. A public redacted version was filed on 13 January 2016, ICC-01/04-02/06-759-Red2.

of privacy' in the accused's situation.¹⁰⁸ Moreover, the Prosecution submits that the use of *ex parte* proceedings was in line with the Court's case law granting chambers discretion in that respect, and was necessary, proportionate and justified.¹⁰⁹

48. In its Reply, the Defence asserts that the Prosecution failed to justify why the screening mechanism put in place in the context of the restrictions litigation was no longer applicable,¹¹⁰ and challenges the Prosecution's argument as to the accused's knowledge that his conversations could be obtained by the Prosecution.¹¹¹ It further avers that the Prosecution failed to provide any reasonable explanation justifying the prolonged *ex parte* nature of the Article 70 investigations, arguing that the Prosecution's submissions on the case law are flawed and fail to recognise that *ex parte* procedures shall be exceptional, proportionate, and justified.¹¹²

ii. Analysis

49. In the decision cited by the Defence,¹¹³ the relevant trial chamber found that, in principle, recourse to *ex parte* submissions should be exceptional, only used when truly necessary and when no alternative procedures are available, and proportionate given the potential prejudice to the accused. The trial chamber further promoted a 'flexible approach' for the use of *ex parte* procedures, considering that the other party should be notified, and its legal basis should be explained, 'unless to do so is inappropriate', and that '[c]omplete secrecy would, for instance, be justified if providing information about the procedure

¹⁰⁸ Prosecution Response, ICC-01/04-02/06-1840-Red, paras 65-66.

¹⁰⁹ Prosecution Response, ICC-01/04-02/06-1840-Red, paras 67-70.

¹¹⁰ Reply, ICC-01/04-02/06-1857-Red, paras 12-13.

¹¹¹ Reply, ICC-01/04-02/06-1857-Red, paras 14-18.

¹¹² Reply, ICC-01/04-02/06-1857-Red, paras 33-38.

¹¹³ Reply, ICC-01/04-02/06-1857-Conf, para, 36, referring to *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the procedures to be adopted for *ex parte* proceedings, 6 December 2007, ICC-01/04-01/06-1058, para. 12.

would risk revealing the very thing that requires protection'.¹¹⁴ The Chamber agrees with these findings.

50. In the present case, *ex parte* classification of the relevant proceedings was initially ordered by the Pre-Trial Chamber on the basis that disclosure of the information would have compromised ongoing investigations, as provided for under Rule 81(2) of the Rules. In that context, the Chamber reminded the Prosecution on two occasions that the Article 70 investigations should be concluded as expeditiously as possible, and that any related applicable disclosure of information to the Defence should be made as soon as possible.¹¹⁵ In line with the approach set out above, the Chamber is not competent to make any determination as to the reasons that justified non-disclosure of the materials related to the Article 70 proceedings. Accordingly, in line with the approach set out in paragraph 24 above, the Chamber will focus on assessing prejudice suffered by the accused in the *Ntaganda* case as a result of the maintenance of the *ex parte* nature of the proceedings until filing of the Notice.

51. In the circumstances, noting that: (i) the statutory framework specifically provides for material to be withheld from the Defence where it may compromise ongoing investigations; (ii) the Chamber itself was not in a position to question the *ex parte* nature of the Article 70 investigations as a whole; (iii) notwithstanding, the Chamber gave specific instructions to the Prosecution in this regard as to concluding the investigations swiftly and effecting relevant disclosure in the *Ntaganda* case, with the specific purpose of minimising any prejudice to the accused; and (iv) the arguments of the Defence on this point appear speculative and unclear as to the alleged prejudice suffered in the present case, and how it would otherwise had acted

¹¹⁴ ICC-01/04-01/06-1058, para. 12.

¹¹⁵ ICC-01/04-02/06-1364-Red2, para. 22; ICC-01/04-02/06-1494-Red4, para. 24.

had it been aware of the Article 70 investigations, the Chamber does not consider that the *ex parte* nature of the proceedings resulted in prejudice to the accused warranting a stay of proceedings.

4. *Allegation that the Prosecution's conduct created an irremediable apprehension of bias on the part of the Chamber*

i. Submissions

52. The Defence asserts that '[a]s a result of its written pleadings practice, including numerous *ex parte* submissions and the material arising from its Article 70 investigation submitted to the Judges for their consideration on the merits, the Prosecution has created a situation which would lead a reasonable observer, properly informed, to apprehend bias on the part of the [...] Chamber'.¹¹⁶ In this regard, the Defence submits that the 'professional Judge' concept previously relied upon by the Chamber is 'not without limits',¹¹⁷ and that the Prosecution has demonstrated¹¹⁸ its intention to use the Conversations which, despite the Chamber's decisions distancing itself therefrom, 'are now in possession of the Chamber'.¹¹⁹ The Defence further argues that the prejudice is ongoing, noting that it has no way of knowing what the Prosecution reviewed or not, and that unfiltered disclosure of the

¹¹⁶ Request, ICC-01/04-02/06-1830-Red, para. 84.

¹¹⁷ Request, ICC-01/04-02/06-1830-Red, para. 85.

¹¹⁸ The Defence refers to the Article 70 Request submitted to the Single Judge, ICC-01/04-02/06-638-Conf-Red, para. 67; Prosecution's Updated List of Evidence, 23 November 2016, ICC-01/04-02/06-1646 and Annex A, wherein the Prosecution added 590 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, 30 January 2017, ICC-01/04-02/06-1762 with Annex A, wherein the Prosecution added 506 summaries of conversations by Mr Ntaganda and Mr Lubanga from the Detention Centre to its list of evidence; Public Redacted Version of "Prosecution's request pursuant to regulation 35 to submit evidence," 3 February 2017, ICC-01/04-02/06-1769-Conf, 12 April 2017, ICC-01/04-02/06-1769-Red ('Regulation 35 Request'); Corrected version of "Prosecution's request for additional Defence disclosure", 10 February 2017, ICC-01/04-02/06-1783-Conf, 15 February 2017, ICC-01/04-02/06-1783-Conf-Corr and ICC-01/04-02/06-1783-Red ('Request for additional Defence disclosure').

¹¹⁹ Request, ICC-01/04-02/06-1830-Red, paras 86-87.

Conversations to the Prosecution on a regular basis continues and is currently scheduled to continue while the Defence prepares and presents its evidence.¹²⁰

53. The Prosecution responds that the Defence has failed to demonstrate any actual bias or an apprehension of bias on the part of the Chamber as a result of the Prosecution's conduct, arguing that: (i) the Chamber reviewed the information before it to the extent necessary to protect witnesses and the integrity of the proceedings, stressed the appropriate context in which such information was to be considered, and declined to consider it when adjudicating the Regulation 35 Request and Request for additional Defence disclosure; (ii) the Defence failed to provide any valid reason for the Chamber to depart from its position that, composed of professional judges, it is capable of disregarding any irrelevant information in its assessment of the charges brought against the accused; (iii) the Defence had 'ample opportunity to counter and/or contradict the information' presented by the Prosecution;¹²¹ and (iv) the allegedly 'numerous' *ex parte* submissions to the Chamber were limited and recently reviewed by the Chamber for the purpose of reclassification.¹²²

54. The LRVs also argue that the submission of Article 70 material did not 'contaminate' the Chamber which consistently stressed the limited purpose and context for which this material was to be considered,¹²³ assessed and took steps to remedy any prejudice caused to the accused,¹²⁴ 'clearly balanced the accused's rights against the Prosecution's interests',¹²⁵ and 'used its inherent powers in order to provide the Defence with remedial measures.'¹²⁶

¹²⁰ Request, ICC-01/04-02/06-1830-Red, paras 88-89.

¹²¹ Prosecution Response, ICC-01/04-02/06-1840-Red, paras 86-90.

¹²² Prosecution Response, ICC-01/04-02/06-1840-Red, para. 91.

¹²³ LRVs Response, ICC-01/04-02/06-1841-Conf, para. 30.

¹²⁴ LRVs Response, ICC-01/04-02/06-1841-Conf, para. 31.

¹²⁵ LRVs Response, ICC-01/04-02/06-1841-Conf, para. 32.

¹²⁶ LRVs Response, ICC-01/04-02/06-1841-Conf, para. 33.

ii. Analysis

55. The Chamber previously underlined that pursuant to Article 74(2) of the Statute, it ‘may base its decision only on evidence submitted and discussed before it at the trial’, and, ‘[a]ccordingly, it may not rely, for the purposes of its final decision, on material that has not been introduced in this context’.¹²⁷

56. In this respect, the Chamber recalls that it has previously rejected a Prosecution request for admission into evidence from the ‘bar table’ of material from the Article 70 proceedings on the basis that its ‘probative value at this stage, due its nature and lack of direct materiality to the charges in the case, is low when balanced with the potential prejudice to the accused’.¹²⁸ Accordingly, as set out above, the Chamber has limited its review of the Conversations to those relied upon by the Defence in support of its Request, and for the specific purpose of assessing the extent of defence strategy-related information obtained by the Prosecution and resulting prejudice to the accused.

57. Moreover, the Chamber has repeatedly stressed that, being composed of professional judges, it is indeed able to assess information in the relevant context, for the specific purposes for which it was submitted and to the extent considered necessary. The Chamber has also emphasised that at the appropriate juncture of proceedings, it will evaluate the relevant evidence in

¹²⁷ Decision on the Defence's motion seeking 'Preventive Measures in Light of Information Presented to the Trial Chamber Concerning the Alleged Bad Character of the Accused', 4 February 2015, ICC-01/04-02/06-443-Conf-Exp, only available to the Prosecution, Defence and Registry, para. 22, referring to *The Prosecutor v. Jean-Pierre Bemba Gombo*, Appeals Chamber, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled “Decision on the admission into evidence of materials contained in the prosecution’s list of evidence”, 3 May 2011, ICC-01/05-01/08-1386, para. 45.

¹²⁸ 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. See also ICC-01/04-02/06-1832, para. 17.

support of the charges brought against the accused, and is capable of disregarding any irrelevant information.¹²⁹

58. The Chamber considers that the Defence does not provide any sufficiently substantiated reason why the Chamber should depart from its position that, being composed of professional judges, it is able to assess the information in the relevant context, and that the Prosecution has created an irremediable situation of apprehension of bias on the part of the Chamber. In this regard, the Chamber notes the finding of the trial chamber in the *Bemba* case that the relevant standard for assessing impartiality, as required under Article 41(2)(a) of the Statute, is ‘whether the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias in the judge’.¹³⁰ It was further considered that ‘the question is not whether the reasonable observer could have apprehended bias, but whether such apprehension is objectively reasonable’ and that there is a strong presumption that ‘the judges of the Court are professional judges, and thus, by virtue of their experience and training, are capable of deciding on the issue before them while relying solely and exclusively on the evidence adduced in the particular case, whilst excluding any information that was available to them in other capacity’.¹³¹

59. Having regard to this standard, and to the aforementioned observations of the Chamber in relation to its assessment of the evidence, the Chamber considers that the Defence’s submissions as to the apprehension of bias on the part of the Chamber are unfounded.

¹²⁹ ICC-01/04-02/06-443-Conf-Exp, para. 32; ICC-01/04-02/06-1364-Red2, para. 21

¹³⁰ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on “Defence Request for Relief for Abuse of Process”, 17 June 2015, ICC-01/05-01/08-3255 (*Bemba* decision on request for relief for abuse of process), para. 100, referring to jurisprudence from the Plenary and the Presidency of the Court.

¹³¹ *Bemba* decision on request for relief for abuse of process, ICC-01/05-01/08-3255, para. 100, referring to jurisprudence from the Plenary and the Presidency of the Court.

IV. CONCLUSION

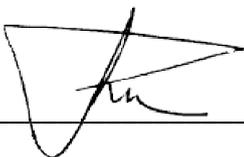
60. The Chamber recalls that a permanent stay of proceedings is an exceptional remedy only to be granted as a last resort, when the essential pre-conditions of a fair trial are missing, and when there is no sufficient indication that the relevant issues will be resolved during the trial process, rendering it impossible to 'piece together the constituent elements of a fair trial'.¹³²
61. Having considered the totality of the submissions made in relation to the Request, the Chamber considers that it is possible to continue 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 the 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. The 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.
62. Furthermore, the Chamber may consider taking additional measures upon receipt of a substantiated application setting out concrete instances of prejudice as a result of the Prosecution having unduly benefitted from its access to the Conversations. Such measures may include allowing the Defence to recall Prosecution witnesses, and/or disregarding certain evidence.

¹³² *Lubanga* Appeals Chamber Decision of 14 December 2006, ICC-01/04-01/06-772, para. 39.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

- (i) **REJECTS** the Request;
- (ii) **DECIDES**, without prejudice to the Request for an order precluding the use of certain material, 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 upon receipt of a request as specified in paragraph 61 above; and
- (iii) **DIRECTS** the Prosecution to file a public redacted version of its Response to the Request for leave to reply and the LRVs to file a public redacted version of the LRVs Response.

Done in both English and French, the English version being authoritative.



Judge Robert Fremr, Presiding Judge



Judge Kuniko Ozaki



Judge Chang-ho Chung

Dated 28 April 2017

At The Hague, The Netherlands