

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: **ICC-01/04-02/06**
Date: **18 August 2015**

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 redacted version of

Decision on restrictions in relation to certain detainees

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

The Office of the Prosecutor

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Mr James Stewart
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Counsel for Bosco Ntaganda

Mr Stéphane Bourgon
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Legal Representatives of Victims

Ms Sarah Pellet
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Legal Representatives of Applicants

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**Unrepresented Applicants for
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Others

Defence counsel for Mr Thomas Lubanga
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Defence counsel for Mr Germain Katanga

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 21(3), 64, 67 and 68(1) of the Rome Statute ('Statute'), Regulations 23 *bis* and 101 of the Regulations of the Court ('Regulations') and Regulations 173-175 of the Regulations of the Registry, issues the following 'Decision on restrictions in relation to certain detainees'.

I. Confidentiality

1. The Chamber notes that this decision pertains to proceedings that have been conducted, in their entirety, in a confidential *ex parte* manner. However, in light of the principle of publicity of proceedings,¹ the Chamber decides to issue the present decision publicly. Certain redactions have been made where the Chamber's obligations under, *inter alia*, Articles 21(3), 67 and 68(1) of the Statute are engaged. Unless otherwise indicated, the confidential *ex parte* filings referred to are available to the Office of the Prosecutor ('Prosecution'), defence team for Mr Ntaganda ('Ntaganda Defence') and Registry only.

II. Procedural history

2. The Chamber has ordered the imposition of certain restrictions on Mr Ntaganda's contacts,² including from 13 March 2015 onwards the active

¹ See, for example, Articles 64(7), 67(1) and 68(2) of the Statute, Rule 15 of the Rules, and Regulations 20(3) and 23*bis* of the Regulations. See also Prosecution's request for public redacted versions of filings and decisions on allegations of witness interference, 15 July 2015, ICC-01/04-02/06-725-Conf-Exp, referring to *Prosecutor v. Uhuru Muigai Kenyatta*, Decision on request of the Legal Representative of Victims for a public redacted version of the pre-trial brief, 11 December 2014, ICC-01/09-02/11-988.

² Decision on the Prosecution request for restrictions on contact and the Defence request for access to logs, 8 December 2014, ICC-01/04-02/06-410-Conf-Exp, only available to the Prosecution and Registry ('First Restrictions Decision'). A redacted version, available to the Ntaganda Defence, was issued on the same day. On 16 February 2015, corrected versions were issued (ICC-01/04-02/06-410-Conf-Exp-Corr; and ICC-01/04-02/06-410-Conf-Exp-Red-Corr).

monitoring of his phone calls,³ and instructed the Registry to conduct a *post factum* review of certain phone conversations by Mr Ntaganda.⁴

3. On 20 May 2015, the Prosecution filed a motion ('Request for Materials')⁵ in which it requested the Chamber to instruct the Registry to provide it with Mr Lubanga's non-privileged: (i) list of contacts; (ii) logs of phone communications for the period of 1 January to 20 May 2015; and (iii) visitation logs for that same period ('Requested Materials'), on the basis that it appeared that Mr Lubanga may have disseminated confidential information and interfered with Prosecution witnesses in the *Ntaganda* case.⁶
4. On 9 June 2015, the Prosecution filed a further motion ('Prosecution Request for Further Restrictions') seeking, *inter alia*, the imposition of restrictions on all phone calls by 'any individual at the detention centre' to certain persons on the basis that they had communicated previously about confidential case information with Mr Ntaganda.⁷

³ Order instructing the Registry to put in place additional temporary restrictions on contact, 13 March 2015, ICC-01/04-02/06-508-Conf-Exp, para. 7 and disposition.

⁴ In accordance with the procedure set by the Chamber (Decision on procedure for review of telephone communications and Defence requests ICC-01/04-02/06-421-Conf-Exp and ICC-01/04-02/06-446-Conf-Exp, 16 February 2015, ICC-01/04-02/06-459-Conf-Exp, with annexes 1 and 2; and Order requesting final submissions on restrictions on Mr Ntaganda's contacts and related matters, 3 July 2015, ICC-01/04-02/06-697-Conf-Exp, only available to the Ntaganda Defence and the Registry [a redacted version, available to the Prosecution, was issued on the same day]), the Registry filed a number of reports (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, with annexes 1-9 ('First Registry Report'); Corrected version of the Addendum to the 'First Report on the *post factum* review of the phone conversations made by Mr Ntaganda' (ICC-01/04-02/06-504-Conf-Exp), 23 April 2015, ICC-01/04-02/06-563-Conf-Exp-Corr, with annexes 1-3; Second Report on the *post factum* review of the phone conversations made by Mr Ntaganda, 22 May 2015, ICC-01/04-02/06-607-Conf-Exp, only available to the *Ntaganda* Defence and the Registry, with 20 annexes ('Second Registry Report') [a redacted version, available to the Lubanga Defence, was issued on 2 July 2015 and another redacted version, available to the Prosecution, was issued on 16 July 2015]; Report on the Active Monitoring Review of Mr Ntaganda's Telephone Conversations pursuant to Trial Chamber VI's Order ICC-01/04-02/06-697 dated 3 July 2015, 13 July 2015, ICC-01/04-02/06-714-Conf-Exp, with one annex ('Report on Active Monitoring'); Third Report on the *post factum* review of the phone conversations made by Mr Ntaganda, 27 July 2015, ICC-01/04-02/06-748-Conf-Exp, only available to the Chamber and Registry, with annexes 1-20 ('Third Registry Report')).

⁵ Prosecution's Request for Access to Thomas Lubanga's List of Non-Privileged Contacts, Call Logs and Visitation Logs, ICC-01/04-02/06-603-Conf-Exp, only available to the Prosecution and the Registry, with annexes A-D. A redacted version, available to the Lubanga Defence, was filed on 3 July 2015 (ICC-01/04-02/06-603-Conf-Exp-Red).

⁶ Request for Materials, ICC-01/04-02/06-603-Conf-Exp, paras 2 and 25.

⁷ Prosecution request for further restrictions to the Accused's communications, notified on 10 June 2015, ICC-01/04-02/06-635-Conf-Exp, available only to the Prosecution and the Registry, in particular paras 1, 7 and 44. A redacted version, available to the Ntaganda Defence, was filed on 10 June 2015 and notified on 11 June 2015

5. On 19 June 2015, [REDACTED].⁸
6. On 23 June 2015, [REDACTED].⁹
7. On 26 June 2015, [REDACTED],¹⁰ [REDACTED].¹¹ [REDACTED].
8. On 29 June 2015, the Chamber issued the ‘Order imposing interim restrictions on detainees’ contacts with certain individuals and related measures’, in which it directed the Registry, *inter alia*, to immediately restrict all telephone calls by any individual at the Detention Centre with certain named persons (‘Named Individuals’) on the basis that the Named Individuals had been implicated in allegations of witness interference in the *Ntaganda* case, including the dissemination of confidential information (‘Interim Order on Restrictions’).¹² The Chamber deferred its consideration of such restrictions with respect to Mr Ntaganda. The Chamber also directed the Registry to immediately commence the active monitoring of all of Mr Lubanga’s non-privileged telephone calls.¹³
9. Also on 29 June 2015, the Chamber issued the ‘Decision on Prosecution request for access to Mr Lubanga’s list of non-privileged contacts, call logs and visitation logs’, granting the Request for Materials.¹⁴
10. Also on 29 June 2015, the Registry [REDACTED],¹⁵ indicating therein that both Mr Lubanga and Mr Katanga had [REDACTED] on their contact lists

(ICC-01/04-02/06-635-Conf-Red). A further redacted version, available to the Lubanga Defence, was filed on 2 July 2015 (ICC-01/04-02/06-635-Conf-Exp-Red). A confidential redacted version was filed on 28 July 2015 (ICC-01/04-02/06-635-Conf-Red3).

⁸ [REDACTED].

⁹ [REDACTED].

¹⁰ [REDACTED].

¹¹ [REDACTED].

¹² ICC-01/04-02/06-683-Conf-Exp, available to the Prosecution and the Registry. Two redacted versions, available to the Ntaganda and the Lubanga Defence, respectively, were filed on 30 June 2015 (ICC-01/04-02/06-683-Conf-Exp-Red and ICC-01/04-02/06-683-Conf-Exp-Red2). [REDACTED].

¹³ Interim Order on Restrictions, ICC-01/04-02/06-683-Conf-Exp, para. 13 and page 11.

¹⁴ ICC-01/04-02/06-684-Conf-Exp, available to Prosecution, Registry and Lubanga Defence. The Chamber ordered the Registry to file in the record of the case, *ex parte*, only available to the Chamber and the Registry, the list of non-privileged telephone numbers of Mr Lubanga by 25 June 2015 (E-mail communication from Legal Officer of the Chamber to Registry on 23 June 2015 at 11:49; E-mail communication from Registry to the Chamber on 23 June 2015 at 16:34; Transmission of information relating to Thomas Lubanga[...] Dyilo[’s] non-privileged contacts pursuant to Trial Chamber VI instructions dated 23 June 2015, dated 25 June 2015 and notified on 26 June 2015, ICC-01/04-02/06-674-Conf-Exp, only available to the Registry, with annex).

[REDACTED]. The Registry indicated that [REDACTED] was removed from their list of telephone contacts.¹⁶

11. On 30 June 2015, [REDACTED].¹⁷
12. Also on 30 June 2015, the Chamber issued two orders in which it, *inter alia*, provided reasons for the removal of [REDACTED] from detainees' contact lists and invited the defence team for Mr Katanga ('Katanga Defence') and the defence team for Mr Lubanga ('Lubanga Defence'), respectively, to submit any observations [REDACTED] by 24 July 2015.¹⁸
13. On 2 July 2015, the Registry filed the Requested Materials in the case record ('Transmission of Requested Materials').¹⁹
14. On 3 July 2015, the Registry filed its report on the interim restrictions placed on detainees' contacts ('Registry Report on Interim Restrictions'), informing the Chamber that it had completed its review of all detained persons' lists of contacts, that Mr Lubanga was the only detainee affected by the Interim Order on Restrictions, and that two Named Individuals ('Two Individuals') had been removed from his contact list.²⁰
15. On 16 July 2015, in accordance with the Chamber's order,²¹ the Prosecution filed its additional observations on the current restrictions on detainee

¹⁵ ICC-01/04-02/06-681-Conf-Exp, only available to the Registry, with annexes 1-2.

¹⁶ [REDACTED].

¹⁷ [REDACTED].

¹⁸ Order on reclassifications and observations from Mr Katanga, ICC-01/04-02/06-686-Conf-Exp, only available to the Registry, the Prosecution and the Katanga Defence ('Order on Reclassification'); Order on reclassification and observations from Mr Lubanga, ICC-01/04-02/06-687-Conf-Exp, only available to the Registry, the Prosecution and the Lubanga Defence (together with Order on Reclassification, 'Orders on Reclassification').

¹⁹ Transmission of information pursuant to Trial Chamber VI's "Decision on Prosecution request for access to Mr Lubanga's list of non-privileged contacts, call logs and visitation logs" dated 29 June 2015, ICC-01/04-02/06-694-Conf-Exp, only available to the Registry, the Prosecution and the Lubanga Defence, with annexes 1-3.

²⁰ Registry's Report on the Implementation of Trial Chamber VI's "Order imposing interim restrictions on detainees' contacts with certain individuals and related measures" dated 29 June 2015 ICC-01/04-02/06-699-Conf-Exp, only available to the Registry, with annexes 1-2 (notified on 6 July 2015).

²¹ Interim Order on Restrictions, ICC-01/04-02/06-683-Conf-Exp, page 11.

communications ('Prosecution Observations of 16 July 2015').²² On 21 July 2015, it also filed the 'Prosecution final observations on the need for further restrictions to NTAGANDA's contacts' ('Prosecution Observations of 21 July 2015').²³

16. On 22 July 2015, in accordance with the Chamber's orders,²⁴ the Lubanga Defence and Katanga Defence each filed observations on the restrictions imposed on Mr Lubanga's and Mr Katanga's communications ('Lubanga Defence Observations' and 'Katanga Defence Observations', respectively).²⁵
17. On 27 July 2015, following an order from the Chamber,²⁶ the Ntaganda Defence filed its submissions on the Prosecution Observations of 16 July 2015 ('Ntaganda Defence Observations').²⁷
18. On 30 July 2015, the Prosecution submitted requests for leave to reply to the Lubanga Defence Observations²⁸ and Katanga Defence Observations,²⁹ respectively. The requests were rejected by the Chamber.³⁰

²² Prosecution additional observations for further restrictions to detainee communications, ICC-01/04-02/06-727-Conf-Exp, only available to the Prosecution and the Registry. Three redacted versions were filed on 16 July 2015 (ICC-01/04-02/06-727-Conf-Exp-Red, available to the Ntaganda Defence; ICC-01/04-02/06-727-Conf-Exp-Red2, available to the Katanga Defence; and ICC-01/04-02/06-727-Conf-Exp-Red3, available to the Lubanga Defence).

²³ ICC-01/04-02/06-738-Conf-Exp, available to Ntaganda Defence, Registry and Prosecution only.

²⁴ Interim Order on Restrictions, ICC-01/04-02/06-683-Conf-Exp-Red, page 10 and ICC-01/04-02/06-683-Conf-Exp-Red2, page 11; Orders on Reclassification, ICC-01/04-02/06-686-Conf-Exp, page 5; ICC-01/04-02/06-687-Conf-Exp, page 4.

²⁵ *Observations de la Défense de M. Lubanga conformément aux ordonnances ICC-01/04-02/06-683-Conf-Exp-Red2 et ICC-01/04-02/06-687-Conf-Exp du 30 juin 2015*, ICC-01/04-02/06-741-Conf-Exp; and Defence Observations pursuant to the 'Order on reclassifications and observations from Mr Katanga', ICC-01/04-02/06-742-Conf-Exp, only available to the Registry and the Katanga Defence. A redacted version, available to the Prosecution, was filed on the same day (ICC-01/04-02/06-742-Conf-Exp-Red).

²⁶ Email communication from the Legal Officer of Chamber to parties on 20 July 2015 at 11:30.

²⁷ Submissions on the Prosecution's Request for Restrictions on Other Detainees, ICC-01/04-02/06-747-Conf-Exp.

²⁸ Prosecution request to file a reply to the "*Observations de la Défense de M. Lubanga conformément aux ordonnances ICC-01/04-02/06-683-Conf-Exp-Red2 et ICC-01/04-02/06-687-Conf-Exp du 30 juin 2015*", ICC-01/04-02/06-741-Conf-Exp, ICC-01/04-02/06-757-Conf-Exp, only available to the Prosecution and Registry ('Request for Leave to Reply to Lubanga Observations'). A redacted version, available to the Lubanga Defence, was filed on 30 July 2015 and notified on 31 July 2015 (ICC-01/04-02/06-757-Conf-Exp-Red). However, pursuant to the Chamber's instruction dated 31st July 2015 (*see* email communication from Legal Officer of the Chamber to Registry on 31 July 2015 at 10:48), ICC-01/04-02/06-757-Conf-Exp was also made available to the Lubanga Defence.

²⁹ Prosecution request to file a reply to the Katanga "Defence Observations pursuant to the 'Order on reclassifications and observations from Mr Katanga'", ICC-01/04-02/06-742-Conf-Exp-Red, ICC-01/04-02/06-

19. On 5 August 2015, the Prosecution requested leave to file a reply to the Ntaganda Defence Observations,³¹ which was also rejected by the Chamber.³²
20. On 7 August 2015, [REDACTED].³³ [REDACTED].³⁴
21. On 12 August 2015, [REDACTED].³⁵
22. On 17 August 2015, the Chamber issued the 'Decision on Prosecution requests to impose restrictions on Mr Ntaganda's contacts'.³⁶

III. Submissions

Prosecution Observations

23. In relation to the Interim Order on Restrictions, the Prosecution argues that 'the ongoing restriction on contact with the [Named Individuals] is necessary, minimally intrusive, and proportionate to address the compelling interest of preventing further dissemination of confidential information and preventing suspected witness interference'.³⁷ Specifically, the Prosecution submits that the restriction on contact with the Named Individuals is necessary at least until the completion of the testimony of all Prosecution insider witnesses.³⁸ The Prosecution avers that, in terms of the applicable standard for maintaining the restrictions, 'the issue relates to the possibility or likelihood of the occurrence of witness interference, not the actual occurrence of interference'.³⁹ Accordingly, it submits that the interests of protecting witnesses and ensuring the integrity of

756-Conf-Exp, only available to the Prosecution, Registry and Katanga Defence ('Request for Leave to Reply to Katanga Observations').

³⁰ See email communication from Legal Officer of the Chamber to parties on 31 July 2015 at 10:48.

³¹ Prosecution request to file a reply to the Defence "Submissions on the Prosecution's Request for Restrictions on Other Detainees", ICC-01/04-02/06-747-Conf-Exp, ICC-01/04-02/06-765-Conf-Exp ('Request for Leave to Reply to Ntaganda Observations', and together with 'Request for Leave to Reply to Lubanga Observations' and 'Request for Leave to Reply to Katanga Observations', 'Requests for Leave to Reply').

³² Email Communication from Legal Officer of the Chamber to parties on 6 August 2015 at 14:22.

³³ [REDACTED].

³⁴ [REDACTED].

³⁵ [REDACTED].

³⁶ ICC-01/04-02/06-785-Conf-Exp.

³⁷ Prosecution Observations of 16 July 2015, ICC-01/04-02/06-727-Conf-Exp, para. 2.

³⁸ Prosecution Observations of 16 July 2015, ICC-01/04-02/06-727-Conf-Exp, paras 3 and 8.

³⁹ Prosecution Observations of 16 July 2015, ICC-01/04-02/06-727-Conf-Exp, para. 9.

the proceedings outweigh the minimal inconvenience posed by the interim restrictions.⁴⁰

24. [REDACTED].⁴¹ The Prosecution made no submissions regarding the specific impact on individual detainees of the interim restrictions imposed.⁴²

Lubanga Defence Observations

25. With respect to the Interim Order on Restrictions, the Lubanga Defence submits, first, that no inappropriate conversations took place between Mr Lubanga and the Two Individuals.⁴³ Notwithstanding, and should the Chamber find that there are compelling security reasons to do so, Mr Lubanga indicated that he does not object to the provisional removal of the Two Individuals from his contact list.⁴⁴ However, should the Chamber decide to conduct a *post factum* review of the telephone conversations with the Two Individuals, the Lubanga Defence indicates that it would seek to make further submissions on the terms of such review.⁴⁵ Second, while Mr Lubanga does not object to the active monitoring of his non-privileged telephone conversations as an interim measure, he wishes to exempt telephone calls made to his wife and children from active monitoring, submitting that active monitoring of these conversations is unjustified and disproportionate, as it constitutes an unnecessary limitation of Mr Lubanga's daily contact with his family.⁴⁶

26. [REDACTED].⁴⁷ [REDACTED].⁴⁸

Katanga Defence Observations

⁴⁰ Prosecution Observations of 16 July 2015, ICC-01/04-02/06-727-Conf-Exp, para. 9.

⁴¹ [REDACTED].

⁴² Prosecution Observations of 16 July 2015, ICC-01/04-02/06-727-Conf-Exp. The Chamber notes, however, that the Prosecution subsequently requested leave to do so, which was rejected – see paragraph 18. See email communication from Legal Officer of the Chamber to Registry on 31 July 2015 at 10:48.

⁴³ Lubanga Defence Observations, ICC-01/04-02/06-741-Conf-Exp, para. 8.

⁴⁴ Lubanga Defence Observations, ICC-01/04-02/06-741-Conf-Exp, para. 8.

⁴⁵ Lubanga Defence Observations, ICC-01/04-02/06-741-Conf-Exp, para. 9.

⁴⁶ Lubanga Defence Observations, ICC-01/04-02/06-741-Conf-Exp, paras 10-18.

⁴⁷ Lubanga Defence Observations, ICC-01/04-02/06-741-Conf-Exp, para. 3.

⁴⁸ Lubanga Defence Observations, ICC-01/04-02/06-741-Conf-Exp, paras 4.

27. With respect to the [REDACTED], the Katanga Defence submits that ‘it has not been informed of [its] factual and legal basis’.⁴⁹ The Katanga Defence further notes that the [REDACTED] were decided without seeking its submissions,⁵⁰ and that, ‘in the absence of urgent and compelling circumstances’, it is of concern that the Katanga Defence was neither informed nor provided with an opportunity to intervene prior to the issuance of the [REDACTED].⁵¹ The Katanga Defence emphasises that [REDACTED],⁵² and submits that the lack of disclosure underlying the reasons for the interim measure ‘places the [Katanga Defence] in a difficult position, both in [REDACTED]’.⁵³
28. The Katanga Defence further submits that, in addition to the [REDACTED].⁵⁴ The Katanga Defence also avers that, as telephone calls at the Detention Centre are recorded and easily reviewable, the ‘complete curtailment of calls between Mr Katanga and [REDACTED] would be disproportionate’.⁵⁵ Accordingly, the Katanga Defence requests the Chamber to: (i) order disclosure of the legal and factual basis underlying the seeking and making of the [REDACTED]; and (ii) to withdraw and/or amend the [REDACTED].⁵⁶

Ntaganda Defence Observations

29. With respect to the [REDACTED], the Ntaganda Defence notes that, while Mr Ntaganda is not affected by the order, he has concerns in relation to the fairness of the trial proceedings in light of ‘the profusion of serious allegations against him’.⁵⁷ Therefore, while Mr Ntaganda considers the present restrictions against other detainees to be unfounded and unnecessary, ‘he does not oppose active

⁴⁹ Katanga Defence Observations, ICC-01/04-02/06-742-Conf-Exp, para. 18.

⁵⁰ Katanga Defence Observations, ICC-01/04-02/06-742-Conf-Exp, para. 19.

⁵¹ Katanga Defence Observations, ICC-01/04-02/06-742-Conf-Exp, para. 26.

⁵² Katanga Defence Observations, ICC-01/04-02/06-742-Conf-Exp, para. 20.

⁵³ Katanga Defence Observations, ICC-01/04-02/06-742-Conf-Exp, para. 23.

⁵⁴ Katanga Defence Observations, ICC-01/04-02/06-742-Conf-Exp, paras 30-32.

⁵⁵ Katanga Defence Observations, ICC-01/04-02/06-742-Conf-Exp, para. 35. *See also* para. 34.

⁵⁶ Katanga Defence Observations, ICC-01/04-02/06-742-Conf-Exp, para. 36.

⁵⁷ Ntaganda Defence Submissions, ICC-01/04-02/06-747-Conf-Exp, para. 2.

monitoring of any conversations between other detainees and the [Named] individuals'.⁵⁸

IV. Analysis and conclusion

30. The Chamber notes that, as a preliminary matter, on 31 July 2015 and 5 August 2015 respectively, it rejected three Requests for Leave to Reply submitted by the Prosecution.⁵⁹
31. In respect of the Request for Leave to Reply to Lubanga Observations, the Chamber considered that the Prosecution had already had an opportunity to make observations with respect to the impact on Mr Lubanga of the Interim Order on Restrictions in the Prosecution Observations of 16 July 2015, and appeared to have elected not to do so. Further, the Chamber was not persuaded that the issues upon which the Prosecution sought to reply⁶⁰ would be of material assistance to it in determining the ongoing necessity of the restrictive measures ordered. With respect to the Request for Leave to Reply to Katanga Observations, the Chamber was of the view that, given the material before it, the issues upon which the Prosecution sought leave to reply, which pertained to the 'requested relief' in the Katanga Defence Observations,⁶¹ would not be of significant assistance to the Chamber in its task of assessing the impact on Mr Katanga of the restrictions imposed. With respect to the Request for Leave to Reply to Ntaganda Observations, the Chamber considered the issue upon which the Prosecution sought to reply to be very circumscribed, and that the Prosecution had effectively clarified the issue upon which it sought to make further submissions in the motion itself.⁶²
32. Accordingly, the Chamber rejected all three Requests for Leave to Reply.

⁵⁸ Ntaganda Defence Submissions, ICC-01/04-02/06-747-Conf-Exp, para. 2.

⁵⁹ See email communications from Legal Officer of the Chamber to the parties on 31 July 2015 at 10:48 and on 6 August 2015 at 14:22.

⁶⁰ Request for Leave to Reply to Lubanga Observations, ICC-01/04-02/06-757-Conf-Exp, para. 11.

⁶¹ Request for Leave to Reply to Katanga Observations, ICC-01/04-02/06-756-Conf-Exp, paras 8-9.

⁶² Request for Leave to Reply to Ntaganda Observations, ICC-01/04-02/06-765-Conf-Exp, para. 11.

33. The Chamber notes further that, as it has previously stated in relation to the relevant standard applicable to restrictions on detainees' communications, the right to privacy and family life is an internationally recognised human rights principle enshrined in a number of human rights instruments that must guide the Chamber's statutory interpretation and decision-making by virtue of Article 21(3) of the Statute. The Chamber has noted that, in giving effect to this right, the European Court of Human Rights ('ECtHR') has held that any interference by a public authority with the exercise of the right to respect a detained person's private and family life, as well as correspondence, must be lawful, necessary and proportionate.⁶³

A. Mr Lubanga

i. Interim Order on Restrictions

34. The Chamber notes that it ordered the removal of the Named Individuals from detainees' contact lists as an interim measure based on 'the serious allegations before it', regarding which it could 'only draw preliminary conclusions'.⁶⁴ The Chamber notes that it is not seised of fresh information from the Prosecution regarding the strength of the allegations against Mr Lubanga himself with respect of the Two Individuals, and indeed, those relating to [REDACTED] predate the First Restrictions Decision. However, based on the nature of the allegations against the Two Individuals, the Chamber considers that there is a risk that the integrity of the proceedings in the *Ntaganda* case may be damaged should the Chamber reinstate the Two Individuals to Mr Lubanga's contact list.

⁶³ First Restrictions Decision, ICC-01/04-02/06-410-Conf-Exp-Red-Corr, para. 43, referring to ECtHR, *Messina v. Italy*, Appl. no. 25498/94, Judgment, 28 September 2000, paras 59-74; ECtHR, *Lavents v. Latvia*, Appl. no. 58442/00, Judgement, 28 November 2002, paras 134-143; ECtHR, *Van der Ven v. The Netherlands*, Appl. no. 50901/99, Judgement, 4 February 2003, paras 64-72; ECtHR, *Kornakovs v. Latvia*, Appl. no. 61005/00, Judgement, 15 June 2006, paras 134-36.

⁶⁴ Interim Order on Restrictions, ICC-01/04-02/06-683-Conf-Exp-Red2, paras 8 and 10. [REDACTED]. See also Interim Order on Restrictions, ICC-01/04-02/06-683-Conf-Exp-Red, para. 11; Request for Materials, ICC-01/04-02/06-603-Conf-Exp-Red, paras 44-45.

35. In reaching this conclusion, the Chamber has had regard to allegations before the Chamber of [REDACTED].⁶⁵ The Chamber observes that the Prosecution did not make any further submissions following the granting of the Request for Materials that would ‘verify [this] information it has already collected’,⁶⁶ and that the Registry indicated that Mr Lubanga did not speak to [REDACTED] on the telephone during the period for which the logs were requested, namely 1 January to 20 May 2015.⁶⁷ However, the Chamber notes that a review of Mr Lubanga’s call logs for this period reveals that Mr Lubanga does, in fact, appear to have spoken to [REDACTED] on thirty-seven occasions,⁶⁸ including on three occasions between the Prosecution filing its List of Witnesses⁶⁹ and the timing of the allegations contained in the Request for Materials.⁷⁰
36. With respect to [REDACTED], the Chamber recalls the Prosecution submission that Mr Lubanga was being used by Mr Ntaganda to exchange information with third parties, including [REDACTED]. The Chamber notes in particular that Mr Ntaganda told [REDACTED] on 14 December 2013 that, *inter alia*, ‘communication should not be an issue while Number 1 is still around’ - apparently in reference to Mr Lubanga - and that, further, ‘Number 1’ told Mr Ntaganda to get in touch with [REDACTED].⁷¹
37. Therefore, having regard to the Chamber’s obligations under Article 64(2) and 68(1) of the Statute, as well as Regulation 101 of the Regulations of the Court, the Chamber considers it necessary and lawful that the restrictions regarding the Two Individuals continue to apply until the completion of the testimony of the Prosecution’s insider witnesses. Noting that Mr Lubanga does not object at

⁶⁵ [REDACTED].

⁶⁶ Request for Materials, ICC-01/04-02/06-603-Conf-Exp-Red, para. 5.

⁶⁷ Registry Report on Interim Restrictions, ICC-01/04-02/06-699-Conf-Exp, para. 3.

⁶⁸ Transmission of Requested Materials, ICC-01/04-02/06-694-Conf-Exp-Anx2.

⁶⁹ Prosecution’s Lists of Witnesses, Summaries, and Evidence, 2 March 2015, ICC-01/04-02/06-491-Conf-AnxA-Red.

⁷⁰ Request for Materials, ICC-01/04-02/06-603-Conf-Exp, paras 44-45.

⁷¹ Prosecution Observations of 21 July 2015, ICC-01/04-02/06-738-Conf-Exp, para. 28. *See also* Second Registry Report, ICC-01/04-02/06-607-Conf-Exp-Anx3-Red, lines 279-80; ICC-01/04-02/06-607-Conf-Exp-Anx10, lines 17-18; Interim Order on Restrictions, ICC-01/04-02/06-683-Conf-Exp-Red2, para. 7.

this stage to the current restrictions with respect of these Two Individuals, and considering that the Chamber will review the restrictions with respect to the Named Individuals if and when appropriate circumstances arise, the Chamber views this measure to be proportionate to its stated aim. The Chamber does not consider it necessary, as raised by Mr Lubanga, to order the *post factum* review of any of the telephone calls between any of the detainees and Named Individuals at this stage.

38. With respect to the active monitoring of Mr Lubanga's non-privileged telephone conversations, the Chamber recalls that it ordered this measure on the basis of 'the specific allegations against Mr Lubanga', as well as the Chamber's obligations to protect the integrity of the proceedings, and the safety and well-being of witnesses in the *Ntaganda* case.⁷²
39. The Chamber notes that, while Mr Lubanga maintains that no impropriety occurred on his part that would warrant active monitoring of his non-privileged telephone conversations, there remain allegations before it implicating Mr Lubanga in the dissemination of confidential information and/or witness interference in the *Ntaganda* case, including suggestions that: (i) [REDACTED];⁷³ (ii) [REDACTED];⁷⁴ and (iii) [REDACTED].⁷⁵
40. The Chamber notes that the Prosecution has not sought to further substantiate these allegations before the Chamber.⁷⁶ However, the Chamber considers that, given the seriousness of the allegations before it, including those relating to the conduct of Mr Ntaganda, with whom Mr Lubanga may currently communicate freely, and having regard to its overarching obligations under Article 64(2) and 68(1) of the Statute, as well as the provisions of Regulation 175 of the Regulations of the Registry, it continues to be lawful and necessary to actively

⁷² Interim Order on Restrictions, ICC-01/04-02/06-683-Conf-Exp-Red2, para. 13.

⁷³ [REDACTED].

⁷⁴ [REDACTED].

⁷⁵ [REDACTED].

⁷⁶ Request for Materials, ICC-01/04-02/06-603-Conf-Exp-Red, para. 5.

monitor Mr Lubanga's non-privileged telephone conversations at this stage. With regard to the proportionality of this measure, the Chamber notes that Mr Lubanga does not generally object at this stage to the active monitoring, and, considering that the Chamber will review the necessity of active monitoring if and when appropriate circumstances arise, the Chamber views this general measure to be proportionate to its stated aim of protecting the integrity of the proceedings and safety of witness in the *Ntaganda* case.

41. However, the Chamber is cognisant that, as raised by Mr Lubanga, the active monitoring regime has compromised the timing and frequency of his communications with his wife and children. Accordingly, noting the requirement that any restrictions on contact ought not to infringe a detainee's private and family life in a disproportionate manner, the Chamber instructs the Registry to allow Mr Lubanga to communicate with his wife and children without being actively monitored. To facilitate this, the Lubanga Defence is instructed to file, within ten days of the issuance of the present decision, a list before the Chamber, available to the Registry, containing the full names of *only* those persons referred to in paragraph 12 of the Lubanga Defence Observations ('List of Family Names'). Thereafter, the Registry is instructed to allow Mr Lubanga to communicate with those on the List of Family Names without being actively monitored.
42. In so doing, the Chamber also considers it appropriate to remind Mr Lubanga that, pursuant to Regulation 174 of the Regulations of the Registry, the telephone calls with his family shall be passively monitored, in the form of recording, at all times. Should the Chamber consider it necessary in order to protect the integrity of the proceedings and the safety, and well-being of witnesses in the *Ntaganda* case, it will order the *post factum* review of these calls. Moreover, Mr Lubanga is reminded that, pursuant to Regulation 175 of the

Regulations of the Registry, his non-privileged telephone calls may also be subject to active monitoring at random.

ii. [REDACTED]

43. The Chamber recalls that [REDACTED].⁷⁷ In deciding whether such a measure is still necessary, the Chamber [REDACTED].⁷⁸
44. The Chamber notes that [REDACTED],⁷⁹ and observes that Mr Lubanga asserts that no such impropriety took place. However, the Chamber recalls its finding that [REDACTED].⁸⁰ Further, regarding proportionality, the Chamber observes that [REDACTED]⁸¹ and it does not consider that such restriction would have an undue impact on him.⁸² Therefore, having regard to the Chamber's obligations under Article 64(2) and 68(1) of the Statute, the Chamber considers the removal of [REDACTED] from Mr Lubanga's contact list to be proportionate to the aim of to ensuring the safety of victims and witnesses and the integrity of the present proceedings at this time, [REDACTED]. [REDACTED].⁸³

B. Mr Katanga

45. [REDACTED] was removed from Mr Katanga's contact list as a result of [REDACTED]. The Chamber considers that the assessment of the necessity of the measure is established [REDACTED].⁸⁴
46. As to the lawfulness of the measure, the Chamber is not persuaded by the Katanga Defence argument that Regulation 101(2) of the Regulations was not envisaged to be applied 'tangentially, by one Trial Chamber in respect of a

⁷⁷ [REDACTED].

⁷⁸ [REDACTED].

⁷⁹ [REDACTED].

⁸⁰ [REDACTED].

⁸¹ Lubanga Defence Observations, ICC-01/04-02/06-741-Conf-Exp, para. 3.

⁸² [REDACTED].

⁸³ [REDACTED].

⁸⁴ [REDACTED].

detained person subject to the authority of another Trial Chamber’.⁸⁵ Indeed, the Chamber notes that Regulation 101(2) empowers a ‘Chamber seized of the case to prohibit, regulate or set conditions for contact between a detained person and any other person’ (emphasis added). The Chamber considers that, as long as any restrictive measures imposed have a nexus to the case with which the Chamber is seised and are lawful, necessary and proportionate, they may be imposed by any Chamber with respect to *any* detained person within the Court’s jurisdiction. In addition, the Chamber recalls its obligations under Article 64(2) and 68(1) of the Statute, which mandate the Chamber to take appropriate measures to protect victims and witnesses. The Chamber therefore considers that removing [REDACTED] from the contact lists of detainees to be a lawful measure under the Court’s legal framework. However, in making the determination of whether such measure is warranted, the Chamber shall have regard to the impact of the restriction on each detained person beyond the confines of the *Ntaganda* case.

47. As a further preliminary matter, the Chamber notes that the Katanga Defence argues that the legal and factual basis of the Chamber’s decisions was redacted from it, thus compromising its ability to meaningfully respond to the necessity of the measures taken by the Chamber [REDACTED].⁸⁶ [REDACTED].⁸⁷ [REDACTED].⁸⁸ [REDACTED].⁸⁹ [REDACTED].
48. The Chamber does not consider that the Katanga Defence requires additional information with respect to the present litigation. Indeed, notwithstanding the concern of the Katanga Defence that the lack of information ‘places [it] in a difficult position’ [REDACTED],⁹⁰ the Chamber considers the Katanga Defence’s submissions on the proportionality of the measures to be sufficient

⁸⁵ Katanga Defence Observations, ICC-01/04-02/06-742-Conf-Exp-Red, para. 25.

⁸⁶ [REDACTED].

⁸⁷ [REDACTED].

⁸⁸ [REDACTED].

⁸⁹ [REDACTED].

⁹⁰ [REDACTED].

for the purposes of informing the assessment in the present decision.⁹¹ The Chamber notes in this regard that Mr Katanga objects to the ongoing removal of [REDACTED].⁹² The Katanga Defence avers that the complete ban of calls between Mr Katanga and [REDACTED] is disproportionate as such calls at the Detention Centre are recorded and thus easily reviewable.⁹³

49. The Chamber is cognisant of [REDACTED]. [REDACTED].⁹⁴ However, the Chamber considers that, in light of its specific findings with respect to [REDACTED], the ability to conduct a *post factum* review of telephone conversations between [REDACTED] and other detainees is not an adequate measure to protect witnesses and the integrity of the proceedings, given that any impropriety in conversations could only be realised after the fact. [REDACTED].⁹⁵ Given the circumstances, the Chamber considers there is no feasible lesser measure to achieve the protection of witnesses and the integrity of the *Ntaganda* proceedings than an outright prohibition on contact between [REDACTED] and any individuals at the Detention Centre, including Mr Katanga.
50. In so finding, the Chamber notes that [REDACTED]. Therefore, [REDACTED]. Accordingly, having regard to the Chamber's obligations under Article 64(2) and 68(1) of the Statute, the Chamber considers that the ongoing prohibition on contact between [REDACTED] and Mr Katanga is not a disproportionate measure with respect of the aim of ensuring the safety of victims and witnesses and the integrity of the present proceedings, [REDACTED]. [REDACTED].

⁹¹ The Chamber notes that the Katanga Defence appears to believe that [REDACTED] was one of the Named Individuals whose removal from detainees' contact lists would remain in place until the completion of the testimony of the Prosecution's insider witnesses (Katanga Defence Observations, ICC-01/04-02/06-742-Conf-Exp-Red, para. 28). However, the Chamber does not consider this misapprehension to have affected the overall utility of the Katanga Defence Observations.

⁹² [REDACTED].

⁹³ Katanga Defence Observations, ICC-01/04-02/06-742-Conf-Exp-Red, para. 35. *See also* para. 34.

⁹⁴ [REDACTED].

⁹⁵ [REDACTED].

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

ORDERS that the restrictions on telephone calls by any individual at the Detention Centre to the Named Individuals shall continue until further notice, including that no Named Individual shall be added to any detainee's contact list;

ORDERS the Lubanga Defence to file a List of Family Names within ten days of the issuance of the present decision, in accordance with paragraph 41 above;

ORDERS that the active monitoring of Mr Lubanga's non-privileged telephone conversations continue, with the exception of those on the List of Family Names;

ORDERS the Registry to file a report, *ex parte* Registry and Chamber only, immediately informing the Chamber of any occasions upon which Mr Lubanga's actively monitored calls were terminated, including the reason therefor;

AFFIRMS its direction that [REDACTED] should continue to have no contact with any person at the Detention Centre; and

REJECTS all other requests.

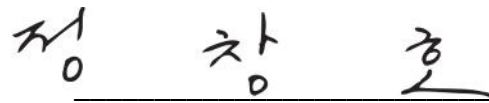
Done in both English and French, the English version being authoritative.



Judge Robert Fremr, Presiding Judge



Judge Kuniko Ozaki



Judge Chang-ho Chung

Dated 18 August 2015

At The Hague, The Netherlands