

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: ICC-01/04-02/06
Date: 26 January 2016

TRIAL CHAMBER VI

Before: Judge Robert Fremr, Presiding Judge
Judge Kuniko Ozaki
Judge Chang-ho Chung

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
*THE PROSECUTOR v. BOSCO NTAGANDA***

Public

Public redacted version of "Corrected version of 'Decision on Lubanga Defence request for lifting of certain restrictions on contacts' (ICC-01/04-02/06-1061-Conf-Exp)", 21 January 2016, ICC-01/04-02/06-1061-Conf-Exp-Corr

Decision 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 Luc Boutin

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

Mr Patrick Craig

**Victims Participation and Reparations
Section**

Others

Defence counsel for Mr Thomas Lubanga
Dyilo
Trial Chamber II

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 Lubanga Defence request for lifting of certain restrictions on contacts'.

I. Procedural history

1. On 29 June 2015, the Chamber imposed certain restriction on Mr Lubanga's contacts ('Order Imposing Restrictions').¹
2. On 18 August 2015, the Chamber issued a 'Decision on restrictions in relation to certain detainees' whereby it lifted some of the aforementioned restrictions and decided to continue certain others. In this decision, it directed that: (i) three named individuals ('Three Individuals') be or remain suspended from Mr Lubanga's list of contacts;² and (ii) active monitoring of Mr Lubanga's non-privileged phone calls be conducted by the Registry, with the exception of phone calls made with his wife and children ('Decision on Restrictions').³
3. On 22 September 2015, the Registrar ordered the active monitoring of Mr Lubanga's non-privileged visits, noting that on the basis of the restrictions imposed by the Chamber on Mr Lubanga's phone calls, the criteria of Regulation 184(1) of the Regulations are met. The Registry indicated that this

¹ Order imposing interim restrictions on detainees' contacts with certain individuals and related measures, 30 June 2015, ICC-01/04-02/06-683-Conf-Exp-Red2.

² ICC-01/04-02/06-786-Conf-Exp-Red2 (notified on 19 August 2015), paras 34-37 and 43-44. A public redacted version was notified on 19 August 2015 (ICC-01/04-02/06-786-Red4).

³ ICC-01/04-02/06-786-Conf-Exp-Red2, paras 38-42. See also, *Transmission à la Chambre de première instance VI de la liste des membres de la famille de M. Lubanga, conformément à l'ordonnance du 19 août 2015 portant sur la référence ICC-01/04-02/06-786-Conf-Exp-Red2*, 19 August 2015, ICC-01/04-02/06-789-Conf-Exp.

decision would be reviewed within one month from the first visit ('Registry Decision on Visits').⁴

4. On 21 October 2015, the defence team for Mr Lubanga ('Lubanga Defence') filed a request seeking the lifting of part of the restrictions on Mr Lubanga's contacts, namely the active monitoring of his calls and visits ('Request').⁵
5. On 13 November 2015, the Prosecution responded, opposing the Request ('Prosecution Response').⁶
6. On 19 November 2015, upon the Chamber's instruction,⁷ the Registry submitted its observations on the Request ('Registry Observations').⁸ [REDACTED].⁹
7. On 27 November 2015, the Lubanga Defence filed a request seeking the lifting of the redactions applied to the redacted version of the Registry Observations ('Request for Lifting of Redactions').¹⁰
8. On 8 December 2015, the Presidency of the Court issued a decision designating the Democratic Republic of the Congo ('DRC') as the state of enforcement for

⁴ Registrar's decision ordering the active monitoring of Mr. Thomas Lubanga Dyilo's non-privileged visits, ICC-01/04-02/06-852-Conf-Exp.

⁵ *Requête de la Défense de M. Lubanga sollicitant la levée des mesures de restriction visant ses visites et ses communications téléphoniques non privilégiées*, ICC-01/04-02/06-926-Conf-Exp.

⁶ Prosecution response to "*Requête de la Défense de M. Lubanga sollicitant la levée des mesures de restriction visant ses visites et ses communications téléphoniques non privilégiées*", ICC-01/04-02/06-1008-Conf-Exp.

⁷ Email from Legal Officer of the Chamber to Registry on 29 October 2015 at 10:07 setting the deadline for the filing of observations on 13 November 2015. Upon two consecutive requests from the Registry, the Chamber granted extensions of time limit to file the observations and set the deadline to 19 November 2015 (emails from Legal Officer of the Chamber to Registry on 12 November 2015 at 15:05 and on 17 November 2015 at 16:04).

⁸ Observations by the Registry on the "*Requête de la Défense de M. Lubanga sollicitant la levée des mesures de restriction visant ses visites et ses communications téléphoniques non privilégiées*", ICC-01/04-02/06-1028-Conf-Exp (notified on 20 November 2015). On 23 November 2015 (notified on 24 November 2015), a confidential redacted version available to Mr Lubanga was filed (ICC-01/04-02/06-1028-Conf-Exp-Red). A further redacted version available to the Prosecution was filed on the same day (ICC-01/04-02/06-1028-Conf-Exp-Red2).

⁹ [REDACTED].

¹⁰ *Requête de la Défense de M. Lubanga sollicitant la levée des expurgations affectant la «Confidential redacted version of "Observations by the Registry on the 'Requête de la Défense de M. Lubanga sollicitant la levée des mesures de restriction visant ses visites et ses communications téléphoniques non privilégiées' ICC-01/04-02/06-926-Conf-Exp filed on 21 October 2015" [...]» transmise à la Défense le 24 novembre 2015*, ICC-01/04-02/06-1036-Conf-Exp.

the remainder of Mr Lubanga's sentence of imprisonment, and directing the Registry to make the necessary arrangements for his transfer.¹¹

II. Submissions

Request

9. The Lubanga Defence requests the lifting of all restrictions imposed on Mr Lubanga's contacts with the exception of restrictions imposed on contacts with the Three Individuals.¹²
10. The Lubanga Defence submits that the procedure adopted by the Chamber for imposing restrictions on Mr Lubanga's contacts is irregular, as the Chamber based the Decision on Restrictions on Regulation 175 of the Regulations of the Registry, which provides that any restrictions imposed on contacts shall be reviewed at the end of each calendar month, whilst, at the time of the filing of the Request, 64 days had passed since the rendering of the Decision on Restrictions.¹³ In addition, the Lubanga Defence submits that the Registry Decision on Visits is also irregular, because pursuant to Regulation 184(4) of the Regulation of the Registry, '[t]he Registrar shall review any order taken under sub-regulation 2 after one calendar month of the commencement of the monitoring'. The Defence points out that, at the time of the filing of the Request, 36 days had passed since the issuance of the Registry Decision on Visits.¹⁴ According to the Lubanga Defence, all restrictions other than those related to the Three Individuals should therefore be lifted.¹⁵
11. Should the Chamber consider that these 'irregularities' do not warrant the lifting of the restrictions, the Lubanga Defence argues in the alternative that the

¹¹ *The Prosecutor v. Thomas Lubanga Dyilo*, Decision designating a State of enforcement, ICC-01/04-01/06-3185-Conf.

¹² Request, ICC-01/04-02/06-926-Conf-Exp, paras 1-2.

¹³ Request, ICC-01/04-02/06-926-Conf-Exp, paras 13-14, 16-18 and 20.

¹⁴ Request, ICC-01/04-02/06-926-Conf-Exp, paras 15-17 and 19-20

¹⁵ Request, ICC-01/04-02/06-926-Conf-Exp, para. 21.

restrictions imposed are not necessary anymore and that they violate Mr Lubanga's rights.¹⁶ It submits that Mr Lubanga's situation has significantly changed, as he has been transferred to a separate wing of the Detention Centre, where he cannot have any contact with other detainees, other than with Mr Katanga. The Lubanga Defence submits that Mr Lubanga therefore has no contact anymore with Mr Ntaganda, which – according to the Lubanga Defence – was the main basis upon which the Chamber found the imposition of restrictions on Mr Lubanga's contacts to be necessary.¹⁷ Furthermore, the Defence avers that the Prosecution, in spite of an offer from Mr Lubanga to cooperate with investigations, has not made any further attempts to substantiate its allegations against Mr Lubanga since Mr Lubanga's logs were transmitted to the Prosecution, thereby giving the restrictions a permanent and punitive character.¹⁸ In addition, the Lubanga Defence submits that Mr Lubanga has demonstrated that he can be trusted, as no incident occurred since the imposition of active monitoring of his phone calls.¹⁹

12. According to the Lubanga Defence, maintaining the restrictive measures at this stage violates Mr Lubanga's rights, in particular his right to privacy, because: (i) due to the lack of resources of the Detention Centre, Mr Lubanga is often locked up alone in his cell; and (ii) the active monitoring of his phone calls considerably limits his ability to communicate with his extended family and friends.²⁰

Prosecution Response

13. The Prosecution opposes the Request. It submits that the imposition of active monitoring of Mr Lubanga's phone calls is lawful, as Articles 64(2) and 68(1) of the Statute provide the Chamber with a broad discretion to address issues

¹⁶ Request, ICC-01/04-02/06-926-Conf-Exp, paras 22, 35 and 44.

¹⁷ Request, ICC-01/04-02/06-926-Conf-Exp, paras 23-28.

¹⁸ Request, ICC-01/04-02/06-926-Conf-Exp, paras 29-34.

¹⁹ Request, ICC-01/04-02/06-926-Conf-Exp, para. 35.

²⁰ Request, ICC-01/04-02/06-926-Conf-Exp, paras 40-43.

arising in the course of the trial which cannot be limited by Regulation 175 of the Regulations of the Registry.²¹

14. The Prosecution further argues that active monitoring remains necessary to prevent witness interference and to protect witnesses, noting in particular that: (i) despite being now detained in a separate wing from the Detention Centre, Mr Lubanga himself has a wide knowledge of the *Ntaganda* case and he has already communicated with persons suspected of interference in that case;²² and (ii) active monitoring is the least restrictive measure available to prevent possible dissemination of confidential information.²³ According to the Prosecution, active monitoring will only be necessary until [REDACTED].²⁴ The Prosecution further argues that the Lubanga Defence's submissions on the lack of action taken by the Prosecution to further substantiate its allegation of witness interference by Mr Lubanga are speculative, and refers to a number of filings that – in its view – establish that the Prosecution is diligent in addressing the issue of witness interference.²⁵
15. Finally, the Prosecution avers that the active monitoring is proportionate to the aim pursued.²⁶ It emphasises that Mr Lubanga has been convicted and that his rights to privacy and family life should be understood in this context. In this regard, the Prosecution notes that phone calls made with his family are not actively monitored, thereby preserving his right to family life.²⁷

Registry Observations

16. In the Registry Observations, the Registry indicates that Mr Lubanga has been transferred to another wing of the Detention Centre, where his contact with

²¹ Prosecution Response, ICC-01/04-02/06-1008-Conf-Exp, paras 11-13

²² Prosecution Response, ICC-01/04-02/06-1008-Conf-Exp, paras 14 and 16.

²³ Prosecution Response, ICC-01/04-02/06-1008-Conf-Exp, para. 15.

²⁴ Prosecution Response, ICC-01/04-02/06-1008-Conf-Exp, para. 17.

²⁵ Prosecution Response, ICC-01/04-02/06-1008-Conf-Exp, para. 18, footnote 15.

²⁶ Prosecution Response, ICC-01/04-02/06-1008-Conf-Exp, para. 19.

²⁷ Prosecution Response, ICC-01/04-02/06-1008-Conf-Exp, para. 20.

other detainees is limited to Mr Katanga.²⁸ It further indicates that between the imposition of active monitoring of his phone calls and the time of the filing of the Registry Observations, Mr Lubanga made [REDACTED], and also communicated with his wife and children by way of unmonitored calls.²⁹ The Registry further informs the Chamber that Mr Lubanga had received visits prior to the decision to actively monitor his visits, but that since the imposition of this measure, [REDACTED].³⁰

17. [REDACTED]³¹ [REDACTED].³² [REDACTED]³³ [REDACTED].³⁴

III. Analysis

18. As a preliminary matter, the Chamber notes that, in the Request for Lifting of Redactions, the Lubanga Defence argues that its right to respond to the allegations made against Mr Lubanga is violated by the communication of redacted information on Mr Lubanga's correspondence.³⁵ Having reviewed the redactions applied by the Registry to the Registry Observations, the Chamber finds that, pursuant to Regulation 23*bis* of the Regulations, they were appropriate at the time, as they referred to the Report that had been filed on a confidential *ex parte*, Registry only, basis. However, as the redacted parts merely referred to the existence and not the content of the Report, [REDACTED] the Chamber considers that the redactions are unnecessary. The Chamber therefore instructs the Registry to reclassify the confidential *ex parte* version of the Registry Observations, so as to give the Lubanga Defence access to the unredacted version. As to the alleged violation of the Lubanga Defence's right to respond to allegations, the Chamber clarifies that no allegations were

²⁸ Registry Observations, ICC-01/04-02/06-1028-Conf-Exp, paras 1-2.

²⁹ Registry Observations, ICC-01/04-02/06-1028-Conf-Exp, paras 3-6.

³⁰ Registry Observations, ICC-01/04-02/06-1028-Conf-Exp, paras 7-11.

³¹ Incident Report, ICC-01/04-02/06-1022-Conf-Exp, paras 13-20

³² Incident Report, ICC-01/04-02/06-1022-Conf-Exp, para. 21.

³³ Incident Report, ICC-01/04-02/06-1022-Conf-Exp, paras 3-7.

³⁴ Incident Report, ICC-01/04-02/06-1022-Conf-Exp, para. 12.

³⁵ Request for Lifting of Redactions, ICC-01/04-02/06-1036-Conf-Exp, paras 4-7.

made in the redacted parts, nor did the Chamber, for the purposes of its reasoning in the present decision, rely on the information contained in the Report.

19. As to the Request, the Chamber recalls that the restrictions were imposed on the basis of the Chamber's 'obligations to protect the integrity of the proceedings, and the safety and well-being of witnesses in the *Ntaganda* case, under Articles 64(2) and 68(1) of the Statute', and that the Registrar was instructed to 'take such reasonable measures as he considers necessary in order to implement [the] active monitoring regime'.³⁶ At the same time, the Registry was 'instructed to immediately terminate a call if reasonable grounds under Regulation 175 of the Regulations of the Registry exist'.³⁷ When the Chamber decided that certain restrictions on Mr Lubanga's contacts should continue, by way of the Decision on Restrictions, it had regard to all three of the aforementioned provisions.³⁸ It is therefore clear that the requirement for the Registrar of Regulation 175(4) of the Registry to review decisions, *taken by the Registrar*, to actively monitor telephone calls does not apply to the Decision on Restrictions, *taken by the Chamber*.
20. The Chamber further recalls that the Decision on Restrictions expressly provided for the possibility of review 'if and when appropriate circumstances arise'.³⁹ As to the alleged irregularity in the process flowing from the Registry Decision on Visits, the Chamber notes that as this is a separate matter, within the competence of the Registrar, it cannot affect the restrictions imposed by the Chamber. It will therefore not be addressed here.⁴⁰

³⁶ Order Imposing Restrictions, ICC-01/04-02/06-683-Conf-Exp, para. 13; Decision on Restrictions, ICC-01/04-02/06-786-Red4, para. 38.

³⁷ Order Imposing Restrictions, ICC-01/04-02/06-683-Conf-Exp, para. 13.

³⁸ Decision on Restrictions, ICC-01/04-02/06-786-Red4, para. 40.

³⁹ Decision on Restrictions, ICC-01/04-02/06-786-Red4, para. 40.

⁴⁰ The Chamber does however note that the Lubanga Defence neglects to indicate that the Registrar specified in the aforementioned decision to actively monitor visits that it 'will be reviewed after a period of one calendar month [REDACTED]', Registry Decision on Visits, ICC-01/04-02/06-852-Conf-Exp, para. 6.

21. As to the Lubanga Defence's alternative argumentation, the Chamber considers that its indication that the Decision on Restrictions would be reviewed 'if and when appropriate circumstances arise' entails, *inter alia*, the existence of changed circumstances that, in the view of the Chamber, warrant review of the measures imposed. In light of the separation of Mr Lubanga from Mr Ntaganda in the Detention Centre and, now in particular, Mr Lubanga's imminent transfer to detention in the DRC, the Chamber considers that circumstances warranting review of the Decision on Restrictions have arisen.
22. The Chamber, however, considers that in light of Mr Lubanga's own knowledge of the *Ntaganda* case and of the extended period of unrestricted contact with Mr Ntaganda, which has only recently ended, the simple fact of separation from Mr Ntaganda does not provide a basis for the lifting of restrictions. Further, the transfer of Mr Lubanga to the DRC, being the State in which the alleged crimes in the *Ntaganda* case occurred and where many of the witnesses continue to reside, could be considered as a further basis for maintaining the restrictions currently in place.
23. The Chamber considers that all measures necessary to ensure the effectiveness of the restrictions ordered by the Chamber, including, as far as possible, active monitoring of visits, should be implemented to protect the integrity of the proceedings and the safety and well-being of witnesses in the *Ntaganda* case. As to the ongoing proportionality of the measures, the Chamber observes that Mr Lubanga is able to have unlimited contact with his direct family. In addition, although such contacts and visits are subject to active monitoring, Mr Lubanga is not prevented from having contact with his extended family and friends, or from having visitors. Moreover, as indicated below, the duration of the restrictions is for a time-limited period.
24. The Chamber considers that the restrictions should only remain in place until [REDACTED].

25. The Chamber observes that, in light of Mr Lubanga's imminent transfer to the DRC, [REDACTED].
26. With regard to his transfer to the DRC, the Chamber entrusts that, as a matter of proper administration and to ensure the integrity of the proceedings before the Court, the Registry will ensure that no confidential materials other than those strictly required for the ongoing reparations proceedings in the case against Mr Lubanga are permitted to be transferred from the Detention Centre.

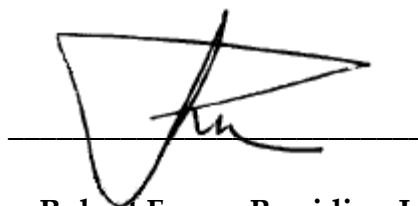
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request;

INSTRUCTS the Registry to file an *ex parte* confidential redacted version of the Registry Observations, available to the Lubanga Defence; and

[REDACTED];

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

A handwritten signature in black ink, consisting of a large, stylized 'F' followed by 'remr', written over a horizontal line.

Judge Robert Fremr, Presiding Judge

A handwritten signature in black ink, appearing to read 'Kuniko Ozaki', written over a horizontal line.

Judge Kuniko Ozaki

A handwritten signature in black ink, consisting of the Korean characters '정창호' (Jeong Chang-ho), written over a horizontal line.

Judge Chang-ho Chung

Dated 26 January 2016

At The Hague, The Netherlands