

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/04-02/06**
Date: **21 November 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***

**Second public redacted version of
Decision reviewing the restrictions placed on Mr Ntaganda's contacts, 7 September
2016, ICC-01/04-02/06-1494-Conf-Exp**

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
Me 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

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 of the Rome Statute ('Statute') and Regulation 101 of the Regulations of the Court ('Regulations'), issues the following 'Decision reviewing the restrictions placed on Mr Ntaganda's contacts'.

I. Procedural History

1. On 18 August 2015, the Chamber issued a decision ordering, *inter alia*, certain ongoing restrictions to be placed on Mr Ntaganda's contacts ('Decision on Restrictions').¹
2. On 1 April 2016, following the Chamber's indication that it would periodically review the restrictions imposed by way of the Decision on Restrictions,² the Chamber invited submissions and observations on this issue, as well as on the removal of [REDACTED] ('Removed Person') from Mr Ntaganda's list of contacts. The Chamber ordered, *inter alia*, that: (i) the Registry file a report by 29 April 2016 on the period of active monitoring of Mr Ntaganda's communications; and (ii) the parties file submissions by 9 May 2016 on the inclusion of the Removed Person on Mr Ntaganda's contact list, and on the lifting or adjustment of other restrictions on Mr Ntaganda's contacts.³
3. On 29 April 2016, the Registry filed as confidential *ex parte*, available only to the Registry and defence team for Mr Ntaganda ('Defence'), the 'Fourth

¹ Decision on Prosecution requests to impose restrictions on Mr Ntaganda's contacts, ICC-01/04-02/06-785-Conf-Exp. A public redacted version was filed on the same day as ICC-01/04-02/06-785-Red.

² Decision on Restrictions, ICC-01/04-02/06-785-Red, para. 70.

³ Email communication from Legal Officer of the Chamber to the parties and Registry on 1 April 2016 at 20:56. The Chamber also stipulated therein that any responses to the submissions of the other party were to be filed by 16 May 2016 ('Response Deadline').

Report on the post-factum review of the phone conversations made by Mr Ntaganda' ('Fourth Registry Report').⁴

4. On 9 May 2016, the Defence filed the 'Observations on behalf of Mr Ntaganda on restrictions on his contacts in detention' ('Defence Submissions').⁵
5. Also on 9 May 2016, the Office of the Prosecutor ('Prosecution') filed as confidential *ex parte*, available only to the Prosecution and the Victims and Witnesses Unit ('VWU'), the 'Prosecution's submissions on the restrictions to NTAGANDA's contacts' ('Prosecution Submissions'), including fifteen annexes, thirteen of which are *ex parte*, Prosecution and VWU only ('*Ex Parte Annexes*').⁶ On the same day, it filed a confidential *ex parte* version of the Prosecution Submissions, notified also to the Defence, including redacted versions of Annexes A and B ('*Inter Partes Annexes*').⁷
6. On 11 May 2016, the Defence filed the 'Urgent request on behalf of Mr Ntaganda seeking disclosure of the annexes to the Prosecution's submissions on the restrictions to Mr Ntaganda's contacts and related requests' ('Disclosure Request').⁸
7. On 3 June 2016, following receipt of further submissions on the Disclosure Request,⁹ the Chamber issued its decision thereon, ordering the lifting of

⁴ ICC-01/04-02/06-1303-Conf-Exp, plus four annexes, also filed as confidential *ex parte*, available only to the Registry and Defence.

⁵ ICC-01/04-02/06-1312-Conf-Exp, confidential, *ex parte*, available to Registry, Prosecution, and Defence, and confidential, *ex parte* Annex A, available to the Registry and Defence only.

⁶ ICC-01/04-02/06-1313-Conf-Exp.

⁷ Prosecution's submissions on the restrictions to NTAGANDA's contacts, ICC-01/04-02/06-1313-Conf-Exp-Red, plus ICC-01/04-02/06-1313-Conf-Exp-AnxA-Red and ICC-01/04-02/06-1313-Conf-Exp-AnxB-Red (all notified on 10 May 2016). A public redacted version was filed on 17 May 2016 (ICC-01/04-02/06-1313-Red).

⁸ See ICC-01/04-02/06-1315-Conf-Exp-Corr (a corrected version of ICC-01/04-02/06-1315-Conf-Exp).

⁹ See email communication from Legal Officer of the Chamber to the parties on 12 May 2016 at 10:49, in which the Chamber shortened the deadline for responses to the Disclosure Request to 16 May 2016, and suspended the Response Deadline until the Chamber had issued its decision thereon. On 16 May 2016, the Prosecution filed the 'Prosecution's response to the "Urgent request on behalf of Mr Ntaganda seeking disclosure of the annexes to the Prosecution's submissions on the restrictions to Mr Ntaganda's contacts and related requests"', ICC-01/04-02/06-1315-Conf-Exp-Corr, ICC-01/04-02/06-1318-Conf-Exp, available only to the Prosecution and the VWU. A confidential *ex parte* version, only available to the Prosecution, Defence and VWU, was filed the following

certain redactions to one of the *Inter Partes* Annexes, rejecting the remainder of the Disclosure Request, and re-setting the Response Deadline to one week from the issuance of the decision ('Decision on Disclosure Request').¹⁰

8. Accordingly, on 13 June 2016, following the Chamber's clarification of the date upon which the Response Deadline fell,¹¹ the Prosecution filed its response to the Defence Submissions ('Prosecution Response')¹² and the Defence filed its response to the Prosecution Submissions ('Defence Response').¹³

II. Submissions

i. Registry

9. The Fourth Registry Report indicates that, between 13 November 2015 and 4 March 2016, [REDACTED].¹⁴ [REDACTED].¹⁵

day (ICC-01/04-02/06-1318-Conf-Exp-Red). Subsequently, on 18 May 2016, the Defence filed the 'Request on behalf of Mr Ntaganda seeking leave to reply to "Confidential, EX PARTE, redacted version of 'Prosecution's response to the 'Urgent request on behalf of Mr Ntaganda seeking disclosure of the annexes to the Prosecution's submissions on the restrictions to Mr Ntaganda's contacts and related requests', ICC-01/04-02/06-1318-Conf-Exp'", ICC-01/04-02/06-1322-Conf-Exp, available only to the Defence, Prosecution, and VWU. On 23 May 2016, the Prosecution filed the 'Response to the Defence request for leave to reply to the "Confidential, EX PARTE, redacted version of 'Prosecution's response to the 'Urgent request on behalf of Mr Ntaganda seeking disclosure of the annexes to the Prosecution's submissions on the restrictions to Mr Ntaganda's contacts and related requests', ICC-01/04-02/06-1318-Conf-Exp", ICC-01/04-02/06-1322-Conf-Exp', ICC-01/04-02/06-1331-Conf-Exp.

¹⁰ Decision on Defence request seeking certain material relating to review of restrictions placed on Mr Ntaganda's contacts, ICC-01/04-02/06-1364-Conf-Exp, confidential *ex parte*, available to the Prosecution and Registry. A confidential redacted *ex parte* version, available to the Prosecution, Defence and Registry, was filed the same day as ICC-01/04-02/06-1364-Conf-Exp-Red.

¹¹ Email communication from Defence on 10 June 2016 at 09:43 requesting an extension of time in which to file its further observations, and email communications from the Chamber on 10 June 2016 at 11:12 and 11:38, the latter clarifying that the correct filing deadline was in fact 13 June 2016.

¹² Response to the "Observations on behalf of Mr Ntaganda on restrictions on his contacts in detention", ICC-01/04-02/06-1312-Conf-Exp, ICC-01/04-02/06-1390-Conf-Exp, confidential, *ex parte*, only available to the Prosecution and VWU, including confidential *ex parte* Annexes A-D only available to the Prosecution and VWU. A confidential redacted version, available to the Prosecution, Defence and VWU, was filed on 14 June 2016 as ICC-01/04-02/06-1390-Conf-Exp-Red.

¹³ Response on behalf of Mr Ntaganda to the "Prosecution's submissions on the restrictions to NTAGANDA's contacts", ICC-01/04-02/06-1391-Conf-Exp, confidential, *ex parte*, only available to the Defence, including confidential *ex parte* Annexes A and B, only available to the Defence. A confidential redacted version, available to the Prosecution, Defence and VWU, was filed on the same day (and notified on 14 June 2016) as ICC-01/04-02/06-1391-Conf-Exp-Red.

¹⁴ Fourth Registry Report, ICC-01/04-02/06-1303-Conf-Exp, page 5 and paras 6-10. *See also* Annexes I-IV.

¹⁵ Fourth Registry Report, ICC-01/04-02/06-1303-Conf-Exp, page 7.

ii. *Prosecution*

10. The Prosecution argues that ‘the restrictions imposed on the Accused’s contacts should be continued in full, as there are no changed circumstances that require their modification’.¹⁶ It submits that sustained attempts to interfere with Prosecution witnesses and further information it has obtained regarding the coaching of potential Defence witnesses justify the continuation of the restrictions ‘beyond the completion of the testimony of the Prosecution’s insider witnesses and until the end of the Defence case’.¹⁷ It avers that the restrictions are necessary to prevent Mr Ntaganda from giving further instructions aimed at dissuading witnesses from testifying, particularly the remaining insider witnesses and their relatives.¹⁸
11. In particular, the Prosecution submits that there have been continued and recent attempts to interfere with Witnesses [REDACTED], and that there exist reasonable grounds to believe that this interference is the ‘result of the Accused’s past access to his networks of associates from the Detention Centre’.¹⁹ It avers further that previous evidence pointing to witness coaching by the accused and his associates, [REDACTED], suggests that such coaching was not an isolated incident but rather points to a ‘broader scheme of coaching aimed at ensuring that Defence witnesses tell the “same” story’.²⁰ The Prosecution argues that this is further supported by information provided by

¹⁶ Prosecution Submissions, ICC-01/04-02/06-1313-Red, paras 2, 24 and 56.

¹⁷ Prosecution Submissions, ICC-01/04-02/06-1313-Red, paras 2 and 24; Prosecution Response, ICC-01/04-02/06-1390-Conf-Exp-Red, paras 11-15.

¹⁸ Prosecution Submissions, ICC-01/04-02/06-1313-Conf-Exp-Red, paras 3 and 31-34; Prosecution Response, ICC-01/04-02/06-1390-Conf-Exp-Red, paras 2 and 27.

¹⁹ Prosecution Submissions, ICC-01/04-02/06-1313-Conf-Exp-Red, paras 3 and 25-31; Prosecution Response, ICC-01/04-02/06-1390-Conf-Exp-Red, para. 19.

²⁰ Prosecution Submissions, ICC-01/04-02/06-1313-Conf-Exp-Red, para. 39. *See more broadly* paras 35-49.

Witnesses [REDACTED], both of whom reported incidents which the Prosecution views as improper attempts to coach them.²¹

12. The Prosecution further argues that the Removed Person should not be reinstated to Mr Ntaganda's list of non-privileged contacts, as he and Mr Ntaganda used coded language in conversations on at least two occasions, whilst being actively monitored, in order to prevent officers at the Court's Detention Centre ('Detention Centre') from ascertaining the content of these conversations.²² The Prosecution also contends that the Removed Person 'may be using a false identity and [REDACTED]'.²³ In this regard, the Prosecution requests that, if the Chamber elects to reinstate the Removed Person to Mr Ntaganda's list of contacts, a thorough investigation of his identity should be conducted by the Registry.²⁴

iii. Defence

13. The Defence argues that the restrictions currently in place on Mr Ntaganda's contacts are no longer warranted 'in light of the absence of "reasonable grounds to believe" that Mr Ntaganda could use his non-privileged communications for any of the reasons listed under Regulation 101(2) [of the Regulations]'.²⁵

14. In particular, it avers that the circumstances leading the Chamber to impose the restrictions on Mr Ntaganda's contacts have 'significantly changed' since the issuance of the Decision on Restrictions,²⁶ namely: (i) [REDACTED];²⁷ and

²¹ Prosecution Submissions, ICC-01/04-02/06-1313-Conf-Exp-Red, paras 46-49.

²² Prosecution Submissions, ICC-01/04-02/06-1313-Red, paras 5 and 50.

²³ Prosecution Submissions, ICC-01/04-02/06-1313-Conf-Exp-Red, paras 5 and 51-55. *See also* Annexes G to L.

²⁴ Prosecution Submissions, ICC-01/04-02/06-1313-Conf-Exp-Red, para. 54.

²⁵ Defence Submissions, ICC-01/04-02/06-1312-Conf-Exp, para. 5; Defence Response, ICC-01/04-02/06-1391-Conf-Exp-Red, paras 22 and 30.

²⁶ Defence Submissions, ICC-01/04-02/06-1312-Conf-Exp, para. 12; Defence Response, ICC-01/04-02/06-1391-Conf-Exp-Red, para. 10.

²⁷ Defence Submissions, ICC-01/04-02/06-1312-Conf-Exp, paras 12 and 14-19.

(ii) Mr Ntaganda has not attempted ‘in any way’ to circumvent the currently enforced restrictions on his contacts to convey confidential information or interfere with witnesses.²⁸ In relation to the Prosecution’s submissions alleging further recent witness interference and coaching, the Defence argues that there is no link between Mr Ntaganda and these alleged incidents.²⁹ It avers that, as a consequence, the current restrictions are no longer necessary and are ‘disproportionate to the actual risk that Mr Ntaganda [will] engage in any form of misconduct’.³⁰

15. In the event that maintaining certain restrictions is deemed necessary by the Chamber, the Defence proposes a modified regime that it submits would be ‘sufficient and proportional to the actual risk of witness interference and/or dissemination of confidential information’ by Mr Ntaganda.³¹ Specifically, the Defence proposes that Mr Ntaganda’s list of non-privileged contacts be extended to certain further individuals (‘Proposed List’).³² The Defence also proposes that the current regime of active monitoring be replaced by a mechanism of weekly random monitoring.³³ The Defence includes the Removed Person in the Proposed List, averring that he is indeed [REDACTED] and should be reinstated as an authorised contact.³⁴

III. Analysis

i. Applicable law

²⁸ Defence Submissions, ICC-01/04-02/06-1312-Conf-Exp, paras 12 and 20-24.

²⁹ See for example Defence Response, ICC-01/04-02/06-1391-Conf-Exp-Red, paras 18, 20-21, and 30.

³⁰ Defence Submissions, ICC-01/04-02/06-1312-Conf-Exp, paras 25-27.

³¹ Defence Submissions, ICC-01/04-02/06-1312-Conf-Exp, paras 6 and 28-38; Defence Response, ICC-01/04-02/06-1391-Conf-Exp-Red, para. 45.

³² Defence Submissions, ICC-01/04-02/06-1312-Conf-Exp-AnxA.

³³ Defence Submissions, ICC-01/04-02/06-1312-Conf-Exp, para. 30.

³⁴ Defence Submissions, ICC-01/04-02/06-1312-Conf-Exp-AnxA; Defence Response, ICC-01/04-02/06-1391-Conf-Exp-Red, paras 31-37; ICC-01/04-02/06-1391-Conf-Exp-AnxB.

16. The Chamber recalls the applicable law set out in its previous decisions relating to the placing of restrictions on Mr Ntaganda's contacts.³⁵ In particular, the Chamber recalls that the European Court of Human Rights ('ECtHR') has held that:

[a]ny 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: i) in accordance with the law; ii) necessary, *inter alia*, for the prevention of disorder and crime and the protection of the rights and freedoms of others; and iii) proportionate to the legitimate aim pursued.³⁶

17. The Chamber also recalls that, in light of this standard, in issuing the Decision on Restrictions, the Chamber held that its analysis would be focused on 'whether the continuation of current restrictions and/or additional restrictions are necessary and proportionate to the aim previously identified by the Chamber, namely "to ensure the safety of witnesses, prevent breaches of confidentiality and ensure the integrity of the proceedings"'.³⁷ The Chamber will continue to be guided by this standard in the present review of the contact regime in place for the accused.

18. In so doing, the Chamber notes further that the ECtHR has held that the passage of time and severity of the measures imposed require a 'careful review' of the necessity of the measures in question and the consideration of 'alternative means' of fulfilling the aim of the measures imposed.³⁸ However,

³⁵ See 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-Red-Corr ('Decision of 8 December 2014'), paras 40-44, and Decision on Restrictions, ICC-01/04-02/06-785-Red, paras 39-42.

³⁶ Decision on Restrictions, ICC-01/04-02/06-785-Red, para. 42.

³⁷ Decision on Restrictions, ICC-01/04-02/06-785-Red, para. 42.

³⁸ ECtHR, *Baginski v. Poland*, Application no 37444/97, 11 October 2005, para. 96; ECtHR, *Piechowicz v. Poland*, Application no 20071/07, 17 April 2012, para. 220. See in this regard Defence Response, ICC-01/04-02/06-1391-Conf-Exp-Red, paras 40-42. See also ECtHR, *Messina v Italy (No 2)*, Application no 25498/94, 28 September 2000, paras 59-74.

the passing of time alone will not necessarily require the lifting or adjustment of the measures imposed.³⁹

ii. Scope of review

19. The Chamber recalls that the restrictions currently imposed on Mr Ntaganda's contacts are twofold. The first set of restrictions relates to his telephone calls ('Telephone Restrictions'), which are currently: (i) only permitted with two individuals (the Chamber's decision with respect to a third individual, the Removed Person, is to be dealt with by way of the present decision);⁴⁰ (ii) actively monitored; and (iii) limited as to duration, language and subject matter, insofar as the use of coded language or discussion of case-related matters is prohibited. Mr Ntaganda is permitted to speak with his children, through his wife, and to record messages to be played to his children after review of their content by the Registry.⁴¹

20. The second set of restrictions are those placed on Mr Ntaganda's visits ('Visitation Restrictions', and together with Telephone Restrictions, 'Restrictions'), which are only permitted: (i) pursuant to Regulations 97(2) and 98 of the Regulations and Regulation 178 of the Regulations of the Registry; and (ii) with respect to family visits, under the condition that they be actively monitored, occur in a language that can be monitored by the Registry, and do not involve any case-related discussions.⁴²

³⁹ ECtHR, *Gallico v. Italy*, Application no 53723/00, 28 June 2005, para. 29; ECtHR, *Enea v. Italy*, Application no 74912/01, 17 September 2009, paras 127-128.

⁴⁰ See Decision on Restrictions, ICC-01/04-02/06-785-Red, para. 65.

⁴¹ See Decision on Restrictions, ICC-01/04-02/06-785-Red, paras 60-65.

⁴² See Decision on Restrictions, ICC-01/04-02/06-785-Red, para. 69.

iii. Findings of the Chamber

21. The Chamber notes the fact that the Decision on Restrictions has been in force for over 12 months, and that certain restrictions had already been in place on an interim basis prior to this period.⁴³ The Chamber will now proceed to review whether the Restrictions remain necessary and proportionate, in accordance with the applicable law outlined above, and to assess whether there are any alternative less restrictive means to ensure the safety of witnesses, prevent breaches of confidentiality and ensure the integrity of the proceedings. In conducting this assessment, the Chamber has had particular regard to any developments occurring since the issuance of the Decision on Restrictions ('Review Period').
22. At the outset, the Chamber recalls its previous findings that there are reasonable grounds to believe that Mr Ntaganda: (i) 'abused his entitlement to communications by speaking to non-registered interlocutors without prior approval of the Registry';⁴⁴ (ii) used coded language 'to disguise attempts to disclose confidential information or to interfere with witnesses';⁴⁵ (iii) disclosed the identity of Prosecution witnesses in circumstances which the Chamber found to be of 'grave concern';⁴⁶ (iv) 'intended to engage in a serious form of witness interference';⁴⁷ and (v) 'instructed his interlocutors to coach witnesses, or directly told his interlocutors which story to tell, stressing the need to tell the story in the manner as described by [him] and the necessity of synchronising the stories'.⁴⁸ The Chamber considers that these findings continue to stand, and re-emphasises the gravity of this conduct, which may

⁴³ See Decision of 8 December 2014, ICC-01/04-02/06-410-Conf-Exp-Corr; Order instructing the Registry to put in place additional temporary restrictions on contact, 13 March 2015, ICC-01/04-02/06-508-Conf-Exp.

⁴⁴ Decision on Restrictions, ICC-01/04-02/06-785-Red, paras 46-47.

⁴⁵ Decision on Restrictions, ICC-01/04-02/06-785-Red, para. 50.

⁴⁶ Decision on Restrictions, ICC-01/04-02/06-785-Red, paras 51-54.

⁴⁷ Decision on Restrictions, ICC-01/04-02/06-785-Red, para. 55.

⁴⁸ Decision on Restrictions, ICC-01/04-02/06-785-Red, para. 57.

have a serious and ongoing impact on both the witnesses in the *Ntaganda* case, and on the proceedings more generally.

23. While the Chamber notes the Defence's indication that it is conducting an ongoing review of the Registry's transcripts and translations of certain conversations upon which those findings were based,⁴⁹ the generalised and unsubstantiated nature of the Defence's submissions on this point, combined with the lack of any request for particular relief, make it unnecessary for the Chamber to consider them further at this time.

24. Indeed, the Chamber observes that the Prosecution's review of additional telephone conversations made by Mr Ntaganda while in the Detention Centre appears to provide further support for the Chamber's original findings with respect to witness interference and coaching. The Prosecution's submissions suggest, in particular, that attempts to coach potential witnesses may have occurred on more than one occasion.⁵⁰ Further, the Prosecution submissions suggest that a number of the accounts of Prosecution witnesses of alleged interference appear to be corroborated by certain of Mr Ntaganda's reviewed non-privileged telephone conversations. If accurate, this would indicate that Mr Ntaganda had direct knowledge of, and involvement in, such interference.⁵¹ The Chamber also takes this opportunity to recall 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.⁵²

⁴⁹ Defence Submissions, ICC-01/04-02/06-1312-Conf-Exp, para. 10. *See further* paras 7-11. Defence Response, ICC-01/04-02/06-1391-Conf-Exp-Red, para. 24.

⁵⁰ Prosecution Submissions, ICC-01/04-02/06-1313-Conf-Exp, para. 44. *See also* paras 41-43.

⁵¹ Prosecution Response, ICC-01/04-02/06-1390-Conf-Exp, para. 19.

⁵² Decision on Disclosure Request, ICC-01/04-02/06-1364-Conf-Exp, para. 22.

a) The Fourth Registry Report

25. The Chamber notes the Defence argument that Mr Ntaganda's conduct during the Review Period, as reflected in the Fourth Registry Report, has been 'commendable', and 'does not reveal, let alone suggest, any attempt on the part of Mr Ntaganda to disseminate protected witness information, instruct anyone to interfere with witnesses or encourage coaching of Defence witnesses'.⁵³ In this regard, the Chamber notes that throughout the period of active monitoring covered by the Fourth Registry Report, the Registry indeed did not identify any specific information relating to potential witnesses in the case, or to Prosecution witnesses.⁵⁴

26. However, the Chamber also notes [REDACTED].⁵⁵ [REDACTED].⁵⁶

27. [REDACTED],⁵⁷ [REDACTED].⁵⁸ [REDACTED].

b) Other relevant developments occurring during the Review Period

28. In assessing relevant developments occurring during the Review Period, setting aside the content of the Fourth Registry Report which has already been discussed above, the Chamber notes that it is not in possession of any information which suggests that, since the date of the Decision on Restrictions, Mr Ntaganda himself has, directly or indirectly, attempted to further disclose confidential information or interfere with witnesses.

29. In issuing the present decision, the Chamber has also had particular regard to the current stage of proceedings. As noted by the Defence, [REDACTED]⁵⁹

⁵³ Defence Submissions, ICC-01/04-02/06-1312-Conf-Exp, para 22 and 24.

⁵⁴ Fourth Registry Report, ICC-01/04-02/06-1303-Conf-Exp, paras 11-12.

⁵⁵ Fourth Registry Report, ICC-01/04-02/06-1303-Conf-Exp, para. 13.

⁵⁶ Fourth Registry Report, ICC-01/04-02/06-1303-Conf-Exp, paras 4 and 7.

⁵⁷ Defence Submissions, ICC-01/04-02/06-1312-Conf-Exp, para. 23.

⁵⁸ [REDACTED].

⁵⁹ Witnesses [REDACTED] ('Four Witnesses').

[REDACTED]. The Chamber observes, however, that there remain in excess of 50 witnesses on the Prosecution's list of witnesses, including [REDACTED].⁶⁰ The Chamber notes in this regard that allegations of attempted witness interference extend beyond the Four Witnesses,⁶¹ including incidents of alleged interference occurring since the imposition of the Restrictions⁶² (as well as alleged renewed attempts to intimidate certain of the Four Witnesses).⁶³ Consequently, though noting that recent reported incidents of interference are not directly linked to Mr Ntaganda, the Chamber considers that the risk of potential interference is not limited to the Four Witnesses.

30. Finally, in a context where the Chamber has previously found there to be reason to believe that Mr Ntaganda both engaged in witness coaching himself, and directed his interlocutors to do so, the fact that preparations for any defence case should currently be actively underway⁶⁴ is a relevant consideration.⁶⁵

c) Conclusion with respect to the Restrictions

31. In the Chamber's view, the circumstances outlined above indicate that the risk of witness interference and witness coaching remains high at the present stage of the proceedings. The Chamber has previously found reasonable grounds to believe that Mr Ntaganda personally engaged in such conduct, and intended and directed others to do so. These factors militate against granting Mr

⁶⁰ Prosecution Submissions, ICC-01/04-02/06-1313-Conf-Exp-Red, para. 33. The Prosecution lists this number as 16 witnesses, though the Chamber notes that three of these witnesses [REDACTED] have since testified.

⁶¹ Prosecution Response, ICC-01/04-02/06-1390-Conf-Exp-Red, para. 14, referring to Witnesses [REDACTED].

⁶² *See for example allegations made in connection to Witness* [REDACTED].

⁶³ *See for example allegations made in connection to Witness* [REDACTED]. *See also allegations made in connection to Witness* [REDACTED].

⁶⁴ *See* Transcript of Hearing on 15 July 2016, ICC-01/04-02/06-T-122-CONF-ENG ET, page 65, line 24 to page 66, line 2.

⁶⁵ It is noted that such conduct was seemingly pursued in a manner deliberately designed to deceive Mr Ntaganda's Defence counsel at the time (*See* Annex 2 to Second Registry Report, ICC-01/04-02/06-607-Conf-Exp-Anx2-Red, lines 103-107).

Ntaganda renewed access at this time to the same, or a similar, modes of communications through which that conduct was originally perpetrated.

32. Specifically, the Chamber is not convinced by the Defence argument that Mr Ntaganda's abstention from engaging in misconduct within the meaning of Regulation 101(2) of the Regulations since the imposition of the Restrictions should lead to the conclusion that the Restrictions are no longer warranted. As the Chamber already found in issuing the Decision on Restrictions, '[n]ot engaging in misconduct should be the norm and the fact that restrictive measures have been effective does not necessarily lead to the conclusion that the need to continue these measures has diminished or disappeared'.⁶⁶

33. The Chamber therefore concludes that certain restrictions remain necessary to ensure the safety of witnesses, prevent breaches of confidentiality and ensure the integrity of the proceedings.

34. The Chamber further considers the maintenance of the present Restrictions to be the least restrictive means available to achieve these objectives. In so deciding, the Chamber does not consider the Defence suggestion to dispense with the active monitoring of telephone calls or visits⁶⁷ to adequately guard against the potential for further conduct listed in Regulation 101(2) of the Regulations, given that any such conduct could only be ascertained after it had already occurred. The Chamber further notes that it considers continuation of the Visitation Restrictions to be an essential element to ensure the effectiveness of the measures in place.⁶⁸

35. In terms of the proportionality of the Restrictions, the Chamber also notes that Mr Ntaganda may continue to have contact with [REDACTED] through

⁶⁶ Decision on Restrictions, ICC-01/04-02/06-785-Red, para. 59.

⁶⁷ Defence Submissions, ICC-01/04-02/06-1312-Conf-Exp, para. 30.

⁶⁸ See ICC-01/04-02/06-504-Conf-Exp-Anx5, page 7 as cited to in the Decision on Restrictions, ICC-01/04-02/06-785-Red, para. 69.

actively monitored telephone conversations, and with his wife and children, through actively monitored telephone conversations and visits, and/or the recording of messages. The Chamber recalls in this regard [REDACTED],⁶⁹ and further was [REDACTED].⁷⁰ The continuing proportionality of the Restrictions and their impact on Mr Ntaganda's family and private life, including on his wife and children,⁷¹ have been assessed in light of these circumstances. As a result, the Chamber considers that, at this time, Mr Ntaganda's right to privacy and family life is being appropriately balanced with the objectives of protecting witnesses, preventing breaches of confidentiality and ensuring the integrity of the proceedings.

36. Although the Prosecution has requested that the Restrictions remain in place until the end of the Defence case, the Chamber instead considers it appropriate to: (i) continue to periodically monitor the Restrictions; and, where necessary, (ii) conduct an *ad hoc* review if compelling reasons arise, as per its Decision on Restrictions.⁷²

37. While the Chamber finds it necessary to maintain the Restrictions, it recalls that, contrary to the Prosecution submission on this issue,⁷³ Mr Ntaganda is already permitted to discuss trial dates with his non-privileged contacts,⁷⁴ and shall continue to be permitted to do so.

38. In respect of the Defence request that 'the members of the Defence team who are not entitled to privileged communications with Mr Ntaganda be allowed

⁶⁹ Decision on Restrictions, ICC-01/04-02/06-785-Conf-Exp, para. 62.

⁷⁰ [REDACTED].

⁷¹ See, *inter alia*, Defence Submissions, ICC-01/04-02/06-1312-Conf-Exp, paras 34 and 36; Defence Response, ICC-01/04-02/06-1391-Conf-Exp-Red, para. 43 and ICC-01/04-02/06-1391-Conf-Exp-AnxA.

⁷² Decision on Restrictions, ICC-01/04-02/06-785-Red, para. 70.

⁷³ Prosecution Response, ICC-01/04-02/06-1390-Conf-Exp-Red, para. 33.

⁷⁴ Decision on Restrictions, ICC-01/04-02/06-785-Conf-Exp, footnote 143 – 'The Chamber appreciates that Mr Ntaganda may wish to inform his family of when trial hearings take place. As evidenced by the Report on Active Monitoring, Mr Ntaganda kept his wife informed about the planned start dates of the trial. The Chamber clarifies that referring to trial dates is permitted and the mere reference to trial hearings should not be considered as a breach of the restrictions'.

to visit him in detention',⁷⁵ the Chamber considers that the Defence has not sufficiently clarified the scope of its request or provided submissions to support it. The Chamber will therefore not address this request at this stage. Should the Defence wish to pursue this matter, the Chamber urges it to clarify, at a minimum, the relief sought.

d) Decision on reinstatement of the Removed Person

39. The Chamber shall now turn to the question of the reinstatement of the Removed Person to Mr Ntaganda's list of non-privileged contacts, which it had deferred pending the Registrar's decision [REDACTED] on this issue.⁷⁶ The Chamber notes that, on 2 March 2016, the Registrar decided to reinstate the Removed Person to Mr Ntaganda's list of non-privileged contacts upon the conclusion of the fourth evidentiary block, which concluded in May 2016, while noting that the Chamber had reserved its decision on the Defence request to make the Removed Person one of Mr Ntaganda's authorised contacts.⁷⁷

40. The Chamber notes that the Defence has not contested the allegation that at least one individual was listed for a considerable period of time as one of Mr Ntaganda's authorised contacts under a false identity.⁷⁸ The Chamber considers such conduct, aimed at circumventing the Registry's supervisory function, to be a serious matter, of relevance to the present assessment. Regarding the Removed Person specifically, the Chamber accepts the Defence submissions that he is [REDACTED] of Mr Ntaganda's, and the explanation provided.⁷⁹ In light, however, of the nature of the issues at stake, the Chamber would expect a greater degree of accuracy to have been provided in

⁷⁵ Defence Submissions, ICC-01/04-02/06-1312-Conf-Exp, para. 38.

⁷⁶ See Decision on Restrictions, ICC-01/04-02/06-785-Red, para. 65.

⁷⁷ Fourth Registry Report, ICC-01/04-02/06-1303-Conf-Exp, para. 14.

⁷⁸ Prosecution Submissions, ICC-01/04-02/06-1313-Conf-Exp-Red, para. 53.

⁷⁹ Defence Response, ICC-01/04-02/06-1391-Conf-Exp, para. 33. [REDACTED].

submissions to the Registry and the Chamber. It is noted that, despite the fact that the Removed Person's status has been at issue for some time, it was only by way of submissions in the Defence Response⁸⁰ that the Defence provided any detailed information to the Chamber on this matter.⁸¹ Nonetheless, the Chamber does not consider further verification of the Removed Person's identity to be necessary at this stage.

41. Having considered: (i) the fact that Mr Ntaganda's conversations with his non-privileged contacts will continue to be actively monitored; (ii) that the Removed Person is submitted to be [REDACTED] of Mr Ntaganda; and (iii) that the Removed Person is said to be [REDACTED],⁸² the Chamber does not believe that ongoing exclusion of the Removed Person from Mr Ntaganda's list of authorised non-privileged contacts is required. The Chamber is also mindful of assessing for each of the measures taken as part of the Restrictions regime whether they continue to be necessary and proportionate as time elapses. Therefore, the Chamber considers that the Removed Person may be immediately reinstated on Mr Ntaganda's list of authorised contacts for the purposes of non-privileged, actively-monitored telephone conversations.

⁸⁰ Defence Response, ICC-01/04-02/06-1391-Conf-Exp, paras 31-34 and ICC-01/04-02/06-1391-Conf-Exp-AnxB.

⁸¹ The Chamber notes that the only other information provided was by way of footnote 6 to the Defence Submissions, ICC-01/04-02/06-1312-Conf-Exp-AnxA. [REDACTED].

⁸² [REDACTED].

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

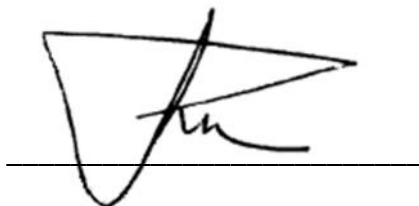
DECIDES to maintain the Restrictions;

GRANTS the Defence request to have the Removed Person reinstated on Mr Ntaganda's list of authorised contacts for non-privileged telephone conversations, subject to same conditions as are applicable to Mr Ntaganda's other authorised non-privileged contacts as specified in the Decision on Restrictions;

REJECTS all other requests; and

ORDERS the filing, by 10 October 2016, of public redacted versions of the Prosecution Response (ICC-01/04-02/06-1390-Conf-Exp-Red), the Defence Submissions (ICC-01/04-02/06-1312-Conf-Exp), the Defence Response (ICC-01/04-02/06-1391-Conf-Exp-Red) and the Fourth Registry Report (ICC-01/04-02/06-1303-Conf-Exp).

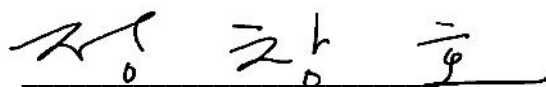
Done in both English and French, the English version being authoritative.



Judge Robert Fremr, Presiding Judge



Judge Kuniko Ozaki



Judge Chang-ho Chung

Dated 21 November 2016

At The Hague, The Netherlands