

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **19 May 2017**

TRIAL CHAMBER VI

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

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

Public

**Public redacted version of 'Further decision reviewing the restrictions placed on
Mr Ntaganda's contacts'**

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 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

Mr Paddy Craig

**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 'Further 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 7 September 2016, following the Chamber's indication that it would periodically review the restrictions in question,² the Chamber issued the 'Decision reviewing the restrictions placed on Mr Ntaganda's contacts' ('First Review Decision'), finding that certain restrictions imposed remained necessary ('Restrictions').³ This decision was upheld by the Appeals Chamber on 8 March 2017 ('Appeals Chamber Judgment').⁴
3. On 10 March 2017, the defence team for Mr Ntaganda ('Defence') requested that a further periodic review of Mr Ntaganda's restrictions be conducted, on the basis that: (i) more than six months has elapsed since the previous periodic

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 ICC-01/04-02/06-1494-Conf-Exp. Confidential *ex parte* redacted and public versions were filed on the same day as ICC-01/04-02/06-1494-Conf-Exp-Red2 (only available to the Defence and Registry), ICC-01/04-02/06-1494-Conf-Exp-Red (only available to the Prosecution and Registry), and ICC-01/04-02/06-1494-Red3 (public). A second public redacted version was filed on 22 November 2016 as ICC-01/04-02/06-1494-Red4.

⁴ Judgment on Mr Bosco Ntaganda's appeal against the decision reviewing restrictions on contacts of 7 September 2016, ICC-01/04-02/06-1817-Conf. A public redacted version was filed on the same day as ICC-01/04-02/06-1817-Red.

review; and (ii) the Prosecution has now completed the presentation of all its witnesses ('Request').⁵

4. Accordingly, on 16 March 2017, the Chamber directed: (i) the Registry to file, by 3 April 2017, a report on the period of active monitoring of Mr Ntaganda's communications since the Chamber's previous review; and (ii) the parties to file, by 13 April 2017, any submissions on the continuation, lifting or adjustment of the restrictions on Mr Ntaganda's contacts that are currently in force.⁶
5. On 3 April 2017, the Registry filed as confidential *ex parte*, available only to the Registry and Defence, the 'Fifth Report on the post-factum review of Mr Bosco Ntaganda's actively monitored communications' ('Registry Report').⁷
6. On 13 April 2017, the Defence filed the 'Observations on behalf of Mr Ntaganda on the continued need for restrictions on his contacts in detention' ('Defence Submissions'),⁸ and the Office of the Prosecutor ('Prosecution') filed the 'Prosecution's submissions on the restrictions to Bosco Ntaganda's contacts' ('Prosecution Submissions').⁹
7. On 24 April 2017, the Defence filed its response to the Prosecution Submissions ('Defence Response'),¹⁰ and the Prosecution filed its response to the Defence Submissions ('Prosecution Response').¹¹

⁵ Request on behalf of Mr Ntaganda for periodic review of restrictions on non-privileged communications, ICC-01/04-02/06-1820, para. 1. The Request was notified on 13 March 2017.

⁶ Email communication from Legal Officer of the Chamber to the parties and Registry on 16 March 2017 at 13:42. Therein, the Chamber also ordered that any responses to the submissions of the other party must be filed by 24 April 2017.

⁷ ICC-01/04-02/06-1847-Conf-Exp. On 5 April, a corrected version was filed as ICC-01/04-02/06-1847-Conf-Exp-Corr.

⁸ ICC-01/04-02/06-1872-Conf-Exp, plus one confidential, *ex parte* annex, available to the Registry and Defence only (ICC-01/04-02/06-1872-Conf-Exp-AnxA). A confidential *ex parte* redacted version of the Defence Submissions was filed on the same day as ICC-01/04-02/06-1872-Conf-Exp-Red.

⁹ ICC-01/04-02/06-1873-Conf.

¹⁰ Defence Response to "Prosecution's submissions on the restrictions to Bosco Ntaganda's contacts", ICC-01/04-02/06-1876-Conf.

II. Submissions

i. Registry

8. The Registry Report indicates that, between 29 April 2016 and 3 April 2017, one of Mr Ntaganda's non-privileged telephone conversations was terminated when a reference was made, without more, to 'documents'.¹² No incidents were reported during family visits during this period.¹³ The Registry Report also details the current regime for Mr Ntaganda's non-privileged telephone calls, noting that the scheduling of such calls is dependent, *inter alia*, on 'the availability of the staff required to actively monitor Mr Ntaganda's non-privileged conversations and constraints that are related to the hearing schedule'.¹⁴

ii. Defence

9. The Defence submits that, '[t]wo years after the imposition of active monitoring', the Restrictions are no longer justified,¹⁵ arguing that: (i) the current Restrictions are 'stringent', and render Mr Ntaganda's privacy rights 'inexistent';¹⁶ (ii) there are no current 'reasonable grounds to believe' that Mr Ntaganda could use his non-privileged telephone calls and/or visits to achieve one of the listed purposes under Regulation 101(2), noting in particular that the Registry Report makes no reference to any incident occurring during the monitored family visits, and that the Registry noted that the incidence of a terminated telephone call in June 2016 'may not have been

¹¹ Prosecution's response to the Defence observations on restrictions to Bosco Ntaganda's contacts, ICC-01/04-02/06-1877-Conf.

¹² Registry Report, ICC-01/04-02/06-1847-Conf-Exp-Corr, para. 11.

¹³ Registry Report, ICC-01/04-02/06-1847-Conf-Exp-Corr, para. 19.

¹⁴ Registry Report, ICC-01/04-02/06-1847-Conf-Exp-Corr, para. 15.

¹⁵ Defence Submissions, ICC-01/04-02/06-1872-Conf-Exp-Red, para. 3.

¹⁶ Defence Submissions, ICC-01/04-02/06-1872-Conf-Exp-Red, paras 14-19.

strictly related to the *Ntaganda* case’;¹⁷ (iii) the risk of interference with Prosecution witnesses who have yet to testify, which was a factor relied on by the Chamber in issuing the First Review Decision, no longer exists at the present stage of proceedings;¹⁸ (iv) the Restrictions are not proportionate to the actual risk that Mr Ntaganda would engage in conduct prohibited under Regulation 101(2), and have adversely affected Mr Ntaganda’s wellbeing;¹⁹ (v) the prevailing circumstances, including the passage of time and absence of violation since April 2016, warrant that the Restrictions being lifted or, alternatively, significantly altered.²⁰

10. As an alternative to the current Restrictions (‘Alternative Request’), the Defence proposes that: (i) full active monitoring of Mr Ntaganda’s non-privileged telephone conversations should be replaced by a system of random active monitoring;²¹ (ii) the number of individuals with whom Mr Ntaganda can have non-privileged telephone communications should be increased to include the individuals identified in Annex A to the Defence Submissions;²² (iii) the number of hours allocated to Mr Ntaganda to place his telephone calls should be increased to one hour per day, amounting to seven hours per week;²³ (iv) a system of passive monitoring during family visits between Mr Ntaganda and his children should be implemented;²⁴ and (v) [REDACTED].²⁵

¹⁷ Defence Submissions, ICC-01/04-02/06-1872-Conf-Exp, paras 13 and 20-29.

¹⁸ Defence Submissions, ICC-01/04-02/06-1872-Conf-Exp-Red, para. 25. *See also* Defence Response, ICC-01/04-02/06-1876-Conf, paras 17, 21 and 30.

¹⁹ Defence Submissions, ICC-01/04-02/06-1872-Conf-Exp-Red, paras 30-34; *See also* Defence Response, ICC-01/04-02/06-1876-Conf, paras 30-31.

²⁰ Defence Submissions, ICC-01/04-02/06-1872-Conf-Exp-Red, page 12 and paras 35-44. *See also* Defence Response, ICC-01/04-02/06-1876-Conf, para. 5.

²¹ Defence Submissions, ICC-01/04-02/06-1872-Conf-Exp-Red, para. 39.

²² Defence Submissions, ICC-01/04-02/06-1872-Conf-Exp-Red, para. 40 and ICC-01/04-02/06-1872-Conf-Exp-AnxA.

²³ Defence Submissions, ICC-01/04-02/06-1872-Conf-Exp-Red, para. 41.

²⁴ Defence Submissions, ICC-01/04-02/06-1872-Conf-Exp-Red, para. 42.

²⁵ Defence Submissions, ICC-01/04-02/06-1872-Conf-Exp, para. 43.

iii. *Prosecution*

11. The Prosecution submits that the Restrictions remain necessary ‘to ensure the safety of witnesses, to prevent breaches of confidentiality and to ensure the integrity of the proceedings’.²⁶ Specifically, the Prosecution avers that: (i) there is an increased risk to the integrity of the proceedings at the start of and during the Defence case in light of the Mr Ntaganda’s previous conduct;²⁷ (ii) the Prosecution has uncovered ‘significant additional, information’ through reviewing further non-privileged conversations of the accused from the Detention Centre that points to a broad scheme of witness-coaching;²⁸ and (iii) despite the fact that all of the Prosecution’s witnesses have testified, these witnesses are not ‘immune to the type of intimidation that the [a]ccused and his associates carried out in the past’.²⁹

12. The Prosecution also argues that the Restrictions remain proportional to the ‘high risk’ of witness coaching and interference, and that since the First Review Decision, ‘no circumstances have intervened that tip the balance of the restrictions currently in place towards lifting or modifying them’.³⁰ The Prosecution submits that, as found by the Appeals Chamber, ‘the passage of time does not mean *per se* that the risk in question no longer exists and/or that restrictions have become disproportionate’.³¹ It concludes that ‘no alternative less restrictive means exist to protect witnesses and the integrity of the proceedings’, asserting the importance of active monitoring in this regard.³²

²⁶ Prosecution Submissions, ICC-01/04-02/06-1873-Conf, paras 2 and 21-23.

²⁷ Prosecution Submissions, ICC-01/04-02/06-1873-Conf, paras 24-27.

²⁸ Prosecution Submissions, ICC-01/04-02/06-1873-Conf, paras 28-34.

²⁹ Prosecution Submissions, ICC-01/04-02/06-1873-Conf, paras 35-48.

³⁰ Prosecution Submissions, ICC-01/04-02/06-1873-Conf, para. 50. *See more generally* paras 49-52.

³¹ Prosecution Submissions, ICC-01/04-02/06-1873-Conf, para. 51, referring to Appeals Chamber Judgment, ICC-01/04-02/06-1817-Red, para. 72. *See also* Prosecution Response, ICC-01/04-02/06-1877-Conf, para. 8.

³² Prosecution Submissions, ICC-01/04-02/06-1873-Conf, paras 53-61. *See also* Prosecution Response, ICC-01/04-02/06-1877-Conf, paras 12-14.

III. Analysis

i. Applicable law

13. The Chamber recalls the applicable law set out in its previous decisions relating to the placing of restrictions on Mr Ntaganda's contacts.³³ As previously noted, the Chamber's analysis shall 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"'.³⁴

14. The Chamber shall also have regard to the applicable jurisprudence of the European Court of Human Rights,³⁵ and the Appeals Chamber Judgment in relation to the necessity and proportionality of restrictions over time, noting in particular that the Appeals Chamber held that:

[T]he passage of time does not mean *per se* that the risk in question no longer exists and/or that restrictions have become disproportionate. In this regard, the passage of time is but one factor that may influence either finding. [...] At the same time, however, the Appeals Chamber considers that the passage of time is a factor that could become more significant as more time elapses and the Trial Chamber must continue to actively review the restrictions in place and carefully balance the need for and proportionality of the restrictions against the important right accorded to detained persons to have contact.³⁶

³³ 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; Decision on Restrictions, ICC-01/04-02/06-785-Red, paras 39-42; First Review Decision, ICC-01/04-02/06-1494-Red4, paras 16-18.

³⁴ Decision on Restrictions, ICC-01/04-02/06-785-Red, para. 42. See also First Review Decision, ICC-01/04-02/06-1494-Red4, para. 17.

³⁵ 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 ECtHR, *Messina v Italy (No 2)*, Application no 25498/94, 28 September 2000, paras 59-74, referred to at footnote 38 of the First Review Decision.

³⁶ Appeals Chamber Judgment, ICC-01/04-02/06-1817-Red, para. 72.

ii. Scope of review

15. 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 three individuals;³⁷ (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.³⁸

16. The second set of restrictions are those placed on Mr Ntaganda's visits ('Visitation 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.³⁹ [REDACTED].⁴⁰

iii. Findings of the Chamber

17. The Chamber notes the fact that the Decision on Restrictions has been in force for approximately nineteen months, and that certain restrictions had already been in place on an interim basis prior to this for a period of approximately two and a half years.⁴¹ The Chamber will proceed to review whether the Restrictions remain necessary and proportionate, in accordance with the

³⁷ See Decision on Restrictions, ICC-01/04-02/06-785-Red, para. 65 and First Review Decision, ICC-01/04-02/06-1494-Conf-Exp, paras 39-41, increasing the number of individuals on Mr Ntaganda's list of authorised contacts from two to three. See also Registry Report, ICC-01/04-02/06-1847-Conf-Exp-Corr, para. 9.

³⁸ See Decision on Restrictions, ICC-01/04-02/06-785-Red, paras 60-65 and First Review Decision, ICC-01/04-02/06-1494-Red4, para. 19.

³⁹ See Decision on Restrictions, ICC-01/04-02/06-785-Red, para. 69 and First Review Decision, ICC-01/04-02/06-1494-Red4, para. 20.

⁴⁰ [REDACTED].

⁴¹ 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.

applicable law outlined above. In so doing, the Chamber shall 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 shall have particular regard to developments occurring since the issuance of the First Review Decision ('Review Period').

a) Factors considered in conducting the present review

18. In reviewing the present Restrictions, 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';⁴² (ii) used coded language 'to disguise attempts to disclose confidential information or to interfere with witnesses';⁴³ (iii) disclosed the identity of Prosecution witnesses in circumstances which the Chamber found to be of 'grave concern';⁴⁴ (iv) 'intended to engage in a serious form of witness interference';⁴⁵ 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'.⁴⁶ As noted in the First Review Decision, the Chamber considers that these findings continue to stand, and re-emphasises the gravity of such conduct, which has had and may continue to have a significant and ongoing impact on witnesses in the *Ntaganda* case, and on the proceedings more broadly.⁴⁷

19. However, while noting the Prosecution's submission that further support for these findings has come to light as a result of the review of the Conversations,

⁴² Decision on Restrictions, ICC-01/04-02/06-785-Red, paras 46-47.

⁴³ Decision on Restrictions, ICC-01/04-02/06-785-Red, para. 50.

⁴⁴ Decision on Restrictions, ICC-01/04-02/06-785-Red, paras 51-54.

⁴⁵ Decision on Restrictions, ICC-01/04-02/06-785-Red, para. 55.

⁴⁶ Decision on Restrictions, ICC-01/04-02/06-785-Red, para. 57.

⁴⁷ *See in this regard* First Review Decision, ICC-01/04-02/06-1494-Red4, para. 22.

the Chamber does not have any information which suggests that, since the date of the First Review Decision, Mr Ntaganda himself has, directly or indirectly, attempted to further disclose confidential information or interfere with witnesses.

20. Indeed, the Chamber considers that the situation at the time of issuing the present decision has significantly changed since the issuance of the First Review Decision. The Chamber notes that on 29 March 2017, the Prosecution case-in-chief was formally closed,⁴⁸ and on 12 April 2017, the Legal representative for victims of the attacks ('LRV') concluded his presentation of evidence.⁴⁹ While noting the Prosecution's ongoing concerns in relation to its witnesses, the Chamber is not persuaded by the argument that the Restrictions should remain in place at this stage on the basis that these witnesses are not 'immune to the type of intimidation that the [a]ccused and his associates carried out in the past'.⁵⁰ Indeed, noting its finding in the First Review Decision that the risk of potential witness interference existed at that time due to the fact that 'there remain[ed] in excess of 50 witnesses on the Prosecution's list of witnesses, including remaining insider witnesses and their family members',⁵¹ the Chamber considers the risk of witness interference with Prosecution witnesses, or with victims authorised to testify, as well as to their safety, to be significantly diminished at the present stage of proceedings.

21. The Chamber also considers it to be relevant that, during the Review Period, the Defence was notified of the Prosecution's investigation under Article 70 of the Statute,⁵² entailing all of Mr Ntaganda's non-privileged telephone conversations being transmitted to the Prosecution. The Chamber considers

⁴⁸ Prosecution's Notice of the Close of its Case-in-Chief, ICC-01/04-02/06-1839.

⁴⁹ See Transcript of hearing of 12 April 2017, ICC-01/04-02/06-T-203-CONF-ENG.

⁵⁰ Prosecution Submissions, ICC-01/04-02/06-1873-Conf, para. 48.

⁵¹ First Review Decision, ICC-01/04-02/06-1494-Conf-Exp, para. 29.

⁵² Prosecution's Communication of the Disclosure of Evidence obtained pursuant to Article 70, 7 November 2016, ICC-01/04-02/06-1616.

that this may further deter Mr Ntaganda from engaging in any prohibited conduct under Regulation 101 of the Regulations, and thus lowers the risk thereof.

22. However, the Chamber also found in the First Review Decision that, ‘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 underway is a relevant consideration’.⁵³ The Chamber considers the risk of further Defence witness coaching linked to the accused to remain a pertinent consideration, given the imminence of the Defence case and the fact that certain matters relating thereto, including the provision of final witness summaries and scheduling issues, are still ongoing.⁵⁴ The Chamber notes that at least one individual alleged to have been coached by Mr Ntaganda appears on the Defence list of witnesses.⁵⁵

b) Conclusion with respect to the Restrictions

23. In the Chamber’s view, the circumstances outlined above indicate that a risk of witness interference and witness coaching still exists at the current stage of the proceedings. The Chamber has previously found reasonable grounds to believe that Mr Ntaganda personally engaged in such conduct, and intended

⁵³ First Review Decision, ICC-01/04-02/06-1494-Red4, para. 30 (footnotes omitted).

⁵⁴ *See in this regard*, Transcript of hearing of 4 May 2017, ICC-01/04-02/06-T-204-CONF-ENG; Email communication from the Chamber on 4 May 2017 at 19:08 directing Prosecution to: (i) identify any specific information not currently contained in the Defence witness summaries that it considers necessary to meaningfully prepare for cross-examination; and (ii) request such information from the Defence in *inter partes* consultations, to be conducted in good faith with a view to reaching an agreement; Decision on further matters related to the presentation of evidence by the Defence, 11 May 2017, ICC-01/04-02/06-1900; Urgent Defence Request on behalf of Mr Ntaganda seeking modification of the schedule for the first two evidentiary blocks, 12 May 2017, ICC-01/04-02/06-1903.

⁵⁵ *See in this regard* Prosecution Submissions, ICC-01/04-02/06-1873-Conf, paras 28-32, in which the Prosecution avers that one individual, who it alleges to have been coached by Mr Ntaganda in 2013, appears on the Defence provisional list of witnesses, and cites to the transcriptions of three conversations and one summary in support. The Chamber notes that the Defence contests the Prosecution’s interpretation of these conversations – *see* Defence Response, ICC-01/04-02/06-1876-Conf, paras 23-29. *See also* ICC-01/04-02/06-1881-Conf-AnxA.

and directed others to do so,⁵⁶ and notes the Prosecution's submissions that further evidence of such coaching continues to emerge.⁵⁷ In light of the imminence of the Defence case, the Chamber considers that these factors militate against allowing Mr Ntaganda unrestricted access at this time to the same, or similar, modes of communications through which that conduct originally occurred, and that certain restrictions on communications remain necessary to ensure the safety of witnesses, to prevent breaches of confidentiality and, and more particularly at this stage, to ensure the integrity of the proceedings.

24. In deciding on what restrictions remain necessary, the Chamber does not consider the Defence suggestion to dispense with the active monitoring of telephone calls, or to combine active and passive monitoring, to adequately guard against the potential for further conduct listed in Regulation 101(2) of the Regulations, given that passive monitoring would allow such conduct to be discovered only after it had already occurred. The Chamber is also not persuaded that Mr Ntaganda's abstention from engaging in conduct 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. Indeed, while the absence of reported misconduct is positive,⁵⁸ the Chamber recalls its finding that '[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

⁵⁶ *See, most recently*, First Review Decision, ICC-01/04-02/06-1494-Red4, para. 31.

⁵⁷ *See in this regard* Prosecution Submissions, ICC-01/04-02/06-1873-Conf, paras 28-32, in which the Prosecution indicates it has uncovered 'significant additional information' since the issuance of the Decision on Restrictions that supports the existence of a broad scheme of witness coaching on the part of Mr Ntaganda.

⁵⁸ The Chamber notes in this regard the finding in the Appeals Chamber Judgment, referring to the previous review period, that 'Mr Ntaganda's willingness to abide by the conditions of the restrictions is noteworthy'. *See* ICC-01/04-02/06-1817-Red, para. 73.

measures has diminished or disappeared’,⁵⁹ which was endorsed by the Appeals Chamber.⁶⁰ Accordingly, while noteworthy, the Chamber has not placed considerable weight on this factor.

25. Notwithstanding, given the stage of proceedings, which the Chamber considers significantly reduces the risks in relation to the safety of witnesses and revealing confidential information, the Chamber is of the view that the present Restrictions are no longer necessary in full, and that lesser measures must be explored to achieve its stated aims.

26. Having considered the Alternative Request, and noting the available options, the Chamber decides to modify the Restrictions, as follows: (i) the number of individuals with whom Mr Ntaganda can have non-privileged telephone communications may be increased, as requested by the Defence, upon certain requirements being met; (ii) the period of time allocated to Mr Ntaganda to place his telephone calls shall be tripled, subject to the capability of the Detention Centre; (iii) family visits shall no longer be actively monitored and shall henceforth be supervised in the usual manner under Regulation 183 of the Regulations of the Registry; and (iv) [REDACTED] (‘Amended Restrictions’). The relevant modalities shall be addressed below.

27. In terms of assessing the proportionality of the Amended Restrictions in the context of the passage of time and in light of Mr Ntaganda’s right to private and family life, the Chamber has had regard to: (i) the limited number of family visits received since Mr Ntaganda’s arrival in the Detention Centre;⁶¹ (ii) the potentially deleterious impact of restrictions on communications on

⁵⁹ First Review Decision, ICC-01/04-02/06-1494-Red4, para. 32, referring to Decision on Restrictions, ICC-01/04-02/06-785-Red, para. 59.

⁶⁰ Appeals Chamber Judgment, ICC-01/04-02/06-1817-Red, para. 73.

⁶¹ The Chamber notes that the interim restrictions on Mr Ntaganda’s family visits were lifted in the Decision on Restrictions, and thus there is no barrier to such visits occurring, albeit they have been, until now, required to be actively monitored – *see* ICC-01/04-02/06-785-Red, para. 69.

detainees' family lives⁶² as well as on their wellbeing over time, which is a relevant consideration in the present case;⁶³ (iii) [REDACTED], which justifies certain restrictions remaining in place;⁶⁴ and (iv) that, via the Amended Restrictions, Mr Ntaganda would continue to have contact, at a minimum, with [REDACTED] through actively monitored telephone conversations, and with his wife and children, through actively monitored telephone conversations, non-actively-monitored visits, and/or the recording of messages. The continuing proportionality of the Amended Restrictions and their impact on Mr Ntaganda's family and private life⁶⁵ have been assessed in light of the totality of these circumstances.

⁶² See, for example, ECtHR, *Piechowicz v. Poland*, Application no 20071/07, 17 April 2012, para. 220.

⁶³ See, for example, Transcript of hearing on 13 September 2016, ICC-01/04-02/06-T-129-CONF-EXP-ENG.

⁶⁴ Decision on Restrictions, ICC-01/04-02/06-785-Conf-Exp, para. 62; First Review Decision, ICC-01/04-02/06-1494-Conf-Exp, para. 35.

⁶⁵ See, *inter alia*, Defence Submissions, ICC-01/04-02/06-1872-Conf-Exp-Red, para. 34; Defence Response, ICC-01/04-02/06-1876-Conf, para. 31.

c) Amended Restrictions

i. Telephone Restrictions

28. As noted above, the Chamber considers that the number of individuals with whom Mr Ntaganda can have non-privileged telephone communications may be increased, upon basic screening of any such individuals by the Registry. In this regard, the Chamber notes the transmission by the Defence of a 'Proposed list of individuals for non-privileged communications' ('Proposed Individuals')⁶⁶ and orders that, should Mr Ntaganda wish any of these individuals to be added to his current list of contacts, the Registry must be provided with a minimum amount of information attesting to the identity of each individual. This information shall include: (i) full name and any nick-names; (ii) relationship to Mr Ntaganda; (iii) telephone number(s); (iv) full residential address; and (v) a colour scan of the individual's identity card or passport. Upon provision of this information, and subject to Regulation 173(5) of the Regulations of the Registry, the Proposed Individuals may then be added to Mr Ntaganda's list of contacts. Noting the 'Decision on restrictions in relation to certain detainees',⁶⁷ no individuals listed therein at footnote 12 (noting [REDACTED] is already on Mr Ntaganda's contact list), may be added to Mr Ntaganda's list of contacts unless the Defence files a request, to which the Prosecution shall have the opportunity to respond.

29. As noted above, the Chamber shall also triple the amount of time allocated to Mr Ntaganda to place his telephone calls from one to three hours of actively-monitored phone calls per week, subject to the capability of the Detention

⁶⁶ Annex A to Defence Submissions, ICC-01/04-02/06-1872-Conf-Exp-AnxA.

⁶⁷ 18 August 2015, ICC-01/04-02/06-786-Conf-Exp plus one confidential *ex parte* annex. In addition to a public version filed on the same day (ICC-01/04-02/06-786-Red4), and certain other redacted versions, ICC-01/04-02/06-786-Conf-Red5 was filed on 18 May 2017.

Centre.⁶⁸ The restrictions as to language and subject matter shall remain, insofar as the telephone conversations must be conducted in a language the Registry can monitor, and use of coded language or discussion of case-related matters remains prohibited.

ii. Visitation Restrictions

30. The Chamber notes that, under Regulation 183 of the Regulations of the Registry, visits at the Detention Centre are to be, *inter alia*, ‘conducted within the sight and hearing of the staff of the detention centre’. The Chamber considers that, at this stage, this is sufficient in terms of surveillance for the purposes of Mr Ntaganda’s family visits, and shall no longer require them to be actively monitored. However, the Chamber emphasises that Detention Centre staff must ensure, as an additional precaution, that no items are passed between Mr Ntaganda and his family members or any other detainees. Further, should Mr Ntaganda seek authorisation for visits from any of the Proposed Individuals who are successfully added to his list of contacts, such visits will be subject to active monitoring. Restrictions as to language and subject matter shall apply, insofar as the conversations must be conducted in a language the Registry can monitor, and use of coded language or discussion of case-related matters will be prohibited.

31. [REDACTED]. Therefore, visits under the usual regime under Regulation 185 of the Regulations of the Registry shall be permitted.

d) Conclusion and future review of Amended Restrictions

32. In light of the foregoing, and having regard to Regulation 101(2) of the Regulations, the Chamber is satisfied that the Amended Restrictions are both

⁶⁸ A one-hour limit was imposed by way of the Decision on Restrictions, ICC-01/04-02/06-785-Red, para. 66. The Chamber notes the submission in the Registry Report on the availability of staff required to actively monitor Mr Ntaganda’s non-privileged conversations – *see* ICC-01/04-02/06-1847-Conf-Exp-Corr, para. 15.

necessary and proportionate, noting in particular the passage of time, which the Chamber considers has become more significant at this stage of proceedings, and which requires the careful balancing of the need for and proportionality of the restrictions against the right accorded to Mr Ntaganda to have contact.⁶⁹ The Chamber is satisfied that the Amended Restrictions constitute appropriate ‘less restrictive means’ to ensure the safety of witnesses, prevent breaches of confidentiality and in particular, to ensure the integrity of the proceedings. It further considers it appropriate to: (i) periodically monitor the Amended Restrictions; and, where necessary, (ii) conduct an *ad hoc* review if compelling reasons arise, as per the Chamber’s existing procedure.⁷⁰

⁶⁹ See in this regard Appeals Chamber Judgment, ICC-01/04-02/06-1817-Red, para. 72.

⁷⁰ Decision on Restrictions, ICC-01/04-02/06-785-Red, para. 70; First Review Decision, ICC-01/04-02/06-1494-Red4, para. 36.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

GRANTS, in part, the Alternative Request;

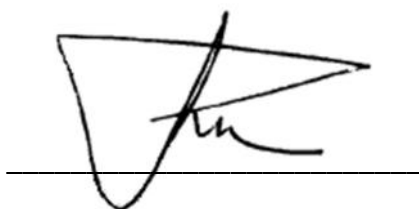
MODIFIES the Restrictions in accordance with the directions above;

DIRECTS the Registry to, forthwith, facilitate the implementation of the Amended Restrictions;

REJECTS all other requests; and

ORDERS the filing, within two weeks of the issuance of the present decision, of public redacted versions of the Defence Submissions (ICC-01/04-02/06-1872-Conf-Exp-Red), the Prosecution Submissions (ICC-01/04-02/06-1873-Conf), the Defence Response (ICC-01/04-02/06-1876-Conf), the Prosecution Response (ICC-01/04-02/06-1877-Conf) and the Registry Report (ICC-01/04-0P2/06-1847-Conf-Exp-Corr).

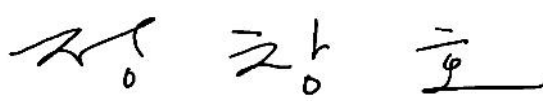
Done in both English and French, the English version being authoritative.



Judge Robert Fremr, Presiding Judge



Judge Kuniko Ozaki



Judge Chang-ho Chung

Dated 19 May 2017

At The Hague, The Netherlands