

**Cour
Pénale
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**International
Criminal
Court**

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Date: 15 August 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 'Second decision reviewing the restrictions in place for Mr Lubanga', 21 July 2017, ICC-01/04-02/06-2000-Conf-Exp

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 Patrick Craig

**Victims Participation and Reparations
Section**

Others

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 and 68(1) of the Rome Statute, and Regulation 101 of the Regulations of the Court, issues this 'Second decision reviewing the restrictions in place for Mr Lubanga'.

I. Background

1. On 29 June 2015, the Chamber imposed certain restrictions on the contacts of Mr Thomas Lubanga Dyilo, and ordered the active monitoring of Mr Lubanga's non-privileged telephone conversations.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 be or remain suspended from Mr Lubanga's list of contacts;² and (ii) active monitoring of Mr Lubanga's non-privileged telephone communications be conducted by the Registry, with the exception of telephone communications with Mr Lubanga's wife and children.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 for Mr Lubanga's telephone communications, the criteria of Regulation 184(1) of the Regulations of the Registry had been met.⁴

¹ Order imposing interim restrictions on detainees' contacts with certain individuals and related measures, ICC-01/04-02/06-683-Conf-Exp. Confidential *ex parte* redacted versions were filed on 30 June 2015 as ICC-01/04-02/06-683-Conf-Exp-Red (Registry, Prosecution and *Ntaganda* Defence) and ICC-01/04-02/06-683-Conf-Exp-Red2 (Registry, Prosecution and *Lubanga* Defence) ('First Decision on Mr Lubanga').

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.*

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.

4. On 17 December 2015, ruling on a request for review by the defence team for Mr Lubanga (*Lubanga Defence*), the Chamber issued a decision maintaining the active monitoring of the telephone communications, including the active monitoring of Mr Lubanga's visits ('First Review Decision').⁵ To ensure that the restrictions imposed on Mr Lubanga could be maintained following his transfer to the Democratic Republic of the Congo ('DRC'), the Chamber [REDACTED].⁶
5. On 5 February 2016, the Registry informed the Chamber that [REDACTED].⁷ In the same filing, the Registry [REDACTED],⁸ and on 10 April 2017, the Registry transmitted a second set of reports to the Chamber [REDACTED] (together, 'Registry Reports').⁹
6. On 1 May 2017, noting the close of the Office of the Prosecutor's ('Prosecution') case-in-chief in the *Ntaganda* case, the Chamber determined that it was appropriate to conduct a review of the ongoing measures restricting the contacts of Mr Lubanga, directed the Prosecution to make submissions, and invited the *Lubanga Defence* to submit observations on the impact and the proportionality of the restrictions imposed.¹⁰
7. On 19 May 2017, the Prosecution filed a request for access to the Registry Reports [REDACTED],¹¹ which the Chamber rejected on 22 May 2017, with reasons to follow.¹²

⁵ Decision on Lubanga Defence request for lifting of certain restrictions on contacts, ICC-01/04-02/06-1061-Conf-Exp. A corrigendum was issued on 21 January 2016 as ICC-01/04-02/06-1061-Conf-Exp-Corr and ICC-01/04-02/06-1061-Conf-Exp-Corr-Anx, and redacted versions were issued as ICC-01/04-02/06-1061-Conf-Exp-Red-Corr and ICC-01/04-02/06-1061-Conf-Exp-Red-Corr-Anx (Registry, Prosecution, *Lubanga Defence*).

⁶ First Review Decision, ICC-01/04-02/06-1061-Conf-Exp-Corr.

⁷ [REDACTED].

⁸ [REDACTED].

⁹ [REDACTED].

¹⁰ Order requesting submissions on the restrictions imposed on contacts of Mr Lubanga, ICC-01/04-02/06-1884-Conf-Exp (Prosecution, Registry and *Lubanga Defence*). A confidential *ex parte* redacted version was filed on 1 May 2017 as ICC-01/04-02/06-1884-Conf-Exp-Red (Registry, Prosecution, Defence, and *Lubanga Defence*).

¹¹ [REDACTED], ICC-01/04-02/06-1912-Conf-Exp.

¹² Email communication from the Chamber to the Prosecution and the *Lubanga Defence*, 22 May 2017, at 13:32.

8. On 22 May 2017, the Prosecution made its submissions on the restrictions in place for Mr Lubanga, arguing that they should be maintained ('Prosecution Submissions').¹³ The Prosecution further argued that Mr Lubanga should be prevented from communicating with three individuals who had been previously removed from his list of contacts, as well as all individuals on the witness list of the defence team for Mr Ntaganda (respectively, '*Ntaganda* Defence' and '*Ntaganda* Defence Witness List').¹⁴
9. On 24 May 2017, the *Lubanga* Defence filed a request seeking access to documents and materials related to the restrictions on Mr Lubanga's contacts.¹⁵
10. On 6 June 2017, the Chamber partly granted the *Lubanga* Defence request for access to portions of the Annexes of the Registry Reports, and set out reasons for its decision denying the Prosecution request for access to the Registry Reports.¹⁶
11. On 12 June 2017, the *Lubanga* Defence submitted its observations, arguing that the restrictions in place for Mr Lubanga should be lifted ('*Lubanga* Defence Submissions').¹⁷

II. Submissions

Prosecution

12. The Prosecution argues that there is no justification for lifting the current restrictions.¹⁸ While acknowledging that the circumstances have changed since

¹³ Prosecution's submissions on the restrictions to Thomas Lubanga's contacts, ICC-01/04-02/06-1916-Conf-Exp (Prosecution and Registry) with confidential annexes A-H. A confidential redacted version was filed on 23 May as ICC-01/04-02/06-1916-Conf-Red.

¹⁴ Prosecution Submissions, ICC-01/04-02/06-1916-Conf-Exp.

¹⁵ Requête de la Défense aux fins de divulgation des rapports communiqués par le Greffé à la Chambre de première instance VI sur les mesures de restriction imposées à M. Lubanga, ICC-01/04-02/06-1923-Conf-Exp (Registry, Prosecution and *Lubanga* Defence).

¹⁶ Decision on Lubanga Defence request seeking access to reports filed by the Registry concerning the restrictions imposed on contacts of Mr Lubanga ICC-01/04-02/06-1939-Conf-Exp (Prosecution, Registry and Lubanga Defence).

¹⁷ Observations de la Défense de M. Lubanga sur les mesures de restriction conformément à l'ordonnance rendue le 1er mai 2017 (ICC-01/04-02/06-1884-Conf-Exp), ICC-01/04-02/06-1951-Conf-Exp (Registry, Prosecution and *Lubanga* Defence).

the time the restrictions were imposed, the Prosecution argues that the risk that Mr Lubanga poses for confidential information, the safety of Prosecution witnesses, and the integrity of the proceedings has not changed.¹⁹

13. The Prosecution states that information has come to light confirming that Mr Lubanga 'disseminated confidential information and was involved in pressuring Prosecution witnesses to cease their cooperation with the Court'.²⁰ The Prosecution avers that, using his non-privileged communication line, Mr Lubanga engaged in coaching witnesses on behalf of Mr Ntaganda, disseminating defence lines, and instructing his associates to 'prepare' witnesses.²¹ In this respect, the Prosecution points to several conversations as evidence that Mr Lubanga was involved in witness interference,²² as well as the statement of Witness [REDACTED], who reported having been pressured in relation to his testimony.²³ The Prosecution maintains that there is a high risk that, if not monitored, Mr Lubanga will engage in further attempts to pervert the course of justice, a risk which is compounded by the start of the Defence case and the fact that [REDACTED].²⁴

14. The Prosecution further requests that Mr Lubanga be prevented from communicating with the three individuals previously removed from his list of contacts, and to have the Registry strike from Mr Lubanga's list of non-privileged contacts any and all individuals who are on the *Ntaganda* Defence Witness List.²⁵ The Prosecution claims that this would appropriately balance Mr Lubanga's right to privacy and family life with the objectives of protecting witnesses, preventing

¹⁸ Prosecution Submissions, ICC-01/04-02/06-1916-Conf-Exp, para.1.

¹⁹ Prosecution Submissions, ICC-01/04-02/06-1916-Conf-Exp, para.2.

²⁰ Prosecution Submissions, ICC-01/04-02/06-1916-Conf-Exp, para.3.

²¹ Prosecution Submissions, ICC-01/04-02/06-1916-Conf-Exp, para. 30.

²² Prosecution Submissions, ICC-01/04-02/06-1916-Conf-Exp, paras 21-28, and paras 31-35.

²³ Prosecution Submissions, ICC-01/04-02/06-1916-Conf-Exp, paras 23-27.

²⁴ Prosecution Submissions, ICC-01/04-02/06-1916-Conf-Exp, paras 4, 36-37.

²⁵ Prosecution Submissions, ICC-01/04-02/06-1916-Conf-Exp, para. 5.

breaches of confidentiality and ensuring the integrity of the proceedings, and that this constitutes the least restrictive means available to the Chamber.²⁶

15. The Prosecution avers that, while all Prosecution witnesses have completed their testimonies in the *Ntaganda* case, they remain vulnerable to pressure to recant and to retaliation, and that, as such, the current restrictions remain necessary to ensure the safety of witnesses as well as to prevent further breaches of confidentiality.²⁷
16. The Prosecution argues that lifting the restrictions at this stage would create the risk that Mr Lubanga would seek to influence witnesses before, or even during their testimony, without being detected.²⁸ While Mr Lubanga and Mr Ntaganda are now physically separated, the Prosecution states that Mr Lubanga is intimately aware of the facts, circumstances, and persons involved in the *Ntaganda* case. Although Mr Lubanga is in prison, he resides in the DRC, where the vast majority of Defence witnesses are believed to reside. The Prosecution posits that this increases Mr Lubanga's capacity to coach witnesses on the *Ntaganda* Defence Witness List and interfere with the course of justice.²⁹
17. The Prosecution notes that it does not have access to the reports on active monitoring for the entire period under review and so is limited in its ability to assess Mr Lubanga's recent conduct.³⁰ However, the Prosecution argues that, even in the event that Mr Lubanga has not engaged in further misconduct, this should be the norm, and the fact that restrictive measures were effective does not necessarily lead to the conclusion that there is no further need to continue these measures.³¹ While the current restrictions regime has now been in place for close

²⁶ Prosecution Submissions, ICC-01/04-02/06-1916-Conf-Exp, para. 6.

²⁷ Prosecution Submissions, ICC-01/04-02/06-1916-Conf-Exp, para. 29.

²⁸ Prosecution Submissions, ICC-01/04-02/06-1916-Conf-Exp, para. 36.

²⁹ Prosecution Submissions, ICC-01/04-02/06-1916-Conf-Exp, para. 40.

³⁰ Prosecution Submissions, ICC-01/04-02/06-1916-Conf-Exp, para. 41.

³¹ Prosecution Submissions, ICC-01/04-02/06-1916-Conf-Exp, para. 41.

to two years, the Prosecution argues that this factor is outweighed by the gravity of Mr Lubanga's misconduct and the potential risk to the trial proceedings.

Lubanga Defence

18. The *Lubanga* Defence states that restrictions are no longer warranted now that the Prosecution's presentation of evidence is complete.³² Further, the *Lubanga* Defence argues that there is no evidence to indicate that Mr Lubanga has interfered with the administration of justice, whether in relation to his own trial or the trial of Mr Ntaganda.³³
19. In regard to Witness [REDACTED]'s statement that he was pressured in relation to his testimony, the *Lubanga* Defence states that if these allegations were true, there is no evidence indicating that Mr Lubanga was behind this.³⁴
20. The *Lubanga* Defence further argues that the phone calls produced do not indicate that Mr Lubanga attempted to interfere with the administration of justice, and, if anything, demonstrate the care taken by Mr Lubanga to ensure that nothing alters the sincerity of the testimony presented before the Court.³⁵
21. Lastly, the *Lubanga* Defence points to previous rulings by Trial Chamber I in which it was determined that allegations of inappropriate behaviour against the *Lubanga* Defence were unfounded.³⁶ The *Lubanga* Defence indicates that, at this stage of the proceedings, there is no justification for maintaining restrictions on the telephone communications and visitors of Mr Lubanga.³⁷

³² *Lubanga* Defence Submissions, ICC-01/04-02/06-1951-Conf-Exp, paras 8-10.

³³ *Lubanga* Defence Submissions, ICC-01/04-02/06-1951-Conf-Exp, para. 11.

³⁴ *Lubanga* Defence Submissions, ICC-01/04-02/06-1951-Conf-Exp, para. 12.

³⁵ *Lubanga* Defence Submissions, ICC-01/04-02/06-1951-Conf-Exp, paras 13-14.

³⁶ *Lubanga* Defence Submissions, ICC-01/04-02/06-1951-Conf-Exp, paras 21-28.

³⁷ *Lubanga* Defence Submissions, ICC-01/04-02/06-1951-Conf-Exp, para. 29.

III. Analysis

i. Applicable Law

22. The Chamber recalls the applicable law in relation to restrictions on detainees,³⁸ and in this regard, will focus its analysis on whether the continuation of restrictions is necessary and proportionate to the aim of ‘protect[ing] 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’.³⁹

23. The Chamber further recalls the Appeals Chamber’s determination in relation to the restrictions placed on Mr Ntaganda’s communications that while ‘the passage of time does not mean *per se* that the risk in question no longer exists [...] the passage of time is a factor that could become more significant as more time elapses’, and that a Trial Chamber must ‘carefully balance the need for and proportionality of the restrictions against the important right accorded to detained persons to have contact’.⁴⁰

ii. Scope of Review

24. The Chamber recalls that pursuant to the restrictions currently imposed on Mr Lubanga’s contacts, Mr Lubanga is able to: (i) have unlimited contact with his direct family; and (ii) subject to active monitoring, have calls and visits with extended family and friends, and other individuals.⁴¹ The Chamber notes that there are no restrictions in place preventing Mr Lubanga from communicating with any particular individuals.

³⁸ See, for example, 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, paras 40-44 and Decision on Restrictions, ICC-01/04-02/06-785-Red, paras 39-42.

³⁹ On necessity and proportionality, see Decision on Restrictions, ICC-01/04-02/06-785-Red, paras 39-42. On the aims of the restrictions in relation to Mr Lubanga, see First Decision on Mr Lubanga, ICC-01/04-02/06-683-Conf-Exp-Red2, para. 13 and First Review Decision, ICC-01/04-02/06-1061-Conf-Exp-Red-Corr, para. 19.

⁴⁰ Judgment on Mr Bosco Ntaganda’s appeal against the decision reviewing restrictions on contacts of 7 September 2016, 8 March 2017, ICC-01/04-02/06-1817-Conf, para. 72. A public redacted version was filed on the same day as ICC-01/04-02/06-1817-Red.

⁴¹ First Review Decision, ICC-01/04-02/06-1061-Conf-Exp-Red-Corr, para. 23.

iii. *Findings of the Chamber*

25. The Chamber notes that certain restrictions were first imposed on Mr Lubanga's communications on 29 June 2015,⁴² and that certain restrictions have remained in place since this time.⁴³ The Chamber will proceed to review whether the restrictions in place remain necessary and proportionate, in accordance with the applicable law outlined above. In conducting this assessment, the Chamber shall have particular regard to any developments that have occurred since the issuance of the First Review Decision.⁴⁴

a) Factors considered in conducting the present review

26. In reviewing the restrictions currently in place for Mr Lubanga, the Chamber recalls that the allegations that led to certain restrictions being placed on Mr Lubanga's communications were of a serious nature.⁴⁵ The restrictions in place for Mr Lubanga were found to be necessary to protect the integrity of the proceedings and the safety and well-being of witnesses in the *Ntaganda* case and were intended 'only [to] remain in place until the [REDACTED].⁴⁶ Further, the Registry [REDACTED].⁴⁷

27. In considering whether the relevant restrictions should be lifted or modified in any way, including whether any lesser measures could be explored to achieve the Chamber's stated aims, the Chamber notes that the situation at the time of issuing the present decision has significantly changed since the issuance of the First Review Decision.⁴⁸ The Chamber notes that the Prosecution's case-in-chief

⁴² First Decision on Mr Lubanga, ICC-01/04-02/06-683-Conf-Exp.

⁴³ First Review Decision, ICC-01/04-02/06-1061-Conf-Exp-Corr.

⁴⁴ First Review Decision, ICC-01/04-02/06-1061-Conf-Exp-Corr.

⁴⁵ Decision on restrictions in relation to certain detainees, 18 August 2015, ICC-01/04-02/06-786-Conf-Exp (Prosecution and Registry), paras 34-40. Confidential *ex parte* redacted versions and a public redacted version were filed on the same day as ICC-01/04-02/06-786-Conf-Exp-Red (Prosecution, *Ntaganda* Defence and Registry), ICC-01/04-02/06-786-Conf-Exp-Red2 (Prosecution, *Lubanga* Defence and Registry), ICC-01/04-02/06-786-Conf-Exp-Red3 and ICC-01/04-02/06-786-Red4 (public).

⁴⁶ First Review Decision, ICC-01/04-02/06-1061-Conf-Exp-Corr, para. 24.

⁴⁷ First Review Decision, ICC-01/04-02/06-1061-Conf-Exp-Corr, para. 25.

⁴⁸ First Review Decision, ICC-01/04-02/06-1061-Conf-Exp-Corr.

was formally closed on 29 March 2017,⁴⁹ and that the Legal representative for victims of the attacks ('LRV') concluded his presentation of evidence on 12 April 2017.⁵⁰ While noting the Prosecution's concerns in relation to its witnesses, the Chamber is not persuaded by the argument that the restrictions should remain in place on the basis that Prosecution witnesses 'remain vulnerable to pressures to recant and to retaliation'.⁵¹ Noting its previous finding that the restrictions should only remain in place 'until the [REDACTED]',⁵² and noting that the Prosecution's case has now been closed, the Chamber considers that the risk of interference with Prosecution witnesses is significantly lower at the current stage of the proceedings.

28. The Chamber notes the Prosecution's submission that further information has come to light regarding witness interference through its review of certain non-privileged conversations from the Detention Centre.⁵³ However, the Chamber notes that the examples referred to by the Prosecution date back primarily to 2013, a period prior to the imposition of the restrictions on Mr Lubanga. Indeed, there is no information before the Chamber to suggest that, since the date of its First Review Decision, Mr Lubanga has directly or indirectly attempted to interfere with witnesses or otherwise pervert the course of justice, or that there is any specific motivation to do so. The Chamber further recalls that Mr Lubanga has been physically separated from Mr Ntaganda since December 2015, and that the restrictions in place for Mr Ntaganda prohibit communications between the two individuals.⁵⁴

29. The Chamber therefore considers that the situation prevailing at the present time has fundamentally changed since the time of its First Review Decision. In this

⁴⁹ Prosecution's Notice of the Close of its Case-in-Chief, ICC-01/04-02/06-1839.

⁵⁰ ICC-01/04-02/06-T-203-CONF-ENG.

⁵¹ Prosecution Submissions, ICC-01/04-02/06-1916-Conf-Exp, para. 29.

⁵² First Review Decision, ICC-01/04-02/06-1061-Conf-Exp-Corr, para. 24.

⁵³ Prosecution Submissions, ICC-01/04-02/06-1916-Conf-Exp, paras 2-3, and paras 30-35.

⁵⁴ Public redacted version of 'Further decision reviewing the restrictions placed on Mr Ntaganda's contacts', ICC-01/04-02/06-1913-Red2.

regard, the Chamber notes: (i) the current stage of the proceedings; (ii) in particular, the Chamber's previous finding that the restrictions placed on Mr Lubanga 'should only remain in place until the [REDACTED]';⁵⁵ (iii) [REDACTED]; and (iv) the absence of information before the Chamber to indicate that Mr Lubanga has engaged in any attempt at witness interference since the date of the First Review Decision. The Chamber finds that the justification for maintaining the current restrictions is no longer apparent.

30. Furthermore, noting: (i) that the current restrictions have been in place for Mr Lubanga for approximately 24 months; and (ii) the right to privacy and family life of detainees, and the negative impact restrictions may have thereon over a prolonged period, the Chamber considers that imposing any lesser restrictive measures at this stage would not be proportionate to Mr Lubanga's right to family and private life.

31. As such, the Chamber determines that the restrictions should be lifted.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

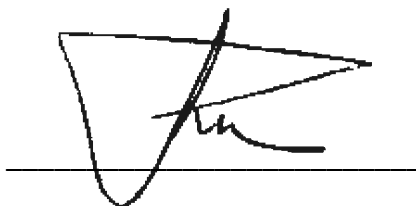
ORDERS the lifting of restrictions on Mr Lubanga's communications and visits;

REJECTS the Prosecution's request to impose additional restrictions on Mr Lubanga's communications and visits; and

INSTRUCTS the Registry to notify the DRC authorities as soon as possible of its determination.

⁵⁵ First Review Decision, ICC-01/04-02/06-1061-Conf-Exp-Corr, para. 24.

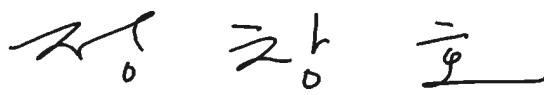
Done in both English and French, the English version being authoritative.

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Judge Robert Fremr, Presiding Judge

A handwritten signature in black ink, appearing to be 'Kuniko Ozaki' in a cursive style.

Judge Kuniko Ozaki

A handwritten signature in black ink, consisting of several distinct, stylized characters.

Judge Chang-ho Chung

Dated 15 August 2017

At The Hague, The Netherlands