



Original: English

No.: ICC-01/04-02/06
Date: 15 January 2016

TRIAL CHAMBER VI

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
*THE PROSECUTOR v. BOSCO NTAGANDA***

Public

Public redacted version version of "Prosecution's Reply to « Réponse/Observations de M. Bosco Ntaganda à la Demande du Procureur pour l'imposition de mesures prévues à la norme 101(2) du Règlement de la Cour », 12 September 2014, ICC-01/04-02/06-368-Conf

Source: The Office of the Prosecutor

Document 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 the Defence

Mr Stéphane Bourgon

Mr Luc Boutin

Legal Representatives of the Victims

Ms Sarah Pellet

Mr Dmytro Suprun

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(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**

Other

I. Introduction

1. The Prosecution replies to the Defence's response¹ to the Prosecution's request for measures under regulation 101(2) of the Regulations of the Court ("RoC") ("Prosecution Reply").
2. Contrary to the Defence's assertions: (i) regulation 101(3) of the RoC only requires that the Defence is informed of the Prosecution's request under regulation 101(2)- there is no obligation to disclose evidence. Any information provided does not have to be tested at trial, and must be considered in its totality. The right to be "informed" is subject to the Court's obligations to protect victims and witnesses and the integrity of the proceedings against the accused; (ii) the "reasonable grounds to believe" test underlying regulation 101(2) is identical to the same legal test found in other parts of the Rome Statute ("Statute"); (iii) international jurisprudence confirms that the right to private and family life is not unlimited and requests for restrictions on contact and for access to information are permissible where they are necessary and proportionate.

II. Confidentiality

3. This document is classified, pursuant to regulation 23*bis*(1) of the RoC, as Confidential only available to the Prosecution, Victims and Witnesses Unit ("VWU") and Defence, consistent with the classification of related filings.

III. Procedural History

4. On 8 August 2014, the Prosecution filed a request for measures under regulation 101(2) of the RoC ("Prosecution's Request")² in the case against Bosco NTAGANDA ("Accused").

¹ ICC-01/04-02/06-360-Conf-Exp.

² ICC-01/04-02/06-349-Conf-Exp, with Confidential redacted version at ICC-01/04-02/06-349-Conf-Red.

5. On 14 August 2014, Trial Chamber IV requested observations from VWU and the Registry on the Prosecution's Request.³ The relevant observations were filed on 19 August 2014 consistent with the Chamber's extension of time to file.⁴
6. On 14 August 2014, the Chamber also set a deadline for the submission of observations from the Defence on the Prosecution's Request.⁵ The Defence Response was filed on 1 September 2014 consistent with the Chamber's extension of time to file.⁶
7. On 4 September 2014, the Prosecution requested leave to reply to the Defence Response,⁷ to which the Defence objected on 5 September.⁸
8. On 10 September 2014, the Chamber granted the requested leave.⁹

IV. Prosecution's Observations

9. The Prosecution Reply is confined to three specific issues:¹⁰ First, the question of what information must be provided to the Defence under regulation 101(3) and what standard such information must meet.¹¹ The Defence Response mischaracterises the standard of information that must be provided under regulation 101(3) to "inform" the Defence of a request made under regulation 101(2).¹² Second, the nature of the "reasonable grounds to believe" standard in the context of a regulation 101(2) request.¹³ The Defence Response mischaracterises the "reasonable grounds to believe" standard underpinning

³ Email from Legal Officer of the Chamber to VWU, 12 August 2014, 13:06; Email from Legal Officer of the Chamber to Registry, 12 August 2014, 15:37.

⁴ ICC-01/04-02/06-356-Conf-Exp; ICC-01/04-02/06-355-Conf-Exp.

⁵ Email from Legal Officer of the Chamber to Defence, 12 August 2014, 12:24.

⁶ ICC-01/04-02/06-360-Conf-Exp. *See* email from Legal Officer of the Chamber to Defence, 13 August 2014, 17:11.

⁷ ICC-01/04-02/06-361-Conf.

⁸ ICC-01/04-02/06-362-Conf-Exp.

⁹ ICC-01/04-02/06-367-Conf.

¹⁰ ICC-01/04-02/06-367-Conf.

¹¹ Prosecution's Request for Leave, paras.12-13.

¹² ICC-01/04-02/06-360-Conf-Exp, paras. 2-3, 7-22.

¹³ Prosecution's Request for Leave, paras.12 and 14.

regulation 101(2) requests.¹⁴ Third, the scope of limitations on contact in the context of the right to private and family life, in particular as may be applied in this case.¹⁵ The Defence mischaracterises the nature of this right and its application.¹⁶

A. Standard of information required under regulation 101(3)

10. Contrary to the Defence Response, regulation 101(3) requires only that the detained person is informed of the Prosecutor's request for restrictive measures. The provision requires neither (i) the degree of specificity in delineating allegations against an accused arising in the course of a trial on guilt or innocence, nor (ii) disclosure of supporting evidence as required in the course of trial.
11. Regulation 101(3)'s plain wording—" [t]he detained person shall be informed of the Prosecutor's request" — is dispositive of the information to which the Defence is entitled. This is made even clearer when contrasted with article 67(1)(a) of the Statute, which provides that, in the course of a trial on guilt or innocence, the accused shall "be informed promptly and in detail of the nature, cause and content of the charge." The obligation to inform *simpliciter* in the context of regulation 101(3) demands far less than the degree of specificity required in the determination of a charge under the Statute.
12. On the matter of disclosure, the Defence asserts without further explanation that rules 76 and 77 apply to the Prosecution's Request.¹⁷ However, regulation 101(3)'s requirement to "inform" a detained person does not presuppose or imply a correlative disclosure obligation. Article 67 and rules 76 and 77 apply exclusively to trials on guilt and innocence. This is evident from, *inter alia*: (i) the plain

¹⁴ ICC-01/04-02/06-360-Conf-Exp, paras. 24-27.

¹⁵ Prosecution's Request for Leave, paras.12 and 15.

¹⁶ ICC-01/04-02/06-360-Conf-Exp, paras. 45-50, 56, 58.

¹⁷ See, e.g., ICC-01/04-02/06-260-Conf-Exp, paras. 10-12.

wording of regulation 101(3); (ii) the fact that article 67(1) refers to rights arising in the context of “the determination of any charge”; (iii) the description of the process set out in rule 76 as “Pre-trial disclosure”; and (iv) the plain language of rule 77, which refers to disclosure of evidence that is material to the preparation of the Defence, or to be used by the Prosecution for “the purposes of the confirmation hearing or at trial.”

13. The distinction established by the Court’s legal texts between trials on guilt and innocence on the one hand, and proceedings concerning regulation 101(2) requests on the other, is logical and commensurate with their nature. A request initiated under regulation 101(2) is fundamentally an administrative proceeding.¹⁸ Significantly, the adjudication of criminal guilt or innocence of the accused—which underlies the disclosure obligations that apply to proceedings before the Court—does not arise in the context of proceedings under regulation 101.
14. By analogy, the criminal/administrative proceedings distinction was noted by the Supreme Court of Canada (“SCC”) in a follow-up case to its seminal decision in *R. v. Stinchcombe*¹⁹ on disclosure in criminal proceedings. In *May v. Ferndale Institution*, the SCC held that the *Stinchcombe* disclosure principles do not apply to decisions concerning the transfer of inmates from a minimum to a medium security institution. The court observed:

The appellants contend that the disclosure requirements set out in *Stinchcombe* apply to the present case because the transfer decision involved the loss of liberty. On the other hand, the respondents argue that the proper context in which to deal with involuntary transfers is administrative law and not criminal law. The *Stinchcombe* disclosure standard is fair and

¹⁸ However, it is important to note that, even if certain information is obtained further to a request under regulation 101(2), it could be used in trial proceedings.

¹⁹ *R. v. Stinchcombe*, [1991] 3 S.C.R. 326.

justified when innocence is at stake but not in situations like this one.

We share the respondents' view. The requirement of procedural fairness must be assessed contextually in every circumstance [...].

It is important to bear in mind that the *Stinchcombe* principles were enunciated in the particular context of criminal proceedings where the innocence of the accused was at stake. Given the severity of the potential consequences the appropriate level of disclosure was quite high. In these cases, the impugned decisions are purely administrative. These cases do not involve a criminal trial and innocence is not at stake. The *Stinchcombe* principles do not apply in the administrative context.²⁰

In fact, this distinction is also evident in the one source concerning changing conditions of detention the Defence cites in support of the obligation to disclose²¹—another SCC case, *Cardinal v. Director of Kent Institution*.²²

15. The other sources relied upon by the Defence to support its assertion that disclosure and un-redacted information are necessary, such as the U.N. Human Rights Committee's General Comment No. 32, apply explicitly and exclusively to decisions concerning guilt and innocence in criminal proceedings.²³ Thus, they are inapposite.

²⁰ *May v. Ferndale Institution*, [2005] 3 S.C.R. 809, paras. 89-91.

²¹ ICC-01/04-02/06-360-Conf-Exp, para. 21.

²² *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, pp. 659-660 (observing that a decision concerning a change in a detainee's conditions was governed by procedural fairness (rather than a disclosure obligation) and noting that what was required was that the decision maker "inform [the detained individuals] of the reasons for his intended decision and give them an opportunity, however informal, to make representations to him concerning these reasons").

²³ ICC-01/04-02/06-360-Conf-Exp, para. 21 citing U.N. Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/3 (23 August 2007), para. 33 (discussing article 14(3)(b) of the International Covenant on Civil and Political Rights which applies to "the determination of any criminal charge against [an individual]").

16. Although administrative proceedings may require disclosure of information to ensure their fairness, the applicable standards and requirements are necessarily different from those pertaining to criminal proceedings.²⁴
17. This is consistent with prior decisions on the application of regulation 101(3). In determining what this provision required, in the context of imposing conditions on the communication between Germain Katanga and Mathieu Ngudjolo Chui, the Single Judge of Pre-Trial Chamber I observed that the detained person had a right to be “informed of any request of the Prosecution.”²⁵ After having imposed interim measures *ex parte*, the Single Judge concluded that the ability of Mathieu Ngudjolo to make “fully informed observations” would be facilitated by: (i) having Defence Counsel to represent him; and (ii) having access to the Prosecution’s application and Registry’s observations on the restrictions that had already been applied pursuant to the *ex parte* order.²⁶ The Single Judge did not require the provision of further supporting material.
18. The Prosecution has more than met this standard of procedural fairness in this case. The Defence has been “fully informed” of the allegations, namely the violation of non-disclosure obligations and inappropriate contact with Prosecution witnesses. The Prosecution’s Request provides specific detail concerning incidents pertaining to [REDACTED] witness, and clearly alleges interference with and disclosure of confidential information concerning [REDACTED] witness as well as interference [REDACTED]. This information is sufficient to put the Accused on notice of the reasons for the Request.
19. The Defence’s Response further mischaracterises the nature of the standard of the information, if any, to be provided, pursuant to regulation 101(3). The Defence

²⁴ See *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, p. 659 and *May v. Ferndale Institution*, [2005] 3 S.C.R. 809, para. 92.

²⁵ ICC-01/04-01/07-187, p.4.

²⁶ ICC-01/04-01/07-187, p.4.

raises concerns about placing reliance on information regarding [REDACTED], asserting that [REDACTED] credibility has not been tested at trial.²⁷ However, there is no requirement under regulation 101(3), that information sufficient to put the Accused on notice of the reasons for the Request, must previously be tested, whether in the context of an administrative proceeding or a trial. At trial, a Chamber must assess evidence in its totality²⁸ and not artificially in isolation.²⁹ This standard cannot be higher in the context of an administrative proceeding where guilt or innocence is not an issue, and where what is required (at this stage) is merely information placing the accused on notice of the request. Here, the information provided points to an overall *pattern* of conduct falling within the enumerated grounds of regulation 101(2).

20. Finally, it is important to consider the obligations of the Prosecution and Chamber concerning the protection of victims and witnesses under article 68 when considering what information must be provided under regulation 101(3). The nature of the provision is such that victim and witness security will often be live issues in regulation 101(2) requests. The redactions applied to the Prosecution's Request are necessary to ensure the safety and security of witnesses and their family members. Moreover, specific measures were proposed under regulation 101(2) to ensure the appropriate investigation of witness interference – in light of the Court's obligations under both article 68, as well as article 64 (to protect the integrity of the criminal proceedings against the Accused).

21. The standard of "informed" under regulation 101(3) must be read consistently with the Court's obligation to protect victims and witnesses. Failing to do so would undermine the provision, ironically preventing measures under regulation 101(2) from being pursued when necessary to protect victims and

²⁷ ICC-01/04-02/06-360-Conf-Exp, para. 9.

²⁸ See, e.g., *R v. Morin* [1988] 2 S.C.R. 345, p.349.

²⁹ See *Prosecutor v. Ntagerura et al.*, ICTR-99- 46, Decision, 7 July 2006, para.174; *Prosecutor v. Halilovic*, IT-01-48-A, Decision, 16 October 2007, para.125.

witnesses because of the security concerns that identifying such individuals in the request itself would cause.

22. In light of the above, the Prosecution objects to the Defence's request to receive the evidence upon which the Prosecution relies and an un-redacted version of the Prosecution's Request, and to receive additional time to respond thereto.³⁰

B. Standard of "reasonable grounds to believe" under regulation 101(2)

23. The Defence's characterisation of the "reasonable grounds to believe" standard underlying regulation 101(2) is incorrect. First, contrary to the Defence's submission, the language of the provision should be understood consistently with other references to the same standard throughout the Statute. Second, the Defence mischaracterises the jurisprudence upon which it relies.
24. The standard of "reasonable grounds to believe" necessary to support a request for measures under regulation 101(2) should be interpreted and applied consistently with the standard articulated in article 58 of the Statute. Further, it should be applied in accordance with the established jurisprudence of the Pre-Trial Chambers³¹ and the Appeals Chamber,³² which equates the standard to "*reasonable suspicion*." Although the nature of the administrative procedure under regulation 101(2) is different to that of criminal procedures under article 58 – the plain meaning of the identical language found in these two provisions must be interpreted consistently.
25. The Defence asserts that the standard should be applied differently in light of the *inter partes* nature of regulation 101(3) proceedings and the *ex parte* nature of applications for an arrest warrant under article 58. However, the jurisprudence

³⁰ ICC-01/04-02/06-360-Conf-Exp, paras. 19-20 and p. 19.

³¹ See, e.g., ICC-01/05-01/08-14-tENG, para. 24; ICC-01/04-02/06-36-Red, para. 16; ICC-02/11-01/11-9-Red, para. 27.

³² ICC-02/05-01/09-73, para. 31.

upon which the Defence relies contradicts its position. Paragraph 24 of the Defence Response relies on an excerpt from the Appeals Chamber's judgment on Mathieu Ngudjolo Chui's application for interim release.³³ In a portion of the same paragraph, not included by the Defence, the Appeals Chamber notes that:

A pre-requisite for the issuance of a warrant of arrest is that the Chamber must be satisfied that there are reasonable grounds to believe that the person committed the crimes in question. The same applies in proceedings for interim release under article 60(2) of the Statute.³⁴

Notably, the Appeals Chamber explicitly states that the application of the "reasonable grounds" standard in decisions on interim release (an *inter partes* proceeding) should be identical to that applied in decisions on applications for arrest warrants (an *ex parte* proceeding).³⁵ Ultimately, while the process involved in *inter partes* and *ex parte* proceedings may be different, the test applied to determine if the standard is met is not. It must be presumed that the meaning of the same words—"reasonable grounds to believe"—is consistent throughout the Court's legal framework. Moreover, regulation 101(3) envisages an *ex parte* process in exceptional circumstances, in any event.

26. Contrary to the Defence's assertions,³⁶ an assessment of reasonable grounds does not require: (i) *per se* the consideration of Defence observations; or (ii) the assessment of the reliability and credibility of the evidence. The observations of the Defence, if any, may be taken into account if provided.

27. Moreover, determining whether reasonable grounds are present³⁷ requires only that "the facts placed before the Chamber must be cogent to the extent of

³³ ICC-01/04-02/06-360-Conf-Exp, para. 24.

³⁴ ICC-01/04-01/07-572, para. 18.

³⁵ This is further supported, by the Chamber's application of article 58 throughout its decision: ICC-01/04-01/07-572, paras. 20-21. This is also supported by the reference to article 58 in the text of article 60 itself.

³⁶ ICC-01/04-02/06-360-Conf-Exp, paras. 26-27.

³⁷ *Contra*, ICC-01/04-02/06-360-Conf-Exp, para. 27.

creating a reasonable belief.”³⁸ Likewise, Chambers have observed that determining whether there are reasonable grounds for a particular conclusion does not require that it be the *only possible* conclusion on the evidence. Reasonable grounds can exist, even where there may be *another reasonable* conclusion to the contrary (for instance, one contingent on varying assessments of the credibility of the evidence).³⁹

28. In any event, the articulation of the standard for “reasonable grounds to believe” set out in the excerpts provided at paragraph 24 of the Defence Response are consistent with the Court’s interpretation of reasonable grounds as “reasonable suspicion”: namely, something more than “suspicion *simpliciter*”⁴⁰ or “mere hunch, innuendo or unsubstantiated hearsay”⁴¹ but less than “incontrovertible evidence of wrongdoing.”⁴²

29. The Prosecution’s Request has met the standard of “reasonable suspicion” (and the alternative articulations of the test as proposed by the Defence), establishing that there are reasonable grounds to believe that conduct enumerated in regulation 101(2) has taken place. In supporting the allegations put before the Chamber, the Prosecution has relied primarily upon witness statements setting out both direct and indirect knowledge of conduct amounting to witness interference and the improper disclosure of confidential information. Evidence

³⁸ ICC-01/04-01/07-572, para. 18. Also note the decision on the issuance of an arrest warrant in the present case, in which the Pre-Trial Chamber endorsed the European Court of Human Rights’ articulation of the standard as “requir[ing] the existence of some facts or information which would satisfy an objective observer that the person concerned may have committed the offence.” ICC-01/04-02/06-36-Red, para. 16.

³⁹ ICC-01/04-01/12-1-Red, para. 19.

⁴⁰ ICC-01/04-01/07-572, para. 18.

⁴¹ *Prosecutor v. Krajisnik*, IT-00-39-T, Decision on Cross Examination of Milorad Davidoviv, 15 December 2005, para.9.

⁴² *Prosecutor v. Krajisnik*, IT-00-39-T, Decision on Cross Examination of Milorad Davidoviv, 15 December 2005, para.9.

of this nature has consistently been accepted by Pre-Trial Chambers to fulfill the “reasonable grounds” standard.⁴³

C. Nature of a detained person’s right of contact

30. As the Defence acknowledges,⁴⁴ a detained individual’s rights to family and private life are subject to necessary and proportionate limitations proscribed by law.⁴⁵ The limitations on contact proposed in the Prosecution’s Request are consistent with this principle.

31. The European Court of Human Rights (“European Court”) has repeatedly upheld restrictions on prisoners’ rights when justified. In *Hirst v. United Kingdom*, for instance, the Grand Chamber of the Court determined that such “justification[s] may well be found in the considerations of security, in particular the prevention of crime and disorder which inevitably flow from the circumstances of imprisonment.”⁴⁶ The European Court further ruled in *Dickson v. United Kingdom* that justification for the restrictions of a prisoner’s rights can flow, *inter alia*, from the necessary and inevitable consequences of imprisonment or from an adequate link between the restriction and the circumstances of the prisoner in question.⁴⁷

32. Whilst a detained person may contact family members in exercising their right to private and family life, even the jurisprudence and legal instruments upon which the Defence relies confirm its limits.⁴⁸ For instance, the European Court in *Lavents*

⁴³ On the specific issue of witness interference see ICC-01/09-01/13-1-Red, paras. 7-13. Witness statements are routinely relied upon to meet the “reasonable grounds” standard when issuing arrest warrants under article 58, notably *without* entering into a discussion, or analysis of, witness credibility. See e.g., ICC-01/04-02/06-36-Conf-Exp, para. 76; ICC-01/04-01/12-1-Red, para. 66; ICC-01/04-02/06-20-Conf-Exp, paras. 103-104 (see in particular footnotes contained therein); ICC-01/05-01/08-14-tENG, para. 34.

⁴⁴ ICC-01/04-02/06-360-Conf-Exp, paras. 42, 52.

⁴⁵ The relevant jurisprudence is noted in the Prosecution’s Request: ICC-01/04-02/06-349-Conf-Exp, para. 52 (and footnotes contained therein).

⁴⁶ *Hirst v. United Kingdom*, Appl. no. 74025/01, “Grand Chamber Judgment”, 6 October 2005, para.69.

⁴⁷ *Dickson v. United Kingdom*, Appl. no. 44362/04, “Judgment”, 4 December 2007, para. 68.

⁴⁸ ICC-01/04-02/06-360-Conf-Exp, para. 46.

*v. Latvia*⁴⁹—while finding that the particular measures in that case (i.e. multiple-year restrictions on all contact) were not justified⁵⁰—recognised that limitations to the right to private and family life on the basis of witness protection may be appropriate if necessary for a pressing social need and proportionate to the aim pursued.⁵¹ Likewise, the *Standard Minimum Rules for the Treatment of Prisoners* case⁵² recognises that the right to family contact may be subject to restrictions necessary for the administration of justice.⁵³ The *Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment* to which the Defence refers⁵⁴ also stipulates that the right to contact is subject to reasonable restrictions specified by law and lawful regulation.⁵⁵

33. Here, restrictions on [REDACTED] contact are prescribed by law, namely regulation 101(2) and any resulting decision of the Chamber.⁵⁶ Moreover, they are reasonable, necessary and proportionate. As set out in the allegations in the Prosecution's Request, the evidence indicates that the Accused's [REDACTED], [REDACTED], have been directly involved in the interference with witnesses.⁵⁷ Immediate restrictions on contact with these individuals, at least until further investigation is undertaken, are necessary to protect the affected individuals and to prevent similar conduct.

⁴⁹ Which the Defence refers to at ICC-01/04-02/06-360-Conf-Exp, para. 46.

⁵⁰ *Lavents c. Lettonie*, Appl. No. 25498/00, "Judgment", 28 November 2002, para. 142.

⁵¹ *Lavents c. Lettonie*, Appl. No. 25498/00, "Judgment", 28 November 2002, para. 141 (« *Par conséquent, si les restrictions apportées aux visites familiales d'un détenu provisoire peuvent se justifier par une multitude de facteurs – le risque de collusion ou de soustraction, la protection des témoins, la nécessité d'assurer un bon déroulement de l'instruction – encore faut-il que ces restrictions se fondent sur un besoin social impérieux et qu'elles demeurent proportionnées aux buts légitimes recherchés.* » (emphasis added)).

⁵² Which the Defence refers to at ICC-01/04-02/06-360-Conf-Exp, para. 46.

⁵³ *Standard Minimum Rules for the Treatment of Prisoners*, U.N. Doc. E/6988 (1977), art. 92.

⁵⁴ ICC-01/04-02/06-360-Conf-Exp, para. 46.

⁵⁵ *Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment*, U.N. Doc. A/RES/43/173 (1988), principle 19.

⁵⁶ [REDACTED]. The Defence fails to indicate how the present case is analogous.

⁵⁷ In the confidential redacted version, see, e.g., ICC-01/04-02/06-349-Conf-Red, paras.19-23.

34. In any event, as indicated in the Prosecution's Request, if communication between the Accused and [REDACTED] is subsequently allowed, the contact should be limited, actively monitored, and restricted to a language that Detention Centre staff can understand. Such a framework would ensure that Detention Centre staff are aware in real time of the content of the conversation. This would appropriately balance the Accused's [REDACTED] with the need to secure witnesses' safety and prevent the disclosure of confidential information.
35. The same analysis concerning the Accused's ability to contact [REDACTED] in the context of [REDACTED] addressed above, applies to his contact with other associates outside of the Detention Centre. An individual's right to private life is likewise subject to reasonable limitations,⁵⁸ and similar restrictions are required in this case to ensure witness safety and protect against the disclosure of confidential information. Moreover, while the heightened protection of contact with family may justify the eventual lifting of prohibitions on such contact (and substituting the aforementioned restrictions), no such justification applies to non-family associates.
36. The restriction on contact with consular or diplomatic staff is justified and proportionate in the circumstances. The Prosecution acknowledges that the relevant details are redacted from the Confidential Redacted version of the Request. However, this does not prevent the Chamber from considering whether such restrictions are necessary under regulation 101(2).
37. Moreover, as noted in the Prosecution's Request, regulation 101(2) explicitly authorises the prohibition, regulation and setting of conditions on contact between the detained individual and "any other person, with the exception of counsel" (emphasis added). Thus, the Chamber is authorised to set conditions on contact with consular or diplomatic officials, notwithstanding the presumptive

⁵⁸ The relevant jurisprudence is noted in the Prosecution's Request: ICC-01/04-02/06-349-Conf-Exp., para. 52 (and footnotes contained therein). [REDACTED].

conditions on contact set out in regulation 98 of the RoC. Significantly, the source of the regulation 98 standard - article 36 of the Vienna Convention on Consular Relations - only requires that individuals have a right of notification to their consular officials, access to their consular officials, and communication with their consular officials. It does not require that such communication takes place out of the hearing of Detention Centre guards. Article 36(2) of the Convention explicitly endorses regulatory restrictions on these provided rights as long as the restrictions, nonetheless, “enable [the] full effect to be given to the purposes for which the rights accorded ... are intended.”⁵⁹

38. In light of the allegations set out in the Prosecution’s Request, such restrictions are necessary and proportionate; maintaining the Accused’s right to access to consular staff, while at the same time ensuring Detention Centre staff are aware in real time of the content of the relevant conversations.
39. It is important to be able to properly investigate certain allegations made regarding interference with witnesses by those within the Accused’s network and to confirm the identity of resource persons.
40. The provision of the requested contact lists, and reports concerning monitored phone calls, to the Prosecution and Chamber is also justified as a reasonable and proportionate restriction on the Accused’s right to private life. As the Defence acknowledges,⁶⁰ the Accused was put on notice that his visits would be supervised. Accordingly, he was aware that the relevant information would be collected upon his arrival at the Detention Centre.⁶¹ Moreover, the provision of the lists will assist in the investigations regarding allegations of witness interference made by witnesses.

⁵⁹ Vienna Convention on Consular Relations art.36, 24 April 1963, 596 UNTS 261.

⁶⁰ See e.g., ICC-01/04-02/06-360-Conf-Exp, para. 65, n. 41.

⁶¹ Regulation 186 of the Regulations of the Registry.

41. In conclusion, contrary to the Defence Response, the requested restrictions are provided by law, necessary and proportionate pursuant to regulation 101(2).

V. Conclusion

42. Based on the foregoing, the Prosecution asks that the Chamber grant the Prosecution's Request.



Fatou Bensouda
Prosecutor

Dated this 15th day of January 2016

At The Hague, The Netherlands