



Original: English

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

Date: 10 October 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
with confidential, *ex parte* Annex A – only available to the Chamber, Registry and Defence

**Public redacted version of “Observations on behalf of Mr Ntaganda on restrictions on his contacts in detention”,
9 May 2016, ICC-01/04-02/06-1312-Conf-Exp**

Source: Defence Team of Mr Bosco Ntaganda

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Further to: (i) the *“Decision on Prosecution requests to impose restrictions on Mr Ntaganda’s contacts”* issued by Trial Chamber VI (“Chamber”) on 18 August 2015 (“Decision on Restrictions”);¹ (ii) the Chamber’s direction inviting the parties to file by 9 May 2016 any submissions they have on the inclusion of [REDACTED] amongst Mr Ntaganda’s authorised contacts for the purposes of active monitoring, and the continuation, lifting or adjustment of the other restrictions on Mr Ntaganda’s contacts which are currently in force, conveyed by way of email on 1 April 2016;² and (iii) the *“Fourth Report on the post-factum review of the phone conversations made by Mr Ntaganda”* submitted by the Registry on 29 April 2016 (“Fourth Registry Report”),³ Counsel representing Mr Ntaganda (“Defence”) hereby submit these:

Observations on behalf of Mr Ntaganda on restrictions on his contacts in detention

“Defence Observations”

INTRODUCTION

1. The Defence hereby provides, pursuant to the Chamber’s invitation, its observations on the inclusion of [REDACTED] amongst Mr Ntaganda’s authorised contacts for the purpose of active monitoring and, more generally, on the continued need for restrictions on Mr Ntaganda’s contacts.
2. The Decision on Restrictions – in which the Chamber adjudicated, on a ‘reasonable grounds to believe’ standard, allegations of witness interference on the part of Mr Ntaganda brought forward by the Office of the Prosecutor (“Prosecution”) – resulted in two sets of restrictions being imposed on Mr Ntaganda’s contacts with the outside world:
 - a. Prohibition on visits, apart from: (i) those under Regulations 97(2) and 98 of the Regulations of the Court (“RoC”) and Regulation 178 of the

¹ ICC-01/04-02/06-785-Conf-Exp.

² Email from a Legal Officer of the Chamber to the parties, 1 April 2016, 20h56.

³ ICC-01/04-02/06-1303-Conf-Exp.

Regulations of the Registry (“RoR”);⁴ and (ii) actively-monitored family visits;⁵ and

- b. Prohibition on non-privileged calls with the exception of two individuals with whom active monitoring would be applied to prohibit use of coded language or discussion of case-related matters.⁶
3. The Defence respectfully posits that in assessing the continued need for the current restriction regime to remain in place, there is only one issue at stake: whether there exists, today, *reasonable grounds to believe* that lifting the restrictions imposed by the Chamber in its Decision on Restrictions could lead Mr Ntaganda to the exercise of his non-privileged phone calls and/or visits to achieve any of the purposes listed under Regulation 101(2) RoC.
4. The issue under consideration is different from the Chamber’s determination whether to grant a request for in-court protective measures for a witness pursuant to Article 68. While the two are related, the latter focuses on the existence of an objectively identifiable *risk* to the safety of the witness for whom in-court protective measures are requested, while the former concerns the right of the Accused to maintain family contacts and contacts with the outside and whether restrictions to this right are necessary on the basis of ‘reasonable grounds to believe’ that the Accused could achieve any of the purposes listed under Regulation 101(2) RoC.
5. As will be explained below, the restrictions currently enforced on Mr Ntaganda’s contacts are no longer justified 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) RoC.

⁴ “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 (the corrected version was filed on 16 February 2015), pp.26-28, as continued *per* Decision on Restrictions, para.69.

⁵ Decision on Restrictions, para.69, p.36.

⁶ Decision on Restrictions, paras.60-65, p.36.

6. Nonetheless, if deemed necessary by the Chamber, the Defence would not be opposed to maintaining, for an interim period, a less stringent restriction regime, which would be sufficient and proportional to the actual risk of witness interference and/or dissemination of confidential information on the part of Mr Ntaganda. The proposed regime is set out below.

SUBMISSIONS

I. Preliminary remarks

7. In its Decision on Restrictions, the Chamber acknowledged that “[REDACTED]”.⁷
8. As the Chamber is aware, the Defence team now comprises a legal consultant who possesses a certain level of proficiency in the Swahili and Kinyarwanda languages.
9. This new addition has enabled the Defence to begin conducting a review of the Registry’s transcripts, translations and summaries of Mr Ntaganda’s phone conversations against their audio-recordings with a view to identifying any incorrectness – a time-consuming exercise, which the Defence could not perform at the time of the submission of its final observations on the Prosecution’s requests for restrictions on Mr Ntaganda’s communications.
10. The preliminary review appears to reveal significant discrepancies that might warrant reconsideration of the Chamber’s findings. However, priority for language-accuracy check has been given to the verification of the transcripts and translations of the Prosecution’s audio-visual material for use at trial. The discrepancies noted in the Registry’s transcripts, translations and/or summaries of Mr Ntaganda’s phone conversations will be brought to the Chamber’s attention as soon as practically possible, if deemed necessary, based on a thorough analysis of the same.

⁷ Decision on Restrictions, para.45.

11. Accordingly, these Defence Observations should not be construed as an acknowledgement of the existence, at the time the Chamber issued its Decision on Restrictions, of ‘reasonable grounds to believe’ that Mr Ntaganda engaged in witness interference or passed on confidential information to unauthorised persons.⁸ For the purposes of the Chamber’s review of the continued need for the current restriction regime to remain in place, the Defence will focus on the circumstances as they have evolved since the Chamber rendered its Decision on Restrictions.

II. There are no actual ‘reasonable grounds to believe’ that Mr Ntaganda could use his non-privileged phone calls and/or visits to interfere with witnesses or leak confidential information

12. The Defence underscores that the circumstances which led the Chamber to impose the above restrictions on Mr Ntaganda’s contacts have significantly changed since the issuance of the Decision on Restrictions:

- a. The [REDACTED] ‘key’ Prosecution insider witnesses, who were the subject of the Prosecution’s allegations of witness interference on the part of Mr Ntaganda, have now completed their testimony; and
- b. As reflected in the Fourth Registry Report, Mr Ntaganda has not attempted in any way to circumvent the currently enforced restrictions on his contacts to convey confidential information to his interlocutors or to provide instructions to interfere with witnesses.

13. The resulting situation reveals no actual reasonable grounds to believe that Mr Ntaganda could use his non-privileged phone calls and/or visits to achieve any of the purposes listed under Regulation 101(2) RoC.⁹

⁸ Cf. Defence opening statement, 3 September 2015, T-24-FRA, p.34, ll.2-9. *See also* Mr Ntaganda’s unsworn statement: 3 September 2015, T-24-FRA, p.79, ll.16-20.

⁹ The Defence also notes that Mr Thomas Lubanga Dyilo and Mr Germain Katanga, who had restrictions on their contacts imposed as a result of allegations of involvement in instances of witness interference in this case (*cf.* “Decision on restrictions in relation to certain detainees”, 18 August 2015, ICC-01/04-02/06-786-Conf-Exp-Red), have both left the Court’s detention centre.

A. The testimony of the Prosecution's 'key' insider witnesses

14. The Prosecution's [REDACTED] 'key', or 'core', [REDACTED] insiders – namely, Witnesses [REDACTED]¹⁰ – have now completed their testimony before the Court. The Defence underscores that the witness interference scheme alleged by the Prosecution in its Initial Request,¹¹ as supplemented by its Request for Further Restrictions,¹² and which formed the main basis for the Chamber's Decision on Restrictions, only concerned these [REDACTED] specific Prosecution witnesses. 'Reasonable grounds to believe' that these witnesses can be the object of witness interference on the part of Mr Ntaganda no longer exist now that they have completed their testimony.¹³
15. In this regard, the Defence notes that in a related decision on a request of Mr Thomas Lubanga seeking the lifting of part of the restrictions on his contacts,

¹⁰ Although the Prosecution regards more than [REDACTED] of its witnesses as 'insider' witnesses (see Decision on Restrictions, fn.55), it clearly singled out Witnesses [REDACTED] as its 'key' or 'core' [REDACTED] witnesses: "Prosecution final observations on the need for further restrictions to NTAGANDA's contacts", 21 July 2015, ICC-01/04-02/06-738-Conf-Exp, paras.24, 26, fn.27.

¹¹ "Prosecution's urgent request for measures under regulation 101(2) of the Regulations of the Court", 8 August 2014, ICC-01/04-02/06-349-Conf-Red (a lesser confidential redacted version of the request was notified to the Defence on 18 December 2014: ICC-01/04-02/06-349-Conf-Red2), paras.15-26 (Witness [REDACTED]), 27-36 (Witness [REDACTED]). The Defence recalls that the Prosecution had indicated in footnote 16 of its "Prosecution's urgent request for immediate suspension of Defence investigators and other measures", 19 June 2015, ICC-01/04-02/06-658-Conf-Exp (a confidential redacted version of which was notified to the Defence on 26 June 2015: ICC-01/04-02/06-658-Conf-Red) that its allegations of interference concerned both Witness [REDACTED] and Witness [REDACTED].

¹² "Prosecution request for further restrictions to the Accused's communications", 9 June 2015, ICC-01/04-02/06-635-Conf-Exp (a confidential redacted version of the request was notified on 10 June 2015: ICC-01/04-02/06-635-Conf-Red), para.32. See also "Prosecution request to change the order of appearance of the first witnesses", 5 June 2015, ICC-01/04-02/06-630-Conf-Exp (a second confidential redaction version of the request was notified to the Defence on 19 January 2016: ICC-01/04-02/06-Conf-Exp-Red4), paras.2, 4.

¹³ During its examination-in-chief of Witness [REDACTED], the Prosecution stated that it considered as its duty to give the witness an opportunity to explain to the Chamber all facts that are relevant to the assessment of his credibility, in that case, the reasons why the witness interrupted his first witness preparation session: [REDACTED]. It is significant that the Prosecution did not adopt the same line of questioning with Witnesses [REDACTED] and [REDACTED] regarding the interference they allegedly experienced from Mr Ntaganda or from associates acting pursuant to his instructions.

the Chamber set [REDACTED] as the point in time from which the restrictions on Mr Lubanga's contacts would be no longer justified.¹⁴

16. Furthermore, no 'reasonable grounds to believe' exist that Mr Ntaganda could interfere with and/or disseminate confidential information about any other witness should his non-privileged communications be reinstated.
17. Indeed, although the Prosecution has systematically attempted to link the security concerns raised by its witnesses with the Chamber's findings in its Decision on Restrictions, no evidence has been adduced that those who allegedly interfered and/or were likely to interfere with its witnesses are linked to Mr Ntaganda or acted/would act pursuant to his instructions.
18. In particular, the Defence notes that there is no evidence that the so-called 'supporters' of the Accused¹⁵ – a vague and undefined category of individuals who are allegedly present in various areas of Ituri and willing to retaliate against those testifying in these proceedings – have ever received any directive from Mr Ntaganda to intimidate Prosecution witnesses. The Defence

¹⁴ Cf. "Decision on Lubanga Defence request for lifting of certain restrictions on contacts", 21 January 2016, ICC-01/04-02/06-1061-Conf-Exp-Corr (a confidential redacted version of the decision was notified to the Defence on 27 January 2016: ICC-01/04-02/06-1061-Conf-Corr-Red3) ("Decision on Lubanga Request for Partial Lifting of Restrictions"), para.24. The Defence notes that the Prosecution has relied upon paragraph 24 of the Decision on Lubanga Request for Partial Lifting of Restrictions in support of *inter alia* requests for in-court protective measures for the testimony of two of its [REDACTED] witnesses: "Prosecution's tenth request for in-court protective measures", 23 December 2015, ICC-01/04-02/06-1071-Conf-Exp (a confidential redacted version was notified to the Defence on 24 December 2015: ICC-01/04-02/06-1071-Conf-Red; the Chamber clarified that the Decision on Lubanga Request for Partial Lifting of Restrictions, unavailable at that time to the Defence, was referred to in the request) (Witness [REDACTED]) and "Prosecution's Twelfth request for in-court protective measures", 22 March 2016, ICC-01/04-02/06-1224-Conf-Exp (a second confidential redaction version of the request was notified to the Defence on 14 April 2016: ICC-01/04-02/06-1224-Conf-Red2) ("Request for In-Court Protective Measures for Witnesses P-0907 and P-0887) (Witness [REDACTED]). The Defence underscores that the Prosecution's reliance on the Decision on Lubanga Request for Partial Lifting of Restrictions was of limited nature and was only aimed at stressing that, in the Prosecution's view, these two insider witnesses were more vulnerable to attempts at interference.

¹⁵ For instance, in support of its "Additional submissions for protective and special measures concerning Prosecution Witness P-800", 6 January 2016, ICC-01/04-02/06-1074-Conf-Exp (a confidential redacted version of the additional submissions was notified on 11 January 2016: ICC-01/04-02/06-1074-Conf-Red), para.17, the Prosecution extensively relied on the alleged presence of [REDACTED].

further notes that there is no evidence that those who were allegedly involved in recent instances of witness interference¹⁶ have ever been in contact with Mr Ntaganda since he is in detention or are even known to him;¹⁷ rather, it stems from the Prosecution's allegations that these individuals appear to have acted on their own behalf.

19. In light of the above, the Defence respectfully submits that there are no longer 'reasonable grounds to believe' that Mr Ntaganda would engage in witness interference and/or reveal confidential information to unauthorised persons.

B. Results of active monitoring of Mr Ntaganda's authorised non-privileged communications

20. The absence of any 'reasonable grounds to believe' that Mr Ntaganda could use his non-privileged contacts for any of the reasons listed under Regulation 101(2) RoC is further demonstrated by Mr Ntaganda's irreproachable conduct since the imposition of restrictions on his contacts in August 2015.
21. The Defence recalls that in relation to the first reported period of active monitoring – from March 2015, when the Chamber first ordered interim measures, until the issuance of the Decision on Restrictions in August 2015 – the Chamber found that "it cannot be concluded that Mr Ntaganda's behaviour during [this period] amounts to witness interference, or otherwise affects the integrity of the proceedings."¹⁸ The Chamber also noted that Mr Ntaganda appeared to have made an effort to ensure that his interlocutors did not use coded language.¹⁹

¹⁶ [REDACTED] (Request for In-Court Protective Measures for Witnesses P-0907 and P-0887, paras.12-13); [REDACTED] ("Prosecution's additional request for in-court protective measures for [REDACTED]", 15 March 2016, ICC-01/04-02/06-1212-Conf-Exp, a confidential redacted version of which was notified on 16 March 2016: ICC-01/04-02/06-1212-Conf-Red ("Request for Additional In-Court Protective Measures for Witness [REDACTED]"), paras.32-36); [REDACTED] (Request for Additional In-Court Protective Measures for Witness [REDACTED], paras.37-38); [REDACTED] (Request for Additional In-Court Protective Measures for Witness [REDACTED], para.40).

¹⁷ The individual called [REDACTED] is not known to Mr Ntaganda.

¹⁸ Decision on Restrictions, para.58.

¹⁹ Decision on Restrictions, para.58.

22. Turning to the period of active monitoring since the issuance of the Decision on Restrictions, the Defence underscores that the Fourth Registry Report 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.²⁰ The Fourth Registry Report also gives no indication that Mr Ntaganda ever spoke to any unregistered caller, with the exception of his children, in respect of whom passing the telephone over has been allowed by the Chamber.²¹
23. The Registry has terminated [REDACTED] conversations since [REDACTED], which the Registry regrettably misrepresents or misunderstood as incidents of “[u]se of coded language or unusual use of vocabulary indicating an attempt to conceal the nature of the conversation”.²² The so-called ‘codes’ were merely generic references to ‘documents’ or ‘instructions’ which, as later explained to the Registry, merely concerned personal matters and were never intended to serve as codes. The Defence stresses that the mere fact that a conversation has been interrupted does not necessarily mean that Mr Ntaganda has breached the Chamber’s restrictions on his contacts.
24. It can reasonably be inferred from Mr Ntaganda’s commendable conduct for more than nine months that there exists no ‘reasonable grounds to believe’ that Mr Ntaganda would engage in witness interference and/or communication of confidential information should his non-privileged contacts be reinstated.

III. The restrictions currently imposed on Mr Ntaganda’s contacts are not proportionate to the actual risk of witness interference and/or leakage of confidential information on the part of Mr Ntaganda

25. In light of the current situation, as it has evolved since the Chamber rendered its Decision on Restrictions, the currently enforced restrictions on Mr

²⁰ Fourth Registry Report, paras.11, 12.

²¹ Decision on Restrictions, para.63.

²² Fourth Registry Report, p.5.

Ntaganda's contacts are disproportionate to the actual risk that Mr Ntaganda engage in any form of misconduct proscribed under Regulation 101(2) RoC should his non-privileged contacts be reinstated.

26. The Defence recalls that the Prosecution's [REDACTED] 'key' insider witnesses – who were the subject of the Prosecution's allegations of interference on the part of Mr Ntaganda – have completed their testimony and that there is no evidence that Mr Ntaganda has ever been involved in any other instances of witness interference. In such circumstances, the risk of any upcoming witness being subject to direct or indirect interference on the part of Mr Ntaganda is considerably low.
27. In contrast, the restrictions imposed on Mr Ntaganda's contacts – with the possibility for Mr Ntaganda to communicate under the regime of active monitoring with two individuals only, twice a week, for very limited periods of time, and with family visits subject to active monitoring – amount to Mr Ntaganda being virtually cut off from the outside and his fundamental right to privacy and family life being substantially reduced. No person could help but be deeply affected by these extraordinary limitations on human contact, which constitute a curtailment of the right to family life. Such a drastic abridgement is not commensurate to the actual risk that Mr Ntaganda engage in any form of witness interference should his non-privileged contacts be reinstated.

IV. The prevailing situation warrants a significantly less stringent restriction regime

28. Although it posits that the present situation warrants the lifting of the restrictions on Mr Ntaganda's contacts in full, the Defence would not be opposed to certain, less severe restrictions being maintained for an interim period of time, if deemed necessary by the Chamber.

29. In this regard, the Defence proposes that Mr Ntaganda's non-privileged phone communications be limited to a certain number of individuals, namely his closest family relatives and friends ("Proposed List"),²³ none of whom are related to the substantive charges brought against Mr Ntaganda or involved in the Prosecution's allegations of witness interference.²⁴ Significantly, the proposed list does not include present or past Defence resource persons.
30. The Defence further proposes that active monitoring should be lifted, to be replaced by a mechanism of weekly random monitoring of Mr Ntaganda's non-privileged phone conversations with the above-mentioned individuals, as provided for in Regulation 175(1) RoR.
31. This would constitute an appropriate balance between Mr Ntaganda's fundamental right to privacy and family life and ensuring that non-privileged communications are not used for any of the purposes listed under Regulation 101(2) RoC. The Defence posits that the possibility for the Registry to promptly detect through random review any misuse of Mr Ntaganda's non-privileged calls – which would likely result in non-privileged contacts being suspended or drastically limited – is a sufficient incentive for Mr Ntaganda and his interlocutors not to engage in any form of misconduct proscribed under Regulation 101(2) RoC.
32. Moreover, to the extent that the currently allowed non-privileged phone conversations are contingent upon the availability of an interpreter, the proposed mechanism would provide for more schedule flexibility. The Defence is ready to explore with the Registry the modalities of the proposed mechanism, in particular the number of hours of non-privileged communications that could be allowed per day.

²³ The Proposed List is appended as confidential, *ex parte* Annex A – only available to the Chamber, Registry and Defence.

²⁴ With the sole exception of Mr Ntaganda [REDACTED], [REDACTED], whose situation will be addressed below.

33. As regards the contents of the conversations, the Defence is not opposed to the interdiction to use coded language and discuss case-related matters being maintained, with the exception of references to trial dates.²⁵ The Defence further undertakes to explain to the individuals of the Proposed List their obligation not to use any coded language or discuss case-related matters with Mr Ntaganda and the fact that their conversation, which is audio-recorded, is subject to random review.
34. As indicated above, the Proposed List includes the name of [REDACTED], [REDACTED]. The Defence is cognizant that the Chamber's findings as to the sharing of confidential information, allowing unregistered persons to speak to Mr Ntaganda and witness interference included *inter alia* [REDACTED].²⁶ However, the Defence respectfully submits that in determining whether the regime of active monitoring should be lifted in respect of communications with [REDACTED], due regard should be given to the fact that [REDACTED] is not any individual; [REDACTED] is [REDACTED] and, as recognized by the Chamber,²⁷ [REDACTED]. [REDACTED].
35. In light of the current situation as it has evolved since the issuance of the Decision on Restrictions, and [REDACTED] being fully aware that any inappropriate use of [REDACTED] phone conversations with Mr Ntaganda will likely result in [REDACTED] contacts with [REDACTED] being suspended or drastically limited, the Defence submits that the proposed random monitoring mechanism provides for sufficient safeguards against any misuse on the part of [REDACTED] of [REDACTED] phone conversations with Mr Ntaganda.
36. For the same reasons, the Defence respectfully submits that the restrictions currently enforced on Mr Ntaganda's private and family visits are no longer

²⁵ Cf. Decision on Restrictions, fn.143.

²⁶ Decision on Restrictions, para.62.

²⁷ Decision on Restrictions, para.62.

justified and proportional to the actual risk of witness interference and/or dissemination of confidential information on the part of Mr Ntaganda.

37. In this regard, the Defence underscores that: (i) since the imposition of restrictions on his contacts, Mr Ntaganda has not received any visit from [REDACTED]; and (ii) since his arrival in the Court's detention centre, Mr Ntaganda has received no visit from [REDACTED]. In light of the present situation, as it has evolved since the issuance of the Decision on Restrictions, maintaining for a longer period the currently imposed ban on private visits and regime of active monitoring of family visits would constitute a disproportionate abridgement of Mr Ntaganda's fundamental right to privacy and family life while in detention. The Defence submits that the regulatory framework – pursuant to which all persons entering the detention centre are subject to security checks – is sufficient to ensure that no confidential information is passed on during private and family visits.
38. Finally, the Defence requests that the members of the Defence team who are not entitled to privileged communications with Mr Ntaganda be allowed to visit him in detention. Such visits have been banned by the custody authorities in application of the restrictions ordered by the Chamber.

CONFIDENTIALITY

39. Pursuant to Regulations 23*bis* (1) and (2) of the Regulations of the Court, these Defence Observations are classified as confidential, *ex parte* – only available to the Chamber, Registry, Prosecution and Defence, as *per* the Chamber's direction of 1 April 2016. Annex A is classified as confidential, *ex parte* – only available to the Chamber, Registry and Defence, as it contains information of personal nature.

RELIEF SOUGHT

40. In light of the above submissions, the Defence respectfully requests the Chamber to **LIFT** the currently imposed restrictions on Mr Ntaganda's contacts or, in the alternative, **ADOPT** the Defence proposed restriction regime as described above in paragraphs 28 to 38.

RESPECTFULLY SUBMITTED ON THIS 10TH DAY OF OCTOBER 2016

A handwritten signature in black ink, appearing to read 'StB' with a small flourish at the end.

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands