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Date: 10 March 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

Request on behalf of Mr Ntaganda for periodic review of restrictions on non-privileged communications

Source: Defence Team of Mr Bosco Ntaganda

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

Me Stéphane Bourgon
Me Christopher Gosnell
Me Marlene Yahya Haage

Legal Representatives of Victims

Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of 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

Detention Section

**Victims Participation and Reparations
Section**

Further to the “*Decision reviewing the restrictions placed on Mr Ntaganda’s contacts*” issued by Trial Chamber VI (“Chamber”) on 7 September 2016 (“*Decision Reviewing Restrictions*”),¹ Counsel representing Mr Ntaganda (“Defence”) hereby submits its:

Request on behalf of Mr Ntaganda for periodic review of restrictions on non-privileged communications

INTRODUCTION

1. Bosco Ntaganda requests that the Trial Chamber invite the parties and, if deemed appropriate, the Registry to make submissions on the continued need for the existing restrictions on Mr Ntaganda’s contacts with the outside world. The purpose of these submissions would be to permit the Trial Chamber to conduct its “periodic review” of the continued necessity and proportionality of those restrictions. The time is now ripe for such submissions given that since the last periodic review, *inter alia*: (i) more than six months has now elapsed; and (ii) the Prosecution has completed the presentation of all its witnesses. These considerations are both relevant to the factors previously weighed by the Trial Chamber, and the change of circumstance in respect of these factors commend and compel a further period review at this time.
2. The Defence suggests that the Trial Chamber adopt the same procedure as previously set out in the Trial Chamber’s email of 1 April 2016, in which the Registry was first invited to submit a report concerning the period under consideration, and then both parties called upon to file submissions and responses simultaneously.

¹ ICC-01/04-02/06-1494-Red4, “Second public redacted version of Decision reviewing the restrictions placed on Mr Ntaganda’s contacts, 7 September 2016, ICC-01/04-02/06-1494-Conf-Exp”, 21 November 2016.

PROCEDURAL BACKGROUND

3. On 18 August 2015, the Trial Chamber issued its first Decision on the Prosecution's request to impose restrictions on Mr Ntaganda.² The Trial Chamber indicated that it would review the ongoing need for such restrictions periodically:

the Chamber will periodically review the continued need for the restrictions imposed by way of the present decision. To be in a position to conduct such periodical reviews, and to realise its duty to protect witnesses and the integrity of the proceedings, the Chamber has to be kept informed of the effectiveness of the restrictions and of any potential contraventions of the restriction regime set up by way of the present decision.³

4. The first periodic review was initiated by the Trial Chamber on 1 April 2016, inviting the parties to make submissions and observations on, *inter alia*, "the continuation, lifting or adjustment of the other restrictions on Mr Ntaganda's contacts which are currently in force."⁴
5. On 7 September 2016, the Trial Chamber, having received the parties' submissions,⁵ decided to maintain the existing restrictions, except to the extent of adding one person with whom Mr Ntaganda was authorised to have

² ICC-01/04-02/06-785-Red, "Public redacted version of Decision on Prosecution request to impose restrictions on Mr Ntaganda's contacts", 18 August 2015 ("Decision on Restrictions 18 August 2015").

³ Decision on Restrictions 18 August 2015, para.70 ("Should there arise a compelling reason to modify this ruling the Chamber shall, if appropriate, review the matter as soon as practicable. Otherwise, the Chamber will periodically review the continued need for the restrictions imposed by way of the present decision.")

⁴ Email communication from Chamber to the Parties and Registry, 1 April 2016 at 20:56. ("recalling also the Chamber's indication that it would periodically review the restrictions imposed (ICC-01/04-02/06-785-Conf-Exp, para. 70)").

⁵ ICC-01/04-02/06-1312-Red, "Public redacted version 'Observations on behalf of Mr Ntaganda on restrictions on his contacts in detention', 9 May 2016, ICC-01/04-02/06-1312-Conf-Exp", 10 October 2016; ICC-01/04-02/06-1313-Red2, "Second public redacted version of 'Prosecution's submissions on restrictions to NTAGANDA's contacts', 9 May 2016, ICC-01/04-02/06-1313-Conf-Exp", 14 December 2016.

contact.⁶ The Trial Chamber noted, in particular, that there was a continuing risk of interference of the remaining Prosecution witnesses.⁷

6. On 13 September 2016, the Trial Chamber addressing Mr Ntaganda explained “the decision will be reviewed again in due course, also it seems by the Appeals Chamber but also anyway by our Chamber, *especially having particular regard to the stage of proceedings*.”⁸
7. On 8 March 2017, the Appeals Chamber issued its “Judgment on Mr Bosco Ntaganda’s appeal against the decision reviewing restrictions on contacts of 7 September 2016”⁹ affirming the Trial Chamber’s decision and noting 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.”¹⁰

SUBMISSIONS

8. The amount of time that has now passed since the Chamber’s last decision on restrictions, combined with the completion of the Prosecution’s presentation of its witnesses, are factors highly relevant to the continued justification, necessity and proportionality of the restrictions on Mr Ntaganda.
9. More than six months has now elapsed since the last periodic review of the restrictions on Mr Ntaganda’s contacts,¹¹ which was initiated 7.5 months after the restrictions were first instituted on an indefinite basis.¹²

⁶ Decision Reviewing Restrictions.

⁷ Decision Reviewing Restrictions, para.31.

⁸ ICC-01/04-02/06-T-128-ENG ET, p.21 ln.6-7 [italics added] (“Hearing of 13 September 2016”).

⁹ ICC-01/04-02/06-1817-Red, “Public redacted Judgement on Mr Bosco Ntaganda’s appeal against the decision reviewing restrictions on contacts of 7 September 2016”, 8 March 2017 (“Judgement on Appeal of Restriction”).

¹⁰ Judgement on Appeal of Restrictions, para.72.

¹¹ 7 September 2016 (Decision Reviewing Restrictions) to 10 March 2017 (Date of this filing).

10. The Appeals Chamber has expressly enjoined the Trial Chamber to “continue to actively review the restrictions in place.”¹³ This Trial Chamber has also acknowledged, citing the European Court of Human Rights, that the passage of time, especially when considered in conjunction with other changed circumstances, requires ongoing “careful review” to ensure the necessity and proportionality of the measures:

the passage of time and severity of the measures imposed require a ‘careful review’ of the necessity of the measures in question and the consideration of ‘alternative means’ of fulfilling the aim of the measures imposed. However, the passage of time alone will not necessarily require the lifting or adjustment of the measures imposed.¹⁴

11. All Prosecution witnesses, insider or otherwise, have now completed their testimony. The risk of interference with these witnesses, and hence the hearing of their testimony in this trial, was a factor upon which the Trial Chamber relied in imposing restrictions on 18 August 2015,¹⁵ and in maintaining restrictions on 7 September 2016.¹⁶ The Presiding Judge specifically mentioned that the completion of the testimony of Prosecution witnesses was an event that would require the Trial Chamber’s particular further attention in respect of restrictions:

And I should also note that the decision will be reviewed again in due course, also it seems by the Appeals Chamber but also anyway by our Chamber, especially having particular regard to *the stage of proceedings*. To put it more understandably to you, *the situation may change, for example, after the end of Prosecution case*, for example, or depending how many witnesses still will be called, how many witnesses have been heard and so on, and what witnesses as well.¹⁷

¹² 18 August 2015 (Decision on Restrictions 18 August 2015) to 1 April 2016 (email communication from Chamber to the Parties and Registry, 1 April 2016 at 20:56.)

¹³ Judgement on Appeal of Restrictions, para.72.

¹⁴ Decision Reviewing Restrictions, para.18.

¹⁵ Decision on Restrictions 18 August 2015, para.66.

¹⁶ Decision Reviewing Restrictions, para.29.

¹⁷ Hearing of 13 September 2016, p.21 ln.6-14 [italics added].

12. The time, accordingly, is now ripe for the Trial Chamber to conduct a further periodic review of the justification, necessity and proportionality of the current measures in place. Those measures are a heavy burden on Mr Ntaganda and the injunction that these measures be “actively reviewed” should require no less than a review when a substantial period of time has elapsed and/or when there has been a significant change in the circumstances that are the basis for the imposition of restrictions. Both conditions are now satisfied.

RELIEF SOUGHT

13. The Defence respectfully requests that Chamber initiate the process of periodic review of the restrictions currently imposed on Mr Ntaganda. The Defence proposes that the same procedure set out in the Trial Chamber’s email of 1 April 2016 be adopted for this periodic review.

RESPECTFULLY SUBMITTED ON THIS 10TH DAY OF MARCH 2017



Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands