

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No.: ICC-01/04-02/06  
Date: 19 February 2018

**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 'Decision on the present restrictions on Mr Ntaganda's contacts'**

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

**The Office of the Prosecutor**

Ms Fatou Bensouda  
Mr James Stewart  
Ms Nicole Samson

**Counsel for Bosco Ntaganda**

Mr Stéphane Bourgon  
Mr Christopher Gosnell

**Legal Representatives of Victims**

Ms Sarah Pellet  
Mr Dmytro Suprun

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for  
Victims**

**The Office of Public Counsel for the  
Defence**

**States' Representatives**

*Amicus Curiae*

**REGISTRY**

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**Registrar**

Mr Herman von Hebel

**Counsel Support Section**

**Victims and Witnesses Unit**

Mr Nigel Verrill

**Detention Section**

Mr Paddy Craig

**Victims Participation and Reparations  
Section**

**Others**

Pre-Trial Chamber I

**Trial Chamber VI** ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Bosco Ntaganda* ('Ntaganda case'), having regard to Articles 21(3), 64, 67, and 68 of the Rome Statute ('Statute') and Regulation 101 of the Regulations of the Court ('Regulations'), issues the following 'Decision on the present restrictions on Mr Ntaganda's contacts'.

## **I. Background**

1. On 18 August 2015, following allegations that Mr Ntaganda had engaged in witness interference and coaching, the Chamber issued a decision ordering, *inter alia*, that certain ongoing restrictions be placed on Mr Ntaganda's contacts to 'ensure the safety of witnesses, prevent breaches of confidentiality and ensure the integrity of proceedings' ('Decision on Restrictions').<sup>1</sup>
2. On 7 September 2016, following the Chamber's indication that it would periodically review the restrictions in question,<sup>2</sup> the Chamber issued the 'Decision reviewing the restrictions placed on Mr Ntaganda's contacts' ('First Review Decision'), finding that certain restrictions imposed remained necessary.<sup>3</sup> This decision was upheld by the Appeals Chamber on 8 March 2017 ('Appeals Chamber Judgment').<sup>4</sup>
3. On 19 May 2017, following a request from the defence team for Mr Ntaganda ('Defence') that a further periodic review of Mr Ntaganda's restrictions be

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<sup>1</sup> Decision on Prosecution requests to impose restrictions on Mr Ntaganda's contacts, ICC-01/04-02/06-785-Conf-Exp. A public redacted version was filed on the same day as ICC-01/04-02/06-785-Red. *See in particular* para. 44.

<sup>2</sup> Decision on Restrictions, ICC-01/04-02/06-785-Red, para. 70.

<sup>3</sup> ICC-01/04-02/06-1494-Conf-Exp. Confidential *ex parte* redacted and public versions were filed on the same day as ICC-01/04-02/06-1494-Conf-Exp-Red2 (only available to the Defence and Registry), ICC-01/04-02/06-1494-Conf-Exp-Red (only available to the Prosecution and Registry), and ICC-01/04-02/06-1494-Red3 (public). A second public redacted version was filed on 22 November 2016 as ICC-01/04-02/06-1494-Red4.

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

conducted,<sup>5</sup> the Chamber issued the ‘Further decision reviewing the restrictions placed on Mr Ntaganda’s contacts’, relaxing certain restrictions placed on Mr Ntaganda’s communications (‘Further Review Decision’).<sup>6</sup>

4. On 19 December 2017, the Defence filed a request seeking the immediate lifting or significant easing of restrictions imposed on Mr Ntaganda’s non-privileged communications (‘Restrictions’), noting that the evidentiary phase of the case was drawing to a close (‘Request’).<sup>7</sup>
5. On 27 December 2017, the Chamber directed: (i) the Registry to file, by 12 January 2018, a report on the period of active monitoring of Mr Ntaganda’s communications since the previous review period; (ii) the Office of the Prosecutor (‘Prosecution’) to file, by 18 January 2018, any response to the Request, and/or any further submissions on the continuation, lifting or adjustment of the Restrictions; and (iii) the Defence to file any further submissions by 24 January 2018.<sup>8</sup>
6. On 11 January 2018, the Registry filed as confidential *ex parte*, available only to the Registry and Defence, the ‘Sixth Report on the Post-factum review of Mr Bosco Ntaganda’s Actively Monitored Communications’ (‘Registry Report’).<sup>9</sup>
7. On 18 January 2018, the Prosecution filed its response to the Request, opposing it (‘Response’).<sup>10</sup>

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

<sup>6</sup> ICC-01/04-02/06-1913-Conf-Exp. Public redacted and confidential redacted versions of the decision were issued on the same day as, respectively, ICC-01/04-02/06-1913-Red2 and ICC-01/04-02/06-1913-Conf-Red.

<sup>7</sup> Request for immediate lifting or significant easing of restrictions imposed on Mr Ntaganda’s non-privileged communications, ICC-01/04-02/06-2165-Conf. *See in particular* para. 16.

<sup>8</sup> Email communication from the Chamber to the parties and Registry on 27 December 2017 at 08:31.

<sup>9</sup> ICC-01/04-02/06-2180-Conf-Exp.

<sup>10</sup> Prosecution’s response to the Defence’s “Request for immediate lifting or significant easing of restrictions imposed on Mr Ntaganda’s non-privileged communications”, 19 December 2017, ICC-01/04-02/06-2165-Conf,

8. On 25 January 2018, having sought a one-day extension of time ('Extension Request'),<sup>11</sup> which was granted,<sup>12</sup> the Defence filed its further submissions ('Further Defence Submissions').<sup>13</sup>

## II. Submissions

### *i. Registry*

9. The Registry Report indicates that, between 3 April 2017 and 11 January 2018, Mr Ntaganda was instructed four times to avoid use of 'vague and coded language' in his telephone conversations, and one conversation was terminated on this basis.<sup>14</sup> The Registry reported that the interlocutor was taken off Mr Ntaganda's list of contacts ('Contacts List'), and later reinstated [REDACTED].<sup>15</sup> [REDACTED].<sup>16</sup> The Registry Report also details the current regime for Mr Ntaganda's non-privileged telephone calls, noting that the scheduling of such calls is dependent, *inter alia*, on 'the availability of the staff required to actively monitor Mr Ntaganda's non-privileged conversations'.<sup>17</sup>

### *ii. Defence*

10. The Defence submits that the Restrictions are 'no longer necessary or proportionate to the objective for which they were imposed',<sup>18</sup> arguing that:
- (i) the stated purpose of the Restrictions is now moot, or at least significantly

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ICC-01/04-02/06-2186-Conf. A corrected version was filed on 24 January 2018 as ICC-01/04-02/06-2186-Conf-Corr.

<sup>11</sup> See email communication from the Defence to the Chamber, Prosecution and participants on 24 January 2018 at 17:57.

<sup>12</sup> See email communication from the Chamber to the parties and participants on 25 January 2018 at 10:09.

<sup>13</sup> Further submissions on lifting or significant easing of restrictions imposed on Mr Ntaganda's non-privileged communications, ICC-01/04-02/06-2194-Conf.

<sup>14</sup> Registry Report, ICC-01/04-02/06-2180-Conf-Exp, para. 11.

<sup>15</sup> Registry Report, ICC-01/04-02/06-2180-Conf-Exp, paras 11-18. The Chamber was informed of this incident by way of email communication from the Registry to the Chamber on 19 October 2017 at 10:15, and directed the Registry on 20 October 2017 at 11:00 to, *inter alia*, 'include this information in the Registry report which the Chamber will order to be filed in the context of the next periodic review of Mr Ntaganda's detention'.

<sup>16</sup> Registry Report, ICC-01/04-02/06-2180-Conf-Exp, paras 19-20.

<sup>17</sup> Registry Report, ICC-01/04-02/06-2180-Conf-Exp, paras 8-9.

<sup>18</sup> Request, ICC-01/04-02/06-2165-Conf, para. 2.

reduced, given present stage of proceedings and the fact that few further witnesses will testify;<sup>19</sup> (ii) the Prosecution has failed to substantiate its allegations of witness interference, including through the examination of Mr Ntaganda and other witnesses in relation to a number of such allegations, and has failed to bring any charges against him pursuant to Article 70 of the Statute;<sup>20</sup> (iii) the serious impact that the Restrictions have had on Mr Ntaganda 'has generated an overwhelming disincentive against any improper conduct in the future', and the passive monitoring of telephone calls is sufficient to address any perceived risk of misconduct or retaliation following the completion of the evidentiary phase of the case;<sup>21</sup> and (iv) the Restrictions have been in place for a length of time that renders them a serious threat to Mr Ntaganda's fundamental rights and wellbeing, including his right to private and family life.<sup>22</sup>

11. Accordingly, the Defence requests that the Chamber order that: (i) the active monitoring of Mr Ntaganda's conversations be immediately lifted in relation to his existing contacts; (ii) Mr Ntaganda be authorised to add persons to his Contacts List, subject to appropriate screening by the Registry (on an immediate basis for family members, and as close in time as possible to the formal closure of testimonial evidence for non-family members); and (iii) visiting restrictions be lifted as close in time as possible to the formal closure of testimonial evidence.<sup>23</sup>

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<sup>19</sup> Request, ICC-01/04-02/06-2165-Conf, paras 2 and 16-21; Further Defence Submissions, ICC-01/04-02/06-2194-Conf, paras 2 and 8-15.

<sup>20</sup> Request, ICC-01/04-02/06-2165-Conf, paras 2 and 22-25; Further Defence Submissions, ICC-01/04-02/06-2194-Conf, paras 3 and 16-27.

<sup>21</sup> Request, ICC-01/04-02/06-2165-Conf, paras 2 and 26.

<sup>22</sup> Request, ICC-01/04-02/06-2165-Conf, paras 2 and 27-33; Further Defence Submissions, ICC-01/04-02/06-2194-Conf, para. 29.

<sup>23</sup> Request, ICC-01/04-02/06-2165-Conf, para. 3. *See also* paras 19-21; Further Defence Submissions, ICC-01/04-02/06-2194-Conf, page 16.

*iii. Prosecution*

12. The Prosecution submits that the Request should be rejected, on the basis that, as long as the evidentiary phase of the case is ongoing, a risk remains that Mr Ntaganda will 'attempt to pervert the course of justice using his ability to communicate from the Detention Centre'.<sup>24</sup> The Prosecution avers that the Restrictions should accordingly not be lifted or altered until the last witness has been heard, at which time the Chamber may revisit their necessity.<sup>25</sup> In support of this, the Prosecution argues that: (i) at this stage, the Restrictions remain necessary to protect witnesses and ensure the integrity of the trial proceedings; (ii) it has substantiated its allegations that Mr Ntaganda engaged in witness interference and coaching, and was under no requirement to do so further at trial; and (iii) at this stage, the Restrictions remain proportional to the risk of witness interference and coaching.<sup>26</sup>

13. The Prosecution argues that the Restrictions should be modified or reduced only after the Chamber closes the evidentiary phase of trial, at which time, in its view, certain restrictions will still be required to prevent any further misconduct, including: (i) limitations to the time the accused may spend on the telephone, both in total and in any one call; (ii) limitations to the number and type of interlocutors on Mr Ntaganda's Contacts List, whom the Registry and Prosecution ought to be able to vet, and which should be limited to 10 to 15 individuals; (iii) an order that Mr Ntaganda refrain from using coded or obscure language or disclosing confidential case information to his contacts; and (iv) the implementation of a regime of random active monitoring of Mr Ntaganda's telephone calls (together, 'Further Restrictions Proposal').<sup>27</sup>

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<sup>24</sup> Response, ICC-01/04-02/06-2186-Conf-Corr, para. 1. *See also* para. 47.

<sup>25</sup> Response, ICC-01/04-02/06-2186-Conf-Corr, paras 2-3. *See also* para. 47.

<sup>26</sup> Response, ICC-01/04-02/06-2186-Conf-Corr, paras 20-35.

<sup>27</sup> Response, ICC-01/04-02/06-2186-Conf-Corr, paras 3 and 36-46.

### III. Analysis

#### *i. Preliminary issue*

14. The Chamber recalls that it granted the Defence a one-day time extension to file the Defence Further Submissions, despite the fact that such request was transmitted after the specified filing deadline.<sup>28</sup> In ruling on the Extension Request, the Chamber considered that, in light of the limited duration of the time extension sought,<sup>29</sup> and due to the consultation issues noted by the Defence, it was in the interests of justice to grant it.

#### *ii. Applicable law*

15. The Chamber recalls the applicable law set out in its previous decisions relating to the placing of restrictions on Mr Ntaganda's contacts.<sup>30</sup> As was previously the case, the Chamber's analysis shall be focused on 'whether the continuation of current restrictions and/or additional restrictions are necessary and proportionate to the aim previously identified by the Chamber, namely "to ensure the safety of witnesses, prevent breaches of confidentiality and ensure the integrity of the proceedings"'.<sup>31</sup>

16. As considered in the Further Review Decision, the Chamber shall also have regard to the applicable jurisprudence of the European Court of Human Rights ('ECtHR')<sup>32</sup> and the Appeals Chamber Judgment in relation to the

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<sup>28</sup> Email communication from the Defence to the Chamber, parties and participants on 24 January 2018 at 17:57.

<sup>29</sup> The Defence specified that it would be in a position to file the Defence Further Observations 'either later in the evening or in any event, no later than 25 January 2018 at 16h00'.

<sup>30</sup> See Decision on the Prosecution request for restrictions on contact and the Defence request for access to logs, 8 December 2014, ICC-01/04-02/06-410-Conf-Exp-Red-Corr ('Decision of 8 December 2014'), paras 40-44; Decision on Restrictions, ICC-01/04-02/06-785-Red, paras 39-42; First Review Decision, ICC-01/04-02/06-1494-Red4, paras 16-18; Further Review Decision, ICC-01/04-02/06-1913-Red2, paras 13-14.

<sup>31</sup> Decision on Restrictions, ICC-01/04-02/06-785-Red, para. 42. See also First Review Decision, ICC-01/04-02/06-1494-Red4, para. 17.

<sup>32</sup> See, for example, ECtHR, *Baginski v. Poland*, Application no 37444/97, 11 October 2005, para. 96; ECtHR, *Piechowicz v. Poland*, Application no 20071/07, 17 April 2012, para. 220. See in this regard ECtHR, *Messina v*

necessity and proportionality of restrictions over time, noting in particular that the Appeals Chamber held that:

[T]he passage of time does not mean *per se* that the risk in question no longer exists and/or that restrictions have become disproportionate. In this regard, the passage of time is but one factor that may influence either finding. [...] At the same time, however, the Appeals Chamber considers that the passage of time is a factor that could become more significant as more time elapses and the Trial Chamber must continue to actively review the restrictions in place and carefully balance the need for and proportionality of the restrictions against the important right accorded to detained persons to have contact.<sup>33</sup>

*iii. Scope of review*

17. The Chamber recalls that the Restrictions as currently imposed on Mr Ntaganda's contacts are twofold. The first set of restrictions relates to his telephone calls ('Telephone Restrictions'), which are currently: (i) permitted with three individuals on Mr Ntaganda's Contacts List as well as those individuals successfully added thereto following the Further Review Decision, which required the provision of 'a minimum amount of information attesting to the identity of each individual';<sup>34</sup> (ii) actively monitored; and (iii) limited as to duration, language, and subject matter, insofar as the use of coded language or discussion of case-related matters is prohibited.<sup>35</sup> In terms of duration, the Chamber, by way of the Further Review Decision, tripled the amount of time Mr Ntaganda was permitted to engage in telephone conversations to three hours per week, subject to the capability of the Detention Centre.<sup>36</sup>

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

<sup>33</sup> Appeals Chamber Judgment, ICC-01/04-02/06-1817-Red, para. 72, referred to in Further Review Decision, ICC-01/04-02/06-1913-Red2, para. 14.

<sup>34</sup> See Further Restrictions Decision, ICC-01/04-02/06-1913-Red2, para. 28.

<sup>35</sup> See Further Restrictions Decision, ICC-01/04-02/06-1913-Red2, para. 29.

<sup>36</sup> See Further Restrictions Decision, ICC-01/04-02/06-1913-Red2, para. 29.

18. The second set of restrictions are those placed on Mr Ntaganda's visits ('Visitation Restrictions'), which provided for: (i) visits pursuant to Regulations 97(2) and 98 of the Regulations, and Regulation 178 of the Regulations of the Registry; (ii) family visits, under the condition that no items are passed between Mr Ntaganda and his family members or any other detainees;<sup>37</sup> and (iii) visits from authorised non-family members, under the condition that such visits are actively monitored, whereby '[r]estrictions as to language and subject matter shall apply, insofar as the conversations must be conducted in a language the Registry can monitor, and use of coded language or discussion of case-related matters will be prohibited'.<sup>38</sup>

*iv. Findings of the Chamber*

19. The Chamber notes that the restrictions to Mr Ntaganda's communications that were ordered pursuant to the Decision on Restrictions have been in place for well over two years, and, in addition, certain restrictions had already been in place on an interim basis for a longer period of time.<sup>39</sup> The Chamber will proceed to review whether the Restrictions remain necessary and proportionate, in accordance with the applicable law outlined above. In so doing, the Chamber shall assess whether it is necessary to impose any alternative 'less restrictive' means to ensure the safety of witnesses, prevent breaches of confidentiality, and ensure the integrity of the proceedings. In conducting this assessment, the Chamber shall have particular regard to developments occurring since the issuance of the Further Review Decision ('Review Period').

20. In reviewing the present Restrictions, the Chamber recalls its previous findings that there are reasonable grounds to believe that Mr Ntaganda:

<sup>37</sup> See Further Restrictions Decision, ICC-01/04-02/06-1913-Red2, para. 30.

<sup>38</sup> See Further Restrictions Decision, ICC-01/04-02/06-1913-Red2, para. 30.

<sup>39</sup> See Decision of 8 December 2014, ICC-01/04-02/06-410-Conf-Exp-Red-Corr; Order instructing the Registry to put in place additional temporary restrictions on contact, 13 March 2015, ICC-01/04-02/06-508-Conf-Exp.

(i) 'abused his entitlement to communications by speaking to non-registered interlocutors without prior approval of the Registry';<sup>40</sup> (ii) used coded language 'to disguise attempts to disclose confidential information or to interfere with witnesses';<sup>41</sup> (iii) disclosed the identity of Prosecution witnesses in circumstances which the Chamber found to be of 'grave concern';<sup>42</sup> (iv) 'intended to engage in a serious form of witness interference';<sup>43</sup> and (v) 'instructed his interlocutors to coach witnesses, or directly told his interlocutors which story to tell, stressing the need to tell the story in the manner as described by [him] and the necessity of synchronising the stories'.<sup>44</sup> As noted in the First Review Decision and Further Review Decision, the Chamber considers that these findings continue to stand, and re-emphasises the gravity of such conduct, which has had a significant impact on the proceedings in the *Ntaganda* case,<sup>45</sup> has resulted in extensive litigation, and has entailed the expenditure of significant resources.

21. Notwithstanding, the Chamber considers that the circumstances in which it imposed the Restrictions have fundamentally changed since the Further Review Decision was issued. Indeed, even at that time, the Chamber considered that the risk of interference with Prosecution witnesses, or with victims authorised to testify, as well as any risk to their safety, had 'significantly diminished', given that the presentation of evidence by the Prosecution and Legal Representative of Victims had been completed at that stage.<sup>46</sup> The Chamber also noted that, during the previous review period, the Defence had been notified of the Prosecution's investigation under Article 70

<sup>40</sup> Decision on Restrictions, ICC-01/04-02/06-785-Red, paras 46-47.

<sup>41</sup> Decision on Restrictions, ICC-01/04-02/06-785-Red, para. 50.

<sup>42</sup> Decision on Restrictions, ICC-01/04-02/06-785-Red, paras 51-54.

<sup>43</sup> Decision on Restrictions, ICC-01/04-02/06-785-Red, para. 55.

<sup>44</sup> Decision on Restrictions, ICC-01/04-02/06-785-Red, para. 57.

<sup>45</sup> See First Review Decision, ICC-01/04-02/06-1494-Red4, para. 22 and Further Review Decision, ICC-01/04-02/06-1913-Red2, para. 18.

<sup>46</sup> Further Review Decision, ICC-01/04-02/06-1913-Red2, para. 20.

of the Statute, entailing all of Mr Ntaganda's non-privileged telephone conversations being transmitted to the Prosecution, and considered that this was a further deterrent to Mr Ntaganda engaging in any prohibited conduct under Regulation 101 of the Regulations.<sup>47</sup>

22. The Chamber also observed in its Further Review Decision that it had previously found reasonable grounds to believe that Mr Ntaganda personally engaged in witness coaching, and intended and directed others to do so, and noted the Prosecution's submissions that further evidence of such coaching continued to emerge.<sup>48</sup> Noting the imminence of the start of the presentation of evidence by the Defence, the Chamber considered that, at that point, these factors militated against allowing Mr Ntaganda unrestricted access to the same, or similar, modes of communications through which that conduct originally occurred, and that certain restrictions on communications remained necessary to ensure the safety of witnesses, to prevent breaches of confidentiality and, and more particularly at that stage, to ensure the integrity of the proceedings.<sup>49</sup>

23. This situation has changed. The last witness called during the Defence evidence presentation has testified before the Chamber, and, as previously indicated, the Chamber does not itself intend to call any witnesses.<sup>50</sup> In terms of the prospect of further Prosecution witnesses testifying, the Chamber notes that the present Prosecution request to adduce rebuttal evidence ('Rebuttal Request')<sup>51</sup> is yet to be ruled upon, and that a complementary request may be

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<sup>47</sup> Further Review Decision, ICC-01/04-02/06-1913-Red2, para. 21.

<sup>48</sup> *See in this regard* Further Review Decision, ICC-01/04-02/06-1913-Red2, para. 22.

<sup>49</sup> *See in this regard* Further Review Decision, ICC-01/04-02/06-1913-Red2, para. 23.

<sup>50</sup> Decision on presentation of evidence pursuant to Articles 64(6)(b) and (d) and 69(3) of the Statute, 23 January 2018, ICC-01/04-02/06-2191, para. 14, page 8.

<sup>51</sup> Prosecution request for presentation of evidence in rebuttal, 30 January 2018, ICC-01/04-02/06-2197-Conf.

forthcoming following the closure of the Defence's presentation of evidence.<sup>52</sup> However, as the Rebuttal Request, if granted, would entail the calling of just one individual as an expert witness, on an expert report that has already been produced and submitted, and noting the foreshadowed limited scope of any request to adduce testimonial evidence in rejoinder,<sup>53</sup> the Chamber is satisfied that few witnesses, if any, will still testify. Therefore, the risks it previously found to exist in relation to witness interference and coaching are now significantly reduced. Furthermore, while the Defence's presentation of evidence has not yet ended, it is expected to be imminent.<sup>54</sup>

24. In these circumstances, and noting that the Chamber's rationale for maintaining certain restrictions to date was largely linked to the fact that a significant number of witnesses were still scheduled to testify, the Chamber is satisfied that the risk of Mr Ntaganda engaging in prohibited conduct under Regulation 101 of the Regulations has significantly diminished and that the current Restrictions are no longer proportionate to the aim of ensuring the safety of witnesses, preventing breaches of confidentiality, and ensuring the integrity of the proceedings. The Chamber must therefore assess whether any lesser measures are necessary and appropriate to achieve its stated aims in imposing and maintaining certain restrictions on Mr Ntaganda's communications.

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<sup>52</sup> *See in this regard* Order providing directions related to the closure of the presentation of evidence, ICC-01/04-02/06-2166, 22 December 2017, para. 16.

<sup>53</sup> *See in this regard* Response on behalf of Mr Ntaganda to "Prosecution request for presentation of evidence in rebuttal", 12 February 2018, ICC-01/04-02/06-2222-Conf, para. 77.

<sup>54</sup> The Chamber notes that, at this stage, the closure of the Defence case will follow the rendering of certain decisions, including on the following: Second Defence request for the admission of evidence from the bar table, 5 February 2018, ICC-01/04-02/06-2208-Conf, with two confidential annexes; Renewed Request on behalf of Mr Ntaganda for admission of the prior recorded testimony of Witness D-0080, 24 January 2018, ICC-01/04-02/06-2193-Conf, with one confidential annex; Request on behalf of Mr Ntaganda seeking partial reconsideration of the Chamber's "Decision on Defence request for admission of evidence from the bar table", 14 February 2018, ICC-01/04-02/06-2226-Conf.

25. To this end, the Chamber considers that, in light of its previous findings that Mr Ntaganda ‘intended to engage in a serious form of witness interference’<sup>55</sup> and ‘instructed his interlocutors to coach witnesses’<sup>56</sup> via his non-privileged telephone conversations from the Detention Centre, some risk of witness interference, including of retaliation, remains even after the closure of the evidentiary phase. Indeed, Mr Ntaganda previously engaged in conduct prohibited under Regulation 101 of the Regulations despite his knowledge of the passive monitoring regime in place at the Detention Centre, whereby his non-privileged telephone communications are recorded in an ongoing manner.

26. However, when balanced against the need to ensure the proportionality of the Restrictions remaining in place, the Chamber considers that a number of factors warrant consideration of the lifting of the Restrictions in their entirety, noting in particular: (i) the time that has elapsed since the restrictions were first placed on Mr Ntaganda’s communications; (ii) the stage of the proceedings; and (iii) the fact that, even if the restrictions have been eased over time, such as by tripling Mr Ntaganda’s allocated time for non-privileged communications, the ability to support this relaxed regime is subject to the capability of the Detention Centre<sup>57</sup> (which is dictated, *inter alia*, by ‘the availability of the staff required to actively monitor Mr Ntaganda’s non-privileged conversations’).<sup>58</sup> Accordingly, the frequency of Mr Ntaganda’s contact with the outside world, including with his family, is subject to practical limitations in relation to which the Chamber has no direct oversight.

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

<sup>56</sup> Decision on Restrictions, ICC-01/04-02/06-785-Red, para. 57.

<sup>57</sup> See Further Restrictions Decision, ICC-01/04-02/06-1913-Red2, para. 29.

<sup>58</sup> Registry Report, ICC-01/04-02/06-2180-Conf-Exp, para. 8.

27. In light of the foregoing, and having regard to its duty to ‘carefully balance the need for and proportionality of the restrictions against the important right accorded to detained persons to have contact’,<sup>59</sup> the Chamber is of the view that the continued application of any restrictions on Mr Ntaganda’s communications, absent further evidence of misconduct, would unduly impinge upon Mr Ntaganda’s fundamental right to respect for private and family life, and thus be disproportionate to any residual need to maintain them at this stage of proceedings. In so finding, the Chamber has had regard to its previous observations as to ‘the potentially deleterious impact of restrictions on communications on detainees’ family lives as well as on their wellbeing over time’.<sup>60</sup> The Chamber has also considered the jurisprudence of the ECtHR on the impact of the passage of time on the proportionality requirement, including the finding of the ECtHR that the extended prohibition of direct contact can only be justified when a genuine and continuing danger continues to exist.<sup>61</sup>

28. In light of the above, the Chamber hereby decides to lift the Telephone Restrictions in full, and finds that it is no longer necessary to continue the regime of active monitoring of Mr Ntaganda’s telephone calls. While the Chamber has noted the Prosecution’s submission that the standard passive monitoring regime is ‘inherently inadequate to ensure that the Accused refrain from unauthorised contact and communications with interlocutors’,<sup>62</sup> it does not consider that maintaining this regime, either full-time or randomly on a weekly basis, is either necessary or proportionate to the stated aim of, *inter alia*, protecting the integrity of the proceedings. Indeed, the Chamber

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<sup>59</sup> Appeals Chamber Judgment, ICC-01/04-02/06-1817-Red, para. 72.

<sup>60</sup> Further Review Decision, ICC-01/04-02/06-1913-Red2, para. 27.

<sup>61</sup> ECtHR, *Khoroshenko v. Russia*, 30 June 2015, Application no. 41418/04, para. 125. *See also Ku era v. Slovakia*, 17 July 2007, Application no. 48666/99, paras 129-131; *Lavents v. Latvia*, 28 November 2002, Application no. 58442/00, paras 141-142.

<sup>62</sup> Response, ICC-01/04-02/06-2186-Conf-Corr, para. 39.

considers that the standard passive monitoring regime deployed by the Registry, coupled with the deterrent effect of the previously-ordered restrictions, is sufficient at this stage to address the level of risk presented by the accused in relation to potential misuse of his non-restricted telephone privileges.

29. Furthermore, noting that the Visitation Restrictions are chiefly now only in operation in relation to non-family members on Mr Ntaganda's Contacts List, which shall be anyway expanded if the Telephone Restrictions are lifted, the Chamber is of the view that, for the reasons outlined above, the Visitation Restrictions shall also be lifted.
30. In deciding that no lesser restrictive measures are required at this point in time, the Chamber has given careful consideration to each of the four limbs of the Prosecution's Further Restrictions Proposal. In terms of placing limitations on the time spent by Mr Ntaganda on the telephone, the Chamber does not consider that the level of risk at this stage of the proceedings warrants such a measure, particularly in light of Regulation 173(4) and (5) of the Regulations of the Registry, and considers that further limiting either the total number of calls or the timing of individual calls to be unnecessary at this point in time.
31. In terms of imposing further restrictions on those individuals who may be added to the Contacts List, the Chamber notes that, following the Further Review Decision, Mr Ntaganda was permitted to add certain individuals to his Contacts List upon the provision of 'a minimum amount of information attesting to the identity of each individual'.<sup>63</sup> The Chamber finds that, in light of the reduced risk of Mr Ntaganda engaging in misconduct at this stage of proceedings, no restrictions as to *who* may be added to his Contacts List shall

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<sup>63</sup> See Further Restrictions Decision, ICC-01/04-02/06-1913-Red2, para. 28.

be imposed moving forward, subject to the requirements of Regulation 173(5) of the Regulations of the Registry.

32. Notwithstanding, the Chamber expects the Registry to maintain the same or similar requirements specified at paragraph 28 of the Further Review Decision, namely, that a 'minimum amount of information attesting to the identity of each individual' is obtained in relation to any individuals sought to be added to the Contacts List. While the Chamber expects the Registry to verify, to the best of its ability, the identity of any new contact on the basis of this information, it does not consider it necessary or appropriate to allow the Prosecution to participate in such a vetting process, or to be provided with the Contacts List, as it considers any such measures to constitute an undue incursion into Mr Ntaganda's private and family life.

33. Finally, the Chamber considers that Mr Ntaganda is under existing obligations under the Court's statutory framework to refrain from disclosing confidential case information to his contacts, including insofar as such conduct would violate existing decisions and orders issued by the Chamber,<sup>64</sup> defeat the confidential classification of filings under Regulation 23 *bis* of the Regulations, or infringe Article 70 of the Statute. The Chamber shall therefore not make any such further order to this effect, and, noting that it does not consider it appropriate to order a regime of random active monitoring of Mr Ntaganda's telephone calls, also declines to place any restrictions on the content of Mr Ntaganda's telephone conversations.

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<sup>64</sup> See, for example, 'Protocol on the Handling of Confidential Information During Investigations and Contact Between a Party or Participant and Witnesses of the Opposing Party or a Participant', 12 December 2014, ICC-01/04-02/06-412-AnxA, paras 4 and 7-8.

*v. Conclusion and further considerations*

34. Accordingly, the Restrictions are hereby lifted in full, and the Chamber is not of the view that the imposition of any lesser restrictive measures at this point would be proportionate to Mr Ntaganda's right to private and family life. Notwithstanding, the Chamber emphasises that, should it become apparent that Mr Ntaganda has engaged or attempted to engage in any further prohibited conduct under Regulation 101 of the Regulations, the Chamber shall immediately order any measures it considers necessary to address this. [REDACTED].<sup>65</sup> [REDACTED].

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<sup>65</sup> See Registry Report, ICC-01/04-02/06-2180-Conf-Exp, para. 6, [REDACTED].

**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY**

**ORDERS** the lifting of all restrictions imposed by the Chamber on Mr Ntaganda's contacts and communications, effective immediately; and

**REJECTS** all other requests.

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

A handwritten signature in black ink, consisting of a large, stylized 'F' followed by 'remr', written over a horizontal line.

**Judge Robert Fremr, Presiding Judge**

A handwritten signature in black ink, appearing to read 'Kuniko Ozaki', written over a horizontal line.

**Judge Kuniko Ozaki**

A handwritten signature in black ink, consisting of three distinct characters, written over a horizontal line.

**Judge Chang-ho Chung**

Dated 19 February 2018

At The Hague, The Netherlands