

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 14 September 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

Former child soldiers' response to the "Public redacted version of 'Request for leave to appeal decision maintaining restrictions on Mr Ntaganda's communications and contacts'"

Source: Office of Public Counsel for Victims (CLR1)

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

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I. INTRODUCTION

1. The Common Legal Representative of the former child soldiers (the “Legal Representative”) hereby files her response to the “Public redacted version of ‘Request for leave to appeal decision maintaining restrictions on Mr Ntaganda’s communications and contacts’” (the “Request”).

2. The Request should be dismissed in its entirety as it does satisfy the four requirements for leave to appeal laid out in article 82(1)(d) of the Statute. The primary issue as well as the alternative issues in respect of which the Defence seeks leave to appeal may not qualify as an “appealable issue” as interpreted by the various chambers of this Court. Indeed, the primary issue – *i.e.* the (in)correctness of the “Decision reviewing the restrictions placed on Mr Ntaganda’s contacts” (the “Impugned Decision”) as whole – is framed in a generic fashion, is overly broad and vague, and lacks the specificity required for the Chamber to adequately perform its assessment under article 82(1)(d) of the Statute. The alternative issues suggested, namely issues (i), (ii) and (iii), either do not arise from the Impugned Decision or constitute a mere disagreement with the Chamber’s findings.

3. Moreover, the Defence assertion that the Impugned Decision affected the accused’s psychological well-being is not *per se* relevant to the determination its impact on the fairness of proceedings. The subjective perception of an accused or his reaction to a decision – however unpleasant or unfair it may seem in the eyes of the accused – does not constitute a proper basis for requesting appellate review.

4. Likewise, certifying appellate review in respect of the issues identified in the Request would not materially advance the proceedings.

II. PROCEDURAL BACKGROUND

5. On 7 September 2016, the Chamber issued the “Public redacted version of ‘Decision reviewing the restrictions placed on Mr Ntaganda’s contacts’”, in which it *inter alia* granted the accused request to have “[r]emoved Person reinstated on Mr Ntaganda’s list of authorised contacts for non-privileged telephone conversations, subject to same conditions as are applicable to Mr Ntaganda’s other authorised non-privileged contacts as specified in the Decision on Restrictions”.¹

6. On 13 September 2016, the Defence filed a “Public redacted version of ‘Request for leave to appeal decision maintaining restrictions on Mr Ntaganda’s communications and contacts’”.² The Defence request leave to appeal the Impugned Decision in respect of the following issues: whether the Chamber “(i) erred by failing to give sufficient weight to the cumulative and ongoing impact of the restrictions on Mr Ntaganda’s rights; (ii) erred in its evaluation of Mr Ntaganda’s conduct and the ostensible witness protection risk arising therefrom; and (iii) erred in determining that the continued restrictions are necessary and proportionate to the objectives being served, including in respect of Regulation 101(2) of the Regulations of the Court”.³

III. SUBMISSIONS

A. The primary issue and the alternative issues identified are either not “appealable issues” or merely constitute a disagreement with the Chamber

7. The Legal Representative submits that the primary issue namely, the (in)correctness of the Impugned Decision as whole, does not meet the requirements of article 82(1)(d) of the Rome Statute. Chambers of this Court have clarified that

¹ See the “Public redacted version of ‘Decision reviewing the restrictions placed on Mr Ntaganda’s contacts’” (Trial Chamber IV), No. ICC-01/04-02/06-1494-Red3, 7 September 2016 (the “Impugned Decision”).

² See the “Public redacted version of ‘Request for leave to appeal decision maintaining restrictions on Mr Ntaganda’s communications and contacts’”, No. ICC-01/04-02/06-1501-Red, 13 September 2016 (the “Request”).

³ *Idem.*, para. 17.

“[o]nly an ‘issue’ may form the subject-matter of an appealable decision”,⁴ and defined the term “issue” as “an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion”.⁵ Contrary to the Defence’s assertion, framing the issue as simply a matter of incorrectness of the Impugned Decision neither enable the Trial Chamber to identify any concrete topic of contention, nor would allow the Appeals Chamber to adequately exercise its review function if the Chamber were to certify the issue as framed. Indeed, the mere dispute over the correctness of a Chamber’s reasoning does not constitute sufficient reason for leave to appeal to be granted an interlocutory.⁶ The Defence’s proposition that the correctness of the Decision may *per se* qualify as an appealable issue does not find support in the two precedents referred to in the Request,⁷ as the errors alleged were specifically linked to the non-compliance with identified standards or provisions in the legal texts of the Court.

8. With respect to the alternative issues suggested, the Legal Representative note that issues (i) and (ii), do not arise from the Impugned Decision and hence, may not be certified for appellate review. Whether the Chamber “*erred by failing to give sufficient weight to the cumulative and ongoing impact of the restrictions on Mr Ntaganda’s rights*” or whether it “*erred in its evaluation of Mr Ntaganda’s conduct and the ostensible witness protection risk arising therefrom*” are both issues that were mainly addressed in the first decision on restriction⁸. The Impugned Decision does not make any new determination in relation to these facts, but merely reiterates its previous findings.⁹ The Defence concedes that when these findings were initially made by the Chamber,

⁴ *Idem*, para. 9

⁵ *Ibid.*

⁶ See the “Decision on the joint defence request for leave to appeal the decision on witness preparation” (Trial Chamber V), No. ICC-01/09-01/11-596, 11 February 2013, para. 6 and the “Decision on Prosecution’s Application for Leave to Appeal the ‘Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial’” (Trial Chamber V(a)), No. ICC-01/09-01/11-817, 18 July 2013, para. 12.

⁷ See the Request, *supra* note 2, para. 16.

⁸ See the “Public redacted version of Decision on Prosecution requests to impose restrictions on Mr Ntaganda’s contacts” (Trial Chamber VI), No. ICC-01/04-02/06-785-Red, 18 August 2015.

⁹ See the Impugned Decision, *supra* note 1, para. 22.

it chose “*not to request leave to appeal*”.¹⁰ It nevertheless contends this should not be construed as “*an abandonment of these submissions*”.¹¹ In the circumstances, it would therefore be procedurally incorrect to grant leave to appeal issues arising from previous decisions.

9. Likewise, alternative issue (iii) namely, the effect of the continued restrictions and their necessity/proportionality reflects a mere disagreement with the findings of the Chamber.¹² In the Impugned Decision, the Chamber did take into account the passage of time as a relevant factor for removing certain restrictions. Specifically, the Chamber granted the Defence’s request for reinstating on the list of non-privileged contacts a person who had been previously removed.¹³

B. The Request fails to identify the specific restriction(s) in respect of which leave to appeal is sought and is premised on a misrepresentation of the Impugned Decision

10. The Defence extensive submissions on the accused’s right to be in contact with his family misrepresent the substance and content of the Impugned Decision.¹⁴ First, nowhere in the Impugned Decision does the Chamber limit or otherwise restrain the accused right to family visits. In this respect, the Defence appears to have misunderstood the scope and the aim of the restrictions imposed. Any doubt as to the scope of these measures has since been clarified by the Chamber. Indeed, during the hearing held on 13 September 2016, the Chamber noted

“that nothing in the Chamber’s decision on restrictions prevents family visits from taking place. Indeed, recognising the importance of such contact, the Chamber has always expressly authorised Mr Ntaganda to have family visits. We therefore also direct the Registry, in consultation with the Defence, to expedite its efforts to arrange such a visit for Mr Ntaganda as soon as possible and note the

¹⁰ See the Request, *supra* note 2, para. 8.

¹¹ *Idem*.

¹² *Ibid.*, para. 2.

¹³ See the Impugned Decision, *supra* note 1, p. 19.

¹⁴ See the Request, *supra* note 2, paras. 20-25.

Registry's submission that it is doing so. The Chamber further encourages the Registry to show maximum flexibility regarding the logistical arrangements for such visits [...]".¹⁵

The issue concerning family visits is therefore moot and does not warrant any further review by the Appeals Chamber.

11. Furthermore, the Request fails to identify the specific measures or restrictions in respect of which the Defence seeks appellate review. Instead, the Defence makes broad assertions, claiming that the restrictions had the effect of limiting his "*contact with the outside world*" leading to the accused being in "*relative isolation*".¹⁶ Although the Defence argues, in essence, that the accused is entitled to remain in regular contact with members of his family, it does not however clarify how the restrictions imposed could be considered as inconsistent with such a right. On its face, the restrictions concerning telephone communications (*i.e.* (i) limiting contacts to family members; (ii) be actively monitored; (iii) be limited in time, language and subject matter, (iv) prohibition on the use of coded language or discussion of case-related matters) do not frustrate the accused's right to regular contact with members of his family. Such measures are appropriate and strike a balance between the requirements of fair trial and other imperatives such as the protection of trial witnesses and victims.

12. In any event, the lack of clarity regarding the specific restrictions that are covered by the Request is a clear indication of the Defence's failure to identify an appealable issue. Indeed, it is unclear whether the aim of a prospective appeal would be for the accused to have limitless contacts and phone calls, be able to use coded language, or for him to be able discuss case-related matters with third persons.

¹⁵ Hearing on 14 September 2016, ICC-01/04-02/06-T-130-ENG ET, p. 17 lines 1 to 8.

¹⁶ See the Request, *supra* note 2, paras. 1 and 24-25.

13. The Defence's request for the Chamber to re-formulate the issues for which request for leave to appeal is sought is equally inappropriate,¹⁷ as it is not for the Chamber to identify what restrictions, among those imposed, are most suitable for appellate review.

C. The subjective perception of unfairness and the associated impact on the accused's well-being are irrelevant considerations for the assessment of the fairness of proceedings

14. The assessment of the fairness of the proceedings necessarily involves an objective assessment. Pre-Trial Chamber defined the notion of "fairness" as follows :

*"The term 'fairness' (équité), from the Latin 'equus', means equilibrium, or balance. As a legal concept, equity, or fairness, "is a direct emanation of the idea of justice". Equity of the proceedings entails equilibrium between the two parties, which assumes both respect for the principle of equality and the principle of adversarial proceedings. In the view of the Chamber, fairness of the proceedings includes respect for the procedural rights of the Prosecutor, the Defence, and the Victims as guaranteed by the relevant statutes (in systems which provide for victim participation in criminal proceedings)."*¹⁸

15. The subjective perception of an accused or his reaction to a court decision, – however unpleasant or unfair it may seem in the eyes of the accused, – does not constitute a proper basis for requesting appellate review. Indeed, it is not uncommon that, over the course of a trial, a trial chamber would issue decisions that have far reaching consequences on the daily life of an accused and hence, may deeply affect the defendant's psychological well-being. These potential consequences do not render the proceedings unfair or contrary to the rights of the accused from a legal standpoint. Furthermore, the possible negative effects that may affect Mr Ntaganda while in detention cannot all be attributed to the Impugned Decision. The limitations

¹⁷ *Idem.*, para. 28.

¹⁸ See the "Decision on the Prosecutor's application for leave to appeal the Chamber's decision of 17 January 2006 on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6" (Pre-Trial Chamber I), No. ICC-01/04-135-tEN, 31 March 2006, para. 38.

imposed on Mr Ntaganda's contacts with the "outside world" and his "relative isolation" are mainly the product of his arrest and detention in a penitentiary institution, and are therefore not directly linked to the Impugned Decision.

D. The resolution of the proposed issues will not materially advance the proceedings

16. The Defence's contention that the resolution on appeal of the proposed issues(s) will materially advance trial proceedings is incorrect. Mr. Ntaganda's ability to actively participate in his defense and provide instructions to counsel is only dependent on his own free will, not on the outcome of any decision by the Court. The accused's recent unwillingness to cooperate with the Court unless provided with detention privileges that were previously suspended on the basis of reasonable grounds cannot be taken into consideration for the purpose of assessing the impact of the Impugned Decision on the progress of the proceedings.

17. Quite the contrary, allowing the accused to benefit from his own refusal to cooperate with the Court would provide further incentives and encouragement for engaging in similar conduct in the future. Given the accused's current stance, the Defence assertion appears to be speculative as it is premised on the sole assumption that the Impugned Decision would be reversed on appeal.

18. Finally, given the ongoing discussions on the very same topic held in court, the Legal Representative wishes to make it clear that while Mr Ntaganda can be "upset"¹⁹ with the Court decisions as well as with the legal arguments made by the Prosecution and the legal representatives of victims,²⁰ his attitude must remain at all times respectful of the judicial process and shall have no bearing on a legal appreciation by the Chamber of the legal issues at stake. Only this would allow the

¹⁹ See the transcript of the hearing held on 14 September 2016, p. 9, line 7.

²⁰ *Idem*, p. 9, lines 5-14.

trial proceedings to move forward fairly and expeditiously, while allowing the accused to be tried within reasonable time.

FOR THE FOREGOING REASONS the Legal Representative respectfully requests the Chamber to dismiss the Request in its entirety.



Sarah Pellet
Common Legal Representative of the former
Child soldiers

Dated this 14th Day of September 2016

At The Hague, The Netherlands