Cour
Pénale
Internationale

International
Criminal
Court

Original: **English**

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

Response of the Common Legal Representative of the Attacks 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**

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 Christoper Gosnell

Legal Representatives of the Victims
Ms Sarah Pellet
Mr Mohamed Abdou

Mr Dmytro Suprun
Ms Anne Grabowski

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

Detention Section

Victims Participation and Reparations Section

Other

I. INTRODUCTION

1. The Common Legal Representative of the Victims of the Attacks (the "Legal Representative"), hereby respectfully submits his response to the "Public redacted version of 'Request for leave to appeal decision maintaining restrictions on Mr Ntaganda's communications and contacts'" (the "Defence Request" or ''Request'').[1] As argued in detail below, the Defence Request has procedural implications that necessarily affect the interests of the victims he represents in the current proceedings.

2. In essence, the Defence Request is a mere disagreement with the Chamber's Decision reviewing the restrictions placed on Mr. Ntaganda's contacts (the "Impugned Decision") and does not, as such, fulfil the legal criteria set out in articles 82(1)(d) of the Rome Statute. It should therefore be dismissed.

II. PROCEDURAL BACKGROUND

3. On 7 September 2016, Trial Chamber VI (the "Chamber") issued the "Public redacted version of 'Decision reviewing the restrictions placed on Mr. Ntaganda's contacts'" (the "Impugned Decision")[2] in which it decided to maintain all but one of the previously imposed restrictions.[3]

4. On 13 September 2016, the Defence filed its Request.

---

[1] See the "Public redacted version of 'Request for leave to appeal decision maintaining restrictions on Mr Ntaganda's communications and contacts", No. ICC-01/04-02/06-1502-Red, 13 September 2016 (the "Defence Request" or ''Request'').

[2] See the "Public redacted version of 'Decision reviewing the restrictions placed on Mr Ntaganda's contacts'" (Trial Chamber VI), No. ICC-01/04-02/06-1494-Red3, 7 September 2016 (the "Impugned Decision").

[3] *Idem*, para. 41.

5. On the same day, the Chamber shortened the deadline for any responses to the Defence Request to 16:00 on 14 September 2016, indicating that it would accept courtesy copies communicated by the set deadline.[4]

III. SUBMISSIONS

1. The criteria contained in article 82(1)(d) of the Rome Statute

6. Article 82(1)(d) of the Rome Statute limits the possibility to request leave to appeal "*a decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings*".

7. The jurisprudence of the Court established the complementary character of the two components set out in article 82(1)(d) of the Rome Statute, as well as the necessity to show their cumulative existence in order to be granted leave to appeal.[5] In this regard, the Appeals Chamber determined that "[e]*vidently, article 82(1)(d) of the Statute has two components. The first concerns the prerequisites for the definition of an appealable issue and the second the criteria by reference to which the Pre-Trial Chamber may state such an issue for consideration by the Appeals Chamber*".[6] The Appeals Chamber also stated that "[o]*nly an 'issue' may form the subject-matter of an appealable decision*",[7] and defined the term "issue" as "*an identifiable subject or topic requiring a decision for its*

[4] See the unedited real-time transcript of the hearing of 13 September 2016, No. ICC-01/04-02/06-T. 130-ENG-RT, pp. 22- 23.
[5] See the "Decision on Prosecutor's Application for leave to appeal in part Pre-Trial Chamber II's Decision on the Prosecutor's applications for warrants of arrest under article 58" (Pre-Trial Chamber II), No. ICC-02/04-01/05-20-US-Exp, 19 August 2005, para. 21. See also "Judgment on the Prosecutor's Application for extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision denying Leave to Appeal", No. ICC-01/04-168, 13 July 2006, paras. 8 and 14.
[6] See the "Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", *supra* note 5, para. 8.
[7] *Idem,* para. 9.

resolution, not merely a question over which there is disagreement or conflicting opinion".[8] Accordingly, the mere dispute over the correctness of a Chamber's reasoning does not constitute sufficient reason to be granted leave to appeal.[9]

8. In addition, the Appeals Chamber considered that "[n]*ot every issue may constitute the subject of an appeal. It must be one apt to 'significantly affect'*, i.e. *in a material way, either a) 'the fair and expeditious conduct of the proceedings' or b) 'the outcome of the trial'*".[10]

9. Moreover, pursuant to the constant jurisprudence of the Court, "*the mere fact that an issue is of general interest or could be raised in future pre-trial or trial proceedings is not sufficient to warrant the granting of leave to appeal*",[11] and "[l]*eave to file interlocutory appeals against decisions should therefore only be granted in exceptional circumstances*".[12]

10. Furthermore, a Chamber presented with an application for leave to appeal must not examine or consider "*arguments on the merits or the substance of the appeal*", since these arguments may be more appropriately considered by the Appeals Chamber when and if leave to appeal is granted.[13]

---

[8] *Ibid.*

[9] 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.

[10] See the "Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", *supra* note 5, para. 10.

[11] See the "Decision on the Prosecutor's application for leave to appeal the Decision on the 'Protocol on investigations in relation to witnesses benefiting from protective measures'" (Trial Chamber II), No. ICC-01/04-01/07-2375-tENG, 8 September 2010, para. 4. See also the "Decision on Ruto Defence's Application for Leave to Appeal the 'Decision on the Prosecution's Request to Add New Witnesses to its List of Witnesses'" (Trial Chamber V(a)), No. ICC-01/09-01/11-983, 24 September 2013, para. 20.

[12] See the "Decision on the Prosecutor's application for leave to appeal the Decision on the 'Protocol on investigations in relation to witnesses benefiting from protective measures'", *supra* note 11, para. 4. See also the "Decision on the Prosecutor's and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges" (Pre-Trial Chamber I), No. ICC-02/11-01/11-464, 31 July 2013, para. 7.

[13] See the "Decision on Prosecutor's Application for leave to appeal in part Pre-Trial Chamber II's Decision on the Prosecutor's applications for warrants of arrest under article 58" (Pre-Trial Chamber II), No. ICC-02/04-01/05-20, 19 August 2005, para. 22.

11. According to the established jurisprudence, in analysing whether an appealable issue would "significantly affect" the fair and expeditious conduct of the proceedings under article 82(1)(d) of the Rome Statute, the notion of "fairness" must be understood as referring to situations "*when a party is provided with the genuine opportunity to present its case - under conditions that do not place it at a substantial disadvantage* vis-à-vis *its opponent - and to be appraised of and comment on the observations and evidence submitted to the Court that might influence its decision*".[14] In turn, "expeditiousness" must be read as "*closely linked to the concept of proceedings 'within a reasonable time', namely the speedy conduct of proceedings, without prejudice to the rights of the parties concerned*".[15]

12. Finally, the Appeals Chamber stated that in order to determine whether an issue would significantly affect the "outcome of the trial" under article 82(1)(d) of the Rome Statute, "[t]*he Pre-Trial or Trial Chamber must ponder the possible implications of a given issue being wrongly decided on the outcome of the case. The exercise involves a forecast of the consequences of such an occurrence*".[16]

2. Application of the criteria contained in article 82(1)(d) of the Rome Statute to the Defence Request

a. No "issue" arises from the Impugned Decision

13. The Legal Representative submits that the Defence fails to identify an "issue" that arises from the Impugned Decision, as required by article 82(1)(d) of the Rome Statute. Rather, the Defence merely disagrees with the Impugned Decision. This is

[14] See *e.g.* the "Decision on the Prosecutor's application for leave to appeal Pre-Trial Chamber III's decision on disclosure" (Pre-Trial Chamber III, Single Judge), No. ICC-01/05-01/08-75, 25 August 2008, para. 14.
[15] *Idem*, para. 18.
[16] See the "Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", *supra* note 5, para. 13.

apparent from the way in which the purported "issue" or "issues" are phrased.

14. The Defence argues that the "issue" arising from the Impugned Decision should be defined "holistically".[17] The Defence attempts to narrow the holistic issue down to three individual "issues". In a third alternative, the Defence proposes that the Trial Chamber re-formulate the issues "*as it may deem necessary and appropriate to ensure appellate scrutiny of the Decision*."[18]

15. The Legal Representative submits that it is for the obligation of the party seeking for leave to appeal to formulate an issue in a precise and concrete manner to allow the Chamber to determine the request in accordance with the criteria set forth in article 82(1)(d) of the Rome Statute. In the present instance, the Defence is suggesting to the Chamber several alternative options in order to select the one which would fall with the relevant requirements.

16. In particular, the third alternative "issue" clearly indicates that the Defence is, in effect, seeking review of the Impugned Decision at all costs, no matter on what ground. Accordingly, the issue is not a legal or factual one but rather "*merely a question over which there is a disagreement or conflicting opinion*".[19]

17. Finally, and contrary to what is argued in the Request, the criteria set forth in article 82(1)(d) *are* concerned with the correctness of a decision, namely whether the Chamber *erred* in law or in fact, not merely with the *consequences* of an otherwise "correct" decision.[20] Again, the Defence is attempting to have the Impugned Decision altered without demonstrating that it contains either an error of law or fact. The first

[17] See the Defence Request, *supra* note 1, para. 2.
[18] *Idem*, para. 2.
[19] See the "Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", *supra* note 5, paras. 8-10. . See also the "Decision on Defence request for leave to appeal the Chamber's decision on postponement of the trial commencement date" (Trial Chamber VI), No. ICC-01/01-02/06-604, 21 May 2015, para. 15.
[20] See the Defence Request, *supra* note 1 para. 15.

applicable criterion of the "issue" being an appealable one is thus not met in the circumstances. Furthermore, as the criteria are cumulative, the Chamber need not look any further in its assessment of whether or not leave to appeal should be granted. The Request for Leave to Appeal must fall at the first hurdle.

b. The "issue" or "issues" raised by the Defence does not affect the fair and expeditious conduct of the proceedings or the outcome of the trial

18. If, however, by extraordinary, the Chamber were to find that the "issue" or "issues" identified by the Defence arises from the Impugned Decision, the Legal Representative submits that this issue has no impact on the fairness and expeditiousness of the proceedings, nor the outcome of the trial as required by article 82(1)(d) of the Rome Statute.

19. It is submitted that even though it is undoubtedly correct that conditions of detention are valid considerations in assessing the fairness of the proceedings, it is not correct to assert[21] that the Impugned Decision affects the fairness of the proceedings simply because it concerns matters related to conditions of detention. The Defence is putting forth the psychological impact of the Impugned Decision on the Accused.[22] It argues that this in turn impacts upon his right to effective participation and that his effective participation affects the fair conduct of proceedings within the meaning of Rule 82(1)(d).[23]

20. As the Defence puts forth that the psychological impact of the Impugned Decision is intertwined with the matter at hand, namely whether the criteria of article 82(1)(d) of the Rome Statute are met in the circumstance, the Legal Representative will briefly address the legal arguments advanced by the Defence, although, as

[21] *Idem*, para. 19.
[22] *Ibid*., para. 26.
[23] *Ibid*.

mentioned *supra*, a Chamber presented with an application for leave to appeal must not examine or consider "*arguments on the merits or the substance of the appeal*".[24]

21. The fairness of the proceedings is a fundamental consideration underlying the Rome Statute and principles of international law. It goes without saying that this includes the physical and psychological well-being of the Accused, as well as his human rights, including the ancillary human rights of his children as argued in the Request.[25] However, as argued above, the very fact that an Accused is affected by a decision that curtails his contacts does not automatically render a decision legally or factually incorrect and thus liable to appellate correction.

22. In this regard, the Legal Representative submits that according to Rule 24.2 of the European Prison Rules,[26] "*communication and visits may be subject to restrictions and monitoring necessary for the requirements of continuing criminal investigations, maintenance of good order, safety and security, prevention of criminal offences and protection of victims of crime, but such restrictions, including specific restrictions ordered by a judicial authority, shall nevertheless allow an acceptable minimum level of contact.*"

23. In accordance with the constant jurisprudence of the European Court of Human Rights (the "ECtHR"), and in particular in the case of *Klamecki v. Poland*, referred to by the Defence, the ECtHR stressed that "*restrictions as limitations put on the number of family visits, supervision over those visits and, if so justified by the nature of the offence, subjection of a detainee to a special prison regime or special visit arrangements constitute an interference with his rights under Article 8* [of the European Convention] *but are not, by themselves, in breach of that provision*"[27]

---

[24] See *supra* note 13.
[25] See the Defence Request, *supra* note 1, paras. 23, 24.
[26] See European Prison Rules, Recommendation Rec(2006)2 of the Committee of Ministers of the Council of Europe to member states on the European Prison Rules, Adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers' Deputies. Available at: http://www.coe.int/t/dgi/criminallawcoop/Presentation/Documents/European-Prison-Rules_978-92-871-5982-3.pdf
[27] See ECtHR, *Klamecki v. Poland* (No. 2), Application No. 31583/96, 3 April 2003, para. 144. See also the Defence Request, *supra* note 1, footnote 44.

24. In the present case, and contrary to the *Klamecki* case, the Accused has not been restricted entirely from having contacts with his wife and his children, but has been regularly authorised to have phone contact with his wife as well as with his children via his wife's telephone

25. In a more recent case decided by the Grand Chamber of the ECtHR, it was held that "*some measure of control of prisoners' contacts with the outside world was both warranted and not in itself incompatible with the European Convention on Human Rights*."[28] The Grand Chamber went on to state that "[s]*uch measures could include the limitations imposed on the number of family visits, supervision over those visits and, if so justified by the nature of the offence and the specific individual characteristics of a detainee, subjection of the detainee to a special prison regime or special visits arrangements*"[29] and that "*in the context of high security prisons, the application of such measures as physical separation may be justified by the prison's security needs or the danger that a detainee would communicate with criminal organisations through family channels*."[30]

26. The Defence argues that the degree of deprivation of human contact to which the Accused is subject as a result of the Impugned Decision constitutes what the ECtHR has described as "relative isolation" and that such regime cannot be imposed on a prisoner indefinitely.[31]

27. In this regard, in its decision in the case of *Ramirez Sanchez v. France*, as referred to by the Defence, the Grand Chamber of the ECtHR found first that "[i]*n order for a punishment or treatment associated with it to be "inhuman" or "degrading", the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or*

[28] See ECtHR, *Khoroshenko v. Russia,* Application No. 41418/04, 30 June 2015, para. 123.
[29] *Idem*.
[30] *Ibid*., para. 125.
[31] See the Defence Request, *supra* note 1, para. 24.

punishment''[32] and then concluded that *"having regard to the physical conditions of the applicant's detention, the fact that his isolation is 'relative', the authorities' willingness to hold him under the ordinary regime, his character and the danger he poses, the conditions in which the applicant was being held during the period under consideration have not reached the minimum level of severity necessary to constitute inhuman treatment within the meaning of Article 3 of the Convention."*[33]

28. It is submitted that in the present case, in light of said criteria under the ECtHR's jurisprudence, the Accused's detention conditions, along with the restrictions imposed on his contacts with the outside world, have not reached the minimum level of severity necessary to constitute inhuman or degrading treatment, given in particular that the Accused has always been allowed an acceptable minimum level of contact.

29. Similarly, the continuation of certain restrictions imposed by virtue of the Impugned Decision cannot either be said to reach the minimum level or severity necessary to constitute inhuman treatment. Furthermore, it is not correct to label the ongoing restrictions as being imposed "indefinitely".[34] This is not least apparent from the fact that, after periodic review, one of the restrictions previously imposed, has been lifted.[35]

30. Indeed, in the Impugned Decision, the Chamber correctly applied the relevant criteria as developed by the ECtHR jurisprudence, focusing in particular on the requirements of ''necessity'' and ''proportionality''.[36] It is therefore groundless to argue that the Chamber failed to determine that the continued restrictions are necessary and proportionate to the objectives being served.[37]

---

[32] See ECtHR, *Ramirez Sanchez v. France*, Application No. 59450/00, 4 July 2006, para. 119.
[33] See ECtHR, *Ramirez Sanchez v. France*, Application No. 59450/00, 4 July 2006, para. 150.
[34] See the Defence Request, *supra* note 1, para. 24.
[35] See the Impugned Decision, *supra* note 2, para 41.
[36] *Idem*, paras. 16-18 and 21.
[37] See the Defence Request, *supra* note 1, para. 17.

31. Finally, it must be remembered that "fair trial" guarantees apply throughout the proceedings and in respect to all parties and participants, including victims.[38] In the same vein, the requirements of the integrity of the proceedings shall apply to all parties and participants in the proceedings before the Court, and not only to the suspect/accused.[39]

32. In conclusion, granting leave to appeal the Impugned Decision in an attempt to address extraneous matters that have impacted the proceedings – even if they may be related or incidental to the effect of the Impugned Decision – is not the proper way to guarantee the integrity of the proceedings. The legal criteria underlying certification of appealable issues are not met in the present case. It would be improper for the Chamber to depart from applying strict legal principles in an impartial way in order to accommodate other considerations; for it is the rule of law itself that guarantees the right to a fair trial in the first place.

[36] *Idem*, paras. 16-18 and 21.

FOR THE FOREGOING REASONS the Legal Representative respectfully requests that the Chamber

DISMISS the Request for Leave to Appeal.

Dmytro Suprun
Common Legal Representative of the Victims of the Attacks

Dated this 14th Day of September 2016

At The Hague, The Netherlands