



Original: English

No.: ICC-RoR220-01/19

Date: 10 December 2019

THE PRESIDENCY

Before: Judge Chile Eboe-Osuji, President
Judge Robert Fremr, First Vice-President
Judge Marc Perrin de Brichambaut, Second Vice-President

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
*THE PROSECUTOR V. BOSCO NTAGANDA***

Public

Public redacted version of “Decision on Defence ‘Request for review of the Registrar’s decision of 21 June 2019’ dated 5 July 2019 (ICC-RoR220-01/19-1-Conf-Exp)”, 17 September 2019, ICC-RoR220-01/19-2-Conf-Exp

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

The Office of the Prosecutor

Counsel for the Defence

Mr Stéphane Bourgon

Mr Christopher Gosnell

Legal Representatives of the Victims

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

REGISTRY

Registrar

Mr Peter Lewis

Other

Victims and Witness Unit

**Victims Participation and Reparations
Section**

The Presidency of the International Criminal Court ('Court') has before it the application filed on 5 July 2019 by Mr Ntaganda pursuant to regulation 220 of the Regulations of the Registry ('Regulations') requesting judicial review of the decision of the Registrar confirming the decision of the Director of Division of Judicial Support Services ('DJSS') to deny his request for supported family visits by the Court ('Application').¹

I. RELEVANT PROCEDURAL HISTORY

1. On 10 December 2010, the Assembly of States Parties ('ASP') established the Trust Fund for Family Visits ('TFFV') for the purpose of funding family visits for indigent detainees.²
2. On 22 March 2013, Mr Ntaganda was transferred from Rwanda to the seat of the Court and has remained in the custody of the Court at the detention centre since.³
3. On 7 March 2019, Mr Ntaganda requested a funded visit from all his children together, with priority given to [REDACTED] children who have not visited him since he was transferred to the Netherlands ('Request'). The Request was accompanied by a supplementary request addressed to the Director of the Division of External Operations to assist in obtaining passports for the three aforementioned children.⁴
4. On 11 June 2019, the Director of the DJSS orally informed Mr Ntaganda that no financial support could or would be provided by the Court to support the requested family visit.⁵
5. On 13 June 2019, Mr Ntaganda requested the Registrar to reconsider the oral decision of the Director of the DJSS rejecting the Request.⁶

¹ ICC-RoR220-01/19-1-Conf-Exp.

² ICC-ASP/9/Res.4, Section X.

³ Decision on Setting the Date of the Initial Appearance and Release Issues, 22 March 2013, ICC-01/04-02/06-41, para. 7

⁴ Annexes B and C to the Application; Application, para. 6. The Presidency notes that the version of the visitor request form it has received is undated and unsigned. It is, therefore, unable to verify the date of the initial request for the visit, which is, in any event, immaterial.

⁵ Application, para. 8.

⁶ Application, para. 9; Annex E to the Application.

6. On 21 June 2019, the Registrar denied the request for reconsideration reaffirming that, due to a lack of financial resources, the Registry was not in a position to advance funds for family visits ('Impugned Decision').⁷
7. On 5 July 2019, Mr Ntaganda filed the Application pursuant to regulation 220 requesting judicial review of the Impugned Decision by the Presidency ('Application').
8. On 8 July 2019, Trial Chamber VI convicted Mr Ntaganda of five counts of crimes against humanity and thirteen counts of war crimes.⁸

II. MERITS

A. Impugned Decision and Application

1. *Relevant parts of the Impugned Decision*

9. The Impugned Decision considers that, whilst the ASP has recognised that specific attention should be given to detained persons' family visits, the ASP has also recognised that there is no legal right to have such visits funded by the detaining authority.⁹ It also considers that the TFFV, as set up by the ASP, is the only identified route through which the financial cost of family visits can be borne by the Court.¹⁰ Further, the Impugned Decision recognises the Court's obligation to seek donations for the TFFV from States and other entities actively.¹¹ In this respect, the Registry specifies that it is engaged in soliciting voluntary contributions to the TFFV actively, but that it is difficult to foresee whether and when additional contributions to the now depleted TFFV will be secured. In light of this, the Registry is not in a position to advance funds for family visits, with such visits being suspended until new funds are secured.¹²

⁷ Annex F to the Application.

⁸ Judgment, ICC-01/04-02/06-2359 and Annexes A, B, and C.

⁹ Impugned Decision, page 1, referring to ICC-ASP/8/Res.4.

¹⁰ Impugned Decision, page 1.

¹¹ Impugned Decision, page 1, referring to Public redacted version of "Decision on the 'Application to review the 'Decision on Complaint to the Registrar by [REDACTED] concerning Supported Family Visit" dated [REDACTED] 2016, 11 August 2016, ICC-RoR221-02/16-3-Red.

¹² Impugned Decision, page 1.

10. The Impugned Decision also explains that, should funds become available through the TFFV, the Registry would have to undertake a proper evaluation of the distribution of such funds subsequently, taking into consideration the situation of all indigent detained persons at the Court. This, according to the Registrar, is another explanation as to why advancing funds to the TFFV would not be appropriate.¹³

2. Application

11. First, Mr Ntaganda argues that the Registrar erred in law by not recognising a detained person's legal right to supported family visits, by stating that the Court's only positive obligation is to seek actively donations to facilitate such visits, actively¹⁴ and by relying on an ASP resolution as prevailing over judicial decisions of the Presidency.¹⁵ In support of his argument, Mr Ntaganda refers to the Presidency's previous findings that the Court has an implied positive obligation to fund indigent detained persons' family visits,¹⁶ especially if such persons are transferred far away from their family.¹⁷

12. Second, Mr Ntaganda argues that the Registrar has failed to exercise his discretion as a consequence of an error of law.¹⁸ He submits that the Impugned Decision demonstrates the Registrar's belief that his discretion cannot be exercised but for the availability of funds in the TFFV, which, in his opinion, constitutes an unjustified renunciation of discretion.¹⁹

13. Mr Ntaganda argues that, in any case, no reasonable decision-maker, taking into account the criteria set out in the *Ngudjolo* Decision as well as the circumstances and nature of the requested family visits, would have declined to provide the requested financial support.²⁰ According to him, 'any failure to facilitate a family visit now ...

¹³ Impugned Decision, page 2.

¹⁴ Application, para. 13.

¹⁵ Application, paras. 19-20.

¹⁶ Application, paras. 13-14; *referring* to Decision on 'Mr Mathieu Ngudjolo's Complaint Under regulation 221(1) of the Regulations of the Registry Against the Registrar's Decision of 18 November 2008, 10 March 2009, ICC-RoR217-02/08-8 ('Ngudjolo Decision'); Public redacted version of "Decision on the 'Application to review the 'Decision on Complaint to the Registrar by [REDACTED] concerning Supported Family Visit" dated [REDACTED] 2016, 11 August 2016, ICC-RoR221-02/16-3-Red, para. 42

¹⁷ Application, para. 23.

¹⁸ Application, para. 24.

¹⁹ Application, para. 28.

²⁰ Application, para. 25.

violates his right to family life, his family's right to family life and [his] right to be treated with dignity.'²¹

B. Preliminary matters

1. Time limit

14. The Presidency recalls that pursuant to regulation 220(1) a detained person wishing to apply to the Presidency for judicial review of a decision of the Registrar taken pursuant to regulation 219, may do so within 7 calendar days. The Application was filed on 5 July 2019, more than 7 calendar days after the issuance of the Impugned Decision on 24 June 2019. However, the Presidency exercises its discretion to assess the merits of the Application in the instant case given the nature of the Request (i.e. first visit from Mr Katanga's [REDACTED] children) and the minimal delay in seeking review.

2. Procedural matters

15. The Presidency notes that in the instant case, the Request was initially rejected orally by the Director of the DJSS. The Presidency suggests that reasons for refusing to grant requests for supported family visits should be communicated in writing, rather than orally, to the detained person so as to give the latter proper notice and the ability to seek review in a meaningful manner, including through the complaints procedure set out in section 5 of chapter 5 of the Regulations.

16. Further, in the instant case, the Presidency notes that Mr Ntaganda's communication of 13 June 2019 requested the Registrar to 'reconsider the situation of Mr Ntaganda' without reference to regulation 219 of the Regulations. This likely reflects the rather informal decision-making process which appears to have been followed, as outlined above. Noting however that Mr Ntaganda's request to the Registrar in effect sought review by the Registrar of the decision taken by the Director of the DJSS apparently *in lieu* of the CCO, the Presidency considers that such request is properly within the scope of regulation 219. As such, in accordance with regulation 219(4), the Impugned Decision is subject to judicial review by the Presidency pursuant to regulation 220.

²¹ Application, paras. 26-27

C. Determination of the Presidency

1. *Standard for judicial review*

17. The Presidency recalls that the judicial review of decisions of the Registrar concerns the propriety of the procedure by which the latter reached a particular decision and the outcome of that decision. It involves a consideration of whether the Registrar has: acted without jurisdiction, committed an error of law, failed to act with procedural fairness, acted in a disproportionate manner, taken into account irrelevant factors, failed to take into account relevant factors, or reached a conclusion which no reasonable person who has properly applied his or her mind to the issue could have reached.²²

18. The instant Application pertains to the existence of a right of detained persons to receive family visits and the scope of any such right, in particular, whether such scope includes an obligation upon the Court to fund family visits of indigent detained persons in the absence of available funds in the TFFV.

2. *Merits*

i. The Court's obligation to fund family visits

19. The Presidency recalls that, in accordance with regulation 100(1) and 179(1) of the Regulations of the Court, detained persons have the right to receive visits, including family visits.²³ Regulation 179(1) provides, in relevant parts, that 'the Registrar shall give specific attention to visits by family of the detained persons with a view to maintain such links'. Further, the Presidency recalls that a detained person's right to receive family visits is clearly acknowledged by international human rights law,²⁴ the

²² The standard of judicial review was defined by the Presidency in its Decision of 20 December 2005, ICCPres-RoC72-02-5, paragraph 16, and supplemented in its Decision of 27 November 2006, ICC-01/04-01/06731-Conf, paragraph 24. See also the Decision of the Presidency of 10 July 2008, ICC-Pres-RoC72-01-8-10, paragraph 20; ICC-01/04-01/06-731-Conf, para. 24; ICC-RoR56-01/09-2, para.11.

²³ *Ngudjolo* Decision, para. 26.

²⁴ See e.g. United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), Standard Minimum Rules, rule 58 (resolution A/RES/70/175 adopted by the General Assembly on 17 December 2015); The Standards of the European Committee for the Prevention of Torture, paragraph 51. (European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, The CPT standards. CPT/Inf/E (2002) 1- Rev 2011); The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principle 19 (adopted by General Assembly resolution 43/173 of 9 December 1988).

rules governing detention,²⁵ the jurisprudence of international criminal jurisdictions²⁶ and that of the European Court of Human Rights.²⁷ Beyond this, it is, at the barest minimum, a humane gesture that underscores the better aspects of human civilisation. It may be useful to keep in mind that ‘family visits’ means simply that. It is the ability of members of a family to visit one of their members who no longer enjoys the liberty of such visits at will. Family visits aim at maintaining the family ties of the detained person, which not only contributes to such person’s eventual re-integration or rehabilitation but also his well-being, as well as that of his family members.²⁸ It should be kept in mind that family visits are distinct from private visits with a spouse or partner, which are separately regulated by regulation 185.

20. In addition, in accordance with regulation 103 of the Regulation of the Court, the Registrar has a duty of care in respect of the physical and psychological well-being of detained persons.²⁹ Family visits may indeed play a significant role in respect of such well-being which, in itself, may enhance the effectiveness of Court proceedings. Where a detained person has his or her physical and psychological well-being properly safeguarded, delays of the proceedings for health-related reasons may, for example, be less likely.

21. As consistently recognised by the Presidency, in the unique circumstances of the Court, where an indigent person is detained in The Hague far from his or her family pursuant to the execution of a decision of the Court, funded family visits are the only mechanism by which the effective exercise of such right is rendered meaningful.³⁰

²⁵ See rule 61 (A) of the ICTY Rules Governing the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal; rule 61(i) of the ICTR Rules Covering the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal; rule 41(A) of the SCSL Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Special Court for Sierra Leone or Otherwise Detained on the Authority of the Special Court for Sierra Leone.

²⁶ *Ngudjolo* Decision, para. 28; referring to *Prosecutor v Krajisnik*, Case No. IT-00-39-T, ‘Decision on the Defence’s Request for an Order Setting Aside, in Part, the Deputy Registrar’s Decision of 3 February 2004’, 14 May 2004, para. 9; *Prosecutor v Ndindiliyimana*, Case No. ICTR-2000-56-T, ‘The President’s Decision on a Defence Motion to Reverse the Prosecutor’s Request for Prohibition of Contact Pursuant to Rule 64’, 25 November 2002, para. 10.

²⁷ *Ngudjolo* Decision, para. 28; referring to *Messina v Italy* (No 2), no 25498/94, Judgment of 28 September 2000, paragraph 61; *Kalashnikov v Russia*, no. 47095/99, Decision of 18 September 2001, para. 7; *Lavents v Latvia*, no. 58442/00. Judgment of 28 November 2002, para. 141; *Estrikh v Latvia*, no. 73819/01, Judgment of 18 January 2007, paragraphs 166 and 169; *Vlasov v Russia*, no. 78146/01, Judgment of 12 June 2008, para. 123.

²⁸ *Ngudjolo* Decision, para. 35.

²⁹ *Ngudjolo* Decision, para. 35.

³⁰ *Ngudjolo* Decision, paras. 31 and 37; Decision on the application for judicial review dated 5 November 2012, 18 December 2012, ICC-RoR221-04/12-4-Red, para. 29; Public redacted version of “Decision on the ‘Application to review the ‘Decision on Complaint to the Registrar by [REDACTED] concerning Supported Family Visit’ dated [REDACTED] 2016, 11 August 2016, ICC-RoR221-02/16-3-Red, para. 42.

ii. Funded family visits and the TFFV

22. The Presidency first notes that, in the context of the *Ngudjolo* Decision issued on 10 March 2009, it had considered that provision should be ‘made for the funding of family visits to indigent persons in the budget of the Court’.³¹ In November 2009, the ASP stated:

3. *Acknowledges* that various mechanisms could usefully be implemented in order to support family links and, in that regard, as a matter of priority, invites the Court to report to the Assembly on the feasibility and the conditions for the establishment of a voluntary system of funding family visits, with a view to its establishment by the Assembly at its ninth session;

4. *Decides* that, pending the establishment of such system, in the case of an indigent detainee, while no legal obligation exists for the detaining authority or any other authority to fund family visits, on purely humanitarian grounds and following the application of clear criteria determining:

- full or partial indigence as determined by the procedure established by the Court to ascertain the status of indigence,
- family relation to the detainee, and
- equal treatment of detainees;

the Court may, on a temporary basis, partly or fully subsidize family visits for indigent detainees up to an amount to be determined by the Assembly in the context of the approval of the programme budget;

5. The temporary budgetary funding shall be subject to re-evaluation upon the establishment of such a mechanism of voluntary funding, no later than at the tenth session of the Assembly.³²

23. On 10 December 2010, the ASP established the TFFV as the principal mechanism to facilitate the funding of family visits for indigent detainees.³³ It stated:

The Assembly of States Parties,

Recalling resolution ICC-ASP/8/Res.4 on the funding of family visits for indigent detainees,

1. *Decides* to establish a special fund within the Registry for the purpose of funding family visits for indigent detainees entirely through voluntary donations and charges the Court with promoting the special fund and collecting contributions from States Parties, other States, non-governmental organizations, civil society, individuals and other entities;

2. *Welcomes* the generous and immediate voluntary contribution to be made by one State Party to the special fund and calls on all other potential contributors to positively consider making a contribution to the special fund;

3. *Agrees* that the special fund shall be administered on a budget neutral basis.³⁴

24. As correctly noted by the Registrar, in the particular circumstances of the Court, one aspect of the Court’s implied obligation to fund family visits of indigent detained persons, is a corollary obligation to seek donations to the TFFV actively.³⁵

³¹ See *Ngudjolo* Decision, para. 41

³² ICC-ASP/8/Res.4, paras. 3-5.

³³ ICC-ASP/9/Res.4.

³⁴ ICC-ASP/9/Res.4, Section X.

25. Turning to the Impugned Decision, the Presidency notes that, in denying the Request, the Registrar states:

The Registry is actively and continually engaged in soliciting voluntary contributions to the Trust Fund for Family Visits, and remains hopeful that new contributions can be secured in the future. However, given the voluntary nature of contributions to the Fund, it is difficult to project if and when additional contributions will be secured. At this time the Fund is depleted, and there are no further contributions that have been promised so far. As such, the Registry is not in the position to advance funds for family visits funded by the Trust Fund for Family Visits. Family visits funded from the Trust Fund for Family Visits are therefore unfortunately suspended until such time as new funds are secured.³⁶

26. It is observed that, notwithstanding the Registrar's efforts in actively seeking donations, the availability of funds in the TFFV has been at a 'critically low level' since 2016,³⁷ with such fund now being depleted and no indication that new contributions will be made in the near future. The Presidency recognises that, in circumstances where the TFFV is depleted, the Court may be impeded from ensuring that the fundamental right to receive family visits of persons detained in its custodial detention is rendered meaningful, with such situation being most detrimental to indigent detainees. Such circumstances cannot however justify, as a matter of law, a suspension, even temporary, of the Court's obligation to ensure the effectiveness of the right for indigent detainees to receive family visits.

27. The Presidency recalls that, pending the establishment of the TFFV in November 2009, the ASP had decided that on purely humanitarian grounds, 'the Court may, on a temporary basis, partly or fully subsidize family visits for indigent detainees up to an amount to be determined by the Assembly in the context of the approval of the programme budget'.³⁸ As such, the Presidency considers that, in circumstances where there are no available funds in the TFFV, the Registrar should, on humanitarian grounds, explore whether there exist alternative feasible means to support family visits of indigent detainees on a temporary basis, partly or fully, pending the provision of the TFFV. In addition, the Presidency urges the Registrar to redouble efforts to seek donations to the TFFV from States Parties, other States, non-governmental organizations, civil society, individuals and other entities.

³⁵ See Public redacted version of "Decision on the 'Application to review the 'Decision on Complaint to the Registrar by [REDACTED] concerning Supported Family Visit" dated [REDACTED] 2016, 11 August 2016, ICC-RoR221-02/16-3-Red, para. 42.

³⁶ Impugned Decision, page 1.

³⁷ ICC-RoR221-02/16, para. 42.

³⁸ ICC-ASP/8/Res.4, para. 4.

28. As it is evident that the Registrar has yet to complete an evaluation as to whether the Request should be granted on its merits, the Presidency remits the Request to the Registrar for assessment on its merits.

29. The Presidency also observes that the Impugned Decision does not address Mr Ntaganda's concerns with obtaining passports for his [REDACTED] children. The Presidency encourages the Registrar, in the course of his assessment of the merits of the matter, to give due consideration to supplementary requests which may be necessary to render the right to family visits meaningful.

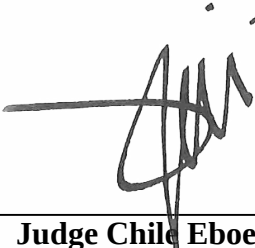
THE PRESIDENCY HEREBY

URGES the Registrar to continue to seek donations for the TFFV actively;

INVITES the Registrar to seek temporary alternative feasible means for funding family visits pending provision of the TFFV; and

REMITTS the matter to the Registrar to consider the Request on its merits.

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



Judge Chile Eboe-Osuji
President

Dated this 10 December 2019

At The Hague, The Netherlands