



Original: **English**

No.: **ICC-RoR220-02/21**
Date: **18 October 2022**
Date original: **15 July 2021**

THE PRESIDENCY

Before: Judge Piotr Hofmański, President
Judge Luz del Carmen Ibáñez Carranza, First Vice-President
Judge Antoine Kesia-Mbe Mindua, 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 the ‘Request for judicial review of “Decision on Mr Ntaganda’s Request for Review addressed to the Registrar received 14 April 2021”, dated 11 May 2021 (ICC-RoR220-02/21-1-Conf-Exp)’ ” dated 15 July 2021 (ICC-RoR220-02/21-6-Conf-Exp)

Decision to be notified in accordance with regulation 31 of the *Regulations of the Court* to:**The Office of the Prosecutor****Counsel for Mr Ntaganda**
Mr Stéphane Bourgon
Ms Mélissa Beaulieu Lussier**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***Amicus Curiae***REGISTRY****Registrar**
Mr Peter Lewis**Detention Section**
Mr Harry Tjonk, Acting Chief Custody
Officer**Division of Court Services**

The Presidency of the International Criminal Court (the ‘Court’) has before it the application filed by Mr Bosco Ntaganda dated 11 May 2021, seeking judicial review pursuant to regulation 220 of the Regulations of the Registry (the ‘Regulations’) of a decision of the Registrar issued on 29 April 2021, requesting a monthly 90-minute video conference call with family (the ‘family video communication’) pending the promulgation of a related policy (the ‘Policy’) and that the Registrar is ordered to provide a timeline for the promulgation of the latter (the ‘Application’).¹

I. PROCEDURAL HISTORY

1. On 19 March 2021, Mr Ntaganda submitted, pursuant to regulation 106 of the Regulations of the Court and regulation 217(1) of the Regulations, a complaint to the Acting Chief Custody Officer (the ‘Acting CCO’), which the latter received on 22 March 2021 (the ‘Complaint’).² Mr Ntaganda requested immediate family video communications at the same frequency as other detained persons.³
2. On 6 April 2021, the Acting CCO issued his decision pursuant regulation 218(5) of the Regulations, rejecting the Complaint as unjustified on the basis that the creation of a related Policy is under consideration with the Registrar.⁴
3. On 14 April 2021, Mr Ntaganda submitted a request for review of the Acting CCO’s decision to the Registrar, pursuant to regulation 219(1) of the Regulations, seeking the *de novo* review of the Complaint and requesting that he be granted the possibility to have regular family video communications on an *ad hoc* basis, as often as all other detained persons (the ‘Request for Review’).⁵
4. On 29 April 2021, the Registrar issued his decision pursuant to regulation 219(3) of the Regulations, granting a single family video communication pending the promulgation of

¹ Defence for Mr Ntaganda, Request for judicial review of “Decision on Mr Ntaganda’s Request for Review addressed to the Registrar received 14 April 2021”, 11 May 2021, ICC-RoR220-02/21-1-Conf-Exp. The Application was notified on 12 May 2021, but on the same day the Registry informed the Presidency that it had been submitted on 11 May 2021 at 15:59 and that a filing error caused this delay in the filing procedure.

² Complaint, ICC-RoR220-02/21-2-Conf-Exp-AnxI, p. 2-3 *annexed to* Registrar, Transmission pursuant to Regulation 220(3) of the Regulations of the Registry and Request for Extension of Time-Limit to file Registry Observations pursuant to Regulation 220(4) of the Regulations of the Registry, 17 May 2021, ICC-RoR220-02/21-2-Conf-Exp (the ‘Transmission’).

³ Complaint, ICC-RoR220-02/21-2-Conf-Exp-AnxI, para. 7.

⁴ Acting CCO Decision, ICC-RoR220-02/21-2-Conf-Exp-AnxI, pp. 4-8, para. 15.

⁵ Request for Review by the Registrar, ICC-RoR220-02/21-2-Conf-Exp-AnxII, p. 14 *annexed to* Transmission.

the Policy and rejecting the remainder of the Request for Review (the ‘Impugned Decision’).⁶

5. On 11 May 2021, Mr Ntaganda filed the present Application seeking judicial review of the Impugned Decision pursuant to regulation 220(1) of the Regulations, including a request for an extension of time-limit.⁷
6. On 17 May 2021, the Registrar transmitted the relevant documents pursuant to regulation 220(3) of the Regulations and submitted a request for an extension of the applicable time limit for the filing of his Observations under regulation 220(4) of the Regulations by two days (the ‘Request for Extension of Time-Limit’).⁸ On 18 May 2021, the Presidency granted the Request for Extension of Time-Limit.⁹
7. On 21 May 2021, the Registrar filed his Observations in relation to Mr Ntaganda’s Application (the ‘Registrar’s Observations’).¹⁰
8. On 11 June 2021, the Registrar transmitted a letter he had addressed to all detained persons and their counsel, dated 8 June 2021, informing, *inter alia*, that he expects that in-person visits of ‘counsel, family and friends will resume on 15 July 2021’.¹¹

II. IMPUGNED DECISION

9. The Impugned Decision grants Mr Ntaganda a single family video communication, pending the promulgation of the Policy and rejects the remainder of the Request.¹² The Impugned Decision recalls that Mr Ntaganda was not generally denied access to family video communications, but, rather, that this possibility is currently being considered for all detained persons.¹³ It further explains that family video communications do not fall under regulation 99(1)(i) of the Regulations of the Court, which guarantees the right of

⁶ Impugned Decision, ICC-RoR220-02/21-2-Conf-Exp-AnxIII, para. 25 *annexed to* Transmission.

⁷ Application, ICC-RoR220-02/21-1-Conf-Exp, para. 46.

⁸ Transmission, paras 2, 4, 11.

⁹ Presidency, Decision on the Request for Extension of Time-limit to file Registry Observations pursuant to Regulation 220(4) of the Regulations of the Registry, 18 May 2021, ICC-RoR220-02/21-3-Conf-Exp, p. 4.

¹⁰ Registrar, Registry’s Observations on “Request for judicial review of ‘Decision of Mr Ntaganda’s Request for Review addressed to the Registrar received on 14 April 2021’”(ICC-RoR220-02-/21-1-Conf-Exp), 21 May 2021, ICC-RoR220-02/21-4-Conf-Exp.

¹¹ Letter, ICC-RoR220-02/21-5-Conf-Exp-Anx, p. 1 *annexed to* Registrar, Registry Transmission of a Letter to Counsel dated 8 June 2021, 11 June 2021, ICC-RoR220-02/21-5-Conf-Exp.

¹² Impugned Decision, ICC-RoR220-02/21-2-Conf-Exp-AnxIII, para. 25.

¹³ Impugned Decision, ICC-RoR220-02/21-2-Conf-Exp-AnxIII, para. 8.

detained persons to communicate by letter or telephone with his or her family, but, rather, are considered as a temporary replacement for family visits in light of the visual nature of the contact.¹⁴ The Impugned Decision further argues that the implementation of family video communication is resource-intensive, requiring financial, logistical and staff resources, as well as ensuring respect for mandatory security and confidentiality requirements.¹⁵ In this regard, specific attention is drawn to potential complexities which may arise for individual detained persons, such as the potential need for state cooperation, as well as support missions, both for technical preparation and accessing family members.¹⁶ This leads to the necessity of establishing a policy to ensure the preservation of the right to family life for all detained persons.¹⁷

III. SUBMISSIONS

A. The Application

10. Mr Ntaganda seeks judicial review of the Impugned Decision, requesting the Presidency to order the Registrar to grant a minimum of one family video communication per month for a duration of 90 minutes until the promulgation of the Policy and to provide a realistic time estimate for the latter.¹⁸ He further requests the Presidency to consider the Request as validly filed pursuant to regulation 35 of the Regulations of the Court.¹⁹
11. As to the admissibility, the Application submits that it was not filed within the prescribed time limit due to limited staff resources, team members being located across different time zones, competing judicial deadlines and present challenges in scheduling privileged legal video communications to obtain Mr Ntaganda's instructions due to the pandemic.²⁰ Mr Ntaganda submits that the reasons for the delay constitute good cause and justify the delay, out of which no prejudice will arise.²¹
12. As to the merits, Mr Ntaganda submits that the Impugned Decision mischaracterised his Complaint and Request for Review, connecting them to the feasibility of the adoption of

¹⁴ Impugned Decision, ICC-RoR220-02/21-2-Conf-Exp-AnxIII, para. 11.

¹⁵ Impugned Decision, ICC-RoR220-02/21-2-Conf-Exp-AnxIII, para. 12.

¹⁶ Impugned Decision, ICC-RoR220-02/21-2-Conf-Exp-AnxIII, paras 13, 21.

¹⁷ Impugned Decision, ICC-RoR220-02/21-2-Conf-Exp-AnxIII, para. 12.

¹⁸ Application, ICC-RoR220-02/21-1-Conf-Exp, para. 46.

¹⁹ Application, ICC-RoR220-02/21-1-Conf-Exp, para. 46.

²⁰ Application, ICC-RoR220-02/21-1-Conf-Exp, para. 40.

²¹ Application, ICC-RoR220-02/21-1-Conf-Exp, paras 44-45.

the Policy,²² whereas, in actuality, they concerned the granting of family video communication on an *ad hoc* basis pending the adoption of such Policy.²³ Mr Ntaganda further submits that the Registrar failed to properly take into account relevant factors, namely Mr Ntaganda's personal circumstances.²⁴ In particular, he highlights that the current state of his proceedings and the lack of any restrictions imposed on non-privileged telephone conversations creates a reduced risk of protected information being disclosed.²⁵ Further, he submits that the Registrar did not consider that the family video communication conducted on 1 April 2021 was easily and properly conducted without additional costs to the Court, noting that his wife is in [REDACTED].²⁶ He further submits that the Registrar's granting of only one family video communication until the promulgation of the Policy fails to ensure that his right for family life is effective.²⁷

13. Finally, Mr Ntaganda submits that it is unreasonable to grant him only one family video communication, pending the promulgation of the Policy, without further specifying a timeframe for such promulgation.²⁸
14. Mr Ntaganda requests the Presidency to consider and grant the Application and to order the Registrar to (i) provide a realistic time estimate for the promulgation of the Policy; and (ii) grant him a minimum of one family video communication per month, for a duration of 90 minutes, until such Policy is promulgated.²⁹

B. Registrar's Observations

15. As to the question of admissibility, the Registrar submits that the Application should be considered inadmissible as it was filed two days after the prescribed deadline without justification.³⁰ He argues that regulation 35(2) of the Regulations of the Court provides that where a request for extension of time has not been made before the expiration of the applicable deadline, an extension can only be granted if it is shown that the inability to

²² Application, ICC-RoR220-02/21-1-Conf-Exp, paras 14-16.

²³ Application, ICC-RoR220-02/21-1-Conf-Exp, para. 17.

²⁴ Application, ICC-RoR220-02/21-1-Conf-Exp, paras 18-19, 21.

²⁵ Application, ICC-RoR220-02/21-1-Conf-Exp, para. 19.

²⁶ Application, ICC-RoR220-02/21-1-Conf-Exp, para. 21.

²⁷ Application, ICC-RoR220-02/21-1-Conf-Exp, para. 23 *referring to* Trial Chamber V, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Decision on Non-Privileged Video-Conferencing at the Detention Centre, 3 February 2021, ICC-01/14-01/18-869-Red, (the '*Yekatom and Ngaïssona* Decision'), para. 11.

²⁸ Application, ICC-RoR220-02/21-1-Conf-Exp, para. 30.

²⁹ Application, ICC-RoR220-02/21-1-Conf-Exp, para. 46.

³⁰ Registrar's Observations, ICC-RoR220-02/21-4-Conf-Exp, para. 10.

file on time was for reasons outside his control.³¹ The Registrar submits that the various justifications offered by the Application in this regard all constitute foreseeable and known circumstances which do not constitute a reason outside Mr Ntaganda's control nor justify why a request for an extension of time could not have been submitted.³²

16. The Registrar notes that the Application has an altered content, compared to the Complaint, since it seeks an *ad hoc* mechanism for the requested family video communication with his wife in [REDACTED],³³ whereas he originally requested such communication with family located in [REDACTED],³⁴ emphasising that it is Mr Ntaganda's responsibility to make clear and substantiated submissions.³⁵ The Registrar claims that the Application is inadmissible, since the request for a family video communication located in [REDACTED] is a different request from what had been put forward in the Complaint and the Request for Review.³⁶ The Registrar informs that this request will be considered by the Acting CCO.³⁷

17. The Registrar submits that he did not mischaracterise the Request for Review.³⁸ He states that his discussion on the promulgation of the Policy was relevant to the question of the timing at the heart of the Request for Review, submitting that it would not be feasible to establish complex and *ad hoc* mechanisms for individual detained persons in addition to finalising the Policy, which is itself intended to ensure the preservation of the right to family life for *all* detained persons.³⁹ Further, the Registrar informs that the Policy should be ready for promulgation in approximately one month.⁴⁰

³¹ Registrar's Observations, ICC-RoR220-02/21-4-Conf-Exp, para. 12.

³² Registrar's Observations, ICC-RoR220-02/21-4-Conf-Exp, paras 16-18.

³³ Registrar's Observations, ICC-RoR220-02/21-4-Conf-Exp, para. 22.

³⁴ Registrar's Observations, ICC-RoR220-02/21-4-Conf-Exp, para. 21.

³⁵ Registrar's Observations, ICC-RoR220-02/21-4-Conf-Exp, para. 24.

³⁶ Registrar's Observations, ICC-RoR220-02/21-4-Conf-Exp, para. 24.

³⁷ Registrar's Observations, ICC-RoR220-02/21-4-Conf-Exp, para. 25.

³⁸ Registrar's Observations, ICC-RoR220-02/21-4-Conf-Exp, paras 28-30.

³⁹ Registrar's Observations, ICC-RoR220-02/21-4-Conf-Exp, para. 29.

⁴⁰ Registrar's Observations, ICC-RoR220-02/21-4-Conf-Exp, para. 28.

IV. DETERMINATION OF THE PRESIDENCY

18. The Registrar's Observations submit that the Application is inadmissible because (i) the filing was submitted with delay, and (ii) Mr Ntaganda amended his request as to the location of the anticipated family video communication.⁴¹

A. Delayed Submission

19. The Presidency observes that Mr Ntaganda included in his Application a request for an extension of time of two working days. According to Mr Ntaganda, he was unable to submit the Application within the regulated timeframe, due to, *inter alia*, staffing constraints, a defence team working in different time zones, competing deadlines of other court submissions, last-minute amendments to the Application and limitations concerning the arrangements for privileged video calls.⁴²

20. The Presidency notes that Mr Ntaganda submits his request for an extension of time-limit pursuant to regulation 35(2) of the Regulations of the Court, arguing that the above reasons demonstrate good cause justifying the filing delay.⁴³ The Registrar submits that said regulation provides that an extension of time requested *after* the lapse of the time-limit shall only be granted if the participant seeking the extension can demonstrate that he or she was unable to file the application within the time limit for reasons outside his or her control and that Mr Ntaganda did not demonstrate that the circumstances of the delay were outside his control.⁴⁴

21. The Presidency considers that regulation 35(2) of the Regulations of the Court is clear in its indication that an extension for time may only be granted after the lapse of the deadline where an application has not been filed in time for reasons outside of the control of the filing party. Considering the reasons submitted for the delayed submission of the Application, the Presidency, Judge Ibáñez Carranza dissenting, observes that they appear to be circumstances which, while challenging, are also ordinary in the current context of the preparation of filings before the Court, as well as being entirely foreseeable. The Presidency, by majority, does not consider that they satisfy the requisite threshold established in regulation 35(2) of being matters beyond the control of an applicant. The

⁴¹ Registrar's Observations, ICC-RoR220-02/21-4-Conf-Exp, paras 10, 19, 26.

⁴² Application, ICC-RoR220-02/21-1-Conf-Exp, para. 40.

⁴³ Application, ICC-RoR220-02/21-1-Conf-Exp, paras 39, 44.

⁴⁴ Registrar's Observations, ICC-RoR220-02/21-4-Conf-Exp, paras 12, 16-18.

majority of the Presidency emphasises that it is crucial in the judicial review process that applicants seek timely and appropriate relief if they cannot file within the applicable time-limit.⁴⁵ Accordingly, the Presidency, Judge Ibáñez Carranza dissenting, rejects *in limine* Mr Ntaganda's request for an extension of time-limit and considers the Application inadmissible.

B. Modification of the Complaint

22. Further, the Registrar submits that the Application encompasses a new request as it involves a request for family video communications with Mr Ntaganda's wife who is temporarily located in [REDACTED],⁴⁶ whereas the original Complaint and Request for Review had pertained to family video communication with his family located in [REDACTED].⁴⁷ The Registrar submits that the Application should be considered inadmissible before the Presidency on such basis.⁴⁸

23. The Presidency, Judge Ibáñez Carranza dissenting, considers that the location of the family who will participate in a family video communication is material to the decision-making on a request of this nature. Accordingly, a significant change to the scope of the request should not have been brought to the attention of the Registrar for the first time in the Application. In this respect, the majority of the Presidency welcomes the indication of the Registrar that the Acting CCO will address this as a new request⁴⁹ and the Presidency, Judge Ibáñez Carranza dissenting, considers that the Application could also be considered moot on this basis.

24. Finally, the Presidency notes that the Registrar's Observations indicate that the Policy 'should be ready for promulgation in approximately one month'.⁵⁰ Noting this commitment by the Registrar, the Presidency shares its full agreement with this approach and instructs the Registry to ensure the issuance of the Policy within one month of the date of notification of the present decision, at the latest.

⁴⁵ See e.g. Appeals Chamber, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on Mr Al Hassan's request for a time extension, 12 May 2021, ICC-01/12-01/18-1470, para. 6.

⁴⁶ Registrar's Observations, ICC-RoR220-02/21-4-Conf-Exp, para. 25.

⁴⁷ Registrar's Observations, ICC-RoR220-02/21-4-Conf-Exp, para. 21.

⁴⁸ Registrar's Observations, ICC-RoR220-02/21-4-Conf-Exp, para. 24.

⁴⁹ Registrar's Observations, ICC-RoR220-02/21-4-Conf-Exp, para. 24.

⁵⁰ Registrar's Observations, ICC-RoR220-02/21-4-Conf-Exp, para. 28.

V. CLASSIFICATION

25. In light of the classification of the Application, the present decision is classified as confidential and *ex parte*. The Presidency takes the view, however, that it would be beneficial to make this decision publicly available, including for the benefit of other detained persons. As such the Presidency hereby indicates its intention to issue a public version of the present decision redacting any references to Mr Ntaganda's family situation and the countries of residence of family members. If there is any factual or legal basis for retaining the confidential classification of this decision or if there is any other information requiring redaction prior to publication, Mr Ntaganda may inform the Presidency thereof no later than by 4pm on 4 August 2021.

In view of the above, the Presidency by majority, Judge Ibáñez Carranza dissenting:

REJECTS the Application *in limine* and **CONFIRMS** the Impugned Decision.

Judge Ibáñez Carranza's partially dissenting and separate opinion is contained below.

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



Judge Luz del Carmen Ibáñez Carranza
Acting President

Dated this 15 July 2021

At The Hague, The Netherlands

**PARTLY DISSENTING AND SEPARATE OPINION OF
JUDGE LUZ DEL CARMEN IBÁÑEZ CARRANZA**

1. I am respectfully unable to concur with the decision of the majority of the Presidency on the ‘Request for judicial review of “Decision on Mr Ntaganda’s Request for Review addressed to the Registrar received 14 April 2021’, filed confidentially and *ex parte* by Mr. Bosco Ntaganda.⁵¹ My disagreement pertains to the majority’s decision to reject the Application *in limine*, and I further emphasise several aspects I consider relevant in the context of the Application.
2. I respectfully disagree with the position of the majority of the Presidency as to the admissibility of the Application. Mr Ntaganda extensively elucidated in his Application the reasons why the latter was submitted with delay. Contrary to my distinguished colleagues, I consider that the circumstances of the pandemic are currently impeding regular work processes and complicate immediate access to counsel. In my view, this challenging situation clearly constitutes reasons outside Mr Ntaganda’s control, within the meaning of regulation 35(2) of the Regulations of the Court. Noting that discretion exists in this regard and considering that the requested time extension is very limited and that an extension of time was also granted to the Registrar,⁵² I would have granted the request for extension of time. Consequently, in my view, the majority’s dismissal of the Application *in limine* is inappropriate.
3. In addition, the Application pertains to Mr Ntaganda’s right to family life and the right for equal treatment of all detained persons. Since the Application was, in my opinion wrongly, rejected *in limine*, the Presidency’s decision does not further consider these matters. In this regard, notwithstanding that the Application introduces the new element of the changed location of the family members for the requested family video communication, I would have considered it appropriate for the majority to have engaged with the key underlying issues.
4. First, I note that a detained person’s right to family life is a fundamental human right which is well-established and articulated in international human rights law. Detained

⁵¹ Application, ICC-RoR220-02/21-1-Conf-Exp.

⁵² The Registrar’s request for an extension of time was appropriately filed before the expiration of the time limit in question.

persons are entitled to receive visits under regulation 100(1) of the Regulations of the Court and regulation 179(1) of the Regulations of the Registry to enable them to maintain family ties. I acknowledge that, in light of the ongoing pandemic, visits of any sort were temporarily suspended to protect the health and safety of the detained persons. Nonetheless, it remains the Court's obligation to protect the right to family life also in these novel and challenging circumstances. While the Court's regulatory framework only provides an entitlement to communicate by telephone or letter, pursuant to regulations 99(1)(i) of the Regulations of the Court, it is evident that family video communication, even if not replacing in-person family visits, can play a crucial role in ensuring the effectiveness of the right to family life, particularly in the present context. I would emphasise that it is the Court's responsibility to ensure that the right to family life is not devoid of any meaningful content.

5. Second, I would expressly note that the principle of equality in treatment of all detained persons is one that this Court should always uphold. All detained persons should receive the same benefits and individual circumstances should only have a limited impact in this regard. I note that Mr Ntaganda was denied to conduct regular family video communication until the promulgation of the related policy, while Trial Chamber V granted Messrs Yekatom and Ngaïssona monthly video family communication of 90 minutes.⁵³ Considering this *de facto* imbalance of treatment, it is thus my position that Mr Ntaganda should be granted family video communications at the same frequency as Messrs Yekatom and Ngaïssona who already enjoy this right upon judicial order. While the determination of Trial Chamber V does evidently not apply to other detained persons, I would have considered it necessary that all detained persons should receive the same benefits. Consequently, I would have granted Mr Ntaganda video family communication on a monthly basis, as permitted to other detained persons. I do not agree with the approach that Mr Ntaganda is required to await the promulgation of a policy until he is permitted to exercise his right to family life in the same way other detained persons are already now.

⁵³ Trial Chamber V, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Decision on Non-Privileged Video-Conferencing at the Detention Centre, 3 February 2021, ICC-01/14-01/18-869-Red.

6. Finally, I note that I fully concur with the majority's view that the Policy should be promulgated by the Registrar within one month of the date of notification of the present Presidency decision.

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



Judge Luz del Carmen Ibáñez Carranza
First Vice-President

Dated this 15 July 2021

At The Hague, The Netherlands