

DISSENTING OPINION OF JUDGE CHANG-HO CHUNG

1. For the reasons outlined below, I respectfully disagree with the decision of the Majority ('Majority Decision') to grant leave to appeal in relation to the 'Decision reviewing the restrictions placed on Mr Ntaganda's contacts' ('Impugned Decision').
2. I concur with the Majority's assessment that the formulation of the Issue is impermissibly broad and is thus incapable of constituting an appealable issue for the purposes of Article 82(1)(d) of the Statute.
3. However, I respectfully disagree with the Majority Decision in granting leave to appeal in relation to the Third Alternative Issue. In my view, the Alternative Issues, including in particular the Third Alternative Issue, would not significantly affect the fairness and expeditiousness of the proceedings.
4. I am of the view that the Defence arguments on the impact on the fairness of the proceedings are misguided.¹ Indeed, the argumentation supporting the Issue and Alternative Issues, with its focus on international human rights instruments and the protections enumerated therein,² fails to recognise that the Chamber itself explicitly acknowledged its obligation to respect the human rights of the accused in arriving at the conclusion in the Impugned Decision.³ In so arguing, the Defence appears to advance the erroneous conclusion that the Impugned Decision precludes all contact between Mr Ntaganda and the outside world, rather than conducting a balancing exercise between Mr Ntaganda's rights and the stated aims of the restrictions. The Request also fails to acknowledge that the

¹ See in this regard, Prosecution Response, ICC-01/04-02/06-1506-Red2, paras 18-19.

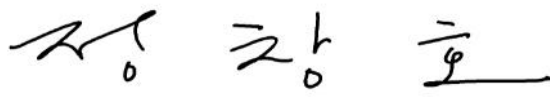
² See, for example, Request, ICC-01/04-02/06-1501-Red, para. 20: 'One of the most basic conditions of humane detention is that a prisoner be allowed to have contact with family members while in custody'.

³ See Impugned Decision, ICC-01/04-02/06-1494-Conf-Exp-Red2, para. 16 – '[T]he Chamber recalls that the European Court of Human Rights ('ECtHR') has held that: '[a]ny interference by a public authority with the exercise of the right to respect a detained person's private and family life, as well as correspondence, must be: i) in accordance with the law; ii) necessary, *inter alia*, for the prevention of disorder and crime and the protection of the rights and freedoms of others; and iii) proportionate to the legitimate aim pursued'.

Impugned Decision provides that the restrictions on Mr Ntaganda's contacts will continue to be subject to periodic review. Accordingly, I disagree with the Majority's conclusion that the Impugned Decision entailed considerations of Mr Ntaganda's fundamental human rights that impacted on the fairness of the proceedings.

5. Further, I also consider inapposite the Defence submissions that the Impugned Decision impacts Mr Ntaganda's ability to effectively participate in the proceedings against him. Mr Ntaganda himself has professed an intention to refrain from engaging in the proceedings; his stated inability to participate, and the resulting impact on the proceedings, is not a *fait accompli* stemming from the Impugned Decision.⁴ For this reason, I also disagree that the Appeals Chamber's immediate resolution of the Third Alternative Issue would materially advance the proceedings; in my view, it is mere speculation to assert that the review of the Impugned Decision by the Appeals Chamber is required to ensure Mr Ntaganda's effective participation in the proceedings, or the fairness thereof.
6. Accordingly, I would have rejected the Request.

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



Judge Chang-ho Chung

Dated this 16 September 2016

At The Hague, The Netherlands

⁴ See in this regard, Prosecution Response, ICC-01/04-02/06-1506-Red2, paras 21 and 23.