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No.: ICC-01/04-02/06  
Date: 13 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**

**Public redacted version of  
“Request for leave to appeal decision maintaining restrictions on Mr Ntaganda’s  
communications and contacts”**

**Source:** Defence Team of Mr Bosco Ntaganda

**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**

Me Stéphane Bourgon  
Me Christopher Gosnell

**Legal Representatives of Victims**

Ms Sarah Pellet  
Mr Dmytro Suprun

**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**

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**Registrar**

Mr Herman von Hebel

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

Further to the Trial Chamber's "Decision reviewing the restrictions placed on Mr Ntaganda's contacts" dated 7 September 2016 ("Decision"),<sup>1</sup> Counsel for Mr Ntaganda (the "Defence") submits this:

**Request for leave to appeal decision maintaining restrictions on Mr. Ntaganda's communications and contacts**

**"Defence Request"**

**INTRODUCTION**

1. Mr Ntaganda seeks leave to appeal the Trial Chamber's Decision to maintain virtually all restrictions on Mr Ntaganda's contacts with the outside world, including his family, that have been in place for more than a year-and-a-half. The decision impacts directly and substantially on Mr Ntaganda's human rights, including his rights to privacy and family life, his right to be presumed innocent, and his right to be treated equally. The nature and duration of the restrictions should be viewed as inherently "affect[ing] the fair conduct of proceedings" which includes detention matters vital to an accused well-being pursuant to Rule 82(1)(d) of the Rules of Procedure and Evidence.<sup>2</sup> In addition, these restrictions are having a serious impact on Mr Ntaganda's psychological well-being which, in turn, affects his ability to participate meaningfully in his defence. Continuing proceedings without immediate resolution of this issue risks hearing a substantial quantity of evidence without Mr Ntaganda's effective participation. Immediate appellate resolution is accordingly necessary to "ensur[e] that the proceedings follow

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<sup>1</sup> ICC-01/04-02/06-1494-Conf-Exp-Red2.

<sup>2</sup> All further references to "Rule" shall be understood as referring to the ICC Rules of Procedure and Evidence.

the right course,”<sup>3</sup> and to provide a “safety net for the integrity of the proceedings.”<sup>4</sup>

2. The Defence requests that the issue for which leave is granted be defined holistically as: whether the Trial Chamber erred in fact or law in maintaining the restrictions on Mr Ntaganda. In the alternative, should the Trial Chamber consider that the issues for leave should be defined more specifically, leave to appeal is sought in respect of whether the Trial Chamber: (i) erred by failing to give sufficient weight to the cumulative and ongoing impact of the restrictions on Mr Ntaganda’s rights, or by according undue weight to ostensible witness protection concerns; (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. In the further alternative, the Defence requests that the Trial Chamber re-formulate the foregoing issues for appeal as it may deem necessary and appropriate to ensure proper appellate scrutiny of the Decision.

## BACKGROUND

3. On 8 August 2014, the Prosecution asked the Trial Chamber to prohibit contacts between Mr Ntaganda and anyone outside the ICC Detention Centre. The basis for this request was allegations that Mr Ntaganda’s [REDACTED] and “others close to him” were responsible for “interference with, and intimidation of, witnesses,” which suggested improper disclosure of

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<sup>3</sup> *Situation in the Democratic Republic of the Congo*, Judgment on Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber’s 31 March 2006 Decision Denying Leave to Appeal”, ICC-01/04-168, 13 July 2006 (“Leave to Appeal Judgment”), para.15.

<sup>4</sup> *Situation in the Democratic Republic of the Congo*, Appeals Chamber, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, para.15.

information by Mr Ntaganda himself.<sup>5</sup> Despite the Registry's confirmation that Mr Ntaganda [REDACTED] the VWU also relayed [REDACTED]<sup>6</sup>

4. On 8 December 2014, on the strength of these allegations, the Trial Chamber prohibited any non-privileged visits by anyone to Mr Ntaganda.<sup>7</sup>
5. On 13 March 2015, based on a review by the Registry of telephone conversations of Mr Ntaganda since December 2013, the Trial Chamber limited his telephone contacts with the outside world to two time-slots per week which, in the event, were limited to thirty minutes each. All such conversations would be contemporaneously monitored and, if necessary, subject to immediate interruption.<sup>8</sup> These measures were imposed based on the Registry's submission that some of the phone calls since December 2013 could be interpreted as "raising intent to intimidate harm or bribe witnesses."<sup>9</sup> The Defence has received transcriptions of and translations of a certain number of conversations. None of the translations has been officially certified as accurate by the Registry.
6. On 18 August 2015, the Trial Chamber maintained the foregoing restrictions, with the added limitation that Mr Ntaganda's conversations were restricted to two individuals only, subject to contemporaneous monitoring, and could not address the trial.<sup>10</sup> Mr Ntaganda's contacts with his seven children was limited to his wife giving the telephone to the children during the two weekly time-slots, and pre-recording messages that the Registry could send to them after being reviewed.<sup>11</sup> Any family visits would be subject to active monitoring which, as a practical matter, would mean the presence of a

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<sup>5</sup> ICC-01/04-02/06-410-Conf-Exp-Red-Corr, paras. 11-12.

<sup>6</sup> ICC-01/04-02/06-410-Conf-Exp-Red-Corr, para. 34.

<sup>7</sup> ICC-01/04-02/06-410-Conf-Exp-Red-Corr, para. 51.

<sup>8</sup> ICC-01/04-02/06-508-Conf-Exp, para. 7.

<sup>9</sup> ICC-01/04-02/06-508-Conf-Exp, para. 4.

<sup>10</sup> ICC-01/04-02/06-785, pp. 35-36.

<sup>11</sup> ICC-01/04-02/06-785, para. 63.

Registry official in the room at all times while Mr Ntaganda is visited by any of his children or his wife.<sup>12</sup>

7. The Trial Chamber indicated in the 18 August Decision that it would “periodically review the continued need for the restrictions.”<sup>13</sup> The Prosecution also appears to have contemplated that the duration of the restrictions would be strictly limited to the need to hear ostensibly vulnerable witnesses who might otherwise be intimidated:

The Prosecution proposes that this additional measure of not allowing any live calls only be imposed until the end of the testimony of the last [REDACTED] witness. *The Prosecution intends to call all military and political [REDACTED] witnesses in the first group of witnesses. Accordingly, this measure will only be for a finite period of time.*<sup>14</sup>

8. The Defence did not appeal this decision. The failure to do so did not constitute any tacit acceptance of wrongdoing by Mr Ntaganda. On the contrary, despite having no burden of proof, Mr Ntaganda offered lengthy submissions on the numerous suspicions and suppositions put forward by both the Registry and the Prosecution, even though this resulted in disclosure of information touching upon Defence strategy and sources.<sup>16</sup> Mr Ntaganda also acknowledged that there had been a reference to the identity of two protected witnesses, but also explained the specific circumstances that could have been viewed as mitigating the wrongfulness of that disclosure.<sup>17</sup> The decision not to request leave to appeal did not constitute an abandonment of these submissions, but rather reflected a concern to ensure that the trial could proceed without being clouded by further allegations that might be prejudicial to the Trial Chamber’s impression of Mr Ntaganda.
9. The Prosecution, since the Trial Chamber’s 18 August 2015 decision, has called 38 witnesses over the course of 99 trial days.

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<sup>12</sup> ICC-01/04-02/06-785, para. 69.

<sup>13</sup> ICC-01/04-02/06-785, para. 70.

<sup>14</sup> ICC-01/04-02/06-635, para. 47 (italics added).

<sup>16</sup> See e.g. ICC-01/04-02/06-759-Conf-Exp, paras. 42, 45.

<sup>17</sup> ICC-01/04-02/06-759-Conf-Exp, paras. 52, 56.

10. On 1 April 2016, the Trial Chamber invited submissions on the lifting or adjustment of restrictions. In its Decision, the Trial Chamber noted that “it is not in possession of any information which suggests that, since the date of the Decision on Restrictions, Mr Ntaganda himself has, directly or indirectly, attempted to further disclose confidential information or interfere with witnesses.”<sup>18</sup> The Trial Chamber also found that the Registry had not, since the 18 August 2015 decision, identified any part of Mr Ntaganda’s conversations that contained “specific information relating to potential witnesses in his case, or to Prosecution witnesses.”<sup>19</sup>
11. The Trial Chamber, despite these findings, maintained restrictions on what appears to be at least three grounds: (i) that thirteen “[REDACTED]” remain to be called by the Prosecution<sup>20</sup> despite the ample opportunity to have called these witnesses earlier; (ii) “that preparations for any defence case should currently be actively underway” – implying that restrictions needed to be maintained to prevent coaching of Defence witnesses;<sup>21</sup> and (iii) reiterating the gravity of the conduct as previously found in the Trial Chamber’s 18 August 2015 decision.

## **I. Applicable Law**

12. A decision is subject to interlocutory appeal, pursuant to Article 82(1)(d), where it:

involves an issue that would significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial, and for which, in the opinion of the [...] Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

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<sup>18</sup> Decision, para. 28.

<sup>19</sup> Decision, para. 25.

<sup>20</sup> Decision, para. 29.

<sup>21</sup> Decision, para. 30.

13. The Appeals Chamber has defined an “issue” as “a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination.”<sup>22</sup> “Essential” in this context must be understood as meaning essential to some judicial disposition, and “not merely a question over which there is disagreement or conflicting opinion.”<sup>23</sup>
14. The notion of “materially advance” involves examination of the degree to which an “authoritative determination” of the “matter posing for decision” will “rid [...] the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial.”<sup>24</sup> The Appeals Chamber has also held that the criterion is met if immediate determination would “move forward” the proceedings, by “ensuring that the proceedings follow the right course”<sup>25</sup> and “remove[] doubts about the correctness of the decision or map[] a course of action along the right lines.”<sup>26</sup> The purpose of such an appeal is to avoid the consequences that would otherwise be embedded in the proceedings and which could “cloud or unravel the judicial process.”<sup>27</sup> The applicable threshold, importantly, is not that interlocutory resolution “*will* materially advance” the proceedings, but only that it “*may*” do so.
15. A request for certification is not concerned with whether a decision was correctly reasoned, but only whether the issues *significantly affect the fairness of the proceedings*.<sup>28</sup> This being the case, the “materially advance” criterion can be

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<sup>22</sup> *Situation in the Democratic Republic of the Congo*, Judgment on Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber’s 31 March 2006 Decision Denying Leave to Appeal”, ICC-01/04-168, 13 July 2006 (“Leave to Appeal Judgment”), para. 9.

<sup>23</sup> *Lubanga*, Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victim’s Participation of 18 January 2008, ICC-01/04-01/06-1191, 26 February 2008, para.8.

<sup>24</sup> Leave to Appeal Judgment, para. 14.

<sup>25</sup> *Id.* para. 15.

<sup>26</sup> *Id.* paras. 14-15.

<sup>27</sup> *Id.* para. 16.

<sup>28</sup> *Muthaura et al.*, Decision on the “Prosecution’s Application for Leave to Appeal the ‘Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence (ICC-01/09-02/11-185)’”, ICC-01/09-02/11-253, 18 August 2011, para. 28.



assessed only in relation to the consequences, not the correctness, of the decision from which interlocutory appeal is sought.

## II. The Correctness of the Decision to Maintain Restrictions on Mr Ntaganda is an Appealable Issue

16. The legal and factual correctness of the maintenance of restrictions on Mr Ntaganda is an appealable issue that arises from the Decision. The legal and factual grounds on which the Trial Chamber appear to have been assessed holistically as part of a balancing exercise. The most appropriate formulation of the issue for appeal in such circumstances is to preserve the holistic nature of the decision in relation to the issues for which leave to appeal is granted. Trial Chamber VI in similar circumstances rejected issues in respect of individual strands of a decision, while granting leave in respect of a more holistically defined “issue.”<sup>29</sup> Examples of similarly broadly defined appealable issues include:

The correctness of the standard and procedure established and applied by the Trial Chamber to determine whether the identity of an intermediary must be disclosed under Rule 77.<sup>30</sup>

[...]

Whether the Chamber had already made the requisite findings under Article 87(7) of the Statute that the Kenyan Government failed to comply with the Prosecution’s cooperation request, such that it ought to have referred the matter to the Assembly of States Parties (‘ASP’); or in the alternative, if the Chamber’s findings are not considered ‘formal’ or ‘judicial’ findings under Article 87(7) of the Statute, whether it had any discretion not to enter the required finding under that provision and thus refer the matter to the ASP.<sup>31</sup>

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<sup>29</sup> *Bemba et al.*, Decision on Defence request seeking leave to appeal the ‘Decision on request for compensation for unlawful detention,’ ICC-01/05-01/13-1893, paras. 7, 21 (determining that the following issue was appealable: “Whether the Chamber erred in law and in fact in finding that Mr Mangenda’s continued detention from 22 October to 31 October 2014 ‘constituted an extension of his lawful detention’ (‘Sixth Issue’)”).

<sup>30</sup> *Lubanga*, Decision on the prosecution request for leave to appeal the “Decision on Intermediaries”, ICC-01/04-01/06-2463-Conf, 2 June 2010, paras. 2, 8.

<sup>31</sup> *Kenyatta*, Decision on the Prosecution’s request for leave to appeal, ICC-01/09-02/11-1004, 9 March 2015 (“*Kenyatta* Decision on Leave to Appeal”), para. 9(i), 25.

17. If the Trial Chamber disagrees with this holistic formulation, then leave is sought in the alternative as to whether the Trial 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. These issues were directly addressed in the Decision;<sup>32</sup> appear to have been essential to the Trial Chamber's ultimate decision,<sup>33</sup> and is not a matter over which there is mere disagreement.
18. A Trial Chamber has the discretion to re-formulate issues posited for appeal as it deems necessary and fit<sup>34</sup> and such issues may be formulated in the alternative.<sup>35</sup> The Defence accordingly requests in the further alternative that the Trial Chamber reformulate the aforementioned issues as it deems necessary and fit to ensure proper appellate review of the Decision.

### **III. The Decision Significantly Affects the Fairness of Proceedings, Which Should be Understood as Including Conditions of Detention Vital to a Defendant's Psychological Well-Being**

19. The Appeals Chamber has held that a Trial Chamber ought to 'exercise its discretion to broadly interpret the two prongs of [A]rticle 82(1)(d) of the Statute if it considers it necessary due to human rights considerations under [...] [A]rticle 21(3) of the Statute'.<sup>36</sup> "Proceedings" cannot be read narrowly as including only the modalities of questioning witnesses or the scope of

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<sup>32</sup> Decision, paras. 21-30.

<sup>33</sup> Decision, paras. 31-38.

<sup>34</sup> *Ruto et al.*, Decision on Prosecution's Application for Leave to Appeal the 'Decision on Mr. Ruto's Request for Excusal from Continuous Presence at Trial', ICC-01/09-01/11-817, 18 July 2013, para. 20.

<sup>35</sup> *Kenyatta* Decision on Leave to Appeal, para. 9(i), 25.

<sup>36</sup> Decision on the "Requête en appel de la défense de monsieur Aimé Kilolo Musamba contre la décision de la Chambre de première instance VII du 17 novembre 2015," 23 December 2015, ICC-01/05-01/13-1533 (OA 12), para. 16.

disclosure. The conditions in which an accused – who is under the direct supervision and custody of the Trial Chamber – is held must also be considered to be “proceedings” for the purposes of Rule 82(1)(d). Matters ancillary to the trial itself have likewise been recognized as being “proceedings” in their own right.<sup>37</sup>

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. Such contact is essential to at least two foundational human rights: the right to be treated with “humanity and with respect to the inherent dignity of the human person”;<sup>38</sup> and the right to respect for family life.<sup>39</sup> The right to family life is a universally accepted value, having been incorporated into the ICCPR, the Banjul Charter, and the European Convention on Human Rights. The UN Human Rights Committee has affirmed that the rights of prisoners who have been convicted – let alone those who are detained while still presumed innocent – “must be guaranteed under the same conditions as for that of free persons [...] subject to the restrictions that are unavoidable in a closed environment.”<sup>41</sup>

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<sup>37</sup> *Bemba et al.*, Decision on Defence request seeking leave to appeal the ‘Decision on request for compensation for unlawful detention,’ ICC-01/05-01/13-1893, 13 May 2016 (“For this purpose, the Chamber considers the ‘proceedings’ at hand to be the compensation proceedings of which it is seised. In the context of these compensation proceedings, the Chamber concurs with the Defence that the Impugned Decision constitutes the final disposition of matters involving Mr Mangenda’s fundamental human rights, and that the Sixth Issue, which relates to the lawfulness of Mr Mangenda’s detention, bears upon such rights.”)

<sup>38</sup> ICCPR, Art. 10(1).

<sup>39</sup> *Id.* Art. 23 (“The family is the natural and fundamental group unit of society and is entitled to protection by society and the State”); European Convention on Human Rights (“European Convention”), Art. 8 (“1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”); African (Banjul) Charter on Human and Peoples’ Rights (“Banjul Charter”), Art. 18 (“1. The family shall be the natural unit and basis of society. It shall be protected by the Statute which shall take care of its physical health and morals. 2. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.”)

<sup>41</sup> HRC General Comment No. 21: Article 10 (Humane Treatment of Persons Deprived of Their

21. The United Nations has elaborated specific minimum standards to uphold prisoners' right to family life. Rule 37 of the *Standard Minimum Rules for Treatment of Prisoners* of 1957 provides that "prisoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits."<sup>42</sup> Principle 19 of *The Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment* of 1988 elevates family visitation to a "right" in itself: "A detained or imprisoned person shall have the *right* to be visited by and to correspond with, in particular, members of his family."<sup>43</sup> Principle 20 of the UN Protection Principles provides that "[i]f a detained or imprisoned person so requests, he shall if possible be kept in a place of detention or imprisonment reasonably near his usual place of residence."
22. The length of time between family visits is an important consideration in the jurisprudence of the ECtHR. Thus, a husband and wife were prohibited from direct contact for one year by Polish authorities, although written communication was still permitted.<sup>44</sup> The European Court of Human Rights accepted that the measures might have been justified "initially" but found that a violation arose with the passage of time:

[W]ith the passage of time and given the severity of the measures, as well as the authorities' general obligation to assist the applicant in maintaining contact with his family during his detention, the situation called, in the Court's opinion, for a careful review of the necessity of keeping him in a complete isolation from his wife."<sup>45</sup>

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Liberty), Adopted at the Forty-fourth Session of the Human Rights Committee, on 10 April 1992, para. 3. See also The Basic Principles for the Treatment of Prisoners, affirmed by the UN General Assembly resolution 45/111 of 14 Dec. 1990, para. 5 ("Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants.")

<sup>42</sup> *Standard Minimum Rules for Treatment of Prisoners* of 1957.

<sup>43</sup> *The Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment* of 1988, (emphasis added).

<sup>44</sup> *Klamecki v. Poland* (No. 2), 31583/96 (2003), paras. 72-73, 100, 149.

<sup>45</sup> *Id.* paras. 150-151.

The Court, in the absence of any adequate justification, and “having regard to the duration and nature of the restrictions”, declared a violation of the right to family life.<sup>46</sup>

23. The rights at stake are not only those of Mr Ntaganda. The effect of a parent’s detention on a child must be assessed with particular care when the latter’s rights are at stake. Thus, “[d]epriving a child of her family life is altogether more serious than depriving an adult of his.”<sup>47</sup> The best interests of the child must be a primary consideration,<sup>48</sup> bearing in mind that “a child is not to be held responsible for the moral failures of either of his parents.”<sup>49</sup> Article 3(1) of the UN *Convention on the Rights of the Child* expressly requires that “[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”
24. Even if the conditions of detention are not inherently part of the “proceedings,” any decisions that have a major practical impact on the capacity of an accused to participate in his Defence must be considered as having at least a “significant impact” on the fairness of the proceedings. Deprivation of intimate family contact for a period exceeding a year-and-a-half; limiting communications to one hour per week; and otherwise prohibiting contact with the outside world evidently will have severe psychological consequences for any normal person. The degree of deprivation of human contact, given the limited number of detainees at the ICC Detention Centre and the absence of anyone who shares Mr Ntaganda’s mother tongue, constitutes what the European Court of Human Rights has described as

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<sup>46</sup> *Id.* para. 152. See *Kučera v. Slovakia*, 48666/99 (2007), paras. 126-127 (finding a violation of the right to family life arising from a prohibition of family visits between husband and wife for thirteen months, without any satisfactory justification).

<sup>47</sup> *HH v Deputy Prosecutor of the Italian Republic* [2013] 1 AC 338, para. 33.

<sup>48</sup> *ZH (Tanzania) v Secretary of State for the Home Department* [2011] 2 AC 166, para. 24 (“any decision which is taken without having regard to the need to safeguard and promote the welfare of any children involved will not be ‘in accordance with the law’ for the purpose of article 8(2)”).

<sup>49</sup> *EM (Lebanon) v. Secretary of State for the Home Department* [2008] UKHL 64, para. 49.

“relative isolation”: “The Court nevertheless wishes to emphasise that solitary confinement, even in cases entailing only *relative isolation*, cannot be imposed on a prisoner indefinitely.”<sup>50</sup>

25. Mr Ntaganda’s isolation has had a substantial impact on his well-being and, therefore, his capacity to participate effectively in his Defence. While the Defence has not yet had the opportunity to submit medical evidence in support of this claim, the Trial Chamber should accept as a matter of common sense and common knowledge that the degree of family separation and social isolation involved could naturally occasion such consequences.
26. Effective participation in one’s own trial is a fundamental right.<sup>51</sup> The physical presence of an accused does not constitute, in itself, effective participation.

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<sup>50</sup> *Case of Ramirez Sanchez. V. France*, (59450/00) (2006), para. 145.

<sup>51</sup> ECHR, *G v. France*, Application No. 27244/09, Judgment, 23 May 2012, para. 52 (citations omitted) (italics added) (translation: “[i]n principle, the right of an accused under Article 6, to participate effectively in his trial includes the right not only to attend, but also to hear and follow the proceedings. Inherent in the very notion of adversarial proceedings, these rights may also be inferred from the right of the accused, particularly set out in Article 6 § 3 c), to ‘defend himself.’ The ‘effective participation’ in this context presupposes that the accused has a broad understanding of the nature and importance for him of the trial, including the scope of any penalty which may be imposed. It must be able to explain to his lawyers his version of events, report any statements with which he would not agree and inform them of any facts which should be put forward in his defense”). *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-PT, Decision on Start of Trial and Modalities for Trial, 29 May 2009, Annex para. 8 (“[u]pon hearing the Reporting Medical Officer or the independent medical expert the Chamber shall determine that either: (a) Mr. Stanišić is well enough to participate [...]; or (b) Mr. Stanišić is too unwell to participate in the proceedings in either way, *in which case the Chamber shall adjourn the proceedings until the next scheduled court session*”) (italics added); *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-T, Second Decision Amending Modalities for Trial, 1 September 2009, Annex A, para. 8 (b); *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-T, Transcript, T. 18804 (29 March 2012) (“the Chamber fully acknowledges that being present at your own trial is a fundamental right, and we do not want in any way to bargain with that”); *The Prosecutor v. Strugar*, Case No. IT-01-42-T, Decision re the Defence Motion to Terminate Proceedings, 26 May 2004, para. 32 (“[t]he Trial Chamber further notes that, in principle, trial *in absentia* are not permitted before the Tribunal. This rule would appear to be devoid of any substance if it related to the mere physical presence of the accused in court. As the presence of the accused has been held to be indispensable for the determination of guilt or innocence, the requirement of presence appears to be to ensure the presence of an accused person who is capable of assisting the Tribunal by the presentation of his or her defence”); *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Transcript, T. 8973-8974 (4 November 1997) (“JUDGE KARIBI-WHYTE: [...] the case is suspended while he is unable to be here. There is no dispute about that. He has a right to be here while the trial is going on”; “JUDGE JAN: He can waive his right, but this is his right, therefore no part of the proceedings can be held in his absence, unless he waives his right and authorizes Mr. Ackerman to represent him. MR. NIEMANN: I am not arguing with that”).

Conditions of detention that have a major impact on the capacity of an accused to exercise the right of effective participation, accordingly, is a matter that affects the fair conduct of proceedings under Rule 82(1)(d).

**IV. Immediate Resolution May Materially Advance the Proceedings**

27. The respect of Mr Ntaganda's rights while in detention will be materially advanced by immediate appellate resolution. The absence of interlocutory resolution would mean that the prejudice and violation of rights caused by any error will not be subject to any remedy until after the violation has occurred. This aspect of the proceedings will, accordingly, be materially advanced by interlocutory resolutions.
28. The trial proceedings as a whole may also be materially advanced by immediate resolution. Mr Ntaganda's ability to participate in his defence is directly affected by the Decision. All of the witnesses in the current evidential block, and perhaps beyond, may be heard without the effective participation of the accused unless there is appellate resolution of the present issue. Further, any portion of the case that is heard without cross-examination or without instructions to proceed will not assist the Trial Chamber in its assessment of the evidence.

**CONCLUSION**

29. Leave to appeal the Decision is requested pursuant to Article 82(1)(d). The issues as previously described are essential to the correctness of the Decision and are, accordingly, appealable. The issues are matters upon which there is not only disagreement, but that are essential to the Trial Chamber's determination. Granting leave to appeal in respect of the issues as defined above affects, whether directly or indirectly, the fairness of proceedings, for which immediate resolution may materially advance the proceedings.

**CONFIDENTIALITY**

30. Pursuant to Regulations 23*bis* (1) and (2) of the Regulations of the Court, the current filing is classified as confidential *ex parte* pending redaction of references to confidential *ex parte* filings.

**RESPECTFULLY SUBMITTED ON THIS 13<sup>TH</sup> DAY OF SEPTEMBER 2016**

A handwritten signature in black ink, appearing to read 'StB-'.

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands