

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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No.: ICC-01/04-02/06
Date: 16 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

**Decision on Defence request for leave to appeal the ‘Decision reviewing the
restrictions placed on Mr Ntaganda’s contacts’**

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 Bosco Ntaganda

Mr Stéphane Bourgon
Mr Christopher Gosnell

Legal Representatives of Victims

Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

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Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Mr Patrick Craig

**Victims Participation and Reparations
Section**

Others

Trial Chamber VI ('Chamber') of the International Criminal Court, in the case of *The Prosecutor v. Bosco Ntaganda* ('Ntaganda case'), having regard to Article 82(1)(d) of the Rome Statute ('Statute'), issues by Majority, Judge Chung dissenting, this 'Decision on Defence request for leave to appeal the "Decision reviewing the restrictions placed on Mr Ntaganda's contacts"'.

I. Background

1. On 18 August 2015, the Chamber issued a decision ordering, *inter alia*, certain restrictions that had been placed on Mr Ntaganda's communications on an interim basis to remain in place ('Restrictions').¹
2. On 7 September 2016, the Chamber issued the 'Decision reviewing the restrictions placed on Mr Ntaganda's contacts', in which it decided to, *inter alia*: (i) maintain the Restrictions; (ii) reinstate a certain individual to Mr Ntaganda's list of non-privileged contacts; and (iii) continue to periodically review the Restrictions ('Impugned Decision').²
3. On 13 September 2016, the defence team for Mr Ntaganda ('Defence') filed a request for leave to appeal the Impugned Decision ('Request').³
4. On the same day, the Chamber shortened the deadline for responses to the Request to 14 September 2016.⁴

¹ Decision on Prosecution requests to impose restrictions on Mr Ntaganda's contacts, ICC-01/04-02/06-785-Conf-Exp. A public redacted version was filed on the same day as ICC-01/04-02/06-785-Red.

² ICC-01/04-02/06-1494-Conf-Exp, confidential, *ex parte*, Registry only. Two confidential, *ex parte*, redacted versions were filed on the same day, Prosecution and Registry only (ICC-01/04-02/06-1494-Conf-Exp-Red) and Defence and Registry only, respectively (ICC-01/04-02/06-1494-Conf-Exp-Red2). A public redacted version was also filed the same day (ICC-01/04-02/06-1494-Red3).

³ Request for leave to appeal decision maintaining restrictions on Mr Ntaganda's communications and contacts, ICC-01/04-02/06-1501-Conf-Exp, confidential, *ex parte*, Defence, Prosecution and Registry only. On the same day, a public redacted version was filed (ICC-01/04-02/06-1501-Red).

⁴ See Transcript of hearing on 13 September 2016, ICC-01/04-02/06-T-130-CONF-ENG ET, page 17, lines 12-13.

5. On 14 September 2016, the Office of the Prosecutor ('Prosecution') filed a response ('Prosecution Response').⁵ On the same day, the Legal Representatives of the Victims ('LRVs') each filed a response.⁶

II. Submissions

6. The Defence seeks leave to appeal on 'whether the Trial Chamber erred in fact or law in maintaining the restrictions on Mr Ntaganda' ('Issue'). In the alternative, leave to appeal is sought in respect of whether the 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' ('First Alternative Issue'); (ii) 'erred in its evaluation of Mr Ntaganda's conduct and the ostensible witness protection risk arising therefrom' ('Second Alternative Issue'); 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' ('Third Alternative Issue', and together, 'Alternative Issues'). In the further alternative, the Defence requests that the Chamber formulate its own issues 'as it may deem necessary and appropriate to ensure proper appellate scrutiny of the [Impugned] Decision'.⁷
7. The Defence argues that the 'legal and factual correctness' of the maintenance of the Restrictions constitutes an appealable issue arising from the Impugned

⁵ Prosecution's response to the Defence's request for leave to appeal the decision reviewing restrictions placed on Mr Ntaganda's contacts, ICC-01/04-02/06-1506-Conf-Exp, confidential, *ex parte*, Prosecution and Registry only, notified on 15 September 2016. A confidential, *ex parte*, redacted version available to the Prosecution, Defence and Registry only was also notified on 15 September 2016 (ICC-01/04-02/06-1506-Conf-Exp-Red), as was a public redacted version (ICC-01/04-02/06-1506-Red2).

⁶ 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'", ICC-01/04-02/06-1505 ('Response of LRV of Victims of the Attacks'); Former child soldiers' response to the "Public redacted version of 'Request for leave to appeal decision maintaining restrictions on Mr Ntaganda's communications and contacts'", ICC-01/04-02/06-1507 ('Response of LRV of Former Child Soldiers'), notified on 15 September 2016.

⁷ Request, ICC-01/04-02/06-1501-Red, paras 2 and 17-18.

Decision. It avers that a 'holistic' formulation of the Issue is appropriate in the circumstances, and argues that other chambers of the Court have certified similarly broadly-formulated issues for appeal.⁸

8. The Defence submits further that the Issue significantly affects the fairness of the proceedings, 'which should be understood as including conditions of detention vital to a defendant's psychological well-being'.⁹ Noting that the Appeals Chamber has ruled that a 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', the Defence argues that the conditions of detention must be held to be considered part of the 'proceedings' for the purposes of Article 82(1)(d) of the Statute.¹⁰ Submitting that effective participation in one's own trial is a fundamental right, the Defence argues that, even if the conditions of detention cannot be said to be part of the 'proceedings', their practical impact on the accused's capacity to participate in his defence means that they at least have a 'significant impact' on the fairness of the proceedings.¹¹
9. The Defence further avers that immediate resolution of the Issue or Alternative Issues may materially advance the proceedings on the basis that, *inter alia*, effective participation of the accused cannot occur 'unless there is appellate resolution of the present [I]ssue'.¹²

⁸ Request, ICC-01/04-02/06-1501-Red, para. 16, referring to *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the prosecution request for leave to appeal the "Decision on Intermediaries", 2 June 2010, ICC-01/04-01/06-2463 and *The Prosecutor v. Uhuru Muigai Kenyatta*, Decision on the Prosecution's request for leave to appeal, 9 March 2015, ICC-01/09-02/11-1004.

⁹ Request, ICC-01/04-02/06-1501-Red, page 10.

¹⁰ Request, ICC-01/04-02/06-1501-Red, para. 19, referring to referring to *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, 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) ('Decision of 23 December 2015'), para. 16.

¹¹ Request, ICC-01/04-02/06-1501-Red, paras 24-26.

¹² Request, ICC-01/04-02/06-1501-Red, paras 27-28.

10. The Prosecution submits that the Request ought to be rejected on the basis that both the Issue and Alternative Issues fail to ‘rise beyond mere discontent with the [Impugned] Decision’.¹³ Specifically, it avers that the Issue is insufficiently specific and is thus not appealable, and that the Alternative Issues do not accurately reflect the reasoning or outcome of the Impugned Decision and thus do not arise therefrom.¹⁴ The Prosecution argues that the Request should be dismissed on this basis alone as failing to meet the first of the aggregate Article 82(1)(d) criteria.¹⁵
11. However, the Prosecution also argues that neither the Issue nor the Alternative Issues show any significant and cumulative impact on the fairness *and* expeditious conduct of the proceedings, and that in any event, the Defence arguments relating to the Impugned Decision’s purported impact on the fairness of proceedings are not reflective of the outcome of the Impugned Decision. The Prosecution avers that the Defence fails to put forward any arguments relating to the outcome of the trial, and that ‘[i]ndeed, none can be shown’.¹⁶ Finally, the Prosecution submits that immediate resolution of the Issue would not materially advance the proceedings, arguing that Mr Ntaganda’s purported inability to participate in the proceedings as a result of the Impugned Decision is mere speculation, and that the Request therefore fails to meet the criteria under Article 82(1)(d) of the Statute.¹⁷
12. The LRVs also argue that the Request should be rejected on the basis that the criteria under Article 82(1)(d) of the Statute are not met, averring that the Request constitutes a ‘mere disagreement’ with the Impugned Decision.¹⁸

¹³ Prosecution Response, ICC-01/04-02/06-1506-Red2, para. 2.

¹⁴ Prosecution Response, ICC-01/04-02/06-1506-Red2, paras 2 and 6-14.

¹⁵ Prosecution Response, ICC-01/04-02/06-1506-Red2, paras 2 and 15.

¹⁶ Prosecution Response, ICC-01/04-02/06-1506-Red2, paras 17-22.

¹⁷ Prosecution Response, ICC-01/04-02/06-1506-Red2, para. 23.

¹⁸ Response of LRV of Victims of the Attacks, ICC-01/04-02/06-1505, paras 2, 13 and 16; Response of LRV of Former Child Soldiers, ICC-01/04-02/06-1507, paras 2 and 7.

III. Analysis

13. The Chamber incorporates by reference the applicable law as set out in previous decisions.¹⁹
14. The Chamber will first consider whether the Issue, and each of the Alternative Issues, constitute appealable issues arising from the Impugned Decision.
15. In this regard, the Chamber recalls the Appeals Chamber's finding that only an 'issue' may form the subject of an appealable decision, which is to comprise 'an identifiable subject or topic requiring a decision for its resolution'.²⁰ The Chamber considers the Defence's broad formulation of the Issue to be inconsistent with this requirement, insofar as it constitutes disagreement with the Impugned Decision as a whole rather than identifying a sufficiently discrete issue stemming therefrom.²¹ The Chamber therefore considers that the Defence has failed to specify the alleged legal or factual issue in a manner which could constitute an appealable issue for the purposes of Article 82(1)(d) of the Statute.
16. The Chamber notes that the three Alternative Issues overlap significantly in their scope and subject matter. Indeed, each of the Alternative Issues appears to simply identify the various factors balanced by the Chamber in arriving at the Impugned Decision; in particular, in its determination of 'whether the continuation of current restrictions and/or additional restrictions are necessary

¹⁹ See for example Decision on Defence request for leave to appeal the Chamber's decision on postponement of the trial commencement date, 4 August 2015, ICC-01/04-02/06-760-Red, paras 20-21.

²⁰ *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 (OA 3) ('DRC Appeals Judgment'), para. 9.

²¹ See similarly, Decision on the Defence request for leave to appeal the Chamber's decision on postponement of the trial commencement date, 21 May 2015, ICC-01/04-02/06-604, para. 17; *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on the joint defence request for leave to appeal the decision on witness preparation, 11 February 2013, ICC-01/09-01/11-596, paras 11-12 and 17-18; *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on the request for leave to appeal the 'Decision on witness preparation and familiarisation, 13 January 2016, ICC-02/11-01/15-388, paras 10-12; Decision on request for leave to appeal the 'Fourth decision on matters related to disclosure and amendments to the List of Evidence' and other issues related to the presentation of evidence by the Office of the Prosecutor, 13 May 2016, ICC-02/11-01/15-524, para. 16.

and proportionate to the aim previously identified by the Chamber, namely “to ensure the safety of witnesses, prevent breaches of confidentiality and ensure the integrity of the proceedings”²². The Chamber further finds that the Alternative Issues are formulated in a general manner, insofar as they point to potential alleged errors in the Chamber’s overall balancing exercise in arriving at the conclusion that the Restrictions ought to be maintained.

17. However, the Chamber considers that the Third Alternative Issue, as formulated, is sufficiently specific so as to constitute an ‘identifiable subject or topic’ arising from the Impugned Decision, given its link to certain concrete legal bases of the Impugned Decision, namely: (i) the requirement that ongoing restrictions be ‘necessary and proportionate’; and (ii) the role of Regulation 101(2) of the Regulations of the Court.²³ Accordingly, the Chamber considers the Third Alternative Issue to constitute an appealable issue arising from the Impugned Decision and shall therefore proceed to assess whether the remaining requirements of Article 82(1)(d) are met.
18. In conducting this assessment, the Chamber recalls the Appeals Chamber’s guidance that a 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’.²⁴ In this regard, the Chamber finds that, in ordering that the Restrictions be maintained, the Impugned Decision entailed considerations of Mr Ntaganda’s fundamental human rights, and that the Third Alternative Issue, which relates to the lawfulness of the limitations on Mr Ntaganda’s right to family and private life in a custodial setting, bears upon such rights.²⁵ In light of this, the Chamber

²² Impugned Decision, ICC-01/04-02/06-1494-Red3, para. 17.

²³ Impugned Decision, ICC-01/04-02/06-1494-Red3, paras 16-18.

²⁴ Decision of 23 December 2015, ICC-01/05-01/13-1533, para. 16.

²⁵ *See, for example*, Article 12 of the Universal Declaration of Human Rights and Articles 9(1), 10 and 17 of the International Covenant on Civil and Political Rights.

considers that the fairness of the proceedings would be significantly affected if the Chamber had wrongly decided the Third Alternative Issue. It is further recalled in this regard that the Restrictions were imposed, and maintained, in order to safeguard interests which are fundamental to the fairness of the proceedings, including to ensure the safety of witnesses, prevent breaches of confidentiality and ensure the integrity of the proceedings. The Chamber also considers the Third Alternative Issue to bear upon the expeditious conduct of the proceedings insofar as it relates to ongoing litigation that has entailed numerous written filings and extensive in-court submissions, and which has been resource-intensive for all concerned.²⁶

19. Finally, in light of the aforementioned impact of the Impugned Decision, the Chamber considers that immediate resolution of the Third Alternative Issue would materially advance the proceedings and would be an appropriate way in which to remove any doubt as to the correctness of the Impugned Decision, thus providing a 'safety net for the integrity of the proceedings'.²⁷

²⁶ See, in this regard, ICC-01/04-02/06-1111-Conf-Exp, paras 18 and 24, plus Annex C, (ICC-01/04-02/06-1111-Conf-Exp-AnxC).

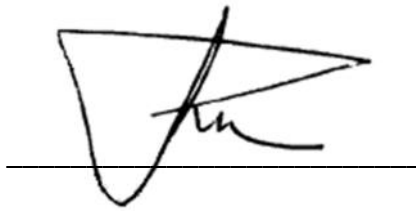
²⁷ DRC Appeals Judgment, ICC-01/04-168, para. 15.

FOR THE FOREGOING REASONS, THE CHAMBER, BY MAJORITY, HEREBY

GRANTS leave to appeal the Impugned Decision on the Third Alternative Issue.

Judge Chung appends a dissenting opinion.

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

A handwritten signature in black ink, appearing to be 'R. Fremr', written over a horizontal line.

Judge Robert Fremr, Presiding Judge

A handwritten signature in black ink, appearing to be 'K. Ozaki', written over a horizontal line.

Judge Kuniko Ozaki

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Judge Chang-ho Chung

Dated this 16 September 2016

At The Hague, The Netherlands