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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 “Prosecution’s response to the Defence’s request for leave to appeal the decision reviewing restrictions placed on Mr Ntaganda’s contacts”, 14 September 2016

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Introduction

1. The *Ntaganda* Defence's request for leave to appeal the Decision reviewing the restrictions placed on Mr Ntaganda's contacts¹ should be rejected. This Application is merely a conduit—and one in a series of actions—to express Mr Ntaganda's opposition to the Decision.

2. The alleged issue²—whether broadly or narrowly framed—fails to rise beyond mere discontent with the Decision. The Defence's preferred "holistic" formulation of the Issue is insufficiently specific and thus, not appealable. Nor are the identified alternative formulations appealable: rather, they fail to properly reflect the Decision's outcome and the Chamber's compelling reasoning to continue the restrictions on Mr Ntaganda's contacts and thus do not even arise from the Decision.

3. Likewise, the Issue, and its alternative formulations, fail to show any significant impact on the fairness and expedition of the proceedings, or the outcome of the trial. Moreover, the Appeals Chamber's immediate resolution of the Issue would not materially advance the proceedings. The Application fails to meet the article 82(1)(d) test for leave to appeal.

Level of Confidentiality

4. The Prosecution files this submission as "Confidential, *ex parte*" pursuant to regulation 23*bis* of the Regulations of the Court, since it refers to a confidential *ex parte* decision. The Prosecution will file confidential redacted and public redacted versions.

¹ [REDACTED] ICC-01/04-02/06-1494-Red3 ("Decision"); [REDACTED] ICC-01/04-02/06-1501-Red ("PRV of Application").

² Here, "Issue".

Submissions

5. The Application must fail: the Issue is a manifest contrary opinion, and does not identify “[a] subject or topic requiring a decision for its resolution”.³ Nor, when the Application misapprehends aspects of the Decision, do the alternative formulations of the Issue “arise” in “the judicial cause under examination.”⁴

i. The Issue is not appealable

6. The Issue—whether the Trial Chamber erred in fact or law in maintaining the restrictions on Mr Ntaganda ⁵—is not appealable. The Issue is generic, and attempts to impugn the entire rationale of the Decision, without stating more. The Defence’s imprecise criticism of the Chamber’s decision cannot qualify as an appealable issue.

7. Nor are the Defence’s alternative formulations of the Issue appealable. The Defence re-submits the Issue as follows:

- a) Whether the Trial Chamber erred by failing to give sufficient weight to the cumulative and ongoing impact of the restrictions on Mr Ntaganda’s rights (“First Alternative Issue”);
- b) Whether the Trial Chamber erred in its evaluation of Mr Ntaganda’s conduct and the ostensible witness protection risk arising therefrom (“Second Alternative Issue”); and
- c) Whether the Trial Chamber 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”).⁶

³ See ICC-01/04-168 OA3, para. 9.

⁴ *Ibid.*

⁵ Application, para. 2.

⁶ Application, paras. 2, 17.

Despite the Defence's unsubstantiated submissions,⁷ these alternative formulations of the Issue are—equally—mere contrary opinions. They too fail to fully recognise the proper outcome of the Decision,⁸ and thus do not arise from it.

8. Indeed, the Application as a whole fails to acknowledge the Chamber's exhaustive reasoning justifying continued restrictions on Mr Ntaganda's contacts. Not only did the Chamber conclude that certain restrictions on Mr Ntaganda's contacts remained necessary "to ensure the safety of witnesses, prevent breaches of confidentiality and ensure the integrity of the proceedings",⁹ it found the restrictions "to be the least restrictive means available to achieve these objectives."¹⁰ Although the Defence considers this "balancing exercise" in passing,¹¹ it does not properly acknowledge the Chamber's nuanced reasoning which was critical to the Decision's outcome. The Defence's failure to thus engage with the Chamber's analysis renders the Issue, and its alternative formulations, abstract.

9. Moreover, when the Defence recites the Chamber's justification for continuing the restrictions, it does so only partially.¹² Contrary to the picture depicted by the Defence, the Chamber's reasoning was meticulous in its legal and factual findings.¹³

10. *First*, in reviewing the restrictions, the Chamber was guided by the appropriate standard, *i.e.*, whether the restrictions remained necessary and proportionate, and whether there were any alternative less restrictive means to ensure the safety of

⁷ *Contra* Application, para. 17.

⁸ See *e.g.*, Application, paras. 2, 16-17, stating the Issues, and claiming they are "essential to the Trial Chamber's ultimate decision", but without acknowledging the Chamber's reasoning. See also Application, para. 11, providing a brief, and incomplete, review of the Chamber's reasoning.

⁹ Decision, para. 33. See also Decision, paras. 16-32.

¹⁰ Decision, para. 34.

¹¹ Application, para. 16.

¹² See Application, para. 11, where the Defence alleges that the Chamber maintained restrictions on "what appears to be at least three grounds: (i) that [REDACTED] witnesses' remain to be called by the Prosecution 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; and (iii) reiterating the gravity of the conduct as previously found in the Trial Chamber's 18 August 2015 decision."

¹³ Decision, paras. 16-41.

witnesses, prevent breaches of confidentiality and ensure the integrity of the proceedings.¹⁴ Although the passage of time and severity of measures “require a careful review of the necessity of the measures[...]”, “[t]he passage of time alone will not necessarily require the lifting or adjustment of the measures imposed.”¹⁵

11. *Second*, the Chamber found that continuing the restrictions was necessary.

- Not only did it recall its previous findings underscoring the gravity of Mr Ntaganda’s conduct,¹⁶ it found that these factors remained germane, given that such conduct may “have a serious and ongoing impact on both the witnesses in the *Ntaganda* case, and on the proceedings more generally.”¹⁷
- [REDACTED].¹⁸
- [REDACTED].¹⁹
- The Chamber also considered the current stage of the proceedings. Over 50 Prosecution witnesses, [REDACTED] are yet to testify. Moreover, the allegations of attempted witness interference extended beyond the four [REDACTED] witnesses who had previously been subject to witness interference. The Chamber also considered it relevant that “[p]reparations for any defence case should currently be actively underway”.²⁰

12. *Third*, the Chamber found that continuing the restrictions was proportionate. Although Mr Ntaganda’s telephone calls and visits are actively monitored, he is

¹⁴ Decision, paras. 16, 17, 21. *See also* [REDACTED]

¹⁵ Decision, para. 18.

¹⁶ Decision, para. 22, noting “that there are reasonable grounds to believe that Mr Ntaganda: (i) abused his entitlement to communications by speaking to non-registered interlocutors without prior approval of the Registry; (ii) used coded language ‘to disguise attempts to disclose confidential information or to interfere with witnesses’; (iii) disclosed the identity of Prosecution witnesses in circumstances which the Chamber found to be of ‘grave concern’; (iv) ‘intended to engage in a serious form of witness interference’; (v) ‘instructed his interlocutors to coach witnesses, or directly told his interlocutors which story to tell, stressing the need to tell the story in the manner described by [him] and the necessity of synchronising the stories.’”

¹⁷ Decision, para. 22.

¹⁸ [REDACTED].

¹⁹ [REDACTED]

²⁰ Decision, paras. 29-30.

permitted to contact [REDACTED], his wife and his children and to receive visits from them. He is also permitted to discuss trial dates with his non-privileged contacts.²¹ Likewise, the Chamber granted the Defence's request to reinstate the "removed person" on Mr Ntaganda's authorised list of contacts.²²

13. Contrary to the Chamber's sound reasoning and decision, the Issue and its alternative formulations appear to wrongly assume that Mr Ntaganda has been disallowed *all* contact. And even if not, the issues presented only superficially represent the Decision, do not arise from it and express mere dissent.

14. For these reasons, the Issue, and the First, Second and Third Alternative Issues, should be dismissed.

ii. The remaining article 82(1)(d) criteria are not met

15. Article 82(1)(d) criteria are cumulative: a failure to fulfil any one of the criteria is fatal to any application for leave to appeal.²³ Since the Issue, and its alternative formulations, are not appealable, they should be dismissed without further consideration.

16. In addition, the Issue, and its alternative formulations, do not meet the remaining article 82(1)(d) criteria.

17. The Defence fails to show any impact on the fair *and* expeditious conduct of the proceedings.²⁴ Indeed, any successful application for leave to appeal must cumulatively demonstrate the impact on "fairness" *and* "expedition" of the

²¹ Decision, paras. 34-37.

²² Decision, paras. 39-41.

²³ ICC-02/11-01/15-117, para. 26. ICC-02/11-01/15-132, para. 5. *See also* ICC-01/05-01/08-3273, para. 8, stating that the article 82(1)(d) criteria are cumulative, and "[f]ailure to fulfil one or more of these criteria is fatal to an application for leave to appeal."

²⁴ Application, paras. 19-26 (emphasis added).

proceedings. But the Application is silent on the purported impact on the expedition of the proceedings.²⁵ The Application is thus flawed.

18. Moreover, the Defence's arguments alleging unfairness are unpersuasive.²⁶ The Defence defines the impact on the fairness of proceedings, as "including conditions of detention vital to a defendant's psychological well-being."²⁷ This definition does not reflect the outcome of the Decision. Although the Defence claims that "[o]ne of the most basic conditions of humane detention is that a prisoner be allowed to have contact with family members while in custody",²⁸ it fails to recognise that the Decision indeed allows such contact.²⁹ Notably, as the Presiding Judge reiterated, "[n]othing in the Chamber's decision on restrictions prevents family visits from taking place."³⁰ Moreover, the Chamber directed the Registry to expedite such family visits.³¹ Likewise, although Mr Ntaganda's contacts are actively monitored at present, the Chamber will periodically revisit the restrictions, and where necessary, conduct an *ad hoc* review if compelling reasons arise.³² Therefore, Mr Ntaganda's alleged violation of his right to family life is mere conjecture.

19. Nor, in the particular context of the Decision, are the Defence's abstract references to human rights case law and principles apposite.³³ The Chamber's formulation of the restrictions—as stipulated in the Decision imposing restrictions (18 August 2015)—complies with human rights law.³⁴ As the Defence itself concedes,³⁵ it failed to seek leave to appeal the Decision imposing restrictions. It cannot mount a challenge belatedly. Its claims that Mr Ntaganda's situation

²⁵ Application, paras. 19-26.

²⁶ *Contra* Application, paras. 19-26.

²⁷ Application, p. 10.

²⁸ Application, para. 20.

²⁹ Decision, para. 35.

³⁰ ICC-01/04-02/06-T-130-ENG RT, p. 22 lns. 8-9.

³¹ *Ibid.*, p. 22 lns. 12-18.

³² Decision, para. 36.

³³ *Contra* Application, paras. 20-22.

³⁴ See Decision imposing restrictions, paras. 39-70; Decision, paras. 16-18. See *e.g.*, [REDACTED]

³⁵ Application, paras. 6,8.

constitutes “relative isolation” are also incorrect.³⁶ Mr Ntaganda speaks several languages and while in detention can communicate with key family members, one other re-instated person, other accused persons, detention centre personnel and his Defence team.

20. Moreover, Mr Ntaganda’s allegations that his detention does not advance his children’s best interests are equally unconvincing.³⁷ The Decision, as its plain text demonstrates, does not prevent Mr Ntaganda from meeting his children. As the Registry has submitted, although securing the children’s passports and visas has been “complicated”, a solution is expected by the end of the year.³⁸ Yet again, Mr Ntaganda’s concerns are speculative.

21. Further, the Defence incorrectly suggests that the Decision affects “[his] capacity to participate effectively in his Defence”.³⁹ Failing a valid medical justification—one that Mr Ntaganda is yet to provide—this claim amounts to no more than mere supposition. Indeed, contrary to the Application and in the absence of concrete medical evidence, the Chamber cannot infer the purported impact on Mr Ntaganda’s well-being as a matter of “common sense” or “common knowledge”.⁴⁰ Rather, in the present circumstances, Mr Ntaganda’s ostensible inability to participate in his proceedings is voluntary, self-inflicted and a result of his own making, *not* of the Decision. Mr Ntaganda’s capacity to participate in his defence is further evidenced by the ongoing proceedings: he continues to instruct his Defence on its conduct⁴¹ and has declared his intention not to follow the proceedings.⁴²

³⁶ *Contra* Application, para. 24.

³⁷ *Contra* Application, para. 23.

³⁸ ICC-01/04-02/06-T-128-ENG, p. 14 lns. 20-25.

³⁹ *Contra* Application, para. 25.

⁴⁰ *Contra* Application, para. 25.

⁴¹ *See e.g.*, ICC-01/04-02/06-T-131-ENG RT, p. 3 ln. 25-p. 12 ln. 14.

⁴² *Ibid*, p. 15 lns. 12-16, reflecting Mr Ntaganda’s response as “I was present yesterday, despite not feeling well because I wanted to make the issues and have my issues addressed. This is not the case. I have -- I don’t feel able to go this morning whether to the court to the video room. *But I don’t want to go either.*” (emphasis added) *See also* ICC-01/04-02/06-1502-AnxA (“Mr Ntaganda’s statement”), pp. 1-14.

22. The Defence fails to argue any impact on the outcome of the trial. Indeed, none can be shown.

23. Finally, the Appeals Chamber's immediate resolution of the Issue (and its alternate formulations) will not materially advance the proceedings.⁴³ The Defence has not shown error or prejudice. More so, in claiming that Mr Ntaganda's inability to participate in the proceedings may affect the hearing of witnesses in the current evidentiary block and "perhaps beyond", and that the case may proceed without Mr Ntaganda's instructions,⁴⁴ the Defence merely speculates. To engage the Appeals Chamber's review at this juncture would require it to address hypotheticals and assume an impermissible advisory function.⁴⁵ Nor has the Defence shown that Mr Ntaganda's ability to participate in his defence is affected by the Decision. Mr Ntaganda's subjective dislike of the Decision is insufficient to trigger the Appeals Chamber's intervention at this stage.

⁴³ *Contra* Application, paras. 27-28.

⁴⁴ Application, para. 28.

⁴⁵ ICC-01/04-01/07-1497 OA8, para. 38.

Conclusion

24. For these reasons, the Application fails to meet the article 82(1)(d) criteria for leave to appeal. The Application should therefore be rejected.



Fatou Bensouda
Prosecutor

Dated this 14th day of September 2016

At The Hague, The Netherlands