



Original: **English**

No.: **ICC-RoR220-02/21**

Date: **4 August 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 “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

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

Counsel for the Defence

Me Stéphane Bourgon, *Ad.E.*

Me Mélissa Beaulieu Lussier

Legal Representatives of 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

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Trust Fund for Victims

Further to the “Decision on Mr Ntaganda’s Request for Review addressed to the Registrar received 14 April 2021” issued by the Registrar on 29 April 2021 (“Impugned Decision”),¹ Counsel for Mr Ntaganda (“Mr Ntaganda” or “Defence”) hereby submits this:

**Request for judicial review of “Decision on Mr Ntaganda’s Request
for Review addressed to the Registrar received 14 April 2021”**

(“Request for Judicial Review”)

INTRODUCTION

1. This Request for Judicial Review first addresses the propriety of the Impugned Decision, including *inter alia*: the Registrar’s mischaracterization of Mr Ntaganda’s 22 March 2021 complaint to the Acting Chief Custody Officer (“Complaint” and “Acting CCO”)² and Mr Ntaganda’s Request for Review addressed to the Registrar on 14 April 2021 (“Request for Review”);³ the Registrar’s consideration of irrelevant factors; and the Registrar’s failure to consider highly relevant factors. This Request for Judicial Review also addresses the manifestly unreasonable outcome of the Impugned Decision amounting to an abuse of the Registrar’s discretion.

2. First, the Impugned Decision focusses mainly on the complexity of adopting a policy with regard to Video Family Visits *instead* of addressing Mr Ntaganda’s specific request, *i.e.* to be granted the possibility to have audio-video calls with his family, as often as all other detained persons, *pending* the promulgation of a Video Family Visit policy.

3. Second, the Impugned Decision fails to take into consideration the specific circumstances of Mr Ntaganda’s situation and/or to provide a reasoned opinion setting out objective and reasonable justification for treating him differently from

¹ Registrar’s Decision on Mr Ntaganda’s Request for Review addressed to the Registrar received 14 April 2021, 29 April 2021 (“Impugned Decision”).

² Form 1.1 – Plainte de la personne détenue au chef du quartier pénitentiaire, 22 March 2021 (“Complaint”).

³ Mr Ntaganda’s Request for Review addressed to the Registrar, 14 April 2021 (“Request for Review”).

other persons detained at the Detention Centre of the International Criminal Court (“ICC DC”).

4. Third, the Registrar’s decision “to grant the Request for Review insofar as it asks for [one] Video Family Visit pending the promulgation of the Policy Document” – without providing *inter alia*, a timeframe for the adoption of such a policy – fails to address Mr Ntaganda’s Complaint and Request for Review as well as Mr Ntaganda’s unequal treatment submissions.

5. The Registrar thus reached a conclusion that no sensible person who has properly applied his or her mind to the issue could have reached, thereby warranting the intervention of the Presidency of the International Criminal Court (“Presidency” and “International Court”).

6. Consequently, the Impugned Decision must be quashed; the Registrar must be ordered to provide an estimated timeframe for the promulgation of a Video Family Visit policy; and, in the meantime, the Registrar should be ordered to grant Mr Ntaganda the possibility to have a minimum of one audio-video call with his family per month.

7. Lastly, this Request for Judicial Review is submitted two working days following the prescribed time limit for the submission of requests for judicial review of decisions issued by the Registrar pursuant to Rule 220(1) of the Regulations of the Registry (“RoR”), *i.e.* seven calendar days from the notification of the decision of the Registrar, on 7 May 2021. Pursuant to Regulation 35 of the Regulations of the Court (“RoC”), Mr Ntaganda respectfully requests that his Request for Judicial Review be considered as a validly filed after the lapse of the prescribed time limit on the basis of his inability to file his application within the time limit for reasons outside his control, which constitutes good cause.

CONFIDENTIALITY

8. This Request for Judicial Review is classified confidential pursuant to Regulation 23*bis*(2) RoC, as it contains personal and confidential information concerning Mr Ntaganda.

PROCEDURAL BACKGROUND

9. For the purpose of conciseness, Mr Ntaganda incorporates herein by reference the procedural background set out in paragraphs 1-23 of his Request for Review.

APPLICABLE LAW

10. A detained person may apply to the Presidency for judicial review of a decision issued by the Registrar pursuant to Regulation 220(1) RoC.

11. On numerous occasions, the Presidency recalled that “(...) the judicial review of decisions of the Registrar concerns the propriety of the procedure by which the latter reached a particular decision and the outcome of that decision. It involves a consideration of whether the Registrar has: acted without jurisdiction, committed an error of law, failed to act with procedural fairness, acted in a disproportionate manner, taken into account irrelevant factors, failed to take into account relevant factors, or reached a conclusion which no reasonable person who has properly applied his or her mind to the issue could have reached.”⁴

12. The Presidency has also issued a number of decisions confirming the International Court’s obligations and the Registry’s duty to take measures to enforce the right of persons detained at the ICC DC to maintain ties with their families

⁴ Public redacted version of “Decision on Defence ‘Request for review of the Registrar’s decision of 21 June 2019’ dated 5 July 2019 (ICC-RoR220-01/19-1-Conf-Exp)”, 17 September 2019, 10 December 2019, [ICC-RoR220-01/19-2-Red](#), para.17; see also, *inter alia*, Decision on the application to review the Registrar’s decision denying the admission of Mr Ernest Midagu Bahati to the list of counsel, 20 December 2005, [ICCPres-RoC72-02-5](#), para.16.

through correspondence, telephone communications and family visits and to ensure that such measures are *effective*.⁵

13. Indeed, various provisions in the ICC legal framework are meant to protect and enforce the right of detainees to family life:

- a. The ICC DC Policy on Family Visits adopted pursuant to Regulation 179(1) RoR, as amended on 1 September 2014, provides that detainees are entitled to receive “a minimum of one visit in each two-week period” of “no less than one-hour long”;⁶
- b. Regulation 99(1)(i) RoC provides that “every detained person shall be entitled [...] to communicate by letter or telephone with his family and other persons;” and
- c. Regulation 100(1) RoC states that “a detained person shall be entitled to receive visits”.

SUBMISSIONS

14. First, the Registrar mischaracterized Mr Ntaganda’s Complaint and Mr Ntaganda’s Request for Review, resulting in the Registrar reaching a manifestly unreasonable conclusion. In the former, Mr Ntaganda stated “[...] I request the Acting CCO to authorize immediately video conferencing calls with my family at the same frequency as the other detainees.”⁷ In the latter, Mr Ntaganda requested,

⁵ See inter alia Decision on Defence ‘Request for review of the Registrar’s decision of 21 June 2019’ dated 5 July 2019 (ICC-RoR220-01/19-1-Conf-Exp), 17 September 2019, [ICC-RoR220-01/19-2-Conf-Exp](#), paras 19-21; The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Decision on “Mr Mathieu Ngudjolo’s Complaint Under Regulation 221(1) of the Regulations of the Registry Against the Registrar’s Decision of 18 November 2008”, 10 March 2009, [ICC-RoR217-02/08-8](#), para.26 (see also paras.31, 35, 43).

⁶ *The Prosecutor v. Alfred Yektom and Patrice-Edouard Ngaissona*, Decision on Non-Privileged Video-Conferencing at the Detention Centre, 3 February 2021, [ICC-01/14-01/18-869-Red](#), para.13, fn.30 (“Decision issued by Trial Chamber V”).

⁷ Complaint, para.7.

pending the promulgation of a permanent policy⁸ “[...] the possibility to have audio-video calls with his family pursuant to *ad hoc* requirements, as often as all other detained persons.”⁹

15. Mr Ntaganda implicitly acknowledged that the Registry is currently working on a policy with regard to Video Family Visits.¹⁰ Mr Ntaganda also stated that “the possible implementation of a system allowing persons detained at the ICC DC to have audio-video calls with their families have [*sic*] been raised and discussed for a long time before the ongoing pandemic with the former CCO and the Director of Division of Judicial Support Services.”¹¹ In addition, Mr Ntaganda argued in his Complaint that one year following the beginning of the Covid-19 pandemic, the Registry could have ensured respect for his rights by establishing a video-conferencing system with his family but did not do so.¹²

16. The foregoing, however, was neither the objective of Mr Ntaganda’s Complaint nor the aim of his Request for Review. In both, Mr Ntaganda’s request was rather to be authorized video-conferencing calls with his family – at the same frequency and/or as often as all other detainees¹³ – *pending* the adoption of a Video Family Visit policy.

17. Notably, instead of addressing Mr Ntaganda’s specific request, the Registrar focused almost exclusively on the difficulties associated with the adoption of a Video Family Visits policy.¹⁴ The Registrar thus considered factors irrelevant to the granting of video family visits to Mr Ntaganda on an *ad hoc* basis and failed to take into

⁸ Request for Review, paras.38, 43-44.

⁹ Request for Review, para.21 [*sic*].

¹⁰ Impugned Decision, para.5.

¹¹ Request for Review, para.31; Complaint, para.3.

¹² Complaint, para.1.

¹³ Complaint para. 7 and Request for Review para.21.

¹⁴ Impugned Decision, paras.12, 13, 14 and 23.

account the evidence before him¹⁵ regarding the feasibility of implementing such video family visits pending the adoption of a permanent policy.

18. Second, although the Registrar asserts that “in analysing the Request for Review I have considered the specific and personal circumstances of the Complainant”,¹⁶ he actually failed to do so.

19. In particular, while the Registrar noted the recent judicial developments in Mr Ntaganda’s case, namely the Judgments on the appeals of the Trial Judgment and the appeal on the Sentencing Judgment,¹⁷ he failed to take into account that the proceedings against Mr Ntaganda are nearly at an end¹⁸ and, more importantly as a result, that since February 2018, Mr Ntaganda is no longer the object of restrictions imposed on his non-privileged telephone conversations from the ICC DC. The Registrar should have considered, at a minimum, that the risks of protected information being disclosed in the course of *ad hoc* audio-video calls with his family are much lower for Mr Ntaganda than for other detainees at the ICC DC, who are the object of such restrictions.¹⁹

20. Moreover, the Registrar erred in considering that “it was in the spirit of the regulation that *two* exceptional Video Family Visits were scheduled to date for the Complainant to be able to communicate about the recent conviction judgment with his family (...).”²⁰ This is incorrect. Mr Ntaganda was granted only *one* video family

¹⁵ Request for Review, paras.18, 19, 33 and 42.

¹⁶ Impugned Decision, para.24.

¹⁷ Public redacted version of Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled ‘Judgment’, 30 March 2021, [ICC-01/04-02/06-2666-Red](#); Public redacted version of Judgment on the appeal of Mr Bosco Ntaganda against the decision of Trial Chamber VI of 7 November 2019 entitled ‘Sentencing judgment’, 30 March 2021, [ICC-01/04-02/06-2667-Red](#)

¹⁸ Both Mr Ntaganda and the one of the Legal Representatives of Victims (LRV2) filed notices of appeal of the Reparations Order issued by Trial Chamber VI on 8 March 2021: Defence Notice of Appeal against the Reparations Order, ICC-01/04-02/06-2659, 8 April 2021, [ICC-01/04-02/06-2669](#) (“Defence Notice of Appeal”); Notice of Appeal of the Common Legal Representative of the Victims of the Attacks against the Reparations Order, 8 April 2021, [ICC-01/04-02/06-2668](#).

¹⁹ Request for Review, paras.3, 4 and 33.

²⁰ Impugned Decision, paras.16 and 24.

visit on 1 April 2021. This video family visit was authorised specifically as a replacement for the planned 30 March 2021 video family visit, which could not take place for reasons beyond the control of Mr Ntaganda.

21. More significantly, the Registrar failed to consider that the video family visit which took place between Mr Ntaganda and his wife on 1 April 2021: (i) was organised on short notice;²¹ (ii) did not require any special staff and did not involve any additional or special cost for the ICC DC or the Court;²² (iii) was conducted in conformity with all applicable regulations, which were strictly adhered to by Mr Ntaganda who scrupulously respected the instructions issued to him;²³ (iv) proceeded without any difficulty *via* Mr Ntaganda's wife smartphone, a means referred to during a conversation between Mr Ntaganda and the Director of the Division of Judicial Support Services on 12 January 2021;²⁴ and (v) was facilitated while Mr Ntaganda's wife [REDACTED], where she is likely to remain for a few months due [REDACTED].²⁵

22. Had the Registrar considered the above highly relevant factors he could not have denied Mr Ntaganda's request to have Video Family Visits at the same frequency²⁶ or as often as the other detainees,²⁷ pending the promulgation of a permanent policy. In fact, taking into consideration the above factors, which the Registrar failed to consider, it is noteworthy that the Impugned Decision is devoid of any justification as to why it would not be possible to grant Mr Ntaganda more than one video family visit in the present circumstances.

23. Third, the Registrar failed to consider the impact of granting Mr Ntaganda only *one* video family visit until the promulgation of a permanent policy on his right

²¹ Request for Review para.18; see *a contrario* Impugned Decision, para.12.

²² Request for Review, para.19; see *a contrario* Impugned Decision, para.12.

²³ Request for Review, para.19; see *a contrario* Impugned Decision, para.12.

²⁴ Request for Review, para.8.

²⁵ Request for Review, para.18.

²⁶ Complaint, para.7.

²⁷ Request for Review, para.21 [*sic*].

to family life. It is incorrect to assert that granting Mr Ntaganda one video family visit to share the result of the 30 March Appeal Judgments was exceptional. This was plainly no more than a humanitarian requirement pursuant to Mr Ntaganda's right to maintain family ties. The Registrar failed to acknowledge – contrary to what Trial Chamber V did when instructing the Registry to “facilitate one non-privileged video-conferencing session per month for Mr Yekatom and Mr Ngaïssona [...] for a period of 90 minute”²⁸ – that “telephone calls are not the same as face-to-face conversations, which are essential for the maintenance of genuine family relationships and to ensure that respect for the detained person's right to family life is *effective*.”²⁹

24. Fourth, through his consideration of irrelevant factors, and failure to consider relevant factors, the Registrar erroneously dismissed Mr Ntaganda's unequal treatment submissions. Indeed, whereas the Registrar argues that differential treatment can be justified – when based on an objective and reasonable justification or when the factual circumstances are different – he fails to set out such an objective and reasonable justification or different factual circumstances explaining on what basis Bosco Ntaganda is treated differently from other detainees at the ICC DC.

25. The fact that the number of video family visits facilitated for Mr Yekatom and Ngaïssona is the consequence of the Decision issued by Trial Chamber V does not constitute an objective justification for the different treatment currently experienced by Mr Ntaganda. This decision was issued for the specific purpose of enforcing their right to family life due to the failure of the ICC DC to do so, at least since the beginning of the Covid-10 pandemic.³⁰ The right to family life is a common protection given to all detainees at the ICC DC, and Mr Ntaganda is just as entitled to it as Mr Yekatom and Mr Ngaïssona.

26. Hence, the Registrar's assertion that “the [Trial Chamber] V Decision instructing the Registry to organize video family visits for Misters Yekatom and

²⁸ Request for Review, para.9.

²⁹ [Decision issued by Trial Chamber V](#), para. 11.

³⁰ [Decision issued by Trial Chamber V](#), para. 11.

Ngaïssona is case specific”, is certainly not an objective and reasonable justification to deprive Mr Ntaganda of the same treatment, *i.e.* one non-privileged video-conferencing session per month for a period of 90 minutes.

27. Further illustrating the Defence argument, when the Defence moved Trial Chamber VI to obtain the same treatment for Mr Ntaganda, the Single Judge concluded on 10 March 2021 that he was not competent to rule upon a matter that is subject to the complaint procedure.³¹ Hence, it is incumbent on the Registrar to ensure that all detainees are treated equally and that their right to family life is respected. Thus, if it is possible to provide Yekatom and Ngaïssona with one non-privileged video-conferencing session per month for a period of 90 minutes, then it must be possible to do the same for Mr Ntaganda, unless there are objective reasons, which make this impossible.

28. In this case, the Registrar failed to consider that it would actually be easier to organize a video-conferencing session for Mr Ntaganda. Mr Ntaganda is not the object of restrictions imposed on his non-privileged telephone conversations and the manner in which the video-conferencing call with his wife on 1 April 2021 unfolded demonstrates the feasibility of organizing video family visits without difficulty.

29. In this regard, the Registrar’s consideration that “it is more resource intensive to organise, for example, Video Family Visits in a situation country where family members are not easily reachable by the ICC Registry staff, and where missions are therefore required”³² – without providing any objective reasons or further details – is irrelevant, at least at this stage, considering the temporary presence Mr Ntaganda’s spouse in [REDACTED] and the experience acquired during the 1 April video-conferencing session. Lastly, considering that the monthly video-conferencing sessions facilitated for Yekatom and Ngaïssona are taking place in the absence of a permanent policy, there is no reason why monthly video conferencing sessions

³¹ Request for Review, para.14.

³² Impugned Decision, para.21.

cannot be organised on an *ad hoc* basis for Mr Ntaganda, pending the promulgation of such a policy.

30. Fifth, the Registrar's Decision granting Mr Ntaganda only one video family visit pending the promulgation of a Video Family Visit policy – without providing, at a minimum, a timeframe for the adoption of such a policy – is manifestly unreasonable.

31. To provide but one likely and realistic example, should the Registry need six months to adopt a permanent Video Family Visit policy, the Impugned Decision amounts to Bosco Ntaganda being provided with only one video family visit for the next six months despite the fact that since December 2019 he has been provided with only one video family visit and/or in-person family visit, with his spouse only.

32. Bearing in mind that the Registry has been looking into the adoption of such a policy for years – some time before of the beginning of the COVID-19 pandemic - a period of six months to adopt a permanent policy is by no means far-fetched.

33. Consequently, for the purpose of being granted an additional video family visit during this six-month period, or more, it will be necessary for Mr Ntaganda to again submit a request to the Acting CCO. Not only is this contrary to the principle of judicial economy, the resulting uncertainty for Mr Ntaganda and his family is neither necessary nor justified in the present circumstances.

34. The Impugned Decision thus perpetuates the violation of Mr Ntaganda's right to family life and as such amounts to an abuse of the Registrar's discretion warranting the intervention of the Presidency.

35. At a minimum, for the reasons stated earlier and as long as Mr Ntaganda's wife and son remain in [REDACTED] and are able to take part in video family visit from there, nothing justifies depriving Mr Ntaganda of one video family visit per month, to take place in circumstances identical to that in which the 1 April 2021 audio video call between Mr Ntaganda and his wife took place.

36. The appropriate relief in these circumstances is to order the Registrar to provide a realistic time estimate for the promulgation of the Registry Video Family Visit policy and to order the Registrar to grant Mr Ntaganda a minimum of one video family visit per month, for a period of 90 minutes, until such policy is promulgated.

REQUEST FOR AN EXTENSION OF TIME

37. As previously mentioned, the prescribed time limit for the submission of this Request for Judicial Review was Friday 7 May 2021.

38. This Request for Judicial Review is submitted two working days later *i.e.* 11 May 2021.

39. Pursuant to Regulation 35(2) RoC:

The Chamber may extend or reduce a time limit if good cause is shown and, where appropriate, after having given the participants an opportunity to be heard. After the lapse of a time limit, an extension of time may 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.

40. The Defence respectfully submits that Mr Ntaganda's inability to file this Request for Judicial Review within the prescribed time limit should be considered in the following context: (i) further to the appeal oral hearings held on 12 to 14 October 2021 the composition of Mr Ntaganda's Defence Team is limited to one counsel, one legal assistant and one case manager; (ii) during the past three to four months, Mr Ntaganda's Defence team members have been working from different locations in different time zones; (iii) on 8 April 2021, Mr Ntaganda submitted a notice of appeal of the Reparations Order issued by Trial Chamber VI on 8 March 2021;³³ (iv) Mr Ntaganda's Defence Team is presently actively working on Mr Ntaganda's Appellant Brief due on 7 June 2021; (v) during the same period, Mr Ntaganda's Defence Team

³³ [Defence Notice of Appeal](#).

has been involved in numerous concurrent activities including *inter alia* litigation with the Registry, submission of a request for additional resources, various consultations regarding the state in which Mr Ntaganda will be transferred to serve his sentence and more importantly, constant liaison with Mr Ntaganda for the purpose of assisting him in coping with the result of the 30 March Appeals Judgments; (vi) on Friday 7 May Mr Ntaganda's Defence team was allocated limited additional resources for the purpose of handling current activities and working on Mr Ntaganda's Appellant Brief and Respondent Brief;³⁴ and (vii) although Mr Ntaganda and his counsel confer by telephone on a daily basis, instructions regarding the content of important submissions such as this Request for Judicial Review, can only be obtained during video privileged legal visits, which are limited and must be scheduled no later than 16h00 on the previous day.

41. Mr Ntaganda's inability to submit this Request for Judicial Review within the prescribed time limit arises from the following.

42. On Thursday 6 May 2021, a video privileged legal visit with Mr Ntaganda was scheduled for the purpose of discussing the content of the latest working draft of this Request for Judicial Review. During this meeting, it was decided to bring significant changes to the existing draft, which could not be prepared in time for Mr Ntaganda's review, for the purpose of filing the same by 16h00 on Friday 7 May 2021.

43. On Monday 10 May 2021, Mr Ntaganda was provided with a modified draft of this Request for Judicial Review, which could not be discussed until the following video privileged legal visit scheduled for today, Tuesday 11 May 2021, at 14h00.

44. In light of the foregoing, the Defence respectfully submits that the above considerations constitute good cause pursuant to Regulation 35 RoC, justifying why Mr Ntaganda was unable to submit this Request for Judicial Review by Friday 7 May 2021.

³⁴ Email correspondence from Counsel Support Service to Me Stéphane Bourgon, Friday 7 May 2021, 17:14.

45. Considering the nature of this Request for Judicial Review, the Defence also submits that no prejudice will arise from the short delay in submitting the same to the Presidency.

RELIEF SOUGHT

46. In light of the foregoing, the Defence respectfully requests the Presidency to:

CONSIDER this Request for Judicial Review as validly filed after the lapse of the prescribed time limit pursuant to Regulation 35 RoC;

GRANT this Request for Judicial Review;

ORDER the Registrar to provide a realistic time estimate for the promulgation of the Registry Video Family Visit policy; and

ORDER the Registrar, until such policy is promulgated, to grant Mr Ntaganda a minimum of one video family visit per month, for a duration of 90 minutes.

RESPECTFULLY SUBMITTED ON THIS 4th DAY OF AUGUST 2021

A handwritten signature in dark ink, appearing to read 'St.B.' with a flourish at the end.

Me Stéphane Bourgon *Ad.E.*, Counsel for Bosco Ntaganda

The Hague, The Netherlands