



Original : English

N° : ICC-01/04-02/06
Date : 13 January 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 “Observations on behalf of Mr Ntaganda on the *post-factum* review of the phone conversations made by Mr Ntaganda”

ICC-01/04-02/06-533-Conf-Exp, 24 March 2015

Source: Defence Team of Mr Bosco Ntaganda

Document to be notified in accordance with regulation 31 of the Regulations of the Court to :

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Further to the submission by the Registry of the *“First Report on the post-factum review of the phone conversations made by Mr Ntaganda”* along with seven confidential annexes on 10 March 2015 (“First Report” and “Annexes”) and the Order instructing the Registry to put in place additional temporary restrictions on contact issued by Trial Chamber VI (“Chamber”) on 13 March 2015 (“13 March Order”), Counsel representing Mr Ntaganda (“Mr Ntaganda” or “Defence”) hereby submit these:

**Observations on behalf of Mr Ntaganda on the *post-factum*
review of the phone conversations made by Mr Ntaganda
 (“Defence Observations”)**

OVERVIEW

1. The Defence hereby submits its observations on the First Report. As a preliminary matter, the Defence deems it very important to underscore the difficulties experienced in reviewing the First Report and its Annexes with Mr Ntaganda in the absence of transcripts in the original language used during his non-privileged telephone conversations. In fact, due to the absence of proper transcripts of Mr Ntaganda’s conversations, the Defence submits that Annexes 1 to 6 in their entirety as well as certain parts of the First Report and Annex 8 cannot be disclosed to the Prosecution in their present state.
2. In addition, with respect to redactions to be applied to the contents of the First Report and its Annexes the Defence seeks redaction of two specific sections, in Annexes 3 and 8, on the basis that the information contained therein has no potential impact on witnesses or on the proceedings.
3. Lastly, further to the additional temporary measures put in place by the Registry pursuant to the 13 March Order, the Defence takes this opportunity to inform the Chamber that it will be seeking to meet with the Prosecution for the purpose of discussing how best to ensure the protection of witnesses on a permanent basis, with a view to allowing the parties to focus on the upcoming trial.

PROCEDURAL BACKGROUND

4. On 8 December 2014, the Chamber instructed the Registry to conduct a *post-factum* review of the non-privileged conversations made by Mr Ntaganda since December 2013 and to submit a report of this review.¹ The Chamber afforded the Defence the opportunity to review the Registry's report and raise any objections prior to releasing it to the Prosecution.²
5. On 19 December 2014, the Registry filed its Preliminary Report and provided the Chamber with, *inter alia*, information about the *modus operandi* it intends to adopt for the review of Mr Ntaganda's non-privileged phone conversations ("Preliminary Report").³
6. On 6 February 2015, the Defence filed a motion requesting the Chamber to schedule a coordination meeting to clarify the methodology and format of the report to be completed by the Registry.⁴
7. On 16 February 2015, the Chamber established the procedure for review of telephone communications and the methodology to be used by the Registrar. The Chamber further instructed the Defence to submit observations on any redactions to be applied to the First Report ("Procedure Decision").⁵
8. On 10 March 2015, the Registry filed its First Report on the *post-factum* review of the phone conversations made by Mr Ntaganda.

¹ Decision on the Prosecution's request for restrictions on contact and the Defence request for access to logs, ICC-01/04-02/06-410 ("Decision on Restrictive Measures"), para. 27.

² Decision on Restrictive Measures, para. 56.

³ Preliminary report on the Registry on the *post-factum* review of non-privileged conversations made by Mr Ntaganda since December 2013, ICC-01/04-02/06-422-Conf-Exp, paras. 7-9 ("Preliminary Report").

⁴ Expedited Motion on Behalf of Mr Ntaganda Requesting the Scheduling of a Coordination Meeting in relation to the Registry Report on Phone Conversations, ICC-01/04-02/06-446-Conf-Exp ("Motion requesting a coordination meeting").

⁵ Decision on procedure for review of telephone communications and Defence requests ICC-01/02-04/06-421-Conf-Exp and ICC-01/02-04/06-Conf-Exp., 16 February 2015, ICC-01/02-04/06-459-Conf-Exp., paras. 38-40.

9. In light of the information contained in the First Report, the Chamber instructed the Registry “to put in place further [temporary] restrictions to the contact regime of Mr Ntaganda” on 13 March 2015.⁶

SUBMISSIONS

I. Annexes 1 to 6 and parts of the First Report and Annex 8 cannot be disclosed to the Prosecution in their present state

10. In its Decision on Restrictive Measures, the Chamber instructed the Defence to inform the Chamber whether it considers that the First Report contains any information that should not be disclosed to the Prosecution and if so, to provide redaction proposals.
11. Due to the absence of transcripts in the original language in which Mr Ntaganda conducted his non-privileged telephone conversations, reviewing the First Report and its Annexes, with him proved to be a very difficult and time consuming exercise.
12. As noted in the Preliminary Report of the Registry, the prevailing language used in the conversations of Mr Ntaganda was Kinyarwanda.⁷ In this regard, the Registry expressed concerns that the use of colloquial language “may create translation difficulties (lack of equivalent words/expressions in French or English”.⁸ In its First Report, the Registry confirmed that it encountered difficulties in understanding the contents of the conversations “which is not ordinary and not easy to understand”.⁹ The Registry further underscored that only the parties and ultimately the Chamber would be in a position to confirm

⁶ Order instructing the Registry to put in place additional temporary restrictions on contact, ICC-01/04-02/06-508-Conf-Exp (“13 March Order”), para. 5.

⁷ Preliminary Report, paras. 5-6: “[...] Mr Ntaganda has used 85% of Kinyarwanda”.

⁸ Preliminary Report, para. 11.

⁹ First Report, paras. 4-5.

or not whether the analysis provided by the Registry adequately reflects the information contained in the conversations”.¹⁰

13. While Mr Ntaganda did recognize the telephone conversations included in the Annexes as being his own in general, on numerous occasions, he was not able to recognize the words found in the Annexes as being the words and/or expressions he would have used.
14. There are two main reasons for this, namely the nature of the Kinyarwanda language — which includes many words or expressions which can have more than one meaning — and more importantly, the absence of transcripts in the original language used during the conversations.
15. In fact, it appears from the transcription of conversations comprised in the Annexes that the author first listened to audio tapes of Mr Ntaganda’s original conversations, from which he made an immediate translation in English without the benefit of a transcript in the original language.
16. On the one hand, this does not come as a surprise considering that the procedure used was described in general by the Registry in its Preliminary Report.¹¹ This was noted by the Defence when requesting the scheduling or a coordination meeting with the aim of avoiding difficulties with the *post factum* review of Mr Ntaganda’s telephone conversations.¹² Unfortunately, the present situation is such that it cannot be said that the conversations included in the First Report and its Annexes accurately reflect the words and/or expressions used by Mr Ntaganda during his non-privileged telephone conversations.

¹⁰ First Report, para. 5; see also 13 March Order, para. 4.

¹¹ Preliminary Report, ICC-01/04-02/06-422-Conf-Exp, paras. 7-9.

¹² Motion requesting a coordination meeting, para. 9: “[...] many aspects thereof as well as many features of the Registry Report remain either vague or unknown”; see also fn 15, referring to para. 9 of the Registry Preliminary Report: “In the Registry Preliminary Report, the Registry explained that it “would proceed to a pre-selection by filtering the telephone calls as specified by the [Prosecution]. The listening of the selected conversations will be carried out and any relevant information contained therein will be transcribed in French or English before its review and analysis, after which a report will be provided to the Chamber”.

17. Considering the purpose for which the *post factum* review of Mr Ntaganda's telephone conversations was ordered — *i.e.* to determine whether Mr Ntaganda made confidential information available to persons not entitled to receive such information and/or interfered, directly or indirectly, with Prosecution witnesses — the conversations comprised in the First Report and its Annexes in verbatim style are of very limited value.
18. Indeed, Rule 175(8) of the Regulations of the Registry (RoR) dealing with the active monitoring of telephone calls provides that:
 8. Where the Registrar finds that a call has breached these Regulations, any other regulations relating to detention matters, or an order by a Chamber, the offending call shall be transcribed by the Registry and, where necessary, translated into one of the working languages of the Court.
19. Consequently, and although the Annexes might allow to draw general *prima facie* conclusions regarding the non-privileged conversations made by Mr Ntaganda, the contents thereof cannot be disclosed to the Prosecution in their present state.
20. Taking into consideration the Registry's preliminary conclusions in the First Report as well as the additional temporary restrictions the Registry was instructed by the Chamber to put in place as a result thereof, the potential prejudice to the Accused of disclosing the contents of the Annexes to the Prosecution, in their present state, is plainly too high.
21. That said, the situation is different with respect to the summaries of non-privileged telephone conversations made by Mr Ntaganda found in Annex 8. Indeed, to the extent that these summaries do not include and/or are not meant to reflect the actual words spoken by Mr Ntaganda, the Defence has no objection to the disclosure of the same to the Prosecution, as long as they meet the threshold of having an impact on witnesses or on the proceedings. Moreover, parts of summaries which contain information directly related to Defence investigations should not be disclosed.

22. For the foregoing reasons, the Defence submits that Annexes 1 to 6 in their entirety as well as certain parts of the First Report and Annex 8 cannot be disclosed to the Prosecution. The Defence redactions proposals to the First Report and Annex 8 —Annexes A and B respectively— are attached to the present Defence Observations.
23. Lastly, should the Chamber be inclined to disclose the First Report and its Annexes to the Prosecution in their present state —despite Rule 175(8) RoR and the absence of proper transcripts of Mr Ntaganda's non-privileged conversations in the original language— the Defence respectfully submits that the Chamber should make it clear that the contents of the First Report and its Annexes are only to be used in relation to the pending Prosecution request for restrictions on contact and should not be constructed as reflecting the actual words and/or expressions used by Mr Ntaganda.

II. Redaction proposals to be applied to the contents of the First Report and Annex 8

24. In addition to the above, the Defence submits that two specific sections in Annexes 3 and 8 reflect confidential information, which should not be disclosed to the Prosecution.
25. The Registry was mandated to assess whether any confidential information pertaining to witnesses, or the case in general, has been discussed throughout the telephone communications. In this regard, the Defence notes that the Chamber made it clear that the contents of the Registry's report shall only address any potential impact on witnesses or on the proceedings.¹³
26. In this regard, the Defence submits that lines 19 to 59 of Annex 3 should be redacted as they contain confidential information relevant to the preparation of the Defence of Mr Ntaganda. In addition, the Defence takes the view that this

¹³ Decision on Restrictive Measures, para. 56; see also Procedure Decision, para. 40.

information does not meet the objective of the Report, which is to indicate information that could potentially have an impact on witnesses or on the proceedings.¹⁴

27. Furthermore, the Defence proposes redactions at lines 269 to 303, on pages 9 and 10 of Annex 8. [REDACTED]. Furthermore this information does not fall in the category of information which has a potential impact on witnesses or on the proceedings.

CONCLUSION

28. In light of the above and considering that the absence of proper transcripts of Mr Ntaganda's conversations will impede the ability of the Defence to provide meaningful observations on the merits of the Prosecution request for restrictions on contact, the Defence reserve the right to request transcripts in the original language of Mr Ntaganda's conversations at a later time.
29. Furthermore, in light of the additional temporary measures put in place by the Registry pursuant to the 13 March Order, the Defence takes this opportunity to inform the Chamber that it will be seeking to meet with the Prosecution for the purpose of discussing how best to ensure the protection of witnesses on a permanent basis, with a view to allowing the parties to focus on the upcoming trial.

CONFIDENTIALITY

30. The Defence requests that these observations on the *post factum* review be received as "Confidential *ex parte*", pursuant to Regulation 23bis (1) of the Regulation of the Court – as it responds to the Registry's First Report, which was filed with the same designation. Accordingly, the Defence Observations are submitted as confidential *ex parte* —Defence and Registry only.

¹⁴ Decision on Restrictive Measures, para. 56; see also Procedure Decision, para. 40.

RESPECTFULLY SUBMITTED ON THIS 13th DAY OF JANUARY 2016

A handwritten signature in black ink, appearing to read 'StB' with a small flourish at the end.

Mr Stéphane Bourgon, Counsel for Bosco Ntaganda
The Hague, The Netherlands