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No.: ICC-01/04-02/06
Date: 11 February 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

**With confidential, *ex parte* Annexes A to D – only available to the Chamber,
Registry and Defence**

**Application on behalf of Mr Ntaganda seeking judicial review of the Registry's
decision on the Defence requests for resources for review of transcriptions and
translations prepared by the Prosecution**

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: (i) the “*Request for resources for transcriptions and translations*” submitted to the Registry by Counsel representing Mr Ntaganda (“Defence”) on 30 October 2015 (“First Defence Request”);¹ (ii) the Registrar’s decision on the First Defence Request rendered on 13 November 2015 (“Registrar’s Decision”);² (iii) the Defence request seeking reconsideration of the Registrar’s Decision submitted on 30 November 2015 (“Defence Request for Reconsideration”);³ and (iv) the Registrar’s decision on the Defence Request for Reconsideration conveyed by way of e-mail on 18 January 2016 (“Impugned Decision”);⁴ the Defence hereby submits this:

Application on behalf of Mr Ntaganda seeking judicial review of the Registry’s decision on the Defence requests for resources for review of transcriptions and translations prepared by the Prosecution

“Defence Application”

INTRODUCTION

1. The Defence hereby respectfully requests judicial review of the Registrar’s decision to provide the Defence with ‘language services’ assistance only “to look into the translation/transcription of specific terms/words.”
2. As set out below, the Impugned Decision rests on an unreasonable assessment of the reasons put forward by the Defence in support of its Request for Reconsideration, and as such, constitutes an abuse of the Registrar’s discretion.

¹ Letter sent by Me Stéphane Bourgon to the Registrar, dated 30 October 2015 and referenced “Request for resources for transcriptions and translations”, appended as Annex A.

² Letter sent by the Registrar to Me Stéphane Bourgon, dated 13 November 2015, appended as Annex B.

³ Letter sent by Me Stéphane Bourgon to the Registrar, dated 30 November 2015 and referenced “Letter from the Registrar CSS/2015/268”, appended as Annex C.

⁴ Email from Mr Pieter Vanaverbeke to Me Stéphane Bourgon, 18 January 2016, 15:30 (“Impugned Decision”), appended as Annex D.

3. Consequently, the Defence respectfully requests Trial Chamber VI (“Chamber”) – acting pursuant to Regulation 83(4) of the Regulations of the Court – to quash the Impugned Decision and, with a view to expediting the adjudication of the matter and allowing the proceedings to be conducted as expeditiously as possible, grant the Defence Request for Reconsideration and order the Registry to allocate to the Defence the necessary funds to secure the part-time services (50 %) of a language assistant.

BACKGROUND

4. Noting the Chamber’s remark that it “has not been notified of any further progress” on the issue of assistance to be provided by the Registry for review of transcriptions and translations prepared by the Office of the Prosecutor (“Prosecution”),⁵ the Defence hereby provides the Chamber with the most recent information on progress made on this issue.
5. On 30 October 2015, further to the Chamber’s instruction,⁶ the Defence seized the Registrar of the issue of the resources necessary to verify the accuracy of the transcriptions and translations provided by the Prosecution of the audio-visual material it intends to use at trial. In this regard, the Defence identified three possible avenues:
 - a. Option 1: The Defence would provide the Registry with the audio-visual exhibits disclosed by the Prosecution along with the related 2000 pages of transcript and 2000 pages of translation and would request that this material be verified / certified as soon as possible;
 - b. Option 2: The Registry would provide the Defence with limited resources for the purpose of securing the services of a language assistant who would work on this material in real time;

⁵ T-58-CONF-ENG, p.6, l.18.

⁶ T-34-CONF-ENG, p.29, ll.19-20.

- c. Option 3: Upon being informed by the Prosecution of the audio-visual exhibits it intends to use or the relevant parts thereof, the Defence would immediately submit these exhibits and/or excerpts to the Registry for transcription/translation purposes.⁷
6. With a view to enhancing the expeditious conduct of the proceedings while ensuring their fairness, the Defence suggested that the second option should be given priority.⁸
 7. On 13 November 2015, the Registrar rejected the First Defence Request “as the justifications provided [therein] are not considered sufficient to support such a request”.⁹ The Registrar added that the Registry “fails to see any reason to provide resources ‘for the purpose of securing the services of a language assistant’ (option 2).” The Registrar stressed that, “at first and prior to any reaction”, a solid “understanding/basis” as to possible issues on quality of translations/transcriptions needs to be established. The Registrar further underscored that he does not consider there to be sufficient reason to support any allegations that the translation and transcriptions provided by the Prosecution would not be accurate or truthful.
 8. The Registrar suggested that the Defence address its concerns firstly with the Prosecution in order to obtain a final overview of the documents and/or parts thereof it wants to rely on at trial and the order in which it wants to use this material. The Registrar added that “[i]n light of the outcome of these consultations, the Registry [remains] open to discuss any future steps that may be appropriate”.
 9. On 30 November 2015, the Defence requested the Registrar to reconsider his Decision.¹⁰ In essence, the Defence submitted that the issue at stake is not

⁷ First Defence Request, Annex A, p.3-4.

⁸ First Defence Request, Annex A, p.4.

⁹ Registrar’s Decision, Annex B.

¹⁰ Defence Request for Reconsideration, Annex C.

whether there exist reasons to believe that the translations and transcriptions provided by the Prosecution are not accurate or truthful, but rather that it is plainly not possible to identify such inaccuracies in the absence of the minimum resources required for this purpose. Agreeing that this endeavour might not require the services of a language assistant working on a full-time basis, the Defence posited, nevertheless, that a part-time assignment (50%) constitutes a minimum.¹¹

10. The Defence Request for Reconsideration has remained pending until mid-January 2016, when – prompted by the Defence¹² – Counsel Support Section (“CSS”) agreed to hold a meeting in presence of a representative of the Court’s Language Services Section (“LSS”) to discuss the matter.
11. On 18 January 2016, a meeting was held between the Defence and representatives of both CSS and LSS to explore possible avenues to solve the issue. Upon completion of the meeting, it was agreed that LSS would verify the accuracy of the transcriptions and translations prepared by the Prosecution *as they are identified for use at trial and provided to the Defence*. The Defence underscores that this solution corresponds to the third option put forward in its First Request.
12. However, later that same day, CSS informed the Defence by way of e-mail that, having ‘misinterpreted’ the context and scope of the Defence request and, hence, having provided the ‘wrong’ feedback, LSS “will not be able to look into the complete footage or complete excerpts [...] but will only be able to look into the translation/transcription of specific terms/words”.¹³
13. On 28 January 2016, in order to provide the Defence with a “further and final opportunity” to finalise its discussions with the Registry regarding the review

¹¹ Defence Request for Reconsideration, Annex C, p.2.

¹² Email from Me Stéphane Bourgon to Mr Pieter Vanaverbeke, 12 January 2016, 10:38 (which remained unanswered); Email from Me Stéphane Bourgon to Mr Pieter Vanaverbeke, 14 January 2016, 15:40.

¹³ Impugned Decision, Annex D (underlined in the original).

of the transcriptions and translations of the audio-visual material the Prosecution intends to use at trial, the Chamber directed that, “exceptionally”, where audio-visual material is admitted into evidence during the testimony of Witness P-0017, all accompanying transcripts and translations will be simply marked for identification at this stage.¹⁴

APPLICABLE LAW

14. The Defence hereby incorporates by reference its previous submissions on the applicable law to judicial review of decisions made by the Registrar on legal aid.¹⁵
15. The Defence notes that ‘legal assistance paid by the Court’ within the purview of Regulation 83(1) of the Regulations includes *inter alia* ‘translation and interpretations costs’.

SUBMISSIONS

16. At the outset, the Defence underscores that the solution ultimately proposed by CSS in the Impugned Decision constitutes an arbitrary and unreasoned reconsideration of a solution agreed upon by the Defence only a few hours earlier, which would have achieved the aim of the Defence.
17. In doing so, the Registry failed to observe any basic rules of natural justice and to act with due procedural fairness towards the Accused. The Impugned Decision could be quashed on this basis alone.
18. However, more significantly, the Registry’s assistance proposal falls outside the realm of reasonability.

¹⁴ T-58-CONF-ENG, p.6, ll.18-22.

¹⁵ “Application on behalf of Mr Ntaganda seeking the judicial review of the Registrar’s decision on the urgent Defence request seeking additional resources”, 27 January 2016, ICC-01/04-02/06-1111-Conf-Exp (“Second Defence Application for Judicial Review”), paras.5-13.

19. In its “*Decision on the conduct of proceedings*”,¹⁶ the Chamber directed the parties to consult to try and resolve any disagreement as to the transcription or translation of the excerpts of audio-visual material intended to be used by a party at trial. In the event any such disagreement cannot be resolved, the Chamber ruled that it may ask the Registry to advise on the transcription or translation.¹⁷
20. In limiting its offer for language assistance to looking into “the translation/transcription of specific terms/words”,¹⁸ the Registry merely confines itself to the role envisioned by the Chamber in its Decision on the Conduct of Proceedings.
21. Strikingly, the Impugned Decision plainly fails to address the concerns raised by the Defence regarding its inability to identify inaccuracies in the Prosecution’s proposed transcriptions and translations, which forms the basis for the Defence seeking language assistance under the legal aid regime as set out in the Regulations of the Court.
22. Regulation 83(1) provides that “[l]egal assistance paid by the Court shall cover all costs reasonably necessary as determined by the Registrar for an effective and efficient defence, including [...] translation and interpretation costs [...].”
23. Mindful of the potentially high costs associated with language assistance, the Defence has approached the Registry in a constructive manner, putting forward different options for the Registry’s discretionary consideration that would all achieve – albeit in a different timeframe – the stated aim.
24. The Defence submits that the ‘solution’ of limiting language assistance to looking into the transcription/translations of ‘specific terms/words’ does not

¹⁶ 2 June 2015, ICC-01/04-02/06-619 (“Decision on the Conduct of Proceedings”).

¹⁷ Decision on the Conduct of Proceedings, para.57.

¹⁸ Impugned Decision, Annex D.

- fall within the range of reasonable legal aid measures that can allow for an ‘effective and efficient defence’ pursuant to Regulation 83(1).
25. In contrast, resources to hire a language assistant on a part-time basis, as proposed in the Defence Request for Reconsideration, entail reasonable costs while ensuring that the Defence has the ability to effectively identify inaccuracies without delay in the Prosecution’s proposed transcriptions and translations. This will, in turn, favour the expeditious conduct of the proceedings by eliminating delays in the admission of evidence due to transcription and/or translation difficulties.
 26. It must be recalled in this regard that the accuracy of transcriptions and translations of audio-visual material is paramount to the determination of the truth as well as to the fairness of proceedings.
 27. The issue is not whether the Defence has grounds to question the accuracy of the transcriptions and translations of audio-visual material the Prosecution intends to adduce in evidence, but rather that Mr Ntaganda cannot be asked to blindly accept and be tried on the basis of audio-visual materials transcribed and translated by the Prosecution – the aim of which is to secure a conviction against him – without having the possibility to verify the accuracy thereof.
 28. The Prosecution – which benefits from its *own* language services as opposed to the Defence¹⁹ – will likely, and legitimately, perform the same accuracy-check should the Defence seek to use and/or admit into evidence transcriptions and/or translations of audio-visual material obtained during its

¹⁹ Mr Ntaganda should not be deprived of the minimum necessary resources to identify potential inaccuracies in the transcription and/or translation of audio-visual material because the Prosecution succeeded in convincing the States Parties to fund its own translation department to the detriment of the Registry, which is short of resources to perform all of its functions in the field of language assistance.

investigations.²⁰ The Registrar failed to give due consideration to the principle of equality of arms.

29. In its Request for Reconsideration, the Defence emphasised that identification of concrete disagreements, as directed by the Chamber, is simply not possible without a thorough review, line by line, of Prosecution's proposed transcriptions and translations and not simply *en passant*, thereby leaving the risk of unnoticed inaccuracies remaining. The Defence has further emphasised that this review must be performed by *qualified persons*, which none of the Defence team members is, and that it does not have any such resources at its disposal.
30. While Mr Ntaganda could provide his defence team with some input – although Swahili is not his first language – reviewing Prosecution's proposed transcriptions and translations with a view to identifying 'concrete disagreements' would impose on Mr Ntaganda a burden that would take away from him the adequate time and facilities for the preparation of his defence.²¹
31. In this regard, the Defence highlights that past experience of reviewing with Mr Ntaganda the accuracy of the Registry transcriptions and translations of his phone conversations proved to be an extremely time-consuming exercise.²²

²⁰ See, e.g., T-40-CONF-ENG, p.3, ll.1-6 (open session) ("MS LUPING: Yes, Mr President, your Honours. We had the confirmation from the Defence this morning shortly before the session started that they would agree to which portion of the French translation that we agreed to. However, we just simply want to ask a Swahili-French interpreter to double-check the precise time stamps of the videos just simply for accuracy, your Honours, as none of us are fluent Swahili speakers. And we should be able to do this at the break, confirm the precise time stamps.")

²¹ Cf. *Lubanga case*, "Decision on discrepancies between the English and the French Transcripts and related issues", 18 June 2009, ICC-01/04-01/06-1974, para.35.

²² See, e.g., "Expedited motion on behalf of Mr Ntaganda seeking an extension of time limit to file observations on the First Registry Report on phone conversations", 13 March 2015, ICC-01/04-02/06-511, para.9, and the Chamber's decision thereon, Email from a Legal Officer of the Chamber to the Defence, 16 March 2015, 13:51; "Request on behalf of Mr Ntaganda seeking a variation of time limit to file the Defence consolidated response on the requested restrictions on Mr Ntaganda's communications with non-privileged contacts", 9 July 2015, ICC-01/04-02/06-707, para.21.

32. Hence, as a result of the Impugned Decision, the Defence is not in a position to accept the Prosecution's proposed transcriptions and translations for the purpose of their admission into evidence or to highlight any 'concrete disagreements' therein for the consideration of the Chamber.
33. It follows from the above that in rendering the Impugned Decision, the Registry reached a conclusion which no sensible person having properly applied his mind to the issue could have reached.
34. Should the Chamber quash the Impugned Decision, the Defence respectfully submits that it should entertain the merits of the Defence Request for Reconsideration, and not remit the matter to the Registrar for further consideration. Indeed, to the extent that the Chamber is provided with all relevant material which was in possession of the Registrar when rendering the Impugned Decision, it is in the interest of justice and the goal to expedite the proceedings strongly militate in favour of an immediate decision on the Defence Request for Reconsideration.

CONFIDENTIALITY

35. This Defence Application is submitted as public, as it addresses matters discussed in public sessions. However, pursuant to Regulation 23*bis* (1) of the Regulations of the Court, the annexes attached thereto are classified as confidential, *ex parte* – only available to the Chamber, Registry and Defence, as they include confidential correspondence between the Defence and the Registry.

RELIEF SOUGHT

36. In light of the above submissions, the Defence respectfully requests the Chamber to:

QUASH the Impugned Decision;

GRANT the Defence Request for Reconsideration; and

ORDER the Registry to allocate to the Defence the resources necessary to hire a language assistant on a part-time basis (50 %).

RESPECTFULLY SUBMITTED ON THIS 11TH DAY OF FEBRUARY 2016

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

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands