



Original: English

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

Date: 22 June 2017

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

**Response to Prosecution's application for reconsideration, and in the alternative
leave to appeal, the Chamber's Decision excluding certain Detention Centre
communications**

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

Ms Fatou Bensouda
Mr James Stewart
Ms Nicole Samson

Counsel for the Defence

Me Stéphane Bourgon
Me Christopher Gosnell

Legal Representatives of Victims

Ms Sarah Pellet
Mr Dmytro Suprun

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 Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Pursuant to Trial Chamber VI (“Chamber”)’s instruction by email of 21 June 2017,¹ Counsel for Bosco Ntaganda hereby submits this:

Response to Prosecution’s application for reconsideration, and in the alternative leave to appeal, the Chamber’s Decision excluding certain Detention Centre communications²

INTRODUCTION

1. The Defence respectfully opposes the Application. Reconsideration of the use of 125 summaries of conversations is supported by no new fact, argument or exceptional circumstance. The Prosecution itself, by not using the term “transcript”, accepts that the 125 “summaries” are not a precise or comprehensive reflection of Mr Ntaganda’s words. This does not meet the Prosecution’s own standard, which was that Mr Ntaganda must be confronted with “the precise language employed by the Accused during these Conversations.”³ More broadly, the use of summaries enhances the risk that other excerpts relevant to the use of particular words cannot be identified. The Chamber appears to invoke both of these sets of concerns in stating that the summaries “are therefore based on an *understanding* and translation of the conversations by the party.”⁴
2. Leave to appeal this aspect of the Chamber’s Decision should also, respectfully, not be granted. The “First Issue” identified in the Application understates the breadth of the Chamber’s reasoning and ignores

¹ Email from Trial Chamber VI Communications to the Parties, 21 June 2017 at 11:39.

² Prosecution’s application for reconsideration, and in the alternative leave to appeal, the Chamber’s Decision excluding certain Detention Centre communications, 20 June 2017, ICC-01/04-02/06-1971 (“Application”).

³ Prosecution’s request to use non-privileged Detention Centre communications during the testimony of Bosco Ntaganda, ICC-01/04-02/06-1925 (“Original Request”), 26 May 2017, para. 5.

⁴ ICC-01/04-02/06-T-209-CONF p.28 ln.1-4 (*italics added*).

circumstances within its contemplation. First, as discussed above, the Chamber used the term “understanding ... of the conversations” in a context that refers to concerns broader than mere textual accuracy. Second, that context inherently creates a risk that not all relevant material can be identified by the accused or the Defence, which is greatly increased by the reliance of summaries instead of transcripts. Third, the words being reproduced are purported to be those of the accused himself and, accordingly, require the highest degree of completeness and accuracy. The “First Issue” omits these essential aspects of the Chamber’s reasoning and, accordingly, does not arise from the Decision.

3. Even if the identified issue was appealable, immediate appellate resolution would not advance the proceedings, nor would it “significantly affect” the fair and expeditious conduct of proceedings or their outcome.
4. Neither reconsideration nor leave to appeal is warranted for the exclusion of six conversations in which Kihema is used. No new argument or fact has been presented that could not have been, or was, presented previously. No showing has been made that the content of those six conversations is so important that exclusion significantly affects the fairness of proceedings or their outcome. Halting the trial and interrupting the testimony of the accused to determine the fate of these six conversations will materially impede, not advance, the proceedings.

I. NO RECONSIDERATION OF THE DECISION ON THE 125 SUMMARIES IS JUSTIFIED

5. This Chamber has previously held that “[r]econsideration is exceptional, and should only be done if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice.”⁵

⁵ Decision on Defence request for reconsideration or, in the alternative, leave to appeal, 4 August 2015, ICC-01/04-02/06-761-Conf-Exp, para. 20.

6. The Prosecution argues: (i) that the Chamber's decision was based only on a concern that the "accuracy and reliability" of the summaries may be in question because they had been prepared by a party;⁶ and (ii) that its summaries were "produced on the basis of" the work of "certified and professional translators" and are, contrary to the Chamber's ruling, accurate and reliable.⁷
7. The Prosecution's previous description of these documents as "summaries"⁸ already concedes the point that it now says is an error. If Prosecution interpreters considered these documents to be an accurate and reliable reflection of the words of Mr Ntaganda, then they would have been called "transcripts." They were not. The issue, accordingly, is not the qualifications or professionalism of the interpreters employed by the Office of the Prosecutor: the issue, rather, is that none of these interpreters appear to have certified that these "summaries" are an accurate reflection of the words spoken by Mr Ntaganda. The Chamber's doubts about the accuracy and reliability of these summaries, accordingly, is not at odds with the Prosecution's own previous submissions.
8. The Defence's submissions also demonstrated that the summaries contained many inaccuracies and were significantly incomplete.⁹
9. The Chamber's doubts about accuracy should, if anything, be enhanced by the explanation in the Application that the summaries "were produced *on the basis of* translations of the conversations completed by certified and professional translators."¹⁰ This seems to suggest that the summaries are not, in and of

⁶ Application, para. 15. *See also* para. 32.

⁷ Application, para. 19. *See also* para. 33.

⁸ Original Request, para. 13; Prosecution's supplemental request to use non-privileged Detention Centre communications during the testimony of Bosco Ntaganda, ICC-01/04-02/06-1930-Conf, ("Supplement to Original Request"), 31 May 2017, para. 10.

⁹ Response, paras. 10-11.

¹⁰ Application, para. 19 (*italics added*).

themselves, the work-product of translators. The Application does not explain who produces the summaries that are “on the basis of” these translations.

10. The issue, further, is not only accuracy but completeness. The Chamber received extensive submissions, in particular, on the small fraction of conversations that had been chosen for translation and or summarization. This, in turn, increases the risk that passages relevant to the interpretation of, in particular, “codes,” will not be brought to light.¹¹ Summarization increases that risk even within individual conversations.¹² A purported “code” might be used elsewhere in the same conversation for which there is only a summary, and never discovered in time to be brought to the Chamber’s attention during Mr Ntaganda’s testimony.
11. The Prosecution argues that this is not a concern because “the underlying audio-recording of each summarised conversation is available and interpreters [...] will be in the courtroom [...] [t]o the extent the Defence or the Chamber wishes to clarify a summary used by the Prosecution, it would be able to do so.”¹³ The problem, however, is that in-court interpreters cannot assist the Defence or the Chamber in identifying other relevant passages in a ten-minute conversation – let alone in 125 ten-minute conversations.
12. Even if that task could be performed *ex improvide* (which it cannot), the Defence would have no advance notice of the purported translation. The lack of notice would mean that, practically speaking, discussions about the correctness of an interpretation in this context would be simply impossible.

¹¹ Response to “Prosecution’s request to use non-privileged Detention Centre communications during the testimony of Bosco Ntaganda” (ICC-01/04-02/06-1925- Conf) and “Prosecution’s supplemental request to use non-privileged Detention Centre communications during the testimony of Bosco Ntaganda” (ICC-01/04-02/06-1930-Conf), ICC-01/04-02/06-1940, 6 June 2017 (“Response”), paras. 5, 12, 38-39.

¹² Response, para. 12.

¹³ Application, para. 21.

13. The Chamber's oral decision reflects a concern not only with the accuracy of translations, but more global concerns arising from "an understanding" of the conversations that a party may bring to its selection of which conversations to re-produce in written form, or which portions of individuals may be reflected in a summary:

With regard to the summaries of the conversations prepared by the Prosecution, the Chamber finds that their use will not be permitted, due to the fact that they have been prepared by a party to the proceedings, and are therefore based on *an understanding* and translation of the conversations by the same party. This applies to all summaries of conversations listed in Annexes A and B of filing number 1930.¹⁴

14. This passage appears to reflect a concern with something broader than the translation of specific words or phrases. The Prosecution's interpretation of the Chamber's exclusion of the summaries as arising only from a concern that "such work may not be accurate or reliable"¹⁵ does not encompass the scope of the Chamber's reasoning, especially when viewed in the context of the parties' submissions.
15. The Prosecution argues that the *Ngudjolo* Appeals Chamber "by implication" approved the use of non-*verbatim* summaries by finding that the Trial Chamber had erred in not permitting the use of Registry-prepared reports of Mr Ngudjolo's detention centre conversations.¹⁶ This holding offers no apposite precedent. First, the reports in *Ngudjolo* were prepared by the Registry, not a party to the proceedings. Second, the Appeals Chamber upheld the Trial Chamber's decision to disclose these reports only in redacted form. Third, only five summaries were concerned,¹⁷ implying that recourse to the underlying audio-recordings for verification might not have been impracticable. Fourth, it is not clear that the Appeals Chamber heard

¹⁴ ICC-01/04-02/06-T-209-CONF p.28 ln.1-4.

¹⁵ Application, para. 32.

¹⁶ Application, para. 20.

¹⁷ *Ngudjolo* Appeal Judgment, ICC-01/04-02/12-271-Corr, para. 271.

arguments concerning the propriety of putting words to a witness – in particular, the accused – on the stand on the basis that they are his own words, whereas those words are not accurately represented. The *Ngudjolo* Appeals Judgment cannot, accordingly, be relied upon as having found “by implication” that the use of summaries in any and all circumstances, let alone present circumstances, is appropriate. The most that can be said is that the Appeals Judgment reversed the decision precluding their use on the basis of the reasons put forward by the Trial Chamber – which was limited to privacy rights and not concerns of accuracy.

16. The Application suggests that the deadline for the production of transcripts was unfair and inappropriately neglected the Prosecution’s offer to replace the summaries with transcripts by the end of June.¹⁸ The Prosecution has possessed the underlying conversations for at least twenty months. The timing of the start of the Defence case, including the possibility that the accused would exercise his right to testify on his own behalf, has long been within the Prosecution’s contemplation. Producing transcripts only in the midst of Mr Ntaganda’s testimony is prejudicial to him and does not well serve the interests of finding the truth.
17. The absence of a showing of abuse of its discretion in respect of timing is further reinforced by the Chamber’s previous rulings. The Chamber, on 28 April 2017, stated the following:

The Chamber also urges the Prosecution to have any further review of the Conversations conducted by members of the Prosecution who are not, or are no longer, part of the trial team of the *Ntaganda* case.¹⁹

This guidance to the Prosecution, in the context of a decision concerning a stay of proceedings, can have been motivated only by a concern to safeguard trial

¹⁸ Application, paras. 17, 22.

¹⁹ Decision on Stay of Proceedings, para. 61. The Chamber also commented that “it would have been preferable for the Prosecution to have engaged a separate team to conduct the Article 70 investigations flowing from the *Ntaganda* case.” *Id.* para. 32.

fairness. The Prosecution has not demonstrated that denying the use of replacement transcripts that were not produced in accordance with this instruction was an unreasonable exercise of the Chamber's discretion.

18. The Prosecution has, accordingly, not met the exigent standard for reconsideration. No clear error of reasoning has been demonstrated, nor is reconsideration necessary to prevent an injustice. On the contrary, maintaining the decision to exclude the summaries is necessary to prevent an injustice. The use of semi-accurate and incomplete summaries, rather than furthering the search for the truth, creates a very real danger of the creation of inaccurate and partial impressions. Elemental fairness and respect for cultural difference requires that an accused not be placed at a disadvantage because he or she is being tried in a language that is not his or her own. The use of the summaries, either individually or cumulatively, does not meet that standard.

II. LEAVE TO APPEAL THE DECISION ON THE 125 SUMMARIES IS NOT JUSTIFIED

19. The First Issue does not accurately reflect the Chamber's reasons for excluding the use of the 125 summaries. It presupposes, erroneously, that the Chamber excluded the summaries "solely because summaries of the underlying digital were prepared by the Prosecution, a party to the proceedings."²⁰
20. The Chamber did not exclude the summaries "solely" because they had been prepared by the Prosecution. Several other factors, either expressly or by necessary implication, should be considered to have been within the Chamber's contemplation: (i) the precision required in confronting a witness, in particular the accused, with words that are purported to be his own;²¹ (ii) the small percentage of conversations that have been produced relative to the

²⁰ Application, para. 3.

²¹ Original Request, para. 5 ("the Prosecution must put its case to him and give him an opportunity to respond to it. This will require using the precise language employed by the Accused during these Conversations.")

total; (iii) the incomplete and non-*verbatim* nature of the summaries; and (iv) the summaries – as the Prosecution acknowledges²² – have been produced for the purpose of establishing definitions for certain codes, which necessarily produces a risk in the context of selection within a large sample of “confirmation bias.” This implies no malfeasance or bad faith on the part of the Prosecution, merely that a party will tend, consciously or unconsciously, to sample in favour of a presupposed theory. Rigour of methodology and strict impartiality is required to avoid this bias, yet the Prosecution has provided no information explaining its criteria or procedure of selection.

21. This Chamber has previously rejected the characterization of issues for appeal that did not reflect the full scope of the factors that, by necessary implication, must have been within the Chamber’s contemplation:

The Majority however recalls that the request for a stay was based “on a number of partly interrelated and overlapping arguments and allegations”, and that its conclusion that “it is possible to continue conducting a fair trial in the present case” was clearly drawn after it had “considered the totality of the submissions made in relation to the Request”, thus indicating a clear cumulative assessment of the arguments raised and of any prejudice arising to the accused.²³

22. The specific circumstances in which the Chamber’s decision was made, as discussed above, further contradict the issue for which the Prosecution seeks certification. These specific circumstances, as the Chamber has previously held, are relevant in determining whether the proposed “issue” actually arises from the decision in question.²⁴
23. The First Issue, in summary, would seize the Appeals Chamber with an academic issue that is not the basis of the Decision, and that ignores

²² Supplement to Original Request, para. 20.

²³ Decision on Defence request for leave to appeal the ‘Decision on Defence request for stay of proceedings with prejudice to the Prosecution’, ICC-01/04-02/06-1955, 13 June 2017, para. 9.

²⁴ Decision on Defence request seeking leave to appeal an oral decision regarding the admissibility of certain evidence outside the temporal scope of the charges, ICC-01/04-02/06-1596, 27 October 2016, para. 15 (“the Impugned Decision was rendered in relation to a specific question put by the Prosecution and objected to by the Defence.”)

considerations and circumstances manifestly relevant to the Decision. The First Issue is, accordingly, not appealable.

24. Even if the First Issue was appealable, the Prosecution has not established that it significantly affects the fairness of the proceedings, or their outcome. The Chamber has allowed the Prosecution, in principle, to use a certain number of transcripts of conversations during its cross-examination of Mr Ntaganda. These transcripts, by virtue of their creation, are presumably deemed by the Prosecution to be more incriminating of Mr Ntaganda than the summaries. The Prosecution has not shown that it does not have adequate scope to achieve its intended purposes within the latitude that has been granted by the Chamber.
25. The Prosecution's assertion that the issue "significantly affect[s] [...] the outcome of the trial" is speculative. Indeed, it is difficult to imagine that these summaries, which purport to show witness tampering, could have a decisive impact on the Chamber's determination of the charges against him in relation to the war crimes and crimes against humanity committed a decade earlier. If there is any possibility that that is the case, then this is all the more reason that the use of non-*verbatim* summaries is unacceptable.
26. Immediate appellate resolution will not materially advance the proceedings. The delays that would be occasioned by certifying an appeal on this issue would interrupt Mr Ntaganda's testimony at a crucial moment and confer a substantial tactical advantage to the Prosecution. A lengthy interruption of Mr Ntaganda's testimony just after his direct examination and just before his cross-examination would cause unfairness.

III. NEITHER LEAVE TO APPEAL NOR RECONSIDERATION SHOULD BE GRANTED FOR THE EXCLUSION OF THE KICHEMA CONVERSATIONS

27. The Prosecution argues that the Chamber's decision would enshrine a principle that "any Defence team could exclude relevant evidence simply by not preparing itself sufficiently."²⁵
28. The suggestion that the Defence has simply not prepared itself sufficiently is unfair. The Chamber is requested to consult with the Registry as to the total number of Kihema interpreters that it has certified. The Defence understands that that number is zero.
29. The Prosecution has raised no fact that was not already known, and no argument that could not have been made, at the time of the Original Request. No clear error has been shown, let alone any exceptional circumstance or miscarriage of justice requiring reconsideration.
30. The Application does not establish that the exclusion of the six conversations significantly affects the fair and expeditious conduct of proceedings or the outcome of the trial. The Application does not show that the content is so vital to the proceedings as to affect their fairness and expeditiousness, or the outcome of this trial. A reply, evidently, would not be an appropriate forum for such submissions.
31. Granting certification would also not materially advance the proceedings. The Application does not show that an "authoritative determination" of this issue now is required to ensure that the proceedings avoid following a course that is so fatally flawed that the final Judgment would be insecure.

²⁵ Application, para. 24.

RELIEF SOUGHT

32. The Defence respectfully requests that the Chamber deny the Application.

RESPECTFULLY SUBMITTED ON THIS 22ND DAY OF JUNE 2017

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

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands