

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: **23 May 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

Decision on Defence request to preclude the use of certain material

Decision 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 Bosco Ntaganda

Mr Stéphane Bourgon
Mr Christopher Gosnell

Legal Representatives of Victims

Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
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**

Others

Trial Chamber VI ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Bosco Ntaganda*, having regard to Articles 64, 67-69 of the Rome Statute, Rules 63-64 of the Rules of Procedure and Evidence ('Rules') and Regulations 33-35 of the Regulations of the Court ('Regulations') issues the following 'Decision on Defence request to preclude the use of certain material'.

I. BACKGROUND

1. On 7 November 2016, the Office of the Prosecutor ('Prosecution') disclosed to the Defence the non-privileged contact and visitor logs, and the recordings of non-privileged telephone conversations from 22 March 2013 onwards for Mr Ntaganda and Mr Lubanga ('Conversations'), obtained pursuant to Article 70 of the Statute ('Notice').¹ In its Notice, the Prosecution submitted that its review of certain of the Conversations reveals 'serious and concerning attempts to interfere with Prosecution investigations and witnesses, and to coach potential Defence witnesses'.² It further assessed the Conversations as being 'material to the Defence's preparation of its case' and the selection of witnesses,³ and indicated that it 'reserves its right to use the [Conversations] during and after the Defence case, in particular for the establishment of the truth, the fair evaluation of the evidence, witness impeachment purposes, rebuttal and for sentencing, if applicable.'⁴
2. On 23 November 2016, the Prosecution added 589 recordings of the Conversations to its List of Evidence.⁵

¹ Prosecution's Communication of the Disclosure of Evidence obtained pursuant to Article 70, ICC-01/04-02/06-1616.

² Notice, ICC-01/04-02/06-1616, para. 14. See also para. 2.

³ Notice, ICC-01/04-02/06-1616, para. 3.

⁴ Notice, ICC-01/04-02/06-1616, para. 18.

⁵ Prosecution's Updated List of Evidence, ICC-01/04-02/06-1646, para 30 and Annex A.

3. On 23 February 2017, the Chamber rejected a Prosecution request for admission into evidence from the 'bar table' of material from the Article 70 proceedings on the basis that its 'probative value at this stage, due its nature and lack of direct materiality to the charges in the case, is low when balanced with the potential prejudice to the accused' by its late admission.⁶
4. On 25 April 2017, the Defence requested that the Chamber order 'that the Prosecution may not use the Conversations – whether in their audio recording or their written form – at any point with witnesses during the Defence case' ('Defence Request' or 'Request').⁷
5. On 28 April 2017, the Chamber rejected a Defence request for a stay of proceedings.⁸ In this decision, the Chamber decided that, without prejudice to the present Request, which had been filed 'after the Chamber had completed its deliberations' on the request for a stay of proceedings, the Prosecution shall not be allowed to use the material obtained in the context of the Article 70 proceedings during the Defence's presentation of evidence unless specifically authorised by the Chamber as necessary for the determination of the truth pursuant to its duty under Article 69(3) of the Statute, upon receipt of a substantiated request to be filed sufficiently in advance of the intended use.⁹
6. On 8 May 2017, the Prosecution filed its response ('Prosecution Response'),¹⁰ opposing the Request.

⁶ Decision on Prosecution's request pursuant to Regulation 35 for an extension of time to submit evidence, 23 February 2017, ICC-01/04-02/06-1799, para. 6.

⁷ Request on behalf of Mr Ntaganda for an order precluding the use during the Defence case of Mr Ntaganda's non-privileged telephone conversations from the Detention Centre, ICC-01/04-02/06-1878, page 18.

⁸ Decision on Defence request for stay of proceedings with prejudice to the Prosecution ('Decision on request for stay of proceedings'), ICC-01/04-02/06-1883. The Defence sought leave to appeal this decision on 4 May 2017, Request on behalf of Mr Ntaganda seeking leave to appeal 'Decision on Defence request for stay of proceedings with prejudice to the Prosecution', ICC-01/04-02/06-1888.

⁹ Decision on request for stay of proceedings, ICC-01/04-02/06-1883, paras 18 and 61 and page 34.

¹⁰ Prosecution's response to the Defence motion to suppress non-privileged Detention Centre telephone conversations, ICC-01/04-02/06-1893.

7. On 11 May 2017, the Defence sought leave to reply to a number of issues raised in the Response ('Request for leave to reply').¹¹
8. On 12 May 2017, the Chamber granted the Request for leave to reply on Issues 3, 5 and 6 identified therein, considering that it would not be assisted by further submissions on the other issues identified in the Request for leave to reply.¹²
9. On 16 May 2017, in line with the time limit and directions set by the Chamber, the Defence replied to the Response ('Defence Reply').¹³

II. SUBMISSIONS

Defence Request

10. The Defence urges the Chamber to preclude the use of the Conversations 'for any purpose, including: (i) to support broad allegations of coaching of Defence witnesses, even when the witness on the stand is not a participant in a said Conversation; and (ii) to challenge the credibility of witnesses on the stand who are participants in a said Conversation'.¹⁴
11. With respect to the applicable law and the Court's jurisprudence relevant to its Request, the Defence posits that while a trial chamber enjoys a significant degree of discretion with regard to the admissibility of evidence, it must weigh probative value and prejudice, considering, in particular, the accused's right under Article 67(1)(g) of the Statute not to be compelled to testify and to remain silent.¹⁵ It further urges the Chamber not to follow the decision of the Appeals Chamber in the case of *The Prosecutor v. Mathieu Ngudjolo Chui* (respectively

¹¹ Request for leave to reply to the "Prosecution's response to the Defence motion to suppress non-privileged Detention Centre telephone conversations", 8 May 2017, ICC-01/04-02/06-1893, ICC-01/04-02/06-1901.

¹² Email communication from the Chamber on 12 May 2017, at 8:15.

¹³ Reply on behalf of Mr Ntaganda to the Prosecution's response to the "Request on behalf of Mr Ntaganda for an order precluding the use during the Defence case of Mr Ntaganda's non-privileged telephone conversations from the Detention Centre" (ICC-01/04-02/06-1893), ICC-01/04-02/06-1908.

¹⁴ Defence Request, ICC-01/04-02/06-1878, para. 5.

¹⁵ Defence Request, ICC-01/04-02/06-1878, paras 30- 31.

'*Ngudjolo case*' and '*Ngudjolo Appeals Judgment*'),¹⁶ which reversed the relevant trial chamber's decision denying the Prosecution access to Mr Ngudjolo's non-privileged conversations from the Detention Centre on the basis that the Prosecution 'cannot use the content of these communications to make a determination of the truth'.¹⁷ According to the Defence, the situation at hand is different from that addressed in the *Ngudjolo Appeals Judgment*, given that: (i) the issue of access does not arise in the present circumstances where the Prosecution already possesses and intends to use the Conversations; (ii) the issue of admissibility is, therefore, 'ripe for determination', in the interest of judicial certainty and in order to enable the Defence to prepare for its case; and (iii) the Chamber has already determined that the Conversations are, in general, irrelevant, and, in the absence of any prospect of admission, can rule *in limine* that they may not be used during cross-examination. It further argues that in any event, absent a principle of precedent or hierarchy between the judicial divisions in the statutory framework, the Chamber is not bound to follow the *Ngudjolo Appeals Judgment*.¹⁸

12. In support of its Request, the Defence submits that allowing use of the Conversations would be 'antithetical to, and seriously damage, the integrity of the proceedings', arguing that the prejudice caused to the accused would 'far outweigh[...]' their probative value. With respect to witnesses who are not participants in the Conversations, the Defence submits that all relevant questions about coaching can be posed without resorting to the Conversations. For witnesses who are participants in any of the Conversations, the Defence argues that the Prosecution should not be permitted to use the Conversations

¹⁶ *The Prosecutor v. Mathieu Ngudjolo Chui*, Judgment on the Prosecutor's appeal against the decision of Trial Chamber II entitled "Judgment pursuant to article 74 of the Statute", 7 April 2015, ICC-01/04-02/12-271-Corr.

¹⁷ Request, ICC-01/04-02/06-1878, para. 32, referring to *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on Request 1200 of the Prosecutor for Prohibition and Restrictive Measures Against Mathieu Ngudjolo with Respect to Contacts Both Outside and Inside the Detention Centre, 24 June 2009, ICC-01/04-01/07-1243, para. 40.

¹⁸ Defence Request, ICC-01/04-02/06-1878, paras 32-37.

for the purpose of showing a prior inconsistent statement, since this was not the purpose for which the recordings were obtained. The Defence also argues that the Prosecution should not be allowed to use the Conversations to show that a witness was coached, as the prejudice resulting from such use of the Conversations 'far outweighs their probative value'. Instead, the Defence argues, the Chamber should base its determination as to whether a witness was coached on 'objective evidence', rather than on 'lengthy conversations that are often interactive and highly ambiguous in character'.¹⁹

13. Turning to the prejudice resulting from the use of the Conversations, the Defence argues that it would be 'substantial' and 'seriously infringe' the accused's right to remain silent, since it would result in hearing 'substantive positions on a host of subjects [...] despite no advice of rights having been provided'.²⁰
14. Finally, the Defence avers that allowing use of the Conversations would 'derail the trial from its ordinary course' by requiring the Chamber to rule on the propriety of Mr Ntaganda's conduct from the Detention Centre and the 'truth or falsity' of the contents of the Conversations, which can only be decided in the Chamber's ultimate findings on the material facts of the case. As a result, the Defence argues, allowing use of the Conversations would 'put [...] the cart before the horse' and serve 'neither the interests nor the expediency of justice'.²¹

Prosecution Response

15. The Prosecution argues that the Defence's request for a 'blanket ruling' precluding any use of the Conversations is 'overbroad and premature', and would 'deprive the Prosecution of the ability to fulfil its duties under

¹⁹ Defence Request, ICC-01/04-02/06-1878, page 13 and paras 38-41.

²⁰ Defence Request, ICC-01/04-02/06-1878, para. 42.

²¹ Defence Request, ICC-01/04-02/06-1878, paras 47-50.

[A]rticle 54(1) to establish the truth of the [a]ccused's influence on Defence witnesses'. Rather, the Prosecution urges the Chamber to rule on the relevance of the material requested to be used in cross-examination 'if and when' the Prosecution files a substantiated request in accordance with the Chamber's ruling in the Decision on request for stay of proceedings. In this regard, the Prosecution indicates that it will 'use discretion in seeking such leave from the Chamber' and 'not seek to cross-examine witnesses who are not implicated in the coaching scheme.'²²

16. In the Prosecution's submission, precluding use of the Conversations would 'constitute legal error', noting that: (i) the Conversations establish that the accused influenced the accounts of as many as 20 implicated Defence witnesses ('Relevant Witnesses') and therefore contain information that is 'central to questions pertaining to the trustworthiness and independence' of the Relevant Witnesses and thus is 'relevant and probative to a fair evaluation of their testimonies'; (ii) the intended use is legally founded on the *Ngudjolo* Appeals Judgment, which, *inter alia*, provides that a trial chamber's role in the determination of the truth 'is heightened in circumstances where the Chamber is aware of possible efforts to distort witness testimony and the truth finding process';²³ and (iii) in the case at hand, the Chamber is aware of such possible efforts and therefore has a heightened duty to scrutinize the trustworthiness and independence of Defence evidence, which would be 'significantly blunted, or even rendered impossible' if the Chamber were to preclude use of the Conversations.²⁴
17. It further submits that the Request has no legal basis, arguing that: (i) it urges the Chamber to follow an 'erroneous' trial chamber decision and ignore 'clear

²² Prosecution Response, ICC-01/04-02/06-1893, para. 30.

²³ *Ngudjolo* Appeals Judgment, ICC-01/04-02/12-271-Corr, para. 275.

²⁴ Prosecution Response, ICC-01/04-02/06-1893, page 6 and paras 16-20.

Appeals Chamber jurisprudence’; (ii) use of the Conversations is necessary for the Chamber to determine whether the Conversations contain ‘a discussion of a truthful account of events’, as purported by the Defence, or whether Mr Ntaganda ‘unlawfully coached Defence witnesses’, as alleged by the Prosecution;²⁵ (iii) use of the Conversations would not infringe the accused’s right to silence, because he was informed of the monitoring process and voluntarily initiated the Conversations;²⁶ and (iv) the provisions regulating rights and warnings given to suspects and procedural requirements for taking statements are not relevant or applicable in the present circumstances.²⁷

18. Finally, the Prosecution argues that use of the ‘lawfully-obtained evidence is probative and not unduly prejudicial’, noting that: (i) communications of ‘strategy’ to witnesses prior to testimony do not benefit from any legal privilege; (ii) the Conversations are ‘central’ to the credibility of the Relevant Witnesses and therefore highly material and probative to the credibility of their respective testimonies; and (iii) if it is true that the Relevant Witnesses were instructed, persuaded, or influenced through calls from the accused, ‘it would be a miscarriage of justice to not expose those facts though cross-examination’.²⁸

Defence Reply

19. The Defence refutes the Prosecution’s assertion that it is urging the Chamber to ignore clear Appeals Chamber jurisprudence, elaborating on its previous argument that the facts in the case at hand are ‘clearly distinguishable’ from the situation addressed in the *Ngudjolo* Appeals Judgment. Specifically, the Defence notes that in the case at hand: (i) the Conversations were obtained in an unfiltered manner and contain both personal information and information

²⁵ Prosecution Response, ICC-01/04-02/06-1893, paras 21-26.

²⁶ Prosecution Response, ICC-01/04-02/06-1893, para. 28.

²⁷ Prosecution Response, ICC-01/04-02/06-1893, para. 29.

²⁸ Prosecution Response, ICC-01/04-02/06-1893, paras 31-34.

concerning Mr Ntaganda's defence; (ii) the Prosecution intends to use the Conversations for a number of witnesses; and (iii) in the Decision on request for stay of proceedings, the Chamber found that the fact that the Prosecution has had access to the Conversations caused prejudice to the Defence and, as an alternative remedy to the requested stay of proceedings, decided that the Prosecution shall not be allowed to use the Conversations during the Defence's presentation of evidence unless specifically authorized by the Chamber as necessary for the determination of the truth.²⁹

20. The Defence further argues that the Request is neither overbroad nor premature, and must be adjudicated at this time. In this respect, the Defence claims that the Prosecution's Response 'establishes beyond doubt' the Prosecution's view that the Decision on request for stay of proceedings 'introduces no more than a mere additional procedural step [...] leading to the use of the Conversations'. The Defence notes that the Chamber's ruling aimed to ensure the fair and expeditious conduct of the proceedings as a result of the prejudice caused to the accused by the Prosecution having had access to the Conversations. Accordingly, the Defence argues that leaving open the possibility for the Prosecution to use the Conversations without any additional guidance, in conjunction with the Prosecution's failure to provide any concrete information concerning its intended use of the Conversations and the stated aim to use the Conversations to cross-examine the Relevant Witnesses, demonstrating the Prosecution's intent to support its broad allegations of coaching of Defence witnesses, is 'plainly insufficient to ensure the fair and expeditious conduct of the proceedings'.³⁰

²⁹ Defence Reply, ICC-01/04-02/06-1908, paras 2-9.

³⁰ Defence Reply, ICC-01/04-02/06-1908, paras 10-16.

21. Finally, the Defence asserts that the Prosecution fails to explain how use of the Conversations would contribute to establishing the truth, while, on the other hand, the potential prejudice to the accused is clearly identified.³¹

III. ANALYSIS AND CONCLUSION

22. The Chamber notes that the remedy sought in the Request goes beyond the remedy granted in the Decision on request for stay of proceedings, insofar as it entails a general ruling precluding any use of the Conversations, rather than the Chamber deciding on a substantiated request to be filed by the Prosecution in accordance with the Chamber's ruling.³² However, given the Chamber's ruling was 'without prejudice' to the present Request,³³ the Chamber will determine whether the additional remedy is warranted in the circumstances.
23. For its determination of the Request, the Chamber finds guidance in the *Ngudjolo* Appeals Judgment referred to by both parties in their submissions, noting the different views as to its interpretation and applicability in the case at hand.
24. The Chamber observes that as a general consideration, the Appeals Chamber held that a trial chamber's role in the determination of the truth is 'heightened in circumstances where the Chamber is aware of possible efforts to distort witness testimony or the truth finding process'.³⁴ In relation to the issue before it, the Appeals Chamber found that by denying the Prosecution the opportunity to use material related to Mr Ngudjolo's conversations in the trial to cross-examine Mr Ngudjolo and a specific witness, the trial chamber 'placed undue weight on the need to protect Mr Ngudjolo's rights as opposed to the need to

³¹ Defence Reply, ICC-01/04-02/06-1908, paras 17-28.

³² Decision on request for stay of proceedings, ICC-01/04-02/06-1883, para. 61 and page 34.

³³ Decision on request for stay of proceedings, ICC-01/04-02/06-1883, page 34.

³⁴ *Ngudjolo* Appeals Judgment, ICC-01/04-02/12-271-Corr, para. 275.

establish the truth', and accordingly 'exercised its discretion unreasonably and therefore erroneously'.³⁵

25. However, the Chamber also notes, as submitted by the Defence, that the situation underlying the Appeals Chamber's ruling differed in several respects from the situation at hand, notably, insofar as in the documents at issue in the *Ngudjolo* case, information related to defence strategy was redacted.³⁶ Most importantly, however, the Chamber observes that the Appeals Chamber addressed a very specific situation, *i.e.* the use of the documents at hand for cross-examination of a specific witness and the accused in the *Ngudjolo* case, rather than entailing a finding on the general appropriateness or necessity of the use of conversations emanating from an accused.
26. In line with this approach, the Chamber considers that it would not be appropriate, at this stage, to make a general ruling allowing or precluding any use of the Conversations. Rather, the Chamber considers that this issue should be assessed on a case-by-case basis, in light of the material intended to be used and the specific scope and purpose of the intended use.
27. While such determination will be made upon receipt of a substantiated request as envisaged in the Decision on request for stay of proceedings, the Chamber considers it appropriate, in the interest of expeditiousness and certainty, to provide additional directions on the requirements for any requests that may be filed in this context. In this regard, the Chamber hereby decides that any requests for use of the Conversations with a specific witness shall contain, at a minimum: (i) a reference to the material, including specific portions thereof, intended to be used; (ii) a description of the manner in which the material is intended to be used during cross-examination of a specific witness; (iii) a

³⁵ *Ngudjolo* Appeals Judgment, ICC-01/04-02/12-271-Corr, para. 276.

³⁶ See *Ngudjolo* Appeals Judgment, ICC-01/04-02/12-271-Corr, para. 276.

description of the specific purpose of the intended use; and (iv) a justification as to why use of this material is necessary for the determination of the truth and cannot be replaced through the usual means of cross-examination. Noting that the Chamber previously rejected admission of the Conversations into evidence on the basis that their ‘probative value is low [...] when balanced with the potential prejudice to the accused’,³⁷ the Chamber considers it important to emphasise that any material submitted in this context shall be narrowly tailored to what is intended to be used and that the Chamber’s review will be confined to the sole purpose of adjudicating on the request for use.

28. In terms of timing for the submission of any requests in line with the aforementioned directions, the Chamber hereby decides that from the third evidentiary block onwards, any requests shall be filed **within five days** of notification of the forthcoming witnesses list in which any of the witnesses with whom the Prosecution intends to use any of the Conversations is listed. The Defence shall then have **five days to respond** to the request. In order to allow the Chamber to issue an informed and timely ruling on any such requests, days are to be understood as calendar days and Regulation 33(1)(b)-(d) shall not apply for the calculation of time limits in this context.³⁸

³⁷ Decision on Prosecution’s request pursuant to Regulation 35 for an extension of time to submit evidence, 23 February 2017, ICC-01/04-02/06-1799, para. 6.

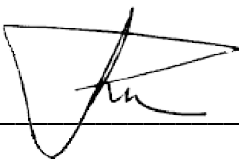
³⁸ In case a deadline falls on a weekend or official holiday of the Court, the documents shall be filed on the first following working day.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

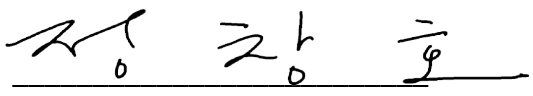
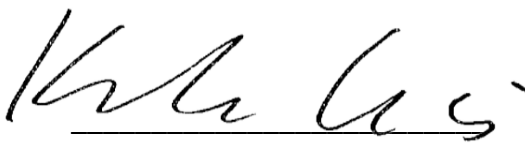
REJECTS the Request; and

ORDERS the parties to comply with the above directions.

Done in both English and French, the English version being authoritative.



Judge Robert Fremr, Presiding Judge



Judge Kuniko Ozaki

Judge Chang-ho Chung

Dated 23 May 2017

At The Hague, The Netherlands