

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-02/06
Date: 17 December 2013

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Single Judge

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
*THE PROSECUTOR V. BOSCO NTAGANDA***

Public

**Decision on the Protocol on the Handling of Confidential Information and Contact
with Witnesses of the Opposing Party**

Decision to be notified, in accordance with regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Fatou Bensouda

James Stewart

Defence

Marc Desalliers

Legal Representatives of the Victims

Legal Representatives of the 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

Herman Von Hebel

Defence Support Section

Victims and Witnesses Unit

Patrick Craig

Detention Section

**Victims Participation and Reparations
Section**

Other

Judge Ekaterina Trendafilova, acting as Single Judge on behalf of Pre-Trial Chamber II (the “Chamber”) of the International Criminal Court (the “Court”)¹ hereby issues this decision regarding the protocol on the handling of confidential information and contact with witnesses of the opposing party.

I. Procedural History

1. On 9 December 2013, the Prosecutor filed the “Prosecution Request to adopt a protocol on the handling of confidential information and on contact with witnesses of the opposing party” (the “Request”),² in which the Prosecutor requests the Single Judge to adopt the Draft Protocol as attached in Annex A to the Request.³ The Prosecutor submits that, after a series of exchanges with the Defence, the parties reached an agreement on the entirety of the Draft Protocol except for two draft provisions. These two draft provisions relate to (i) the need to inform the Victims and Witness’s Unit (the “VWU”) when, in the course of an investigation, it is necessary to disclose the identity of a witness who is in the protection program to third parties (the “First Issue”); and (ii) the need to exercise caution when investigating witnesses of the opposing party who allege that they suffered sexual violence, where it is apparent that the witness has not revealed the sexual violence to members of his or her family (the “Second Issue”).⁴

2. On 12 December 2013, the Defence submitted the “Réponse de la Défense à la ‘Prosecution Request to adopt a protocol on the handling of confidential information and on contact with witnesses of the opposing party’”,⁵ in which the Defence opposes the adoption of the Draft Protocol as it currently stands and requests the reclassification of the Request as public, as the redactions applied to the codes of the

¹ Pre-Trial Chamber II, “Decision Designating a Single Judge”, 21 March 2013, ICC-01/04-02/06-40, p. 4.

² ICC-01/04-02/06-167-Conf and its public Annex A. A public redacted version of the Prosecutor’s filing has been filed simultaneously, ICC-01/04-02/06-167-Red.

³ ICC-01/04-02/06-167-Red, para. 26.

⁴ ICC-01/04-02/06-167-Red, para. 3, ICC-01/04-02/06-167-AnxA, paras 21 (for the First Issue) and 26 (for the Second Issue).

⁵ ICC-01/04-02/06-174.

witnesses who are victims of sexual violence are not necessary to protect the identity of these witnesses (the “Request for Reclassification”).⁶

3. On 16 December 2013, the Prosecutor submitted her response to the Request for Reclassification advanced by the Defence.⁷

II. Determination of the Single Judge

4. The Single Judge notes articles 21(1)(a) and (3), 43(6), 54(1)(b), 61(6), 67(1) and 68 of the Rome Statute (the “Statute”), rules 17, 18 and 87 of the Rules of Procedure and Evidence (the “Rules”) and articles 8 and 29 of the Code of Professional Conduct for counsel (the “Code of Conduct”).

5. The Single Judge recalls that the Draft Protocol has been elaborated by the parties since 24 June 2013 without the involvement of the Chamber. While the Prosecutor requests that the Single Judge “adopt the Protocol as set out in Annex A” of the Request, it is clear from the submissions of both parties that they seek to resolve only two outstanding issues by way of a judicial decision. Accordingly, the Single Judge understands that she may not review and adopt the Draft Protocol but confine herself to the questions submitted. She therefore addresses hereunder the two contentious issues in turn.

1. The First Issue

6. Paragraph 21 of the Draft Protocol as submitted to the Single Judge reads:

21. Should the investigating party need to disclose the identity of a witness who is in the ICCPP or of a person otherwise protected by the Victims and Witnesses Unit (“VWU”), the VWU Head of Protection shall be informed of such intention as soon as possible. Additionally, the way disclosure will take place will be discussed with VWU.

7. The Prosecutor submits that the above paragraph is designed to ensure that “the VWU is properly informed of, and in a position to advise on, any disclosure that could

⁶ ICC-01/04-02/06-174, para. 35, p. 11.

⁷ ICC-01/04-02/06-183.

impact the security and protection regime for a witness under its care”.⁸ She adds that this is a “*preventative* measure ensuring that best practice is considered at the outset”.⁹

8. The Defence objects to the inclusion of paragraph 21 in the Draft Protocol. First, the Defence submits that this provision does not take into account the particular characteristics of the field investigations carried out by the Defence, including the difficult logistical conditions existing in Ituri, where the telephone network is deficient and internet connection almost inexistent.¹⁰ The Defence further submits that the advice to be given by the VWU on the modality of disclosure of the identity of a protected witness would paralyze the investigation of the Defence.¹¹ Secondly, the Defence underlines that imposing upon it an obligation to inform the VWU of the imminent disclosure by the Defence of the identity of a protected witness would compromise the confidential character of the Defence investigation.¹² Thirdly, in light of the limited resources available to the Defence, the procedure laid down in paragraph 21 of the Draft Protocol would ultimately result in considerable delays in the Defence investigation.¹³

9. At the outset, the Single Judge recalls that in deciding the issue at stake, a balance shall be achieved between two competing interests.¹⁴ On the one hand, the Single Judge must be attentive to the right of the suspect to prepare his defence for the purpose of the confirmation of charge hearing, as provided for in articles 61(6) and 67(1) of the Statute. On the other hand, the Single Judge has an obligation to protect the safety, physical, and psychological well-being, dignity and privacy of witnesses, as stipulated in article 68(1) of the Statute. The same obligation is incumbent on the

⁸ ICC-01/04-02/06-167-Red, para. 15.

⁹ ICC-01/04-02/06-167-Red, para. 19.

¹⁰ ICC-01/04-02/06-174, para. 17.

¹¹ ICC-01/04-02/06-174, para. 19.

¹² ICC-01/04-02/06-174, para. 23.

¹³ ICC-01/04-02/06-174, para. 24.

¹⁴ Pre-Trial Chamber II, “Corrigendum on the ‘Decision on Establishing Modalities to be Observed When Complying with Summons Conditions’”, 6 April 2011, ICC-01/09-01/11-38-Corr, paras 10-11.

Prosecutor, pursuant to articles 54(1)(b) and 68(1) of the Statute, and on the Defence counsel, in accordance with article 29 of the Code of Conduct.¹⁵

10. In this context, the Single Judge recalls that she has previously established a system, namely in the two cases arising out of the situation in the Republic of Kenya, with a view to regulating the modalities under which the Defence teams were allowed to contact potential witnesses after seeking the expert advice of the VWU on the security arrangements to be put in place.¹⁶

11. The Single Judge, however, is mindful of the distinct and specific circumstances surrounding the situation in the Democratic Republic of the Congo, in particular in the district of Ituri, which may impact the Defence investigation in the field. In this respect, the Single Judge considers that a procedure similar to that successfully employed in previous cases before this Chamber may prove to be impracticable in the present case, due to the different situation on the ground. Nevertheless, the Single Judge is of the view that the two competing interests referred to above may still be accommodated by relying on the expertise provided by the VWU, in a preventative way as requested by the Prosecutor, albeit with different modalities from those currently proposed in paragraph 21 of the Draft Protocol.

12. Accordingly, the Single Judge considers it appropriate that the Defence liaise with representatives of the VWU *prior* to each mission to be undertaken in the field. In the course of these meetings, the Defence is requested to communicate to the VWU the details of its upcoming mission(s), including the place(s), dates and, to the extent possible, the types of organisations, institutions and, if available, the persons that the

¹⁵ Pre-Trial Chamber II, "Corrigendum on the 'Decision on Establishing Modalities to be Observed When Complying with Summons Conditions'", 6 April 2011, ICC-01/09-01/11-38-Corr, para. 11.

¹⁶ Pre-Trial Chamber II, "Decision Establishing Modalities to be Observed When Complying with Summons Conditions, 6 April 2011, ICC-01/09-01/11-38-Corr"; Pre-Trial Chamber II, "Decision on the 'Defence Request for Variation of Decision on Summons or in the Alternative Request for Leave to Appeal'", 12 May 2011, ICC-01/09-01/11-86; Pre-Trial Chamber II, "Decision on the 'Defence Request for Variation of Decision on Summons or in the Alternative Request for Leave to Appeal'", 12 May 2011, ICC-01/09-02/11-89.

Defence intends to contact in the course of its mission(s) and to which it intends to disclose the identity of protected witnesses.

13. The VWU, in turn, shall provide the Defence team of the suspect with its best practices concerning the establishment of contact and the care to be taken in approaching protected witnesses as well as with its advice based on the specific information provided by the Defence. In this respect, the VWU is encouraged to develop standard guidelines to be communicated to the Defence.

14. The Single Judge stresses that the requirement to seek advice from the VWU prior to any mission shall not be considered as an authorization of any kind, but as a mere advice and assistance provided by the VWU, as the specialized unit of the Court dealing with the protection of witnesses, pursuant to article 43(6) of the Statute and rules 17 and 18 of the Rules.¹⁷ In addition, the Single Judge emphasizes that communicating to the VWU the details of its upcoming mission(s) and investigative activities does not amount to any interference or prejudice to the confidentiality of the Defence investigation, in so far as the VWU “shall act impartially when cooperating with all parties”, pursuant to rule 18(b) of the Rules, in full respect of the neutral role of the Registry.

15. In light of the foregoing, the Single Judge considers that the current paragraph 21 of the Draft Protocol as attached in Annex A shall be replaced by the following:

21. Should the investigating party need to disclose the identity of a witness who is in the ICCPP or of a person otherwise protected by the Victims and Witnesses Unit (“VWU”), the investigating party shall liaise with the VWU prior to the mission in which such disclosure may take place and shall communicate the details of the place, time and, to the extent possible, the types of organisations, institutions and, if available, the persons that the party intends to contact and to which it intends to disclose the identity of protected witness(es) and/or persons otherwise protected by the VWU. Additionally, the way disclosure will take place will be discussed with the VWU, which shall provide the investigating party with its best practices and advice in relation to the specific information communicated by that party.

¹⁷ Pre-Trial Chamber II, ICC-01/09-01/11-38-Corr, para. 15.

2. The Second Issue

16. Paragraph 26 of the Draft Protocol, as submitted, states:

26. Where a witness has stated that she or he has suffered sexual and gender based crimes and it is apparent that the witness has not discussed the violence with members of his or her family, the investigating party must exercise real caution in investigating the allegations. It cannot reveal this information to the family members or to persons who will communicate the information to family members and any inquiries it undertakes must be done so as to ensure the confidentiality of the information.

17. The Prosecutor submits that, in light of the fact that some witnesses in the present case were allegedly victims of sexual violence and did not reveal their victimization to their family members, additional care by the investigating party shall be employed. As such, the Prosecutor is of the view that the minimal gain obtained by the investigating party in inquiring with family members about the sexual violence suffered by the witnesses will be outweighed by the long-lasting impact the revelation could have on the witnesses and their families.¹⁸

18. The Defence objects to the inclusion of paragraph 26 in the Draft Protocol, on the basis that investigating the reasons why the witness has or has not revealed her sexual assault to family members is directly relevant to the issues of credibility of the witness and reliability of his or her testimony.¹⁹ The Defence adds that other provisions of the Draft Protocol as well as the duty to respect the confidentiality of information related to victims of sexual violence, which is incumbent on Defence counsel, constitute sufficient safeguards in this respect.²⁰

19. The Single Judge recalls that all witnesses who are allegedly victims of sexual violence have been granted anonymity (P-0018, P-0019, P-0113)²¹ except for witness P-0010, who consented to have her identity disclosed to the Defence.²² With regard to the

¹⁸ ICC-01/04-02/06-167-Red, para. 25.

¹⁹ ICC-01/04-02/06-174, para. 29.

²⁰ ICC-01/04-02/06-174, para. 32.

²¹ Pre-Trial Chamber II, "Redacted First Decision on the Prosecutor's Requests for Redactions and Other Related Requests", ICC-01/04-02/06-117-Conf-Red, para. 36; "Redacted Third Decision on the Prosecutor's Requests for Redactions", ICC-01/04-02/06-165-Conf-Red, para. 27.

²² Pre-Trial Chamber II, "Decision on the "Prosecution's Request for a Variation of Protective Measures for Three Witnesses", ICC-01/04-02/06-95-Conf-Exp, p. 6.

latter, however, the Single Judge recalls that she specified that she remains vulnerable due to the circumstances of her victimization.²³

20. Taking into account the anonymity granted to the witnesses of sexual violence in the present case and the particularly vulnerable circumstances surrounding witness P-0010, the Single Judge is of the view that additional care must be taken by the Defence when investigating the allegations pertaining to sexual violence made by these witnesses. The Single Judge is of the view that, on the one hand, the Defence will not be prejudiced by the impossibility to reveal to family members, or persons who may be in contact with such family members, the sexual violence suffered by the witnesses in question, as this is certainly not the only way for the Defence to assess the credibility of those witnesses. On the other hand, the Single Judge considers that the vulnerability of these witnesses in conjunction with the cultural stigma that may derive from their sexual victimization being revealed to family members, weighs in favour of applying measures to safeguard the disclosure of the fact that he or she has suffered from sexual violence and has not revealed this information to family members.

21. In light of the above considerations, the Single Judge considers that paragraph 26 of the Draft Protocol as proposed can be retained. In the view of the Single Judge, the provision as currently drafted does not unduly prejudice the rights of the suspect pursuant to articles 61(6) and 67 of the Statute, while at the same time it safeguards the psychological well-being, dignity and privacy of the witnesses, in accordance with article 68(1) of the Statute.

22. Lastly, the Single Judge observes with some concern from the submissions made that the VWU has not been consulted in the process of elaborating the Draft Protocol. Considering that this unit carries out crucial responsibilities as it is foreseen in the Draft Protocol, it is the view of the Single Judge that its observations to the Draft Protocol must be obtained as soon as possible. Consequently, the Single Judge

²³ ICC-01/04-02/06-117-Conf-Exp-AnxI, para. 16.

considers it appropriate that the parties involve the VWU and take its observations, if any, on board prior to adopting the Draft Protocol, as amended by the present decision. The Single Judge expects the VWU to be immediately ready and available to provide the parties with its observations in order not to delay the adoption of the Draft Protocol and the parties' investigations, taking into consideration the proximity of the confirmation of charges hearing.

3. The Request for Reclassification

23. In her response, the Prosecutor underlines that the "justification for redacting the information in the public redacted version of the filing relates to the *substance* of the information the witnesses provide, not to the protection of their witness codes".²⁴ The Prosecutor submits that the interest to be protected "is the *information* provided by these three witnesses [...] that identify which family members two of the witnesses told of their sexual abuse".²⁵ Accordingly, the Prosecutor requests the Single Judge to reject the Request for Reclassification.

24. The Single Judge is of the view that, as pointed out by the Prosecutor, the redactions at stake were applied in order to conceal the information related to which family members are aware of the sexual violence suffered by the witnesses, and not the codes assigned to them for the purpose of these proceedings.

25. The Single Judge recalls that, as stated in paragraph 19-20 above, the three witnesses referred to by the Prosecutor in her Request are anonymous and that the vulnerability of these witnesses in conjunction with the cultural stigma that may derive from their sexual victimization requires that great care is taken to ensure that they cannot be identified. Accordingly, taking into account her responsibility to protect the witnesses pursuant to article 68(1) of the Statute, the Single Judge considers that reclassifying the confidential version of the Request as public would expose them

²⁴ ICC-01/04-02/06-183, para. 4.

²⁵ ICC-01/04-02/06-183, para. 4.

to the risk of being identified by the public. The Request for Reclassification must be rejected.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

- a) decides** that paragraph 21 of the Draft Protocol shall be amended as specified in paragraph 15 of the present decision;
- b) instructs** the Prosecutor and Defence to liaise with the VWU prior to adopting the Protocol, as amended by the present decision
- c) instructs** the VWU to be immediately ready and available to provide the parties with its observations in accordance with paragraph 22 of the present decision;
- d) rejects** the Request for Reclassification; and
- e) reminds** the Prosecutor and the Defence to abide to their obligations in respect of confidentiality of information and protection of victims and witnesses.

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



Judge Ekaterina Trendafilova
Single Judge

Dated this Tuesday, 17 December 2013

At The Hague, The Netherlands