

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 4 April 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  
with confidential Annex**

**Decision on the Defence request regarding the application of certain protocols**

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**

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**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 and 68 of the Rome Statute ('Statute') and the 'Code of Professional Conduct for counsel' ('Code of Professional Conduct'), issues this 'Decision on the Defence request regarding the application of certain protocols'.

### **I. Background and submissions**

1. On 12 December 2014, the Chamber adopted the 'Protocol on the Handling of Confidential Information during Investigations and Contact Between a Party or Participant and Witnesses of the Opposing Party or of a Participant' ('Contacts Protocol').<sup>1</sup>
2. On 18 February 2015, the Chamber adopted the 'Protocol on dual status witnesses'.<sup>2</sup>
3. On 27 March 2017, the defence team for Mr Ntaganda ('Defence') requested clarification from the Chamber on the application of the Contacts Protocol ('Request').<sup>3</sup> Specifically, the Defence indicates that, while the Prosecution had not (at that stage) declared the end of the presentation of its case, the Defence is actively involved in the preparation of its case, including conducting investigations and interviewing potential witnesses for the Defence. The Defence states that it requires clarification from the Chamber as to the application of the Contacts Protocol to potential meetings between the Defence and certain

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<sup>1</sup> Decision on the adoption of a 'Protocol on the Handling of Confidential Information During Investigations and Contact Between a Party or Participant and Witnesses of the Opposing Party or of a Participant', 12 December 2014, ICC-01/04-02/06-412, with public Annex A.

<sup>2</sup> Decision adopting the Protocol on dual status witnesses and the Protocol on vulnerable witnesses, ICC-01/04-02/06-464. The 'Protocol on dual status witnesses' is contained at ICC-01/04-02/06-430-Anx1.

<sup>3</sup> Email communication from Defence to the Chamber on 27 March 2017 at 19:56. *See email* reproduced at the confidential annex to the present decision, pages 5-7.

individuals who, ‘despite being on the Prosecution’s list of witnesses, have not and will not testify as Prosecution witnesses’.

4. On 29 March 2017, the Office of the Prosecutor (‘Prosecution’) filed a notice of the end of its case-in-chief (‘Notice’).<sup>4</sup>
5. On 29 March 2017, following the instruction of the Chamber,<sup>5</sup> the Prosecution<sup>6</sup> and the Legal Representatives of Victims (‘LRVs’)<sup>7</sup> each transmitted responses to the Chamber, the latter jointly (respectively, ‘Prosecution Response’ and ‘LRVs Response’).<sup>8</sup>
6. The Prosecution submits that the sections of the Contacts Protocol relating to a party or participant’s obligations when handling confidential information during investigations ‘remain in full force and effect throughout the investigation by a party’. The Prosecution avers that the provisions of the Code of Professional Conduct, the Code of Conduct for Investigators and the Code of Conduct of the Office of the Prosecutor, all referenced in paragraph 2 of the Contacts Protocol, also remain applicable, as do the sections of the Contacts Protocol on inadvertent disclosure and on the disclosure of the identity of witnesses of the other party or participants in the course of investigations.
7. The Prosecution concurs that the section of the Contacts Protocol dealing with contact between a party and the witnesses of the opposing party applies to regulate contact between individuals that a party or participant intends to rely upon, and not to those individuals who were not relied upon. It observes that it did not rely for its case-in-chief on 13 witnesses who were identified in its list of

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<sup>4</sup> Prosecution’s Notice of the Close of its Case-in-Chief, ICC-01/04-02/06-1839.

<sup>5</sup> Email communication from the Chamber to parties and participants on 28 March 2017 at 12:55. *See email* reproduced at confidential annex to the present decision, page 4.

<sup>6</sup> Email communication from the Prosecution to the Chamber at 14:49.

<sup>7</sup> Email communication from the LRVs to the Chamber at 14:56.

<sup>8</sup> *See emails* reproduced at confidential annex to the present decision, pages 3 and 2.

witnesses, and indicates that it will inform these individuals that the Defence may contact them, and that such a meeting may be consented to without first seeking the views of the Prosecution.

8. The Prosecution observes that the 'Protocol on dual status witnesses', however, remains in force in relation to any dual status witnesses, and that this protocol contains provisions requiring notice to be provided to the relevant LRV should a party wish to contact a person who has dual status.
9. The LRVs submit that, pursuant to paragraph 2 of the Contacts Protocol, the latter's provisions must be interpreted consistently with the provisions of, *inter alia*, the Code of Professional Conduct. The LRVs aver that, accordingly, as far as witnesses with dual status who are represented by counsel are concerned, such individuals cannot be contacted directly by the Defence, but may only be contacted via their legal representative, irrespective of whether these individuals were called to testify. The LRVs observe that this requirement is expressly provided in Article 28 of the Code of Professional Conduct, according to which 'Counsel shall not address directly the client of another counsel except through or with the permission of that counsel'. The LRVs request the Chamber to interpret the Contacts Protocol in accordance with the provisions of the Code of Professional Conduct.

## II. Analysis

10. The Chamber recalls that Section VI of the Contacts Protocol 'governs the conditions under which the investigating party or participant is authorised to contact witnesses of the opposing party or a participant', and that this section applies only to a 'witness' as defined in the Contacts Protocol.<sup>9</sup> 'Witness' is defined therein as 'a person whom a party or participant intends to call to testify or whose statement the party or participant intends to rely upon, provided that

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<sup>9</sup> Contacts Protocol, ICC-01/04-02/06-412-AnxA, paras 31-32.

such intention has been conveyed to the non-calling party or participant by means that establish a clear intention on behalf of the calling party or participant to rely upon the individual as a witness'.<sup>10</sup> The Contacts Protocol also specifies that any deviation therefrom requires the prior authorisation of the Chamber.<sup>11</sup>

11. Given that, since the Request was transmitted to the Chamber, the Prosecution has: (i) filed the Notice; and (ii) clearly indicated that it does not intend to rely on certain individuals that appeared on its list of witnesses, the Chamber considers that Section VI of the Contacts Protocol indeed no longer applies to the 13 individuals specified in the Prosecution Response. The Chamber notes that the Prosecution has undertaken to communicate with these individuals to inform them that the Defence may contact them and that they may consent to such a meeting without first seeking the views of the Prosecution, and considers such course of action to be appropriate.
12. With respect to any individual who appears on the Prosecution's list of witnesses and is also a victim represented by an LRV, the Chamber considers that, in order to promote best practice investigations and in light of Article 68 of the Statute, the 'Protocol on dual status witnesses' shall continue to apply regardless of the fact that these individuals' testimony will no longer be relied upon by the Prosecution. Therefore, while noting Article 28 of the Code of Professional Conduct, the Chamber directs the Defence to comply with Section 6 of the 'Protocol on dual status witnesses', whereby, when it wishes to contact an individual with dual status, it shall provide notice as soon as possible of this to the relevant LRV. Finally, as sought in the Request, Chamber confirms that, as specified in paragraph 1 of the Contacts Protocol, the Defence must take all measures necessary to ensure the protection and the safety of witnesses, victims, and other individuals at risk, as well as the integrity of its investigations.

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<sup>10</sup> Contacts Protocol, ICC-01/04-02/06-412-AnxA, para. 3(f). This is erroneously referred to as paragraph 1(f) at paragraph 32 of the Contacts Protocol.

<sup>11</sup> Contacts Protocol, ICC-01/04-02/06-412-AnxA, para. 46.

**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY**

**ADOPTS** the guidance specified above.

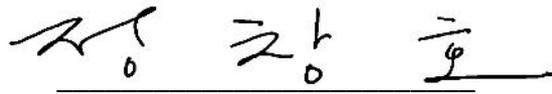
Done in both English and French, the English version being authoritative.

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**Judge Robert Fremr, Presiding Judge**

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**Judge Kuniko Ozaki**

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**Judge Chang-ho Chung**

Dated 4 April 2017

At The Hague, The Netherlands