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TRIAL CHAMBER VI

Before: Judge Robert Fremr, Presiding Judge
Judge Kuniko Ozaki
Judge Geoffrey Henderson

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

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

**Public
With Public Annex A**

**Prosecution's Proposed Protocol on the Handling of Confidential Information
During Investigations and Contact Between a Party and Witnesses of the
Opposing Party**

Source: The Office of the Prosecutor

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

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INTRODUCTION

1. The Prosecution submits a proposed protocol on the handling of confidential information during investigations and contact between a party and witnesses of the opposing party ("Proposed Protocol"), further to its oral submissions at the status conference on 17 October 2014.¹

2. The Proposed Protocol is based on the "Protocol on the Handling of Confidential Information and Contact with Witnesses of the Opposing Party" implemented by the Pre-Trial Chamber in this case ("Pre-Trial Protocol").² The Pre-Trial Protocol was based on the protocols regulating the handling of confidential information and contact with the witnesses of another party adopted by the Trial Chambers in *Katanga*,³ *Bemba*,⁴ *Banda & Jerbo*,⁵ *Lubanga*,⁶ and both the *Kenyatta*⁷ and *Ruto & Sang*⁸ cases.

3. The parties agree on all but four provisions in the Proposed Protocol. The four disputed provisions relate to: (i) the requirement to apply to the Chamber in order to use photographs depicting witnesses; (ii) the restriction on sharing inadvertently disclosed material with the Accused; (iii) the need to inform the Victims and Witness's Unit ("VWU") when, in the course of an investigation, it is necessary to disclose the identity of a witness in the ICCPP or who has otherwise been relocated with the assistance of the Court; and (iv) the need to exercise caution when investigating witnesses of the opposing party who allege they have suffered sexual violence, where it is apparent that the witness has not revealed the sexual violence to his or her family members. The last two disputed

¹ ICC-01/04-02/06-T-15-ENG, pages 13-16.

² ICC-01/04-02/06-185.

³ ICC-01/04-01/07-1134, ICC-01/04-01/07-2007-Anx1 and ICC-01/04-01/07-2047.

⁴ ICC-01/05-01/08-813-Red.

⁵ ICC-02/05-03/09-451-Anx.

⁶ ICC-01/04-01/06-1372.

⁷ ICC-01/09-02/11-469-Anx.

⁸ ICC-01/09-01/11-458-AnxA-Corr.

provisions were litigated before the Pre-Trial Chamber (they are paragraphs 21 and 27 of the Proposed Protocol, respectively), and ultimately resolved by the Single Judge in favour of the Prosecution (they are included in the Pre-Trial Protocol as paragraphs 21 and 26, respectively).⁹

PROCEDURAL HISTORY

4. The Trial Chamber encouraged the parties to enter into active discussions about the five protocols raised at the 11 September 2014 status conference.¹⁰
5. On 9 October 2014, the Chamber scheduled a status conference for 17 October 2014 and requested the parties to provide written submissions on several issues, including the protocols to be agreed upon in the case.
6. Following the implementation of the “Protocol on the Handling of Confidential Information and Contact with Witnesses of the Opposing Party” at the pre-trial phase of this case, the VWU and Legal Representative for the Victims (“Legal Representatives”) were consulted and their input incorporated.¹¹
7. The parties met on 24 October 2014 to discuss the Proposed Protocol. On 30 October 2014, the Defence provided its final position indicating that there remain four provisions in dispute, which are set out below for the Trial Chamber to adjudicate.
8. On 30 October 2014, the Prosecution sent the Proposed Protocol to VWU and the Legal Representatives.

⁹ ICC-01/04-02/06-185, paras 15 and 21.

¹⁰ ICC-01/04-02/06-T-13-ENG, page 58. *See also*, ICC-01/04-02/06-T-13-ENG, pages 22-25.

¹¹ Representatives of VWU provided input on the Proposed Protocol on 20 December 2013, 12 May 2014 and 1 September 2014. The LR provided input to the Prosecution on 5 May 2014 and 30 October 2014.

9. Attached as Annex A is the Prosecution's Proposed Protocol with the four disputed provisions highlighted in yellow. The Prosecution requests that these four provisions be included in the protocol implemented by the Trial Chamber. These measures are not inconsistent with or prejudicial to the rights of the Accused to a fair and impartial trial.

PROSECUTION SUBMISSIONS

10. The purpose of the Proposed Protocol is to protect all victims and witnesses who cooperate with the Court, while respecting the rights of the parties to investigate the other party's evidence, including the credibility of witnesses. As Chambers of this Court have held, such protocols reflect the principles of necessity and witness security and constitute "'a set of minimum rules' which are designed to safeguard, to the greatest degree possible, the security of witnesses during investigations, whilst taking into account the rights and the obligations of the parties."¹²
11. The VWU has noted that good investigative practices by the parties and participants are the first step in the protection system available to witnesses:

[t]he very foundation of the Court's protection system lies on the application of good practises (*sic*) by any representative of the Court who interacts with witnesses. These practices are aimed at hiding a witness's interaction with the Court from the community where the witness resides, from potential threats and the public.¹³

Consequently, the parties must ensure best practices not only when interacting with witnesses, but also when potentially exposing the witnesses' interactions with the Court to third parties.

¹² ICC-02/11-01/11-49, para 13, citing ICC-01/05-01/08-813-Red, para 80 and ICC-01/04-01/06-1372, para 8.

¹³ ICC-01/04-01/07-585, para 10.

12. Respect for the confidentiality of *inter partes* disclosure, including the identity of witnesses, sources or even intermediaries, reduces the risks to their security and can avoid triggering the Court's duty to take additional protective measures. Alternative protection mechanisms, such as the Proposed Protocol, should be established.

I. The requirement to apply to the Chamber in order to use photographs depicting witnesses (paragraph 7)

13. Paragraph 7 of the Proposed Protocol governs the use of photographs depicting witnesses for investigative purposes. This provision closely resembles that in the Pre-Trial Protocol, with the addition of the phrase "*[i]n order to use such material, the investigating party should present a request to the Chamber.*"
14. As set out in footnote 13 of the Proposed Protocol, this phrase is based upon the protocols concerning the disclosure of the identity of witnesses of the other party and the handling of confidential information in the course of investigations implemented by the Chambers in the *Gbagbo* and *Katanga* cases.
15. In *Gbagbo*, Pre-Trial Chamber III adopted the position that prior to using photographs, parties must make a request to the Chamber for authorisation, noting that photographs should only be used when there is no other satisfactory alternative means of investigation.¹⁴
16. In its decision on a request by the *Katanga* Defence for use of photographic images of incriminating witnesses for the purposes of conducting its

¹⁴ ICC-02/11-01/11-49-Anx, page 4 « Concernant l'utilisation de photographies, dans tous les cas la partie qui enquête doit présenter à la Chambre une demande d'autorisation motivée avant de présenter les photographies au public. Les photographies doivent seulement être utilisées quand il n'existe pas d'autres moyens d'enquêtes alternatifs satisfaisants. Comme pour les autres informations caractérisées de non-publique, un compte-rendu détaillé de sa communication doit être conservé par la partie qui enquête. »

investigations,¹⁵ the Trial Chamber sought input from the VWU on the use of photographs for such a purposes.¹⁶ The following excerpts formed part of VWU's response:

***Re (3):** The use of photos potentially has a very high impact on the level of risk for the individuals concerned. This may be the case both for witnesses who are participants in the Court's protection programme and witnesses who benefit from procedural protective measures. By the use of photos a much larger group of people may identify an individual by sight (rather than by name), thus much less intricate knowledge of the individual concerned is required and a link to the Court can be established far more easily.*

***Re (4):** Due to the higher likelihood that individuals will be identified by the use of family names, the risk could also be elevated. In general and depending on the concrete circumstances of the case, the increase of risk for the witness concerned would not be as high as it may be in case of photos being used in the course of the investigations. It has to be noted, however, that the level of risk for the individuals whose identities are being used to verify the identity of the witness could be elevated through this investigative technique.*

***Re (5):** There is a high risk of adverse psychological impact if photos are used without prior knowledge and consent of the concerned witness. These concerns are amplified in the circumstance of witnesses who are considered to be vulnerable. A key factor for traumatising is the loss of control and a sense of intrusion. Using the photos, in particular if this done without informing and seeking the consent of the respective witnesses first, may reinforce their helplessness and sense of intrusion and as such be experienced as a re-violation. In addition, some witness might feel deceived or betrayed by the Court.*

From a psychological point of view, it would be imperative to explain to the witness upfront what may happen to the pictures they have provided and to seek their informed consent. Should this not be possible, from a psychological point of view, it would be imperative to inform the witnesses as swiftly as possible about the use of the photos.

It is also important to note that many witnesses perceive themselves to be at a very high level of risk. While this does not always correspond to the objective level of risk, it may still cause extreme difficulties in the management of witnesses and ultimately their willingness to cooperate with the Court. The

¹⁵ ICC-01/04-01/07-2060-Red.

¹⁶ ICC-01/04-01/07-2148, para 2.

*investigative activities of the defence thus far have already led to an increased perceived level of risk for some witnesses. The use of photos could further elevate this perceived level of risk.*¹⁷

17. Accordingly, VWU strongly advised the Chamber against taking a “blanket” approach authorising the use of photographs. Rather, VWU recommended that *if* the Chamber authorised the use of photographic images at all, it do so based on a specific application that outlines the particular line of inquiry and where alternative modes of investigations were not feasible. Consequently, restricting the use of photographs to the greatest extent possible.¹⁸
18. Trial Chamber II held that it was necessary to request authorisation from the Chamber prior to using photographs of protected witnesses, and emphasised that the use of photographs should be kept to a minimum and only where no other tools are available.¹⁹ In so ordering, the Trial Chamber referred to its obligation under article 68.
19. It is on the basis of the same risks of unnecessarily associating witnesses (and their family members) with the Court and the adverse psychological impact on individuals, that the Prosecution requests that prior to using photographs of witnesses for investigative purposes, a request be submitted to this Chamber.

II. The restriction on sharing inadvertently disclosed material with the Accused (paragraph 11)

20. Paragraph 11 of the Proposed Protocol governs inadvertent disclosure, and imposes an obligation on the receiving party to not share the material in any manner. A similar provision was in the Pre-Trial Protocol (also at paragraph

¹⁷ ICC-01/04-01/07-2148, para 3.

¹⁸ ICC-01/04-01/07-2148, para 3.

¹⁹ ICC-01/04-01/07-2148, para 9. In paragraphs 10 and 11, the Trial Chamber set out the other recommendations of the VWU, including using a panel of photographs and keeping a register of the circumstances of the use of each photograph.

11).²⁰ The Prosecution has augmented this provision, for clarity, in the Proposed Protocol to add the phrase “*including with the accused*” at the end.

21. The purpose of this provision is to immediately curtail the further dissemination of inadvertently disclosed material, including material that should have been redacted. Such information should never have been disclosed to the Defence team or to the Accused in the first place; its disclosure is effectively the result of a mistake. There would be no reason to share such information with the Accused unless it would be to take advantage of an error which could result in serious security risks for Prosecution witnesses and victims.
22. The duty on counsel to not share the materials implies that they are prohibited from sharing the inadvertent disclosure with any third party, which includes the Accused. While the Accused is under an obligation to respect confidentiality, this is not equivalent to the ethical and professional obligation binding upon counsel.
23. Article 8 of *The Code of Professional Conduct for counsel* (“Code”) outlines the fundamental principle of respect for professional secrecy and confidentiality of information in accordance with the legal texts of the Court. Indeed, this principle is expressly set out in the solemn undertaking in article 5.
24. Article 8(3) of the Code expressly provides that counsel may only reveal protected information to “co-counsel, assistants and other staff working on the particular case to which the information relates and solely to enable the exercise of his or her functions in relation to that case.” There is no reference to the Accused in this provision. Moreover, article 8(4) specifies that such disclosure can only occur where it is provided for by a specific provision in

²⁰ The provision is also in the Protocol establishing a redaction regime in the Kenya cases (ICC-01/09-01/11-458-AnxA-Corr and ICC-01/09-02/11-495-AnxA-Corr, para 22.

the legal texts of the Court, or where it is ordered by the Chamber. It goes on to *explicitly* prevent counsel from revealing “the identity of protected victims or witnesses, or any confidential information that may reveal their identity or whereabouts”.

25. During the *Lubanga* proceedings, Trial Chamber I expressly prohibited the Defence from sharing with the accused or making use of confidential information that was inadvertently disclosed by the Prosecution.²¹ The Chamber made this order on the basis of article 68(1).²²
26. Trial Chamber V in *Ruto & Sang* held that parties and participants are presumed to act in good faith and are bound by their obligations of professional secrecy and confidentiality of information set out in article 8 of the Code. The Chamber noted that the obligations under article 8(4) continue to apply in cases of inadvertent disclosure, and that as such, no further restrictions needs to be ordered by the Chamber.²³
27. The Prosecution submits that parties are under an ethical obligation to not share with anyone, including the Accused, material that was inadvertently disclosed, and requests the Chamber to include wording to this effect in any protocol it authorises.

III. The need to inform VWU when it is necessary to disclose the identity of a witness in the ICCPP or who has otherwise been relocated with the assistance of the Court (paragraph 21)

28. This provision was the subject of litigation at the pre-trial phase of the proceedings.²⁴ The Single Judge, in balancing the interests of the rights of the Accused enshrined in article 67(1) against her obligation to protect the

²¹ ICC-01/04-01/06-1403-Conf, para 5.

²² ICC-01/04-01/06-1403-Conf, para 5.

²³ ICC-01/09-01/11-458, para 25.

²⁴ ICC-01/04-02/06-185, paras 6-15.

safety, physical and psychological well-being, dignity and privacy of witnesses as set out in article 68(1) of the Statute, found it appropriate for the Defence to have to liaise with representatives of VWU *prior* to each mission in order to advise when it intended to disclose the identity of protected witnesses and to whom.²⁵ In so doing, the Single Judge modified, and expanded upon, the provision initially proposed by the Prosecution.

29. In the Proposed Protocol, the Prosecution seeks to maintain the provision authorised by the Single Judge²⁶ with two minor amendments. The first is the addition of the words “*or participant*” after “investigating party”, to ensure that this provision of the Proposed Protocol also governs participants. The second change was agreed to following *inter partes* discussions on 15 October 2014. It sees the phrase “of a person otherwise protected by the [VWU]” replaced with “*who has otherwise been relocated with the assistance of the Court during the course of specific investigations related to that witness*”.
30. The Prosecution maintains that given VWU’s mandate under regulation 96 of the Regulations of the Registry to “take all necessary measures to maintain a protection programme for witnesses”, VWU needs to be informed of any development that could impact on its security assessment for such witnesses. This includes the disclosure of any information that could compromise the security of a protected person or the integrity of the protection programme itself.
31. Paragraph 21 of the Proposed Protocol is a preventative measure designed to ensure that the VWU is properly informed of, and in a position to advise on, any disclosure that *could* impact the security and protection regime for a witness under its care. The provision provides for essential VWU input

²⁵ ICC-01/04-02/06-185, paras 9 and 12.

²⁶ ICC-01/04-02/06-185, para 15.

aimed at avoiding, or significantly minimising, the risk of disclosure of information that could increase risk to such individuals. The disclosure of any information that could expose these persons to greater risk must be carefully managed by the parties, and the VWU must be involved.

32. Such a provision was also included in the protocol adopted by the Trial Chamber in *Banda & Jerbo*.²⁷
33. The Single Judge emphasized that communicating to the VWU the details of its upcoming mission(s) and investigative activities did not amount to any interference or prejudice to the confidentiality of the Defence investigation, in so far as VWU is impartial.²⁸
34. The Prosecution submits that paragraph 21 in the Proposed Protocol is not prejudicial to or inconsistent with the rights of the Accused, and is an appropriate balance with the need to protect victims and witnesses.

IV. The need to exercise caution when investigating witnesses of the opposing party who allege they have suffered sexual violence, where it is apparent that the witness has not revealed the sexual violence to his or her family members (paragraph 27)

35. Like paragraph 21, this provision was also the subject of litigation at the pre-trial phase of the proceedings.²⁹ The Single Judge held that the provision would remain in the Pre-Trial Protocol as proposed by the Prosecution.
36. In the Proposed Protocol, the Prosecution seeks an additional clause, that reads:

Where there are no suitable alternative investigative avenues available, the investigating party or participant may communicate the information that the

²⁷ ICC-02/05-03/09-451-Anx, para 15.

²⁸ ICC-01/04-02/06-185, para 14.

²⁹ ICC-01/04-02/06-185, paras 16-21.

witness suffered sexual or gender based crimes to those individuals that the witness has stated she or he has informed or has confirmed are aware of the sexual and gender based crimes suffered, provided that in doing so the investigating party or participant does not reveal that she or he is a witness with the ICC.

The Prosecution submits that this addition will provide added flexibility to the Defence in its conduct with this vulnerable category of witnesses.

37. As was the case in the pre-trial phase of these proceedings, there are three witnesses in the case who suffered sexual violence and have stated to the Prosecution that they fear telling their family or community of their experience for fear of rejection and abandonment.
38. Where a witness has stated that he or she has suffered sexual violence and it is apparent that the witness has not discussed the alleged sexual violence with members of his or her family, the investigating party must exercise real caution in investigating the allegations in order to protect fully the witness's dignity, privacy and psychological wellbeing.
39. Indeed, article 68(1) mandates that the Court *shall* take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses, *specifically* where the crime involves sexual violence. By virtue of the same provision, the Prosecutor is independently mandated to take such measures in the investigation and prosecution of these crimes.
40. In balancing the witness' rights under article 68(1) with those of the Accused, the Prosecution urges this Chamber to consider the limited benefit, if any, to the investigating party's inquiring with family members where the witness has stated that he or she did not reveal the fact of this violence to them. The investigating party will not have advanced the inquiry at all by asking the family members if they are aware of the account,

as the investigating party already knows they are not. The family member's lack of information will not reveal that the account of the witness is not true, simply that the family member was not aware of it. On the other hand, the potential impact to the witness' psychological well-being and dignity of this disclosure could be tremendous and devastating. The minimal "gain" obtained by the investigating party is outweighed by the long-lasting impact that this could have on the witness and his or her family.

41. The Single Judge held that the Defence would 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 was certainly not the only way for the Defence to assess the credibility of those witnesses."³⁰ Further, the Single Judge found that the vulnerability of these witnesses in conjunction with the cultural stigma that may derive from their sexual victimisation being revealed to family members, weighed 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.³¹
42. Accordingly, the Prosecution has proposed a similar provision in the Proposed Protocol whereby the investigating party must not reveal the alleged sexual violence to the family members or to persons who will communicate this information to family members where it is apparent that it is not already known to them. Any inquiries undertaken by the Defence must be done so as to ensure the confidentiality of this information.

³⁰ ICC-01/04-02/06-185, para 20.

³¹ ICC-01/04-02/06-185, para 20.

REQUEST

43. The Prosecution requests that the Chamber adopt the Proposed Protocol, attached as Annex A.



Fatou Bensouda

Prosecutor

Dated this 31st day of October 2014

At The Hague, The Netherlands