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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 Annexes A1-A8, B1-B4, C1-C2, D1-D3 and E1-E7

**Public redacted version of "Prosecution's request for orders in response to Defence contacts with Prosecution and Dual Status Witnesses", 25 September 2015,
ICC-01/04-02/06-866-Conf**

Source: 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 Office of the Prosecutor (“Prosecution”) seeks relief from Trial Chamber VI (“Chamber”) as a result of violations of court orders through breaches of protocols adopted in these proceedings that regulate and restrict contact with witnesses of the opposing party, including those with dual status (“Dual Status Witnesses”),¹ and the codes of conduct for counsel and investigators.²
2. These breaches by the Defence include:
 - (a) failing to identify themselves as members of the Defence team to Prosecution witnesses and providing accounts of what happened that do not match the accounts given by the affected Prosecution witnesses;³
 - (b) directly contacting four individuals known to the Defence to be Prosecution witnesses since 11 September,⁴ three of whom are Dual Status Witnesses,⁵ without prior notice to or consent⁶ from the Prosecution or Legal Representative of Victims (“LRV”), or prior authorisation from the Chamber;
 - (c) usurping the role of the calling party by directly asking individuals, some of whom were known to be Prosecution witnesses and/or Dual Status Witnesses, if they consented to be interviewed;⁷
 - (d) interviewing Witness P-790 when aware of his identity and status as a Prosecution witness;
 - (e) interviewing Witness P-113 without her informed consent;⁸

¹ Protocol on the handling of confidential information and on contact with witnesses of the opposing party, paras. 33-35, 45 and Protocol on dual status witnesses, para. 6(a).

² Code of Conduct for Investigators (ICC/A1/2008/005, 10 September 2008), sections 4.1, 4.2, 7.1, 7.4, 9.1 and Code of Professional Conduct for counsel (Resolution ICC-ASP/4/Res.1), articles 7(3) and 7(4), 24(1), 27, 28.

³ For example, Witnesses P-100 and P-113.

⁴ Witnesses P-895, P-100, P-790, P-113. The Prosecution recalls that there were two prior contacts with Witnesses [REDACTED].

⁵ Witnesses P-790, P-100, P-113.

⁶ After Defence advised that inadvertent contact was made with Witness P-895, the Prosecution agreed to limited contact with this individual for [REDACTED].

⁷ For example, Witnesses P-100, P-790 and [REDACTED].

(f) failing to inform Prosecution witnesses that meetings with them were being audio-recorded and failing to obtain their consent to such recording;

(g) communicating an oral message directly from the Accused to Prosecution Witness [REDACTED] during a meeting with him, questioning him on his decision to have a legal representative attend the meeting and pushing the witness to meet with the Defence lawyers alone; and

(h) failing to disclose complete audio-recordings of interviews of Prosecution witnesses as required.⁹

3. Contrary to the Defence's assertions, the matters raised in this filing are not mere disagreements between the Parties.¹⁰ Nor are the rules surrounding contact with witnesses of an opposing party in any way unclear.¹¹ Rather, the matters raised in this filing relate to a series of violations of court orders through breaches of the relevant protocols and the codes of conduct for counsel and investigators, and merit review by the Chamber.

Confidentiality

4. The filing is classified as Confidential pursuant to regulation 23*bis* (1) and (2) of the Regulations of the Court, because it contains confidential information regarding Prosecution and Dual Status Witnesses.

Background

5. On 12 December 2014, the Chamber adopted the 'Protocol on the handling of confidential information and on contact with witnesses of the opposing party' ("Witness Contact Protocol")¹² following discussions between the Parties and

⁸ For example, Witness P-790.

⁹ For example, Witnesses P-895, P-790 and P-113. The Defence initially refused to disclose the audio-recording for [REDACTED] and only did so after a court order to do so.

¹⁰ ICC-01/04-02/06-T-25-Red-ENG, p. 9, lns. 12-14 and 17-18, p. 10, lns. 3-4, p. 11, lns. 7-8 and 18-20, p. 11, ln. 24 to p. 12, ln. 5.

¹¹ ICC-01/04-02/06-T-25-Red-ENG, p.9, lns.12-23, p.12, lns.4-17; ICC-01/04-02/06-T-28-Red-ENG, p.70, ln.8 to p.71, ln.1.

¹² ICC-01/04-02/06-412.

participants, and receiving written submissions from the Prosecution,¹³ the LRVs,¹⁴ the Victims and Witnesses Unit (“VWU”)¹⁵ and the Defence.¹⁶

6. On 18 February 2015, the Chamber adopted the ‘Protocol on dual status witnesses’ (“Dual Status Witness Protocol”), as agreed by the Parties and participants in consultation with representatives from the VWU.¹⁷
7. Prior inadvertent contacts were reported in March 2015. On 7 March 2015, Defence Counsel advised the Prosecution that there had been inadvertent contact with Witness [REDACTED], as he had instructed his investigators to find a person with the same last name as Witness [REDACTED].¹⁸ On 13 March 2015, Defence Counsel advised the Prosecution that there had been another “*inadvertent attempt by my two investigators to contact Prosecution witness [REDACTED]*” due to Defence Counsel’s error as he did not realise [REDACTED] was a Prosecution witness in spite of the notice given by the Prosecution since 2 March 2015.¹⁹ The Defence investigators were not able to speak directly to Witness [REDACTED].
8. On 17 June 2015, the Chamber issued its decision adopting the ‘Protocol on the practices to be used to familiarise witnesses for giving testimony at trial’ (“Familiarisation Protocol”).²⁰
9. On 19 June 2015, the Prosecution sought the immediate [REDACTED].²¹ The filing detailed, *inter alia*, direct contacts made by [REDACTED] with Witnesses [REDACTED], and disclosure of confidential information about Prosecution witnesses.²²

¹³ ICC-01/04-02/06-392.

¹⁴ ICC-01/04-02/06-397.

¹⁵ ICC-01/04-02/06-398-Conf.

¹⁶ ICC-01/04-02/06-400.

¹⁷ ICC-01/04-02/06-464, paras. 2, 5 (and adopted the ‘Protocol on dual status witnesses’ attached as ICC-01/04-02/06-430-Anx1).

¹⁸ Annex A.1. Email dated 7 March 2015, 17:37.

¹⁹ Email dated 13 March 2015, 21:04; ICC-01/04-02/06-555-Conf-Exp-Red3, para. 44; ICC-01/04-02/06-555-Conf-Exp-Anx1 (Annex not available to the Prosecution).

²⁰ ICC-01/04-02/06-656.

²¹ ICC-01/04-02/06-658-Conf-Exp.

²² ICC-01/04-02/06-658-Conf-Exp, paras. 11-16, 19-23, 28-29, 33-39.

10. On 23 June 2015, the Chamber ordered interim measures in relation to [REDACTED] ("Interim Decision"), in which it underscored that [REDACTED] and instructed the Defence to review its procedures and where appropriate revise its working methods.²³
11. On 12 August 2015, the Chamber issued its final decision on the Prosecution Request [REDACTED] in which it recalled [REDACTED]²⁴
12. On 11 September 2015, Defence Counsel advised the Prosecution that *"a possibility exists that our investigator interacted with Prosecution witness P-0895."*²⁵ In response to a query on 11 September 2015, Defence Counsel responded the same day that *"I have not been able to verify whether any information regarding the status of our investigator was communicated to the two persons encountered [REDACTED]"*.²⁶
13. On 14 September 2015, Defence Counsel brought to the Prosecution's attention *"two inadvertent contact (sic) with Prosecution witnesses, namely P-0790 and P-0100."*²⁷ The Defence stated that Witness P-790 was questioned. Defence Counsel further stated that both Witness P-790 and P-100 had consented to being interviewed, and that he sought the Prosecution's authorisation to interview them.²⁸ On the same day, Defence Counsel met with Witness [REDACTED] in the presence of Prosecution Counsel. The Prosecution requested a copy of the audio-recording made by the Defence, but Defence Counsel refused to provide it.²⁹
14. On 15 September 2015, Defence Counsel advised the Prosecution of *"the possibility – not confirmed – of an inadvertent contact between our investigator and a Prosecution witness, namely P-113 (dual status)."* Defence Counsel stated that the person was interviewed; and it was only when they read her first name and her account after the interview was completed that they considered it was possible she was Witness

²³ [REDACTED].

²⁴ [REDACTED].

²⁵ Annex A.2. Email dated 9 September 2015, 10:58.

²⁶ Annex A.3. Email dated 11 September 2015, 20:01.

²⁷ Annex A.4. Email dated 14 September 2015, 09:56.

²⁸ Annex A.4. Email dated 14 September 2015, 09:56.

²⁹ Annex A.6. Email dated 14 September 2015, 18:58.

P-113. The Defence said she did not provide a full name that matched that of Witness P-113, nor did her date of birth or names of her parents match her witness statement.³⁰

15. On 15 September 2015, the Prosecution advised the Chamber that it intended to submit a filing in relation to inappropriate contacts made by the Defence to Prosecution witnesses.³¹ Between 14 and 24 September 2015, the Prosecution contacted Witnesses P-113, P-790, P-100 and P-895 to clarify the circumstances of these contacts.³²
16. On 16 September 2015, Defence Counsel contacted the Prosecution asserting that no statement was taken from Witness P-113.³³ The same day, the Prosecution asked the Defence to provide the names of those who questioned Witness P-113 and the record of that meeting. The Prosecution also sought the names of the Defence team members who had questioned Witness P-790 and sought disclosure of the notes taken. The Defence provided a response to these requests *via* its filing on 21 September 2015,³⁴ and disclosed the audio-recordings of Witnesses P-113, P-790 and P-100.
17. On 16 September 2015, the Chamber confirmed, in an oral order, that paragraph 45 of the Witness Contact Protocol requires disclosure to the calling party of meetings with its witnesses by the opposing party.³⁵ The Defence disclosed the audio-recording of the interview with Witness [REDACTED] as ordered the next day.
18. On 21 September 2015, the Defence sought the Chamber's authorisation for VWU to convene a meeting between the Defence, the Prosecution and Legal

³⁰ Annex A.5. Email dated 15 September 2015, 14:14. The Defence stated that other than the first name, the other names provided by the witness did not match the names in the witness's Prosecution statement. Nor did the date of birth or names of parents match the information contained in the witness's Prosecution statement.

³¹ ICC-01/04-02/06-T-25-Red-ENG, p. 17, ln. 25 to p. 16, ln. 2.

³² Annexes B.1 to B.4.

³³ Annex A.7. Email dated 16 September 2015, 00:35.

³⁴ ICC-01/04-02/06-844-Conf-Exp-AnxD.

³⁵ ICC-01/04-02/06-T-26-Red-ENG, p. 47, lns. 1-5 and lns. 9-12.

Representative of Victims, Mr Suprun (“Defence Request”).³⁶ Amongst the annexes attached to the Defence Request is a report about Defence contacts with Prosecution Witnesses P-790, P-100, P-113 and P-895 (“Defence Report”).³⁷ The Defence further disclosed audio-recordings of the meetings with P-790, P-113 and P-895.³⁸

Prosecution’s Submissions

19. The Defence seeks to characterise the issues regarding its inappropriate contacts with Prosecution witnesses as mere misunderstandings between the Parties.³⁹
20. Instead, these are potential violations of court orders by Defence team members who have breached provisions of two agreed protocols by the way in which they have had direct contact with Prosecution witnesses and Dual Status Witnesses.⁴⁰ Further, they have violated their obligations under the relevant codes of conduct for Defence Counsel and Defence Investigators. Contrary to the Defence’s assertions, simply *informing* the Prosecution of their ongoing breaches does not sufficiently discharge the Defence’s ethical and professional duties.⁴¹ The obligations regarding contact with the opposing party’s witnesses are clear from the protocols and codes of conduct.⁴² Moreover, the Defence’s guidelines for its investigators issued following the prior inadvertent contacts with Witnesses [REDACTED] and [REDACTED] should have been complied with.⁴³
21. In the field, the Defence has had direct contact with six Prosecution witnesses to date, four in the first week of calling evidence. Two of these witnesses were even interviewed by the Defence. Witness P-790’s account indicates that the meeting was not inadvertent. The Defence investigator and resource person went to his

³⁶ ICC-01/04-04/06-844-Conf-Exp.

³⁷ ICC-01/04-04/06-844-Conf-Exp-AnxD.

³⁸ Annexes E.1-E.7.

³⁹ ICC-01/04-02/06-T-25-Red-ENG, p. 9, lns. 12-14 and 17-18, p. 11, lns. 18-20, p. 11, ln. 24 to p.12, ln. 5.

⁴⁰ ICC-01/04-02/06-412, p. 16; ICC-01/04-02/06-464, p. 4.

⁴¹ ICC-01/04-02/06-T-25-Red-ENG, p. 12, lns. 1-13.

⁴² ICC-01/04-02/06-T-25-Red-ENG, p.14, ln.3 to p.18, ln.13.

⁴³ ICC-01/04-02/06-667-Conf-Exp, para.12.

home and asked him to confirm that he was the [REDACTED] and to confirm the name they had for him before proceeding to question him. The other witness, P-113, [REDACTED], stated that she was misled into speaking to the Defence because they described themselves as “ICC lawyers”. Although the audio-recording indicates they said they worked for the Defence of Bosco Ntaganda, Witness P-113 did not understand that they worked for the Defence team of the Accused. The Defence members did not indicate the purpose of the questions or notes.

22. At the seat of the Court, the Defence directly informed Witness [REDACTED] about their request to meet with him during the courtesy meeting, before the Prosecution had an opportunity to address this request with the witness: to explain that it is a proper procedure, that he can consent to the meeting or not, and that he is entitled to the presence of a legal representative should he wish to have one present. Not only is the Witness Contact Protocol clear about the procedure for obtaining consent for such meetings, the reason why it is imperative that the calling party and the LRV, where applicable, seek the consent of the witness is because they can spend more time to explain the procedure to the witness, address any concerns the witness may have and explain the parameters of such meetings. It can be upsetting to a witness to be asked directly by the Defence team to meet, without first understanding the request or their rights in relation to it. Many witnesses feel obliged to respond immediately when such a request is made. The Chamber has since clarified that courtesy meetings must only be used to introduce counsel to the witness.⁴⁴

23. Witness [REDACTED] agreed to meet with the Defence team in advance of his testimony but requested that a Prosecution representative attend with him, as was his entitlement under paragraph 40 of the Witness Contact Protocol. During the meeting, the Defence repeatedly asked him to change his mind about being interviewed in the presence of Prosecution representatives. The witness said he felt

⁴⁴ ICC-01/04-02/06-T-26-Red-ENG, p.48, lns.11-20. See also: ICC-01/04-02/06-T-27-Red-ENG, p. 4, lns.1-3.

disturbed when Defence Counsel passed on a message from the Accused, and said that the Accused would do the same in the courtroom.⁴⁵

24. This conduct by the Defence took place in spite of: (a) the Chamber's recent warning and instruction, [REDACTED], that *"impropriety in the conduct of investigators will not be tolerated"*;⁴⁶ (b) the Defence's promise that guidelines would be issued to its investigators and resource persons, and their work closely monitored to avoid inadvertent contact happening again in the future;⁴⁷ (c) the Chamber's instructions for the Defence to review its procedures for investigations and to revise its working methods where appropriate,⁴⁸ in particular, in its supervision of its investigators; (d) the Chamber's proposal to continue the Defence Counsel's initiative [REDACTED]⁴⁹ and (e) the Chamber's reminder that the Witness Contact Protocol and code of conduct for Investigators require that [REDACTED]⁵⁰

25. The Prosecution sets out below: (a) the Defence contacts in the field with the Prosecution and/or Dual Status Witnesses P-895, P-100, P-790 and P-113; and (b) the specific obligations of Defence Counsel and Investigators, which it submits have been breached during these contacts.

I. Contacts with Prosecution/Dual Status Witnesses

(a) Contact with P-895

26. On 11 September 2015, members of the Defence team went to [REDACTED] where meeting Witness P-895 must have been foreseeable given he is the [REDACTED]

⁴⁵ Annex C: Transcript of DRC-OTP-2088-0311, p. 3, ln. 31 to p. 4, ln. 69: « **SB** : Alors, J'aimerais commencer par vous souhaiter, ou plutôt vous transmettre les salutations de BOSCO...On a beaucoup parlé de vous récemment.... Et, alors BOSCO vous transmet ses salutations, et puis... il ne manquera pas de le faire dans la salle d'audience.... **NS** : Je ne pense pas qu'il aura l'opportunité de dire quoi que ce soit au témoin dans la salle d'audience...Cela ne sera pas permis....Je ne veux pas vous laisser dire à Monsieur le témoin que M. Bosco NTAGANDA va lui parler en salle d'audience....**SB** : [...] J'ai transmis les salutations de M. NTAGANDA à [REDACTED].... Parce que M. NTAGANDA allait certainement voir [REDACTED] dans la salle d'audience.»

⁴⁶ [REDACTED].

⁴⁷ [REDACTED].

⁴⁸ [REDACTED].

⁴⁹ [REDACTED].

⁵⁰ [REDACTED].

(as appears in his statement), and that the Defence's stated purpose was [REDACTED].⁵¹ Witness P-895 appeared surprised when first told by the Prosecution on 11 September 2015 that the woman from the Court who came to his work and spoke to him was from the Accused's Defence team.⁵²

27. On 11 September 2015, the Prosecution agreed that the Defence resource person could have limited further contact with Witness P-895 in the field, solely to [REDACTED].⁵³ However, according to the Defence Report, in spite of this agreement and in violation of the Witness Contact Protocol and code of conduct, on 15 and 16 September 2015, the Defence resource person, Ms Dimitri, met with Witness P-895. This was done without the prior knowledge, or consent, of the Prosecution or Witness P-895, to discuss matters that went beyond [REDACTED]. Ms Dimitri secretly audio-recorded conversations with P-895 on 10, 15 and 16 September 2015 *"to protect her professional integrity."*⁵⁴ Witness P-895 confirmed that these recordings were done without his knowledge or consent.⁵⁵ On 15 September 2015, the Defence resource person asked Witness P-895 a leading question – *"mais vous saviez que j'étais de la Défense,"* to which he responded yes.⁵⁶ Witness P-895 said that he found the manner in which she put this question provocative.⁵⁷ On 22 September 2015, when the Prosecution asked Witness P-895 how the Defence introduced themselves, he said that he was told that she was from the Defence.⁵⁸

(b) Contact with P-100

28. Witness P-100, a vulnerable victim,⁵⁹ told the Prosecution that on 12 September 2015, a local person informed him that an *"ICC delegation from the Hague"* was seeking to meet with [REDACTED]. P-100 said that in this context he approached a

⁵¹ Annex A.2. Email dated 9 September 2015, 10:58.

⁵² Annex B.1: DRC-OTP-2088-0309.

⁵³ Email dated 11 September 2015, 18:19.

⁵⁴ ICC-01/04-02/06-844-Conf-Exp-AnxD; Annexes E.1-E.3.

⁵⁵ Annex D.1; DRC-OTP-2088-0365.

⁵⁶ Annex E.2: DRC-OTP-2088-0373.

⁵⁷ Annex D.1.

⁵⁸ Annex D.1.

⁵⁹ See: DRC-OTP-0096-0020 at 0028-0029, paras. 37-39, 42.

female Congolese member of the delegation and provided his contact details. Witness P-100 states that she did not explain for whom at the Court she worked. P-100 asked the Prosecution if they could tell him who the “*ICC delegation*” was, as he found it hard to distinguish amongst the different ICC groups. The Prosecution explained to P-100 that they were from the Defence team, that the Defence had since asked to interview him, and that this was for him to decide. Witness P-100 responded that he did not want to meet or talk to the Defence.⁶⁰ This contrasts the Defence’s account that their investigator introduced herself as working with the Defence, after which P-100 consented to be interviewed.⁶¹ Indeed, P-100 understood that the Defence was describing themselves to the wider community of [REDACTED] victims as “*ICC lawyers*” without advising that they worked for the Defence.

(c) Contact with P-113

29. Witness P-113 stated that on [REDACTED], a local man from [REDACTED], came to find her saying that “*ICC lawyers*” wanted to meet her because they were looking for [REDACTED] who had suffered during the war. She said that when she first met the ICC group in [REDACTED], the white woman who interviewed her gave her name and said that she was a lawyer working with the “*Office of the ICC*” or as “*ICC lawyers*”. Although the audio-recording indicates that Witness P-113 was informed that the Defence team indicated they worked for the Defence of Bosco Ntaganda, P-113 indicates that she did not understand that they worked for the Accused. It is apparent from the audio-recording that they had to repeat the reference to Bosco Ntaganda. Witness P-113 did not understand. The woman who interviewed her took notes on her computer. P-113, who is still upset by the encounter, said that if she had understood that they worked for the Accused she would not have agreed to speak to them. P-113 confirmed that she only provided her real first name and not her real last name because she did not know them, but

⁶⁰ Annex B.2; DRC-OTP-2088-0362.

⁶¹ Annex A.4; Email dated 14 September 2015, 09:56; ICC-01/04-02/06-844-Conf-Exp-AnxD.

said that she provided her real date of birth.⁶² The Defence audio-recorded this interview without P-113's knowledge or consent.⁶³

(d) Contact with P-790

30. The Defence has known of Witness P-790's identity as a Prosecution witness since 2 March 2015, including his full name and his current position [REDACTED].⁶⁴ As is evident from P-790's account, the Defence tracked him down at his home with a police officer. The Defence resource person first asked him if he was the [REDACTED], then asked him if he was [REDACTED]. Only after the witness confirmed that this was him, thereby establishing his identity, did she start asking him a series of questions. Witness P-790 said that they knew his name and did not explicitly ask for his prior consent before asking him questions. The audio-recording confirms that the Defence team repeated Witness P-790's full name and job title to him before proceeding to interview him. Ms Dimitri did ask P-790 if he had met anybody else from the ICC. After he told her that he had given a signed statement to the LRV, they proceeded to interview him, even after asking P-790 if he was a 'victim' in the case (rather than his representative).⁶⁵ Although, P-790 did not mention he met the Prosecution or his status as a Prosecution witness, as soon as he halted the interview the Defence resource person said to him that they would be asking the Prosecution if he agreed to be interviewed.⁶⁶ This also indicates that they were already aware of his status as a Prosecution witness. At no time did the Defence inform Witness P-790 that they were recording the interview or seek his consent for such a recording.

31. This contrasts with the Defence's account that the Defence investigator did not know he was a Prosecution witness and that she stopped the interview when she

⁶² Annex B.3: DRC-OTP-2088-0313.

⁶³ Annex D.3: DRC-OTP-2088-0418; Annex E.5: DRC-OTP-2088-0383.

⁶⁴ For instance, on the cover page of his witness statement, DRC-OTP-2078-2373, Witness P-790 is identified as [REDACTED]. But at paragraph 12 (page 2375) [REDACTED]; ICC-01/04-02/06-491-Conf-AnxB, p. 129.

⁶⁵ Annex E.4: DRC-OTP-2088-0377.

⁶⁶ Annex B.4: DRC-OTP-2088-0358.

realised who he was, and that she told him she could not meet him because he was a Prosecution witness.⁶⁷ The Defence claims it only knew he was *formerly* [REDACTED],⁶⁸ but in his disclosed witness statement, P-790 states that he *returned* to his former position as [REDACTED].⁶⁹

II. Breaches of obligations of Defence Counsel and Investigators

32. The Prosecution outlines the various breaches of the protocols and codes of conduct below.

(a) Duty of Counsel and Investigators to identify for whom they work

33. First, Defence counsel, investigators and resource persons are required to identify themselves, and the fact that they are members of the Defence team for the Accused, with those they meet during their investigations. The Code of Conduct for Investigators⁷⁰ requires an investigator to “*accurately identify himself or herself and disclose in his or her dealings with beneficiaries or potential beneficiaries his or her connection to the case or investigation;*”⁷¹ and to observe the “*highest standards of integrity and conduct in discharging his or her duties*”.⁷² The Code of Professional Conduct for counsel (“Code of Conduct for Counsel”)⁷³ requires counsel to not act in any way prejudicial to the ongoing proceedings and to not bring the Court into disrepute;⁷⁴ and to be respectful and courteous with victims and witnesses.⁷⁵

34. These obligations are particularly important where there is a risk that the Defence will meet Prosecution or Dual Status Witnesses, and that a failure to identify themselves as Defence can lead witnesses into error. The Defence team failed to clearly identify themselves to Witness P-100, which led him to mistakenly engage

⁶⁷ Annex A.2; Email dated 14 September 2015, 09:56.

⁶⁸ ICC-01/04-02/06-844-Conf-Exp-AnxD, p. 3.

⁶⁹ DRC-OTP-2078-2373, at p. 2375, para. 12; ICC-01/04-02/06-491-Conf-AnxB.

⁷⁰ ICC/A1/2008/005, 10 September 2008.

⁷¹ Section 7.1.

⁷² Section 4.1.

⁷³ Resolution ICC-ASP/4/Res.1.

⁷⁴ Article 24.

⁷⁵ Article 7.

with the Defence without his informed consent. Although the audio-recording disclosed by the Defence indicates that Witness P-113 was informed that they worked with the Defence, she was clearly confused by the encounter and told both the Prosecution and Legal Representative that she did not know who they were and was upset by the encounter.

35. Most witnesses do not differentiate between the various branches of the Court, and this will be even more likely where witnesses have had limited contact with the calling party or VWU. Witnesses may not fully understand the role of each party, the nature of the opposing party's request, or the governing rules. This is evident in the accounts given by Witnesses P-790, P-100, P-113 and P-895.

(b) Duty not to make direct contact with Prosecution Witnesses and Dual Status Witnesses without prior notice and consent

36. Second, Defence Counsel and Defence investigators breached their obligations not to directly contact Prosecution witnesses and Dual Status Witnesses without prior notice to, and consent of, the Prosecution and/or LRV (outside the allowable courtesy meeting) when they contacted Witnesses P-790, P-895, P-113 and P-100.⁷⁶
37. Contrary to the Defence's assertions,⁷⁷ the requirements under the Witness Contact Protocol are unambiguous. This protocol clearly stipulates that "*the party or participant seeking to contact a witness of the opposing party will provide the latter with notice of its intent to do so. Such a procedure will allow the opposing party or participant to ask the witness whether he/she agrees to be contacted or interviewed.*"⁷⁸ The opposing party shall ask their witness if they consent to the request within five business days.⁷⁹ Accordingly, the party seeking contact must withhold from contacting a witness until the witness has consented to that contact. Consent is to be sought by the calling party or participant within a specified period of time. Clearly, this

⁷⁶ The Prosecution recalls the prior inadvertent contacts with Witnesses [REDACTED].

⁷⁷ ICC-01/04-02/06-T-25-Red-ENG, p. 9, lns. 12-14 and 17-18, p. 11, lns. 18-20, p. 11, ln. 24 to p. 12, ln. 5.

⁷⁸ ICC-01/04-02-06-412-AnxA, para. 34.

⁷⁹ ICC-01/04-02-06-412-AnxA, para. 34.

notice is to be provided, and consent attained, *prior* to contacting an opposing party's witness. Moreover, under the Code of Conduct for Counsel⁸⁰ and Dual Status Witness Protocol,⁸¹ the Defence cannot directly address Dual Status Witnesses, and must engage with them through their Legal Representatives.

38. Both protocols require members of the Defence team, at a minimum, to exercise diligence in approaching individuals who may be Prosecution witnesses or Dual Status Witnesses. Defence must at the very least: (a) clearly introduce themselves as being from the Defence (which they did not do with Witness P-100); (b) ask the person's name and check it against the names of Prosecution witnesses (which they did not do with Witnesses [REDACTED], P-895, or P-100) *before* seeking to locate, engage with, or ask any questions; and, (c) only after such checks should they ask if the person has been met by other persons of the Court (which they did not do with Witnesses [REDACTED], P-895, P-100 or P-113).
39. Even then, it is unreasonable, as the Defence has sought to argue in relation to Witnesses P-790 and P-895,⁸² that it can solely rely upon a witness identifying him- or herself as a Prosecution witness or Dual Status Witness. Witnesses are asked to keep this information confidential from third parties who they do not know and even their own family members, where necessary. The expectation that a witness will admit to being a Prosecution witness when advised not to do so for their own security is even more unreasonable when the contact occurs in an indiscrete location, such as Witness P-895's [REDACTED] where others might see or overhear discussions with Witnesses P-100, P-113 and P-790. It is also unreasonable to expect witnesses to confirm their status as Prosecution witnesses when the allegations of attempted witness interference by the Accused or his supporters is now public knowledge.

⁸⁰ Code of Conduct for Counsel, article 28.

⁸¹ ICC-01/04-02-06-430-Anx1, para. 6(a) (adopted in ICC-01/04-02/06-464).

⁸² ICC_01/04-02/06-844-Conf-Exp-AnxD; P-895: The Defence noted that the individual had not identified himself by name or as a Prosecution witness; See Annex A.2; P-100 and P-790: Annex A.4; P-113: Annex A.5.

40. As Witness P-895 works in [REDACTED], the Defence should have informally obtained the names of staff before engaging with them, and provided notice to the Prosecution before speaking to him. There is also no adequate explanation as to why the Defence investigator went back to him, knowing he was a Prosecution witness, to secretly record him twice, once pressuring him by asking him a leading question that he knew she was with the Defence. The Defence investigators also did not exercise diligence when dealing with the [REDACTED] victims: they had to know that there was a high risk they would meet Prosecution witnesses and Dual Status Witnesses in [REDACTED]. The Defence must have known that there was a specific risk they would encounter Witness P-113 when they sent a [REDACTED] to look for “[REDACTED] who have suffered during the war.” The Defence are also now aware of where Witness [REDACTED] resides, even though this information was redacted from them.

41. The Defence has stated that it wants to meet with the Prosecution, LRVs and VWU, to discuss how to improve their practices.⁸³ However, the Defence’s attitude to the recent contacts with Prosecution and Dual Status Witnesses is demonstrated by their approach in informing the Prosecution of the contacts, but immediately stating that as the witness “consented” to the contact so that they be authorised to further engage and/or interview them.⁸⁴ In contrast, to the inadvertent contacts with Witnesses [REDACTED] and [REDACTED], the Defence is not offering to disclose sworn affidavits from their team explaining how these breaches of the Witness Contact Protocol or Dual Status Witnesses Protocol occurred. Instead, an unsworn report was disclosed, together with recordings – some partial only – of conversations with Prosecution witnesses.⁸⁵

42. Even on the basis of the Defence’s account – which the Prosecution does not accept – , the claim that the Defence team was unable to identify Witnesses P-790 or P-895

⁸³ ICC-01/04-02/06-T-28, p.70, ln.8 to p.71, ln.1.

⁸⁴ See e.g. Annexes A.2, A.4.

⁸⁵ ICC-01/04-02/06-844-Conf-Exp-AnxD.

before questioning them is very hard to reconcile with the facts: they knew P-790's job and full name, and that P-895 worked [REDACTED]. It is not acceptable for the Defence to claim that there was an error because the new Defence team members do not know the names of Prosecution witnesses.⁸⁶ This is team knowledge; new team members need to be supervised closely and it is possible to have an encrypted computer with this information in the field.

(c) Duty to not usurp the Prosecution's role in asking their witnesses if they consent to being interviewed

43. The Defence violated this requirement in its contact with Witnesses P-790 and [REDACTED]. The Defence initially said that they do not consider it inappropriate to ask Prosecution witnesses if they agree to be interviewed.⁸⁷ The Defence appears to concede this point now as they say they no longer wish to meet any Prosecution witnesses and will only seek to use courtesy meetings to introduce themselves to witnesses,⁸⁸ but this does not detract from the violations of both protocols.

(d) Duty to obtain a witness's prior consent to be interviewed and ask if they wish to have a representative present during any such interview

44. The Witness Contact Protocol requires that *"a party or participant who seeks to interview a witness of the opposing party or of a participant can only do so if the witness consents to the interview."*⁸⁹ The witness has the right to have a representative of the calling party present in any such meeting.⁹⁰ Moreover, if an interview is conducted, *"a video or audio record of the entire interview will be provided to the party or participant calling the witness or relying on his or her statement as soon as practicable*

⁸⁶ ICC-01/04-02/06-844-Conf-Exp-AnxD.

⁸⁷ See e.g. Annex A.8. Email dated 10 September 2015, 00:46.

⁸⁸ ICC-01/04-02/06-26-Red-ENG, p.4, lns.1-7.

⁸⁹ ICC-01/04-02-06-412-AnxA, para.33.

⁹⁰ ICC-01/04-02/06-412-AnxA, para.40.

after the conclusion of the interview."⁹¹ Any deviation from its provisions requires the prior authorisation of the Chamber.⁹²

45. The Defence violated these obligations when it interviewed Witnesses P-790 and P-113 without their informed consent and bypassed the Prosecution and LRV.⁹³ The Defence must not be allowed to benefit from their violations of the protocols and codes of conduct to use any such notes for cross-examination purposes with Witnesses P-790 or P-113, when they did not give their informed consent.⁹⁴ The Defence also violated their obligations to inform and seek consent from the Witnesses that they will audio-record them.⁹⁵

Relief Sought

46. Based on the above, the Prosecution seeks an order from the Chamber directing all members of the Defence team to adhere strictly to the provisions of the protocols and their codes of conduct as Counsel or Investigators, including:

- (i) to clearly state that they work for the Defence team of the Accused when they introduce themselves to any witnesses;
- (ii) to clearly inform witnesses that they will audio-record interviews and to obtain the witnesses' consent before any such a recording can be made;
- (iii) to not contact any Prosecution witnesses prior to obtaining the consent of the Prosecution and/or LRV;
- (iv) in the event the Defence wishes to meet with Prosecution witnesses,⁹⁶ to not discuss, raise, refer to or allude to a Defence request to meet with a witness of

⁹¹ ICC-01/04-02/06-412-AnxA, para.45.

⁹² ICC-01/04-02-06-412-AnxA, para.46.

⁹³ See paras.29-30 above.

⁹⁴ See e.g. ICC-01/04-01/06-1981, paras.35, 42, 67, fn. 67; *Prosecutor v Martić*, IT-95-11-T, Decision adoption Guidelines on the standards governing the admission of evidence, 19 January 2006, para.9.

⁹⁵ See Annexes D.1, D.2, D.3.

⁹⁶ ICC-01/04-02/06-T-27-Red-ENG, p.4, lns 4-7.

the opposing party,⁹⁷ and to channel any such requests through the calling party and LRV, where applicable;

- (v) for the Defence to be precluded from using the unsanctioned interview notes and audio-recordings in their cross-examination of the witnesses;
- (vi) to disclose the complete audio-recordings of the interviews with Witnesses P-895, P-790 and P-113 since in some instances the Defence appears to have disclosed only partial recordings, and no recordings of meetings with P-895 on technical assistance have yet been disclosed;
- (vii) for the Defence team members who contacted Witnesses P-895, P-100, P-113 and P-790 to be ordered to provide sworn affidavits explaining the circumstances of their contacts, including how they described their roles at the Court to the witnesses, and from whom they obtained their instructions, if any, to meet with, and/or interview Witnesses P-790 and P-113.



Fatou Bensouda, Prosecutor

Dated this 6th day of October 2015
At The Hague, the Netherlands

⁹⁷ ICC-01/04-02/06-T-26-Red-ENG, p.48, lns.16-20.