

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-02/06
Date: 15 January 2016

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

Public redacted version of “Prosecution reply to the Defence’s “Confidential Redacted Version of ‘Final Observations on Prosecution Requests for Restrictions on Mr Ntaganda’s Communications’, 3 August 2015, ICC-01/04-02/06-759-Conf-Exp”, ICC-01/04-02/06-759-Conf-Exp-Red”, 13 August 2015, ICC-01/04-02/06-780-Conf-Exp

Source: Office of the Prosecutor

Document 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 the Defence

Mr Stéphane Bourgon
Mr Luc Boutin
Mr Christopher Gosnell

Legal Representatives of the Victims

Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(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

Mr Patrick Craig

**Victims Participation and Reparations
Section**

Other

Introduction

1. The Office of the Prosecutor (“Prosecution”) replies to two matters addressed in the Defence’s final observations on the Prosecution’s requests for restrictions to the Accused’s contacts:¹
 - a. The applicability of the Protocol on handling confidential information and regulating contact with witnesses of the opposing party and regulation 42 [REDACTED] of the Regulations of the Court (“RoC”) in relation to the Accused’s obligation not to disclose confidential information; and
 - b. Whether any further information obtained through the monitoring of the Accused’s communication should be provided to an *amicus curiae* rather than to the Prosecution, particularly in view of the non-privileged nature of the communication at issue.
2. On the first matter, the Accused has been aware since at least July 2013 that regulation 42 of the RoC applied to certain witnesses and documentary material. He was under an obligation not to violate the corresponding protective measures [REDACTED]. Further, regulation 42 applies to [REDACTED]. In addition to regulation 42, the “Protocol on the Handling of Confidential Information during Investigations and Contact Between a Party or Participant and Witnesses of the Opposing Party or Participant”² obliges the Accused to not disclose the identity and cooperation of a Prosecution witness. The Accused has acted in violation of these obligations.
3. On the second matter, although the Prosecution’s request did not extend to further recordings of telephone conversations, no legal privilege attaches to the Accused’s recorded telephone conversations. According to this Court’s

¹ ICC-01/04-02/06-759-Conf-Exp-Red (“Defence Observations”). On 12 August 2015, Trial Chamber VI (“Chamber”), *via* email, granted the Prosecution leave to reply to the two matters addressed at paras.12 and 14 of the Prosecution’s request for leave to reply (ICC-01/04-02/06-775-Conf-Exp).

² ICC-01/04-02/06-412-AnxA (“Protocol”).

jurisprudence, the Prosecution can access such recordings directly for the purposes of an investigation without the need to appoint independent counsel.

Confidentiality

4. This filing is classified as “Confidential, *EX PARTE* – only available to the Prosecution, Defence, Registry and Victims and Witnesses Unit” under regulation 23bis(2) of the RoC, in line with the classification of related filings. The Prosecution submits that it is appropriate to file a public redacted version of this filing.³

Prosecution’s Submissions

I. The Accused is obliged not to disclose confidential information pursuant to the Protocol and regulation 42 [REDACTED]

5. Although the Defence acknowledges that witness protection orders exist and were “generally known” to Mr Ntaganda,⁴ the Prosecution sets out the specific sources of the obligation not to disclose confidential information and the ways in which Mr Ntaganda is subject to them.⁵
6. First, since 2013, both Parties have been in agreement with all but two paragraphs⁶ of the Protocol which Pre-Trial Chamber II applied on 17 December 2013 and this Chamber adopted on 12 December 2014.⁷
7. Paragraph 21 of the Protocol provides that a party shall *under no circumstances* reveal that a witness of the opposing party is involved, directly or indirectly, with

³ See ICC-01/04-02/06-725-Conf-Exp.

⁴ Defence Observations, para.19.

⁵ See also ICC-01/04-02/06-349-Conf-Red, paras.42-47.

⁶ See ICC-01/04-02/06-349-Conf-Exp, paras.44-47; ICC-01/04-02/06-185.

⁷ ICC-01/04-02/06-412.

the activities of the Court, or the nature of such involvement.⁸ The Protocol also provides that a party must go through the opposing party if it seeks to contact the opposing party's witnesses.⁹ These obligations apply in respect of *all* witnesses, regardless of whether or not they were granted protective measures [REDACTED].

8. Further, as clearly stated in the letters signed by Counsel for both Parties accompanying disclosure, the confidentiality level of Prosecution witness statements is "confidential". This information also appears on the relevant metadata field in Ringtail.
9. The definition of "confidential" in regulation 14(b) of the Regulations of the Registry is "not to be disclosed to the public".
10. Contrary to the Defence's assertion in paragraph 20 of its observations, regulation 42 of the RoC applies whether or not [REDACTED]. It is correct that the Accused can only abide by his obligation not to undermine a regulation 42 protection once he knows that regulation 42 applies, but this occurs whenever the Accused is informed that regulation 42 is applicable to a given witness or document. In this case, Pre-Trial Chamber II issued decisions¹⁰ as early as July 2013 on the fact that [REDACTED] and [REDACTED] were subject to [REDACTED]. In August 2013, Pre-Trial Chamber II issued similar decisions for other witnesses.¹¹

⁸ Protocol, para.21.

⁹ Protocol, para.34.

¹⁰ See ICC-01/04-02/06-63-Conf-Red, paras.6-12; ICC-01/04-02/06-58-Red, paras.27-30; ICC-01/04-02/06-78-Conf-Red, paras.21, 42-45.

¹¹ ICC-01/04-02/06-95-Conf.

11. The fact that [REDACTED] may have been granted orally or were not accompanied by lengthy reasoning is legally irrelevant.¹² The Accused in this case was bound to abide by those orders, respect them, and not breach them.
12. Finally, the scenarios described by the Defence in paragraphs 21-22 of its observations in which an accused may legitimately discuss potential witnesses without violating regulation 42 of the RoC do not reflect what transpired during the Accused's recorded conversations. The context in which the Accused's conversations took place and the Accused's own words reveal that specific persons are going to testify for the Prosecution or have cooperated with it.¹³ This conduct is prohibited under the Protocol and the Court's regulatory framework.
13. In view of the above, the Accused has long been aware that he is under an obligation not to disclose the identity of Prosecution witnesses or any witnesses for whom regulation 42 is in effect.

II. There is no need for an *amicus curiae*

14. The Prosecution's final observations referred to the Prosecution's previous request "to be informed of any telephone calls that the Registry has terminated, and the basis therefor".¹⁴ This request did not extend to the actual recordings of the relevant calls.
15. Therefore, the Defence request that any further recordings of the Accused's conversations be provided to an *amicus curiae* rather than to the Prosecution¹⁵ is moot.

¹² *Contra* Defence Observations, para.19.

¹³ See e.g. ICC-01/04-02/06-738-Conf-Exp, paras.24, 26 ("Prosecution Final Observations").

¹⁴ Prosecution Final Observations, para.44.

¹⁵ Defence Observations, paras.77, 79-80.

16. Nevertheless, should the Prosecution make any further requests for access to further recordings of the Accused's conversations, an *amicus curiae* is not required. There are no issues of privilege arising from the recording of the Accused's non-privileged calls. In the *Bemba* case, the Pre-Trial Chamber held that as long as the recorded conversations are not of calls with Counsel for the Accused, "they can be legitimately directly accessed by the Prosecutor for the purposes of her investigation and there is accordingly no need for an 'independent counsel' to be appointed."¹⁶

Request

17. Based on the foregoing, the Prosecution asks that the Chamber impose the restrictions requested in the Prosecution Final Observations.



Fatou Bensouda
Prosecutor

Dated this 15th day of January 2016
At The Hague, the Netherlands

¹⁶ ICC-01/05-46, para.4; *see also* ICC-01/05-50, para.10.