

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

No.: ICC-01/04-02/06
Date: 30 November 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
with Confidential Annex A**

**Decision on Defence request seeking leave to use certain photographs of Witness
P-0883 during investigations**

Decision 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

Me 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

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

Trial Chamber VI ('Chamber') of the International Criminal Court, in the case of *The Prosecutor v. Bosco Ntaganda*, having regard to Articles 64(2), 64(6), 67 and 68(1) of the Rome Statute ('Statute') and 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' ('Protocol'),¹ issues the following 'Decision on Defence request seeking leave to use certain photographs of Witness P-0883 during investigations'.

I. Procedural history and submissions

1. On 12 December 2014, the Chamber adopted the Protocol in these proceedings.² The Protocol sets out, *inter alia*, the procedures governing the handling of confidential information during investigations, including 'the circumstances in which disclosure of the identity of a protected witness from the opposing party can be effectuated'.³ In the Decision Adopting the Protocol, the Chamber decided that the use of photographs depicting witnesses during investigations does not require the specific leave of the Chamber in each case.⁴
2. On 7 April 2015, the Chamber issued a decision on a request by the Office of the Prosecutor ('Prosecution') for certain redactions ('7 April 2015 Decision').⁵ In that decision, the Chamber outlined certain exceptions to the use of photographs, indicating that the parties must seek the Chamber's leave before using an image

¹ 12 December 2014, ICC-01/04-02/06-412-AnxA.

² Decision on 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 a Participant, with public Annex A, ICC-01/04-02/06-412 ('Decision Adopting the Protocol').

³ Protocol, ICC-01/04-02/06-412-AnxA, para. 1.

⁴ Decision Adopting the Protocol, ICC-01/04-02/06-412, para. 14.

⁵ Decision on the Prosecution request for redactions, confidential, *ex parte*, Prosecution and VWU only, ICC-01/04-02/06-545-Conf-Exp. Confidential redacted and public redacted versions (ICC-01/04-02/06-545-Conf-Exp-Red and ICC-01/04-02/06-545-Red2) were issued on the same day.

depicting Witness P-0883 (amongst other specific witnesses) in the course of their investigations.⁶

3. On 11 November 2016, the defence team for Mr Ntaganda ('Defence') sent a request to the Chamber seeking leave to use certain photographs of Witness P-0883⁷ during its investigations ('Request').⁸ On the same day, the Chamber received responses to the Request from both the Prosecution ('Response')⁹ and the Legal Representative of Victims for former child soldiers ('LRV').¹⁰ Both the Prosecution and the LRV opposed the Request, noting, *inter alia*, a lack of specificity and of any indication the Defence had sought to investigate by alternative means.
4. The Request and the submissions, which had been received by way of e-mail due to the time-sensitive nature of the matter, are placed on the record by way of confidential Annex A to this decision.
5. On 14 November 2016, the Chamber issued a ruling, by e-mail, granting the Request subject to conditions.¹¹ The ruling, and the reasons therefor, are placed on the record by way of this decision.

II. Analysis

6. The Chamber recalls its duty to ensure that the trial is conducted with full respect to the rights of the accused and with due regard to the protection of victims and

⁶ 7 April 2015 Decision, ICC-01/04-02/06-545-Conf-Exp-Red, para. 26.

⁷ DRC-OTP-2075-1004 to DRC-OTP-2075-1006.

⁸ E-mail communication from the Defence to the Chamber on 11 November 2016 at 12:04, *see* confidential Annex A to this Decision ('Annex A').

⁹ E-mail communication from the Prosecution to the Chamber on 11 November 2016 at 12:58, *see* Annex A.

¹⁰ E-mail communication from the LRV to the Chamber on 11 November 2016 at 16:04, *see* Annex A. The Chamber had forwarded the Request and Response to the LRV on 11 November 2016, directing that any observations be provided by 17:00 that same day (e-mail communication from Legal Officer of the Chamber to the parties and LRV on 11 November 2016 at 13:49).

¹¹ E-mail communication from Legal Officer of the Chamber to the parties and the LRV on 14 November 2016 at 12:37.

witnesses.¹² This duty is also reflected in the stated objective of the Protocol, which is to ‘protect the safety of witnesses, victims and other individuals at risk, as well as the integrity of investigations, in a manner consistent with the rights of the accused’.¹³

7. The Chamber notes that the Request appears to rest on a general submission, based on past experience, of the difficulty of verifying a witness’s account without use of a photograph which may assist people in recognising the person in question. While the Chamber considers that this submission lacks a desirable degree of specificity, it accepts that certain investigative flexibility is likely to be required, in particular, in light of the difficult logistical and practical circumstances prevailing in the locations of the investigations. This is especially so given the relatively short time frame available prior to the Witness’s impending testimony, although the Chamber notes that no reason was provided for why the Request was only received at this stage.
8. Nonetheless, the Chamber found it appropriate to grant the Request, subject to the rigorous observance by Defence investigators of the relevant safeguards in the Protocol. Accordingly, the Chamber confirms, for the record, its earlier authorisation to the Defence to use the specified photographs during its investigations, provided that the photographs are used within the framework set out in the Protocol. In that regard, the Chamber notes, in particular, the following provisions:
 - they may only be used when no satisfactory alternative investigative avenue is available;¹⁴
 - they may not be used if they contain any element which tends to reveal the involvement of the witness with the Court;¹⁵

¹² See Article 64(2), (6)(c) and (e), as well as Articles 67 and 68(1) of the Statute.

¹³ Protocol, ICC-01/04-02/06-412-AnxA, para. 1.

¹⁴ Protocol, ICC-01/04-02/06-412-AnxA, para. 9.

- they should only be used together with photographs of the same kind (of other individuals);¹⁶
- members of the public (as defined in the Protocol) may not be permitted to retain copies of the photographs;¹⁷
- the fact and nature of Witness P-0883's involvement with the Court must not be revealed under any circumstances;¹⁸
- the Defence should not make inquiries about Witness P-0883's current location, and shall inform the Victims and Witnesses Unit ('VWU') as soon as possible if such location becomes apparent;¹⁹
- the Defence must exercise real caution in investigating allegations of sexual violence in accordance with the terms of the Protocol;²⁰ and
- the Defence must inform the VWU as soon as possible if it becomes apparent that anyone to whom the photographs are shown knows or understands that Witness P-0883 is involved with the Court.²¹

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

¹⁵ Protocol, ICC-01/04-02/06-412-AnxA, para. 9. In this respect, the Chamber notes its observation in the 7 April 2015 Decision that 'most of the images depicting [...] P-0883 [...] contain elements which tend to reveal [her] cooperation with the Court, notably on the basis that the images appear to have been taken for a forensic purpose, and therefore, in accordance with the Confidentiality Protocol, are not to be used during investigations' (see 7 April 2015 Decision, ICC-01/04-02/06-545-Red2, para. 26).

¹⁶ Protocol, ICC-01/04-02/06-412-AnxA, para. 9.

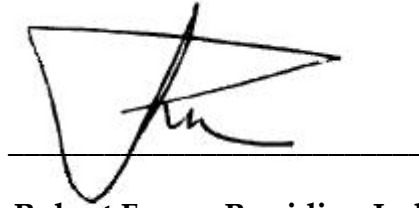
¹⁷ Protocol, ICC-01/04-02/06-412-AnxA, para. 9.

¹⁸ Protocol, ICC-01/04-02/06-412-AnxA, para. 21.

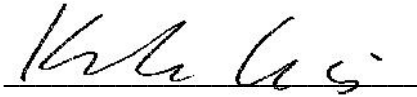
¹⁹ Protocol, ICC-01/04-02/06-412-AnxA, para. 24.

²⁰ Protocol, ICC-01/04-02/06-412-AnxA, para. 25.

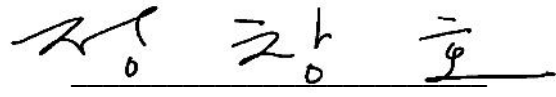
²¹ Protocol, ICC-01/04-02/06-412-AnxA, para. 26.



Judge Robert Fremr, Presiding Judge



Judge Kuniko Ozaki



Judge Chang-ho Chung

Dated 30 November 2016

At The Hague, The Netherlands