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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

**Public redacted version of “Decision on Prosecution request for suspension of
investigators and related matters” ICC-01/04-02/06-777-Conf-Exp**

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
Mr Luc Boutin

Legal Representatives of Victims

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**

Others

Trial Chamber VI ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Bosco Ntaganda* ('Ntaganda case'), having regard to Articles 64, 67 and 68(1) of the Rome Statute ('Statute') and the Code of Conduct for Investigators, issues this 'Decision on Prosecution request for suspension of investigators and related matters'.

I. Background and submissions

1. On 19 June 2015, the Office of the Prosecutor ('Prosecution') filed an urgent, *ex parte* request seeking, *inter alia*, the immediate suspension of two investigators on the defence team for Mr Ntaganda ('Defence') and other related measures ('Request for Suspension').¹
2. The Prosecution submitted that one of the investigators, Jean Logo Dhengachu ('First Investigator'): (i) intentionally revealed the identity of two Prosecution witnesses, and other confidential case related information; (ii) suggested lines of response to potential witnesses prior to their proposed meeting with Defence counsel; and (iii) discussed a strategy of paying witnesses without Defence counsels' knowledge.² In support of the Request, the Prosecution annexed to it, *inter alia*, what it submitted was the transcript of a recording of a conversation between, amongst others, the First Investigator and P-0190 ('Recording').³
3. The Prosecution submitted that the second Defence investigator, [REDACTED] ('Second Investigator', and together with the First Investigator, the 'Investigators'), threatened P-0190 because of his cooperation with the Prosecution.⁴

¹ Prosecution's urgent request for immediate suspension of Defence investigators and other measures, ICC-01/04-02/06-658-Conf-Exp, *ex parte* Prosecution and Victims and Witnesses Unit ('VWU') only, with 16 confidential, *ex parte*, Annexes. A confidential redacted, Prosecution, Defence and VWU only, version was filed on 26 June 2015 (ICC-01/04-02/06-658-Conf-Red).

² Request for Suspension, ICC-01/04-02/06-658-Conf-Red, para. 2. See also paras 21-32.

³ See Annexes 3 and 4 to the Request for Suspension.

⁴ Request for Suspension, ICC-01/04-02/06-658-Conf-Red, para. 3. See also paras 19-20.

4. The Prosecution additionally submitted that the Investigators, together with others, 'contacted and pressured' a second Prosecution witness (P-0901).⁵
5. The Prosecution requested that: (i) the Investigators be immediately suspended and removed from any list of registered contacts at the Detention Centre; (ii) Defence counsel be ordered to file the Investigators' statements regarding their contact with P-0190 in the record of the case; (iii) Defence counsel be ordered to report to the Chamber and Prosecution on the extent and means of the Investigators' access to case-related materials; (iv) Defence counsel, in coordination with the Registry, be ordered to recover all case related materials from the Investigators without delay, and their access to further case related materials be severed; (v) Defence counsel be ordered to direct their team not to share confidential information with, and not to receive assistance from [REDACTED] and [REDACTED]; and (vi) the matters raised in the Request for Suspension be referred to the Registrar and the Disciplinary Board for further consideration and action.⁶
6. On 23 June 2015, the Chamber ordered, amongst other things: (i) the immediate suspension of the First Investigator from any involvement in the case and of his access to confidential information in the case; (ii) the taking of steps to recover all confidential case related material already in the First Investigator's possession; (iii) that the Investigators have no contact with any person in the Detention Centre; (vi) the Defence not to share any confidential information in the case with [REDACTED] or [REDACTED] and not to use them for investigative assistance or in any similar capacity; (v) the Prosecution to file a confidential redacted version of the Request for Suspension within three days of the date of the order; and (vi) the Defence to file any response to the Request for Suspension within 10 days from receipt of notification of the redacted

⁵ Request for Suspension, ICC-01/04-02/06-658-Conf-Red, paras 33-40.

⁶ Request for Suspension, ICC-01/04-02/06-658-Conf-Red, paras 55-57.

version of it ('Interim Order').⁷ In the Interim Order, the Chamber deferred consideration of certain portions of the Request for Suspension, as well as consideration of whether the interim measures ordered should remain in place or not, pending receipt of the Defence's submissions.⁸

7. On 25 June 2015, the Defence filed a notice informing the Chamber of steps taken by it in light of the Interim Order, including, given the existing relationship between the Investigators, that the Defence had suspended both Investigators.⁹
8. On 2 July 2015, the Defence filed an expedited motion seeking: (i) disclosure of certain additional material in connection with the Request for Suspension; (ii) leave 'to engage' the Investigators 'concerning the allegations raised against them'; and (iii) variation of the deadline to respond to the Request for Suspension until 21 August 2015 ('Defence Disclosure Motion').¹⁰
9. On 3 July 2015, the Chamber held an *ex parte*, Prosecution, Defence and Registry only, status conference at which, amongst other matters, certain additional submissions were made in relation to the Request for Suspension.¹¹

⁷ Order taking interim measures in relation to a Defence investigator and related matters, ICC-01/04-02/06-667-Conf-Exp.

⁸ Interim Order, ICC-01/04-02/06-667-Conf-Exp, page 9.

⁹ Notice on behalf of Mr Ntaganda informing the Chamber of the steps taken following the Chamber's order dated 23 June 2015, ICC-01/04-02/06-673-Conf-Exp.

¹⁰ Expedited motion on behalf of Mr Ntaganda seeking disclosure of necessary material; leave to engage [REDACTED] and Mr Logo concerning the allegations raised against them; and variation of the time limit for the purpose of responding to the "Prosecution" urgent request for immediate suspension of Defence investigators and other measures", ICC-01/04-02/06-691-Conf-Exp.

¹¹ Transcript of Hearing on 3 July 2015, ICC-01/04-02/06-T-21-CONF-EXP-ENG.

10. Having been directed to do so by the Chamber,¹² the Prosecution responded to the Defence Disclosure Motion on 9 July 2015 ('Prosecution Disclosure Response').¹³
11. On 10 July 2015, the Defence filed a request for, amongst other things, leave to reply to the Prosecution Disclosure Response, on three points.¹⁴ On 13 July 2015, the Chamber granted the request, in part, inviting a focused reply on one of the three points identified.¹⁵ On 14 July 2015, the Defence filed its reply.¹⁶
12. On 13 July 2015, having been authorised to do so,¹⁷ the Defence filed copies of statements taken from the Investigators relating to their contacts with witnesses including P-0190 and P-0910.¹⁸
13. On 16 July 2015, the Chamber issued a decision in which it, amongst other things: (i) partially granted the Defence request for certain disclosure; (ii) authorised the Defence to contact the Investigators for the narrow purposes of assessing the reliability of Defence evidence collected with their assistance or involvement and further exploring their contact with relevant witnesses in light of the allegations; and (iii) directed that the Defence response to the Request for Suspension be filed by 31 July 2015 ('Disclosure Decision').¹⁹ In the Disclosure

¹² E-mail from Legal Officer of the Chamber to the parties on 6 July 2015 at 17:40. In this e-mail the Chamber also suspended the deadline for the Defence to respond to the Request, indicating that it would be re-set once the Chamber decided on the Defence Disclosure Motion.

¹³ Prosecution's Response to the Defence's expedited motion to vary the time limit to respond to the "Prosecution's urgent request for immediate suspension of Defence investigators and other measures" (ICC-01/04-02/06-691-Conf-Exp), ICC-01/04-02/06-705-Conf-Exp.

¹⁴ Request on behalf of Mr Ntaganda seeking leave to reply to the "Prosecution's Response to the Defence's expedited motion to vary the time limit to respond to the 'Prosecution's urgent request for immediate suspension of Defence investigators and other measures'", ICC-01/04-02/06-711-Conf-Exp. A confidential redacted version (ICC-01/04-02/06-711-Conf-Exp-Red) was notified on 13 July 2015.

¹⁵ E-mail from Legal Officer of the Chamber to the parties on 13 July 2015 at 10:15.

¹⁶ Reply on behalf of Mr Ntaganda to the "Prosecution's Response to the Defence's expedited motion to vary the time limit to respond to the 'Prosecution's urgent request for immediate suspension of Defence investigators and other measures'", ICC-01/04-02/06-718-Conf-Exp.

¹⁷ E-mail from Legal Officer of the Chamber to the Defence on 13 July 2015 at 10:35.

¹⁸ Notice on Behalf of Mr Ntaganda Communicating to Trial Chamber VI the Statements of its First and Second investigators, ICC-01/04-02/06-717-Conf-Exp (notified on 14 July 2015) with two confidential, *ex parte*, Annexes.

¹⁹ Decision on the Defence's expedited request for disclosure and related matters, ICC-01/04-02/06-731-Conf-Exp.

Decision, the Chamber also indicated, in particular, that it would consider the allegations in the Request for Suspension ‘only to the extent necessary to form a view on whether or not there are reasonable grounds to believe that one or both of the Investigators have engaged in conduct sufficiently detrimental to the integrity of the proceedings and the safety and well-being of witnesses to warrant the relief requested’.²⁰

14. On 20 July 2015, the Defence filed a request for reconsideration or, in the alternative, leave to appeal the Disclosure Decision,²¹ which was opposed by the Prosecution²² and rejected by the Chamber on 4 August 2015.²³

15. On 21 July 2015, the Defence filed a request seeking access to confidential documents in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (*‘Katanga and Ngudjolo case’*) pertaining to allegations made against the First Investigator in the course of that case.²⁴

16. On 24 July 2015, in accordance with the Chamber’s order shortening the deadline to respond,²⁵ the Prosecution filed its response, whereby it opposed, in part, the Defence’s request to access certain materials in the *Katanga and Ngudjolo case*.²⁶

17. On 29 July 2015, the Chamber: (i) granted, in part, the Defence’s request to access certain materials in the *Katanga and Ngudjolo case*; and (ii) extended the

²⁰ Disclosure Decision, ICC-01/04-02/06-731-Conf-Exp, para. 30.

²¹ Request for Reconsideration or, In the Alternative, Leave to Appeal Issues Relating to Determination of Motion to Suspend Defence Investigators, ICC-01/04-02/06-734-Conf-Exp.

²² Prosecution’s response to the Defence’s “Request for Reconsideration or, In the Alternative, Leave to Appeal Issues Relating to Determination of Motion to Suspend Defence Investigators”, 24 July 2015, ICC-01/04-02/06-746-Conf-Exp.

²³ Decision on Defence request for reconsideration or, in the alternative, leave to appeal, ICC-01/04-02/06-761-Conf-Exp.

²⁴ Urgent request for confidential documents in the *Katanga case*, ICC-01/04-02/06-737-Conf-Exp.

²⁵ E-mail from Legal Officer of the Chamber to the Prosecution on 21 July 2015 at 19:02.

²⁶ Prosecution response to Defence’s “Urgent request for confidential documents in the *Katanga case*”, ICC-01/04-02/06-737-Conf-Exp, ICC-01/04-02/06-744-Conf-Exp.

deadline for the Defence's response to the Request for Suspension to 5 August 2015.²⁷

18. Also on 29 July 2015, the Defence sought an extension of page limit, to not more than 30 pages, to respond to the Request for Suspension.²⁸ On 30 July 2015, the Prosecution indicated that it did not oppose the request for extension of page limit,²⁹ and the Chamber, having found that the requirements of Regulation 37 of the Regulations of the Court were met, granted the request.³⁰

19. On 5 August 2015, the Defence responded to the Request for Suspension ('Defence Response').³¹ The Defence acknowledges that the First Investigator revealed the identity of two Prosecution witnesses and that, accordingly, 'his further collaboration with the Defence in this case would not be appropriate'.³² The Defence, however, submits that the other allegations against the First Investigator are 'not founded'.³³ The Defence also states that the delay of 'more than three months' between the Prosecution becoming aware of the breach of confidentiality by the First Investigator and the Defence being informed of this conduct was 'unjustified' and 'substantially exacerbated' the prejudice arising to the Defence from the conduct in question.³⁴

20. The Defence contests the allegations against the Second Investigator, submitting that they 'have no merit and should be rejected'.³⁵ In particular, in respect of the specific allegations against the Second Investigator, the Defence

²⁷ Decision on Defence request seeking access to confidential documents in the *Katanga and Ngudjolo* case, ICC-01/04-02/06-754-Conf-Exp.

²⁸ Expedited request on behalf of Mr Ntaganda seeking an extension of the page limit in responding to the "Prosecution's urgent request for immediate suspension of Defence investigators and other measures", ICC-01/04-02/06-755-Conf-Exp. A corrigendum (ICC-01/04-02/06-755-Conf-Exp-Corr) was filed on 30 July 2015.

²⁹ E-mail from the Prosecution to Trial Chamber VI Communications on 30 July 2015 at 10:46.

³⁰ E-mail from Legal Officer of the Chamber to the parties on 30 July 2015 at 11:41.

³¹ Response on behalf of Mr Ntaganda to the "Prosecution's urgent request for immediate suspension of Defence investigators and other measures", ICC-01/04-02/06-767-Conf-Exp, *ex parte* Defence and Registry only, with confidential *ex parte* annexes A-H. A confidential redacted version, available to the Prosecution, was notified on 6 August 2015 (ICC-01/04-02/06-767-Conf-Exp-Red).

³² Defence Response, ICC-01/04-02/06-767-Conf-Exp-Red, paras 1 and 13.

³³ Defence Response, ICC-01/04-02/06-767-Conf-Exp-Red, para. 13. See also paras 50-69.

³⁴ Defence Response, ICC-01/04-02/06-767-Conf-Exp-Red, paras 1, 14-18.

³⁵ Defence Response, ICC-01/04-02/06-767-Conf-Exp-Red, para. 2.

contends that: (i) the account provided by P-0901 reveals ‘no improper contact, let alone intimidation’; and (ii) and that the allegations from P-0190 are ‘contradictory and unreliable’.³⁶ The Defence further submits that the Prosecution’s general allegations of a ‘broader practice’ of disclosure of confidential information and intimidation of witnesses is unsupported by the Recording, and consequently there is no reasonable basis to suspect the Second Investigator’s involvement in any such scheme, or to warrant his suspension.³⁷

21. The Defence advises that the Investigators had access to the Prosecution witness ‘*will-say* statements’ and the Prosecution witness list,³⁸ and files further statements from both Investigators into the record.³⁹

22. The Defence requests that the Chamber: (i) find that there is no basis for suspension of the Second Investigator;⁴⁰ and (ii) clarify the Interim Order to permit the Defence to contact [REDACTED] and [REDACTED] for the purpose of ‘obtaining information relevant to Defence investigations’, while confirming that the Defence has not shared confidential information with them or used them for ‘investigative assistance’, and will not do so.⁴¹

II. Analysis

23. As a preliminary matter, regarding the timing of the Request for Suspension, the Chamber considers it regrettable that a motion with potentially such foreseeably significant implications for the Defence’s preparations was filed approximately only three weeks before the then-scheduled trial commencement date. It is noted in this regard that the Prosecution appears to have been in possession of the relevant information since March 2015.

³⁶ Defence Response, ICC-01/04-02/06-767-Conf-Exp-Red, para. 2. See also paras 19-48.

³⁷ Defence Response, ICC-01/04-02/06-767-Conf-Exp-Red, paras 2, 49-69 and 77.

³⁸ Defence Response, ICC-01/04-02/06-767-Conf-Exp-Red, para. 74.

³⁹ Defence Response, ICC-01/04-02/06-767-Conf-Exp-Red, para. 75. See also annexes C and E of the Defence Response.

⁴⁰ Defence Response, ICC-01/04-02/06-767-Conf-Exp-Red, para. 77.

⁴¹ Defence Response, ICC-01/04-02/06-767-Conf-Exp-Red, paras 70-73 and 77.

Nonetheless, the Chamber understands the timing of the motion to have been dictated by the preparation of a transcript and translation of the Recording, which appears to have only become available on 17 June 2015⁴² and which was necessary in order to properly seise the Chamber of the matter. The Chamber considers, however, that the reason why it took almost three months for this transcription and translation to be produced has not been satisfactorily explained, particularly in light of the seriousness and urgency of the matter in issue.

24. The Chamber recalls that, pursuant to Articles 64(2) and 68(1) of the Statute, it has an obligation to ensure the fairness and integrity of the proceedings, including taking appropriate measures to protect the safety and well-being of witnesses.⁴³ Notwithstanding the timing of the motion, the Chamber therefore deems it necessary to consider and rule upon the merits of the Request for Suspension. Turning to its substance, as foreshadowed in the Disclosure Decision, the Chamber has considered the allegations raised in the Request for Suspension to the extent necessary to 'form a view on whether or not there are reasonable grounds to believe that one or both of the Investigators have engaged in conduct sufficiently detrimental to the integrity of the proceedings and the safety and well-being of witnesses to warrant the relief requested'.⁴⁴

Request for suspension, restriction and referral of First Investigator

25. In respect of the First Investigator, the Chamber recalls that in the Interim Order, having noted that the transcript of the Recording 'appear[ed] to show conduct on the part of the First Investigator which wholly contravenes the applicable legal and ethical framework',⁴⁵ the Chamber ordered, *inter alia*, the

⁴² Motion for Suspension, ICC-01/04-02/06-658-Conf-Red, para. 18. See also ICC-01/04-02/06-T-21-CONF-EXP-ENG, page 26, lines 8-20.

⁴³ Interim Order, ICC-01/04-02/06-667-Conf-Exp, para. 6.

⁴⁴ Disclosure Decision, ICC-01/04-02/06-731-Conf-Exp, para. 30.

⁴⁵ Interim Order, ICC-01/04-02/06-667-Conf-Exp, para. 8.

urgent interim suspension of the First Investigator and of his access to confidential information in the *Ntaganda* case. In particular, the Chamber noted that the First Investigator appeared to have revealed the identity of two Prosecution witnesses in the context of also revealing further confidential case related material.⁴⁶ Having now received the Defence Response, it is appropriate for the Chamber to review that provisional suspension.

26. The Chamber recalls that pursuant to 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’⁴⁷ applicable in the *Ntaganda* case, as well as the Court’s Code of Conduct for Investigators, all investigators are expected to observe the highest standards of integrity and conduct. This includes not disclosing any information deemed confidential by the Court, save where such disclosure is ‘directly and specifically necessary’ for the preparation and presentation of the party’s case, and not making any disclosure which places, or is likely to place, the security of any person at risk.⁴⁸

27. The Chamber observes that both the First Investigator⁴⁹ and the Defence⁵⁰ acknowledge that the First Investigator disclosed the identity of two Prosecution witnesses to persons not authorised to receive such information. The Chamber notes that on this basis the Defence does not contest that the First Investigator’s further collaboration with the Defence in this case would ‘not be appropriate’. The Chamber has noted the First Investigator’s explanation that he believed the other participants in the conversation to already know that the

⁴⁶ Interim Order, ICC-01/04-02/06-667-Conf-Exp, para. 8.

⁴⁷ ICC-01/04-02/06-412-AnxA (‘Confidential Information Protocol’).

⁴⁸ See e.g. Confidential Information Protocol, ICC-01/04-02/06-412-AnxA, paras 5-11 and 17-21; Code of Conduct for Investigators, Sections 5 (Confidentiality) and 6 (Security).

⁴⁹ Defence Response, ICC-01/04-02/06-767-Conf-Exp-AnxE, para. 25. While the First Investigator does not explicitly state that he disclosed the identity of the witnesses, the Chamber understands his statement to be an acknowledgement of such disclosure.

⁵⁰ Defence Response, ICC-01/04-02/06-767-Conf-Exp-Red, paras 1 and 13.

two individuals in question were Prosecution witnesses, and that his purpose had been only to demonstrate that he could not speak directly to the accused.⁵¹ However, in the Chamber's view, this does not justify a breach of confidentiality, which, in the circumstances, served no legitimate investigative purpose and would appear to have been done with complete disregard for the applicable legal and ethical framework. The Chamber notes that the manner of the disclosure does not suggest inadvertence, with the witnesses being specifically identified and discussed at some length. The Chamber considers the unauthorised disclosure of identifying witness information to be of the utmost seriousness given, in particular, its potential to place individuals at risk⁵² and the allegations of witness interference currently before the Chamber, which were known to the First Investigator.

28. The Chamber consequently finds that, on the basis of this unauthorised disclosure, there are reasonable grounds to believe that the First Investigator engaged in conduct sufficiently detrimental to the integrity of the proceedings and the safety and well-being of witnesses to warrant his continued suspension from the *Ntaganda* case, of his access to confidential information in the *Ntaganda* case and from contact with any person in the Detention Centre. Noting the Defence's prior observations regarding the applicable standard of proof,⁵³ the Chamber observes that it would have reached the same conclusion even had a 'balance of probabilities' standard been applied. The Chamber finds it unnecessary for present purposes to proceed to consider the other allegations against the First Investigator as raised in the Request for Suspension.

29. Pursuant to Section 10 (Disciplinary procedure) of the Code of Conduct for Investigators, in respect of any breach or attempted breach of the code,

⁵¹ Defence Response, ICC-01/04-02/06-767-Conf-Exp-AnxE, para. 25.

⁵² See e.g. Confidential Information Protocol, ICC-01/04-02/06-412-AnxA, para. 19.

⁵³ See e.g. ICC-01/04-02/06-T-21-CONF-EXP-ENG; ICC-01/04-02/06-718-Conf-Exp; ICC-01/04-02/06-734-Cof-Exp.

appropriate disciplinary measures shall, in the case of Defence investigators, be taken by the Disciplinary Board, in accordance with the procedures set out in the Code of Professional Conduct for Counsel. The Chamber finds it appropriate in the circumstances to refer to the Registry the allegations against the First Investigator as raised in the Request for Suspension, including the alleged breach of confidentiality, for transmission to the Commissioner of the Disciplinary Board ('Commissioner') for consideration and any further action deemed appropriate. Accordingly, the Registry is directed to transmit to the Commissioner, on a confidential basis, a file including the present decision and all relevant filings referred to therein.⁵⁴

30. Should compelling circumstances arise, such as an exonerating finding by the Disciplinary Board, the Chamber shall, if appropriate, review its findings with respect to the First Investigator as soon as practicable.

Request for suspension, restriction and referral of Second Investigator

31. In respect of the Second Investigator, the Chamber recalls that in the Interim Order, while noting the seriousness of the allegations made, it found that the materials before it did 'not substantiate the allegations to a sufficient degree' to justify the taking of measures of the gravity proposed in the Request for Suspension at that time, other than removing the Second Investigator, on an interim basis, from any lists of registered contacts at the Detention Centre.⁵⁵ The Chamber considers that this situation remains unchanged.

⁵⁴ This includes, in particular, ICC-01/04-02/06-658-Conf-Red and annexes; ICC-01/04-02/06-667-Conf-Exp; ICC-01/04-02/06-673-Conf-Exp; ICC-01/04-02/06-691-Conf-Exp; ICC-01/04-02/06-705-Conf-Exp; ICC-01/04-02/06-717-Conf-Exp and annexes; ICC-01/04-02/06-718-Conf-Exp; ICC-01/04-02/06-731-Conf-Exp; ICC-01/04-02/06-737-Conf-Exp; ICC-01/04-02/06-744-Conf-Exp; ICC-01/04-02/06-754-Conf-Exp and the materials referred to in the disposition; and ICC-01/04-02/06-767-Conf-Exp-Red and annexes.

⁵⁵ Interim Order, ICC-01/04-02/06-667-Conf-Exp, paras 9-10.

32. In respect of the allegation that the Second Investigator ‘contacted and pressured’ P-0901, the Chamber finds that it has not been established that at the time these contacts took place, in February and early March 2015, the Second Investigator was in a position to be aware of P-0901’s status as a Prosecution witness, which was only disclosed on 20 March 2015.⁵⁶ In the absence of such awareness, the Chamber does not consider that the record of contacts between, or on behalf of, the Second Investigator and P-0901 in itself reveals impropriety in the conduct of the Second Investigator. The Chamber notes with concern the alleged subsequent attempts of certain individuals to contact P-0901, in particular following disclosure of his status as a Prosecution witness;⁵⁷ however, on the information before it, the Chamber does not find there to be a basis to link these attempts to the Second Investigator.

33. In respect of the allegation that the Second Investigator threatened P-0190, the Chamber notes a number of potentially significant divergences between the accounts as provided by P-0190 and by the Second Investigator, including as to which of them initiated contact with the other.⁵⁸ Should, as the Second Investigator contends, this contact have been initiated *proprio motu* by P-0190 at a time when the Second Investigator was in fact actively seeking to contact him, this would have been a notable coincidence. The Second Investigator does not provide an explanation for how, or why, P-0190 came to contact him. However, the Chamber considers that P-0190’s account of the initial contact contains a degree of ambiguity, including as to the actual identity of the interlocutor, who appears to have first introduced himself as [REDACTED] and may have used a [REDACTED].⁵⁹ Further, while the Chamber cannot exclude the possibility that

⁵⁶ See e.g. Request for Suspension, ICC-01/04-02/06-658-Conf-Red, para. 16; ICC-01/04-02/06-767-Conf-Exp-AnxC, para. 25; Prosecution’s Communication of the Disclosure of Evidence, ICC-01/04-02/06-535, para. 2 and confidential Annex, ICC-01/04-02/06-535-Conf-AnxA.

⁵⁷ Request for Suspension, ICC-01/04-02/06-658-Conf-Red, paras 39-40.

⁵⁸ Compare, for example, ICC-01/04-02/06-767-Conf-Exp-AnxA, paras 12-14 and ICC-01/04-02/06-767-Conf-Exp-AnxC, paras 4-5 with ICC-01/04-02/06-658-Conf-Exp-Anx6, paras 3-6.

⁵⁹ ICC-01/04-02/06-658-Conf-Exp-Anx6.

the Second Investigator was aware of P-0190's status as a Prosecution witness at the time, the Chamber considers that the material before it reasonably suggests that this was not the case. In the circumstances, and noting additionally the potential for misunderstanding regarding the alleged threat, the Chamber has made no determination regarding the reliability or credibility of P-0190's account. Nonetheless, the Chamber finds that the material before it in respect of the alleged threat, consisting predominantly of the uncorroborated and potentially ambiguous account of one witness, provides insufficient substantiation in the context of the serious remedies sought in the Request for Suspension.

34. Finally, the Chamber does not consider that the allegations of misconduct raised against the First Investigator, on the basis of the Recording, in themselves and even if accepted as true, provide grounds for imputing any such misconduct to the Second Investigator, who was not present during the conversation in question. The Chamber notes that the Second Investigator is referred to during the course of the Recording, notably in the context of facilitating unauthorised payments.⁶⁰ However, the Chamber does not consider that the First Investigator's apparent statement of intention to pursue a particular strategy with the Second Investigator, who was working as his assistant at the time, provides a sufficient basis to believe that the Second Investigator was independently, or otherwise, pursuing such a strategy in any broader sense.

35. The Chamber notes that the Defence had temporarily suspended the involvement of the Second Investigator in the *Ntaganda* case on the basis, *inter alia*, of the 'existing relationship' between the Investigators and the fact that the Second Investigator was '*de facto* acting as assistant to [the First Investigator]'.⁶¹ In this regard, the Chamber commends the Defence for its responsible and

⁶⁰ ICC-01/04-02/06-658-Conf-Anx4, page 35. See also ICC-01/04-02/06-658-Conf-Exp-Anx2, para. 14.

⁶¹ ICC-01/04-02/06-673-Conf-Exp, para. 2.

cautious approach to the allegations. On the basis of the information before it, the Chamber does not, however, consider that there is a sufficient basis for suspension of the Second Investigator, or for referral of his conduct to the Registry or Disciplinary Board.

36. The Chamber, nonetheless, recalls its guidance that it would be appropriate for the Defence to give careful review and consideration to its procedures for the conduct of investigations, including the degree of supervision provided to investigators and resource persons.⁶² Noting the Defence's prior acknowledgement of the close professional relationship between the Investigators, and the Chamber's finding above regarding the conduct of the First Investigator, the Chamber considers that additional directions and supervision by Defence counsel would, in particular, be appropriate in respect of the Second Investigator, should he have further involvement in the *Ntaganda* case. In the Chamber's view, this would include ensuring that the Second Investigator does not have any further contact with the First Investigator on any case-related matters. Further, while recognising Defence counsel's general discretion in organising Defence team resources and working methods, the Chamber considers it advisable in the circumstances - in particular, in light of the litigation on restrictions on Mr Ntaganda's contacts - to maintain the system, initiated by Defence counsel as a precautionary measure, whereby instructions and guidance be provided exclusively through Defence counsel.⁶³

Request for Defence Counsel to report on involvement of the Investigators in the Ntaganda case and means of communication

⁶² Interim Order, ICC-01/04-02/06-667-Conf-Exp, para. 12.

⁶³ ICC-01/04-02/06-555-Conf-Exp-Red, paras 55 and 57. Additionally, the Chamber notes that the Second Investigator did not appear on the list of registered contacts of any person at the Detention Centre and therefore considers it unnecessary to specifically maintain with respect to him the prohibition on contact put in place by way of the Interim Order.

37. The Chamber notes that the Defence has filed copies of the Investigators' statements into the record and, in accordance with the Chamber's direction, has indicated the degree of access which the Investigators had to confidential information in the *Ntaganda* case.

38. For present purposes, and noting the measures already taken by it, the Chamber does not consider it necessary to further order the Defence to identify to the Chamber or the Prosecution the e-mail addresses or other means of communication used between the Defence and the Investigators. The Chamber notes, however, that this is without prejudice to the possibility of the Prosecution bringing a request for such investigative steps before a pre-trial chamber should it consider there to be a basis for doing so.

Request relating to [REDACTED] and [REDACTED]

39. From the information before it, the Chamber considers that the basis for the direction in the Interim Order prohibiting the Defence from sharing confidential information with [REDACTED] and [REDACTED] or from using them for investigative assistance, or in any similar capacity, remains in place. The Chamber consequently affirms this prohibition. In this regard, the Chamber additionally notes with concern the frequent contact which the First Investigator appears to have had with [REDACTED], seemingly potentially in connection with the *Ntaganda* case, as evidenced during the course of the Recording.⁶⁴

40. The Chamber clarifies that the order does not prevent the Defence from contacting or interviewing either [REDACTED] or [REDACTED], and obtaining from them any information which may be relevant to Defence investigations. Any such contact should, however, be effected in a manner which makes clear

⁶⁴ See e.g. ICC-01/04-02/06-658-Conf-Exp-Anx4, pages 4-5, 16-17 and 36.

that in no circumstances should either individual be tasked with, or permitted to engage in, any form of investigative assistance, including, in particular, approaching or contacting any other individual for any purpose connected with the *Ntaganda* case.

Confidentiality

41. Finally, the Chamber notes that the litigation on this matter has been conducted on an entirely confidential *ex parte* basis. The Chamber has noted the parties' preferences for public redacted versions of relevant decisions and filings to be made available.⁶⁵ The Chamber recognises the importance of the principle of publicity but, noting that the matter has now been referred to the Disciplinary Board, which will issue a public decision in due course, finds that reclassification of relevant filings in respect of this specific litigation would be more appropriately considered following the Disciplinary Board's consideration of the matter.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

ORDERS that the suspension of the First Investigator's involvement in the *Ntaganda* case and of his access to confidential information in the case should remain in place;

INSTRUCTS the Registry to transmit, on a confidential basis, a file containing the present decision and all relevant filings referred to therein to the Commissioner of the Disciplinary Board for consideration, in accordance with paragraph 29 above;

⁶⁵ Prosecution's request for public redacted versions of filings and decisions on allegations of witness interference, ICC-01/04-02/06-725-Conf-Exp; Response on behalf of Mr Ntaganda to "Prosecution's request for public redacted versions of filings and decisions on allegations of witness interference", ICC-01/04-02/06-770-Conf-Exp.

DIRECTS that the First Investigator should continue to have no contact with any person at the Detention Centre;

CLARIFIES that the restrictions with respect to the Defence's engagement with [REDACTED] and [REDACTED] do not prevent the Defence contacting or interviewing them, subject to the guidance provided in paragraph 40 above; and

REJECTS all other requests.

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

/Signed/

Judge Robert Fremr, Presiding Judge

/Signed/

/Signed/

Judge Kuniko Ozaki

Judge Chang-ho Chung

Dated this 12 August 2015

At The Hague, The Netherlands