

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/04-02/06**
Original Date: **23 June 2015**
Date: **10 March 2021**

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

Order 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

Mr Patrick Craig

**Victims Participation and Reparations
Section**

Others

Trial Chamber VI ('Chamber') of the International Criminal 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'), Regulation 23bis of the Regulations of the Court, and the Code of Conduct for Investigators, issues this 'Order taking interim measures in relation to a Defence investigator 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 Mr Ntaganda's defence team and other related measures ('Request').¹
2. The Prosecution submits 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 counsel for the defence team for Mr Ntaganda ('Defence'); and (iii) discussed a strategy of paying witness without Defence counsels' knowledge.²
3. The Prosecution submits that the second Defence investigator, [REDACTED] ('Second Investigator'),³ threatened P-0190 because of his cooperation with the Prosecution.⁴
4. The Prosecution additionally submits that the two Defence investigators, together with others, 'contacted and pressured' a second Prosecution witness.⁵

¹ Prosecution's urgent request for immediate suspension of Defence investigators and other measures, ICC-01/04-02/06-658-Conf-Exp with 16 confidential, *ex parte*, Annexes.

² Request, ICC-01/04-02/06-658-Conf-Exp, para. 2. *See also* paras 21-32.

³ The Chamber notes the status of the First Investigator and Second Investigator within the defence team as reflected in the Notice on behalf of Mr NTAGANDA setting out difficulties encountered in relation to the conduct of investigations, 13 April 2015, ICC-01/04-02/06-555-Conf-Exp, para. 15. Confidential redacted versions of the Notice (ICC-01/04-02/06-555-Conf-Exp-Red and ICC-01/04-02/06-555-Conf-Exp-Red2) were filed on 24 April 2015 and 12 May 2015.

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

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

5. The Prosecution requests that: (i) the two investigators be immediately suspended and removed from any list of registered contacts at the Detention Centre; (ii) Defence counsel be ordered to file the First and Second Investigator's 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 First and Second 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], [REDACTED] and [REDACTED]; and (vi) the matters raised in the Request be referred to the Registrar and the Disciplinary Board for further consideration and action.⁶

II. Analysis

6. On the basis of the materials before it, noting its obligation to ensure the fairness and integrity of the proceedings and to take appropriate measures to protect the safety and well-being of witnesses,⁷ the Chamber deems it necessary to take urgent interim measures to safeguard those interests. The Chamber notes that this urgency arises, *inter alia*, from the need to prevent any further inappropriate dissemination of confidential information, which has the potential to result in irreversible harm, including to the safety of witnesses in the case. Further, in light of the seriousness of the allegations and to ensure the effectiveness of the measures taken, the Chamber has found it appropriate to proceed at this stage on the basis of the Prosecution's *ex parte* Request. The Chamber is nonetheless mindful of the impact the requested measures may have on the Defence, and therefore considers it appropriate for the Defence to be provided with a copy of

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

⁷ Articles 64(2) and 68(1) of the Statute.

the Request, with minimal redactions, including the annexes to the extent appropriate, and an opportunity to make submissions on it, as well as on the interim measures outlined below.

7. As a preliminary matter, the Chamber notes that the Defence has previously informed it of certain ‘inadvertent contacts’ between Defence investigators and Prosecution witnesses.⁸ This included a meeting between the First Investigator and P-0190 on 7 March 2015,⁹ as well as certain contacts with P-0910.¹⁰ The Chamber notes the discrepancies in accounts of the 7 March 2015 meeting as between the version provided by the Defence in the Notice,¹¹ and that of the Prosecution, supported by a statement of P-0190 and what is purported to be a transcript of a recording of a portion of the 7 March 2015 meeting.¹²
8. The Chamber is gravely concerned by the content of the transcript of the recording which appears to show conduct on the part of the First Investigator which wholly contravenes the applicable legal and ethical framework.¹³ The Chamber notes, for example, that the identity of two Prosecution witnesses appears to have been revealed by the First Investigator, in the context of, *inter alia*, also revealing further confidential case related information.¹⁴ On the basis of the information before it, the Chamber finds it appropriate to take urgent interim steps to suspend the First Investigator’s involvement in the case, including suspending his access to confidential case related materials,

⁸ Notice on behalf of Mr NTAGANDA setting out difficulties encountered in relation to the conduct of investigations, 13 April 2015, ICC-01/04-02/06-555-Conf-Exp (‘Notice’). Confidential redacted versions (ICC-01/04-02/06-555-Conf-Exp-Red and ICC-01/04-02/06-555-Conf-Exp-Red2) were filed on 24 April 2015 and 12 May 2015.

⁹ Notice, ICC-01/04-02/06-555-Conf-Exp, paras 30-31.

¹⁰ Notice, ICC-01/04-02/06-555-Conf-Exp, paras 45-51.

¹¹ Notice, ICC-01/04-02/06-555-Conf-Exp, paras 30-31.

¹² See Annexes 2-5 of the Request.

¹³ This includes 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, ICC-01/04-02/06-412-AnxA, and the Court’s Code of Conduct for Investigators.

¹⁴ ICC-01/04-02/06-658-Conf-Exp-Anx4. The Chamber notes in this regard the Defence’s prior submission that it had not provided the First Investigator with a copy of the Prosecution’s list of witnesses until 8 March 2015 (Notice, ICC-01/04-02/06-555-Conf-Exp, paras 16 and 18). The Chamber is not in a position at this time to know how the First Investigator acquired the information in question.

recovering any confidential case related materials currently in his possession and ensuring that he has no further contact with any person at the Detention Centre until such time as the Chamber may otherwise direct.

9. With respect to the Second Investigator, the Chamber observes that the allegations made against him are serious, and, if proven to be correct, would warrant the relief requested by the Prosecution. However, the Chamber considers that the materials currently before it, consisting primarily of the statement of one witness (in the context of the alleged threat), do not substantiate the allegations to a sufficient degree, so as to justify the taking of measures of the gravity proposed in the Request at this time.
10. However, the Chamber notes the Defence's earlier submission that the accused agreed not to have direct contact with the Second Investigator.¹⁵ In light of the seriousness of the present allegations and the ongoing litigation on restrictions placed on Mr Ntaganda's contacts, the Chamber considers such precautions to be appropriate in the circumstances. The Registry is therefore instructed, on an interim basis, to remove the Second Investigator from the list of contacts of any persons in the Detention Centre.
11. As far as the Chamber is aware, neither [REDACTED] nor [REDACTED] have any official connection to the Defence. The Chamber recalls therefore that confidential information in the case should not be shared with them. However, noting with concern certain of the statements attributed to [REDACTED] in the transcript of the recording, as well as prior indications that [REDACTED] may be or have been involved in witness inference in this case,¹⁶ the Chamber considers it appropriate to specifically direct that no confidential information in

¹⁵ Notice, ICC-01/04-02/06-555-Conf-Exp-Red, para. 57.

¹⁶ See e.g. Victims and Witnesses Unit's report on potential interference with some Prosecution witnesses and other individuals, ICC-01/04-02/06-634-Conf-Exp-Anx, pages 2-3; First Report on the post-factum review of the phone conversations made by Mr Ntaganda, ICC-01/04-02/06-504-Conf-Exp, para. 31.

the case be shared with them and that they not be used for investigative assistance, or in any other similar capacity, by the Defence.

12. The Chamber wishes to underscore that impropriety in the conduct of investigations will not be tolerated. The Chamber emphasises that it is not alleged by the Prosecution, and there is no indication, that Defence counsel is in any way implicated in the alleged misconduct.¹⁷ The indications before the Chamber are, on the contrary, that attempts are being made to pursue certain strategies without the knowledge of Defence counsel.¹⁸ The Chamber notes the Defence's previous submission that, subsequent to the inadvertent contacts occurring in March 2015, measures have been put in place to avoid 'future inadvertent contacts with Prosecution witnesses', including the issuing of guidelines to the investigator and resource person and 'close monitoring' of their work.¹⁹ The Chamber is mindful of the fact that the allegations made pre-date the measures put in place by the Defence. However, in light of the allegations and the additional information now presented, the Chamber considers it nonetheless appropriate for the Defence to carefully further review its procedures regarding the conduct of investigations, including the degree of access of various persons to confidential information, and, where appropriate, revise its working methods.

¹⁷ The Prosecution submits that the First Investigator 'misled' the Defence counsel, and agreed to 'conceal' his actions from the Defence counsel and act 'without Defence Counsel's knowledge', Request, ICC-01/04-02/06-658-Conf-Exp, paras 26 and 31-32.

¹⁸ See e.g. ICC-01/04-02/06-658-Conf-Exp-Anx4, lines 1301-1311.

¹⁹ Notice, ICC-01/04-02/06-555-Conf-Exp-Red, para. 55.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

ORDERS the Registry and the Defence, in cooperation, to immediately:

- suspend the First Investigator from any further involvement in the case;
- suspend the First Investigator's access to all confidential information in the case;
- take steps to recover all confidential case related material already in the First Investigator's possession; noting that nothing should be done which might compromise recovery of this material, the Chamber further orders that neither the First Investigator nor the Second Investigator be notified of the content of the Request or of this order until at least such time as steps have been taken to recover the material in the First Investigator's possession; and
- ensure that the First Investigator and Second Investigator have no contact with any person in the Detention Centre, including, as necessary, removing them from any lists of registered contacts.

ORDERS the Victims and Witnesses Unit, in consultation with the Prosecution, to review the security measures in place for P-0190 and take any steps deemed appropriate to ensure his safety in light of the Request and orders made herein;

DIRECTS 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 other similar capacity;

DIRECTS the Prosecution to file, in accordance with paragraph 6, a confidential redacted version of the Request within three days of this order;

DIRECTS the Defence to file any response to the Request within 10 days of its notification to the Defence, including indicating the degree of access to confidential material which had been permitted to the First Investigator and Second Investigator

and the existence or otherwise of statements by the First and Second Investigators addressing their contacts with P-0190; and

DEFERS its consideration of the remainder of the Request, as well as on the appropriateness or otherwise of continuing the interim orders put in place by way of this order, pending receipt of the Defence's submissions.

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 23 June 2015

At The Hague, The Netherlands