

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/04-02/06**
Date: **10 December 2015**

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 redacted version of

**Decision on Prosecution's requests relating to in-court protective and special
measures for Witness P-0039**

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

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 ('Court'), in the case of *The Prosecutor v. Bosco Ntaganda*, having regard to Articles 64(2), 67(1), 68(1) and (2), and 82(1)(d) of the Rome Statute ('Statute'), and Rules 87 and 88 of the Rules of Procedure and Evidence ('Rules'), issues the following 'Decision on Prosecution's requests relating to in-court protective and special measures for Witness P-0039'.

I. Procedural history

1. On 14 October 2015, the Office of the Prosecutor ('Prosecution') filed a request ('Initial Request') seeking that face and voice distortion and use of a pseudonym be granted as in-court protective measures pursuant to Rule 87 of the Rules for the testimony of Witness P-0039 ('Witness').¹
2. On 22 October 2015, the defence team for Mr Ntaganda ('Defence') filed a response opposing the Initial Request,² and the Legal Representative of the victims of the attacks ('Legal Representative') filed a response in support of it.³
3. On 27 October 2015, the Victims and Witnesses Unit ('VWU') transmitted its observations on the Initial Request to the Chamber,⁴ recommending the implementation of the protective measures sought. On the same day, the VWU also transmitted to the Chamber its vulnerability assessment for the Witness and recommended the adoption of special measures for his testimony,⁵ namely that [REDACTED].

¹ Prosecution's submission pursuant to regulation 35 to vary the time limit for the sixth request for in-court protective measures concerning Prosecution Witness P-0039, ICC-01/04-02/06-899-Conf-Exp. A confidential redacted version (ICC-01/04-02/06-899-Conf-Red) and public redacted version (ICC-01/04-02/06-899-Red2) were filed on the same day. The Prosecution sought a variation of the time limit to file this request, which was granted by the Chamber pursuant to Regulation 35(2) of the Regulations of the Court (E-mail from the Chamber to the parties and participants on 14 October 2015 at 17:00). On this occasion, the Chamber also shortened the deadline for the filing of any response to 22 October 2015.

² Response on behalf of Mr Ntaganda to 'Prosecution's submission pursuant to regulation 35 to vary the time limit for the sixth request for in-court protective measures concerning Prosecution Witness P-0039', ICC-01/04-02/06-930-Conf.

³ Response of the Common Legal Representative of the Victims of the Attacks to the 'Confidential redacted version of Prosecution's submission pursuant to regulation 35 to vary the time limit for the sixth request for in-court protective measures concerning Prosecution Witness P-0039', ICC-01/04-02/06-928-Conf.

⁴ E-mail from VWU to the Chamber on 27 October 2015 at 15:24.

⁵ E-mail from VWU to the Chamber on 27 October 2015 at 11:11.

4. On 28 October 2015, the Chamber granted, in part, the Initial Request ('Initial Decision').⁶ Having found that it would 'sufficiently mitigate any risks to [the Witness's] security', the Chamber authorised the use of pseudonym for the purpose of the trial and decided not to grant voice and face distortion for the testimony.
5. During a hearing held on 28 October 2015, the Witness appeared before the Chamber *via* video-link.⁷ Having been informed that the Chamber had only partially granted the in-court protective measures sought, the Witness indicated that he did not want to testify.⁸
6. Towards the end of the hearing, the Prosecution sought reconsideration of the Initial Decision and, in the alternative, requested that the Witness be compelled to testify pursuant to the Chamber's power under Article 64 of the Statute.⁹ Having heard the Defence's and the Legal Representative's oral submissions thereon,¹⁰ the Chamber rejected both requests by way of an oral ruling on the same day.¹¹
7. On 3 November 2015, the Prosecution filed a request seeking that face and voice distortion be granted for the Witness pursuant to Rules 87 ('First Request') and/or 88 of the Rules ('Second Request'), and leave to appeal the Initial Decision ('Third Request', together with the First and Second Requests, 'Prosecution Requests').¹²

⁶ Decision on Prosecution's request for in-court protective measures for Witness P-0039, ICC-01/04-02/06-956-Conf. A public redacted version was filed on the same day (ICC-01/04-02/06-956-Red).

⁷ Transcript of hearing on 28 October 2015, ICC-01/04-02/06-T-40-CONF-ENG ET. *See also* Decision on Prosecution's request to hear P-0039's testimony by way of video-link, 12 October 2015, ICC-01/04-02/06-897-Red2.

⁸ ICC-01/04-02/06-T-40-CONF-ENG ET, page 69, line 16 to page 75, line 15.

⁹ ICC-01/04-02/06-T-40-CONF-ENG ET, page 75, line 25 to page 77, line 11.

¹⁰ ICC-01/04-02/06-T-40-CONF-ENG ET, page 77, line 13 to page 80, line 11.

¹¹ ICC-01/04-02/06-T-40-CONF-ENG ET, page 81, line 2 to page 82, line 5.

¹² Prosecution applications for protective/special measures under rule 87 or rule 88, and for leave to appeal the "Decision on Prosecution's request for in-court protective measures for Witness P-0039", ICC-01/04-02/06-973-Conf with two confidential Annexes. On 4 November 2015, a public redacted version of the application was filed (ICC-01/04-02/06-973-Red).

8. On 9 November 2015, the Defence filed a response in which it opposes the Prosecution Requests;¹³ the Legal Representative filed a response in support of them;¹⁴ and the Legal Representative of former child soldiers filed a response to the Third Request,¹⁵ in which she argues that leave to appeal should be granted.

II. Analysis

9. The Chamber will address the Prosecution Requests consecutively.

A. First Request and Second Request: Protective and/or special measures under Rules 87 and/or 88 of the Rules

10. The Chamber notes that the Prosecution seeks that the Chamber grant *additional* protective measures to that of a pseudonym with respect of the Witness, namely voice and face distortion, pursuant to Rule 87 of the Rules,¹⁶ and/or grant the same measures as special measures, pursuant to Rule 88 of the Rules.¹⁷ The Prosecution argues that the Chamber has ‘broad discretion as to what special measures can be granted’¹⁸ and that it may grant all special measures deemed necessary under Rule 88 of the Rules in accordance with its related obligations under Article 68(1) of the Statute.¹⁹
11. The Chamber recalls it has already rendered a decision pursuant to Rule 87 of the Rules, in which it decided not to order the specific measures now sought

¹³ Consolidated response on behalf of Mr Ntaganda to Prosecution applications for protective/special measures under Rule 87 or 88, and for leave to appeal the Decision on Prosecution’s request for in-court protective measures for Witness P-0039, ICC-01/04-02/06-990-Conf (‘Defence Response’).

¹⁴ Response of the Common Legal Representative of the Victims of the Attack to the ‘Prosecution applications for protective/special measures under rule 87 or rule 88, and for leave to appeal the ‘Decision on Prosecution’s request for in-court protective measures for Witness P-0039’’, ICC-01/04-02/06-991-Conf (‘Legal Representative Response’). A public redacted version was filed on the same day (ICC-01/04-02/06-991-Red).

¹⁵ Former Child Soldiers’ Response to the Prosecution application for leave to appeal the ‘Decision on Prosecution’s request for in-court protective measures for Witness P-0039, ICC-01/04-02/06-992-Conf (‘Legal Representative of former child soldiers Response’).

¹⁶ Prosecution Requests, ICC-01/04-02/06-973-Red, paras 16-17 and 19-21.

¹⁷ Prosecution Requests, ICC-01/04-02/06-973-Red, paras 18-21.

¹⁸ Prosecution Requests, ICC-01/04-02/06-973-Red, para. 18.

¹⁹ Prosecution Requests, ICC-01/04-02/06-973-Red, paras 10 and 18.

to be added by the Prosecution.²⁰ Consequently, the Chamber finds that the First Request amounts to a reconsideration request and will proceed to analyse whether the First Request meets the requisite standard.

12. As the Chamber previously held, reconsideration is ‘exceptional’, and ‘should only be done if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice’. New facts and arguments arising since the decision was rendered may be relevant to this assessment.²¹

13. The Chamber finds that the Prosecution has failed to meet the above standard. In particular, the Chamber notes that the facts and submissions raised in support of the First Request – including the newly reported [REDACTED]²² – were already in the Legal Representative’s and the Prosecution’s possession when the Initial Request was being litigated. The failure to bring these issues to the Chamber’s attention at the relevant time does not qualify them as ‘new facts’ warranting reconsideration of the Initial Decision. Moreover, the Chamber considers that the submissions fail to demonstrate any clear error of reasoning. Consistent with its obligations under Article 68 of the Statute, the Chamber has further considered whether the interests of justice, including the well-being of the Witness, nonetheless warrant reconsideration of the Initial Decision. The Chamber does not find that to be the case in the present circumstances.

14. Turning to the Second Request, the Chamber notes the factors considered above²³ as well as the timing of the Prosecution’s Second Request. It further

²⁰ Initial Decision, ICC-01/04-02/06-956-Red, para. 8 and page 5. *See also*, ICC-01/04-02/06-T-40-CONF-ENG ET, page 81, line 2 to page 82, line 5.

²¹ *See, inter alia*, Decision on the Defence request for reconsideration and clarification, 27 February 2015, ICC-01/04-02/06-483, para. 13; Decision on the Prosecution’s request for reconsideration or, in the alternative, leave to appeal, 18 March 2015, ICC-01/04-02/06-519, para. 12; Decision on the Defence request for reconsideration, 27 May 2015, ICC-01/04-02/06-611, para. 12.

²² Legal Representative Response, ICC-01/04-02/06-991-Conf, paras 11-12; Confidential redacted Response of the Common Legal Representative of Victims of the Attacks to the “Confidential redacted version of the ‘Corrected version of ‘Fifth Prosecution request for in-court protective measures’”, 14 October 2015, ICC-01/04-02/06-900-Conf-Exp-Corr, 4 November 2015, ICC-01/04-02/06-977-Conf-Red, paras 13-20.

²³ *See above* para. 13.

observes that all information relating to the Witness's personal circumstances provided by the Prosecution in support of the special measures sought²⁴ was before the Chamber when it rendered the Initial Decision. It is on the basis of this information, having received the VWU's vulnerability assessment,²⁵ and mindful of its obligations under Article 68(1) of the Statute, that the Chamber decided to grant the single protective measure of a pseudonym for the Witness pursuant to Rule 87 of the Rules. Consequently, and in light of the fact that the Chamber has not been provided with additional information warranting a modification of its earlier decision, the Chamber does not find it appropriate to now grant the same measures under Rule 88 of the Rules.

15. The First and Second Requests are therefore rejected.

B. Third Request: Leave to appeal under Article 82(1)(d) of the Statute

16. The Chamber notes the Prosecution seeks leave to appeal the Initial Decision on three issues, namely:

- i. Whether the Trial Chamber, having accepted that there was an objectively justifiable risk to the [W]itness that warranted the protective measure of a pseudonym, erred in fact by denying the protective measures of face and voice distortion, thereby undermining the effectiveness of the granted protective measure of a pseudonym when the trial is being conducted publicly and broadcast over the Internet;
- ii. Whether the Chamber applied incorrect standards for risk assessment and risk management, and thereby erred in law, when it found that face and voice distortion for the [W]itness were not necessary to manage the recognised objectively justifiable risk because 'no specific threats ha[d] been identified to date'; and
- iii. Whether the Trial Chamber misconceived the scope of the [a]ccused's right to a public hearing when it rejected face and voice distortion based, among other things, on the notion that shielding the identity of witnesses from the public affects the fairness of the trial (together, 'Issues').²⁶

²⁴ Prosecution Requests, ICC-01/04-02/06-973-Red, para. 18. *See also*, paras 12-17.

²⁵ E-mail from VWU to the Chamber on 27 October 2015 at 11:11.

²⁶ Prosecution Requests, ICC-01/04-02/06-973-Red, para. 3.

17. The Chamber, incorporating by reference the applicable law as set out in previous decisions,²⁷ does not consider that the Issues meet the requirements of Article 82(1)(d) of the Statute.
18. The Chamber finds that, even if the Issues were to constitute appealable issues, they do not significantly affect the expeditiousness of the proceedings or outcome of the trial. In this regard, the Chamber notes that the three Issues are intrinsically linked to the Chamber's discrete factual assessment of the Witness's particular circumstances and recalls, as highlighted by the Defence,²⁸ that the Initial Decision concerns protective measures sought for *one* crime base witness only. The Chamber therefore fails to see how the Issues 'directly impact on the Prosecution's ability to call [other] witnesses'²⁹ and finds unconvincing the Prosecution's argument that an immediate resolution of the Issues by the Appeals Chamber is required to ensure consistency across the Court,³⁰ or for other witnesses appearing before the Chamber.³¹
19. Having found that the requirements of Article 82(1)(d) of the Statute are not satisfied, the Third Request is rejected.

²⁷ Decision on Defence request for leave to appeal the Chamber's decision on postponement of the trial commencement date, 4 August 2015, ICC-01/04-02/06-760-Red, para. 21.

²⁸ Defence Response, ICC-01/04-02/06-990-Conf, paras 30 and 33.

²⁹ Prosecution Requests, ICC-01/04-02/06-973-Red, para. 34. *See also*, paras 32 and 39; Legal Representative of former child soldiers Response, ICC-01/04-02/06-992-Conf, paras 15 and 18.

³⁰ Prosecution Requests, ICC-01/04-02/06-973-Red, paras 37 and 38.

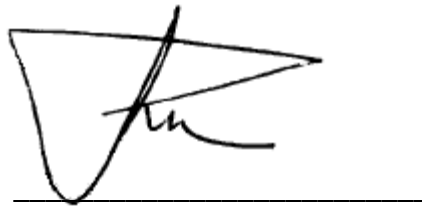
³¹ Prosecution Requests, ICC-01/04-02/06-973-Red, para. 39.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Prosecution Requests; and

ORDERS the filing of public redacted versions of ICC-01/04-02/06-930-Conf and ICC-01/04-02/06-990-Conf, by the Defence, of ICC-01/04-02/06-928-Conf, by the Legal Representative of the victims of the attacks, and of ICC-01/04-02/06-992-Conf, by the Legal Representative of former child soldiers.

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



Judge Robert Fremr, Presiding Judge



Judge Kuniko Ozaki



Judge Chang-ho Chung

Dated 10 December 2015

At The Hague, The Netherlands