

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No.: **ICC-01/04-02/06**

Date: **12 January 2017**

**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 in-court protective measures for Witness P-0863'**

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 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**

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**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*, having regard to Articles 64(2), 67(1) and 68(1) of the Rome Statute and Rule 87 of the Rules of Procedure and Evidence ('Rules'), and incorporating by reference the applicable law as set out in the 'Decision on request for in-court protective measures relating to the first Prosecution witness',<sup>1</sup> issues the following 'Decision on Prosecution request for in-court protective measures for Witness P-0863'.

### **I. Procedural history**

1. On 24 October 2016, the Office of the Prosecutor ('Prosecution') filed a request seeking in-court protective measures for, *inter alia*, Witness P-0863 ('Witness') in the form of face and voice distortion during testimony and the use of a pseudonym for the purposes of the trial ('Request').<sup>2</sup>
2. On 6 December 2016, the defence team for Mr Ntaganda ('Defence') opposed the Request ('Defence Response').<sup>3</sup>
3. Also on 6 December 2016, the Legal Representative of the victims of the attacks ('LRV') filed a response in support of the Request ('LRV Response').<sup>4</sup>
4. On 10 January 2017, the Victims and Witnesses Unit ('VWU') submitted its protective measures assessment for the Witness.<sup>5</sup>

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<sup>1</sup> 14 September 2015, ICC-01/04-02/06-824-Conf, paras 5-6 ('First Protective Measures Decision'). A public redacted version was filed the following day (ICC-01/04-02/06-824-Red).

<sup>2</sup> Prosecution's submission pursuant to regulation 35 to vary a time limit and request for in-court protective measures for Witnesses P-0868 and P-0863, ICC-01/04-02/06-1652-Conf-Exp, with confidential Annex A, *ex parte* Prosecution and Victims and Witnesses Unit only. On 26 November 2016, and notified on 28 November 2016, a confidential redacted version was filed (ICC-01/04-02/06-1652-Conf-Red). On 16 December 2016, a public redacted version was filed (ICC-01/04-02/06-1652-Red2).

<sup>3</sup> Response on behalf of Mr Ntaganda to "Prosecution's submission pursuant to regulation 35 to vary a time limit and request for in-court protective measures for Witnesses P-0868 and P-0863", ICC-01/04-02/06-1673-Conf.

<sup>4</sup> 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 a time limit and request for in-court protective measures for Witnesses P-0868 and P-0863', 24 November 2016, ICC-01/04-02/06-1652-Conf-Exp", ICC-01/04-02/06-1672-Conf. A public redacted version was filed on 10 January 2017 (ICC-01/04-02/06-1672-Red).

## II. Submissions

### *i. Prosecution*

5. The Prosecution submits that the measures proposed are necessary and that the risks posed to the Witness and his family are objectively justifiable, on the basis of: (i) the fact that the Witness and his family still live within Mr Ntaganda's broad geographic area of influence;<sup>6</sup> (ii) the nature of the anticipated evidence of the Witness;<sup>7</sup> (iii) the Witness's former position, which means he is more easily identifiable in his community;<sup>8</sup> and (iv) the Witness and his family not being in the Court's Protection Programme ('ICCPP').<sup>9</sup> The Prosecution argues further that the protective measures sought will not violate the right of Mr Ntaganda to a public hearing.<sup>10</sup>

### *ii. Defence*

6. The Defence opposes the in-court protective measures requested, on the basis of: (i) the absence of any material from the Witness indicating the existence of fears for his security, and the fact that the Witness indicated in his screening interview that he 'has no security concerns regarding cooperation with the [Prosecution]';<sup>11</sup> and (ii) the absence of an objectively justifiable risk to the Witness or his family, including on the basis that the Witness has not been the subject of any specific threat.<sup>12</sup>

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<sup>5</sup> E-mail communication from the VWU to the Chamber on 10 January 2017 at 17:11.

<sup>6</sup> Request, ICC-01/04-02/06-1652-Conf-Red, paras 3 and 18-21.

<sup>7</sup> Request, ICC-01/04-02/06-1652-Conf-Red, paras 15-16.

<sup>8</sup> Request, ICC-01/04-02/06-1652-Conf-Red, para. 24.

<sup>9</sup> Request, ICC-01/04-02/06-1652-Conf-Red, paras 27-28.

<sup>10</sup> Request, ICC-01/04-02/06-1652-Red2, paras 29-33.

<sup>11</sup> Defence Response, ICC-01/04-02/06-1673-Conf, paras 1 and 8-10.

<sup>12</sup> Defence Response, ICC-01/04-02/06-1673-Conf, paras 6-7.

*iii. LRV*

7. The LRV supports the Request, submitting that the specific situation of the Witness requires that his identity be protected in order to ‘avoid negative repercussions’ flowing from his involvement with the Court.<sup>13</sup> The LRV argues that the Witness’s role at the time of the attacks means that his testimony will be unique, and that, as the Witness is well-known in the area in which he resides, he and his family will be exposed to risk if his cooperation with the Court and substantive testimony become known.<sup>14</sup>

### III. Analysis

8. In assessing whether there exists an objectively justifiable risk to the Witness and/or his family, the Chamber has considered the nature of the Witness’s anticipated testimony, the fact that the Witness and family still live within the broad geographical area of influence of Mr Ntaganda and his supporters, and the fact that the Witness and his family are not in the ICCPP. The Chamber recalls in this connection that, in its First Protective Measures Decision, it ruled that factors such as the security situation in a region may be relevant to risks faced by individual witnesses.<sup>15</sup> The Chamber has also had regard to the Prosecution submission that the Witness may remain identifiable in his community due to [REDACTED].<sup>16</sup>
9. The Chamber notes the Defence argument that the Witness previously indicated he had no security concerns, and that the Prosecution has not presented a

<sup>13</sup> LRV Response, ICC-01/04-02/06-1672-Conf, para.10.

<sup>14</sup> LRV Response, ICC-01/04-02/06-1672-Conf, paras 13-14.

<sup>15</sup> First Protective Measures Decision, ICC-01/04-02/06-824-Conf, paras 14-15.

<sup>16</sup> Request, ICC-01/04-02/06-1652-Conf-Red, para. 24.

concrete basis to justify the protective measures for the Witness.<sup>17</sup> Indeed, the Chamber finds that the Request was poorly substantiated by the Prosecution.

10. However, while noting that the Witness is not reported to have experienced any specific security incidents, the Chamber recalls that threats to a witness or his or her family are not a prerequisite to determining whether a witness faces an objectively justifiable risk, and that there are reported instances where other witnesses, including crime base witnesses, were allegedly threatened as a result of their involvement with the Court.<sup>18</sup> Further, considering that the personal circumstances, profile and level of risk of a witness may evolve over time, the Chamber does not consider that the fact that the Witness was assessed during his screening interview to have 'no security concerns regarding cooperation with the [Prosecution]' negates the existence of any security risks at this stage.<sup>19</sup>
11. The Chamber has given particular consideration to the protective measures assessment of the VWU in relation to the Witness. Therein, it is noted that, due to a number of factors, including the nature of the Witness's [REDACTED], the implementation of the requested in-court protective measures is recommended, and that a 'realistic threat' would arise if the Witness's identity becomes known as a result of testifying publicly. In support of its recommendation, the VWU also notes the current political tensions in the Democratic Republic of the Congo, which it states [REDACTED].
12. In light of the abovementioned factors, the Chamber is satisfied that there exists an objectively justifiable risk with respect to the Witness's security and wellbeing warranting the shielding of his identity from the public. The Chamber further

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<sup>17</sup> Defence Response, ICC-01/04-02/06-1673-Conf, paras 1 and 10.

<sup>18</sup> See, most recently, Transcript of hearing on 12 December 2016, ICC-01/04-02/06-T-176-CONF-ENG ET, page 4, lines 18-23. See also First Protective Measures Decision, ICC-01/04-02/06-824-Red, para. 14.

<sup>19</sup> See Defence Response, ICC-01/04-02/06-1673-Conf, paras 1 and 10, referring to DRC-OTP-2068-0272.

finds that the in-court protective measures sought do not unduly infringe upon the rights of Mr Ntaganda, given that the accused and the Defence will be able to see the Witness give evidence at trial and hear the Witness's voice without distortion. Accordingly, and pursuant to Rule 87 of the Rules, the Chamber grants the measures of use of a pseudonym for the purposes of the trial and voice and face distortion during testimony.

13. As a final matter, the Chamber recalls that it previously ruled that public redacted versions of the Request, Defence Response and LRV Response ought to be filed within four weeks of its previous decision on the Request, which related to a separate witness.<sup>20</sup> At the time of issuing the present decision, the public redacted version of the Defence Response has not yet been filed. Accordingly, the Chamber reminds the Defence to file, forthwith, a public redacted version of the Defence Response.

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<sup>20</sup> See ICC-01/04-02/06-T-176-CONF-ENG ET, page 6, lines 9-10.

**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY**

**GRANTS** the use of a pseudonym for the purposes of the trial and voice and face distortion during testimony for the Witness.

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

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**Judge Robert Fremr, Presiding Judge**

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**Judge Kuniko Ozaki**

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**Judge Chang-ho Chung**

Dated this 12 January 2017

At The Hague, The Netherlands