

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **22 November 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

Decision on Defence request for in-court protective measures for Witness D-0017

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

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',¹ issues the following 'Decision on Defence request for in-court protective measures for Witness D-0017'.

I. Procedural history

1. On 28 April 2017, the defence team for Mr Bosco Ntaganda ('Defence') filed a request seeking in-court protective measures for, *inter alia*, Witness D-0017 ('Witness') in the form of a pseudonym for the purposes of the trial and voice and face distortion during the testimony of the Witness ('Request').²
2. On 10 May 2017, the Office of the Prosecutor ('Prosecution') filed a response, opposing the Request ('Response').³
3. On 15 November 2017, the Victims and Witnesses Unit ('VWU') submitted its protective measures assessment for the Witness, recommending the same protective measures requested.⁴

II. Submissions

i. Defence

4. The Defence submits that the measures proposed are necessary and that the risks posed to the Witness and/or to his family are objectively justifiable, on the basis

¹ Decision on request for in-court protective measures relating to the first Prosecution witness, 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 as ICC-01/04-02/06-824-Red.

² Request for in-court protective measures for Witnesses D-0004 and D-0017, 28 April 2017, ICC-01/04-02/06-1882-Conf.

³ Prosecution Response to the Defence Request for in-court protective measures for Witnesses D-0004 and D-0017, 10 May 2017, ICC-01/04-02/06-1899-Conf. A public redacted version was filed on 1 November 2017 as ICC-01/04-02/06-1899-Red.

⁴ E-mail communication from the VWU to the Chamber on 15 November 2017 at 12:07.

of, *inter alia*: (i) the nature of the Witness's expected testimony;⁵ (ii) the Witness's place of residence and profession, which entails frequent contact with a large part of the Witness's community;⁶ (iii) the 'express negative reaction' of the Witness's community to being associated with the Court;⁷ (iv) 'the proximity of [the] Witness [...] to Mr Ntaganda' and 'the current hostility demonstrated against Mr Ntaganda in the region';⁸ (v) the current political tensions in the Ituri region;⁹ and (vi) the Witness's health condition.¹⁰

ii. Prosecution

5. The Prosecution submits that no objectively justifiable risk to the Witness and/or to his family has been established, arguing, *inter alia*, that: (i) the Defence's references to the risks posed to the Witness are 'only vague', 'not clearly articulate[d]', or 'not explain[ed]';¹¹ (ii) the reference to the Witness's health condition is not sufficiently explained;¹² (iii) the Defence failed to provide 'any explanation, or evidence, of its claim that there is "current hostility demonstrated against Mr. Ntaganda in the region"';¹³ (iv) no evidence is provided to support the alleged concerns of the Witness;¹⁴ and (v) the Witness resides in a relatively safe area with a predominantly Hema-Gegere population.¹⁵ According to the Prosecution, the alleged concerns therefore 'amount to vague and unfounded subjective fears that cannot warrant an exception to the rule that [...] witnesses testify publicly'.¹⁶

⁵ Request, ICC-01/04-02/06-1882-Conf, para.12.

⁶ Request, ICC-01/04-02/06-1882-Conf, para. 13.

⁷ Request, ICC-01/04-02/06-1882-Conf, para. 14.

⁸ Request, ICC-01/04-02/06-1882-Conf, para. 4.

⁹ Request, ICC-01/04-02/06-1882-Conf, para. 6.

¹⁰ Request, ICC-01/04-02/06-1882-Conf, para. 15.

¹¹ Response, ICC-01/04-02/06-1899-Conf, paras 3, 13 and 17.

¹² Response, ICC-01/04-02/06-1899-Conf, para. 18.

¹³ Response, ICC-01/04-02/06-1899-Conf, para. 24.

¹⁴ Response, ICC-01/04-02/06-1899-Conf, para. 20.

¹⁵ Response, ICC-01/04-02/06-1899-Conf, paras 5 and 22-24.

¹⁶ Response, ICC-01/04-02/06-1899-Conf, paras 4 and 20.

III. Analysis

6. In assessing whether an objectively justifiable risk to the Witness and/or to the Witness's family exists, the Chamber has considered several factors, including, *inter alia*, the Witness's area of residence, the nature and implications of the Witness's profession and concomitant level of contact with his community, and the nature of the Witness's anticipated testimony.¹⁷ The Chamber also recalls that the general security situation in a region may be relevant to risks faced by individual witnesses,¹⁸ and has further given consideration to this in the present decision. In so doing, the Chamber has referred to a Registry report outlining the security issues in the DRC, indicating that the general security situation in Ituri has deteriorated since the beginning of the year and remains volatile.¹⁹
7. The Chamber notes that the Request does not provide evidence of the existence of tangible or prior threats to the Witness, but only describes the perceived risks in general terms. However, the Chamber recalls, in this regard, that a prior direct threat is not a prerequisite to determining that a witness faces an objectively justifiable risk.²⁰ To assist in its determination of the Request, the Chamber has also given consideration to the protective measures assessment provided by the VWU.²¹ Therein, it was noted that, while the Witness expressed more a perception of danger rather than considerations founded on objective factors, the VWU concluded that, due, *inter alia*, to the general instability and increase of violence in the Ituri region, and to certain risk factors specific to the Witness, the use of in-court protective measures is recommended. Further, having noted the nature of

¹⁷ See, similarly, Decision on Defence request for in-court protective measures for Witness D-0038, 12 October 2017, ICC-01/04-02/06-2061; Decision on Prosecution request for in-court protective measures for Witness [REDACTED], 2 November 2016, ICC-01/04-02/06-1605-Red.

¹⁸ First Protective Measures Decision, ICC-01/04-02/06-824-Conf, paras 14-15.

¹⁹ See, similarly, Transcript of hearing of 12 September 2017, ICC-01/04-02/06-T-242-CONF-ENG ET, page 61, lines 3 to 11, referring to Fourth Report of the Registry on the Security Situation in the Democratic Republic of the Congo, 30 June 2017, ICC-01/04-02/06-1980-Conf.

²⁰ First Protective Measures Decision, ICC-01/04-02/06-824-Conf, para. 14.

²¹ E-mail communication from the VWU to the Chamber on 15 November 2017 at 12:07.

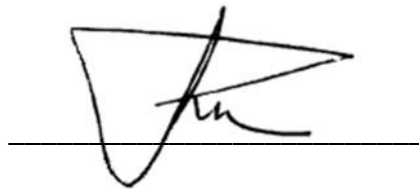
the expected testimony of the Witness and his reported fears of retaliation in connection with testifying as a Defence witness, the Chamber considers that granting the requested measures would, as noted by the VWU, reduce the risk of reprisals and minimise the need to deploy intrusive risk reduction or protection measures post-testimony.

8. In light of the abovementioned factors, while conscious of the principle that the fairness of the trial generally favours the identity of the witnesses being made known to the public, the Chamber is satisfied that an objectively justifiable risk exists in relation to the Witness, warranting the protection of his identity. Therefore, the Chamber grants, pursuant to Rule 87 of the Rules, the protective measures sought in the form of the use of a pseudonym for the purposes of the trial and face and voice distortion during the Witness's testimony.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

GRANTS the request for in-court protective measures in the form of a pseudonym for the purposes of the trial and voice and face distortion during the testimony of Witness D-0017.

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

A handwritten signature in black ink, consisting of a large, stylized 'F' followed by a smaller, cursive 'r', positioned above a horizontal line.

Judge Robert Fremr, Presiding Judge

A handwritten signature in black ink, appearing to read 'K. Ozaki', positioned above a horizontal line.

Judge Kuniko Ozaki

A handwritten signature in black ink, consisting of three distinct, stylized characters, positioned above a horizontal line.

Judge Chang-ho Chung

Dated this 22 November 2017

At The Hague, The Netherlands