

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No.: **ICC-01/04-02/06**  
Date: **1 December 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 in-court protective measures for Witness D-0243**

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, Rules 87 and 88 of the Rules of Procedure and Evidence ('Rules'), and Regulation 35 of the Regulations of the Court ('Regulations'), 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 in-court protective measures for Witness D-0243'.

### **I. Procedural history**

1. On 16 October 2017, the defence team for Mr Ntaganda ('Defence') requested, *inter alia*, the addition of Witness D-0243 ('Witness') to its list of witnesses.<sup>2</sup> The Chamber authorised this addition on 6 November 2017.<sup>3</sup>
2. On 16 November 2017, the Defence filed a request seeking in-court protective measures for the Witness, in the form of face and voice distortion and the use of a pseudonym ('Request'). The Defence also sought an extension of time pursuant to Regulation 35(2) for the purposes of the Request ('Request for Extension').<sup>4</sup>
3. On 23 November 2017, the Prosecution filed its response, opposing the Request ('Response').<sup>5</sup>
4. On 28 November 2017, the Victims and Witnesses Unit ('VWU') provided its assessment recommending the same protective measures as requested.<sup>6</sup> On the

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<sup>1</sup> ICC-01/04-02/06-824-Conf, 14 September 2015, paras 5-6. A public redacted version was filed on 16 September 2015 as ICC-01/04-02/06-824-Red.

<sup>2</sup> Request to Add Witnesses D-0185, D-0207 and D-0243 to the Defence List of Witnesses, ICC-01/04-02/06-2065-Conf.

<sup>3</sup> Decision on Defence Requests to add D-0185, D-0207, and D-0243 to its List of Witnesses and for the admission of prior recorded testimony pursuant to Rule 68(2)(b), ICC-01/04-02/06-2099.

<sup>4</sup> Request for in-court protective measures for Witness D-0243 and for extension of time, ICC-01/04-02/06-2117-Conf-Exp, with Confidential Annex A. A confidential redacted version was filed on the same day, ICC-01/04-02/06-2117-Conf-Red.

<sup>5</sup> Prosecution response to the Defence "Confidential redacted version of 'Request for in-court protective measures for Witness D-0243 and for extension of time'", ICC-01/04-02/06-2130-Conf.

same day, the VWU transmitted its vulnerability assessment for the Witness, stating that no special measures are recommended under Rule 88 of the Rules.<sup>7</sup>

## II. Submissions and Analysis

### *Request for Extension*

5. The Defence acknowledges that it was not unable to file the present application in time, but nevertheless requests the Chamber to accept the late filing in the interests of justice.<sup>8</sup> In this regard, the Defence submits, *inter alia*, that: (i) the deadline fell on 6 November 2017, the same date on which the addition of the Witness was granted;<sup>9</sup> (ii) the delay in filing was not 'extreme';<sup>10</sup> (iii) in-court protective measures have no impact upon the Prosecution's preparation for cross-examination of the Witness;<sup>11</sup> and (iv) Article 68(1) militates in favour of granting the Request.<sup>12</sup>
6. The Prosecution submits that the Defence has not demonstrated that it was unable to file the Request by the deadline, or, at the latest, by 10 November 2017, and notes that the Defence has conceded that it should have acted more quickly. However, the Prosecution does not propose that the Request be rejected *in limine* on the basis of its late filing.<sup>13</sup>
7. The Chamber notes that pursuant to Regulation 35 of the Regulations, a time limit may be extended if good cause has been shown. After the lapse of a time limit, the requesting party or participant must demonstrate that it was 'unable to file the

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<sup>6</sup> Email communication from the VWU to the Chamber on 28 November 2017 at 16:56.

<sup>7</sup> Email communication from the VWU to the Chamber on 28 November 2017, at 17:20.

<sup>8</sup> Request, ICC-01/04/-02/06-2117-Conf-Red, paras 2, 18-21.

<sup>9</sup> Request, ICC-01/04/-02/06-2117-Conf-Red, paras 2, 17, and 20.

<sup>10</sup> Request, ICC-01/04/-02/06-2117-Conf-Red para. 20.

<sup>11</sup> Request, ICC-01/04/-02/06-2117-Conf-Red paras 2, 20-21.

<sup>12</sup> Request, ICC-01/04/-02/06-2117-Conf-Red para. 19.

<sup>13</sup> Response, ICC-01/04-02/06-2130-Conf, para. 1.

application within the time limit for reasons outside [its] control'.<sup>14</sup> The Chamber further notes that if the criteria of Regulation 35 are not met, the Chamber may nevertheless grant an extension of time if it is in the interests of justice to do so.<sup>15</sup>

8. Noting that the requirements of Regulation 35 are not met in the current circumstances, the Chamber will assess whether the extension of time is warranted in the interests of justice. In this regard, the Chamber observes that the deadline for the Request was 6 November 2017, the same day on which Witness D-0243 was added to the Defence list of witnesses. The Chamber further notes its obligations in regard to the protection of victims and witnesses pursuant to Article 68(1) of the Statute. The Chamber further notes the Prosecution's submission in this regard and it finds that no prejudice would be caused by granting the extension. In light of the above, the Chamber finds that it is in the interests of justice to grant the Request for Extension and to continue to adjudicate the Request on its merits.

#### *Request*

9. The Defence argues that the Witness has expressed concerns about potential negative repercussions arising from his testimony, which are objectively justified given his personal circumstances and the security situation in Ituri.<sup>16</sup> In support of its Request, the Defence submits, *inter alia*, that: (i) the most recent Registry report on the security situation in Ituri indicates that the environment in the province has deteriorated since the beginning of the year, and that there has been an

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<sup>14</sup> Regulation 35(2) of the Regulations. The Chamber recalls that the Appeals Chamber considered this to involve the existence of 'exceptional circumstances.' *The Prosecutor v. Thomas Lubanga Dyilo*, Reasons for the 'Decision of the Appeals chamber on the request of counsel to Mr. Thomas Lubanga Dyilo for modification of the time limit pursuant to regulation 35 of the Regulations of the court of 7 February 2017', ICC-01/04-01/06-834, paras 9-10.

<sup>15</sup> *See, for example*, Decision on Prosecution application under Rule 68(2)(b) and Regulation 35 for admission of prior recorded testimony of Witness P-0551, ICC-01/04-02/06-1733, para. 6.

<sup>16</sup> Request, ICC-01/04/-02/06-2117-Conf-Red, paras 1, 15.

increase in attacks by the FNI's successor, the FRPI;<sup>17</sup> (ii) in light of his profession, the Witness comes into with a large number of people and travels throughout Ituri to areas where former or current FNI or FRPI members are in the majority;<sup>18</sup> (iii) the Witness's livelihood depends on personal and professional relationships and appearing as a Witness for the Defence may give rise to negative perceptions;<sup>19</sup> and (iv) the Witness has expressed concern that he may be at risk for physical or economic retaliation if his activities and affiliation with the UPC and the FPLC become publicly known.<sup>20</sup>

10. The Prosecution submits that the Request should be rejected because no objectively justifiable risk to Witness D-0243's safety, physical or psychological well-being, dignity or privacy has been established that warrants an exception to the principle of publicity.<sup>21</sup> In this regard, the Prosecution argues, *inter alia*, that: (i) the only individual circumstance that the Defence has referred to in support of its request is the Witness's work, and it is unclear what precisely the Witness's professional activities are, or how the Witness's economic well-being could be at risk due to his public testimony;<sup>22</sup> (ii) travelling for work does not automatically place the Witness at risk of retaliation;<sup>23</sup> (iii) the fact that a witness's testimony may give rise to 'negative perceptions' does not warrant the granting of protective measures;<sup>24</sup> (iv) the Witness's testimony does not concern the FNI or FRPI, and the Defence has not provided a link between the persons attacked by the FRPI in the Democratic Republic of the Congo and the Witness;<sup>25</sup> and (v) the

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<sup>17</sup> Request, ICC-01/04-02/06-2117-Conf-Red, paras 1, 6-11

<sup>18</sup> Request, ICC-01/04-02/06-2117-Conf-Red, paras 12-13.

<sup>19</sup> Request, ICC-01/04-02/06-2117-Conf-Red, para. 12.

<sup>20</sup> Request, ICC-01/04-02/06-2117-Conf-Red, paras 1, 14.

<sup>21</sup> Response, ICC-01/04-02/06-2130-Conf, paras 2, 14-15, 24, 28.

<sup>22</sup> Response, ICC-01/04-02/06-2130-Conf, paras 4, 19-20.

<sup>23</sup> Response, ICC-01/04-02/06-2130-Conf, para. 21.

<sup>24</sup> Response, ICC-01/04-02/06-2130-Conf, para. 21.

<sup>25</sup> Response, ICC-01/04-02/06-2130-Conf, paras 5, 23.

Defence itself has characterised aspects of D-0243's anticipated testimony as 'general' and 'background information'.<sup>26</sup>

11. In its assessment of the need for protective measures for the Witness, the VWU indicates that the Witness's fears are more a perception of danger rather than founded on any objective rationale, as he is unable to provide any specific or substantial facts to objectively support his fears. Nevertheless, the VWU indicates that the general instability in the region lends support to the use of in-court protective measures, stating that such measures would reduce the risk of reprisals against the Witness. As such, the VWU recommends the same protective measures requested.<sup>27</sup>
  
12. The Chamber recalls that protective measures such as those sought should only be granted 'following a case-by-case assessment of whether they are necessary in light of an objectively justifiable risk'.<sup>28</sup> In the present circumstances, the Chamber is not persuaded that such an objectively justifiable risk exists. While factors such as the security situation in a region may be relevant when considered in relation to the circumstances of a specific witness, the Chamber is not persuaded that this factor warrants granting the Request in the particular circumstances, noting that, while the Witness travels throughout a particular part of Ituri for work, based on the information provided in the Request and the VWU's assessment, the Chamber does not consider that it has been adequately demonstrated that this poses a risk to the Witness.
  
13. Having considered the concerns expressed by the Witness, the Chamber recalls that, while the subjective fears and opinions of a witness may be relevant to the

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<sup>26</sup> Response, ICC-01/04-02/06-2130-Conf, paras 5, 26.

<sup>27</sup> Email communication from the VWU to the Chamber on 28 November 2017 at 16:56.

<sup>28</sup> Decision on request for in-court protective measures relating to the first Prosecution witness, ICC-01/04-02/06-824-Red, para. 6.

Chamber's assessment of risk, such fears are not determinative.<sup>29</sup> The Chamber further notes the nature of the anticipated evidence and that, based on the information before it, there are limited factors relating to the Witness's individual circumstances that impact on his security risks. Considering the aforementioned lack of supporting information, the Chamber is not persuaded that an objectively justifiable risk exists in relation to the Witness.

14. In light of the above, the Chamber rejects the Request. However, if necessary and where appropriate, the Chamber may order the use of private session for portions of the Witness's testimony, and any such determination shall be made at the relevant time.

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<sup>29</sup> Transcript of hearing on 27 January 2017, ICC-01/04-02/06-T-189-CONF-ENG-ET, p. 48, lines 15-19.

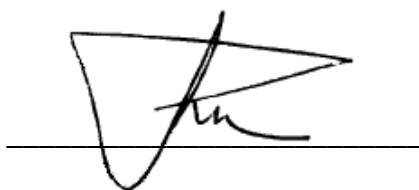


**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY**

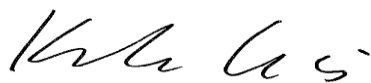
**GRANTS** the Request for Extension; and

**REJECTS** the Request.

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 'remr', written over a horizontal line.

**Judge Robert Fremr, Presiding Judge**

A handwritten signature in black ink, appearing to read 'Kuniko Ozaki', written over a horizontal line.

**Judge Kuniko Ozaki**

A handwritten signature in black ink, consisting of three distinct characters, written over a horizontal line.

**Judge Chang-ho Chung**

Dated this 1 December 2017

At The Hague, The Netherland