

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: 26 January 2018

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-0207

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, Rule 87 of the Rules of Procedure and Evidence ('Rules'), and Regulations 33(2) and 35 of the Regulations of the Court ('Regulations') issues the following 'Decision on Defence request for in-court protective measures for Witness D-0207'.

I. Procedural history

1. On 16 October 2017, the defence team for Mr Ntaganda ('Defence') requested the addition of, amongst others, Witness D-0207 ('Witness') to its list of witnesses,¹ as well as the admission of his prior recorded testimony pursuant to Rule 68(2)(b) of the Rules.²
2. On 6 November 2017, the Chamber authorised the Witness's addition to the list, but rejected the Rule 68(2)(b) request, and decided that the Witness's testimony be scheduled in the sixth evidentiary block.³
3. On 27 December 2017, *via* email,⁴ the Defence requested an extension of time until 18 January 2018 to submit a request for in-court protective measures in relation to the Witness ('Request for Extension'), on the basis that a meeting with the Witness for that purpose could only be arranged in January 2018. The Request for Extension was opposed by the Office of the Prosecutor ('Prosecution').⁵

¹ Request to Add Witnesses D-0185, D-0207 and D-0243 to the Defence List of Witnesses, ICC-01/04-02/06-2065-Conf.

² Request to admit prior recorded testimony of eleven witnesses under Rule 68(2), ICC-01/04-02/06-2066-Conf. The Defence filed a corrected version of this request on 27 October 2017, ICC-01/04-02/06-2066-Conf-Corr.

³ 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.

⁴ Email from the Defence at 11:51.

⁵ Prosecution response to the Defence request for an extension of the time limit to file a request for in-court protective measures in relation to D-0207, 3 January 2018, ICC-01/04-02/06-2172-Conf.

4. On 3 January 2018, the Request for Extension was granted by the Chamber *via* email ('Decision on Request for Extension'),⁶ which is placed on the record, together with the reasons therefor, by virtue of the present decision.
5. On 18 January 2018, at 16:19, the Defence filed its request for in-court protective measures for the Witness in the form of face and voice distortion, and use of a pseudonym ('Request').⁷ The late filing was 'accept[ed]' by the Chamber ('Decision on Late Filing'),⁸ and the reasons for this decision are set out below.
6. On 24 January 2018, in line with the time limit set by the Chamber,⁹ the Prosecution filed its response, opposing the Request ('Response').¹⁰
7. On 25 January 2018, the Victims and Witnesses Unit ('VWU') provided the Chamber with its protective measures assessment in relation to the Witness, recommending the measures requested.¹¹

II. Submissions and Analysis

i. Preliminary issues: Decision on Request for Extension and Decision on Late Filing

8. The Chamber recalls that, pursuant to the first sentence of Regulation 35(2) 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, pursuant to the second sentence of Regulation 35(2), that it was 'unable to file the

⁶ Email from the Chamber to the parties and participants on 3 January 2018, at 15:52.

⁷ Request on behalf of Mr Ntaganda for in-court protective measures for Witness D-0207, ICC-01/04-02/06-2187-Conf. The Request was notified on 19 January 2018.

⁸ Email from the Chamber to the parties and participants on 19 January, at 15:02.

⁹ Email from the Chamber to the parties and participants on 19 January, at 15:02.

¹⁰ Prosecution response to the Defence "Request for in-court protective measures for Witness D-0207", ICC-01/04-02/06-2192-Conf, paras 1 and 14.

¹¹ Email communication from the VWU to the Chamber, at 16:00.

application within the time limit for reasons outside [its] control'.¹² The Chamber further recalls that if the criteria of Regulation 35(2) are not met, the Chamber may nevertheless grant an extension of time if it is in the interests of justice to do so.¹³

9. The Chamber noted that the Request for Extension was submitted on 27 December 2017, at 11:51, prior to the expiry of the time limit established by the Chamber with regard to the witness schedule at that time.¹⁴ While noting its previous direction that email requests regarding substantive matters should be 'exception[al]' and limited to matters requiring 'urgent attention' that 'can only be brought to the Chamber within an actionable time frame by email',¹⁵ the Chamber also considered that the Request was submitted during the Court recess, and that it has accepted similar requests from both parties on other occasions. In these circumstances, and in the interests of efficiency, the Chamber considered itself properly seized of the Request for Extension within the meaning of the first sentence of Regulation 35(2).
10. However, the Chamber found that the Defence had failed to demonstrate 'good cause' for the extension, as it has failed to adequately explain why it was not possible to obtain the information required for its Request at an earlier stage. Noting that the requirements of Regulation 35(2) were not met in the circumstances, the Chamber assessed whether granting the extension of time was

¹² 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.

¹³ See, e.g., Decision on Prosecution application under Rule 68(2)(b) and Regulation 35 for admission of prior recorded testimony of Witness P-0551, 19 January 2017, ICC-01/04-02/06-1733, para. 6.

¹⁴ Decision on the conduct of proceedings, 2 June 2015, ICC-01/04-02/06-619, para. 50, applicable to the Defence case pursuant to Decision supplementing the Decision on the Conduct of Proceedings (ICC-01/04-02/06-619) and providing directions related to preparations for the presentation of evidence by the Defence, ICC-01/04-02/06-1757, para. 8, providing that 'requests for in-court protective measures are to be filed no later than four weeks before the scheduled commencement of testimony.'

¹⁵ Transcript of hearing on 11 September 2014, ICC-01/04-02/06-T-13, page 5, lines 1 to 10.

warranted in the interests of justice. In this regard, the Chamber noted its obligations in relation to the protection of victims and witnesses pursuant to Article 68(1) of the Statute, and further found that no prejudice would arise from granting the requested extension, given that it would still allow the Prosecution to respond, the VWU to submit its assessment, and the Chamber to issue a decision sufficiently in advance of the Witness's testimony.

11. Regarding the timing of the filing of the Request, the Chamber notes the Defence's argument, conveyed *via* email, that neither the Request for Extension nor the Decision on the Request for Extension 'mentioned the time at which the Defence Request was to be submitted'.¹⁶ The Chamber is not persuaded by this argumentation, and emphasises that, unless otherwise indicated, time limits are to be determined in accordance with Regulation 33(2) of the Regulations, which provides that '[d]ocuments shall be filed with the Registry between 9am and 4pm The Hague time [...]'. However, noting the limited period of the delay, the Defence's submission that it was unable to submit the Request by 16:00 due to technical problems, the fact that a courtesy copy was provided upon filing of the Request, the nature of the filing, and the Chamber's obligation under Article 68(1) of the Statute, the Chamber considered it in the interests of justice to accept the late filing.

ii. Request

Submissions

12. The Defence argues that the requested measures are 'required to protect the safety, physical and psychological well-being, dignity and privacy of [the Witness], first on the basis of objectively justifiable risks to his safety arising from the general security situation in Ituri, and second, on the basis of the negative

¹⁶ Email from the Defence on 18 January 2018, at 16:38.

repercussions arising from his testimony should it be known by the inhabitants of his place of residence, more particularly by [certain Prosecution witnesses ('Prosecution Witnesses')], that he testified as a witness in this case'.¹⁷

13. With respect to the Witness's personal circumstances, the Defence notes that he is a father of six children, some of whom still go to school in his area of residence. It also states that, due to the nature of the Witness's work as a businessman, he is in contact with a large number of people throughout Bunia and its surroundings, and his livelihood depends on both personal and professional relationships with a large number of individuals.¹⁸ It further refers to the presence of a large number of individuals of Lendu ethnicity in the areas he visits on account of his work, and submits that, with reference to the most recent Registry report on the security situation in Ituri ('Registry Report'),¹⁹ in the current circumstances of violence and increasing attacks of a political dimension, the risk of retaliation for perceived affiliation with political parties is heightened, and appearing as a Defence witness 'is likely to give rise to negative perceptions against him and may very well place [the Witness's] safety at risk'.²⁰

14. Moreover, the Defence argues that the Witness's testimony 'is related to sensible issues including that of child soldiers', and is connected to the testimony of the Prosecution Witnesses, who benefited from protective measures, and are presently unaware that he is a witness in this case.²¹ In these circumstances, the Defence argues that if the Witness were to testify publicly, the Prosecution Witnesses will 'immediately make the connection with the questions they were asked during their cross-examination', which, in turn, 'will alert the [...] community about the fact that [its] inhabitants [...] are testifying in this case and

¹⁷ Request, ICC-01/04-02/06-2187-Conf, para. 10.

¹⁸ Request, ICC-01/04-02/06-2187-Conf, para. 13.

¹⁹ 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 and confidential Annex.

²⁰ Request, ICC-01/04-02/06-2187-Conf, paras 15-17.

²¹ Request, ICC-01/04-02/06-2187-Conf, paras 18-19.

adopting contrary positions’.²² Noting further that the Witness indicated knowing the Prosecution Witnesses ‘very well’, and that they live in the same neighbourhood and attend the same venues, the Defence argues that, should the Prosecution Witnesses learn of his testimony, ‘it is very likely that this will impact [the Witness’s] physical or psychological well-being, dignity o[r] privacy’.²³ Finally, the Defence notes that, even if the Witness was to testify publicly, as a result of the Prosecution Witnesses’ testimony, most of his testimony would have to take place in private session.²⁴

15. The Prosecution opposes the Request, on the basis that no objectively justifiable risk to the Witness’s safety, physical or psychological well-being, dignity or privacy has been established.²⁵ Specifically, the Prosecution argues that: (i) the Defence failed to identify any specific threat against the Witness or to explain how the information in the Registry Report relates to the security situation of the Witness;²⁶ (ii) the Witness’s anticipated testimony ‘does not touch on any sensitive political issues’ putting the Witness’s security at risk;²⁷ (iii) the Witness already consented to his identity being disclosed to the Prosecution Witnesses in 2016 for the purpose of cross-examination;²⁸ and (iv) the Witness’s individual circumstances, including with regard to his occupation, do not place him at risk of retaliation or negatively impact on his business.²⁹

²² Request, ICC-01/04-02/06-2187-Conf, para. 19.

²³ Request, ICC-01/04-02/06-2187-Conf, paras 20-21.

²⁴ Request, ICC-01/04-02/06-2187-Conf, para. 22.

²⁵ Response, ICC-01/04-02/06-2192-Conf, paras 1 and 14.

²⁶ Response, ICC-01/04-02/06-2192-Conf, para. 10.

²⁷ Response, ICC-01/04-02/06-2192-Conf, para. 11. *See also* para. 13.

²⁸ Response, ICC-01/04-02/06-2192-Conf, para. 12.

²⁹ Response, ICC-01/04-02/06-2192-Conf, para.13.

Analysis

16. The Chamber incorporates by reference the applicable law as set out in its 'Decision on request for in-court protective measures relating to the first Prosecution witness'.³⁰
17. The Chamber recalls that it has previously held that the general security situation in a region may be relevant to risks faced by individual witnesses.³¹ In assessing the existence of such a risk, the Chamber has referred to Registry reports outlining the security issues in the Democratic Republic of the Congo.³² The Chamber further recalls that, in assessing whether an objectively justifiable risk to a witness and/or his or her family exists, the Chamber has previously considered several factors, including, *inter alia*, the witness's place of residence or area of travel, the witness's professional responsibilities, the witness's family situation, the nature of the witness's anticipated testimony,³³ comprising, more specifically, the expected connection to the testimony provided by other witnesses in this case.³⁴
18. In the present instance, the Chamber has considered the Witness's place of residence and areas of travel, and the Defence's submission that, due to his occupation, he comes into contact with a large number of people, which it considers may increase the risks faced by the Witness. The Chamber has also

³⁰ Decision on request for in-court protective measures relating to the first Prosecution witness, 14 September 2015, ICC-01/04-02/06-824-Conf ('First Protective Measures Decision'), paras 5-6. A public redacted version was filed on 16 September 2015 as ICC-01/04-02/06-824-Red.

³¹ See, e.g., First Protective Measures Decision, ICC-01/04-02/06-824-Conf, paras 14-15.

³² See, e.g., transcript of hearing of 12 September 2017, ICC-01/04-02/06-T-242-CONF-ENG ET, page 61, lines 3 to 11; transcript of hearing of 15 September 2017, ICC-01/04-02/06-T-245-CONF-ENG ET, page 61, lines 9 to 11.

³³ See, e.g., Decision on Prosecution request for in-court protective measures for Prosecution Witness P-0551, 15 February 2017, ICC-01/04-02/06-1786, para. 10; Confidential redacted version of 'Decision on Prosecution's request for in-court protective and special measures for Witness P-0800', 10 February 2017, ICC-01/04-02/06-1160-Conf-Red, para. 7; transcript of hearing of 15 September 2017, ICC-01/04-02/06-T-245-CONF-ENG ET, page 61, lines 12 to 17.

³⁴ See transcript of hearing on 15 September 2017, ICC-01/04-02/06-T-245-Red-ENG, page 60, line 3 to page 62, line 3.

considered the information in the Registry Report, which indicates that the general security situation in the Ituri province has deteriorated since the beginning of 2017 and remains volatile, and that inter-ethnic violence and attacks by armed groups from different sides are reported to have increased.³⁵

19. While 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 the witness faces an objectively justifiable risk, and that there are reported instances where other witnesses were allegedly threatened as a result of their involvement with the Court.³⁶

20. Moreover, the Chamber has taken into account the nature of the Witness's anticipated testimony as detailed in the Witness's written statement,³⁷ which, as previously noted,³⁸ relates to, and may challenge certain aspects of, the testimony of the Prosecution Witnesses. Noting the Defence's submission that the Witness lives in the same community as these witnesses and attends the same locations therein, the Chamber considers that testifying without protective measures may risk exposing the Witness and his family to further risk. While it is true that the Witness's name and contact with the Defence has, amongst other individuals, been referred to in the context of the Prosecution Witnesses' cross-examination,³⁹ the Witness was not explicitly identified as a Defence witness scheduled to testify in this case. In these circumstances, the Chamber is of the view that testifying without protective measures would place the Witness and his family at risk. In this respect, the Chamber considers that the purportedly 'apolitical' nature of the

³⁵ Registry Report, ICC-01/04-02/06-1980-Conf, paras 1, 3-7, and confidential Annex A.

³⁶ See, e.g., 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.

³⁷ DRC-D18-0001-6152.

³⁸ See ICC-01/04-02/06-2099, para. 31.

³⁹ See Response, ICC-01/04-02/06-2192-Conf, para. 12.

Witness's evidence⁴⁰ has no major impact on the presence of such risk in the present circumstances.

21. Furthermore, the Chamber has considered the protective measures assessment of the VWU in relation to the Witness, wherein the VWU notes that if the Witness's cooperation with the Court were to be publicly known, it likely increases the level of risk to the Witness and his family, and therefore recommends granting the requested measures.
22. In light of the foregoing, while conscious of the principle that the fairness of the trial generally favours the identity of the witnesses being made known to the public,⁴¹ the Chamber is satisfied that an objectively justifiable risk exists with respect to security of the Witness and his family, warranting the shielding of his identity from the public. Accordingly, and pursuant to Rule 87 of the Rules, the Chamber grants the measures of face and voice distortion during the Witness's testimony, and the use of a pseudonym for the purposes of the trial.

⁴⁰ See Response, ICC-01/04-02/06-2192-Conf, para. 13.

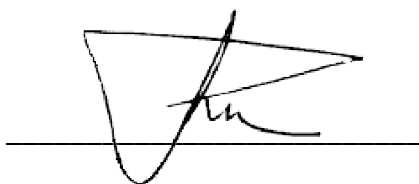
⁴¹ See Decision on Defence request for in-court protective measures for Witness D-0017, 22 November 2017, ICC-01/04-02/06- 2125, para. 8.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

PLACES ON THE RECORD the Decision on Request for Extension and the Decision on Late Filing; and

GRANTS the request for in-court protective measures in the form of face and voice distortion during the testimony of Witness D-0207, and the use of a pseudonym for the purposes of the trial.

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



Judge Robert Fremr, Presiding Judge



Judge Kuniko Ozaki



Judge Chang-ho Chung

Dated this 26 January 2018

At The Hague, The Netherlands