

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/04-02/06**
Date: **15 September 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 request for in-court protective measures relating to the first
Prosecution witness**

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* ('Ntaganda case'), having regard to Articles 64(2) and (6)(e) and 68(1) and (2) of the Rome Statute ('Statute'), and Rules 87 and 88 of the Rules of Procedure and Evidence ('Rules'), issues the following 'Decision on request for in-court protective measures relating to the first Prosecution witness'.

I. Procedural history

1. On 2 June 2015, the Chamber issued its 'Decision on the conduct of proceedings' ('Conduct of Proceedings Decision'), in which it ruled, *inter alia*, that:

[t]he calling party shall make any requests for in-court protective measures, in accordance with Rule 87(1) and (2) of the Rules, in such time so as to enable the [Victims and Witnesses Unit ('VWU')] to make observations and advise the Chamber, and allow for responses to the request to be filed, before the Chamber's ruling on the request. The Chamber will normally rule on such a request just prior to the commencement of testimony of the witness concerned. In any event, and without prejudice to subsequent unforeseen developments, requests for in-court protective measures are to be filed no later than four weeks before the scheduled commencement of testimony.¹

2. On 17 August 2015, the Office of the Prosecutor ('Prosecution') filed a request seeking in-court protective measures in relation to two witnesses testifying in the first evidentiary block scheduled to commence on 15 September 2015 ('Request').² The measures are requested in relation to the first Prosecution witness, [REDACTED] ('Witness'), and the second Prosecution witness, and include facial and voice distortion, as well as the use of a pseudonym. The Prosecution avers that the measures sought will not 'unfairly prejudice the

¹ ICC-01/04-02/06-619, para. 50 (footnotes omitted).

² Second Prosecution request for in-court protective measures, 17 August 2015, ICC-01/04-02/06-782-Conf-Exp. A confidential redacted version was filed the same day and notified on 18 August 2015 (ICC-01/04-02/06-782-Conf-Red). A public redacted version was filed on 2 September 2015 (ICC-01/04-02/06-782-Red2).

rights of the [a]ccused', as these witnesses will remain anonymous to the public only.³

3. On 31 August 2015, the defence team for Mr Ntaganda ('Defence') filed a response, opposing the Request ('Response').⁴ The Defence argues, *inter alia*, that the Request 'provides no references supporting any of the assertions set out therein', impeding the ability of the Defence to provide meaningful observations on the validity of the security concerns outlined in relation to the Witnesses. In light of this, the Defence requests that the VWU observations be provided to it in a timely manner to facilitate any additional observations it may wish to make.⁵ The Defence also argues that the extent of the in-court protective measures requested means that the Chamber will inevitably need to resort frequently to private sessions, 'seriously hamper[ing] the public's ability to follow the proceedings'.⁶
4. On 11 September 2015, the VWU transmitted its observations on the Request to the Chamber with respect of the Witness ('Observations'), supporting the measures requested.⁷ On the same day, the VWU indicated that no special measures under Rule 88 of the Rules are recommended with respect to the Witness.⁸

II. Legal framework

5. Pursuant to Article 67(1) of the Statute, accused persons are entitled to a public hearing, as emphasised in Regulation 20 of the Regulations of the Court ('Regulations'), which provides that '[a]ll hearings shall be held in public, unless otherwise provided in the Statute, Rules, these Regulations or ordered

³ Request, ICC-01/04-02/06-782-Red2, para. 2.

⁴ Response on behalf of Mr Ntaganda to "Second Prosecution request for in-court protective measures", ICC-01/04-02/06-801-Conf-Exp. A confidential redacted version was filed on 1 September 2015 (ICC-01/04-02/06-801-Conf-Red). A public redacted version was filed on 4 September 2015 and registered on 7 September 2015 (ICC-01/04-02/06-801-Red2).

⁵ Response, ICC-01/04-02/06-801-Red2, paras 5-6.

⁶ Response, ICC-01/04-02/06-801-Red2, para. 7.

⁷ Email communication from the VWU to the Chamber on 11 September 2015, at 15:35.

⁸ Email communication from the VWU to the Chamber on 11 September 2015, at 17:44.

by the Chamber'.⁹ Exceptions to the principle of publicity are provided for in Article 68(1) and (2) of the Statute, which, read in conjunction with Article 64, (2) and (6)(e) of the Statute and Rule 87 of the Rules, give power to a chamber to order protective measures 'to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses' and to hold 'any part of the proceedings in camera'.¹⁰ However, protective measures must not be prejudicial to or inconsistent with the rights of the accused to a fair and impartial trial and, as noted by Trial Chamber I in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, applications for in-court protective measures should not be 'routinely made in the expectation that they will be routinely granted'.¹¹

6. The Chamber concurs with Trial Chamber V(a) that protective measures, such as those sought in the Request, should be granted 'only on an exceptional basis, following a case-by-case assessment of whether they are necessary in light of an objectively justifiable risk and are proportionate to the rights of the accused'.¹² The Chamber considers that such case-by-case evaluation will involve a particularised analysis of the risk with respect to each witness.

III. Submissions and analysis

Preliminary issue

7. The Defence contends that there is a lack of specific material supporting the measures sought in the Request, and thus have asked that the Chamber order the notification to the parties of a confidential redacted version of the VWU report on protective measures as soon as possible, or at least before the expiry

⁹ See for example *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, Decision on 'Prosecution's First Request for In-Court Protective Measures for Trial Witnesses', 3 September 2014, ICC-01/09-01/11-902-Red2 ('*Ruto/Sang* Decision'), para. 10.

¹⁰ *Ruto/Sang* Decision, ICC-01/09-01/11-902-Red2, para. 11.

¹¹ *Ruto/Sang* Decision, ICC-01/09-01/11-902-Red2, para. 11, referring to Transcript of hearing on 24 March 2009, ICC-01/04-01/06-T-153-Red2-ENG, page 63, lines 15 – 17 (actually referring to lines 19-21).

¹² *Ruto/Sang* Decision, ICC-01/09-01/11-902-Red2, para. 13; *The Prosecutor v. German Katanga and Mathieu Ngudjolo Chui*, Public redacted version of 'Order on protective measures for certain witnesses called by the Prosecutor and the Chamber (Rules 87 and 88 of the Rules of Procedure and Evidence)', 9 December 2009, ICC-01/04-01/07-1667-Red-tENG, paras 8-9.

of the deadline for the filing of responses to the Request, to allow the Defence to make additional observations if necessary ('Notification Request').¹³

8. The Chamber recalls that it previously outlined the procedure for requests for in-court protective measures in its Conduct of Proceedings Decision, including indicating that the Chamber will normally rule on any such request 'just prior to the commencement of testimony of the witness concerned'.¹⁴ In outlining that procedure, the Chamber was conscious that, ordinarily, the VWU does not have the opportunity to provide its observations until close to the date that each witness will testify. The Chamber further specified that a redacted version of the VWU's observations will only be notified to the parties 'if appropriate'.¹⁵ Noting that the relevant deadline for responses to the Request had expired prior to receipt of the VWU Observations, the Chamber observes that the relief sought in the Notification Request was not, in fact, available. The Chamber nonetheless considered whether the content of the VWU Observations was such as to warrant its disclosure to the parties in this particular instance, but has found that not to be the case. Accordingly, the Notification Request is rejected.

The Request relating to the Witness

9. The Prosecution argues that certain protective measures are required for the Witness (facial distortion, voice distortion and the use of a pseudonym during the testimony). The Prosecution notes that the Witness is 'a civilian and a crime-based witness who has dual status in these proceedings' and is 'expected to provide unique and important evidence of the crimes'.¹⁶ The Prosecution states that the Witness is [REDACTED].¹⁷ The Prosecution argues,

¹³ Response, ICC-01/04-02/06-801-Red2, para. 6.

¹⁴ Conduct of Proceedings Decision, ICC-01/04-02/06-619, para. 50.

¹⁵ Conduct of Proceedings Decision, ICC-01/04-02/06-619, para. 50, footnote 29.

¹⁶ Request, ICC-01/04-02/06-782-Red2, para. 4.

¹⁷ [REDACTED].

inter alia, that (i) revealing the Witness's identity to the public would 'heighten the risk of retaliation against and stigmatisation of [REDACTED] and [REDACTED] family members'; (ii) the Witness has expressed concerns over personal safety and that of family members, should the Witness's identity be known to the public; and (iii) because the Witness is the first being called to testify in the *Ntaganda* case, there is a greater chance this testimony will be the subject of increased media attention. The Prosecution avers that, should the requested measures be implemented, the need for 'additional and more intrusive protective measures to be applied upon the completion of [REDACTED] testimony' will likely be obviated.¹⁸

10. The Prosecution states further that [REDACTED], which further justifies the need for protective measures to be implemented.¹⁹

11. In response, the Defence argues that it has not previously been made aware of any security concerns with respect of the Witness, and that '[n]othing in Witness [REDACTED]-related material disclosed by the Prosecution so far reveals, let alone implies, that the [W]itness has such concerns'.²⁰ The Defence notes further that the Witness's [REDACTED] is entirely redacted from the Defence, and the Prosecution provides no 'tangible information' with respect to risks in this regard.²¹ The Defence argues that the Witness appears to be in a similar position to other crime-base witnesses coming from small communities in the [REDACTED], and that, having 'wilfully accept[ed] to testify before a criminal court accepts that his/her testimony will be the object of media attention'.²²

¹⁸ Request, ICC-01/04-02/06-782-Red2, para. 5.

¹⁹ [REDACTED].

²⁰ Response, ICC-01/04-02/06-801-Red2, para. 8.

²¹ Response, ICC-01/04-02/06-801-Red2, para. 8.

²² Response, ICC-01/04-02/06-801-Red2, para. 9.

12. In respect of the issue of proportionality, the Defence avers that the requested measures impede the Chamber's ability to carry out its truth-seeking function, insofar as concealing the Witness's identity from the public may decrease the Witness's commitment to tell the truth and [REDACTED] public accountability.²³ The Defence argues further that concealing the identity of the Witness may compromise the ability of local victim communities to relate to the Court proceedings.²⁴ The Defence concludes that, in the absence of 'any objectively justifiable risk to [the Witness's] security and safety' and in order to ensure the trial record is as public as possible, the Witness's identity must be known to the public.²⁵
13. The Chamber notes that the VWU, in its Observations, supports the Request in full, highlighting, *inter alia*, that the Witness has articulated concerns about [REDACTED] identity being made public, and noting that, as this is the first witness to appear before the Chamber in the *Ntaganda* case, the VWU's ability to predict the reaction of the public is limited. Accordingly, and to avoid implementing subsequent protection measures in the case that the Witness's identity becomes known to the public, the VWU 'strongly recommends' implementing in-court protection measures during the Witness's testimony.²⁶
14. In ruling on the Request with respect to the Witness, the Chamber recalls that other chambers of the Court have indicated that factors such as the security situation in a region may be relevant when considered in relation to the circumstances of a specific witness. In addition, evidence of prior direct threats to a witness, or his/her family, are not a prerequisite to determining

²³ Response, ICC-01/04-02/06-801-Red2, para. 10.

²⁴ Response, ICC-01/04-02/06-801-Red2, para. 11.

²⁵ Response, ICC-01/04-02/06-801-Red2, para. 12.

²⁶ VWU Observations, Email communication from VWU to the Chamber on 11 September 2015, at 15:35.

that a witness faces an objectively justifiable risk, thus warranting the granting of protective measures.²⁷

15. The Chamber has taken note of concerns expressed in relation to the [REDACTED],²⁸ including, *inter alia*, that the Witness has indicated that [REDACTED]. The Chamber notes in this connection that the Witness is the first to testify before the Chamber, and that, accordingly, the impact of the commencement of trial on the security situation in the region is yet unknown. To this end, the Chamber notes that Witness is [REDACTED], and that both the VWU and Prosecution have foreshadowed the potential need for further protection measures in respect of the Witness in the event that the Witness's identity is revealed.

16. Accordingly, in light of these factors and of the VWU's assessment, and while conscious of the fair trial-related concerns which generally lie in favour of the identity of witnesses being made known to the public, the Chamber is satisfied that an objectively justifiable risk exists with respect to the Witness warranting the protection of the Witness's identity. Noting that the Defence has been provided with the name and identifying information of the Witness, the Chamber does not consider this measure to be disproportionate to the rights of the accused. To this end, the Chamber notes 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. Therefore, the Chamber finds, pursuant to Rule 87 of the Rules, that the protective measures sought, specifically the allocation of a pseudonym for use during the trial and face and voice distortion during testimony, should be granted in this case.

²⁷ See, for example, *Ruto/Sang* Decision, ICC-01/09-01/11-902-Red2, para. 14.

²⁸ [REDACTED].

17. The Chamber will determine on a case-by-case basis, at the relevant time, whether private or closed sessions or redactions to public records are necessary in order to protect the identity of the Witness from being disclosed to the public. The Chamber will ensure that these protective measures, if ordered, are necessary to ensure adequate protection and do not cause undue prejudice to the Defence or undermine the fairness of the trial. The Chamber will again consider, in this connection, the arguments of the Defence regarding the publicity of proceeding, noting at this stage that, unless the Chamber orders a private or closed session, the public will be able to hear the evidence presented and follow the testimony of this witness.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

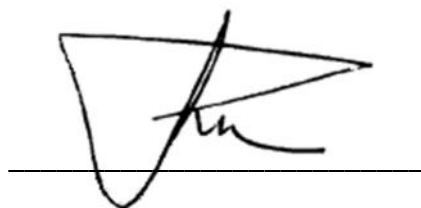
GRANTS the Request with respect of the Witness, specifically for use of a pseudonym for the purposes of the trial and voice and face distortion during testimony;

DECIDES that any request for the use of private or closed sessions and redactions to public records with respect to the Witness shall be decided on a case-by-case basis at the relevant time;

DEFERS its decision with respect of the Request insofar as it relates to the second Prosecution witness; and

REJECTS the Notification 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 be 'Kuniko Ozaki', written over a horizontal line.

Judge Kuniko Ozaki

A handwritten signature in black ink, consisting of the Korean characters '정창호' (Jeong Chang-ho), written over a horizontal line.

Judge Chang-ho Chung

Dated 15 September 2015

At The Hague, The Netherlands