

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **3 June 2016**

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's request for in-court protective measures for Witness P-0190, 2 June 2016, ICC-01/04-02/06-1359-Conf"

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

Mr Cyril Laucci (Legal Adviser to
Witness P-0190)

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 Prosecution's request for in-court protective measures for Witness P-0190'.

I. Procedural background and submissions

1. On 6 May 2016, the Office of the Prosecutor ('Prosecution') filed a request seeking in-court protective measures for Witness P-0190 ('Witness') in the form of face and voice distortion during testimony and the use of a pseudonym ('Request').² The Prosecution submits that these measures are necessary to enable the Witness to give evidence without fear for his personal safety and security or that of his family members, and to protect his psychological well-being, dignity and privacy. In support of its Request, the Prosecution refers to the fact that: (i) the Witness served as [REDACTED] and worked for [REDACTED], is [REDACTED], and is expected to provide direct evidence about the role played by the accused in the UPC/FPLC and on a significant number of the charges; (ii) due to [REDACTED], the Witness is 'highly identifiable', warranting 'extra caution' during his testimony; (iii) there have been [REDACTED]; (iv) [REDACTED]; and (v) granting the requested protective measures may negate the need for further

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

² Prosecution's thirteenth request for in-court protective measures, ICC-01/04-02/06-1310-Conf-Exp, with confidential annexes A-E. Confidential *ex parte* redacted, confidential redacted and public redacted versions were filed on the same day and notified on 9 May 2016 (ICC-01/04-02/06-1310-Conf-Exp-Red, ICC-01/04-02/06-1310-Conf-Red2, and ICC-01/04-02/06-1310-Red3).

intrusive protection measures for the Witness and his relatives after completion of testimony.³

2. On 26 May 2016, in line with the schedule established by the Chamber,⁴ the defence team for Mr Ntaganda ('Defence') opposed the Request ('Defence Response').⁵ According to the Defence, testifying publicly as a Prosecution witness would not pose any objectively justifiable risk to the Witness's safety. In this regard, the Defence submits that: (i) the Witness [REDACTED]; (ii) the Witness's background 'is, at most, a factor that can be taken into consideration in assessing the need to elicit evidence in private session should the requested in-court protective measures be granted'; (iii) [REDACTED] and the reported [REDACTED] were 'very limited'; (iv) the [REDACTED] are 'uncorroborated and ambiguous [REDACTED]; and (v) the [REDACTED] is insufficient to warrant the requested in-court protective measures.⁶
3. On 30 May 2016, the Prosecution sought leave to reply to the Defence Response ('Request for Leave to Reply'),⁷ by making submissions as to whether '(a) the timing and the context of any [REDACTED] should be taken into account when assessing the existence of objectively justifiable risks to the witness's safety; and (b) there is still an "objectively justifiable risk" even if a witness allegedly exacerbated that risk.'⁸

³ Request, ICC-01/04-02/06-1310-Conf-Red2, paras 7-22.

⁴ Email from Legal Officer of the Chamber to the parties and participants on 19 May 2016 at 9:45.

⁵ Response on behalf of Mr Ntaganda to "Prosecution's thirteenth request for in-court protective measures", 26 May 2016, ICC-01/04-02/06-1334-Conf-Exp. Confidential redacted and *ex parte* redacted versions were filed on the same day.

⁶ Defence Response, ICC-01/04-02/06-1334-Conf-Exp, paras 4-19.

⁷ Prosecution request to file a reply to the "Response on behalf of Mr Ntaganda to 'Prosecution's thirteenth request for in-court protective measures'" (ICC-01/04-02/06-1334-Conf-Exp), ICC-01/04-02/06-1347-Conf-Exp.

⁸ Request for Leave to Reply, ICC-01/04-02/06-1347-Conf-Exp, para. 8.

4. Also on 30 May 2016, the Victims and Witnesses Unit ('VWU') provided its report on in-court protective measures for the Witness,⁹ whereby it recommends that the Chamber grant the same measures as those sought in the Request.
5. On 1 June 2016, the Prosecution provided the Chamber, Defence and participants, with a courtesy copy of an addendum to the Request ('Addendum').¹⁰

II. Analysis

6. As a preliminary matter, regarding the Request for Leave to Reply, pursuant to Regulation 24(5) of the Regulations, the Chamber recalls that participants may only reply to a response with the leave of the Chamber. In the present case, the Chamber does not consider that it would be assisted by further submissions on either issue. The Chamber therefore rejects the Request for Leave to Reply.
7. Turning to the merits of the Request, the Chamber notes that Witness P-0190 is [REDACTED] and is expected to provide direct evidence about the accused's acts and conduct in relation to a significant number of the charges. The Chamber also notes the Prosecution's submission that the Witness [REDACTED], as well as the Defence's challenges to [REDACTED].
8. Moreover, the Chamber takes into account the VWU's assessment, in which it states that the risk to the Witness would increase greatly if he were to testify publicly, and that, in its view, the requested measures are necessary. The Chamber considers that the VWU is best placed to assess [REDACTED], and what impact any public awareness of the Witness testifying in the present case would have [REDACTED].

⁹ Email from the VWU to the Chamber on 30 May 2016 at 13:57.

¹⁰ The 'Addendum to "Prosecution's thirteenth request for in-court protective measures", 6 May 2016, ICC-01/04-2/06-1310-Conf-Exp' was attached to an email from the Prosecution to the Chamber, copying the Defence and legal representatives, sent on 1 June 2016 at 19:27. In the email, the Prosecution indicated that the Addendum had just been filed with the Registry.

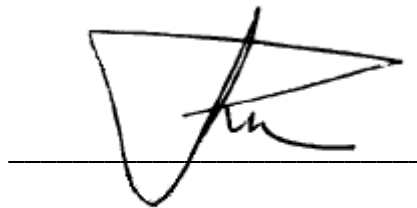
9. Regarding the parties' submissions on the Witness's [REDACTED], and how these [REDACTED] impact on his safety, the Chamber observes that the [REDACTED]. In these circumstances, the Chamber finds that while the fact that such [REDACTED] does not in itself result in an objectively justifiable risk to the Witness's safety, it cannot be seen as negating the existence of such a risk either.
10. In light of the above, and mindful of the fair trial-related concerns which generally militate against the identity of witnesses being shielded from the public, the Chamber is satisfied that in the present situation, an objectively justifiable risk exists with respect to the Witness and his family which warrants the protection of the Witness's identity from the public. The Chamber further finds that the in-court protective measures sought do not unduly infringe upon the rights of the accused 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 requested measures of use of a pseudonym for the purposes of the trial and voice and face distortion during testimony. The Chamber will determine on a case-by-case basis, at the relevant time during the Witness's testimony, whether private or closed sessions or redactions to public records are necessary. At this point, the Chamber clarifies that the Addendum was submitted at a time when the Chamber had already considered and reached a decision on the Request, on the basis of the materials then before it. Noting that the Prosecution submitted the Addendum to further support the Request, which is granted, the Chamber has not considered the Addendum. It further notes that the VWU is notified of the Addendum and therefore does not consider that the Chamber need take any action in relation to the Addendum, or the information it contains.

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 Witness P-0190; and

REJECTS the Request for Leave to Reply.

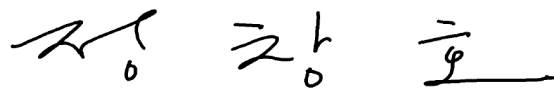
Done in both English and French, the English version being authoritative.

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 Korean characters '정창호' followed by a horizontal line.

Judge Chang-ho Chung

Dated this 3 June 2016

At The Hague, The Netherlands