

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **12 October 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-0038

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 24(5) and 35 of the Regulations of the Court ('Regulations'), issues the following 'Decision on Defence request for in-court protective measures for Witness D-0038'.

I. Procedural history and submissions

1. On 24 August 2017, the defence team for Mr Ntaganda ('Defence') requested in-court protective measures for Witness D-0038 ('Witness') in the form of face and voice distortion and use of a pseudonym ('Request').¹ The Defence argues that the Witness has expressed concerns about potential negative repercussions that may result from his testimony, and submits that such concerns are objectively well-founded.² In particular, it submits that protective measures for the Witness are warranted in light of, *inter alia*: (i) the nature of his profession, as a result of which he travels widely and comes into contact with a large number of people;³ (ii) the general security situation in the area where the witness resides and the general inability of the government of the Democratic Republic of the Congo ('DRC') to suppress acts of retaliation;⁴ and (iii) the nature of the Witness's testimony, which 'will include discussions of crimes committed by Lendu combatants' and reveal the Witness's role at the time of the charges.⁵
2. On 20 September 2017, the Office of the Prosecutor ('Prosecution') requested a variation of the time limit to file its response pursuant to Regulation 35 of the Regulations and opposed the Request ('Regulation 35 Request', 'Response', and

¹ Request for in-court protective measures for Witness D-0038, 24 August 2017, ICC-01/04-02/06-2015-Conf-Exp, paras 1, 14. A confidential redacted version was filed on the same day as ICC-01/04-02/06-2015-Conf-Red.

² Request, ICC-01/04-02/06-2015-Conf-Red, para. 1.

³ Request, ICC-01/04-02/06-2015-Conf-Red, paras 6, 8.

⁴ Request, ICC-01/04-02/06-2015-Conf-Red, paras 7, 9-11.

⁵ Request, ICC-01/04-02/06-2015-Conf-Red, para. 12.

together, ‘Regulation 35 Request and Response’).⁶ With regard to the Regulation 35 Request, the Prosecution requests, in particular, that the Chamber consider the Response despite the expiration of the applicable time limit.⁷ The Prosecution ‘regrets having missed the deadline imposed by the Chamber, and recognises that its failure to do so does not qualify as “good cause”’.⁸ It submits, however, that, considering the interest in ensuring the public nature of the proceedings unless there is an objectively justifiable reason for not doing so, it would be in the interests of justice to take the Response into account when deciding upon the Request.⁹ Further, were the Chamber to decide, in the exercise of its discretion, to take the Response into account, this would not ‘derail the proceedings from their ordained course’ and would not be ‘unduly prejudicial to the Accused since [the Witness’s] testimony is still four weeks away’.¹⁰

3. On 2 October 2017, the Defence opposed the Regulation 35 Request and sought leave to reply to the Response (‘Request for Leave to Reply’).¹¹ The Defence argues that the Prosecution’s request for a twenty-day filing extension is not justified and that the Regulation 35 Request should be denied.¹² It avers that the Prosecution has not offered any explanation for its failure to comply with the applicable deadline, nor has it shown that it was ‘unable’ to meet the deadline as required by Regulation 35(2) of the Regulations.¹³ Furthermore, the Defence

⁶ Prosecution’s submission pursuant to regulation 35 to vary a time limit and response to the Defence confidential redacted version of “Request for in-court protective measures for Witness D-0038”, 20 September 2017, ICC-01/04-02/06-2042-Conf.

⁷ Regulation 35 Request and Response, ICC-01/04-02/06-2042-Conf, paras 2, 21.

⁸ Regulation 35 Request and Response, ICC-01/04-02/06-2042-Conf, paras 2, 8 (footnote omitted).

⁹ Regulation 35 Request and Response, ICC-01/04-02/06-2042-Conf, para. 9.

¹⁰ Regulation 35 Request and Response, ICC-01/04-02/06-2042-Conf, paras 2, 9, also referring to *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Reasons for the “Decision on the ‘Application for Extension of Time Limits Pursuant to Regulation 35 of the Regulations of the Court to Allow the Defence to Submit its Observations on the Prosecutor’s Appeal regarding the Decision on Evidentiary Scope of the Confirmation Hearing and Preventative Relocation’”, 27 June 2008, ICC-01/04-01/07-653, para. 6.

¹¹ Response on behalf of Mr Ntaganda to “Prosecution’s submission pursuant to regulation 35 to vary a time limit and Request for leave to reply to Prosecution response to the Defence confidential redacted version of ‘Request for in-court protective measures for Witness D-0038’”, 2 October 2017, ICC-01/04-02/06-2047-Conf.

¹² Request for Leave to Reply, ICC-01/04-02/06-2047-Conf, paras 1, 12 (footnote omitted).

¹³ Request for Leave to Reply, ICC-01/04-02/06-2047-Conf, paras 1, 5, 12.

argues that the Prosecution has not provided any explanation as to why ‘accepting a submission so long after the applicable deadline would be in the interests of justice’.¹⁴ Were the Chamber to grant the Prosecution’s request to vary the time limit, the Defence requests leave to reply to address three issues.¹⁵

4. On 5 October 2017, the Prosecution opposed the Request for Leave to Reply.¹⁶
5. On 10 October 2017, the Victims and Witnesses Unit (‘VWU’) provided the Chamber with its in-court protective measures assessment in relation to the Witness, recommending the same in-court protective measures as requested.¹⁷

II. Analysis

i. Preliminary issues

6. The Chamber will first address the Regulation 35 Request. The Chamber recalls that any responses to requests for protective measures are to be filed within seven days of notification of the request, unless otherwise ordered.¹⁸ It further recalls that on 15 September 2017, the Chamber reminded the parties and the participants to comply with the aforementioned time limit.¹⁹
7. According to Regulation 35(2) of the Regulations, ‘[a]fter the lapse of a time limit, an extension of time may only be granted if the participant seeking the extension

¹⁴ Request for Leave to Reply, ICC-01/04-02/06-2047-Conf, para 1.

¹⁵ Request for Leave to Reply, ICC-01/04-02/06-2047-Conf, paras 2, 7-12.

¹⁶ Prosecution response to the Defence’s ‘Response to ‘Prosecution’s submission pursuant to regulation 35 to vary a time limit and Request for leave to reply to Prosecution response to the Defence confidential redacted version of ‘Request for in-court protective measures for Witness D-0038’’, (ICC-01/04-02/06-2047-Conf), 5 October 2017, ICC-01/04-02/06-2053-Conf.

¹⁷ Email communication from the VWU to the Chamber on 10 October 2017, at 16:10.

¹⁸ Supplemental decision on matters related to the conduct of proceedings, 27 May 2016, ICC-01/04-02/-06-1342, para. 14; 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, 30 January 2017, ICC-01/04-02/06-1757, para. 8.

¹⁹ Transcript of hearing on 15 September 2017, ICC-01/04-02/06-T-245-CONF-ENG ET, page 60, line 22 to page 61, line 3.

can demonstrate that he or she was unable to file the application within the time limit for reasons outside his or her control'. However, as previously found by the Chamber, 'even if a party fails to demonstrate such reasons, the Chamber has discretion to accept filings filed after expiry of the time limit'.²⁰

8. In the present instance, by filing the Regulation 35 Request nearly three weeks after the expiry of the relevant deadline, without providing justification for this delay, the Prosecution did not take the necessary steps to ensure compliance with the procedure and the deadlines set by the Chamber. The conditions of Regulation 35 of the Regulations are not met, and in the present circumstances the Chamber does not see any reason to exercise its discretion to grant an extension. The Regulation 35 Request is therefore rejected. Consequently, it is not necessary to consider the Request for Leave to Reply.

ii. Request

9. Turning to the merits of the Request, 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'.²¹
10. 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.²² In assessing the existence of such a risk, the Chamber has referred to Registry reports

²⁰ See, e.g., transcript of hearing on 29 August 2017, ICC-01/04-02/06-T-232-CONF-ENG CT, page 56, lines 19-20. See also Decision on Prosecution's request pursuant to Regulation 35 for an extension of time to submit evidence, 23 February 2017, ICC-01/04-02/06-1799, para. 6.

²¹ 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.

²² See, e.g., First Protective Measures Decision, ICC-01/04-02/06-824-Conf, paras 14-15.

outlining the security issues in the DRC.²³ 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, and the nature of the witness's anticipated testimony.²⁴

11. In the present instance, the Chamber has considered the Witness's place of residence and the Defence's submission that, due to his occupation, he travels widely throughout the DRC and comes into contact with a large number of people. In this respect, it has also considered the information provided by the Registry in its latest report on the security situation in the DRC, which indicates that the general security situation in the Ituri province has deteriorated since the beginning of the year and remains volatile and that inter-ethnic violence and attacks by armed groups from different sides are reported to have increased.²⁵

12. The Chamber has also taken into account the nature of the Witness's anticipated testimony as detailed in the Request and in the summary provided by the Defence, according to which the testimony will reveal the Witness's role at the time of the charges and refer to, *inter alia*, alleged crimes committed by Lendu fighters.²⁶ In this regard, the Chamber also notes the Defence's submissions with respect to the subjective fears expressed by the Witness regarding the risk of

²³ 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.

²⁴ 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.

²⁵ 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, paras 1, 3-7 and confidential Annex A.

²⁶ See Request, ICC-01/04-02/06-2015-Conf-Red, para. 12 and Sixth Revision of Witness Summaries, 24 August 2017, ICC-01/04-02/06-2018, Confidential Annex A.

retaliation that may result from testifying for the Defence.²⁷ 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.²⁸

13. The Chamber has also considered the protective measures assessment of the VWU in relation to the Witness, wherein the VWU recommends granting the requested measures.

14. In light of the foregoing, the Chamber is satisfied that an objectively justifiable risk with respect to the Witness's security exists, 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.

²⁷ See Request, ICC-01/04-02/06-2015-Conf-Red, paras 1, 7, 12.

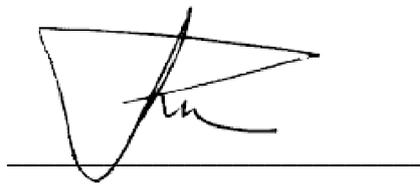
²⁸ See, e.g., transcript of hearing on 12 December 2016, ICC-01/04-02/06-T-176-CONF-ENG ET, page 4, lines 18-23. See also First Protective Measures Decision, ICC-01/04-02/06-824-Red, para. 14.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

GRANTS the request for in-court protective measures in the form of face and voice distortion during the testimony of Witness D-0038 and the use of a pseudonym for the purposes of the trial; and

REJECTS all other requests.

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

A handwritten signature in black ink, consisting of a large, stylized 'R' followed by 'Fremr', written over a horizontal line.

Judge Robert Fremr, Presiding Judge

Two handwritten signatures in black ink, one in English and one in Korean, written over a horizontal line.

Judge Kuniko Ozaki

Judge Chang-ho Chung

Dated this 12 October 2017

At The Hague, The Netherlands