

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **2 November 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 redacted version**

**Decision on Prosecution request for in-court protective measures for  
Witness [REDACTED]**

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*

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**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 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',<sup>1</sup> issues the following 'Decision on Prosecution request for in-court protective measures for Witness [REDACTED]'.

## **I. Procedural history**

1. On 10 October 2016, the Office of the Prosecutor ('Prosecution') filed a request seeking in-court protective measures for Witness [REDACTED] ('Witness') in the form of face and voice distortion and the use of a pseudonym during testimony ('Request').<sup>2</sup>
2. On 18 October 2016, the defence team for Mr Ntaganda ('Defence') filed a response in which it opposed the Request ('Response').<sup>3</sup>
3. On 1 November 2016, the Victims and Witnesses Unit ('VWU') submitted its protective measures assessment for the Witness.<sup>4</sup>

## **II. Submissions**

### *i. Prosecution*

4. The Prosecution submits that the measures proposed are necessary and that the risks posed to the Witness and the Witness's family are objectively justifiable, on the basis of: (i) reports that following, and because of, [REDACTED], members of

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

<sup>2</sup> Prosecution's request for in-court protective measures for Witness [REDACTED], 10 October 2016, ICC-01/04-02/06-1576-Conf-Exp. A confidential redacted version was filed on 11 October 2016 (ICC-01/04-02/06-1576-Conf-Red). A public redacted version was filed on the same day (ICC-01/04-02/06-1576-Red2).

<sup>3</sup> Response on behalf of Mr Ntaganda to "Prosecution's request for in-court protective measures for Witness [REDACTED]", 18 October 2016, ICC-01/04-02/06-1587-Conf.

<sup>4</sup> E-mail communication from the VWU to the Chamber on 1 November 2016 at 12:21.

the Witness's family have faced intimidation;<sup>5</sup> (ii) the fact that the Witness and the Witness's family still live within Mr Ntaganda's geographic area of influence;<sup>6</sup> (iii) the anticipated evidence of the Witness;<sup>7</sup> (iv) the Witness's former and current role, which means he may be more easily recognised in the Witness's community;<sup>8</sup> (v) prior reported incidents of violence and intimidation experienced by the Witness [REDACTED];<sup>9</sup> and (vi) the Witness and the Witness's family not being in the Court's Protection Programme ('ICCPP').<sup>10</sup>

*ii. Defence*

5. The Defence opposes the in-court protective measures requested, on the basis of:
  - (i) the absence of a signed statement from the Witness describing the nature of the Witness's fears and affirming the existence of those fears;<sup>11</sup> (ii) the absence of an objectively justifiable risk to the Witness or the Witness's family, [REDACTED];<sup>12</sup> (iii) the submission that 'no credible evidence of post-testimonial intimidation' of any of the witnesses in this case has ever been put before the Chamber;<sup>13</sup> and (iv) the investigation notes annexed to the Request by the Prosecution ('Investigation Notes') being insufficient to substantiate the allegations referred to in the Request, and which are not, in the Defence's submission, an appropriate manner in which to disclose relevant material.<sup>14</sup>

### **III. Analysis**

6. In assessing whether there exists an objectively justifiable risk to the Witness and/or to the Witness's family, the Chamber has considered the nature of the

<sup>5</sup> Request, ICC-01/04-02/06-1576-Conf-Red, paras 4 and 10-17.

<sup>6</sup> Request, ICC-01/04-02/06-1576-Conf-Red, paras 3, 10 and 20-29.

<sup>7</sup> Request, ICC-01/04-02/06-1576-Red2, para. 9.

<sup>8</sup> Request, ICC-01/04-02/06-1576-Conf-Red, para. 23.

<sup>9</sup> Request, ICC-01/04-02/06-1576-Conf-Red, para. 19.

<sup>10</sup> Request, ICC-01/04-02/06-1576-Conf-Red, paras 3 and 30.

<sup>11</sup> Response, ICC-01/04-02/06-1587-Conf, paras 1 and 3-7.

<sup>12</sup> Response, ICC-01/04-02/06-1587-Conf, paras 2 and 8-11.

<sup>13</sup> Response, ICC-01/04-02/06-1587-Conf, paras 12-13.

<sup>14</sup> Response, ICC-01/04-02/06-1587-Conf, para. 14.

Witness's anticipated testimony, the fact that the Witness and family still live within a geographical area of influence of Mr Ntaganda and his supporters, and the fact that the Witness and family are not in the ICCPP. The Chamber recalls in this connection that, in its First Protective Measures Decision, it ruled that factors such as the security situation in a region may be relevant to risks faced by individual witnesses.<sup>15</sup>

7. The Chamber has also had regard to the Witness's current role and the extent to which the Witness may be recognisable [REDACTED].<sup>16</sup> In this regard, the Chamber has noted the alleged attempt to dissuade the Witness from testifying [REDACTED],<sup>17</sup> and has given particular regard to the alleged intimidation faced by the Witness's family [REDACTED], as evidenced by a signed statement from the [REDACTED].<sup>18</sup>
8. The Chamber notes that the incidence of intimidation does not appear to be documented in detail in the Request or its annexes.<sup>19</sup> However, a prior direct threat is not a prerequisite to determining that a witness faces an objectively justifiable risk.<sup>20</sup> The fact that the Witness's [REDACTED], might be considered to militate against granting protective measures in this instance. However, the Chamber notes that the level of risk may fluctuate over time and in relation to the specificities of [REDACTED], as well as the evolving personal circumstances and profile of a witness.
9. The Chamber has also given particular consideration to the protective measures assessment of the VWU. Therein, it was noted that, due to a number of factors,

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<sup>15</sup> First Protective Measures Decision, ICC-01/04-02/06-824-Conf, paras 14-15.

<sup>16</sup> Request, ICC-01/04-02/06-1576-Conf-Red, para. 23.

<sup>17</sup> See ICC-01/04-02/06-1576-Conf-AnxM.

<sup>18</sup> See ICC-01/04-02/06-1576-Conf-Exp-AnxA.

<sup>19</sup> See for example Request, ICC-01/04-02/06-1576-Conf-Exp-AnxA; ICC-01/04-02/06-1576-Conf-AnxH.

<sup>20</sup> First Protective Measures Decision, ICC-01/04-02/06-824-Red, para. 14.

including the recent heightening of security risks in the region in which the Witness resides, and the reported incidents following the Witness's [REDACTED], the use of in-court protective measures is recommended.

10. In light of the abovementioned factors, the Chamber is satisfied that there exists an objectively justifiable risk with respect to the Witness's security and wellbeing warranting the shielding 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 Mr Ntaganda, 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 measures of use of a pseudonym for the purposes of the trial and voice and face distortion during testimony. [REDACTED].

11. As a final matter, the Chamber recalls that it has previously ruled that it 'will consider the nature of any Investigation Note in deciding what weight to accord to it'.<sup>21</sup> In the present Request, while noting the submissions of the Defence, the Chamber does not consider that the concerns raised necessarily warrant attributing no weight to the Investigation Notes. Nonetheless, the Chamber notes that they have not been determinative to this decision. In particular, the incident alleged in Annex H is independently supported, in general terms, by the signed statement of [REDACTED], and while the Chamber has taken into account the alleged incident in Annex M in its reasoning, it would not have changed the outcome of the present decision.

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<sup>21</sup> [REDACTED].

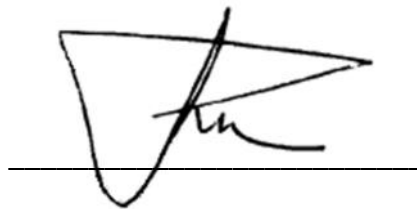
**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY**

**GRANTS** the use of a pseudonym for the purposes of the trial and voice and face distortion during testimony for the Witness;

**ORDERS** [REDACTED]; and

**ORDERS** the Defence to file a public redacted version of ICC-01/04-02/06-1587-Conf within two weeks of notification of the present decision.

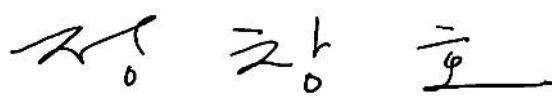
Done in both English and French, the English version being authoritative.



**Judge Robert Fremr, Presiding Judge**



**Judge Kuniko Ozaki**



**Judge Chang-ho Chung**

Dated this 2 November 2016

At The Hague, The Netherlands