

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/04-02/06
Date: 5 November 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
with Confidential Annex A**

**Public redacted version of "Prosecution application for rule 88 special
measures in relation to Prosecution Witness [REDACTED]", 4 November 2015,
ICC-01/04-02/06-978-Conf**

Source: Office of the Prosecutor

Document 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 the Defence

Mr Stéphane Bourgon
Mr Luc Boutin

Legal Representatives of the Victims

Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(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

Introduction

1. Trial Chamber VI (“Chamber”) decided that the in-court protective measures ordered by Trial Chamber I in relation to Witness [REDACTED] are directly applicable to the *Ntaganda* case.¹ Accordingly, Witness [REDACTED] will testify with face and voice distortion and the use of a pseudonym.²
2. Moreover, during her testimony in the *Lubanga* proceedings, pursuant to a recommendation by the Victims and Witnesses Unit (“VWU”),³ Witness [REDACTED] was additionally granted certain special measures, including that she be accompanied by a VWU support assistant and that she not be able to see the Accused in that case at any time during her testimony.⁴ This was achieved by extending the curtain around the witness and by ensuring that the Accused was not present in the courtroom when the witness entered and exited. The Accused was still able to see the witness on the screen in front of him.
3. Witness [REDACTED] is a vulnerable victim and witness as well as a victim of sexual violence.⁵ She is expected to testify about [REDACTED].⁶ She is also expected to testify about [REDACTED].⁷
4. On 27 October 2015, Witness [REDACTED]’s Legal Representative informed the Office of the Prosecutor (“Prosecution”) that the witness asked if the measures put in place during her *Lubanga* trial testimony would also be put in place during the *Ntaganda* trial to shield her from the Accused while she testified. The Prosecution informed the VWU of this request. During the witness preparation

¹ ICC-01/04-02/06-774-Conf with public redacted version at ICC-01/04-02/06-774-Red.

² ICC-01/04-02/06-774-Conf with public redacted version at ICC-01/04-02/06-774-Red.

³ See Annex A: Email dated 26 February 2009 regarding VWU’s recommendations for [REDACTED].

⁴ See DRC-OTP-2055-0558, p. 0559, ln. 25 – p. 0560, ln. 6; p. 0565, lns. 20-24; p. 0567, lns. 1-5, 14-15; p. 0595, lns. 21-25 (open session).

⁵ See, e.g. [REDACTED].

⁶ See, e.g. [REDACTED].

⁷ [REDACTED].

session on 2 November 2015, Witness [REDACTED] informed the Prosecution directly that she fears seeing the Accused in the courtroom. On the same day, the witness's Legal Representative met the witness and informed the Prosecution that the witness repeated her request that the same measures that were in place during the *Lubanga* trial be put in place during these proceedings. The witness further requested that a support person from the VWU sit next to her during her testimony.

5. Pursuant to rule 88 of the Rules of Procedure and Evidence ("Rules"), articles 68(1) and (2) of the Rome Statute ("Statute"), and regulation 42 of the Regulations of the Court ("Regulations"), the Prosecution requests that the Chamber grant shielding from the Accused as a special measure to facilitate Witness [REDACTED]'s testimony and the presence of a support person from the VWU during her testimony ("Request").

Confidentiality

6. This filing and its Annex are classified as "Confidential" pursuant to regulation 23bis(1) and (2) of the Regulations since they refer to information contained in confidential witness statements, and information that will be elicited in private session during Witness [REDACTED]'s testimony in the *Ntaganda* case.

Procedural Background

7. On 26 February 2009, the VWU recommended that a number of special measures be authorised during Witness [REDACTED]'s testimony in the *Lubanga* proceedings.⁸ These measures included that "[REDACTED]."⁹
8. On 5 March 2009, shortly before Witness [REDACTED] entered the courtroom to commence her testimony in the *Lubanga* proceedings, the Presiding Judge in that case noted that "turning then to the next witness, I anticipate that the recommendations that have come from the Victims and Witness Unit are, in terms of their recommendations, are likely to be uncontroversial."¹⁰ The parties and participants did not object to these recommended measures.¹¹ The Accused in *Lubanga* left the courtroom before Witness [REDACTED] entered¹² and was brought in after she had taken her seat.¹³ The witness was also accompanied by a support assistant during her testimony.¹⁴
9. On 27 May 2015, the Prosecution requested that the Chamber maintain the in-court protective measures (face and voice distortion and use of a pseudonym during testimony) previously ordered and implemented in the *Lubanga* proceedings for 11 witnesses, including Witness [REDACTED].¹⁵
10. On 17 June 2015, the Defence indicated that it did not object to the Prosecution's 27 May 2015 request.¹⁶
11. On 10 August 2015, the Chamber granted the Prosecution's 27 May 2015 request.¹⁷

⁸ See Annex A: Email dated 26 February 2009 regarding VWU's recommendations for [REDACTED].

⁹ See Annex A: Email dated 26 February 2009 regarding VWU's recommendations for [REDACTED].

¹⁰ DRC-OTP-2055-0558, p. 0559, ln. 25 – p. 0560, ln. 2 (open session).

¹¹ DRC-OTP-2055-0558, p. 0560, lns. 2-6 (open session).

¹² See, e.g. DRC-OTP-2055-0558, p. 0565, lns. 20-24 (open session) ("Then we need, please, to go into closed session so the witness can be brought into the Chamber, and I'm sorry, Mr. Lubanga, once again, if you could go for a short walk. Thank you very much... (Mr. Lubanga withdrew)").

¹³ See, e.g. DRC-OTP-2055-0558, p. 0567, lns. 1-5 (open session) ("We need to go into open session so the witness can take the solemn undertaking. And we need Mr. Lubanga back, please. Thank you very much...(Mr. Lubanga entered court)").

¹⁴ See, e.g. DRC-OTP-2055-0558, p. 0567, lns. 14-15; p. 0595, lns. 21-25 (open session).

¹⁵ ICC-01/04-02/06-609-Conf-Exp-Corr with confidential redacted version at ICC-01/04-02/06-609-Conf-Corr-Red and public redacted version at ICC-01/04-02/06-609-Conf-Corr-Red2.

¹⁶ ICC-01/04-02/06-654.

Prosecution's Submissions

The Court's regulatory framework authorises the use of special measures

12. Article 68(1) requires the Chamber to “take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses” and have regard to all relevant factors in particular where the crime involves sexual or gender violence.
13. Two separate provisions in the Rules relate to the protection of witnesses and serve complementary purposes—rule 87 (protective measures) and rule 88 (special measures). Rule 87 allows the Court to take measures to protect the identity or location of a victim or witness (or another person at risk) from the public or media. The Chamber has already granted protective measures (face and voice distortion and the use of a pseudonym) in relation to Witness [REDACTED].¹⁸ Rule 88 allows the Court to impose measures to facilitate the testimony of vulnerable victims and witnesses.¹⁹ The Chamber has discretion to determine which special measures would facilitate the testimony of a vulnerable witness.²⁰
14. The Prosecution notes that the Chamber’s “Decision on the conduct of proceedings” provides that “[t]he Chamber shall determine the need for any measure pursuant to Rule 88 of the Rules upon receipt of VWU's report of the vulnerability assessment of an individual, which will be carried out after the

¹⁷ ICC-01/04-02/06-774-Conf with public redacted version at ICC-01/04-02/06-774-Red.

¹⁸ ICC-01/04-02/06-774-Conf with public redacted version at ICC-01/04-02/06-774-Red.

¹⁹ Brady, H., “Protective and Special Measures for Victims and Witnesses” in Lee, R. *et al.* (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers 2001), pp. 447-450.

²⁰ See *e.g.* H. Brady, ‘Protective and Special Measures for Victims and Witnesses’, in Lee, R. *et al.*, (eds.), *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence*, (Transnational Publishers Inc., 2001), p. 447: “Rule 88 is primarily designed to allow the Court to order ‘special measures’ to facilitate the testimony of certain vulnerable victims and witnesses, such as traumatised victims or witnesses, children, victims of sexual violence and the elderly. [...] [T]he drafters of Rule 88 purposely reserved to it a degree of flexibility, thus giving the Court scope to fashion orders as may be necessary and appropriate in the circumstances”. See also pp. 448-449.

witness's arrival at the location of the testimony.”²¹ However, rule 88 itself authorises a Chamber to order special measures “[u]pon the motion of the Prosecutor or the defence, or upon the request of a witness or a victim or his or her legal representative, if any, or on its own motion, and after having consulted with the Victims and Witnesses Unit, as appropriate.” The VWU previously recommended the requested measures for this witness when she testified in the *Lubanga* proceedings.²²

15. The Prosecution submits this Request because Witness [REDACTED] informed the Prosecution as well as her Legal Representative that she fears seeing the Accused in the courtroom. The witness’s Legal Representative also communicated this request to the Prosecution and further informed the Prosecution that the witness would like a support person to be present in court during her testimony.

There is good reason to implement the requested measures in respect of Witness [REDACTED]

16. The Presiding Judge of Trial Chamber I in *Lubanga* stated that screening a witness from the Accused “is something that should not take place routinely but should be exceptional and should be reserved for those situations where for good reason it is necessary to implement it to protect truly vulnerable witnesses.”²³

17. There is good reason to implement the requested measures in respect of [REDACTED] who is a truly vulnerable witness. She is a victim of traumatic

²¹ ICC-01/04-02/06-619, para. 51.

²² See Annex A: Email dated 26 February 2009 regarding VWU’s recommendations for [REDACTED].

²³ ICC-01/04-01/06-T-124-Red3-ENG CT, p. 63, lns. 19-22; See also p. 64, lns. 11-12.

experiences including [REDACTED].²⁴ She is also a victim of sexual violence: [REDACTED],²⁵ [REDACTED],²⁶ [REDACTED]²⁷ [REDACTED]²⁸ [REDACTED].²⁹

18. The fact that Witness [REDACTED] was granted the requested measures in the case against Thomas Lubanga, [REDACTED], provides added reason for granting the same measures in this case.

19. At the International Criminal Tribunal for the former Yugoslavia, the Trial Chamber in *Tadić* noted that “[w]omen who have been raped and have sought justice in the legal system commonly compare this experience to being raped a second time.”³⁰ The same Chamber also noted that “the installation of temporary screens in the courtroom, positioned so that the witness cannot see the accused but the accused may view the witness via the courtroom monitors may also be suitable, depending upon the technical practicalities, for any witness for whom full anonymity is not ordered by the Trial Chamber and will give the Trial Chamber the benefit of observing directly the demeanour of the witness.”³¹

20. Granting the Request will not prejudice the Accused in any way since he will still be able to listen to and see the witness’s testimony in real time on his computer screen. His Counsel will be able to see the witness clearly during her testimony.

Regulation 42 applies to the requested measures

²⁴ See, e.g. [REDACTED].

²⁵ [REDACTED].

²⁶ [REDACTED].

²⁷ [REDACTED].

²⁸ [REDACTED].

²⁹ [REDACTED].

³⁰ *Prosecutor v. Tadić*, IT-94-1, Decision on the Prosecutor’s motion requesting protective measures for victims and witnesses, 10 August 1995, para. 46 citing Judith Lewis Herman, M.D., *Trauma and Recovery* (1991) 72.

³¹ *Prosecutor v. Tadić*, IT-94-1, Decision on the Prosecutor’s motion requesting protective measures for victims and witnesses, 10 August 1995, para. 51.

21. In addition, or in the alternative, the Prosecution submits that the requested measures should be granted by virtue of regulation 42 of the Regulations given that the measures were granted in *Lubanga* and remain applicable.

22. Under regulation 42(1) of the Regulations, protective measures “shall continue to have full force and effect in relation to any other proceedings before the Court, subject to revision by a Chamber.” In the *Katanga* proceedings, Trial Chamber II applied this provision to maintain the in-court protective measures previously ordered by Trial Chamber I in the *Lubanga* proceedings for three witnesses who subsequently testified in the *Katanga* trial, holding that:

...regulation 42(1) [...] provides that the protective measures ordered for a victim or witness in a case before the Court continue to apply, *mutatis mutandis*, in all other cases. Therefore, unless the procedure set out in regulation 42(3) is implemented, the protective measures originally ordered remain applicable.

Thus, the Chamber can but take formal note that, in accordance with regulation 42(1) [...], the protective measures ordered by Chamber I in the Thomas Lubanga Dyilo case apply directly, *mutatis mutandis*, to the present case.³²

23. In its 10 August 2015 Decision, the Chamber noted that “in accordance with Regulation 42(1), and consistent with prior jurisprudence, the Chamber is of the view that the in-court protective measures ordered by Trial Chamber I in relation to the Witnesses are directly applicable to the Ntaganda case.”³³

24. Although the measures which are the subject of the present request are special measures under rule 88, the Prosecution submits that the same rationale should apply. Nothing has changed since Witness [REDACTED] testified in the *Lubanga* proceedings that would imply the need to withdraw the special measures granted to her during that case.

³² ICC-01/04-01/07-1516-tENG, paras. 8-9.

³³ ICC-01/04-02/06-774-Conf with public redacted version at ICC-01/04-02/06-774-Red, para. 4 (footnote omitted); see also p. 5.

Request

25. For the foregoing reasons, the Prosecution asks that the Chamber grant its Request.



Fatou Bensouda, Prosecutor

Dated this 5th day of November 2015
At The Hague, The Netherlands