

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: ICC-01/04-02/06
Date: 9 February 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-0790', 15 January 2016,
ICC-01/04-02/06-1083-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 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**

Others

Trial Chamber VI ('Chamber') of the International Criminal 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'), Regulation 35 of the Regulations of the Court, 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-0790'.

I. Procedural background and submissions

1. On 18 December 2015, the Office of the Prosecutor ('Prosecution') filed a request under Rules 87 and 88 of the Rules seeking in-court protective and/or special measures for Witness P-0790 ('Witness') in the form of face and voice distortion, as well as the use of a pseudonym during testimony ('Request').² The Prosecution submits that these measures are necessary to adequately protect the Witness and ensure his safety and security during and after his testimony. In support of its request, the Prosecution submits, *inter alia*, that the Witness is [REDACTED] and that his subjective fears are grounded [REDACTED].³
2. On 11 January 2016, the Legal Representative of Victims of the attacks ('Legal Representative'), who was appointed to represent the Witness, filed a response in support of the Request.⁴ He submits that there exists an objectively justifiable risk to the safety and the physical and psychological well-being of the Witness and that of his family.⁵ The Legal Representative also notes that most affected

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

² Prosecution's ninth request for in-court protective or special measures, ICC-01/04-02/06-1066-Conf-Exp, with one confidential, *ex parte*, annex. Confidential redacted versions of the Request and its annex were filed on the same day (ICC-01/04-02/06-1066-Conf-Red and ICC-01/04-02/06-1066-Conf-AnxA-Red).

³ Request, ICC-01/04-02/06-1066-Conf-Red, para. 14.

⁴ Response of the Common Legal Representative of Victims of the Attacks to the 'Prosecution's ninth request for in-court protective or special measures', ICC-01/04-02/06-1076-Conf-Exp ('LRV Response'). A confidential redacted version of the Request was filed on the same day (ICC-01/04-02/06-1076-Conf-Red).

⁵ LRV Response, ICC-01/04-02/06-1076-Conf-Red, paras 8 and 13.

communities, [REDACTED], remain in an unstable and fragile situation, and recalls that several Prosecution witnesses have previously been threatened due to their collaboration with the Court.⁶

3. Also on 11 January 2016, the defence team for Mr Ntaganda ('Defence') filed a response ('Defence Response'), in which it indicated that it does not object to the protective measures sought being granted to the Witness pursuant to Rule 87 of the Rules.⁷ It submits, however, that the same measures ought not to be granted as special measures on the basis of Rule 88 of the Rules.⁸
4. On 12 January 2016, the Victims and Witnesses Unit ('VWU') transmitted its observations on the Request to the Chamber,⁹ indicating that, in light of the Witness's [REDACTED] and current place of residence, it is recommended to implement all measures set out in the Request ('VWU Observations'). The VWU further submits that the in-court protective measures sought are required to ensure the effectiveness of the protective measures already in place.
5. On 13 January 2016, the Defence filed an urgent additional response to the Request ('Second Defence Response'),¹⁰ in which it, *inter alia*, requests that the Chamber disregard the position it adopted in the Defence Response and, on the basis of newly disclosed information in the form of the Witness's full length victim application, opposes the Request. In addition, the Defence requests that the Chamber order the Prosecution and the Legal Representative to provide additional information regarding [REDACTED] and seeks an opportunity to

⁶ LRV Response, ICC-01/04-02/06-1076-Conf-Red, para. 9.

⁷ Response on behalf of Mr Ntaganda to 'Prosecution's ninth request for in-court protective or special measures', ICC-01/04-02/06-1077-Conf, para. 2.

⁸ Defence Response, ICC-01/04-02/06-1077-Conf, para. 8.

⁹ E-mail from VWU to the Chamber on 12 January 2016 at 16:31.

¹⁰ Urgent additional response on behalf of Mr Ntaganda to the "Prosecution's ninth request for in-court protective or special measures", ICC-01/04-02/06-1082-Conf.

respond to any additional information provided ('Defence Request for Additional Information').

II. Analysis

6. As a preliminary matter, the Chamber finds that the newly available information related to the Witness amounts to a circumstance outside the Defence's control which warrants an extension of the time limit pursuant to Regulation 35(2) of the Regulations of the Court for the purposes of responding to the Request. Consequently, the Chamber has considered the Second Defence Response in issuing the present decision.
7. With regard to the Defence Request for Additional Information, the Chamber is satisfied that it has sufficient information to adjudicate the Request. The Chamber considers, however, that any further relevant information relating to [REDACTED] should be disclosed to the Defence. In that regard, the Chamber notes that it appears that [REDACTED] was reported by the Legal Representative, who does not have disclosure obligations equivalent to those of the Prosecution.¹¹ Nonetheless, the Chamber directs the Legal Representative to provide any further relevant information in his possession in relation to [REDACTED] to the Prosecution. The latter is to disclose such information to the Defence forthwith, redacted if necessary, to the extent it falls within the Prosecution's disclosure obligations.
8. The Chamber recalls that factors such as the security situation in a region may be relevant in relation to the circumstances of a specific witness.¹² The Chamber

¹¹ *The Prosecutor v Germain Katanga*, Appeals Chamber, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled 'Decision on the Modalities of Victim Participation at Trial', ICC-01/04-01/07-2288, para. 87.

¹² First Protective Measures Decision, ICC-01/04-02/06-824-Red, paras 14-15. Therein, the Chamber indicated it had taken note of concerns expressed in relation to the security situation in the Ituri region, referring to Third Report of the Registry on the Security Situation in the Democratic Republic of the Congo, 1 May 2015, ICC-

notes that the Witness is a [REDACTED] who, [REDACTED], and [REDACTED], may be at increased risk.¹³ Moreover, the Chamber notes [REDACTED], which forced [REDACTED],¹⁴ and recalls the reported instances where other witnesses, [REDACTED], were allegedly threatened as a result of their involvement with the Court.¹⁵

9. As for the Defence's submission that the newly available information undercuts the Witness's reported security concerns,¹⁶ the Chamber observes that the responses contained in a victim application form must be read primarily as relating to a person's status as a victim. An indicated lack of security concerns, or willingness to be known within the community as someone who interacted with the Court as a victim, cannot necessarily be equated with an acceptance to be publicly known in some other capacity, including as being a witness before the Court. The Chamber, therefore, considers that the responses provided in the Witness's victim application form do not vitiate the information otherwise before it.
10. In light of the above, the Chamber is satisfied that there exists an objectively justifiable risk with respect to the Witness's security and well-being, warranting the protection of the Witness's identity from the public. The Chamber further finds that the 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. The

01/04-02/06-585-Conf. The corrected annex was notified on 4 May 2015 (ICC-01/04-02/06-585-Conf-Anx-Corr).

¹³ VWU Observations; LRV Response, ICC-01/04-02/06-1076-Conf-Red, para. 9.

¹⁴ Annex A to Request, ICC-01/04-02/06-1066-Conf-AnxA-Red; Request, ICC-01/04-02/06-1066-Conf-Red, paras 9-10; LRV Response, ICC-01/04-02/06-1076-Conf-Red, para. 8.

¹⁵ LRV Response, ICC-01/04-02/06-1076-Conf-Red, para. 9 referring to Confidential Redacted Response of the Common Legal Representative of victims of the Attacks to the 'Confidential redacted version of "Corrected version of 'Fifth Prosecution request for in-court protective measures", 14 October 2015, ICC-01/04-02/06-900-Conf-Exp-Corr', 4 November 2015, ICC-01/04-02/06-977-Conf-Red, paras 13-20.

¹⁶ Second Defence Response, ICC-01/04-02/06-1082-Conf, paras 12-14.

Chamber therefore grants the in-court protective measures sought pursuant to Rule 87 of the Rules.

11. 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.

12. Having so found, the Chamber does not consider it necessary to consider the Prosecution's request pursuant to Rule 88.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

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

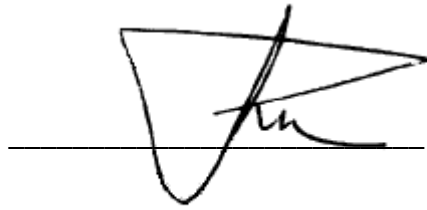
DIRECTS the Legal Representative to provide to the Prosecution any further relevant information in his possession relating to [REDACTED];

ORDERS the Prosecution to file a public redacted version of the Request by the filing deadline on 29 January 2016;

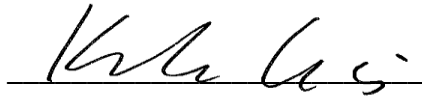
ORDERS the Legal Representative and the Defence to file public redacted versions of their respective responses by the filing deadline on 5 February 2016; and

REJECTS all other requests.

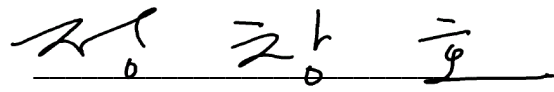
Done in both English and French, the English version being authoritative.

A handwritten signature in black ink, consisting of a large, stylized 'F' followed by a horizontal line and a small flourish.

Judge Robert Fremr, Presiding Judge

A handwritten signature in black ink, appearing to be 'K. Ozaki' in a cursive style.

Judge Kuniko Ozaki

A handwritten signature in black ink, consisting of several distinct, stylized characters.

Judge Chang-ho Chung

Dated this 9 February 2016

At The Hague, The Netherlands