

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: 15 February 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 Prosecution request for in-court protective measures for Prosecution
Witness P-0551**

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 Regulation 35 of the Regulations of the Court, issues the following 'Decision on Prosecution request for in-court protective measures for Prosecution Witness P 0551'.

I. Procedural history

1. On 19 January 2017, the Chamber granted a request by the Office of the Prosecutor ('Prosecution') to add Witness P-0551('Witness') to its list of witnesses and decided that Rule 68(3) of the Rules is, in principle, appropriate for admission of the Witness's prior recorded testimony into evidence.¹
2. On 30 January 2017, the Prosecution made a request pursuant to Regulation 35 of the Regulations to vary a time limit and requested in-court protective measures for the Witness ('Request').²
3. On 10 February 2017 the defence for Mr Ntaganda ('Defence') responded,³ not opposing the request for a variation of the time limit,⁴ but opposing the request for in-court protective measures ('Response').⁵
4. On 15 February 2017, the Victims and Witnesses Unit ('VWU') submitted its assessment of in-court protective measures for Witness P-0551.⁶

¹ Decision on Prosecution Request under Rule 68(2)(b) and Regulation 35 for admission of prior recorded testimony of Witness P-0551, 19 January 2017, ICC-01/04-02/06-1733.

² Prosecution's submission pursuant to regulation 35 to vary the time limit and request for in-court protective measures for Prosecution Witness P-0551, 27 January 2017, ICC-01/04-02/06-1756-Conf-Exp. A confidential redacted version was filed on the same day as ICC-01/04-02/06-1756-Conf-Red.

³ Response on behalf of Mr Ntaganda to "Prosecution's submission pursuant to regulation 35 to vary the time limit and request for in-court protective measures for Prosecution Witness P-0551", 10 February 2017, ICC-01/04-02/06-1778-Conf.

⁴ Response, ICC-01/04-02/06-1778-Conf, para. 2.

⁵ Response, ICC-01/04-02/06-1778-Conf, para. 18.

⁶ See e-mail from Associate Legal Officer of VWS to the Chamber, 15 February 2017, at 12:13.

II. Submissions

i. Prosecution

5. With regard to its request for a variation of time limit, the Prosecution submits that good cause is shown pursuant to Regulation 35(2) of the Regulations, as there was no indication that the Witness would be called to testify until 19 January 2017, when the Chamber issued its decision in that respect.⁷ Accordingly, the Prosecution was not in a position to meet the four-week deadline prior to the testimony to request in-court protective measures.⁸
6. The Prosecution further submits that the requested protective measures are necessary and that the risks posed to this Witness and his family are objectively justifiable, because: (i) the Witness is likely to travel, for professional and family reasons, to two locations within the geographical influence of Mr Ntaganda and where former UPC/FPLC members and associates are present;⁹ (ii) the security situation in Ituri remains unstable;¹⁰ (iii) the Witness's current position makes him more easily recognisable;¹¹ (iv) the Witness's ethnicity, which was looked upon unfavourably by Hema and Lendu, coupled with his wife's ethnicity, could result in him being considered a traitor by Mr Ntaganda's followers;¹² and (v) the Witness is not in the Court's Protection Programme (ICCPP).¹³ Furthermore, the Prosecution contends that granting the requested in-court protective measures will not violate Mr Ntaganda's right to a fair and public hearing, in so far as he

⁷ Decision on Prosecution Request under Rule 68(2)(b) and Regulation 35 for admission of prior recorded testimony of Witness P-0551, 19 January 2017, ICC-01/04-02/06-1733, p. 15.

⁸ Request, ICC-01/04-02/06-1756-Conf-Red, para. 14.

⁹ Request, ICC-01/04-02/06-1756-Conf-Red, paras 18-20.

¹⁰ Request, ICC-01/04-02/06-1756-Conf-Red, para. 20.

¹¹ Request, ICC-01/04-02/06-1756-Conf-Red, para. 25.

¹² Request, ICC-01/04-02/06-1756-Conf-Red, para. 28.

¹³ Request, ICC-01/04-02/06-1756-Conf-Red, para. 29.

has been provided with the name and identifying information of the witness, who will therefore remain anonymous to the public only.¹⁴

ii. Defence

7. The Defence opposes the request for in-court protective measures on the following grounds: (i) nothing in the material related to the Witness suggests that disclosure of his identity to the public would endanger the Witness or his family;¹⁵ (ii) the Witness has not been the target of any direct or specific threat in relation to his cooperation with the Court;¹⁶ (iii) the nature of the Witness's evidence significantly reduces any possible risk to the Witness;¹⁷ (iv) non-admission to the ICCPP may not be invoked as a basis for granting in-court protective measures;¹⁸ and (v) no signed statement has been provided substantiating the Witness's security concerns nor a signed affidavit or investigation note has been disclosed.¹⁹

III. Analysis

8. The Chamber incorporates by reference the applicable law as set out in the 'Decision on request for in-court protective measures relating to the first Prosecution witness' ('First Protective Measures Decision').²⁰
9. The Chamber will first address the request for a variation of time limit. The Chamber recalls that according to its Decision on the conduct of proceedings,²¹

¹⁴ Request, ICC-01/04-02/06-1756-Conf-Red, para. 30.

¹⁵ Defence Response, ICC-01/04-02/06-1778-Conf, para. 8.

¹⁶ Defence Response, ICC-01/04-02/06-1778-Conf, para. 9.

¹⁷ Defence Response, ICC-01/04-02/06-1778-Conf, para. 10.

¹⁸ Defence Response, ICC-01/04-02/06-1778-Conf, para. 14.

¹⁹ Defence Response, ICC-01/04-02/06-1778-Conf, para. 15.

²⁰ Decision on request for in-court protective measures relating to the first Prosecution witness, 14 September 2015, ICC-01/04-02/06-824-Conf, paras 5-6. A public redacted version was filed the following day (ICC-01/04-02/06-824-Red).

²¹ ICC-01/04-02/06-619, para. 50.

requests for in-court protective measures are to be filed no later than four weeks before the scheduled commencement of testimony. The Chamber notes this Witness was not scheduled to testify in the current evidentiary block until 19 January 2017, after the Chamber's decision to hear the Witness's testimony pursuant to Rule 68(3) of the Rules. The Chamber observes that the date when the Prosecution filed its Request has not impacted the time period for the Defence to respond, nor falls unduly close to the expected date of testimony of the Witness. The Chamber further observes that the Defence does not oppose the Request in this regard. Accordingly, having regard to the Chamber's independent obligation to ensure the security and well-being of witnesses and victims and their families, the Chamber considers it in the interests of justice to grant the request for variation of the time limit for the filing of the Request.

10. Turning to the merits of the Request, when assessing whether there exists an objectively justifiable risk to the Witness and/or his family, the Chamber has considered several factors, including the nature of the Witness's anticipated testimony, the Witness's place of residence, the fact that the Witness and his family travel or live within the broad geographical area of influence of Mr Ntaganda and his supporters, and the particular position held by the Witness within the school system of the Democratic Republic of the Congo.
11. In addition, the Chamber has considered the assessment of the VWU, which recommends that the requested protective measures be granted on the basis of realistic concerns that if the Witness' identity became known, it would present a threat to him and his family. The VWU points out that although the province of residence of the Witness is not historically recognised as an area of high-risk in relation to the present case, it points to other potential reasons why the relevant area can be considered as one with a heightened risk.

12. The Chamber recalls that it has previously held that factors such as the security situation in a region may be relevant to determining the risks faced by individual witnesses.²² However, The Chamber observes that the Witness, in his capacity as a school inspector, is expected to testify primarily on the different types of school records used in Ituri, the impact of the armed conflict on school attendance at the relevant time, including with regard to those children allegedly associated with the UPC/FPLC. Due to the technical nature of his expected evidence, in the view of the Chamber, no risk would arise from any possible recognition of the Witness or the Witness travelling to areas where former UPC/FPLC members or associates may still reside.
13. In light of the above considerations, the Chamber is not satisfied that there exists an objectively justifiable risk with respect to the Witness's security and wellbeing warranting the shielding of his identity from the public. Accordingly, the Chamber rejects the Request to the extent concerning the in-court protective measures.

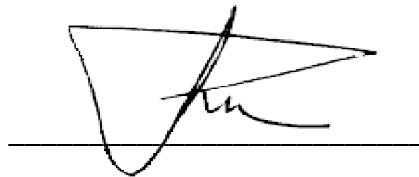
²² First Protective Measures Decision, ICC-01/04-02/06-824-Conf, paras 14-15.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

GRANTS the request for a variation of the time limit to seek in-court protective measures for Witness P-0551; and

REJECTS the request for in-court protective measures in the form of use of a pseudonym for the purposes of the trial and voice and face distortion during testimony for Witness P-0551.

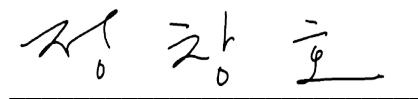
Done in both English and French, the English version being authoritative.



Judge Robert Fremr, Presiding Judge



Judge Kuniko Ozaki



Judge Chang-ho Chung

Dated this 15 February 2017

At The Hague, The Netherlands