

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 1 November 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

**Public redacted version of "Prosecution Response to the Defence Request for in-court protective measures for Witnesses D-0004 and D-0017", 10 May 2017,
ICC-01/04-02/06-1899-Conf**

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Introduction

1. The Prosecution opposes the Defence request for in-court protective measures for Witnesses D-0004 and D-0017 (“Defence Request”),¹ because no objectively justifiable risk to them has been established that warrants an exception to the rule that when witnesses testify their identity should be known to the public.
2. This rule is based on fair trial concerns: not only to protect the Accused’s rights, but also to ensure the Chamber can establish the truth and oversee the proper conduct of proceedings. Accordingly, any exceptions to the rule must be objectively justified.
3. The Defence does not clearly identify any objectively justifiable risk to either witness. D-0004 is said to be concerned for [REDACTED], and his psychological well-being and privacy. The Defence asserts that he lives [REDACTED] in an unstable area. The Defence further argues that it is not known how the public will react to him testifying as the first Defence witness for the Accused. D-0017 is concerned by a potential negative reaction from his own community if he is associated with the Court. There are no further explanations, in particular from whom they are purportedly at risk, or what the alleged risks are. There are only vague references made to risks to D-0004 from the “public”, and risks to D-0017 from “his community”.
4. The witnesses’ alleged concerns amount to unclear and unsubstantiated subjective fears. No evidence is provided to support any of the claims.
5. On the contrary, the facts suggest that there are no objectively justifiable risks to either witness. Both witnesses are [REDACTED]. They live in [REDACTED], a [REDACTED] and it is considered a relatively safe location. There is no indication

¹ ICC-01/04-02/06-1882-Conf (“Defence Request”).

or evidence proffered that their local community, or others within the region, are hostile towards the Accused or those who testify on his behalf. Indeed, [REDACTED].

Confidentiality

6. This filing is classified as Confidential because it refers to the current place of residence and other sensitive information concerning two proposed Defence witnesses.

Submissions

(a) Witnesses' identities should usually be known to the public

7. When assessing prior requests for in-court protective measures ("ICPM"), Trial Chamber VI ("Chamber") has consistently upheld the basic principle that: "fair trial-related concerns ...generally lie in favour of the identity of witnesses being known to the public".²
8. Contrary to what the Defence implies,³ when assessing the fair trial-related concerns of granting an ICPM request, the Chamber must consider more than possible undue prejudice to the Accused's rights. Even if there is no prejudice to the Accused, the Chamber must also assess whether the ICPM sought might undermine – more broadly - the fairness of the trial.
9. Indeed, the Chamber has previously stated that any ICPM must be necessary to ensure adequate protection and not cause undue prejudice to the Defence *or* undermine the fairness of the trial.⁴

² ICC-01/04-02/06-824-Red, para. 16.

³ Defence Request, para. 5.

⁴ ICC-01/04-02/06-824-Red, para. 17.

10. The Appeals Chamber, when assessing an issue of fairness at trial, acknowledged that it is relevant to consider the ability for the Chamber and Prosecution to establish the truth, envisaged by articles 54(1)(a) and 69(3) of the Rome Statute (“Statute”). Fairness of the trial also requires that a Chamber can ensure the proper conduct of proceedings, pursuant to article 64(2) of the Statute.⁵ The European Court of Human Rights (“ECHR”) has also recognised that the purpose of the right to a public hearing is to protect “*litigants* against the administration of justice in secret with no public scrutiny”; *and* so the public maintains confidence in the courts.⁶ These concerns go beyond the rights of the Accused.
11. Therefore, the Chamber must consider whether granting anonymity to the witnesses *vis-à-vis* the public may undermine its truth-seeking function and ability to ensure the proper conduct of the proceedings. For instance, if a witness knows that the veracity of his account may not be subjected to the same level of public scrutiny because his identity is not known, this may impact on the Chamber’s ability to establish the truth and ensure the proper administration of justice.

(b) No objectively justifiable risks have been established

12. The Chamber has consistently held that if it grants an ICPM request for a witness to testify anonymously from the public, it “should be granted ‘only on an exceptional basis, following a case-by-case assessment of whether they are necessary in light of an objectively justifiable risk ...’”.⁷

⁵ See *e.g.* ICC-01/04-02/12-271-Corr, paras. 256-257. The Appeals Chamber considered that although it was not necessary to decide whether and to what extent the Prosecutor has a right to a ‘fair trial’, a fundamental aspect of the trial is the objective of establishing the truth pursuant to article 54(1)(a) and article 69(3). See also ICC-01/04-02/12-271-Anx A, paras.5-6, where in their Joint Dissenting Opinion, Judge Trendafilova and Judge Tarfusser observed that article 64(2) which covers the right to a fair trial, governs the Trial Chamber’s powers for the proper conduct of proceedings and duty to establish the truth.

⁶ See *e.g.* *Axen v Germany*, December 8, 1983, Series A., No.72; 6 E.H.R.R. 195, para. 25; *Werner v Austria and Szucs and Austria*, November 24, 1997, R.J.D.1997-VII, No.56, para. 45.

⁷ See *e.g.* ICC-01/04-02/06-824-Red, paras. 6 and 16.

13. The Defence does not clearly articulate what, if any, the risks are to either witness D-0004 or D-0017 if their identity is made known publicly.
14. D-0004 is purportedly concerned for his [REDACTED],⁸ but there is no further explanation regarding the impact of public testimony on either point. In any event, this concern is insufficient on its own to warrant granting him anonymity from the public. Nor has the Defence explained why the fact that D-0004 has not told his family or community of his involvement in the case⁹ requires or warrants anonymity.
15. D-0004 [REDACTED]. [REDACTED].¹⁰ [REDACTED]. [REDACTED].
16. The only explicit references to potential security-related concerns for D-0004 in the Defence Request are that he [REDACTED] reside in an area where the security situation is unstable;¹¹ and, that as he is the first witness to testify for the Defence of the Accused “it is difficult to predict the reaction of the public to the Ntaganda case”.¹² However, the Defence does not explain how these factors might impact on D-0004’s security should his identity be known publicly when he testifies. There is also no explanation as to what group or groups from within the public might pose a risk to D-0004.
17. D-0017 is apparently concerned that there would be a potential “express negative reaction” from *his* community with being associated with the Court;¹³ and risk to him and his family due mainly to his interaction with many people in his community. However, again, the Defence provides no explanation as to what is meant by this. For instance, the Defence does not explain to which community he refers, what potential negative reaction D-0017 anticipates, or the basis upon

⁸ Defence Request, para. 8.

⁹ Defence Request, para. 10.

¹⁰ Defence Request, para. 9.

¹¹ Defence Request, para. 8.

¹² Defence Request, para. 11.

¹³ Defence Request, para. 14.

which he asserts that his community would react negatively to his public testimony.

18. There is an obscure reference to D-0017's [REDACTED],¹⁴ but with no explanation as to [REDACTED], or how and why it requires him to testify anonymously.
19. No evidence is provided to support any of the witnesses' alleged concerns.
20. In any event, these purported concerns amount to vague and unfounded subjective fears that cannot warrant an exception to the rule that the witnesses testify publicly. The Chamber has previously rejected ICPM requests where it considered they were founded on unsupported subjective fears. For instance, as regards Witness P-0043 the Chamber held that: "[w]hile the subjective fears and opinions of the witness may be relevant to the Chamber's assessment of risk, they are not determinative and the Chamber does not consider that in the present situation these submissions show an objectively justifiable risk in the absence of any additional supporting material."¹⁵
21. Similarly, Trial Chamber I rejected a request for ICPM in part because it considered that the application was based on the witness's "potential subjective fears and concerns or preferences not substantiated by objective verifiable circumstances".¹⁶
22. Rather, the facts reveal that there are no objectively justifiable risks to D-0004 or D-0017. Both witnesses are [REDACTED].¹⁷ They live in [REDACTED]¹⁸

¹⁴ Defence Request, para. 15.

¹⁵ ICC-01/04-02/06-T-189-CONF-ENG-ET, p. 48, l. 15-19.

¹⁶ ICC-02/11-01/15-T-86-RED-ENG, p. 18, l. 1-14.

¹⁷ See e.g. [REDACTED].

¹⁸ See e.g. [REDACTED].

[REDACTED].¹⁹ There have not been any significant security-related incidents in this area reported for some years.²⁰

23. There is no indication or evidence proffered by the Defence to support their contention that the witnesses' community [REDACTED] would react negatively towards them for testifying before the Court. Indeed, there is no logical reason as to why the [REDACTED], [REDACTED],²¹ would oppose witnesses testifying for the Accused regarding crimes allegedly committed by UPC/FPLC and/or Hema forces against Lendu.

24. Nor has the Defence provided any explanation, or evidence, of its claim that there is "current hostility demonstrated against Mr. Ntaganda in the region".²² In particular, the Defence does not explain from whom the Accused currently faces hostility, precisely where or how any hostility is being demonstrated. The Defence claims that the witnesses face risks from the hostility towards the Accused, because of their alleged "proximity" to him.²³ However, there is no explanation, or evidence, provided as to how or why any such hostility towards the Accused would impact on Witnesses D-0004 and D-0017; in particular, when [REDACTED].

25. The Defence has failed to establish any objectively justifiable risk to D-0004 or D-0017 that warrants protecting their identity from the public when testifying.

¹⁹ See e.g. [REDACTED]

²⁰ See e.g. [REDACTED].

²¹ See e.g. [REDACTED].

²² Defence Request, para. 4.

²³ Defence Request, para. 4.

Conclusion

26. For all the foregoing reasons, the Prosecution requests that the Chamber reject the Defence's Request for in-court protective measures for D-0004 and D-0017.



Fatou Bensouda
Prosecutor

Dated this 1st day of November 2017

At The Hague, The Netherlands