

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/04-02/06
Date: **29 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's submission pursuant to regulation 35 to vary a time limit and response to the Defence confidential redacted version of 'Request for in-court protective measures for Witness D-0038'", 20 September 2017,
ICC-01/04-02/06-2042-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. Witness D-0038 was added as the third back-up witness for the third evidentiary block five days before that block commenced. The Defence Request was filed the day after D-0038 was added.¹ The Prosecution did not file its response prior to the expiration of the time limit on 31 August 2017. Given the extended duration of the Accused's testimony, D-0038's testimony could not be heard in the third evidentiary block. The witness is now scheduled to testify on 17 October 2017 in the fourth evidentiary block.

2. Pursuant to regulation 35(2) of the Regulations,² the Prosecution seeks a variation of the time limit³ to submit its response to the Defence Request for in-court protective measures ("ICPM") for Witness D-0038. The Prosecution regrets having missed the deadline imposed by the Chamber,⁴ and recognises that its failure to do so does not qualify as "good cause". However, should the Chamber, in its discretion, decide to take this response into account, this would not be unduly prejudicial to the Accused since D-0038's testimony is still four weeks away.

3. The Defence Request should be rejected because, based on the information made available to the Prosecution, no objectively justifiable risk to the witness's safety, physical and psychological well-being, dignity or privacy has been established that warrants an exception to the principle of publicity.

4. The principle of publicity is based on fair trial concerns: not only to protect the Accused's rights, but also to ensure that the Chamber can establish the truth and oversee the proper conduct of proceedings. Accordingly, any exceptions to

¹ ICC-01/04-02/06-2015-Conf-Red ("Defence Request").

² Regulations of the Court ("Regulations").

³ See ICC-01/04-02/06-1342, para. 14; ICC-01/04-02/06-1757, para. 8.

⁴ Trial Chamber VI ("Chamber").

publicity must be objectively justified. The fears and concerns that the Defence asserts that Witness D-0038 has expressed are entirely speculative.

Confidentiality

5. In accordance with regulation 23bis(2) of the Regulations, this response is classified as Confidential as it responds to a Confidential Defence Request.

Submissions

I. The Chamber may grant a variation of the time limit

6. Under regulation 35(2) of the Regulations, a Chamber may extend a time limit “if good cause is shown”.⁵ However, the Chamber has discretion to accept filings filed after the expiry of a time limit even when a party is unable to demonstrate that the reason for such failure was outside of its control.⁶ As stated by Trial Chamber IX, the non-fulfilment of the requirements of regulation 35 does not mean that a request must be dismissed when a different outcome can be reached while preserving the fair and expeditious conduct of the proceedings.⁷ The Appeals Chamber has also extended a time limit where it was in the “*interest of justice*”.⁸
7. On 23 August 2017, five days before the start of the third evidentiary block, D-0038 was included as the third back-up witness for that block.⁹ The Defence Request was filed a day later. In view of the duration of the Accused’s testimony

⁵ The Appeals Chamber has held that “[s]uch reasons as may found a good cause are necessarily associated with a party’s duties and obligations in the judicial process. A cause is good, if founded upon reasons associated with a person’s capacity to conform to the applicable procedural rule or regulation or the directions of the Court. Incapability to do so must be for sound reasons, such as would objectively provide justification for the inability of a party to comply with his/her obligations”, ICC-01/04-01/06-834, para. 7. *See also* ICC-01/04-01/07-2325, para. 15.

⁶ ICC-01/04-02/06-T-232-CONF-ENG ET, p. 56, lns. 15-20 (private session); *See also* ICC-01/04-02/06-1799, para. 6.

⁷ ICC-02/04-01/15-600, para. 14, citing ICC-01/05-01/13-1191, paras. 9-11.

⁸ ICC-01/04-01/10-505, para. 11.

⁹ Email from the Defence to the Chamber, Prosecution and participants dated 23 August 2017 at 10:58.

it became apparent that there would not be sufficient time for the back-up witnesses to testify in that block. The Defence, having consulted the Victims and Witnesses Section (“VWS”), confirmed this on 6 September 2017.¹⁰

8. The Prosecution regrets having missed the deadline imposed by the Chamber, and recognises that its failure to do so does not qualify as “good cause”.
9. Although the Prosecution response is late, the Prosecution submits that it would be in the interests of justice to take into account the Prosecution’s submissions in deciding whether to grant the Request. In particular, there is the interest in ensuring the public nature of the proceedings, unless there is an objectively justifiable reason for not doing so. Should the Chamber, in its discretion, decide to take the Prosecution’s submissions into account in its determination of the Defence Request, this would not “derail the proceedings from their ordained course”¹¹ and would not be unduly prejudicial to the Accused since this witness’s testimony is still four weeks away.

II. The Defence Request should be rejected

A. The identity of witnesses should generally be known to the public

10. When assessing prior requests for ICPM, the 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”.¹²
11. The Chamber has also 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.¹³

¹⁰ Email from the Defence to the Prosecution dated 6 September 2017 at 08:03.

¹¹ ICC-01/04-01/07-653, para. 6.

¹² ICC-01/04-02/06-824-Red, para. 16.

12. 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”). The fairness of the trial also requires that a Chamber ensures the proper conduct of proceedings, pursuant to article 64(2) of the Statute.¹⁴ 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.¹⁵ These concerns go beyond the rights of the Accused.

13. 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

14. At the outset, the Prosecution notes that it has not been provided with any information about where Witness D-0038 resides or travels to, and, as such, bases this response only on the information available to it. In view of the fact that relevant information may be available to the Chamber and/or VWS in relation to place of residence and locations of travel, the Prosecution defers to the Chamber’s

¹³ ICC-01/04-02/06-824-Red, para. 17.

¹⁴ 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.

¹⁵ 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.

discretion in the determination of its decision. By way of example, if Witness D-0038 resides in a predominantly [REDACTED] area, this reduces the security risk should he testify publicly.¹⁶

15. The Chamber has consistently held that requests for a witness to testify anonymously from the public “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...’”¹⁷

16. The Defence fails to demonstrate the existence of such a risk in relation to Witness D-0038 since the concerns referred to in the Defence Request are unsubstantiated and entirely speculative.¹⁸ Accordingly, the Chamber should reject the Defence Request as it has previously done in similar circumstances.¹⁹

17. None of the information that D-0038 is expected to provide²⁰ appears to relate, let alone amount to a criticism of, the DRC government.²¹ Even if that were to be the case, unsubstantiated fears of arbitrary prosecution and entirely speculative arguments²² cannot justify derogation from the principle of publicity of proceedings. Further, none of the documents cited by the Defence²³ support the contention that an objectively justifiable risk, in the form of retaliation by individuals due to his testimony or in any other form,²⁴ exists specifically in relation to Witness D-0038.

¹⁶ [REDACTED].

¹⁷ See *e.g.* ICC-01/04-02/06-824-Red, paras. 6 and 16.

¹⁸ See Defence Request, paras. 6, 9-12.

¹⁹ The Chamber rejected a previous Defence request for protective measures that was based, primarily, on the witness's own assessment of risk since is not a determinative factor, see ICC-01/04-02/06-T-244-CONF-ENG ET, p. 4, lns. 6-15 (private session); See also ICC-01/04-02/06-T-189-CONF-ENG-ET, p. 48, lns. 15-19.

²⁰ ICC-01/04-02/06-2001-Conf-AnxA, pp. 2-3.

²¹ See Defence Request, para. 9.

²² Defence Request, para. 7.

²³ Defence Request, fns. 9-15.

²⁴ Defence Request, paras. 7, 10.

18. The fact that D-0038 may come into contact with a number of people due to his work²⁵ does not justify ICPM in the absence of an objectively justifiable risk.
19. As previously held by the Chamber, “the fact itself that somebody's testifying for Defence shouldn't be a reason for granting such protective measures without any concrete threat” and such measures should not be granted where there is no concrete example of the risk of retaliation.²⁶
20. Should the Chamber accept such general facts as evidence of an objectively justifiable risk, testifying publicly in this trial would become the exception, rather than the rule.

Conclusion

21. For the foregoing reasons, the Prosecution asks that the Chamber consider this response despite the expiration of the applicable time limit, and reject the Defence Request.



Fatou Bensouda
Prosecutor

Dated this 29th day of November 2017

At The Hague, The Netherlands

²⁵ Defence Request, paras. 6, 8.

²⁶ ICC-01/04-02/06-T-206-CONF-ENG ET, p. 40, lns. 7-13 (private session); See Defence Request, paras. 9-11.