

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

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

Date: **23 August 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

**Decision on Defence request for leave to appeal the oral decision granting in-court
protective measures for Witness P-0850**

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

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 Article 82(1)(d) of the Rome Statute ('Statute'), issues this 'Decision on Defence request for leave to appeal the oral decision granting in-court protective measures for Witness P-0850'.

I. Procedural History and Submissions

1. On 27 June 2016, the Chamber issued an oral ruling on the request for in-court protective measures for Witness P-0850 ('Witness'), filed by the Office of the Prosecutor ('Prosecution') on 2 June 2016,¹ granting the use of a pseudonym for the purposes of the trial and voice and face distortion during the testimony ('Impugned Decision').²
2. On 4 July 2016, the defence team for Mr Ntaganda ('Defence') filed a request for leave to appeal the Impugned Decision ('Request').³ It seeks leave to appeal the following issue:

[w]hether the Impugned Decision rests on an erroneous legal interpretation of the governing criteria and/or applicable test recognized in the jurisprudence of the Court for the granting of in-court protective measures to witnesses, *i.e.* the existence of an objectively justifiable security risk specifically affecting a witness ('Issue').⁴

3. The Defence submits that the Issue is an appealable one as it 'strikes at the core of Mr Ntaganda's fundamental right to a public hearing, enshrined in Article 67(1) of the Statute'.⁵ It avers that the Issue identifies a gap between the law applicable to requests for in-court protective measures, which requires the

¹ Prosecution's eighteenth request for in-court protective measures, ICC-01/04-02/06-1362-Conf-Exp. A confidential redacted version was filed on the same day and a public redacted version was filed on 1 July 2016 (ICC-01/04-02/06-1362-Conf-Red and ICC-01/04-02/06-1362-Red2). The Defence filed a response on 13 June 2016, in which it opposed the request (ICC-01/04-02/06-1388-Conf). A public redacted version was filed on 22 July 2016 (ICC-01/04-02/06-1388-Red).

² Transcript of hearing on 27 June 2016, ICC-01/04-02/06-T-110-CONF-ENG ET, page 32, line 10 – page 33, line 14.

³ Request on behalf of Mr Ntaganda seeking leave to appeal the Chamber's oral decision on the "Prosecution's eighteenth request for in-court protective measures", ICC-01/04-02/06-1437-Conf.

⁴ Request, ICC-01/04-02/06-1437-Conf, para. 1.

⁵ Request, ICC-01/04-02/06-1437-Conf, para. 2.

Prosecution to show an objectively justifiable security risk based on a case-by-case assessment of the witness's situation, and the Chamber's application of the governing criteria to the particular situation of the Witness.⁶ The Defence argues that the Chamber's finding that there exists an objectively justifiable risk with respect to the Witness's security rests on 'general considerations that do not specifically relate to the [W]itness's particular security situation',⁷ specifically: (i) the Registry's assessment of the security situation in Ituri in November 2014, February 2015, and May 2015;⁸ (ii) the Prosecution's failure to adduce evidence that Mr Ntaganda's alleged influence is still 'perceptible' today in the area where the Witness resides;⁹ and (iii) the 'apparent relationship' between reported instances of other witnesses allegedly being threatened as a result of their involvement with the Court and the Witness's situation.¹⁰

4. Furthermore, the Defence submits that the Issue would significantly affect the fair and expeditious conduct of the proceedings, as the Chamber's approach may result in the 'possibility that the identity of all Prosecution crime-base witnesses will be shielded from the public',¹¹ which violates the accused's right to a public hearing,¹² affects the witness's commitment to tell the truth and 'feeling of public accountability',¹³ and leads to significant time being spent moving back and forth between public and private sessions, and reviewing transcripts with a view to submitting proposals for lesser redacted versions.¹⁴ The Defence submits that therefore appellate intervention may materially

⁶ Request, ICC-01/04-02/06-1437-Conf, para. 14.

⁷ Request, ICC-01/04-02/06-1437-Conf, para. 10.

⁸ Request, ICC-01/04-02/06-1437-Conf, para. 11.

⁹ Request, ICC-01/04-02/06-1437-Conf, para. 12.

¹⁰ Request, ICC-01/04-02/06-1437-Conf, para. 13.

¹¹ Request, ICC-01/04-02/06-1437-Conf, para. 17.

¹² Request, ICC-01/04-02/06-1437-Conf, para. 18.

¹³ Request, ICC-01/04-02/06-1437-Conf, paras 19-20.

¹⁴ Request, ICC-01/04-02/06-1437-Conf, para. 22.

advance proceedings, as it will ensure that ‘adjudication of future requests for in-court protective measures proceeds on a sound basis’.¹⁵

5. On 7 July 2016, the Prosecution opposed the Request (‘Response’),¹⁶ submitting that the Issue does not arise from the Impugned Decision. It avers that there is no contradiction between the Impugned Decision and the Chamber’s prior confirmation that it will undertake ‘a particularised analysis of the risk with respect to each witness’.¹⁷ The Prosecution further submits that the Issue does not ‘substantially interfere with the ability of the public to hear the evidence given’, or affect the expeditious conduct of the proceedings.¹⁸ The Prosecution contends that the Defence submissions only challenge the ‘sufficiency of the evidence’ for in-court protective measures, and fail to make any argument justifying appellate intervention or demonstrating that immediate resolution of the Issue will materially advance the proceedings.¹⁹

II. Analysis

6. The Chamber incorporates by reference the applicable law on Article 82(1)(d) of the Statute as set out in previous decisions.²⁰
7. The Chamber notes the Defence’s submissions that the Impugned Decision was made ‘in the absence of any evidence specifically related to the [W]itness’ and based solely on ‘general considerations that do not specifically relate to the [W]itness’s particular security situation’, which the Defence appears to view as based solely on submissions put forward by the Prosecution.²¹ However, from the Impugned Decision, it is apparent that the Chamber considered three

¹⁵ Request, ICC-01/04-02/06-1437-Conf, para. 25.

¹⁶ Prosecution’s response to Mr Ntaganda’s request for leave to appeal the oral decision on the Prosecution’s eighteenth request for protective measures, ICC-01/04-02/06-1444-Conf.

¹⁷ Response, ICC-01/04-02/06-1444-Conf, paras 5-12 and 21.

¹⁸ Response, ICC-01/04-02/06-1444-Conf, paras 15-19.

¹⁹ Response, ICC-01/04-02/06-1444-Conf, paras 20-22.

²⁰ See for example, Decision on Defence request for leave to appeal the Chamber’s decision on postponement of the trial commencement date, 4 August 2015, ICC-01/04-02/06-760-Red, paras 20-21.

²¹ See Request, ICC-01/04-02/06-1437-Conf, paras 14 and 10, and paras 11-13.

aspects related to the Witness and his family,²² and ‘in addition [...] had particular regard to the [Victims and Witnesses Unit]’s assessment in respect of the [W]itness’s security situation’.²³ The Chamber therefore considers that the Issue misconstrues the Impugned Decision.

8. Moreover, the Defence’s submission that the Issue significantly affects the fair and expeditious conduct of the proceedings in fact goes beyond the effect of the Impugned Decision. Instead, it speculates as to the outcome of future requests for in-court protective measures and advances general submissions on the potential impact that the granting of protective measures may have on, *inter alia*, the ‘commitment’ of witnesses to tell the truth.²⁴
9. In light of the above, the Defence failed to demonstrate and the Chamber does not consider that the Impugned Decision involves any issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, as required under the first limb of Article 82(1)(d) of the Statute.
10. Although it would therefore be unnecessary for the Chamber to consider the remaining requirements of Article 82(1)(d) of the Statute, the Chamber will briefly consider the Defence’s argument that immediate resolution by the Appeals Chamber materially advances the proceedings. The Chamber notes the Defence’s submission that ‘[t]he Issue extends beyond the Impugned Decision’,²⁵ but it nonetheless observes that the Impugned Decision concerns a witness whose testimony is already completed. Furthermore, the Chamber considers that the Defence’s submission that the Appeals Chamber has ‘to clarify whether in-court protective measures can be granted on the sole basis of

²² ICC-01/04-02/06-T-110-CONF-ENG, page 32, lines 19-24.

²³ ICC-01/04-02/06-T-110-CONF-ENG, page 32, lines 24-25. In accordance with the Chamber’s established practice the Victims and Witnesses Unit provided the Chamber with an individualised assessment of the security of the Witness prior to the start of his testimony, on an *ex parte* basis.

²⁴ See Request, ICC-01/04-02/06-1437-Conf, paras 19-20.

²⁵ Request, ICC-01/04-02/06-1437-Conf, para. 24.

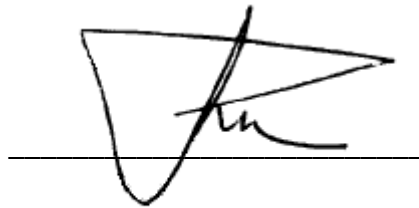
considerations that may apply to any given witness'²⁶ does not actually follow from the Issue or the Impugned Decision. Consequently, the Defence request for leave to appeal also fails on the second limb of Article 82(1)(d) of the Statute.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request; and

DIRECTS the Prosecution to file a public redacted version of the Response (ICC-01/04-02/06-1444-Conf) by 6 September 2016.

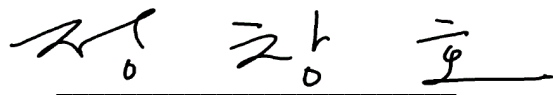
Done in both English and French, the English version being authoritative.



Judge Robert Fremr, Presiding Judge



Judge Kuniko Ozaki



Judge Chang-ho Chung

Dated this 23 August 2016

At The Hague, The Netherlands

²⁶ Request, ICC-01/04-02/06-1437-Conf, para. 25.