

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **7 April 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 'Decision on request for measures pursuant to Rules 87
and 88 for Witnesses V1, V2, and V3'**

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 and Rules 87 and 88 of the Rules of Procedure and Evidence ('Rules'), 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 in-court protective measures for Witnesses V1, V2, and V3'.

I. Procedural history

1. On 10 February 2017, the Chamber authorised Witness a/30012/15 ('V3'), and, by majority, Witnesses a/30365/15 ('V2') and a/00256/13 ('V1') (collectively 'Witnesses'), represented by the Legal Representative of the Victims of the Attacks ('LRV'), to present evidence before the Chamber.² The Chamber determined that Witness V1 would testify via video-link.³
2. On 15 March 2017, the LRV filed a request seeking measures pursuant to Rules 87 and 88 of the Rules in the form of face and voice distortion during testimony and the use of pseudonyms for the purposes of the trial for the three Witnesses ('Request').⁴ The LRV further 'anticipate[d] that additional special measures may be needed for the victims concerned depending on the level of vulnerability and/or health conditions to be assessed and established by the [VWU] prior to their appearance'.⁵

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

² Decision on the request by the Legal Representative of the Victims of the Attacks for leave to present evidence and victims' views and concerns, ICC-01/04-02/06-1780-Conf ('Decision authorising victims to present evidence and views and concerns'), paras 20-25, 32-34, and pages 20-21. The presentation of evidence by V1 and V2 was authorised by Majority, Judge Ozaki dissenting.

³ Decision authorising victims to present evidence and views and concerns, ICC-01/04-02/06-1780-Conf, para. 58, and page 21.

⁴ Request by the Common Legal Representative of the Victims of the Attacks for in-court protective/special measures for victims a/00256/13, a/30012/15 and a/30365/15, ICC-01/04-02/06-1823-Conf.

⁵ Request, ICC-01/04-02/06-1823-Conf, para. 29.

3. On 21 March 2017, the Office of the Prosecutor ('Prosecution') responded, supporting the Request ('Prosecution Response').⁶
4. On 23 March 2017, the defence team for Mr Ntaganda ('Defence') opposed, in part, the Request ('Defence Response').⁷
5. On 3 and 5 April 2017, the Victims and Witnesses Unit ('VWU') submitted protective measures assessments for the Witnesses, recommending that the requested measures be granted.⁸

II. Submissions

i. LRV

6. In support of his Request, the LRV states that Witness V1 is [REDACTED] for a prolonged period of time, including in 2002-2003. The LRV submits that the witness is expected to provide a potentially unique eye witness account, as well as evidence that he was subjected to torture and degrading treatment that caused him serious physical injuries. The LRV asserts that protective measures are also necessary in order to protect his privacy and psychological well-being, and to prevent his potential re-traumatisation.⁹
7. The LRV submits that Witness V3 is well-known in the region as [REDACTED].¹⁰ The witness is expected to provide potentially unique information directly involving the accused. Given the nature of the expected evidence and his professional position and status in the community, the LRV submits that the requested measures are necessary to protect the security of the witness and that

⁶ Prosecution's response to the "Request by the Common Legal Representative of the Victims of the Attacks for in-court protective/special measures for victims a/00256/13, a/30012/15 and a/30365/15", ICC-01/04-02/06-1831-Conf.

⁷ Response on behalf of Mr Ntaganda to "Request by the Common Legal Representative of the Victims of the Attacks for in-court protective/special measures for victims a/00256, a/30012/15 and a/30365/15", ICC-01/04-02/06-1833-Conf.

⁸ Email communications from the VWU to the Chamber on 3 April 2017 at 17.46 and 17.49, and email communication from the VWU to the Chamber on 5 April 2017 at 17.40.

⁹ Request, ICC-01/04-02/06-1823-Conf, paras 3 and 16.

¹⁰ Request, ICC-01/04-02/06-1823-Conf, paras 4 and 17.

of his family who may be subject to reprisals if the witness's identity and his involvement with the Court become public.¹¹

8. The LRV submits that Witness V2 is expected to present evidence [REDACTED], and that presenting this evidence publicly [REDACTED].¹² The LRV states that the witness may be subject [REDACTED].¹³ The LRV further requests that portions of Witness V2's testimony [REDACTED].¹⁴
9. The LRV further submits that in-court protective measures are necessary to protect the security of the Witnesses, who all reside in localities where former UPC/FPLC militia members and supporters of the accused are stated to be present and influential.¹⁵

ii. Prosecution

10. In support of the LRV request, the Prosecution states that the requested measures are necessary 'to protect the safety, physical and psychological well-being, privacy and dignity of the victims',¹⁶ noting that all three witnesses face objectively justifiable risks to their security and well-being.¹⁷
11. The Prosecution submits that the sought measures are warranted in light of the unique nature of the evidence anticipated to be provided by Witnesses V1 and V3, as well as the fact that they are easily recognisable within their respective communities.¹⁸ With respect to Witness V2, the Prosecution submits that the requested measures are necessary in light of [REDACTED].¹⁹ The Prosecution indicates that it would not object to hearing specific parts of Witness V2's

¹¹ Request, ICC-01/04-02/06-1823-Conf, paras 4 and 17.

¹² Request, ICC-01/04-02/06-1823-Conf, paras 5, 10, 18, and 20.

¹³ Request, ICC-01/04-02/06-1823-Conf, paras 5, 10, 18, and 20.

¹⁴ Request, ICC-01/04-02/06-1823-Conf, para. 19.

¹⁵ Request, ICC-01/04-02/06-1823-Conf, para. 22.

¹⁶ Prosecution Response, ICC-01/04-02/06-1831-Conf, para. 1.

¹⁷ Prosecution Response, ICC-01/04-02/06-1831-Conf, para. 5.

¹⁸ Prosecution Response, ICC-01/04-02/06-1831-Conf, para. 6.

¹⁹ Prosecution Response, ICC-01/04-02/06-1831-Conf, para. 7.

evidence, in particular, those parts concerning [REDACTED], in private session [REDACTED].²⁰

12. In addition, the Prosecution argues that the security concerns of the Witnesses are well-founded based on the fact that they reside within the accused's 'geographic scope of influence'.²¹

iii. Defence

13. The Defence opposes in-court protective measures for Witnesses V1 and V3, indicating that the LRV failed to demonstrate an objectively justifiable risk to the safety of these witnesses and their families.²² The Defence further argues that the LRV failed to demonstrate that there would be an objectively justifiable risk to the privacy and psychological well-being of Witness V1 if he were to testify publicly.²³
14. The Defence submits, *inter alia*, that since the places of residence of the Witnesses are redacted, it cannot make submissions on this point.²⁴ Furthermore, the Defence points to the presentation of views and concerns by three victims who indicated that 'the Lendu and the Hema have reconciled' as an indication that residing in [REDACTED] does not necessarily warrant the granting of in-court protective measures.²⁵ The Defence notes that Witness V1 may be more easily recognisable by virtue of his position, but argues that the LRV has not demonstrated a potential for harm to the witness.²⁶ As to the witness's [REDACTED], the Defence argues that these are only factors to be considered, but do not, in themselves, justify granting in-court protective measures.²⁷ As to

²⁰ Prosecution Response, ICC-01/04-02/06-1831-Conf, para. 7.

²¹ Prosecution Response, ICC-01/04-02/06-1831-Conf, para. 8.

²² Defence Response, ICC-01/04-02/06-1833-Conf, para. 3.

²³ Defence Response, ICC-01/04-02/06-1833-Conf, para. 3.

²⁴ Defence Response, ICC-01/04-02/06-1833-Conf, para. 6.

²⁵ Defence Response, ICC-01/04-02/06-1833-Conf, paras 7-8.

²⁶ Defence Response, ICC-01/04-02/06-1833-Conf, para. 15.

²⁷ Defence Response, ICC-01/04-02/06-1833-Conf, para. 17.

the privacy and psychological well-being of Witness V1, the Defence states that the LRV's arguments in this regard are speculative and do not satisfy the threshold of an objectively justifiable risk.²⁸

15. The Defence also submits that in-court protective measures should not be granted to Witness V3, indicating that being well-known in the community does not in itself create a risk for reprisals, and that, while Witness V3 will present evidence relating directly to the accused, such a presentation of evidence does not necessarily create an objectively justifiable risk.²⁹
16. While the Defence does not oppose the requested in-court protective measures for Witness V2, it opposes the use of private session for hearing particular parts of the testimony, arguing that in-court protective measures are sufficient to protect the identity of the witness.³⁰ The Defence further contends that testimony in private session would impact the public's capacity to follow the proceedings.³¹ In the event that the Chamber finds the use of private session necessary, the Defence submits that this assessment should be conducted on a case-by-case basis at the relevant time.³²

III. Analysis

17. The Chamber notes that the Witnesses reside in areas where UPC/FPLC elements and supporters may be based, and notes that these elements may continue to have influence in the region.³³ In this regard, 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.³⁴ The Chamber also notes reported instances

²⁸ Defence Response, ICC-01/04-02/06-1833-Conf, para. 18.

²⁹ Defence Response, ICC-01/04-02/06-1833-Conf, paras 22-23.

³⁰ Defence Response, ICC-01/04-02/06-1833-Conf, paras 2 and 29.

³¹ Defence Response, ICC-01/04-02/06-1833-Conf, para. 28.

³² Defence Response, ICC-01/04-02/06-1833-Conf, para. 30.

³³ Request, ICC-01/04-02/06-1823-Conf, para. 22.

³⁴ First Protective Measures Decision, ICC-01/04-02/06-824-Red, paras 14-15.

where witnesses were allegedly subject to threats as a result of their involvement with the Court.³⁵ Furthermore, the Chamber recalls that threats to a witness are not a prerequisite to determining that a witness faces an objectively justifiable risk.³⁶ The Chamber has also had regard to Witnesses V1 and V3's positions and the extent to which they may be recognisable in their respective communities.³⁷

18. [REDACTED].³⁸
19. Furthermore, the Chamber notes the VWU's assessments on the sought protective measures, in particular that testifying in public without protective measures may expose the Witnesses to enhanced levels of risk that may trigger retaliation by those loyal to the accused, including [REDACTED]. The Chamber further notes that the Witnesses are not in the ICCPP.
20. In light of the above, the Chamber is satisfied that the requested measures are necessary to ensure the security and/or the dignity, privacy, and psychological well-being of the Witnesses. Further, the Chamber finds that the measures sought do not unduly infringe upon the rights of the accused. The Chamber notes that the accused and the Defence are aware of the identities of the Witnesses, and will be able to see them in the courtroom or – in the case of Witness V1, via video-link – and hear their voices without distortion.
21. Any determination as to whether it is necessary to enter into private session for portions of Witness V2's testimony regarding [REDACTED] will be made at the relevant time.

³⁵ 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.

³⁶ First Protective Measures Decision, ICC-01/04-02/06-824-Conf, para. 14.

³⁷ Request, ICC-01/04-02/06-1823-Conf, paras 3, 4, 16, and 17.

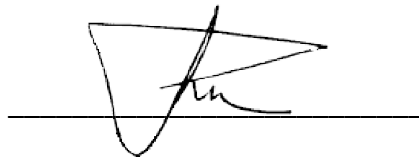
³⁸ [REDACTED].

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

GRANTS the use of pseudonyms for the purposes of the trial and voice and face distortion during testimony for Witnesses V1, V2, and V3; and

ORDERS the LRV and the parties to file public redacted versions of their respective filings within two weeks of notification of the present decision.

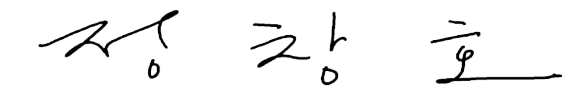
Done in both English and French, the English version being authoritative.



Judge Robert Fremr, Presiding Judge



Judge Kuniko Ozaki



Judge Chang-ho Chung

Dated this 7 April 2017

At The Hague, The Netherlands