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No.: ICC-01/04-02/06
Date: 21 October 2015

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 the time limit for the seventh request for in-court protective measures concerning Prosecution Witness P-0886”, 20 October 2015,
ICC-01/04-02/06-913-Conf-Exp**

Source: The Office of the Prosecutor

Document 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 the Defence

Mr Stéphane Bourgon
Mr Luc Boutin

Legal Representatives of the Victims

Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(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**

Other

Introduction

1. Pursuant to regulation 35(2) of the Regulations of the Court (“Regulations”) and article 68(1) of the Statute, the Office of the Prosecutor (“Prosecution”) seeks a variation of the time limit to submit a request for in-court protective measures – in the form of facial and voice distortion and the use of a pseudonym during testimony – for Prosecution Witness P-0886 (“Request”).
2. There is good cause for Trial Chamber VI (“Chamber”) to grant a variation of the time limit, as the Prosecution only learned that Prosecution Witness P-0886 seeks these measures on [REDACTED] during his witness preparation session. The variation would not unduly prejudice the Accused.
3. Should the Chamber grant the variation of the time limit, the in-court protective measures sought will protect this witness’s security, psychological well-being, dignity and privacy within the meaning of article 68(1) of the Statute, and may mitigate the need for subsequent, more intrusive measures post-testimony. Moreover, the measures sought appropriately balance the Accused’s right to a fair and public hearing under articles 64(2) and 67(1) of the Statute, against the need to protect victims and witnesses appearing before the Court, pursuant to articles 64(2) and 68(1) and (2) of the Statute. The measures sought will not unfairly prejudice the rights of the Accused as he has been provided with Prosecution Witness P-0886’s name and identifying information; the identity of this witness will remain anonymous to the public only.

Confidentiality

4. This filing is classified as “Confidential, *ex parte* – only available to the Prosecution and Victims and Witnesses Unit” pursuant to regulation 23*bis*(1) of the Regulations since it refers to confidential witness information and the place of

residence of a witness. The Prosecution will file confidential and public redacted versions of this filing.

Procedural Background

5. On 2 June 2015, the Chamber issued its Conduct of the Proceedings Decision, establishing the deadlines for common case matters ("Decision").¹ Concerning the Prosecution's presentation of evidence, the Court directed that the Prosecution provide a 'Forthcoming Witnesses List' four weeks prior to the start of a block, including, *inter alia*, the identified witnesses it intends to call and the order in which it intends to call them.² Further, the Court directed that requests for in-court protective measures be filed "no later than four weeks before" the scheduled commencement of that witness's testimony.³
6. On 22 June 2015, the Chamber ordered that the second evidentiary block begin on 19 October 2015.⁴
7. On 26 June 2015, in accordance with the Court's directive, the Prosecution filed its updated list of witnesses, on which Prosecution Witness P-0886 was projected to testify [REDACTED].⁵ On 18 September 2015, the Prosecution provided an updated list of witnesses in which Prosecution Witness P-0886 was identified as the [REDACTED].⁶ The Prosecution anticipates that this testimony will commence on [REDACTED]. The Prosecution did not seek in-court protective measures four weeks before this witness's anticipated testimony as it was not aware that the witness had specific security concerns at that time.

¹ ICC-01/04-02/06-619.

² ICC-01/04-02/06-619, para. 18.

³ ICC-01/04-02/06-619, para. 50.

⁴ ICC-01/04-02/06-661-Conf-Red2, para. 11.

⁵ ICC-01/04-02/06-675-Conf-AnxA.

⁶ Email sent by the Prosecution to the Trial Chamber VI Communications on 18 September 2015 at 18:47.

8. [REDACTED], during the Prosecution's initial interaction with Prosecution Witness P-0886 in the course of his witness preparation session, he stated that he sought in-court protective measures on the basis of concerns about his security and that of his family should his identity be made public in the Democratic Republic of Congo ("DRC").

Prosecution's Submissions

The variation of the time limit is justified

9. Under regulation 35(2) of the Regulations, a Chamber may extend a time limit "if good cause is shown." The Chamber may extend the time limit after it has elapsed if it can be demonstrated that the extension of the time limit could not be sought prior to its expiration for reasons outside a participant's control.
10. On [REDACTED], during the Prosecution's initial interaction with Prosecution Witness P-0886 in the course of his witness preparation session, the Prosecution clarified with the witness that he did not have any concerns testifying publicly as he confirmed to members of the Prosecution previously. In response, Prosecution Witness P-0886 advised that indeed he did not have any concerns with his identity being known, as no one here (in The Netherlands) knows him. The Prosecution explained that the proceedings are public and, as such, his testimony would also be transmitted back to the DRC. As a result of this information, Prosecution Witness P-0886 advised the Prosecution that he has concerns for his security should people in the DRC know about his involvement in these proceedings, in particular supporters of the UPC and members of the Hema community in [REDACTED]. He advised that he would not have any fear testifying if his identity were not disclosed publicly in the DRC.

11. As the Prosecution only learned of Prosecution Witness P-0886's security concerns on [REDACTED], it was not in a position to request in-court protective measures four weeks prior to the commencement of his testimony.⁷ The Prosecution seeks to vary this time limit due to circumstances outside of its control. At this time, the Prosecution requests facial and voice distortion and the use of a pseudonym during the testimony of Prosecution Witness P-0886. Granting this variation now would not "derail the proceedings from their ordained course"⁸ and is not unduly prejudicial to the Defence.

The requested measures are necessary and proportionate

12. The in-court protective measures sought are necessary for Prosecution Witness P-0886 in light of an objectively justifiable risk. Publicly revealing the witness's identity will risk compromising his safety, privacy and his physical and psychological well-being within the meaning of article 68(1). These measures appropriately balance the Accused's right to a fair trial and reduce the possibility of needing more intrusive protective measures following testimony.
13. Prosecution Witness P-0886 is a crime-base witness who is of [REDACTED] ethnicity. He is expected to testify, *inter alia*, about: [REDACTED] when UPC/FPLC militia attacked it and fleeing with his family and the population; spending several days in the bush and being forced by UPC/FPLC soldiers to engage in [REDACTED] for the UPC/FPLC; [REDACTED] following the attack including [REDACTED] near or at the [REDACTED] in an area of [REDACTED], about [REDACTED] near the [REDACTED], and [REDACTED]; having his household items pillaged; seeing houses [REDACTED] damaged or burned by the UPC/FPLC; learning of [REDACTED] being killed by UPC/FPLC soldiers; and seeing Bosco Ntaganda [REDACTED] after the UPC/FPLC attack.

⁷ ICC-01/04-02/06-619, para. 50.

⁸ ICC-01/04-01/07-653, para. 6.

14. [REDACTED] his safety and security are monitored and regularly assessed. The Prosecution requests in-court protective measures because this witness is concerned for his security and that of his family members if his identity were to be known publicly, especially in the area around [REDACTED]. Prosecution Witness P-0886 lives together with [REDACTED], a community of [REDACTED] where inhabitants are commonly known to each other. [REDACTED] to an area where UPC elements and supporters are based in [REDACTED], and which can be easily accessed by former members of the UPC/FPLC. Prosecution Witness P-0886 fears that if his identity is known as a result of his testimony before the Court, he may be targeted and at risk. None of Prosecution Witness P-0886's family members are aware of his involvement with the Court, nor is anyone in his community.

15. The Prosecution submits that Prosecution Witness P-886's concerns for his security are objectively justifiable, in light of his and his family's being [REDACTED] of areas in which former members of the UPC/FPLC reside and operate.⁹ Moreover, the Prosecution refers to the Chamber's findings as regards potential attempts to interfere with Prosecution witnesses, including by supporters outside the detention centre.¹⁰ Should the requested measures be granted, the need for additional, more intrusive measures being sought post-testimony would likely be obviated.

16. The requested measures do not unduly prejudice the Accused because, if granted, Prosecution Witness P-0886 would remain anonymous to the public only.

⁹ Of particular note, Trial Chamber V(a) found that "evidence of prior direct threats to a witness, or his/her family, are not required in order to determine that they face an objectively justifiable risk sufficient to support the granting of protective measures" (ICC-01/09-01/11-902-Red2, para.14).

¹⁰ ICC-01/04-02/06-785, paras. 43-57.

Relief Requested

17. The Prosecution requests that the Chamber find that there is good cause to vary the time limit to submit a request for in-court protective measures for Prosecution Witness P-0886, and grant its request for facial and voice distortion and the use of a pseudonym during his testimony before the Court.



Fatou Bensouda
Prosecutor

Dated this 21st day of October 2015
At The Hague, The Netherlands