

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

No.: ICC-01/04-02/06
Date: **4 November 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 applications for protective/special measures under rule 87 or rule 88, and for leave to appeal the ‘Decision on Prosecution’s request for in-court protective measures for Witness P-0039’”,
3 November 2015, ICC-01/04-02/06-973-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. On 28 October 2015, Trial Chamber VI (“Chamber”) granted, in part, the Prosecution request for in-court protective measures for Witness P-0039.¹ Specifically, the Chamber granted the Prosecution’s request for the use of a pseudonym to protect Witness P-0039’s identity from the public, but rejected the Prosecution’s request for face and voice distortion. The Chamber also rejected the Prosecution’s request for reconsideration of its decision, but invited the Prosecution to renew its request for in-court protective measures should it have additional information to provide.²

2. In accordance with articles 68(1) and (2) of the Statute, rule 87 and rule 88 of the Rules of Procedure and Evidence (“Rules”), the Prosecution requests that the in-court protective/special measures for Witness P-0039 include face and voice distortion, in addition to the use of a pseudonym.

3. In addition, the Prosecution seeks leave to appeal the “Decision on Prosecution’s request for in-court protective measures for Witness P-0039”³ on the following three issues (“Issues”):
 - (i) Whether the Trial Chamber, having accepted that there was an objectively justifiable risk to the witness that warranted the protective measure of a pseudonym, erred in fact by denying the protective measures of face and voice distortion, thereby undermining the effectiveness of the granted protective measure of a pseudonym when the trial is being conducted publicly and broadcast over the Internet (“First Issue”);

¹ ICC-01/04-02/06-956-Conf.

² ICC-01/04-02/06-T-40-CONF-ENG ET, p. 81, lns. 2–21.

³ ICC-01/04-02/06-956-Conf.

- (ii) Whether the Trial Chamber applied incorrect standards for risk assessment and risk management, and thereby erred in law, when it found that face and voice distortion for the witness were not necessary to manage the recognised objectively justifiable risk because [REDACTED] (“Second Issue”); and
 - (iii) Whether the Trial Chamber misconceived the scope of the Accused’s right to a public hearing when it rejected face and voice distortion based, among other things, on the notion that shielding the identity of witnesses from the public affects the fairness of the trial (“Third Issue”).
4. The Issues arise from the Decision and meet the criteria for leave to appeal under article 82(1)(d).

Confidentiality

5. Pursuant to regulation 23*bis*(2) of the Regulations of the Court, the Prosecution files these submissions confidentially, as they refer to the Decision and other submissions that are subject to the same classification.

Background

6. On 14 October 2015, the Prosecution requested in-court protective measures, including face and voice distortion and the use of a pseudonym, for Prosecution Witness P-0039.⁴
7. On 22 October 2015, the Defence opposed the Prosecution request.⁵

⁴ ICC-01/04-02/06-899-Conf-Exp.

⁵ ICC-01/04-02/06-930-Conf.

8. On 28 October 2015, the Chamber granted, the use of a pseudonym for P-0039 but rejected face and voice distortion.⁶
9. On 28 October 2015, the Chamber rejected the Prosecution's request for reconsideration of its decision but noted that the Prosecution could re-apply for protective measures with additional information.⁷

Prosecution's Submissions

A) Request for in-court protective/special measures of face and voice distortion

a) The Court's statutory framework expressly protects vulnerable witnesses

10. Article 68(1) requires the Chamber to protect the safety of victims and witnesses but also to "take appropriate measures to protect the [...] physical and psychological well-being, dignity and privacy of victims and witnesses", having regard to all relevant factors including their age and health. Article 68(2) expressly provides that the Chamber may consider "the views of the victim or witness" to order measures "as an exception to the principle of public hearings."
11. Two separate provisions in the Rules relate to the protection of witnesses and serve complementary purposes—rule 87 (protective measures) and rule 88 (special measures). Rule 87 allows the Court to take measures to protect the identity or location of a victim or witness (or another person at risk) from the public or media, while rule 88 allows the Court to impose measures to facilitate the testimony of vulnerable victims and witnesses.⁸ The Chamber has discretion

⁶ ICC-01/04-02/06-956-Conf.

⁷ ICC-01/04-02/06-T-40-CONF-ENG ET p. 81, lns. 2-21.

⁸ Brady, H., "Protective and Special Measures for Victims and Witnesses" in Lee, R. *et al.* (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers 2001), pp. 447-450.

to determine which special measures would facilitate the testimony of a vulnerable witness.⁹ In this case, the Prosecution is applying for the protective measures of face and voice distortion (in addition to a pseudonym), under rule 87 as a protective measure, and/or rule 88 as a special measure given P-0039's security situation and his [REDACTED].

12. [REDACTED].

13. [REDACTED]. The Prosecution has called him to testify about crimes committed by the UPC, as described above. [REDACTED].

14. When P-0039 was informed by the Chamber that face and voice distortion would not be applied as protective measures under rule 87, he refused to testify out of fear for his [REDACTED].¹⁰

15. The Ituri Province in the Democratic Republic of the Congo ("DRC") remains in a precarious state of post-conflict security with armed groups still active.¹¹ Ethnic groups that once attacked each other now reside in a fragile coexistence. [REDACTED].¹² Moreover, the *ad hoc* international tribunals have recognised that the general volatile situation in a post-conflict region and potential threats against witnesses living in the region, or even in neighbouring countries, can justify the witnesses' fears for their safety as a result of participating in the tribunal's

⁹ See e.g. H. Brady, 'Protective and Special Measures for Victims and Witnesses', in Lee, R. et al., (eds.), *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence*, (Transnational Publishers Inc., 2001), p.447: "Rule 88 is primarily designed to allow the Court to order 'special measures' to facilitate the testimony of certain vulnerable victims and witnesses, such as traumatised victims or witnesses, children, victims of sexual violence and the elderly. [...] [T]he drafters of Rule 88 purposely reserved to it a degree of flexibility, thus giving the Court scope to fashion orders as may be necessary and appropriate in the circumstances". See also pp. 448-449.

¹⁰ ICC-01/04-02/06-T-40-CONF-ENG ET, p. 74, lns. 3-5, p. 75, lns. 2-3.

¹¹ See generally, ICC-01/04-02/06-585-Conf.

¹² ICC-01/04-02/06-396-Conf-Anx1, p. 7.

proceedings.¹³ The Court's Victims and Witnesses Unit ("VWU") has confirmed that the measures as requested by the Prosecution were necessary because [REDACTED].¹⁴ [REDACTED].

b) In-court protective measures under rule 87 and article 68 are warranted for this witness

16. Although the Court has granted the use of a pseudonym for P-0039, face and voice distortion are also critical for his security. The Registry's Public Information and Documentation Section ("PIDS") live-streams the videos of the proceedings, which any person with an internet connection can watch. PIDS also uploads video summaries to the ICC YouTube Channel. Once uploaded, PIDS distributes the link of the summaries *via* email to a number of DRC TV and Radio stations, which routinely broadcast such material. This new information establishes that many individuals and organisations in the DRC have routine access to video recordings of the proceedings, even without an internet connection. The dissemination of the video image and voice of P-0039 would increase the risk that he could be identified. This information establishes the necessity of a pseudonym in combination with face and voice distortion for Witness P-0039.

¹³ See e.g. *Prosecutor v Rwamakuba*, Decision on the Defence Motion for Protective Measures, Case No. ICTR-98-44C-PT, T. Ch. III, 21 September 2005, para. 9; *Prosecutor v Furundzija*, Decision on Prosecutor's Motion Requesting Protective Measures for Witnesses "A" and "D" at Trial IT-95-17/1-T, T. Ch.II, 11 June 1998, paras. 7-8; *Delalić et al.* Decision on the Motion by the Prosecution for Protective Measures for the Witness Designated by the Pseudonym "N", Case No. IT-96-21-T, T.Ch., 28 April 1997, paras. 7-9 (reasoning that "[e]ven if witness's fears have not been substantiated by objective evidence, they cannot be disregarded as irrational. They must be seen in the light of the normal tensions that exist in the aftermath of the conflict. It is not unusual for people to take the law into their own hands against their enemies, real or imagined, in such situations, and in the circumstances, fear of probable attacks is not an abnormal reaction. A Trial Chamber cannot, therefore, summarily dismiss the personal fears of a witness it is mandated to protect under Article 22 of the Statute").

¹⁴ See ICC-01/04-02/06-956-Conf, para. 6. Citing email from VWU to the Chamber on 27 October 2015 at 15:24.

17. The Chamber granted in-court protective measures, including face and voice distortion for a similarly-situated Prosecution witness – [REDACTED].¹⁵ [REDACTED] faced similar risks to his security due his testimony in this case. In addition, as is the case for P-0039, [REDACTED] did not face any specific or concrete security threats. In its Decision concerning [REDACTED] protective measures, the Chamber considered the “concerns expressed in relation to the [REDACTED].¹⁶ The sole distinguishable factor between [REDACTED] and P-0039 is that [REDACTED] witness to [REDACTED]. The Prosecution submits that there is no information available to suggest that the unknown security situation in relation to this trial has changed and that the Chamber is unaware of either positive or negative developments in the security environment. The region remains a volatile environment for persons who cooperate with the Court.

c) Granting the measures as special measures under rule 88 and article 68 will facilitate P-0039's testimony

18. [REDACTED] special measures under rule 88 are necessary and appropriate to facilitate his testimony before the Court. In particular, P-0039 confirmed that he did not feel comfortable testifying if his face could be seen and voice heard by the public due to [REDACTED].¹⁷ Rule 88 was purposely intended by its drafters to provide Chambers with sufficient flexibility to tailor specific special measures as necessary for individual witnesses. The explicit language of rule 88 also makes it clear that Chambers have a broad discretion as to what special measures can be granted; as they can “order special measures such as, but not limited to, measures to facilitate the testimony of a traumatised victim or witness, a child, an elderly person or a victim of sexual violence...”. Chambers are therefore not limited to measures that will facilitate the testimony, but any other special measures

¹⁵ ICC-01/04-02/06-824-Conf.

¹⁶ ICC-01/04-02/06-824-Conf.

¹⁷ ICC-01/04-06-T-40-CONF-ENG ET, p. 74, lns. 3-4, p. 75, lns. 2-3.

deemed necessary for the individual witness. Accordingly, the Chamber has a discretion under rule 88, not only rule 87, to allow for the use of face and voice distortion, where a vulnerable witness such as P-0039 otherwise feels unable to testify if he can be seen or heard publicly. Even if the Chamber considers that the preconditions for face and voice distortion under rule 87 continue not to have been met, the Chamber can still impose such measures under the independent and separate authority of rule 88 in order to address the particular circumstances of the witness.

d) Conclusion : The requested protective/special measures are warranted under article 68, rules 87 and/or 88 and do not violate the Accused's right to a public hearing

19. The Prosecution requests the Trial Chamber to grant the full set of protective/special measures requested for this witness, under article 68, rule 87 and/or rule 88. Granting face and voice distortion in addition to a pseudonym would not violate the Accused's right to a public hearing, as the Chamber has held for other witnesses who will or have testified with these measures.¹⁸ Other Trial Chambers have similarly allowed for the measures of pseudonym, as well as face and voice distortion, for crime-base as well as former military insider witnesses.¹⁹ Article 68(2) explicitly provides that granting measures to take into account a witness's views is an exception to the principle of public hearings.

20. An accused's right to a public hearing is not absolute; the interests of all concerned, including victims and witnesses, must be taken into account and balanced. The European Court of Human Rights has held that the right to a

¹⁸ [REDACTED]: ICC-01/04-02/06-824-Conf, para. 10; P-0901: ICC-01/04-02/06-828-Conf, para. 10; [REDACTED]: ICC-01/04-02/06-905-Conf, paras. 8-9.

¹⁹ See e.g. ICC-01/04-01/06-T-104-ENG, p. 1, lns. 13 – p. 5, ln. 1; ICC-01/04-01/07-1667-Red-tENG, paras. 1, 10-12; ICC-01/05-01/08-1940; Some of these requests for protective measures of pseudonym, face and voice distortion were granted by Trial Chamber I for common trial witnesses including P-0010 and P-0055. See e.g. ICC-01/04-01/06-T-104-ENG, p. 1, ln. 13 – p. 5, ln. 1; ICC-01/04-02/06-774-Conf, para. 5.

public hearing is not violated even where a trial is not open to the public to protect the private life of the parties or where publicity would prejudice the interests of justice.²⁰

21. Witness P-0039's security and psychological interests must be fully taken into account. Moreover, the concept of a public hearing does not mean that the public must necessarily be able to see the face of the witness or to hear his or her voice. This is particularly so where the Chamber has already determined that there are security concerns which warrant granting a pseudonym to the witness. Instead, the purpose of this right is to ensure that the administration of justice is not carried out in secret and without public scrutiny; and so that the public maintains confidence in the Court and so that the rights of the accused person are protected.²¹ In this instance, if the Chamber were to grant the witness face and voice distortion in addition to the use of a pseudonym, the hearing will still be in public given that any non-identifying testimony that P-0039 gives will be in open session and publicly available.

B) Request for leave to appeal the Decision

22. In addition to the above request for protective/special measures under rules 87 and/or 88 for Witness P-0039, the Prosecution seeks leave to appeal the Decision on the three Issues identified in paragraph 3 above. Because the Issues concern the Chamber's general approach to the protection of victims and witnesses and therefore raise systemic questions that affect the entire trial, they meet the criteria for leave to appeal irrespective of whether the Chamber grants the Prosecution's request for protective/special measures for P-0039.

²⁰ See e.g. ECHR, *Guisset v. France*, Appl. no. 33933/96, "Judgment", September 26, 2000, para. 73; ECHR, *B and P v. UK*, Appl. nos. 36337/97 and 35974/97, "Judgment", April 24, 2001, para. 36.

²¹ See e.g. *Axen v Germany*, December 8, 1983, Series A., No. 72; 6 E.H.R.R. 195.

(a) The Issues arise from the Decision

23. All three Issues are appealable issues within the terms of article 82(1)(d)²² that arise from the Decision.²³

24. In relation to the First Issue, the Trial Chamber accepted that the testimony of Witness P-0039 would expose him to an “objectively justifiable risk”²⁴ and accordingly granted the witness the protective measure of a pseudonym,²⁵ a protective measure intended to shield his identity as a witness from the public. However, it rejected the Prosecution’s request to allow P-0039 to give evidence using face and voice distortion.²⁶ The issue therefore arises whether in a public trial, which is being broadcast through the Internet²⁷ and where excerpts of the hearings remain available on the Internet on the ICC Youtube channel,²⁸ the protective measure of a pseudonym can effectively mitigate the identified risk without also allowing the witness to testify using face and voice distortion.

25. The Second Issue arises from the Trial Chamber’s rejection of the witness using face and voice distortion when testifying on the basis that [REDACTED].²⁹ This finding presupposes that in the Trial Chamber’s view, to reach a sufficient risk level to grant face and voice distortion, evidence of a “specific threat” is required.

²² The Appeals Chamber has held that “only an issue may form the subject-matter of an appealable decision. An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement of a conflicting opinion. [...] An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination. It may be legal or factual or a mixed one.” ICC-01/04-168 OA3, paras. 9-10.

²³ Decision, paras. 7-8, p. 6.

²⁴ Decision, para. 8. This conclusion is based on the facts rehearsed at paragraph 7 of the Decision.

²⁵ Decision, para. 8.

²⁶ Decision, p. 6, disposition, third paragraph.

²⁷ See Annex A, which is a list of the viewership of the live-streaming through the website of the ICC of the case *Prosecutor v. Ntaganda* from 2 September 2015 until 28 September 2015. See in particular pp. 37-38, which list the number of viewers and total duration of viewing from Rwanda and the Democratic Republic of the Congo, thereby confirming that persons from Rwanda and the DRC can and do access the live-stream.

²⁸ See <https://www.youtube.com/user/IntlCriminalCourt/videos>.

²⁹ Decision, para. 8.

This is also supported by the Trial Chamber's statement when [REDACTED] of the Decision. In that context, the Chamber found that [REDACTED].³⁰ These findings give rise to the question whether the Trial Chamber applied standards for risk assessment and risk management that are appropriate to comply with its duties of protection under rule 87 and article 68(1).

26. The Third Issue arises from the Trial Chamber's finding that it is "mindful of the fair trial-related concerns which generally militate against shielding the identity of witnesses from the public" as a reason to reject the protective measures of face and voice distortion for Witness P-0039.³¹ The question is whether it is an essential component of a public hearing under article 67(1) that the public be aware of the identity of a witness and in particular must be able to see the image of a witness and hear his or her voice without technological alteration. In the specific context of this Decision the related question also arises whether the Trial Chamber's finding is logically inconsistent, and therefore vitiated by an error. However, it is respectfully submitted, the Chamber undermined the protection offered when it concluded not to shield P-0039's identity from the public through face and voice distortion, thus allowing the witness's identity to be fully seen by people who may follow the proceedings live or on the Internet.

(b) The Issues meet the criteria for leave to appeal

27. Issues concerning the manner in which the Prosecution and the Court as a whole comply with the duty under article 68(1) to protect victims and witnesses or other persons at risk on account of the activities of the Court have previously been found to meet the criteria for leave to appeal.³² The Issues raised in this application concern the standards and procedures for the assessment and

³⁰ ICC-01/04-02/06-T-40-CONF-ENG ET, p. 81, lns. 18-21.

³¹ Decision, para. 8.

³² See for instance ICC-01/04-01/07-483-Conf; ICC-01/04-01/07-107.

management of security risks. They significantly affect the fair and expeditious conduct of the proceedings and the outcome of the trial. In addition, immediate resolution of the Issues by the Appeals Chamber will materially advance the proceedings.

i. The Issues significantly affect the fair conduct of the proceedings

28. According to the jurisprudence of this Court, “fairness” within the terms of article 82(1)(d) incorporates fairness towards the Accused, the victims and the Prosecution. It requires that the procedural and substantive rights and obligations of all participants be respected.³³ In particular, the treatment of victims or witnesses may have a significant impact on the overall fairness of the proceedings.³⁴

29. The three Issues raised in this application go to the heart of the Court’s duty of protection under article 68(1). The Court’s failure to comply with its duty “to ensure, as a matter of the highest priority, that witnesses are appropriately protected”³⁵ would significantly affect the fairness towards Witness P-0039. In addition, because the Issues raise a systemic question of the standard and procedures for witness protection, they affect the fairness towards other witnesses who will testify in this case and thereby the proceedings as a whole.

30. Fairness under article 82(1)(d) has also been interpreted to mean “that the Prosecutor must be able to exercise the powers and fulfil the duties listed in Article 54”³⁶ and it has been linked to the ability of a party to present its case.³⁷ If the objective risk to witnesses, such as P-0039, is not correctly assessed and

³³ ICC-01/04-141, para. 48; ICC-02/04-01/05-212, paras. 10-11; ICC-01/04-135-tEN, para. 38.

³⁴ ICC-01/04-01/06-2463, para. 30.

³⁵ ICC-01/04-01/07-776 OA7, para. 101.

³⁶ ICC-01/04-135-tEN, paras. 38-39.

³⁷ ICC-02/04-01/05-90-US-Exp (reclassified pursuant to ICC-02/04-01/05-135), para. 24.

managed, this will significantly impact on the Prosecution's ability to exercise its powers and to present its case, as witnesses will simply refuse to cooperate with the Court and to give evidence. However, even if the witness's cooperation was still forthcoming, the Prosecution, who has an independent duty to protect its witnesses under articles 54(3)(f) and 68(1), could not call witnesses to give evidence if it were not satisfied that the risks arising from their testimony are appropriately managed by the Court as a whole.³⁸

ii. The Issues significantly affect the expeditious conduct of the proceedings

31. According to the jurisprudence of the Court, issues that "may have an impact on how the Prosecution goes about selecting its witnesses"³⁹ or affect "in 'a material way' the Prosecutor's ability to prove her allegations"⁴⁰ have been found to significantly affect the expeditious conduct of the proceedings. In addition Trial Chamber I in the *Lubanga* case has found that "[t]he introduction of evidence touching on the issue of the guilt or innocence of the accused may materially affect the content and the substance of the evidence introduced during the trial and its length, since this is likely to affect the nature and extent of the evidence called and the issues to be raised. Indeed, this decision may result in the Chamber considering evidence that otherwise would not be available."⁴¹

32. Because the Issues affect the Prosecution's ability to call witnesses and to present its case at trial, they also significantly affect the expeditious conduct of the proceedings. If witnesses who need in-court protective measures cease cooperating with the Court as a result of an incorrect approach to protection, then the Prosecution would need to re-schedule the presentation of its evidence. The

³⁸ See "Prosecution – Registry, Joint Protocol on the Mandate, Standards and Procedure for protection", 21 March 2011 ("OTP-VWU Protection Protocol"), Annex B, article 27(7).

³⁹ ICC-01/04-01/07-116, p. 6.

⁴⁰ ICC-02/11-01/11-464, para. 38.

⁴¹ ICC-01/04-01/06-1191, para. 42.

Prosecution could also need time to explain to its witnesses for whom face and voice distortion measures have been requested that, although the Prosecution has already explained that the request is never “guaranteed”, recent rulings in the case suggest that there is a real possibility that the request may be denied. In such case, the Prosecution will need to determine whether the witnesses are still willing to testify if those measures are not granted. In addition, and as noted above, the Prosecution may even be forced to withdraw witnesses if it is not satisfied that they are appropriately protected from risks resulting from their testimony, and find alternative evidence, which would significantly impact on the expeditious conduct of the proceedings.

iii. The Issues affect the outcome of the trial

33. Issues that “directly relate[...] with the amount and type of evidence that the Chamber will have to consider when making its final determination in accordance with Article 74”⁴² affect the outcome of the trial. As acknowledged by Trial Chamber II in the *Katanga* and *Ngudjolo* case, introducing particular pieces of incriminating evidence into the trial may have an impact on its outcome.⁴³

34. The Issues directly impact on the Prosecution’s ability to call witnesses and to introduce its evidence. Nor is the impact of these Issues limited to Witness P-0039, who as a result of the Decision refused to give evidence. Instead the impact potentially extends to all future witnesses in this case who are at risk on account of their interaction with the Court. If this Decision stands, the same standards and procedures for the assessment and management of security risks can be expected to be applied to all future witnesses. The Issues are therefore systemic and have a significant impact on the outcome of the trial.

⁴² ICC-01/05-01/08-1169, para. 35.

⁴³ ICC-01/04-01/07-2404, para. 30.

35. Although the Trial Chamber indicated that the evidence of Witness P-0039 could be introduced by way of some [REDACTED],⁴⁴ this would not offset the impact that the Issues will have on the outcome of the trial. It is uncertain whether the requirements for the introduction of the evidence in another way, such as rule 68, can be met. Moreover, even if the prior recorded evidence of Witness P-0039 were admitted, it is uncertain whether the Chamber would give it the same weight as if the witness had testified *viva voce* in person. For that reason, Trial Chamber III in the *Bemba* case held that issues concerning the “type of evidence” that the Chamber will have to consider may impact on the outcome of the trial.⁴⁵

iv. Immediate resolution of the Issues by the Appeals Chamber may materially advance the proceedings

36. Immediate resolution of the Issues by the Appeals Chamber may, and in fact will, advance these proceedings by ensuring that the protection of witnesses is dealt with correctly on an ongoing basis throughout this case.

37. In particular, the Issues should immediately be resolved by the Appeals Chamber because the Decision departs from prior jurisprudence on matters that are critical to the functions of the Court. It adopts standards and procedures for the assessment and management of security risks for witnesses that are inconsistent with those adopted by the Prosecution and the VWU pursuant to their agreement reached in 2011,⁴⁶ as well as prior decisions of this Court,⁴⁷ including by this Chamber.⁴⁸ Because the protection of victims and witnesses is a key pillar of the Rome Statute, it is essential that this is done correctly. Because the Decision

⁴⁴ ICC-01/04-02/06-T-40-CONF-ENG ET, p. 81, ln. 17.

⁴⁵ ICC-01/05-01/08-1169, para. 35.

⁴⁶ See OTP-VWU Protection Protocol, Annex B; see in particular articles 8(1), 9(2), 22(1), 26(2) and 27.

⁴⁷ See for instance ICC-01/09-01/11-902-Red2, para. 14.

⁴⁸ See for instance ICC-01/04-02/06-824-Conf, para. 16, relying among others on ICC-01/09-01/11-902-Red2, para. 14.

departs from prior practice, it must be subject to the scrutiny of the Appeals Chamber who will either confirm or overturn the Decision. If the Appeals Chamber were to confirm the correctness of this Decision, then the Prosecution and the VWU would need to amend their standards and procedures and adjust them to the Court's evolving jurisprudence.⁴⁹

38. While different cases may require tailored solutions to certain problems, it is critical to both the effectiveness and the credibility of the Court that these Issues be resolved and applied consistently across the Court. It cannot be that the witnesses testifying in this case do not benefit from protection similar to that afforded to witnesses who testify in other cases at this Court or similar to that enjoyed by witnesses where no intervention by the Trial Chamber is required.

39. In addition, an immediate resolution of the Issues by the Appeals Chamber will prevent any detrimental consequences which could arise from the application of these measures not only to Witness P-0039, but also to other witnesses due to give evidence in this case. As a result of the Decision, the objective security risk to which Witness P-0039 is exposed⁵⁰ is not managed in a way that the Prosecution and the VWU deem to be adequate.⁵¹ It is true that the ultimate responsibility for preventing harm to witnesses by way of adopting procedural protective measures lies with the Chamber.⁵² However, if the Chamber's Decision is incorrect, this could lead to significant detrimental consequences for *all* witnesses in this case who are at risk on account of their interaction with the Court. This could manifestly impact on the integrity of the proceedings, both through the direct impact on the witnesses and on the evidence available to the Prosecution. The Issues should therefore be resolved by the Appeals Chamber at this stage.

⁴⁹ OTP-VWU Protection Protocol, Annex B, Article 2(4).

⁵⁰ Decision, para. 8.

⁵¹ Decision, paras. 1, 6.

⁵² ICC-01/04-01/07-776 OA7, paras. 93-94, see also para. 2.

Conclusion

40. For the reasons set out above, the Trial Chamber should

- (i) grant Witness P-0039 the in-court protective/special measures of face and voice distortion (in addition to a pseudonym) pursuant to articles 68(1) and (2), and rules 87 and/or 88; and
- (ii) grant the Prosecution leave to appeal the Decision on the three Issues set out in paragraph 3 above.



Fatou Bensouda, Prosecutor

Dated this 4th day of November 2015

At The Hague, The Netherlands