

**Cour
Pénale
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**International
Criminal
Court**

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Date: 9 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 Response of the Common Legal Representative of the Victims of the Attack to the “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’”

Source: Office of Public Counsel for Victims

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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I. INTRODUCTION

1. On behalf of the victims of the attacks participating in the present case, the Common Legal Representative of the Victims of the Attacks (the “Legal Representative”), in accordance with regulation 65(3) of the Regulations of the Court, hereby submits his response to the “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’” (the “Prosecution Application”).¹ In particular, the Legal Representative, who represents P-0039 as participating victim [REDACTED] in the present proceedings, fully supports the Prosecution Application regarding the implementation of protective/special measures (the “Protective/Special Measures Request”). The Legal Representative further fully supports the Prosecution Application regarding its request for leave to appeal the Decision on the Prosecution’s Request for in-court Protective Measures for Witness P-0039 (the “Request for Leave to Appeal”). It is respectfully submitted that the Request for Leave to Appeal meets the criteria set forth in article 82(1)(d) of the Statute and should be granted accordingly.

II. PROCEDURAL BACKGROUND

2. On 14 October 2015, the Prosecution requested the in-court protective measures of face and voice distortion and the use of a pseudonym for Witness P-0039.² (the “14 October 2015 Request for Protective Measures”).

¹ See the “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’”, No. ICC-01/04-02/06-973-Conf, 3 November 2015 (the “Prosecution Application”). A public redacted version of the Prosecution Application was filed on 5 November 2015. See No. ICC-01/04-02/06-973-Red.

² See the “Confidential Redacted version of ‘Prosecution’s submission pursuant to regulation 35 to vary the time limit for the sixth request for in-court protective measures concerning Prosecution Witness P-0039’, 14 October 2015”, No. ICC-01/04-02/06-899-Conf-Red, 14 October 2015 (the “14 October 2015 Request for Protective Measures”).

3. On 22 October 2015, the Defence opposed the 14 October 2015 Request for Protective Measures.³

4. Also on 22 October 2015, the Legal Representative filed his response to the 14 October 2015 Request for Protective Measures, supporting the said request in its entirety.⁴

5. On 28 October 2015, Trial Chamber VI (the “Chamber”) issued its decision on the 14 October 2015 Request for Protective Measures, granting it in part. (the “Impugned Decision”).⁵ The Chamber, *inter alia*, found that “*an objectively justifiable risk exists with respect to certain aspects of the Witness’s forthcoming testimony which warrant adequate protection*”⁶ but that [REDACTED]. It thus granted the request for the use of pseudonym in relation to P-0039 but rejected the request for face and voice distortion.⁷

6. Prior to the scheduled commencement of Witness P-0039’s testimony on 28 October 2015, the Presiding Judge explained the practical implications of the Impugned Decision to the witness. Witness P-0039 then refused to testify in the absence of the protective measures of face and voice distortion.⁸

7. Subsequent to the witness’s refusal to testify under the regime of protective measures as ordered by the Chamber in the Impugned Decision, the Prosecution [REDACTED].

³ See the “Response on behalf of Mr Ntaganda to ‘Prosecution’s submission pursuant to regulation 35 to vary the time limit for the sixth request for in-court protective measures concerning Prosecution Witness P-0039’”, No. ICC-01/04-02/06-930-Conf, 22 October 2015.

⁴ See the “Response of the Common Legal Representative of the Victims of the Attacks to the ‘Confidential redacted version of ‘Prosecution’s submission pursuant to regulation 35 to vary the time limit for the sixth request for in-court protective measures concerning Prosecution Witness P-0039’, 14 October 2015”, No. ICC-01/04-02/06-928-Conf, 22 October 2015.

⁵ See the “Decision on Prosecution’s request for in-court protective measures for Witness P-0039”, No. ICC-01/04-02/06-956-Conf, 28 October 2015 (the “Impugned Decision”).

⁶ *Idem*, para. 8.

⁷ *Ibid.*

⁸ See the transcript of the hearing of 28 October 2015, No. ICC-01/04-02/06-T-40-Red-ENG ET, p. 75, lines 2-3.

8. On 3 November 2015, the Prosecution submitted its Application containing a Protective/Special Measures Request and a Request for Leave to Appeal.⁹

9. In its Request for Leave to Appeal, the Prosecution sought leave to appeal the Impugned Decision in relation to the following three 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 pseudonym when the trial is being conducted publicly and broadcast over the internet ("First Issue");*
- 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");*
- 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").¹⁰*

⁹ See the Prosecution Application, *supra* note 1.

¹⁰ *Idem*, paras. 3, 22 and 40.

III. RESPONSE OF THE LEGAL REPRESENTATIVE TO THE PROTECTIVE/SPECIAL MEASURES REQUEST

10. The Legal Representative fully supports the Prosecution Protective/Special Measures Request, as the requested measures are necessary in order to adequately and effectively protect the witness's safety, physical and psychological well-being, dignity and privacy. In this regard, and as previously argued before the Chamber, the requested measures are not unfairly prejudicial to the rights of the Accused¹¹

11. Moreover, the Legal Representative, by reference, reiterates in full his recent submissions regarding the Prosecution's request for protective measures [REDACTED] (the "CLR2 4 November 2015 Submissions"),¹² in which he submitted, *inter alia*, that, given that the Court proceedings are broadcast worldwide, a witness's identity can be adequately and effectively protected from the public *only* if the use of a pseudonym is granted in conjunction with face and voice distortion.¹³

12. In addition, the Legal Representative, by reference, reiterates in full his submissions according to which [REDACTED], several factors should be taken into consideration when deciding on whether in-court protective measures should be

¹¹ See the "Response of the Common Legal Representative of the Victims of the Attacks to the 'Confidential redacted version of 'Prosecution's submission pursuant to regulation 35 to vary the time limit for the sixth request for in-court protective measures concerning Prosecution Witness P-0039', 14 October 2015'", No. ICC-01/04-02/06-928-Conf, 22 October 2015, para. 13. (the "CLR2 22 October 2015 Response").

¹² See the "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'", No. ICC-01/04-02/06-977-Conf-Exp, 4 November 2015. See also the "Confidential redacted version of the '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'", No. ICC-01/04-2/06-977-Conf-Red (the "CLR2 4 November 2015 Submissions").

¹³ *Idem*, paras. 39-43.

granted to a witness, and that given the current reality in the field said factors are relevant to all dual-status witnesses in the present proceedings.¹⁴

13. Therefore, the Legal Representative respectfully requests the Chamber to take into consideration all the said factors when deciding on the Protective/Special Measures Request, given in particular that Witness P-0039 [REDACTED]. Furthermore, as underscored by the Prosecution in its Protective/Special Measures Request, P-0039 [REDACTED].¹⁵ The protective measures sought are thus necessary to ensure that he is protected from [REDACTED], on account of his cooperation with and testimony before the Court. Consequently, the Legal Representative respectfully requests the Chamber to grant the Prosecution Protective/Special Measures Request.

IV. RESPONSE OF THE LEGAL REPRESENTATIVE TO THE REQUEST FOR LEAVE TO APPEAL

14. The Legal Representative fully supports the Prosecution Request for Leave to Appeal and in particular the Prosecution's line of reasoning that the three issues as identified arise from the Impugned Decision and meet the criteria for granting leave to appeal under article 82(1)(d) of the Statute. Accordingly, the Legal Representative fully endorses the arguments of the Prosecution and he will not repeat said argumentation.

1. The criteria contained in article 82(1)(d) of the Statute

15. Article 82(1)(d) of the Statute provides for the possibility to request leave to appeal *"a decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings"*.

¹⁴ *Ibid.*, paras. 7-30.

¹⁵ See the Prosecution Application, *supra* note 1, paras. 12-14.

16. The constant jurisprudence of the Court, according to the Appeals Chamber's interpretation of article 81(2)(d) of the Statute,¹⁶ establishes that in order for leave of appeal to be granted pursuant to article 81(2)(d), the applicant must show that the following cumulative criteria are fulfilled:

- (a) The matter is an "appealable issue";
- (b) The issue at hand could significantly affect:
 - (i) The fair and expeditious conduct of the proceedings; or
 - (ii) The outcome of the trial; and
- (c) In the opinion of the Chamber, an immediate resolution by the Appeals Chamber could materially advance the proceedings.¹⁷

17. The Appeals Chamber held that "[a]n issue in an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is a disagreement or 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. The issue may be legal or factual or a mixed one."¹⁸

¹⁶ See the "Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal" (Appeals Chambers), No. ICC-01/04-02/06-168, 13 July 2006 (the "Judgment on Extraordinary Review"), paras 9-20.

¹⁷ See e.g. the "Decision on Defence request for leave to appeal the Chamber's decision on postponement of the trial commencement date" (Trial Chamber VI), No. ICC-01/01-02/06-604, 21 May 2015, paras. 14-15; the "Decision on the Prosecution's request for leave to appeal" (Trial Chamber V(B)), No. ICC-01/09-02/11-1004, 9 March 2015, para. 23; the "Decision on the Defence Request for Leave to Appeal the Decision on the Defence Request for Interim Relief" (Trial Chamber III"), No. ICC-01/05-01/08-3122, 26 August 2014, paras. 16-17; the "Decision on 'Prosecution's application for leave to appeal the decision on excusal from presence at trial under Rule 134quarter'" (Trial Chamber V(A)), No. ICC-01/09-01/11-1246, 2 April 2014, paras 15-16; the "Decision on the Defence Application for Leave to Appeal the 'Decision on the Defence's Request for Disclosure of Documents in the Possession of the Office of the Prosecutor'" (Trial Chamber IV), No. ICC-02/05-03/09-457, 21 March 2013, paras. 11-12; the "Decision on the 'Defence Request for Leave to Appeal Decision 3319'" (Trial Chamber II), No. ICC-01/04-01/07-3327, 28 December 2012, para. 9; the "Decision on the 'Defence Application for Leave to Appeal the Trial Chamber's *Décision relative aux modalités de participation des victimes au stade des débats sur le fond*'" (Trial Chamber II), No. ICC-01/04-01/07-2032, 20 April 2010, paras 16-17.

¹⁸ See the Judgment on Extraordinary Review, *supra* note 16, para. 9. See also the "Decision on Defence request for leave to appeal the Chamber's decision on postponement of the trial commencement date" (Trial Chamber VI), No. ICC-01/01-02/06-604, 21 May 2015, para. 15.

18. The Appeals Chamber also considered that “[n]ot every issue may constitute the subject of an appeal. It must be one apt to ‘significantly affect’, i.e. in a material way, either a) ‘the fair and expeditious conduct of the proceedings’ or b) ‘the outcome of the trial’”.¹⁹

19. In analysing whether an appealable issue would “significantly affect” the fair and expeditious conduct of the proceedings under article 82(1)(d) of the Statute, the notion of “fairness” must be understood as referring to situations “when a party is provided with the genuine opportunity to present its case - under conditions that do not place it at a substantial disadvantage vis-à-vis its opponent - and to be appraised of and comment on the observations and evidence submitted to the Court that might influence its decision”.²⁰ In turn, “expeditiousness” must be read as “closely linked to the concept of proceedings ‘within a reasonable time’, namely the speedy conduct of proceedings, without prejudice to the rights of the parties concerned”.²¹

20. The object of article 82(1)(d) of the Statute is to pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial.²² Trial Chamber II held in particular that “appeals against such decisions are subject to the leave of the Trial Chamber because only the Trial Chamber is in a position to determine whether an immediate resolution of an issue by the Appeals Chamber is necessary to advance the proceedings. This mechanism ensures that appeals on issues that could be addressed, where necessary, only in an appeal against a final judgment, do not unduly delay the proceedings”.²³

¹⁹ See the Judgment on Extraordinary Review, *supra* note 16, para. 10.

²⁰ See e.g. the “Decision on the Prosecutor’s application for leave to appeal Pre-Trial Chamber III’s decision on disclosure” (Pre-Trial Chamber III, Single Judge), No. ICC-01/05-01/08-75, 25 August 2008, para. 14.

²¹ *Idem*, para. 18.

²² See the “Decision on three applications for leave to appeal Decision ICC-01/04-01/07-3003 of 9 June 2011” (Trial Chamber II), No. ICC-01/04-01/07-3073-tENG, 27 July 2011, para. 6, referring to Judgment on Extraordinary Review, para. 19.

²³ See the “Decision on the ‘Request for Leave to Appeal against the ‘Decision on the Request for an order for the commencement of the pre-confirmation phase by the Defence of Saif Al-Islam Gaddafi’”, (Pre-Trial Chamber I), No. ICC-01/11-01/11-490, 11 December 2013, para. 8; the “Decision on three

2. Application of the criteria contained in article 82(1)(d) of the Statute to the Request for Leave to Appeal

a. The identified “issues” arise from the Impugned Decision

21. The issues as formulated by the Prosecution clearly arise from the Impugned Decision.

22. Indeed, the Chamber ruled that *“it was satisfied that an objectively justifiable risk exists in relation to certain aspects of the Witness’s forthcoming testimony which warrant adequate protection”*.²⁴ The Chamber further ruled that (i) *“the Witness’s testimony is not expected to relate to the accused directly”*;²⁵ and (ii) that [REDACTED]. It then decided that *“mindful of the fair trial-related concerns which generally militate against shielding the identity of witnesses from the public, [it] finds that the use of a pseudonym during the Witness’s testimony will sufficiently mitigate any risk to his security.”*²⁶

23. It is thus averred, that the Issues as identified in the Prosecution Request for Leave to Appeal arise from the Impugned Decision with respect to (i) the correlation between the existence of a risk to the security of Witness P-0039; (ii) [REDACTED] in relation to the regime of protective measures to be granted; (iii) the Chamber’s interpretation of the adequacy of certain types of protective measures available pursuant to rule 87 of the Rules of Procedure and Evidence; (iv) the interpretation of the Accused’s right to a public hearing; and (v) the Chamber’s appreciation of the impact certain types of protective measures have on the concept of the “publicity” of hearings.

applications for leave to appeal Decision ICC-01/04-01/07-3003 of 9 June 2011” (Trial Chamber II), No. ICC-01/04-01/07-3073-tENG, 27 July 2011, para. 6.

²⁴ See the Impugned Decision, *supra* note 5, para. 8.

²⁵ *Idem*.

²⁶ *Ibid*.

b. The “issues” identified by the Prosecution affect the fair and expeditious conduct of the proceedings and the outcome of the trial

24. The three Issues as set out in the Request for Leave to Appeal – each in its own right – significantly affect the fair and expeditious conduct of the proceedings and require immediate appellate scrutiny. It is submitted that the Chamber, while recognising that *“an objectively justifiable risk exists with respect to certain aspects of the Witness’s forthcoming testimony which warrant adequate protection”*,²⁷ erred in failing to order necessary protective measures to ensure that P-0039’s identity is adequately and effectively protected *vis-à-vis* the public by applying flawed legal and factual considerations to the case at hand.

25. In particular, in relation to the First Issue, it is averred that ordering all of the protective measures requested would have been the only logical consequence in the circumstances, given that the Chamber considered that it had ordered such measures as *“will sufficiently mitigate any risk to his security.”*²⁸ The Legal Representative thus respectfully joins the submissions of the Prosecution in that the question of whether the Chamber erred in granting the protective measure of pseudonym only can effectively mitigate the risk of the witness being identified when hearings are broadcast worldwide.²⁹

26. In relation to the Second Issue, the Chamber’s rejection of an integral part of measures available to effectively conceal the witness’s identity, namely face and voice distortion, [REDACTED] was in error. As the Legal Representative has recently argued before the Chamber, [REDACTED]; it would in fact defeat the purpose of protective measures intended to shield against any such attempts of interfering with a witness or victim in the first place.³⁰ There exists a plethora of applicable jurisprudence established both by different Trial Chambers of the Court and the

²⁷ *Ibid.*

²⁸ *Ibid.* (Emphasis added)

²⁹ See the Prosecution Application, *supra* note 1, para. 24.

³⁰ See the CLR2 4 November 2015 Submissions, *supra* note 12, para. 7.

International Criminal Tribunal for the Former Yugoslavia,³¹ that supports this position and which the Chamber failed to take into consideration when asserting that [REDACTED] against granting face and voice distortion for P-0039's testimony before it.

27. In relation to the Third Issue, the Legal Representative also agrees with the submission of the Prosecution that the Chamber's interpretation of the Accused's right to publicity of hearings is vitiated by an error that necessitates the immediate resolution of the Appeals Chamber. As such, the Chamber's ruling involves the interpretation of a component of the Accused's fair trial rights guaranteed by virtue of article 67 of the Statute, namely, the right to a public hearing. However, it further involves balancing this right against the Chamber's obligations under article 68 of the Statute, and will necessarily have to be re-visited in relation to other persons called to testify before the Chamber in this case who may be exposed to real and justifiable risks to their physical and psychological well-being. Thus, if this Issue is not resolved at the current juncture, there is the inherent danger that the fair and expeditious conduct of the proceedings will be significantly affected.

28. Finally, it is submitted, that if these Issue are not resolved at this stage, there is the risk that a flawed legal test will be applied in future decisions concerning protective measures for persons testifying before the Chamber, which may result in putting those who cooperate with the Court at risk of being identified and harmed on account of their cooperation. Such a situation would go squarely against the Chamber's obligation pursuant to article 68(1) of the Statute to "*take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.*"

29. The Legal Representative, by reference, reiterates his recent submissions, namely that (i) in light of the constant jurisprudence of the Court and the

³¹ *Idem*, paras. 7-9.

international jurisprudence, in-court protective measures in form of face and voice distortion in conjunction with the use of a pseudonym do not unfairly prejudice either the rights of the Accused or the publicity of the trial;³² and (ii) the use of a pseudonym only in the proceedings before the Court when hearings are broadcast throughout the world is clearly not sufficient because when the face and voice of a witness remain undistorted, the witness cannot reasonably be said to benefit from protection of his/her *identity*, and therefore remains fully exposed to any ensuing risks to his/her security and well-being.³³

30. Consequently, the Legal Representative respectfully requests the Chamber to grant the Prosecution Request for Leave to Appeal with respect to the three Issues as formulated.

V. CONFIDENTIALITY

31. Pursuant to regulations 23*bis*(1) and (2) of the Regulations of the Court, the present submissions are classified as “confidential”, as they refer to sensitive information regarding [REDACTED] dual-status Witness P-0039 as well as to documents marked with the same classification. A public redacted version will be filed at the same time.

³² *Ibid.*, paras. 31-38.

³³ *Ibid.*, paras. 39-43.

FOR THE FOREGOING REASONS, the Legal Representative respectfully requests that the Chamber grant the Prosecution Protective/Special Measures Request and the Prosecution Request for Leave to Appeal, respectively, in their entirety.

A handwritten signature in black ink, appearing to read 'D. Suprun', with a long vertical stroke extending downwards from the bottom of the signature.

Dmytro Suprun
Common Legal Representative of the Victims of the Attacks

Dated this 9th Day of November 2015

At The Hague, The Netherlands