

**Cour
Pénale
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**International
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Court**

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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 Former Child Soldiers' Response to the Prosecution application 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 (CLR1)

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

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I. INTRODUCTION

1. The Common Legal Representative of the former child soldiers (the “Legal Representative”) hereby files her response to the Prosecution’s application for leave to appeal the “Decision on Prosecution’s request for in-court protective measures for Witness P-0039” (the “Decision”).¹ Although the request for protection relates to a witness whose testimony is likely affects interests of the victims of the attacks, the Legal Representative nevertheless shares the Prosecution’s view that the request for leave to appeal challenges “*the Chamber’s general approach to the protection of victims and witnesses and therefore raise systemic questions that affect the entire trial*”.² These aspects are of fundamental importance to all the victims and witnesses expected to appear before the Court during the trial, including the former child soldiers.

2. The Legal Representative supports the Prosecution’s application for leave to appeal the Decision in respect of the three issues identified. The application meets all the requirements set out in article 82(1)(d) of the Rome Statute. The three issues are indeed (i) appealable issues arising from the Decision; (ii) will significantly affect the fair and expeditious conduct of the proceedings and (iii) will affect the outcome of the trial. Moreover, an immediate resolution of these issues by the Appeals Chamber appears to be necessary at this stage of the proceedings.

II. CONFIDENTIALITY

3. Pursuant to regulation 23*bis*(2) of the Regulations of the Court, this submission is filed confidential following the Prosecution classification and because it refers to filings, orders and transcripts currently classified as confidential.

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”, 7 October 2015, ICC-01/04-02/06-890-Conf”, No. ICC-01/04-02/06-973-Conf, 3 November 2015 (the “Prosecution Application”).

² *Idem.*, para. 22.

III. PROCEDURAL BACKGROUND

4. 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-0039.³

5. On 28 October 2015, the Chamber granted the use of a pseudonym for Witness P-0039 but rejected face and voice distortion.⁴ As a consequence, Witness P-0039 refused to testify, arguing that his security will be at stake should he testify without voice and facial distortion.⁵

6. 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 in-court protective measures with additional information.⁶

7. On 3 November 2015, the Prosecution filed an application for leave to appeal the "Decision on Prosecution's request for in-court protective measures for Witness P-0039".⁷

III. SUMMISSIONS

1. Article 82(1)(d) of the Rome Statute provides for the possibility for the parties to seek 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*

³ 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.

⁴ See the "Decision on Prosecution's request for in-court protective measures for Witness P-0039" (Trial Chamber VI), No. ICC-01/04-02/06-956-Conf, 28 October 2015 (the "Decision").

⁵ See transcript of the hearing on 28 October 2015, No. ICC-01/04-02/06-T-40-CONF-ENG ET, p. 74, line 24 to p. 75, line 3.

⁶ *Idem*, p. 81, lines 2-21.

⁷ See the Prosecution Application, *supra* note 1.

the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings”.

8. The jurisprudence of the Court has clarified the various requirements of article 82(1)(d) of the Rome Statute.⁸ In this regard, the Appeals Chamber ruled that “[e]vidently, article 82 (1) (d) of the Statute has two components. The first concerns the prerequisites for the definition of an appealable issue and the second the criteria by reference to which the Pre-Trial Chamber may state such an issue for consideration by the Appeals Chamber”.⁹ The Appeals Chamber stated that “[o]nly an ‘issue’ may form the subject-matter of an appealable decision”,¹⁰ and defined the term “issue” as “an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion”.¹¹ 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’”.¹²

A. The three issues arise from the Decision

9. The Prosecution seeks leave to appeal the Decision on three issues. It is submitted that all the three issues arise from the Decision.

10. The first issue, as framed by the Prosecution, relates to “[w]hether 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

⁸ See the “Decision on Prosecutor’s Application for leave to appeal in part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest under article 58” (Pre-Trial Chamber II), No. ICC-02/04-01/05-20, 19 August 2005, para. 21. See also 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 Chamber), No. ICC-01/04-168 OA3, 13 July 2006, paras. 8 and 14.

⁹ 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”, *supra* note 8, para. 8.

¹⁰ *Idem*, para. 9.

¹¹ *Ibid.*

¹² *Ibid.*, para. 10.

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".¹³ This issue arises from the Chamber's ruling that "*an objectively justifiable risk exists with respect to certain aspects of the Witness's [...] testimony*"¹⁴ and from its conclusion that "*the use of a pseudonym during the Witness's testimony will sufficiently mitigate any risks to his security*".¹⁵ The effectiveness and adequacy of the in-court protective measures ordered by a Chamber pursuant to article 68(1) of the Rome Statute are important matters which require an immediate resolution by the Appeals Chamber. This is particularly the case where "an objectively justifiable risk" to the witness has been identified.

11. In the same vein, the second issue delineated in the Request also arises from the Decision. The issue concerns "[w]hether 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]".¹⁶ This issue stems from the Chamber's conclusion that the "[w]itness's testimony is not expected to relate to the accused directly, [REDACTED]".¹⁷ This part of the Decision clearly requires the existence of [REDACTED] in order to grant the in-court protective measures of face and voice distortion.

12. The third issue concerning "*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*" also arises from the Decision.¹⁸ It arises from the Trial Chamber's finding that it is "*mindful of the fair trial-related concerns which generally militate against*

¹³ See the Prosecution Application, *supra* note 1, para. 3.

¹⁴ See the Decision, *supra* note 4, para. 8.

¹⁵ *Idem*.

¹⁶ See the Prosecution Application, *supra* note 1, para. 3.

¹⁷ See the Decision, *supra* note 4, para. 8.

¹⁸ *Idem*.

shielding the identity of witnesses from the public” as a reason to reject the in-court protective measures of face and voice distortion for Witness P-0039.¹⁹ This issue also raises important questions regarding the scope of the requirement for the publicity of the proceedings. More importantly, it questions the Chamber’s conclusion that face and voice distortion affect the publicity of the proceedings.

13. The issues identified by the Prosecution are not just a mere disagreement with the Chamber’s conclusions. Indeed, the Chamber itself recognised the existence of *“an objectively justifiable risk”* for the safety of the witness.²⁰ Moreover, the Chamber’s partial denial of the request for the adoption of in-court protective measures had a direct consequence on Witness P-0039’s choice to refuse to testify, out of concerns for his safety.

B. The three issues significantly affect the fair and expeditious conduct of the proceedings

14. Moreover, the Legal Representative submits that the three issues will affect the fair and expeditious conduct of the trial. As the Prosecution correctly points out, the *“fair conduct of the proceedings”* is a broad notion that embraces not only *“fairness towards the Accused, [but also towards] the victims and the Prosecution”*.²¹ Affording witnesses with adequate and effective in-court protective measures in response to an *“an objectively justifiable risk”* is not only a requirement and an obligation for the Court pursuant to article 68(1) of the Rome Statute, but it is also a matter which deeply affects the fairness of the proceedings. Indeed, it would seem plainly unfair that witnesses are put at risk just because some affordable and easily available in-court protective measures were not granted. This unfairness is even more apparent considering the fact that the security risks victims and witnesses face are in most cases created, or at least amplified, by their interaction with the Court.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ See the Prosecution Application, *supra* note 1, para. 28.

Given the current security situation in [REDACTED],²² witnesses cannot be expected to cooperate with the Court while fearing for their lives and in the absence of adequate protective measure being adopted to mitigate risks for their safety.

15. The Legal Representative also concurs with the Prosecution's submission that the issues related to the protection of witnesses directly have a direct impact on the expeditiousness of the proceedings.²³ The scope of in-court protective measures granted affects the Prosecution's presentation of evidence and its ability to call witnesses in a timely manner. Hence, failure to provide witnesses with adequate protection is likely to delay the trial. The consequences of the lack of adequate in-court protective measures on the expeditiousness of the proceedings cannot be more apparent than in the case of Witness P-0039, who refused to testify out of concerns for his personal safety. More disruption and delay may be caused if a restrictive approach to in-court protective measures is applied by the Chamber in respect of other witnesses.

C. The issues affect the outcome of the trial

16. The Legal Representative concurs with the Prosecution that the three issues are likely to affect the outcome of the trial.²⁴ In the Decision, the Chamber seemed to adopt a general approach to protection, taking into account the nature and content of each testimony and whether it is "expected to relate to the accused directly".²⁵ In doing so, the Decision seems to suggest that the absence of direct references to the accused in a witness testimony may justify the use of a pseudonym without necessarily granting face or voice distortion. These far-reaching implications of the Decision may lead to excluding this type of in-court protective measures from the majority of [REDACTED] witnesses expected to testify at trial.

²² Several aspects of the security situation [REDACTED] were discussed at length at various stages of the proceedings. See, *inter alia*, [REDACTED].

²³ See the Prosecution Application, *supra* note 1, paras. 31-32.

²⁴ *Idem*, para. 33.

²⁵ See the Decision, *supra* note 4, para. 8.

17. Moreover, the Decision does not explicitly state the objective of the protective measures granted to Witness P-0039. It is unclear whether the Chamber intended to shield the identity of Witness P-0039 from the public or not.²⁶ In any event, the use of pseudonym without applying face and voice distortion is likely to prove insufficient to shield the identity of the witness from the public. If the identity of the witness and his involvement with the Court become known to the public this would, as such, amplify the risks for his personal safety – and therefore defeat the purpose of the other protective measure granted by the Chamber. Accordingly, it appears important that the Appeals Chamber review the appropriateness of allowing the use of pseudonym without applying face and voice distortion. Moreover, it is important to consider the implications of denying face and voice distortion on the publicity of the proceedings. Indeed, the Legal Representative avers that the mere use of pseudonym necessarily leads to more frequent recourse to private sessions to mitigate the security concerns, which in turn clearly affects the publicity principle.

18. Denying specific types of protective measure for certain categories of witnesses may deter witnesses from cooperating with the Court, which may ultimately impact on the sufficiency of the evidence adduced. Such a consequence certainly affects the outcome of the trial, particularly because it impacts on the Prosecution's ability to prove the allegations laid out in the charges beyond a reasonable doubt.

²⁶ In the Decision, the Chamber seems to have taken the view that “*fair trial-related concerns [...] militate against shielding the identity of witnesses from the public*”. See the Decision, *supra* note 4, para. 8.

D. The immediate resolution of the issues by the Appeals Chamber will materially advance the proceedings

19. The Legal Representative concurs with the Prosecution's submission that the granting the application in respect of the three issues will materially advance the proceedings.²⁷ As noted *supra*, the Decision has far-reaching implications for the assessment and management of security risks, not only for Witness P-0039, but also for all [REDACTED] witnesses who are in a similar situation.

20. Since the Decision sets a new precedent with regard to witness' protection, and given that Witness P-0039 is the first witness to refuse to testify on the basis that the in-court protective measures granted are inadequate, it is submitted that this is the most appropriate stage for the Appeal Chamber to either confirm or overturn the Decision.

21. Moreover, the duty to protect the safety and the physical and psychological well-being of witnesses is an ongoing obligation for the Court under article 68(1) of the Rome Statute. Such an obligation does not end with the conclusion of a witness' testimony. Even for those witnesses who choose not to testify out of security concerns, such as Witness P-0039, there is no assurance that the Chamber will not disclose the information related to them to the public on the basis of a restrictive approach to in-court protective measures. This is particularly the case if the Chamber takes the view that it is not necessary to shield the identity of certain witnesses from the public because of "*fair trial-related concerns*".²⁸

²⁷ See the Prosecution Application, *supra* note 1, paras. 36 *et seq.*

²⁸ See the Decision, *supra* note 4, para. 8.

FOR THESE REASONS, the Legal Representative respectfully request the Chamber should grant the Prosecution's leave to appeal the Decision in its entirety.

A handwritten signature in black ink, appearing to read 'Sarah Pellet', followed by a period.

Sarah Pellet
Common Legal Representative of the Former
Child soldiers

Dated this 9th Day of November 2015

At The Hague, The Netherlands