



Original: English

No.: ICC-01/04-02/06
Date: 13 January 2016

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

With Confidential Annexes A, B and C and Public Annex 1

**Public redacted version of “Additional submissions for protective and special measures concerning Prosecution Witness P-800”, 6 January 2016,
ICC-01/04-02/06-1074-Conf-Exp**

Source: The 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. The Office of the Prosecutor ("Prosecution") submits additional observations in relation to the "Corrected version of "Fifth Prosecution request for in-court protective measures", filed on 14 October 2015 ("Fifth Request").¹ The Prosecution supplements its prior request for in-court protective measures (face and voice distortion and the use of a pseudonym) for Prosecution Witness P-800, pursuant to articles 64(2) and 68(1) and (2) of the Rome Statute ("Statute"), and rules 87 and 88 of the Rules of Procedure and Evidence ("Rules"). Additionally, the Prosecution requests that Trial Chamber VI ("Chamber") grant P-800 with special measures [REDACTED], namely by allowing for regular breaks during his questioning and questions adapted to his needs, pursuant to rule 88 of the Rules and article 68(1) and (2) of the Statute.
2. P-800 is a crime-base witness of [REDACTED] expected to testify about crimes committed during and following UPC/FPLC attacks on villages in Mongbwalu and Sayo. [REDACTED]. He has expressed concerns about retaliation and stigmatisation following his testimony and therefore asked that his identity is fully protected by use of facial and voice distortion as well as the use of a pseudonym. His concerns are objectively justifiable. There is still a risk of retaliation against Prosecution witnesses from the Accused's supporters. [REDACTED]. [REDACTED]. Ituri district and the region remain unstable.
3. Moreover, special measures are necessary to allow P-800 to have regular breaks and questioning adapted to his needs, due to P-800's [REDACTED].
4. These measures sought do not hamper the right of the Accused to a fair and public hearing under articles 64(2) and 67(1) of the Statute. The Accused has

¹ ICC-01/04-02/06-900-Conf-Exp-Corr.

been provided with the name and identifying information of P-800 whose identity will remain anonymous to the public only. The public will have access to non-identifying information provided by P-800 during his testimony.

Confidentiality

5. This request 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 of the Court as it provides information about protective measures, witness security and P-800’s current location of residence. The Prosecution will file redacted confidential and public versions.

Background

6. On 14 October 2015, the Prosecution submitted the “Fifth Request” in which it sought permission to add P-859 and either P-800 or P-815 or both at the end of the second evidentiary block and requested in-court protective measures in the form of facial and voice distortion, as well as the use of a pseudonym for the three witnesses under rule 87 of the Rules.²
7. On 19 October 2015, the Chamber granted the request to add P-859 to the second evidentiary block.³
8. On 13 November 2015, the Chamber found that the protection of P-859’s identity was justified by the existence of an objectively justifiable risk to his security and well-being and granted facial and voice distortion and the use of a pseudonym.⁴

² ICC-01/04-02/06-900-Conf-Exp-Corr.

³ ICC-01/04-02/06-T-33-CONF-ENG ET, p. 3, ln. 22 - p. 4, ln. 10.

⁴ ICC-01/04-02/06-1004-Conf-Red.

9. P-800 is [REDACTED] on the list of witnesses that the parties have agreed upon for the third evidentiary block.⁵ [REDACTED],⁶ [REDACTED].

Submissions

a) The statutory framework expressly protects witnesses appearing before the Court

10. The Chamber is empowered to grant P-800 in-court protective measures of face and voice distortion, and use of pseudonym, pursuant to articles 68(1) and (2), article 64(2), and rules 87 and 88 of the Rules. The Court's statutory framework expressly protects witnesses appearing before the Court.
11. The in-court protective measures of face and voice distortion, in addition to use of a pseudonym, are necessary for P-800 because publicly revealing his identity will risk compromising his safety, privacy and his physical and psychological well-being within the meaning of article 68(1).
12. 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."
13. Article 64(2) requires a Chamber to ensure, not only that a trial is fair and expeditious and is conducted with full respect for the rights of the accused, but also that there is due regard for the protection of victims and witnesses.

⁵ Email dated 27 November 2015 at 12:11.

⁶ Email dated 18 November 2015 at 15:55.

14. 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 victims and witnesses.⁷ The Chamber has discretion to determine which special measures would facilitate the testimony of a witness.⁸ 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-800's security situation.

b) In-court protective measures under rule 87 and articles 64 and 68 are warranted for this Witness

(i) P-800 and his family face objectively justifiable risks

15. P-800's concerns that he has expressed for the safety of himself and his family are objectively justifiable, for the following reasons.

16. Prosecution Witness P-800 is a civilian [REDACTED]. [REDACTED]. P-800 is expected to testify, *inter alia*, about the UPC/FPLC attacks on villages in Mongbwalu and Sayo. He is expected to give evidence about UPC/FPLC attacks which forcibly displaced and killed civilians and how the UPC/FPLC militia targeted Lendu persons due to their ethnicity. P-800 is also expected to

⁷ 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.

⁸ 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.

testify about the widespread pillaging and the destruction of property, [REDACTED].⁹

17. [REDACTED]. [REDACTED]. P-800 has communicated that he fears retaliation and stigmatisation, which may arise from any public dissemination of his identity during testimony. [REDACTED].¹⁰ In the [REDACTED] region, the inhabitants commonly know one another. It is also [REDACTED]. [REDACTED].¹¹ [REDACTED].¹² [REDACTED]; [REDACTED].¹³ [REDACTED].¹⁴

18. [REDACTED].¹⁵

19. 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.¹⁶ Ethnic groups that once attacked each other now reside in a fragile co-existence. 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 proceedings.¹⁷

⁹ ICC-01/04-02/06-900-Conf-Exp-Corr, p. 7, para. 15.

¹⁰ [REDACTED].

¹¹ [REDACTED].

¹² [REDACTED].

¹³ [REDACTED].

¹⁴ [REDACTED].

¹⁵ See e.g. ICC-01/04-02/06-956-Conf, p. 5, para. 6; ICC-01/04-02/06-1004-Conf-Red, p. 5, para. 4.

¹⁶ See generally, ICC-01/04-02/06-585-Conf.

¹⁷ 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

20. As this Chamber has recalled in previous decisions relating to in-court protective measures, the security situation in the region may be a relevant factor when considered in relation to the circumstances of a specific witness.¹⁸
21. [REDACTED].¹⁹ The Chamber concluded that there were reasonable grounds to believe that the Accused sought to disguise attempts to disclose confidential information or to interfere with Prosecution witnesses, during the course of telephone conversations from the detention centre with third parties. Furthermore, when the Accused spoke of “silencing” certain persons - that he, through an interlocutor, intended to engage in a serious form of witness interference.²⁰

(ii) *Face and voice distortion, as well as a pseudonym, are necessary*

22. Face and voice distortion, in addition to the use of pseudonym, are necessary measures to ensure adequate protection of P-800. Granting of use of a pseudonym alone would not suffice to protect P-800.
23. Filming and video practices in the current proceedings have demonstrated that unprotected witnesses’ images are easily accessible to a vast public on a worldwide scale thus maximising the risk of witnesses’ identification. 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. Accordingly, many individuals and organisations in

Trial Chamber cannot, therefore, summarily dismiss the personal fears of a witness it is mandated to protect under Article 22 of the Statute”).

¹⁸ ICC-01/04-02/06-824-Red, para. 14 (citing ICC-01/09-01/11-902-Red2, para. 14); ICC-01/04-02/06-1004-Conf-Red, para. 5.

¹⁹ ICC-01/04-02/06-396-Conf-Anx1, p. 7.

²⁰ See ICC-01/04-02/06-785-Red, paras. 50-57.

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-800 would increase the risk that he could be identified. This necessitates the use of a pseudonym in combination with face and voice distortion for Witness P-800.

(iii) *There is no need to prove any specific threats or risks posed to P-800*

24. There is no need to establish that P-800 is subject to any specific threat or risk.
25. The Chamber granted in-court protective measures, including face and voice distortion for similarly situated Prosecution Witnesses – [REDACTED]²¹ and P-859.²² [REDACTED] and P-859 faced similar risks to their security due to their testimony in this case. In addition, as is the case for P-800, they did not face any specific or concrete security threats. [REDACTED].²³
26. In the decision granting facial and voice distortion as well as the use of a pseudonym for P-859, the Trial Chamber recently found that “factors such as the security situation in a region may be relevant in relation to the circumstances of a specific witness”.²⁴
- c) *Granting the measures as special measures under rule 88 and article 68 extend to P-800 as a witness and will facilitate his testimony*
27. 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;

²¹ ICC-01/04-02/06-824-Conf.

²² ICC-01/04-02/06-1004-Conf-Red.

²³ ICC-01/04-02/06-824-Conf.

²⁴ ICC-01/04-02/06-1004-Conf-Red, p. 5, para. 5.

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 deemed necessary for the individual witness.

28. Moreover, a plain textual reading of rule 88, and other related provisions such as rule 86, make it clear that special measures under rule 88 are “*not limited to*” vulnerable witnesses – but may be considered for any witness where appropriate. For instance rule 88 refers to requests “of a witness”, and taking into account the views of “the victim or witness”. Furthermore, rule 86 provides that a Chamber, in making any direction or order, shall take into account the needs of “*all* victims and witnesses” in accordance with article 68. Chambers have a discretion in determining what measures may be considered appropriate, if at all, under rule 88 for individual witnesses.²⁵
29. The Chamber has discretion under rule 88, not only rule 87, to allow for the use of face and voice distortion, where a witness 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.

²⁵ See e.g. ICC-01/04-01/06-1040, p. 16, para. 35: “The Chamber will not list herein the specific protective and special measures under Rules 87 and 88 that can be used for the presentation of evidence of traumatised and vulnerable witnesses, however the Chamber indicates that in applying Article 64 of the Statute, it will ensure that appropriate steps are taken to guarantee the protection of *all* victims and witnesses, and *particularly* those who have suffered trauma or who are in a vulnerable situation” (Emphasis added); *The Prosecutor v. Thomas Lubanga Dyilo*, “Decision on victims’ participation”, ICC-01/04-01/06-1119, p. 43, para. 127: “Under Rule 88 of the Rules the Chamber may order special measures to assist victims *and* witnesses, *including* measures to facilitate the testimony of a traumatized victim or witness, children, the elderly and victims of sexual and gender violence”. (Emphasis added).

d) The requested protective/special measures are warranted under article 64 and 68 and rules 87 and/or 88 and do not violate the Accused's right to a public hearing

30. The Prosecution requests the Chamber to grant the full set of protective and special measures requested for this witness, under article 68, rule 87 and/or rule 88. 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.
31. 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.²⁶ Other Trial Chambers have allowed for the measures of pseudonym, as well as face and voice distortion, for crime-base as well as former military insider witnesses.²⁷ 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.
32. 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. In particular, Witness P-800's security and needs must be fully taken into account. The European Court of Human Rights has held that the right to a public hearing is not violated even where a trial is not open to the public to

²⁶ [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; P-0859: ICC-01/04-02/06-1004-Conf-Red, pp. 5-6, paras 5-6.

²⁷ 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.

protect the private life of the parties or where publicity would prejudice the interests of justice.²⁸

33. 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. 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.²⁹ 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-800 gives will be in open session and publicly available. Moreover, the Accused is aware of the identity of P-800.

*e) Additional special measures are warranted under rule 88 due to P-800's
[REDACTED]*

34. The Prosecution further requests additional special measures for P-800, on the basis of [REDACTED]. Granting him any additional breaks necessary and adapting the questioning to his needs will enable the witness to cope appropriately with questioning. The Chamber is able to take into account the particular characteristics of a witness when deciding what special measures if any to grant under rule 88.³⁰

²⁸ 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.

²⁹ See e.g. *Axen v Germany*, December 8, 1983, Series A., No. 72; 6 E.H.R.R. 195.

³⁰ See e.g. ICC-01/04-01/06-1049, p. 15, paras. 31-32. Trial Chamber I observed that "[t]here must be awareness of the *particular characteristics of a witness* which may cause the court environment to be particularly foreign and uncomfortable". (Emphasis added).

Request

35. For all the foregoing reasons, the Prosecution requests that the Chamber grant P-800:

- i. in-court protective and special measures of facial and voice distortion and the use of a pseudonym pursuant to articles 64(2) and 68(1) and (2) of the Statute and rules 87 and 88 of the Rules; and
- ii. special measures of additional breaks and questioning adapted to his needs during testimony, pursuant to article 68(1) and (2) of the Statute and rule 88 of the Rules.



Fatou Bensouda, Prosecutor

Dated this 13th day of January 2016
At The Hague, The Netherlands