

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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No.: ICC-01/04-02/06

Date: 26 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 Annex A**

Public redacted version of "Prosecution's ninth request for in-court protective or special measures," 15 December 2015, ICC-01/04-02/06-1066-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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Other

Introduction

1. The Prosecution requests in-court protective measures for Prosecution Witness P-0790 in the form of facial distortion, voice distortion and the use of a pseudonym, as provided for in rules 87 and 88 of the Rules of Procedure and Evidence ("Rules"). This witness will be the first to testify in the third evidence block scheduled to commence on 18 January 2016.
2. The protective measures sought will ensure this witness is able to give evidence without fear for his personal safety or that of his family members. The measures sought appropriately balance the Accused's right to a public hearing under article 67(1) of the Statute, against the need to protect witnesses appearing before the Court, pursuant to articles 64(2), 68(1) and 68(2) of the Statute. The Defence is aware of the identity of the witness, and the measures sought do not prejudice the rights of the Accused. The witness's identity will be protected from the public only.

Confidentiality

3. This request is classified as "Confidential, *ex parte* – only available to the Prosecution, the Legal Representative of the Victims of the Attacks and Victims and Witnesses Unit" pursuant to regulation 23bis (1) of the Regulations of the Court as it refers to confidential security-related witness information. The Prosecution will file a confidential and a public redacted version of this filing.

Prosecution's Submissions

4. Article 68(1) requires the Chamber to protect the safety of victims and witnesses, and 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. Article 68(2) expressly provides that the

Chamber may consider “the views of the [...] witness” to order measures “as an exception to the principle of public hearings.”

5. 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. The Chamber has discretion to determine which special measures would facilitate the testimony of a vulnerable witness.¹
6. The Prosecution requests facial distortion, voice distortion and the use of a pseudonym under rule 87 as a protective measure, and/or under rule 88 as a special measure given Witness P-0790’s specific security situation and vulnerability. [REDACTED].²
7. [REDACTED], Witness P-0790 will provide important and unique evidence on the UPC/FPLC attack on Kobu in February 2003. Witness P-0790 witnessed UPC/FPLC soldiers [REDACTED]. [REDACTED], he witnessed the destruction of villages and manhunts for Lendu civilians. [REDACTED].
8. Witness P-0790 has expressed security concerns to the Prosecution and his Legal Representative, and has reported several specific incidents that are related to his cooperation with the Prosecution. He initially [REDACTED]. His participation as a Prosecution witness is not known to members of his family

¹ See: Brady, H., “Protective and Special Measures for Victims and Witnesses”, in Lee et al. (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 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.

² [REDACTED].

or his community. Prosecution Witness P-0790 fears that he and his family members will be stigmatised if his appearance before the Court were made public. [REDACTED], such an outcome could have far more significant consequences for this witness and his family members.

9. [REDACTED], shortly after the disclosure of his identity as a Prosecution witness to the Defence, Witness P-0790 received [REDACTED].³
10. The Legal Representative for Victims reported to the Prosecution that [REDACTED].
11. [REDACTED].⁴ [REDACTED].⁵ [REDACTED].
12. Witness P-0790 still resides in the [REDACTED] region. While he lives in a predominantly Lendu area, he is exposed to increased risk in the Hema-dominated areas where he [REDACTED]. Armed groups are still active in post-conflict Ituri; the ethnic groups who were engaged in this conflict now reside in a fragile co-existence.⁶ The First Registry's Report on the Security Situation in the Democratic Republic of the Congo ("DRC") refers to the "influence of Bosco Ntaganda still [being] perceptible" and the "fear of retaliation from supporters of the accused."⁷
13. 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.⁸ The *ad hoc* international tribunals have also recognised that the general volatile

³ See Annex A to this filing, document DRC-OTP-2083-0329. This investigator's note was not previously disclosed as it was not relevant. It will also be formally disclosed.

⁴ ICC-01/04-02/06-866-Conf, Annex A.4; ICC-01/04-02/06-912-Conf.

⁵ See DRC-OTP-2088-0358.

⁶ See *generally*, ICC-01/04-02/06-585-Conf-Anx.

⁷ [REDACTED].

⁸ 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.

situation in a post-conflict region and potential threats against witnesses living in that region, or even in neighbouring countries, can justify the witnesses' fears for their safety as a result of participating in the tribunal's proceedings.⁹

14. Although his safety and security is regularly assessed and monitored by the Prosecution, [REDACTED]. He lives in [REDACTED]. Witness P-0790's subjective fears are not unfounded; they are grounded in his experience [REDACTED]. Revealing Witness P-0790's identity publicly would serve to heighten the risk to him and his family members, [REDACTED]. As such, the in-court protective measures sought are necessary.
15. The Prosecution submits that granting the use of a pseudonym in concert with facial and voice distortion is necessary to adequately protect this witness and ensure his safety and security during and after his testimony. The Registry's Public Information and Documentation Section ("PIDS") live-streams the proceedings, such that they are easily accessible to anyone with an internet connection. PIDS also uploads an audiovisual summary of each witness' testimony to the ICC YouTube channel. Once uploaded, PIDS distributes a link to these summaries via email to a number of television and radio broadcasters in the DRC, who routinely broadcast such material. The Prosecution notes that in the PIDS audiovisual summary of the testimony of Prosecution Witness [REDACTED],¹⁰ [REDACTED]. The dissemination of the image and voice of

⁹ See: *Prosecutor v Rwamakuba*, Decision on the Defence Motion for Protective Measures, 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", 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").

¹⁰ ICC-01/04-02/06-T-44-Conf-Eng, p. 19, line 21 to p. 20, line 19.

Prosecution witnesses in this way increases the risk to them and their family members, which the use of a pseudonym is meant to mitigate.

16. Finally, implementing the requested protective measures during trial will likely obviate the need for additional and more intrusive protective measures to be applied upon the completion of his testimony.

Request

17. The Prosecution requests that the Chamber grant in-court protective measures to Prosecution Witness P-0790 in the form of facial distortion, voice distortion and the use of a pseudonym during his testimony.



Fatou Bensouda, Prosecutor

Dated this 26th day of January 2016
At The Hague, The Netherlands