

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 27 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

Public Redacted Version of the “Confidential Redacted Version of the ‘Response of the Common Legal Representative of Victims of the Attacks to the ‘Prosecution’s ninth request for in-court protective or special measures’”

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. The Common Legal Representative of the Victims of the Attacks (the “Legal Representative” or “CLR2”) hereby submits his response to the “Prosecution’s ninth request for in-court protective or special measures” (the “Prosecution Request” or “Request”) filed on 18 December 2015,¹ whereby it requests that the Chamber grant the in-court protective measures of pseudonym in conjunction with face and voice distortion for the upcoming testimony of witness P-0790.² As the Prosecution Request concerns dual status Witness P-0790, whom the Legal Representative represents in his capacity as participating victim [REDACTED], the Legal Representative respectfully presents these submissions on the matter and requests that Trial Chamber VI (the “Chamber”) grant the Prosecution Request and order the in-court protective measures of pseudonym, face and voice distortion.

II. PROCEDURAL BACKGROUND

2. On 24 November 2015, the Prosecution informed the Chamber, Defence, and Legal Representatives of Victims of the order of witnesses it intends to call during the third evidentiary block of the proceedings.³ According to its proposed list, the Prosecution has scheduled P-0790 as the first witness to be called during the next evidentiary block⁴ scheduled to start on 18 January 2016.

3. On 18 December 2015, the Prosecution filed the Prosecution Request - *ex parte* and available only to the Prosecution, VWS, and CLR2.⁵ On the same day, the Prosecution filed a confidential redacted version of its Request.⁶

¹ See the “Prosecution’s ninth request for in-court protective or special measures”, No. ICC-01/04-02/06-1066-Conf-Exp, 18 December 2015 (the “Prosecution Request”).

² *Idem*, paras. 1, 6, 15 and 17.

³ See email sent by the Prosecution to the Chamber, Defence, and Legal Representatives of Victims at 17:13 on 24 November 2015.

⁴ *Idem*.

⁵ *Ibid.*, para. 3.

⁶ See the “Confidential redacted version of ‘Prosecution’s ninth request for in-court protective or special measures,’ 15 December 2015”, No. ICC-01/04-02/06-1066-Conf-Red, 18 December 2015.

III. SUBMISSIONS BY THE LEGAL REPRESENTATIVE

4. The Legal Representative submits that the requested in-court protective measures are necessary, adequate, and the least intrusive measures available to protect the safety, physical and psychological well-being of his client and those of the latter's family.

Relevant factors to be taken into account

5. The Legal Representative reiterates his previous submissions that when considering whether a witness should be granted in-court protective measures to effectively and adequately protect his/her safety and physical and psychological well-being because of his/her testimony in the Court proceedings, several factors need to be taken into account.⁷ Such factors include, *inter alia*, the security situation in the territory concerned, the risk of reprisals from supporters of the accused, and the need to protect the privacy of witnesses and to safeguard their psychological well-being.⁸

⁷ 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 (the "CLR2 Submissions of 4 November 2015"), paras. 7-11. See also the "Confidential Redacted 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-Red, 4 November 2015.

⁸ See the "Public redacted version of the Decision on the Protection of Prosecution Witnesses 267 and 353 of 20 May 2009" (Trial Chamber II), No. ICC-01/04-01/07-1179-tENG, 28 May 2009, paras. 35-36, 38 and 44. See the "Decision Granting Protective Measures for Witness 323 during in-Court Testimony" (Trial Chamber II), No. ICC-01/04-01/07-1795-Red-tENG, 27 January 2010, paras. 9-10 and 12. See the "Decision on the application for the institution of protective measures for Witnesses a/0381/09, a/0018/09, a/0191/08, pan/0363/09 and Victim a/0363/09, issued on 27 January 2011" (Trial Chamber II), No. ICC-01/04-01/07-2663-Red-tENG, 22 February 2011, paras. 10-11 and 15-16. See the transcript of the hearing held on 3 March 2011 (Trial Chamber III), No. ICC-01/05-01/08-T-79-Red-ENG CT2 WT, pp. 44-45. See also the "Second redaction of: Decision on 'Prosecutor's First Request for In-Court Protective Measures for Trial Witnesses'" (Trial Chamber V(A)), No. ICC-01/09-01/11-902-Red2, 3 September 2013, paras. 13-14 and 26-27.

6. In the case of P-0790, the risk to the safety and the physical and psychological well-being of the witness is an objectively justifiable one. Not only [REDACTED] where the Accused still enjoys widespread support among the population, but [REDACTED] demonstrate that P-0790 security and safety is at an acute risk.

7. The Legal Representative recalls that there exists a body of jurisprudence of the International Criminal *ad hoc* Tribunals according to which protective measures can be granted for a witness *either* because of specific threats against a witness or his/her family *or* otherwise when demonstrating “*a combination of three conditions: (i) the witness’s testimony may antagonise persons who reside in a specific territory; (ii) the witness, or his or her family live or work in the territory, or have property in the territory; (iii) there exists an unstable security situation in that territory which is particularly unfavourable to witnesses who appear before the Tribunal.*”⁹ In particular, the ICTY Trial Chamber held that “*for the protective measures sought to be granted the applicant must show that, should it become publicly known that he testified, there is a real risk to his security or that of his family. [...] Some specific reasons must be established and the Trial Chamber must be satisfied that the fear expressed has an objective foundation.*”¹⁰ In another case, the ICTY Trial Chamber specified that “*an objectively grounded risk to the security and welfare of a witness or his family exists when, inter alia, the Prosecution informs the Chamber that a witness has expressed fears based on his place of residence or of the prospect that individuals sympathetic to the Accused will recognise him.*”¹¹

⁹ See ICTY, *The Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-T, Decision on Prosecution’s Motion for Protective Measures for Witness 35 in the Tentative Order of Testimony, 26 November 2007, para. 2.

¹⁰ See ICTY, *The Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, 30 July 2002, Decision on Prosecution Motion for Trial Related Protective Measures for Witnesses (Bosnia), para. 11.

¹¹ See ICTY, *The Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Prosecution Motions for Protective Measures for Witnesses KDZ601 and KDZ605, 19 August 2011, para. 11. The witness for whom the protective measures were granted lived in a municipality in which “*the Accused has ‘considerable support’*”, and the Trial Chamber rejected the Accused’s argument that the contentions of the witness’s subjective fears were not objectively reasonable and his claims not documented. See *idem*, paras. 2 and 8.

8. As submitted by the Prosecution, P-0790 [REDACTED]. This real and justifiable risk to his physical safety and psychological well-being equally extends to P-0790's family members [REDACTED].

9. Additionally, the security situation in the most affected communities, where the Accused continues to have many supporters, remains unstable and fragile and may quickly deteriorate at any given time. The fact that the witness [REDACTED], further puts him at risk should he testify with his identity becoming publicly known. After returning to the region, he could easily be identified and targeted. In this regard, the Legal Representative recalls that [REDACTED].¹²

Factors demonstrating the existence of real risks of significant harm to the psychological well-being of dual-status witness P-0790

10. P-0790 is not only a witness to the events but, moreover, a victim of the attacks against the civilian population. He has personally suffered hardship and physical injury, and more significantly, he had to witness the death of [REDACTED]. This has caused him severe psychological suffering. Putting [REDACTED] at risk of interference and reprisals would thus unduly expose him to re-traumatisation and should therefore be avoided at all costs.

11. In addition, the Legal Representative wishes to recall that the [REDACTED], have aggravated the situation of his feeling exposed. The psychological stress this has caused him should not be under-estimated.

12. It is submitted that the Chamber is under the obligation to protect the safety, physical, and psychological well-being, dignity and privacy of victims and witnesses. It is also under the obligation to take great care that protective measures granted to a

¹² See the CLR2 Submissions of 4 November 2015, *supra* note 7, paras. 13-20.

witness are sufficient to ensure adequate protection of the witness and to effectively respond to the risks the witness is exposed to.¹³

13. The Legal Representatives therefore respectfully requests the Chamber to take the above factors into consideration and to order all of the requested in-court protective measures, namely the use of pseudonym, face and voice distortion to withhold P-0790's identity from the public and thus counter the real and objectively justifiable risks P-0790 is exposed to.

The requested measures do not unfairly prejudice either the rights of the Accused or the publicity of the trial

14. The Legal Representative submits that the requested in-court protective measures do not unfairly prejudice the rights of the accused as P-0790's identity, voice and face will only be withheld from the public. However, these measures enable P-0790 to testify without putting himself and others in his immediate family at risk. The requested protective measures are necessary, reasonable and proportionate. It is submitted that no less restrictive protective measures exist to ensure effective and adequate protection of P-0790.

15. It is further submitted that the requested in-court protective measures do not undermine the principle of the publicity of the trial. The requested protective measures are reasonable and proportionate as they address both the requirements of the publicity of the trial and the risks faced by P-0790, who is also a victim. By affording P-0790 the minimally necessary means to shield his identity from the public, the Chamber will be able to largely hear his testimony in public session, therefore ensuring the publicity of the trial.

¹³ See the "Public redacted version of the Decision on the Protection of Prosecution Witnesses 267 and 353 of 20 May 2009" (Trial Chamber II), No. ICC-01/04-01/07-1179-tENG, 28 May 2009, para. 44. See also the "Second redaction of: Decision on 'Prosecutor's First Request for In-Court Protective Measures for Trial Witnesses'" (Trial Chamber V(A)), No. ICC-01/09-01/11-902-Red2, 3 September 2013, para. 27.

16. Article 67 of the Rome Statute must be interpreted *“having regard to the provisions of the Statute”*, including article 68 which provides for *“an exception to the principle of public hearings provided for in article 67”* and pursuant to which Chambers of the Court may order protective measures to be put in place as set out in rule 87 of the Rules of Procedure and Evidence. In accordance with the constant jurisprudence of the Court, (i) *“the Defence’s right to have evidence disclosed – essential as this may be – cannot be considered to be absolute. Where the protection of victims and witnesses is at stake, the Chamber must seek a solution which strikes a fair balance between the equally legitimate rights of the accused, on the one hand, and the victims and witnesses on the other”*¹⁴; (ii) *“putting in place arrangements to enable [witnesses’] voices and faces to be distorted does not jeopardise the interests of the accused persons any more than it is prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial”*¹⁵; (iii) *“[protective measures in form of face and voice distortion and the use of a pseudonym] would entail minimal restrictions which do not affect the rights of the Defence in any substantive way”*¹⁶; and (iv) *“these protective measures are necessary to ensure adequate protection and do not cause undue prejudice to the Defence or undermine the fairness of the trial.”*¹⁷

Pseudonym only is insufficient to adequately and effectively protect P-0790

17. The Legal Representative submits that the complementary protective measures of pseudonym, face and voice distortion are necessary to adequately and effectively withhold P-0790’s identity from the public. The use of a pseudonym only would not be sufficient to ensure the same, given the proceedings before the Court are broadcast throughout the world. If the face and/or voice of a witness remain

¹⁴ See the “Public redacted version of the Decision on the Protection of Prosecution Witnesses 267 and 353 of 20 May 2009” (Trial Chamber II), No. ICC-01/04-01/07-1179-tENG, 28 May 2009, para. 31.

¹⁵ See the “Decision on the Prosecutor’s Application for Protective Measures Pursuant to Article 54(3)(f) of the Statute and Rule 81(4) of the Rules” (Trial Chamber II), No. ICC-01/04-01/07-989-tENG, 25 March 2009, para. 7.

¹⁶ See the “Decision Granting Protective Measures for Witness 323 during in-Court Testimony” (Trial Chamber II), No. ICC-01/04-01/07-1795-Red-tENG, 27 January 2010, para. 13.

¹⁷ See the “Second redaction of: Decision on ‘Prosecutor’s First Request for In-Court Protective Measures for Trial Witnesses’” (Trial Chamber V(A)), No. ICC-01/09-01/11-902-Red2, 3 September 2013, para. 27.

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, as was for instance recognised by Trial Chamber II in the *Katanga and Ngudjolo* case.¹⁸

18. Consequently, in-court protective measures in form of the use of a pseudonym only cannot adequately deal with the P-0790's legitimate concerns.¹⁹ Indeed, it is sufficient that only one person in the affected communities sees the transmission or recordings of a witness's testimony wherein his face is shown that the witness becomes easily identifiable.

Timing of a decision regarding in-court protective measures

19. The Legal Representative respectfully requests that both for the purposes of the expeditiousness of the proceedings and for the benefit of the witnesses concerned, a decision regarding in-court protective measures be issued prior to P-0790 physically appearing in court so as to allow the witness a reasonable opportunity to consult with his Legal Representative and to take an informed decision about whether or not to consent to testifying should the requested protective measures not be granted or only partially granted.

IV. CONFIDENTIALITY

20. Pursuant to regulations 23bis(1) and (2) of the Regulations of the Court, the present submissions are classified as "confidential *ex parte*" – available to Prosecution, VWS, and CLR2 only, as they refer to sensitive information regarding the security and well-being of a Prosecution witness with dual status. A confidential redacted version of the submissions will be filed at the same time.

¹⁸ See the "Decision Granting Protective Measures for Witness 323 during in-Court Testimony" (Trial Chamber II), No. ICC-01/04-01/07-1795-Red-tENG, 27 January 2010, para. 10 (Emphasis added).

¹⁹ See e.g. ICTY, *The Prosecutor v. Mile Mrkšić et al.*, Case No. IT-95-13/I-T, Decision on Prosecution's additional motion for protective measures of sensitive witnesses, 25 October 2005, para. 7.

FOR THE FOREGOING REASONS the Legal Representative respectfully requests that the Chamber grant the Prosecution Request for the in-court protective measures of pseudonym, face and voice distortion for the upcoming testimony of dual status Witness P-0790 in its entirety.

A handwritten signature in black ink, appearing to read 'Dmytro 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 11th Day of January 2016

At The Hague, The Netherlands