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

Date: 4 March 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**

**Public redacted version of “Additional Submissions for Special and Protective
Measures for Witness P-0815”, 4 March 2016**

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 Prosecution supplements its prior request for in-court special and protective measures for Prosecution Witness P-0815, in the form of face and voice distortion as well as the use of a pseudonym pursuant to articles 64(2) and 68(1) of the Rome Statute ("Statute"), and rules 87 and 88 of the Rules of Procedure and Evidence ("Rules"). Moreover, the Prosecution requests that Witness P-0815 be granted the special measure [REDACTED], if required, during the course of his testimony, pursuant to article 68(1) and (2) of the Statute and rule 88 of the Rules.
2. Witness P-0815 is a civilian of [REDACTED] and a crime-base witness who is expected to testify about crimes committed during and following the UPC/FPLC attack on Sayo in 2002. [REDACTED]. [REDACTED].
3. Witness P-0815 has expressed concerns about his security should he testify and requested that his identity be fully protected. The Witness's security concerns for himself and his family are objectively justifiable. There is a risk of retaliation against Prosecution witnesses from the Accused's supporters. [REDACTED]. Ituri district and the region remain unstable.
4. In addition, Witness P-0815 [REDACTED]; accordingly, the special measure [REDACTED] in-court may be required.
5. The 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 been provided with the name and identifying information of Witness P-0815 whose identity will remain anonymous to the public only. The public will have access to non-identifying information provided by Witness P-0815 during his testimony.

Confidentiality

6. 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-0815’s current location of residence. The Prosecution will file redacted confidential and public versions.

Background

7. On 14 October 2015, the Prosecution submitted the “Corrected version of “Fifth Prosecution request for in-court protective measures”, in which it sought permission to add Witness P-0859 and either Witness P-0800 or P-0815, 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.¹
8. On 19 October 2015, the Chamber granted the request to add Witness P-0859 to the second evidentiary block² and on 13 November 2015, the Chamber granted the in-court protective measures in the form of face and voice distortion as well as the use of a pseudonym.³
9. On 6 January 2016, the Prosecution made additional submissions for in-court special and protective measures in relation to Witness P-0800 *inter alia* in the form of face and voice distortion, and the use of a pseudonym.⁴
10. On 9 February 2016, the Chamber granted the in-court protective measures of face and voice distortion as well as the use of a pseudonym for Witness P-0800’s testimony.⁵

¹ ICC-01/04-02/06-900-Conf-Exp-Corr.

² ICC-01/04-02/06-T-33-CONF-ENG ET, p. 3, ln. 22 - p. 4, ln. 10.

³ ICC-01/04-02/06-1004-Conf-Red.

⁴ ICC-01/04-02/06-1074-Conf-Exp.

Submissions

a) In-court protective and special measures of face and voice distortion and use of pseudonym under rule 87 and 88 and articles 64 and 68 are warranted

11. The Chamber is empowered to grant the 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. Indeed, the Court's statutory framework expressly protects witnesses appearing before the Court.
12. Given Witness P-0815's security situation and the security situation in the region, 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.
13. The concerns that Witness P-0815 has expressed for his and his family's safety are objectively justifiable, for the following reasons.
14. Witness P-0815 is a civilian of [REDACTED] and a crime-base witness who is expected to testify, *inter alia*, about the UPC/FPLC attack on Sayo in 2002, including how UPC/FPLC attacks on Sayo forced him and his family to flee to the bush. His testimony is expected to address how UPC/FPLC soldiers murdered [REDACTED], looted and damaged homes, and protected objects - the Catholic Church and the Health Centre. [REDACTED].⁶
15. [REDACTED]. [REDACTED]. He has expressed concerns for his and his family's security due to his cooperation with the Prosecution and anticipated testimony.

⁵ ICC-01/04-02/06-1160-Conf-Exp.

⁶ ICC-01/04-02/06-900-Conf-Exp-Corr, p. 6, para. 12.

[REDACTED], a small community where inhabitants are commonly known to each other.⁷ [REDACTED].⁸

16. [REDACTED]⁹ [REDACTED]¹⁰ [REDACTED]. [REDACTED].¹¹ [REDACTED].¹²

17. [REDACTED].¹³

18. 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.¹⁴ The Chamber has recalled in previous decisions relating to in-court protective measures that the security situation in the region may be a relevant factor when considered in relation to the circumstances of a specific witness.¹⁵

19. [REDACTED].¹⁶ 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. The Chamber also held that the Accused, through an interlocutor, intended to engage in a serious form of witness interference when he spoke of "silencing" certain persons.¹⁷

⁷ ICC-01/04-02/06-900-Conf-Exp-Corr, pp. 6-7, para. 13.

⁸ [REDACTED].

⁹ See [REDACTED].

¹⁰ See [REDACTED].

¹¹ See [REDACTED].

¹² See [REDACTED].

¹³ 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.

¹⁴ See generally, ICC-01/04-02/06-585-Conf. The *ad hoc* internationals have recognised that the general volatile situation in a post-conflict region and potential threats against witnesses living in the region can justify witnesses' fears for their safety. 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.

¹⁵ 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.

¹⁶ ICC-01/04-02/06-396-Conf-Anx1, p. 7.

¹⁷ See ICC-01/04-02/06-785-Red, paras.50-57.

20. P-0815 is not subject to any specific threat or risk. The Chamber has, however, granted in-court protective measures, including face and voice distortion and the use of a pseudonym, for similarly situated Prosecution Witnesses, namely [REDACTED]¹⁸, P-0859¹⁹ and P-0800.²⁰ In its decision concerning Witness P-0800's protective measures, the Chamber recalled "reported instances where other witnesses, including crime based witnesses, were allegedly threatened as a result of their involvement with the Court".²¹
21. In conclusion, Witness P-0815's concerns in relation to his and his family's safety are objectively justifiable.
22. Separately, [REDACTED], the protection of his privacy and psychological well-being - as well as that of his family - is necessary.²²

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

23. 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.
24. 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

¹⁸ ICC-01/04-02/06-824-Conf.

¹⁹ ICC-01/04-02/06-1004-Conf-Red.

²⁰ ICC-01/04-02/06-1160-Conf-Exp.

²¹ ICC-01/04-02/06-1160-Conf-Exp, para. 7.

²² ICC-01/04-02/06-900-Conf-Exp-Corr, p. 7, para. 13.

witnesses who will or have testified with these measures.²³ 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.²⁴ 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. Further, as the European Court of Human Rights has held, the right to a public hearing is not absolute and subject to the protection of the private life of the parties or where publicity would prejudice the interests of justice.²⁵

25. Witness P-0815's identity has already been disclosed to the Accused. 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 Witness P-0815 gives will be in open session and publicly available.

c) Additional special measures of [REDACTED] are warranted under rule 88

26. The Prosecution further requests additional special measures for Witness P-0815, [REDACTED] in-court if needed. [REDACTED]. 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 88.²⁶

²³ Witness P-0805: ICC-01/04-02/06-824-Conf, para. 10; P-0901: ICC-01/04-02/06-828-Conf, para. 10; P-0768: ICC-01/04-02/06-905-Conf, paras. 8-9; Witness P-0859: ICC-01/04-02/06-1004-Conf-Red, pp. 5-6, paras 5-6; Witness P-0800: ICC-01/04-02/06-1160-Conf, para. 8.

²⁴ 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 Witnesses 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.

²⁵ 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.

²⁶ 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

27. For all the foregoing reasons, the Prosecution requests that the Chamber grant
Witness P-0815:

- i. in-court protective and special measures of facial and voice distortion and the use of a pseudonym; and
- ii. the special measure of [REDACTED] in-court, if needed.



Fatou Bensouda, Prosecutor

Dated this 4th day of March 2016
At The Hague, The Netherlands