

**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 “Prosecution’s eleventh request for in-court protective and special measures”, 17 March 2016, ICC-01/04-02/06-1218-Conf-Exp

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Introduction

1. The Prosecution requests in-court protective measures in the form of face and voice distortion and the use of a pseudonym for the testimony of Prosecution Witnesses P-0892 and P-0912, [REDACTED], 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"). The Prosecution also requests the following special measures pursuant to rule 88: (a) that Witnesses P-0892 and P-0912 be granted reading and writing assistance, if required, during their testimony; (b) that questioning be adapted to the needs and capacities of Witness P-0912; and (c) that Witness P-0912 be assisted in court by a Victims and Witnesses Unit ("VWU") support assistant ("Request").
2. The Request is necessary given: (i) the witness's expected evidence, in particular in relation to [REDACTED]; (ii) their current residence being located [REDACTED]; (iii) the possibility that they may be identified by persons involved in [REDACTED]; and (iv) the fact that neither of them [REDACTED]. The requested special measures of in-court assistance and/or adapted questioning are also necessary in view of the specific needs of these witnesses.
3. Granting the Request will ensure the safety, physical and psychological well-being, dignity and privacy of these witnesses as mandated by article 68(1) of the Statute. It will also mitigate the need for more intrusive security-related measures post-testimony.
4. 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). The Accused has been provided with the names and identifying information of both witnesses; their identity will remain anonymous

to the public only. The public will have access to non-identifying information provided by the witnesses during their testimony.

Confidentiality

5. This filing is classified as “Confidential, *ex parte* – only available to the Prosecution and the Victims and Witnesses Unit” pursuant to regulation 23bis(1) of the Regulations of the Court, as it provides information about witnesses’ security and locations of residence. The Prosecution will file confidential and public redacted versions of this filing.

Prosecution’s Submissions

6. The Prosecution requests face and voice distortion voice distortion and the use of a pseudonym during the testimony of Witness P-0912, and during the testimony of [REDACTED], Witness P-0892. The Prosecution also requests that both Witnesses P-0912 and P-0892 be granted reading and writing assistance, if required, during their testimony; that questioning be adapted to the needs and capacities of Witness P-0912; and that Witness P-0912 be assisted in court by a VWU support assistant.

I. In-court protective and special measures of face and voice distortion and the use of pseudonym are warranted

7. The protective/special measures of face and voice distortion and use of pseudonym under rules 87 and 88, and articles 64(2) and 68(1), are warranted. In particular, the concerns that both witnesses have expressed for the safety of themselves and/or their family members are objectively justifiable, for the following reasons.

i. Anticipated evidence

8. Witness P-0912 is of [REDACTED] ethnicity. Witness P-0892, [REDACTED], is of [REDACTED] ethnicity. Witnesses P-0912 and P-0892 lived in Mongbwalu during the UPC/FPLC's multiple attacks on that town. Witness P-0912, who was [REDACTED].
9. Both Witness P-0912 and P-0892 are expected to provide evidence on, *inter alia*, the commission of the following crimes by UPC/FPLC soldiers in Mongbwalu during the temporal scope of the charges: murder and attempted murder, attacks against the civilian population, rape and sexual slavery of civilians, persecution, pillaging, forcible transfer of population, the use of children under 15 to participate actively in hostilities and destruction of property.
10. Accordingly, Witnesses P-0912 and P-0892 are expected to give evidence on a significant number of the charges against the Accused. The requested protective or special measures are necessary to avoid revealing their identities, bearing in mind the potential risk of retaliation from supporters of the Accused as elaborated upon further below. Moreover, if the request to [REDACTED].¹

ii. Both witnesses reside [REDACTED] in a region that remains unstable

11. Witness P-0912 and her family currently reside in [REDACTED]; Witness P-0892 and her family currently reside in [REDACTED]. Both these locations are [REDACTED].
12. In particular, the [REDACTED].² [REDACTED].³ [REDACTED].⁴ [REDACTED].⁵

¹ [REDACTED].

² [REDACTED].

³ [REDACTED].

⁴ [REDACTED].

13. [REDACTED].⁶

14. Witness P-0892 has expressed concerns about testifying in these proceedings since she considers [REDACTED]. She fears negative repercussions if her cooperation with the Prosecution were to be made known.⁷

15. Inhabitants of [REDACTED] commonly know each other, as do inhabitants of [REDACTED].

16. [REDACTED].⁸ 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.⁹

17. Moreover, the security situation in the region, in general, remains unstable. [REDACTED].¹⁰

18. As previously noted by this Chamber¹¹ and Trial Chamber V(A)¹² in relation to the granting of in-court protective measures, the security situation in the region may be a relevant factor when considered in relation to the circumstances of a

⁵ [REDACTED].

⁶ [REDACTED].

⁷ [REDACTED].

⁸ [REDACTED].

⁹ See ICC-01/04-02/06-785-Red, paras.50-57.

¹⁰ See generally, [REDACTED]. 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.

¹¹ ICC-01/04-02/06-824-Red, para.14; ICC-01/04-02/06-1004-Conf-Red, para.5 with public redacted version at ICC-01/04-02/06-1004-Red2, para.5.

¹² ICC-01/09-01/11-902-Red2, para.14.

specific witness. Trial Chamber V(A) went on to state that “evidence of prior direct threats to a witness, or his/her family, are not required in order to determine that they face an objectively justifiable risk sufficient to support the granting of protective measures.”¹³

19. Although neither witness has been the subject of any specific threat or risk, the Chamber has granted in-court protective measures, including face and voice distortion and the use of a pseudonym, for similarly situated Prosecution Witnesses, namely [REDACTED],¹⁴ P-0859¹⁵ and P-0800.¹⁶ 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.”¹⁷

iii. Both witnesses may be identified by persons involved in [REDACTED]

20. Witness P-0912 [REDACTED].

21. The Prosecution requests that the evidence regarding [REDACTED] be heard in private session. Nevertheless, if granted, this measure alone may not suffice to protect these witnesses from any attempts at retaliation by those involved in the crimes or their associates. Even if this evidence were to be elicited in private session, should any of those involved in [REDACTED] find out the name, or see the face, or even hear the voice of either of these witnesses, they would likely assume that the witnesses have given evidence regarding this incident.

¹³ ICC-01/09-01/11-902-Red2, para.14.

¹⁴ ICC-01/04-02/06-824-Conf.

¹⁵ ICC-01/04-02/06-1004-Conf-Red.

¹⁶ ICC-01/04-02/06-1160-Conf-Exp.

¹⁷ ICC-01/04-02/06-1160-Conf-Exp, para. 7.

22. As stated above, due to the objective risks against Witnesses P-0892 and P-0912 the possibility of retaliatory acts being undertaken against these witnesses should not be ignored.

iv. [REDACTED]

23. Although the safety and security of both of these witnesses is closely monitored and assessed, [REDACTED].¹⁸

24. Implementing the requested protective/special measures during the testimony of these witnesses will likely obviate the need for additional and more intrusive measures, [REDACTED], to be applied upon the completion of Witness P-0912 and P-0892's testimony.

II. The requested protective/special measures do not violate the Accused's right to a public hearing

25. The Prosecution requests that the Chamber grant the full set of protective and special measures requested for these 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.

26. As the Chamber has previously found, granting the protective measures of voice and face distortion together with the use of a pseudonym does not unfairly prejudice the rights of the Accused when he has been provided with the name and identifying information of the witness who will remain anonymous to the

¹⁸ [REDACTED].

public only.¹⁹ The Accused is in possession of this information, and, as such, will not be prejudiced should the requested protective measures be granted.

27. Granting face and voice distortion in addition to a pseudonym would not violate the Accused's right to a public hearing.²⁰ Article 68(2) explicitly provides that granting measures to take into account a witness' views is an exception to the principle of public hearings. Further, 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.²¹ Moreover, if the Chamber were to grant the witnesses 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 both witnesses give will be in open session and publicly available.

III. Additional in-court special measures are warranted

28. In addition granting the additional in-court special measures of reading or writing assistance for both witnesses, as well as questioning adapted to the needs of P-0912 and the assistance of a VWU support person to Witness P-0912 is warranted.

29. Rule 88 allows the Court to impose measures to facilitate the testimony of vulnerable victims and witnesses, and Chambers have the discretion to determine which special measures would facilitate the testimony of a vulnerable witness.²²

¹⁹ ICC-01/04-02/06-905-Red, para.8.

²⁰ Witness [REDACTED]: ICC-01/04-02/06-824-Conf, para. 10; Witness P-0901: ICC-01/04-02/06-828-Conf, para. 10; Witness [REDACTED]: 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.

²¹ 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.

²² 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), pp. 447-450: "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".

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 of the Rules.²³

i. Both witnesses should be granted reading or writing assistance if needed

30. Witnesses P-0892 and P-0912 have indicated that they are unable to read or write. As such, they should be granted reading or writing assistance in the courtroom, if required.

ii. Witness P-0912 requires in-court assistance and adapted questioning

31. As indicated above,²⁴ Witness P-0912 [REDACTED]. As stated, the Chamber is able to take into account her particular circumstances as [REDACTED] when deciding what special measures, if any, to grant under rule 88.²⁵

32. [REDACTED].²⁶

33. In order to minimise the risk of re-traumatisation, the Prosecution requests the Chamber to authorise a [REDACTED] support assistant from the VWU to sit next to Witness P-0912 during her testimony and to provide her with assistance when necessary.²⁷

²³ See e.g. ICC-01/04-01/06-1049, para.32 (“The Trial Chamber also draws special attention to the vulnerability of some of the people who may be called to testify. There must be awareness of the particular characteristics of a witness which may cause the court environment to be particularly foreign and uncomfortable. In the context of the present case, for example, particular attention should be paid to any children who are called as witnesses to ensure that their psychological well-being is considered as a matter of paramount importance, pursuant to Article 68 of the Statute and Rule 88 of the Rules.”).

²⁴ See paras.8, and 19.

²⁵ 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).

²⁶ [REDACTED].

²⁷ [REDACTED].

34. Further, in order to facilitate Witness P-0912's testimony, and to give her the opportunity to testify to the best of her abilities, the Prosecution also requests the Chamber to order the Parties and participants to:

- (i) Start with questions to guide the witness through the statement;
- (ii) Use short, simple questions and language which is easy to understand, avoiding legal terms, long sentences and double negations;
- (iii) Put questions in a non-confrontational, non-pressuring manner;
- (iv) [REDACTED];
- (v) [REDACTED]:
 - (a) [REDACTED];
 - (b) [REDACTED];
- (vi) [REDACTED].²⁸

iii. Evidence of [REDACTED] needs to be elicited in private session

35. The Prosecution requests that evidence regarding [REDACTED] be elicited in private session, due to [REDACTED]. This is a relevant factor for the Chamber to consider in assessing the need for protective or special measures for these witnesses pursuant to article 68(1) of the Statute. [REDACTED].²⁹

36. Article 68(1) of the Statute provides that in taking appropriate measures to ensure the protection of the safety, physical and psychological well-being, dignity and privacy of victims and witnesses, Chambers shall have regard to all relevant factors. [REDACTED].³⁰

37. The Accused will not be prejudiced in any way should the Chamber grant the requested special measures.

²⁸ [REDACTED].

²⁹ [REDACTED].

³⁰ [REDACTED].

Conclusion and Request

38. Witnesses P-0912 and P-0892 have expressed objectively justifiable concerns for their safety and that of their family members that warrant the requested protective/special measures. These witnesses also have specific needs that warrant granting certain additional in-court special measures. For all of the foregoing reasons, the Prosecution asks that the Chamber grant its Request.



Fatou Bensouda
Prosecutor

Dated this 15th day of April 2016
At The Hague, The Netherlands