

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **29 April 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 and B**

**Public redacted version of "Prosecution's Application for Defence Disclosure of
Information related to Witness P-0800's Security", 18 March 2016,
ICC-01/04-02/06-1219-Conf**

Source: 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 requests that Trial Chamber VI (“Chamber”) order the Defence to provide relevant information to the Prosecution and to the Chamber regarding the Defence assertion that [REDACTED].¹ In particular, the Prosecution seeks information regarding: (a) the [REDACTED]; and (b) any information indicating the basis of their knowledge (“Requested Information”).
2. The Prosecution seeks the Requested Information, pursuant to articles 54(1)(a), 54(3)(f), 64(6)(e) and 68(1) of the Rome Statute (“Statute”) and rule 79(4) of the Rules of Procedure and Evidence (“Rules”), in order to fulfill its obligations: (a) to properly assess, and take any necessary measures, to ensure the protection of the safety, physical and psychological well-being, dignity and privacy of P-0800; and (b) to safeguard the integrity of the proceedings and prosecution of crimes in the case against Bosco Ntaganda by taking measures to avoid interference with its witnesses. Any interference with P-0800, even post-testimony, undermines the integrity of the proceedings. For instance, such interference with a Prosecution witness could deter upcoming Prosecution witnesses from cooperating, or from being as forthcoming when they testify.
3. The potential risks are not hypothetical. There is a real risk of potential retaliation from supporters of the Accused [REDACTED].
4. The Defence has not responded to date to the repeated requests made by the Prosecution to provide the Requested Information.
5. Disclosure of such limited information to the Prosecution will not prejudice the Accused. Whilst the Requested Information sought will reveal identities of some individuals contacted by the Defence in the course of its investigations, no

¹ ICC-01/04-02/06-T-69-CONF-ENG, p.10, l.21 – p.12, l.22.

additional information is sought that might reveal details of the Defence strategy for the case. In any event, the Prosecution submits that balancing the interests of the Accused against the need to protect P-0800 militates in favour of disclosure of the Requested Information.

6. Alternatively, and without detracting from the Prosecution's principle argument that it has an obligation to protect its witnesses and should get access to the Requested Information, the Requested Information should be conveyed at minimum to the Chamber and Victims and Witnesses Unit ("VWU"), for assessment and action, as necessary, given their respective obligations to protect victims and witnesses appearing before the Court.

Confidentiality

7. This filing is classified as "Confidential" pursuant to regulation 23bis(1) of the Regulations of the Court, as it provides information about P-0800's security [REDACTED]. The Prosecution will file a public redacted version of this filing.

Background

8. Prosecution Witness P-0800 testified from 16 to 17 February 2016. During the course of his cross-examination by the Defence, it was put to the witness that "[REDACTED]".² In particular, Lead Counsel observed that "*according to the information I have here, [REDACTED]*".³ Lead Counsel further explained that: "[REDACTED]".⁴
9. On 19 February 2016, the Prosecution requested by email disclosure of the information that the Defence stated [REDACTED], in order to assess the impact

² ICC-01/04-02/06-T-69-CONF-ENG, p.10, ll.21-22.

³ ICC-01/04-02/06-T-69-CONF-ENG, p.11, ll.21-23.

⁴ ICC-01/04-02/06-T-69-CONF-ENG, p.12, ll.16-18.

on the security of Prosecution Witness P-0800. No response was received to this request.⁵

10. On 25 February 2016, the Prosecution again repeated its request for the information. No response to date has been received to the request.⁶

Prosecution's Submissions

11. The Prosecution requests that the Chamber order the Defence to disclose the Requested Information, for the following reasons.

(a) Statutory obligation to protect P-0800's physical and psychological welfare

12. First, the Prosecution is obliged to take appropriate measures to ensure the protection of P-0800's physical and psychological well-being, as well as his dignity and privacy. Accordingly, the Prosecution must investigate and assess any information that suggests [REDACTED]. At a minimum, the Prosecution requires the Requested Information in order to concretely assess the nature and scope of the risks posed to P-0800 and his family; and to take any measures, if any, needed to ensure the protection of him and his family.

13. In particular, article 68(1) requires that the Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of P-0800. Article 68(1) stipulates that "*the Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes*".⁷ Similarly, article 54(3)(f) refers to the Prosecution's powers to "take necessary measures, or request that necessary measures be taken, to ensure...the protection of any person".

⁵ Email dated 19 February 2016 at 17h57. Attached as Confidential Annex A.

⁶ Email dated 25 February 2016 at 15h31. Attached as Confidential Annex B.

⁷ Own emphasis added.

14. Chambers of this Court,⁸ including the Appeals Chamber, have recognised the statutory obligation of the Prosecution to protect victims and witnesses, including under articles 54(1)(b), 54(3)(f) and 68(1) of the Statute. The Appeals Chamber stated that the Prosecution is “*undoubtedly [...] responsible under the Statute to ensure that appropriate measures are taken to protect the safety of victims and witnesses*”.⁹ The Appeals Chamber acknowledged that whilst the VWU is responsible for specific aspects of witness protection, the Prosecution has a general protection mandate under articles 54(3)(f) and 68(1) of the Statute, which requires the Prosecution to take general measures to deal with issues that might be expected to arise to prevent harm to witnesses. Examples given included “*to enhance the personal security situation of a witness or the physical security of their residence*”.¹⁰ The Appeals Chamber further acknowledged that “*the Prosecutor is close to the relevant witnesses on the ground and in a position to see where a need for protection may arise*.”¹¹

15. Moreover, the Chamber is required, and empowered, to take measures to ensure P-0800’s protection, pursuant to articles 68(1) and 64(6)(e).

16. The Prosecution observes that the Requested Information does not constitute evidence. Instead, it amounts to security-related information of relevance to Witness P-0800. However, the Chamber is empowered to order the Defence to

⁸ See e.g. ICC-01/09-01/11-169, paras.14-15 : “[T]he Prosecutor is an organ of the Court entrusted, by virtue of articles 54(1)(b) and (e) and 68(1) of the Statute, with the obligation to protect, *inter alia*, victims.[...] the autonomous duty of the Prosecutor to protect victims”.

⁹ ICC-01/04-01/07-776, para.80. See also para.65. Although the Appeals Chamber was considering the issue of scope of the Prosecution’s powers to take protective measures; the Appeals Chamber made it clear that this was strictly in the context of the practice of preventive relocation. The Appeals Chamber stated that: “[i]t is important to stress at the outset that the question on appeal relates to the practice of ‘preventive relocation’ only and is not a general consideration of protective measures that can be taken in relation to witnesses”.

¹⁰ ICC-01/04-01/07-776, para.98.

¹¹ ICC-01/04-01/07-776, para.101.

disclose evidence, pursuant to rule 79(4), even when it does not relate to an alibi or grounds excluding criminal responsibility.¹²

(b) Statutory obligation to safeguard the integrity of the proceedings

17. Second, the Prosecution is required to take measures to safeguard the integrity of the proceedings and to ensure the effective prosecution of crimes within the Court's jurisdiction, pursuant to article 54(1)(b).

18. Any interference with Prosecution witnesses, including after they testify, can impact on the integrity of the proceedings. For instance, witness interference can dissuade subsequent Prosecution witnesses from cooperating or can scare them into being less forthcoming in their testimony.¹³

19. Accordingly, the Defence's failure to provide the information sought prevents the Prosecution from taking, or seeking, appropriate measures to protect the integrity of the proceedings.

(c) Potential risks posed to P-0800 and his family

20. There is a potential risk of retaliation against P-0800 or his family members, if it becomes known to supporters of the Accused that he has testified against him. Accordingly, it is essential that the relevant information is disclosed in order to assess the specific risks posed to P-0800 and his family; and, whether any measures can be taken to ensure their protection.

¹² See e.g. ICC-01/04-01/06-1235-Corr-Anx1, para.35. Trial Chamber I found that: "Rule 79(4) reveals the Chamber has the power to order advance disclosure of any evidence out with those defences that the accused intends to rely on".

¹³ See e.g. *Prosecutor v Nshogoza*, ICTR-07-91-T, Judgment, 7 July 2009, paras.218-219. The Chamber recognised the importance of maintaining the integrity of the administration of justice in trials involving serious criminal offences (in the context of contempt of proceedings). The Chamber referred to the substantial reliance upon oral evidence, which "entails appropriate measures for the protection of the integrity of witnesses and their testimony". The Trial Chamber acknowledged that breaching of protective measures "not only defies the authority of the Tribunal but may also have the effect of dissuading witnesses from testifying before it."

21. [REDACTED].

22. [REDACTED]¹⁴ [REDACTED]¹⁵ [REDACTED].¹⁶ [REDACTED].¹⁷ [REDACTED].

23. [REDACTED].¹⁸

24. The First Registry Report on the security situation in the Democratic Republic of the Congo ("DRC") indicates that the "influence of Bosco Ntaganda [is] still perceptible" and mentions victims' "fear of retaliation from supporters of the Accused."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. 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.²⁰

25. Moreover, the security situation in the region, in general, remains unstable. The Ituri Province in the DRC remains in a precarious state of post-conflict security with armed groups still active.²¹

26. In its decision concerning Witness P-0800's protective measures, the Chamber recalled "reported instances where other witnesses, including crime based

¹⁴ See [REDACTED].

¹⁵ See [REDACTED].

¹⁶ See [REDACTED].

¹⁷ See [REDACTED].

¹⁸ 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.

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

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

²¹ 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.

witnesses, were allegedly threatened as a result of their involvement with the Court.”²²

(d) No prejudice to the Accused

27. Disclosure of the limited information requested will not prejudice the Accused. In particular, disclosure will not reveal any detailed information regarding the Defence strategy for the case. All that will be revealed is the identity and background of individuals who have been contacted in the course of Defence investigations. This information will not reveal who will be called to testify as Defence witnesses. In any event, the Prosecution submits that balancing any interests of the Accused, against the obligation to protect P-0800, necessitates disclosure to the Prosecution of the Requested Information.

28. Alternatively, and without detracting from the Prosecution’s principle argument that it must get access to the Requested Information because it has a stand-alone obligation to protect its witnesses and is well placed to assess that information being closer to its witnesses, the Requested Information should be disclosed at minimum to the Chamber and VWU. Both the Chamber and VWU have respective obligations to protect victims and witnesses appearing before the Court. At the very least, the Requested Information needs to be appropriately assessed and actioned.

²² ICC-01/04-02/06-1160-Conf-Exp, para. 7.

Conclusion and Request

29. For the foregoing reasons, the Prosecution requests that the Chamber order the Defence to disclose the Requested Information.



Fatou Bensouda
Prosecutor

Dated this 29th day of April 2016

At The Hague, The Netherlands