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**International
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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***

Confidential

**Prosecution's response to Mr Ntaganda's request for leave to appeal the oral
decision on the Prosecution's eighteenth request for protective measures**

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Ms Fatou Bensouda, Prosecutor
Mr James Stewart
Ms Nicole Samson

Counsel for the Defence

Mr Stéphane Bourgon
Mr Christopher Gosnell

Legal Representatives of Victims

Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

The Office of Public Counsel for Victims

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations Other
Section**

Introduction

1. The Trial Chamber should not certify for appeal its decision granting protective measures to witness P-0850.¹ Mere disagreements do not meet the statutory criteria for appellate intervention. This applies *a fortiori* when the Defence arguments do not properly relate to the substance of the challenged Decision. Indeed, nothing in the Decision suggests that it even gives rise to the issue for which appeal is sought.

Confidentiality

2. Consistent with regulation 23(2) of the Regulations of the Court, this response is filed confidentially to reflect the classification of the Motion.²

Submissions

3. The Motion fails to identify an issue which genuinely arises from the Decision.³ Nor in any event does it show that the proposed issue significantly affects the fair and expeditious conduct of the proceedings,⁴ and that the immediate intervention of the Appeals Chamber may materially advance the proceedings.⁵ Failing all the threshold requirements of article 82(1)(d), the Motion must thus be denied.

I. The issue proposed for certification does not arise from the Decision

4. The Motion proposes one issue for certification:

Whether the Impugned Decision rests on an erroneous legal interpretation of the governing criteria and/or applicable test recognized in the jurisprudence of the Court for the granting of in-court protective measures to witnesses, *i.e.* the

¹ *Contra* ICC-01/04-02/06-1437-Conf ("Motion"), paras. 1, 27. *See also* ICC-01/04-02/06-T-110-Conf-ENG, pp. 32 (ln. 10) to 33 (ln. 14) ("Decision").

² *See* Motion, para. 26.

³ *Contra* Motion, paras. 1, 8-15.

⁴ *Contra* Motion, paras. 2, 16-22.

⁵ *Contra* Motion, paras. 2, 23-25.

existence of an objectively justifiable security risk specifically affecting a witness.⁶

5. The Defence claim that the Issue arises from the Decision is based solely on the supposed contradiction between the Chamber's practice in this case and its prior confirmation that it will undertake "a particularised analysis of the risk with respect to each witness".⁷ Yet this contradiction does not exist.

6. In particular, there is no "gap" between the applicable law and "the Chamber's application" of that law.⁸ The Chamber's finding of an objectively justifiable risk to P-0850 did not rest only "on general considerations that do not specifically relate to the witness's particular security situation."⁹ Accordingly, no further guidance from the Appeals Chamber is required.¹⁰

7. To support its claim that the Chamber's analysis was generalised and non-specific, the Defence elaborates upon its previous unsuccessful argument that "no distinctive factors specifically related to Witness P-0850 [...] have been put forth by the Prosecution",¹¹ addressing in particular:

- the timing of the Registry's assessments of the security situation in Ituri, and its submission that "the Prosecution has not adduced any evidence that the Registry's assessment [...] is still accurate";¹²

⁶ Motion, para. 1 ("Issue").

⁷ See Motion, paras. 9-10, 14 (referring to ICC-01/04-02/06-824-Red ("First Protective Measures Decision"), including para. 6).

⁸ *Contra* Motion, para. 14.

⁹ *Contra* Motion, para. 10.

¹⁰ *Contra* Motion, paras. 8, 14.

¹¹ See ICC-01/04-02/06-1388-Conf, para. 4.

¹² Motion, para. 11.

- its submission that “the Prosecution has not adduced any evidence that Mr Ntaganda’s alleged influence is still ‘perceptible’ today [...] in the area where Witness P-0850 resides”;¹³ and
- its submission that “there is no apparent relationship between [...] reported instances” of threats to witnesses “and Witness P-0850’s situation.”¹⁴

8. However, these submissions on the merits—which tend indeed to highlight the Defence’s disagreement with the Decision, rather than to assist in identifying any appealable issue—address just two of the four factors upon which the Chamber relied.¹⁵ They make no reference to the Chamber’s express consideration of “the witness’s professional and family situation and the fact that his involvement in the proceedings is not known to members of his extended family and to wider community”,¹⁶ nor do they address “the minimal degree of protection currently provided” to the witness.¹⁷ Such factors are manifestly specific and personal.

9. Moreover, and perhaps even more significant, the Defence also overlooks the Chamber’s emphasis that it “had particular regard to the VWU’s assessment in respect of the witness security situation”,¹⁸ which had been provided to the Chamber after the Parties’ written submissions on 27 June 2016 and which “recommend[ed] granting the same protective measures sought in the request.”¹⁹ Reference to such an assessment is not only further evidence that the Chamber *did* conduct the

¹³ Motion, para. 12.

¹⁴ Motion, para. 13.

¹⁵ See Decision, pp. 32 (Ins. 19-21: “In ruling on the request, the Chamber has considered: first, the place of residence of the witness and his family, which is in a region where the security situation remains unstable, in which the accused allegedly exercises influence”), 33 (Ins.1-3: “The Chamber has not been made aware of any direct threat to the witness, but it notes the reported instances when other witnesses, including crime-based witnesses, were allegedly threatened as a result of their involvement with the Court”).

¹⁶ Decision, p. 32 (Ins. 21-23).

¹⁷ Decision, p. 32 (Ins. 23-24). See *further* First Protective Measures Decision, paras. 13, 15 (noting that revelation of a witness’ identity may require more extensive protections out of court).

¹⁸ Decision, p. 32 (Ins. 24-25).

¹⁹ Decision, p. 32 (Ins. 15-16).

“particularised analysis of the risk”, but was also entirely consistent with its previous practice.²⁰

10. In this context, it is also appropriate to recall the necessarily coded language for references to confidential matters in a *public* oral decision, rendered in open session. In this context, the Chamber cannot be expected to address security-related details in full, especially when the precise contours of the VWU’s assessment may not even be known to the Parties, let alone the public.²¹ Balancing the need for publicity of the proceedings with the need to maintain confidentiality of security related information, as in this case, does not mean that the Chamber failed to conduct the particularised analysis required.

11. Finally, the subsequent content of P-0850’s own testimony does not—and, indeed, cannot—show that the Chamber’s *prior* Decision was not reasoned with sufficient particularity. To the contrary, the Defence relies on P-0850’s testimony only to show “that he is not in danger *per se*”.²² It thus enters into the underlying merits of the Decision, and not the question whether any inconsistency between the law and the Chamber’s actual reasoning reveals the appealable issue claimed. The Defence itself agrees that this is impermissible.²³

12. In any event, the Defence also misapprehends the significance of P-0850’s testimony, which states that he requested protective measures “to prevent what

²⁰ See *e.g.* First Protective Measures Decision, paras. 13 (noting that “the VWU [...] supports the Request in full”), 16 (“in light of these factors and of the VWU’s assessment [...] the Chamber is satisfied that an objectively justifiable risk exists”).

²¹ See *e.g.* First Protective Measures Decision, para. 8 (noting that, “ordinarily, the VWU does not have the opportunity to provide its observations until close to the date that each witness will testify” and that “a redacted version of the VWU’s observations will only be notified to the parties ‘if appropriate’”). See also ICC-02/11-01/15-598, paras. 6-7.

²² Motion, para. 15.

²³ Motion, para. 7 (“underscor[ing] that a request for leave to appeal is not concerned with whether the impugned decision is legally founded or not, but should rather be aimed at addressing the specific criteria set out in Article 82(1)(d)”).

could happen to me afterwards", even though he had not "received threats".²⁴ Yet, as this Chamber has previously held, "evidence of prior direct threats to a witness, or his/her family, are not a prerequisite to determining that a witness faces an objectively justifiable risk, thus warranting [...] protective measures."²⁵

II. The requirements of article 82(1)(d) are not met

13. Notwithstanding its failure to show that the Issue genuinely arises from the Decision, the Motion should in any event be dismissed because it fails to show that the criteria of article 82(1)(d) are satisfied.

14. The Prosecution notes that the Motion does not even attempt to argue that the Issue has any impact on the outcome of the trial. Rather, it is only contended that the Issue significantly affects the fair and expeditious conduct of the proceedings and requires immediate resolution by the Appeals Chamber. This is incorrect.

II. 1. The Issue does not significantly affect the fair and expeditious conduct of the proceedings

15. The Issue does not significantly affect the fair and expeditious conduct of the proceedings. Indeed, many of the arguments raised in the Motion are no more than speculative, and do not relate to the Issue as it has been presented.

16. Thus, the fact that 23 of 28 witnesses have so far been determined to require protective measures,²⁶ and the Defence fear of "a real possibility" that this might apply to "all Prosecution crime-base witnesses",²⁷ are irrelevant to the Issue—which is confined to whether "the Impugned Decision" relating to P-0850 departed from the law to which the Chamber had previously correctly directed itself. Nothing in the Motion challenges the previous 22 determinations that certain witnesses require

²⁴ Motion, para. 15 (quoting T-113-Conf-Eng, pp. 10 (l. 1) to 11 (l. 8)).

²⁵ First Protective Measures Decision, para. 14 (citing ICC-01/09-01/11-902-Red2, para. 14).

²⁶ Motion, para. 16.

²⁷ Motion, para. 17.

protective measures, nor would the Motion be timely if it did. Indeed, if anything, the Motion tends to suggest that the Defence views the First Protective Measures Decision as setting out the relevant law correctly.²⁸

17. The logic of the Motion is incorrect, in implying that the Issue “results in the trial against Mr Ntaganda being virtually conducted out of public scrutiny”.²⁹ To the contrary, the protective measures ordered—use of a pseudonym, and voice and face distortion—do not themselves substantially interfere with the ability of the public to hear the evidence given.³⁰ As the Chamber has previously recalled, the extent to which it is necessary additionally to hear certain evidence in private or closed session is a *separate* determination, which is itself conducted on a case-by-case basis.³¹ These separate determinations have not been challenged by the Issue—either with respect to P-0850 or any other witness—and are thus irrelevant to the present application.

18. The implication that any decision granting protective measures *ipso facto* significantly affects the fair conduct of the proceedings is also questionable.³² The undeveloped assertion that “making a witness’s identity known to the public [...] increases the witness’s commitment to tell the truth as well as his/her feeling of public accountability” is, at best, speculative.³³ Indeed, as the *Gbagbo and Blé Goudé* Trial Chamber recently observed:

[T]he Chamber sees no merit in the argument of the Defence that the broadcasting of witness testimony makes witnesses more responsible and

²⁸ See Motion, paras. 1, 7.

²⁹ Motion, para. 18.

³⁰ See First Protective Measures Decision, para. 17.

³¹ First Protective Measures Decision, para. 17 (“The Chamber will determine on a case-by-case basis, at the relevant time, whether private or closed sessions or redactions to public records are necessary in order to protect the identity of the Witness from being disclosed to the public. The Chamber will ensure that these protective measures, if ordered, are necessary to ensure adequate protection and do not cause undue prejudice to the Defence or undermine the fairness of the trial. The Chamber will again consider, in this connection, the arguments of the Defence regarding the publicity of the proceeding”).

³² *Contra* Motion, paras. 19-21.

³³ *Contra* Motion, para. 19.

more likely to tell the truth, thereby contributing to the fairness of the proceedings. There is no basis for this argument in the legal text[s] of the Court. The Chamber is concerned by the mere suggestion that these proceedings should profit from the exertion of pressure of any kind of witnesses that appear before the Chamber. Witnesses must be able to speak free, free of any pressure.³⁴

19. Likewise, the Motion fails to show that the Issue significantly affects the expeditious conduct of proceedings. The Motion refers only to the supposed "significant time" lost by "moving back and forth between public and private sessions" and reviewing transcripts "with a view to submitting proposals for lesser redacted versions".³⁵ Both arguments thus seem to relate to the Chamber's practice in ordering the use of private sessions,³⁶ rather than the use of pseudonyms and face and voice distortion ordered in the Decision and challenged in the Issue. In any event, it is doubtful that the expeditious conduct of the proceedings can be said to be "significantly" affected in this way. It is axiomatic that the employment even of time-consuming procedures, in the interest of fairness, do not necessarily make a trial any less expeditious.

II. 2. Immediate resolution of the Issue by the Appeals Chamber will not materially advance the proceedings

20. The Motion fails to show that immediate resolution of the Issue may materially advance the proceedings. Indeed, the Defence acknowledges that P-0850 has already completed his testimony,³⁷ and so the question whether or not he should testify under the protective measures ordered is moot.

21. Moreover, no argument is made at all justifying appellate intervention for the Issue, defined in the narrow terms that the Defence has properly sought to frame it.

³⁴ ICC-02/11-01/15-T-57, p. 47 (lns. 1-9). Although this transcript (from 1 July 2016) has not yet been published in TRIM, these remarks were made by the Presiding Judge when delivering an oral decision of the Trial Chamber in open session.

³⁵ Motion, para. 22.

³⁶ See above para. 17.

³⁷ Motion, para. 3.

Rather, it is only said that “[t]he sufficiency of the evidence put forward by the Prosecution in support of its requests for in-court protective measures is a matter that permeates the present proceedings.”³⁸ Yet the sufficiency of the evidence is not the subject of the Issue, which purports to challenge the consistency of the legal reasoning in principle and practice.³⁹ In any event, as previously explained, the Decision did not grant protective measures “on the sole basis of considerations that may apply to any given witness”, but on the basis of a particularised assessment.⁴⁰

22. Nor does the practical remedy apparently sought by the Defence depend upon the intervention of the Appeals Chamber. Notwithstanding the adequacy of the Chamber’s reasoning in ordering protective measures and/or the use of private or closed sessions, the Defence may directly seek the reclassification of transcripts if it can make the necessary showing.⁴¹

Conclusion

23. For the reasons above, the Trial Chamber should dismiss the Motion.



Fatou Bensouda
Prosecutor

Dated this 7th day of July 2016

At The Hague, The Netherlands

³⁸ Motion, para. 23. *See also* para. 24 (referring to the Prosecution’s practice in arguing requests for protective measures).

³⁹ *See above* para. 4.

⁴⁰ *See above* paras. 8-9.

⁴¹ *See* Motion, para. 3.