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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 request for in-court protective measures
for Witnesses P-0245 and P-0301", 9 September 2016,
ICC-01/04-02/06-1500-Conf-Exp**

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 requests in-court protective measures for Prosecution Witnesses P-0245 and P-0301 in the form of facial 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 rule 87 of the Rules of Procedure and Evidence ("Rules"). These witnesses will testify in the sixth evidence block, which has commenced on 5 September 2016.
2. Granting the requested protective measures will ensure that Witnesses P-0245 and P-0301 are able to give evidence without fear for their personal security or that of their family members. It will also mitigate the need for more intrusive security-related measures post-testimony.
3. The measures sought appropriately balance the Accused's right to a public hearing under article 67(1) of the Statute, against the need to protect witnesses appearing before the Court, pursuant to articles 64(2), 68(1) and 68(2) of the Statute. The identity of these witnesses has been provided to the Defence, and the measures sought do not prejudice the rights of the Accused. The witnesses' identity will be protected from the public only.

Confidentiality

4. This request and its annex are 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 refers to confidential security-related witness information. The Prosecution will file confidential and public redacted versions of this filing.

Prosecution's Submissions

5. The Prosecution requests that Trial Chamber VI ("Chamber") grant facial distortion, voice distortion and the use of a pseudonym during the testimony of Witness P-0245, a Lendu [REDACTED] who will testify about attacks on the Lendu community and the non-Iturians in Bunia and other locations by the Hema and the UPC, and Witness P-0301, a Lendu civilian who provides evidence about crimes committed by the UPC in Lipri, Kobu and other villages of the Walendu-Djatsi *collectivité* in February 2003. The requested protective measures are warranted in view of the objectively justifiable risk to these witnesses' security and well-being.

Witnesses P-0245 and P-0301 both reside within the Accused's geographic area of influence

6. Witnesses P-0245 and P-0301 both live within the geographic area of influence of the Accused and in an area where former UPC/FPLC members and associates loyal to the Accused are present. The requested protective measures are necessary to avoid revealing these witnesses' identity, bearing in mind the potential risk of retaliation from supporters of the Accused as elaborated upon further below.

(a) Witness P-0245

7. Witness P-0245, a [REDACTED]-year old Lendu [REDACTED], was a [REDACTED] during the conflict from the late 1990s to about 2006. He was a member of [REDACTED] as well as [REDACTED]. He also participated in the [REDACTED]. Witness P-0245 is expected to testify about UPC/FPLC attacks on the Lendu community as well as the non-Iturians and about UPC/FPLC attacks on Bambu, Kobu, Nyangarayi, Mongbwalu and Kilo.

8. Witness P-0245 resides in [REDACTED] with his wife, his [REDACTED] children, a nephew and one other dependent. [REDACTED].¹ [REDACTED].² Witness P-0245 expressed the fear that if he is recognised during his testimony before the Court he would face intimidation and stigmatisation. Witness P-0245 is a [REDACTED], in view of the [REDACTED], and is therefore easily identifiable.

(b) Witness P-0301

9. Witness P-0301 is a Lendu civilian who fled Bunia to Kobu when the UPC attacked Bunia in August 2002. When the UPC carried out the Second Attack in February 2003, he fled Kobu to Gutsi. He is expected to testify about the UPC/FPLC's attack on Kobu in February 2003, including the capture and murder of civilians by the UPC/FPLC, and about seeing some fifty corpses in a banana field following the departure of the UPC/FPLC troops from Kobu.
10. Witness P-0301 resides in [REDACTED], Djugu Territory, Democratic Republic of Congo ("DRC"), with his wife, his son and four of his nephews. [REDACTED] is in a remote area of the Ituri Province and an area in which supporters of the Accused continue to have influence. The witness requested that his identity not be revealed to the public out of fear of retaliation that could affect him and his family. The witness is [REDACTED], as he [REDACTED], and is therefore easily identifiable.

The Ituri Province remains unstable

11. Armed groups are still active in post-conflict Ituri; the ethnic groups who were engaged in this conflict now reside in a fragile co-existence.³ [REDACTED]⁴ The

¹ See [REDACTED].

² See [REDACTED].

³ See generally, ICC-01/04-02/06-585-Conf-Anx.

⁴ [REDACTED].

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.⁵

12. Moreover, the security situation in the region, in general, remains unstable. [REDACTED].⁶

13. As previously noted by this Chamber⁷ and Trial Chamber V(A)⁸ 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 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.”⁹

14. Witnesses P-0245 and P-0301 have not been the subject of any direct or specific threats; however, 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 P-0805,¹⁰ P-0859,¹¹ P-0800,¹² P-0892,¹³ P-0894,¹⁴ P-0877¹⁵ and P-0850.¹⁶ In previous decisions concerning protective

⁵ ICC-01/04-02/06-785-Red, paras. 50-57.

⁶ [REDACTED].

⁷ ICC-01/04-02/06-824-Red, para.14; ICC-01/04-02/06-1004-Conf-Red, para.5.

⁸ ICC-01/09-01/11-902-Red2, para.14.

⁹ *Ibid.*

¹⁰ ICC-01/04-02/06-824-Conf.

¹¹ ICC-01/04-02/06-1004-Conf-Red.

¹² ICC-01/04-02/06-1160-Conf-Red.

¹³ ICC-01/04-02/06-1277-Conf.

¹⁴ ICC-01/04-02/06-T-101-CONF-ENG, p.61, l.17 to p.63, l.17.

¹⁵ ICC-01/04-02/06-T-106-CONF-ENG, p.89, l.4 to p.90, l.11.

¹⁶ ICC-01/04-02/06-T-110-CONF-ENG, p.32, l.10 to p.33, l.14.

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

[REDACTED]

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

16. Implementing the requested protective measures during the testimony of Witnesses P-0245 and P-0301 will likely obviate the need for additional and more intrusive protective measures, [REDACTED], to be applied upon the completion of his testimony.

The requested protective measures do not violate the Accused’s right to a public hearing

17. The protective 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.

18. The Chamber has previously found that protective measures of voice and face distortion together with the use of a pseudonym do not unfairly prejudice the rights of the Accused as he has been provided with the name and identifying

¹⁷ See Witness P-0800: ICC-01/04-02/06-1160-Conf-Red, para. 7; Witness P-0892: ICC-01/04-02/06-1277-Conf, para. 6.

¹⁸ [REDACTED].

information of this witness; the two witnesses will remain anonymous to the public only.¹⁹

19. Article 68(2) of the Statute explicitly provides that granting measures to take into account a witness's 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.²⁰ Moreover, if the Chamber grants the witnesses' face and voice distortion in addition to the use of a pseudonym, the hearing will still be in public as any non-identifying testimony will be given in open session and publicly available.
20. The Prosecution submits that the use of a pseudonym in concert with facial and voice distortion is necessary to adequately protect Witnesses P-0245 and P-0301 and ensure their safety, security, psychological well-being, dignity and privacy during and after their testimony. The Chamber has found reasonable grounds to believe that the Accused and his associates have interfered with Prosecution witnesses, particularly insiders prepared to provide unique and valuable testimony.²¹
21. Granting the use of a pseudonym alone would not suffice to protect Witnesses P-0245 and P-0301 as unprotected images of witnesses are easily accessible to the public on a worldwide scale, thereby maximising the risk of identification. The dissemination of the video image or voice of Witnesses P-0245 and P-0301 would increase the risk that they could be identified. This necessitates the use of a pseudonym in combination with face and voice distortion.

¹⁹ See Witness P-0805: ICC-01/04-02/06-824-Conf, para. 16; Witness P-0901: ICC-01/04-02/06-828-Conf, para. 10; Witness P-0768: ICC-01/04-02/06-905-Conf, para. 8; Witness P-0859: ICC-01/04-02/06-1004-Conf-Red, para. 6; Witness P-0800: ICC-01/04-02/06-1160-Conf-Red, para. 8.

²⁰ 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.

²¹ ICC-01/04-02/06-785-Red, para. 55.

22. The requested protective measures will ensure that Witnesses P-0245 and P-0301 are able to give evidence without fear for their personal safety and security or that of their family members, and in a manner that protects their psychological well-being, dignity and privacy as provided for under article 68(1) of the Statute. It will also mitigate the need for more intrusive security-related measures post-testimony.
23. The Prosecution notes that during prior familiarisation and preparation sessions with the witnesses who have testified, the uncertainty around whether their identity would be made public during their testimony appeared to be a source of anxiety and concern. On this basis, the Prosecution respectfully requests that, if possible, the Chamber issue its decision or decisions on the request for in-court protective measures for Prosecution Witnesses P-0245 and P-0301 prior to, or during, their witness preparation and familiarisation to permit the Prosecution to advise the witnesses of the status of their request in the course of this process.²² The Prosecution anticipates that this process will take place between 26 and 27 September 2016 for Witness P-0245 and between 5 and 6 October 2016 for Witness P-0301.

²² In its decision on the conduct of proceedings, the Chamber stated that, where a requesting party considers there are reasons for the Chamber to rule on the request for in-court protective measures at an earlier moment (than “just prior to the commencement of the testimony of the witness concerned”), it shall provide these reasons and specify the date by which it wishes the Chamber to rule on the matter (ICC-01/04-02/06-619, para. 50 and footnote 30).

Request

24. The Prosecution requests that the Chamber grant in-court protective measures for Prosecution Witnesses P-0245 and P-0301 in the form of facial distortion, voice distortion and the use of a pseudonym during their testimony.



Fatou Bensouda
Prosecutor

Dated this 19th day of September 2016
At The Hague, The Netherlands