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No.: ICC-01/04-02/06
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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 "Corrected version of 'Prosecution's request for in-court protective measures for Prosecution witnesses testifying in the 6th evidentiary block'", 18 August 2016, ICC-01/04-02/06-1475-Conf-Exp-Corr

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Introduction

1. The Prosecution requests in-court protective measures for Prosecution Witnesses P-0100, P-0127, P-0668, P-0108, P-0365 and P-0105 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 is scheduled to commence on 5 September 2016.
2. Granting the requested protective measures will ensure that Witnesses P-0100, P-0127, P-0668, P-0108, P-0365 and P-0105 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.
4. The Prosecution further anticipates the need for special measures pursuant to rule 88 of the Rules for Witness P-0108 and, in this regard, defers to the Victims and Witnesses Unit ("VWU")'s pre-testimony assessment.

Confidentiality

5. 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

6. The Prosecution requests that Trial Chamber VI ("Chamber") grant facial distortion, voice distortion and the use of a pseudonym during the testimony of: (1) Witnesses P-0100, P-0127, P-0108 and P-0105, four crime-base witnesses who provide important evidence about crimes committed by the UPC in Lipri, Kobu and other villages of the Walendu-Djatsi *collectivité* in February 2003; (2) Witness P-0668, a [REDACTED] who provides evidence on the background of the UPC/FPLC as well as about the Accused's authority within the UPC/FPLC; and (3) Witness P-0365, who provides important evidence about the rape of civilians and the rape and sexual slavery of child soldiers by the UPC/FPLC. The requested protective measures are warranted in view of the objectively justifiable risk to these witnesses' security and well-being.

7. The Prosecution notes, with respect to the eight remaining witnesses scheduled to appear during the sixth evidentiary block, that (1) the Chamber has granted in-court protective measures for Witness P-0912,¹ that (2) the Chamber has also held that, in accordance with regulation 42(1) of the Regulations of the Court, the in-court protective measures ordered by Trial Chamber I in respect of Witness P-0014 shall remain in place for the purposes of the *Ntaganda* case,² and that (3) Witnesses P-0420, P-0945, P-0934, P-0937, P-0935, P-0939 do not require in-court protective measures.

¹ See ICC-01/04-02/06-1277-Conf.

² See ICC-01/04-02/06-774-Conf, paras. 3-5.

Witnesses P-0100, P-0127, P-0668, P-0108, P-0365 and P-0105 all reside within the Accused's geographic area of influence

8. Witnesses P-0100, P-0127, P-0668, P-0108, P-0365 and P-0105 all 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-0100

9. Witness P-0100 is a Lendu civilian and a crime-base witness who has dual status in these proceedings (a/01721/13). Witness P-0100 was present when the UPC/FPLC carried out its attack on the villages of the Walendu-Djatsi *collectivité*. The UPC/FPLC killed [REDACTED] members of his family in [REDACTED]. He is a witness of the crimes of murder, attacks against civilians, persecution, conscription or enlistment and use of child soldiers, forcible transfer or displacement, and destruction of property by UPC/FPLC forces.
10. Witness P-0100 resides [REDACTED] Djugu Territory, in the Ituri Province, with his wife and [REDACTED] children. Whilst [REDACTED] is a predominantly Lendu village, similar risks arise in [REDACTED] as they do in the rest of Djugu territory, because it is in the general area of influence of the Accused – including the area from Sayo/Mongbwalu to Kilo – where former UPC/FPLC members and associates loyal to the Accused are present.³ The witness has expressed fear for retaliation and stigmatization should his testimony become public.

³ See e.g. ICC-01/04-02/06-1336-Conf-Exp-AnxA; ICC-01/04-02/06-1074-Conf-Exp-AnxA-Red, AnxB-Red, Anx-C-Red.

Witness P-0127

11. Witness P-0127 is also a civilian, [REDACTED], who was a [REDACTED] when the UPC/FPLC carried out its attack on the Walendu-Djatsi *collectivité* in February and March 2003. He is expected to testify about the UPC/FPLC's attack on the civilian population of Lipri, Tsili and villages beyond, including Katho, Petsi, Dhekpa, Sangi, Buli and Thali. He will provide important evidence of murders, displacement or forcible transfer of the civilian population, destruction of property, and pillaging committed during this attack. He will also testify about UPC/FPLC's invitation to a "pacification" meeting in Sangi and about the UPC/FPLC's attack on Sangi, Buli and the surrounding villages.

12. Witness P-0127 resides in [REDACTED] Djugu Territory, a remote area of the Ituri Province and an area in which supporters of the Accused continue to have influence. Witness P-0127 lives there with his partner and [REDACTED] children. P-0127's family has no knowledge of his involvement in these proceedings, nor is his involvement known to the members of his community. The witness indicated that [REDACTED] is situated next to [REDACTED], which is [REDACTED] and that he therefore fears retaliation in case his identity becomes public. He further emphasised the [REDACTED].

(b) Witness P-0668

13. Witness P-0668 is an [REDACTED] civilian who, as the [REDACTED], [REDACTED], including the UPC/FPLC, from 2000 to 2003. She is expected to provide evidence related to the background of the UPC/FPLC as well as to the Accused's authority within the UPC/FPLC.

14. Witness P-0668 resides in [REDACTED], a location within the geographic area of influence of the Accused where former UPC/FPLC members and/or associates

loyal to the Accused have been reported to be present. [REDACTED]⁴
[REDACTED].⁵

15. Witness P-0668 explained to the Prosecution that she fears for her security and that of her family if her cooperation with the ICC becomes public. She reported to the Prosecution that the Accused and the UPC still have active networks, both in [REDACTED] and Ituri, and that their continued presence poses a threat to her safety. Witness P-0668 is [REDACTED].⁶

16. Moreover, because of her [REDACTED].⁷ [REDACTED].⁸ [REDACTED].⁹

17. Later, when she [REDACTED]¹⁰ and [REDACTED]. [REDACTED].

18. Revealing the identity of Witness P-0668 to the public would expose her to further threats and would put her and her family's safety at risk. In-court protective measures are warranted in view of the objectively justifiable risk to this witness's security and well-being.

(c) Witness P-0108

19. Witness P-0108 is a Lendu man who was a member of a group of civilians from [REDACTED] who attended a "pacification" meeting in February 2003 at which he was attacked with a machete [REDACTED].

20. Witness P-0108 and his family reside in [REDACTED], Djugu Territory, Ituri Province, also an area which remains within the influence of former UPC/FPLC

⁴ [REDACTED].

⁵ See [REDACTED].

⁶ Witness P-0668 was elected President of the Special Interim Assembly for Ituri in 2003. In 2004, she was elected as a representative for the district of Ituri at the National Assembly of the Democratic Republic of Congo. She was later appointed District Commissioner of Ituri, a position she occupied until 2008. See DRC-OTP-2082-1407.

⁷ See DRC-OTP-2082-1409, at 1408-1409.

⁸ See ICC-01/04-02/06-603-Conf-Exp, para. 9 and DRC-OTP-2083-0333, paras. 3-7.

⁹ See ICC-01/04-02/06-683-Conf-Exp, para. 11.

¹⁰ See DRC-OTP-2082-1405, at 1417, para. 49 and DRC-OTP-0021-0160, at 0219.

members and associates loyal to the Accused.¹¹ The Prosecution further requests in-court protective measures because this witness is a [REDACTED]-old man who has suffered severe [REDACTED] injuries and has mobility issues. As a result, he is heavily dependent on his family in his daily life. His [REDACTED] and health concerns heighten this witness's vulnerability and the need for protective measures, particularly considering potential retaliation after testimony if his status as a trial witness is publicly exposed.

(d) Witness P-0365

21. Witness P-0365 is [REDACTED]. P-0365 is expected to provide important evidence about the rape of women and sexual slavery perpetrated by armed groups of Ituri, including the UPC, about seeing child soldiers in uniform and being threatened by some of them demanding for money in the roadblocks, and about her [REDACTED].
22. Witness P-0365 resides in [REDACTED] with her husband and [REDACTED] family members, including her [REDACTED] children and her husband's [REDACTED] children. None of her family members are aware of her cooperation with the ICC. [REDACTED].¹² [REDACTED].¹³ The witness's [REDACTED], mean that - should her identity become known - she could face risk against herself, her family, and [REDACTED]. Witness P-0365 expressed fears for her security and requested in-court protective measures, because she [REDACTED]. She indicated that, although she [REDACTED], cooperating with the OTP in the case against the Accused could trigger retaliation from [REDACTED] ([REDACTED]) and stigmatization, which would affect her [REDACTED]. She also noted that the Accused is still supported by many people in [REDACTED].

¹¹ See e.g. ICC-01/04-02/06-1336-Conf-Exp-AnxA; ICC-01/04-02/06-1074-Conf-Exp-AnxA-Red, AnxB-Red, Anx-C-Red.

¹² See [REDACTED].

¹³ See [REDACTED].

(e) Witness P-0105

23. Witness P-0105 is a civilian, [REDACTED], and a crime-base witness who will testify about the attack on the villages in the Walendu-Djatsi *collectivité* in February 2003. He is expected to testify about the UPC/FPLC's attack on Lipri and the surrounding areas and about being present when the Lendu *Notables* received an invitation from UPC/FPLC commander SALUMU MULENDA to a "pacification" meeting in Sangi. P-0105 attended that meeting on 25 February 2003. He witnessed forced displacement, destruction of property and pillaging committed by UPC/FPLC. He saw the corpses of people he knew who were killed in Kobu. He will provide evidence of UPC/FPLC perpetrated murder, rape and sexual slavery.

24. Witness P-0105's family residence is located in [REDACTED], Djugu Territory, a remote area of the Ituri Province and an area in which supporters of the Accused continue to have influence. Witness P-0105 lives there with his partner, [REDACTED] children and [REDACTED] grand-children, most of whom have no knowledge of his involvement in these proceedings, nor is his involvement known to the members of his community. Witness P-0105 fears that if he is recognised during his testimony before the Court, he and his family will suffer from reprisals and stigmatization. He also indicated that he [REDACTED]. As such, in-court protective measures are necessary.

The Ituri Province remains unstable

25. 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.¹⁴ [REDACTED].¹⁵ The Chamber concluded that there were reasonable grounds to believe that the Accused sought to disguise attempts to disclose confidential information or to

¹⁴ See generally, ICC-01/04-02/06-585-Conf-Anx.

¹⁵ [REDACTED].

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.¹⁶

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

27. As previously noted by this Chamber¹⁸ and Trial Chamber V(A)¹⁹ 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.”²⁰

28. Witnesses P-0100, P-0127, P-0108, P-0365 and P-0105 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-0805,²¹ P-0859,²² P-0800,²³ P-0892,²⁴ P-0894,²⁵ P-0877²⁶ and P-0850.²⁷ In previous decisions concerning protective measures, the Chamber recalled “reported instances where

¹⁶ ICC-01/04-02/06-785-Red, paras. 50-57.

¹⁷ [REDACTED].

¹⁸ ICC-01/04-02/06-824-Red, para.14; ICC-01/04-02/06-1004-Conf-Red, para.5.

¹⁹ ICC-01/09-01/11-902-Red2, para.14.

²⁰ *Ibid.*

²¹ ICC-01/04-02/06-824-Conf.

²² ICC-01/04-02/06-1004-Conf-Red.

²³ ICC-01/04-02/06-1160-Conf-Red.

²⁴ ICC-01/04-02/06-1277-Conf.

²⁵ ICC-01/04-02/06-T-101-CONF-ENG, p.61, l.17 to p.63, l.17.

²⁶ ICC-01/04-02/06-T-106-CONF-ENG, p.89, l.4 to p.90, l.11.

²⁷ ICC-01/04-02/06-T-110-CONF-ENG, p.32, l.10 to p.33, l.14.

other witnesses, including crime based witnesses, were allegedly threatened as a result of their involvement with the Court.”²⁸

[REDACTED]

29. Although the safety and security of these witnesses is closely monitored and assessed, [REDACTED].²⁹

30. Implementing the requested protective measures during the testimony of Witnesses P-0100, P-0127, P-0668, P-0108, P-0365 and P-0105 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

31. 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.

32. The Chamber has previously found that protective measures of voice and face distortion together with the use of a pseudonym does not unfairly prejudice the rights of the Accused as he has been provided with the name and identifying information of this witness; the six witnesses will remain anonymous to the public only.³⁰

²⁸ 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.

²⁹ [REDACTED].

³⁰ 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.

33. 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.³¹ 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.
34. The Prosecution submits that the use of a pseudonym in concert with facial and voice distortion is necessary to adequately protect Witnesses P-0100, P-0127, P-0668, P-0108, P-0365 and P-0105 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.³²
35. Granting the use of a pseudonym alone would not suffice to protect Witnesses P-0100, P-0127, P-0668, P-0108, P-0365 and P-0105 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-0100, P-0127, P-0668, P-0108, P-0365 and P-0105 would increase the risk that they could be identified. This necessitates the use of a pseudonym in combination with face and voice distortion.
36. The requested protective measures will ensure that Witnesses P-0100, P-0127, P-0668, P-0108, P-0365 and P-0105 are able to give evidence without fear for their personal safety and security or that of their family members, and in a manner that

³¹ 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.

³² ICC-01/04-02/06-785-Red, para. 55.

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.

37. The Prosecution notes that during past familiarisation and preparation process 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-0100, P-0127, P-0668, P-0108, P-0365 and P-0105 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.³³ The Prosecution anticipates that this process will commence as follows:

(a) Witness P-0100: between 8 and 10 September 2016; (b) Witness P-0127: between 14 and 15 September 2016; (c) Witness P-0668: between 16 and 21 September 2016; (d) Witness P-0108: between 26 and 28 September 2016; (e) Witness P-0365: between 29 and 30 September 2016; and (f) Witness P-0105: during the week of 4 and 5 October 2016.

Special measures for Witness P-0108

38. In light of Witness P-0108's capacity³⁴ and medical condition – the witness has reported suffering from [REDACTED] – the Prosecution further anticipates the need for special measures pursuant to rule 88 of the Rules and article 68(1) of the Statute, in particular regarding the manner of questioning and in the form of

³³ 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).

³⁴ See above, para. 20.

regular breaks, as necessary, during his testimony. The Prosecution defers to the VWU's pre-testimony assessment in this regard.

Request

39. The Prosecution requests that the Chamber grant in-court protective measures for Prosecution Witnesses P-0100, P-0127, P-0105, P-0108, P-0668 and P-0365 in the form of facial distortion, voice distortion and the use of a pseudonym during their testimony. The Prosecution anticipates the need of special measures pursuant to rule 88 of the Rules for Witness P-0108 and, in this regard, defers to the VWU's pre-testimony assessment.



Fatou Bensouda
Prosecutor

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