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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 “Prosecution’s submission pursuant to regulation 35 to vary the time limit to request in-court protective measures for Prosecution Witness P-0792”, 3 October 2016, ICC-01/04-02/06-1555-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. Pursuant to regulation 35(2) of the Regulations of the Court (“Regulations”), the Prosecution seeks a variation of the time limit¹ to submit a request for in-court protective measures in the form of facial and voice distortion and the use of a pseudonym during his testimony for Prosecution Witness P-0792. The Prosecution requests these measures pursuant to articles 64(2) and 68(1) of the Statute and rule 87 of the Rules of Procedure and Evidence.
2. There is good cause for Trial Chamber VI (“Chamber”) to grant a variation of the time limit. Witness P-0792 was very recently added to the Prosecution’s list of witnesses to testify in the sixth evidence block [REDACTED]. Witness P-0792 is currently scheduled to testify towards the end of this block.
3. Should the Chamber grant the variation of the time limit, the in-court protective measures sought will ensure that Witness P-0792 is able to give evidence without fear for his personal security or that of his family members. 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 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. Witness P-0792’s identity has been provided to the Defence, and the measures sought do not prejudice the rights of the Accused. The witness’s identity will be protected from the public only.

¹ ICC-01/04-02/06-619, para 50.

Confidentiality

5. This request classified as “*Confidential, ex parte – only available to the Prosecution and the Victims and Witnesses Unit*” pursuant to regulation 23bis(1) of the Regulations as it refers to confidential security-related witness information. The Prosecution will file confidential and public redacted versions of this filing.

Prosecution’s Submissions

The variation of the time limit is justified

6. Under regulation 35(2) of the Regulations, a Chamber may extend a time limit “if good cause is shown”. The Chamber may extend the time limit after it has elapsed if it can be demonstrated that the extension of the time limit could not be sought prior to its expiration for reasons outside a participant’s control.
7. [REDACTED]. On [REDACTED], the Prosecution was notified [REDACTED]. The Prosecution immediately took steps to contact Witness P-0792, the reserve witness identified for the sixth evidence block, and advise him that he will be called to testify [REDACTED].
8. The Prosecution seeks to vary this time limit due to circumstances outside of its control. Granting this variation now would not “derail the proceedings from their ordained course”² and it is not unduly prejudice the Accused.

The request in-court protective measures are necessary and proportionate

9. Witness P-0792 [REDACTED]. He is a crime-base witness who is expected to provide evidence on, *inter alia*, the forcible transfer and displacement of civilians by the UPC/FPLC during the time period of the charges, [REDACTED] to a

² ICC-01/04-01/07-653, para. 6.

“pacification” meeting at which many attendees were murdered, [REDACTED] corpses in Kobu behind the Hôtel Paradiso. [REDACTED].

10. The requested protective measures are warranted in view of the objectively justifiable risk to this witness’s security and well-being, and that of his family members.

i. Witness P-0792 lives within Accused’s geographic area of influence and in a region that remains unstable

11. Witness P-0792’s [REDACTED] in Ituri. [REDACTED] where former UPC/FPLC members and associates loyal to the Accused are present.³ Witness P-0792 lives with [REDACTED] most of whom have no knowledge of his involvement in these proceedings, nor is his involvement known to the members of his community. He fears that if he is recognised during his testimony before the Court, he and his family will suffer from reprisals and stigmatisation. As such, in-court protective measures are necessary.

12. 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.⁴ [REDACTED]⁵ 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.⁶

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.

⁴ [REDACTED].

⁵ [REDACTED].

⁶ ICC-01/04-02/06-785-Red, paras. 50-57.

13. Moreover, the security situation in the region, in general, remains unstable.
[REDACTED].⁷

14. As previously noted by this Chamber⁸ and Trial Chamber V(A)⁹ 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.”¹⁰

15. Witness P-0792 has 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,¹¹ most recently Witnesses P-0100, P-0105 and P-0127.¹² In previous decisions concerning 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.”¹³

⁷ [REDACTED].

⁸ ICC-01/04-02/06-824-Red, para.14; ICC-01/04-02/06-1004-Conf-Red, para.5.

⁹ ICC-01/09-01/11-902-Red2, para.14.

¹⁰ *Ibid.*

¹¹ See Witness P-0805 (ICC-01/04-02/06-824-Conf); Witness P-0859 (ICC-01/04-02/06-1004-Conf-Red); Witness P-0800 (ICC-01/04-02/06-1160-Conf-Red); Witness P-0892 (ICC-01/04-02/06-1277-Conf); Witness P-0894 (ICC-01/04-02/06-T-101-Conf-ENG, p. 61, ln. 17 to p. 63, ln. 17); Witness P-0877 (ICC-01/04-02/06-T-106-Conf-ENG, p. 89, ln. 4 to p. 90, ln. 11); Witness P-0850 (ICC-01/04-02/06-T-110-Conf-ENG, p. 32, ln. 10 to p. 33, ln. 14)

¹² ICC-01/04-02/06-T-127-Conf-ENG, p. 73, ln. 7 to p. 75, ln. 15.

¹³ 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.

ii. [REDACTED]

16. Although his safety and security is closely monitored and assessed, [REDACTED]. [REDACTED].¹⁴

17. Implementing the requested protective measures during the testimony of Witness P-0792 will likely obviate the need for additional and more intrusive protective measures, [REDACTED] to be applied upon the completion of his testimony.

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

18. 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.

19. 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; he will remain anonymous to the public only.¹⁵

20. 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.¹⁶ Moreover, if the Chamber grants the witness's face and voice

¹⁴ ICC-01/04-02/06-905-Conf, para.7.

¹⁵ 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; Witnesses P-0100, P-0105 and P-0127: ICC-01/04-02/06-T-127-Conf-ENG, p. 75, lns. 5-11).

¹⁶ 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.

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.

21. The Prosecution submits that the use of a pseudonym in concert with facial and voice distortion is necessary to adequately protect Witness P-0792 and ensure his safety, security, psychological well-being, dignity and privacy during and after his 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.¹⁷
22. Granting the use of a pseudonym alone would not suffice to protect Witness P-0792 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 this individual would greatly increase the risk that he could be identified. This necessitates the use of a pseudonym in combination with face and voice distortion.
23. The requested protective measures will ensure that Witness P-0792 is able to give his evidence without fear for his or his family member's safety and security, and in a manner that protects his 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.

¹⁷ ICC-01/04-02/06-785-Red, para. 55.

Request

24. The Prosecution requests that the Chamber find there is good cause to vary the time limit to submit a request for in-court protective measures for Witness P-0792, and grant its request for facial and voice distortion, and the use of a pseudonym during his testimony.



Fatou Bensouda
Prosecutor

Dated this 20th day of October 2016
At The Hague, The Netherlands