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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 a time limit and request for in-court protective measures for Witnesses P-0868 and P-0863", 24 November 2016, ICC-01/04-02/06-1652-Conf-Exp

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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),¹ articles 64(2) and 68(1)² and rule 87,³ the Prosecution seeks a variation of the time limit⁴ to submit a request for in-court protective measures for Prosecution Witness P-0868 (“Regulation 35(2) Request”). The Prosecution requests in-court protective measures in the form of facial and voice distortion and the use of a pseudonym during the testimony of Prosecution Witnesses P-0868 and P-0863 (“ICPM Request”).
2. There is good cause for Trial Chamber VI (“Chamber”) to grant a variation of the time limit. Witness P-0868 is scheduled to testify on 14 December 2016. Until 2 November 2016, Witness P-0868 was not scheduled to appear in the current evidentiary block – he was added when it became apparent that the testimony of other witnesses, whose testimony during this block had originally been confirmed, needed to be rescheduled.
3. The ICPM Request is necessary, in particular, in view of the fact that Witnesses P-0868 and P-0863 currently reside within the Accused’s geographic area of influence and in a region that remains unstable, and the fact that the witnesses are easily recognisable in their community and that [REDACTED].
4. Granting the ICPM Request will ensure the safety, physical and psychological well-being, dignity and privacy of Witnesses P-0868 and P-0863 as mandated by article 68(1) of the Statute. It will also mitigate the need for more intrusive security-related measures post-testimony.
5. The 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

¹ Regulations of the Court (“Regulations”).

² Rome Statute (“Statute”).

³ Rules of Procedure and Evidence.

⁴ See ICC-01/04-02/06-619, para 50.

protect victims and witnesses appearing before the Court, pursuant to articles 64(2) and 68(1) and (2). The Accused has been provided with the names and identifying information of these witnesses; their identity will remain anonymous only to the public that will have access to non-identifying information provided by the witnesses during his testimony.

Confidentiality

6. This filing is classified as “Confidential, *ex parte* – only available to the Prosecution and the Victims and Witnesses Unit” pursuant to regulation 23*bis*(1) of the Regulations of the Court, as it provides information about witnesses’ security and place of residence. The Prosecution will file confidential and public redacted versions of this filing.

Prosecution’s Submissions

7. There is good cause for the Chamber to grant the Regulation 35(2) Request. The ICPM Request should be granted since the witnesses’ concerns are objectively justifiable.

I. The variation of the time limit for Witness P-0868’s ICPM request is justified

8. Under regulation 35(2) of the Regulations, a Chamber may extend a time limit “if good cause is shown”.⁵ The Chamber may extend a 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.

⁵ The Appeals Chamber has held that “[s]uch reasons as may found a good cause are necessarily associated with a party’s duties and obligations in the judicial process. A cause is good, if founded upon reasons associated with a person’s capacity to conform to the applicable procedural rule or regulation or the directions of the Court. Incapability to do so must be for sound reasons, such as would objectively provide justification for the inability of a party to comply with his/her obligations”, ICC-01/04-01/06-834, para.7. The Appeals Chamber has further decided to extend a time limit where it was in the “interest of justice”, see ICC-01/04-01/10-505, para.11; *See also* ICC-01/04-01/07-2325, para.15.

9. There is good cause for the Chamber to grant a variation of the time limit for the ICPM Request in relation to Witness P-0868. The request for the variation of the time limit could not have been sought prior to its expiration.
10. Applications for in-court protective measures are due no later than four weeks before the scheduled commencement of a witness's testimony.⁶ Witness P-0868 is currently scheduled to commence his testimony on 14 December 2016, three weeks from the filing of this Request.⁷ However, until 2 November 2016, Witness P-0868 was not scheduled to appear in the current evidentiary block⁸ – he was only added when it became apparent that the testimony of other witnesses, whose testimony during this block had originally been confirmed, needed to be rescheduled. Upon adding Witness P-0868 to the list of witnesses, the Prosecution overlooked the fact that it had not sought in-court protective measures for this witness in its request for in-court protective measures for witnesses in the 7th evidentiary block.⁹
11. Granting the variation of time requested would not “derail the proceedings from their ordained course”¹⁰ and would not be unduly prejudicial to the Accused. The Prosecution filed applications for in-court protective measures for four witnesses who were scheduled to appear in the current block in May 2015.¹¹ It filed applications for six other witnesses appearing in this block ahead of the four week deadline, in some cases 10 or 20 days before the expiration of

⁶ ICC-01/04-02/06-619, para.50.

⁷ The Prosecution is likely to propose calling Witness P-0868 to testify earlier, on 7 December 2016, in place of Witness [REDACTED], who is no longer available to testify in this block.

⁸ See emails from the Prosecution to the Chamber, Defence and participants dated 7 October 2016 at 09:53, 14 October 2016 at 13:56, and 2 November 2016 at 19:00.

⁹ ICC-01/04-02/06-1579-Conf-Red.

¹⁰ ICC-01/04-01/07-653, para.6.

¹¹ ICC-01/04-02/06-609-Conf-Corr-Red3. Witnesses [REDACTED].

the deadline.¹² The applications for two witnesses appearing in this block were filed with a slight delay of three or four days.¹³

12. Even if the Chamber finds that the criteria of regulation 35(2) of the Regulations are not fulfilled, the Request need not be dismissed. As recently recalled by Trial Chamber IX, the non-fulfilment of the requirements of regulation 35 does not mean that a request must be dismissed when a different outcome can be reached while preserving the fair and expeditious conduct of the proceedings.¹⁴

II. In-court protective measures of face and voice distortion and the use of pseudonym are warranted for Witnesses P-0868 and P-0863

Witness P-0868

13. Witness P-0868 is of Lendu ethnicity and [REDACTED]. He witnessed a UPC/FPLC attack in [REDACTED] after which he fled with his family. He was subsequently among a group of persons who were going to attend a pacification meeting in Kobu that was called for by the UPC/FPLC. The witness did not attend this meeting since he found out that the first group of persons who had reached Kobu had been killed. [REDACTED]. Upon his return to [REDACTED], he found that his and other civilians' houses had been burnt, as was the school and that the church was destroyed. Farms were also destroyed, and crops had been torn out.¹⁵

14. Witness P-0868 is expected to provide evidence on, *inter alia*, the commission of the following crimes by UPC/FPLC soldiers in and around Kobu and [REDACTED] during the temporal scope of the charges: murder and attempted

¹² ICC-01/04-02/06-1579-conf-Red. Witnesses [REDACTED].

¹³ Witnesses [REDACTED].

¹⁴ ICC-02/04-01/15-600, para. 14.

¹⁵ [REDACTED].

murder, attacks against the civilian population, persecution, forcible transfer of population, and destruction of property.

Witness P-0863

15. Witness P-0863 is also of Lendu ethnicity and [REDACTED].¹⁶ [REDACTED].

He witnessed several crimes committed by the UPC/FPLC, such as murders of civilians, pillaging and the destruction of property as well as protected objects such as [REDACTED].¹⁷ Witness P-0863 [REDACTED].¹⁸ During the attack on [REDACTED] by the UPC/FPLC in January or February 2003, Witness P-0863 fled to the forest.¹⁹ The witness describes the poor living conditions of the population displaced to the forest and witnessing people dying from those living conditions, as well as burying the bodies of those killed [REDACTED].²⁰

16. Accordingly, Witnesses P-0868 and P-0863 are expected to give evidence on a significant number of the charges against the Accused. The requested protective measures are necessary to avoid revealing their identity, bearing in mind the potential risk of retaliation from supporters of the Accused as elaborated upon further below.

A. Witnesses P-0868 and P-0863 and their families reside within the Accused's geographic area of influence and in a region that remains unstable

17. When the Prosecution met with Witness P-0868 [REDACTED],²¹ the witness stated that he fears that when he returns to [REDACTED] following his

¹⁶ [REDACTED].

¹⁷ [REDACTED].

¹⁸ [REDACTED].

¹⁹ [REDACTED].

²⁰ [REDACTED].

²¹ [REDACTED].

testimony, the Accused will mobilise his followers in the witness's area of residence.²²

18. Witness P-0868 and his family currently reside in [REDACTED]. Witness P-0863 currently works in [REDACTED] and resides [REDACTED]. Whilst these areas seem to be predominantly inhabited by Lendu,²³ similar risks arise there as in the rest of [REDACTED] territory because they are within the general area of influence of the Accused, where former UPC/FPLC members and associates loyal to him are present.²⁴

19. [REDACTED].²⁵ In the context of the litigation concerning the restrictions to the Accused's contacts, 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.²⁶

20. 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.²⁷

²² [REDACTED].

²³ [REDACTED].

²⁴ [REDACTED].

²⁵ [REDACTED].

²⁶ See ICC-01/04-02/06-785-Red, paras.50-57.

²⁷ [REDACTED]. 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, ICTR-98-44C-PT, 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, 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", IT-96-21-T, T. Ch., 28 April 1997, paras.7-9.

21. As previously noted by this Chamber²⁸ and Trial Chamber V(A)²⁹ 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. Further, both this Chamber and Trial Chamber V(A) have stated that the existence of specific incidents or threats in relation to a witness are not a prerequisite to finding that there is an objectively justifiable risk.³⁰

22. Although Witnesses P-0868 and P-0863 have not been the subject of any specific threat or risk, the Chamber has granted in-court protective measures, including face and voice distortion and the use of a pseudonym, for similarly situated Prosecution witnesses, such as Witnesses [REDACTED],³¹ [REDACTED],³² [REDACTED],³³ [REDACTED],³⁴ [REDACTED],³⁵ [REDACTED]³⁶ and [REDACTED].³⁷ In various decisions including those concerning Witnesses [REDACTED] and [REDACTED] protective measures, the Chamber recalled [REDACTED].³⁸

²⁸ ICC-01/04-02/06-824-Red, para.14; ICC-01/04-02/06-1004-Conf-Red, para.5 with public redacted version at ICC-01/04-02/06-1004-Red2, para.5.

²⁹ ICC-01/09-01/11-902-Red2, para.14.

³⁰ ICC-01/04-02/06-T-155-CONF-ENG ET, p.67, lns.10-15 (open session); ICC-01/09-01/11-902-Red2, para.14.

³¹ [REDACTED].

³² [REDACTED].

³³ [REDACTED].

³⁴ [REDACTED].

³⁵ [REDACTED].

³⁶ [REDACTED].

³⁷ [REDACTED].

³⁸ [REDACTED].

B. Witness P-0868 and P-0863 may be targeted since they are easily recognisable in their community

23. Witness P-0868 is easily recognisable in his community because [REDACTED].

Further, the witness states that [REDACTED]. Numerous witnesses have testified,³⁹ including in open session,⁴⁰ regarding [REDACTED]. [REDACTED].

24. Witness P-0863 is also easily identifiable in his community, in view of the [REDACTED].⁴¹

25. These factors are relevant to the Chamber's determination of the Request and the Chamber has previously taken into account similar factors in granting requests for in-court protective measures.⁴² For example, in granting protective measures for Witness P-0245, the Chamber stated that it "has also taken into account the position of the witness and the extent to which he is known within the community. As the Chamber held before, this may increase the risk faced by the witness and his family given the fact that a greater number of people may recognize the witness, the relative ease by which he could be subsequently located and the potential that the witness could be viewed as representing a particular community."⁴³ In relation to [REDACTED].⁴⁴

26. Due to the objective risks against Witnesses P-0868 and P-0863, the possibility of retaliatory acts being undertaken against them should not be ignored.

³⁹ [REDACTED].

⁴⁰ [REDACTED].

⁴¹ [REDACTED].

⁴² [REDACTED].

⁴³ ICC-01/04-02/06-T-139-CONF-ENG ET, p.54, ln.25 – p.55, ln.5 (open session).

⁴⁴ [REDACTED].

C. Witnesses P-0868 and P-0863 and their families [REDACTED]

27. Although the safety and security of Witnesses P-0868 and P-0863 and their families are closely monitored and assessed, [REDACTED]. As previously noted by the Chamber, [REDACTED].⁴⁵

28. Implementing the requested protective measures during the testimony of these witnesses will likely obviate the need for additional and more intrusive measures, [REDACTED], to be applied upon the completion of their testimony.

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

29. The Prosecution requests that the Chamber grant the full set of protective measures requested for Witnesses P-0868 and P-0863 under article 68 and rule 87. The 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.

30. As the Chamber has previously found, granting the protective measures of voice and face distortion together with the use of a pseudonym does not unfairly prejudice the rights of the Accused when he has been provided with the name and identifying information of the witness who will remain anonymous to the public only.⁴⁶ The Accused is in possession of this information, and, as such, will not be prejudiced should the requested protective measures be granted.

⁴⁵ [REDACTED].

⁴⁶ ICC-01/04-02/06-905-Red, para.8.

31. Granting face and voice distortion in addition to a pseudonym would not violate the Accused's right to a public hearing.⁴⁷ Article 68(2) 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.⁴⁸ Moreover, if the Chamber were to grant the witnesses face and voice distortion in addition to the use of a pseudonym, the hearings will still be in public given that any non-identifying testimony that the witnesses give will be in open session and publicly available.
32. The Prosecution submits that the use of a pseudonym in concert with facial and voice distortion is necessary to adequately protect Witnesses P-0863 and P-0868 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.⁴⁹
33. Granting the use of a pseudonym alone would not suffice to protect Witnesses P-0868 and P-0863, 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-0868 or P-0863 would increase the risk that they could be identified. This necessitates the use of a pseudonym in combination with face and voice distortion.
34. The requested protective measures will ensure that Witnesses [REDACTED] and [REDACTED] are able to give evidence without fear for their personal

⁴⁷ Witness P-0805: ICC-01/04-02/06-824-Conf, para.10; Witness P-0901: ICC-01/04-02/06-828-Conf, para.10; Witness [REDACTED]: ICC-01/04-02/06-905-Conf, paras.8-9; Witness P-0859: ICC-01/04-02/06-1004-Conf-Red, pp.5-6, paras.5-6; Witness P-0800: ICC-01/04-02/06-1160-Conf, para.8.

⁴⁸ 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.

⁴⁹ ICC-01/04-02/06-785-Red, para. 55.

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.

Conclusion and Request

35. There is good cause for the Chamber to grant a variation of the time limit for the ICPM Request for Witness [REDACTED]. The protective measures requested for Witnesses [REDACTED] and [REDACTED] should be granted since the witnesses' concerns are objectively justifiable.
36. For all of the foregoing reasons, the Prosecution asks that the Chamber grant the Regulation 35(2) Request and the ICPM Request.



Fatou Bensouda
Prosecutor

Dated this 16th day of December 2016
At The Hague, The Netherlands