

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-02/06
Date: 10 January 2017

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 Response of the Common Legal Representative of the Victims of the Attacks to the “Confidential 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”

Source: Office of Public Counsel for Victims (CLR2)

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

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Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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I. INTRODUCTION

1. The Common Legal Representative of the Victims of the Attacks (the “Legal Representative”) hereby submits his response to the “Confidential 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” (the “Prosecution Request”).¹ The Prosecution Request concerns two dual-status victims the Legal Representative represents in these proceedings – [REDACTED] and [REDACTED], respectively.

2. The Legal Representative fully supports the Prosecution Request for protective measures for both witnesses concerned and respectfully requests that Trial Chamber VI (the “Chamber”) receive the Prosecution Request as properly filed by granting the requested extension of time pursuant to regulation 35(2) of the Regulations of the Court (the “Regulations”). The Chamber is further requested to grant the protective measures sought for both Witnesses P-0868 and P-0863.

II. PROCEDURAL BACKGROUND

3. On 27 May 2016, the Chamber issued its Supplemental Decision on Matters Related to the Conduct of the Proceedings, whereby it “[set] a standard deadline for responses to all future requests for in-court protective measures, and direct[ed] that any such responses are to be filed within seven days of notification of the request, unless otherwise ordered.”²

¹ See the “Confidential 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”, No. ICC-01/04-02/06-1652-Conf, 28 November 2016 (the “Prosecution Request”). Although the Legal Representative represents both witnesses concerned by in their capacity as participating victims in this case, he was not notified of the *ex parte* version of the filing. His submissions are therefore based on the confidential redacted version of the Prosecution Request.

² See the “Supplemental decision on matters related to the conduct of the proceedings” (Trial Chamber VI), No. ICC-01/04-02/06-1342, 27 May 2016, para. 14. Emphasis omitted.

4. On 7 October 2016, the Prosecution notified its witness list for the seventh evidentiary block.³ The order of witnesses to be called during this block was subsequently amended.⁴ The further update of the witnesses scheduled to testify during the block was communicated on 2 November 2016, with a number of witnesses having been withdrawn and Witnesses P-0810, P-0868, P-0453, and P-0863 having been added instead.⁵ The final updated list, according to which P-0868 is provisionally foreseen to testify as the twelfth witness in the block⁶ and P-0863 as the final, seventeenth, witness of the block, was notified on 24 November 2016.⁷ The Prosecution further confirmed that the Defence agreed to the changes in appearances communicated on 24 November 2016.⁸

III. SUBMISSIONS

5. The Legal Representative fully supports the requested protective measures of in-court face and voice distortion, as well as the use of a pseudonym for the duration of the trial in respect of both dual-status witnesses concerned.

(i) Prosecution's Request for Extension of Time Limit

6. The Prosecution's Request was filed after the deadline for requests for protective measures previously set by the Chamber.

³ See the Email Communication from the Prosecution to the Chamber, Defence and Legal Representatives of Victims of 7 October 2016 at 9:53.

⁴ See the Email Communications from the Prosecution to the Chamber, Defence and Legal Representatives of Victims of 14 October 2016 at 13:56,

⁵ The Prosecution removed Witnesses P-0875 and P-0908 from the list. See the Email Communications from the Prosecution to the Chamber, Defence and Legal Representatives of Victims of 2 November 2016 at 19:00.

⁶ The Prosecution indicated that the scheduling still depended upon the confirmation of his travel arrangements.

⁷ Email Communications from the Prosecution to the Chamber, Defence and Legal Representatives of Victims of 24 November 2016 at 19:02.

⁸ *Idem*.

7. The Prosecution submits that it overlooked the fact that it had not yet sought in-court protective measures for Witness P-0868 upon adding him to the list of upcoming witnesses for the 7th evidentiary block.⁹ It thus requests an extension of time limit for the filing of its request, arguing that “[t]here is good cause for the Chamber to grant a variation of the time limit [...] in relation to P-0868”.¹⁰ It argues that due to the changes in the calling order necessitated by the rescheduling of other witnesses, P-0868’s testimony was moved up to the seventh evidentiary block, when he was originally expected to appear in the following block only.¹¹

8. The Prosecution contends that granting a variation of time would not be unduly prejudicial to the Accused.¹²

9. If the Chamber were minded to find that the requirements of regulation 35(2) of the Regulations are not fulfilled, the Legal Representative respectfully requests that the Chamber nevertheless adopt a lenient approach in this instance, given the subject-matter of the Prosecution Request. The request for which the variation of time limit is sought is one pertaining to the security and well-being of two victims and members of the victims’ families. The interests of the persons concerned – who were not at the origin of the non-compliance with the deadline set by the Chamber – must weigh heavier than the strict compliance with the deadline in this exceptional and specific case. It is, therefore, respectfully requested that the Chamber grant the extension of time limit and consider the merits of the request for protective measures for Prosecution Witness P-0868, as it is under the positive obligation to protect the safety, physical and psychological well-being of victims and witnesses enshrined in article 68(1) of the Rome Statute.

10. While the Prosecution does not advance specific submissions in relation to its request for protective measures for Witness P-0863, the Legal Representative avers

⁹ See the Prosecution Request, *supra* note 1, para. 10.

¹⁰ *Idem*, para. 9

¹¹ *Ibid.*, para. 10.

¹² *Ibid.*, para. 11.

that the same rationale must apply and be taken into account by the Chamber. The Prosecution's Request pertains to the safety and well-being of a victim of atrocious crimes. The very fact that it is necessary to employ measures to protect the physical safety and psychological well-being of this person is a testament to the importance that the request be considered, even if filed out of time. As set out below, the specific situation of P-0863 requires that his cooperation with the Court be kept hidden from the public in order to avoid negative repercussions connected therewith.

(ii) The requested protective measures are necessary in order to adequately protect victims [REDACTED]

11. Both [REDACTED] have suffered harm as a result of the traumatic events they are being called to testify about. Having agreed to appear as Prosecution Witnesses P-0868 and P-0863, these victims are willing to assist the Chamber in the search for the truth.

12. Both witnesses and their respective families continue to reside in the general area affected by the events that form the subject matter of these proceedings. The security situation in this area has not improved in the recent past and association or cooperation with the Court is not well-received among the community of persons who are still supportive of the Accused. As the Chamber has recently confirmed, "*the general security situation in a region may be a relevant consideration in respect of specific witnesses*".¹³ It also recalled that "*threats to a witness or his or her family are not a prerequisite to determining whether a witness faces an objectively justifiable risk and that there are reported instances where other witnesses were allegedly threatened as a result of their involvement with the Court.*"¹⁴

¹³ See the oral decision on protective measures for Witness P-0883, hearing held on 28 November 2016, ICC-01/04-02/06-T-166-CONF-ENG-CT, p. 3 (open session).

¹⁴ *Idem*.

P-0863

13. [REDACTED] who will be called as Witness P-0863 worked as [REDACTED] at the time of the attacks. His testimony will be unique and identifiable as he is well-known in the area in which he resides. If he were to publicly testify with his face, voice and name being seen and heard, he could easily become the subject of retaliation from supporters of the Accused. Such potential retaliation equally extends to his immediate family, should his cooperation with the Court and substantive testimony become known. The risk to his safety and well-being and that of his family members is an objectively justifiable one within the meaning of the term interpreted and applied by this Chamber in relation to other witnesses who still reside in area where supporters of the accused continue to wield significant influence.

14. In order to adequately guarantee the anonymity of Witness P-0863 *vis-à-vis* the public, the Chamber is requested to order the protective measures of an assigned pseudonym and face and voice distortion to be applied during his testimony. These measures are the least intrusive means available to achieve the aim of shielding his identity.

P-0868

15. Victim [REDACTED], who will testify as Witness P-0868, used to work as [REDACTED]. Due to this position, he is well-known and could easily be targeted were it to become publicly known that he is testifying against the Accused. The requested protective measures of face and voice distortion in combination with a pseudonym are therefore necessary and adequate to withhold his identity from the public.

16. Presently, he and his family reside in an area in which the general security situation remains unstable and where supporters loyal to the Accused are present. The Legal Representative in this respect joins the Prosecution's arguments that the

Chamber should take into account that it has previously 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,¹⁵ and that there had been reported instances where other witnesses, including crime-base witnesses were allegedly threatened as a result of their involvement with the Court.¹⁶ These facts should duly be taken into consideration by the Chamber when deciding upon the Prosecution Request.

(iii) The protective measures requested do not unduly prejudice the rights of the Accused

17. The Accused will be able to see and hear the witnesses giving *viva voce* testimony in the court room. He is also aware of their identities. The protective measures sought will merely shield the dual-status witnesses from the public. Parts of their testimony can thus be heard in open session without putting them at risk. While the Accused has a right to a public hearing, victims and witnesses have a right to their physical and psychological integrity not being interfered with on account of the activities of the Court. The Chamber is the guardian of both of these rights and must find the appropriate balance between competing interests. In the Legal Representative's submissions, this balance will be appropriately struck if the Chamber grants the requested protective measures for both P-0868 and P-0863.

IV. CONFIDENTIALITY

18. Pursuant to regulations 23*bis*(1) and (2) of the Regulations of the Court, the present submissions are classified as "confidential" as they refer to sensitive information regarding Prosecution witnesses and respond to submissions with the same classification.

¹⁵ See the Prosecution Request, *supra* note 1, para. 19.

¹⁶ *Idem*, para. 22.

FOR THE FOREGOING REASONS the Legal Representative respectfully requests that the Chamber

GRANT the Prosecution Request in its entirety.

A handwritten signature in black ink, appearing to read 'Dmytro Suprun', with a long vertical stroke extending downwards.

Dmytro Suprun
Common Legal Representative of the Victims of the Attacks

Dated this 10th Day of January 2017

At The Hague, The Netherlands