

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 3 March 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 the “Request by the Common Legal Representative of the Victims of the Attacks for in-court protective/special measures for victims a/01635/13, a/20018/14 and a/30286/15”, ICC-01/04-02/06-1793-Conf, 17 February 2017

Source: Office of Public Counsel for Victims (CLR2)

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Ms Nicole Samson

Counsel for the Defence

Mr Stéphane Bourgon
Mr Christopher Gosnell

Legal Representatives of the Victims

Ms Sarah Pellet
Mr Mohamed Abdou

Legal Representatives of the Applicants

Mr Dmytro Suprun
Ms Anne Grabowski

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. The Common Legal Representative of the Victims of the Attacks (the “Legal Representative”) respectfully requests that Trial Chamber VI (the “Chamber”) grant in-court protective/special measures of face and voice distortion and the use of a pseudonym with regard to three victims authorised to present views and concerns, in particular a/01635/13, a/20018/14 and a/30286/15, pursuant to articles 64(2) and 68(1) and (2) of the Rome Statute and rules 87 and 88 of the Rules of Procedure and Evidence (the “Rules”).

2. Victims a/20018/14 and a/30286/15 are expected to present views and concerns exclusively on the harm themselves suffered from [REDACTED], while victim a/01635/13 is expected to present views and concerns on the harm suffered [REDACTED] as a result of [REDACTED]. It is submitted that the requested in-court protective/special measures are necessary to protect the [REDACTED] psychological well-being of the victims concerned, and furthermore to prevent the [REDACTED] and their re-traumatisation. The requested protective/special measures are the least intrusive, for instance, comparing to the recourse to close sessions. They are not prejudicial to the rights of the Accused given the limited scope of the victims’ expected statements, and also given the fact that the victims’ views and concerns are not meant to form part of the evidence in the present case.

3. The Legal Representative anticipates that given the particularly traumatised experience three victims suffered from, additional special measures under rule 88 of the Rules may be needed to be put in place following the assessment by the VWS.

II. PROCEDURAL BACKGROUND

4. On 2 June 2015, the Chamber issued the “Decision on the conduct of the proceedings”¹ wherein it, *inter alia*, directed that “[a] Legal Representative shall file any request for leave to present evidence no later than two days after the Prosecution concluded its presentation of evidence. If the request includes leave for witnesses to be called, it shall include a summary of the expected testimony and an estimate of the time needed for the examination.”²

5. On 19 October 2016, the Chamber issued the “Order setting certain deadlines related to the end of the presentation of evidence by the Prosecution”,³ wherein it ruled that “the LRVs are directed to indicate by 16 December 2016 whether they anticipate bringing a request to present evidence and/or for the views and concerns of victims to be presented to the Chamber, and the likely scope of any such request.”⁴

6. On 16 December 2016, the Legal Representative notified the Chamber of his intention to present evidence.⁵

7. On 11 January 2017, the Chamber issued the “Order relating to the deadline for any requests by the Legal Representatives of Victims to present evidence or views

¹ See the “Decision on the conduct of the proceedings” (Trial Chamber VI), No. ICC-01/04-02/06-619, 2 June 2015.

² *Idem*, para. 69.

³ See the “Order sitting certain deadlines related to the end of the presentation of evidence by the Prosecution” (Trial Chamber VI), No. ICC-01/04-02/06-1588, 19 October 2016. See also, the “Corrigendum of ‘Order sitting certain deadlines related to the end of the presentation of evidence by the Prosecution’, 19 October 2016, ICC-01/04-02/06-1588” (Trial Chamber VI), No. ICC-01/04-02/06-1588-Corr, 12 December 2016.

⁴ *Idem*, para. 9.

⁵ See the “Notification to Trial Chamber VI by the Common Legal Representative of the Victims of the Attacks of his intention to request for leave to present evidence”, No. ICC-01/04-02/06-1687-Conf-Exp, 16 December 2016.

and concerns of victims”,⁶ wherein it ruled that any request to call witnesses and/or to present views and concerns of victims shall be filed no later than 23 January 2017.⁷

8. On 23 January 2017, the Legal Representative submitted the “Request [...] for leave to present evidence and victims’ views and concerns”.⁸

9. On 3 February 2017, the Prosecution and the Defence submitted their respective response to said request.⁹

10. On 10 February 2017, the Chamber issued its “Decision on the request by the Legal Representative of the Victims of the Attacks for leave to present evidence and victims’ views and concerns”, wherein it authorised (i) victim a/30012/15, and victims a/30365/15 and a/00256/13 (by Majority), to present evidence, and (ii) victims a/01243/13, a/20126/14, a/30169/15, a/20018/14, a/30286/15, and a/01635/13 to present their views and concerns.¹⁰ The Chamber *inter alia* directed the Legal Representative to file ant request for measures pursuant to rule 87 or 88 of the Rules for victims authorised to present their views and concerns by 20 February 2017.¹¹

⁶ See the “Order relating to the deadline for any requests by the Legal Representatives of Victims to present evidence or views and concerns of victims” (Trial Chamber VI), No. ICC-01/04-02/06-1711, 11 January 2017.

⁷ *Idem*, para. 4.

⁸ See the “Request by the Common Legal Representative of the Victims of the Attacks for leave to present evidence and victims’ views and concerns”, No. ICC-01/04-02/06-1739-Conf-Exp, 23 January 2017. A confidential redacted version of the request was filed on same date. See No. ICC-01/04-02/06-1739-Conf-Red.

⁹ See the “Prosecution’s response to the “Confidential Redacted Version of Request by the Common Legal Representative of the Victims of the Attacks for leave to present evidence and victims’ views and concerns” - ICC-01/04-02/06-1739-Conf-Red”, No. ICC-01/04-02/06-1772-Conf, 3 February 2017. See also the “Response on behalf of Mr Ntaganda to ‘Request by the Common Legal Representative of the Victims of the Attacks for leave to present evidence and victims’ views and concerns’”, No. ICC-01/04-02/06-1773-Conf, 3 February 2017.

¹⁰ See the “Decision on the request by the Legal Representative of the Victims of the Attacks for leave to present evidence and victims’ views and concerns”, *supra* note 1, p. 20.

¹¹ *Idem*.

III. SUBMISSIONS

a. Applicable Law

11. Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.¹² Trial Chamber shall take appropriate measures to protect the safety, physical and psychological well-being, [REDACTED] privacy of victims and witnesses, and in doing so, it shall have regard to all relevant factors, and in particular [REDACTED].¹³ Article 68(2) of the Rome Statute expressly provides the possibility for Trial Chamber to derogate from the principle of public hearings by ordering measures in order to protect victims and witnesses, and emphasises [REDACTED].¹⁴ Rule 87 of the Rules expressly provides Trial Chamber with the possibility to order in-court protective measures in form of face and voice distortion, and the use of a pseudonym,¹⁵ while rule 88 of the Rules entitles the Chamber to order “*special measures*”¹⁶ in order to prevent [REDACTED].¹⁷

12. It is submitted that insofar the present request aims to ensure first and foremost the privacy, [REDACTED] psychological well-being of the victims, rather than their physical safety, it is based on provisions under both rules 87 and 88 of the Rules which are both derived from and governed by the provisions under article 68 of the Rome Statute.

13. Different Chambers of the Court, including this Chamber, have constantly granted in-court protective/special measures in form of face and voice distortion and the use of a pseudonym to witnesses [REDACTED]. To the best of the Legal Representative’s knowledge, [REDACTED]. It is submitted that there exist no reason

¹² See article 64(2) of the Rome Statute.

¹³ See article 68(1) of the Rome Statute.

¹⁴ See article 68(2) of the Rome Statute (Emphasis added).

¹⁵ See rule 87(3)(c) and (d) of the Rules.

¹⁶ See rule 88(1) of the Rules.

¹⁷ See rule 88(5) of the Rules.

not to apply that constant practice [REDACTED] authorised to present views and concerns rather than presenting evidence, because in both instances the persons concerned are meant to speak out and to reveal [REDACTED].

14. The requested in-court protective/special measures do not prejudice the rights of the Accused. In this regard, different Chambers of the Court have constantly found that (i) *"the Defence's right to have evidence disclosed – essential as this may be – cannot be considered to be absolute. Where the protection of victims and witnesses is at stake, the Chamber must seek a solution which strikes a fair balance between the equally legitimate rights of the accused, on the one hand, and the victims and witnesses on the other"*¹⁸; (ii) *"putting in place arrangements to enable [witnesses'] voices and faces to be distorted does not jeopardise the interests of the accused persons any more than it is prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial"*¹⁹; (iii) *"[protective measures in form of face and voice distortion and the use of a pseudonym] would entail minimal restrictions which do not affect the rights of the Defence in any substantive way"*²⁰; and (iv) *"these protective measures are necessary to ensure adequate protection and do not cause undue prejudice to the Defence or undermine the fairness of the trial."*²¹

15. The Court's said constant practice with regard to the protection [REDACTED] is fully consistent with domestic laws and the practice of international courts and tribunals.²²

¹⁸ See the "Public redacted version of the Decision on the Protection of Prosecution Witnesses 267 and 353 of 20 May 2009" (Trial Chamber II), No. ICC-01/04-01/07-1179-tENG, 28 May 2009, para. 31.

¹⁹ See the "Decision on the Prosecutor's Application for Protective Measures Pursuant to Article 54(3)(f) of the Statute and Rule 81(4) of the Rules" (Trial Chamber II), No. ICC-01/04-01/07-989-tENG, 25 March 2009, para. 7.

²⁰ See the "Decision Granting Protective Measures for Witness 323 during in-Court Testimony" (Trial Chamber II), No. ICC-01/04-01/07-1795-Red-tENG, 27 January 2010, para. 13.

²¹ See the "Second redaction of: Decision on 'Prosecutor's First Request for In-Court Protective Measures for Trial Witnesses'" (Trial Chamber V(A)), No. ICC-01/09-01/11-902-Red2, 3 September 2013, para. 27.

²² See SCSL, *The Prosecutor v. Sesay et al.*, Decision on the Prosecution Motion for Modification of Protective Measures for Witnesses, SCSL-04-15-T, 5 July 2004, para. 32. In particular, the SCSL Trial Chamber found that [REDACTED]. See also ICTY, *The Prosecutor v. Tadić*, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, IT-94-1-T, 10 August 1995, paras. 55 and 47. In particular, ICTY Trial Chamber found that *"the interest in the ability of the defendant to*

16. In particular, as pointed out by the Trial Chamber of the ICTY, “*protective measures sought which allow a witness’s testimony to take place in open session, but with methods designed to conceal his identity from the public (such as the use of pseudonym, face and voice distortion), are considered less of an infringement on the public nature of the proceedings*”,²³ as opposed to the more restrictive, deemed ‘extraordinary’, protective measures when closed session is warranted.²⁴ In any instance where any kind of protective measures are sought, the “*Trial Chamber must consider whether it is appropriate that such measures be granted on the basis of whether the witness’s fears are legitimate and well founded and the right of the accused to a fair and public trial.*”²⁵

b. Present Instance

(i) *The requested in-court protective/special measures are warranted*

17. Victim a/30286/15 is expected to present views and concerns about [REDACTED]. Victim a/20018/14 is expected to present evidence about [REDACTED]. Victim a/01635/13 is expected to present views and concerns about [REDACTED].

establish facts must be weighed against the interest in the anonymity of the witness. The balancing of these interests is inherent in the notion of a ‘fair trial’. A fair trial means not only fair treatment to the defendant but also to the prosecution and to the witnesses”, and [REDACTED]. See also, ECtHR, B. and P. v. UK, Applications Nos. 36337/97 and 35974/97, Judgment, 24 April 2001, para. 36. In particular, ECtHR emphasised that “it is established in the Court’s case-law that, even in a criminal-law context where there is a high expectation of publicity, it may on occasion be necessary under Article 6 to limit the open and public nature of proceedings in order, for example, to protect the safety or privacy of witnesses”. The ECHR specifically underscored on numerous occasions the importance of witnesses’ and victims’ protection and stressed in particular that “principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify”. See ECHR, Doorson v. The Netherlands, Application No. 20524/92, 26 March 1996, para. 70. See also ECHR, R.R. and others v. Hungary, Application No. 19400/11, 4 December 2012, para. 32; Ahuregeze v. Sweden, Application No. 37075/09, 27 October 2011, para. 121.

²³ See ICTY, *The Prosecutor v. Slobodan Milošević* Case No. IT-02-54-T, Decision on Prosecution Motion for Trial Related Protective Measures for Witnesses (Bosnia), 30 July 2002, para. 7.

²⁴ *Idem*, para. 6. See also ICTY, *The Prosecutor v. Milan Martić*, Case. No. IT-95-11-T, Decision on Defence Motion for Protective Measures for Witnesses MM-096, MM-116 and MM-090, 18 August 2006, pp. 2-3.

²⁵ *Ibid*, para. 7.

18. Given the [REDACTED] of the expected statements, it is legitimate to say that their presentation publicly will affect the [REDACTED] not only of the victims concerned but also of the victims' family members, [REDACTED].

19. Furthermore, revealing the identity of the victims concerned is very likely to expose the victims themselves and their relatives to [REDACTED]. This in turn is very likely to result in re-traumatisation of the victims concerned who appear still today – thirteen years after the events – vulnerable and psychologically instable.

20. Accordingly, it is submitted that the [REDACTED] the expected statements and [REDACTED] are the relevant factors for the Chamber to consider in assessing the potential impact the public appearance of the victims concerned may have on their psychological and eventually physical well-being, and therefore the need for protective/special measures for these victims pursuant to article 68(1) and (2) of the Rome Statute.

(ii) The requested in-court protective/special measures are the least intrusive

21. The Legal Representative submits that the requested in-court protective/special measures during the presentation of their views and concerns are the least intrusive measures, *i.e.* comparing to the recourse to close session, and are very likely to obviate the need for additional and more intrusive measures that may be needed upon the completion of the victims appearance, such as the ones to address [REDACTED]. Furthermore, granting the requested protective/special measures will allow hearing the victims' statements in open session without putting them at risk and without the need to often recourse to private or closed sessions.

(iii) The requested in-court protective/special measures are not prejudicial to the Accused

22. It is submitted that the requested in-court protective /special measures do not unfairly prejudice the rights of the Accused. First, these measures will shield the victims concerned from the public only, while their identity will be known to the

Accused. Second, the scope of the victims' statements is limited to the harm they suffered from their victimisation. Finally, the victims concerned are not supposed to be examined by either parties or the judges and their views and concerns are not meant to form part of the evidence in the present case.

(iv) Additional special measures may be needed

23. The Legal Representative anticipates that additional special measures may be needed for the victims concerned depending on the level of their vulnerability to be assessed and established by the VWS prior to their appearance.

IV. CONFIDENTIALITY

24. 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 the victims authorised to present views and concerns.

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

GRANT the requested in-court protective/special measures for victims a/01635/13, a/20018/14 and a/30286/15 in form of face and voice distortion and the use of a pseudonym during the presentation of their views and concerns.

A handwritten signature in black ink, appearing to read 'Dmytro Suprun', with a small dot at the end.

Dmytro Suprun
Common Legal Representative of the Victims of the Attacks

Dated this 3rd Day of March 2017

At The Hague, The Netherlands