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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

**With Confidential, *EX PARTE* – only available to the Prosecution and the Victims
and Witnesses Unit Annex 1**

**Public redacted version of “Prosecution’s submission pursuant to regulation 35 to
vary the time limit and request for in-court protective measures for Prosecution
Witness P-0551”, 27 January 2017, ICC-01/04-02/06-1756-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),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 Witness P-0551 in the form of facial and voice distortion and the use of a pseudonym ("Request").
2. There is good cause for Trial Chamber VI ("Chamber") to grant a variation of the time limit since it only became clear that Witness P-0551 may be called to testify *viva voce* on 19 January 2017.
3. Granting the requested protective measures will ensure that Witness P-0551 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. The identity of this witness has been provided to the Defence, and the measures sought do not prejudice the rights of the Accused. The identity of the witness will be protected from the public only.

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 as they refer to confidential security-related witness information. The Prosecution will file confidential and public redacted versions of this filing.

¹ Regulations of the Court ("Regulations").

² Rome Statute ("Statute").

³ Rules of Procedure and Evidence ("Rules").

⁴ See ICC-01/04-02/06-619, para.50.

Background

6. On 1 November 2016, the Prosecution sought the admission of the prior recorded testimony of Witness P-0551 pursuant to rule 68(2)(b) of the Rules and regulation 35 of the Regulations, pending submission of the required accompanying declaration,⁵ which was provided on 2 December 2016.⁶
7. On 22 December 2016, the Defence opposed the Prosecution's 1 November 2016 request.⁷
8. On 16 January 2017, the Prosecution filed an addendum to its 2 December 2016 filing, confirming that the officer who certified Witness P-0551's rule 68(2)(b) declaration was duly authorised to do so in accordance with the law and procedure of the Democratic Republic of the Congo ("DRC").⁸
9. On 19 January 2017, the Chamber granted the Prosecution's request to add Witness P-0551 to the Prosecution's list of witnesses and decided that rule 68(3) of the Rules is, in principle, appropriate for the admission of this witness's prior recorded testimony.⁹
10. On 23 January 2017 the Prosecution provided an updated list of forthcoming witnesses in which it indicated that Witness P-0551 would testify after Witness P-0116 in the eighth block of evidence, and that in-court protective measures will be sought.¹⁰
11. On 24 January 2017, the Prosecution requested that Witness P-0551's testimony be heard *via* video-link and proposed, together with the Defence, that Witness P-0551 be called to testify on 15 and/or 16 February 2017.¹¹ In this filing, the

⁵ ICC-01/04-02/06-1601-Conf.

⁶ ICC-01/04-02/06-1668-Conf.

⁷ ICC-01/04-02/06-1699-Conf.

⁸ ICC-01/04-02/06-1719-Conf.

⁹ ICC-01/04-02/06-1733.

¹⁰ Email from the Prosecution to the Chamber, Parties and participants dated 23 January 2017 at 17:09.

¹¹ ICC-01/04-02/06-1750.

Prosecution also noted that Witness P-0551 will require in-court protective measures and that the Prosecution will make a separate application without delay.

Prosecution's Submissions

12. There is good cause to grant the requested variation of the time limit, which could not have been sought prior to its expiration, and the requested protective measures are warranted in view of the objectively justifiable risk to Witness P-0551's security and well-being.

I. The Chamber should grant a variation of the time limit for the Request

13. Under regulation 35(2) of the Regulations, a Chamber may extend a time limit "if good cause is shown".¹² 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.
14. Applications for in-court protective measures are due no later than four weeks before the scheduled commencement of a witness's testimony.¹³ However, until the Chamber's 19 January 2017 decision,¹⁴ there was no indication that Witness P-0551 would be called to testify *viva voce* since the Prosecution requested admission of his prior recorded testimony pursuant to rule 68(2)(b) of the Rules.¹⁵ The Prosecution and Defence have jointly proposed that Witness P-0551 be called

¹² 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.

¹³ ICC-01/04-02/06-619, para.50.

¹⁴ ICC-01/04-02/06-1733.

¹⁵ ICC-01/04-02/06-1601-Conf.

to testify on 15 and/or 16 February 2017,¹⁶ three weeks from the filing of this Request.

15. Granting the variation of time requested would not “derail the proceedings from their ordained course”¹⁷ and would not be unduly prejudicial to the Accused.
16. Even if the Chamber finds that the Request does not meet the criteria of regulation 35(2) of the Regulations, the Chamber may still grant the Request. 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.¹⁸

II. The Chamber should grant Witness P-0551 the full set of protective measures

17. Witness P-0551 is of Bira ethnicity. He is married and has [REDACTED] children. The witness was a senior school inspector from 1989 to 2004 and is expected to testify about different types of school records used in Ituri as well as the impact of the conflict during the relevant period on school attendance, administration of the schools and regulation of school records. He is also expected to testify about records concerning Witnesses [REDACTED] and schools attended by Witnesses [REDACTED].

Witness P-0551 resides in an area where cooperation with the Court could be looked at unfavourably and where former associates of the Accused may be present; his family members reside within the Accused's geographic area of influence

18. Witness P-0551 has expressed concerns regarding the disclosure of his identity to the public. The witness is originally from [REDACTED] and currently resides in [REDACTED]. One of his [REDACTED] lives and works in [REDACTED] while

¹⁶ ICC-01/04-02/06-1750.

¹⁷ ICC-01/04-01/07-653, para.6.

¹⁸ ICC-02/04-01/15-600, para.14.

one of his [REDACTED] lives in [REDACTED].¹⁹ The witness travelled to [REDACTED] and [REDACTED] in [REDACTED] and may travel to [REDACTED] to visit his family in these areas.²⁰ The witness has also informed the Prosecution that at times he is required to travel to [REDACTED] for work and that the last time he did so was in [REDACTED].²¹

19. [REDACTED].²² [REDACTED].²³ [REDACTED].²⁴ Co-operation with the Court, regardless of the case or situation, is unlikely to be looked upon favourably in this area. Moreover, former members of the *Congrès national pour la défense du peuple* ("CNDP"), namely former associates of the Accused, may have relocated to this part of the country.

20. [REDACTED] and [REDACTED], both areas where the witness travels, are within the geographic area of influence of the Accused and in areas where former UPC/FPLC members and associates loyal to the Accused are present. Moreover, the security situation in this 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.²⁵

21. The requested protective measures are necessary to avoid revealing this witness's identity, bearing in mind the potential risk of retaliation from supporters of the Accused and others who, for other reasons, may look unfavourably upon co-operation with the Court.

22. 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

¹⁹ See Confidential, EX PARTE Annex 1.

²⁰ See Confidential, EX PARTE Annex 1.

²¹ See Confidential, EX PARTE Annex 1.

²² [REDACTED].

²³ [REDACTED].

²⁴ [REDACTED].

²⁵ See generally ICC-01/04-02/06-585-Conf.

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

23. As previously noted by this Chamber²⁷ and Trial Chamber V(A)²⁸ 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.²⁹ 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.”³⁰

24. Witness P-0551 has not been the subject of any direct or specific threats in relation to his co-operation with the court. 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 Witnesses [REDACTED],³¹ P-0859,³² P-0800,³³ P-0892,³⁴ P-0894,³⁵ P-0877,³⁶ P-0850,³⁷ P-0018,³⁸ P-0019,³⁹ [REDACTED],⁴⁰ P-0100,⁴¹ P-0127,⁴² P-0105,⁴³ P-0245⁴⁴ and P-0365.⁴⁵ In

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

²⁷ ICC-01/04-02/06-824-Red, para.14; ICC-01/04-02/06-1004-Conf-Red, para.5.

²⁸ ICC-01/09-01/11-902-Red2, para.14.

²⁹ The *ad hoc* international tribunals have also recognised that the generally 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, Case No. ICTR-98-44C-PT, T. Ch. III, 21 September 2005, para. 9; *Prosecutor v Furundzija*, Decision on Prosecutor’s Motion Requesting Protective Measures for Witnesses “A” and “D” at Trial, Case No. IT-95-17/1-T, T. Ch.II, 11 June 1998, paras. 7-8; *Prosecutor v Delalić et al.*, Decision on the Motion by the Prosecution for Protective Measures for the Witness Designated by the Pseudonym “N”, Case No. IT-96-21-T, T.Ch., 28 April 1997, paras. 7-9.

³⁰ ICC-01/09-01/11-902-Red2, para.14.

³¹ ICC-01/04-02/06-824-Conf.

³² ICC-01/04-02/06-1004-Conf-Red.

³³ ICC-01/04-02/06-1160-Conf-Red.

³⁴ ICC-01/04-02/06-1277-Conf.

³⁵ ICC-01/04-02/06-T-101-CONF-ENG, p.61, ln.17 - p.63, ln.17.

³⁶ ICC-01/04-02/06-T-106-CONF-ENG, p.89, ln.4 - p.90, ln.11.

³⁷ ICC-01/04-02/06-T-110-CONF-ENG, p.32, ln.10 - p.33, ln.14.

³⁸ ICC-01/04-02/06-1418-Conf-Red.

³⁹ ICC-01/04-02/06-1433-Conf.

⁴⁰ ICC-01/04-02/06-T-115, p.57, ln.19 - p.58, ln.11.

⁴¹ ICC-01/04-02/06-T-127-ENG, p.73, ln.7 - p.75, ln.11.

⁴² *Ibid.*

⁴³ *Ibid.*

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.”⁴⁶

Witness P-0551 may be targeted since he is easily recognisable

25. Witness P-0551 is easily recognisable in [REDACTED] due to his current work as an *Inspecteur Principal Provincial de l'enseignement Primaire, Secondaire, et Professionnelle* (Principal Provincial Inspector of primary, secondary and professional education) for [REDACTED], and in [REDACTED] due to his previous role as a senior school inspector. He stated that when he was in Bunia in 2002/2003, [REDACTED].⁴⁷ Witness P-0551 also stated that when he was in Bunia in 2002-2003, [REDACTED].⁴⁸

26. 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.⁴⁹ 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.”⁵⁰ In relation to Witness P-0800, the Chamber considered

⁴⁴ ICC-01/04-02/06-T-139, p.53, ln.16 - p.54, ln.21.

⁴⁵ ICC-01/04-02/06-T-145, p.55, ln.14 - p.58, ln.21.

⁴⁶ 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.

⁴⁷ See DRC-OTP-2095-0376, para.26.

⁴⁸ See DRC-OTP-2095-0376, para.28.

⁴⁹ [REDACTED].

⁵⁰ ICC-01/04-02/06-T-139-CONF-ENG ET, p.54, ln.25 – p.55, ln.5 (open session).

that “the Witness's professional responsibilities, which bring him in contact with a large number of people, may also place him at increased risk.”⁵¹

27. Due to the objective risks against Witness P-0551, the possibility of retaliatory acts being undertaken against him and/or his family should not be ignored.

Witness P-0551's family may be targeted since his wife is [REDACTED]

28. Witness P-0551 is of Bira ethnicity and fled from Bunia during the conflict,⁵² in particular because, as he stated, both the Hema and the Lendu looked upon the Bira unfavourably since the Bira retained a neutral position during the conflict.⁵³ The fact that Witness P-0551's wife [REDACTED]⁵⁴ [REDACTED].

Witness P-0551 is not in the ICCPP

29. Although the safety and security of this witness is closely monitored and assessed, he is not in the Court's Protection Programme (ICCPP). As previously noted by the Chamber, the risks to a witness's security and that of their family may be greater if they are not in the ICCPP.⁵⁵ Implementing the requested protective measures during the testimony of Witness P-0551 will likely obviate the need for additional and more intrusive protective measures, such as referral to the ICCPP, to be applied upon the completion of his testimony.

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

30. 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. The Chamber has previously found

⁵¹ ICC-01/04-02/06-1160-Conf-Exp, para.7.

⁵² See DRC-OTP-2095-0376, para.26.

⁵³ See DRC-OTP-2095-0376, para.26.

⁵⁴ See DRC-OTP-2095-0376, para.26.

⁵⁵ ICC-01/04-02/06-905-Conf, para.7.

that 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 a witness who will remain anonymous to the public only.⁵⁶

31. 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.⁵⁷ Moreover, if the Chamber grants the witness's 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.
32. The Prosecution submits that the use of a pseudonym together with facial and voice distortion is necessary to adequately protect Witness P-0551 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.⁵⁸
33. Granting the use of a pseudonym alone would not suffice to protect Witness P-0551 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 Witness P-0551 would increase the risk that he could be identified. This necessitates the use of a pseudonym in combination with face and voice distortion. The requested protective measures will ensure that Witness P-0551 is able to give evidence without fear for his personal safety and

⁵⁶ See Witness [REDACTED]: ICC-01/04-02/06-824-Conf, para.16; [REDACTED]; [REDACTED]; 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.

⁵⁷ 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.

⁵⁸ ICC-01/04-02/06-785-Red, para.55.

security or that of his family members, 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.

Conclusion

34. For all of the foregoing reasons, the Prosecution asks that the Chamber grant its Request.



Fatou Bensouda
Prosecutor

Dated this 14th day of March 2017
At The Hague, The Netherlands