

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 21 April 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/00256/13, a/30012/15 and a/30365/15”, ICC-01/04-02/06-1823-Conf, 15 March 2017

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

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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 for the three victims authorised to present evidence, namely a/00256/13, a/30012/15 and a/30365/15, 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”). The Legal Representative further requests that the Chamber, in principle and depending on a case specific assessment at the relevant time, hear specific parts of a/30365/15’s evidence in private session. This measure is requested pursuant to rules 87 and 88 of the Rules.

2. As set out in more detail below, the Legal Representative avers that a/00256/13, a/30012/15 and a/30365/15 are to be regarded as “vulnerable witnesses”¹ for different reasons unique to them.

3. Victim a/00256/13 is expected to provide a potentially unique eye-witness account on the use of a heavy weapon in [REDACTED] which caused the death of his six family members at a time. He is also expected to give evidence on being subjected to torture and degrading treatment which caused him serious physical injuries he is still suffering from. The victim is [REDACTED] and was a [REDACTED] for a prolonged period of time, including in 2002-2003. Furthermore, the victim is [REDACTED] and appears vulnerable when speaking about the events. He might indeed be in need of psychological assistance before, during and after his testimony.

¹ The “Protocol on the vulnerability assessment and support procedure used to facilitate the testimony of vulnerable witnesses” defines a vulnerable witness as “those witnesses who face an increased risk to; a) Suffer psychological harm through the process of testifying, and/or b) Experience psychological or physical difficulties, which affect their ability to testify.” See the “Victims and Witnesses Unit’s submission of the Protocol on the vulnerability assessment and support procedure used to facilitate the testimony of vulnerable witnesses pursuant to Order no. ICC-01/04-02/06-416”, No. ICC-01/04-02/06-445-Anx1, 5 February 2015, para. 5.

Given the victim's [REDACTED] and his vulnerability, the requested protective/special measures are necessary to ensure not only the security of the victim and that of his family members, but also his privacy and psychological well-being.

4. Victim a/30012/15 is expected to provide potentially unique evidence on the conduct of Mr Ntaganda and Mr Kisémbó during the period between the end of 2002 and the beginning of 2003. The victim is [REDACTED] and [REDACTED]. [REDACTED], the requested protective measures are required to ensure the security of the victim and that of his family members.

5. Victim a/30365/15 is expected to provide evidence about being subjected to sexual violence. Given the sensitive nature of the victimisation, the requested protective/special measures are necessary to protect the dignity, privacy and psychological well-being of the victim, and furthermore to prevent her stigmatisation and re-traumatisation.

6. The protective/special measures requested for a/00256/13, a/30012/15 and a/30365/15 are the least intrusive measures available when, for instance, compared to recourse to closed session testimony. They are not, as such, prejudicial to the rights of the accused, given that the accused has been provided with the identity of the victims and will be able to see them and have them cross-examined on his behalf.

7. Finally, the Legal Representative anticipates that, given the nature of the victims' traumatisation, additional special measures under rule 88 of the Rules may be needed to be put in place following their respective pre-testimony assessment by the VWS.

II. PROCEDURAL BACKGROUND

8. 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, Judge Ozaki dissenting), 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.² The Chamber *inter alia* directed the Legal Representative to file any request for measures pursuant to rules 87 or 88 of the Rules for victims authorised to present evidence by 15 March 2017.³ The Chamber further indicated that the presentation of evidence by victims a/30012/15 and a/30365/15 (at the seat of the Court), and a/00256/13 (by video-link) is scheduled to take place between 10 and 13 April 2017.⁴

III. SUBMISSIONS

a. Applicable Law

9. A 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.⁵ The Trial Chamber shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses, and in doing so, it shall have regard to all relevant factors, including age, health and the nature of the crime, and in particular where the crime involves sexual or gender violence.⁶ Article 68(2) of the Rome Statute expressly provides the possibility for the Trial Chamber to derogate from the principle of public hearings by ordering measures in order to protect victims and witnesses, and

² 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” (Trial Chamber VI), No. ICC-01/04-02/06-1780-Conf, 10 February 2017, p. 20.

³ *Idem*.

⁴ *Ibid.*, p. 21.

⁵ See article 64(2) of the Rome Statute.

⁶ See article 68(1) of the Rome Statute.

emphasises that “such measures shall be implemented in the case of a victim of sexual violence”.⁷ Rule 87 of the Rules expressly confers upon the Trial Chamber the possibility to order in-court protective measures in form of face and voice distortion, and the use of a pseudonym,⁸ for the duration of the trial, while rule 88 of the Rules empowers the Chamber to order “special measures”⁹ in order “to facilitate the testimony of a traumatized victim or witness, a child or an elderly person or a victim of sexual violence”¹⁰ and to prevent “violations of the privacy of a witness or victim”, and “to avoid any harassment or intimidation, paying particular attention to attacks on victims of crimes of sexual violence.”¹¹

10. With respect to victim a/30365/15, it is submitted that, insofar as the present request aims to ensure first and foremost the privacy, dignity and psychological well-being of the victim, rather than her physical safety, it is based on provisions under both rules 87 and 88 of the Rules, which are derived from and governed by the provisions under article 68 of the Rome Statute. As regards victim a/00256/13, the present request aims at ensuring both the security and the privacy and psychological well-being of the victim and his relatives.

11. Different Chambers of the Court, including this Chamber,¹² have previously granted in-court protective/special measures in form of face and voice distortion and the use of a pseudonym to witnesses who had become victims of sexual violence. The Chambers have also granted such measures to witnesses on account of their

⁷ See article 68(2) of the Rome Statute (Emphasis added).

⁸ See rule 87(3)(c) and (d) of the Rules.

⁹ See rule 88(1) of the Rules.

¹⁰ *Idem*.

¹¹ See rule 88(5) of the Rules.

¹² See the “Decision on request for measures pursuant to Rules 87 and 88 for victims a/01635/13, a/20018/14 and a/30286/15” (Trial Chamber VI), No. ICC-01/04-02/06-1808-Conf, 28 February 2017. See also the “Decision on Prosecution’s request for in-court protective measures and special measures for Witnesses P-0892 and P-0912” (Trial Chamber VI), No. ICC-01/04-02/06-1277-Conf, 14 April 2016.

professional position and/or other personal circumstances, such as the nature of the crime and the extent of their vulnerability and/or traumatising.¹³

12. This Chamber has previously granted in-court protective/special measures to crime-based witnesses, including dual-status witnesses, where it established the existence of an objectively justifiable risk to the witness and/or his/her family. In assessing whether there exists such risk, the Chamber considered the nature of the anticipated testimony, whether the witness and his family still resided within the broad geographical area of influence of Mr Ntaganda and his supporters, and whether the witness and his/her family were admitted into the ICCPP.¹⁴ Furthermore, the Chamber has repeatedly ruled that *“threats to a witness or his or her family are not a prerequisite to determining whether a witness faces an objectively justified risk, and that there are reported instances where other witnesses, including crime base witnesses, were allegedly threatened as a result of their involvement with the Court”*,¹⁵ and that *“the general security situation in the region may be a relevant consideration in respect of specific witnesses”*.¹⁶

13. It is submitted that the requested in-court protective/special measures do not prejudice the rights of the accused. In this regard, different Chambers of the Court have consistently 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*

¹³ See the “Decision on the ‘Prosecution’s application for in-court protective and special measures” (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-612-Red, 29 November 2016, paras. 33-47.

¹⁴ See, *inter alia*, the “Decision on Prosecution request for in-court protective measures for P-0863” (Trial Chamber VI), No. ICC-01/04-02/06-1714-Conf, 12 January 2017. See also, transcripts of the hearing held on 6 February 2017 [Oral ruling on in-court protective measures for P-0857], ICC-01/04-02/06-T-192-CONF-ENG RT, pp. 78-82.

¹⁵ See the “Decision on Prosecution request for in-court protective measures for P-0863”, *supra* note 14, para. 11. See also the “Decision on Prosecution’s request for in-court protective and special measures for Witnesses P-0892 and P-0912”, *supra* note 12, para. 6.

¹⁶ See the transcripts of the hearing held on 18 January 2017 [Oral ruling on in-court protective measures for P-0005], ICC-01/04-02/06-T-182-CONF-ENG RT, pp. 51-42. See also the transcripts of the hearing held on 17 January 2017 [Oral ruling on in-court protective measures for P-0773], ICC-01/04-02/06-T-181-CONF-ENG RT, pp. 3-4.

the equally legitimate rights of the accused, on the one hand, and the victims and witnesses on the other”¹⁷; (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”¹⁸; (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”¹⁹; 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.”²⁰

14. The Court’s said practice is fully consistent with domestic laws and the practice of international courts and tribunals.²¹

¹⁷ 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.

¹⁸ 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.

¹⁹ 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.

²⁰ 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.

²¹ 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 “it is trite law that the need for special consideration to victims of sexual violence or children during their testimonials in court has been widely recognised in both domestic laws of states and in international courts.” 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 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 “several states limit the public disclosure of identifying information about victims and witnesses of sexual assault.” 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 ECtHR 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 ECtHR, *Doorson v. The Netherlands*, Application No. 20524/92, 26 March 1996, para. 70. See also ECtHR, *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.

15. In particular, as pointed out by a 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*”,²² as opposed to the more restrictive, deemed ‘extraordinary’, protective measures when closed session is warranted.²³ 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.*”²⁴

b. Submissions regarding victims a/00256/13, a/30012/15 and a/30365/15

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

16. Victim a/00256/13 is expected to provide potentially unique evidence on the use of a heavy weapon in [REDACTED] which instantly caused the death of six of his family members. He was an eye-witness to the event and is expected to give a detailed description of the injuries to his relatives’ bodies. He is also expected to give evidence on being subjected to torture and degrading treatment, which caused him serious physical injuries he is still suffers from. The victim is [REDACTED] and [REDACTED] for a prolonged period of time, including in 2002-2003. Furthermore, the victim is [REDACTED] and suffers from serious physical injury that considerably affects his daily life. He also appears vulnerable when speaking about the events, and might need psychological assistance before, during and after his testimony. The Legal Representative submits that the requested protective/special measures are necessary in order to ensure not only the security of the victim and that of his family members, but also his privacy and psychological well-being. It is also submitted, that

²² 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.

²³ *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.

²⁴ *Ibid*, para. 7.

the public dissemination of the victim's testimony without his identity being concealed to the public may likely result in the victim being forced to repeatedly discuss his traumatic experience after he returns home from testifying, or at least live with the anxiety of possibly having to do so. This would *"create an objectively justifiable risk of further traumatising of a witness who appears already vulnerable on account of the traumatic experiences [he] suffered"*.²⁵

17. Victim a/30012/15 is expected to present potentially unique evidence on the conduct of Mr Ntaganda and Mr Kisembo during the period of the charges, and, in particular, about their relations and contacts with his father who [REDACTED], and who was, according to the victim, killed for his refusal to cooperate with the UPC/FPLC. The victim is [REDACTED], and [REDACTED]. It is therefore submitted that, given the nature of the victim's expected evidence directly involving the accused, and [REDACTED], the requested in-court protective measures are required to protect the security of the victim and that of his family who may be subject of reprisals if the victim's identity and his involvement with the Court becomes public.

18. Victim a/30365/15 is expected to present evidence about her rape by three UPC soldiers. Given the very sensitive nature of the expected evidence, requiring her to publicly present this evidence will negatively affect her dignity, privacy and psychological well-being. Furthermore, revealing the identity of the victim is very likely to expose herself and her relatives to stigma, marginalisation and ostracism by either her own family members or within her community. This in turn is very likely to result in serious re-traumatisation of the victim who still today – thirteen years after the events – appears vulnerable and psychologically instable.

19. The Legal Representative also requests that the Chamber order, if it becomes necessary, that those parts of a/30365/15's testimony that concern the sexual violence

²⁵ See the "Decision on the 'Prosecution's application for in-court protective and special measures'", *supra* note 13, para. 40.

incidents itself be heard in private session so as to allow the victim to express herself freely. The Chamber has previously ruled in a similar manner and allowed parts of the testimony of sexual violence victims to be heard in private session.²⁶

20. It is therefore submitted that, given the very sensitive nature of the expected evidence, the requested measures are necessary to ensure the victim's dignity, privacy and psychological well-being, and also to prevent the victim from stigmatisation and re-traumatisation.

21. Furthermore, this Chamber has previously granted similar protective measures with respect to victims of sexual violence on the above grounds.²⁷ The fact that the victim is called in her capacity as a participating victim rather than a witness for the Prosecution should not make a difference in the Chamber's consideration of her individual needs as sexual violence witness appearing before the Chamber.

22. Finally, all three victims currently reside in the localities where former UPC/FPLC militia members and supporters of the accused are present and continue to have influence. Significantly enough, the three victims recently expressed fear about their own security and the safety of their family, should the fact of their testimony against the accused become public.²⁸

(ii) *Security situation in Ituri remains unstable*

23. The Legal Representative observes that the unstable security situation in Ituri, and more particularly in the most affected communities, continues to be of major

²⁶ See e.g. the "Decision on Prosecution's request for in-court protective measures and special measures for Witnesses P-0892 and P-0912", *supra* note 12. See also the transcript of the hearing held on 2 May 2016, ICC-01/04-02/06-T-93-CONF-ENG ET, p. 3 (P-0887); the transcript of the hearing held on 6 July 2016, ICC-01/04-02/06-T-115-CONF-ENG ET (private session) (P-0113).

²⁷ See e.g. the "Decision on Prosecution's request for in-court protective measures and special measures for Witnesses P-0892 and P-0912", *supra* note 12, para. 8.

²⁸ See DRC-PCV-0001-0027, pp. 6-7; DRC-PCV-0001-0035, p. 6; and DRC-PCV-0001-0042, p. 5.

concern to participating victims and is one of the factors pushing many of them to move to more safe areas.²⁹

24. Furthermore, this 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.³⁰ 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.³¹ More recently, the Chamber found that the risk of witness interference remains high at the present stage of the proceedings.³² In addition, very recently, the Prosecution indicated that having reviewed nearly 600 of the accused’s calls, it found further alarming evidence of the extent to which the accused is attempting to tamper with evidence.³³

(iii) *Victims a/00256/13, a/30012/15 and a/30365/15 are not in the ICCPP*

25. Victims a/00256/13, a/30012/15 and a/30365/15 are not in the ICCPP. Granting the requested in-court protective/special measures to the victims will likely obviate the need for additional and more intrusive protective/special measures, such as referral to the ICCPP or addressing reprisals and/or stigmatisation and/or re-traumatisation, to be applied post-testimony.

26. It is submitted, that although these victims have not been the subject of any direct or specific threats, the Chamber recalled “*reported instances where other*

²⁹ See the « Sixth periodic report on victims in the case and their general situation », No. ICC-01/04-02/06-1774, 6 February 2017, para. 10. See also the « Fifth periodic report on victims in the case and their general situation », No. ICC-01/04-02/06-1567, 6 October 2016, para. 10.

³⁰ See the “Public Redacted version of Decision on Prosecution requests to impose restrictions on Mr Ntaganda’s contacts” (Trial Chamber VI), No. ICC-01/04-02/06-785, 18 August 2015, paras. 50-57.

³¹ *Idem.*

³² See the “Second public redacted version of Decision reviewing the restrictions placed on Mr Ntaganda’s contacts, 7 September 2016, ICC-01/04-02/06-1494-Conf-Exp”, No. ICC-01/04-02/06-1494-Red4, 21 November 2016, para. 31.

³³ See the “Public redacted version of ‘Prosecution’s request for additional Defence disclosure’, 10 February 2017, ICC-01/04-02/06-1783-Conf”, No. ICC-01/04-02/06-1783-Red, 15 February 2017, para. 8.

witnesses, including crime based witnesses, were allegedly threatened as a result of their involvement with the Court”.³⁴

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

27. The Legal Representative submits that the requested in-court protective/special measures during the presentation of the evidence by the victims concerned are the least intrusive measures, *i.e.* comparing with 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 to address consequences of stigmatisation and/or re-traumatisation. Furthermore, granting the requested protective/special measures will allow hearing the victims’ evidence in open session without putting them at risk and without frequent recourse to private or closed sessions.

(v) *The requested in-court protective/special measures are not prejudicial to the rights of the accused*

28. It is submitted that the requested in-court protective/special measures appropriately balance the accused’s right to a fair and public hearing under articles 64(2) and 67(1) of the Rome Statute, with the need to protect victims and witnesses appearing before the Court, pursuant to articles 64(2) and 68(1) and (2) of the Rome Statute. This Chamber has consistently found that the protective measures of voice and face distortion together with the use of a pseudonym do not unfairly prejudice the rights of the accused as he has been provided with the identity of the witness;

³⁴ See the “Confidential redacted version of ‘Decision on Prosecution’s request for in-court protective and special measures for Witness P-0800’” (Trial Chamber VI), No. ICC-01/04-02/06-1160-Conf-Red, 9 February 2016, para. 7. See also the “Decision on Prosecution’s request for in-court protective measures and special measures for Witnesses P-0892 and P-0912”, *supra* note 12, para. 6.

their identity being hidden from the public only.³⁵ This approach is fully consistent with the Court's jurisprudence and the relevant international jurisprudence.³⁶

(vi) *Additional special measures may be needed*

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

(vii) *Timing of the decision*

30. Finally, the Legal Representative respectfully requests that, if possible, the Chamber issue its decision on the present request prior to the scheduled day of the start of the presentation of evidence by the victims concerned. This would allow the Legal Representative to advise the victims accordingly in good time prior to their appearance. Given their respective vulnerable state, it would be beneficial to their overall well-being if they were advised of the implications of the Chamber's decision on the current request prior to taking the stand.

IV. CONFIDENTIALITY

31. Pursuant to regulations 23bis(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 evidence before the Chamber.

³⁵ See *inter alia* the "Decision on Prosecution request for in-court protective measures for P-0863", *supra* note 14, para. 12.

³⁶ See *supra* paras. 9-15.

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

GRANT the requested in-court protective/special measures for victims a/00256/13, a/30012/15 and a/30365/15 in form of face and voice distortion and the use of a pseudonym during the presentation of evidence.

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 21st Day of April 2017

At The Hague, The Netherlands