

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: ICC-01/04-02/06
Date: **12 December 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 "Prosecution response to the Defence 'Request for in-court protective measures for Witness D-0251'", 3 November 2017,
ICC-01/04-02/06-2096-Conf**

Source: 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. The Prosecution opposes the Defence request for in-court protective measures (“ICPM”) for Witness D-0251¹ because no objectively justifiable risk to this witness’s safety, physical or psychological well-being, dignity or privacy has been established that warrants an exception to the principle of publicity.
2. The principle of publicity is based on fair trial concerns. It exists not only to protect the Accused’s rights but also to ensure that the Chamber can establish the truth and oversee the proper conduct of proceedings. Accordingly, any exception to this principle must be objectively justified.
3. None of Witness D-0251’s individual circumstances warrant ICPM. The witness’s fears are unsubstantiated and should not be given undue weight.
4. The Defence fails to provide concrete information regarding any objectively justifiable risk that Witness D-0251 faces. Instead it argues that anyone who testifies on behalf of the Accused could face retaliation by the DRC government and/or the FRPI² even though Witness D-0251’s expected testimony is unrelated to either of these entities. Such general facts do not demonstrate an objectively justifiable risk on account of public testimony.

Confidentiality

5. In accordance with regulation 23*bis*(2) of the Regulations of the Court, this response is classified as “Confidential” as it responds to a Confidential Defence Request.

¹ ICC-01/04-02/06-2085-Conf (“Defence Request”).

² Defence Request, paras. 7-9.

Submissions

A. Witness identity should usually be known to the public

6. When assessing prior requests for ICPM, the Chamber has consistently upheld the basic principle that “fair trial-related concerns ...generally lie in favour of the identity of witnesses being known to the public”.³ The Chamber has also stated that any ICPM must be necessary to ensure the adequate protection of witnesses and not cause undue prejudice to the Defence or undermine the fairness of the trial.⁴
7. The Appeals Chamber, when assessing an issue of fairness at trial, acknowledged that it is relevant to consider the ability for the Chamber and Prosecution to establish the truth, envisaged by articles 54(1)(a) and 69(3) of the Statute.⁵ The fairness of the trial also requires that a Chamber ensures the proper conduct of proceedings, pursuant to article 64(2) of the Statute.⁶ The European Court of Human Rights has recognised that the purpose of the right to a public hearing is to protect “*litigants* against the administration of justice in secret with no public scrutiny” and that this principle exists in order to maintain the public’s confidence in the courts.⁷ These concerns go beyond the rights of the Accused.
8. The Chamber must consider whether granting anonymity to Witness D-0251 *vis-à-vis* the public may undermine its truth-seeking function and ability to ensure the proper conduct of the proceedings. For instance, if a witness knows that the

³ ICC-01/04-02/06-824-Red, para. 16.

⁴ ICC-01/04-02/06-824-Red, para. 17.

⁵ Rome Statute.

⁶ See *e.g.* ICC-01/04-02/12-271-Corr, paras. 256-257. The Appeals Chamber considered that although it was not necessary to decide whether and to what extent the Prosecutor has a right to a “fair trial”, a fundamental aspect of the trial is the objective of establishing the truth pursuant to article 54(1)(a) and article 69(3). See also ICC-01/04-02/12-271-Anx A, paras. 5-6, where, in their Joint Dissenting Opinion, Judge Trendafilova and Judge Tarfusser observed that article 64(2) which covers the right to a fair trial, governs the Trial Chamber’s powers for the proper conduct of proceedings and duty to establish the truth.

⁷ See *e.g.* *Axen v Germany*, December 8, 1983, Series A., No.72; 6 E.H.R.R. 195, para. 25 (emphasis added); *Werner v Austria and Szucs and Austria*, November 24, 1997, R.J.D.1997-VII, No.56, para. 45.

veracity of his or her account may not be subjected to the same level of public scrutiny because his or her identity is not known, this may impact on the account provided by the witness and, consequently, on the Chamber's ability to establish the truth and ensure the proper administration of justice.

B. No objectively justifiable risk has been established in relation to D-0251

9. The Chamber has consistently held that ICPM requests for a witness to testify anonymously from the public "should be granted 'only on an exceptional basis, following a case-by-case assessment of whether they are necessary in light of an objectively justifiable risk ...'".⁸ The Defence fails to demonstrate the existence of such a risk to Witness D-0251 if she testifies publicly.

D-0251's fears are unsubstantiated and should not be given undue weight

10. The Defence states that Witness D-0251 expressed fears about potential negative repercussions arising from her testimony.⁹ However, the Defence provides no objectively justifiable basis for these fears and merely speculates about the potential sources of, and reason for, such negative repercussions.¹⁰ Vague and unfounded subjective fears do not warrant an exception to the rule that witnesses should testify publicly.
11. The Defence states that "[t]he witness's own assessment of risk has also been treated as highly relevant to determining whether there is an objectively justifiable risk of harm that justifies protective measures", citing the Chamber's decision in relation to Witness P-0857.¹¹ Nothing in the decision suggests that the witness's own assessment of risk was treated as "highly relevant" by the Chamber. On the contrary, the Chamber stated that the Prosecution poorly

⁸ ICC-01/04-02/06-824-Red, paras. 6, 16.

⁹ Defence Request, paras. 1, 11.

¹⁰ Defence Request, paras. 1, 11.

¹¹ Defence Request, para. 3, fn. 4 citing ICC-01/04-02/06-T-192-CONF-ENG, p. 67, lns. 7-11.

substantiated its request for ICPM because the only documentation provided in support of it “appears to be solely based on the witness’ own assessment and opinion”.¹² The Chamber also noted that the Victims and Witnesses Unit’s assessment also appeared to be primarily based on Witness P-0857’s own assessment.¹³ The Chamber merely stated that it “took note” of Witness P-0857’s fears.¹⁴

12. Indeed, the Chamber previously rejected ICPM requests that were based on unsupported subjective fears. For instance, in relation to Witness P-0043 the Chamber held that:

[w]hile the subjective fears and opinions of the witness may be relevant to the Chamber’s assessment of risk, they are not determinative and the Chamber does not consider that in the present situation these submissions show an objectively justifiable risk in the absence of any additional supporting material.¹⁵

None of D-0251’s individual circumstances warrant ICPM

13. The fact that Witness D-0251 [REDACTED]¹⁶ does not automatically place her at serious risk of retaliation or necessarily mean that [REDACTED] will suffer just because she will testify for the Accused. The Defence does not even state [REDACTED].

14. The Defence also seeks to rely on its assertion that Witness D-0251 “travels to [REDACTED] regularly” as a reason to grant the Defence Request.¹⁷ This

¹² ICC-01/04-02/06-T-192-CONF-ENG ET, p. 66, ln. 22 – p. 67, ln. 1 (open session). The Prosecution notes that the transcript erroneously reads “purely substantiated” at line 1 of page 67. That the latter is an error is confirmed by the French transcript, see ICC-01/04-02/06-T-192-CONF-FRA ET, p. 66, lns. 17-22 (open session).

¹³ ICC-01/04-02/06-T-192-CONF-ENG ET, p. 67, lns. 7-11 (open session).

¹⁴ ICC-01/04-02/06-T-192-CONF-ENG ET, p. 67, lns. 7-11 (open session).

¹⁵ ICC-01/04-02/06-T-189-CONF-ENG-ET, p. 48, lns. 15-19 (open session).

¹⁶ Defence Request, para. 10.

¹⁷ Defence Request, para. 11.

assertion contradicts the Defence's previous submission that [REDACTED],¹⁸ [REDACTED].¹⁹ [REDACTED]. Regardless, since Witness D-0251 "meets the same persons" when she goes to [REDACTED] and these persons "know her very well",²⁰ such persons likely already know about Witness D-0251's [REDACTED]. Her public testimony in this case would not affect her security. In any event, the Defence provides no further information about these persons.

The Defence fails to identify any realistic, specific potential threat against D-0251

15. The Defence relies on documents which do not support the Defence Request, such as an OHCHR report on human rights violations committed in the Kasai provinces;²¹ a UN News Centre article calling for an investigation into Congo's Kasai provinces;²² a report on Freedom in the World 2017;²³ and a news report about the killing of refugees from Burundi who were protesting in South Kivu²⁴ to suggest that the DRC Government has supported militias and police who have carried out human rights abuses on civilians, but fails to demonstrate how this creates an objectively justifiable risk for Witness D-0251.

16. The Defence asserts that the FRPI or those affiliated with them "can be reasonably presumed to be hostile to anyone who is perceived to give testimony on behalf of 'The Terminator'"²⁵ but is unable to provide further explanation or specifics as to any objectively justifiable threat that Witness D-0251 faces from the FRPI. Nor does the Defence provide cogent reasons to support its assertion that any witness who testifies on behalf of the Accused faces a risk of retaliation because the

¹⁸ ICC-01/04-02/06-2052-Conf, para. 11.

¹⁹ ICC-01/04-02/06-2052-Conf-AnxA, para. 10. The Prosecution notes that the Defence has now applied redactions to Witness D-0251's statement, including to her current place of residence (ICC-01/04-02/06-2086-Conf-AnxA, para. 10) despite the fact that the statement was provided without any redactions in the Defence application to add this witness to its list (ICC-01/04-02/06-2052-Conf-AnxA).

²⁰ Defence Request, para. 11.

²¹ Defence Request, para. 7, fn. 13.

²² Defence Request, para. 7, fn. 13.

²³ Defence Request, para. 8, fn. 15.

²⁴ Defence Request, para. 8, fn. 14; Defence Request, Annex A.

²⁵ Defence Request, para. 7.

Accused is a “well-known former opponent of the DRC’s current president.”²⁶
Witness D-0251’s expected testimony relates to neither the FRPI nor the DRC government.

Conclusion

17. The Defence has failed to establish any objectively justifiable risk to Witness D-0251’s safety, physical or psychological well-being, dignity or privacy that warrants concealing her identity from the public when testifying. Accordingly, the Defence Request should be rejected.



Fatou Bensouda
Prosecutor

Dated this 12th day of December 2017

At The Hague, The Netherlands

²⁶ Defence Request, para. 9.