

**Cour
Pénale
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**International
Criminal
Court**

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Date: 21 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 'Confidential redacted version of 'Request for in-court protective measures for Witness D-0243 and for extension of time'", 23 November 2017, ICC-01/04-02/06-2130-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 Defence requests in-court protective measures (“ICPM”) for Witness D-0243¹ whom the Chamber authorised the Defence to add to its list of witnesses on 6 November 2017.² The Defence acknowledges that it was not unable to file the Defence Request prior to the applicable deadline³ and “concedes that it should have acted more quickly” after receiving the Chamber’s authorisation.⁴ The Defence provides no justification as to why it could not have filed the Defence Request at the latest on 10 November 2017 when it filed its request for the admission of Witness D-0243’s prior recorded testimony pursuant to rule 68(3).⁵ Nevertheless, the Prosecution does not propose that the Defence Request should be rejected *in limine*.
2. However, the Defence Request should be rejected on its merits because no objectively justifiable risk to Witness D-0243’s safety, physical or psychological well-being, dignity or privacy has been established that warrants an exception to the principle of publicity.
3. 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.
4. The sole individual circumstance that the Defence refers to in support of its Request, Witness D-0243’s work, does not warrant ICPM. The witness’s fears are unsubstantiated and should not be given undue weight.

¹ ICC-01/04-02/06-2117-Conf-Red (“Defence Request”).

² ICC-01/04-02/06-2099.

³ Defence Request, paras. 2, 18, 20.

⁴ Defence Request, para. 20.

⁵ ICC-01/04-02/06-2107-Conf-Red.

5. The Defence fails to provide concrete information regarding any objectively justifiable risk that Witness D-0243 faces. Instead it makes reference to attacks by the FRPI and to human rights violations by the FARDC and implies that those who testify on behalf of the Accused are more likely to face retaliation than others.⁶ However, Witness D-0243's expected testimony is unrelated to the FRPI or FARDC. Indeed, as stated by the Chamber, his anticipated testimony relates to "contextual and background information in relation to communications".⁷ The general facts referred to by the Defence in relation to the FRPI, FARDC and the DRC government more broadly do not demonstrate an objectively justifiable risk in relation to Witness D-0243 on account of his public testimony.

Confidentiality

6. 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.

Background

7. On 30 January 2017, the Chamber ordered the Defence, *inter alia*, to provide the final version of its list of witnesses and summaries of anticipated testimony, as well as its final list of evidence by 26 April 2017.⁸
8. On 16 October 2017, the Defence requested, *inter alia*, the addition of Witness D-0243 to its list of witnesses.⁹ The Chamber authorised this addition on 6 November 2017.¹⁰

⁶ Defence Request, paras. 9-12.

⁷ ICC-01/04-02/06-2099, para. 26.

⁸ ICC-01/04-02/06-1757, para. 11.

⁹ ICC-01/04-02/06-2065-Conf.

¹⁰ ICC-01/04-02/06-2099.

9. On 10 November 2017, the Defence requested the admission of Witness D-0243's prior recorded testimony pursuant to rule 68(3).¹¹
10. On 16 November 2017, the Defence filed the Defence Request.

Submissions

A. Witness identity should usually be known to the public

11. 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".¹² 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.¹³
12. 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.¹⁴ The fairness of the trial also requires that a Chamber ensures the proper conduct of proceedings, pursuant to article 64(2) of the Statute.¹⁵ 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

¹¹ ICC-01/04-02/06-2107-Conf-Red.

¹² ICC-01/04-02/06-824-Red, para. 16.

¹³ ICC-01/04-02/06-824-Red, para. 17.

¹⁴ Rome Statute.

¹⁵ 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.

scrutiny” and that this principle exists in order to maintain the public’s confidence in the courts.¹⁶ These concerns go beyond the rights of the Accused.

13. The Chamber must consider whether granting anonymity to Witness D-0243 *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 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-0243

14. 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...’”.¹⁷ The Defence fails to demonstrate the existence of such a risk to Witness D-0243 if he testifies publicly.

D-0243’s fears are unsubstantiated and should not be given undue weight

15. The Defence states that Witness D-0243 expressed fears and concerns about potential negative repercussions arising from his testimony.¹⁸ However, the Defence provides no objectively justifiable basis for these fears and merely speculates about the potential sources of, and reason for, such negative

¹⁶ 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.

¹⁷ ICC-01/04-02/06-824-Red, paras. 6, 16.

¹⁸ Defence Request, paras. 1, 14.

repercussions.¹⁹ Vague and unfounded subjective fears do not warrant an exception to the rule that witnesses should testify publicly.

16. The Defence states that “[t]he witness’s own assessment of risk has also been treated as relevant to determining whether there is an objectively justifiable risk of harm.”²⁰ In support of this assertion, the Defence cites to the Chamber’s decision on the protective measures to be adopted in relation to Prosecution Witness P-0857 where the Chamber “took note of the fact that the witness expressed fears of retaliation from supporters of the accused, specifically on the basis of his particular current location of residence”.²¹ While the Chamber did take note of the witness’s expression of fear in this instance, Witness D-0243, unlike Witness P-0857, will be testifying on behalf of the Accused, so the Accused’s supporters have no reason to retaliate against him. Further, Witness P-0857 is of Lendu ethnicity and [REDACTED].²² On the other hand, Witness D-0243 is of Hema ethnicity.²³

17. Further, in this same decision cited by the Defence, the Chamber stated that the Prosecution poorly 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”.²⁴ 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.²⁵ 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:

¹⁹ Defence Request, paras. 10, 12-14.

²⁰ Defence Request, para. 4.

²¹ Defence Request, para. 4, fn. 7 citing ICC-01/04-02/06-T-192-CONF-ENG, p. 67, lns. 7-11.

²² See ICC-01/04-02/06-1686-Conf-Exp-Red, paras. 5-6, 16.

²³ ICC-01/04-02/06-2107-Conf-AnxI, p. 2/32.

²⁴ 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).

²⁵ ICC-01/04-02/06-T-192-CONF-ENG ET, p. 67, lns. 7-11 (open session).

[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.²⁶

18. Witness D-0243's fears are unsupported subjective fears. Accordingly, ICPM are not warranted in this instance.

None of D-0243's individual circumstances warrant ICPM

19. The only individual circumstance that the Defence refers to as a basis for the Chamber to grant ICPM in relation to Witness D-0243 is his work.²⁷ However, none of the information provided about this witness's work indicates the need for ICPM. The Defence merely speculates as to the alleged physical or economic harm that the witness may face should he testify without ICPM.

20. In the Defence Request, the Defence states that "[REDACTED]".²⁸ In its request to admit this witness's prior recorded testimony pursuant to rule 68(3), the Defence states that the witness "[REDACTED]".²⁹ It remains unclear precisely what this witness's professional activities are. Such information is relevant to the Chamber's determination. However, the Defence has failed to explain how this witness's economic well-being could be at risk due to his public testimony as a Defence witness. A thorough Defence justification appears necessary under the circumstances considering his [REDACTED], being "self-employed",³⁰ meaning that he has no superior to answer to.

²⁶ ICC-01/04-02/06-T-189-CONF-ENG-ET, p. 48, lns. 15-19 (open session).

²⁷ See Defence request, paras. 12-13.

²⁸ Defence Request, para. 12.

²⁹ ICC-01/04-02/06-2107-Conf-Red, para. 30.

³⁰ ICC-01/04-02/06-2107-Conf-Red, para. 30.

21. The fact that Witness D-0243 travels for his work³¹ does not automatically place him at serious risk of retaliation or necessarily mean that he will suffer just because he will testify for the Accused. Neither does the fact that a witness's testimony may give rise to "negative perceptions against him"³² warrant ICPM, especially when no objective basis has been provided for the likelihood of such a perception.

The Defence fails to identify any realistic, specific potential threat against D-0243

22. In deciding on a request for ICPM, the Chamber recalled "that it has previously held that the general security situation in a region may be a relevant consideration in respect of *specific witnesses*."³³ Therefore, the Chamber made it clear that the general security situation is not necessarily always relevant to *any* witness.

23. The Defence fails to identify any realistic, specific potential threat against D-0243. Any "increase in attacks by the FNI's successor, the FRPI"³⁴ does not automatically mean that Witness D-0243 requires ICPM. The Defence provides no indication of any link between the persons attacked by the FRPI and Witness D-0243. Neither does Witness D-0243's testimony in any way concern the FNI or FRPI.

24. The Defence states that "[t]he Government of the DRC is either unable or unwilling to suppress" the insecurity in Ituri citing a MONUSCO report concerning human rights violations throughout the entire DRC,³⁵ and notes that the FARDC is alleged to have committed several of these violations.³⁶ However,

³¹ Defence Request, para. 13.

³² Defence Request, para. 12.

³³ ICC-01/04-02/06-T-242-CONF-ENG ET, p. 61, lns. 1-3 (emphasis added, private session).

³⁴ Defence Request, para. 9.

³⁵ Defence Request, para. 11, fn. 17 citing to the document contained at Annex A to the Defence Request.

³⁶ Defence Request, para. 11.

the Defence fails to demonstrate how any of this creates an objectively justifiable risk for Witness D-0243 whose testimony is unrelated to either the FARDC or even the DRC government more broadly.

25. The Defence asserts that “[t]estimony of individuals perceived as affiliated to or aligned with political parties is more likely to be a cause of retaliation that [*sic*] might otherwise be the case”³⁷ but is again unable to provide further explanation or specifics as to any objectively justifiable threat that Witness D-0243 faces from the FRPI, DRC government, or any other entity.

26. Indeed, the Chamber has characterised the information that Witness D-0243 could provide as “contextual and background information in relation to communications.”³⁸ The Defence has acknowledged that “Witness D-0243’s testimony concerns [REDACTED]”,³⁹ is “of limited scope”,⁴⁰ and “is not central to core issues in the case”.⁴¹ The Defence itself characterised certain aspects of D-0243’s anticipated testimony as “*general* information regarding certain events that took place” between 2000 and 2003 and “background information”.⁴²

27. None of the general facts referred to by the Defence in relation to the security situation in Ituri warrant ICPM for Witness D-0243 in particular due to the nature of his anticipated testimony.

Conclusion

28. The Defence has failed to establish any objectively justifiable risk to Witness D-0243’s safety, physical or psychological well-being, dignity or privacy that

³⁷ Defence Request, para. 10.

³⁸ ICC-01/04-02/06-2099, para. 26.

³⁹ ICC-01/04-02/06-2065-Conf, para. 2.

⁴⁰ ICC-01/04-02/06-2065-Conf, para. 2.

⁴¹ ICC-01/04-02/06-2107-Conf-Red, para. 23.

⁴² ICC-01/04-02/06-2107-Conf-Red, para. 18 (emphasis in original).

warrants concealing his identity from the public when testifying. Accordingly, the Defence Request should be rejected.



Fatou Bensouda
Prosecutor

Dated this 21st day of December 2017

At The Hague, The Netherlands