

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/04-02/06**

Date: **1 June 2016**

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 "Additional submissions for protective and special measures concerning Prosecution Witness P-0018", 30 May 2016,
ICC-01/04-02/06-1349-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. The Office of the Prosecutor (“Prosecution”) submits additional observations in relation to the “Fourth Prosecution request for in-court protective measures”, filed on 2 October 2015 (“Fourth Request”).¹ The Prosecution supplements its prior request for in-court protective measures (face and voice distortion and the use of a pseudonym) for Prosecution Witness P-0018, pursuant to articles 64(2) and 68(1) and (2) of the Rome Statute (“Statute”), and rules 87 and 88 of the Rules of Procedure and Evidence (“Rules”). Additionally, the Prosecution requests that Trial Chamber VI (“Chamber”) grant P-0018 as a vulnerable witness with special measures pursuant to rule 88 of the Rules and article 68(1) and (2) of the Statute, namely: (a) regular breaks during her questioning and questions adapted to her needs and capacities; and (b) that she be assisted in Court by a Victims and Witnesses Unit (“VWU”) support assistant (“Request”). P-0018 is the eighth Prosecution witness on the list of witnesses for the fifth evidentiary block.²
2. The Request is necessary given: (i) the witness’s expected evidence, in particular [REDACTED]; (ii) [REDACTED]; (iii) [REDACTED]; and (iv) the fact that she is [REDACTED]. The requested special measures of in-court assistance and/or adapted questioning are also necessary in view of the specific needs of this witness.
3. Granting the Request will ensure the safety, physical and psychological well-being, dignity and privacy of this witness as mandated by article 68(1) of the Statute. 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 fair and public hearing under articles 64(2) and 67(1) of the Statute against the need to

¹ ICC-01/04-02/06-883-Conf.

² Email dated 10 May 2016 at 17:59 pm.

protect victims and witnesses appearing before the Court, pursuant to articles 64(2) and 68(1) and (2). The Accused has been provided with the names and identifying information of this witness, her identity will remain anonymous to the public only. The public will have access to non-identifying information provided by the witness during her testimony.

Confidentiality

5. This filing is classified as “Confidential, *ex parte* – only available to the Prosecution and Victims and Witnesses Unit” pursuant to regulation 23*bis* (1) of the Regulations of the Court as it provides information about witness security and locations of residence. The Prosecution will file redacted confidential and public versions.

Prosecution’s Submissions

6. The Prosecution requests face and voice distortion and the use of a pseudonym during the testimony of Witness P-0018. The Prosecution also requests that questioning be adapted to the needs and capacities of Witness P-0018, and that she be assisted in court by a VWU support assistant.

I. In-court protective and special measures of face and voice distortion and the use of pseudonym are warranted

7. The protective/special measures of face and voice distortion and use of pseudonym under rules 87 and 88, and articles 64(2) and 68(1), are warranted. In particular, the risks posed to P-0018 and her family are objectively justifiable, for the following reasons.

i. Anticipated evidence

8. Witness P-0018 is [REDACTED]. [REDACTED] who will testify about the attack on the villages in the Walendu-Djatsi *collectivité* in February 2003. She is expected to provide evidence about [REDACTED]. She is expected to give evidence about [REDACTED].
9. Witness P-0018 is expected to provide evidence on, inter alia, the commission of the following crimes by UPC/FPLC soldiers in and around Bambu, Buli, Sangi, Jitchu and Kobu during the temporal scope of the charges: murder and attempted murder, attacks against the civilian population, rape and sexual slavery of civilians, persecution, pillaging, forcible transfer of population, and destruction of property. P-0018's expected testimony will also relate to victim impact.
10. Accordingly, Witness P-0018 is expected to give evidence on a significant number of the charges against the Accused. The requested protective or special measures are necessary to avoid revealing her identity, bearing in mind the potential risk of retaliation from supporters of the Accused as elaborated upon further below.
11. [REDACTED].³ [REDACTED].
12. Moreover, [REDACTED].
13. Revealing Witness P-0018's identity publicly would heighten the risk to her, especially to her psychological well-being and dignity. As such, in-court protective measures are necessary.

³ [REDACTED].

ii. Witness P-0018 resides [REDACTED] in a region that remains unstable

14. Witness P-0018 and her family currently reside in [REDACTED]. [REDACTED], similar risks arise in [REDACTED] as they do in the rest of [REDACTED].⁴
15. Moreover, the security situation in the region, in general, remains unstable. The Ituri Province in the Democratic Republic of the Congo (“DRC”) remains in a precarious state of post-conflict security with armed groups still active.⁵ The ethnic groups who were engaged in this conflict now reside in a fragile co-existence.⁶
16. P-0018 is expected to [REDACTED]. However, [REDACTED].⁷ [REDACTED].⁸ Moreover, [REDACTED].⁹
17. As P-0018’s [REDACTED], where [REDACTED], revealing her identity publicly may also expose [REDACTED] to risk.
18. As previously noted by this Chamber¹⁰ and Trial Chamber V(A)¹¹ 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

⁴ [REDACTED].

⁵ See generally, ICC-01/04-02/06-585-Conf. The *ad hoc* internationals have recognised that the general 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 IT-95-17/1-T, T. Ch.II, 11 June 1998, paras. 7-8; *Delali 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.

⁶ See generally, ICC-01/04-02/06-585-Conf-Anx.

⁷ [REDACTED].

⁸ [REDACTED].

⁹ [REDACTED].

¹⁰ ICC-01/04-02/06-824-Red, para.14; ICC-01/04-02/06-1004-Conf-Red, para.5 with public redacted version at ICC-01/04-02/06-1004-Red2, para.5.

¹¹ ICC-01/09-01/11-902-Red2, para.14.

specific witness.¹² The *ad hoc* international tribunals have also recognised that the general volatile situation in a post-conflict region and potential threats against witnesses living in that region, or even in neighbouring countries, can justify the witnesses' fears for their safety as a result of participating in the tribunal's proceedings.¹³

19. [REDACTED].¹⁴ 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 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.¹⁵

20. Trial Chamber V(A) stated 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."¹⁶ Although Witness P-0018 has not been the subject of any specific threat or risk, in its decision concerning Witness P-0800's protective measures, the Chamber recalled "reported instances where other witnesses, including crime based

¹² ICC-01/04-02/06-824-Red, para. 14 (citing ICC-01/09-01/11-902-Red2, para. 14); ICC-01/04-02/06-1004-Conf-Red, para. 5.

¹³ See: *Prosecutor v Rwamakuba*, Decision on the Defence Motion for Protective Measures, 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, IT-95-17/1-T, T. Ch.II, 11 June 1998, paras. 7-8; *Delali et al.*, Decision on the Motion by the Prosecution for Protective Measures for the Witness Designated by the Pseudonym "N", IT-96-21-T, T.Ch., 28 April 1997, paras. 7-9 (reasoning that: "[e]ven if witness's fears have not been substantiated by objective evidence, they cannot be disregarded as irrational. They must be seen in the light of the normal tensions that exist in the aftermath of the conflict. It is not unusual for people to take the law into their own hands against their enemies, real or imagined, in such situations, and in the circumstances, fear of probable attacks is not an abnormal reaction. A Trial Chamber cannot, therefore, summarily dismiss the personal fears of a witness it is mandated to protect under Article 22 of the Statute").

¹⁴ [REDACTED].

¹⁵ See ICC-01/04-02/06-785-Red, paras.50-57.

¹⁶ ICC-01/09-01/11-902-Red2, para.14.

witnesses, were allegedly threatened as a result of their involvement with the Court.”¹⁷

iii. Witness P-0018 may be identified by [REDACTED]

21. [REDACTED].

22. [REDACTED]. Nevertheless, if granted, this measure alone may not suffice to protect her from any attempts [REDACTED]. Even if this evidence were to be elicited in private session, should any of those involved [REDACTED], they would likely assume that she has given evidence regarding this incident.

23. As stated above, due to the objective risks against Witness P-0018 the possibility of [REDACTED] should not be ignored.

iv. [REDACTED]

24. Although the safety and security of Witness P-0018 is closely monitored and assessed, [REDACTED].¹⁸

25. Implementing the requested protective/special measures during the testimony of these witnesses will likely obviate the need for additional and more intrusive measures, [REDACTED], to be applied upon the completion of Witness P-0018’s testimony.

II. The requested protective/special measures do not violate the Accused’s right to a public hearing

26. The Prosecution requests that the Chamber grant the full set of protective and special measures requested for Witness P-0018 under article 68, rule 87 and/or rule 88. The measures sought appropriately balance the Accused’s right to a fair

¹⁷ ICC-01/04-02/06-1160-Conf-Exp, para. 7.

¹⁸ [REDACTED].

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.

27. As the Chamber has previously found, granting the 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 the witness who will remain anonymous to the public only.¹⁹ The Accused is in possession of this information, and, as such, will not be prejudiced should the requested protective measures be granted.

28. Granting face and voice distortion in addition to a pseudonym would not violate the Accused's right to a public hearing.²⁰ Article 68(2) explicitly provides that granting measures to take into account a witness' 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.²¹ Moreover, if the Chamber were to grant the witnesses face and voice distortion in addition to the use of a pseudonym, the hearing will still be in public given that any non-identifying testimony that both witnesses give will be in open session and publicly available.

III. Additional in-court special measures are warranted

29. In addition granting the additional in-court special measures of questioning adapted to the needs of P-0018 and the assistance of a VWU support person to her is warranted.

¹⁹ ICC-01/04-02/06-905-Red, para.8.

²⁰ See e.g. Witness [REDACTED]: ICC-01/04-02/06-824-Conf, para. 10; Witness P-0901: ICC-01/04-02/06-828-Conf, para. 10; Witness [REDACTED]: ICC-01/04-02/06-905-Conf, paras. 8-9; Witness P-0859: ICC-01/04-02/06-1004-Conf-Red, pp. 5-6, paras 5-6; Witness P-0800: ICC-01/04-02/06-1160-Conf, para. 8.

²¹ 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.

30. Rule 88 allows the Court to impose measures to facilitate the testimony of vulnerable victims and witnesses, and Chambers have the discretion to determine which special measures would facilitate the testimony of a vulnerable witness.²² The Chamber is able to take into account the particular characteristics of a witness when deciding what special measures, if any, to grant under rule 88 of the Rules.²³
31. Witness P-0018 is a vulnerable witness [REDACTED]. As stated, the Chamber is able to take into account her particular circumstances as a vulnerable witness [REDACTED] when deciding what special measures, if any, to grant under rule 88.²⁴
32. At the International Criminal Tribunal for the former Yugoslavia, the Trial Chamber in Tadić noted that [REDACTED].²⁵
33. In order to minimise the risk of re-traumatisation, the Prosecution requests the Chamber to authorise a Swahili speaking support assistant from the VWU to sit next to Witness P-0018 during her testimony and to provide her with assistance when necessary.²⁶

²² See e.g. H. Brady, 'Protective and Special Measures for Victims and Witnesses', in Lee, R. et al., (eds.), *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence*, (Transnational Publishers Inc., 2001), pp. 447-450: "Rule 88 is primarily designed to allow the Court to order 'special measures' to facilitate the testimony of certain vulnerable victims and witnesses, such as traumatised victims or witnesses, children, victims of sexual violence and the elderly. [...] [T]he drafters of Rule 88 purposely reserved to it a degree of flexibility, thus giving the Court scope to fashion orders as may be necessary and appropriate in the circumstances".

²³ See e.g. ICC-01/04-01/06-1049, para.32 ("The Trial Chamber also draws special attention to the vulnerability of some of the people who may be called to testify. There must be awareness of the particular characteristics of a witness which may cause the court environment to be particularly foreign and uncomfortable. In the context of the present case, for example, particular attention should be paid to any children who are called as witnesses to ensure that their psychological well-being is considered as a matter of paramount importance, pursuant to Article 68 of the Statute and Rule 88 of the Rules.").

²⁴ See e.g. ICC-01/04-01/06-1049, p.15, paras.31-32. Trial Chamber I observed that "[t]here must be awareness of the particular characteristics of a witness which may cause the court environment to be particularly foreign and uncomfortable". (Emphasis added).

²⁵ [REDACTED].

²⁶ The Chamber granted this special measure in relation to Witness P-0010, see email from the Chamber to the Parties and Participants dated 6 November 2015 at 17:47. See also ICC-01/04-02/06-1277-Conf, para.9 regarding P-0912.

34. Further, in order to facilitate Witness P-0018's testimony, and to give her the opportunity to testify to the best of her abilities, the Prosecution also requests the Chamber to order the Parties and participants to adapt their questioning in accordance with her needs and capacities, in particular as follows:

- (i) Start with questions to guide the witness through the statement;
- (ii) Use short, simple questions and language which is easy to understand, avoiding legal terms, long sentences and double negations;
- (iii) Put questions in a non-confrontational, non-pressuring manner;
- (iv) Avoid questions that may be embarrassing for the witness;
- (v) [REDACTED]:
 - (a) [REDACTED];
 - (b) [REDACTED];
- (vi) Observe the witness closely, in case of signs of nervousness, distraction, withdrawal or too emotional reactions, a break is allowed or witness is asked if she needs a break.²⁷

35. Moreover, the Prosecution requests that any questioning of [REDACTED].

i. Evidence of P-0018's [REDACTED] needs to be elicited in private session

36. The Prosecution requests that evidence regarding Witness P-0018's [REDACTED] be elicited in private session, due to the sensitive nature of that evidence and its potential impact on the psychological well-being, dignity and privacy of Witnesses P-0018 [REDACTED]. This is a relevant factor for the Chamber to consider in assessing the need for protective or special measures for these witnesses pursuant to article 68(1) of the Statute. [REDACTED].²⁸

²⁷ The Chamber granted these special measures in relation to Witness P-0010, *see* email from the Chamber to the Parties and Participants dated 6 November 2015 at 17:47. *See also* ICC-01/04-02/06-1277-Conf, [REDACTED]. [REDACTED].

²⁸[REDACTED].

37. Article 68(1) of the Statute provides that in taking appropriate measures to ensure the protection of the safety, physical and psychological well-being, dignity and privacy of victims and witnesses, Chambers shall have regard to all relevant factors. As stated in the same article, such factors include the nature of the crime, [REDACTED]. This is consistent with domestic laws and the practice of international courts and tribunals.²⁹

38. The Accused will not be prejudiced in any way should the Chamber grant the requested special measures.

Conclusion and Request

39. Witness P-0018 has objectively justifiable risks to her safety and that of their family members that warrant the requested protective/special measures. She also has specific needs that warrant granting certain additional in-court special measures. For all of the foregoing reasons, the Prosecution asks that the Chamber grant its Request.



Fatou Bensouda
Prosecutor

Dated this 1st day of June 2016
At The Hague, The Netherlands

²⁹ [REDACTED].