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**International
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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

Public redacted version of "Prosecution's twentieth request for in-court protective and special measures", 10 June 2016, ICC-01/04-02/06-1383-Conf-Exp

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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”) requests that Trial Chamber VI (“Chamber”) grant in relation to Prosecution Witness P-0019¹ in-court protective measures of face and voice distortion, the use of a pseudonym, and that part of her testimony related to [REDACTED] be heard in private session, pursuant to articles 64(2) and 68(1) and (2) of the Rome Statute (“Statute”), and rule 87 of the Rules of Procedure and Evidence (“Rules”).
2. Additionally, the Prosecution requests that the Chamber grant the following special measures for P-0019 as a vulnerable witness, pursuant to rule 88 of the Rules and article 68(1) and (2) of the Statute, namely: (a) regular breaks during her questioning and shorter sessions; (b) that she be assisted in court by a Victims and Witnesses Unit (“VWU”) support assistant; and (c) questions be put to her that are adapted to her needs and capabilities.
3. First, the Request for in-court protective measures is necessary given: (i) the witness’ expected evidence, in particular in relation to [REDACTED]; (ii) [REDACTED]; (iii) [REDACTED]; and (iv) the fact that [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, especially in view of the fact that [REDACTED].
4. 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.

¹ P-0019 is the eleventh Prosecution witness on the list of witnesses for the fifth evidentiary block, email dated 8 June 2016 at 15:30 pm from the Prosecution to the Chamber, the Defence and the Legal Representatives.

5. Third, 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 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

6. This filing is classified as "Confidential, *ex parte* – only available to the Prosecution and Victims and Witnesses Unit" pursuant to regulation 23bis (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

- I. *In-court protective and special measures of face distortion, voice alteration, use of pseudonym and the use of private session to [REDACTED] 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-0019's safety, well-being and dignity are objectively justifiable, for the following reasons.

i. Witness P-0019's anticipated evidence

8. Witness P-0019, is expected to give evidence on [REDACTED]. The witness is expected to provide evidence on, *inter alia*, the crimes of murder and attempted

murder, attacks against the civilian population, rape and sexual slavery of civilians, persecution, pillaging, forcible transfer of population, committed by *Union des Patriotes Congolais* ("UPC")/ *Forces Patriotiques pour la Libération du Congo* ("FPLC") soldiers in and around [REDACTED] during the time frame of the charges.

9. Witness P-0019 is of [REDACTED] ethnicity. She is a civilian and a crime-base witness who will testify about the attack on the villages in the Walendu-Djatsi *collectivité* in February 2003. She is expected to provide evidence that the UPC/FPLC [REDACTED]. Witness P-0019 is expected to give evidence about [REDACTED] by the UPC/FPLC. She is also expected to testify about [REDACTED]; and about the impact of her victimization.

ii. Witness P-0019 resides [REDACTED] in a region that remains unstable

10. Witness P-0019 and her family currently reside in [REDACTED]. [REDACTED], similar risks arise in [REDACTED] as they do in the rest of [REDACTED].²

11. 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.³ The ethnic groups who were engaged in this conflict now reside in a fragile co-existence.⁴

² [REDACTED].

³ *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.

⁴ *See generally*, ICC-01/04-02/06-585-Conf-Anx.

12. As previously noted by this Chamber⁵ and Trial Chamber V(A)⁶ 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.⁷ 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.⁸
13. [REDACTED]⁹ 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.¹⁰
14. 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

⁵ 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.

⁶ ICC-01/09-01/11-902-Red2, para.14.

⁷ 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.

⁸ *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").

⁹ ICC-01/04-02/06-396-Conf-Anx1, p. 7 (these are observations set out by *Avocats Sans Frontières* as cited by the Registry).

¹⁰ *See* ICC-01/04-02/06-785-Red, paras.50-57.

justifiable risk sufficient to support the granting of protective measures.”¹¹
Although [REDACTED].¹²

iii. Evidence of Witness P-0019’s [REDACTED] needs to be elicited in private session

15. [REDACTED]. [REDACTED]. Revealing Witness P-0019’s identity publicly would heighten the risk to her safety as well as to her psychological well-being and dignity.

16. 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, in particular where [REDACTED]. This is consistent with domestic laws and the practice of international courts and tribunals.¹³

17. First, the unique nature of the circumstances of [REDACTED]. The Prosecution notes that voice alteration and face distortion would remain necessary, even if the Chamber grants the use of private session, because [REDACTED].

18. Second, revealing her identity [REDACTED]. [REDACTED].¹⁴ [REDACTED].¹⁵
[REDACTED]¹⁶ [REDACTED].

19. Moreover, the sensitive nature of that evidence potentially impacts on the psychological well-being, dignity and privacy of Witnesses P-0019, [REDACTED].
The nature of her victimization is a relevant factor for the Chamber to consider in

¹¹ ICC-01/09-01/11-902-Red2, para. 14.

¹² [REDACTED].

¹³ [REDACTED].

¹⁴ [REDACTED].

¹⁵ *Ibid.*

¹⁶ [REDACTED].

assessing the need for protective or special measures for these witnesses pursuant to article 68(1) of the Statute. [REDACTED].¹⁷

iv. Witness P-0019 is [REDACTED]

20. Although the safety and security of Witness P-0019 is closely monitored and assessed, [REDACTED].¹⁸

21. 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-0019's testimony.

II. Additional in-court special measures are warranted

22. In addition granting the additional in-court special measures are warranted of allowing regular breaks, shorter sessions, questioning adapted to the needs of P-0019, and the assistance of a VWU support person. The Prosecution notes that the witness has indicated [REDACTED], should the need arise.

23. Rule 88 allows the Court to implement 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.¹⁹ The Chamber is able to take into account the particular characteristics of a witness

¹⁷ [REDACTED].

¹⁸ [REDACTED].

¹⁹ 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".

when deciding what special measures, if any, to grant under rule 88 of the Rules.²⁰

24. Witness P-0019 is [REDACTED]. Witness P-0019 [REDACTED]. [REDACTED].²¹

The Prosecution requests that shorter sessions and regular breaks be allowed for Witness P-0019 to testify in the most comfortable conditions possible.

25. The Prosecution further requests that, if necessary, the Chamber authorize a [REDACTED] speaking support assistant from the VWU to sit next to Witness P-0019 during her testimony and to provide her with assistance.²²

26. Further, in order to facilitate Witness P-0019's testimony, and to give her the opportunity to testify to the best of her abilities, the Prosecution also requests that the Chamber order the Parties and participants to adapt their questioning in accordance with her needs and capacities, for instance as follows, [REDACTED]:

- (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) In case the witness is questioned about [REDACTED]:
 - (a) Formulate questions [REDACTED];

²⁰ 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.”).

²¹ DRC-OTP-2059-0080, at 0085.

²² 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.

- (b) Avoid unnecessarily [REDACTED] questions;
- (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.²³

27. Moreover, the Prosecution requests that any questioning of P-0019 comply with [REDACTED] the Rules.

28. The VWU will conduct its vulnerability assessment with the witness, and may recommend special measures very close to testimony, taking into consideration, *inter alia*, the views and need of the witness at that time. The Prosecution notes that some additional special measures - [REDACTED] - are not foreseen at this time, but may nevertheless be assessed closer to her testimony as being necessary. The Prosecution is in consultation with the VWU in relation to special measures required, pursuant to the Protocol on the vulnerability assessment and support procedure used to facilitate the testimony of vulnerable witnesses.²⁴

III. *The requested protective and special measures do not violate the Accused's right to a public hearing*

29. The Prosecution requests that the Chamber grant the full set of protective and special measures requested for Witness P-0019 under article 68, rule 87 and/or rule 88. 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 protect victims and witnesses appearing before the Court, pursuant to articles 64(2) and 68(1) and (2) of the Statute.

30. 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

²³ [REDACTED].

²⁴ ICC-01/04-02/06-445-Anx1.

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.²⁵ The Accused is in possession of this information, and, as such, will not be prejudiced should the requested protective measures be granted.

31. Granting face and voice distortion in addition to a pseudonym would not violate the Accused's right to a public hearing.²⁶ 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.²⁷ 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.

32. The requested additional special measures do not prejudice the Defence.

²⁵ ICC-01/04-02/06-905-Red, para.8.

²⁶ See e.g. Witness [REDACTED]: ICC-01/04-02/06-824-Conf, para. 10; Witness [REDACTED]: ICC-01/04-02/06-828-Conf, para. 10; Witness [REDACTED]: ICC-01/04-02/06-905-Conf, paras. 8-9; Witness [REDACTED]: ICC-01/04-02/06-1004-Conf-Red, pp. 5-6, paras 5-6; Witness [REDACTED]: ICC-01/04-02/06-1160-Conf, para. 8.

²⁷ 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.

Conclusion and Request

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



Fatou Bensouda
Prosecutor

Dated this 14th day of June 2016
At The Hague, The Netherlands