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No.: **ICC-01/04-02/06**
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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 “Response on behalf of Mr Ntaganda to ‘Second
Prosecution request for in-court protective measures’”,
ICC-01/04-02/06-801-Conf-Exp, 31 August 2015**

Source: Defence Team of Mr Bosco Ntaganda

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

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Further to the submission of the “*Second Prosecution request for in-court protective measures*” by the Office of the Prosecutor (“Prosecution”) on 17 August 2015 (“Prosecution Second Request”),¹ Counsel representing Mr Ntaganda (“Defence”) hereby submit this:

Response on behalf of Mr Ntaganda to “Second Prosecution request for in-court protective measures”

“Defence Response”

INTRODUCTION

1. On 27 May 2015, the Prosecution sought to maintain in the current proceedings in-court protective measures previously ordered by Trial Chamber I in the *Lubanga* case in relation to 11 witnesses who testified in the case against Mr Lubanga and who are expected to testify in the present case (“Prosecution First Request”).² While it did not object to the Prosecution First Request, the Defence underscored that it was not in a position to make any meaningful and useful comments as to whether the maintaining of the protective measures remains necessary as it was not aware of the specific security needs for these witnesses.³ On 10 August 2015, Trial Chamber VI (“Chamber”) granted the Prosecution First Request.⁴
2. With a view to the upcoming first evidentiary block – scheduled to commence on 15 September 2015 – the Prosecution now requests in-court protective measures with respect to two other witnesses, namely Witnesses P-0805 and P-0901, in the form of: (i) facial distortion; (ii) voice distortion; and (iii) the use of a pseudonym during their testimony. The Prosecution Second Request rests on the premise that the requested measures will ensure that both witnesses

¹ ICC-01/04-02/06-782-Conf-Exp. A confidential redacted version of the Prosecution Second Request was filed on 18 August 2015: ICC-01/04-02/06-782-Conf-Red.

² ICC-01/04-02/06-609-Conf-Corr-Red.

³ ICC-01/04-02/06-654, paras.1 and 2.

⁴ ICC-01/04-02/06-774-Conf. The Chamber issued a public redacted version of its decision on the same day.

will be able to give evidence “without fear for their personal safety, or that of their family members”.⁵

3. For the reasons expressed below, the Defence opposes the Prosecution Second Request.

SUBMISSIONS

I. Preliminary remarks

4. It is incumbent upon the party requesting in-court protective measures to demonstrate whether the measures sought are: (i) necessary in light of an objectively justifiable risk; and (ii) proportionate to the rights of the accused.⁶ Grounds for concern are not sufficient, in themselves, to grant in-court protective measures.⁷ Protective measures should be granted only on an exceptional basis, following a case-by-case assessment.⁸ A case-by-case evaluation requires an individualised consideration of risk in each particular case.⁹
5. Strikingly, the Prosecution Second Request provides no references supporting any of the assertions set out therein.¹⁰ The absence of such references seriously impairs the Defence’s ability to provide meaningful observations on the validity of the purported security concerns expressed by Witnesses P-0805 and P-0901.
6. In such context, the Defence respectfully requests the Chamber to order the notification to the parties of a confidential redacted version of the report to be submitted by the Victims and Witnesses Unit (“VWU”) pursuant to Rule 87 as soon as practicable and, in any event, before the expiry of the statutory

⁵ Prosecution Second Request, para.2.

⁶ ICC-01/09-01/11-902-Red2 (“*Ruto* Decision”), para.13.

⁷ See *Ruto* Decision, paras.18, 30, 33, 39, 43.

⁸ *Ruto* Decision, para.13.

⁹ *Ruto* Decision, para.14.

¹⁰ On the contrary, the Prosecution First Request provided supporting references, but such references were redacted to the Defence.

deadline for the filing of responses to the Prosecution Second Request,¹¹ so as to allow the Defence to make additional observations if deemed necessary before the Chamber adjudicates the Prosecution Second Request.

7. Furthermore, the Defence wishes to emphasise that the extent of the in-court protective measures requested by the Prosecution is such that granting them will inevitably lead to frequently resorting to private sessions, which will, in turn, seriously hamper the public's ability to follow the proceedings. Indeed, in order to avoid that the public know the identity of the witnesses, a significant number of questions (beyond identifying questions) will have to be asked in private session, including questions that go to the core of the witnesses' narrative. This will be likely the case with any question related to Witness P-0901's role during the period of the charges, [REDACTED].

II. Witness P-0805

8. At the outset, the Defence notes with concern that it is informed for the first time that Witness P-0805 would have expressed concerns over his safety and that of his family members should his identity be known to the public. Nothing in Witness P-0805-related material disclosed by the Prosecution so far reveals, let alone implies, that the witness has such concerns. With respect to the Prosecution's assertion that "Witness P-0805 resides [REDACTED]",¹² the Defence observes that the information pertaining to Witness P-0805's current location is entirely redacted in Witness P-0805-related material. Moreover, in its Second Request, the Prosecution provides no tangible information supporting this assertion.
9. Leaving aside these two unsubstantiated claims, Witness P-0805's situation appears to be no different from that of any other crime-base witness, who all

¹¹ At footnote 29 of the "*Decision on the conduct of proceedings*", ICC-01/04-02/06-619, the Chamber indicated that "[i]f appropriate, [it] may order that a confidential redacted version of the VWU's report be notified to the parties".

¹² Prosecution Second Request, para.6.

reside or come from small communities in the Ituri region. The Prosecution's assertions suggest, at most, Witness P-0805's discomfort with being a Prosecution witness. Such feeling is inherent to any testimony before a criminal court. Similarly, a person who wilfully accepts to testify before a criminal court accepts that his/her testimony will be the object of media attention (whether heightened or not), which is a necessary component of the publicity of criminal proceedings.

10. As regards the proportionality of the requested protective measures, the Defence underscores that these measures amount to hiding from the public Witness P-0805's identity. The impact of such outcome on the Chamber's ability to carry out its truth-seeking function cannot be underestimated. A recent UNODC manual indicates that the possibility for a witness to benefit from protective measures is considered by some countries to entail a risk that such measures may become an incentive for the witness to give false testimony that he or she believes the Prosecution wants or needs.¹³ The Defence submits that making a witness's identity known to the public increases the witness's commitment to tell the truth as well as his/her feeling of public accountability.
11. When requesting that [REDACTED], the Prosecution vigorously argued that hearing from the outset evidence from a crime-base witness rather than from [REDACTED] will allow the local 'victim' communities to "immediately" relate to the proceedings.¹⁴ Witness P-0805's identity is not a mere detail that can be dissociated from his narrative. The Defence fails to understand how hiding the witness's identity from the public can serve the purpose of allowing the local 'victim' communities to relate to the proceedings against Mr Ntaganda.

¹³ United Nations Office on Drugs and Crime, *Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime*, 2008, p.45.

¹⁴ "Prosecution request to change the order of appearance of the first witnesses" ("Prosecution Request to Change the Order of Appearance"), ICC-01/04-02/06-630-Conf-Red, para.20.

12. For these reasons, the Defence opposes the in-court protective measures sought in relation to Witness P-0805's upcoming testimony. Absent any objectively justifiable risk to Witness P-0805's security and safety and with a view to ensuring that the trial record is accessible to the public to a maximal extent, Witness P-0805's identity must be known to the public.

III. Witness P-0901

13. The Prosecution also fails to establish the existence of an objectively justifiable risk to Witness P-0901's safety and security which would warrant in-court protective measures.
14. The Prosecution refers to a series of events in support of its contention that Witness P-0901 has 'serious' security concerns related to his involvement with the Prosecution, including retaliation against himself and his family. Significantly, these events date back to [REDACTED],¹⁵ well before Witness P-0901 met for the first time with Prosecution investigators.¹⁶ In any event, [REDACTED] – which are mentioned in the "[REDACTED]"¹⁷ but are surprisingly not referred to in the Prosecution Second Request – are vague and ambiguous.¹⁸ They reveal, at most, grounds for concern,¹⁹ which are not sufficient to warrant in-court protective measures.²⁰ In any event, [REDACTED] do not suggest the existence of any threat to his safety or security.
15. Furthermore, it is noteworthy that Witness P-0901 did not hesitate to [REDACTED].²¹

¹⁵ Regrettably, the Prosecution does not refer to any material in support of its contentions in relation to Witness P-0901. Having reviewed Witness P-0901-related material disclosed by the Prosecution, the Defence observes that the incidents related in paragraph 9 of the Prosecution Second Request are summarized in [REDACTED].

¹⁶ See [REDACTED].

¹⁷ [REDACTED].

¹⁸ [REDACTED].

¹⁹ [REDACTED].

²⁰ See *Ruto* Decision, paras.18, 30, 33, 39, 43.

²¹ [REDACTED].

16. The Prosecution indicates that Witness P-0901 is currently [REDACTED].²² It further specifies that Witness P-0901, [REDACTED].²³ The Prosecution does not make clear whether [REDACTED] is the only protective measure of which Witness P-0901 benefits or not. Likewise, the Prosecution does not indicate *when* Witness P-0901 became [REDACTED].
17. Finally, it is significant that in its Prosecution Request to Change the Order of Appearance – in which it argued the existence ‘heightened security problems’ in relation to four [REDACTED] witnesses – the Prosecution made no mention of [REDACTED] purported security concerns, whereas these concerns were known to the Prosecution at that time.
18. As regards the proportionality of the requested protective measures, the Defence reiterates that the impact of hiding a witness’s identity to the public on the Chamber’s ability to carry out its truth-seeking function cannot be underestimated. In fact, making a witness’s identity known to the public will increase the witness’s commitment to tell the truth as well as his/her feeling of public accountability. This is even more significant in the case of a witness questioned by the Prosecution pursuant to Article 55(2) – like Witness P-0901 – who, by the mere fact that there are reasonable grounds to believe that he has committed a crime within the jurisdiction of the Court, has an incentive to lie and exculpate himself during his testimony.
19. For these reasons, the Defence opposes the in-court protective measures sought in relation to Witness P-0901’s upcoming testimony. Absent any objectively justifiable risk to Witness P-901’s security and safety and with a view to ensuring that the trial record is accessible to the public to a maximal extent, Witness P-0901’s identity must be known to the public.

²² Prosecution Second Request, para.8.

²³ Prosecution Second Request, para.10.

CONFIDENTIALITY

20. Pursuant to Regulations 23*bis* (1) and (2) of the Regulations of the Court, this Defence Response is submitted on a confidential *ex parte* basis – only available to the Chamber, Prosecution, Defence and Registry – as it responds to a filing bearing the same classification. A public redacted version will be filed separately.

RELIEF SOUGHT

In light of the above submissions, the Defence respectfully requests the Chamber to:

DENY the Prosecution Second Request.

RESPECTFULLY SUBMITTED ON THIS 4TH DAY OF SEPTEMBER 2015

A handwritten signature in black ink, appearing to read 'StB-'.

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands