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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 “Consolidated response on behalf of Mr Ntaganda to Prosecution applications for protective/special measures under Rule 87 or Rule 88, and for leave to appeal the Decision on Prosecution’s request for in-court protective measures for Witness P-0039”,
ICC-01/04-02/06-990-Conf, 9 November 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 *“Decision on Prosecution’s request for in-court protective measures for Witness P-0039”* issued by Trial Chamber VI (“Chamber”) on 28 October 2015 (*“Impugned Decision”*)¹ and the submission of the *“Prosecution applications for protective/special measures under Rule 87 or rule 88, and for leave to appeal the ‘Decision on Prosecution’s request for in-court protective measures for Witness P-0039’”* (*“Prosecution Application for protective/special measures”* and *“Prosecution Application for leave to appeal”*, respectively),² Counsel representing Mr Ntaganda (“Defence”) hereby submit this:

Consolidated response on behalf of Mr Ntaganda to Prosecution applications for protective/special measures under Rule 87 or Rule 88, and for leave to appeal the Decision on Prosecution’s request for in-court protective measures for Witness P-0039

“Defence Response”

INTRODUCTION

1. The Defence hereby responds simultaneously to the Prosecution Application for protective/special measures and the Prosecution Application for leave to appeal. For the reasons expressed below, the Defence opposes both Applications.

SUBMISSIONS

I. THE PROSECUTION APPLICATION FOR PROTECTIVE/SPECIAL MEASURES

2. On 14 October 2015, the Prosecution requested the Chamber to grant, pursuant to Article 68(1), in-court protective measures for Prosecution

¹ ICC-01/04-02/06-956-Conf.

² ICC-01/04-02/06-973-Conf.

Witness P-0039 in the form of facial and voice distortion and the use of a pseudonym during his testimony before the Court.³

3. In support of its Request, the Prosecution argued that:
 - a. revealing Witness P-0039's identity would risk compromising his safety, privacy and his physical and psychological well-being within the meaning of article 68(1);⁴
 - b. Witness P-0039: (i) is "[REDACTED]"; and (ii) reported "[REDACTED]";⁵
 - c. Witness P-0039's [REDACTED] and [REDACTED] heighten this witness's vulnerability;⁶
 - d. There is a potential of retaliation after testimony;⁷ and
 - e. Witness P-0039 fears for his family due to the instability of the security situation in the area where he is living and the alleged presence of persons loyal to the UPC/FPLC groups and/or the Accused in this area.⁸
4. In the Impugned Decision, the Chamber held that since "Witness P-0039's testimony was not expected to relate to the Accused directly" and that "no specific threats had been identified", neither by the Prosecution nor by VWU, the use of a pseudonym during Witness P-0039's testimony would sufficiently mitigate any risk to his security.⁹

³ ICC-01/04-02/06-899-Conf-Red ("Prosecution Request"), para. 16.

⁴ Prosecution Request, para.11.

⁵ Prosecution Request, para.14.

⁶ Prosecution Request, para.14.

⁷ Prosecution Request, para.14.

⁸ Prosecution Request, para.15.

⁹ Impugned Decision, para.8.

5. On 28 October 2015, the Prosecution orally requested the Chamber to reconsider the Impugned Decision based on “the well-being of the witness” and the fact that the Court’s hearings were broadcasted on the Internet.¹⁰
6. In light of Witness P-0039’s legal representative confirmation that he had no information about threats to the safety of his client,¹¹ the Chamber held “we haven’t found strong reasons to reconsider to change our previous decision”.¹²
7. However, the Chamber indicated that “in the future if there could be some change of situation on the part of the witness, maybe some concrete threats to him, then it would be may be the right time, maybe, to come with another request to reconsider our previous decision”.¹³
8. On this basis, the Prosecution Application for protective/special measures is procedurally impermissible as a ‘belated challenge’ to the Chamber’s Decision in the ‘guise’ of a further request for reconsideration in the absence of any change of circumstances.
9. In its Application for protective/special measures, the Prosecution is applying anew for the implementation of facial and voice distortion during the testimony of Witness P-0039 (in addition to the use of a pseudonym), but now under Rule 87 as a ‘protective measure’ and/or Rule 88 as a ‘special measure’, “given P-0039’s security situation and [REDACTED]”.
10. With respect to Rule 87, the Prosecution has failed to identify any “change of situation on the part of the witness”¹⁴ since 28 October 2015 or any concrete threats to the safety of Witness P-0039 which would warrant the requested additional in-court protective measures.

¹⁰ ICC-01/04-02/06-T-40-CONF-ENG, p.76, l.5 to p.77, l.7.

¹¹ ICC-01/04-02/06-T-40-CONF-ENG, p.79, l.21-24.

¹² ICC-01/04-02/06-T-40-CONF-ENG, p.81, l.3-4.

¹³ ICC-01/04-02/06-T-40-CONF-ENG, p.81, l.18-21.

¹⁴ ICC-01/04-02/06-T-40-CONF-ENG, p.81, l.18-19.

11. As regards Rule 88, the Defence underscores that special measures under this provision can only be granted in addition to protective measures ordered pursuant to Rule 87, unless the later provision does not provide for a specific protective measure that would fit the particular case of a witness.¹⁵
12. Considering that Rule 87 expressly provides for alteration of picture and voice, such in-court protective measures can only be granted on the basis of this rule and not on the basis of Rule 88.
13. Accordingly, the Prosecution cannot request the implementation of facial and voice distortion (in addition to the use of a pseudonym) as special measures under Rule 88 when these measures have already been rejected under Article 68 and Rule 87.
14. What is more, Prosecution Annex A (referred to in the Prosecution Application for leave to appeal) reveals that only 70 persons in the Democratic Republic of the Congo viewed the live-streaming through the Court's website during the period from 2 September to 28 September 2015,¹⁶ which for a country of 74,88 millions of habitants¹⁷ is insignificant. In a country where only three percent of the population use internet,¹⁸ it is very unlikely that persons living in the same area as Witness P-0039 will learn of his testimony via its live-streaming, let alone his identity which is protected by a pseudonym.¹⁹

¹⁵ *Prosecutor v. Bemba*, Transcript, 14 June 2011, ICC-01/05-01/08-T-128-Red-ENG, T.34 ; *Prosecutor v. Bemba*, Transcript, 25 June 2012, ICC-01/05-01/08-T-227-Red-ENG, T.31-32; *Prosecutor v. Katanga & Ngudjolo*, Transcript, 19 April 2010, ICC-01/04-01/07-T-129-Red-ENG, T.8-10; *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07-1667, 23 November 2009.

¹⁶ Prosecution Application for leave to appeal, Annex A, p.38.

¹⁷ <http://www.worldbank.org/en/country/drc>

¹⁸ <http://donnees.banquemondiale.org/indicateur/IT.NET.USER.P2>

¹⁹ Furthermore, the Defence is surprised that the Prosecution, rather than using time and resources allegedly necessary to explain again to its witnesses that all in-court protective measures requested might not be granted by the Chamber, is spending considerable financial resources to request a report prepared by an external contractor on the viewership of the live-streaming through the website of the Court, which has little if any probative value

15. In light of the above, in the absence of any change of situation since 28 October 2015, the Prosecution Application for protective/special measures under both Rules 87 and 88 must be rejected.

II. THE PROSECUTION APPLICATION FOR LEAVE TO APPEAL

16. The Prosecution seeks leave to appeal the Impugned Decision on three issues.
17. None of the three issues put forward by the Prosecution in its Application are ‘appealable’ issues arising out of the Impugned Decision. In addition, the Prosecution Application for leave to appeal fails to meet the appellate standard as set out in Article 82(1)(d) of the Statute. In particular, the Prosecution fails to demonstrate that: (i) the three proposed issues affect the fair and expeditious conduct of the proceedings or the outcome of the trial; and (ii) the immediate resolution of the three proposed issues by the Appeals Chamber will materially advance the proceedings.

A. The Prosecution Application for leave to appeal fails to identify appealable issues

18. It is well-established jurisprudence that the appealing party must identify an ‘appealable’ issue, namely “an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion”.²⁰
19. Under its first and second proposed issues, the Prosecution merely disputes the Chamber’s assessment of Witness P-0039’s security situation, based on the same arguments and information previously advanced in its Prosecution Request and oral request for reconsideration, which the Chamber considered

²⁰ ICC-01/04-618, para.9.

- and rejected.²¹ In particular, the Chamber assessed the risks that Witness P-0039 might be exposed to when testifying, as a result of which, the Chamber ordered the use of a pseudonym for the purposes of the trial when referring to the witness.
20. In arguing that the Chamber erred in fact by denying the protective measures of face and voice distortion and that the Chamber applied an incorrect standard for risk assessment and risk management, the Prosecution disputes the Chamber's factual findings, not its legal reasoning. Moreover, rather than identifying two discrete issues for resolution by the Appeals Chamber, the Prosecution challenges the entirety of the Chamber's reasoning as erroneous.²²
 21. For these reasons, the first and second proposed issues fail to qualify as 'appealable' issues.
 22. The third proposed issue refers to the balance to be struck between the implementation of in-court protective measures and the right of the Accused to a fair trial and public hearing.
 23. The Prosecution implies that granting in-court protective measures for Prosecution Witness P-0039 in the form of facial and voice distortion does not impact the right of the Accused to a public hearing.
 24. It must be underscored that, quite to the contrary, it is widely understood that, the adoption of protective measures for witnesses may infringe upon the fairness as well as the public nature of the procedure.²³ Moreover, there is no doubt that the ability for the public to see the image of a witness and hear his or her voice without technological alteration is an essential component of the publicity of proceedings.

²¹ Impugned Decision, paras.7-8; ICC-01/04-02/06-T-40-CONF-ENG, p.81, l.2-21.

²² *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on the joint defence request for leave to appeal the decision on witness preparation, 13 February 2013, ICC-01/09-01/11-596, para. 11 ; ICC-01/04-02/06-519, para.26.

²³ *Supranational Criminal Law: A System Sui Generis*, Haveman, Kavran, Nicholls, p. 173 ; ICTY, *Prosecutor v. Furundzija*, Case No IT-95-17/1, Trial Chamber II, Judgment, 10 December 1998, para.4.

25. It falls within the duties of a trial chamber to balance the rights of the Accused to a full public hearing and the protection of victims and witnesses, bearing in mind that any protective measures shall not be inconsistent with or prejudicial to the rights of the Accused.
26. Accordingly, the third proposed issue does not identify a subject requiring a decision for its resolution and, as such, fails to qualify as an 'appealable' issue.

B. The Prosecution Application for leave to appeal fails to show that the Impugned Decision involves issues that would significantly affect the fair and expeditious conduct of the proceedings

27. The Prosecution misconstrues the notion of 'fairness' as encapsulated in Article 82(1)(d). 'Fairness' within the meaning of Article 82(1)(d) is directed at the fair conduct of the proceedings and not at particular individuals.²⁴ The suggestion that the protection of Witness P-0039 has been unfairly called into question is not a valid consideration for the purpose of Article 82(1)(d).
28. Moreover, the Prosecution's suggestion that it "could not call witnesses to give evidence if it were not satisfied that the risks arising from their testimony are appropriately managed by the Court as a whole"²⁵ is both speculative and inappropriate. The Defence recalls that "neither party 'owns' the witnesses it intends to call; witnesses are witnesses of the Court and it is for the Chamber to assess the needs of the individual if exceptional measures are proposed".²⁶ The Prosecution did not provide any information suggesting that its witnesses will refuse to testify in cases where all requested in-court protective measures are not granted.

²⁴ ICC-01/04-01-06-2463, para.30.

²⁵ Prosecution Application for leave to appeal, para.30.

²⁶ ICC-01/04-01/06-2285-Conf, para.16.

29. The possibility that a request for in-court protective measures may not be granted in its entirety has no bearing on the Prosecution's ability to call witnesses. In-court protective measures are granted only if the security situation of a witness warrants such measures.
30. Finally, the Prosecution's argument that the three proposed issues would affect the expeditious conduct of the proceeding – as this may affect the Prosecution's ability to call witnesses and to present its case at trial – fails to take into account that the Impugned Decision only dealt with one witness, namely Witness P-0039.
31. The Impugned Decision does not impact the Prosecution's ability to present its case at trial and, as such, involves no issues that would affect the fair and expeditious conduct of the proceedings. The Prosecution should already have explained to its witnesses that protective measures are granted only upon showing the existence of an objectively identifiable risk to the security of the witness and that the ultimate decision in this regard rests with the Chamber.
32. While the alleged need for the Prosecution to meet its witnesses yet again to explain what should already have been explained might create work for the Prosecution, it has no impact on the fair and expeditious conduct of proceeding.

C. The Prosecution Application for leave to appeal fails to show that the Impugned Decision involves issues that would significantly affect the outcome of the trial

33. Bearing in mind – as explained above – that the Impugned Decision dealt with the situation of only one witness, the Prosecution has failed to show that the Impugned Decision involves issues that would significantly affect the outcome of the trial.

34. The Prosecution's contention that in the eventuality of having Witness P-0039's testimony introduced under Rule 68, "it is uncertain whether the Chamber would give it the same weight as if the witness had testified *viva voce* in person",²⁷ is somehow surprising. In this regard, the Defence recalls that the Prosecution previously requested, pursuant to Rule 68(3), the admission into evidence of the prior recorded testimony of two of its 'key' witnesses, namely Witnesses P-0055 and P-0010.

D. The Prosecution Application for leave to appeal fails to show that immediate resolution by the Appeals Chamber of the proposed issues may materially advance the Proceedings

35. It stems from the Prosecution Application for leave to appeal that the Prosecution is calling into question the Chamber's discretionary power to assess the security situation of each witness.
36. The Prosecution overlooks the fact that when dealing with a request for in-court protective measures, the Chamber not only has the power to grant the request, but has also the power to *grant partially* or *deny* the request. While the Prosecution legitimately focusses on the situation of its witnesses, the Chamber has the additional statutory duty to balance the protection of the witness with the right of the Accused to a fair and public hearing. A trial chamber is not bound to grant in-court protective measures simply because such measures have been requested by the Prosecution.
37. In this regard, it is quit far-fetched to suggest that the Prosecution and VWU need to amend their standards and procedures and adjust them to the Court's evolving jurisprudence as a result of the Impugned Decision.

²⁷ Prosecution Application for leave to appeal, para.35.

38. Firstly, the Prosecution does not show how the Impugned Decision is incompatible with these standards and procedures. The Prosecution's assessment of a witness's personal situation is always subject to the discretionary control of the Chamber.
39. Secondly, the Prosecution fails to demonstrate that the Impugned Decision departs from the Court's prior practice. As acknowledged by the Prosecution itself, the Prosecution has always had the duty to explain to its witnesses that protective measures cannot be guaranteed.²⁸
40. Lastly, the Prosecution does not explain all appellate review of the well-established relationship between the implementation of protective measures and the rights of the Accused to a fair and public trial would impact on the present proceeding.
41. It follows from the above that immediate resolution by the Appeals Chamber of the issues put forward by the Prosecution will not materially advance the proceedings.

CONFIDENTIALITY

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

²⁸ Prosecution Application for leave to appeal, para.32.

RELIEF SOUGHT

43. For the reasons set out above, the Defence respectfully requests the Chamber to **REJECT** the Prosecution Applications.

RESPECTFULLY SUBMITTED ON THIS 15TH DAY OF DECEMBER 2015

A handwritten signature in dark ink, appearing to read 'StB' with a flourish at the end.

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands