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No.: ICC-01/04-02/06
Date: **15 December 2015**

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 ‘Prosecution’s submission pursuant to regulation 35 to vary the time limit for the sixth request for in-court protective measures concerning Prosecution Witness P-0039’”,
ICC-01/04-02/06-930-Conf, 22 October 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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**Victims Participation and Reparations
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Further to: (i) the confidential redacted version of the *“Prosecution’s submission pursuant to regulation 35 to vary the time limit for the sixth request for in-court protective measures concerning Prosecution Witness P-0039”* submitted by the Office of the Prosecutor (“Prosecution”) on 14 October 2015 (“Prosecution Sixth Request”);¹ and (ii) Trial Chamber VI’s (“Chamber”) order shortening the deadline for any responses to the Prosecution Sixth Request to 22 October 2015² Counsel representing Mr Ntaganda (“Defence”) hereby submit this:

Response on behalf of Mr Ntaganda to “Prosecution’s submission pursuant to regulation 35 to vary the time limit for the sixth request for in-court protective measures concerning Prosecution Witness P-0039”

“Defence Response”

INTRODUCTION

1. On 14 October 2015, the Prosecution submitted its Sixth Request, whereby it moves the Chamber to: (i) find that there is good cause to vary *a posteriori* the time limit to submit a request for in-court protective measures for Prosecution Witness P-0039; and, should the Chamber vary the time limit, (ii) grant in-court protective measures for Witness P-0039 in the form of facial and voice distortion as well as the use of a pseudonym.
2. On 14 October 2015, the Chamber granted the Prosecution request for an extension of deadline.³
3. For the reasons expressed below, the Defence opposes the Prosecution Sixth Request.

¹ ICC-01/04-02/06-899-Conf-Red.

² Email from Trial Chamber VI Communications, 14 October 2015, 17:00.

³ Email from Trial Chamber VI Communications, 14 October 2015, 17:00.

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.⁴
5. Grounds for concern are not sufficient, in themselves, to grant in-court protective measures.⁵ Protective measures should be granted only on an exceptional basis, following a case-by-case assessment.⁶ A case-by-case evaluation requires an individualized consideration of risk in each particular case.⁷ Applications for in-court protective measures should not be routinely made in the expectation that they will be routinely granted.⁸
6. In the instant case, 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 Witness P-0039, 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 witness's narrative.
7. Moreover, noting the *quasi* similarity between the Prosecution Sixth Request and other pending requests for in-court protective measures, the Defence is

⁴ ICC-01/04-02/06-824-Conf, Chamber Decision on Request for In-Court Protective Measures for the First Prosecution Witness ("First Decision"), para.6, *referring to* ICC-01/09/11-902-Red2 ("*Ruto* Decision"), para 13.

⁵ See *Ruto* Decision, paras. 18, 30, 33, 39, 43.

⁶ Chamber Decision on Request for In-Court Protective Measures for the First Prosecution Witness, para.6, *referring to* *Ruto* Decision, para. 13.

⁷ Chamber Decision on Request for In-Court Protective Measures for the First Prosecution Witness, para.6; *Ruto* Decision, para. 14.

⁸ Chamber Decision on Request for In-Court Protective Measures for the First Prosecution Witness, para.5, *referring to* *Ruto* Decision, para.11.

concerned that the Prosecution is routinely making such requests in the expectation that they will be routinely granted.⁹

II. The Prosecution has failed to establish the existence of an objectively justifiable risk to Witness P-0039's safety and security which would warrant in-court protective measures

8. The Defence notes that nothing in Witness P-0039-related material disclosed by the Prosecution so far reveals, let alone implies, that the witness's safety and that of his family could be jeopardized if the witness's identity were to be disclosed to the public as a result of his testimony before the Court.¹⁰ The timing by which Witness P-0039 expressed his purported safety concerns for the first time – namely, during a consultation with its Legal representative shortly before [REDACTED], while his “safety and security are monitored and regularly assessed”¹¹ – casts doubt as to their being well-founded.
9. In fact, Witness P-0039's situation appears to be no different from that of any other crime-base witness, who all reside or come from small communities in the Ituri region. The Prosecution's assertions suggest, at most, Witness P-0039's discomfort with being a Prosecution witness. Such feeling is inherent to any testimony before a criminal court.
10. Although [REDACTED] of a witness may be a relevant factor when considering whether ‘appropriate measures’ shall be taken by the Court to protect the witness, it is insufficient, in and of itself, to justify an exception to the principle of the publicity of proceedings, provided for in Article 67.

⁹ First Decision, para.5 referring to *Ruto* Decision, ICC-01/09-01/1 1-902-Red2, para. 11, referring to Transcript of hearing on 24 March 2009, ICC-01/04-01/06-T-153-Red2-ENG, page 63, lines 15 - 17 (actually referring to lines 19-21).

¹⁰ In his statements (DRC-OTP-0104-0015 and DRC-OTP-2062-0244), Witness P-0039 simply mentions having been asked if he had concerns regarding his protection and security and that the security measures which are available to him have been explained, without specifying whether he has such concerns or whether he wishes to benefit from such measures: DRC-OTP-0104-0015, para.5.

¹¹ Prosecution Sixth Request, para.14.

11. As regards the proportionality of the requested protective measures, the Defence underscores that these measures amount to hiding from the public Witness P-0039'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.¹² 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.
12. For these reasons, the Defence opposes the in-court protective measures sought in relation to Witness P-0039's upcoming testimony. Absent any objectively justifiable risk to Witness P-0039'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-0039's identity must be known to the public.

RELIEF SOUGHT

13. In light of the above arguments and submissions, the Defence respectfully requests the Chamber to:

REJECT the Prosecution Sixth Request.

RESPECTFULLY SUBMITTED ON THIS 15TH DAY OF DECEMBER 2015



Me Stéphane Bourgon, Counsel for Bosco Ntaganda

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¹² United Nations Office on Drugs and Crime, *Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime*, 2008, p.45.