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No.: ICC-01/04-02/06
Date: 18 January 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 “Response on behalf of Mr Ntaganda to ‘Prosecution’s tenth request for in-court protective measures’”

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: (i) the confidential redacted version of the “*Prosecution’s tenth request for in-court protective measures*” submitted by the Office of the Prosecutor (“Prosecution”) on 24 December 2015 (“Prosecution Request”);¹ and (ii) the “*Decision on the conduct of proceedings*” issued by Trial Chamber VI (“Chamber”) on 2 June 2015,² Counsel representing Mr Ntaganda (“Defence”) hereby submit this:

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

“Defence Response”

INTRODUCTION

1. The Prosecution requests – pursuant to Rule 87 of the Rules of Procedure and Evidence (“Rules”) – in-court protective measures for Witness P-0290 in the form of facial distortion, voice distortion and the use of a pseudonym.³
2. For the reasons expressed below, the Defence submits that the Prosecution has failed to substantiate the existence of an objectively justifiable risk to the safety of Witness P-0290 which would warrant the implementation of any in-court protective measure during his testimony. Consequently, the Prosecution Request should be rejected.

SUBMISSIONS

3. In support of its Request, the Prosecution advances justifications, none of which particularises the existence of an objectively justifiable risk to the safety of Witness P-0290.
4. At the outset, the Defence notes that Witness P-0290 is not alleged to [REDACTED].⁴ The situation of Witness P-0290 cannot thus be compared, as

¹ ICC-01/04-02/06-1071-Conf-Red. The Prosecution Request was originally submitted on a confidential *ex parte* basis – only available to the Prosecution and Victims and Witnesses Unit on 23 December 2015. A public redacted version of the Prosecution Request was also submitted on 24 December 2015.

² ICC-01/04-02/06-619.

³ Prosecution Request, paras.1, 14.

suggested by the Prosecution,⁵ to that of Witness P-0901 and Witness P-0768, in respect of whom the Chamber relied on [REDACTED] when ordering in-court protective measures.⁶

5. Moreover, the Chamber's findings in its "*Decision on Prosecution requests to impose restrictions on Mr Ntaganda's contacts*",⁷ referred to by the Prosecution,⁸ are inapposite to Witness P-0290's situation, insofar as the Chamber's conclusions on witness interference were made in respect of certain witnesses only, which did not include Witness P-0290. The Prosecution further fails to take into account that as a result of the measures put in place by the Chamber in the Decision on Restrictions on Contacts, there is virtually no possibility of interference on the part of Mr Ntaganda.
6. More importantly, the Defence observes that Witness P-0290's anticipated testimony is essentially technical in nature, which entails a significantly lesser risk of retaliation. The mere fact that Witness P-0290 is expected to "implicate the Accused in the commission of crimes"⁹ through his testimony does not establish any objectively justifiable risk to the witness's safety should his identity be known to the public. The Defence stresses that it is the essence of a criminal trial that witnesses called by the Prosecution provide, to various extents, evidence which implicates the Accused in the commission of the crimes for which he is charged. In fact, Witness P-0290's situation appears to

⁴ On 11 January 2016, submitting that some of the redactions applied in the Prosecution Request seemed to relate to [REDACTED], the Defence requested the Chamber to order the Prosecution to file a lesser redacted version of the confidential of its Request, with redactions solely limited to logistical issues: "Preliminary response on behalf of Mr Ntaganda to 'Prosecution's tenth request for in-court protective or special measures [*sic*]", 11 January 2016, ICC-01/04-02/06-1080-Conf ("Defence Request for a Lesser Redacted Version"). On 12 January 2016, the Chamber rejected the Defence Request for a Lesser Redacted Version, noting that "none of the redacted text contains [REDACTED]": Email from a Legal Officer of the Chamber to the parties and participants, 12 January 2016, 15:13.

⁵ Prosecution Request, para.11.

⁶ In its "Decision on request for in-court protective measures relating to P-0901" (16 September 2015, ICC-01/04-02/06-828-Conf), the Chamber took into account *inter alia* that Witness P-0901 had previously [REDACTED]: para.9. With respect to Witness P-0768, *see* [REDACTED].

⁷ ICC-01/04-02/06-785-Red, 18 August 2015 ("Decision on Restrictions on Contacts").

⁸ Prosecution Request, para.12.

⁹ Prosecution Request, para.7.

be no different from that of any witness expected to provide incriminating evidence as part of a criminal trial.

7. In the absence of any concrete threats, Witness P-0290's subjective fear that [REDACTED]¹⁰ does not establish the existence of an *objectively* justifiable risk to the safety of the witness should his identity be known to the public.
8. In these circumstances, it is in the interests of justice that Witness P-0290 testify publicly.
9. In fact, taking into consideration that Witness P-0290 is easily identifiable on the basis of his anticipated evidence, any protective measures imposed to shield his identity from the public would necessarily lead to multiple segments of his testimony taking place in private session. Consequently, to the extent that the Prosecution has failed to demonstrate that Witness P-0290's safety would be jeopardized should he testify publicly, even the use of a pseudonym is not warranted in the present circumstances.

CONFIDENTIALITY

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

RELIEF SOUGHT

11. In light of the above submissions, the Defence respectfully requests the Chamber to **REJECT** the Prosecution Request.

¹⁰ Prosecution Request, para.6.

RESPECTFULLY SUBMITTED ON THIS 18TH DAY OF JANUARY 2016

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

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands