



Original: **English**

No.: ICC-01/04-02/06
Date: 27 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 ninth request for in-court protective or special measures’”, 11 January 2016, ICC-01/04-02/06-1077-Conf

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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Unrepresented Victims

**Unrepresented Applicants
(Participation / Reparation)**

**The Office of Public Counsel for
Victims**

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Section**

Further to: (i) the confidential redacted version of the “*Prosecution’s ninth request for in-court protective or special measures*” submitted by the Office of the Prosecutor (“Prosecution”) on 18 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 ninth request for in-court protective or special measures”

“Defence Response”

1. The Prosecution requests in-court protective measures for Witness P-0790 in the form of facial distortion, voice distortion and the use of a pseudonym.³
2. Without prejudice to the necessity for the Chamber to ensure that the Defence is provided with a genuine opportunity, as well as the real possibility, to question and test Witness P-0790 on all issues relevant to his credibility – including the allegations of [REDACTED] raised *for the first time*⁴ in the Prosecution Request – the Defence does not object to above-mentioned in-court protective measures being granted to Witness P-0790.
3. It must be noted in this regard – taking into consideration as alleged by the Prosecution that Witness P-0790 is [REDACTED]⁵ – that most questions put to Witness P-0790 will likely make it possible to reveal his identity.

¹ ICC-01/04-02/06-1066-Conf-Red. The Prosecution Request was originally submitted on a confidential *ex parte* basis – only available to the Prosecution, the Legal Representative of the Victims of the Attacks and Victims and Witnesses Unit on 15 December 2015.

² ICC-01/04-02/06-619.

³ Prosecution Request, paras.1, 17.

⁴ The Defence notes with concern the Prosecution’s statement that it did not consider relevant until today the investigator’s note DRC-OTP-2083-0329 appended as Annex A to the Prosecution Request and referred to in footnote 3 therein. In light of the Chamber’s oral decision on the Defence’s “[REDACTED]” ([REDACTED]), this might well constitute a breach of the Prosecution’s disclosure obligations. Cf. T-41-CONF-ENG, p.6, l.2 to p.8, l.6.

⁵ Prosecution Request, para.14.

Consequently, most of his testimony will likely have to take place in private session as a result of the measures requested, if granted by the Chamber.

4. Furthermore, the Defence takes serious issue with some of the reasons put forward by the Prosecution in support of its Request, which constitute irrelevant considerations for the purpose of determining whether in-court protective measures should be ordered or not with respect to Witness P-0790.
5. Firstly, the Prosecution's insinuation that [REDACTED] and Witness P-0790 was not [REDACTED]⁶ is misplaced in the context of the present Request. The circumstances surrounding the [REDACTED] between Witness P-0790 and [REDACTED] – a fact that was not put into question by the Chamber in its "[REDACTED]"⁷ – do not substantiate, let alone suggest, the existence of an objectively justifiable risk to the safety of the witness.
6. Secondly, in relying on an NGO's remark to the effect that the "influence of Bosco Ntaganda is still perceptible" in Ituri – as quoted in a Registry report issued more than one year ago⁸ – in support of its claim that Witness P-0790 is "exposed to increased risk in the Hema-dominated areas where he [REDACTED]"⁹, the Prosecution fails to take into account that as a result of the measures put in place by the Chamber in its *"Decision on Prosecution requests to impose restrictions on Mr Ntaganda's contacts"*,¹⁰ there is virtually no possibility of interference on the part of Mr Ntaganda.
7. Thirdly, in referring to the way the Public Information and Documentation Section has disseminated on the Internet the testimony of Witness P-0106 before the Court to support its argument that "granting the use of a pseudonym in concert with facial and voice distortion is necessary to adequately protect [Witness P-0790] and ensure his safety and security during

⁶ Prosecution Request, para.11 (using quotation marks for the word '[REDACTED]').

⁷ [REDACTED].

⁸ ICC-01/04-02/06-396-Anx1, 10 November 2014, p.7.

⁹ Prosecution Request, para.12.

¹⁰ ICC-01/04-02/06-785-Red, 18 August 2015.

and after his testimony”,¹¹ the Prosecution ignores that a request for in-court protective measures must be adjudicated with consideration of the particular circumstances of each witness.¹² Apart from implicitly criticising the Chamber’s ruling on the in-court protective measures put in place for the testimony of Witness P-0106, the Prosecution fails to explain how the fact that: (i) the Court’s proceedings are broadcasted on the Internet; and (ii) an audio-visual summary thereof is uploaded on YouTube, warrants – for all upcoming witnesses – the implementation of in-court protective measures in the form of facial distortion, voice distortion *along with* the use of a pseudonym.

8. Finally, the Defence notes that the Prosecution bases its Request on Rule 87 and/or Rule 88 of the Rules of Procedure and Evidence (“Rules”).¹³ The Defence underscores that special measures under Rule 88 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.¹⁴ 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 88.¹⁵
9. The information provided by the Prosecution does not support a finding that Witness P-0790 falls in the category of certain vulnerable victims and witnesses, such as traumatised victims or witnesses, children, victims of sexual violence and the elderly, who may benefit from ‘special measures’ pursuant to Rule 88.

¹¹ Prosecution Request, para.15.

¹² Cf. “Decision on Prosecution’s requests relating to in-court protective and special measures for Witness P-0039”, 10 December 2015, ICC-01/04-02/06-1049-Conf (“Witness P-0039 Decision”), para.18.

¹³ Prosecution Request, paras.2, 5, 6.

¹⁴ *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.

¹⁵ “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”, 9 November 2015, ICC-01/04-02/06-990-Conf, paras.11-13. *See also* Witness P-0039 Decision, para.14.

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. The Defence notes that the Prosecution has undertaken to file a public redacted version of its Request.¹⁶ The Defence will submit a public redacted version of its Response once the Prosecution files a public redacted version of its Request.

RESPECTFULLY SUBMITTED ON THIS 27TH DAY OF JANUARY 2016

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

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands

¹⁶ Prosecution Request, para.3.