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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 'Confidential redacted version of 'Corrected version 'of Fifth Prosecution request for in-court protective measures'" 14 October 2015, ICC-01/04-02/06-900-Conf-Exp-Corr", 5 November 2015, ICC-01/04-02/06-984-Conf

Source: Defence Team of Mr Bosco Ntaganda

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Ms Nicole Samson

Counsel for the Defence

Me Stéphane Bourgon
Me Luc Boutin

Legal Representatives of Victims

Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation / Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Further to the submission of the “*Confidential redacted version of ‘Corrected version of ‘Fifth Prosecution request for in-court protective measures’*”, 14 October 2015, ICC-01/04-02/06-900-Conf-Exp-Corr” by the Office of the Prosecutor (“Prosecution”) on 14 October 2015 (“Prosecution Fifth Request”),¹ Counsel representing Mr Ntaganda (“Defence”) hereby submit this:

Response on behalf of Mr Ntaganda to “Confidential redacted version of ‘Corrected version of ‘Fifth Prosecution request for in-court protective measures’”, 14 October 2015, ICC-01/04-02/06-900-Conf-Exp-Corr”

“Defence Response”

INTRODUCTION

1. On 14 October 2015, the Prosecution submitted its Fifth Request, whereby it moves the Chamber to grant in-court protective measures for Witnesses P-0859, P-0815 and P-0800 in the form of (i) facial distortion; (ii) voice distortion; and (iii) the use of pseudonyms during their testimonies. The Prosecution Fifth Request rests on the premise that the requested measures will ensure that these witnesses will be able to give evidence “without fear for their personal safety, or that of their family members”.²
2. For the reasons expressed below, the Defence opposes the Prosecution Fifth Request.

¹ ICC-01/04-02/06-900-Conf-Exp-Corr.

² Prosecution Fifth Request, para. 5.

SUBMISSIONS

I. Preliminary remarks

3. 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.³
4. Grounds for concern are not sufficient, in themselves, to grant in-court protective measures.⁴ Protective measures should be granted only on an exceptional basis, following a case-by-case assessment.⁵ A case-by-case evaluation requires an individualised consideration of the risk involved in each particular case.⁶ Applications for in-court protective measures should not be routinely made in the expectation that they will be routinely granted.⁷
5. 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 Witnesses P-0859, P-0815 and P-0800, 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' narratives.
6. As regards the proportionality of the requested protective measures, the Defence underscores that these measures amount to hiding from the public Witnesses P-0859, P-0800 and P-0815's identity. The impact of such outcome

³ ICC-01/04-02/060824-Conf, Chamber Decision on Request for In-Court Protective Measures for the First Prosecution Witness ("First Decision"), para. 6, *referring to* ICC-01/09-01/11-902-Red2 ("*Ruto Decision*"), para.13.

⁴ *See Ruto Decision*, paras.18, 30, 33, 39, 43.

⁵ Chamber Decision on Request for In-Court Protective Measures for the First Prosecution Witness, para. 6, *referring to Ruto Decision*, para.13.

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

⁷ Chamber Decision on Request for In-Court Protective Measures for the First Prosecution Witness, para. 5, *referring to Ruto Decision*, para.11.

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.⁸ 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

7. Moreover, taking into consideration the *quasi* similarity between the Prosecution Fifth Request and previous requests for in-court protective measures,⁹ the Defence is concerned that the Prosecution is routinely making such requests in the expectations that they will be routinely granted.¹⁰
8. In the present case, the Chamber has recalled that the granting of protective measures is an exceptional measure which, in principle, requires a showing of an objectively justifiably risk.
9. In the case of Prosecution Witness P-0886 and Witness P-0039, the Chamber denied the Prosecution's requests for facial and voice distortion taking into consideration that "the basis of the request appears to be the subjective fears of the witness together with uncertainty of the level of risk at this early stage of proceedings".¹¹ Moreover, the Chamber also took into account the fact that their testimony was not expected to relate to the accused directly.¹²

⁸ United Nations Office on Drugs and Crime, *Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime*, 2008, p.45.

⁹ Confidential redacted version of "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", 14 October 2015, ICC-01/04-02/06-899-Conf-Red, para. 14-15. See also: ICC-01/04-02/06-913-Conf-Red.

¹⁰ 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).

¹¹ ICC-01/04-01/06-T-36-CONF-ENG, p.57, lines 1-3. In the same vein, see also ICC-01/04-02/06-956-Conf, para.8.

¹² ICC-01/04-02/06-956-Conf, para.8; ICC-01/04-02/06-T-36-CONF-ENG, p.59, 1.8-10.

10. Turning to the Prosecution's Fifth Request, the Defence posits that the measures sought by the Prosecution in the case of Witnesses P-0859, P-0815 and P-0800 are based on the same subjective fears of the witnesses. Moreover, the Defence underscores that none of these three witnesses are expected to testify directly about Mr Ntaganda.

II. Prosecution Witness P-0859

11. The Defence notes with concern that it is informed for the first time that Witness P-0859 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-0859-related material disclosed by the Prosecution so far reveals, let alone implies, that the witness ever had or has such concerns.
12. With respect to the Prosecution's assertion that "[REDACTED], where residents commonly know each other. It is also an area where former UPC/FPLC members and associates loyal to the Accused may be present, and where the Accused continues to exert influence",¹³ the Defence observes that the information pertaining to Witness P-0859's [REDACTED] is entirely redacted in Witness P-0859-related material. The Defence is thus unable to offer specific observations.
13. Nevertheless, Witness P-0859'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-0859'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.

¹³ Prosecution Fifth Request, para.10.

14. For these reasons, the Defence opposes the in-court protective measures sought in relation to Witness P-0859's upcoming testimony. Absent any objectively justifiable risk to Witness P-0859'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-0859's identity must be known to the public.

III. Prosecution Witness P-0815

15. The Prosecution also fails to establish the existence of an objectively justifiable risk to Witness P-0815's safety and security which would warrant in-court protective measures.
16. The Defence is informed for the first time that Witness P-0815 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-0815-related material disclosed by the Prosecution so far reveals, let alone implies, that the witness ever had or has such concerns.
17. The Prosecution refers to a series of events in support of its contention that Witness P-0815 has security concerns related to his involvement with the Prosecution, including stigmatisation and retaliation against himself and his family. The Defence observes that the information pertaining to Witness P-0815's [REDACTED] is entirely redacted in Witness P-0815-related material. Once again, the Defence is unable to offer specific observations.
18. Nonetheless, Witness P-0815'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-0815'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.

19. For these reasons, the Defence opposes the in-court protective measures sought in relation to Witness P-0815's upcoming testimony. Absent any objectively justifiable risk to Witness P-815'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-0815's identity must be known to the public.
20. However, conscious that P-0815's [REDACTED], the Defence suggests that when testifying on that subject, P-0815's testimony should take place in private session.

IV. Prosecution Witness P-0800

21. The Defence notes that nothing in Witness P-0800-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.
22. The Prosecution refers to a series of events in support of its contention that Witness P-0800 has security concerns related to his involvement with the Prosecution, including stigmatisation and retaliation against himself and his family. The Defence observes that the information pertaining to Witness P-0815's [REDACTED] is entirely redacted in Witness P-0815-related material. Again, the Defence is unable to offer specific observations.
23. In fact, Witness P-0800'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-0800's discomfort with being a Prosecution witness. Such feeling is inherent to any testimony before a criminal court.
24. For these reasons, the Defence opposes the in-court protective measures sought in relation to Witness P-0800's upcoming testimony. Absent any objectively justifiable risk to Witness P-0800'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-0800's identity must be known to the public.

CONFIDENTIALITY

25. 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 Fifth Request.

RESPECTFULLY SUBMITTED ON THIS 11TH DAY OF FEBRUARY 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