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No.: **ICC-01/04-02/06**

Date: **23 March 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 ‘Additional Submissions for Special and Protective Measures for Witness P-0815’”

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 *“Corrected version of ‘Fifth Prosecution request for in-court protective measures’”* filed by the Office of the Prosecutor (“Prosecution”) on 15 October 2015 (“First Prosecution Request”);¹ (ii) the *“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” submitted by Counsel representing Mr Ntaganda (“Defence”) on 5 November 2015 (“First Defence Response”);² (iii) the confidential redacted version of *“Additional Submissions for Special and Protective Measures for Witness P-0815”* submitted by the Prosecution on 4 March 2016 (“Prosecution Additional Submissions”);³ and (iv) Trial Chamber VI (“Chamber”)’s order shortening the deadline for any responses to the Prosecution Additional Submissions to 23 March 2016, conveyed by way of e-mail on 16 March 2016, the Defence hereby submits this:

Response on behalf of Mr Ntaganda to “Additional Submissions for Special and Protective Measures for Witness P-0815”

“Defence Response”

INTRODUCTION

1. With a view to Witness P-0815’s upcoming testimony – scheduled to testify first in the forthcoming fourth evidentiary block – the Prosecution ‘supplements’ its First Request for in-court protective measures in the form of face and voice distortion as well as the use of a pseudonym during his testimony. The Prosecution further requests the Chamber to grant Witness P-0815 the special measure of [REDACTED], if required, during the course of his testimony.
2. For the reasons expressed below, the Defence reiterates its opposition to the Prosecution First Request, but does not object to the special measure of

¹ ICC-01/04-02/06-900-Conf-Corr-Red.

² ICC-01/04-02/06-984-Conf.

³ ICC-01/04-02/06-1196-Conf-Red.

[REDACTED] being granted to Witness P-0815, provided that such measure does not interfere with the witness's testimony.

SUBMISSIONS

I. Preliminary matters

3. The Defence takes issue with the Prosecution's approach to ground its requests for in-court protective measures on both Rule 87 and Rule 88 of the Rules of Procedure and Evidence ("Rules").⁴ The Defence underscores that special measures under Rule 88 can only be granted *in addition* to protective measures ordered pursuant to Rule 87 if the latter provision does not provide for a specific protective measure that would fit the particular case of a witness. 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.
4. 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 requested under Rule 87.⁵
5. More importantly, it is noteworthy that the right of Mr Ntaganda to respond to a request seeking measures that may potentially infringe on his fundamental right to a public hearing is, once again, seriously hampered by the redactions applied therein.⁶ The Defence notes the Chamber's general approach in this regard,⁷ but takes issue with the long-term impact on the

⁴ The Defence notes that the First Prosecution Request was initially premised on Rule 87 only.

⁵ See "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.

⁶ See Prosecution Additional Submissions, paras.2, 3, 15, 16, 17 and fn.11, in which some sentences are entirely redacted.

⁷ See *inter alia* "Decision on Prosecution's request for in-court protective measures for Witness P-0290", 1 February 2016, ICC-01/04-02/06-1133-Conf-Red, para.3.

fairness of proceedings of the Prosecution's overuse of redactions to hide witness-related information to the Defence.

II. The Prosecution First Request for in-court protective measures, as supplemented by the Prosecution Additional Submissions

6. In its First Response, the Defence submitted that the Prosecution had failed to establish the existence of an objectively justifiable risk to Witness P-0815's safety and security that would warrant in-court protective measures.⁸
7. In its Additional Submissions, the Prosecution advances no new compelling grounds highlighting the existence of an objectively justifiable risk to the safety of Witness P-0815 should his identity be known to the public.
8. At the outset, the Defence underscores that the Prosecution concedes that Witness P-0815 is not subject to any specific threat or risk.⁹ The Defence further notes that Witness P-0815's [REDACTED] – and by extension, [REDACTED] – is already, [REDACTED].¹⁰ The Prosecution fails to establish how testifying publicly before the Court is different, in terms of risk to the safety of the witness, from [REDACTED].
9. In its Additional Submissions, the Prosecution attempts to substantiate its previous (unsupported) contention that [REDACTED] “where UPC/FPLC elements and supporters are based, and which can be easily accessed by former members of the UPC/FPLC”¹¹ by referring to [REDACTED].¹²
10. In support of its suggestion that such (alleged) presence of demobilised UPC/FPLC elements in [REDACTED] amounts to an objectively justifiable risk to the safety of the witness, the Prosecution relies on: (i) Registry reports

⁸ First Defence Response, para.15.

⁹ Prosecution Additional Submissions, para.20.

¹⁰ Prosecution Additional Submissions, paras.2, 15.

¹¹ Prosecution First Request, para.13.

¹² Prosecution Additional Submissions, para.16.

issued several months ago, in [REDACTED]¹³ and [REDACTED]¹⁴ respectively, that have not been recently updated; (ii) the Chamber's "*Decision on Prosecution requests to impose restrictions on Mr Ntaganda's contacts*",¹⁵ which concerned specific witnesses and was not aimed at establishing whether there exists a wider interference scheme in this case potentially involving all witnesses, and as a result of which there is virtually no possibility of interference on the part of Mr Ntaganda; and (iii) instances of alleged threats directed against witnesses, including crime based witnesses, reported by the Legal Representative of victims of the attacks,¹⁶ which the Defence is not privy to¹⁷ and which appear to be unrelated to Witness P-0815's specific situation.

11. The Prosecution's reliance on these unrelated submissions – considered either individually or together – fails to establish the existence of any objectively justifiable risk to the safety of Witness P-0815 should he testify publicly.
12. The Prosecution's repeated requests for the full set of in-court protective measures downplay the importance for the public to know the identity of witnesses. In this regard, the Defence recalls its previous (unchallenged) submission 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.¹⁸

¹³ [REDACTED], ICC-01/04-02/06-396-Conf, *referred to* in Prosecution Additional Submissions, para.19.

¹⁴ [REDACTED], ICC-01/04-02/06-585-Conf, *referred to* in Prosecution Additional Submissions, para.18.

¹⁵ 18 August 2015, ICC-01/04-02/06-785-Red, *referred to* in Prosecution Additional Submissions, para.19.

¹⁶ "Response of the Common Legal Representative of Victims of the Attacks to 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'", 4 November 2015, ICC-01/04-02/06-977-Conf-Red ("LRV Submissions"), *referred to* in Prosecution Additional Submissions, para.20.

¹⁷ Paragraphs 17 and 18 of the confidential redacted version of the LRV Submissions notified to the Defence are entirely redacted.

¹⁸ *See e.g.* "Response on behalf of Mr Ntaganda to 'Second Prosecution request for in-court protective measures'", 31 August 2015, ICC-01/04-02/06-801-Conf-Exp, para.10.

13. Separately, in line with its previous suggestion,¹⁹ the Defence would not oppose Witness P-0815 being questioned about [REDACTED] in private session, as requested by the Prosecution in its Additional Submissions.²⁰

III. Request for special measures of [REDACTED] under Rule 88

14. The Defence does not object to Witness P-0815 being afforded with [REDACTED] during his testimony, if needed, provided that such [REDACTED] does not interfere with the flow of Witness P-0815's testimony.

CONFIDENTIALITY

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

RELIEF SOUGHT

16. For the reasons expressed below, the Defence respectfully requests the Chamber to:

REJECT the Prosecution First Request with respect to Witness P-0815 in its entirety.

RESPECTFULLY SUBMITTED ON THIS 23RD DAY OF MARCH 2016



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¹⁹ First Defence Response, para.20.

²⁰ Prosecution Additional Submissions, para.22.