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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 'Prosecution's eleventh 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 the submission of the *“Confidential redacted version of ‘Prosecution’s eleventh request for in-court protective measures’, 17 March 2016, ICC-01/04-02/06-1218-Conf-Exp”* by the Office of the Prosecutor (“Prosecution”) on 18 March 2016 (“Prosecution Eleventh Request”),¹ Counsel representing Mr Ntaganda (“Defence”) hereby submit this:

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

“Defence Response”

INTRODUCTION

1. On 18 March 2016, the Prosecution submitted its Eleventh Request, whereby it moves Trial Chamber VI (“Chamber”) to grant Witnesses P-0892 and P-0912: (a) in-court protective measures, in the form of (i) face and voice distortion and (ii) the use of pseudonyms during their testimony; and (b) special measures, in the form of (i) [REDACTED] assistance during their testimony; (ii) questions being adapted to the needs and capacities of the witnesses, and; (iii) assistance in court of Witness P-0912 by a [REDACTED] support assistant. In addition, the Prosecution requests that evidence of Witness P-0912’s [REDACTED] be elicited in private session.
2. The Prosecution Eleventh Request rests on the premise that the requested measures “will ensure the safety, physical and psychological well-being, dignity and privacy of these witnesses” and that it will “mitigate the need for more intrusive security-related measures post-testimony”.²
3. For the reasons expressed below, the Defence partially opposes the Prosecution Eleventh Request.

¹ ICC-01/04-02/06-1218-Conf-Red.

² Prosecution Eleventh Request, para.3.

SUBMISSIONS

I. Preliminary remarks

4. As a preliminary matter, the Defence underscores that the requested in-court protective measures amount to hiding from the public the identity of Witnesses P-0892 and P-0912. The negative impact of such outcome on the Chamber's ability to carry out its truth-seeking function certainly cannot be underestimated. In this regard, 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.³ Even though the Prosecution appears to challenge the authority and relevance of this manual,⁴ the Defence posits that, on the contrary, this document is a useful and valuable tool for all professionals involved in the protection of witnesses.⁵ Thus, 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.

³ United Nations Office on Drugs and Crime, *Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime*, 2008, p.45.

⁴ "Prosecution's response to the 'Submissions on behalf of Mr Ntaganda on certain matters related to the conduct of proceedings'", 23 March 2016, ICC-01/04-02/06-1227-Conf, para.23, fn.51.

⁵ The compilation by the United Nations Office on Drugs and Crime (UNODC) of the good practices for the protection of witnesses in criminal proceedings involving organized crime was made with the active support and contributions of dedicated professionals of Member States of the United Nations, but also of international criminal tribunals and international organizations involved in this field. (See preface of this manual). Moving to implement those mandates, the United Nations Office on Drugs and Crime (UNODC) commenced a series of regional workshops in 2005 with the active participation of expert representatives from law enforcement, prosecutorial and judicial authorities of Member States to develop a set of internationally recognized good practices in the establishment and operation of witness protection programmes. The workshops were attended by officials from different geographical regions with varying degrees of exposure to organized crime and from different socio-political circumstances and legal systems. International organizations and agencies with an active engagement in the field of witness protection also made valuable contributions. Authorities from more than 40 countries, 8 international organizations and 3 legal institutes participated in the consultation process. (See page 3 of this manual)

https://www.unodc.org/documents/southeastasiaandpacific//Publications/Projects/indonesia/Good_practices_for_the_protection_of_witnesses_in_criminal_proceedings_involving_organized_crime.pdf

5. Moreover, taking into consideration the *quasi* similarity between the Prosecution Eleventh Request and previous requests for in-court protective measures,⁶ the Defence is seriously concerned that the Prosecution is routinely making such requests in the expectations that they will be routinely granted.⁷
6. In the present proceedings, the Chamber has recalled that granting in-court protective measures is an exceptional measure which, in principle, requires a showing of an objectively justifiably risk.⁸ In this regard, the Defence vigorously takes issue with the reasoning of the Common Legal Representative of the Victims of the Attacks submitted in his Response to the Prosecution Eleventh Request⁹: the subjective fear of reprisals, intimidation and threats – even though it might be real – *does not* constitute an objectively justifiable risk to the security, safety and physical and psychological well-being of a witness but, on the contrary, is purely subjective. The Defence notes that such a risk is inexistent in the present case, since the Prosecution itself acknowledged that “neither witness has been subject of any specific threat or risk”¹⁰.
7. The Defence recalls that in the case of Prosecution Witnesses P-0886 and P-0039, the Chamber denied the Prosecution’s requests for facial and voice distortion considering that “the basis of the request appears to be the *subjective fears* of the witness together with uncertainty of the level of risk at

⁶ Compare Prosecution Eleventh Request with “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, paras.14-15. See also: ICC-01/04-02/06-900-Conf-Corr-Red; ICC-01/04-02/06-913-Conf-Red.

⁷ “Decision on request for in-court protective measures relating to the first Prosecution witness”, 14 September 2015, ICC-01/04-02/06-824-Conf (“First Decision”), para.5 *referring to Ruto* case, “Decision on ‘Prosecution’s First Request for In-Court Protective Measures for Trial Witnesses’”, 3 September 2014, ICC-01/09-01/11-902-Red2 (“*Ruto* Decision”), para.11. See also Transcript of hearing on 24 March 2009, ICC-01/04-01/06-T-153-Red2-ENG, page 63, ll.15-17 (actually referring to ll.19-21).

⁸ First Decision’, para.6, *referring to Ruto* Decision, para.13.

⁹ ICC-01/04-02/06-1257-Conf, para. 9.

¹⁰ Prosecution Eleventh Request, para.19.

this early stage of proceedings”.¹¹ Moreover, the Chamber also took into account the fact that the witnesses’ testimony was not expected to relate to [REDACTED].¹²

8. The Defence submits that the requested in-court protective measures for Witnesses P-0892 and P-0912 are based on the same kind of subjective fears as Witnesses P-0886 and P-0039. Moreover, the Defence underscores that Witness P-0912 is not expected to testify directly about [REDACTED]. With regard to Witness P-0892, although she is expected to testify directly against [REDACTED], this testimony will be limited in scope to the crime of [REDACTED].

II. In-court protective measures

9. At the outset, the Defence notes that the Prosecution bases its Eleventh Request for in-court protective measures on both Rule 87 and 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 adopted 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 as well as for a pseudonym, such in-court protective measures can only be granted on the basis of this rule and not on the basis of Rule 88.¹⁵

¹¹ ICC-01/04-01/06-T-36-CONF-ENG, p.57, ll.1-3 (emphasis added). 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, ll.8-10.

¹³ Prosecution Eleventh Request, para. 7.

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* “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-Red, para.14.

10. Furthermore, the Defence notes with concern that it is informed for the first time that Witnesses P-0892 and P-0912 would have expressed concerns for their safety and that of their family members. Nothing in Witnesses P-0892 and P-0912 related material disclosed by the Prosecution so far reveals, let alone implies, that the witnesses ever had or have such concerns. Regarding the information reported by the Common Legal Representative of the Victims of the Attacks [REDACTED]¹⁶ – the Defence recalls that even though Legal Representatives do not have “disclosure obligations equivalent to those of the Prosecution”, the Chamber directed the Legal Representatives to provide any further relevant information in their possession to the Prosecution, which then has to disclose such information to the Defence.¹⁷ In this regard, the Defence has no information that the Common Legal Representative of the Victims of the Attacks updated the Prosecution about Witness P-0892’s situation.
11. The Prosecution’s assertions that “the requested protective or special measures are necessary to avoid revealing their identities, bearing in mind the potential risk of retaliation from supporters of the Accused” and that revealing the identity of Witnesses P-0892 and P-0912 [REDACTED]¹⁸ are not supported by any substantial and relevant information.
12. First, in referring to the influence Mr Ntaganda allegedly retains in Ituri, the Prosecution fails to take into account that Mr Ntaganda is not native from Ituri, where he spent a maximum of four non-consecutive years, 15 years ago and where he does not have any family. In this regard, it is noteworthy that the First Registry Report on the security situation in the Democratic Republic of the Congo (“DRC”), on which the Prosecution grounds its allegation of

¹⁶ Response of the Common Legal Representative of the Victims of the Attacks to the “Confidential redacted version of ‘Prosecution’s eleventh request for in court protective and special measures’”, ICC-01/04-02/06-1257-Conf, 8 April 2016, para. 6.

¹⁷ Decision on Prosecution’s request for in-court protective measures for Witness P-0790, ICC-01/04-02/06-1083-Conf, para. 7.

¹⁸ Prosecution Eleventh Request, para.10.

influence of the Accused, is outdated.¹⁹ The same holds true for the alleged ‘instability’ of the region.

13. Moreover, since 18 August 2015, the Accused has been cut off almost entirely from the outside world, with no means to influence anyone, anywhere.²⁰ The Defence recalls that the Chamber’s findings in its Decision on Restrictions on Contacts²¹ only dealt with certain insider witnesses, not with crime-based witnesses.
14. Furthermore, the Defence observes that information pertaining to Witnesses P-0892 and P-0912’s current location is entirely redacted in the Prosecution Eleventh Request,²² thereby preventing the Defence to offer specific observations thereon.
15. Second, the Defence notes that nothing in Witnesses P-0892 and P-0912-related material disclosed by the Prosecution so far reveals, let alone implies, that the witnesses’ safety and that of their family could be jeopardized if the witnesses’ identity were to be disclosed to the public as a result of their testimony before the Court.
16. In light of the criteria set up by the Chamber²³ and the decisions previously issued regarding Witnesses P-0886 and P-0039²⁴, bearing in mind the Prosecution’s acknowledgement that neither witness has been subjected to

¹⁹ This report is dated 7 November 2014.

²⁰ In its “*Decision on Prosecution requests to impose restrictions on Mr Ntaganda’s contacts*”, 18 August 2015, ICC-01/04-02/06-785-Red (“*Decision on Restrictions on Contacts*”), the Chamber allowed Mr Ntaganda to communicate with two individuals only.

²¹ ICC-01/04-02/06-785-Red.

²² See Prosecution Eleventh Request, paras.11-15.

²³ First Decision, para. 6, referring to Ruto Decision, para.13: In-court protective measures is an exceptional measure which, in principle, requires a showing of an objectively justifiably risk.

²⁴ ICC-01/04-01/06-T-36-CONF-ENG, p.57, lines 1-3 (emphasis added). In the same vein, see also ICC-01/04-02/06-956-Conf, para.8: the Chamber denied the Prosecution’s requests for facial and voice distortion considering 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”. ICC-01/04-02/06-956-Conf, para.8; ICC-01/04-02/06-T-36-CONF-ENG, p.59, l.8-10 : the Chamber also took into account the fact that the witnesses’ testimony was not expected to relate to the accused directly

any specific threat or risk,²⁵ the Defence submits that the requested in-court protective measures for Witnesses P-0892 and P-0912 are based on subjective fears similar to that of Witness P-0886 and P-0039.

17. Therefore, Witnesses P-0892 and P-0912's situation appears to be no different from that of any other crime-base witness, who all reside or come from small communities [REDACTED]. The Prosecution's assertions suggest, at most, Witnesses P-0892 and P-0912's discomfort with being Prosecution witnesses. 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 might be the object of media attention (whether heightened or not), which is a necessary component of the publicity of criminal proceedings.
18. For these reasons, the Defence opposes the in-court protective measures sought in relation to Witnesses P-0892 and P-0912's upcoming testimony.
19. Absent any objectively justifiable risk to Witnesses P-0892 and P-0912's security and safety and with a view to ensuring that the trial record is accessible to the public to a maximal extent, Witnesses P-0892 and P-0912's identity must be known to the public.
20. Finally, the Defence challenges the Common Legal Representative's assertion that "revealing P-0912's identity to the public would directly lead to the identification of P-0892"²⁶. Indeed, as long as private sessions are ordered when identifying information about Witness P-0912 is elicited, this will equally protect Witness P-0912. Protecting the identity of the [REDACTED] of a witness is the '*raison d'être*' of private session.

²⁵ Prosecution Eleventh Request, para.19.

²⁶ Response of the Common Legal Representative of the Victims of the Attacks to the "Confidential redacted version of 'Prosecution's eleventh request for in court protective and special measures'", ICC-01/04-02/06-1257-Conf, 8 April 2016, para. 13.

III. Additional in-court special measures

21. Even though the Defence notes that Witnesses P-0892 and P-0912 both [REDACTED]²⁷ and as such should be able [REDACTED], it does not oppose the Prosecution Eleventh Request for both witnesses to be granted [REDACTED] assistance in the courtroom, if needed.
22. On the basis of the material disclosed by the Prosecution in relation to Witness P-0912, the Defence does not challenge the *prima facie* [REDACTED] of Witness P-0912 and, as such, does not object to a [REDACTED] as long as this does not impact in any way the testimony of the witness.
23. Likewise, the Defence acknowledges the need to exercise care when putting questions to Witness P-0912 to alleviate the stress associated with her testimony.
24. However, the Defence insists that despite the *prima facie* [REDACTED] of Witness P-0912, no leading questions should be put to her during examination-in-chief. If this is what is meant by Prosecution's request to "guide the witness through the statement",²⁸ the Defence opposes the same.
25. Moreover, while it will endeavour to avoid pressuring or embarrassing Witness P-0912, the Defence insists that it must have the ability to perform its duty and obligations, and to effectively challenge the evidence expected to be provided by Witness P-0912.

IV. Recourse to private session to elicit evidence about Witness P-0912's alleged rape

26. The Prosecution requests that evidence regarding Witness P-0912's alleged [REDACTED] be elicited in private session due to: (i) the sensitive nature of that evidence; (ii) the potential impact of that evidence on the psychological

²⁷ Witness P-0912: DRC-OTP-2078-2863, para.9; Witness P-0892: DRC-OTP-2078-2848, para.9. Witness P-0892 also attended two years of secondary school in Bunia.

²⁸ Prosecution Eleventh Request, para.34.

well-being, dignity and privacy of both Witnesses P-0892 and P-0912, and; (iii) [REDACTED].²⁹

27. The Prosecution also argues that this measure alone “may not suffice to protect these witnesses from any attempts at retaliation by those involved in the crimes” and for this reason, also requests face and voice distortion and the use of a pseudonym as previously set out.³⁰
28. The Defence underscores that granting both requests is likely to throw a veil on the entirety of Witness P-0912’s testimony. Indeed, not only information of an identifying nature will be elicited in private session, but the whole narrative of Witness P-0912’s alleged [REDACTED] – the gist of her expected testimony – will most likely have to be proffered in private session.
29. Accordingly, the Defence posits that if the Chamber were to grant Witnesses P-0892 and P-0912, voice and face distortion as well as a pseudonym, this prevent the Chamber to order that evidence regarding Witness P-0912’s [REDACTED] be elicited in private session subject to gravely impair the public nature of the trial of the Accused.
30. As rightly submitted by the Common Legal Representative of the Victims of the Attacks in his “*Submissions on certain matters related to the conduct of the proceedings*” (“LRV Submissions on the Conduct of Proceedings”),³¹ “[t]he very reason of in-court protective measures is to make it possible that the majority of a witness’s testimony can be heard in open session”.³²
31. Furthermore, hearing the entirety of Witness P-0912’s in private session will also defeat the purpose of justice in itself, especially in the light of the goal professed by the Prosecution to take a mainstream approach to dealing with [REDACTED] based crimes, in order to encourage military commanders and

²⁹ Prosecution Eleventh Request, para.35.

³⁰ Prosecution Eleventh Request, para.21.

³¹ 17 March 2016, ICC-01/04-02/06-1215.

³² LRV Submissions on the Conduct of Proceedings, para.12.

non-military superiors to deal effectively with the commission of these crimes by their forces or subordinates.³³

32. Directing that the entire evidence related to Witness P-0912's alleged [REDACTED] be elicited in private session will make of this goal a vain wish, if only because the public will not be able to scrutinize the prosecution of [REDACTED] crimes before the Court. This may also undermine the dissuasive impact of prosecution of such crimes on the perpetrators.³⁴
33. Moreover, as suggested by the Common Legal Representative of the Victims of the Attacks in his LRV Submissions on the Conduct of Proceedings,³⁵ the Defence is of the view that privacy of both Witnesses P-0892 and P-0912 can be equally preserved if the Chamber favours the use of codes names instead of ordering private session.

CONFIDENTIALITY

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

RELIEF SOUGHT

35. In light of the above submissions, the Defence respectfully requests the Chamber to:

³³ Prosecution, *Policy Paper on Sexual and Gender-Based Crimes*, June 2014, paras.28 and 78.

³⁴ Cf. Prosecution, *Policy Paper on Sexual and Gender-Based Crimes*, June 2014, paras.28 and 78.

³⁵ LRV Submissions on the Conduct of Proceedings, para.13.

DENY partially the Prosecution's request for in-court protective measures for Witnesses P-0892 and P-0912;

DECLARE that alteration of picture and voice as well as for a pseudonym can only be granted on the basis of Rule 87 and not on the basis of Rule 88.

RESPECTFULLY SUBMITTED ON THIS 28TH DAY OF APRIL 2016

A handwritten signature in black ink, appearing to read 'StB-'.

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands