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

Date: **26 May 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 additional request for in-court protective measures for [REDACTED]”, 30 March 2016, ICC-01/04-02/06-1237-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  
Me William St-Michel

**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**

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**Registrar**

Mr Herman von Hebel

**Counsel Support Section**

**Victims and Witnesses Unit**

Mr Nigel Verrill

**Detention Section**

**Victims Participation and Reparations  
Section**

Further to: (i) the confidential redacted version of the “*Prosecution’s additional request for in-court protective measures for [REDACTED]*” submitted by the Office of the Prosecutor (“Prosecution”) on 16 March 2016 (“Prosecution Request”);<sup>1</sup> and (ii) Trial Chamber VI (“Chamber”)’s order shortening the deadline for any responses to the Prosecution Request to 30 March 2016, conveyed by way of e-mail on 17 March 2016, Counsel representing Mr Ntaganda (“Defence”) hereby submit this:

**Response on behalf of Mr Ntaganda to “Prosecution’s additional request for in-court protective measures for [REDACTED]”**

**“Defence Response”**

**INTRODUCTION**

1. The Defence hereby responds to the Prosecution request for the testimony of Witness [REDACTED] to be heard in its entirety in private session, as an in-court protective measure additional to the full set of in-court protective measures already granted to the witness.<sup>2</sup>
2. For the reasons expressed below, the Defence opposes the Prosecution Request.

**SUBMISSIONS**

**I. Introduction**

3. On their face, the allegations giving rise to the Prosecution Request appear serious. The Prosecution’s allegations, however, are not the issue at stake here. Rather, the risk of Witness [REDACTED] testifying in this case becoming known to [REDACTED] is what must be assessed in adjudicating the Prosecution Request.

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<sup>1</sup> ICC-01/04-02/06-1212-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 15 March 2016.

<sup>2</sup> “Decision on Prosecution request for in-court protective measures”, 10 August 2015, ICC-01/04-02/06-774-Conf, paras.1, 5.

4. Accordingly, in responding to the Prosecution Request, the Defence will solely focus on the appropriateness of the exceptional in-court protective measure sought by the Prosecution in light of: (i) the above-mentioned risk; and (ii) Mr Ntaganda's fundamental right to a public hearing.

## II. Preliminary observations

5. Even though the adjudication of the Prosecution Request should not rest on the allegations of [REDACTED] raised therein, the Defence notes with concern, and deems necessary to underscore, the inappropriate character of the Prosecution's suggestions that [REDACTED] ("[REDACTED]")<sup>3</sup> – [REDACTED] – [REDACTED].
6. Indeed, the Prosecution's suggestions are clearly directed at either Mr Ntaganda himself or at members of his Defence team, without being substantiated.
7. The Prosecution's suggestions include *inter alia*:
  - a. [REDACTED]<sup>4</sup>
  - b. [REDACTED]<sup>5</sup>
  - c. [REDACTED]<sup>6</sup>
  - and
  - d. [REDACTED]<sup>7</sup>
8. The above suggestions are very serious, considering that [REDACTED]. Surely, the Prosecution is not suggesting that [REDACTED], which leaves

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<sup>3</sup> [REDACTED].

<sup>4</sup> Prosecution Request, para.4.

<sup>5</sup> Prosecution Request, para.28.

<sup>6</sup> Prosecution Request, para.36.

<sup>7</sup> Prosecution Request, para.51.

only Mr Ntaganda himself and/or members of his Defence team as [REDACTED].

9. First, the Prosecution is well aware that [REDACTED]. Second, at the time of [REDACTED] – [REDACTED] – the Defence did not have any [REDACTED].<sup>8</sup> In fact, [REDACTED]. Third, all members of Mr Ntaganda’s Defence team in The Hague are well-aware of [REDACTED] and there is no reason to believe that they could be [REDACTED].

10. Hence, unless the Prosecution is in possession of tangible information regarding [REDACTED], it must refrain from raising such unsubstantiated allegations, which are of no assistance and certainly not in the interests of justice.<sup>9</sup>

### **III. The appropriateness of hearing in its entirety Witness [REDACTED]’s testimony in private session**

11. At the outset, the Defence expresses its understanding that the Prosecution’s request to hear the testimony of Witness [REDACTED] in its entirety in private session is exclusively aimed at protecting the witness’s family from retaliation should it become known that Witness [REDACTED] testified as a Prosecution witness,<sup>10</sup> and not at protecting the witness himself, who now benefits from the highest protection the Court can grant.

12. The Defence underscores that the risk which the Prosecution seeks to eliminate through its Request – *i.e.* the possibility of Witness [REDACTED] testifying in the instant case becoming known to [REDACTED] – is virtually unlikely to occur should the witness testify in the usual regime of public session (with appropriate recourse to private sessions), if only because: (i)

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<sup>8</sup> See [REDACTED].

<sup>9</sup> Cf. *Kenyatta* case, “Decision on the Defence application concerning professional ethics applicable to prosecution lawyers”, 31 May 2013, ICC-01/09-02/11-747, para.18.

<sup>10</sup> Prosecution Request, paras.6, 7, 28, 45-49.

Witness [REDACTED] has [REDACTED] that has not been publicly disseminated; and (ii) [REDACTED] is not known to the public.

13. More importantly, the 30-minute delay between Court hearings and their broadcast on the Internet ensures that no one following remotely the proceedings can become aware of any identifying information inadvertently mentioned in public session. This means that if reference is inadvertently made in open session to either Witness [REDACTED], [REDACTED] or any other information that may lead to objectively identifying him, this oversight can be corrected and those who follow the proceedings *via* the Internet will not be privy to this information.
14. In fact, the only means by which [REDACTED] could become aware of his testimony as a result of an inadvertent reference being made in open session to identifying information, is through an individual familiar with Witness [REDACTED]'s involvement with the Court sitting in the public gallery.
15. The Defence stresses that Witness [REDACTED] will be cross-examined by Lead Counsel, who is sufficiently experienced to avoid inadvertent references to any element that could objectively lead to identifying Witness [REDACTED] during his testimony. The Defence trusts that the Prosecution examining lawyer will exercise the same care in questioning the witness.
16. The Defence acknowledges that mistakes do happen and that, as such, the risk of inadvertent references to information of an objectively identifying nature – either on the part of the examining lawyer or from the witness himself – cannot be entirely ruled out should the witness testify in open session.
17. However, such a possibility cannot, in and of itself, justify the entirety of a witness's testimony be given in private session. The risk that [REDACTED] become aware of his testimony – as a result of an inadvertent reference to information of an identifying nature in public session – must be assessed

against the likelihood that individuals acquainted with Witness [REDACTED]'s cooperation with the Prosecution are present in the public gallery during his testimony.

18. In this regard, the Defence notes that the Prosecution Request provides no tangible information, let alone *prima facie* evidence, that [REDACTED], or [REDACTED], have been attending or are likely to attend in person Court hearings in this case.
19. Furthermore, as regards the possibility for [REDACTED] to learn of his testimony through media coverage, the Defence respectfully posits that the Chamber can and will ensure that inadvertent references to information of an identifying nature are not overemphasised when corrective action is taken, thereby alleviating the risk that the attention of persons present in the public gallery is drawn to the identifying information inadvertently elicited in open session.
20. More importantly, the Prosecution fails to establish how any and all aspects of Witness [REDACTED]'s expected testimony are likely to lead to his identification should they be elicited in open session and reported thereafter in the media.
21. In its regard, the Defence recalls its submission that once the full set of in-court protective measures has been put in place in respect of a witness, the determination as to whether an answer to a given question may reveal the identity of the witness should take into account the following factors: (i) the nature of the information expected to be elicited through the question; (ii) whether the witness is in an exclusive position to provide the information;

and (iii) the number of individuals being in a position to identify the witness as a result of the answer expected to be given.<sup>11</sup>

22. To the extent that information related to the topics listed in paragraph 52 of the Prosecution Request is referred to in [REDACTED], the Defence agrees that any questions on these topics should be asked and answered in private session.
23. However, there are several other topics of Witness [REDACTED]'s expected testimony in respect of which the witness is not in an exclusive position to provide information.<sup>12</sup> For the sake of the publicity of proceedings and with a view to not overburdening the parties with a time-consuming post-testimony review of the transcripts, the Defence submits that such information should be elicited in open session.
24. The Defence acknowledges that some witnesses have been allowed in other cases – either before this Court or before another international criminal jurisdiction – to testify entirely in closed session. However, while it cannot comment on the merits of the decisions referred to by the Prosecution – if only because the factual reasons justifying the testimonies to be heard in closed session are not set out in the ruling – the Defence notes that the location of the Special Court of Sierra Leone (in Sierra Leone, where the alleged crimes are said to have been committed) was a major consideration in allowing the witness to testify in closed session.<sup>13</sup> Significantly, this is not the case in the present circumstances.

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<sup>11</sup> “Submissions on behalf of Mr Ntaganda on certain matters related to the conduct of proceedings”, 17 March 2016, ICC-01/04-02/06-1217-Conf (“Defence Submissions on Certain Matters Related to the Conduct of Proceedings”), para.24.

<sup>12</sup> *See, inter alia*, topics [REDACTED] of Witness [REDACTED].

<sup>13</sup> SCSL, *Norman et al.* case, SCSL-04-14-T, “Order on an Application by the Prosecution to Hold a Closed Session Hearing of Witness TF2-223”, 27 October 2004, SCSL-04-14-T-237, p.3.



#### IV. Conclusion

25. The Defence stresses that it takes the safety of witnesses and their family very seriously. However, the additional in-court protective measure sought by the Prosecution is incommensurate to the odds of Witness [REDACTED]'s testimony becoming known to [REDACTED]. While due regard must be had to the safety of witnesses, Mr Ntaganda has the fundamental right to a public hearing,<sup>14</sup> which, in the Defence's submission, increases witnesses' commitment to say the truth.<sup>15</sup>
26. Consequently, the Defence respectfully submits that Witness [REDACTED]'s testimony should be heard in public session, with recourse to private sessions when appropriate.

#### CONFIDENTIALITY

27. 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.

#### RELIEF SOUGHT

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

**RESPECTFULLY SUBMITTED ON THIS 26<sup>TH</sup> DAY OF MAY 2016**



Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands

<sup>14</sup> See the remarks of the Presiding Judge on the balance to strike between 'competing interests': T-36-CONF-ENG, p.57, ll.21-25.

<sup>15</sup> Defence Submissions on Certain Matters Related to the Conduct of Proceedings, para.22.