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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 Twelfth request for in-court protective measures’”, 21 April 2016, ICC-01/04-02/06-1292-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 lesser confidential redacted version of the *“Prosecution’s Twelfth request for in-court protective measures”* submitted by the Office of the Prosecutor (“Prosecution”) on 13 April 2016 (“Prosecution Request”);<sup>1</sup> (ii) the *“Confidential Redacted Response of the Common Legal Representative of the Victims of the Attacks to the Prosecution’s Twelfth request for in-court protective measures”* and *“Request pursuant to article 68(2) of the Rome Statute and rule 88(1) of the Rules of Procedure and Evidence”* submitted by the Common Legal Representative of the Victims of the Attacks (“CLR”) on 12 April 2016;<sup>2</sup> and (iii) Trial Chamber VI (“Chamber”)’s order shortening the deadline for any response to the Prosecution Request to 21 April 2016, Counsel representing Mr Ntaganda (“Defence”) hereby submit this:

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

**“Defence Response”**

**INTRODUCTION**

1. The Defence hereby responds to the Prosecution’s request for Witnesses P-0907 and P-0887, who are [REDACTED], to be granted in-court protective measures in the form of facial and voice distortion as well as the use of pseudonyms as provided for in Rule 87 of the Rules of Procedure and Evidence (“Rules”).
2. The Defence also hereby responds to the CLR’s request for additional special measures under Article 68(2) and Rule 88 of the Rules, namely that:
  - (i) details of Witness P-0887’s [REDACTED] be heard in private session; and
  - (ii) [REDACTED] remain on stand-by during the testimony of Witness P-0887

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<sup>1</sup> ICC-01/04-02/06-1224-Conf-Red2. The lesser confidential redacted version of the Prosecution Request was formally notified on 14 April 2016. The Prosecution Request was initially submitted on 22 March 2016 on an *ex parte* basis, only available to the Chamber, Prosecution and Common Legal Representative for the Victims of the Attacks: ICC-01/04-02/06-1224-Conf-Exp. A first confidential redacted version of the Prosecution Request was notified on 13 April 2016: ICC-01/04-02/06-1224-Conf-Red.

<sup>2</sup> ICC-01/04-02/06-1262-Conf-Red.

in the event that it becomes necessary for the witness to benefit from the in-court assistance of [REDACTED] during the evidence she is expected to give about [REDACTED].

3. For the reasons expressed below, the Defence partially opposes the Prosecution Request. As regards the CLRV's request that Witness P-0887's evidence about the [REDACTED] be heard in private session, the Defence posits that the necessity for this should be assessed on a case-by-case basis at the relevant time. Furthermore, the Defence does not object to a [REDACTED] being on stand-by during Witness P-0887's testimony, provided that this assistance does not interfere with the flow of the testimony.

## SUBMISSIONS

### I. Witness P-0907

4. Given the *prima facie* indication that Witness P-0907 would have been the object of [REDACTED] by [REDACTED] – who would allegedly have told him that, *inter alia*, [REDACTED]<sup>3</sup> – the Defence does not oppose, as such, the use of the in-court protective measures requested by the Prosecution with regards to Witness P-0907.
5. Notwithstanding this, the Defence deems important to bring forward some clarifications regarding Witness P-0907's alleged [REDACTED].
6. Firstly, contrary to what is suggested by the Prosecution, the circumstances surrounding Witness P-0907's [REDACTED]<sup>4</sup> do not establish, let alone imply, the existence of an objectively justifiable risk to the witness's security. Quite to the contrary, the fact that Witness P-0907 [REDACTED], [REDACTED], shows that the witness did not fear [REDACTED], at least at that time. In this regard,

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<sup>3</sup> Prosecution Request, para.12, *citing to* DRC-OTP-2088-0579, para.5.

<sup>4</sup> Prosecution Request, paras.6-10.

the Defence posits that Witness P-0907's account of [REDACTED] suggests, at most, a subjective discomfort with [REDACTED].

7. Moreover, in relation to one of these [REDACTED], the Prosecution contends that Witness P-0907 "[REDACTED]".<sup>5</sup> The Defence underscores that, as highlighted in Witness P-0907's statements, apart from [REDACTED] – who [REDACTED] – no other person, [REDACTED], was [REDACTED].
8. Secondly, the Defence deems necessary to underscore the paucity of information provided by the Prosecution as well as, more importantly, the risks associated with granting in-court protective measures on the sole basis of allegations of [REDACTED] advanced by the Prosecution, with no statements and/or affidavit (whether provided by the investigator or by Witness P-0907 himself) in support thereof. The Defence posits that more is required and respectfully suggests that the Chamber should request additional evidence from the Prosecution before adjudicating the Prosecution Request.
9. The Prosecution bears the burden to establish the existence of an *objectively* (and not subjectively) *justifiable* (and not unsubstantiated) risk to the safety of the witness in respect of whom in-court protective measures are sought. The Prosecution's allegations of [REDACTED] – taking into consideration in particular the absence of statement and/or affidavit – imposes on the Defence a need to investigate uncorroborated allegations, a task which it cannot perform within the regulatory time limit for responses to requests for in-court protective measures, due to *inter alia* a lack of sufficient time and resources.
10. The absence of any statement and/or affidavit further deprives the Defence of an appropriate basis to challenge the witness's credibility and security concerns during cross-examination, which is prejudicial to the Accused.

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<sup>5</sup> Prosecution Request, para.10.

11. Finally, the Defence reiterates its concern with the Prosecution's constant, unrelated reliance on the Chamber's "[REDACTED]" in support of requests for in-court protective measures for any and all of its witnesses.<sup>6</sup> The Defence recalls that the Prosecution's allegations dealt with in the Chamber's decision concerned specific witnesses, who included neither Witness P-0907 nor Witness P-0887.

## II. Witness P-0887

12. The Defence notes that the individual who allegedly [REDACTED] with Witness P-0907 appears to have also [REDACTED] Witness P-0887, although nothing suggests that [REDACTED] Witness P-0887's cooperation with the Court. In such circumstances, the Defence acknowledges that there exist *prima facie* indications that the safety of Witness P-0887 could be at risk should it become known to the public that she has testified in the instant case. Other than [REDACTED] – unsupported by any statement and/or affidavit – no additional evidence in the material disclosed in relation to Witness P-0887 suggests that there is an objectively justifiable risk to her safety.
13. However, the Defence submits that the nature of the risk faced by Witness P-0887 warrants, at a maximum, the use of a pseudonym.<sup>7</sup> Indeed, unlike Witness P-0907, Witness P-0887 is not a [REDACTED] witness who is expected to provide [REDACTED]. Witness P-0887 is, on the contrary, a [REDACTED].

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<sup>6</sup> [REDACTED], *referred to* at Prosecution Request, para.20.

<sup>7</sup> *Cf.* Oral decision on request for reconsideration of decision on Prosecution's request for in-court protective measures for the testimony of Witness P-0039 (T-40-CONF-ENG, p.81, ll.7-12 ("According to us, the in-court protective measures we decided upon was adequate to the level of risk concerning this witness. I would like to say that, according to us, the threshold is for use, the whole menu, I mean face distortion and voice distortion, is a bit higher than in the case of this concrete witness, so we are insisting on our decision. And we really mean that it would be a little bit wrong precedence to change the decision and to lower this threshold."), p.81, l.25 to p.82, ll.1-2 ("that we even found some objective risk, but the level of that risk should be corresponding o the measures taken by the Chamber").

14. The Defence further notes that the absence of any concrete intimidation or concrete attempts to intimidate – like in Witness P-0887's situation – will warrant the use of a pseudonym only.<sup>8</sup>
15. On another note, the Defence takes issue with the Prosecution's premise that in-court protective measures are required in relation to Witness P-0887's testimony because the witness fears [REDACTED].<sup>9</sup>
16. The risk of [REDACTED] does not establish, by and of itself, the existence of an objectively justifiable risk to the safety of this witness warranting that the witness's identity be concealed from the public. The Defence stresses that there are other, less far-reaching means available than the usual set of in-court protective measures to ensure the safety and dignity of a witness when testifying about [REDACTED], such as eliciting such evidence in private session.<sup>10</sup> In this regard, the Defence notes that a large part of Witness P-0887's expected testimony is [REDACTED] and does not touch the subject of [REDACTED].<sup>11</sup>
17. However, in line with the Chamber's approach in this regard,<sup>12</sup> the Defence posits that the necessity for Witness P-0887's evidence on the [REDACTED] heard in private session, *as per* the CLRV's request, should be assessed on a case-by-case basis at the relevant time.
18. As regards the CLRV's request for [REDACTED] to remain on stand-by, the Defence does not object to such a measure being granted, provided that it does not interfere with the flow of the testimony.

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<sup>8</sup> Cf. Oral decision on request for in-court protective measures for the testimony of Witness P-0886 (T-36-CONF-ENG, p.2, ll.11-16).

<sup>9</sup> Prosecution Request, para.18.

<sup>10</sup> Cf. "Decision on Prosecution's request for in-court protective measures and special measures for Witnesses P-0892 and P-0912", 14 April 2016, ICC-01/04-02/06-1277-Conf ("Decision on In-Court Protective Measures for Witnesses P-0892 and P-0912"), para.8.

<sup>11</sup> See ICC-01/04-02/06-491-Conf-AnxB, pp.68-70.

<sup>12</sup> Decision on In-Court Protective Measures for Witnesses P-0892 and P-0912, para.8.

**CONFIDENTIALITY**

19. 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.

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

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

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands