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

Date: **22 July 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 “Fourth
Prosecution request for in-court protective measures””,
26 October 2015, ICC-01/04-02/06-940-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 Chloé Grandon

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

Detention Section

**Victims Participation and Reparations
Section**

Further to the “*Fourth Prosecution request for in-court protective measures*” submitted by the Office of the Prosecutor (“Prosecution”) on 2 October 2015 (“Fourth Prosecution Request”)¹, Counsel representing Mr Ntaganda (“Defence”) hereby submit this:

Response on behalf of Mr Ntaganda to
“Fourth Prosecution request for in-court protective measures”
“Defence Response”

INTRODUCTION

1. On 2 October 2015, the Prosecution submitted its Fourth Prosecution Request, whereby it moves the Chamber to grant in-court protective measures for Witness P-0018 in the form of facial and voice distortion as well as the use of a pseudonym.
2. For the reasons expressed below, the Defence opposes the Fourth Prosecution Request.

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.²
4. Grounds for concern are not sufficient, in themselves, to grant in-court protective measures.³ Protective measures should be granted only on an

¹ ICC-01/04-02/06-883-Conf.

² ICC-01/04-02/06-824-Conf, Chamber Decision on Request for In-Court Protective Measures for the First Prosecution Witness (“First Decision”), para.6, *referring to* ICC-01/09/11-902-Red2 (“*Ruto Decision*”), para 13.

³ *See Ruto Decision*, paras. 18, 30, 33, 39, 43.

exceptional basis, following a case-by-case assessment.⁴ A case-by-case evaluation requires an individualized consideration of risk in each particular case.⁵ Applications for in-court protective measures should not be routinely made in the expectation that they will be routinely granted.⁶

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 Witness P-0018, 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 witness's narrative.
6. Moreover, due to the *quasi* similarity between the Fourth Prosecution Request and other pending requests for in-court protective measures⁷, the Defence is concerned that the Prosecution is routinely making such requests in the expectations that they will be routinely granted.⁸

⁴ Chamber Decision on Request for In-Court Protective Measures for the First Prosecution Witness, para.6, *referring to Ruto Decision*, para. 13.

⁵ Chamber Decision on Request for In-Court Protective Measures for the First Prosecution Witness, para.6; *Ruto Decision*, para. 14.

⁶ Chamber Decision on Request for In-Court Protective Measures for the First Prosecution Witness, para.5, *referring to Ruto Decision*, para.11.

⁷ 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.

⁸ 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).

II. The Prosecution has failed to establish the existence of an objectively justifiable risk to Witness P-0018's safety and security which would warrant in-court protective measures

7. The Defence notes that nothing in Witness P-0018-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 her testimony before the Court.⁹

8. In fact, Witness P-0018'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 and without supporting documents, that:

- ✓ Witness P-0018 [REDACTED];
- ✓ Witness P-0018 [REDACTED];
- ✓ Witness P-0018 [REDEACTED].¹⁰

9. The Defence posits that such feeling is inherent to any testimony of a victim [REDACTED] before a criminal court.

10. Even though the Defence recognizes that [REDACTED] is relevant when considering whether appropriate measures shall be taken by the Court to protect a witness, it is not sufficient to justify a breach of the principle of public hearings provided for in Article 67.

11. As regards to the proportionality of the requested protective measures, the Defence underscores that these measures amount to hiding from the public

⁹ In her statements (DRC-OTP-0096-0116 and DRC-OTP-2052-0176), Witness P-0018 simply mentions having been asked if she had concerns regarding her protection and security and that the security measures which are available to her have been explained, without specifying whether she has such concerns or whether she wishes to benefit from such measures.

¹⁰ Fourth Prosecution Request, para. 5.

Witness P-0018's identity. The impact of such outcome 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.¹¹ 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.

12. For these reasons, the Defence opposes the in-court protective measures sought in relation to Witness P-0018's upcoming testimony. Absence of any objectively justifiable risk to Witness P-0018'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-0018's identity must be known to the public.
13. However, conscious that [REDACTED] may lead, in some culture, to stigmatisation and ostracism of the victim, the Defence suggests that when testifying on that subject, it should be in private session.

CONFIDENTIALITY

14. 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.

¹¹ United Nations Office on Drugs and Crime, *Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime*, 2008, p.45.

RELIEF SOUGHT

15. In light of the above arguments and submissions, the Defence respectfully requests the Chamber to:

REJECT the Fourth Prosecution Request.

RESPECTFULLY SUBMITTED ON THIS 22ND DAY OF JULY 2016

A handwritten signature in black ink, appearing to read 'StB' with a flourish at the end.

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands