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

Date: **26 September 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 “Corrected version of ‘Prosecution’s request for in-court protective measures for Prosecution witnesses testifying in the 6th evidentiary block’”, 17 August 2016, ICC-01/04-02/06-1475-Conf-Exp” 2 September 2016, ICC-01/04-02/06-1487

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 the *“Corrected version of ‘Prosecution’s request for in-court protective measures for Prosecution witnesses testifying in the 6th evidentiary block”* submitted by the Office of the Prosecutor (“Prosecution”) on 18 August 2016 (“Prosecution Request”);¹ (ii) Trial Chamber VI (“Chamber”)’s *“Supplemental decision on matters related to the conduct of proceedings”* (“Supplemental Decision on Conduct of Proceedings”) issued on 27 May 2016;² and (iii) the Chamber’s decision granting the Defence a four-day extension to respond, communicated by electronic mail on 26 August 2016,³ Counsel representing Mr Ntaganda (“Defence”) hereby submit this:

Response on behalf of Mr Ntaganda to “Corrected version of ‘Prosecution’s request for in-court protective measures for Prosecution witnesses testifying in the 6th evidentiary block””, 17 August 2016, ICC-01/04-02/06-1475-Conf-Exp

“Defence Response”

1. The Defence opposes the Prosecution’s request that Witnesses P-0100, P-0127, P-0108, P-0365 and P-0105 be granted in-court protective measures. The Prosecution fails to demonstrate any objectively justifiable security risk related specifically to these Witnesses. The Defence does not, however, oppose the Prosecution’s request in respect of Witness P-0668, nor does it oppose the special measures requested for Witness P-0108.

GENERAL SUBMISSIONS

The Prosecution fails to demonstrate an objectively justifiable risk

2. The Prosecution concedes that “Witnesses P-0100, P-0127, P-0108 and P-0105 have not been the subject of any direct or specific threats”.⁴ The Prosecution

¹ ICC-01/04-02/06-1475-Conf-Corr-Red.

² “Supplemental decision on matters related to the conduct of proceedings”, 27 May 2016, ICC-01/04-02/06-1342.

³ Email from a Legal Office of the Chamber to the parties and participants, 2 June 2016, 16h30.

⁴ Prosecution Request para. 28.

instead proposes to conceal the identities of these witnesses from the public on the basis that they reside “[REDACTED]”⁵ or “[REDACTED]”.⁶

3. The Prosecution’s assertions are unsubstantiated and over-broad. Any insinuation that Mr Ntaganda might try to intimidate these witnesses in advance of their testimony is negated, if for no other reason, by the stringent controls on his communications that have been in effect for more than a year. The Prosecution has provided no credible basis on which to assert that “former UPC/FPLC members” might seek to retaliate against these crime-base witnesses before or after their testimony has been heard. This unsubstantiated allegation does not constitute an objectively justifiable risk⁷ and, if accepted, would permit the concealment of the identity of almost any witness residing [REDACTED]. This is not consistent with the principle of a public trial, nor with the broader interests of justice, the perception of fair and impartial justice in the affected communities, or the interests of truth and reconciliation.
4. The Prosecution fails to address the individual security circumstances of witnesses for whom the protective measures are requested. The absence of such submissions, even assuming that there is criminality or instability in Ituri in general,⁸ is grounds to reject the requested protective measures.
5. A “potential risk,”⁹ to which the Prosecution refers repeatedly, is not the proper standard for granting protective measures. The standard is an *objectively* justifiable risk – i.e. a presently existing, substantiated risk to the specific individual. In the absence of such a showing, the request should be rejected.

⁵ Prosecution Request para 8.

⁶ Prosecution Request para 8.

⁷ Prosecution Request fn 11; ICC-01/04-02/06-1336-Conf-Exp-AnxA.

⁸ Prosecution Request para 25.

⁹ Prosecution Request, paras. 8, 20.

The rights of the Accused to a public hearing

6. The Prosecution's assertion that the right to a public hearing will not be affected by the implementation of the protective measures¹⁰ sought is incorrect. The identity of witnesses is one of the most important aspects of a public trial. A vital test of the credibility of a witness is their willingness, in front of the world at large, to give the testimony in question. Deviations from this procedure, even before the ICC, must be understood as exceptional and only when justified based on individual circumstances.¹¹ As noted by the Chamber, "applications for in-court protective measures should not be 'routinely made in the expectation that they will be routinely granted'".¹²
7. In addition, past experience has shown that once protective measures are granted, a significant amount of the testimony is conducted in private session which – for all practical purposes – has led to this trial being held largely in private session.

The need for more intrusive security-related measures post-testimony and the ICCPP

8. The Prosecution has repeatedly argued that protective measures would also "mitigate the need for more intrusive security-related measures post-testimony".¹³ The Prosecution has not demonstrated that the absence of in-court measures will lead to post-testimony "intrusive" measures being required, nor what "intrusive" measures are contemplated. In any event, the alleged inconvenience or even cost of post-testimonial protection of witnesses, if any, should not be lightly accepted as a basis for undermining the public nature of criminal proceedings.

¹⁰ Prosecution Request para 33 ("the hearing will still be in public").

¹¹ ICC-01/04-02/06-824-Conf, para 5.

¹² ICC-01/04-02/06-824-Conf, para 5 citing *The Prosecutor v. Thomas Lubanga Dyilo* Transcript of hearing on 24 March 2009, ICC-01/04-01/06-T-153-Red2-ENG, page 63, lines 19 - 21.

¹³ Prosecution Request para 2.

9. Further, non-admission into the [REDACTED] should not be used as a justification for granting in-court protective measures.¹⁴ On the contrary, the non-admission to the [REDACTED] should be viewed as *prima facie* indicative of the absence of such risk. If credible security threats arise, then a person can be added to the [REDACTED] if necessary.

The choice of protective measures

10. The Defence posits that the protective measures, if any, should be adjusted in light of the particular situation of the witness. The Prosecution automatically requests facial distortion, voice distortion and the use of a pseudonym for all the witness in the 6th evidentiary block that are not expert witnesses or have already been granted protective measures.
11. Any measures that are granted should be limited to what is absolutely necessary in light of the gravity of the objectively justifiable risk. The Prosecution has not, for example, sought only a pseudonym in respect of any witness. Requesting the full-range of protective measures to all “crime-base” without distinction suggests that the minimum necessary measures have not been considered and none have been proposed to the Trial Chamber.

SUBMISSIONS IN RESPECT OF EACH WITNESS

(a) Witness P-0100

12. Witness P-0100 has not been subject of any direct or specific threats.¹⁵ The Prosecution merely puts forth arguments of a general nature and insufficiently substantiated. Witness P-0100 is testifying on general well-known events that are public knowledge in this case.

¹⁴ Prosecution Request para 29.

¹⁵ Prosecution Request para 28.

13. The Prosecution makes no reference to any source justifying why the predominately [REDACTED] contains similar risks to those raised in another village or in the [REDACTED].¹⁶ The Prosecution must demonstrate that the risk is objectively justifiable and applicable specifically to Witness P-0100. It is insufficient to simply assume that there is a potential risk in the entire [REDACTED]. The risk must be established for each specific witness. A similar risk in another area does not meet the threshold required.
14. The Prosecution makes no reference to any source where the witness “[REDACTED]”¹⁷. In fact, quite to the contrary, in his “[REDACTED]” stated Witness P-0100 stated that he had no reason to fear for his safety, well-being, dignity or private life for himself or any other relatives as result of his “interaction” with the Court.¹⁸

(b) Witness P-0127

15. Witness P-0127 has not, as acknowledged by the Prosecution, been subject of any direct or specific threats.¹⁹ Witness P-0127 is testifying on general well-known events, such as the pacification meeting in Sangi, that have already been discussed publicly in this case.
16. The Prosecution argues that “supporters of the Accused continue to have influence”²⁰ in the area where the Witness resides. However, the Prosecution provides no citation or evidence to this fact. The Prosecution has therefore not demonstrated that there is an objectively justifiable risk in the case of Witness P-0127.
17. Furthermore, the Prosecution submits that the witness indicated that an area unknown to the Defence (redacted information) is located next to another

¹⁶ Prosecution Request para 10.

¹⁷ Prosecution Request para 10.

¹⁸ DRC-OTP-2090-0038, p.0039 (para.6)

¹⁹ Prosecution Request para 28.

²⁰ Prosecution Request para 12.

unknown area (redacted information) and therefore Witness P-0127 fears retaliation if his identity becomes public.²¹ Once again there is no reference provided in support of this contention which would allow the Defence to conduct verifications. The concerns, as indicated by the Witness, seem to be of another area that is situated nearby. This is not sufficient to be applied specifically to the situation of Witness P-0127. What is more, this concern is entirely subjective to the Witness and thereby does not meet the necessary standard.

18. The mere fact that Witness P-0127 used to work as a [REDACTED] is irrelevant. An objectively justifiable risk has to be demonstrated to warrant any in-court protective measures. It is not a criteria whether or not the witness *could* more easily be identified. A public figure is not automatically more likely to be at risk of reprisal.

(c) Witness P-0668

19. The Defence does not object to the requested protective measures.

(d) Witness P-0108

20. The Prosecution concedes that Witness P-0108 has not been subject of any direct or specific threats.²² Once again the Prosecution merely puts forth general arguments with no supporting justification. The events P-0108 will come testify about are well-known.
21. The only reasoning brought forth in the case of Witness P-0108 is “an area which remains within the influence of former UPC/FPLC members and associates loyal to the Accused”²³. In fact, the Prosecution relies on

²¹ Prosecution Request para 12.

²² Prosecution Request para 28.

²³ Prosecution Request para 20.

conversations with other witness in support its request.²⁴ This is insufficient, as the test requires that the risk be specific to the Witness. Otherwise every witness from the entire area would automatically be granted the same measures.

22. The Defence does not oppose the Prosecution request for certain special measures²⁵ due to [REDACTED] but does not concede that these would further justify protective measures.

(e) Witness P-0365

23. Witness P-0365 has not been subject of any direct or specific threats.²⁶ The Prosecution does not demonstrate that there is an objective justifiable risk to warrant in-court protective measures. No evidence has been provided to explain her fears for her security.²⁷ The subjective views of P-0365 are insufficient to warrant the exceptional measures. The fact that her testimony could jeopardize any of her family and/or professional relationships is purely speculative.
24. Furthermore, it is irrelevant that none of the family members are currently aware of her cooperation with the ICC. This is common practice for witnesses before the international tribunals. It does not mean that there is an objective justifiable risk to the witness testifying publicly. This is not a case where personal sexual violence may justify concealing the Witness' identity from family members or relatives.
25. In fact, the Prosecution even states that Witness P-0365 [REDACTED].²⁸ [REDACTED]. If such a witness were to be granted protective measures, despite having worked [REDACTED] and without any demonstrating any

²⁴ Prosecution Request fn. 11.

²⁵ Prosecution Request para 38.

²⁶ Prosecution Request para 28.

²⁷ Prosecution Request para 22.

²⁸ [REDACTED]

objective justifiable risk, the only witnesses who will be testifying publicly before this Chamber would be experts.

26. Witness P-0365 was informed that she might be called to testify before the Court in public²⁹ and raised no issues in this regard.

(f) Witness P-0105

27. The Prosecution recognizes that Witness P-0105 has not been subject of any direct or specific threats.³⁰ Once again the witness, as many other witnesses, will be testifying on general well-known events that do not warrant any particular protective measures. The Prosecution does not bring forth any objective justifiable risk specifically related to Witness P-0105. The Prosecution asserts that the family residence would be “in an area in which supporters of the Accused continue to have influence”³¹ without substantiating this argument. The fears expressed by the Witness are purely speculative and subjective. In addition, there is no reference to these concerns that would allow the Chamber to properly assess the risk.
28. Finally, Witness P-0105 is a public figure not unfamiliar with the workings of a court. Witness P-0105 used to be [REDACTED].³² It is not a criteria whether or not the witness *could* more easily be identified. A public figure is not automatically more likely to be at risk of reprisal. The Prosecution has not demonstrated any reason – yet alone an objective justifiable risk – to conceal the identity of Witness P-0105.

²⁹ DRC-OTP-2080-0085, para. 5.

³⁰ Prosecution Request para 28.

³¹ Prosecution Request para 24.

³² [REDACTED]

CONFIDENTIALITY

29. 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

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

REJECT the Prosecution Request for in-court protective measures in regards to Witnesses P-0100, P-0127, P-0108, P-0365 and P-0105.

RESPECTFULLY SUBMITTED ON THIS 26TH DAY OF SEPTEMBER 2016

A handwritten signature in dark ink, appearing to read 'StB-' with a stylized flourish.

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands