



Original: English

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

Date: 21 October 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 submission pursuant to regulation 35 to vary the time limit to
request in-court protective measures for Prosecution Witness P-0792'",
ICC-01/4-02/06-1568-Conf, 6 October 2016**

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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REGISTRY

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Mr Nigel Verrill

Detention Section

Victims Participation and Reparations Section

Further to: (i) the confidential redacted version of the “*Prosecution’s submission pursuant to regulation 35 to vary the time limit to request in-court protective measures for Prosecution Witness P-0792*” submitted by the Office of the Prosecutor (“Prosecution”) on 3 October 2016 (“Request”);¹ and (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 2016² Counsel representing Mr Ntaganda (“Defence”) hereby submit this:

Response on behalf of Mr Ntaganda to “Prosecution’s submission pursuant to regulation 35 to vary the time limit to request in-court protective measures for Prosecution Witness P-0792”

“Defence Response”

1. The Defence opposes the Request. The only potential threat averted by these measures, given their timing, is post-testimonial retaliation. Post-testimonial retaliation would not dissuade or prevent testimony that has already occurred and, accordingly, responds to a lower level of risk than pre-testimonial protective measures. No evidence has been submitted to the Trial Chamber that any non-insider witness has been threatened as a result of their participation in this case, let alone endured *post-testimonial* threats or intimidation. The specific risk obviated by these measures, given that Mr Ntaganda already knows this person’s identity, is that someone independent [REDACTED] will engage in such *post-testimonial* retaliation.
2. The degree of risk arising from participation in the case is even lower in respect of P-0792 who has apparently been actively involved in [REDACTED]. The prospect that the witness’s identification would expose him to a risk that

¹ ICC-01/04-02/06-1555-Conf-Red.

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

he has not already been incurred by [REDACTED] – which is not likely to have gone unnoticed if [REDACTED] – is low.

3. The witness's testimony is also of a generic character that does not particularly incriminate Mr Ntaganda or anyone else who is still alive. The risk of an act of retaliation should be evaluated accordingly.
4. The absence of a direct affirmation by the witness before the Trial Chamber should also, in itself, be deemed fatal to the application. The routine practice of other international tribunals,³ which should also be insisted upon by Chambers of the ICC, is that no dispensation from normal proceedings should be allowed unless – at the very least – the witness has declared under oath the basis of their fears.
5. The Defence also objects to not being in a position to comment upon any VWU assessment that may be provided to, and taken into account by, the Trial Chamber in reaching its decision.

³ *The Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, 17 October 2012, para.7 (“[h]aving reviewed the Declaration, the Chamber finds that the Accused has failed to provide sufficient information to determine whether the Witness would face an objectively grounded risk to his security or welfare should the Witness testify in open session. Nothing in the Declaration, which remains very general, indicates an objective threat to the Witness’s security or welfare. Protective measures may not be granted on the basis of a broad statement not related to any objective risk to the security or welfare of the Witness or his family”); *The Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on Accused’s Motions For Protective Measures For Witnesses KW289, KW299, KW978, and KW543, 1 November 2012, para.11 (“[t]he Chamber reminds the Accused that it is his obligation to fully reflect the concerns of a witness in future protective measures motions at the time that those motions are filed.”); *The Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on Prosecution Motions For Protective Measures For Witnesses KDZ601 And KDZ605, 19 August 2011, para.10 (“[r]egarding the Accused’s argument, discussed above, that the Chamber defer its decision until it hears from the Witnesses in closed session, the Chamber considers it unnecessary as it is satisfied that the Prosecution has consulted the Witnesses recently and that it has provided sufficient relevant information to the Chamber to enable it to dispose of the KDZ601 Motion and the KDZ605 Motion.”); *The Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision On Accused’s Motion For Protective Measures For Witness KW194, 12 November 2012, para.5 (“[h]aving reviewed the Declaration, the Chamber notes that the Witness’s only contention is that his statement contains information about the activities of the Sarajevo-Romanija Corps and believes that this testimony would “put [his] career in a great danger” because it would damage the relationships and “atmosphere of unity” within the organisation in which he currently works. The Chamber is not satisfied, on the basis of the information before it, that there is an objectively grounded risk to the security or welfare of the Witness should he testify in open session.”).

6. In these particular circumstances, the Prosecution has failed to establish any objectively justified security risk warranting the diminution of the public character of the proceedings. The routine exceptions to this principle arising from an unduly low standard for granting protective measures diminishes the principle that justice must be seen to be done; damages the appearance of public justice; and impairs the Defence's ability to discover and root out some forms of intentional deception or inaccuracies. The requested measures should, accordingly, be denied.

CONFIDENTIALITY

7. 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

8. 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 Witness P-0792.

RESPECTFULLY SUBMITTED ON THIS 21ST DAY OF OCTOBER 2016



Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands