



Original: English

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

Date: 13 January 2017

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 a time limit and request for in-court protective measures for Witnesses P-0868 and P-0863'",
ICC-01/04-02/06-1673-Conf, 6 December 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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Further to: (i) the confidential redacted version of the *“Prosecution’s submission pursuant to regulation 35 to vary a time limit and request for in-court protective measures for Witnesses P-0868 and P-0863”* submitted by the Office of the Prosecutor (“Prosecution”) on 24 November 2016 (“Prosecution 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 2016,² Counsel representing Mr Ntaganda (“Defence”) hereby submit this:

Response on behalf of Mr Ntaganda to “Prosecution’s submission pursuant to regulation 35 to vary a time limit and request for in-court protective measures for Witnesses P-0868 and P-0863”

“Defence Response”

1. The Defence opposes the Prosecution’s request that Witnesses P-0868 and P-0863 be granted in-court protective measures in the form of facial and voice distortion as well as the use of a pseudonym. The latter stated during his screening interview that he “[REDACTED].”³ No information has been provided indicating that this view has changed, let alone any information signed by anyone – not even an OTP investigator – affirming that he has expressed such fears.
2. P-0868’s ostensible concerns are not affirmed by a signature and the original investigation notes in which this information appears has not been disclosed to the Defence nor, to the Defence’s knowledge, provided to the Trial Chamber. The information provided, accordingly, does not meet even the liminal threshold of proof for findings of fact required in respect of such motions.

¹ ICC-01/04-02/06-1652-Conf-Red.

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

³ DRC-OTP-2068-0272, para. 3

3. Good cause has not been shown for the late filing of the motion.

SUBMISSIONS

1. The Prosecution has not shown good cause justifying a variation of the time-limit

4. Witness P-0868 has been scheduled to testify during the current block since 2 November 2016. The Prosecution has not explained why the insertion of P-0868 has any causal connection with the failure to have timely filed the request for protective measures. Indeed, the Prosecution appears to concede that there is no such connection, explaining that it simply “overlooked the fact that it had not sought in-court protective measures for this witness”.⁴
5. No good cause having been established, the appropriate remedy – assuming that the Prosecution request is granted – is to prohibit the witnesses appearance until the required time period has elapsed.

2. There is no objectively justifiable risk to the security of witnesses P-0868 and P-0863

6. As acknowledged by the Prosecution, “Witnesses P-0868 and P-0863 have not been the subject of any specific threat or risk”.⁵
7. In-court protective measures should not “routinely be made in the expectation that they will routinely be granted.”⁶ This pronouncement by the *Lubanga* Trial Chamber is a reflection not only of the right of the accused to a trial that is held in public, but also the public’s interest in seeing justice being done. This is particularly important for an international court that is located thousands of kilometers from the communities principally concerned, and for whom the only window on trial proceedings is by way of their electronic dissemination. The latter also has practical consequences, including

⁴ Prosecution Request, para.10.

⁵ Prosecution Request, para.22.

⁶ ICC-01/04-01/06-T-153-Red2-ENG, 63:19-21.

encouraging witnesses to come forward who hear testimony that is inaccurate or outright false.

8. The Prosecution has not provided a single signed statement by the two witnesses for whom protective measures are sought. The failure to provide even a signed statement by an investigator falls below the minimum standard of proof for deviating from the principle of a public trial that has been consistently required at other international tribunals facing similar issues of witness insecurity.⁷
9. The failure to provide such signed statements is more than a technicality. Requiring Prosecution investigators to solemnly affirm the veracity of their submissions to the Court provides a guarantee of accuracy and reliability that is otherwise absent. This is appropriate given the function of investigators, which is to collect and present facts rather than make submissions. No probative value should be accorded to statements that are not backed up by

⁷ *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.”).

an affirmation of truth and accuracy, for which the declarant can be held accountable.

A. Witnesses P-0863

10. No basis – subjective, objective or otherwise – has been presented to justify the protective measures for Witness P-0863. Witness P-0863's screening note states that "[REDACTED]."⁸ No information has been provided suggesting that the witness now thinks otherwise in respect of her testimony before the Court. The Prosecution has not even asked the witness, apparently, whether she wishes to have these measures put in place, let alone offered an affirmation signed by anyone that the witness expressed those fears.

B. Witness P-0868

11. The Prosecution has provided one line from an undisclosed Witness Information Form (WIF). The Note in which this one line has been provided is not signed by the witness or even by an investigator.⁹ Factual information about a witness's concerns that is to form the basis of a decision of this Chamber would normally, even in the context of procedural litigation, be subject to proof by some form of affirmation. None has been provided – an omission that is particularly unacceptable in light of the non-disclosure of the WIF in original form that was filled in with the witness in person, when he presumably could have signed it.
12. The witness reported no "[REDACTED]."¹⁰ More tellingly, however, the investigators apparently asked no questions about older security incidents, let alone made any inquiries to discover the basis of the witness's fear. This is information that could have been useful for the Trial Chamber in making an informed determination, and that could have been easily obtained. The Trial

⁸ Screening note of Witness P-0863, DRC-OTP-2068-0272.

⁹ Investigation note, Annex A, DRC-OTP-2098-0404.

¹⁰ Annex A, DRC-OTP-2098-0404, para.2.

Chamber is accordingly requested to raise the threshold of evidential proof to provide an incentive to the Prosecution to obtain even the most basic information as to the nature of the witness's concerns. The conferral of protective measures, in the absence of such inquiries, becomes a purely subjective exercise.

ANNEXED INVESTIGATION NOTES

13. The Defence objects to the timing of the disclosure of the investigative notes annexed to the Prosecution Request. The investigative notes contain information that is material to the Defence preparations. The Defence only became aware of the existence of the investigative notes after notification of the Prosecution Request, when it was disclosed on 28 November 2016.¹¹
14. This investigation note was created on 24 November 2016, a few days before the Prosecution filed its request. The Prosecution provides no justification or good cause as to why this investigation notes, containing information obtained on 21 April 2016, was not created earlier and disclosed to the Defence.
15. The Defence requests that the Prosecution be ordered to provide the original notes, subject to any redactions justified by applicable rules and practices.

CONFIDENTIALITY

16. 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.

¹¹ DRC-OTP-2098-0404.

RELIEF SOUGHT

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

REJECT the Prosecution Request in its entirety;

ORDER the Prosecution to disclose the original notes that are the basis of information presented in summarized form in other notes.

RESPECTFULLY SUBMITTED ON THIS 13TH DAY OF JANUARY 2017

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