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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 request for in-court protective measures for Prosecution Witnesses P-0005, P-0043 and P-0857'", 27 December 2016, ICC-01/04-02/06-1703-Conf

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 request for in-court protective measures for Prosecution Witnesses P-0005, P-0043 and P-0857” submitted by the Office of the Prosecutor (“Prosecution”) on 16 December 2016 (“Prosecution Request” or “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 request for in-court protective measures for Prosecution Witnesses P-0005, P-0043 and P-0857”

“Defence Response”

1. The Defence opposes the Prosecution’s request for the full range of in-court protective measures (voice and face distortion, and pseudonym) for witnesses P-0005, P-0043, and P-0857. The witnesses, despite being long known to Mr Ntaganda, have not received any threats. The Prosecution has not claimed that they have been threatened. P-0043 was correctly required to give his testimony in public in the *Lubanga* case. The Trial Chamber, in denying the Prosecution’s motion for protective measures in that case, underscored the “high importance” of the “principle of open justice” and that “requests for anonymity should not be lightly granted” to ensure that “these applications are not routinely made in the expectation that they will be routinely granted.”³ The denial of protective measures was not based on Mr Lubanga’s inability to intimidate the witness, or the absence of a network in Ituri that might do so, but because of the relatively generic nature of Witness P-0043’s testimony and the absence of threats preceding his testimony.⁴ Those factors

¹ ICC-01/04-02/06-1686-Conf-Red.

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

³ ICC-01/04-01/06-T-153-Red2-ENG, 63:17-21.

⁴ ICC-01/04-01/06-T-153-Red2-ENG, 62:25 – 63:12.

remain unchanged, notwithstanding the witness's self-serving and unsubstantiated assertion that Mr Ntaganda has access to a network to which Mr Lubanga did not have access at the time of his previous testimony. The Prosecution has likewise failed to substantiate any objectively justified risk of post-testimonial retaliation in respect of Witnesses P-0005 and P-0857.

SUBMISSIONS

2. No crime-base witness in the eighth evidentiary block will testify in public if this Request is granted. Requests for in-court protective measures have, in effect, become routine. The formula of those requests is to refer to a witness's subjective wish for protective measures, combined with reference to conversations of Mr Ntaganda [REDACTED]. The Prosecution then asserts that this substantiates a genuine risk of post-testimonial retaliation for any and all witnesses who assert such a subjective fear.
3. Only two crime-base witnesses have not been granted full protective measures since the beginning of this trial.⁵ [REDACTED]⁶ no request for protective measures has been denied, even in part. Witnesses now appear to have the expectation, possibly fortified by information provided during interviews, that protective measures are commonly granted. This was precisely the phenomenon that the *Lubanga* Trial Chamber cautioned against in stating that requests for in-court protective measures should not "routinely be made in the expectation that they will routinely be granted."⁷ This statement was made in

"As we have just summarised, the evidence of this witness [P-0043] is mainly focused on his arrest in 2002, although, as we have also set out in detail, he will be asked about certain other important issues. We do not consider that these matters will affect the neutrality of his position in any significant way, and we do not understand his evidence as in any way materially attacking or criticising either the president or the present government of the DRC. Following his arrest, he has not experienced any difficulties within the DRC and he has continued with his professional work, albeit he is awaiting a new appointment. The accused has known for some time that this witness will form part of the Prosecution's evidence and, as we've just stressed, no threats have been made to him."

⁵ ICC-01/04-02/06-T-36-CONF-ENG ET, 55 – 57 (P-868); ICC-01/04-02/06-956-Conf (P-0039).

⁶ ICC-01/04-02/06-T-40-CONF-ENG ET, 68 – 83.

⁷ ICC-01/04-01/06-T-153-Red2-ENG, 63:19-21.

the context of denying a request for protective measures by P-0043, and the materials submitted by the Prosecution only underscore the extent to which such an expectation can affect the alleged basis for the requests for protective measures themselves.

A. Witness P-0005

4. [REDACTED]. [REDACTED].⁸ [REDACTED].⁹ [REDACTED]¹⁰ [REDACTED].
5. The Prosecution appears to refer to *ex parte* information in relation to Witness P-0005's fears.¹¹ The Defence objects to any such submissions having been made, and requests that the Prosecution Request be denied on this basis alone. In the alternative, the Defence requests that they be disclosed to the Defence immediately or expressly disregarded.
6. The Defence is not aware of any information about any post-testimony reprisals against any witness in this case. This is a highly significant fact because this is the only type of intimidation that is prevented by according in-court protective measures. The Prosecution has not discharged its burden of showing that there is an objective basis for such measures being necessary for Witness P-0005's safety and security based on any applicable standard of risk.

B. Witness P-0043

7. No signed statement has been provided from Witness P-0043 substantiating his alleged concerns. The investigator's notes are unsigned. There is no affirmation by the investigator that these "notes" do not contain errors, and no affirmation by the witness that they are not false. The failure to provide such an affirmation is inexplicable and, given that the burden of proof rests on the Prosecution,

⁸ Prosecution Request, Annex B, DRC-OTP-2099-0493, p.0494.

⁹ Prosecution Request, Annex B, DRC-OTP-2099-0493, p.0495.
"[REDACTED]."

¹⁰ Prosecution Request, Annex B, DRC-OTP-2099-0493, p.0494.

¹¹ Prosecution Request, para.8.

should be fatal to the Request. Neither the Defence nor (to the Defence's knowledge) the Trial Chamber has even been provided with the original investigator's notes of the conversations with Witness P-0043.

8. The *Lubanga* Trial Chamber denied Witness P-0043's request for protective measures in that case. That Chamber noted that "[t]he witness has not suggested that there have been any specific threats or incidents concerning his or his family's safety, since he provided his statement to the Office of the Prosecutor in September of 2005."¹² The witness also, according to the *Lubanga* Trial Chamber,¹³ was not intimidated by members of the UPC and, according to [REDACTED],¹⁴ even had meetings with UPC representatives in the context of his work.
9. Witness P-0043 testified in *Lubanga* despite the absence of protective measures. He has not reported being subjected to any threats or intimidation since giving that testimony.
10. Witness P-0043 has ostensibly attempted to justify his request for in-court protective measures by asserting that "[REDACTED]."¹⁵
11. The witness's self-serving attempt to distinguish the situation in this case from that of the *Lubanga* case should be rejected. First, there is no objective basis for the claim. Second, the Prosecution has not attempted to establish any objective basis for this claim. Third, the absence of such a network was not the basis for the denial of protective measures in *Lubanga*. The basis, rather, was that the witness's testimony concerned crime-base and that he had not previously been the object of any threats. Both of those facts remain true to this day. Fourth, the

¹² ICC-01/04-01/06-T-153-Red2-ENG, 62:14-17.

¹³ ICC-01/04-01/06-T-153-Red2-ENG, 61:14-20.

¹⁴ DRC-OTP-0126-0086, p.0095-0096, para.49.

"[REDACTED]."

¹⁵ Prosecution Request, Annex D.

existence of any such “network” is irrelevant in light of the strict contact restrictions to which Mr Ntaganda has been, and is, subject.

C. Witness P-0857

12. No signed statement has been provided from Witness P-0857 substantiating his alleged concerns. The investigator’s notes are unsigned. There is no affirmation by the investigator that these “notes” do not contain errors, and no affirmation by the witness that they are not false. The failure to provide such an affirmation is inexplicable and, given that the burden of proof rests on the Prosecution, should cause the Trial Chamber to deny the Request in respect of Witness P-0857 *in limine*. Neither the Defence nor (to the Defence’s knowledge) the Trial Chamber has even been provided with the original investigator’s note of the conversation with Witness P-0857.
13. Witness P-0857, when asked [REDACTED].¹⁶
14. It is only after the Prosecution explained to him the available in-court protective measures and the possibility to request them from the Chamber on [REDACTED] 2015 that Witness P-0857 requested them.¹⁷
15. No objective foundation has been established to justify granting protective measures.

D. The Request should be denied because of late disclosure, which appears now to be a routine practice

16. The Defence objects to the timing of the disclosure of the disclosure of the transcript of the interview¹⁸ and the investigative notes¹⁹ annexed to the Prosecution Request. These documents contain information material to the

¹⁶ [REDACTED].

¹⁷ Prosecution Request, Annex E.

¹⁸ Prosecution Request, Annex B.

¹⁹ Prosecution Request, Annex C, Annex D and Annex E.

Defence preparation as they mention Mr Ntaganda with relation to their security concerns. The Defence only became aware of the existence of these documents upon notification of the Prosecution Request for in-court protective measures for Witnesses P-0005, P-0043 and P-0857 on 16 December 2016, and have not yet been officially disclosed.

17. The transcript of the witness interview is dated [REDACTED] 2008.²⁰ It was only disclosed to the Defence on 19 December 2016 after Trial Chamber VI's instruction ordering that document ICC-01/04-02/06-1686-Conf-Exp-AnxB be reclassified as "Confidential" instead of "Ex Parte." No justification has been given by the Prosecution for classifying this interview "*ex parte*", which is part of a broader pattern of late-disclosure and over-broad redactions. The Defence has been compelled throughout the course of this case to request disclosure of materials that ought to have been disclosed spontaneously by the Prosecution, and that is probably indicative of further undisclosed material.

CONFIDENTIALITY

18. 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.

²⁰ See Prosecution Request, Annex B.

RELIEF SOUGHT

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

REJECT the Prosecution Request in its entirety.

RESPECTFULLY SUBMITTED ON THIS 8TH DAY OF FEBRUARY 2017

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

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands