

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: 10 February 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***

Confidential

Response on behalf of Mr Ntaganda to "Prosecution's submission pursuant to regulation 35 to vary the time limit and request for in-court protective measures for Prosecution Witness P-0551"

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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**Unrepresented Applicants (Participation
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REGISTRY

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Section**

Further to the confidential redacted version of the "*Prosecution's submission pursuant to regulation 35 to vary the time limit and request for in-court protective measures for Prosecution Witness P-0551*" submitted by the Office of the Prosecutor ("Prosecution") on 27 January 2017 ("Prosecution Request" or "Request")¹ but notified to the parties and participants on 30 January 2017, 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 and request for in-court protective measures for Prosecution Witness P-0551"

"Defence Response"

INTRODUCTION

1. On 27 January 2017, the Prosecution submitted a Request, whereby it moves the Chamber to vary the time limit pursuant to regulation 35 of the Regulations of the Court ("RoC") to submit its Request for in-court protective measures for Witness P-0551 and to grant in-court protective measures in the form of: (i) facial distortion; (2) voice distortion; (3) and the use of a pseudonym. The Prosecution rests on the premise that the requested protective measures will ensure that Witness P-0551 will be able to give evidence "without fear for his personal security or that of his family members."²
2. Due to the late addition of Witness P-0551 on the Prosecution's list of witnesses, the Defence does not oppose the Prosecution Request pursuant to regulation 35 RoC to vary the time limit. However, the Defence opposes the Prosecution Request for the implementation of in-court protective measures for Witness P-0551. The Prosecution has not established the existence of an objectively justifiable risk to the security of Witness P-0551. Moreover, the abundant use of such protective measures violates Mr Ntaganda's right to a public and fair trial, even when he knows the identity of the witness.

¹ ICC-01/04-02/06-1756-Conf-Red

² Request, para 3.

SUBMISSIONS

I. Prosecution's request pursuant to regulation 35 to vary the time limit

3. The Defence does not oppose the Prosecution Request to vary the time limit to submit its Request for in-court protective measures for Witness P-0551.
4. The Defence notes, however, that the Prosecution has been aware of the possibility of Witness P-0551 having to testify *viva voce* since at least 22 December 2016, when the Defence responded to the Prosecution's 1 November 2016 Rule 68(2)(b) request.

II. The Trial Chamber should not grant Witness P-0551 the full set of protective measures

5. As a preliminary matter, the Defence notes that considerable information pertaining to Witness P-0551's situation is redacted from the Defence in the Prosecution Request, in particular concerning the place of residence of Witness P-0551 and the locations he allegedly travels to.³ Consequently, the Defence is deprived of the opportunity to submit relevant and specific observations in this regard.
6. The Defence underscores that the information redacted is prejudicial in so far as it seriously impedes the ability of the Defence to conduct the necessary investigations in relation to the information provided by Witness P-0551. This is especially the case, considering that Witness P-0551 is scheduled to testify very shortly.
7. It is incumbent upon the Prosecution when requesting in-court protective measures to demonstrate that the measures sought: (1) are necessary in light of the existence of an objectively justifiably risk to the security of the witness; and

³ Request, para 17-20, 25.

- (ii) do not infringe upon and, in any case, are proportionate to the rights of the Accused.
8. The Defence notes that nothing in Witness P-0551 related material disclosed by the Prosecution so far reveals 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 his testimony before the Court.
9. In fact, Witness P-0551's subjective fear that cooperation with the Court could be looked at unfavourably in the area in which he and his family reside does not come close to the threshold of risk or insecurity required to justify testifying with protective measures. The Prosecution acknowledges that the witness, despite being allegedly "easily recognisable due to his current work,"⁴ has not been the subject of any direct or specific threat in relation to his co-operation with the Court.⁵ As such, his situation appears to be no different from that of any other witness who resides in Ituri.
10. In this regard, the Defence emphasizes that the nature of Witness P-0551's evidence – the purpose of which is to provide technical information in relation to school records and the schooling system in general – significantly reduces the existence of any possible risk to the witness and must be taken into consideration.
11. Concerning the proportionality of the requested protective measures, the Defence underscores that these measures amount to hiding Witness P-0551's identity from the public. In the *Lubanga* case, Trial Chamber I emphasized 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."⁶

⁴ Request, para 25.

⁵ Request, para 24.

⁶ ICC-01/04-01/06-T-153-Red2-ENG, 63:17-21.

12. However, requests for in-court protective measures have become routine before this Chamber. Here, the Prosecution, once again, refers to Witness P-0551's wish for protective measures based on subjective and speculative fears, without any supporting material being provided, combined with references to conversations of Mr Ntaganda concerning insider-witnesses that occurred years ago. The Prosecution then asserts that this substantiates a genuine risk of post-testimonial retaliation for this witness, as it does in its view, for any and all witnesses who assert such a subjective fear.
13. The search for truth is not well served by creating an expectation amongst prospective witnesses, or the public at large, that testimony can routinely be given anonymously. The right to a public trial, as well as the public administration of justice, should not be sacrificed to the personal preferences of witnesses and speculative assessments of risk.
14. Moreover, non-admission to the Court's protection program is not a legitimate basis for granting in-court protective measures.⁷ Indeed, admission to the ICCPP is exceptional and limited to specific cases requiring the implementation of protection measures in the face of demonstrated threat to the security of the witness. As conceded by the Prosecution, the safety and security of Witness P-0551 is closely monitored and assessed. Considering the absence of appropriate justifications, the implementation of in-court protective measures is superfluous and the right to a public trial must prevail.
15. Finally, no signed statement has been provided from Witness P-0551 substantiating his alleged concerns and no signed affidavit or investigation note has been disclosed. The failure to provide such a statement and/or appropriate justifications is inexplicable. Considering the burden of proof that rests on the Prosecution, this should cause the Chamber to deny the Request in respect of Witness P-0551 *in limine*.

⁷ Request, para 29.

16. For all these reasons, the Defence opposes the implementation of in-court protective measures sought in relation to Witness P-0551's upcoming testimony. Absent any objectively justifiable risk to Witness P-0551's security and with a view to ensuring that the trial record is accessible to the public to a maximal extent, Witness P-0551's identity must be known to the public.

CONFIDENTIALITY

17. 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

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

REJECT the Prosecution Request for in-court protection measures for Witness P-0551.

RESPECTFULLY SUBMITTED ON THIS 10TH DAY OF FEBRUARY 2017



Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands