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

Date: **16 November 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 request for in-court protective measures for  
Witness [REDACTED]'", 18 October 2016, ICC-01/04-02/06-1587-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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**The Office of Public Counsel for Victims**

**The Office of Public Counsel for the Defence**

**States' Representatives**

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**REGISTRY**

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**Victims and Witnesses Unit**

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**Detention Section**

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Further to: (i) the confidential redacted version of the “*Prosecution’s request for in-court protective measures for Witness [REDACTED]*” submitted by the Office of the Prosecutor (“Prosecution”) on 11 October 2016 (“Request”);<sup>1</sup> 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<sup>2</sup> Counsel representing Mr Ntaganda (“Defence”) hereby submit this:

**Response on behalf of Mr Ntaganda to “Prosecution’s request for in-court protective measures for Witness [REDACTED]”**

**“Defence Response”**

1. The Defence opposes the Prosecution’s request that Witnesses [REDACTED] be granted in-court protective measures. The Prosecution has not – as far as the Defence can tell from the *inter partes* material filed in support of the Request – presented a signed statement from the witness affirming his subjective fears, let alone describing the objective basis for those fears. The absence of such an affirmation, in itself, should lead to denial of the Request.
2. Even if such a statement were produced, the Request is not otherwise adequately substantiated. The supposed “intimidation” of [REDACTED] or his family [REDACTED] amounts, as far as the information provided shows, to nothing more than public criticism. Removing the trial from public view as a reaction to such criticism is not in the interests of justice. Furthermore, no credible information has ever been placed before the Trial Chamber that any Prosecution witness has faced retaliation for their testimony.

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<sup>1</sup> ICC-01/04-02/06-1576-Conf-Red.

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

**I. The Prosecution has provided no signed statement by the person seeking the protective measures**

3. In-court protective measures should not “routinely be made in the expectation that they will routinely be granted.”<sup>3</sup> Such requests have, however, now become so routine in this case that the Prosecution does not even bother to provide any affirmation from witnesses memorializing: (i) the subjective fears meriting such a request; or (ii) the “objectively justifiable risk” substantiating such fears.
4. No less than a signed affirmation from the witness on whose behalf the measures are sought should be required by the Trial Chamber. Other international tribunals have required no less when they are asked to deviate from the principle of public trial,<sup>4</sup> and no less should be required at the ICC. The rights of the accused are not the only interest safeguarded by a fair and public trial. The insistence expressed by the [REDACTED] [REDACTED] that

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<sup>3</sup> ICC-01/04-01/06-T-153-Red2-ENG, 63:19-21.

<sup>4</sup> *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.”).

such measures not come to be seen as routine ensures that witnesses approach their testimony with appropriate solemnity, and that the public at large has confidence in the quality of justice being done at a court far removed from their communities. The transparency of proceedings should be maintained unless – at the very least – the witness himself or herself expresses the concerns that are supposedly the basis for the Chamber deviating from its normal procedures.

5. Instead of relying on [REDACTED]'s own views, the Prosecution relies on far-flung sources including: a statement of [REDACTED]'s [REDACTED] (a [REDACTED]) given in [REDACTED];<sup>5</sup> a statement of trial witness [REDACTED] conducted over 11 days in The Hague in [REDACTED];<sup>6</sup> and other sources dating back many years.
6. The only comment by [REDACTED] [REDACTED] in respect of these matters is presented in the form of what appears to be a summary (prepared on 10 October 2016) of an investigation note (prepared on [REDACTED]).<sup>7</sup> First, the Trial Chamber should not accept a summary of an investigation note as having any probative value in the absence of the original Investigation Note itself. Second, [REDACTED] gives no indication in the Investigation Note that the [REDACTED] at [REDACTED] in [REDACTED] threatened, pressured or intimidated anyone. Third, the Investigation Note contradicts [REDACTED]'s [REDACTED]'s ([REDACTED]) account of the alleged incident. [REDACTED] is reported to have told the investigators that [REDACTED] “had been [REDACTED]” by [REDACTED] in question,<sup>8</sup> whereas [REDACTED] [REDACTED] says that [REDACTED] only [REDACTED] in [REDACTED]

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<sup>5</sup> Annex A, available in redacted form to the Defence as DRC-OTP-2066-0259.

<sup>6</sup> Annex K.

<sup>7</sup> Annex H.

<sup>8</sup> Annex H (“[REDACTED] reported that [REDACTED], [REDACTED], had been [REDACTED] the [REDACTED], [REDACTED], in the [REDACTED], by [REDACTED] [...]”).

about the [REDACTED].<sup>9</sup> The discrepancy raises doubts about the reliability of the description of events that the Prosecution seeks to now characterize as constituting intimidation. In light of these discrepancies, and the absence of [REDACTED] himself previously interpreting this event as “intimidation”, the least that should now be required is a declaration signed by the witness expressing his fears and describing the alleged basis for those fears.

7. The failure to provide a statement by the witness is exacerbated by the Prosecution’s liberal reliance on *ex parte* annexes. The Defence is not in a position to comment on these materials, and the Trial Chamber does not have the benefit of *inter partes* submissions that might raise doubts about the reliability of those materials.

## II. The Prosecution fails to demonstrate an objectively justifiable risk

8. The Prosecution cites two alleged incidents following [REDACTED]’s public testimony in [REDACTED] as constituting intimidation:
  - i. [REDACTED];<sup>10</sup> and
  - ii. [REDACTED].<sup>11</sup>
9. The Prosecution also refers to two pieces of information that were available to the witness prior [REDACTED]: alleged dissuasion by [REDACTED];<sup>12</sup> and the witness’s account of an alleged [REDACTED].<sup>13</sup>
10. The two events of which the witness was aware [REDACTED] provide no basis for in-court protective measures [REDACTED]. These events did not dissuade the witness from [REDACTED] much closer in time to these events, and about these events. The Defence would, incidentally, not object to hearing

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<sup>9</sup> Annex A, DRC-OTP-2066-0259, para.12 (“[REDACTED]”).

<sup>10</sup> Annex A, para.12 and Annex H.

<sup>11</sup> Annex A, para.13.

<sup>12</sup> Prosecution Request, para.19, referring to Annex M, para.3.

<sup>13</sup> Prosecution Request, para.19, referring to Annex N, p.70 to 75.

the specific testimony about [REDACTED] in private session. This would be a much less intrusive witness protection measure and preserve the public nature of the proceedings to a much greater degree.

11. The two [REDACTED] events do not, based on the information provided, constitute intimidation. The information provided shows only that [REDACTED]. The Prosecution's definition of "intimidation" means that any criticism of [REDACTED] proceedings justifies private session. Such a view is not in the interests of justice, and undermines the mission of the ICC.

### **III. No credible evidence of post-testimonial intimidation has ever been put before the Trial Chamber, particularly in respect of "crime-base" witnesses**

12. No information, as far as the Defence has been made aware, has been placed before the Trial Chamber of post-testimonial intimidation of any crime-base witness. The only citation in support of this claim provided by the Prosecution is a reference to a victims representative's submission that includes three paragraphs that are "[REDACTED]".<sup>14</sup> The Defence has no information as to the timing or nature of this alleged intimidation. The Defence suggests that these claims should be closely scrutinized to ascertain whether these reports, whatever they may be, are indicative in any way of an enhanced risk for [REDACTED].
13. The Prosecution's reliance<sup>15</sup> on allegations of witness interference by Mr Ntaganda himself is misplaced. Those allegations concern alleged attempts to influence, in advance of their testimony, two [REDACTED]. These allegations, concerning conduct that occurred more than two years ago and for which strong restrictive measures have been, and still are, in place, provide no justification for in-court protective measures designed to reduce the risk of

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<sup>14</sup> Request, para. 18, citing ICC-01/04-02/06-1160-Red2, fn. 18, citing ICC-01/04-02/06-977-Conf-Red, paras. 13-20.

<sup>15</sup> Request, para. 18.

post-testimonial retribution against a crime-base witness who has already testified about these same matters in public.

#### **IV. Annexed investigation notes**

14. The Defence objects, as indicated above, to the Prosecution's practice of preparing summarized versions of Investigation Notes. Annexes H and M are investigation notes dated 10 October 2016 that appear to be based on investigation notes created in [REDACTED] and [REDACTED], respectively. If there is sensitive or non-disclosable information in those notes, then the appropriate procedure is to redact any such information and to disclose such notes in accordance with deadlines set by the Chamber, i.e. 2 March 2015. No justification has been offered by the Prosecution for the late disclosure and for its practice or re-writing contemporaneous investigation notes for the purposes of disclosure or substantiating motions. In the absence of any such justification, the Trial Chamber is requested to decline to accord any weight to these notes, or to order the Prosecution to disclose the original notes in redacted form without delay.

#### **CONFIDENTIALITY**

15. 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**

16. 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 [REDACTED].

**RESPECTFULLY SUBMITTED ON THIS 16<sup>TH</sup> DAY OF NOVEMBER 2016**

A handwritten signature in black ink, appearing to read 'StB' with a small flourish at the end.

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands