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No.: ICC-01/09-01/11
Date: 18 October 2013

TRIAL CHAMBER V(A)

Before: Judge Chile Eboe-Osuji, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Robert Fremr

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
THE PROSECUTOR v. WILLIAM SAMOEI RUTO and JOSHUA ARAP SANG**

Public Redacted Version of

**Prosecution's Second Request for In-Court Protective Measures for Trial
Witnesses (ICC-01/09-01/11-1044-Conf-Exp)**

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Introduction

1. On 12 August 2013, the Prosecution filed its first request for in-court protective measures for nine of the first ten scheduled witnesses (First Request).¹ The running order of witnesses has since changed and the next group of witnesses scheduled to testify (P-0487, P-0268, P-0469, and P-0423) was not covered by that application. The Prosecution accordingly submits a request for in-court protective measures for these four witnesses. Due to the imminent start date of these witnesses, the Prosecution also requests that the Chamber order responses on an expedited basis.
2. Pursuant to Article 68(1) and Rule 87, the Prosecution requests the Chamber to authorise: i) image and voice distortion during testimony; ii) assignment and use of a pseudonym; and iii) limited *in camera* sessions for identifying evidence. These protective measures strike an appropriate balance between the Court's duty under Article 68(1) to protect witnesses who appear before the Court, and the Accused's right under Article 67(1) to a public hearing. The requested protective measures do not unduly prejudice the Accused as the witnesses will remain anonymous to the public only.

Confidentiality

3. Pursuant to Regulation 23*bis*(1) of the Regulations of the Court, this application is designated as "confidential, *ex parte*, Prosecution and VWU only", since it contains confidential information related to witnesses. Confidential and public redacted versions will be filed shortly.

Submissions

4. The Prosecution seeks in-court protective measures for witnesses P-0487, P-0268, P-0469, and P-0423. Specifically, the Prosecution requests the Chamber to authorise: i) image and voice distortion under Rule 87(3)(c) and

¹ ICC-01/09-01/11-845-Conf-Exp and ICC-01/09-01/11-845-Conf-Red.

Regulation 94(b) and (c) of the Regulations of the Registry (ROR); ii) assignment and use of a pseudonym under Rule 87(3)(d) and Regulation 94(a) ROR; and iii) limited *in camera* sessions under Articles 64(7) and 68(1), Rule 87(3)(e) and Regulation 94(e) ROR.

5. At this stage, the Prosecution does not expect that special measures under Rule 88 will be required for these witnesses, but it may make a further application should circumstances arise before or during the testimony of a witness which render these measures necessary.
6. The Prosecution incorporates by reference the submissions contained in its First Request regarding the necessity of these measures (in a general sense), and their proportionality vis-à-vis the rights of the Accused. Recent developments further confirm the need for protective measures to be applied in this case.
7. Since the First Request was filed, recent actions by the Kenyan Parliament have exacerbated the general concerns expressed therein. The National Assembly and Senate passed motions calling for the repeal of Kenya's International Crimes Act (2008).² These developments have further chilled the willingness of Kenyans to be seen to cooperate with the ICC, which in turn increases the risks to witnesses. As the Chamber is aware, these developments have already adversely affected the willingness of Prosecution witnesses to testify in this case.³ In the witnesses' eyes, this public revocation of the Court makes it even more dangerous to be seen to be supporting this process. This subjective fear seems to be justified: [REDACTED],⁴ increasing the possibility of post-testimony retaliation or harassment.
8. The Prosecution also notes the resolution of the Assembly of Heads of States from the African Union's Special Session on the ICC this past weekend⁵ and

² See ICC-01/09-01/11-T-32-Red-ENG, pp. 5-8; "Kenya MPs vote to withdraw from ICC", BBC News, 5 September 2013, <http://www.bbc.co.uk/news/world-africa-23969316>; "Kenya parliament votes to withdraw from ICC", Al-Jazeera, 5 September 2013, <http://www.aljazeera.com/news/africa/2013/09/201395151027359326.html>.

³ ICC-01/09-01/11-T-32-Red-ENG ET, p.8, lines 7-12; p.9, line 8 to p.10, line 3.

⁴ ICC-01/09-01/11-T-30-CONF-ENG ET, p.2, line 20 to p.6, line 8; ICC-01/09-01/11-967-Conf+Anxs.

⁵ http://summits.au.int/en/sites/default/files/Ext%20Assembly%20AU%20Dec%20&%20Decl%20_E.pdf

the speech by Kenya's President Uhuru Kenyatta at that event.⁶ Both of these developments demonstrate the seriousness with which the Kenyan Parliament, and other African states, are treating Kenya's stance pertaining to the Court's authority to determine responsibility for what happened in Kenya in 2007-2008. Not only do these developments tend to chill the willingness of witnesses to cooperate with the Court; they may also embolden third parties with an intent to harm and/or interfere with witnesses, if they think that they can do so without fear of repercussions, since their government does not appear to support the Court's 'interference' in its domestic affairs.

9. The recent developments of the Kenyan Parliament are matters that affect all witnesses [REDACTED] are serious and cogent enough to constitute *prima facie* evidence in favour of granting in-court protective measures unless individual assessments show otherwise.⁷ So too are the on-going attempts to interfere with, bribe and expose witnesses that the Prosecution has previously brought to the attention of the Chamber, and which have also led to the issuance of a public warrant of arrest by the Court.
10. In addition to these general assertions, the Prosecution submits that the specific circumstances of each of the witnesses – set out below – further justify the protective measures sought.

(a) **P-0487**

11. P-0487 and his family [REDACTED] currently live in REDACTED.
12. His identity was disclosed to the Defence in January 2013. [REDACTED].⁸
[REDACTED].
13. [REDACTED].

⁶ As reported by, for example, <http://www.citizennews.co.ke/news/2012/local/item/14250-president-kenyattas-speech-at-the-au-summit>.

⁷ ICC-01/09-01/11-T-32-Red-ENG ET, p.11, lines 2-11; p.46, lines 13-19.

⁸ [REDACTED].

14. When representatives of the OTP met with the witness in [REDACTED], he indicated that having his identity protected from the public is important for the safety of him and his family. More recently, when the issue of in-court protective measures was again raised with the witness on [REDACTED], he said that he could testify publicly.⁹ However, this does not relieve the Court of its duties of protection under Article 68 (1) of the Statute. In this specific instance, [REDACTED] and the experience with witnesses (or suspected witnesses) being identified in public, the Prosecution remains of the view that in-court protective measures are necessary to protect the witness and his family [REDACTED].

(b) P-0268

15. P-0268 [REDACTED]. P-0268's identity was disclosed to the Defence in January 2013.
16. [REDACTED].
17. [REDACTED].
18. P-0268 is particularly concerned about [REDACTED].
19. During a meeting with the OTP in [REDACTED], P-0268 indicated that he would like face and voice distortion and the use of a pseudonym. He explained that his exposure to the Kenyan public would not only affect his own security, but also that of his immediate and distant family members. In [REDACTED], P-0268 informed the OTP that he wants his testimony to take place in closed session. The investigator who spoke to him said P-0268 appears to be more afraid than ever because of what is taking place in the Kenyan media and the fact that he might [REDACTED].

⁹ However, the OTP investigator who spoke to the witness is not sure that the witness fully understood what was being discussed.

(c) P-0469

20. P-0469 and [REDACTED] currently live in [REDACTED]. Her identity was disclosed to the Defence in January 2013.
21. [REDACTED]
22. [REDACTED]:
 - (i) [REDACTED].
 - (ii) [REDACTED].
 - (iii) [REDACTED].
 - (iv) [REDACTED].
 - (v) [REDACTED].
23. [REDACTED].
24. P-0469 stated that she would appreciate face and voice distortion and the use of a pseudonym, because people have been guessing and spreading rumours that she is a witness. She stated that if she were to testify publicly, these rumours would be confirmed and she would be a subject of security threats or would be killed [REDACTED]. [REDACTED].

(d) P-0423

25. [REDACTED].¹⁰ [REDACTED]. His identity was disclosed to the Defence on 9 January 2013.
26. During a meeting with the OTP in [REDACTED], P-0423 indicated that he would appreciate in-court protective measures. He explained that [REDACTED]. He believes that if in-court protective measures are applied, his family [REDACTED] will be safe.

¹⁰ [REDACTED].

Relief Requested

27. For the foregoing reasons, the Prosecution requests that the Chamber grant: i) image and voice distortion; ii) use of pseudonyms during testimony; iii) limited *in camera* sessions; and iv) redactions to public records, where necessary to prevent identification, for witnesses P-0487, P-0268, P-0469, and P-0423.
28. Finally, due to the imminent start date of these witnesses (P-0487 may start as early as Friday 18 October 2013), the Prosecution respectfully requests that the Chamber order the Defence and the CLR (as applicable) to file written responses on an expedited basis, alternatively in the form of oral submissions in court.



Fatou Bensouda, Prosecutor

Dated this 18th day of October 2013

At The Hague, the Netherlands