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Pénale
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**International
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Court**

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TRIAL CHAMBER V(B)

Before: Judge Kuniko Ozaki, Presiding
Judge Robert Fremr
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
*THE PROSECUTOR v. UHURU MUIGAI KENYATTA***

PUBLIC REDACTED VERSION

**Defence Response to
‘Confidential redacted version of the Prosecution request for protective measures
and protections against self-incrimination for its first ten witnesses’**

Source: Defence for President Uhuru Muigai Kenyatta

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

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I. INTRODUCTION

1. The Defence for Uhuru Kenyatta ('Defence') hereby responds to the lesser redacted 'Confidential redacted version of the Prosecution request for protective measures and protections against self-incrimination for its first ten witnesses' ('Request for Protective Measures').¹
2. The Defence submits that the Prosecution's request to Trial Chamber V(B) ('Chamber') under Rule 74 to provide conditions of trial that: (a) restrict public testimony; (b) restrict identification by the Kenyan authorities of non-victim witnesses who have committed serious crimes including murder, rape and otherwise in the PEV; and (c) provide assurances against self-incrimination to six of the ten witnesses who have allegedly committed such serious crimes, should be rejected. Such measures constitute inducements to the identified witnesses to provide evidence to fit the Prosecution case and effectively grant an immunity against prosecution for individuals who may either: (a) bear responsibility for acts of serious violence during the PEV; or (b) be falsely claiming to have committed such crimes as revealed by the statements of Witness 118 in the 'Defence Application for a Permanent Stay of the Proceedings due to Abuse of Process' ('Abuse of Process Application') in the knowledge that there is no consequence as a result.²
3. Further, the in-court protective measures sought by the Prosecution under Article 68(1) for eight witnesses, namely: (a) image and voice distortion; (b) continued use of witness pseudonyms; and (c) limited *in camera* sessions for identifying evidence, are neither necessary nor proportionate and should be denied.

¹ ICC-01/09-02/11-823-Conf-Red3.

² ICC-01/09-02/11-822-Conf.

4. This motion is filed confidentially as it responds to a confidential filing. A public redacted version is filed concurrently.

II. APPLICABLE LAW

5. The Chamber is invited to consider Articles 64, 67 and 68 of the Rome Statute and Rules 87 and 74 of the Rules of Procedure and Evidence.
6. Article 64(2) demands that the Chamber ensure that the trial is ‘conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.’ Article 67(1) of the Statute recognises the Accused’s fundamental right to a public hearing. Article 68(1) and (2) of the Statute, read in unison with Article 64(2) and (6)(e) of the Statute and Rule 87 of the Rules, grants the Chamber the power to order protective measures ‘to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses,’ and to hold parts of the proceedings *in camera*. Article 68(5) dictates that such measures shall not be exercised in a manner which is prejudicial to or inconsistent with the rights of the Accused.
7. Rule 87(1) requires the Chamber to ‘seek to obtain, whenever possible, the consent of the person in respect of whom the protective measure is sought prior to ordering the protective measure.’
8. Rule 74 addresses the issue of self-incrimination by a witness. Rule 74(3)(a) sets out the principle that a ‘witness may object to making any statement that might tend to incriminate him or her.’ Where the witness has received an assurance against self-incrimination under Rule 74, the witness may be required to answer questions. Subsection 7 lists those measures that the Chamber *shall* implement in order to give effect to any assurance granted. Pursuant to subsection 6, where ‘the Chamber determines that it would not be appropriate to provide an

assurance to [a] witness, it shall not require the witness to answer the question,’ but ‘may still continue the questioning of the witness on other matters.’

9. The Trial Chambers in *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (‘Katanga’) and *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* (‘Ruto’) observed that protective measures ‘should be granted only on an exceptional basis, following a case-by-case assessment of whether they are necessary in light of an objectively justifiable risk and are proportionate to the rights of the accused.’³
10. In *The Prosecutor v. Thomas Lubanga Dyilo* (‘Lubanga’), Trial Chamber I held that applications for protective measures should not be ‘routinely made in the expectation that they will be routinely granted.’⁴ In *Ruto*, the Prosecution sought similar in-court protective measures for nine of its first ten witnesses, citing ‘widespread opposition in Kenya to the ICC process.’⁵ Trial Chamber V(A) held that ‘[i]t does not consider that generalised assertions regarding the degree of domestic support for the trials can be sufficient for [the purposes of evaluating the risk faced by each individual witness].’⁶
11. At the International Criminal Tribunal for the former Yugoslavia (‘ICTY’), Trial Chamber III in *Prosecutor v. Milutinovic et al* held that ‘fears expressed by potential witnesses are not in themselves sufficient to establish a real likelihood that they may be in danger or at risk’ and that ‘what is required to interfere with the rights of the accused in this respect is something more.’⁷ The ICTY

³ ICC-01/09-01/11-902-Red, para. 13, citing ICC-01/04-01/07-1667-Red-tENG, paras 8-9.

⁴ ICC-01/04-01/06-T-153-Red2-ENG, p. 63, lines 15-17.

⁵ ICC-01/09-01/11-902-Red, para. 2, citing ICC-01/09-01/11-845-Conf-Exp, para. 5.

⁶ ICC-01/09-01/11-902-Red, para. 14.

⁷ ICTY Trial Chamber III, *Prosecutor v. Milan Milutinovic et al.*, IT-05-87-PT, ‘Decision on Prosecution Sixth Motion for Protective Measures,’ 1 June 2006, para. 19, citing: *Prosecutor v. Milan Milutinovic et al.*, IT-05-87-PT, ‘Prosecution’s Response to Joint Request by the Accused for Temporary Provisional Release During the Summer Recess,’ 26 May 2006, para. 4; *Prosecutor v. Prlic et al.*, IT-04-74-PT, ‘Order to Grant Protective Measures to Eleven Sensitive Witnesses,’ 5 October 2005, p. 3; *Prosecutor v. Dusko Tadic*, IT-94-1-T, ‘Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, paras 62-66.

Trial Chamber in *Prosecutor v. Kunarac et al* ruled that '[o]ver and above the reasons that public proceedings facilitate public knowledge and understanding and may have a general deterrent effect the public should have the opportunity to assess the fairness of proceedings.'⁸

12. Any measures restricting the fair trial rights of the Accused must be strictly necessary.⁹ With particular regard to the holding of closed sessions, ICTY Trial Chamber II has held that 'the more extreme the protection sought, the more onerous will be the obligation upon the application to establish the risk asserted.'¹⁰

III. SUBMISSIONS

A. Assurance against Self-Incrimination under Rule 74

13. The Prosecution requests the Chamber to provide assurances against self-incrimination under Rule 74 for six witnesses, namely Witnesses 11, 217, 429, 430, 493 and 505.¹¹ The Prosecution has itself stated publicly that Witnesses 11,¹² 429,¹³ 430,¹⁴ and 493¹⁵ are Mungiki 'insiders,' and has referred publicly to Witness 505 as a 'former Mungiki member.'¹⁶ The Prosecution argues that 'public disclosure of the potentially self-incriminatory evidence of these witnesses may expose them to a risk of prosecution outside this Court.'¹⁷

Pursuant to Rule 74, the Prosecution requests the Chamber to grant image and

⁸ ICTY Trial Chamber, *Prosecutor v. Dragoljub Kunarac et al.*, IT-96-23-T and IT-96-23/1-T, 'Order on Defence Motion Pursuant to Rule 79,' 22 March 2000, para. 5.

⁹ European Court of Human Rights, *P.S. v Germany (Application 33900/96)*, 20 December 2001, paras 22-23.

¹⁰ ICTY Trial Chamber II, *Prosecutor v. Mile Mrksic et al.*, IT-95-13/1-T, 'Decision on Prosecution's Additional Motion for Protective Measures of Sensitive Witnesses,' 25 October 2005, para. 6, citing: *Prosecutor v. Slobodan Milosevic*, IT-02-54-T, 'Decision on Prosecution's Motion for Trial Related Protective Measures (Bosnia)', 30 July 2002, para. 5.

¹¹ ICC-01/09-02/11-823-Conf-Red3, para. 2.

¹² ICC-01/09-02/11-404, paras 143 and 148, citing ICC-01/09-02/11-382-Red, para. 193. *See also*: ICC-01/09-02/11-382-Red, para. 135.

¹³ ICC-01/09-02/11-519-Red, para. 10.

¹⁴ ICC-01/09-02/11-519-Red, para. 10.

¹⁵ ICC-01/09-02/11-562-Red2, para. 16.

¹⁶ ICC-01/09-02/11-562-Red2, para. 38.

¹⁷ ICC-01/09-02/11-823-Conf-Red3, para. 2.

voice distortion ‘for the purpose of shielding’¹⁸ the six witnesses during their ‘potentially self-incriminatory evidence.’ Given the nature of the proposed testimony of these witnesses, it is clear that the Prosecution will also seek Rule 74 assurances in relation to a further [REDACTED] Mungiki witnesses, namely Witnesses [REDACTED], and the ruling upon this matter will have an effect upon the overall nature of the trial.

14. In support of its submission, the Prosecution argues that in the present case ‘it will be sufficient to limit *in camera* sessions to topics that may identify the witness, rather than the entirety of the witnesses’ testimony.’¹⁹ The Prosecution argues that this approach, ‘complies with the letter and spirit of Rule 74(7), and will satisfy the goals of a public trial while eliciting the testimony of these witnesses.’²⁰
15. Contrary to the Prosecution’s submission, in order to give effect to the assurances against self-incrimination in respect of the six witnesses, the Rule 74(7) regime obligates the Chamber to hear the evidence of the witness *in camera*, and requires that the identity of the witness and the content of the evidence given shall not be disclosed in any manner. This regime is obligatory and compels the application of certain protective measures. The rule also requires that the record of the proceedings shall be under seal and that protective measures shall be used to ensure that the identity of the witness and the content of the evidence given are not disclosed. Accordingly, the Chamber does not have a discretion under Rule 74(7) to minimise, reduce or cherry-pick those aspects of protection that it does not deem necessary, following the provision of an assurance against self-incrimination to a witness.

¹⁸ ICC-01/09-02/11-823-Conf-Red3, para. 36.

¹⁹ ICC-01/09-02/11-823-Conf-Red3, para. 31.

²⁰ ICC-01/09-02/11-823-Conf-Red3, para. 31.

16. The only discretion available to the Chamber is the determination of whether or not it is appropriate to provide an assurance to the witness. The rule does not, however, contain any guidance as to *when* the provision of such an assurance should be given. The only guidance provided in Rule 74 relates to how to determine whether or not a witness should be required to answer a question once an assurance has been provided.²¹
17. The extent to which this trial relies on evidence from self-confessed criminals is unprecedented in international criminal proceedings.²² During their Prosecution interviews, Witnesses 493 and 505 confessed to [REDACTED],²³ and Witnesses [REDACTED], 429 and 430 detailed their previous criminality.²⁴ Defence investigations have also revealed crimes that were committed outwith the jurisdiction of the ICC and which are unrelated to the PEV, but which are relevant to the witnesses' credibility. The evidence obtained in recent weeks by the Defence has revealed the involvement of Witness 11 in crimes [REDACTED]; the involvement of Witness [REDACTED] in crimes [REDACTED]; Witness 429 [REDACTED]; the involvement of Witness 430 in crimes [REDACTED], and the involvement of Witness 493 in crimes [REDACTED]. An outline of these allegations, as revealed in interviews with Defence witnesses, is set out in Confidential Annexes A and B. The ICC has no substantive or procedural jurisdiction over such crimes.
18. Fulfilment of the Chamber's obligation to ensure that neither the witnesses' identities nor their self-incriminating testimony is made public, as required by

²¹ Rule 74(3) and (5).

²² The Prosecution indicated in its interviews with Witnesses 11, 217, 429, 430, 493 and 505, that it has grounds to believe that they may have committed a crime or crimes that fall within the jurisdiction of the Court. *See*: KEN-OTP-0052-1211_R04 at 1214; KEN-OTP-0072-0552_R02 at 0553; KEN-OTP-0081-0262_R03 at 0263; KEN-OTP-0074-0718_R02 at 0720 ; KEN-OTP-0085-1665_R02 at 1666; KEN-OTP-0104-0342_R02 at 0344; KEN-OTP-0085-0921_R04 at 0925; KEN-OTP-0085-0973_R04 at 0974; KEN-OTP-0083-0142_R02 at 0144; KEN-OTP-0090-0305_R03 at 0307; KEN-OTP-0104-0373_R02 at 0376; KEN-OTP-0092-0212_R03 at 0222.

²³ [REDACTED].

²⁴ Witness 217 informed the Prosecution that he is currently the subject of [REDACTED], KEN-OTP-0074-1057_R02 at 1061. Additionally, Witnesses 429 and 430 both informed the Prosecution that they have been [REDACTED], KEN-OTP-0085-1142_R04 at 1166 and KEN-OTP-0083-0270_R02 at 0287.

the provision of a Rule 74 assurance, will render the majority of the trial proceedings in this case non-public and would shield allegedly serious criminals from justice. In respect of Mr Kenyatta's alleged individual criminal responsibility, the Prosecution relies entirely on fifteen self-confessed criminals, namely members or former members of the Mungiki.²⁵ According to the estimates provided by the Prosecution, the examination-in-chief of the Prosecution's Mungiki witnesses will require 159 hours,²⁶ which amounts to 64.89% of the total estimated length of the examination-in-chief of all Prosecution witnesses.²⁷ A significant portion of this testimony will necessarily relate to their activities and conduct in the PEV and will therefore be considered self-incriminatory.

19. The suppression of the identities and self-incriminatory testimony of these witnesses would render the notion of a public trial farcical and would prevent the legitimate investigations, arrests and prosecutions of key criminals responsible for the PEV and other crimes in Kenya by Kenyan authorities. In this regard, it is to be noted that the evidence from the Mungiki witnesses is unique to the ICC. None of the materials within their statements is contained in CIPEV, the report of KNCHR,²⁸ the Prosecution's case materials at the ICC, nor any other investigative reports on the PEV. None of these individuals has been named in any other sources as having been responsible for criminal conduct in the PEV. The ICC versions of their evidence do not correspond with any other evidential sources including national security reports. Therefore, the only way

²⁵ [REDACTED].

²⁶ This calculation does not include the time estimation for Witness 548's examination in chief, which the Prosecution has not yet provided to the Defence. The examination-in-chief of the following [REDACTED] witnesses are estimated as follows: 12 hours for witnesses 12; 118; 152; 217; 219; 428; 429; 430; 493; 505; and 506 respectively, 10 hours for OTP-11; 9 hours for Witness 494 and 8 hours for Witness 510. These estimates are taken from ICC-01/09-02/11-596-Conf-AnxA-Red.

²⁷ The total time estimate for the examination-in-chief of all Prosecution witnesses (excluding experts), 245 hours, is based on the figures provided in ICC-01/09-02/11-596-Conf-AnxA-Red, minus the time estimates relating to the three Prosecution witnesses who have been withdrawn (Witness 5, 6 hours; Witness 334, 5 hours and Witness 426, 6 hours). The total does not include the estimates for the examination-in-chief of Witness 66 or Witness 548, as the Prosecution has not yet provided this information to the Defence.

²⁸ KEN-OTP-0001-0002.

Kenya can deal with the allegations of criminal conduct as alleged at the ICC is by disclosure of the same to the Kenyan authorities. The prevention of legitimate investigations by States of serious crimes committed within the State as a result of the application of Rule 74 in the instant case would fundamentally contravene one of the reasons for the establishment of the ICC, namely the encouragement of States to investigate and prosecute crimes nationally.²⁹ Earlier criticism in the admissibility proceedings of the Government of Kenya for the failure to prosecute PEV crimes will be viewed as hypocrisy if the ICC engages in shielding perpetrators of the PEV from national prosecutions by withholding material evidence.³⁰

20. In respect of crimes committed during the PEV, the Defence Abuse of Process filing, based upon the statements made by Prosecution intermediary [REDACTED] and Witness 118, has raised the issue of false confessions of involvement in the PEV by Prosecution witnesses.³¹ In these circumstances, the truthfulness of witnesses may be tested as to whether such claims were indeed true and whether there is liability for prosecution as a potential consequence. The provision of any protection or effective immunity from prosecution in these circumstances constitutes an incentive for witnesses to lie and put forward false claims, as suggested by Witness 118.
21. The suppression of the identities and self-incriminatory testimony of these witnesses would also prevent members of the public who may be following the court proceedings from coming forward with information and reporting to the Defence or the Kenyan authorities the extent of their knowledge about the

²⁹ The Preamble to the Rome Statute affirms ‘that that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation’ and recalls that ‘it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.’ The Prosecution has itself stated that in ‘the preamble of the Statute, the *primary* responsibility for the investigation and prosecution of the most serious crimes of international concerns resides at the national level’ (emphasis added), ICC-01/09-02/11-71, para. 2.

³⁰ ICC-01/09-02/11-71, para. 12.

³¹ ICC-01/09-02/11-822-Conf, paras 30 to 36, 42, 60 to 62, and 73 to 82.

truthfulness of the claims. For these reasons, the provision of assurances against self-incrimination to the key witnesses in this case would contravene the fundamental right of the Accused to a public trial and a fair hearing.

22. In the circumstances, the Defence requests the Chamber not to accede to the Prosecution's request given the disproportionate effect that the granting of Rule 74 assurances would have on the publicity and fairness of the proceedings as well as the necessary ability of the Kenyan State to investigate crimes committed on its territory.

B. The Prosecution fails to demonstrate that the in-court protective measures requested are rendered necessary by objectively justifiable risk

23. In respect of the in-court protective measures sought by the Prosecution, it must be demonstrated that the requests, considered both individually and collectively, are rendered strictly necessary by an objectively justifiable risk in respect of each of the witnesses.³² As general considerations, the Prosecution relies upon (i) the security situation in Kenya and (ii) motions calling for the repeal of Kenya's International Crimes Act (2008). The Defence will address each argument in turn.
24. In respect of the Prosecution's generic submission that the protective measures sought are necessary in light the 'security situation in Kenya' and 'the dangers to which Prosecution witnesses are exposed',³³ the Prosecution relies upon its previous submissions on the matter.³⁴ In respect of ICC-01/09-02/11-633-Conf-AnxA-Red, the Defence directs the Chamber to its response at ICC-01/09-02/11-661-Conf. The Defence is unable to respond to the content of the other

³² ICC-01/09-01/11-902-Red, para. 13, citing ICC-01/04-01/07-1667-Red-tENG, paras 8-9, and European Court of Human Rights, *P.S. v Germany (Application 33900/96)*, 20 December 2001, paras 22-23.

³³ ICC-01/09-02/11-823-Conf-Red3, para. 9.

³⁴ The Prosecution cites ICC-01/09-02/11-556-Conf-Exp-AnxA, ICC-01/09-02/11-633-Conf-Exp-AnxA, ICC-01/09-02/11-519-Conf-Exp, ICC-01/09-02/11-562-Conf-Exp, ICC-01/09-02/11-638-Conf-Exp, and ICC-01/09-02/11-796-Conf-Exp-AnxA.

submissions as it remains without access to these documents, despite its request for access on 21 October 2013.³⁵ Moreover, the Defence submits that the Prosecution fails even to attempt to draw an evidential link between the security situation and any objectively justifiable risk posed to each of the witnesses for whom it seeks in-court protective measures.

25. Concerning the Prosecution's second argument, namely that motions calling for the repeal of Kenya's International Crimes Act (2008) 'have exacerbated [security] concerns' and 'chilled the willingness of Kenyans to be seen to cooperate with the ICC, which in turn increases the risks to witnesses,'³⁶ the Defence submits that this argument amounts to unsubstantiated conjecture. The Defence recalls the recent pronouncement by Trial Chamber V(A) that it 'does not consider that generalised assertions regarding the degree of domestic support for the trials can be sufficient for [the purposes of evaluating the risk faced by each individual witness].' The Prosecution also fails to establish a link between any perceived 'chilling' of the willingness of Kenyans to be seen to cooperate with the Court and the physical safety of the witnesses.³⁷

i. Witnesses [REDACTED]

26. Witnesses 11, [REDACTED], 429, 430 and 505 are all former Mungiki members who 'are currently in the [REDACTED].' In respect of each of these individuals, the Defence submits that the Prosecution relies heavily on purely subjective fear which does not constitute any part of the test laid out in *Katanga*,³⁸ and which cannot therefore be a relevant consideration in determining whether to grant the requested measures.³⁹

³⁵ ICC-01/09-02/11-829-Conf.

³⁶ ICC-01/09-02/11-823-Conf-Red3, para. 10.

³⁷ ICC_01/09-01/11-902-Red, para. 14.

³⁸ ICC-01/04-01/07-1667-Red-tENG, paras 8-9; *Ruto*, ICC-01/09-01/11-902-Red, para. 13.

³⁹ *Supra*, para. 11.

27. The Prosecution also seeks to rely on the allegation that ‘several Mungiki members who had apparent first-hand knowledge of the Accused’s involvement in the PEV were killed or forcibly disappeared in its aftermath.’⁴⁰ The Prosecution states, further, that ‘[t]hese killings and disappearances have increased the Mungiki witnesses’ subjective security fears.’⁴¹ In response to the Defence’s request for all evidence underpinning these allegations,⁴² the Prosecution stated that it ‘has already disclosed to the Defence all the information in its possession, including various media reports,’ and ‘interviews with Mungiki insider witnesses.’⁴³ The Defence submits that this serious allegation remains unsubstantiated. The Prosecution has not conducted any substantive investigation into the matter, e.g. by seeking the official records of these individuals’ deaths, neither has the Prosecution established any evidential link between the deaths of those cited and Mr Kenyatta. In the circumstances, the Defence submits that such an allegation cannot be used as a foundation for the granting of protective measures in the instant case. The specific submissions relied upon by the Prosecution in respect of each individual within the [REDACTED] will now be addressed in turn.
28. In support of its application for protective measures for Witness 11, the Prosecution relies upon a reference to the allegation that ‘[REDACTED]’ of Witness 11 ‘were among the Mungiki members killed in the immediate aftermath of the PEV.’⁴⁴ Crucially, the Prosecution fails to link these events to the Accused, the proceedings, or Witness 11’s safety. In further ‘support’ of its application for in-court protective measures, the Prosecution recites its spurious claim that ‘an individual purportedly acting on behalf of the Accused’ has

⁴⁰ ICC-01/09-02/11-823-Conf-Red3, para. 13.

⁴¹ ICC-01/09-02/11-823-Conf-Red3, para. 13.

⁴² ICC-01/09-02/11-829-Conf, para. 3.

⁴³ ICC-01/09-02/11-833-Conf, para. 5.

⁴⁴ ICC-01/09-02/11-823-Conf-Red3, para. 14.

offered Witness 11 a ‘deal’ not to testify.⁴⁵ The Defence repeats its vehement rejection of this allegation, which is based upon a misinterpretation of the evidence by the Prosecution and a false account provided by Witness 11. The Defence refers the Chamber to the submissions made in respect of this witness and his involvement in an offence against the administration of justice in its Abuse of Process filing.⁴⁶ The Prosecution has failed to demonstrate that any protective measures should be granted in respect of Witness 11 as they have failed to establish an objectively justifiable risk, based upon evidence, to the safety of the witness.

29. Furthermore, the Defence notes the position of Witness 11 who has stated that he *wants* to testify publicly.⁴⁷ The witness has even emphasised his desire to testify openly [REDACTED]. This correspondence is attached in Confidential Annex C. In the circumstances, it is unlikely that Witness 11 would give his consent to the imposition of protective measures, which should be obtained, wherever possible, pursuant to Rule 87. In short, the Prosecution has failed to establish any legal basis for the provision of any protective measures, in circumstances where even the witness wishes to testify publicly.
30. In seeking to establish that Witness 217 would be at an ‘objectively justifiable risk’ if he were to testify without protective measures, the Prosecution states that he ‘[REDACTED].’⁴⁸ This paragraph is unsupported by any evidential reference. A reasonable interpretation of the events described in brief by the Prosecution from Witness 217 is that they are consistent with legitimate police investigations into a known and senior [REDACTED]. The Defence also notes that these events are said to have occurred ‘[p]rior to [Witness 217’s] acceptance

⁴⁵ ICC-01/09-02/11-823-Conf-Red3, para. 14.

⁴⁶ ICC-01/09-02/11-822-Conf, paras 8, 18-23, and 69-70.

⁴⁷ ICC-01/09-02/11-823-Conf-Red3, para. 15.

⁴⁸ ICC-01/09-02/11-832-Conf-Red3, para. 16.

into the [REDACTED]' and submits that any risk posed ought now to have been satisfactorily abrogated by his admission into [REDACTED].

31. The Prosecution also relies upon information from Witness 217 that he 'believes his conversations have been monitored in the past.'⁴⁹ This subjective statement is not however supported by any evidential reference, nor is it linked to any risk to Witness 217's safety, either 'in the past' or now, or indeed the Accused, the proceedings, or the prospect of the witness testifying publicly without protective measures. Finally, the Prosecution seeks to rely on Witness 217's report of 'what he perceived as pressure by intermediaries of the Accused to give evidence to the Defence.'⁵⁰ The Defence rejects this allegation as similarly unsubstantiated. No details of such approaches have been provided and no names supplied. The Defence submits that both claims of subjective fear should be disregarded. The Prosecution has failed to establish any legal basis for the provision of any protective measures.
32. The reasons cited in support of the imposition of in-court protective measures for Witness 429 are set out in a single short paragraph in the Prosecution's Request for Protective Measures.⁵¹ The Prosecution states that Witness 429 was involved [REDACTED]. According to the witness, [REDACTED].⁵² The Defence submits that the Prosecution has neither sought to support the allegations made with any evidence nor flesh out any detail of the incidents relied upon. The Defence submits that the reasons cited by the Prosecution should be disregarded as both unsubstantiated and subjective. The Defence has not been informed as to when Witness 429 was [REDACTED], but notes that he was interviewed by the Prosecution in [REDACTED].⁵³ It is likely, therefore,

⁴⁹ ICC-01/09-02/11-832-Conf-Red3, para. 16.

⁵⁰ ICC-01/09-02/11-832-Conf-Red3, para. 16.

⁵¹ ICC-01/09-02/11-832-Conf-Red3, para. 17.

⁵² ICC-01/09-02/11-832-Conf-Red3, para. 17.

⁵³ *See, for example*, KEN-OTP-0042-0003_R03.

that the incidents mentioned occurred before he had any involvement with the Court, and therefore prior to [REDACTED]. Once again, the Prosecution has failed to establish any legal basis for the provision of any protective measures in respect of this witness.

33. In purported support of its application for in-court protective measures for Witness 430, the Prosecution states that [REDACTED].⁵⁴ The Defence does not have access to the filing referred to by the Prosecution. The Defence submits, however, that, even if the information provided by Witness 430 is true, it is not attributable in any way to the Accused and does not demonstrate a risk to Witness 430's safety. The Prosecution refers to [REDACTED].⁵⁵ The Defence remains without access to the filings cited in support of this allegation. However, the Defence vehemently refutes the insinuation that the Accused is in any way linked to these events, and repeats its observation that the Prosecution has offered no evidence of the Accused's involvement in any alleged extra-judicial killings of Mungiki members. The Defence submits that the Prosecution has failed to demonstrate that in-court protective measures are warranted by an objectively justifiable risk.

34. The reasons cited in support of the imposition of in-court protective measures for Witness 505 are contained at paragraph 19 of the Request for Protective Measures. A section of this paragraph remains redacted. The Defence submits that the submissions made by the Prosecution demonstrate no link to Mr Kenyatta, rely on hearsay, and do not demonstrate any legal basis for the provision of protective measures. For these reasons, the submissions of the Prosecution in respect of Witness 505 should be dismissed in their entirety.

⁵⁴ ICC-01/09-02/11-823-Conf-Red3, para. 18.

⁵⁵ ICC-01/09-02/11-823-Conf-Red3, para. 18.

ii. Other [REDACTED]

35. The Prosecution's application states that Witness 2 is currently [REDACTED].⁵⁶ The Prosecution relies upon Witness 2's subjective assertion that [REDACTED].⁵⁷ The Defence submits that no basis has been provided to establish the reasons why the provision of in-court protective measures has been recommended in this case. It is unclear to the Defence as to why this individual cannot testify publicly given that [REDACTED]. In the event the programme provides insufficient protection to allow witnesses to testify openly in court, which must surely be the aim of such protection, the Defence submits that such failing or weakness of the programme must not be compensated by undermining the right of the Accused to a public trial. The Defence submits that the Prosecution has failed to demonstrate that in-court protective measures are warranted by an objectively justifiable risk.

iii. [REDACTED] of Witnesses

36. The Defence notes that Witness 232 has [REDACTED].⁵⁸ In addition, the Prosecution accepts that despite [REDACTED], he has not been threatened.⁵⁹ The Prosecution relies only upon the witness' expressions of subjective fear and preference for protective measures. These are not relevant considerations. The Prosecution has failed to demonstrate that in-court protective measures are warranted by an objectively justifiable risk.
37. In relation to Witness 493, the Prosecution has not even attempted to demonstrate that he would be placed at objectively justifiable risk if he were to testify publicly. The Defence submits that the request for in-court protective measures for Witness 493 should be dismissed on the basis that the Prosecution

⁵⁶ ICC-01/09-02/11-832-Conf-Red3, para. 20.

⁵⁷ ICC-01/09-02/11-832-Conf-Red3, para. 20.

⁵⁸ ICC-01/09-02/11-832-Conf-Red3, para. 23.

⁵⁹ ICC-01/09-02/11-823-Conf-Red3, para. 24.

has offered no evidence whatsoever in support of its claim that Witness 493 would be at objectively justifiable risk were his 'cooperation with the Court' to be revealed to the public.⁶⁰ In any event, the Defence submits that any such risk ought now to have been satisfactorily abrogated by [REDACTED].

C. The requested measures disproportionately infringe the rights of the Accused

38. The Defence submits that the shielding of Prosecution witnesses from public view and scrutiny by the imposition of voice and image distortion, the use of pseudonyms, and *in camera* sessions would result in a trial by pseudonym. The granting of the requested measures would prevent public scrutiny of the fairness of the proceedings and the credibility of witnesses and would constitute an unacceptable, and wholly disproportionate, infringement of the rights of the Accused to a public trial and a fair hearing. For the reasons set out at paragraphs 13 to 22 above, the Prosecution's claim that 'the Defence will be able to examine each of these witnesses publicly [...] and will be able to present its theory of the case without restriction' is not plausible.⁶¹ The Defence contends that the measures requested would in fact preclude the penetration of evidence in cross-examination, and therefore further violate the rights of the Accused.
39. The Prosecution asserts that 'public anonymity' 'will facilitate the truth-finding function of the Court, encouraging witnesses to give full and frank evidence without fear for their personal safety.'⁶² This assertion disregards the important protection afforded by public proceedings, in which witnesses are encouraged to come forward with information to counter the testimony heard, and therefore truly to facilitate the truth-finding function of the Court. Both the

⁶⁰ ICC-01/09-02/11-823-Conf-Red3, para. 26.

⁶¹ ICC-01/09-02/11-823-Conf-Red3, para. 27.

⁶² ICC-01/09-02/11-823-Conf-Red3, para. 27.

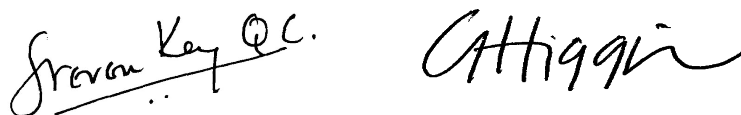
victims of the PEV and the broader Kenyan public have a keen interest in following the proceedings to the greatest extent possible.⁶³ The Prosecution submits that '[n]o less intrusive measures are available,' and that without in-court protective measures 'it is highly likely that the Prosecution will have to implement far more intrusive and onerous protection measures.'⁶⁴ This amounts to a tacit acceptance that other measures *are* available. The implementation of out-of-court protective measures, which will not intrude on the rights of the Accused or impact the benefit of open proceedings afforded to the victims and public, must be exhausted. Convenience cannot trump the rights of the Accused. Moreover, the Defence submits that the whole purpose of a protection programme should be to facilitate the provision of public testimony, given the protection afforded to the witness.

IV. RELIEF

40. The Defence respectfully requests the Chamber to:

- (i) Deny the Prosecution's request for (a) the use of image and voice distortion; (b) the continued use of witness pseudonyms and (c) *in camera* sessions for identifying evidence; and
- (ii) Deny the Prosecution's request for Rule 74 assurances.

Respectfully submitted,



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Steven Kay QC and Gillian Higgins

On behalf of Uhuru Muigai Kenyatta

⁶³ In this regard, the Defence endorses the submissions of the Common Legal Representative of the Victims, ICC-01/09-02/11-834-Conf-Corr, paras 3 and 12.

⁶⁴ ICC-01/09-02/11-823-Conf-Red3, para. 28.

Dated this 11th day of November 2013

At London, England