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No.: ICC-01/09-01/11
Date: 20 November 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 Third Request for In-Court Protective Measures for Trial Witness
KEN-OTP-P-0535 (ICC-01/09-01/11-1102-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. The Prosecution requests in-court protective measures for witness P-0535, currently scheduled to begin testifying on 21 November 2013. Witness P-0535 was not included on the Prosecution's previous requests for in-court protective measures because he was originally scheduled to appear much later in the proceedings. Due to the imminent start date of his testimony, 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 witness 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 the witness. A confidential version will be filed shortly afterwards.

Submissions

4. The Prosecution requests that the Chamber authorise the following in-court protective measures for witness P-0535: i) image and voice distortion under Rule 87(3)(c) and 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 this witness, but it may make a further application should circumstances arise before or during his testimony which render these measures necessary.
6. The Prosecution incorporates by reference the submissions contained in its previous requests¹ 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.

¹ ICC-01/09-01/11-845-Conf-Exp; ICC-01/09-01/11-845-Conf-Red; ICC-01/09-01/11-1044-Conf-Exp ; ICC-01/09-01/11-1044-Conf-Red; CC-01/09-01/11-1044-Conf-Red2.

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, at <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.

8. The Prosecution also notes the resolution of the Assembly of Heads of States from the African Union's Special Session on the ICC in October 2013⁵ and 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 P-0535 further justify the protective measures sought. [REDACTED]
11. From January to March 2008 (immediately after the violence), [REDACTED], P-0535 received threatening messages [REDACTED] P-0535 believes this happened because [REDACTED]. Due to the threats he received, P-0535 left [REDACTED], and has not received any direct threats since 2008.

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

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.

12. P-0535 has expressed concern [REDACTED] while he is away from the area during his testimony in The Hague. [REDACTED] This caused P-0535 to take additional security measures [REDACTED] during his absence. It also demonstrates that there are still actors in Kenya with questionable motives intent on identifying and exposing the identity of witnesses.

Relief Requested

13. For the foregoing reasons, the Prosecution requests that the Chamber grant: i) image and voice distortion; ii) use of a pseudonym during testimony; iii) limited *in camera* sessions; and iv) redactions to public records, where necessary to prevent identification, for witness P-0535.
14. Finally, due to the imminent start date of this witness (P-0535 may start as early as Thursday, 21 November 2013), the Prosecution respectfully requests that the Chamber order the Defence to file written responses on an expedited basis, alternatively in the form of oral submissions in court.



Fatou Bensouda, Prosecutor

Dated this 20th day of November 2013

At The Hague, the Netherlands