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**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**

**Corrigendum of Prosecution's Fourth Request for In-Court Protective Measures  
for Trial Witnesses dated 24 December 2013  
(ICC-01/09-01/11-1129-Conf-Exp-Corr)**

**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 and on 16 October 2013 respectively, the Prosecution filed its first and second requests for in-court protective measures (“First Request”<sup>1</sup> and “Second Request”<sup>2</sup>). On 18 November 2013, the Prosecution filed its third request for in-court protective measures in respect of witness P-0535. The running order of witnesses has since changed and the next tranche of Prosecution witnesses scheduled to testify as of 13 January 2014 (P-0452, P-0356, P-0128, P-0185, P-0024, P-0442, P-0409, P-0323 and P-0469)<sup>3</sup> was only partially covered by those Requests.

2. Accordingly, the Prosecution hereby submits a request for in-court protective measures for six witnesses (P-0356, P-0128, P-0024, P-0442, P-0409 and P-0323) who were not part of its previous Requests. More specifically, the Prosecution requests the Chamber to authorise the following measures pursuant to Article 68(1) and Rule 87: i) image and voice distortion during testimony; ii) assignment and use of a pseudonym; and iii) limited *in camera* sessions for identifying evidence.

3. Moreover, in compliance with the Trial Chamber V(A) 3 September 2013 decision on the First Request<sup>4</sup>, the Prosecution provides updated security-related information regarding two other prospective witnesses who were part of the First Request (P-0452 and P-0185)<sup>5</sup>. Based on this updated information, the Prosecution seeks to partially amend its First Request and requests that the Chamber allow P-0452 and P-0185 to be heard entirely *in camera*. Should the Chamber decline this amended request, however, the Prosecution submits that, as a minimum, both

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<sup>1</sup> ICC-01/09-01/11-845-Conf-Exp.

<sup>2</sup> ICC-01/09-01/11-1044-Conf-Exp.

<sup>3</sup> See e-mail communication sent by the Prosecution to Trial Chamber V-A Communications on 28 November 2013 (17:09) entitled “Updated Witness Schedule for 2014”. Prosecution witness P-0464 is an expert witness, whose personal and professional circumstances do not require in-court protective measures.

<sup>4</sup> ICC-01/09-01/11-902-Conf-Exp, para. 22.

<sup>5</sup> ICC-01/09-01/11-845-Conf-Exp, para. 10(b).

witnesses should be granted the in-court protective measures listed in paragraph 2 above.<sup>6</sup>

4. Furthermore, the Prosecution hereby provides updated security-information regarding P-0469, another prospective witness whose original request for in-court protective measures was covered in the Second Request (resolution pending).<sup>7</sup> With respect to this witness, the Prosecution maintains its original request.

5. The protective measures invoked in paragraphs 2 and 3 above 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.

6. Due to the imminent testimony of these witnesses, the Prosecution also requests that the Chamber orders responses on an expedited basis, alternatively requires the parties and participants to respond orally, as has been the practice with several previous witnesses.

### **Confidentiality**

7. 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.

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<sup>6</sup> *Ibid.*, para. 18.

<sup>7</sup> ICC-01/09-01/11-1044-Conf-Exp, paras. 20-24 and 27.

## Submissions

8. The Prosecution seeks in-court protective measures for witnesses P-0452, P-0356, P-0128, P-0185, P-0024, P-0442, P-0409 and P-0323 and renews its Second Request for the same protective measures to be afforded to witness P-0469.<sup>8</sup>

9. Specifically, as regards P-0356, P-0128, P-0024, P-0442, P-0409, P-0323 and P-0469 the Prosecution requests the Chamber to authorise: 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) of the RoR; and iii) limited *in camera* sessions under Articles 64(7) and 68(1), Rule 87(3)(e) and Regulation 94(e) of the RoR.

10. As regards P-0452 and P-0185, the Prosecution requests the Chamber to order that their testimony be heard entirely *in camera* under Articles 64(7) and 68(1), and Rule 87(3)(e) and Regulation 94(e) of the RoR. Alternatively, the Prosecution seeks that the Chamber grant these two witnesses the same protective measures listed in paragraph 9 above as per its First Request.<sup>9</sup>

11. 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.

12. The Prosecution incorporates by reference the general assertions contained in its Second Request regarding the necessity of these measures (in a general sense), and their proportionality vis-à-vis the rights of the Accused.<sup>10</sup>

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<sup>8</sup> *Ibid.*

<sup>9</sup> ICC-01/09-01/11-845-Conf-Exp, para. 18.

<sup>10</sup> ICC-01/09-01/11-1044-Conf-Exp, paras. 7-9.

13. In addition, the Prosecution submits that the specific circumstances of each of the witnesses – set out below – further justify the protective measures sought.

**A. P-0356**

14. [REDACTED].

15. P-0356 is a [REDACTED] year old male of [REDACTED] ethnicity. [REDACTED].

16. P-0356 was [REDACTED] the 2007 PEV. [REDACTED]. Subsequently, P-0356 alleges that [REDACTED] ordered him [REDACTED] had actively participated in [REDACTED] for him and told P-0356 that if he did not consent his life would be in danger. P-0356 refused. According to P-0356, [REDACTED] the individuals who participated [REDACTED] were later killed.

17. The witness was interviewed by the OTP [REDACTED].

18. [REDACTED].

19. [REDACTED].

20. [REDACTED].<sup>11</sup> [REDACTED].

21. As indicated above, the witness possesses [REDACTED] information about the PEV [REDACTED]. Moreover, in light of P-0356's [REDACTED], the Prosecution assesses that a reasonable possibility exists that the witness and or his family would be exposed to retaliation [REDACTED] if P-0356's identity is revealed to the public.

22. [REDACTED]. Moreover in light of the political climate currently prevailing in Kenya *vis-a-vis* the Court, publicising the witness' cooperation with this institution will likely render the witness a pariah in his own community, [REDACTED].

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<sup>11</sup> [REDACTED].

23. Equally important in the present determination is the fear expressed by P-0356's [REDACTED] of being killed if [REDACTED] was to be publicly identified as an ICC witness and the impact that this fear has had on the witness' well-being. [REDACTED]. While in-court protective measures of the kind sought in the present application may not entirely remove these psychological strains, they could certainly appease them and relieve the witness from the tension that is already inevitably associated with testifying before the ICC.

**B. P-0128**

24. [REDACTED].

25. P-0128 was interviewed by the OTP in [REDACTED]. He holds dual status of witness and victim and his identity was disclosed to the Accused on 9 January 2013.

26. [REDACTED].

27. [REDACTED].

28. [REDACTED].

29. [REDACTED].

**C. P-0024**

30. [REDACTED].<sup>12</sup> [REDACTED].

31. Even prior to being interviewed by the OTP [REDACTED], P-0024 had been the target of indirect and direct intimidation [REDACTED] in connection to his knowledge of the 2007 PEV. [REDACTED].

32. [REDACTED].

33. [REDACTED].

34. [REDACTED].

35. [REDACTED].

36. [REDACTED].

37. [REDACTED].

38. The identity of P-0024 was disclosed to the Accused on 13 March 2013.

39. As indicated above, P-0024 possesses [REDACTED]. Attempts to dissuade him from cooperate with the Prosecution, or to denounce him as an ICC witness have already occurred. Revealing his identity to the public will compromise [REDACTED].

40. [REDACTED].

41. [REDACTED].<sup>13</sup>

**D. P-0442**

42. [REDACTED].

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<sup>12</sup> [REDACTED].

<sup>13</sup> [REDACTED].

43. The witness was interviewed by the OTP in [REDACTED] and her identity disclosed on 9 January 2013.

44. From [REDACTED] to [REDACTED], P-0442 has reported a series of events relating to her security:

- i. [REDACTED].
- ii. [REDACTED].
- iii. [REDACTED].<sup>14</sup>
- iv. [REDACTED].
- v. [REDACTED].<sup>15</sup>
- vi. [REDACTED].
- vii. [REDACTED].

45. [REDACTED]. The witness explained that she was very concerned because the Accused are now “the Government” and that by testifying she would be effectively “fighting against” the State apparatus.

#### **E. P-0409**

46. [REDACTED].

47. The witness was interviewed in [REDACTED] and holds dual status of victim and witness. His identity was disclosed to the Accused on 9 January 2013.

48. [REDACTED].<sup>16</sup> [REDACTED].

49. [REDACTED].

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<sup>14</sup> [REDACTED].

<sup>15</sup> [REDACTED].

<sup>16</sup> [REDACTED].

**F. P-0323**

50. [REDACTED].

51. The environment P-0323 was living in was the main reason that prompted the Prosecution [REDACTED].

52. The witness was interviewed in [REDACTED] and his identity disclosed to the Accused on 9 January 2013.

**G. P-0185 and P-0452**

53. P-0185 and P-0452 were among the ten witnesses whom the Prosecution intended to call to testify during the first session of the present case.<sup>17</sup> To that end and in light of their individual security circumstances, the Prosecution requested that the Chamber grant them in-court protective measures. The underlying facts adduced by the Prosecution in support of its application are detailed in the First Request.<sup>18</sup>

54. On 3 September 2013, the Chamber ordered “the VWU and the Prosecutor to provide additional and updated information, if any, relevant to the protective measures sought” in respect of *inter alia* P-0185 and P-0452 and deferred the decision on such measures “until the additional and updated information and the views of the respective witnesses are transmitted to the Chamber”.<sup>19</sup> Ultimately, the appearance of P-0185 and P-0452 had to be rescheduled and the decision on their in-court protective measures remained pending.

55. Further to the 3 September 2013 order, the Prosecution hereby provides an overview of the most current and relevant security-related information regarding the

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<sup>17</sup> ICC-01/09-01/11-794, paras. 5, 9. The witnesses [REDACTED] hold dual status of victims and witnesses.

<sup>18</sup> ICC-01/09-01/11-845-Conf-Exp, para. 10 (b).

<sup>19</sup> ICC-01/09-01/11-902-Conf-Exp, p. 22.

two witnesses. This new information coupled with the circumstances surrounding [REDACTED], prompt the Prosecution to amend in part its First Request and seek the authorization of the Chamber to allow P-0452 and P-0185 to be heard entirely *in camera*.

56. On [REDACTED] 2013, P-0185 e-mailed the Prosecution withdrawing [REDACTED] cooperation with the Court adducing fears for [REDACTED] security. This fear was further confirmed to the OTP in a meeting on [REDACTED] 2013 during which P-0185 explained that he [REDACTED].

57. [REDACTED].

58. [REDACTED].<sup>20</sup>

59. P-0185 explained that after the physical and emotional ordeals [REDACTED] went through during the PEV and after having lost their properties and means of sustenance, [REDACTED]. Neither witness has any desire to abandon [REDACTED] newly found equilibrium [REDACTED], but fear that [REDACTED] the media learn of their cooperation with the ICC. According to P-0185, both Kikuyu and Kalenjin communities are now united in “chasing witnesses”.<sup>21</sup>

60. Additionally, the Prosecution submits that the specific circumstances of P-0452 further justify the robust protective measures sought (testimony entirely *in camera*). [REDACTED].

61. In fact, P-0452’s [REDACTED] even anonymity, face and voice distortion will not be able to sufficiently conceal.

62. [REDACTED]. Thus any testimony regarding could potentially lead to their identification and also reprisals.

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<sup>20</sup> [REDACTED].

<sup>21</sup> [REDACTED].

63. Even if the parties and participants were to avail themselves of the use of the Personal Information Sheet (PIS) during their respective examinations, in order to properly conceal P-0452's identity, the sheet would need to list a considerable number of individuals, locations [REDACTED] becoming a voluminous and complex aid to handle. While in principle the length of a PIS is not a primary consideration in determining the efficacy of its use, the Prosecution believes that [REDACTED] warrant special consideration.

64. The Prosecution understands that P-0452 [REDACTED]. Thus in P-0452's case being confronted with a long and complex PIS and being asked to refer to it frequently throughout [REDACTED] testimony may cause [REDACTED] uneasiness in the courtroom and add a further layer of complexity to the already demanding task of testifying before the ICC.

65. The Prosecution submits that all the foregoing considerations militate in favour of the Chamber granting the Prosecution's application to let P-0452's and P-0185's evidence be heard entirely *in camera*.

#### **H. P-0469**

66. P-0469 was originally scheduled to testify during a previous session of the proceedings.<sup>22</sup> In view of her expected appearance, the Prosecution requested the witness be granted in-court protective measures.<sup>23</sup> However, in light of her [REDACTED], P-0469's appearance had to be rescheduled and the decision concerning her protective measures postponed accordingly.<sup>24</sup>

67. The Prosecution hereby renews its Second Request and refers to the main factual and substantive submissions detailed therein. However, in order to better

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<sup>22</sup> ICC-01/09-01/11-794, paras. 5, 9.

<sup>23</sup> See ICC-01/09-01/11-1044-Conf-Exp, p. 22.

<sup>24</sup> ICC-01/09-01/11-T-70-CONF-ENG, p. 3, lines 19-25 p. 4, lines 1-10.

assist the Chamber in its final determination, the Prosecution provides a brief update on the witness' personal circumstances since the Second Request was filed.

68. [REDACTED].<sup>25</sup> [REDACTED].<sup>26</sup>

### **Relief Requested**

69. For the foregoing reasons, the Prosecution requests that the Chamber grant witnesses P-0356, P-0128, P-0024, P-0442, P-0409, P-0323 and P-0469 the following in-court protective measures: 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.

70. The Prosecution further requests that the Chamber grant P-0185 and P-0452 to testify entirely *in camera* or, in the alternative, to be afforded the same in-court protective measures mentioned in paragraph 69.

71. Finally, due to the imminent start date of these witnesses, 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.




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Fatou Bensouda, Prosecutor

Dated this 2<sup>nd</sup> day of January 2014

At The Hague, the Netherlands

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<sup>25</sup> [REDACTED].

<sup>26</sup> [REDACTED].