



Original: English

No.: ICC-01/09-01/11

Date: 24 March 2014

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

Public Redacted Version of "Prosecution's Fifth Request for In-Court Protective Measures for Trial Witnesses", 21 March 2014, ICC-01/09-01/11-1223-Conf-Exp

Source: Office of the Prosecutor

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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"¹ and "Second Request"²). On 18 November 2013, the Prosecution filed its third request for in-court protective measures in respect of witness P-0535. On 24 December, the Prosecution filed its fourth request for the witnesses scheduled to testify as of 13 January 2014 ("Fourth Request"³). The Prosecution hereby submits a request for in-court protective measures for three witnesses scheduled for the upcoming sessions who were not part of its previous requests (P-0508, P-0028, P-0019), and renews its requests for P-0452 and P-0469.⁴

2. In respect of P-0508, P-0028, P-0019 and P-0469, 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) *in camera* sessions (as necessary) for identifying evidence.

3. In respect of P-0452, the Prosecution requests that the Chamber allow P-0452 to be heard entirely *in camera*. Should the Chamber decline this request, the Prosecution submits that, as a minimum, the witness should be granted the in-court protective measures listed in paragraph 2 above.

4. 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.

¹ ICC-01/09-01/11-845-Conf-Exp.

² ICC-01/09-01/11-1044-Conf-Exp.

³ ICC-01/09-01/11-1129-Conf-Exp-Corr.

⁴ The Prosecution requested protective measures for P-0469 in its Second Request and for P-0452 in its First Request. The request for P-0452 was then updated and partially amended in its Fourth Request.

5. Due to the imminent testimony of these witnesses, the Prosecution also requests that the Chamber order responses on an expedited basis, or alternatively that it require the parties and participants to respond orally, as has been the practice with a number of previous witnesses.

Confidentiality

6. 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

7. The Prosecution seeks in-court protective measures for witnesses P-0508, P-0028 and P-0019 and renews its requests for protective measures to be afforded to witnesses P-0469 and P-0452.

8. Specifically, as regards P-0508, P-0028, P-0019 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) *in camera* sessions under Articles 64(7) and 68(1), Rule 87(3)(e) and Regulation 94(e) of the RoR.

9. As regards P-0452, in view of the updated information provided in the Fourth Request,⁵ the Prosecution requests the Chamber to order that her testimony be heard entirely *in camera* under Articles 64(7) and 68(1), Rule 87(3)(e) and Regulation 94(e)

⁵ ICC-01/09-01/11-1129-Conf-Exp-Corr, paras. 55-65.

of the RoR. Alternatively, the Prosecution seeks that the Chamber grant this witness the same protective measures listed in paragraph 8 above as per its First Request.⁶

10. 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.

11. 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.⁷

12. 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-0508

13. P-0508 was interviewed by the OTP [REDACTED]. He holds a dual status of witness and victim and his identity was disclosed to the Accused on 9 January 2013. He has not been a subject of direct threat, but on [REDACTED] 2012, [REDACTED]. It has not yet been established whether this threat was in fact connected with his cooperation with the Prosecution.

14. P-0508 is [REDACTED]. He is a [REDACTED] and is well known [REDACTED] in [REDACTED]. He was recently asked [REDACTED].

15. [REDACTED]. He lives in [REDACTED], the majority of whom are hostile towards ICC witnesses. Moreover, P-0508 [REDACTED] would recognise and expose him.

16. [REDACTED]

⁶ ICC-01/09-01/11-845-Conf-Exp, paras. 10(a), 18.

⁷ ICC-01/09-01/11-1044-Conf-Exp, paras. 7-9.

17. On [REDACTED], the Prosecution was notified that P-0508 [REDACTED] participating victim.⁸ On this basis, the OTP met with the witness [REDACTED].

18. Due to [REDACTED], P-0508 is afraid of being exposed [REDACTED] and potentially endangering the life and the well-being of himself and his family. Therefore, he emphasised his wish to be granted in-court protective measures.

19. [REDACTED]. [REDACTED].

20. On 1 January 2014, [REDACTED].

B. P-0028

21. [REDACTED].

22. In previous filings, the Prosecution informed the Pre-Trial Chamber of some examples of incidents where P-0028 has been the subject of indirect and direct intimidation in Kenya in connection to his knowledge of the PEV.⁹ P-0028 is a Kalenjin who possesses insider-type of information about planning meetings and the role of the Accused and other key associates in the violence. [REDACTED].

23. [REDACTED].

24. [REDACTED].

25. [REDACTED].

26. [REDACTED].

27. [REDACTED].

28. [REDACTED].

29. [REDACTED].

⁸ ICC-01/09-01/11-1145-Conf and ICC-01/09-01/11-1145-Conf-AnxA.

⁹ ICC-01/09-01/11-311-Conf-Exp, paras. 50-56; ICC-01/09-01/11-97-Conf-Exp-AnxA, paras. 8-11.

30. [REDACTED].

31. During his initial contact with the OTP in [REDACTED], P-0028 stated that both he and his family were in danger and that he feared for the safety of his family, [REDACTED].

32. [REDACTED].

33. [REDACTED].

34. [REDACTED].

35. On 1 June 2011, P-0028 reported that [REDACTED].

36. The identity of P-0028 was disclosed to the Accused on 9 January 2013.

37. As noted above, P-0028 possesses important insider and linkage-knowledge about meetings that Mr RUTO hosted and attended and where preparations for the attacks were discussed and implemented and about Mr SANG's contribution to the common plan. [REDACTED]. Revealing his identity to the public will compromise [REDACTED].

38. Even assuming that the witness was shielded from physical harm [REDACTED].

39. Moreover, the concern for the possible consequences [REDACTED] constitutes an additional emotional strain on P-0028 who has already expressed serious concerns about [REDACTED] and reluctance to testify for this reason.

C. P-0019

40. [REDACTED].

41. P-0019 is a Kalenjin who possesses insider-type of information about meetings to organise and plan the violence. He names Farouk KIBET, a known RUTO associate, as a key perpetrator who coordinated the violence. [REDACTED].

42. The Prosecution has previously informed the Pre-Trial Chamber about some of the incidents demonstrating that P-0019 has been the target of indirect and direct intimidation in Kenya in connection to his knowledge of the PEV.¹⁰ Even before making initial contact with the OTP in [REDACTED], P-0019 expressed fears for himself and his family.

43. [REDACTED].

44. [REDACTED].

45. [REDACTED].

46. [REDACTED].¹¹ [REDACTED].

47. [REDACTED].

48. [REDACTED].¹² [REDACTED].

49. [REDACTED].

50. [REDACTED].

51. [REDACTED].

52. The identity of P-0019 was disclosed to the Accused on 9 January 2013.

53. As noted above, P-0019 possesses important insider and linkage-knowledge about meetings that Mr RUTO either attended or was directly referred to, and where

¹⁰ See e.g. paras. 5, 28 and 36 of ICC-01/09-01/11-311-Conf-Exp.

¹¹ [REDACTED].

¹² [REDACTED].

participation in the attacks was planned, coordinated and rewarded. [REDACTED].
Revealing his identity to the public will [REDACTED].

54. Even assuming that the witness was shielded from physical harm [REDACTED]. Public confirmation that P-0019 is an ICC witness would [REDACTED].

D. P-0452

55. P-0452 was among the ten witnesses whom the Prosecution intended to call to testify during the first session of the present case.¹³ To that end and in light of her individual security circumstances, the Prosecution requested that the Chamber grant her in-court protective measures. The underlying facts adduced by the Prosecution in support of its application are detailed in the First Request.¹⁴ Ultimately, the appearance of P-0452 had to be rescheduled and the decision on her in-court protective measures remained pending. In its Fourth Request, the Prosecution updated the Chamber on intervening developments and, based on that information, amended its request for P-0452 to be heard entirely *in camera*.¹⁵

56. The Prosecution hereby renews its updated request for protective measures and refers to the main factual and substantive submissions detailed in its First and Fourth Requests regarding this witness.

57. Moreover, in order to better assist the Chamber in its final determination, the Prosecution provides a brief update on the witness's personal circumstances since the First and Fourth Requests were filed.

¹³ ICC-01/09-01/11-794, paras. 5, 9.

¹⁴ ICC-01/09-01/11-845-Conf-Exp, para. 10 (b).

¹⁵ ICC-01/09-01/11-1129-Conf-Exp-Corr, paras. 55-65.

58. In [REDACTED], OTP representatives met with P-0452 to discuss [REDACTED] as scheduled. P-0452 said that [REDACTED] after a meeting with OTP representatives in [REDACTED]¹⁶ [REDACTED].

59. P-0452 said that she got really scared after this incident. Previously she was not afraid to testify because she felt safe in [REDACTED] but now she feels threatened because everyone is watching them and wants to know what she is doing. No one in [REDACTED] wants to hear anything about the trial and they blame people like her who are considered OTP witnesses. P-0452 went on to state that [REDACTED]. She emphasised that [REDACTED] and it would be all over the media in Kenya. As previously mentioned, subsequent to the Kiambaa incident, [REDACTED].¹⁷

60. As a follow-up to the meeting in [REDACTED], OTP representatives met P-0452 in [REDACTED]. During that meeting, P-0452 explained that she would really like to testify but only on condition that her entire testimony was *in-camera* because [REDACTED]. After the OTP representatives explained that they would request protective measures for her and that it would be up to the Judges to make a decision, P-0452 agreed to travel to testify in the upcoming session.

E. P-0469

61. P-0469 was originally scheduled to testify during a previous session of the proceedings.¹⁸ In view of her expected appearance, the Prosecution requested the witness be granted in-court protective measures.¹⁹ However, in light of [REDACTED], P-0469's appearance had to be rescheduled and the decision concerning her protective measures postponed accordingly.²⁰

¹⁶ [REDACTED].

¹⁷ ICC-01/09-01/11-1129-Conf-Exp-Corr, paras. 56, 60 and 61.

¹⁸ ICC-01/09-01/11-794, paras. 5, 9.

¹⁹ ICC-01/09-01/11-1044-Conf-Exp, paras. 20-24.

²⁰ ICC-01/09-01/11-T-70-CONF-ENG, p. 2, line 19 to p. 3, line 10.

62. The Prosecution hereby renews its Second Request (as updated in its Fourth Request) and refers to the main factual and substantive submissions detailed therein.

63. Recently, subsequently to those requests being filed, P-0469 informed the OTP of the approaches detailed in paragraph 20 above, [REDACTED].

Relief Requested

64. For the foregoing reasons, the Prosecution requests that the Chamber grant witnesses P-0508, P-0028, P-0019 and P-0469 the following in-court protective measures: i) image and voice distortion; ii) use of pseudonyms during testimony; iii) *in camera* sessions; and iv) redactions to public records, where necessary to prevent identification.

65. The Prosecution further requests that the Chamber grant witness P-0452 to testify entirely *in camera* or, in the alternative, be afforded the same in-court protective measures mentioned in paragraph 64.

66. 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.



Fatou Bensouda, Prosecutor

Dated this 24th day of March 2014

At The Hague, the Netherlands