

**Cour
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**International
Criminal
Court**

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TRIAL CHAMBER V(A)

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

SITUATION IN THE REPUBLIC OF KENYA

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

Further public redacted version of
Decision on 'Prosecution's First Request for In-Court Protective Measures for
Trial Witnesses'

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Mr Anton Steynberg

Counsel for William Samoei Ruto

Mr Karim Khan
Mr David Hooper
Mr Essa Faal
Ms Shyamala Alagendra

Counsel for Joshua Arap Sang

Mr Joseph Kipchumba Kigen-Katwa
Mr Silas Chekera

Legal Representatives of Victims

Mr Wilfred Nderitu

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

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Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Deputy Registrar

Victims and Witnesses Unit

Mr Patrick Craig

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber V(A) (the ‘Chamber’) of the International Criminal Court (the ‘Court’), in the case of *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, having considered Article 64(2) and (6)(e), and Article 68(1) of the Rome Statute (the ‘Statute’) and Rule 87 of the Rules of Procedure and Evidence (the ‘Rules’), renders its Decision on ‘Prosecution’s First Request for In-Court Protective Measures for Trial Witnesses’.

I. PROCEDURAL HISTORY AND GENERAL SUBMISSIONS

1. On 7 August 2013, the Office of the Prosecutor (the ‘Prosecution’) submitted a request seeking in-court protective measures for nine out of the first ten trial witnesses, specifically image and voice distortion during their testimony and assignment of a pseudonym for use during their testimony (the ‘Request’).¹ Moreover, the Prosecution requests that ‘discrete portion/s of evidence referring to the witness’s identity or other identifying information be given in closed session’.² The Prosecution submits that this can be dealt with on a case-by-case basis and that most of these witnesses’ testimony will be given in open session.³ As a corollary, the Prosecution also requests that any information that may lead to the identification of these witnesses which is inadvertently disclosed in public session be redacted from the public records.⁴
2. In general, the Prosecution refers to the ‘widespread opposition in Kenya to the ICC process’ and ‘antagonism against persons perceived to be supporting the process’.⁵ Thus, the Prosecution states that retaliation against the witnesses and/or their family members is likely if their identities are publicly disclosed. The Prosecution submits

¹ Prosecution’s First Request for In-Court Protective Measures for Trial Witnesses, ICC-01/09-01/11-845-Conf-Exp, paras 1, 6 and 18.

² Request, ICC-01/09-01/11-845-Conf-Exp, para. 8.

³ Request, ICC-01/09-01/11-845-Conf-Exp, paras 8 and 13.

⁴ Request, ICC-01/09-01/11-845-Conf-Exp, para. 17.

⁵ Request, ICC-01/09-01/11-845-Conf-Exp, para. 5.

that the sought protective measures will encourage the witnesses to give ‘full and frank evidence without fear for their personal safety or that of their family members’.⁶

3. The Prosecution argues that the protective measures are necessary and are proportional in respect of the rights of the accused,⁷ and that attempts by supporters and collaborators of the accused to dissuade perceived witnesses from testifying have increased exponentially as the start date for trial approaches.⁸ The Prosecution also submits that the measures do not cause any unfair trial related prejudice to the Defence, particularly since the identity of these witnesses is known to the Defence.⁹ The Prosecution further states that no less intrusive measures are available, and in fact, if the protective measures sought would not be granted, it is highly likely that the Prosecution, in consultation with the Victims and Witnesses Unit (the ‘VWU’), would have to implement more intrusive and onerous protective measures.¹⁰
4. On 21 August 2013,¹¹ the VWU submitted its Observations to the Request.¹² [REDACTED].¹³ [REDACTED].¹⁴ [REDACTED].¹⁵
5. On 22 August 2013, the defence team for Mr Ruto (the ‘Ruto Defence’), responded to the Request.¹⁶ The Ruto Defence opposes the Request, asserting that it lacks specificity and fails to demonstrate on a case-by-case basis that the protective measures sought

⁶ Request, ICC-01/09-01/11-845-Conf-Exp, para. 5.

⁷ Request, ICC-01/09-01/11-845-Conf-Exp, para. 10.

⁸ Request, ICC-01/09-01/11-845-Conf-Exp, para. 11.

⁹ Request, ICC-01/09-01/11-845-Conf-Exp, para. 14.

¹⁰ Request, ICC-01/09-01/11-845-Conf-Exp, para. 15.

¹¹ Pursuant to Regulation 34 of the Regulations of the Court, the Chamber instructed that any written response be filed no later than 16:00 on 22 August 2013. The Chamber also invited the VWU to file observations by the aforesaid deadline. See e-mail from Trial Chamber V-A Communications to counsel of 13 August 2013 at 14:52.

¹² Victims and Witnesses Unit’s Observations on the “Prosecution’s First Request for In-Court Protective Measures for Trial Witnesses” (ICC-01/09-01/11-845-Conf-Exp), ICC-01/09-01/11-865-Conf-Exp.

¹³ ICC-01/09-01/11-865-Conf-Exp, para. 1.

¹⁴ ICC-01/09-01/11-865-Conf-Exp, para. 2.

¹⁵ ICC-01/09-01/11-865-Conf-Exp, para. 3.

¹⁶ Defence response to the Prosecution’s First Request for In-Court Protective Measures for Trial Witnesses, ICC-01/09-01/11-867-Conf.

are necessary and are proportionate to Mr Ruto's fair trial rights. The Ruto Defence contends that the Request 'relies on a general opinion poll to prove "risk", cites historic threats with no currency or connection to the present case and includes a witness who, according to her own statement "has spoken to the press on many...occasions"' [footnotes omitted].¹⁷ The Ruto Defence submits that the Request 'appears to herald a trial in which all Kenyan prosecution witnesses will testify anonymously so far as the public are concerned', as it is made 'regardless of whether the witnesses have been relocated in Kenya or abroad, are otherwise part of the ICC witness protection programme or face real, rather than hypothetical, risks'.¹⁸ It contends that the assertions made by the Prosecution based on a general opinion poll, which it does not consider demonstrates that an objectively justifiable risk exists, are unsupported and unjustified.¹⁹

6. The Ruto Defence argues that, if such an extensive request is granted, Mr Ruto will be unable to avail himself of the protection inherent in a public trial, which is an internationally recognised right.²⁰ It submits that any deviation from this right should be granted only on an exceptional basis.²¹ Moreover, it contends that, in many instances where it has been applied, the use of closed sessions has had the 'effect of removing significant evidence of a witness from the public domain' and protections inherent in a public trial are lost to an accused.²² The Ruto Defence argues that public anonymity makes it less likely that lies are uncovered by the process of public scrutiny through which persons may come forward to controvert evidence that has come to their attention through a public trial.²³ Furthermore, it submits that the requested

¹⁷ ICC-01/09-01/11-867-Conf, para. 2.

¹⁸ ICC-01/09-01/11-867-Conf, para. 3.

¹⁹ ICC-01/09-01/11-867-Conf, paras 11-13.

²⁰ ICC-01/09-01/11-867-Conf, paras 4 and 8.

²¹ ICC-01/09-01/11-867-Conf, para. 9.

²² ICC-01/09-01/11-867-Conf, para. 5.

²³ ICC-01/09-01/11-867-Conf, para. 14.

measures are disproportionate to the potential harm to Mr Ruto's right to a public trial and that there are alternatives which have less impact on the fair trial rights of Mr Ruto. In its view, other options should be 'canvassed on a more transparent basis'.²⁴

7. The Ruto Defence additionally submits that the confidential redacted version of the Request should contain less redactions, given that the identities of all trial witnesses have been disclosed. It therefore requests the Chamber to order the Prosecution to file a lesser redacted version of the Request. Alternatively, it requests that the VWU give its opinion on the Request.²⁵
8. The Ruto Defence argues in general that the Prosecution has failed to demonstrate on a case-by-case basis that the protective measures are necessary for each witness. It submits that witnesses who have been relocated outside Kenya face no security risk warranting a need to testify anonymously.²⁶ Moreover, as regards family members of relocated witnesses, the Ruto Defence argues that most people in Kenya already know or suspect that they know the identity of witnesses, and nothing has happened to their family members.²⁷ As for the witnesses living in Kenya, it submits that no compelling reasons are provided to justify the protective measures sought.²⁸
9. On 22 August 2013, the defence team for Mr Sang (the 'Sang Defence') submitted a response, in which it opposes the Request.²⁹ The Sang Defence argues that it is clear that 'this is only the beginning of a series of requests for in-court protective measures' and that '[a]t this rate, and if the justifications of the prosecution are to be believed, any Kenyan witness who comes to testify at trial will be the beneficiary of the same

²⁴ ICC-01/09-01/11-867-Conf, para. 21.

²⁵ ICC-01/09-01/11-867-Conf, para. 7.

²⁶ ICC-01/09-01/11-867-Conf, para. 16.

²⁷ ICC-01/09-01/11-867-Conf, para. 17.

²⁸ ICC-01/09-01/11-867-Conf, para. 18.

²⁹ ICC-01/09-01/11-868-Conf.

protective measures'. It is submitted that this 'would render the entire trial nothing but a sequence of faceless stories and fabrications'.³⁰ Although the Sang Defence recognises that the Trial Chamber has the authority to order in-court protective measures, it submits that this authority 'must be exercised with due caution and concern for the rights of the accused'.³¹ The Sang Defence submits that the protective measures sought are neither necessary nor proportional, particularly since the Prosecution has not demonstrated that the public would seek retaliation against witnesses in relation to their testimony before the Court.³² It argues that the 'fact that the public is increasingly disillusioned with the ICC process does not mean that members of the public will take violent action against the witnesses'.³³ The Sang Defence also argues that only five of the nine witnesses have expressed concerns about testifying publicly, and thus, the Prosecution 'should not seek to protect people who have not expressed a need for protection'.³⁴ It also contends that, contrary to the Prosecution submissions, the protective measures sought would 'allow witnesses to feel as if their testimony will not be heard beyond the walls of the courtroom' and thus 'witnesses may be more emboldened in their lies, as they do not sense accountability to the general public, and more importantly, to individuals who may be in a position to counter or question their testimony and motivation'. Furthermore, the Sang Defence submits that these could also make defence investigations more difficult, 'as there is less likelihood that the public will respond with tips or contradictions to the testimony, if the witnesses are not known'.³⁵

³⁰ ICC-01/09-01/11-868-Conf, para. 2.

³¹ ICC-01/09-01/11-868-Conf, para. 6.

³² ICC-01/09-01/11-868-Conf, paras. 10-11.

³³ ICC-01/09-01/11-868-Conf, para. 12.

³⁴ ICC-01/09-01/11-868-Conf, para. 13.

³⁵ ICC-01/09-01/11-868-Conf, para. 14.

II. CASE-BY-CASE SUBMISSIONS AND ANALYSIS BY THE CHAMBER

10. Pursuant to Article 67(1) of the Statute, the accused have the fundamental right to a public hearing. This principle of publicity is further emphasised in Regulation 20 of the Regulations of the Court (the 'Regulations'), which provides that '[a]ll hearings shall be held in public, unless otherwise provided in the Statute, Rules, these Regulations or ordered by the Chamber'. As stressed by the Trial Chamber in the *Lubanga case*, applications for protective measures should not be 'routinely made in the expectation that they will be routinely granted'.³⁶
11. Notwithstanding, the above principle is subject to exceptions, particularly those provided for in Article 68(1) and (2) of the Statute, which read in unison with Article 64, (2) and (6)(e) of the Statute and Rule 87 of the Rules, give power to the Trial Chamber to order protective measures 'to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses' and to hold 'any part of the proceedings in camera'. However, these measures 'shall not be prejudicial to or inconsistent with the rights of the accused to a fair and impartial trial'.
12. The Chamber notes that pursuant to Rule 87(1) of the Rules, the Chamber 'shall seek to obtain, whenever possible, the consent of the person in respect of whom the protective measures is sought prior to ordering the protective measure'. This same provision also requires consultation with the VWU prior to the implementation of any protective measure.
13. Consequently, protective measures such as those asked for in the Request, should be granted only on an exceptional basis, following a case-by-case assessment of whether

³⁶ Lubanga case, Transcript of hearing on 24 March 2009, ICC-01/04-01/06-T-153-Red2-ENG, page 63, lines 15 – 17.

they are necessary in light of an objectively justifiable risk and are proportionate to the rights of the accused.³⁷

14. The Chamber emphasises that a case-by-case evaluation requires an individualised consideration of risk in each particular case. It does not consider that generalised assertions regarding the degree of domestic support for the trials can be sufficient for these purposes. However, factors such as the security situation in a particular territory may be pertinent when considered in relation to the circumstances of a particular witness. It is equally noted that evidence of prior direct threats to a witness, or his/her family, are not required in order to determine that they face an objectively justifiable risk sufficient to support the granting of protective measures.

Witness [REDACTED]

15. The Prosecution submits that the witness, [REDACTED], has received threats in the past which [REDACTED], which was reported in the Kenyan newspapers. The Prosecution further submits that the witness's parents reside in Eldoret, which is in the core geographic area of influence and operations of the accused and their supporters.³⁸
16. The Ruto Defence contends that the Request cites historic threats with no currency or connection to the present case.³⁹ Moreover, it submits that the witness's testimony is fairly general and that although the Prosecution mentions the witness's parents, there is 'no suggestion that any threat has ever been made to either parent, nor to any other family member'. The Ruto Defence argues that the only threats mentioned were 'purportedly received, but not substantiated', over 5 years ago, in mid-2008 and there

³⁷ Katanga and Ngudjolo case, Public redacted version of 'Order on protective measures for certain witnesses called by the Prosecutor and the Chamber (Rules 87 and 88 of the Rules of Procedure and Evidence), 9 December 2009, ICC-01/04-01/07-1667-Red-tENG, paras 8-9.

³⁸ Request, ICC-01/09-01/11-845-Conf-Exp, para. 10(a).

³⁹ ICC-01/09-01/11-867-Conf, para. 2.

is no mention of any subsequent threats relating to [REDACTED] status as a witness before the Court. It further submits that there are no grounds to believe that either the witness or [REDACTED] family have been subject to any threats since disclosure of [REDACTED] identity to the defence in January 2013. Thus, the Ruto Defence contends that 'it is illegitimate to speculate that the motivations which prompted threats to be made over five years ago remain current or applicable to these proceedings'.⁴⁰

17. The Sang Defence submits that the example set forth by the Prosecution for this witness only relates to domestic processes in which the witness testified, but not to the Court.⁴¹
18. The Chamber notes the witness has previously received threats which [REDACTED]. The fact that the witness [REDACTED] is relevant. In that regard, the Chamber notes the VWU submission regarding the fluid security and socio-political environment in Kenya and the unpredictability of the consequences of public testimony on the security situation of witnesses.⁴² Mindful of the serious obligations on the Court with respect to witness safety and security, the Chamber finds that there are grounds for concern in respect of this witness sufficient to warrant further enquiry. Therefore, the Chamber invites the Prosecution and the VWU to provide the Chamber with any additional and updated information relevant to the determination of the protective measures sought in this case, in particular, in light of any views expressed by the witness [REDACTED] upon [REDACTED] arrival in The Hague. The VWU, in consultation with the Prosecution where appropriate, should notify the witness of this application upon [REDACTED] arrival in The Hague. The VWU is to transmit to the

⁴⁰ ICC-01/09-01/11-867-Conf, para. 18(a).

⁴¹ ICC-01/09-01/11-868-Conf, para. 12.

⁴² Victims and Witnesses Unit's Observations on the "Prosecution's First Request for In-Court Protective Measures for Trial Witnesses" (ICC-01/09-01/11-845-Conf-Exp), ICC-01/09-01/11-865-Conf-Exp, para.1.

Chamber the witness's views, as well as any updated information it may have on the witness's security situation. The Chamber will take a decision thereafter.

Witness [REDACTED]

19. The Prosecution submits that the witnesses, [REDACTED] and that they have expressed concerns about security should their cooperation with the Prosecution become known. In January 2013, the witnesses reported having recently received "strange" telephone calls related to their participation with the Court. A caller, identified as a government appointed internally displaced persons co-ordinator, called witness [REDACTED] to enquire whether the witness's wife is an ICC witness.⁴³
20. The Ruto Defence contends that according to the statement of [REDACTED], [REDACTED] has spoken to the press on many occasions and thus 'is evidently not afraid of publicity'.⁴⁴ Furthermore, it submits that no substantiated allegation of any threat against either witness is made in the Request and that since the disclosure of their identities in January 2013, there has been no complaint of any threat to them.⁴⁵
21. The Sang Defence contends that the examples set forth for these witnesses only relate to domestic processes in which they testified, but not to the Court.⁴⁶
22. The Chamber notes, in particular, the telephone calls reported by the witnesses earlier this year, the fact that the witnesses are [REDACTED], the submissions of the VWU regarding the fluid nature of the current security and socio-political environment in

⁴³ Request, ICC-01/09-01/11-845-Conf-Exp, para. 10(b).

⁴⁴ ICC-01/09-01/11-867-Conf, paras 2 and 18(b).

⁴⁵ ICC-01/09-01/11-867-Conf, para. 18(b).

⁴⁶ ICC-01/09-01/11-868-Conf, para. 12.

Kenya,⁴⁷ as well as the concerns which the witnesses have previously expressed concerning their security. Mindful of the serious obligations on the Court with respect to witness safety and security, the Chamber finds that further enquiry is warranted in this case. Therefore, the Chamber invites the Prosecution and the VWU to provide the Chamber with any additional and updated information relevant to the determination of the protective measures sought for these witnesses, in particular, in light of any views expressed by the witnesses themselves upon their arrival in The Hague. The VWU, in consultation with the Prosecution where appropriate, should inform the witnesses of this application upon their arrival in The Hague. The VWU is to transmit to the Chamber the witness's views, as well as any updated information it may have on the witness's security situation. The Chamber will take a decision thereafter.

Witness [REDACTED]

23. The Prosecution submits that the witness and [REDACTED] family have been threatened [REDACTED]. [REDACTED], the witness has personal security concerns, particularly in relation to the disclosure of [REDACTED] identity and [REDACTED] cooperation with the Prosecution.⁴⁸ The Prosecution also states that [REDACTED].⁴⁹
24. The Ruto Defence submits that, although the witness is incriminating of Mr Ruto, the evidence is indirect and largely focused on [REDACTED]. The only threats mentioned by the Prosecution occurred in 2008 and relate to [REDACTED]. Although [REDACTED] identity was disclosed to the Ruto Defence in March 2013,

⁴⁷ Victims and Witnesses Unit's Observations on the "Prosecution's First Request for In-Court Protective Measures for Trial Witnesses" (ICC-01/09-01/11-845-Conf-Exp), ICC-01/09-01/11-865-Conf-Exp, para.1.

⁴⁸ Request, ICC-01/09-01/11-845-Conf-Exp, para. 10(c).

⁴⁹ Request, ICC-01/09-01/11-845-Conf-Exp, para. 10(c).

[REDACTED] and there is no suggestion that the witness was threatened by the accused.⁵⁰

25. The Sang Defence contends that [REDACTED], but not to the Court.⁵¹

26. The Chamber considers that it has been provided with sufficient information to support a finding that this witness would face an objectively justifiable risk should [REDACTED] identity be disclosed to the public in a trial before the Court. [REDACTED].⁵² The Chamber is also mindful of the fact that the witness and [REDACTED] family have previously suffered threats [REDACTED]. Therefore, the Chamber finds that the protective measures sought, specifically the allocation of a pseudonym for use during the trial and face and voice distortion during testimony, should be granted in this case. However, the Chamber notes that neither the Prosecution nor the VWU have provided any information on the views of the witness as regards the use of protective measures during [REDACTED] testimony, pursuant to Rule 87(1) and (2) of the Rules. The VWU, in consultation with the Prosecution where appropriate, should notify the witness of this application and of the protective measures granted upon the witness's arrival in The Hague.

27. Consequently, pursuant to Rule 87(1) of the Rules, the Chamber authorises the use of a pseudonym for the purposes of the trial and voice and face distortion vis-à-vis the public during [REDACTED] testimony. The Chamber will determine on a case-by-case basis, at the relevant time, whether closed sessions are necessary in order to protect the identity of the witness from being disclosed to the public. The Chamber considers that these protective measures are necessary to ensure adequate protection and do not

⁵⁰ ICC-01/09-01/11-867-Conf, para. 18(c).

⁵¹ ICC-01/09-01/11-868-Conf, para. 12.

⁵² Victims and Witnesses Unit's Observations on the "Prosecution's First Request for In-Court Protective Measures for Trial Witnesses" (ICC-01/09-01/11-845-Conf-Exp), ICC-01/09-01/11-865-Conf-Exp, para.2.

cause undue prejudice to the Defence or undermine the fairness of the trial. Unless the Chamber orders a closed session, the public will be able to hear the evidence presented and follow the testimony of this witness. In making any such order for closed session the Chamber will have regard to the principles discussed at paragraphs 10 and 11 above. Moreover, the accused and their counsel are aware of the identity of this individual, and the accused will be able to see the witness give evidence at trial and hear [REDACTED] voice without distortion.⁵³

Witness [REDACTED]

28. The Prosecution states that the witness [REDACTED]. The Prosecution submits that publicly disclosing [REDACTED] identity would compromise the Court's ability to protect [REDACTED].⁵⁴
29. The Ruto Defence submits that there are substantial redactions in the Request, but it appears that there is no complaint of any threats made to the witness, although [REDACTED] identity was disclosed to the Ruto Defence in January 2013.⁵⁵
30. The Chamber [REDACTED]. The VWU asserts that testifying publicly would defeat the purpose of the measures which have already been taken. The Chamber again recalls the submissions of the VWU regarding the current unpredictable security and socio-political environment in Kenya⁵⁶ and notes, in particular, that [REDACTED]. Mindful of the serious obligations on the Court with respect to witness safety and security, the Chamber finds that there are grounds for concern in respect of this witness sufficient to warrant further enquiry. Therefore, the Chamber invites the

⁵³ ICC-01/04-01/07-1667-Red-tENG, para. 13.

⁵⁴ Request, ICC-01/09-01/11-845-Conf-Exp, para. 10(d).

⁵⁵ ICC-01/09-01/11-867-Conf, para. 18(d).

⁵⁶ Victims and Witnesses Unit's Observations on the "Prosecution's First Request for In-Court Protective Measures for Trial Witnesses" (ICC-01/09-01/11-845-Conf-Exp), ICC-01/09-01/11-865-Conf-Exp, para 1 and 2.

Prosecution and the VWU to provide the Chamber with any additional and updated information relevant to the determination of the protective measures sought in this case, in particular, in light of any views expressed by the witness [REDACTED] upon [REDACTED] arrival in The Hague. The VWU, in consultation with the Prosecution where appropriate, should notify the witness of this application upon [REDACTED] arrival in The Hague. The VWU is to transmit to the Chamber the witness's views, as well as any updated information it may have on the witness's security situation. The Chamber will take a decision thereafter.

Witness [REDACTED]

31. The Prosecution submits that [REDACTED]. The witness has security concerns in relation to [REDACTED] collaboration with the Prosecution [REDACTED]. The Prosecution further states that [REDACTED] and that [REDACTED] has been pressured by a relative to end cooperation with the Court.⁵⁷
32. The Ruto Defence submits that the witness provides no direct evidence against Mr Ruto and there is no evidence of threats.⁵⁸
33. The Chamber notes that [REDACTED]. Moreover, the witness appears to have experienced pressure to withdraw as a witness and to end [REDACTED] cooperation with the Court. Mindful of the serious obligations on the Court with respect to witness safety and security, the Chamber finds that there are grounds for concern in respect of this witness sufficient to warrant further enquiry. Therefore, the Chamber invites the Prosecution and the VWU to provide the Chamber with any additional and updated information relevant to the determination of the protective measures sought in this

⁵⁷ Request, ICC-01/09-01/11-845-Conf-Exp, para. 10(e).

⁵⁸ ICC-01/09-01/11-867-Conf, para. 18(e).

case, in particular, in light of any views expressed by the witness [REDACTED] upon [REDACTED] arrival in The Hague. The VWU, in consultation with the Prosecution where appropriate, should notify the witness of this application upon [REDACTED] arrival in The Hague. The VWU is to transmit to the Chamber the witness's views, as well as any updated information it may have on the witness's security situation. The Chamber will take a decision thereafter.

Witness [REDACTED]

34. The Prosecution states that the [REDACTED]. The Prosecution submits that the witness has expressed concern about the safety of both [REDACTED] and [REDACTED] family members, [REDACTED]. The Prosecution also submits that the witness is not willing to testify in open court.⁵⁹
35. The Ruto Defence submits that the witness provides no direct evidence against Mr Ruto and there is no evidence of any threats. Further, although the Prosecution states that the witness is not willing to testify in open court, 'no explanation is provided as to why that may be and, of itself, is clearly not a sufficient basis for anonymity'.⁶⁰
36. The Chamber notes that [REDACTED]. In the circumstances, the Chamber finds that a determination on protective measures in respect of this witness would be premature at this stage and that further information, [REDACTED], is required in order to make a properly informed decision. The Chamber therefore requests the VWU and the Prosecution to provide any additional and updated relevant information relating to this witness, including any views expressed by the witness [REDACTED] upon [REDACTED] arrival in The Hague. [REDACTED]. The VWU, in consultation with the

⁵⁹ Request, ICC-01/09-01/11-845-Conf-Exp, para. 10(f).

⁶⁰ ICC-01/09-01/11-867-Conf, para. 18(f).

Prosecution where appropriate, should inform the witness of this application upon [REDACTED] arrival in The Hague. The VWU is to transmit to the Chamber the witness's views, as well as any updated information it may have on the witness's security situation. The Chamber will take a decision thereafter.

Witness [REDACTED]

37. The Prosecution submits that the witness, who [REDACTED] and that publicly disclosing [REDACTED] identity would thus compromise the Court's ability to protect [REDACTED]. [REDACTED]. The Prosecution informs that the witness gave a statement about the post-election violence in 2008 and it presumes this was provided to government officials. Moreover, the Prosecution states that [REDACTED] and [REDACTED] was mentioned as someone who supported the Court following the confirmation of charges proceedings in this case. The Prosecution further submits that the witness received anonymous phone calls [REDACTED].⁶¹
38. The Ruto Defence contends that this witness provides little evidence of substance. Furthermore, it argues that there is no evidence of threats against him.⁶²
39. The Chamber notes that, [REDACTED]⁶³ It appears that the witness also received anonymous phone calls earlier this year, [REDACTED]. Mindful of the serious obligations on the Court with respect to witness safety and security, the Chamber finds that there are grounds for concern in respect of this witness sufficient to warrant further enquiry. Therefore, the Chamber invites the Prosecution and the VWU to

⁶¹ Request, ICC-01/09-01/11-845-Conf-Exp, para. 10(g); Victims and Witnesses Unit's Observations on the "Prosecution's First Request for In-Court Protective Measures for Trial Witnesses" (ICC-01/09-01/11-845-Conf-Exp), ICC-01/09-01/11-865-Conf-Exp, para.2.

⁶² ICC-01/09-01/11-867-Conf, para. 18(g).

⁶³ Victims and Witnesses Unit's Observations on the "Prosecution's First Request for In-Court Protective Measures for Trial Witnesses" (ICC-01/09-01/11-845-Conf-Exp), ICC-01/09-01/11-865-Conf-Exp, para.2.

provide the Chamber with any additional and updated information relevant to the determination of the protective measures sought in this case, in particular, in light of any views expressed by the witness [REDACTED] upon [REDACTED] arrival in The Hague. The VWU, in consultation with the Prosecution where appropriate, should notify the witness of this application upon the witness's arrival in The Hague. The VWU is to transmit to the Chamber the witness's views, as well as any updated information it may have on the witness's security situation. The Chamber will take a decision thereafter.

Witness [REDACTED]

40. The Prosecution submits that the witness [REDACTED]. The Prosecution further states that although the witness [REDACTED] has recently received threats in relation to [REDACTED] participation with the Court.⁶⁴
41. The Ruto Defence contends that this witness provides little evidence of substance. Furthermore, it argues that there is no evidence of threats against [REDACTED] nor is there any request for special measures.⁶⁵
42. The Sang Defence argues that the witness [REDACTED] without any security complaint.⁶⁶
43. The Chamber notes that [REDACTED]. The Prosecution submits that [REDACTED] the witness was approached by unknown men who gave him one week to publicly renounce any association with the Court. It is further submitted that [REDACTED] the witness received an anonymous text message warning him to 'be very, very careful'.

⁶⁴ Request, ICC-01/09-01/11-845-Conf-Exp, para. 10(h).

⁶⁵ ICC-01/09-01/11-867-Conf, para. 18(h).

⁶⁶ ICC-01/09-01/11-868-Conf, para. 12.

Moreover, the witness has expressed concern about [REDACTED] safety should [REDACTED] identity as a Prosecution witness become publicly known. Mindful of the serious obligations on the Court with respect to witness safety and security, the Chamber finds that there are grounds for concern in respect of this witness sufficient to warrant further enquiry. Therefore, the Chamber invites the Prosecution and the VWU to provide the Chamber with any additional and updated information relevant to the determination of the protective measures sought in this case, in particular, in light of any views expressed by the witness [REDACTED] upon [REDACTED] arrival in The Hague. The VWU, in consultation with the Prosecution where appropriate, should notify the witness of this application upon [REDACTED] arrival in The Hague. The VWU is to transmit to the Chamber the witness's views, as well as any updated information it may have on the witness's security situation. The Chamber will take a decision thereafter.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

GRANTS, pursuant to Rule 87 of the Rules, and subject to the witness's consent, in-court protective measures, specifically use of a pseudonym for the purposes of the trial and voice and face distortion during testimony, for Witness [REDACTED];

ORDERS the VWU and the Prosecutor to provide additional and updated information, if any, relevant to the protective measures sought in respect of each of [REDACTED], including, in the case of [REDACTED], the information specifically requested at paragraph 36 above;

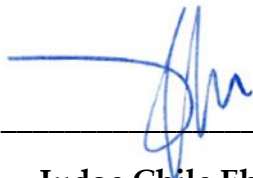
DIRECTS the VWU, pursuant to Rules 87(1) and (2) of the Rules, and in consultation with the Prosecution as appropriate, to inform each of the witnesses of the relevant requested

and granted protective measures as soon as possible upon their arrival in The Hague and to convey to the Chamber the respective views of the witnesses;

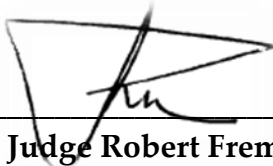
DEFERS the decision as regards each of [REDACTED], until the additional and updated information and the views of the respective witnesses are transmitted to the Chamber; and

DECIDES that any request for the use of closed sessions, or for redactions to public records, in order to prevent the identification of witnesses who have been granted protective measures for the purposes of their testimony shall be decided on a case-by-case basis at the relevant time.

Done in both English and French, the English version being authoritative.



Judge Chile Eboe-Osuji
(Presiding)

Judge Olga Herrera Carbuccion

Judge Robert Fremr

Dated 3 September 2013

At The Hague, The Netherlands