



Original: English

No.: ICC-01/09-02/11
Date: 11 October 2013

TRIAL CHAMBER V(B)

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

SITUATION IN THE REPUBLIC OF KENYA

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

Public

**Public redacted version of the Prosecution request for protective measures and
protections against self-incrimination for its first ten witnesses**

Source: The 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 seeks in-court protective measures under Article 68(1) for eight of its first 10 witnesses: 2, 11, 217, 232, 429, 430, 493, and 505. [REDACTED]. The Prosecution requests the Chamber to authorise: (i) image and voice distortion; (ii) continued use of witness pseudonyms; and (iii) limited *in camera* sessions for identifying evidence. These protective measures will 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 will not unduly prejudice the Accused as the witnesses will remain anonymous to the public only.
2. The Prosecution also requests the Chamber to provide assurances against self-incrimination under Rule 74 for six of its first 10 witnesses: 11, 217, 429, 430, 493, and 505. Public disclosure of the potentially self-incriminatory evidence of these witnesses may expose them to a risk of prosecution outside this Court. The Chamber may take steps to mitigate this risk under Rule 74.

Confidentiality

3. This application is designated "confidential, *ex parte*" because it contains witnesses' identifying information. Redacted versions have been filed concurrently.

Procedural history

4. On 3 July 2013, the Chamber directed the Prosecution to indicate whether it intended to file applications for in-court protective measures.¹ On 25 July 2013, the Prosecution confirmed that it would do so for its first 10 witnesses “at least 30 days before the commencement of the trial”.² The Prosecution informed the Chamber in the same filing that that “the issue of self-incrimination may arise” with respect to its witnesses interviewed pursuant to Article 55(2) and Rule 112.³
5. On 12 September 2013, the Prosecution filed its notification of the order of its first ten witnesses.⁴

Submissions

6. The Prosecution seeks protective measures for Witnesses 2, 11, 217, 232, 429, 430, 493, and 505. Specifically, 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) continued use of witness pseudonyms 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.
7. Previous decisions support the recourse to protective measures. Recognising that “[w]ithout . . . these measures, there is a real risk that witnesses before the court will be put at significant risk of harm and the court would thereby have failed to discharge its obligations under Article 68”,⁵ Chambers have authorised in-court protective measures for witnesses who may be at risk on

¹ ICC-01/09-02/11-769, para. 2(vii).

² ICC-01/09-02/11-778, para. 10.

³ ICC-01/09-02/11-778, para. 9.

⁴ ICC-01/09-02/11-803; ICC-01/09-02/11-803-Conf-AnxA.

⁵ ICC-01/04-01/06-T-104-ENG, p.4, lines 20-23.

account of their cooperation with the Court if the measures are: (i) necessary, based on a real and objective risk, to protect the witnesses' or the witnesses' family's safety and security; and (ii) proportionate to the rights of the Accused.⁶

8. The Prosecution anticipates that *in camera* sessions will be limited to discrete portion(s) of evidence referring to the witness' identifying information, and suggests that this can be dealt with on a case-by-case basis during each witness' testimony. Article 64(7) dictates that this trial shall be held in public, and the Prosecution will structure its questioning to minimise the use of *in camera* sessions. The Prosecution does not expect at this stage that special measures under Rule 88 will be required, but reserves its right to make a further application if these measures become necessary before or during the testimony of a witness.

I. The protective measures sought are necessary in light of an objectively justifiable risk.

9. Since the beginning of this case, the Prosecution has kept the Chamber abreast of the security situation in Kenya,⁷ and the dangers to which Prosecution witnesses are exposed.⁸ The Chamber has on several occasions acknowledged the existence of this risk, notably in its decisions granting delayed disclosure of witness identities,⁹ and redactions to identities of witnesses and their families.¹⁰

⁶ See, e.g., ICC-01/09-01/11-902-Red2, para. 13; ICC-01/04-01/07-1667-Red-tENG, paras 8-9, 12, 19; ICC-01/04-01/07-1795-Conf-tENG, para. 6; ICC-01/04-01/07-T-189-ENG, p. 11, lines 1-5; ICC-01/04-01/06-T-104-ENG, p. 4, lines 13-25; ICC-01/04-01/06-T-105-ENG, pp. 37-38; ICC-01/04-01/06-T-110-ENG, p. 12, lines 4-9; ICC-01/04-01/06-T-113, p. 21, lines 17-25; ICC-01/05-01/08-T-107-ENG, pp. 1-2; ICC-01/05-01/08-1023, paras 22-28.

⁷ See, e.g., ICC-01/09-02/11-556-Conf-Exp-AnxA; ICC-01/09-02/11-633-Conf-Exp-AnxA, paras 5-12.

⁸ See, e.g., ICC-01/09-02/11-519-Conf-Exp; ICC-01/09-02/11-562-Conf-Exp; ICC-01/09-02/11-638-Conf-Exp; ICC-01/09-02/11-796-Conf-AnxA, paras 85-95.

⁹ ICC-01/09-02/11-580-Conf-Exp; ICC-01/09-02/11-593-Conf-Exp; ICC-01/09-02/11-619-Conf-Exp.

¹⁰ See, e.g., ICC-01/09-02/11-495-AnxA-Corr, paras 55-56; ICC-01/09-02/11-574-Conf.

10. Recent actions by the Kenyan Parliament have exacerbated these concerns.

The National Assembly and Senate passed motions calling for the repeal of Kenya's International Crimes Act (2008).¹¹ 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. Indeed, these developments have adversely affected the willingness of Prosecution witnesses to testify in the *Ruto & Sang* case.¹² 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],¹³ [REDACTED],¹⁴ [REDACTED].

11. In addition to these concerns, which provide the domestic context in which the Chamber's decision must be made,¹⁵ each of the witnesses has objective security and safety concerns based on concrete evidence.

(i) *Witnesses* [REDACTED]

12. Witnesses 11, 217, 429, 430 and 505 are [REDACTED] who provide linkage evidence regarding the Accused's interactions [REDACTED] during the post-election violence period ("PEV") and his alleged contributions to the crimes charged. They are [REDACTED], and have been [REDACTED]

¹¹ 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, <http://www.aljazeera.com/news/africa/2013/09/201395151027359326.html>.

¹² ICC-01/09-01/11-T-32-Red-ENG, p. 8, lines 7-12, p. 9, line 8-p. 10, line 3. It has also affected witnesses in this case. [REDACTED].

¹³ See [REDACTED].

¹⁴ See, e.g., [REDACTED].

¹⁵ The Chamber in the *Ruto & Sang* case noted that "[although i]t does not consider that generalised assertions regarding the degree of domestic support for the trials can be sufficient . . . the security situation in a particular territory may be pertinent when considered in relation to the circumstances of a particular witness". See ICC-01/09-01/11-902-Red2, para. 14.

because of the increased risk they faced on account of their cooperation with the Court. The Prosecution requests protective measures [REDACTED].¹⁶

13. [REDACTED].¹⁷

14. Witness 11 was [REDACTED]. [REDACTED].¹⁸ [REDACTED].¹⁹

15. While Witness 11 has previously expressed to the Prosecution his desire to testify publicly, public testimony may undermine the out-of-court protective measures [REDACTED] and may reveal the identities of other witnesses. After taking advice from the VWU, the Prosecution is therefore seeking in-court protective measures for Witness 11, notwithstanding his stated preference for his entire testimony to be public. In the Prosecution's view, the statutory protective duties imposed on the Court as a whole (Prosecution, VWU and Chambers) continue to apply, regardless of a witness' wish to forego protective measures, in whole or in part. The witness' preference can be balanced by structuring his examination such that the need for *in camera* sessions is minimised.

16. Witness 217 was [REDACTED] on [REDACTED]. Prior to his [REDACTED], Witness 217 [REDACTED]. He believes [REDACTED]. The witness reported what he perceived as pressure by intermediaries of the Accused to give evidence to the Defence, which Witness 217 refused.

17. Witness 429 was [REDACTED] on [REDACTED]. [REDACTED], which he believed was a deliberate attempt to target him. He reports that two months after the incident he was attacked by [REDACTED]. According to the witness, [REDACTED].

¹⁶ See, e.g., ICC-01/04-01/07-1667-Conf-tENG, para 11 ("In no circumstances does the Chamber wish . . . to defeat the objectives of the Protection Programme.").

¹⁷ See, e.g., ICC-01/09-02/11-519-Conf-Exp-AnxA, pp. 8, 11, 12.

¹⁸ ICC-01/09-02/11-796-Conf-AnxA, para. 87.

¹⁹ ICC-01/09-02/11-519-Conf-Exp, para. 15.

18. Witness 430 was [REDACTED] on [REDACTED]. Witness 430 [REDACTED]. [REDACTED].²⁰ Witness 430 [REDACTED]. He reports that during [REDACTED].²¹

19. Witness 505 was [REDACTED] on [REDACTED]. Witness 505. [REDACTED]. In [REDACTED], Witness 505 received warnings from [REDACTED] that they would not tolerate anyone [REDACTED] testifying against the Accused.²² [REDACTED].

(ii) Witness 2 ([REDACTED])

20. Witness 2 was [REDACTED]. Witness 2 is currently in the [REDACTED]. The witness reports that [REDACTED]. [REDACTED].

21. The Prosecution has consulted with [REDACTED] regarding the advisability of Witness 2's identity being revealed through public testimony. [REDACTED] recommended in-court protective measures so that the protection [REDACTED] would not be undermined. The Prosecution supports this recommendation.

(iii) Witness 232 ([REDACTED])

22. Witness 232 is [REDACTED]. On [REDACTED], Witness 232 was granted an [REDACTED]. The Prosecution requests protective measures described above so as not to undermine the witness' security at his current location.

23. Witness 232 is [REDACTED]; disclosure of this particular [REDACTED] evidence is likely to identify him because [REDACTED].²³ The Prosecution

²⁰ ICC-01/09-02/11-519-Conf-Exp, para. 22; ICC-01/09-02/11-519-Conf-Exp-AnxA, p. 14.

²¹ ICC-01/09-02/11-519-Conf-Exp-AnxA, pp. 13-14.

²² ICC-01/09-02/11-562-Conf-Exp, para. 39; ICC-01/09-02/11-562-Conf-Exp-AnxA, pp. 11-12.

²³ See ICC-01/09-02/11-562-Conf-Exp, para. 35; ICC-01/09-02/11-562-Conf-Exp-AnxA, p. 3.

brought Witness 232's security concerns to the Chamber's attention [REDACTED],²⁴ [REDACTED].²⁵

24. Further, on [REDACTED], Witness 232 told the Prosecution that he wanted the continued use of his pseudonym and facial and voice distortion during his testimony. He also requested that identifying portions of his testimony be held in private session, in particular [REDACTED]. Witness 232 stated that he was scared because "[REDACTED]". He stated that [REDACTED]. Although Witness 232 has not been threatened directly, the Chamber in the *Ruto & Sang* case 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".²⁶

25. Finally, Witness 232 breaks down when [REDACTED]. Although Witness 232 has been traumatised by the events, the Prosecution does not seek special measures under Rule 88 at this stage, instead reserving its right to make an oral request before or during the witness' testimony if the need arises.

(iv) *Witness 493 ([REDACTED])*

26. Witness 493 is [REDACTED]. Although he has [REDACTED]. [REDACTED]. The need to [REDACTED] Witness 493 stems from an objective security assessment by the VWU. Publicly disclosing his identity may compromise [REDACTED] ability to protect him [REDACTED]. The Prosecution requests protective measures so as not to undermine the protection offered by the [REDACTED]. [REDACTED] if his cooperation with the Court is revealed to the public. The Prosecution brought Witness

²⁴ ICC-01/09-02/11-562-Conf-Exp.

²⁵ ICC-01/09-02/11-593-Conf-Exp, paras 45-47, 51, 53; ICC-01/09-02/11-619-Conf-Exp, paras 10-11.

²⁶ ICC-01/09-01/11-902-Red2, para. 14.

493's objective security concerns to the Chamber's attention [REDACTED],²⁷
[REDACTED].²⁸

II. The protective measures sought are proportionate to the rights of the Accused.

27. The Prosecution envisages that all of its first ten witnesses will testify substantially in open session. With the requested measures in place, the Defence will be able to examine each of these witnesses publicly, except on discrete matters that bear on the witnesses' identity, and will be able to present its theory of the case without restriction. The Accused will be able to see the witnesses when they testify in Court and to hear their voices undistorted. By ensuring public anonymity, the protective measures will facilitate the truth-finding function of the Court, encouraging witnesses to give full and frank evidence without fear for their personal safety or that of their family members.

28. No less intrusive measures are available to counter the risks posed by publicly revealing their collaboration with the Court. If the witnesses are not afforded protective measures, it is highly likely that the Prosecution will have to implement far more intrusive and onerous protection measures in order to protect the witnesses and their family members from the risk of harm.

III. Assurance against self-incrimination.

29. Rule 74 seeks to strike a balance between the Chamber's interest in obtaining information in order to establish the truth and the risk that the persons providing such information fall subject to prosecution on account of their testimony. Rule 74(3)(c)(i) authorises the Chamber to give an assurance

²⁷ ICC-01/09-02/11-562-Conf-Exp, paras 16-25; ICC-01/09-02/11-562-Conf-Exp-AnxA, pp. 5-7.

²⁸ ICC-01/09-02/11-593-Conf-Exp, paras 32-37, 42, 51, 53.

to witnesses that their evidence “[w]ill be kept confidential and will not be disclosed to the public or any State”, to preclude the use of the information as a basis for criminal prosecution.²⁹ The Chamber is able to “give effect to” the assurance by ordering the protective measures described in Rule 74(7).

30. Unlike in previous cases before this Court, there is currently no guarantee by the Government of Kenya not to prosecute ICC witnesses on the basis of their testimony.³⁰ Neither do any domestic amnesty laws apply to the perpetrators of the PEV.

31. Although Rule 74(7)(a) states that a witnesses evidence “shall . . . be given in camera” when issues of self-incrimination under Rule 74 arise, the Prosecution submits that it will be sufficient to limit *in camera* sessions to topics that may identify the witness, rather than the entirety of the witnesses’ testimony. The Prosecution believes there is a public interest in having the substantive criminal evidence heard in public and this will allow for far less time spent in closed session. In the Prosecution’s view, such an approach complies with the letter and the spirit of Rule 74(7), and will satisfy the goals of a public trial while eliciting the testimony of these witnesses.

32. Rule 74(3)(c)(i) requires that evidence given by witnesses subject to Rule 74 may not be disclosed to “any State”. To give effect to this provision, in the unique circumstances of this case where the Accused is the Head of State, the Prosecution requests the Chamber to require the Accused to sign an undertaking not to reveal these witnesses’ identities or potentially self-incriminating evidence to any States, government agencies or officials, and to abide by the Chamber’s confidentiality orders.

²⁹ See ICC-01/04-01/07-3153, para. 9.

³⁰ For example, the governments of the Central African Republic (ICC-01/05-01/08-835, para. 3) and the Democratic Republic of Congo (ICC-01/04-01/07-3033, para. 6).

33. The Prosecution reserves its right to request the extension of the protections offered under Rule 74 and/or seek other relief from the Chamber if it becomes clear that the safeguards proposed above are insufficient, for example, if a witnesses' identity is publicly disclosed.
34. The areas of the witnesses' testimony that give rise to an assurance against self-incrimination are listed in Annex A. The Prosecution notes that [REDACTED].

Conclusion

35. For the foregoing reasons, the Prosecution requests the Chamber to grant, for Witnesses 2, 11, 217, 232, 429, 430, 493 and 505: (i) image and voice distortion; (ii) continued use of witness pseudonyms; and (iii) limited *in camera* sessions.
36. The Prosecution also requests the Chamber to grant image and voice distortion under Rule 74 for the purpose of shielding Witnesses 11, 217, 429, 430, 493 and 505 during their potentially self-incriminatory evidence.



Fatou Bensouda,
Prosecutor

Dated this 11th of October 2013
At The Hague, The Netherlands