



Original: English

No.: ICC-01/09-02/11  
Date: 28 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 Document**

**Public Redacted version of the “Victims’ Response to “Confidential redacted version of the Prosecution request for protective measures and protections against self-incrimination for its first ten witnesses**

**Source: Common Legal Representative of Victims**

**Document to be notified in accordance with regulation 31 of the *Regulations of the***

***Court to:***

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**REGISTRY**

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**Victims and Witnesses Unit**

Mr Patrick Craig

**Victims Participation and Reparations  
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## I. Introduction

1. On behalf of the victims in this case, the Common Legal Representative hereby submits his response to the “Prosecution request for protective measures and protections against self-incrimination for its first ten witnesses” (“Request”).<sup>1</sup>
2. The Trial Chamber ruled in its “Decision on victim participation and representation” that “in accordance with Regulation 24(2) of the Regulations, (...) the Common Legal Representative may file responses to documents but must first demonstrate that the subject matter at issue is directly related to the interests of victims”.<sup>2</sup>
3. The subject matter at issue directly affects the personal interests of the victims. [REDACTED]. It is in the interests of all the victims that in-court protective measures are granted in order to ensure that witnesses are not targeted on account of their testimony, as this might stop them and other witnesses from testifying, and therefore have a negative impact on the victims’ right to know the truth. The victims also have an interest in following these proceedings to the greatest extent possible.

## II. Confidentiality

4. This submission is filed confidentially in accordance with Regulation 23*bis*(2) of the Regulations of the Court, as it responds to an application from the Prosecution which was designated “confidential”. The Common Legal Representative will file a public redacted version of this response in due course.

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<sup>1</sup> ICC-01/09-02/11-823-Conf-Red, 11 October 2013.

<sup>2</sup> ICC-01/09-02/11-498, 3 October 2012, para. 71.

### III.Procedural History

5. On 3 July 2013, the Chamber directed the Prosecution to indicate whether it intended to file applications for in-court protective measures.<sup>3</sup> On 25 July 2013, the Prosecution confirmed that it would do so for its first ten witnesses “at least 30 days before the commencement of trial”.<sup>4</sup>
6. On 12 September 2013, the Prosecution filed its notification of the order of its first ten witnesses.<sup>5</sup>
7. On 11 October 2013, the Prosecution filed both redacted and un-redacted versions of its Request, in which it asked the Trial Chamber to grant: (i) image and voice distortion; (ii) continued use of witness pseudonyms; and (iii) limited *in camera* sessions for Witnesses 2, 11, 217, 232, 429, 430, 493 and 505. In addition, the Prosecution requested 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.

### IV.Submissions

8. The Common Legal Representative does not oppose the relief sought in the Request. Furthermore, he supports the request by the Prosecution that the Accused sign an undertaking not to reveal the identity of witnesses or potentially incriminating evidence to any States, government agencies or officials.<sup>6</sup>

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<sup>3</sup> ICC-01/09-02/11-769, 3 July 2013, para. 2(vii).

<sup>4</sup> ICC-01/09-02/11-778, 25 July 2013, para.10.

<sup>5</sup> ICC-01/09-02/11-803-Conf, 12 September 2013; ICC-01/09-02/11-803-Conf-AnxA, 12 September 2013.

<sup>6</sup> Request, para.32.

9. The concerns raised by the Prosecution in paragraphs 10 and 13 of the Request relating to the Kenyan National Assembly and Senate motions calling for the repeal of the International Crimes Act (2008),<sup>7</sup> [REDACTED] are valid and must be taken into account by the Chamber. Furthermore, the Accused's campaign to bring to an end this trial has recently entered a new and more intense phase. This has included a speech to the African Union on 12 October 2013, in which the Accused described the Court as "[a] painfully farcical pantomime" and as "the toy of declining imperial powers". The Accused also asserted that "we only get bias and race-hunting at the ICC."<sup>8</sup>
10. Witnesses will be aware that there is now strong opposition towards the Court in general at the highest levels of the Kenyan Government, illustrated by open expressions of deep hostility towards the Court by the Accused himself. There is also strong official opposition to the continuation of the present trial, illustrated by the submission by the Accused's Government of an Article 16 request to the United Nations Security Council.<sup>9</sup> Furthermore, the Kenyan media, while ignoring many aspects of the present proceedings (such as the plight of the surviving victims), has widely publicised the withdrawal of prosecution witnesses in this case<sup>10</sup> and in the *Ruto & Sang* case.<sup>11</sup> Further, in the *Ruto & Sang* case, there have been widely-publicised efforts to reveal the identity of a protected witness during the proceedings. In this environment,

<sup>7</sup> Cf. ICC-01/09-01/11-T-32-Red-ENG, 18 September 2013, pp. 5-8; "Kenya MPs vote to withdraw from ICC", BBC News, 5 September 2013, <http://bbc.in/1ehsZGx> [25 October 2013]; "Kenya parliament votes to withdraw from ICC", Al-Jazeera, 5 September 2013, <http://aje.me/1cKIItRS> [25 October 2013].

<sup>8</sup> "Uhuru blasts US, UK in AU speech", New Vision, 12 October 2013, <http://bit.ly/19I8QJC> [25 October 2013].

<sup>9</sup> The Article 16 issue was introduced to the Security Council by the African Union ("AU") in a letter dated 12 October 2013. The AU letter was a result of the Extraordinary Summit of the AU and the "Decision on Africa's relationship with the International Criminal Court (ICC)" made during the summit. The Government of Kenya forwarded the AU letter to the Security Council on 22 October 2013, which was then circulated by the President of the Security Council as document S/2013/624.

<sup>10</sup> Among the dozens of news stories in the Kenyan media emphasising the withdrawal of witnesses in this case are: "Three Witnesses Pull Out of Kenyatta's ICC Case", Citizen News, 18 July 2013, <http://bit.ly/1blh877> [25 October 2013]; and "Two International Criminal Court witnesses withdraw from Uhuru Kenyatta's case", Standard Digital, 18 July 2013, <http://bit.ly/13INuNw> [25 October 2013].

<sup>11</sup> E.g. "Another ICC Ruto witness withdraws", The Star, 5 September 2013, <http://bit.ly/15C0cvH> [25 October 2013]; "Four more witnesses against Ruto withdraw", East Africa Standard, 16 September 2013, <http://bit.ly/1fZAkhN> [25 October 2013]; "Two more witnesses withdraw from Ruto Hague case", Capital News, 1 September 2013, <http://bit.ly/1frP4A3> [25 October 2013]; "How witnesses exit hit Bensouda case", Daily Nation, 14 September 2013, <http://bit.ly/191ityW> [25 October 2013].

the risk of withdrawal of other witnesses who are willing to give evidence against the President of Kenya can only have increased in recent months.

11. [REDACTED]

12. The Common Legal Representative endorses the Prosecution's request that *in camera* sessions should be limited. Indeed, *in camera* sessions should be kept to the minimum necessary, and limited to topics that may identify a witness. The victims have no mechanism for following the evidence of the witnesses who will testify at trial other than public broadcast on radio and television, and press reports based on that public broadcast. Therefore, the public character of the trial should be maintained to the greatest extent possible, so that the proceedings can be followed by the public at large, as well as by the victims participating in this case.

## **V. Relief**

13. The Legal Representative supports the Request in the terms expressed above.

Respectfully submitted,



**Fergal Gaynor**  
**Common Legal Representative of victims**

Dated this 28<sup>th</sup> day of October 2013

At Nairobi, Kenya