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TRIAL CHAMBER III

Before: Judge Miatta Maria Samba

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF
THE PROSECUTOR v. PAUL GICHERU

Public redacted

Decision on the Prosecution Request for In-Court Protective Measures

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

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TRIAL CHAMBER III of the International Criminal Court, in the case of *The Prosecutor v. Paul Gicheru*, having regard to Articles 64, 67 and 68 of the Rome Statute (the ‘Statute’), Rule 87 of the Rules of Procedure and Evidence (the ‘Rules’) and Regulations 20 and 42 of the Regulations of the Court (the ‘Regulations’), issues this ‘Decision on the Prosecution Request for In-Court Protective Measures’.

I. PROCEDURAL HISTORY AND SUBMISSIONS

1. On 7 October 2021, in the ‘Directions on the Conduct of the Proceedings’, the Chamber ordered the Office of the Prosecutor (the ‘Prosecution’) to file an application no later than 22 October 2021 seeking relevant in-court protective measures under Rule 87 of the Rules for all Prosecution witnesses for whom it was reasonably foreseeable that protective measures would be required.¹
2. On 22 October 2021, the Prosecution requested that the Chamber authorise the following in-court protective measures:
 - a. Witnesses [REDACTED], [REDACTED] and [P-]0730: Voice and facial distortion, the use of a pseudonym as well as use of private session and closed sessions; and
 - b. Witnesses P-0732, P-0733, P-0734 and P-0735: Voice and facial distortion, the use of a pseudonym [...] as well as use of private session and closed sessions if the Prosecution’s requests to introduce their evidence under rule 68(2) *in lieu* of oral testimony is rejected [...].²
3. The Prosecution submits that the requested in-court protective measures broadly relate to two categories of witnesses: (i) witnesses admitted into the International Criminal Court protection program (the ‘ICCPP’); and (ii) witnesses who are current and former Prosecution staff members who frequently travel to conduct confidential investigations in the field and in high risk areas.³
4. The Prosecution further notified the Chamber that the in-court protective measures which applied to (i) [REDACTED]⁴ and P-0495 in the *Ruto and Sang* case

¹ [Directions on the Conduct of the Proceedings](#), 7 October 2021, ICC-01/09-01/20-189 (the ‘Directions’) with Annex A, para. 40.

² Prosecution’s Request for in-court protective measures and Notice of application of Regulation 42(2), 22 October 2021, ICC-01/09-01/20-199-Conf-Exp (the ‘Request’), para. 1. A corrected version was filed on 25 October 2021 (ICC-01/09-01/20-199-Conf-Exp-Corr). A public redacted version was filed on 28 October 2021 ([ICC-01/09-01/20-199-Corr-Red2](#)).

³ [Request](#), para. 2.

⁴ [REDACTED].

and (ii) P-0731 in the *Abu Garda* case should continue to apply in the current proceedings pursuant to Regulation 42(2) of the Regulations.⁵

5. On 2 November 2021, the Defence notified the Chamber that it leaves it to the Chamber's discretion to decide upon the in-court protective measures.⁶

6. On 24 November 2021, the Prosecution notified the Chamber that it did not intend to call P-0495 to testify as a Prosecution witness, either voluntarily or by summons, as P-0495 was considered hostile to the Prosecution.⁷ The Prosecution further submitted that it maintains its request to admit P-0495's prior recorded testimony under Rule 68(2)(d) of the Rules.⁸

7. On 14 December 2021, the Chamber rejected the Prosecution's request to admit P-0495's prior recorded testimony under Rule 68(2)(d) of the Rules.⁹

8. On 15 December 2021, the Chamber issued the 'Decision on the Prosecution's Request to Admit Prior Recorded Testimony under Rule 68(2)(b)' in relation to, *inter alia*, witnesses P-0731, P-0732, P-0733, P-0734 and P-0735.¹⁰ The Chamber found no benefit in introducing P-0731 and P-0732's prior recorded testimony at this stage of the proceedings and thus did not consider whether the conditions of Rule 68(2)(b) of the Rules had been satisfied.¹¹ The Chamber further held that P-0733's report did not qualify as prior recorded testimony for the purposes of Rule 68 of the Rules and instead, was more appropriately categorised as an internal work product in the sense of Rule 81(1) of the Rules.¹² The Chamber accordingly held that P-0733's report and associated material could be considered as formally submitted.¹³ The Chamber did,

⁵ [Request](#), paras 6 and 27-28.

⁶ Email from the Defence to the Chamber, dated 2 November 2021, at 9:46.

⁷ Email from the Prosecution to the Chamber, dated 24 November 2021, at 15:41. *See also* Decision on the Prosecution's Request to Admit Prior Recorded Testimony under Rule 68(2)(d), 14 December 2021, ICC-01/09-01/20-247-Conf (the 'Rule 68(2)(d) Decision'), para. 26. A public redacted version was filed on the same day ([ICC-01/09-01/20-247-Red](#)).

⁸ Email from the Prosecution to the Chamber, dated 24 November 2021, at 15:41.

⁹ [Rule 68\(2\)\(d\) Decision](#), para. 27. *See also* Prosecution's request for the introduction of the prior recorded testimony of Witness P-0495 pursuant to rule 68(2)(d), 22 October 2021, ICC-01/09-01/20-196-Conf with confidential annex A, ICC-01/09-01/20-196-Conf-AnxA. A public redacted version was filed on 27 October 2021 ([ICC-01/09-01/20-196-Red](#)).

¹⁰ Decision on the Prosecution's Request to Admit Prior Recorded Testimony under Rule 68(2)(b), 15 December 2021, ICC-01/09-01/20-250-Conf (the 'Rule 68(2)(b) Decision'). A public redacted version was filed on the same day ([ICC-01/09-01/20-250-Red](#)). *See also* Prosecution's request for introduction of prior recorded testimony of Witnesses P-731, P-732, P-0733, P-0734, P-0735, P-0736 and P-0737 pursuant to rule 68(2)(b), 22 October 2021, ICC-01/09-01/20-198-Conf with confidential annexes A-H. A public redacted version was filed on 27 October 2021 ([ICC-01/09-01/20-198-Red](#)).

¹¹ *See* [Rule 68\(2\)\(b\) Decision](#), paras 7-11.

¹² *See* [Rule 68\(2\)\(b\) Decision](#), para. 15.

¹³ *See* [Rule 68\(2\)\(b\) Decision](#), para. 16.

however, admit the prior recorded testimony and associated material of P-0734 and P-0735 under Rule 68(2)(b) of the Rules.¹⁴

9. On 17 December 2021, following a request from the Chamber,¹⁵ the Victims and Witnesses Unit (the ‘VWU’) transmitted its observations on [REDACTED] and [REDACTED] to the Chamber.¹⁶ Specifically, the VWU confirmed that [REDACTED] and [REDACTED] are participants in the ICCPP and have [REDACTED].¹⁷ The VWU recommended that the Chamber consider granting [REDACTED] and [REDACTED] the following in-court protective measures: image distortion, voice distortion, the use of pseudonyms, the use of closed and/or private session when needed and redaction of any identifying information from the Court’s records before dissemination to the public.¹⁸

10. On 10 January 2022, the Prosecution informed the Chamber via email that it would not be seeking a summons for P-0495’s attendance in court.¹⁹

II. APPLICABLE LAW

11. Both Articles 64(7) and 67(1) of the Statute and Regulation 20 of the Regulations establish the principle of publicity of the proceedings as an entitlement of the accused. The principle of publicity is, however, subject to exceptions,²⁰ including the need to protect victims and witnesses.²¹ Article 68(1) and (2) of the Statute, in conjunction with Article 64(2) and (6)(e) of the Statute and Rule 87 of the Rules, give the Chamber the power to ‘take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses’. Such measures include ‘conduct[ing] any part of the proceedings in camera or allow[ing] the presentation of evidence by electronic or other special means’.²² The Chamber may also order measures to protect the witnesses’ identity, such as the use of pseudonyms and distortion of the

¹⁴ See [Rule 68\(2\)\(b\) Decision](#), para. 22.

¹⁵ Email from the Chamber to the Victims and Witnesses Unit (the ‘VWU’), dated 13 December 2021, at 17:20.

¹⁶ Email from the VWU to the Chamber, dated 17 December 2021, at 10:45.

¹⁷ Email from the VWU to the Chamber, dated 17 December 2021, at 10:45.

¹⁸ Email from the VWU to the Chamber, dated 17 December 2021, at 10:45.

¹⁹ Email from the Prosecution to the Chamber, dated 10 January 2022, at 17:59.

²⁰ See Regulation 20(1) of the Regulations.

²¹ Trial Chamber V, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, [Public redacted version of Decision on the Prosecution Requests for In-Court Protective Measures for 73 Trial Witnesses](#), 19 April 2021, ICC-01/14-01/18-906-Red2 (the ‘*Yekatom and Ngaïssona* Decision’), para. 14; Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, [Public Redacted Decision on the ‘Prosecution’s application for in-court protective and special measures’](#), 29 November 2016, ICC-02/04-01/15-612-Red (the ‘*Ongwen* Decision’), para. 5.

²² Article 68(2) of the Statute.

voice and/or image of a witness testifying at trial.²³ The measures must not, however, be prejudicial to or inconsistent with the accused's right to a fair and impartial trial.²⁴

12. The Chamber recalls that in-court protective measures should only be granted on an exceptional basis, after a case-by-case assessment of whether such measures are necessary in light of an objectively justifiable risk.²⁵ Pertinently, the measures must also be proportionate to the accused's rights.²⁶ This case-by-case evaluation necessitates an analysis of the risk faced by each witness.²⁷

13. This decision is, however, without prejudice to the Chamber's reconsideration of in-court protective measures at a later time as necessary, including subject to further information provided by the VWU immediately prior to a witness' testimony.²⁸ It is also noted by the Chamber that under Rule 87(1) of the Rules, '[t]he Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the protective measure is sought prior to ordering the protective measure'.

III. ANALYSIS

14. The Chamber notes that the following witnesses subject to the Prosecution's Request are no longer foreseen to testify in the trial proceedings: witnesses P-0495, P-0731, P-0732, P-0733, P-0734 and P-0735. Accordingly, it considers it unnecessary to address the Request with regard to these witnesses.

15. The Chamber will therefore only consider whether (i) in-court protective measures are necessary for [REDACTED], [REDACTED] and P-0730 (the 'New Witnesses') and (ii) whether the in-court protective measures afforded to

²³ Rule 87 of the Rules and Regulation 94 of the Regulations of the Registry.

²⁴ Article 68(1) of the Statute.

²⁵ [Yekatom and Ngaïssona Decision](#), paras 17-18; [Ongwen Decision](#), paras 8-9; Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, [Public Redacted Version of "Decision on in-court protective measures for Witnesses 38, 22 and 87"](#), ICC-01/05-01/08-1021 of 19 November 2010, 27 June 2016, ICC-01/05-01/08-1021-Red (the 'First Bemba Decision'), para. 25; Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, [Public redacted version of Decision on request for in-court protective measures relating to the first Prosecution witness](#), 15 September 2015, ICC-01/04-02/06-824-Red (the 'Ntaganda Decision'), para. 6; Trial Chamber V(A), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, [Public redacted version of Decision on 'Prosecution's First Request for In-Court Protective Measures for Trial Witnesses'](#), 3 September 2013, ICC-01/09-01/11-902-Red2 (the 'Ruto and Sang Decision'), para. 13; Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, [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 (the 'Katanga and Ngudjolo Decision'), para. 9.

²⁶ [Yekatom and Ngaïssona Decision](#), paras 17-18; [Ongwen Decision](#), paras 8-9; [First Bemba Decision](#), para. 25; [Ntaganda Decision](#), para. 6; [Ruto and Sang Decision](#), para. 13; [Katanga and Ngudjolo Decision](#), para. 9.

²⁷ [Ongwen Decision](#), para. 6.

²⁸ See [Directions](#), para. 40.

[REDACTED] in the *Ruto and Sang* case (the ‘*Ruto and Sang* Witnesses’) shall continue to apply in the present proceedings.

A. The New Witnesses

1. Witnesses [REDACTED] and [REDACTED]

16. Witnesses [REDACTED] and [REDACTED] are [REDACTED] who have provided evidence regarding allegedly being corruptly influenced by Mr Gicheru and his associates in the present case.²⁹ Both [REDACTED] and [REDACTED] are participants in the ICCPP.³⁰

17. The Prosecution submits that the in-court protective measures for witnesses [REDACTED] and [REDACTED] will ensure that they can give evidence without fearing for their personal safety.³¹ The Prosecution further proposes that the measures sought are appropriate and justified considering the risk faced by these witnesses in appearing before the Court.³² In particular, the Prosecution argues that these measures are substantiated by best practices in the field and are required to avoid compromising the protection afforded to the relevant witnesses through the ICCPP.³³

18. Similarly, the VWU submits that the risks arising from witnesses [REDACTED] and [REDACTED]’s testimony before the Chamber warrant the implementation of in-court protective measures to mitigate potential harm that may befall them and [REDACTED].³⁴

19. Following the foregoing, the Chamber is satisfied that an objectively justifiable risk exists to witnesses [REDACTED] and [REDACTED]’s legitimate interests under Article 68 of the Statute thereby making it necessary to preserve their anonymity when testifying in the current proceedings. The Chamber also notes the importance of avoiding compromising the protection afforded to [REDACTED] and [REDACTED] through the ICCPP.³⁵ As such, the Chamber finds that the requested in-court protective measures for [REDACTED] and [REDACTED] – specifically, voice and face distortion and the use of pseudonyms – are justified in the current proceedings.

²⁹ [Request](#), para. 11.

³⁰ See [Request](#), paras 12-13; Email from the VWU to the Chamber, dated 17 December 2021, at 10:45.

³¹ [Request](#), para. 14.

³² [Request](#), para. 3.

³³ [Request](#), para. 3.

³⁴ Email from the VWU to the Chamber, dated 17 December 2021, at 10:45.

³⁵ See e.g. [Yekatom and Ngaïssona Decision](#), para. 52; [Katanga and Ngudjolo Decision](#), para. 11.

20. The Chamber will assess whether the requested in-court protective measures for witnesses [REDACTED] and [REDACTED] are proportionate to Mr Gicheru's rights below.

2. *Witness P-0730*

21. Witness P-0730 is a staff member of the Prosecution.³⁶

22. The Prosecution submits that the measures sought are appropriate and justified in view of the risk faced by P-0730 in appearing before the Court.³⁷ P-0730 travels to high risk areas and is often involved in sensitive matters due to his role with the Prosecution.³⁸ Accordingly, the Prosecution argues that concealing P-0730's identity from the public is imperative to preserve his ability to perform his functions and to protect the personal safety of P-0730, his colleagues and others that he interacts with through his work with the Prosecution.³⁹ The Prosecution proposes that granting protective measures for P-0730 for the foregoing reasons is also consistent with the Court's prior jurisprudence.⁴⁰

23. The Chamber notes that P-0730's role within the Prosecution has already been disclosed to the public. As such, the Chamber does not consider that any further objectively justifiable risk exists to P-0730's legitimate interests under Article 68 of the Statute should his position with the Prosecution be made public in the current case. Accordingly, the Chamber finds that the use of a pseudonym for P-0730 in the present proceedings is not justified.

24. However, images of P-0730 are not readily available to the public. In this regard, the Chamber acknowledges that, due to the nature of P-0730's work, a level of anonymity is necessary to protect his safety when carrying out his functions for the Prosecution. It is noted that the Court's prior jurisprudence also supports the granting of in-court protective measures to the Prosecution's staff members for the purposes of protecting ongoing investigations and avoiding risks to their safety.⁴¹

25. The Chamber finds that the foregoing justifies the authorisation of face distortion for P-0730 in the present proceedings. The Chamber, however, is not convinced by the

³⁶ [Request](#), para. 20.

³⁷ [Request](#), para. 3.

³⁸ [Request](#), para. 21.

³⁹ [Request](#), para. 21.

⁴⁰ [Request](#), para. 19.

⁴¹ [Ongwen Decision](#), paras 36-37; [Katanga and Ngudjolo Decision](#), paras 6 and 19. See also Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, [Public redacted version of 'First decision on in-court protective measures'](#), 5 January 2021, ICC-01/12-01/18-1019-Red2, paras 14-15.

Prosecution's submissions that the risks faced by P-0730 also justify voice distortion in the current circumstances.⁴² Rather, the Chamber is satisfied that P-0730's anonymity will be sufficiently protected by face distortion.

26. The Chamber will assess whether the requested in-court protective measures for P-0730 are proportionate to Mr Gicheru's rights below.

3. Whether the requested in-court protective measures for the New Witnesses are proportionate to the accused's rights

27. The Prosecution proposes that the requested in-court protective measures are the least restrictive means necessary to appropriately balance Mr Gicheru's right to a fair and public trial against the Court's competing obligations to protect the relevant witnesses' physical, psychological well-being, dignity and privacy.⁴³ Further to this, the Prosecution submits that the requested measures do not unfairly prejudice Mr Gicheru and are necessary to ensure that the witnesses are able to provide unfettered evidence to assist the Court in determining the truth.⁴⁴

28. The Chamber notes that the Defence does not oppose the requested measures.⁴⁵ The Chamber itself also has not identified any major prejudice that would be caused to Mr Gicheru's rights.

29. The impact of these measures on the public nature of the proceedings will also be limited. As noted by the Prosecution, most of the New Witnesses' testimony will be given in public session: closed or private session will only be used for critical portions of the testimony to protect the witnesses' identity or security.⁴⁶ The public will therefore still be able to follow the proceedings.⁴⁷

30. Accordingly, the measures sought would cause minimal prejudice to the defence and are consistent with the accused's fundamental right to a fair trial, as set out in Article 67 of the Statute. The Chamber thus grants (i) the use of voice and face

⁴² See e.g. [Ongwen Decision](#), paras 36-37; [Katanga and Ngudjolo Decision](#), paras 6 and 19. See also Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, [Public redacted version of 'First decision on in-court protective measures'](#), 5 January 2021, ICC-01/12-01/18-1019-Red2, paras 14-15.

⁴³ [Request](#), para. 4.

⁴⁴ [Request](#), paras 4 and 38.

⁴⁵ Email from the Defence to the Chamber, dated 2 November 2021, at 9:46.

⁴⁶ [Request](#), para. 39.

⁴⁷ See [Second Bemba Decision](#), para. 11; [First Bemba Decision](#), para. 28; [Ongwen Decision](#), para. 13.

distortion and pseudonyms for both witnesses [REDACTED] and [REDACTED] and (ii) the use of voice distortion and pseudonym for witness P-0730.

B. The *Ruto and Sang* Witnesses

31. The *Ruto and Sang* Witnesses all testified in the *Ruto and Sang* case between September 2013 and November 2014.⁴⁸ Trial Chamber V(A) ordered the following in-court protective measures for the *Ruto and Sang* Witnesses: voice and face distortion, the use of pseudonyms and permitted private sessions, as necessary.⁴⁹ The Prosecution submits that the circumstances justifying Trial Chamber V(A) ordering in-court protective measures for the *Ruto and Sang* Witnesses have not changed: at the time of their testimony in *Ruto and Sang*, [REDACTED].⁵⁰

32. Regulation 42(1) of the Regulations provides that '[p]rotective measures once ordered in any proceedings in respect of a [...] witness shall continue to have full force and effect in relation to any other proceedings before the Court and shall continue after proceedings have been concluded [...]'. The protective measures originally ordered will continue with full force and effect unless the procedure laid out in Regulation 42(3) of the Regulations has been implemented.

33. Therefore, consistent with Regulation 42(1) of the Regulations and the Court's prior jurisprudence,⁵¹ the Chamber finds that the in-court protective measures ordered by Trial Chamber V(A) in the *Ruto and Sang* case shall continue to have full force and effect in the current proceedings.

⁴⁸ [Request](#), para. 27.

⁴⁹ [Request](#), para. 27.

⁵⁰ [Request](#), para. 33.

⁵¹ Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, [Public redacted version of Decision on Prosecution request for in-court protective measures](#), 10 August 2015, ICC-01/04-02/06-774-Red, para. 4; Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, [Order concerning protection measures applied to transcripts of testimonies of prosecution Witnesses 2, 12, 30 and 157 in the Thomas Lubanga Dyilo case](#), 7 October 2009, ICC-01/04-01/07-1516-tENG, paras 8-9. *See also* Appeals Chamber, *The Prosecutor v. Mathieu Ngudjolo Chui*, [Order on the reclassification of documents ICC-01/04-02/12-55-Conf-Anx3-Corr and ICC-01/04-02/12-55-Conf-Red-Corr](#), 18 April 2013, ICC-01/04-02/12-66, para. 7; Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, [Decision on protective measures for the exhibits associated with the testimony of P-2, P-30 and P-157](#), 24 December 2009, ICC-01/04-01/07-1741, para. 6.


FOR THESE REASONS, THE CHAMBER HEREBY

GRANTS the Request, subject to the witnesses' consent, in relation to [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED] and [REDACTED];

GRANTS image distortion for P-0730 and rejects the remainder of the Request with regard to P-0730; and

DECLARES the Request with regard to P-0495, P-0731, P-0732, P-0733, P-0734 and P-0735 as moot.

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



Judge Miatta Maria Samba

Dated 3 February 2022

At The Hague, The Netherlands