



Original: **English**

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

Date: **13 May 2014**

Date of public redacted version: **11 December 2017**

TRIAL CHAMBER V(A)

Before: Judge Chile Eboe-Osuji, Presiding
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 redacted version of

Decision on the Prosecution's request for protective measures for Witness 452

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

Counsel for Joshua Arap Sang

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

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’ or ‘ICC’), in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, pursuant to Articles 64(2), 67 and 68(1) and (2) of the Rome Statute (‘Statute’), Rules 87 and 88 of the Rules of Procedure and Evidence (‘Rules’) and Regulation 20 of the Regulations of the Court (‘Regulations’), renders this ‘Decision on the Prosecution’s request for protective measures for Witness 452’.

A. Procedural Background

1. On 7 August 2013, the Office of the Prosecutor (‘Prosecution’ or ‘OTP’) filed the ‘Prosecution’s First Request for In-Court Protective Measures for Trial Witnesses’ (‘First Request’).¹
2. On 24 December 2013, the Prosecution filed the ‘Prosecution’s Fourth Request for In-Court Protective Measures for Trial Witnesses’ (‘Fourth Request’).²
3. On 21 March 2014, the Prosecution filed the ‘Prosecution’s Fifth Request for In-Court Protective Measures for Trial Witnesses’ (‘Fifth Request’).³
4. On 6 May 2014, the ‘Prosecution’s Sixth Request for In-Court Protective Measures for Trial Witnesses’ was filed (‘Sixth Request’).⁴
5. On 9 May 2014, the Prosecution submitted an Addendum to its Sixth Request (‘Addendum’).⁵

¹ ICC-01/09-01/11-845-Conf-Exp. A confidential redacted version was filed on 9 August 2013 (ICC-01/09-01/11-845-Conf-Red).

² ICC-01/09-01/11-1129-Conf-Exp. A corrigendum of a confidential redacted version was filed on 24 December 2013 (ICC-01/09-01/11-1129-Conf-Corr-Red).

³ ICC-01/09-01/11-1223-Conf-Exp. A confidential redacted version was filed on 24 March 2014 (ICC-01/09-01/11-1223-Conf-Red).

⁴ ICC-01/09-01/11-1295-Conf-Exp. A lesser confidential redacted version was filed on 12 May 2014 (ICC-01/09-01/11-1295-Conf-Red2).

⁵ Addendum to the “Prosecution’s sixth request for in-court protective measures for trial witnesses” ICC-01/09-01/11-1295-Conf-Exp, ICC-01/09-01/11-1301-Conf.

6. On that same date, the Defence for Mr Ruto ('Ruto Defence'), the Legal Representative for Victims ('LRV') and the Defence for Mr Sang ('Sang Defence') filed their responses to the requests for protective measures in relation to Witness 452.⁶
7. On 13 May 2014, the Victims and Witnesses Unit ('VWU') submitted an in-court report and a vulnerability assessment report.⁷

B. Submissions

8. In the First Request, [REDACTED].⁸
9. In its Fourth Request, the Prosecution amends the relief sought in the First Request and seeks that the Witness be heard entirely *in camera*. The Prosecution submitted that the Witness [REDACTED]. In its view, any reference of the witness's story made publicly would identify [REDACTED]. The Prosecution also argues that the Witness [REDACTED]. Furthermore, the Prosecution argued that the use of the Protected Information Sheet would be too extensive and not useful, particularly since the Witness has only basic formal education in Swahili.⁹
10. In its Fifth Request, the Prosecution reiterates its request for *in camera* testimony. Furthermore, the Prosecution states that, if required, it would make a further application for special measures under Rule 88 of the Rules.¹⁰ The Prosecution

⁶ Defence response to Protective Measures Request for P-0452, ICC-01/09-01/11-1300-Conf; Response of the Common Legal Representative for Victims to the Confidential Redacted Version of "Prosecution's Sixth Request for In-Court Protective Measures for Trial Witnesses", 6 May 2014, ICC-01/09-01/11-1295-Conf-Exp, ICC-01/09-01/11-1302-Conf; Sang Defence Response to In-Court Protective Measures Request for P-0452, ICC-01/09-01/11-1303-Conf. On 9 May 2014, the Trial Chamber directed counsel, pursuant to Regulation 35 of the Regulations, to file written submissions on the Sixth Request in relation to Witness 452 no later than 16.00 on Monday, 12 May 2014 (e-mail from Trial Chamber VA Communications at 16:18).

⁷ E-mails from VWU to Trial Chamber V-A Communications at 11:55 and 12:06.

⁸ ICC-01/09-01/11-845-Conf-Exp, paragraph 10(b).

⁹ ICC-01/09-01/11-1129-Conf-Red. paras 3, 10 and 53-65.

¹⁰ ICC-01/09-01/11-1223-Conf-Red, paras 9-12.

further updates on the Witness's security situation. The prosecution submits that the Witness [REDACTED], after meeting with OTP representatives. Likewise, the Prosecution informs that in a meeting with OTP representatives in March 2014, the Witness said [REDACTED] would testify, but only on condition that [REDACTED] entire testimony was *in camera*.¹¹

11. In its Sixth Request, Prosecution submits a further update and a new request for protective measures. It requests that the testimony of Witness 452 be heard entirely *in camera* and abandoned its alternative request for other protective measures (pseudonym, voice and face distortion and partial use of private sessions). The Prosecution submits that after the Fifth Request was filed, [REDACTED], although it did not identify the Witness [REDACTED]. The Prosecution further informs that if the Chamber were to deny the request for protective measures, 'the Prosecution is prepared to withdraw this witness'.¹²
12. In its Addendum, the Prosecution requests that [REDACTED] and [REDACTED]. The Prosecution further informs the Chamber that [REDACTED] is not aware that the Witness has travelled to The Hague and will testify in the trial. Furthermore, the Prosecution submits that [REDACTED] has recently threatened the Witness via an SMS when [REDACTED]. The Witness has told [REDACTED] will remain in the handover location for several days before returning home for security reasons. Accordingly, the Prosecution submits that unless [REDACTED] that it was the Witness who testified, even if [REDACTED] were to testify in private session, as [REDACTED]. The Prosecution also submits that [REDACTED]. The Prosecution argues that the protective measures sought are necessary in order not to further compromise the Witness's already precarious domestic situation. The Prosecution thus requests that [REDACTED]. The Prosecution finally notes that the Defence is fully aware of the Witness's

¹¹ ICC-01/09-01/11-1223-Conf-Exp, paras 57-60.

¹² ICC-01/09-01/11-1295-Conf-Red2, paras 39-49.

identity, as well as having access to [REDACTED] statements and being able to freely question [REDACTED].¹³

13. In its response, the Ruto Defence does not oppose the requested protective measures, albeit on an exceptional basis, considering the witness's vulnerability. The Ruto Defence however submits that these measures are required for 'domestic reasons' and have no basis in security concerns.¹⁴
14. The Sang Defence does not oppose the request for protective measures, based on the seriousness of the injuries suffered by the victim, the circumstances in which they were inflicted, the need to protect [REDACTED] against re-traumatisation, and the fact that [REDACTED] testimony does not implicate Mr Sang.¹⁵ The Sang Defence requests that a summary of the witness's testimony be given by the Presiding Judge at the end of each day of testimony, in order to assist those members of the public following these proceedings and to ensure that the protective measures are not prejudicial to or inconsistent with the rights of the accused.¹⁶
15. The LRV supports the Prosecution's request for protective measures for the Witness, who is a dual status witness. The LRV notes that the Witness suffered serious injuries and that there are risks of re-traumatisation. However, the LRV does not agree with the Prosecution's proposal to withdraw the Witness if the protective measures sought are not granted, as this action would be detrimental to the course of justice and attainment of the truth. Moreover, the LRV submits that withdrawing the Witness at this stage, would result in a huge waste in expenditure in terms of financial, human and other resources. Finally, the LRV

¹³ ICC-01/09-01/11-1301-Conf.

¹⁴ ICC-01/09-01/11-1300-Conf, paras 3-6.

¹⁵ ICC-01/09-01/11-1303-Conf, para. 5.

¹⁶ ICC-01/09-01/11-1303-Conf, para. 6.

submits that transferring the Witness to The Hague without the opportunity to testify is also likely to lead to re-traumatisation.¹⁷

16. The VWU informs that the witness did not report any specific threat as a result of [REDACTED] cooperation with the Prosecution. The VWU is of the view that [REDACTED] there is no doubt that should the witness give any of [REDACTED] evidence in public, [REDACTED] will be immediately identified with unknown consequences'. The VWU therefore recommends the protective measures sought by the Prosecution in order to mitigate potential risks to the witness, but also to alleviate [REDACTED] fears and concerns. Additionally, should the Chamber decide that evidential summaries be released to the public, as requested by the Sang Defence, the VWU recommends that no identifying information at all be contained in these summaries. The VWU also recommends redactions to any identifying information from any record that may be disseminated to the public in the future.¹⁸
17. In its vulnerability assessment, the VWU recommends special measures, particularly: a) that a support assistant from the VWU who the witness is familiar with be able to sit next to the Witness in the witness box, particularly at the beginning of testimony and subsequently as to the wish of the Witness; b) that the VWU psychologist is allowed to sit in the courtroom to monitor the Witness, as required; c) that breaks are offered to the Witness should [REDACTED] become tired, evidently distressed or show signs of distraction. The VWU reiterates their recommendation that the Witness' testimony should be heard entirely *in camera*, as requested by the calling party.¹⁹

C. Analysis

¹⁷ ICC-01/09-01/11-1302-Conf. paras. 3-7.

¹⁸ E-mail from VWU to Trial Chamber V-A Communications on 13 May 2014 at 11:55.

¹⁹ E-mail from VWU to Trial Chamber V-A Communications on 13 May 2014 at 12:06.

18. The Chamber recalls its previous findings in which it determined that pursuant to Article 67(1) of the Statute and Regulation 20 of the Regulations, the accused have the fundamental right to a public hearing.²⁰ The Chamber further concluded:

The foregoing indicates a general rule. It 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'. As stressed by Trial Chamber I in the Lubanga case, applications for protective measures should not be 'routinely made in the expectation that they will be routinely granted'. [footnotes omitted]²¹

19. The Chamber has further stressed that consent of the witness, as well as consultations with the VWU, should be taken into consideration prior to ordering protective measures, which 'should be granted only on an exceptional basis, following a case-by-case assessment of whether they are necessary in light of an objectively justifiable risk and are proportionate to the rights of the accused'.²²
20. The Chamber has also determined that although an individualised consideration of risk is required, it may also take into account general factors such as the security situation in a territory, when considering the particular circumstances of a witness.²³
21. In relation to the Witness, the Chamber determined the following as regards the protective measures originally sought in the First Request:

The Chamber notes, in particular, [REDACTED], the submissions of the VWU regarding the fluid nature of the current security and socio-political environment in Kenya, 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

²⁰ Decision on 'Prosecution's First Request for In-Court Protective Measures for Trial Witnesses', 3 September 2013, ICC-01/09-01/11-902-Conf-Red, para. 10.

²¹ ICC-01/09-01/11-902-Conf-Red, para. 11.

²² ICC-01/09-01/11-902-Conf-Red, para. 13.

²³ ICC-01/09-01/11-902-Conf-Red, para. 14.

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. [footnotes omitted]²⁴

22. In considering the request for protective measures, the Chamber has disregarded the Prosecution's submissions, in the Sixth Request, that if the protective measures sought are not granted, it is ready to withdraw the witness 'rather than exposing [REDACTED] to any further stress and trauma'.²⁵ The Chamber considers that the submission is coercive and inappropriate and should not have been made in that way. The decision of the Chamber is based solely on 'objectively justifiable risks' to the safety, well-being, dignity and privacy of the witness. Nonetheless, the Chamber notes that the circumstances of a witness's well-being must be contemplated at all stages of the Prosecution's investigation and prosecution of a case, pursuant to Article 54(1)(b) of the Statute, including in deciding whether to persist in calling a vulnerable witness or arranging for their travel to The Hague, especially where the occurrence of the testimony may be contingent on factors outside the Prosecution's control.
23. The Chamber observes that the Ruto Defence and the Sang Defence have not opposed the protective measures sought in the particular circumstances surrounding Witness 452 and that the LRV also supports the aforesaid protective measures.
24. The Chamber notes that the VWU has supported the protective measures sought by the Prosecution and additionally requests special measures in light of the vulnerability of the witness.

²⁴ ICC-01/09-01/11-902-Conf-Exp, para. 22.

²⁵ ICC-01/09-01/11-1295-Conf-Exp, para. 48.

25. As for the request of the Sang Defence for the production of a summary of the witness's evidence at the end of each court hearing, the Chamber reminds the parties that Pursuant to the Chamber's 'Decision No. 3 on the Conduct of Proceedings (Public Redacted Versions of Transcripts of Testimonies Heard in Private Session)',²⁶ public redacted versions of the witness's testimony shall be produced without delay. In the view of the Chamber, this measure is sufficient to guarantee the rights of the accused to a public hearing in the present circumstances.
26. Although the parties and the LRV have not made submissions on the special measures recommended by the VWU, given [REDACTED], the Chamber considers them appropriate in order to guarantee the well-being of the Witness, and does not consider them as conflicting with the rights of the accused to a fair and expeditious trial.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

GRANTS the requested protective measures;

ORDERS that the testimony of Witness 452 be held entirely *in camera*;

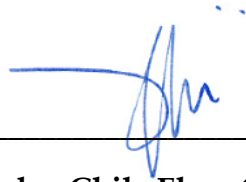
GRANTS special measures recommended by the VWU;

ORDERS that: a) that a support assistant from the VWU who the Witness is familiar with be able to sit next to the Witness in the witness box, particularly at the beginning of testimony and subsequently as to the wish of the Witness; b) that the VWU psychologist is allowed to sit in the courtroom to monitor the Witness, as required; and c) that breaks are offered to the Witness should [REDACTED] become tired, evidently distressed or show signs of distraction; and

²⁶ 24 September 2013, ICC-01/09-01/11-981.

ORDERS the Registry, the parties and the LRV [REDACTED].

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



Judge Chile Eboe-Osuji
(Presiding)



Judge Olga Herrera Carbuccia



Judge Robert Fremr

Dated 13 May 2014

At The Hague, The Netherlands