

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-01/11
Date: 3 September 2013

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***

**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

**The Office of Public Counsel for the
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 [REDACTED].¹⁰
4. On 21 August 2013,¹¹ the VWU submitted its Observations on 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 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

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.

witness who, according to [REDACTED] 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 [REDACTED] prosecution witnesses will testify anonymously so far as the public are concerned’, as it is made ‘regardless of whether the witnesses [REDACTED] 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 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

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.

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

7. The Ruto Defence additionally submits that the confidential redacted version of the Request should contain less redactions, [REDACTED].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. [REDACTED].²⁶ [REDACTED].²⁷ [REDACTED].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, [REDACTED] witness who comes to testify at trial will be the beneficiary of the same 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 [in his own view] 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

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.

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.

The Sang Defence also argues that [REDACTED].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

II. ANALYSIS

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'.
11. 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

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

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

measures should not be 'routinely made in the expectation that they will be routinely granted'.³⁶

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 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]

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

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.

15. The Prosecution submits that the witness, [REDACTED].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 [REDACTED].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 [REDACTED].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. [REDACTED] The Chamber will take a decision thereafter.

Witness [REDACTED]

19. The Prosecution submits that the witnesses, [REDACTED].⁴³
20. The Ruto Defence contends that [REDACTED].⁴⁴ [REDACTED].⁴⁵
21. The Sang Defence contends that [REDACTED].⁴⁶

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

³⁹ ICC-01/09-01/11-867-Conf, para. 2.

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.

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.

22. The Chamber notes, in particular, [REDACTED],⁴⁷ [REDACTED]. 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. [REDACTED]. The Chamber will take a decision thereafter.

Witness [REDACTED]

23. The Prosecution submits that the witness [REDACTED].⁴⁸ [REDACTED].⁴⁹

24. The Ruto Defence submits that, [REDACTED].⁵⁰

25. The Sang Defence contends that [REDACTED].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 [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. [REDACTED].

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

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).

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.

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 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].⁵⁴
29. The Ruto Defence submits that [REDACTED].⁵⁵
30. The Chamber [REDACTED]⁵⁶ [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. [REDACTED] The Chamber will take a decision thereafter.

Witness [REDACTED]

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.

31. The Prosecution submits that the witness [REDACTED].⁵⁷
32. The Ruto Defence submits [REDACTED].⁵⁸
33. The Chamber notes 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. [REDACTED] The Chamber will take a decision thereafter.

Witness [REDACTED]

34. The Prosecution states that the [REDACTED].⁵⁹
35. The Ruto Defence submits [REDACTED].⁶⁰
36. The Chamber notes that [REDACTED]. In the circumstances, the Chamber finds that a [REDACTED], is required in order to make a properly informed decision. [REDACTED]. The Chamber will take a decision thereafter.

Witness [REDACTED]

37. The Prosecution submits that the witness, who [REDACTED].⁶¹
38. The Ruto Defence contends that this witness provides little evidence of substance. [REDACTED].⁶²

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

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

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

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

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.

39. The Chamber notes that, [REDACTED].⁶³ [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. [REDACTED] The Chamber will take a decision thereafter.

Witness [REDACTED]

40. The Prosecution submits that the witness [REDACTED].⁶⁴

41. The Ruto Defence contends that this witness provides little evidence of substance. [REDACTED].⁶⁵

42. The Sang Defence argues that [REDACTED].⁶⁶

43. The Chamber notes 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. [REDACTED] The Chamber will take a decision thereafter.

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.

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.

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];

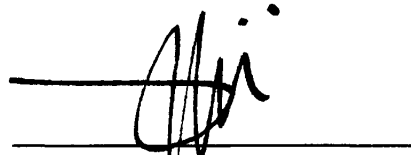
ORDERS the VWU and the Prosecutor to provide additional and updated information, if any, relevant to the protective measures sought in respect of each of Witness [REDACTED];

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 Witness [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.

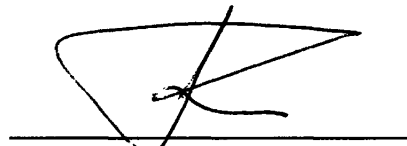
Done in both English and French, the English version being authoritative.

A handwritten signature in black ink, consisting of a large, stylized 'C' followed by 'E-O', written over a horizontal line.

Judge Chile Eboe-Osuji
(Presiding)

A handwritten signature in black ink, appearing to read 'O. Herrera C.', written over a horizontal line.

Judge Olga Herrera Carbuccia

A handwritten signature in black ink, consisting of a large, stylized 'R' followed by 'F', written over a horizontal line.

Judge Robert Fremr

Dated 3 September 2013

At The Hague, The Netherlands