

**Cour
Pénale
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**International
Criminal
Court**

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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

Public redacted version of “Corrected version of Prosecution’s Request for in-court protective measures and Notice of application of Regulation 42(2)”, ICC-01/09-01/20-199-Conf-Exp-Corr, 25 October 2021”

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

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I. INTRODUCTION

1. Pursuant to Trial Chamber III's¹ Directions on the Conduct of Proceedings,² the Office of the Prosecutor³ requests the Chamber to authorise the following in-court protective measures for the following witnesses, in accordance with articles 64 and 68, and rules 87 and 88 of the Rules of Procedure and Evidence:⁴
 - a. Witnesses P-0341, P-0274 and [REDACTED]: 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 and 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, as explained below.
2. The protective measures requested concern two broad categories of witnesses: (i) witnesses who have been admitted⁵ into the ICC protection program⁶ [REDACTED];⁷ and (iii) witnesses who are current⁸ and former⁹ OTP staff members and who travel frequently to conduct confidential investigations in the field and in high risk areas.
3. The measures sought are appropriate and justified in view of the risk faced by these witnesses in appearing before the Court. For category (i), these measures are substantiated by best practices in the field and in order to not compromise the protection already afforded or about to be afforded to them through the

¹ "Chamber".

² ICC-01/09-01/20-189, para. 40.

³ "Prosecution" or "OTP".

⁴ "Rules".

⁵ [REDACTED].

⁶ "ICCP".

⁷ [REDACTED].

⁸ [REDACTED], P-0733, P-0734 and P-0735.

⁹ P-0732.

ICCPP. For category (ii), the measures are required by the unique nature of the witnesses' past and present work.

4. The measures requested are also the least restrictive means necessary to appropriately balance the Accused's right to a fair and public trial against the Court's competing obligation to protect the physical and psychological well-being, dignity, and privacy, of victims and witnesses who appear before it. Moreover they do not unfairly prejudice the Accused.
5. The attendant risks to the witnesses in this case are substantial, particularly in light of the unprecedented level of public scrutiny and animosity against witnesses of both the Prosecution and Defence in the *Ruto and Sang* case,¹⁰ which also led to dire consequences.¹¹ The two cases are inextricably linked and the protection of prospective trial witnesses in this case warrants the Chamber's utmost vigilance.
6. Finally, the Prosecution respectfully notifies the Chamber that six witnesses the Prosecution intends to rely upon at trial - P-0516, P-0800, P-0613, P-0536, P-0495, and [REDACTED] - are already subject to protective measures ordered [REDACTED], pursuant to Regulation 42(2) of the Regulations of the Court.¹² As explained below, those measures have not been varied and the circumstances of the witnesses affected by them remain unchanged. As such, the Prosecution submits that those measures should continue to apply in this case.

II. CONFIDENTIALITY

7. This filing is classified as Confidential, *ex parte* – only available to the Prosecution and the Victims and Witnesses Section (VWS), pursuant to regulation 23*bis*(2) of

¹⁰ ICC-01/09-01/11-2027-Red-Corr, p. 118-129.

¹¹ **P-0730**: KEN-OTP-0159-0884 at 0906, paras. 85-86, at 0909, para. 91(h); **P-0731**: KEN-OTP-0160-0690 at 0691-0692, paras. 8-10; KEN-OTP-0135-0446 at 0447, para. 8; KEN-OTP-0160-0676; KEN-OTP-0160-0680; KEN-OTP-0160-0681.

¹² "RoC". See also, ICC-01/04-02/06-774-Conf, paras. 3-5.

the Regulations of the Court, as it contains confidential information bearing on witness security, including their current residence, work-related activities and protection status with the VWS. A confidential redacted and a public redacted version of this filing will be submitted shortly.¹³

III. SUBMISSIONS

8. The Prosecution currently intends to call approximately 12 to 13 witnesses to testify *viva voce*, including under rule 68(3).¹⁴ Depending on the circumstances prevailing at the time set for the commencement of trial in mid-February 2022, some witnesses may be required to testify via video-link due to COVID-19 related restrictions or other relevant applicable considerations.
9. This Request addresses the in-court protective measures that are reasonably foreseeable at this moment. The Prosecution cannot exclude, and even anticipates, that further modifications to some of the requested measures may be requested, in particular with respect to witnesses whose evidence the Prosecution is currently seeking to introduce in the record of the case pursuant to rule 68(2).¹⁵

A. Witnesses for whom protective measures are requested

a. Witnesses who have been included in the ICCPP or whose inclusion is imminent

10. The Prosecution seeks in-court protective measures for one witness who is in the ICCPP [REDACTED] and another witness [REDACTED]. For both witnesses, the Prosecution seeks in-court protective measures, in the form of voice and face

¹³ ICC-01/09-01/20-189, para. 46.

¹⁴ The Prosecution will file its final List of Witnesses by 15 November as per ICC-01/09-01/20-185, p. 9.

¹⁵ ICC-01/09-01/20-196-Conf.

distortion, the use of pseudonym, as well as use of private session pursuant to rule 87 and regulation 94.¹⁶

11. Both witnesses [REDACTED] provided evidence about having been corruptly influenced by the Accused and his associates in this case.¹⁷ As such, the Prosecution intends to call them to testify *viva voce*.¹⁸
12. [REDACTED] currently lives in [REDACTED]. He was interviewed by the Prosecution shortly after, [REDACTED]. [REDACTED]. [REDACTED] identity has already been disclosed to the Defence.
13. [REDACTED] was included in the ICCPP [REDACTED], and remains under VWS management.
14. In-court protection measures for these witnesses will further ensure that they can give evidence freely without fear for their personal safety and without compromising the security they have been afforded under the terms of the ICCPP.
15. Granting this request is consistent with the jurisprudence of the Court that has authorised similar measures to protect the safety of witnesses in the ICCPP.¹⁹ In the *Lubanga* case, for instance, the Chamber considered that:

“If any of [the ICCPP witness] identities were to become known, the whole purpose of their protection which has been afforded to the witnesses would be undermined, and they, together with their families would be at risk for an indefinite period of time. The accused has been

¹⁶ Of the Registry Regulations (“RoR”).

¹⁷ ICC-01/09-01/20-125-Conf-AnxA-Corr3, paras. 260-287, 303-315.

¹⁸ ICC-01/09-01/20-171-Conf, para. 11(i).

¹⁹ ICC-01/04-01/06-T-104-ENG ET, p. 4, l. 4 – p. 5, l. 1. **P-0516**: ICC-01/09-01/20-T-002-CONF-ENG, pp. 36-37; **P-0800**: ICC-01/09-01/11-T-152-CONF-ENG, pp. 18-19; **P-0613**: ICC-01/09-01/20-T-013-CONF-Red-ENG, pp. 6-7; **P-0536**: ICC-01/09-01/20-T-008-CONF-Red-ENG, pp. 14-15, ICC-01/09-01/11-902-Conf-Red, -Red2, paras. 26-27. *See below*, para.27.

given the full identifying details for these and is able, therefore, to deal with their evidence without restriction.”²⁰

b. Witnesses who are current or former OTP staff and who frequently travel to the field and other risk areas

16. Witnesses [REDACTED], P-0733, P-0734 and P-0735 are all current OTP staff assigned to different Divisions, Units and Sections dedicated to support the investigations.
17. P-0732 is a former OTP investigator [REDACTED].
18. For all these witnesses the Prosecution seeks in-court protective measures in the form of voice and face distortion, the use of pseudonym as well as use of private session, pursuant to rule 87 and regulation 94 of the RoR.
19. Granting this request for these witnesses is consistent with the Court’s jurisprudence. OTP staff members working in the field in charge of investigations have regularly been granted protective measures in order to avoid risks for the safety and also to protect ongoing investigations.²¹
20. The Prosecution intends to call [REDACTED] to testify *viva voce* in this case.²² He is [REDACTED] with the Investigation Division of the OTP. [REDACTED]. [REDACTED].
21. Due to the nature of his work, [REDACTED] travels extensively to high risk areas of OTP operation and given his seniority he is often involved in activities involving sensitive investigative matters, [REDACTED]. To preserve his ability to perform these and other core investigative functions across investigations and cases now and in the future, it is imperative that his identities be concealed from

²⁰ ICC-01/04-01/06-T-104-ENG ET, p. 4, l. 4 –18. See also more recently, ICC-01/14-01/18-906-ICC-01/14-01/18-906-Red2.

²¹ ICC-02/05-02/09-T-13-ENG CT WT 20-10-2009 12/101 NB PT, p. 11, lns. 13-29. See also, ICC-01/12-01/18-1019-Red2, paras. 15.

²² [REDACTED]. At the moment of filing this application, the record number of the request is not available.

the public at large. Publicly revealing his identity would not only place his personal safety at risk, but also that of colleagues working with him in the field as well as witnesses, victims and other individuals he interacts with.

22. P-0732, P-0733, P-0734 and P-0735 are witnesses whose evidence the Prosecution seeks to introduce in the record of the case pursuant to rule 68(2)(b).²³ If the Prosecution's applications are rejected, the Prosecution may call these witnesses to testify *viva voce* and for this reason it includes them in this application, without excluding the possibility of filing supplemental applications should the need arise.
23. P-0732 is a former OTP investigator who, under the direction of [REDACTED], conducted extensive investigative activities in the context of the article 70 investigation in this case. If called to testify in person, he will speak about a discrete matter concerning the investigation.
24. P-0732 now works as [REDACTED]. In this capacity, he may be required to deploy to high risk theatres conducting inquiries of a highly sensitive nature, including collecting intelligence from sensitive sources and other human assets. It is imperative, for his own security, that of the individuals he interacts with and the activities of his current employer that his identity not be divulged to the public.
25. P-0733 is an analyst with the Investigative Analysis Section. If called to testify in person, she will speak about a discrete matter concerning the investigation. Analysts, like investigators, are frequently required to deploy to the field in support of different investigative activities, including meeting and interviewing victims and witnesses, and collect a wide range of evidence. As such, their identities must be protected for the same reasons specified above for [REDACTED], to allow them to continue to operate safely in the field.

²³ On 22 October 2021 the Prosecution submitted an application to introduce their evidence at trial under Rule 68(2)(b). At the moment of filing this application, the record number of these requests are not yet available.

26. P-0734 and P-0735 are both [REDACTED] in the Forensic Science Section of the OTP. If called to testify, they will speak to a discrete matter of the investigation concerning the extraction of data from the [REDACTED] cell phone. These investigators conduct field investigations for the Prosecution and will continue to do so in the future. In order to ensure the security and confidentiality of their missions in foreign countries, which often present precarious security situations, it is necessary to keep the witnesses' identity confidential, allowing them to remain anonymous when operating in those countries, for the same reasons specified above for [REDACTED].

c. Witnesses who are subject to continuing protective measures ordered in the Ruto and Sang case, pursuant to Regulation 42 (2)

27. Witness P-0516, P-0800, P-0613, P-0536 and P-0495 testified in the *Ruto and Sang* case between September 2013 and November 2014.²⁴ Prior to their respective testimony, Trial Chamber V(A) ordered in-court protective measures for all of them in the form of voice and facial distortion, the use of a pseudonym and permitted private sessions, as necessary.²⁵

28. [REDACTED].²⁶

29. Regulation 42(2) provides that “[p]rotective measures once ordered in any proceedings in respect of a victim or witness shall continue to have full force and effect in relation to any other proceedings before the Court [...]”.

²⁴ **P-0516**: 22-26 September 2014; **P-0800**: 17-26 November 2014; **P-0613**: 18-20 June 2014; **P-0536**: 17, 19-20 September and 2-4 October 2013; **P-0495**: 16-22 September 2014.

²⁵ **P-0516**: ICC-01/09-01/20-T-002-CONF-ENG, pp. 36-37; **P-0800**: ICC-01/09-01/11-T-152-CONF-ENG, pp. 18-19; **P-0613**: ICC-01/09-01/20-T-013-CONF-Red-ENG, pp. 6-7; **P-0536**: ICC-01/09-01/20-T-008-CONF-Red-ENG, pp. 14-15, ICC-01/09-01/11-902-Conf-Red, -Red2, paras. 26-27; **P-0495**: ICC-01/09-01/20-T-047-CONF-ENG, pp. 62-63.

²⁶ [REDACTED].

30. P-0516, P-0800, P-0613, and P-0536 will be called to testify *viva voce* in this case,²⁷ having all been allegedly subject of corrupt influence by the Accused and his associates.²⁸
31. P-0495, a further alleged victim of the Accused's corruption scheme, and [REDACTED], [REDACTED] whose evidence the Prosecution is seeking to introduce in this case pursuant to rule 68(2)(d). If the Prosecution's applications for these witnesses are rejected, it may call them to testify *viva voce* and for this reason it includes them in this application, without excluding the possibility of filing supplemental applications should the need arise.
32. The Prosecution submits that pursuant to Regulation 42(1), the protective measures ordered by Trial Chamber V(A) and [REDACTED] in relation to P-0516, P-0800, P-0613, P-0536, P-0495 [REDACTED] respectively remain in place, and that in-court protective measures ordered by those Chambers in relation to these witnesses apply in these proceedings.²⁹
33. The circumstances that justified the in-court protective measures for P-0516, P-0800, P-0613 and P-0536 ordered by Trial Chamber V have not changed. At the time of their testimony [REDACTED].
34. As for P-0495, [REDACTED], he nevertheless was also considered by Trial Chamber V in need of in-court protective measures. While the witness has been out of reach to the OTP [REDACTED],³⁰ his last known location was [REDACTED]. To the best of the Prosecution's knowledge and belief, he remains [REDACTED], [REDACTED]. In light of the past and current situation

²⁷ ICC-01/09-01/20-171-Conf, para. 11(i). On 22 October 2021 the Prosecution submitted requests to introduce the evidence of these witnesses at trial under Rule 68(3). The record number of the request is not available at the time of filing this application.

²⁸ ICC-01/09-01/20-125-Conf-AnxA-Corr3, paras. 104-113, 135-160, 176-194, 239-247.

²⁹ ICC-01/04-02/06-774-Conf. See *mutatis mutandis*, ICC-01/09-01/20-165-Corr, para. 11.

³⁰ On 22 October 2021 the Prosecution submitted a request to introduce his evidence at trial under Rule 68(2)(d). The record number of the request is not available at the time of filing this application, but the Prosecution incorporates by reference all factual submissions relevant to the witness' current posture made therein.

[REDACTED], the Prosecution submits that P-0495 remains at risk should his identity become public, [REDACTED]. As such, the in-court protective measures he is subject to continue to be justified.

35. [REDACTED].³¹ [REDACTED] is a [REDACTED] with the Investigation Division of the OTP. [REDACTED]. [REDACTED] is also supporting the investigations in [REDACTED]. The same reasons underlying the need to grant in-court protective measures to [REDACTED] justify the continued application of the protective measures [REDACTED] to [REDACTED].
36. In light of the above, the continuing in-court protective measures put in place by Trial Chamber V for P-0516, P-0800, P-0613, P-0536 and P-0495, [REDACTED] remain necessary.

B. The requested measures are consistent with the rights of the Accused

37. Although the Prosecution requests that the identities of 13 witnesses be withheld from the public, the impact on the public nature of the proceedings is mitigated and justified in the circumstances of this case.
38. First, the measures requested are needed to ensure that the witnesses are able to provide unfettered evidence, and in so doing, assist the Court in establishing the truth. The identities of all core witnesses in this case have been known to the Defence for some time. The Defence will have the same opportunity and ability to question these witnesses as if their identities were publicly known, and is not prevented from conducting its own enquiries³² to test the prospective evidence.
39. Second, although the public will not know the identities of the affected witnesses, most of their testimony will be given in public session. Notably, the Prosecution has not (at this point) requested total closed session for any witness in an effort to limit the impact on the publicity of the proceedings as much as possible. Under

³¹ ICC-02/05-02/09-T-13-ENG CT WT 20-10-2009 12/101 NB PT, p. 11, lns. 12-19.

³² Subject to the protocols for witness contacts and the handling of confidential information, ICC-01/09-01/20-67-AnxII.

the requested measures, closed or private session will be used only for critical portions of testimony to protect the identities of witnesses or information that is particularly identifying and therefore likely to affect the security of the witness if broadcast publicly.

IV. CONCLUSIONS AND RELIEF SOUGHT

40. For the foregoing reasons, the Prosecution requests the Chamber to:
- a. Grant in-court protective measures in the form of voice and facial distortion, use of a pseudonym as well as use of private session for Witnesses P-0341, P-0274 and [REDACTED];
 - b. Grant in-court protective measures in the form of voice and facial distortion, use of a pseudonym and as well as use of private session for Witnesses P-0732, P-0733, P-0734 and P-0735, in the eventuality that their respective applications pursuant to Rule 68(2) are rejected; and
 - c. Take notice that in court-protective measures, in the form of voice and facial distortion, use of a pseudonym as well as use of private session, continue to apply in relation to Witnesses P-0516, P-0800, P-0613, P-0536, P-0495 and [REDACTED].



James Stewart, Deputy Prosecutor

Dated this 28th day of October 2021
At The Hague, The Netherlands