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TRIAL CHAMBER IV

Before: Judge Kuniko Ozaki, Presiding
Judge Christine Van den Wyngaert
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
THE PROSECUTOR *v.* FRANCIS KIRIMI MUTHAURA
AND
UHURU MUIGAI KENYATTA**

Public Document

with Confidential and *ex parte* Annex A available to the Prosecution, Muthaura Defence and the VWU only, Confidential Annexes B and C, and Confidential and *ex parte* Annex D available to the Muthaura Defence and the VWU only

Corrigendum to “Defence Application for (1) An Order prohibiting the Prosecution from contacting potential Defence witnesses without following the procedural safeguards stipulated in other cases before the ICC and (2) An Order to the Prosecution to disclose information on all contacts between the Prosecution and potential Defence witnesses”

Sources: Counsel for Ambassador Francis Kirimi Muthaura

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

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I. Introduction

1. The Defence of Ambassador Francis Kirimi Muthaura (“Defence”) respectfully requests that the Trial Chamber urgently issues an order prohibiting the Prosecution from contacting, by direct or indirect means, any individual whom it knows or believes to be a potential Defence witness¹ until such time that the Chamber renders a decision on the protocol arising out of the ordered² consultations between the parties, participants and Registry on the rules governing contact with witnesses of the other party. The Defence submits that the apparent - and un-denied - conduct by the Prosecution in this matter potentially amounts to serious misconduct that may have already placed the life of at least one potential Defence witness at risk (see Confidential and ex parte Annex D³), and which, inherent within it, includes the risk of subverting the proper administration of justice.

2. Additionally, the Defence requests the Chamber order the Prosecution to disclose as soon as practicable, pursuant to Article 67(2) of the Rome Statute (“Statute”), Rule 77 of the Rules of Procedure and Evidence (“Rules”) and for reasons of witness safety and security, a log of all direct and indirect contacts and attempted contacts between the Prosecution and potential Defence witnesses as well as all items that record, summarise or otherwise reference the contents of these communications. Finally, the Defence notifies the Chamber, parties, participants and Registry that the Defence shall not agree to any protocol arising out of the above mentioned consultations that does not follow the settled and unequivocal jurisprudence of this Court and include the minimum requirements that: 1) a party seeking to interview the witness of

¹ As expanded upon below, the Defence submits that any individual who has been interviewed by the Defence in the course of its investigations in this case is a potential Defence witness.

² Status Conference Transcript of 12 June 2012, ICC-01/09-02/11-T-18-ENG, p. 81, lines 23-25.

³ This annex is classified as confidential and ex parte available to the Muthaura Defence and the VWU Only because it discusses the security situation of a potential Defence witness and concerns ongoing Defence investigations.

an opposing party must notify the calling party and obtain the consent of such a witness through the opposing party or VWU; and 2) “the party calling the witness or relying on his or her statement is entitled to have a representative attending the interview, unless the interviewing party objects to such presence and applies to the Chamber for a ruling on the matter” or the witness does not desire the calling party to be present.⁴

II. Background

3. On 25 May 2012 at 11h50, Co-counsel for the Defence Ms. Shyamala Alagendra sent an email to the prosecuting Trial Attorney with conduct for this case, Ms. Adesola Adeboyejo, entitled “URGENT : OTP CONTACTING DEFENCE WITNESSES”.⁵ In the email, the Defence informed the Prosecution that it had received information that the Prosecution was making attempts to contact a potential Defence witness through a particular and named intermediary. Ms. Alagendra’s email further noted that though the Defence thought it unlikely that the Prosecution would be making such efforts “in light of the settled practice of the Court in relation to contacting other parties’ witnesses”, the Defence wished to provide “the Prosecution the opportunity to confirm or deny this assertion”.

4. At 18h01, Trial Attorney Ms. Adeboyejo responded by email that “[w]hilst the Prosecution is well aware of the practise in relation to contacting other parties’ witnesses in other cases, the position is not yet settled with regards to the Kenya cases. To this end, we will be grateful to receive from you, the exact details of the attempted contact.”⁶

⁴ *Prosecutor v. Laurent Gbagbo*, Pre-Trial Chamber III, Decision on the Protocols concerning the disclosure of the identity of witnesses of the other party and the handling of confidential information in the course of investigations, 6 March 2012, ICC-02/11-01/11-49, para. 32.

⁵ A copy of the email is included as Confidential *ex parte* Annex A available only to the Prosecution, Defence and VWU. The annex classified as such due to it containing the name of a potential Defence witness.

⁶ A copy of the email is included as Confidential Annex B, classified as such due to the email addresses revealed.

5. At 19h10, Lead Counsel for the Defence of Ambassador Muthaura, replied to Ms. Adeboyejo's email as follows, requesting an urgent response and also copying a representative of the Victims and Witnesses Unit (VWU):

The "practice" you describe is properly described as the required procedure when contacting another party's witness. The required procedure has been established pursuant to orders of successive Chambers of the ICC. It had been presumed by me that absent new jurisprudence altering the stated principles and practices set out by Judges, the OTP would not arrogate to itself authority to unilaterally set aside that law and required practice. Be that as it may, I must notify you that I do not consider it appropriate to give you any more information about this matter. The enquiry contained in Shyamala's e mail was specific and capable of being easily denied or confirmed by the OTP.

Accordingly, I must ask for a formal response to Shyamala's enquiry. Either to confirm or deny the allegation or to formally state that you decline to comment on the allegation of the OTP contacting Defence witnesses by means of the named intermediary without our knowledge.⁷

6. To date the Defence has received no reply from the Prosecution to Lead Counsel's urgent email of 25 May 2012.
7. At the Status Conference held on 12 June 2012, the Defence raised this issue and sought the assistance of the Trial Chamber. In the course of submissions, the Defence requested that pending any decision by the Chamber on this matter following Defence written submissions, and to mitigate irremediable harm, the Chamber order the Prosecution to comply with the standing jurisprudence of the Court on rules governing contact with witnesses of the other party and injunct, restrain or otherwise prohibit the Prosecution from

⁷ A copy of the email is included as Confidential Annex C, classified as such due to the email addresses revealed.

contacting Defence witnesses without first seeking the permission of the Chamber or the Defence.⁸

8. In response to the Defence request for an oral injunction and order, the Chamber proposed that the Prosecution voluntarily undertake to “refrain from contact with potential Defence witnesses [...] except for [...] some urgent circumstances involving witness security”.⁹ The Prosecution response was that

*it’s a difficult undertaking for us to make but yes, within the framework as framed by your Honours, we can make that, but with the caveat that because there is no protocol, even the issue of which Defence witnesses has been referred to, is still something that is still subject to discussion between both parties. Be that as it may, we would take it for the purpose of this hearing that these Defence witnesses being referred to are those identified as such for the - - during the pre-trial hearings. That’s the extent to which we can give an undertaking, your Honours.”*¹⁰

9. The Defence rejected this undertaking as insufficient,¹¹ subsequent to which the Chamber decided that it would issue an order following a written application by the Defence and response from the Prosecution on this matter, pending which “the Prosecution will do whatever they can do.”¹²

10. In accordance with the Chamber’s oral decision the Defence prays that the Trial Chamber prohibit the Prosecution from directly contacting potential Defence witnesses and order the Prosecution to disclose information on all

⁸ ICC-01/09-02/11-T-18-ENG, p. 69, line 24 to p. 70, line 8.

⁹ ICC-01/09-02/11-T-18-ENG, p. 79, line 17 to p. 80, line 2.

¹⁰ ICC-01/09-02/11-T-18-ENG, p. 80, lines 3 to 10.

¹¹ ICC-01/09-02/11-T-18-ENG, p. 80, lines 11 to 14.

¹² ICC-01/09-02/11-T-18-ENG, p. 81, lines 9 to 12.

contacts between the Prosecution and persons whom the prosecution know or believe to be Defence witnesses.

III. The Prosecution's stated position is contrary to the principles of legal certainty, good faith, *inter partes* cooperation and the Prosecution's own practice

11. Contrary to the Prosecution's assertion at the 12 June 2012 status conference,¹³ and as submitted by the Defence at the said conference,¹⁴ no 'protocol' was promulgated at the pre-trial stage of the case governing contact with witnesses of the other party. The 12 May 2011 Decision¹⁵ ("12 May Decision") referred to by the Prosecution instead concerns a Defence challenge to the conditions imposed by the Single Judge in the "Decision on Variation of Summons Conditions"¹⁶ ("4 April Decision") – namely that the Defence shall *"communicate the name and necessary contact details [of any potential witness] to the VWU which, in turn, will advise the Defence on whether this contact may put the person at risk and/or which security arrangements the Defence should obey, if necessary."*¹⁷

12. As is clear from the wording of both Decisions, the Single Judge's orders are not directed at the procedure for contacting witnesses of the other party, but rather the basic procedure the Defence must follow when it wishes to contact and seek the consent of any potential witness to conduct an interview, wherever that individual may be located, and regardless of whether the individual may be a witness of the Prosecution.

¹³ ICC-01/09-02/11-T-18-ENG, p. 73, line 19 to p. 74, line 8.

¹⁴ ICC-01/09-02/11-T-18-ENG, p. 74, lines 11 to 21.

¹⁵ Decision on the "Defence Request for Variation of Decision on Summons or in the Alternative Request for Leave to Appeal", ICC-01/09-02/11-89.

¹⁶ 4 April 2011, ICC-01/09-02/11-38.

¹⁷ *Ibid.*, para. 15.

13. Various Chambers of the International Criminal Court¹⁸ have considered the principles and modalities governing the very specific circumstances of contact with witnesses of the other party. The starting or triggering point is when one party knows or has cause to believe that the individual it wishes to interview is a witness of the other party. The 4 April and 12 May 2011 Decisions of the Single Judge are indifferent as to whether the Defence is aware of any affiliation the individual in question may have to the Prosecution, the Victims Participation and Reparations Section, a non-governmental organisation or any other entity; the same procedure, as quoted above, is to be followed regardless.

14. It is when such knowledge of witness affiliation exists however, that the pragmatic and essential procedures developed and repeatedly endorsed by the Chambers of this Court come into effect. Lead Counsel, well aware of the Court's clear jurisprudence on this issue, therefore promulgated internal protocols governing the conduct of Defence investigations, which were filed confidential *ex parte* Defence and VWU only with Pre-Trial Chamber II on 23 June 2011.¹⁹

15. The Defence was therefore operating under two "protocols": one governing the procedure for initiating contact with *any* potential witness, pursuant to the 4 April and 12 May Decisions; and one, internal protocol, governing the continuation of contact with individuals as soon as the Defence becomes aware that the individual may be a potential Prosecution witness.

¹⁸ See *infra* paragraphs 19-21 and 25.

¹⁹ ICC-01/09-02/11-133-Conf-Exp-AnxB.

16. While these protocols constitute Defence work product, it is appropriate to disclose that Paragraph 11 of this second Defence protocol²⁰ requires a Defence team member who, after initiating an interview with a potential witness, following the procedures set out in the 4 April and 12 May Decisions, learns that the individual being questioned may be a potential Prosecution witness, to halt the interview and contact supervisory Defence counsel, who shall then contact the Prosecutor directly and, if necessary, the Pre-Trial Chamber.

17. In order to ensure that this measure had the intended affect – to ascertain whether an individual being interviewed may be a potential Prosecution witness – the Defence inquired of each person it interviewed whether the individual had been contacted by any member of the Prosecution. This inquiry is reflected in the following language included in the statement of each witness submitted into evidence by the Defence at the confirmation stage of the case: “I have not been contacted by the Office of the Prosecutor of the International Criminal Court and I am not aware of any attempts by the Office of the Prosecutor to contact me”.²¹ No individual interviewed by the Defence indicated that the Prosecution or any other member of the Court had contacted him or her.

18. The reason behind the Defence’s implementation of this procedure, and as noted several times above, is the common, golden jurisprudential thread running through the decisions of all Chambers that have addressed the issue of contacting opposing party witnesses: communication with the witness through the calling party and the general right of the calling party to be present at any interview of the witness by the opposing party.

²⁰ ICC-01/09-02/11-133-Conf-Exp-AnxB.

²¹ See e.g., KEN-D12-0001-0001; KEN-D12-0001-0330; KEN-D12-0002-0210; KEN-D12-0003-0115.

19. Trial Chamber I held that “[a] party or a participant wishing to interview a witness whom the other party or a participant intends to call, shall first inform the party or the participant of the proposal,”²² and “[t]he party or participant calling the witness is entitled to have a representative present during the interview, unless – [] following an application – the Chamber rules otherwise.”²³ Trial Chamber I later explained that “there are no sustainable reasons in principle for distinguishing between prosecution and defence witnesses for these purposes: neither party ‘owns’ the witnesses it intends to call [...]”²⁴

20. Trial Chamber II cited with approval the approach of Trial Chamber I with respect to the right of the calling party to be present at any interview by the non-calling party “as it allows for all possible eventualities”,²⁵ as well as the requirement that the non-calling party communicate with the witness only through the medium of the calling party, or if deemed necessary, VWU.²⁶

21. Trial Chamber III noted that “Trial Chamber II has endorsed Trial Chamber I’s approach [on contacting for interviews witnesses to be called by the opposing party]” with certain exceptions to whether VWU need attend such meetings, and then “propose[d] to follow the practice implemented by Trial Chamber II.”²⁷

²² *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the prosecution’s application for an order governing disclosure of non-public information to members of the public and an order regulating contact with witnesses, 3 June 2008, ICC-01/04-01/06-1372, 3 June 2008, para. 14.

²³ *Ibid.*, para. 11.

²⁴ *Prosecutor v. Thomas Lubanga Dyilo*, Redacted Second Decision on disclosure by the defence and Decision on whether the prosecution may contact defence witnesses, 20 January 2010, ICC-01/04-01/06-2192-Red, para. 49 (emphasis added).

²⁵ *Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*, Decision on a number of procedural issues raised by the Registry, 14 May 2009, ICC-01/04-01/07-1134, para. 28.

²⁶ *Ibid.*, paras. 29-30.

²⁷ *Prosecutor v. Jean-Pierre Bemba Gombo*, Redacted Decision on the Prosecution’s Requests to Lift, Maintain and Apply Redactions to Witness Statements and Related Documents, 20 July 2010, ICC-01/05-01/08-813-Red, paras. 67-68.

22. Perhaps most inconvenient to the position taken by the Prosecution in its email of 25 May 2012 and at the 12 June 2012 Status Conference on the issue of contacting opposing party witnesses is the practice followed by the parties in the one Trial Chamber that has been constituted for more than a year without having issued a decision governing the contact of opposing party witnesses – Trial Chamber IV.²⁸ Even though no protocol has been endorsed or decision issued on the contact of opposing party witnesses by Trial Chamber IV, the Defence of Abdallah Banda and Saleh Jerbo (“Banda and Jerbo Defence”) submitted requests to the Prosecutor seeking to interview particular Prosecution witnesses.²⁹

23. The Prosecution did not, in response to these *inter partes* requests, inform the Banda and Jerbo Defence that they could directly contact Prosecution witnesses without notifying the Prosecution given the absence of any relevant protocol or decision in the record of that case. Instead, the Prosecution insisted that a particular process be followed: “*I have considered your request to interview certain Prosecution witnesses, and I agree to your request. However, any interviews of Prosecution witnesses by the Defence should follow the procedure outlined in my letter to you of 20 January 2011.*”³⁰ For sake of transparency and to provide the Chamber with a full briefing of its position on this issue, the Defence urges the Prosecution to disclose, in its Response to the present Defence Application, whether the procedures outlined in the referred 20 January 2011 letter sets out whether the Prosecution is the only party that shall be permitted to contact Prosecution witnesses for the purposes of

²⁸ *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Presidency, Decision constituting Trial Chamber IV and referring to it the case of *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, 16 March 2011, ICC-02/05-03/09-124.

²⁹ Defence Request for a Temporary Stay of Proceedings, 6 January 2012, ICC-02/05-03/09-274, para. 23 and Public Annexure M thereto (ICC-02/05-03/09-274-AnxM).

³⁰ See ICC-02/05-03/09-274-AnxM at p. 2.

obtaining their consent to be interviewed by the Banda and Jerbo Defence and whether the OTP insisted that, in principle, a member of the OTP should be present at any such interview.

24. If the answer, which Lead Counsel is well aware of,³¹ is “yes” to both queries, then the Prosecution will have insisted on following the two core guiding principles – the ‘golden thread’ – of ICC jurisprudence on the matter of contacting opposing party witnesses even where the Trial Chamber has not endorsed a protocol or otherwise issued a decision on the matter. As so aptly noted by Trial Chamber I, and as previously quoted, “there are no sustainable reasons in principle for distinguishing between prosecution and defence witnesses for these purposes [...]”³² For the Prosecution, in this case, to insist that it may ignore the settled jurisprudence and practice of the Court when contacting or attempting to contact potential Defence witnesses because no protocol exists in the record of the case is, in the Defence’s respectful submission, a most untenable position unbecoming of this high office.

25. Most recently, and while other Pre-Trial Chambers, including the Pre-Trial Chamber in this case, did not issue decisions on the subject of contacting opposing party witnesses, Pre-Trial Chamber III, in *Prosecutor v. Laurent Gbagbo*, has likewise followed the settled jurisprudence and practice of the Court on the two core and unchanging elements of contacting opposing party witnesses:

[T]he Single Judge considers it is appropriate, based on the jurisprudence of the Court, to establish the procedures governing the conditions under which the investigating party is allowed to contact the other party’s witnesses [...] The

³¹ Lead Counsel for Ambassador Muthaura also serves as Lead Counsel for Abdallah Banda and Saleh Jerbo.

³² *Prosecutor v. Thomas Lubanga Dyilo*, Redacted Second Decision on disclosure by the defence and Decision on whether the prosecution may contact defence witnesses, 20 January 2010, ICC-01/04-01/06-2192-Red, para. 49 (emphasis added).

*consent [of the witness] must be given voluntarily and must be sought through the representative of the other party [...] Concerning the presence during the interview of a representative of the party calling the witness or relying on his or her statement, the Single Judge considers it appropriate to endorse the established practice of other Chambers. Accordingly, the party calling the witness or relying on his or her statement is entitled to have a representative attending the interview, unless the interviewing party objects to such presence and applies to the Chamber for a ruling on the matter [or the witness does not wish the calling party to be present].*³³

26. The Defence has acted with utmost good faith. It instituted an internal policy in accordance with the settled jurisprudence of three Trial Chambers and now at least one Pre-Trial Chamber, and, in the respectful submission of the Defence, followed the practice of the Prosecutor in cases where no relevant protocol or decision has been issued on the subject of contacting opposing party witnesses. The Defence wholeheartedly agrees with the admonishment of the Presiding Judge that this matter is basically an *inter partes* issue.³⁴ However, the *inter partes* mechanism can only function on the basis of trust, transparency and genuine cooperation between the parties. If one party proceeds in a surreptitious fashion to contact or attempt to contact the witnesses of another party on the basis that it is under no obligation to follow, or at the very least notify that it shall not be following, the unchallenged and repeatedly re-affirmed jurisprudence and practice of the Chambers of the Court and the party's own practice, then the *inter partes* process has not even been given the opportunity to succeed.

³³ Decision on the Protocols concerning the disclosure of the identity of witnesses of the other party and the handling of confidential information in the course of investigations, 6 March 2012, ICC-02/11-01/11-49, paras. 29, 31-32.

³⁴ ICC-01/09-02/11-T-18-ENG, p. 69, lines 5-8.

27. If the Prosecutor's stated policy in this case is allowed to stand without rebuke from the Chamber – namely that the Prosecution need not follow, nor at the very least even notify that it shall not follow, the settled jurisprudence of the Court on essential procedural matters – then this Defence and every defence team that shall come before the Court will have to apply to the Pre-Trial Chamber (and in some instances the Trial Chamber) for the issuance of every conceivable manner of procedural guarantee necessary to preserve the rights of suspects and accused persons if such guarantees are not already established by the Appeals Chamber or otherwise by specific rulings of the Chamber before which that suspect or accused appears. Such a situation is of course untenable; the basic principles of legal certainty and like cases being treated alike must prevail.

IV. Potential harm requiring the issuance of an urgent injunction

28. The Prosecution's position on the issue of contacting opposing party witnesses in this case, as set out in its email of 25 May and at the 12 June status conference, is similar to its submissions before Trial Chamber II on the more specific issue of a protocol governing contact with protected witnesses.³⁵

The Trial Chamber observed:

As regards the Protocol's field of application, the Chamber notes that the Prosecutor considers that he does not have to apply the Protocol during his own investigations since he was not involved in drafting it. However, the Chamber would recall that the purpose of the Protocol is to lay down a set of general guidelines which are to be applied on a case-by-case basis [...] The Chamber considers that the Protocol constitutes a set of minimum rules designed to safeguard the security of all protected witnesses, whether called by the Prosecutor or by the other participants. It is the Chamber's view that, although the

³⁵ *Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*, Decision on the "Protocol on investigations in relation to witnesses benefiting from protective measures", 26 April 2010, ICC-01/04-01/07-2047-tENG.

*Prosecutor is free to adopt practices which offer greater protection during his investigations, he cannot, however, disregard those minimum rules.*³⁶

29. Indeed, the Defence does not file this urgent application as an academic exercise aimed at preserving legal cohesion in the jurisprudence of the Court, but because the practices developed and followed at the Court with respect to contacting opposing party witnesses are the “minimum rules” necessary to preserving the security and well-being of potential witnesses as well as safeguarding the integrity of the proceedings, as much as is possible, from any appearance of witness intimidation, duress or inducement by the parties.

30. With respect to the security and well-being of a potential witnesses once a party has followed the established procedure in seeking to interview the witness, “and if the witness consents to the meeting,” the *Lubanga* Trial Chamber notes that “*the party calling him or her will have to consider the circumstances of the proposed meeting and whether there are any significant adverse security implications; it will have to ensure there are no identifiable issues of concern as regards the individual witness’s mental or emotional stability [...]*”³⁷

31. The Prosecution has made reference to “interference” with its potential witnesses and concerns regarding their security.³⁸ The Defence accepts that the Prosecution is the entity best placed to evaluate and address the security and other concerns of its potential witnesses, save perhaps in circumstances when a witness is part of the ICCPP. Similarly, and as is clearly established by the above quoted *Lubanga* Trial Chamber Decision, the Defence is the party

³⁶ Ibid., para. 14 (internal citation omitted) (emphasis added).

³⁷ Trial Chamber I, Redacted Second Decision on disclosure by the defence and Decision on whether the prosecution may contact defence witnesses, 20 January 2010, ICC-01/04-01/06-2192-Red, para. 50 (emphasis added).

³⁸ Prosecution’s Submissions on the Agenda for Status Conference, 28 May 2012, ICC-01/09-02/11-428, paras. 11-12.

best positioned to evaluate and address the security and other concerns of its potential witnesses.

32. Defence witnesses have also been threatened, including the individual who was the subject of the Defence's email of 25 May 2012. As is set out in Annex D to this filing, the Defence have reason to believe this threat – accompanied by monetary promises should the witness change and fabricate his testimony in a manner unfavourable to Ambassador Muthaura – resulted from the actions of persons linked to the Prosecution. While matters are proceeding quickly and the Defence is in the process of ascertaining the exact nature of the threat to this potential Defence witness, if in fact persons linked to the Prosecution were responsible for this security threat it will have been a grave violation of the Prosecutor's obligation under the Rome Statute. Indeed, the Prosecutor's actions – or lack thereof, if confirmed, constitute especially egregious misconduct given the stinging criticism of the *Lubanga* Trial Chamber of the Prosecution's use of intermediaries in that case.³⁹

33. Accordingly, under these circumstances, and until the Chamber has ruled definitively on the matter, it is imperative that the Prosecutor be enjoined, restrained or otherwise prohibited from contacting potential Defence witnesses directly or indirectly (through third parties) – for any reason whatsoever – without first notifying the Defence and the Chamber. Only the Defence should serve as a conduit between the Prosecution and any potential Defence witness that consents to speak to or otherwise meet with the Prosecution. To be clear, the term "potential defence witness" includes not only the individuals named in the Defence List of Evidence, such as the

³⁹ Trial Chamber I, Judgment pursuant to Article 74 of the Statute, 14 March 2012, ICC-01/04-01/06-2842. pgs. 90-220.

individual who is the subject of the Defence's 25 May 2012 email,⁴⁰ but also individuals whom the Prosecution are aware or have reasonable grounds to believe have provided a statement to or otherwise met with members of the Defence as part of their substantive investigation into the case. As submitted above and also established through the attached annexes, both the safety of potential witnesses and the integrity of the judicial proceedings are at on going risk due to the Prosecution's unilateral decision to ignore the settled jurisprudence of the Court on the contact of opposing party witnesses.

V. Disclosure of contact logs and other pertinent information pursuant to Article 67(2), Rule 77 and for reasons of witness safety and security

34. Given the grave security risks arising out of the Prosecution's decision to ignore the established jurisprudence of the Court with respect to the contact of opposing party witnesses, it is essential that the Prosecution be ordered to immediately disclose to the Defence a log of all direct and indirect (such as through third parties) contacts and attempted contacts between the Prosecution and potential Defence witnesses as well as all items that record, summarise or otherwise reference the contents of any and all communications the Prosecution or persons affiliated with the Prosecution (such as intermediaries) may have had with potential Defence witnesses. As submitted above, and in line with the jurisprudence of Trial Chamber I,⁴¹ the Defence is best positioned to be able to evaluate and mitigate any security or other risks that may have arisen with respect to its potential witnesses due to the Prosecution's actions. In order to do so, the Defence must know which of its potential witnesses the Prosecution has directly or indirectly been in contact with, as well as the context and substance of any interactions.

⁴⁰ ICC-01/09-02/11-305-Conf-Anx4.

⁴¹ Redacted Second Decision on disclosure by the defence and Decision on whether the prosecution may contact defence witnesses, 20 January 2010, ICC-01/04-01/06-2192-Red, para. 50.

35. Furthermore, any information pertaining to Prosecution contact with potential Defence witnesses would most certainly be material to the preparation of the Defence, and therefore subject to disclosure pursuant to Rule 77 of the Rules. It also possible that such material would be required to be disclosed, and as soon as practicable, under Article 67(2) as potentially exculpatory information.

VI. Notification of Defence's minimum requirements for a protocol governing contact with witnesses of the other party

36. Given the above Defence submissions, it should perhaps come as little surprise to the Chamber, parties, participants and the Registry that the Defence is unable to agree to any protocol that does not include the two core principles governing contact with opposing party witnesses as set out in the jurisprudence of the Court. First, under all circumstances, the party intending to call a witness must be notified if an opposing party wishes to contact such a witness and all communications between the non-calling party and the witness for the purposes of seeking consent to interview the witness must pass through either the calling party or the VWU. Second, in principle the calling party has the right to be present at the interview of the witness by the non-calling party unless the Chamber, after application by the non-calling party, orders otherwise or the witness does not wish the calling-party to be present.

Relief Requested

For the reasons submitted above, the Defence hereby respectfully requests that the Chamber immediately:

- (i) Issue an order prohibiting the Prosecution from contacting through direct or indirect means 'potential Defence witnesses', as that phrase is defined at paragraph 33 above;

and

- (ii) Order the Prosecution to disclose to the Defence log of all direct and indirect (such as through third parties) contacts and attempted contacts between the Prosecution and potential Defence witnesses as well as all items that record, summarise or otherwise reference the contents of any and all communications the Prosecution or persons affiliated with the Prosecution (such as intermediaries) may have had with potential Defence witnesses.

Respectfully Submitted,



Mr. Karim A. A. Khan QC
Lead Counsel for Ambassador Francis K. Muthaura

Dated this 15th Day of June 2012

At The Hague, The Netherlands