

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 18 June 2012

TRIAL CHAMBER V

Before: Judge Kuniko Ozaki, Presiding Judge
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 Redacted Version

Public Redacted Version of the Prosecution Response 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”

Source: The Office of the Prosecutor

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

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Introduction

1. The Prosecution hereby submits its response to the “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” (“Defence Application”).¹

2. The Defence Application fails both in fact and in law and should be dismissed. The Defence’s suggestion that the Prosecution is acting improperly in the course of its investigations or departing from the “golden jurisprudential thread running through the decisions of all Chambers” is nothing more than over-blown rhetoric.² The Prosecution has and continues to conduct itself in good faith, in accordance with its statutory duties, and with scrupulous regard for the security of witnesses.

3. The Prosecution understands the Defence Application to be requesting an interim injunction pending the Chamber’s decision on whether to adopt a witness contact protocol in this case. This request, however, in fact seeks a ruling so broad that it would prevent the Prosecution from conducting ordinary investigative activity; Defence *meetings* with persons it characterizes as *potential* Defence witnesses would thereafter bar the Prosecution’s ability to talk to them. This position defies common sense, is unsupported in law, and is antithetical to the Court’s truth finding function. The request for an interim injunction should be rejected, along with the other relief sought in the Defence Application.

¹ 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, 14 June 2012, ICC-01/09-02/11-433.

² ICC-01/09-02/11-433, para 18.

Confidentiality

4. To provide a comprehensive response to the Defence Motion, the Prosecution has been required to include in its response information that would not normally be shared with the Defence or the public, at least at this stage of proceedings. This information includes the identities of individuals whom the parties may call as trial witnesses. To account for this, the Prosecution is filing three versions of its response, with varying confidentiality designations.
5. The first version is designated as “public” and redacts information that, if disclosed publicly or to the Defence, may place certain witnesses at risk of retaliation on account of their co-operation with the Prosecution or Defence.
6. The second version is designated “confidential”, available to all parties and participants, but not to the public. The only information redacted from this version are (i) the identities of potential Prosecution trial witnesses and information that would lead to their identification; (ii) information discussed at the *ex parte* hearing on 12 June 2012, which the Prosecution cannot unilaterally reclassify;³ and (iii) information relating to an ongoing Prosecution investigation into witness tampering.
7. The third version is designated “confidential, *ex parte*”, available to the Chamber and the VWU only. This version is unredacted to ensure that the Chamber is provided with all relevant information.

³ See Regulation 23*bis*(3).

Procedural Background

8. At the status conference held on 12 June 2012, counsel for Mr Muthaura stated that the Defence had “received information that the Prosecutor was using an intermediary to contact one of [the Defence] witnesses”.⁴ The Defence stated that it would submit a written filing on the issue and requested, in the interim, that the “Prosecution be estopped and ordered, prohibited from contacting Defence witnesses”.⁵
9. In response to a question from the Chamber, the Prosecution undertook to “refrain from contact with Defence witnesses [identified during the pre-trial hearings] for four days, except for . . . urgent circumstances involving witness security”.⁶
10. On 14 June 2012, the Defence filed the Defence Application, in which it seeks an order prohibiting the Prosecution from “contacting through direct or indirect means ‘potential Defence witnesses’” and the disclosure of any “contacts and attempted contacts between the Prosecution and potential Defence witnesses”.⁷ On 15 June 2012, the Defence filed a corrigendum.⁸

Factual Background

11. [REDACTED]. The Defence Application is based upon a supposed Prosecution attempt to contact [REDACTED] through an “intermediary by the name of [REDACTED]”.⁹ The Prosecution has never instructed anyone named [REDACTED] to contact Mr [REDACTED] on its behalf.

⁴ ICC-01/09-02/11-T-18-ENG ET WT, page 67, lines 7-9.

⁵ ICC-01/09-02/11-T-18-ENG ET WT, page 69, lines 24-25; page 75, lines 17-22.

⁶ ICC-01/09-02/11-T-18-ENG ET WT, page 79, line 24 to page 80, line 10.

⁷ ICC-01/09-02/11-433, pages 18-19.

⁸ ICC-01/09-02/11-433-Corr.

⁹ ICC-01/09-02/11-433-Conf-Exp-Anx A.

12. Mr [REDACTED] was a central player in the post-election violence ("PEV"). He was a key intermediary between the PNU coalition – including both accused – and the Mungiki.¹⁰ He helped broker the truce and subsequent agreement between the Mungiki and the PNU during the 2007 campaign.¹¹ More importantly, as an intermediary between the accused and the Mungiki during the PEV, Mr [REDACTED] played, in the Pre-Trial Chamber's words, "[REDACTED]

"¹²

13. At confirmation, the Defence for both accused submitted and relied upon written statements of Mr [REDACTED].¹³ In the Prosecution's view, those statements contain falsehoods and half-truths. Tellingly, the statement submitted by the Muthaura Defence fails to address the PEV period itself, much less the allegations regarding Mr [REDACTED]'s role as an intermediary between the Mungiki and the accused.

14. Put simply, Mr [REDACTED] is in a position, should he choose to testify in this trial, to shed light on the responsibility of the accused for the crimes alleged in this case. The order requested by the Defence would, however, prevent the Prosecution from performing legitimate investigative activity aimed at establishing the truth in this case.

15. The Prosecution attempted to contact Mr [REDACTED] on four occasions. The first was in [REDACTED] 2011, before the Defence interviewed Mr [REDACTED].¹⁴ At that time, the Prosecution attempted to establish contact with him via an

¹⁰ See, e.g., Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-02/11-382-Red, paras [REDACTED]

¹¹ ICC-01/09-02/11-382-Red, paras [REDACTED]

¹² ICC-01/09-02/11-382-Red, para [REDACTED]

¹³ Statement submitted by the Muthaura Defence: [REDACTED]; statement submitted by the Kenyatta Defence: [REDACTED]

¹⁴ [REDACTED]

intermediary, after receiving information about an attempt on Mr [REDACTED]'s life and that he might be willing to provide evidence to the Prosecution.

16. More recently, the Prosecution made three efforts to contact Mr [REDACTED] directly, after receiving information from several sources that he might be willing to tell the whole story about his role. One of the several sources was [REDACTED], who informed the Prosecution [REDACTED] on [REDACTED] 2012 that Mr [REDACTED] was "50/50" on whether to withdraw the evidence he had provided to the Defence, "cross over to the other side", and give "true evidence" to the Prosecution.¹⁵ [REDACTED] also explained that Mr [REDACTED]'s willingness to remain a Defence witness was conditioned on receiving a security guarantee from the accused, which, at that point, had apparently not been given.

17. [REDACTED] asked the Prosecution team what he should do if he came across individuals who were willing to talk to the Prosecution, citing Mr [REDACTED] as an example. [REDACTED] expressed concern that for Mr [REDACTED], it would be dangerous to use the channel of communication normally used by the Prosecution and [REDACTED]. Prosecution staff responded that if [REDACTED] had information regarding persons willing to speak to the Prosecution, he should first contact the Prosecution through the normal channels, and the Prosecution would then establish an alternative mode of communication.

18. At no time did the Prosecution request [REDACTED] to contact Mr [REDACTED] on the Prosecution's behalf. Instead, the Prosecution twice telephoned Mr [REDACTED] on 13 April and 8 May 2012. The Prosecution also sent Mr [REDACTED] an email on 9 May, inquiring as to his willingness to speak with

¹⁵ [REDACTED]
[REDACTED]

the Prosecution. Mr [REDACTED] did not answer the Prosecution's telephone calls or email, and contact was not established.

19. **Witness X.** Witness X, [REDACTED], is a high level insider who attended several planning meetings with the accused before and during the PEV and has knowledge of their involvement therein. Like Mr [REDACTED], Mr [REDACTED] is in a position – should he choose to testify completely and accurately – to provide significant evidence about the responsibility of the accused for the crimes alleged in this case. He is [REDACTED]
[REDACTED]
[REDACTED]¹⁶

20. The Prosecution first interviewed Mr [REDACTED] on [REDACTED] 2011¹⁷ but did not rely on his statement at confirmation. Subsequent to his Prosecution interview, the Muthaura Defence interviewed him on [REDACTED] 2011,¹⁸ and his statement was offered by the Defence at confirmation.

21. The Prosecution re-interviewed Witness X between [REDACTED] 2012. During his re-interview, Witness X informed the Prosecution that his Defence interview had been organized by several intermediaries, including [REDACTED].¹⁹ Witness X stated that before being interviewed by Defence counsel, one intermediary told him “we don't want to hear anything like [REDACTED]”, which Witness X understood as an instruction to say only “what they are after, what they want to hear”.²⁰ He also explained that several parts of his Defence statement were untrue. For some of the falsehoods, Witness X said he

¹⁶ [REDACTED]
¹⁷ The Prosecution first established contact with Witness X on [REDACTED] 2011.

¹⁸ [REDACTED]

¹⁹ [REDACTED]
[REDACTED]
[REDACTED]

Witness X's interview was audio-recorded pursuant to Article 55(2) of the Statute. The audiotape is currently being transcribed, and the above information is taken from the tape.

simply lied to the Defence as a result of the instructions he had received from the intermediaries, and that his untrue responses were transcribed faithfully by the Defence team into the statement.²¹ On other matters, Witness X said that he told the Defence team the truth, but that his (true) responses were not included in the statement and that incorrect statements were included instead.²² According to Witness X, he was pressured into signing his statement and did not read it before doing so.²³ Witness X said that prior to signing his statement, he was concerned about his security because of what the Defence intermediaries had told him, and that [REDACTED] [REDACTED] said that after Witness X signed the statement, he would no longer have any security issues.²⁴

22. The Prosecution has had no communication with Witness X since [REDACTED] 2012. Witness X is currently [REDACTED] and his main protective measure is the fact that his co-operation with the Prosecution remains confidential as of today's date.

23. **Witness Y.** [REDACTED] is a high level insider who attended several planning meetings with the accused before and during the PEV and has knowledge of their involvement. Like Mr [REDACTED] and Witness X, Mr [REDACTED] is in a position – should he choose to testify completely and accurately – to provide significant evidence about the criminal responsibility of the accused.

24. Mr [REDACTED] is known to the Prosecution as [REDACTED] and [REDACTED]
[REDACTED]
[REDACTED]²⁵ He was a Defence witness at confirmation;

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ [REDACTED]

according to his statement, Witness Y was interviewed by the Muthaura Defence on [REDACTED] 2011.²⁶

25. During an interview in [REDACTED] 2012, Prosecution Witness Z [REDACTED] informed the Prosecution that Witness Y would “be available” to talk to the Prosecution. The Prosecution considered this to be significant given that Witness Z [REDACTED]

26. On the basis of this information, the Prosecution screened Witness Y by telephone on [REDACTED] 2012 and conducted an interview between [REDACTED] 2012. During his interview, Witness Y informed the Prosecution that he did not consider that he had provided his statement to the Defence voluntarily.²⁷ According to Witness Y, he agreed to provide the statement because he feared for his security.²⁸ He also expressed concern about what would happen to him if the Defence discovered that he had spoken to the Prosecution.

27. The Prosecution has had no communication with Witness Y since [REDACTED] 2012. Witness Y is currently [REDACTED] and his main protective measure is the fact that his co-operation with the Prosecution remains confidential as of today’s date.

28. [REDACTED]. Mr [REDACTED] is named on the confirmation hearing witness list for the Muthaura Defence.²⁹ He is [REDACTED]

²⁶ [REDACTED]

²⁷ Witness Y’s interview was audio-recorded pursuant to Article 55(2) of the Statute. The audiotape is currently being transcribed, and the above information is taken from the tape.

²⁸ *Ibid.*

²⁹ [REDACTED]

██████████,³⁰ where, on ██████████
 ██████████³¹

29. The Prosecution telephoned Mr ██████████ on 6 February 2012 to schedule a meeting to discuss and obtain ██████████ records. Mr ██████████ requested an official email request that he could send to ██████████. The Prosecution sent the requested email the same day. On 21 March, the Prosecution telephoned Mr ██████████ to follow up on the 6 February email. Mr ██████████ indicated that he would get back to the Prosecution in a few days. On 28 March Mr ██████████ sent the Prosecution an email stating that “we are happy to arrange a mutually convenient time and date for yourself or one of your colleagues to visit ██████████” and requesting that the Prosecution propose dates for the visit. The Prosecution replied the same day suggesting a meeting the week after Easter. On 15 June 2012, the Prosecution received what appeared to be an auto-generated message from Mr ██████████ email account, stating that he would be on leave for a period of time. The proposed meeting with Mr ██████████ has not taken place.

30. At no stage during the Prosecution’s contacts with Mr ██████████ did he indicate that he was unwilling to meet with the Prosecution to discuss ██████████ records, or request that the Defence be notified of the Prosecution’s wish to obtain the records in question. The Prosecution never requested Mr ██████████ to provide testimony in his personal capacity; he is simply the individual with whom the Prosecution must liaise in order to obtain ██████████ records.

31. **Current Officials in the Government of Kenya.** The Prosecution has, in the context of requests for State assistance under Part 9 of the Statute, addressed co-operation requests to officials in the Government of Kenya who were witnesses at confirmation for both accused. Specifically, the Prosecution has

³⁰ ICC-01/09-02/11-382-Red, para ██████████

³¹ ICC-01/09-02/11-382-Red, para ██████████; *see also* paras ██████████

contacted the following individuals after they were identified as Defence witnesses at the confirmation stage:

- Francis Kimemia, Acting Permanent Secretary to the Cabinet and Head of the Public Service;³²
- [REDACTED]
[REDACTED]
[REDACTED]³³
- Michael Gichangi, Head of National Security Intelligence Service;³⁴
- Mr. Thuita Mwangi, Permanent Secretary, Ministry of Foreign Affairs;³⁵
- Amos Wako, Former Attorney General of Kenya; Member, Cabinet Sub-Committee on the ICC.³⁶

32. These persons are Kenyan focal points on cooperation matters with the ICC and were contacted by the Prosecution in that capacity. The Prosecution has not requested statements, testimony, or any evidence from these individuals in their individual capacities.

The Prosecution's Investigative Activities Comply with the "Golden Thread" of this Court's Jurisprudence

33. The Defence does not – and cannot – argue that the Prosecution has violated any orders in this case. To the contrary, the Prosecution has complied with all judicial rulings applicable to this case. As the Defence concedes, "no

³² ICC-01/09-02/11-301-Conf-AnxA, page 5; ICC-01/09-02/11-T-7- ENG ET WT, page 68, lines 4-6; ICC-01/09-02/11-T-5-CONF-ENG, page 30, line 24 to page 31, line 4.

³³ [REDACTED]

³⁴ ICC-01/09-02/11-301-Conf-AnxA, page 3; ICC-01/09-02/11-T-7-ENG ET WT, page 13, lines 16-17.

³⁵ ICC-01/09-02/11-301-Conf-AnxA, page 3; ICC-01/09-02/11-T-9-CONF-ENG, page 14 and following; ICC-01/09-02/11-T-15-Red-ENG, page 46, lines 14-18.

³⁶ ICC-01/09-02/11-301-Conf-AnxA, page 8; ICC-01/09-02/11-382-Red, para 382, n.737; ICC-01/09-02/11-374-Red, para 95, nn.223-224.

‘protocol’ was promulgated at the pre-trial stage of the case governing contact with witnesses of the other party”.³⁷ Nor is there a Trial Chamber protocol; rather, this Trial Chamber requested submissions on “[w]hether a protocol... is necessary”.³⁸

34. More than that, the Single Judge opted not to establish at the pre-trial stage the rule in this case the Defence now seeks to enforce. During litigation regarding the suspects’ summons conditions, the Defence asked that Decision 38 be modified because, among other things, it “impose[d] no reciprocal obligations on the Prosecution as concerns their [sic] contacts and interviews with persons, who are either potential or actual witnesses for the Defence”.³⁹ In support, the Defence cited the Trial Chamber I and II jurisprudence it now relies upon to urge that a witness may not be contacted absent the consent of the calling party.⁴⁰ The Single Judge denied the Defence request, opting not to impose that rule regarding witness contact,⁴¹ and rejecting the Defence argument that “[t]he imposition of such judicial instructions” was “particularly warranted in the case of the Prosecution”.⁴²

35. Nonetheless, the Defence argues that the Prosecution should have followed the rule that the Single Judge opted not to adopt in this case. The Defence asserts that the jurisprudence of the other Chambers establishes a “golden

³⁷ ICC-01/09-02/11-433, para 11.

³⁸ Order scheduling a status conference, 14 May 2012, ICC-01/09-02/11-422, para 2(p).

³⁹ Defence Request for Variation of Decision on Summons or in the Alternative Request for Leave to Appeal, 11 April 2011, ICC-01/09-02/11-52, para 31.

⁴⁰ See ICC-01/09-02/11-52, para 31, n.13 (citing 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, para 14 & Decision on a number of procedural issues raised by the Registry, 14 May 2009, ICC-01/04-01/07-1134, paras 27-28).

⁴¹ Decision on the “Defence Request for Variation of Decision on Summons or in the Alternative Request for Leave to Appeal”, 12 May 2011, ICC-01/09-02/11-89, paras 10-24; disposition.

⁴² ICC-01/09-02/11-52, para 31. Contrast this with the approach taken in the *Gbagbo* case, where the Single Judge considered it necessary to adopt a protocol regulating contact with witnesses. See 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 29-32.

jurisprudential thread” – namely, “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”.⁴³ The Prosecution disagrees with the Defence’s interpretation of the precedents.

36. First, those Chambers’ decisions do not establish the rigid rule the Defence now seeks to enforce. Trial Chamber I explained that while contact with an adverse witness should, “in principle”, be established through the calling party, this principle’s “application ‘in practice’ will be infinitely various” and must take into account “the witness['] consent” and “whether there are any significant adverse security implications”.⁴⁴ Similarly, Trial Chamber II emphasized that witness consent is the touchstone: “[I]f the witness wishes that the interview take place without a representative of the party calling him or her, there is no need for an application to the Chamber [...]. The Chamber reiterates in this respect that interviews can only take place if the witness him or herself consents. This consent must be given voluntarily.”⁴⁵

37. In other words, the “golden thread” in the jurisprudence regarding witness contact is that the *consent* and *security* of witnesses is paramount. Trial Chamber I explained: “The overarching consideration is the consent of the witness. Once a witness consents, unless the Chamber rules otherwise, contact should be facilitated.”⁴⁶

38. The Single Judge in the *Gbagbo* case has taken the same approach, holding that “if the witness wishes for the interview to take place without a representative of the party calling him or her or relying on his or her

⁴³ ICC-01/09-02/11-433, para 18.

⁴⁴ 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, paras 49-50.

⁴⁵ Decision on a number of procedural issues raised by the Registry, 14 May 2009, ICC-01/04-01/07-1134, para 28.

⁴⁶ 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, para 11.

statement, then there is no need for an application to the Chamber, as the witness's consent in this sense is sufficient.”⁴⁷

39. The Prosecution's contact with the individuals described above has paid scrupulous regard to these bedrock principles of consent and witness security. For example, contacting Mr [REDACTED] and Witnesses X and Y through the Defence would likely expose them to heightened security risks by suggesting that they might depart from the evidence in their Defence statements. The Prosecution's security concerns are, moreover, shared by the witnesses themselves, as expressed during their Prosecution interviews.
40. At this juncture, it is important to emphasize that the Prosecution does not in any way suggest that Defence counsel or their staff have, or ever would, act improperly towards these individuals. However, counsel for both accused have taken the position that any materials provided to them must be passed on to their clients.⁴⁸ It is this prospect – information being provided to the accused, who are not in detention, and thereafter being communicated to their intermediaries and supporters on the ground – that lies behind the security concerns articulated by Witnesses X and Y, and those of other insiders.
41. In the circumstances, the Prosecution concluded that informing the Defence in advance – not Defence counsel, but the accused themselves, since counsel have made clear that they will pass along any information to their clients⁴⁹ -- would likely have placed the individuals in danger, in violation of the Prosecution's duties under Article 68 of the Statute.⁵⁰

⁴⁷ 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.

⁴⁸ See ICC-01/09-02/11-T-18-ENG ET WT, page 23, line 14 to page 24, line 9.

⁴⁹ See ICC-01/09-02/11-T-18-ENG ET WT, page 23, line 14 to page 24, line 9.

⁵⁰ The Defence's reliance on the parties' practice is the *Banda & Jerbo* case is inapposite. See ICC-01/09-02/11-433, paras 22-24. Witness security and well-being is not a “one-size-fits-all” issue. It requires a

42. Indeed, almost every insider – from government functionary to Mungiki member – who has spoken to the Prosecution has expressed a fear of being harmed or even killed because of co-operation with the Prosecution. This fear is objectively reasonable, as demonstrated by the post-PEV murders and forced disappearances of key witnesses with knowledge of the accuseds' roles in the PEV, including:

- Charles Ndungu Wagacha, acting Mungiki Chairman during the PEV, who allegedly attended meetings with senior PNU officials and liaised with them on behalf of Mungiki leader Maina Njenga, who was in prison at the time.⁵¹ Mr Wagacha was reportedly killed by police on 24 April 2008 on his way to meet with Maina Njenga in prison.⁵²
- Naftali Irungu, member of the Mungiki top leadership cell, who received money from PNU politicians to organize attacks during the PEV.⁵³ Mr Irungu was reportedly killed with Mr Wagacha on 24 April 2008.⁵⁴
- Maina Kangethe Dlambo, a senior Mungiki leader present at several meetings with PNU officials and Mungiki members during the PEV.⁵⁵ Mr Dlambo was reportedly arrested by the police on 13 June 2008 and subsequently disappeared.⁵⁶

detailed assessment of the specific circumstances of each individual and each specific case. What may be appropriate in one case may be entirely inappropriate in another. This case demonstrates the point. Given the history of witness interference in this case, it would have been reckless for the Prosecution to have mechanically applied non-binding jurisprudence and practices from other cases in its interactions with each and every witness, as the Defence argues. In the absence of a judicial ruling in this case, the appropriate course of action was the one the Prosecution employed – the course of action considered most likely to safeguard the security and well-being of the individuals concerned.

⁵¹ ICC-01/09-02/11-382-Red, para 194.

⁵² See KEN-OTP-0052-1317, at 1322; KEN-OTP-0053-0072; KEN-OTP-0053-0061; KEN-OTP-0053-0062.

⁵³ See KEN-OTP-0052-1317, at 1322; KEN-OTP-0060-0299 at 0314-0318; 0320; KEN-OTP-0060-0112, at 0122-0123.

⁵⁴ See KEN-OTP-0052-1317, at 1322; KEN-OTP-0053-0072; KEN-OTP-0053-0061; KEN-OTP-0053-0062.

⁵⁵ See ICC-01/09-02/11-382-Red, paras 311-312, 322, 342.

⁵⁶ See KEN-OTP-0053-0074, at 0116, para 61.

- Njuguna Gitau Njuguna, a Mungiki spokesman,⁵⁷ who played a central role in the deployment of Mungiki members to Naivasha during the PEV. Mr Njuguna was killed in Nairobi on 5 November 2009, after reportedly expressing an intention to meet with former ICC Prosecutor Luis Moreno-Ocampo, who was in Nairobi that day.⁵⁸
- George Njoroge Wagacha, personal assistant to Mungiki leader Maina Njenga during the PEV.⁵⁹ Mr Wagacha was reportedly killed together with Virginia Nyakio, Maina Njenga's wife, on 12 April 2008 on the way to meet with Mr Njenga in prison.⁶⁰

43. Equally important, the Prosecution's concerns for the safety of Witnesses X and Y have proven to be well-founded. As explained above, both explained to the Prosecution during their interviews that they had provided statements to the Defence – which according to Witness X included false exculpatory evidence – because they were concerned about their safety if they refused and/or because they understood from Defence intermediaries that they were expected to give exculpatory accounts.

The Defence Request for an Interim Injunction is Without Merit

44. The Defence argues that until this matter is resolved by the Chamber,⁶¹ “it is imperative that the Prosecutor be enjoined [sic], 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”.⁶² The Prosecution opposes the requested

⁵⁷ See KEN-OTP-0052-1523, at 1535.

⁵⁸ See KEN-OTP-0052-1331, at 1336; KEN-OTP-0052-1523, at 1536-1537; KEN-OTP-0060-0093, at 0105.

⁵⁹ See KEN-OTP-0060-0150, at 0155.

⁶⁰ See KEN-OTP-0053-0065, at 0066-0067.

⁶¹ The parties have begun the discussions regarding the possibility of a witness protocol, as ordered by the Chamber at the 12 June 2012 status conference. See ICC-01/09-02/11-T-18-ENG ET WT, page 81, lines 12 to 25.

⁶² ICC-01/09-02/11-433, para 33 (emphasis added).

injunction because it fails to address the specific circumstances of this case, would interfere with the Prosecution's statutory functions, and is manifestly overbroad.

45. While other Chambers may have chosen to regulate witness contact during the trial phase in a certain manner, it does not follow that the same approach should be followed here, particularly at this stage of the proceedings. In this case, the accused are at liberty in Kenya, where they hold considerable political and economic sway and have access to witnesses that external investigators could never hope to match. The witness security issues are daunting, the incidents of witness tampering and interference unprecedented.

46. Nor is there any basis for the Defence request. No party owns its witnesses. Not is it appropriate to impose blanket measures that are designed to impede the discovery of the truth. Nor is there any indication that the Prosecution behaved improperly or that unwilling witnesses were pressured to speak to the Prosecution. Rather, the Prosecution is conducting itself – as it always has – in accordance with its statutory duties regarding investigations and witness well-being. These duties include the Prosecution's responsibilities under Article 54(1)(a), its disclosure obligations under the Statute and the Rules, its obligations to respect the rights of the accused, and its obligations with respect to the security of witnesses. All of these duties and obligations are sufficient to protect the interests of the Defence. The requested interim injunction would constitute an unwarranted and unnecessary restriction on the Prosecution's functions and should be rejected on this basis.

47. Even if the Chamber were to consider granting interim relief, the requested injunction is manifestly over-broad. Despite the Defence's purported

reliance on decisions from other Chambers, its injunction request demands that this Chamber go significantly *further* than any Chamber ever has, particularly at this stage of the proceedings. The Defence requests the Chamber to enjoin the Prosecution from contacting not only individuals identified as Defence witnesses before the confirmation hearing, but also any “*potential* Defence witness”⁶³ – i.e., an “individual[] whom the Prosecution are aware *or have [sic] 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”.⁶⁴

48. If granted, the proposed injunction would prohibit the Prosecution from contacting anyone with whom the Defence team has so much as *met*, irrespective of whether the Defence intends to call that individual as a witness, and irrespective of whether the Defence has questioned the witness at all. Putting aside the practical impossibility of determining each and every individual whom the Defence may have *met*, the proposed injunction would effectively “lock down” the witness pool and prevent the Prosecution from exercising its statutory investigative functions.

49. Additionally, the proposed injunction would prevent the Prosecution from making routine contact with Kenyan government officials, and thus would interfere with the Prosecution’s statutory functions and require the Prosecution to channel its confidential co-operation requests through the Defence.⁶⁵

⁶³ ICC-01/09-02/11-433, para 1 (emphasis added).

⁶⁴ ICC-01/09-02/11-433, para 34 (emphasis added).

⁶⁵ *See, e.g.*, Article 87(3) of the Statute (“The requested State shall keep confidential a request for cooperation and any documents supporting the request, except to the extent that the disclosure is necessary for execution of the request.”); *see also* Article 87(4).

**Allegations Regarding a Security Threat Supposedly Emanating from
“persons linked to the Prosecution”**

50. At paragraph 32 of its Application, the Defence refers to an alleged threat to Mr [REDACTED] and states that it has “reason to believe that this threat – accompanied by monetary promises should the witness change or fabricate his testimony in a manner unfavourable to Ambassador Muthaura – resulted from the actions of persons linked to the Prosecution”.⁶⁶

51. The Prosecution can state without reserve that it has no knowledge of *anyone* acting on its behalf *ever* making threats or inducements to witnesses in this case. If and when the Defence decides to share its concrete allegations regarding the supposed “especially egregious misconduct”, the Prosecution will be able to respond.

The Disclosure Request Should be Denied

52. The Defence demand for disclosure of all “contacts and attempted contacts between the Prosecution and potential Defence witnesses” should be denied. It is largely moot, since the Prosecution has provided the sought-after information in this response.⁶⁷ Moreover, even as to persons not identified to the Defence, the request is inappropriate and, if granted, might create risks to the persons.

53. For example, the identities of Witnesses X and Y cannot be safely disclosed at this time. Both individuals have expressed objectively justifiable concerns for their safety if their co-operation with the Prosecution is disclosed. Before their identities are disclosed, the Prosecution should have the opportunity to discuss with them the prospect of disclosure and the associated security implications, and to assist them to take actions to mitigate the risks.

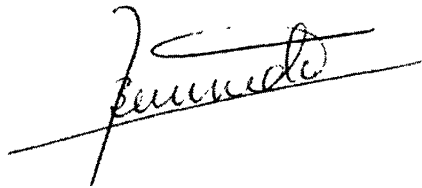
⁶⁶ ICC-01/09-02/11-433, para 32.

⁶⁷ ICC-01/09-02/11-433, para 34.

54. The Prosecution accepts that because of the allegations made by Witnesses X and Y regarding the veracity of their Defence statements, the manner in which they were taken, and the conduct of Defence intermediaries, the Defence should, in principle, be provided with the records of their interviews. The interviews were audio recorded and are in the process of being transcribed. Once transcription is complete, the Prosecution will promptly disclose them to the Defence, with any discrete redactions that may be warranted under the proposed redactions protocol, if such protocol is authorized by the Chamber.⁶⁸ Unless the Chamber rules otherwise, the Prosecution proposes to disclose the identities of Witnesses X and Y once appropriate security measures are in place.

Relief Requested

55. For the foregoing reasons, the Prosecution requests that the Chamber dismiss the Defence Application.



Fatou Bensouda,
Prosecutor

Dated this 18th day of June, 2012
At The Hague, The Netherlands

⁶⁸ See ICC-01/09-02/11-T-18-ENG ET WT, page 29, lines 12-16.