

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-02/11

Date: 22 June 2012

TRIAL CHAMBER V

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
with public annex**

**Submission of the draft protocol on contacts with the witnesses of opposing parties
and on communication of non-public information to the public in the course of the
parties and participants' investigations**

Source: Registrar

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

The Office of the Prosecutor

Ms Fatou Bensouda, Prosecutor

Counsel for Francis Kirimi Muthaura

Mr Karim Khan

Mr Essa Faal

Mr Kennedy Ogetto

Ms Shyamala Alagendra

Counsel for Uhuru Muigai Kenyatta

Mr Steven Kay

Ms Gillian Higgins

Legal Representatives of Victims

Mr Morris Anyah

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Deputy Registrar

Mr Didier-Daniel Preira

Victims and Witnesses Unit

Ms Maria Luisa Martinod-Jacome

Detention Section

**Victims Participation and Reparations
Section**

Other

The Registrar of the International Criminal Court (the “Court”);

NOTING the “Code of Professional Conduct for counsel” adopted by the Assembly of States Parties at the 3rd plenary meeting on 2 December 2005;¹

NOTING the “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” issued by Trial Chamber I on 3 June 2008;²

NOTING the “Code of conduct for investigators” promulgated by the Registrar in consultation with the President and the Prosecutor on 10 September 2008;³

NOTING the “Decision on a number of procedural issues raised by the Registry” issued by Trial Chamber II on 14 May 2009;⁴

NOTING the “*Corrigendum* to Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings” issued by Trial Chamber III on 12 July 2010;⁵

NOTING the “Redacted Decision on the Prosecution’s Requests to Lift, Maintain and Apply Redactions to Witness Statements and Related Documents” issued by Trial Chamber III on 20 July 2010;⁶

NOTING the “Decision authorising the appearance of Victims a/0381/09, a/0018/09, a/0191/08, and pan/0363/09 acting on behalf of a/0363/09” issued by Trial Chamber II on 9 November 2010;⁷

¹ Resolution ICC-ASP/4/Res.1.

² ICC-01/04-01/06-1372.

³ Ref: ICC/AI/2008/005.

⁴ ICC-01/04-01/07-1134.

⁵ ICC-01/05-01/08-807-Corr.

⁶ ICC-01/05-01/08-813-Red.

⁷ ICC-01/04-01/07-2517-tENG.

NOTING the “Decision on Variation of Summons Conditions” issued by Pre-Trial Chamber II on 4 April 2011;⁸

NOTING the “Decision on the “Defence Request for Variation of Decision on Summons or in the Alternative Request for Leave to Appeal” issued by Pre-Trial Chamber II on 12 May 2011;⁹

NOTING the “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” issued by Pre-Trial Chamber III on 6 March 2012;¹⁰

NOTING the “Victims and Witnesses Unit’s Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony and Protocol on the vulnerability assessment and support procedure used to facilitate the testimony of vulnerable witnesses” submitted by the Registrar before Pre-Trial Chamber I on 16 April 2012;¹¹

NOTING the Status Conference held on 12 June 2012;¹²

NOTING articles 43(6), 67(e) and 68(1), (3) and (4) of the Rome Statute, rules 16 to 19, 86 to 88 of the Rules of Procedure and Evidence, regulation 41 of the Regulations of the Court and regulations 79 and 92 to 96 of the Regulations of the Registry;

CONSIDERING that during the Status Conference held on 12 June 2012 the Chamber directed “the parties and legal representatives of victims to jointly consult with the Registry with a view to coming up with a workable protocol”¹³ regulating the contacts with the witnesses of opposing parties and communication of non-public information

⁸ ICC-01/09-02/11-38

⁹ ICC-01/09-02/11-89

¹⁰ ICC-02/11-01/11-49.

¹¹ ICC-02/11-01/11-93-Anx2.

¹² ICC-01/09-02/11-T-18-ENG.

¹³ ICC-01/09-02/11-T-18-ENG, p. 59, lines 14-20.

to the public and requested the Registry “to file a report to the Chamber with a draft protocol for the Chamber’s consideration by 4 July”¹⁴;

RESPECTFULLY SUBMITS a draft protocol on contacts with the witnesses of opposing parties and on communication of non-public information to the public in the course of the parties and participants’ investigations for the consideration of the Chamber:

1. The Victims and Witnesses Unit (the “VWU”) liaised with the Prosecution, both Defence teams and the legal representative of victims in order to prepare a draft protocol both on contacts with the witnesses of opposing parties and on communication of non-public information to the public in the course of the parties and participants’ investigations (the “Draft Protocol”). For this purpose the VWU prepared a draft for the parties and participants based on the existing jurisprudence and practices.
2. The respective teams communicated their comments on the Draft Protocol. Despite several exchanges of e-mails between the Registry representatives, no agreement was reached between the parties and the legal representative with regard to some of the provisions of the Protocol. Therefore, the VWU incorporated all of them in the attached annex for the consideration of the Chamber.
3. The VWU, as the issue impacted on parts of the attached Draft Protocol, also requested the parties and participants to provide their views concerning the case law of Pre-Trial Chamber II on the pre-clearance by the VWU of contacts between the Defence and potential witnesses.¹⁵
4. In that regard, the Prosecution suggested “discontinuing the standing order, in the understanding that the parties / participants who are notified of a request by the other party to contact “their” witness have the obligation to assess the

¹⁴ *Ibid.*

¹⁵ ICC-01/09-02/11-38 and ICC-01/09-02/11-89

security situation of this witness very carefully". The Prosecution added that "where necessary, or if in doubt, that party will need to liaise closely with VWU".¹⁶

5. The Defence team of Mr. Kenyatta agreed with the above suggestion.¹⁷
6. The Defence team of Mr. Muthaura however indicated that "regardless of initial concerns expressed by the Muthaura Defence at the pre-confirmation stage, in practice the pre-clearance procedure has worked very well [...] and] should continue given the various witness and victim security concerns that have been raised by all parties and participants in this case". The Muthaura Defence team concluded that "the bulk of the credit for the success of the pre-clearance process goes to VWU for the very professional and efficient manner in which they have addressed all pre-clearance requests submitted by the Muthaura Defence".¹⁸
7. Finally, the legal representative indicated that "if the standing order on pre-clearance with VWU [was] to be removed (thereby eliminating the requirements of ICC-01/09-02/11-38, re-affirmed in the May Order), the victims' view [was] that the definition of "victim" would have to include "victim applicant" [...]". He added that "if, on the other hand, the standing order remains in force, the victims' position is that this paragraph should be included in the Protocol: "The modalities which are prescribed in ICC-01/09-02/11-38 shall apply to contacts by the Defence with victim-applicants, and the VWU shall notify the legal representative (if known) of any such victim whenever the Defence seeks an "advise" from the VWU in relation to any such victim. The Prosecution shall notify the legal representative (if known) of any such victim before contacting or interviewing any such victim"".¹⁹
8. In light of the comments made during the discussions on the Draft Protocol, the VWU wishes to inform the Chamber, the parties and participants about the limitations attached to the application of the above mentioned case law:

¹⁶ E-mail from the representative of the Prosecution to the VWU dated 21 June 2012.

¹⁷ E-mail from the representative of the Kenyatta Defence team to the VWU dated 21 June 2012.

¹⁸ E-mail from the representative of the Muthaura Defence team to the VWU dated 21 June 2012.

¹⁹ E-mail from the representative of the Legal representative team to the VWU dated 21 June 2012.

1) First of all, the VWU recalls that the check that is (and can be) performed by the Unit is limited, in accordance with the Decision ICC- 01/09-02/11-89, to the verification of the existence of previous information at VWU's disposal which would indicate that the individual is already known to the Unit. Such information would indeed show that the individual already encountered security concerns and may trigger specific attention of the VWU and lead the Unit to invite the party willing to interview this individual to follow particular protection procedure. Before doing so, the VWU will always report to the Trial Chamber the outcome of its verification and seek the Chamber's guidance.

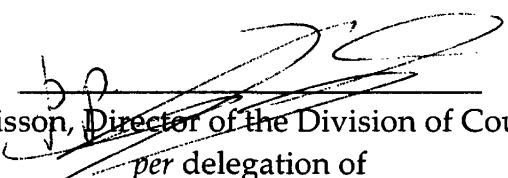
2) The VWU has taken note of the Muthaura Defence and the legal representative's comment with regard to the protection of victims-applicants. However, the VWU would like to indicate that several difficulties would emanate from such application of the case law. In particular, it is unclear how the VWU would receive relevant information and how it will be able to perform its check. The information that a victim-applicant is potentially indicating in his/her application form will have to be verified by the VWU which will suppose further assessment in the field. This task will be extremely time-consuming and it would be impossible for the VWU to comply with the time limit set out in the Decision ICC- 01/09-02/11-89.

3) The VWU, a unit within the Registry, shall not inform any party/participant of the intention of the other parties/participants to contact its witness/victim-client. The VWU will have to report to the Chamber should it come aware of the fact that a party wants to meet with a victim applicant. The VWU would follow the exact same path should a party wanting to meet a witness of the opposing party, if the VWU is informed of the status of this individual. Once again, the VWU reiterates that it would be only the case if this specific individual encountered security issues already reported to the VWU as the Unit

does not have necessarily at its disposal the full final lists of witnesses of the parties or of the victims.

4) Finally, the VWU is of the view that the Prosecution's proposal concerning the discontinuation of the Pre-Trial case law would appropriately allow the Unit to fulfil its mandate as any security concerns that the parties or participants may have will be reported to the Unit which would in turn provide its advice on protection whenever necessary.

9. The VWU remains available to provide further assistance to the Chamber in establishing a final Protocol on contacts with the witnesses of opposing parties and on communication of non-public information to the public in the course of the parties and participants' investigations.


Marc Dubuisson, Director of the Division of Court Services
per delegation of
Silvana Arbia, Registrar

Dated this 22 June 2012

At The Hague, The Netherlands