

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 24 August 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 document

**Decision on the protocol concerning the handling of confidential information
and contacts of a party with witnesses whom the opposing party intends to call**

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

The Office of the Prosecutor

Ms Fatou Bensouda

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

Deputy Registrar

Victims and Witnesses Unit

Ms Maria Luisa Martinod-Jacome

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber V (“Chamber”) of the International Criminal Court in the case of *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta* renders the following decision, having considered Articles 54(1)(b) and (3)(f), 57(3)(c), 67(1) and 68(1) of the Rome Statute (“Statute”), Regulations 92 to 96 of the Regulations of the Registry, and Article 8(4) of the Code of Professional Conduct for counsel.

Procedural background

1. On 12 June 2012, the Chamber held a status conference at which it directed the parties and legal representative of victims to jointly consult with the Registry with a view to proposing a workable protocol on contacts with the opposing party’s witnesses and on communication of non-public information to the public.¹ Such a draft protocol was to be filed by 22 June 2012.²
2. On 22 June 2012, the Registrar filed the “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”.³ A draft protocol (“Draft Protocol”) is appended to the Registrar’s submission as Annex 1. The parties, the legal representative of victims and the Victims and Witnesses Unit (“VWU”) agreed on most of the provisions of the Draft Protocol. Their arguments with respect to those provisions on which they could not agree are included in the Draft Protocol. The Chamber will not summarise these arguments, unless necessary.

¹ ICC-01/09-02/11-T-18-ENG, page 59, lines 14 – 18.

² ICC-01/09-02/11-T-18-ENG, page 81, lines 12 – 18.

³ ICC-01/09-02/11-440, with Annex 1. The documents were notified on 25 June 2012.

3. The Chamber notes, at the outset, that some aspects of the parties' contacts with the opposing party's witnesses were regulated at the pre-trial stage. Among the conditions restricting the suspects' liberty, Pre-Trial Chamber II included a prohibition of direct or indirect contacts with "any person who is or is believed to be a victim or a witness of the crimes for which Francis Kirimi Muthaura [and] Uhuru Muigai Kenyatta have been summoned".⁴ Subsequently, the Pre-Trial Chamber set out the modalities of the defence's contacts with persons willing to give their account of the alleged facts as follows:

- such a person must give his or her consent voluntarily and knowingly, and the parties to the proceedings are prohibited from trying to influence that person's decision as to whether or not to agree to be contacted by the defence;
- before such contact takes place, the defence is ordered to communicate the name and necessary contact details to the VWU, which is to advise the defence, within two weeks, on whether such contact may put the person at risk.⁵

4. In its decision of 12 May 2011, Pre-Trial Chamber II further decided that the above modalities only applied to the defence and not to the Office of the Prosecutor ("prosecution"), which has "significant duties as well as powers, related to the protection of victims and witnesses, which the Defence does not have."⁶

⁴ Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 8 March 2011, ICC-01/09-02/11-1, page 24.

⁵ Decision on Variation of Summons Conditions, 4 April 2011, ICC-01/09-02/11-38, paragraphs 15 to 16.

⁶ 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, paragraph 23.

Analysis

5. The Chamber takes note of the relevant jurisprudence of other Chambers.⁷ The Chamber will follow the principles enunciated by those Chambers, subject to modifications resulting from (i) the acceptance of some of the suggestions of the parties, the legal representative of victims and the VWU in the present case, and (ii) the specific circumstances of the present case. The Chamber considers that the final protocol, included as an Annex to the present decision, fully supersedes the procedure which applied to the defence at the pre-trial stage,⁸ without prejudice to paragraph 7 below. The Chamber points out that it has given considerable weight to the parties' agreements on various issues, notwithstanding that the Chamber is not bound by such agreements. Where there is no disagreement, the Chamber has generally accepted the proposed procedure in the form presented in the Draft Protocol, at times with minor modifications. As regards issues on which agreement was not reached and more than one option was presented to the Chamber, it chose the option which, in its view, best accords with the Chamber's sense of justice, having particular regard to the above-mentioned principles. The Chamber will discuss some of the issues on which there was no agreement and will give its reasons for preferring one option to another.

⁷ *Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, 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 (notified on 4 June 2008), ICC-01/04-01/06-1372; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Trial Chamber II, Decision on a number of procedural issues raised by the Registry, 14 May 2009, ICC-01/04-01/07-1134; *Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber III, 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; *Prosecutor v. Thomas Lubanga Dyilo*, 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; *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.

⁸ Decision on Variation of Summons Conditions, 4 April 2011, ICC-01/09-02/11-38, paragraphs 15 to 16.

6. The prosecution and the Muthaura defence proposed different definitions of a witness for the purposes of the Draft Protocol.⁹ The Muthaura defence's definition includes, *inter alia*, individuals whom the party has reasonable grounds to believe have met with another party or participant as part of that party or participant's substantive investigation into the case. The Chamber finds this definition too broad. The Chamber also fails to see how limiting the definition of "witnesses" to those identified in accordance with the definition suggested by the prosecution (*i.e.* any person whom a party or participants or participant intends to call during the trial proceedings, provided that the intention has been conveyed to the non-calling party) could adversely affect the principle of equality of arms, as argued by the Muthaura defence.¹⁰ In particular, the Chamber sees no risk of prejudice to the defence on account of the fact that the prosecution can contact persons whom the defence does not at this stage intend to call to testify but may choose to do so later on. If such persons provide to the prosecution information of an exculpatory nature, the prosecution will be obliged to disclose it to the defence in accordance with Article 67(2) of the Statute. Furthermore, if the prosecution eventually does not call them as witnesses, the defence will be free to call them. The Chamber also notes that the definition proposed by the Muthaura defence may extend to persons who are unlikely to ever be called as witnesses, for example persons whom a party met, as part of its investigation, for the sole purpose of obtaining information on the whereabouts of a person whom the party intends to call as a witness. The prosecution's definition of a witness will therefore be adopted for the purposes of the final protocol, with some modification.
7. The Chamber notes that the Draft Protocol contains proposed provisions pertaining to victims. As the Chamber has not yet ruled on the system of processing

⁹ Draft Protocol, pages 2 to 3.

¹⁰ Draft Protocol, page 2.

applications for participation and modalities of participation of victims, the final protocol, attached as the Annex, will not deal with matters relating to victims. The relevant parts of the Draft Protocol shall apply until the Chamber rules on these matters.

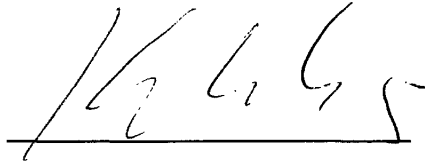
8. The Chamber does not agree with the proposal of the prosecution that no notification of the other party should be required when the witness him- or herself takes the initiative of contacting the non-calling party.¹¹ Such an exception is not consistent with the general requirement of transparency in parties' contacts with witnesses whom the opposing party intends to call. The Chamber is therefore of the view that witnesses who contact the non-calling party should be dealt with in the same way as where a party contacts the other party's witness, including the requirement of obtaining the witness' consent.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

DECIDES that the parties and legal representative of victims shall apply the Protocol set out in the Annex to the present decision and, in so far as contacts with victims are concerned, the Draft Protocol until the Chamber rules on such contacts.

¹¹ Draft Protocol, paragraph 3.

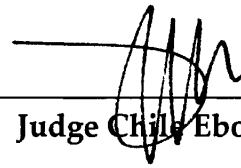
Done in both English and French, the English version being authoritative.



Judge Kuniko Ozaki, Presiding Judge



Judge Christine Van den Wyngaert



Judge Chiles Eboe-Osuji

Dated this 24 August 2012

At The Hague, The Netherlands