

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-02/11
Date: 9 November 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 supplementary protocol concerning the handling of
confidential information concerning victims and contacts of a party with
victims**

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 (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court”), in the case of *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta* (“Muthaura and Kenyatta case”), pursuant to Articles 54(1)(b) and 3(f), 57(3)(c), 67(1), 68(1) and (3), of the Rome Statute (“Statute”), Rule 89 of the Rules of Procedure and Evidence (“Rules”), Regulations 86 of the Regulations of the Court (“Regulations”), Regulations 92 to 96 of the Regulations of the Registry, and Article 8(4) of the Code of Professional Conduct for counsel issues the following Decision on the protocol concerning the handling of confidential information concerning victims and contacts of a party with victims (“Decision”).

I. PROCEDURAL BACKGROUND

1. On 24 August 2012 the Chamber issued the “Decision on the protocol concerning the handling of confidential information and contacts of a party with witnesses whom the opposing party intends to call” in the *Muthaura and Kenyatta* case, with the annexed Protocol (“Original Protocol”).¹ The Original Protocol is based on a draft protocol submitted by the Registrar as developed in consultation with the parties, the legal representative of victims, and the Victims and Witnesses Unit (“VWU”) (“Draft Protocol”).² In its decision, the Chamber noted that, although the Draft Protocol contained provisions pertaining to victims,³ these would not be addressed in the Original Protocol as the Chamber had not yet ruled on the system of victim participation to be applied in this case.⁴ The Chamber directed the parties and the legal representative of victims to apply the relevant parts of the Draft Protocol to contacts with victims until the Chamber ruled on such contacts.⁵

¹ ICC-01/09-02/11-469 and ICC-01/09-02/11-469-Anx.

² ICC-01/09-02/11-440, with Annex 1.

³ ICC-01/09-02/11-469, para. 7.

⁴ ICC-01/09-02/11-469, para. 7.

⁵ ICC-01/09-02/11-469, para. 7.

2. On 3 October 2012 the Chamber issued the Decision on victims' representation and participation,⁶ in which it ruled upon the procedures governing the participation of victims in the present case under Article 68(3) of the Statute. As set out in that decision, only those victims "who wish to present their views and concerns individually by appearing directly before the Chamber, in person or via video-link" must submit a written application to the Registry in accordance with Rule 89 of the Rules and Regulation 86 of the Regulations.⁷ After an initial review of these applications by the Registry for completeness, the Chamber will make a "preliminary assessment as to whether the suggested form of participation is appropriate and identify a limited number of victims who may be authorised to participate individually by appearing directly before the Chamber".⁸ After the preliminary assessment by the Chamber, the application forms of selected victims will be transmitted to the parties for their observations. The selected victims' identities will be disclosed to the parties at this stage.⁹
3. The present Decision supplements the Original Protocol¹⁰ in light of the Decision on victims' representation and participation.

II. SUPPLEMENTARY PROTOCOL CONCERNING CONTACT WITH VICTIMS AND THE HANDLING OF CONFIDENTIAL INFORMATION

1. Application of the Supplementary Protocol

4. The application of this supplementary protocol concerning contact with victims and the handling of confidential information ("Supplementary Protocol") will be triggered when the Chamber has conducted its preliminary review of a victim's

⁶ ICC-01/09-02/11-498.

⁷ ICC-01/09-02/11-498, paras 24 and 55 – 56. Pursuant to the Decision on victims' representation and participation, all other victims who wish to participate without appearing before the Chamber may present their views and concerns through the appointed common legal representative. (See para. 24 of ICC-01/09-02/11-498.) Victims in this category may register with the Court, in accordance with paragraph xx of the decision.

⁸ ICC-01/09-02/11-498, para. 56.

⁹ ICC-01/09-02/11-498, para. 57.

¹⁰ ICC-01/09-02/11-469-Anx.

application to participate individually and directly in the case and has submitted the application to the parties for their comments.

2. Definition of victim

5. Solely for the purposes of the Supplementary Protocol, the use of the term “victim” refers to a victim whose identity has been disclosed to the parties following the Chamber’s preliminary review of his or her application and submission of that application to the parties for comments.

3. Contacts with victims

6. A party which intends to contact a victim shall first notify the common legal representative of this intention. After being notified, the common legal representative shall seek the consent of the victim within five days of receiving notification. If the victim consents, the common legal representative shall inform the relevant party and facilitate contact as appropriate.
7. If the common legal representative objects to the interview, he or she shall inform the relevant party. If the common legal representative and the party cannot reach an agreement, despite their best efforts, they shall promptly raise the matter with the Chamber. The interview shall not take place until the Chamber rules on the matter.
8. The common legal representative may be present during an interview of a victim with the victim’s consent. The common legal representative present at an interview shall not, in any manner, prevent or dissuade the victim from answering questions freely, except where an objection to any particular question relates to the security of the victim. If the common legal representative considers that he or she must object to any part of the procedure followed or a particular line of questioning this will be

recorded for the Chamber's ruling on the application of the party affected. Such objections must not unduly impede or interrupt the interview.

9. The common legal representative may designate a member of his or her team to attend the meeting on his or her behalf if he or she cannot attend. The legal representative has the right to receive a copy of the statement, transcript or recording made during the interview.
10. In addition, it is the responsibility of the common legal representative to ensure that appropriate assistance is provided and that, where necessary, the VWU is contacted well in advance of any scheduled interview in order to arrange for an assessment of the need for assistance by a VWU representative during the interview.
11. The rules set out in paragraphs 14 and 15 of the Original Protocol shall apply to contact with victims who are participating in the ICCPP or subject to an assisted move.

4. Communication of non-public information to the public in the course of the parties and participants' investigations

12. The guidelines in relation to the disclosure of confidential information contained in paragraphs 16 to 36 of the Original Protocol shall apply to identifying information related to victims or their identified family members.¹¹

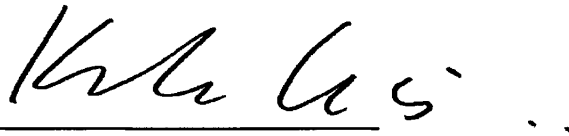
III. ORDERS

For the foregoing reasons, the Chamber hereby:

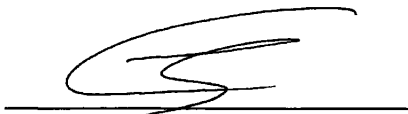
¹¹ ICC-01/09-02/11-469-Anx. The provisions contained in paragraphs 34 – 36 of the Original Protocol regarding breaches of confidentiality shall also apply to any accidental disclosure of confidential identifying information of a victim participant who has registered with the Court's database.

DECIDES that the parties and common legal representative of victims shall apply the Supplementary Protocol set out in paragraphs 4 to 12 of the present Decision.

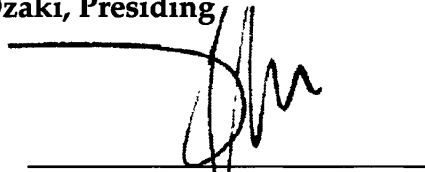
Done in both English and French, the English version being authoritative.



Judge Kuniko Ozaki, Presiding



Judge Christine Van den Wyngaert



Judge Chile Eboe-Osuji

Dated 9 November 2012

At The Hague, The Netherlands