



Original: English

No.: ICC-01/09-02/11
Date: 27 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
With 2 Annexes CONFIDENTIAL EX PARTE – Registry, OPCV -
**Registry's Observations Completing its
Proposal on the Division of Responsibilities and
Effective Functioning of the Common Legal Representation System**

Source: The 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 Fergal Gaynor

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms. Silvana Arbia

Counsel Support Section

Mr. Esteban Peralta Losilla

Deputy Registrar

Mr. Didier Preira

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Ms. Fiona McKay

Other

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

NOTING the “Decision on victims’ representation and participation” (the “Decision”) issued by Trial Chamber V (the “Chamber”) on 3 October 2012;¹

NOTING the “OPCV’s Proposal on the Division of Responsibilities and Effective Functioning of the Common Legal Representation System” (“OPCV’s proposal”) filed by OPCV on 17 October 2012;²

NOTING the “Registry’s Proposal on the Division of Responsibilities and Effective Functioning of the Common Legal Representation System” (“Registry’s proposal”) filed by the Registry on 17 October 2012;³

NOTING article 68(3) of the Rome Statute, rules 22, 89 to 91 of the Rules of Procedure and Evidence (the “RPE”), regulations 23*bis*, 24*bis*, 67, 68, 80 and 81 of the Regulations of the Court (the “RoC”), regulations 115, 124 and 125 of the Regulations of the Registry (“the RoR”), article 16 of the Code of Professional Conduct for Counsel (the “CPCC”);

CONSIDERING that, in her Proposal, the Registrar “reserve[d] her position as to the suitability of the [...] resources [proposed by the OPCV] for the purpose of implementing the Decision until communication of the identity, qualifications and experience of the proposed candidates”⁴ and submitted further observations that may have an impact on the suitability of the said resources;⁵

CONSIDERING that in order to complete her assessment to the Chamber, the Registrar addressed, on 22 October 2012, an internal memorandum to the Principal Counsel of OPCV (“the Registrar’s Memorandum”), seeking clarifications concerning information transmitted to Trial Chamber V on three issues:⁶

¹ ICC-01/09-01/11-498.

² ICC-01/09-01/11-507.

³ ICC-01/09-01/11-508.

⁴ ICC-01/09-01/11-508, par. 17.

⁵ ICC-01/09-01/11-508, par. 18.

⁶ Annex 1.

- the arrangement taken to segregate access to information by case between OPCV's legal teams (par. 17 of OPCV's proposal) ("the 1st issue");
- the fact that the two staff currently performing as P-4 are both tainted as far as the *Muthaura* case is concerned (par. 21 of OPCV's proposal) ("the 2nd issue"); and
- whether the resources identified by OPCV for the implementation of the Decision in the two *Kenya* cases fulfilled the requirements set up under rule 22 of the RPE and regulation 67 of the RoC, in particular "at least 10 years of relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings" (par. 16-17 of the Registry's proposal) ("the 3rd issue").

CONSIDERING that the Principal Counsel responded on 5 November 2012 by way of internal memorandum (the "OPCV's Memorandum");⁷

CONSIDERING that the Registrar hereby reiterates her full respect for the independence of the OPCV, as expressly emphasized at par. 24 of her Proposal and observes that the request for clarification were only prompted by the Registrar's commitment to complete the assessment requested by the Chamber in its Decision;

CONSIDERING that the Registrar now aims at completing her assessment in light of the information provided by the Principal Counsel;

RESPECTFULLY SUBMIT AS FOLLOWS:

A. On the 1st issue: arrangement taken to segregate access to information by case between OPCV's legal teams (par. 17 of OPCV's proposal)

1. At par. 17 of its Proposal, OPCV reminds its earlier submission before Pre-Trial Chamber II⁸ that, although no conflict of interests seemed to arise with respect to the representation of victims in both cases, it deemed necessary "to constitute two

⁷ Annex 2.

⁸ ICC-01/09-01/11-49, par. 5-7.

separate and autonomous legal teams, one for each case and to set up an arrangement to segregate access to information by case between OPCV's legal teams.

2. Since such segregation system did not appear in the lists communicated by OPCV with respect to access to TRIM documents – including victims' applications – and notifications of documents, the Registrar requested clarifications on this apparent discrepancy between the information transmitted to the Chamber and the instructions given to the Registry.⁹
3. In her Memorandum, the Principal Counsel thanks the Registrar for drawing her attention to this issue and writes that the Registrar's request prompted the OPCV to review its rules concerning the access to documents. On 30 October 2012, OPCV transmitted new instructions to the Registry: the lists of names of persons to whom access is granted to confidential and under seal documents are now different, with the exception of the Principal Counsel's name which still appears on both lists. Under seal documents are now to be accessed by the Principal Counsel only and a second person, different for each case, with the function of case manager for OPCV.
4. The Registrar further observes that, whereas only one of the two OPCV staff members working at P4 level previously appeared on both access lists in *Kenya 1* and *Kenya 2* cases and the other did not appear in any of the cases, the new instructions provided on 30 October 2012 now bear the name of the two P4 staff members in the *Kenya 1* case and none in the *Kenya 2* case.
5. In her Memorandum, the Principal Counsel further explains that, though not apparent from the outside, the segregation of information within the Office had been secured through internal procedures.

⁹ Annex 1 : Registrar's Memorandum, par. 2-4.

B. On the 2nd issue: the fact that the two staff currently performing as P-4 are both tainted as far as the *Muthaura* case is concerned (par. 21 of OPCV's proposal)

6. The Registrar observes that, with respect to the OPCV's submission that the two P4 staff members of OPCV could not work in the *Kenya 2* case because they had access to confidential documents in the *Kenya 1* case, the distribution lists communicated to Court Management Section show that:

- the Principal Counsel has access to under seal documents in both cases;
- the first P4 had access to confidential documents in both cases until 30 October 2012 and now has access to confidential documents in the *Kenya 1* case;
- the second P4 never had access to confidential documents in any of the two cases and was granted access to confidential documents in the *Kenya 1* case on 30 October 2012 only.

7. This information is without prejudice to the internal arrangements taken within the OPCV to segregate access to information between the two cases, as referred to in the OPCV's memorandum.

C. On the 3rd issue: whether the resources identified by OPCV for the implementation of the Decision in the two *Kenya* cases fulfilled the requirements set up under rule 22 of the RPE and regulation 67 of the RoC, in particular "at least 10 years of relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings" (par. 16-17 of the Registry's proposal)

8. The Registrar had reserved her position until further information was provided. In response to the Registrar's request, the Public Counsel reiterated that "in [her] assessment] a Legal Officer is well placed to perform the functions described in the decision".¹⁰ The Registrar takes note of this position and, in the absence of further information, can do no better than leaving this matter, especially the issue

¹⁰ Annex 2: OPCV's Memorandum, p. 3.

as to whether 10 years of relevant experience are required for the performance of the functions described in the Decision, to the appreciation of the Chamber.

9. With respect to the OPCV's further submission that "in any case, at this point in time, the Office is not in a position to assign other staff to the Kenyan cases", the Registrar refers to her above observations as to whether the two P4 staff members are, or not, "tainted" as far as the *Kenya 2* case is concerned.

RESPECTFULLY SUBMITTED



Silvana Arbia, Registrar

Dated this 27 November 2012

At The Hague, the Netherlands