

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 17 January 2013

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

Joint Defence Application for an Order to the Prosecutor for the provision of a list containing the bar memberships and good standing status of Prosecution trial lawyers expected to make submissions at trial and Request that the Trial Chamber promulgate a protocol of professional ethics applicable to Prosecution lawyers

Sources: Defence for Francis Kirimi Muthaura
Defence for Uhuru Muigai Kenyatta

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

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Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
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States' Representatives

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REGISTRY

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**Victims Participation and Reparations Other
Section**

I. INTRODUCTION

1. The Defence of Francis Kirimi Muthaura (“Muthaura Defence”) and the Defence of Uhuru Muigai Kenyatta (collectively “Defence”) hereby respectfully request the Trial Chamber (“Chamber”) to: (i) order the Prosecutor to provide the Defence with a list of all lawyers whom the Prosecutor intends to exercise rights of audience during the trial in this case; (ii) for each individual listed any and all national bars to which the individual is a member; and (iii) whether the individual remains in ‘good standing’ with respect to each bar he or she is admitted to. The Defence additionally request (iv) that the Trial Chamber promulgate a protocol stipulating the principles of ethics or deontology applicable to prosecution lawyers or alternatively issue a directive requiring the Office of the Prosecutor (“OTP”) to comply and uphold the Code of Professional Conduct for counsel with such consequential amendments and additions as are necessary to underscore the OTP’s unique obligations pursuant to, *inter alia*, Articles 42, 44 and 54 of the Rome Statute and its functions and responsibilities as the investigating and prosecuting authority before the International Criminal Court (“Court” or “ICC”).

2. The Defence submit that, in view of paragraph 4 of the Witness preparation protocol (“Protocol”)¹ promulgated by the Chamber, which sets out that “*[w]itness preparation is to be carried out in good faith and in keeping with the applicable standards of professional conduct and ethics*”, the provision of such information and the promulgation of an ethics protocol applicable to OTP lawyers is necessary, in accordance with the principle of equality of arms, fairness and transparency of procedures and in the interests of justice. At the same time, provision of such information and the promulgation of such a protocol will have no impact on the Prosecutor’s independence or the functioning of the Office of the Prosecutor.

¹ ICC-01/09-02/11-588-Anx.

II. BACKGROUND

3. On 2 January 2013, Trial Chamber V (“Chamber”) issued its “Decision on witness preparation” (“Decision”),² annexing thereto and adopting the “Witness preparation protocol”³ that “witness preparation shall be permitted [...] [to] take place in accordance with”.⁴
4. The Chamber held that in addition to the safeguards of cross-examination and the recording of witness preparation sessions, “[t]he risk that witness preparation could be used to coach witnesses can also be mitigated by clear guidelines establishing permissible and prohibited conduct”, which the “Chamber has included [...] in the witness preparation protocol”, and “addition[ally] [...] note[d] that professional standards require counsel to act in good faith at all times and prohibit intentional interference with a witness's evidence”.⁵
5. Paragraph 4 of the Protocol specifies that “[w]itness preparation is to be carried out in good faith and in keeping with the applicable standards of professional conduct and ethics”.⁶ Additionally, paragraph 6 of the Protocol requires the lawyer who will question the witness in court to conduct the witness preparation session.
6. On 7 January 2013, the Muthaura Defence emailed the Prosecution, requesting that it provide the Defence a list of all lawyers whom the Prosecutor presently intends will exercise rights of audience during the trial scheduled to begin on 11 April 2013.⁷ The Muthaura Defence noted that this request was without

² ICC-01/09-02/11-588.

³ ICC-01/09-02/11-588-Anx.

⁴ ICC-01/09-02/11-588, para. 53.

⁵ Decision, para. 49 (emphasis added).

⁶ ICC-01/09-02/11-588-Anx (emphasis added).

⁷ Email from Defence co-counsel Ms. Alagendra to Ms. Adeboyejo of 7 January 2013 at 17h37.

prejudice to the Prosecutor's right to change or supplement the composition of the Prosecution trial team in this case. The Muthaura Defence additionally requested that the Prosecution indicate in its response which of these lawyers are admitted to any national bar, if so which bar or bars, and whether the lawyer in question remains in 'good standing' with respect to the bar or bars where she or he is admitted.

7. The Prosecution trial attorney with carriage of the case responded to the Muthaura Defence email on 8 January 2013, declining to provide the requested information and stating that the Prosecution could not find a statutory basis for the Defence request.⁸

III. SUBMISSIONS IN SUPPORT OF THE DEFENCE APPLICATION

8. Defence counsel and other counsel⁹ practicing before the ICC must strictly adhere to the Code of Professional Conduct for counsel ("Code"), which contains detailed and specific provisions addressing, *inter alia*: the independence of counsel,¹⁰ the scope and definition of "professional conduct",¹¹ respecting and handling confidential information,¹² conflict of interest,¹³ communications with the Chambers and judges,¹⁴ duties towards the Court,¹⁵ the duty not to introduce evidence counsel knows to be incorrect,¹⁶ relations with other counsel,¹⁷ relations with witnesses and victims¹⁸ and the definition of misconduct under the Code.¹⁹

⁸ Email from Prosecution Trial Lawyer Ms. Adeboyejo to Ms. Alagendra of 8 January 2013 at 18h24.

⁹ Such as counsel for victims or counsel acting for States. See Code of Professional Conduct for counsel, Article 1.

¹⁰ Article 6.

¹¹ Article 7.

¹² Article 8.

¹³ Article 16.

¹⁴ Article 23.

¹⁵ Article 24.

¹⁶ Article 25(1).

¹⁷ Article 27.

9. Importantly, Article 4 of the Code establishes that “[w]here there is any inconsistency between this code and any other code of ethics or professional responsibility which counsel are bound to honour, the terms of this Code shall prevail in respect of the practice and professional ethics of counsel when practising before the Court.” Article 4 therefore recognizes the existence and applicability before the Court of additional codes of conduct and professional ethics governing and guiding counsel’s conduct and actions in matters related to the ICC, and clarifies that the Code is supreme in instances of conflict with other applicable codes and guidelines.
10. Unlike the position in respect of defence counsel practicing before the ICC, lawyers representing the office of the prosecutor at the *ad hoc* and hybrid tribunals,²⁰ and even the honourable judges of the Court,²¹ no code of professional conduct and ethics has been promulgated for the Office of the Prosecutor of the ICC. The Prosecution’s own stated position is that the Code “is not applicable to the Prosecution”²² but that the Prosecution is “not [...] completely unfettered by ethical obligations”.²³ The Prosecution went on to note, with respect to the issue at hand in *Gbagbo* (the protection of persons interacting with the Prosecution) that the relevant provisions of the Rome Statute, the Regulations of the Office of the Prosecutor, the Code of Conduct for Investigators,²⁴ and “the core values laid out in Section 1.2 of the Staff

¹⁸ Article 29.

¹⁹ Article 31.

²⁰ See, e.g., ICTY and ICTR Prosecutor’s Regulation No. 2 (1999) promulgating the Standards of Professional Conduct for Prosecution Counsel; Code of Professional Conduct for Counsel with the Right of Audience before the Special Court for Sierra Leone (“SCSL Code”) (Adopted 14 May 2005 and amended 13 May 2006) (applicable to both Prosecution and Defence counsel).

²¹ Code of Judicial Ethics, ICC-BD/02-01-05.

²² *Prosecutor v. Laurent Gbagbo*, Prosecution’s Observations for a Protocol on the Handling of Confidential Information, 8 February 2012, ICC-02/11-01/11-37, para. 16 (hereinafter “Prosecution’s Observations”). The Single Judge of Pre-Trial Chamber III agreed with the Prosecution that the Code is inapplicable to the Prosecutor (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. 26).

²³ Prosecution’s Observations, para. 17.

²⁴ ICC/AI/2008/005.

Regulations of the Court”, provide “sufficient regulatory basis to ensure that all persons at risk on account of their interaction with the Prosecution are appropriately protected”.²⁵ These submissions of the Prosecutor make it clear that there is no ICC code of professional conduct applicable to Prosecution lawyers in the discharge of their responsibilities or against which the conduct of OTP lawyers can be assessed in appropriate cases.

11. Even accepting the Prosecution’s submission of a “sufficient regulatory basis” with respect to its protection obligations with people it interacts with, on the matter of witness preparation, which involves a myriad of delicate and difficult matters of conduct and judgment in a lawyer’s interaction with a witness, no such ‘regulatory’ basis exists at the ICC to guide and inform Prosecution lawyers, nor the Chamber, Defence nor outside parties, on the “applicable standards of professional conduct and ethics” under which the questioning Prosecution attorney will prepare the witness in “good faith”. Indeed, there is no public code of conduct that can be used as a yardstick to assess OTP conduct of investigations, dealing with witnesses, or conduct in court, or to guide OTP lawyers in the discharge of their ethical and legal obligations as members of the OTP, and critically, as officers of the court.²⁶
12. The detailed and specific issues addressed in the Code that will instruct, guide, govern and restrict Defence counsel in conducting witness preparation, in addition to the provisions of the Protocol²⁷ – such as the scope and definition of

²⁵ Prosecution’s Observations, para. 17.

²⁶ Articles 46, 71 of the Statute and Rules 23 and 25 of the Rules of Procedure do not address the mischief that the present application seeks to address. Firstly, these provisions are addressed to the Prosecutor, not her staff. Secondly, these provisions do not attempt to define appropriate standards of conduct or considerations that should properly inform decisions of prosecution counsel in complying with the OTP’s statutory obligations. They provide no assistance to the Chamber, defence or victims – or the public – as to how prosecution lawyers or staff should conduct themselves.

²⁷ Defence counsel are, of course, as submitted above, also bound by, and shall act in accordance with the applicable national codes of conduct and ethics wherever these codes do not conflict with the Code and Protocol.

“professional conduct”,²⁸ duties towards the Court,²⁹ and the duty not to introduce evidence counsel knows to be incorrect³⁰ – do not exist in any comparable and binding document for the lawyers of the Office of the Prosecutor. In fact, as noted by Markovic, even the Staff Rules of the ICC,³¹ while more specific than the aforementioned Staff Regulations of the Court, “are [still] general in scope”, and “are not directed specifically at OTP attorneys”.³² Further, “[b]eyond the Staff Rules and general prohibitions against misconduct and breach of duty, OTP attorneys currently operate under no formal ethical constraints in carrying out their day-to-day duties at the Court.”³³

13. Under these circumstances, the Defence respectfully submit that the Trial Chamber must act pursuant to its Article 64(2) obligations to “ensure that [the] trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses”, by ordering the Prosecutor to provide the information requested by the Defence and by promulgating a protocol stipulating the principles of ethics or deontology applicable to Prosecution lawyers. Alternatively, the Trial Chamber can issue a directive requiring the OTP to comply and uphold the Code of Professional Conduct for counsel with such consequential amendments and additions as are necessary to underscore the OTP’s unique obligations pursuant to, *inter alia*, Articles 42, 44 and 54 of the Statute and its functions and responsibilities as the investigating and prosecuting authority before the ICC.
14. As underscored in the ICTY and ICTR Prosecutor’s Regulation No. 2 (1999) promulgating the Standards of Professional Conduct for Prosecution Counsel,

²⁸ Code, Article 7.

²⁹ Code, Article 24.

³⁰ Code, Article 25(1).

³¹ ICC-ASP/4/3.

³² M. Markovic, “The ICC Prosecutor’s Missing Code of Conduct”, 47 *Texas International Law Journal* 1 (2011), pgs. 206-207.

³³ *Ibid.*, p. 207.

“it is desirable that the standards of professional conduct of prosecution counsel should [] be clearly set out and understood”. The Code of Professional Conduct for Counsel with the Right of Audience before the Special Court for Sierra Leone, applicable to both prosecution and defence attorneys, uses even stronger language, setting out in its preamble “that being subject to a Code of Professional Conduct is one essential attribute of being qualified as counsel”.³⁴

15. The non-provision of the requested information will result in an unequal and unfair situation. The Defence, in conducting witness preparation (and generally), are and will be subject to the detailed and specific provisions of the Code as well as applicable codes of conduct and ethics of national bar associations.³⁵ Quite correctly, the Chamber and the Prosecution will evaluate the conduct of counsel for the Defence in undertaking witness preparation (and investigations and trial and written advocacy generally) in light of the Code and applicable national codes, in addition to the Protocol, and demand that the Defence adhere to these codes. The Prosecution may also allege breaches of and misconduct under these detailed and specific codes and, if deemed necessary, seek disciplinary measures against counsel before the Court and/or a counsel’s national bar association or associations. This may extend, in some situations, to counsel being permanently struck off the list of lawyers eligible to practice before any Court of law – national or international. Fairness dictates that the same avenues of redress should apply to any lawyer or advocate appearing before the Court including those representing the OTP. To rule otherwise would be to erode the equality of the parties before the Court and create a two-tier system whereby allegations of breaches of professional conduct can be made by one party and not the other.

³⁴ Adopted 14 May 2005 and amended 13 May 2006.

³⁵ See http://icc-cpi.int/en_menus/icc/structure%20of%20the%20court/defence/counsel/Pages/counsel%20for%20the%20defence%20authorised%20to%20act%20before%20the%20court.aspx.

16. Without the provision of the requested information and the relief requested in this application, the Defence, and indeed the Chamber, are significantly handicapped in seeking to properly evaluate the actions and conduct of Prosecution lawyers undertaking witness preparation (and indeed out of court investigations, decisions on disclosure, and general conduct of OTP lawyers that usually and necessarily regulate the legal profession).
17. Any argument that the Defence are free to bring any matter of concern to the Chamber for adjudication and to seek appropriate relief would be without merit. Firstly, such an avenue is open to the Prosecution with regards to any allegation they may wish to make in appropriate cases against conduct by any Defence or Victim's counsel appearing before the Court. This avenue of redress is not to negate the utility of the Code of Professional Conduct for counsel applicable to defence and victims' counsel appearing before the Court.
18. Secondly, a Trial Chamber is not a disciplinary panel. Its primary responsibility is to dispense justice in the cases before it. However, breaches of a code of conduct may require a Trial Chamber to intervene to the extent that such breach impacts upon the fairness of proceedings over which it is adjudicating. The requested code or protocol detailing the standards of professionalism required of Prosecution lawyers may prevent misunderstandings and errors of conduct by OTP lawyers escalating to serious breaches of the statute that could erode confidence in the administration of justice and which may ultimately undermine the mandate of the ICC. The Defence respectfully submit that a code of professional conduct for Prosecution advocates appearing before the Court is imperative to ensure, not only equality of treatment of all lawyers appearing before the Court, but to underline the unity of obligation of all lawyers as ministers of justice and as advocates before the Court.

19. The Defence acknowledges that the Prosecution has unique and non-derogable obligations arising out of its mandate to investigate incriminatory and exculpatory evidence equally and the obligation that Prosecution lawyers fairly prosecute and do not strive officiously for a conviction at all costs. Such responsibilities, however, need to be underscored in any code of conduct applicable to Prosecution lawyers.
20. Thirdly, the Defence respectfully submit that a public, transparent Code of Conduct applicable to Prosecution lawyers will help ensure all employees of the OTP (and at the very least lawyers involved in investigations, case preparation and advocacy before the Court) are aware of their ethical and legal obligations. This is particularly necessary given that the Defence have reason to believe that several Prosecution lawyers in the present case are not members of any professional body, bar association or law society and thus it cannot be assumed that they have received any training regarding deontology or professional ethics.
21. The Defence wish to make clear that it is not asserting that only members of a national bar can exercise rights of audience on behalf of the Prosecutor. That is a matter for the judgement of the Prosecutor herself. What the Defence does contend, however, is that public interest, transparency, and fairness militate in favour of the Defence, Victims and public being notified as to the standards and ethical obligations the Prosecutor requires in relation to Her staff. As the above referenced commentator, Markovic, has noted, “[i]n the absence of such a framework, individual OTP attorneys may either follow their domestic codes of conduct (to the extent their home nations have codes of conduct) or merely

follow their individual sense of what is ethical”.³⁶ This, in the respectful submission of the Defence, is clearly unsatisfactory.

22. The fact that no set of standards or code of conduct has been promulgated that is applicable to Prosecution staff members or lawyers in the past ten years should not be used as justification for allowing this unsatisfactory situation to continue. The inaction of the previous Prosecutor in issuing such a code of conduct is, in the considered submission of the Defence, a matter of regret and concern. The Defence contend that it is within the province of the judiciary to promulgate such a code of conduct or protocol and require all parties in the case to abide by its provisions, irrespective of which side of the courtroom they happen to sit.
23. The information and relief requested in no way impinges on the independence of the Honourable Prosecutor to select her trial team or to change its composition at her sole discretion. Nor does provision of this information or the requested relief in any way affect the functioning of the Office of the Prosecutor. Nor will the provision of such information or the promulgation of such a code reveal confidential information or even prosecutorial strategy.
24. The Defence maintain that the Trial Chamber is entitled to make such an order pursuant to Article 64(2) of the Statute. If the Trial Chamber determines, contrary to the submissions of the Defence in the present Application, that it is not entitled to make such an order, the Defence respectfully urge the Trial Chamber to consider making a recommendation to the Prosecutor to promulgate such a Code of Conduct and to disseminate the same to the Defence prior to the commencement of Trial. The Defence respectfully put the

³⁶ M. Markovic, “The ICC Prosecutor’s Missing Code of Conduct”, 47 *Texas International Law Journal* 1 (2011), p. 209.

Prosecutor on notice that, in the event that shortcomings or matters of concern are identified in the conduct of Her staff or the practices that seem to have been adopted, and in the absence of such a code, it may seek to request Her attendance at trial to explain the absence of such a code and for Her to provide the details of the professional qualifications and training of members of Her office. There must, in the respectful submission of the Defence, be accountability and it is critical that clear standards of expected conduct of Prosecution staff members and lawyers are published, against which their actual conduct may be measured.

25. In the absence of such transparency, there is the real risk of inconsistent, unregulated conduct being adopted by different OTP lawyers to the prejudice of the fair trial rights of the Accused. Fairness to OTP lawyers and staff members also militates in favour of such a protocol or directive being promulgated by the Trial Chamber so that they will be sufficiently on notice as to the ethical and legal obligations required of them as officers of the Court and ministers of justice.

RELIEF REQUESTED

26. The Defence respectfully request that the Chamber order the Prosecutor to provide the Defence with:
 - (i) a list of all lawyers whom the Prosecutor intends will exercise rights of audience during the trial in this case;
 - (ii) for each individual listed, any and all national bars to which the individual is a member;
 - (iii) whether the individual remains in 'good standing' with respect to each bar he or she is admitted to; and

- (iv) that the Trial Chamber promulgate a protocol stipulating the principles of ethics/deontology applicable to Prosecution lawyers or alternatively issue a directive requiring the OTP to comply and uphold the Code of Professional Conduct for counsel with such consequential amendments and additions as are necessary to underscore the OTP's unique obligations pursuant to, *inter alia*, Articles 42, 44 and 54 of the Rome Statute and its functions and responsibilities as the investigating and prosecuting authority before the ICC

Respectfully Submitted,



Karim A. A. Khan QC
On behalf of Francis K. Muthaura
At Nairobi, Kenya




Steven Kay QC and Gillian Higgins
On behalf of Uhuru Muigai Kenyatta
At London, England

Dated this 17th Day of January 2013