

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 4 February 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

Public Redacted Version of “Application for Sanctions pursuant to Article 70 of the Statute against an OTP staff Member and request for steps to be taken to ensure the protection of defence witnesses” filed on 1 February 2013

Sources: Defence for Ambassador Francis Kirimi Muthaura

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

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I. INTRODUCTION

1. The Defence for Ambassador Francis Kirimi Muthaura (“the Defence”) files this application pursuant to Articles 64(2), 68(1) and 71 of the Rome Statute and the *“Protocol on the handling of confidential information and contacts with witnesses whom the opposing party intends to call”*¹ (“the Protocol”), requesting the Trial Chamber to sanction individual staff members of the Office of the Prosecutor (“OTP”) including [REDACTED], unidentified investigators who were present and participated in the interviews of Prosecution Witnesses [REDACTED] and [REDACTED] and/or the responsible authorities within the Office of the Prosecutor. The Defence further requests the Chamber to order the Prosecution to disclose the information requested herein which, the Defence submits, is required in order to protect the safety and welfare of Defence witnesses in this case.

2. At the outset, the Defence must express its dismay that it is compelled to file the present Motion. The conduct of the OTP and its summary rejection of Defence correspondence and expressions of concern about OTP practices has made this inevitable. The unfortunate reality is that [REDACTED] and other staff members of the OTP have repeatedly put the safety and security of critical Defence Witnesses in jeopardy. They have done this by disclosing the identities – and their role as Defence Witnesses – to several Prosecution witnesses, who, the OTP says, are [REDACTED].²

¹ ICC-01/09-02/11-469-Anx.

² [REDACTED].

3. The Defence requests that the Trial Chamber take necessary measures to hold the Prosecution accountable for what seem to be deliberate violations of various orders of this Court and its legal and ethical obligations under the Rome Statute. The Court has previously come under public criticism for not taking appropriate measures going beyond “*symbolic slaps on the wrist*” and for not taking “*their responsibilities and used their powers under the Statute to sanction*”³ when confronted with various breaches and shortcomings committed by the OTP. The OTP has proven unwilling or unable to regulate itself so as to uphold the ethics expected of that Office and has adopted what can only be described as a cavalier attitude to the issue of defence rights and witness protection, now requiring judicial intervention, as requested in the present Application.
4. This filing is classified as “confidential” because it contains information concerning identities of witnesses which must be kept confidential.

II. BACKGROUND

5. On 24 August 2012, the Trial Chamber issued the Protocol, which was to govern the modalities of handling, *inter alia*, confidential information, especially with regards to the disclosure of the identities of witnesses during investigations by the Prosecution and defence.⁴
6. During the interview of Prosecution Witness [REDACTED], Prosecution [REDACTED], ventured to inappropriately confirm the witness’s guesswork that [REDACTED] is a Defence witness by questioning

³ Dov Jacobs, Assistant Professor in International Law and International Criminal Law at Leiden University. “The Lubanga Sentence (Part 2): Why the Ocampo Bashing is getting old”, 10 July 2012, available at: <http://dovjacobs.blogspot.nl/2012/07/lubanga-sentence-part-2-why-ocampo.html> (last accessed 31 January 2013).

⁴ ICC-01/09-02/11-469 and ICC-01/09-02/11-469-Anx.

[REDACTED] in the following manner, indirectly confirming that [REDACTED]:⁵

[REDACTED].

7. During another part of the interview,⁶ [REDACTED] put forward questions relating to the involvement of a particular individual [REDACTED] as a Defence witness. The Defence are concerned that [REDACTED] may have been referring to [REDACTED] and additionally disclosed to Witness [REDACTED] the fact that [REDACTED] is also a Defence witness.
8. The Defence brought this matter to the attention of the OTP without delay and requested the OTP to provide the Defence with the necessary information so that measures could be taken to safeguard the security of Defence witnesses. In addition, the Defence asked the OTP to disclose the names of all the Prosecution witnesses (including persons spoken to by the Prosecution who it does not intend to call at trial), to whom it had revealed or otherwise confirmed the identity of Defence witnesses. Prosecution Counsel [REDACTED], gave short shrift to the Defence complaint, asserting that no inappropriate disclosure had taken place.⁷
9. Where a witness purports to identify the name and involvement of an individual as a witness, be it as a witness for the party conducting the interview or the opposing party, it is incumbent on the questioning party not to directly or indirectly confirm the truth or otherwise of such

⁵ Transcript of Interview of Prosecution Witness [REDACTED].

⁶ See [REDACTED].

⁷ A copy of the email communications with the Prosecution is included in Confidential and *ex parte* Annex A.

guesswork and speculation.⁸ The Protocol seeks to underline the importance of both parties complying with its stipulations and guidelines. Despite this, the OTP's conduct in this case unfortunately discloses what can only be described as a stubborn refusal to accept that such admonitions and judicial requirements are binding upon it.

10. That this is so is, perhaps, brought into starkest focus during the interview of Prosecution Witness [REDACTED]. Witness [REDACTED] claims to be [REDACTED]. Regrettably, once again, the alleged culprit was Prosecution staff member [REDACTED]. In the course of the interview [REDACTED] informed the witness, in clear and unequivocal terms, that [REDACTED] was a Defence witness [REDACTED]. The Defence maintains that this constitutes a gratuitous violation of the Protocol and either deliberately or negligently imperilled the safety of a Defence witness. The relevant portion of the interview is set out below:⁹

[REDACTED]

11. It is clear from the record of the interview that [REDACTED] manner of questioning detailed above, had the effect of confirming, unreservedly, [REDACTED] that [REDACTED] was indeed a Defence witness in this case. This is made clear almost immediately after [REDACTED] impermissible disclosure by [REDACTED]:¹⁰

[REDACTED]

⁸ The relevant pages from the transcript of interviews of Witness [REDACTED] are annexed as Confidential and *ex parte* Annex B (Transcript of Interview of Prosecution Witness [REDACTED]). The Defence submits that these pages of the transcript demonstrate that the manner of questioning adopted by [REDACTED] regarding [REDACTED] systematically confirmed in the witness's mind that [REDACTED] was indeed a Defence witness and verified for the witness [REDACTED] involvement with the Defence.

⁹ Transcript of Interview of Prosecution Witness [REDACTED].

¹⁰ Transcript of Interview of Prosecution Witness [REDACTED].

12. The Defence [REDACTED]¹¹ without delay [REDACTED].¹² On this occasion, the Defence has chosen not to raise the conduct and impermissible disclosures to Prosecution Witness [REDACTED] with the OTP, but has opted to file this application to the Chamber directly. Previous attempts by the Defence to engage the Prosecution to resolve alleged breaches which impinge on the security of Defence witnesses have not borne any fruit. Indeed, the Defence characterises the OTP's *inter partes* communications as dismissive and high-handed. This is of concern, especially from an office which this Chamber has described as having *"legal and ethical obligations to protect the security of witnesses and respect the confidentiality of information. Article 54(l)(b) of the Statute provides that the Prosecutor shall 'respect the interests and personal circumstances of victims and witnesses' in the course of investigations. Article 68(1) specifically requires the Prosecutor to take measures to 'protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.'"*¹³ Regrettably, it seems that when it comes to the safety and security of Defence witnesses for Ambassador Muthaura in this case, the Prosecution has often times patently flouted this cardinal obligation.
13. The Defence submits that the conduct of Prosecution staff member [REDACTED] has in all likelihood had a negative impact on the security of at least [REDACTED],¹⁴ [REDACTED].

¹¹ [REDACTED].

¹² [REDACTED].

¹³ [REDACTED].

¹⁴ [REDACTED].

III. SUBMISSIONS

14. Article 68(1) of the Statute makes it incumbent on the Prosecutor to take appropriate steps and measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. The Appeals Chamber has held that “[t]here is no exception to the general principle that the Prosecutor (or other parties and participants) must follow the orders of the Trial Chamber when it comes to issues of protection.”¹⁵ There is a Protocol in place issued by the Trial Chamber in this case, and similar protocols issued in other cases before the Court, which expressly prohibits the very conduct that is the subject of this application. The Protocol must be strictly complied with, and any dereliction or breach of its provisions must be sanctionable.¹⁶

15. The Defence fears that Judge Fulford’s observation that the Prosecution’s intention not to comply with orders of the Trial Chamber was not only limited to the particular issue that the Court was considering in *Lubanga*, but “extended to all judicial decisions that relate to [...] the protection of those who have been affected by their interaction with the court”, has proved prescient. As was rightly pointed out by the honourable judge, such behavior would inevitably “render a fair trial impossible”.¹⁷

¹⁵ *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled “Decision on the Prosecution’s Urgent Request for Variation of Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU”, 8 October 2010, ICC-01/04-01/06-2582, para. 50.

¹⁶ Protocol, para. 20. See also protocol annexed to 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; ICC-01/05-01/08-798-Conf, paras. 25 and 26, quoted in 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, para. 83.

¹⁷ ICC-01/04-01/06-2582, para. 57.

16. The Defence submits that the deliberate disclosure of the identities of Defence witnesses to Prosecution insider witnesses is reprehensible and was without any legitimate forensic purpose and without any safeguards put in place to ameliorate danger to the Defence witnesses caused by such disclosure. The OTP's refusal to err on the side of caution (when it comes to defence witnesses) and consider that witness security *may* be in jeopardy and to act swiftly to mitigate any danger to the lives of individuals makes this only worse. This is rendered ever more acute when it is the conduct of the OTP itself that is the origin of the danger.

17. The Defence submits that in addition to the legal obligations under the Rome Statute, at all times during the interviews of witnesses [REDACTED] and [REDACTED], the Prosecution was well aware of the established jurisprudence of the Court absolutely prohibiting any party from revealing that an individual being referred to in the course of investigations is directly or indirectly involved with the activities of the Court or nature of the involvement.¹⁸

18. The fact that the Prosecution stubbornly refused to countenance the possibility that it may have erred in improperly disclosing the identities of Defence witnesses can only mean that the Prosecution failed to take the precautions set out in paragraphs 22, 34 and 35 of the Protocol which it was required to do, even on account of a mere "reasonable suspicion" that such information may have been disclosed in the course of its work. The Defence of Ambassador Muthaura took the step of [REDACTED] and their

¹⁸ Protocol, para. 20. See also protocol annexed to 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; ICC-01/05-01/08-798-Conf, paras. 25 and 26, quoted in 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, para. 83.

involvement as Defence witnesses had been disclosed to Prosecution [REDACTED] witnesses who were [REDACTED].¹⁹

19. The absence of a code of conduct governing the behaviour of persons acting as Prosecution counsel in the ICC is troublesome and may, *prima facie*, leave complaints such as the one contained in this application without the remedy it deserves. The absence of a Code, furthermore, means – in real terms – an absence of guidance to assist Prosecution counsel, who may not be members of a Bar and who may have had no training in deontology or professional ethics, from knowing what behaviour is or is not acceptable. Additionally, the possibility that Prosecution counsel in this and others cases before the ICC may not possess appropriate memberships to the professional bodies regulating the conduct of counsel in their respective countries of nationality or where they received their legal training, means the Defence and indeed the Chamber is deprived of the remedies provided for in rule 46(B)²⁰ of the ICTY and ICTR Rules of Procedure and Evidence for the breaches and conduct of the sort complained of in this present motion.

¹⁹ See Confidential and *ex parte* Annex C.

²⁰ Rule 46: Misconduct of Counsel

(A) If a Judge or a Chamber finds that the conduct of a counsel is offensive, abusive or otherwise obstructs the proper conduct of the proceedings, or that a counsel is negligent or otherwise fails to meet the standard of professional competence and ethics in the performance of his duties, the Chamber may, after giving counsel due warning:

(i) refuse audience to that counsel; and/or

(ii) determine, after giving counsel an opportunity to be heard, that counsel is no longer eligible to represent a suspect or an accused before the Tribunal pursuant to Rule 44 and 45.

(B) A Judge or a Chamber may also, with the approval of the President, communicate any misconduct of counsel to the professional body regulating the conduct of counsel in the counsel's State of admission or, if a university professor of law and not otherwise admitted to the profession, to the governing body of that counsel's University.

(C) Under the supervision of the President, the Registrar shall publish and oversee the implementation of a Code of Professional Conduct for defence counsel.

20. The Code of Conduct applicable to prosecutors appearing before the *ad hoc* international tribunals has expressly provided that in the conduct of investigations and proceedings before the court, “prosecution counsel will adopt the highest standards of professional conduct”. The Prosecutor expects them, consistent always with the letter and spirit of the relevant Statute and Rules of Procedure and Evidence, and the independence of the Prosecutor to, *inter alia*: (a) serve and protect the public interest, including the interest of victims and witnesses, and to respect the fundamental rights of an accused person; (b) to exercise the highest standards of integrity and care, including the obligation always to act in good faith; (c) to take available measures, as required, to protect the privacy and ensure the safety of victims, witnesses and their families and to make reasonable efforts to minimise inconvenience to witnesses; and (d) to preserve professional confidentiality, including not disclosing information which may jeopardise ongoing investigations or prosecutions or which may jeopardise the safety of victims and witnesses.²¹ A breach of any of these standards may attract sanctions pursuant to Rules 46 or 77 of the Rules of Procedure and Evidence applicable to both the ICTY and ICTR.²²
21. Article 25 of the Code of Conduct applicable to prosecution counsel appearing before the Special Court for Sierra Leone (“SCSL”) requires “Prosecution Counsel [to] respect the confidentiality of all information entrusted to him in connection with a case” and states that “[a]ny breach is actionable as misconduct in accordance with Article 27 of the Code”.
22. Disclosure of witness identities to unauthorised persons may constitute actionable misconduct. Recently, the Single Judge of the SCSL was called

²¹ Standards of Professional Conduct for Prosecution Counsel, ICTR and ICTY, Regulation 2(a), (d),(g) and (i).

²² Standards of Professional Conduct for Prosecution Counsel, ICTR and ICTY, Regulation 4.

upon by the Prosecution to sanction Lead Counsel for Mr. Charles G. Taylor, Mr. Courtenay Griffiths, for disclosing the identities of 7 protected witnesses. The Single Judge issued a preliminary decision that she had “*reason to believe that Lead Defence Counsel may be in contempt*” for such disclosure.²³

23. The failure to comply with orders of the Court are matters which previous Trial Chambers have had occasion to reprimand the OTP. In *Lubanga*, the Appeals Chamber concluded that the orders of a Chamber are binding and that the Prosecutor is obliged to comply with them. This is a fundamental criterion for any trial to be fair.²⁴ Put simply, the Judges of the ICC are supreme and not the parties that appear before them.
24. The Defence submits that the Prosecution’s conduct in that case was correctly described as bringing to the fore “*a more profound and enduring concern namely that the Prosecutor may decide whether or not to implement the Trial Chamber’s orders depending on his interpretation of his obligations under the Statute*”. As stated by the Appeals Chamber, “[n]o criminal court can operate on the basis that whenever it makes an order in a particular area, it is for the Prosecutor to elect whether or not to implement it, depending on his interpretation of his obligations”.²⁵
25. [REDACTED].

²³ Decision on Confidential Annexes A-E Prosecution Motion for the Trial Chamber to Summarily deal with Contempt of the Special Court for Sierra Leone and for Urgent Interim Measures, 19 June 2012, SCSL-12-01-T-1294, available at: <http://www.sc-sl.org/LinkClick.aspx?fileticket=DjB4Vell8N0%3d&tabid=159>. Mr. Griffiths was found not guilty of contempt on the basis that the *mens rea* had not been established to the required standard to establish that Mr. Griffiths had knowingly and wilfully interfered with the administration of justice of the Special Court (Judgement in Contempt Proceedings, 19 October 2012, SCSL-12-01-T-466-491).

²⁴ Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled “Decision on the Prosecution’s Urgent Request for Variation of Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU”, 8 October 2010, ICC-01/04-01/06-2582, paras. 46, 59.

²⁵ ICC-01/04-01/06-2582, paras. 46, 48.

26. The Defence submits that the breaches detailed in this application are matters which threaten the fairness of the trial against Ambassador Muthaura and requires the intervention of the Trial Chamber under Article 71.

IV. Request for Disclosure of information directly relevant to the safety and security of Defence Witness

27. The Defence requests the Trial Chamber to order the Prosecution to inform the VWU Head of Protection of the details of all instances where the identities of confidential Defence Witnesses have been disclosed during its investigations. This is what is required by the Protocol.²⁶ The Defence additionally submits that such information should also be disclosed to the Defence so that it may be alive to any matters which may affect its ability to present its defence at trial.

28. [REDACTED].

29. The Defence previously noted that its [REDACTED].²⁷ The Defence requires disclosure of relevant information for it to be able to properly and fairly make a determination as to whether it is necessary to [REDACTED] or whether existing or additional safeguards may be sufficient to counter the stated risk to the witness at present.

²⁶ Paragraph 35 of the Protocol states: “[I]f a party or participant exposed confidential information, or has become aware of any other breach of the confidentiality of information under the present Protocol, it shall immediately inform the VWU Head of Protection.” Paragraph 36 sets out: “In addition, if it comes to the attention of a party or participant that a third party knows or has become aware of information in violation of this Protocol, it shall inform the third party about the confidential nature of such information and that it should not be disclosed any further.”

²⁷ [REDACTED].

30. The Defence requests disclosure of all information relevant to the matters raised in this application. Pursuant to paragraph 22 of the Protocol, the Prosecution is obliged to keep a record of: (i) the name and particulars of the person to whom the information was communicated; (ii) the name of the person who communicated the information; (iii) the date at which the information was communicated; (iv) the location where the information was communicated; and (v) the purpose for which the information was disclosed. In this regard, the Defence makes the concession that it does not require disclosure of the location where the information was communicated, at this time. With respect to the date and identities of the OTP staff members connected to the issue, the Defence submits that this information is necessary so that it may seek appropriate remedy from the Chamber for any possible breaches or misconduct. The date of the disclosure will allow the Defence to make an assessment as to any possible links between the disclosure and the security threats to its witness, as it was able to do in relation to [REDACTED], in paragraph 13 above.
31. The Defence submits that, at present, the Prosecution has redacted even the names of witnesses whose identities and roles as Defence witnesses have been discussed with Prosecution [REDACTED]. This is the case in relation to [REDACTED].
32. The Defence submits that the remedy requested is necessary given the OTP's apparent flagrant disregard for the orders of this Court as conveyed in the Protocol, and its high-handedness in summarily dismissing Defence correspondence which seek to identify and correct errors that could put Defence witnesses in jeopardy. In these circumstances, the intervention of the Trial Chamber is necessary to ensure that all parties are equal before the law and that there is no ambiguity in the standards of conduct

required of all parties, which would in turn ensure that the fair trial rights of Ambassador Muthaura are respected.

Relief Requested

33. The Defence respectfully requests the Chamber to:

- (i) Order the Prosecution to strictly comply with the Protocol as well as its obligations under the Rome Statute in relation to Defence witnesses;
- (ii) Require an explanation from the OTP and, if appropriate, sanction [REDACTED], the relevant anonymous OTP investigators and/or the appropriate authority within the OTP for disclosing confidential information concerning Defence witness identities to unauthorised persons and thereby exposing Defence witnesses to serious security risks;
- (iii) Order the Prosecution to disclose to the VWU and the Defence the identities and relevant details of all individuals to whom it has disclosed the identities of Defence witnesses;
- (iv) Order the VWU to conduct an assessment of the security risks that the disclosure complained of may have caused to Defence witnesses and to take such measures as are necessary to mitigate against these risks [REDACTED]; and
- (v) Consider the matters that form the basis of this application as further support for the relief requested in the “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".²⁸

Respectfully Submitted,



Karim A. A. Khan QC
Lead Counsel, Muthaura Defence

Dated this 4th Day of February 2013
At The Hague, the Netherlands

²⁸ ICC-01/09-02/11-603.