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No.: **ICC-01/09-02/11**
Date: **8 February 2013**

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

Prosecution Response to 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"

Source: **The Office of the Prosecutor**

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

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Introduction

1. The Prosecution hereby responds to 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" ("Application").[1] The Application lacks any legal basis and is unwarranted. The Prosecution accordingly submits that it should be denied.

Submissions

I. <u>The primary relief sought in the Application is unnecessary.</u>

2. The primary relief sought in the Application is a list of the national bar associations to which members of the Prosecution trial team belong, and information as to whether they are in "good standing".[2] The request is premised on the theory that without this information, "the Defence, and indeed the Chamber, are significantly handicapped in seeking to properly evaluate the actions and conduct of Prosecution lawyers undertaking witness preparation".[3]

3. The requested relief is wholly unnecessary to permit the Court "to evaluate the actions and conduct" of the lawyers, much less will it address the "mischief [the A]pplication seeks to address"[4] – namely, that lawyers with the OTP will feel free to ignore or violate the Chamber's Decision on witness preparation ("Decision").[5] The six-page protocol annexed to the Decision ("Protocol") details the conduct that is and is not permissible during witness preparation. We seriously question how a party's ability to access the relevant ethical rules of the various national bars would affect its assessment whether the prosecutor or defence lawyer

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[1] ICC-01/09-02/11-603.
[2] ICC-01/09-02/11-603, paras 1, 26.
[3] ICC-01/09-02/11-603, para 16.
[4] ICC-01/09-02/11-603, para 11, n.26.
[5] ICC-01/09-02/11-588.

complied with the procedures specified in the Protocol. Rather, questions regarding the conduct of witness preparation sessions, should they arise, can and should be resolved under the Protocol itself.

4. The Defence's equality of arms argument is similarly without merit.[6] Contrary to the Defence's submission, the Decision does not create "a two-tier system".[7] Rather, it establishes the same witness preparation rules for both parties.[8] It also provides the parties with the same avenues of redress should questions arise as to the conduct of witness preparation sessions. It enables the non-calling party to seek disclosure of the video record of the preparation session(s) in question, provided there is a "concrete and credible basis for the request".[9] And, of course, both parties are able to request the Chamber to order the other party to comply with the provisions of the Protocol, if there is a credible basis to believe that the party has departed from it. For these reasons, there is no "ero[sion of] the equality of the parties" that would require the Chamber to grant the relief the Defence seeks.[10]

II. <u>There is no legal basis for the alternative relief sought in the Application.</u>

5. As an alternative form of relief, the Defence requests "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".[11] This request lacks any legal basis.

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[6] ICC-01/09-02/11-603, paras 2, 15, 18.
[7] ICC-01/09-02/11-603, para 15.
[8] *See, e.g.*, ICC-01/09-02/11-588-Anx, paras 5-7, 10-14, 20-21, 30 (explaining the obligations and responsibilities upon the "calling party" during witness preparation).
[9] ICC-01/09-02/11-588, para 50.
[10] ICC-01/09-02/11-603, para 15.
[11] ICC-01/09-02/11-603, para 26; *see also* paras 1, 13.

6. While it is undisputed that the Chamber has broad power to regulate the conduct of cases before it,[12] it does not have the statutory authority to grant the relief the Defence appears to seek – namely, the promulgation of a protocol governing the conduct of all Prosecution lawyers in all cases. Article 42(2) of the Statute grants full authority to regulate the conduct of Prosecution staff to the Prosecutor. Rule 9 of the Rules of Procedure and Evidence entrusts the Prosecutor with the task of adopting "regulations to govern the operation of the Office". In similar fashion, the Chamber's authority to regulate the conduct of lawyers – for the Prosecution, for the Defence, for represented victims, for the Registry -- who appear before it in individual cases does not extend, under the Court's legal framework, to issuing broad rules of conduct applicable to all Prosecution lawyers in all cases, which is what the Defence appears to seek. To the contrary, granting such relief would run afoul of the separation of powers enshrined in the Court's legal texts, and would be *ultra vires* the authority of the Chamber.

7. The Defence's request for a ruling binding the Prosecution to the Code of Professional Conduct for counsel also fails.[13] By its express terms in Article 1 ("Scope"), the Code – promulgated by the States Parties -- expressly applies to "defence counsel, counsel acting for States, *amici curiae* and counsel or legal representatives for victims and witnesses practicing at the international Criminal Court". Moreover, Article 3 of the Code contains a very detailed and, the Prosecution submits, exclusive procedure for amendment. Were the Chamber to order that the Code applies to Prosecution lawyers, it would necessarily exceed the limitation the State Parties deliberately wrote into the Code, and it would assume for itself an amendment authority that the States deliberately reserved for themselves.

[12] *See* Article 64 of the Rome Statute.
[13] ICC-01/09-02/11-603, paras 1, 26.

III. The requested relief, a Chamber-promulgated protocol, is unnecessary.

8. As noted above, the conduct at issue in the Application – witness preparation – is already comprehensively regulated by the Chamber's Decision. No further rules or protocols are needed. Further, the general conduct of Prosecution lawyers in this and all other matters is already regulated by the Court's legal texts and court-wide Staff Rules and Regulations. For that reason, and as noted in the Application itself, the Single Judge in the *Gbagbo* case noted that the Prosecution's conduct is adequately regulated by its express statutory duties.[14]

9. In addition to the Prosecution-specific duties enshrined in the Statute,[15] Prosecution staff members are required to uphold the core values laid out in Regulation 1.2 of the Staff Regulations of the Court. These include the duty to respect the principles embodied in the Rome Statute and to "uphold the highest standards of efficiency, competence and integrity" which includes compliance with relevant standards of "probity, impartiality, fairness, honesty and truthfulness".[16]

10. It is thus inaccurate for the Defence to argue that the Prosecution is not bound by the requirements of professional conduct, or bound to engage in honorable and independent behavior or to observe duties of respect for the Court that are contained in the Code of Professional Conduct for counsel. This argument also ignores that the Prosecution has enunciated expressly that it values and promotes the highest standards of efficiency, competence and integrity amongst all members of the Office.[17] And, it fails to consider that upon joining the Prosecution each staff member is obliged to sign an undertaking "to avoid any action which may reflect adversely on my status as a staff member at the Office of

[14] ICC-02/11-01/11-49, paras 26-27.
[15] *See, e.g.*, Articles 54 and 68(1) of the Rome Statute.
[16] Staff Regulation 1.2(b), Annex to presidential directive ICC/PRESD/G/2004/001 on Promulgation of Staff Regulations.
[17] See Staff Regulation 1.1(d), 1.2(b), 1.3(a), 4.2, Staff Rule 101.9(b), OTP Regulation 17 and 18, Article 44 (2).

the Prosecutor of the International Criminal Court (hereinafter "the Office of the Prosecutor"), or on the integrity, independence and impartiality which are required by that status", and also an Oath of Office to "perform [] duties and exercise [] powers […] honourably, faithfully, impartially and conscientiously, and […] respect the confidentiality of the investigations and prosecutions".[18]

11. The Statute also proscribes the kind of unethical conduct that the Defence implies the Prosecution will engage in during witness preparation sessions. Like all persons, members of the Prosecution cannot commit acts that constitute offences against the administration of justice, which would include – in the instance of witness preparation – "presenting evidence that the party knows is false or forged" and "corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tempering with or interfering with the collection of evidence."[19]

12. It is further not necessary for the Chamber to create and impose a specific disciplinary regime to ensure compliance with the standards enunciated in the staff rules, the Rome Statute, and other instruments. First and foremost, the staff member can face internal procedures for violating the oaths and undertakings set out above. Second, unlike the situation of a defence lawyer representing an Accused or a Suspect, courts can sanction the Prosecution for misconduct by its agents; in contrast, it is difficult to imagine that the Court could or would as readily sanction the Accused in his or her case as a means to punish misconduct by defence counsel.

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[18] Article 45, Rule 6(1), Staff Regulation 1.1(b).
[19] Article 70(1)(b, (c).

Conclusion

13. For the foregoing reasons, the Prosecution respectfully submits that the Chamber should dismiss the Application.

Fatou Bensouda,
Prosecutor

Dated this 8th day of February 2013
At The Hague, The Netherlands