



Original: English

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

Date: 13 March 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 “Victims and Witnesses Unit’s Submission following  
the ‘Decision on witness preparation’ (ICC-01/09-02/11-588)”**

**Source:** The Office of the Prosecutor

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

**The Office of the Prosecutor**

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1. On 2 January 2013, the Chamber issued its “Decision on witness preparation” (“Decision”),<sup>1</sup> which contained, in its Annex, the “Witness preparation protocol” (“Protocol”).<sup>2</sup>
2. On 21 February 2013, the Registry filed its “Victims and Witnesses Unit's Submission following the ‘Decision on witness preparation’ (ICC-01/09-02/11-588)”, seeking clarification from the Chamber regarding the scope of pre-testimony contact between the witness and calling party.<sup>3</sup> Specifically, the Registry questioned whether:

[T]he absence of the prohibition of contact between the calling party and the witness during the pre-testimony meeting (which ends at least 24 hours before the testimony) should be extended to the 24 hours' time period preceding the testimony and further throughout the duration of the testimony **or** if a prohibition of contact between the witness and the calling party shall be in place once the pre-testimony meeting ends (i.e. 24 hours before the testimony) and until the end of the testimony.<sup>4</sup>

3. The Registry indicated that the Chamber had invited the query to be raised in “a formal filing which the parties could also respond to”.<sup>5</sup> The Prosecution responds as follows.
4. The Prosecution understands that the Decision and Protocol depart from the pre-testimony restrictions on witness contact imposed by Trial Chambers in previous cases and permit the calling party to have contact with its witnesses up until they testify, with the caveat that witness preparation sessions must be completed no later than “24 hours before the witness’s testimony is due to commence”.<sup>6</sup> The silence in the Decision and Protocol regarding non-substantive contact between the calling party and the witness in the 24 hours preceding the witness’s testimony suggests that it is, in principle, permissible. In the Prosecution’s view, such contact (which would

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<sup>1</sup> ICC-01/09-02/11-588.

<sup>2</sup> ICC-01/09-02/11-588-Anx.

<sup>3</sup> ICC-01/09-02/11-659, page 4.

<sup>4</sup> ICC-01/09-02/11-659, page 5 (emphasis added).

<sup>5</sup> ICC-01/09-02/11-659, page 4.

<sup>6</sup> ICC-01/09-02/11-588-Anx, para 11.

likely be unusual but could be for matters regarding the security or well-being of the witness, or other matters not pertaining to the substance of the witness's evidence) does not present any greater risk to the integrity of the case than the substantive witness preparations, given the assumption that counsel will adhere to professional standards,<sup>7</sup> and the availability of cross-examination to elicit information on the nature of any such contact.

5. The Prosecution understands that from the time the witness begins to testify until the end of the witness' testimony, the calling party's contact with the witness is restricted to its examination in court, unless the Chamber otherwise permits.



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Fatou Bensouda,  
Prosecutor

Dated this 13<sup>th</sup> of March 2013  
At The Hague, The Netherlands

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<sup>7</sup> ICC-01/09-02/11-588, para 51.