

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 31 May 2013

TRIAL CHAMBER V(B)

Before: Judge Kuniko Ozaki, Presiding Judge
Judge Robert Fremr
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
THE PROSECUTOR v.
UHURU MUIGAI KENYATTA**

Public

**Decision on the Defence application concerning professional ethics applicable
to prosecution lawyers**

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

The Office of the Prosecutor

Ms Fatou Bensouda

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

Mr Herman von Hebel

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber V(B) (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court”), in the case of *The Prosecutor v. Uhuru Muigai Kenyatta*, having regard to Articles 42(2), 44, 54(1), 64(2) and 64(6)(f), 70 and 71 of the Rome Statute (“Statute”), Rules 6 and 9 of the Rules of Procedure and Evidence (“Rules”), Articles 1, 6, 7, 23, 24, 25, 27 and 29 of the Code of Professional Conduct for Counsel (“Code”), Regulation 29 of the Regulations of the Court (“Regulations”), Regulation 17 of the Regulations of the Office of the Prosecutor (“Prosecution Regulations”), Article X of the Staff Regulations, and Rules 101.9(a) and 110.1 of the Staff Rules, issues the following Decision on the Defence application concerning professional ethics applicable to prosecution lawyers.

I. Background and Submissions

1. On 30 December 2012, the defence teams for Mr Muthaura and Mr Kenyatta (together, “Defence”) ¹ submitted that the behaviour of the Office of the Prosecutor (“Prosecution”) in alleging negligence on the part of the defence ² violated professional ethics insofar as it “suggest[ed] or impl[ied] without proper foundation that anyone in the case, including the accused, has misbehaved”.³ The Defence requested that the Chamber order the disclosure of any evidence which supports the allegation or alternatively that it direct the Prosecution “to refrain from making unfounded and inappropriate allegations impugning the conduct of members of the Defence”.⁴

¹ Defence Response to “Lesser Redacted Version of the 5 November 2012 ‘Prosecution Application for delayed disclosure of witness identities’ (ICC-01/09-02/11-519-Conf-Exp; ICC-01/09-02/11-519-Red)”, ICC-01/09-02/11-585-Conf.

² The statement at issue appears in footnote 40 of the Lesser Redacted Version of the 5 November 2012 ‘Prosecution Application for delayed disclosure of witness identities’ (ICC-01/09-02/11-519-Conf-Exp; ICC-01/09-02/11-519-Red), 6 December 2012, ICC-01/09-02/11-519-Conf-Red2.

³ ICC-01/09-02/11-585-Conf, paras 11 – 13.

⁴ ICC-01/09-02/11-585-Conf, para. 14.

2. On 17 January 2013, the Defence filed 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”).⁵ On 1 February 2013 the defence for Mr Muthaura filed an application for sanctions against an OTP staff member (“Defence Request for Sanctions”).⁶
3. On 11 March 2013, the Prosecution notified the Chamber of its withdrawal of the charges against Mr Muthaura.⁷ Subsequently, on 18 March 2013 the Chamber issued a decision granting the Prosecution permission to withdraw the charges and declaring all outstanding requests by the defence for Mr Muthaura to be moot, including the Defence Request for Sanctions.⁸ However, as the Application was filed jointly, it is not rendered moot by the termination of the case against Mr Muthaura.
4. In its Application, the Defence requests that the Chamber act pursuant to its Article 64(2) obligations to ensure that the trial is fair and expeditious and conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses, and order the Prosecution to provide the Defence with a list containing the bar memberships of all lawyers expected to make submissions at trial and information as to whether they are in “good standing”.⁹ The Defence

⁵ ICC-01/09-02/11-603.

⁶ 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, ICC-01/09-02/11-617-Conf-Exp. A public redacted version was filed on 4 February 2013, ICC-01/09-02/11-617-Red.

⁷ Transcript of hearing on 11 March 2013, ICC-01/09-02/11-T-23-ENG, page 3, line 10 to page 5, line 24 and Prosecution notification of withdrawal of the charges against Francis Kirimi Muthaura, ICC-01/09-02/11-687.

⁸ Decision on the withdrawal of charges against Mr Muthaura, ICC-01/09-02/11-696.

⁹ ICC-01/09-02/11-603, para. 1 and 13.

submits that the non-provision of this information will “erode the equality of the parties before the Court”.¹⁰

5. The Defence also submits that although defence counsel and other counsel practicing before the ICC must adhere to the Code, there is no code of professional conduct and ethics applicable to the Prosecution.¹¹ The Defence submits that particularly in view of paragraph 4 of the Witness Preparation Protocol,¹² 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”,¹³ the Chamber should promulgate a protocol of ethics for the Prosecution.¹⁴
6. The Defence submits that a code of professional conduct applicable to the Prosecution is necessary to ensure equality of treatment of all lawyers appearing before the Court.¹⁵ It argues that such a code of conduct is particularly necessary given that “the Defence has reason to believe that several Prosecution lawyers in the present case are not members of any professional body, bar association or law society” and may not have received training in professional ethics.¹⁶ Alternatively, the Defence submits that the Trial Chamber should “issue a directive requiring the OTP to comply and uphold the Code of Professional Conduct for counsel” with any necessary amendments.¹⁷
7. In its response, filed on 8 February 2013,¹⁸ the Prosecution argues that the Application should be denied. The Prosecution contends that the relief requested is

¹⁰ ICC-01/09-02/11-603, para. 15.

¹¹ ICC-01/09-02/11-603, paras 8 – 10.

¹² Annex to the Decision on witness preparation, 2 January 2013, ICC-01/09-02/11-588-Anx.

¹³ ICC-01/09-02/11-588-Anx, para. 4.

¹⁴ ICC-01/09-02/11-603, para. 2.

¹⁵ ICC-01/09-02/11-603, para. 18.

¹⁶ ICC-01/09-02/11-603, para. 20.

¹⁷ ICC-01/09-02/11-603, para. 13.

¹⁸ 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

unnecessary to enable the Court to evaluate the conduct of Prosecution lawyers,¹⁹ and that their general conduct is already sufficiently regulated by the Court's legal texts and the Staff Rules and Regulations.²⁰ The Prosecution observes that upon joining the Prosecution, each staff member is required to sign an undertaking to avoid actions which would reflect adversely on the "integrity, independence and impartiality" of the Prosecution as well as an oath of office to perform duties impartially and conscientiously and to respect the confidentiality of investigations and prosecutions.²¹

8. With regard to the Witness Preparation Protocol, the Prosecution argues that the Prosecution's conduct is already "comprehensively regulated" by the Chamber in the Protocol and the Statute.²² The Prosecution also submits that the request for the Chamber to promulgate a code of conduct lacks a legal basis, as the Chamber does not have the statutory authority to impose a code of conduct on all Prosecution lawyers in all cases.²³ Similarly, the Prosecution argues that the Chamber lacks the authority to order the Prosecution to comply with the Code, which is not applicable to the Prosecution, and can only be amended by the States Parties.²⁴ Finally, the Prosecution contends that the Chamber need not create a disciplinary regime to ensure compliance with the applicable standards, as Prosecution staff members face internal procedures for misconduct and because the Chamber has the power to sanction the Prosecution for misconduct.²⁵

trial and Request that the Trial Chamber promulgate a protocol of professional ethics applicable to Prosecution lawyers", ICC-01/09-02/11-635.

¹⁹ ICC-01/09-02/11-635, para. 3.

²⁰ ICC-01/09-02/11-635, para. 8.

²¹ ICC-01/09-02/11-635, para. 10.

²² ICC-01/09-02/11-635, paras 8 and 11.

²³ ICC-01/09-02/11-635, paras 5 and 6.

²⁴ ICC-01/09-02/11-635, para. 7.

²⁵ ICC-01/09-02/11-635, para. 12.

II. Analysis and Conclusion

9. As an initial matter, the Chamber notes that the defence bases its requests for (i) a list of the bar membership and “good standing” of Prosecution lawyers in the present case and (ii) a code of conduct for Prosecution lawyers or an order for Prosecution lawyers to obey the Code of Conduct on the reference to the “applicable standards of professional conduct and ethics” in the Witness Preparation Decision.²⁶ However, the Defence also submits that the requested relief will enable the Defence and the Chamber “to properly evaluate the actions of 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)”,²⁷ and appears to suggest that the need for the relief requested extends beyond concerns about the conduct of Prosecution lawyers during witness preparation.²⁸

10. In the Witness Preparation Protocol, in addition to setting out a number of specific guidelines to be followed when conducting witness preparation, the Chamber held that “[w]itness preparation is to be carried out in good faith and in keeping with the applicable standards of professional conduct and ethics”.²⁹ Although the Code does not apply to Prosecution counsel,³⁰ members of the Office of the Prosecutor are bound by the provisions in the Rome Statute, the Rules of Procedure and Evidence, the Regulations of the Court, the Prosecution Regulations, and the Staff Rules and Regulations relating to the relevant standards of professional conduct and ethics,

²⁶ See ICC-01/09-02/11-603, paras 4 and 12.

²⁷ ICC-01/09-02/11-603, para. 16.

²⁸ ICC-01/09-02/11-603, paras 17 – 20 and 25.

²⁹ ICC-01/09-02/11-588-Anx, para. 4.

³⁰ Article 1 of the Code of Conduct states that “[t]his Code shall apply to defence counsel, counsel acting for States, *amici curiae* and counsel or legal representatives for victims and witnesses practicing at the International Criminal Court”. The Chamber observes in this regard that the absence of a code of conduct applicable to the Prosecution constitutes “a major departure from the practice of the other international criminal tribunals”. Counsel Matters at the International Criminal Court: A Review of Key Developments Impacting Lawyers Practicing before the ICC, November 2012, International Bar Association Human Rights Institute, page 17.

including Articles 42(2), 44, 54(1), 70 and 71, Rule 6 of the Rules, Regulation 29 of the Regulations, Regulation 17 of the Prosecution Regulations, Rules 101.9(a) and 110.1 of the Staff Rules, Articles I and X and Regulations 1.1, 1.2, 1.3 and 1.4 of the Staff Regulations.

11. Bearing in mind these provisions, the Chamber considers that Prosecution lawyers in this case are bound by a number of general ethical principles. However, given that Defence counsel are bound by the Code of Conduct,³¹ in order to maintain equality between the parties and to ensure the fairness of the proceedings, the Chamber is of the view that further clarification as to the applicable standards of professional conduct and ethics to be observed by the Prosecution in the conduct of this case will be of assistance going forward.
12. As the Staff Regulations make clear, the authority to impose disciplinary measures on Prosecution staff for misconduct lies primarily with the Prosecutor.³² In addition, given that Article 42(2) of the Statute provides that the Prosecutor shall have full authority over the management and administration of the Office,³³ and because this Chamber is only seised of the present case, the Chamber agrees that it lacks the authority to promulgate a code of conduct which would apply to “all” Prosecution lawyers.
13. However, pursuant to Article 64(2) and 64(6)(f) the Chamber has the power to regulate the conduct of the proceedings in the case before it.³⁴ The Chamber also has the power, pursuant to Article 71, to order sanctions for misconduct. In the view of

³¹ Article 1 of the Code of Professional Conduct for Counsel.

³² See Article X of the Staff Regulations.

³³ Rule 9 of the Rules of Procedure and Evidence authorises the Prosecutor to adopt “regulations to govern the operation of the Office”.

³⁴ See paragraph 47 of *Prosecutor v. Thomas Lubanga Dyilo*, 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 the 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.

the Chamber, Article 71 is specifically directed towards conduct occurring within the courtroom referring as it does to “persons present before” the Court. This narrow interpretation is supported by reference to the French version of the provision which unambiguously refers to “l’inconduite à l’audience.” It is also consistent with the only Appeals Chamber decision to date in which the provision has been considered. In that decision, issued in the *Lubanga* case in October 2010, the Appeals Chamber reversed a decision of Trial Chamber I to stay the proceedings for failure of the Prosecution to follow its directions reasoning that the Trial Chamber should first have considered sanctions pursuant to Article 71.³⁵ Although the Appeals Chamber did not directly consider the question of whether Article 71 of the Statute is limited to misconduct committed during or in close connection with courtroom proceedings, it is significant that the directions in question had been given orally and in writing during the course of an ongoing trial. Finally, the Chamber notes that equivalent misconduct provisions at other international courts³⁶ are not limited to persons “present,” suggesting that an in-court requirement was purposefully included by the drafters.³⁷

14. The Chamber considers, however, that it has the power to address misconduct occurring outside the courtroom by having recourse to its broad discretionary powers to ensure a fair trial and uphold the interests of justice as provided for in Article 64(2) of the Statute and to rule on any other relevant matters in performing its functions as provided for in Article 64(6)(f) of the Statute. It is axiomatic that these provisions grant sufficient power to impose sanctions for breaches of its own

³⁵ ICC-01/04-01/06-2582, paras 59 – 60.

³⁶ Rule 46 of the ICTY Rules of Procedure and Evidence; Rule 46 of the ICTR Rules of Procedure and Evidence; Rule 46 of the SCSL Rules of Procedure and Evidence; Rule 38 of the ECCC Internal Rules and Rule 60 of the STL Rules of Procedure and Evidence.

³⁷ In their commentaries on the provision, Professors Triffterer and Schabas also support a narrow interpretation of Article 71. Otto Triffterer, *The Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes Article by Article* (2008) page 1353. William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010), page 860 (“[t]he limitation of misconduct to misconduct in the courtroom stands in quite marked contrast to the law applicable before the *ad hoc* tribunals”).

orders as without such power it could not ensure a fair trial or otherwise perform its functions. The Appeals Chamber has emphasised the binding nature of Court orders stating, in the Lubanga case:

The Appeals Chamber fully endorses the statement of the Trial Chamber that “no 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.” Orders of a Trial Chamber are binding orders to be implemented unless and until they are suspended.³⁸

15. These broadly framed provisions may indeed be seen as a codification of the concept of “inherent powers” which provide courts with authority to undertake all acts reasonably required to efficiently perform their functions. In the view of the Chamber this necessarily includes the ability to sanction breaches of its own orders and similar misconduct occurring outside the courtroom. This view is supported by Regulation 29 of the Regulations which includes a specific reference, in the context of non-compliance with the Regulations and orders of a Chamber, to the “inherent powers of the Chamber.”³⁹

16. In the Chamber’s view, the Code of Professional Conduct for Counsel should, where applicable and to the extent possible, also apply to members of the Prosecution, for purposes of the conduct of this case. Without limiting the generality of the foregoing, the Chamber sets out in Annex A with the necessary amendments several readily applicable provisions of the Code of Professional Conduct for Counsel that the Prosecution is expected to respect, not only in carrying out witness preparation, but throughout the conduct of this case. Reference is made to the Code of Conduct because these guidelines address a number of

³⁸ ICC-01/04-01/06-2582 at para. 48.

³⁹ Similarly at the *ad hoc* tribunals, the power to prosecute “contempt of court” which includes disclosure of information in knowing violation of a court order, is described as an “exercise of [...] inherent power.” Rule 77 (A) of the ICTY Rules of Procedure and Evidence; Rule 77 (A) of the ICTR Rules of Procedure and Evidence and Rule 77 (A) of the SCSL Rules of Procedure and Evidence.

relevant ethical issues. These provisions develop with more specificity the general ethical principles the Chamber expects both parties to observe in the present proceedings

17. In light of the above clarifications as to the ethical rules applicable to both witness preparation and the general conduct of counsel in the present case, and given that the Defence does not assert that only members of a national bar can exercise rights of audience,⁴⁰ the Chamber does not consider it necessary to order disclosure of the bar membership of Prosecution counsel.

18. Finally, as regards the Prosecution's footnote 40 of ICC-01/09-02/11-519-Conf-Red2, the Chamber directs both parties to refrain from making unsubstantiated allegations in the future. Additionally, the Chamber requests that the parties, the participants and the Registry refrain from filing submissions unless requesting specific relief.

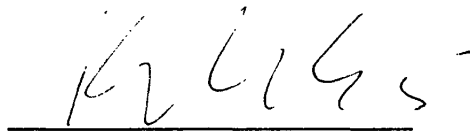
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Defence request for disclosure of the bar membership of Prosecution counsel.

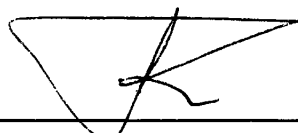
DIRECTS both parties to observe the abovementioned rules of ethical conduct during proceedings in the present case.

⁴⁰ In this regard, Rule 22 of the Rules, which sets out the necessary qualifications for defence counsel, contains no bar membership requirement. Similarly, Regulations 122 and 124 of the Registry, dealing with the Registry's maintenance of a list of counsel and associate counsel, do not mention bar membership as a necessary prerequisite.

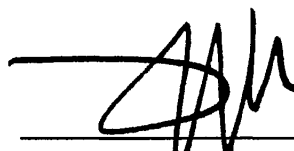
Done in both English and French, the English version being authoritative.



Judge Kuniko Ozaki, Presiding



Judge Robert Fremr



Judge Chie Eboe-Osuji

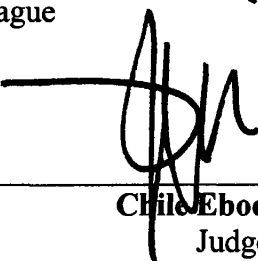
Dated 31 May 2013

At The Hague, The Netherlands

CONCURRING SEPARATE OPINION OF JUDGE EBOE-OSUJI

1. I fully concur with the decision of the Chamber, as far as it goes.
2. I do, however, consider it very important that Counsel who represent parties and participants on all sides should also modulate their professional conduct according to the standards of civility and professionalism for the legal profession. A useful set of such standards, as applicable, has been set out in the *California Attorney Guidelines of Civility and Professionalism*, attached as Annex A1.

Dated 31 May 2013 at The Hague



Chilo Eboe-Osuji
Judge