

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 13 August 2013

TRIAL CHAMBER V(B)

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

SITUATION IN THE REPUBLIC OF KENYA

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

Public
Victims' application relating to possible disclosure of confidential information

Source: Common Legal Representative for Victims

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

The Office of the Prosecutor

Ms Fatou Bensouda
Ms Adesola Adeboyejo

Counsel for the Defence

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
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Ms Paolina Massidda
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States Representative

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REGISTRY

Registrar

Mr Herman von Hebel

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Detention Section

Victims and Witnesses Unit

Mr Patrick Craig

**Victims Participation and Reparations
Section**

Ms Fiona McKay

Other

I. Introduction

1. On behalf of the victims of this case, the Common Legal Representative for Victims ("Legal Representative") hereby informs the Trial Chamber of circumstances which might have given rise to a breach of the Protocol of 24 August 2012 ("Protocol"), and of the Code of Professional Conduct for Counsel ("Code of Conduct").¹
2. He requests the Trial Chamber to order the Defence to provide clarifying information which will assist the Trial Chamber in determining whether, in fact, there has been a breach of the Protocol, or of the Code of Conduct. Further, confirmation from the Defence that no such breach has occurred would provide much-needed reassurance to the victims of the present case.

II. Factual background

3. In late July 2013, several newspapers and other media organs in Kenya reported that Mr Steven Kay had submitted a confidential petition to the High Court of Kenya, requesting access to mobile telephone data relating to witnesses in the present case.² The victims have reported to the Legal Representative their deep concern and anxiety about these reports, which they believe might be directed at undermining the participation of victims and protected witnesses in the present case.
4. *The Daily Nation* on 30 July 2013 reported that "[t]he confidential petition is meant to obtain information about key witnesses that ICC Prosecutor Fatou

¹ Annex to ICC-01/09-02/11-469, 24 August 2012.

² e.g. *The Standard*, 'President Uhuru Kenyatta's case against Safaricom, Airtel to be heard in camera', 30 July 2013, available at <<http://bit.ly/146n9jI>> (accessed 13 August 2012); Capital FM, 'Media ejected from Uhuru, mobile operators' case', 30 July 2013, available at <<http://bit.ly/146n9jI>> (accessed 13 August 2013); *The Star*, 'Uhuru seeks cell phone records of 60 witnesses', 1 August 2013, available at <<http://bit.ly/18rrKAq>> (accessed 13 August 2013). The Judiciary issued a press release dated 30 July 2013, relating to the confidential nature of the proceedings. It stated that the information might be publicly released in the future. Available at <<http://bit.ly/121zXKR>> (accessed 13 August 2013).

Bensouda is expected to rely on when the trial against Mr Kenyatta opens on November 12, 2013."³

5. *The Daily Nation* also reported that it had received on 30 July 2013 from Mr Kennedy Ogeto, on behalf of Mr Kay, a statement which said, *inter alia*, "The proceedings were permitted to be filed confidentially after the applicant (Mr Kay) established appropriate legal basis in order to protect *the identity of witnesses and victims in the ICC case against President Kenyatta*."⁴
6. On 1 August 2013, the Legal Representative sent an email to Mr Kay, setting out the relevant factual background, and stating as follows:

"As you will of course be aware, I represent the interests of the victims participating in the Kenyatta case before the ICC. (Decision on victims' participation and representation, 3 October 2012, ICC-01/09-02/11-498; 'Decision appointing a common legal representative for victims', 20 November 2012, ICC-01/09-02/11-537.)

I believe that, on the basis of the information you provided in your statement to the Daily Nation, your petition affects the interests of my clients. Specifically, it raises the strong possibility that you have requested mobile telephone data relating to my clients, and their whereabouts at certain moments. It is almost inconceivable that the mobile telephone companies would be able to find this data unless you have disclosed the names and other identifying information of my clients to the High Court and/or the mobile telephone companies. This raises questions of the right to privacy of my clients, as well as serious concerns for their security.

[...]

Therefore, I kindly request that you send me a copy of the petition, given my mandate to protect the rights of the "victims in the ICC case against President Kenyatta."

I can assure you that the petition will be handled in a confidential manner by me, and will be treated with the same care as any other confidential filing to which I have access.

Second, if it is not already obvious from the petition itself, I would be grateful if you could confirm whether you have, in fact, disclosed the names or any other material which might identify any of the victims in the ICC case against Mr Kenyatta, including victims who are among the witnesses currently on the Prosecution's list of witnesses, to the High Court or to any mobile telephone company in Kenya."

7. In a further email later on 1 August 2013, the Legal Representative informed the Defence that, if he had not received a response by 8 August, he would feel

³ *The Daily Nation*, 'Uhuru lawyer seeks ICC witnesses' records', 30 July 2013, available at <<http://bit.ly/17KJnsX>> (accessed 13 August 2013).

⁴ *Ibid*, emphasis added.

obliged, in order properly to protect his clients, to then seek appropriate relief from the Trial Chamber.

8. The Defence did not reply to either of the emails sent by the Legal Representative on 1 August 2013, nor did it reply to a follow-up email of 8 August 2013.
9. The Legal Representative has not received a copy of the petition in question. He is therefore is not yet aware if the Defence has, in fact, disclosed the names or any other material which might identify any of the “dual status” victims, or any other protected witnesses in the present case, to the High Court of Kenya or to any mobile telephone company in Kenya.
10. However, it appears from the circumstances set out above and in particular the reference by Mr Ogeto to “the identity of witnesses and victims in the ICC case against President Kenyatta” as a reason for the confidentiality of the proceedings before the High Court, that there is at least a reasonable likelihood that unauthorised disclosure of information leading to the identification of protected persons might have taken place. The Defence’s failure to clarify the position has not assisted the Legal Representative.
11. The relevant provisions regulating the disclosure to the public of identifying information relating to protected victims and witnesses are set forth below.

III. Relevant provisions governing the disclosure of identifying information

Code of Professional Conduct for Counsel

12. Article 8 of the Code of Professional Conduct for Counsel sets out the general principles of non-disclosure of confidential information, and Article 8(4) states in part: “In particular, Counsel shall not reveal the identity of protected victims and witnesses, or any confidential information that may reveal their identity and whereabouts, unless he or she has been authorized to do so by an order of the Court.”

Code of Conduct for Investigators

13. Paragraph 5.2 of the Code of Conduct for Investigators states: "An investigator shall not disclose any privileged material or information, or any material or information deemed confidential by the Court, unless authorized to do so."⁵
14. Paragraph 6.1 of the Code of Conduct for Investigators states: "An investigator shall not engage in any deliberate conduct, or make any disclosure, which places or is likely to place the security of any person at risk."

The Protocol

15. The Trial Chamber set forth in the Protocol a number of provisions intended to regulate the disclosure of confidential information relating to witnesses, including "dual status" victims who are to be called to testify.⁶ For the purposes of this Application, the most salient points arising from the Protocol are the following:⁷

- a. "For the purposes of this Protocol, the term "public" includes all persons, governments, organisations, entities, associations and groups. It does not include the judges of the Court, legal staff of the Court, members of the Registry, the Prosecutor and her representatives, the Accused, the defence teams and the legal representatives of victims and their teams."⁸ That is to say, for the purposes of the protocol, the term "public" includes the High Court of Kenya, its judges and staff,

⁵ The Registry, *Code of conduct for investigators*, 10 September 2008, available at <<http://bit.ly/13gJO2e>> (accessed 13 August 2013).

⁶ A subsequent supplementary protocol (ICC-01/09-02/11-524, dated 9 November 2012 and filed on 12 November 2012), dealing with those victims "who wish to present their views and concerns individually by appearing directly before the Chamber, in person or via video-link", has no application in the present circumstances.

⁷ In accordance with paragraphs 34-35 of the Protocol, the Legal Representative on 11 August 2013, having failed to receive any response from the Defence to his enquiries, notified the VWU Head of Protection by email of the possibility of breaches of the Protocol, setting out the relevant factual background.

⁸ Protocol, para. 3.

and all mobile telephone companies in Kenya, as well as all members of the Government of Kenya, apart from the Accused and his defence team.

- b. "Every party or participant shall apply good practices throughout their investigations. An integral part of these good practices is to minimise the risk of exposing confidential material to the greatest extent possible."⁹
- c. "The parties and participants shall adhere to the high standards of confidentiality set out in the Code of Professional Conduct for counsel and the Code of Conduct for Investigators"¹⁰.
- d. "Parties and participants shall not disclose to the public any confidential material obtained in the course of the proceedings before the ICC, except to the extent it proves to be necessary and inevitable for their investigation and/or preparation of the case. *In cases where such disclosure may reasonably be seen as inconsistent with specific conditions of confidentiality applicable to a document or information, the party or participant may only disclose it with the leave of the Chamber.*"¹¹
- e. "Should it become necessary for the purposes of conducting investigations and/or preparation of the case to refer to the identity of any individual who is or has been involved, directly or indirectly, with the activities of the Court, *the party or participant shall under no circumstances reveal (i) that the person is involved, directly or indirectly, with the activities of the Court; or (ii) the nature of such involvement.*"¹²
- f. In relation to record-keeping, the Protocol provides: "The party or participant disclosing identifying information related to Witnesses or their family members shall keep a record of all of the circumstances in

⁹ *Ibid*, para. 16.

¹⁰ *Ibid*, para. 17.

¹¹ *Ibid*, para. 19, emphasis added.

¹² *Ibid*, para. 20, emphasis added.

relation to such disclosure during their investigation and/or preparation of the case. This record shall contain (i) the name and particulars of the person(s) 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.”¹³

- g. Furthermore, the Protocol recognizes the potential for re-traumatisation of vulnerable witnesses which might be caused by disclosure of identifying information without their informed consent:¹⁴

“A key element in the process of traumatisation arises from the sense of loss of control (of their lives, wellbeing and/or physical and psychological integrity) and unwanted intrusion that may occur within a single traumatic event or series of traumatic events. In a similar way, treatment for many survivors of traumatic abuse can involve processes to aid the individual in resuming control and psychosocial integrity. Given these considerations, the disclosure of identifying information related to these individuals without prior informed consent may reinforce a sense of helplessness and represent a further intrusion (that indeed may risk the vulnerable Witnesses experiencing a form of re-violation).”

IV. Information which might identify of protected victims and witnesses must be disclosed only in accordance with the Protocol

16. The victims are aware that the pre-trial period of the present case has taken place in a context of allegations of high levels of witness intimidation within Kenya. The victims have repeatedly and firmly expressed to the Legal Representative their serious concerns for their own safety, as well as their concerns that the Accused will use the institutions and powers available to him as President to do whatever he can to derail the ICC process, and to bring to an end the case against him. For example, the victims have observed with great concern the recent vigorous efforts of the Government of Kenya before

¹³ *Ibid*, para. 22.

¹⁴ *Ibid*, para. 27.

various international fora (the African Union, the United Nations Security Council and the Assembly of States Parties) to terminate ICC jurisdiction over the present case. The victims have also expressed deep disquiet in relation to reports in the media in recent months which have emphasized the withdrawal of several Prosecution witnesses in the present case, following the election of the Accused as President of Kenya.

17. The parties are undoubtedly permitted to conduct investigations to uncover evidence in support of their respective cases, and the retrieval of any mobile telephone data and cell tower data which will assist the Trial Chamber in its pursuit of the truth is to be welcomed.
18. Nevertheless, it is imperative that any disclosure of identifying information relating to victims and witnesses takes place strictly in accordance with the Protocol and the other provisions set out above, which reflect in clear terms that disclosure to the public of information which might identify protected persons is a matter to be handled with the utmost caution.
19. It is a matter of the gravest concern that information which might identify protected victims, and other witnesses, might recently have been disclosed to members of the public in Kenya, without the express permission of the Trial Chamber. Such disclosure, if it has taken place, can only increase the possibility that those protected individuals or their families in Kenya will be subject to intimidation, bribery or other inappropriate influence.
20. Article 68(1) of the Statute mandates the Court to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. The unwarranted disclosure of the identities of protected victims and witnesses impacts directly on their safety, physical and psychological well-being, and the disclosure of mobile telephone data also raises concerns regarding their right to privacy.

21. It is imperative to minimize the possibility of any further witness intimidation in this case, and to ensure that the Trial Chamber's directions regarding the disclosure of confidential information are properly observed.
22. It would therefore be appropriate for the Chamber to order the Defence to clarify what information it has disclosed, so that the Chamber is then fully informed of the position and can take whatever action it deems appropriate.

V. Relief requested

23. For the reasons set out above, the Legal Representative respectfully requests the Trial Chamber to order the Defence, pursuant to Article 68(1) of the Statute and Article 8(4) of the Code of Professional Conduct for Counsel:
 - a. To inform the Trial Chamber, the Legal Representative and the Prosecution without delay whether it has communicated information which might lead to the identification of any victim of the crimes charged in the present case, or any protected witness, to any member of "the public", as defined in the Protocol (including to the High Court of Kenya or to any mobile telephone company in Kenya).
 - b. To provide to the Trial Chamber the record required by paragraph 22 of the Protocol in relation to any such disclosure.

Respectfully submitted,



Fergal Gaynor
Common Legal Representative of Victims

Dated this 13th of August 2013

At Nairobi, Kenya