

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 24 August 2012

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 document

**Decision on the protocol concerning the handling of confidential information
and contacts of a party with witnesses whom the opposing party intends to call**

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 Francis Kirimi Muthaura
Mr Karim Khan, Mr Essa Faal,
Mr Kennedy Ogetto, Ms Shyamala
Alagendra

Legal Representatives of Victims
Mr Morris Anyah

Counsel for Uhuru Muigai Kenyatta
Mr Steven Kay
Ms Gillian Higgins
Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar
Ms Silvana Arbia

Deputy Registrar

Victims and Witnesses Unit
Ms Maria Luisa Martinod-Jacome

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber V (“Chamber”) of the International Criminal Court in the case of *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta* renders the following decision, having considered Articles 54(1)(b) and (3)(f), 57(3)(c), 67(1) and 68(1) of the Rome Statute (“Statute”), Regulations 92 to 96 of the Regulations of the Registry, and Article 8(4) of the Code of Professional Conduct for counsel.

Procedural background

1. On 12 June 2012, the Chamber held a status conference at which it directed the parties and legal representative of victims to jointly consult with the Registry with a view to proposing a workable protocol on contacts with the opposing party’s witnesses and on communication of non-public information to the public.¹ Such a draft protocol was to be filed by 22 June 2012.²
2. On 22 June 2012, the Registrar filed the “Submission of the draft protocol on contacts with the witnesses of opposing parties and on communication of non-public information to the public in the course of the parties and participants’ investigations”.³ A draft protocol (“Draft Protocol”) is appended to the Registrar’s submission as Annex 1. The parties, the legal representative of victims and the Victims and Witnesses Unit (“VWU”) agreed on most of the provisions of the Draft Protocol. Their arguments with respect to those provisions on which they could not agree are included in the Draft Protocol. The Chamber will not summarise these arguments, unless necessary.

¹ ICC-01/09-02/11-T-18-ENG, page 59, lines 14 – 18.

² ICC-01/09-02/11-T-18-ENG, page 81, lines 12 – 18.

³ ICC-01/09-02/11-440, with Annex 1. The documents were notified on 25 June 2012.

3. The Chamber notes, at the outset, that some aspects of the parties' contacts with the opposing party's witnesses were regulated at the pre-trial stage. Among the conditions restricting the suspects' liberty, Pre-Trial Chamber II included a prohibition of direct or indirect contacts with "any person who is or is believed to be a victim or a witness of the crimes for which Francis Kirimi Muthaura [and] Uhuru Muigai Kenyatta have been summoned".⁴ Subsequently, the Pre-Trial Chamber set out the modalities of the defence's contacts with persons willing to give their account of the alleged facts as follows:

- such a person must give his or her consent voluntarily and knowingly, and the parties to the proceedings are prohibited from trying to influence that person's decision as to whether or not to agree to be contacted by the defence;
- before such contact takes place, the defence is ordered to communicate the name and necessary contact details to the VWU, which is to advise the defence, within two weeks, on whether such contact may put the person at risk.⁵

4. In its decision of 12 May 2011, Pre-Trial Chamber II further decided that the above modalities only applied to the defence and not to the Office of the Prosecutor ("prosecution"), which has "significant duties as well as powers, related to the protection of victims and witnesses, which the Defence does not have."⁶

⁴ Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 8 March 2011, ICC-01/09-02/11-1, page 24.

⁵ Decision on Variation of Summons Conditions, 4 April 2011, ICC-01/09-02/11-38, paragraphs 15 to 16.

⁶ Decision on the "Defence Request for Variation of Decision on Summons or in the Alternative Request for Leave to Appeal", 12 May 2011, ICC-01/09-02/11-89, paragraph 23.

Analysis

5. The Chamber takes note of the relevant jurisprudence of other Chambers.⁷ The Chamber will follow the principles enunciated by those Chambers, subject to modifications resulting from (i) the acceptance of some of the suggestions of the parties, the legal representative of victims and the VWU in the present case, and (ii) the specific circumstances of the present case. The Chamber considers that the final protocol, included as an Annex to the present decision, fully supersedes the procedure which applied to the defence at the pre-trial stage,⁸ without prejudice to paragraph 7 below. The Chamber points out that it has given considerable weight to the parties' agreements on various issues, notwithstanding that the Chamber is not bound by such agreements. Where there is no disagreement, the Chamber has generally accepted the proposed procedure in the form presented in the Draft Protocol, at times with minor modifications. As regards issues on which agreement was not reached and more than one option was presented to the Chamber, it chose the option which, in its view, best accords with the Chamber's sense of justice, having particular regard to the above-mentioned principles. The Chamber will discuss some of the issues on which there was no agreement and will give its reasons for preferring one option to another.

⁷ *Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, Decision on the prosecution's application for an order governing disclosure of non-public information to members of the public and an order regulating contact with witnesses, 3 June 2008 (notified on 4 June 2008), ICC-01/04-01/06-1372; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Trial Chamber II, Decision on a number of procedural issues raised by the Registry, 14 May 2009, ICC-01/04-01/07-1134; *Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber III, 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; *Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, Redacted Second Decision on disclosure by the defence and Decision on whether the prosecution may contact defence witnesses, 20 January 2010, ICC-01/04-01/06-2192-Red; *Prosecutor v. Laurent Gbagbo*, Pre-Trial Chamber III, 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.

⁸ Decision on Variation of Summons Conditions, 4 April 2011, ICC-01/09-02/11-38, paragraphs 15 to 16.

6. The prosecution and the Muthaura defence proposed different definitions of a witness for the purposes of the Draft Protocol.⁹ The Muthaura defence's definition includes, *inter alia*, individuals whom the party has reasonable grounds to believe have met with another party or participant as part of that party or participant's substantive investigation into the case. The Chamber finds this definition too broad. The Chamber also fails to see how limiting the definition of "witnesses" to those identified in accordance with the definition suggested by the prosecution (*i.e.* any person whom a party or participants or participant intends to call during the trial proceedings, provided that the intention has been conveyed to the non-calling party) could adversely affect the principle of equality of arms, as argued by the Muthaura defence.¹⁰ In particular, the Chamber sees no risk of prejudice to the defence on account of the fact that the prosecution can contact persons whom the defence does not at this stage intend to call to testify but may choose to do so later on. If such persons provide to the prosecution information of an exculpatory nature, the prosecution will be obliged to disclose it to the defence in accordance with Article 67(2) of the Statute. Furthermore, if the prosecution eventually does not call them as witnesses, the defence will be free to call them. The Chamber also notes that the definition proposed by the Muthaura defence may extend to persons who are unlikely to ever be called as witnesses, for example persons whom a party met, as part of its investigation, for the sole purpose of obtaining information on the whereabouts of a person whom the party intends to call as a witness. The prosecution's definition of a witness will therefore be adopted for the purposes of the final protocol, with some modification.
7. The Chamber notes that the Draft Protocol contains proposed provisions pertaining to victims. As the Chamber has not yet ruled on the system of processing

⁹ Draft Protocol, pages 2 to 3.

¹⁰ Draft Protocol, page 2.

applications for participation and modalities of participation of victims, the final protocol, attached as the Annex, will not deal with matters relating to victims. The relevant parts of the Draft Protocol shall apply until the Chamber rules on these matters.

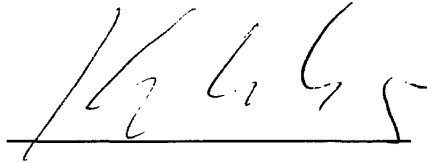
8. The Chamber does not agree with the proposal of the prosecution that no notification of the other party should be required when the witness him- or herself takes the initiative of contacting the non-calling party.¹¹ Such an exception is not consistent with the general requirement of transparency in parties' contacts with witnesses whom the opposing party intends to call. The Chamber is therefore of the view that witnesses who contact the non-calling party should be dealt with in the same way as where a party contacts the other party's witness, including the requirement of obtaining the witness' consent.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY


DECIDES that the parties and legal representative of victims shall apply the Protocol set out in the Annex to the present decision and, in so far as contacts with victims are concerned, the Draft Protocol until the Chamber rules on such contacts.

¹¹ Draft Protocol, paragraph 3.

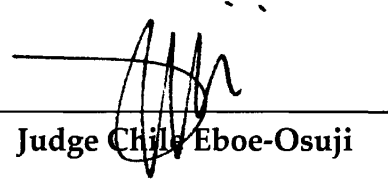
Done in both English and French, the English version being authoritative.



Judge Kuniko Ozaki, Presiding Judge



Judge Christine Van den Wyngaert



Judge Chile Eboe-Osuji

Dated this 24 August 2012

At The Hague, The Netherlands

Annex

Protocol

1. Definitions

1. For the purposes of this Protocol, a witness is a person whom a party or participant intends to call to testify during the trial proceedings, provided that such intention has been conveyed to the non-calling party, either by the calling party including the individual on its filed witness list, or by the witness informing the non-calling party that he or she has agreed to be called as another party's witness, or by any other means that establish a clear intention on behalf of the calling party to call the individual as a witness and that this individual has consented thereto.
2. For the purposes of this Protocol, "Others at Risk" are persons at risk on account of their activities for the Court or on account of the testimony / statements given by others.
3. 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.

2. Contacts with the witnesses of another party

2.1 Notification of another party

4. Subject to the exceptions listed in paragraph 5 below, a party which intends to interview a Witness of another party shall first notify the other party of this intention, setting out the suggested time and location of the interview. If the non-

calling party becomes aware that the individual is a Witness only at the initial contact, it shall, subject to the exceptions listed in paragraph 5, cease contact and notify the calling party as soon as possible.

5. The notification obligation shall not apply if (i) the non-calling party has an objectively justified basis for determining that notification could jeopardise the security of the Witness, in which circumstance the VWU shall be immediately notified in order to assess the validity of the party's concern and any contact with the Witness, pending the VWU's assessment, shall be audio or video recorded; or (ii) the contact is established for purposes wholly other than conducting an interview (e.g. such as the fulfillment of cooperation obligations by government officials).
6. In the instances set out in paragraph 5, the other obligations under this Protocol related to the "Contacts with the witnesses of another party" shall not apply, except in respect of the conditions related to the VWU, set out in paragraphs 14 to 15.

2.2 Consent

7. After being notified, the party calling the Witness shall seek the consent of the Witness within five days of receiving notification. In doing so, the calling party shall not in any way attempt to influence the Witness's decision as to whether or not to agree to be interviewed by the other party. If the Witness consents, the calling party shall inform the non-calling party and contact shall be facilitated as appropriate.

2.3 Objections to the interview

8. If the party who intends to call a Witness objects to the interview, it shall inform the non-calling party. If the parties cannot reach an agreement, despite their best efforts, they shall promptly raise the matter with the Chamber.
9. Without prejudice to Article 56 of the Rome Statute ("Statute"), Rule 114 of the Rules of Procedure and Evidence and Article 57(3)(b) of the Statute, the non-calling party shall not proceed with the interview until the Chamber rules on the matter.

2.4 Presence during the interview

10. Where the notification provisions of Section 2.1 apply, and unless the Chamber rules otherwise (for example for reasons related to security), a representative of the party calling the Witness may be present during the interview, provided that the Witness consents. If the Witness does not consent, the interview shall take place without a representative of the calling party.
11. The representative of the calling party present at an interview shall not, in any manner, prevent or dissuade the witness from answering questions freely. If the calling party considers that it must object to any part of the procedure followed or a particular line of questioning this will be recorded. Such objections must not impede or unduly disrupt the interview.
12. In principle, the parties shall make all the necessary logistical arrangements in accordance with the good practices to organise the interview. However, should there be any remaining security concerns, the calling party shall inform the VWU for the latter to assess the situation and, if necessary, take relevant steps in order to assist the parties in organising the meeting in a safe manner.

13. In addition, independent of the wishes of the Witness, it is the responsibility of the calling party to ensure that, if the Witness is particularly vulnerable or otherwise in need of assistance during the interview, the appropriate assistance is provided and that, where necessary, it contacts the VWU well in advance of the scheduled interview in order to arrange for an assessment of the need for assistance by a VWU representative during the interview.

2.5. Individuals participating in the ICCPP and those subject to an assisted move

14. When the party wishing to interview an individual is aware that he or she is a participant in the ICCPP, or has been otherwise re-located with the assistance of the Court, the party shall, in addition to the procedures established above, also inform the VWU.

15. In respect of the individuals in the ICCPP, all contact shall occur exclusively through VWU, which shall seek the consent of the individual and make the arrangements for the interview to take place.

3. Communication of non-public information to the public in the course of the parties and participants' investigations

3.1 General

16. 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.

17. 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. The VWU remains available to provide training on good practices and advice to the Court staff, parties and participants who are in direct contact with potential witnesses.
18. All obligations listed in the current protocol that apply to the parties and participants also apply to their staff, the intermediaries they use, any other individuals who perform tasks on their behalf and the suspects or accused.

3.2. Limited disclosure of confidential information

19. 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.
20. 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.

3.3. Disclosure of visual and/or non-textual material

21. The disclosure of identifying information contained in visual and/ or non-textual material such as photographs or audio-tapes, which may reveal the involvement of the person or persons depicted in the activities of the Court, can have a significant impact on the level of risk for the individuals concerned. The parties and participants should only disclose such material where alternative modes of investigations have proved ineffective or are not feasible, and shall limit the disclosure of such material to what is strictly necessary in the circumstances. To reduce the risk of disclosing the involvement in the activities of the Court of the persons depicted, the parties and participants shall only disclose materials which do not contain elements which tend to reveal such involvement.

3.4. Record

22. The party or participant disclosing identifying information related to Witnesses or their family members shall keep a record of all of the circumstances in 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.

23. In respect of identifying information related to Witnesses or their identified family members, in visual and/ or non-textual form, the party or participant shall, in addition to keeping a record as indicated above in paragraph 22, also keep a record

of all the members of the party or participant's team having access to this material and the period in which they had such access.

3.5. Location of protected persons

24. A party or participant shall not make inquires relating to the current location of individuals who are participants in the ICCPP, individuals who have been assisted by the Court to move away from their initial place of residence or those whose location has been protected by the Chamber, without leave of the Chamber.
25. The party or participant shall inform the VWU Head of Protection as soon as possible, should the location of such protected Witnesses become apparent to him/her.

3.6. Prior consent to disclosure

26. Witnesses may perceive themselves to be at a very high level of risk by realising that investigative activities related to them are conducted in the field. While this perception does not always correspond to the objective level of risk, it may still cause difficulties in the management of expectations and may ultimately have an effect on the willingness of those affected to cooperate with the Court.
27. These concerns are amplified with regard to Witnesses who are considered to be vulnerable. 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).

28. In order to avoid such an adverse reaction to investigative activities, the individuals concerned must be informed from the outset that their involvement with the Court may also entail being the subject of investigations.
29. Therefore, the parties or participants carry the responsibility of ensuring that the individuals concerned provide their informed written consent to their involvement with the Court. This consent should be provided before the provision of any witness statement. The parties and participants bear a higher responsibility in this regard when their activities may involve vulnerable Witnesses.
30. When informing Witnesses of the above, parties or participants shall explain (i) the nature of the information to be revealed; (ii) to whom it may be revealed; (iii) the purpose for which the information will be disclosed; and (iv) the possible consequences for the Witness. In order to be able to provide informed consent, the individual should be given enough time to be able to comprehend, retain and balance the information provided before arriving at a decision.
31. If the party or participant collects visual and/ or non-textual material from the Witness, it shall clarify explicitly how these materials may be disclosed.
32. If any of the information provided in paragraph 30 changes, the parties or participants shall endeavour to inform the Witness of such change.

33. In the event the Witness is a minor (i.e. under the age of 18), the informed consent should also be provided by their legal guardian, if at all possible.

3.7. Breaches of confidentiality

34. All parties and participants must be conscious of the possible danger that their inquiries may pose to Witnesses, members of their family or Others at Risk. The party or participant should bring to the attention of the VWU Head of Protection any reasonable suspicion that a Witness, members of his or her family or Others at Risk may have been placed at risk for any reason (for example, that his/ her protected location has become known) as soon as possible.

35. Likewise, if 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.

36. 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.