

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 20 June 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**

**Decision on the defence's request for interim measures in relation to the  
prosecution's contacts with potential defence witnesses**

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

**Counsel for Uhuru Muigai Kenyatta**

Mr Steven Kay  
Ms Gillian Higgins

**Legal Representatives of Victims**

Mr Morris Anyah

**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**

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**Registrar**

Ms Silvana Arbia

**Deputy Registrar**

**Victims and Witnesses Unit**

Ms Maria Luisa Martinod-Jacome

**Detention Section**

**Victims Participation and Reparations  
Section**

**Others**

1. Trial Chamber V ("Chamber") of the International Criminal Court the case of *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta* renders the following decision.
2. On 12 June 2012, at a status conference, the defence for Francis Kirimi Muthaura ("Muthaura defence") submitted that the Office of the Prosecutor ("prosecution") was using an intermediary to contact one of the Muthaura defence's witnesses.<sup>1</sup> The Muthaura defence applied for an interim injunction prohibiting the prosecution's contacts with defence witnesses without following the procedure set out in the case of *The Prosecutor v. Thomas Lubanga Dyilo* and other cases.<sup>2</sup> The Chamber invited the defence to make a written application and the prosecution to undertake, of their own volition, to refrain from contacting potential defence witnesses pending the Chamber's decision on the matter.<sup>3</sup> The prosecution made an undertaking in relation to that request of the Chamber, indicating that the interim measure in question would only apply to its contacts with witnesses "identified as such (...) during the pre-trial hearings".<sup>4</sup>
3. On 14 June 2012, the Muthaura defence filed the "Defence Application for (1) An Order prohibiting the Prosecution from contacting potential Defence witnesses without following the procedural safeguards stipulated in other cases before the ICC and (2) An Order to the Prosecution to disclose information on all contacts between the Prosecution and potential Defence witnesses" ("Application").<sup>5</sup> The Muthaura defence requests that the Chamber immediately: (i) issue an order prohibiting the prosecution from contacting through direct or indirect means

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<sup>1</sup> Transcript of status conference, ICC-01/09-02/11-T-18-ENG ("Transcript"), p. 67.

<sup>2</sup> Transcript, p. 71.

<sup>3</sup> Transcript, pp. 79–80.

<sup>4</sup> Transcript, p. 80.

<sup>5</sup> ICC-01/09-02/11-433 with annexes. On 15 June 2012, the defence filed a corrigendum (ICC-01/09-02/11-433-Corr with an annex).

potential defence witnesses until such time that the Chamber renders a decision on the protocol on contacting witnesses of the other party, and (ii) order the prosecution to disclose to the Muthaura defence a log of contacts between the prosecution and potential defence witnesses. For the purposes of its Application the Muthaura defence defines “potential defence witnesses” as (a) the individuals named in the defence list of evidence<sup>6</sup> and (b) individuals whom the prosecution is aware or has reasonable grounds to believe have provided a statement to or otherwise met with members of the Muthaura defence as part of their substantive investigation into the case.<sup>7</sup> In support of its Application, the Muthaura defence makes reference to an alleged contact between an intermediary acting on behalf of the prosecution and an individual whose name appears in the defence list of evidence.<sup>8</sup>

4. On 18 June 2012, the defence for Uhuru Muigai Kenyatta (“Kenyatta defence”) filed a response to the Application,<sup>9</sup> in which it: (i) adopts the submissions of the Muthaura defence “in so far as [the Application] deals with the general issue of restraining the prosecution from contacting the witnesses of a party or a participant in the proceedings until the Chamber has established an appropriate protocol”, and (ii) makes requests identical to those made by the Muthaura defence.
5. On 18 June 2012, the prosecution filed its response to the Application.<sup>10</sup> The prosecution opposes the Application and submits that (i) the defence’s proposed

<sup>6</sup> ICC-01/09-02/11-305-Conf-Anx4.

<sup>7</sup> Application, para. 33.

<sup>8</sup> *Ibid.*, paras 3-6.

<sup>9</sup> Defence Response on behalf of Uhuru Kenyatta to the “Defence Application for (1) An Order prohibiting the Prosecution from contacting potential Defence witnesses without following the procedural safeguards stipulated in other cases before the ICC and (2) An Order to the Prosecution to disclose information on all contacts between the Prosecution and potential Defence witnesses” (ICC-01/09-02/11-433-Corr), ICC-01/09-02/11-436.

<sup>10</sup> Prosecution Response to “Defence Application for (1) An Order prohibiting the Prosecution from contacting potential Defence witnesses without following the procedural safeguards stipulated in other cases before the ICC and (2) An Order to the Prosecution to disclose information on all contacts between the Prosecution and potential Defence witnesses, ICC-01/09-02/11-437-Conf-Exp. Confidential and public versions were notified on 19 June 2012 (ICC-01/09-02/11-437-Conf-Red, ICC-01/09-02/11-437-Red2).

injunction fails to address the specific circumstances of this case; (ii) a ruling sought by the Muthaura defence would prevent the prosecution from conducting its investigative activity; and (iii) if granted, the defence request for disclosure of “all contacts and attempted contacts between the Prosecution and potential Defence witnesses” may create risks to the persons concerned.<sup>11</sup>

6. The Chamber recalls at the outset that 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.<sup>12</sup> Such a draft protocol is to be filed by 22 June 2012<sup>13</sup> and in due course the Chamber will issue a decision with respect to it. The Chamber notes that the Application contains submissions relevant to the adoption of such protocol. They will be taken into consideration when the Chamber makes its decision on the protocol. In the present decision the Chamber will only deal with the question whether interim measures are required until the Chamber decides on the protocol.
7. In order to rule on such interim measures, the Chamber needs to determine whether the absence of restrictions on the prosecution’s contacts with potential defence witnesses in the present case will create an irreversible situation that could not be corrected, or otherwise cause irreparable prejudice to the defence and/or to the persons who may be contacted by the prosecution. The Chamber takes note of the jurisprudence of the Appeals Chamber on suspensive effect, under Article 82(3) of the Rome Statute. While not directly applicable to the measures sought in the present case, it is of guidance. When examining applications for suspensive effect, the Appeals Chamber considered whether the implementation of the decision under appeal: (i) would create an irreversible situation that could not be corrected,

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<sup>11</sup> *Ibid.*, paras 44, 49 and 52.

<sup>12</sup> Transcript, p. 59.

<sup>13</sup> Transcript, p. 81.

even if the Appeals Chamber eventually were to find in favour of the appellant; (ii) would lead to consequences that would be very difficult to correct and may be irreversible, or (iii) could potentially defeat the purpose of the appeal.<sup>14</sup> The Chamber also notes the jurisprudence of the European Court of Human Rights, requiring “imminent risk of irreparable damage”,<sup>15</sup> and Article 41 of the Statute of the International Court of Justice (“ICJ”), which provides for provisional measures “to preserve the respective rights of either party”. The power to indicate such measures was considered by the ICJ to presuppose that “irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings”.<sup>16</sup> The Chamber is, however, mindful of the specific mandates of these two courts and of the fact that States are parties to proceedings before them.

8. The Muthaura defence submits that “the apparent- and un-denied- conduct by the Prosecution in this matter potentially amounts to serious misconduct that may have already placed the life of at least one potential Defence witness at risk (...) and which, inherent within it, includes the risk of subverting the proper administration of justice”.<sup>17</sup> The Muthaura defence provides documents in support of its allegation.<sup>18</sup> However, having reviewed the relevant information, including the updated information provided by the Muthaura defence in its confidential *ex parte* Annex D, the Chamber sees no link between the prosecution’s conduct and the alleged risk to the life of that witness.

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<sup>14</sup> *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on the requests of Mr Ruto and Mr Sang for suspensive effect, 29 February 2012, ICC-01/09-01/11-391, para. 9, citing to: *Prosecutor v. Jean-Pierre Bemba Gombo*, “Decision on the Request of Mr Bemba to Give Suspensive Effect to the Appeal Against the Decision on the Admissibility and Abuse of Process Challenges”, 9 July 2010, ICC-01/05-01/08-817, para. 11.

<sup>15</sup> *Mamatkulov v. Turkey*, Grand Chamber Judgment, 4 February 2005, nos. 46827/99 and 46951/99, para. 104.

<sup>16</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Order of 13 September 1993, para. 35.

<sup>17</sup> Application, para. 1. See also para. 32.

<sup>18</sup> Annexes A-D to the Application.

9. In addition to this allegation, the Muthaura defence makes reference to rulings of other Trial Chambers stressing the importance of the protocol governing contacts with the opposing party's witnesses and its role in safeguarding the security of witnesses.<sup>19</sup> However, those rulings are of a general nature and, on their own, are of little relevance to the issue in the present case of whether an interim order is required at this stage to restrict the prosecution's contacts with potential defence witnesses.
  
10. The Muthaura defence claimed on record that their request for the interim order was compelled by emergency. However, the Chamber notes that the Muthaura defence was aware of what it believes was a contact between an intermediary acting on behalf of the prosecution and an individual whose name appears on the defence list of evidence, as early as on 25 May 2012, and that by the end of that same day the Muthaura defence had already had an *inter partes* exchange with the prosecution on this issue.<sup>20</sup> The Chamber further notes that defence counsel waited until the Chamber-scheduled status conference of 12 June 2012 to request that an injunction be granted on an extremely urgent basis.<sup>21</sup> The fact that the Muthaura defence chose to bring this matter to the Chamber's attention only on 12 June 2012 casts doubt on the assertion that interim measures are required pending the adoption of a generic protocol.
  
11. Turning to the second part of the relief sought by the Muthaura defence, which is an order to the prosecution for disclosure of a log of contacts with potential defence witnesses, the Chamber notes that it has not been explained why such a log should be provided as an interim measure pending the Chamber's decision on the protocol.

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<sup>19</sup> Application, paras 28-30.

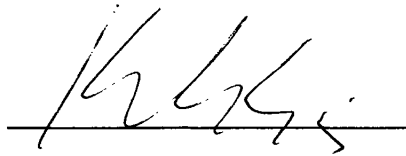
<sup>20</sup> Annexes A-C to the Application

<sup>21</sup> Transcript, pp. 67 to 81.

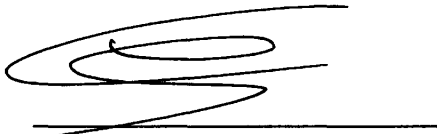
**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY:**

- **Rejects** the request for an interim order prohibiting the prosecution from contacting potential defence witnesses until such time that the Chamber renders a decision on the protocol on contacting witnesses of the other party; and
- **Rejects** the request for an order to the prosecution for disclosure of a log of contacts with potential defence witnesses, without prejudice to the prayer being resubmitted in future and properly grounded.

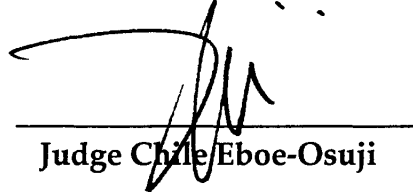
Done in both English and French, the English version being authoritative.



**Judge Kuniko Ozaki, Presiding Judge**



**Judge Christine Van den Wyngaert**



**Judge Chile Eboe-Osuji**

Dated this 20 June 2012

At The Hague, The Netherlands