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

Date: **25 June 2012**

TRIAL CHAMBER V

Before: Judge Kuniko Ozaki, Presiding
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

**Defence Submissions on the provision of a Summary of the Presentation of
Evidence and an In-depth Analysis Chart**

Sources: Counsel for Ambassador Francis Kirimi Muthaura

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

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I. Procedural History

1. At the status conference held on 12 June 2012, Trial Chamber V (the “Chamber”) requested that the parties consult on the possible elements of a “summary of Prosecution evidence” and an “in-depth analysis chart” (“IDAC”) and to update the Chamber on these discussions within 10 days.¹
2. Following consultations among the parties, it was generally agreed that the Prosecution shall provide a summary of its evidence, also known as a “pre-trial brief” to the defence teams.² By its very nature this Pre-Trial Brief will not be available until completion of Prosecution disclosure. It will not be disclosed anytime soon.
3. With respect to the format, content and timing for disclosure of the IDAC, the Prosecution and the Defence of Ambassador Francis K. Muthaura (“Defence”) were able to agree to the majority of the elements, with two key exceptions.

II. IDAC elements agreed upon by the Prosecution and Defence

4. The Prosecution has agreed to provide an IDAC that includes the information fields listed below:
 - Fact upon which the Prosecution seeks to rely;
 - Source (ERN);
 - Title of source;
 - Page within source (ERN);
 - Paragraph/line within page;
 - Type of document;

¹ ICC-01/09-02/11-T-18-ENG ET CT, page 51, line 3 to page 52, line 1.

² The Defence understands that based on the jurisprudence of the Court, or at least in the context of this case, the “summary of prosecution evidence” and the “Pre-Trial Brief” are synonymous terms.

- Witness code of witness to whom the document relates (based on the "related to witness" field);
- Date of the item; and
- Element(s) of crime(s) to which the fact relates.

5. This is satisfactory to the Defence aside from the below stated points.

III. Timing of IDAC provision and reference to DCC

6. The Prosecution and Defence have not been able to arrive at an agreement as to when the IDAC should be provided to the Defence. The Prosecution position appears to be that the IDAC should reference only the paragraphs of the Pre-Trial Brief. Accordingly, the IDAC would only be provided and available to the Defence once disclosure has been completed, many months from now.
7. The Defence respectfully submits that the IDAC should reference the relevant paragraphs of the Amended DCC and be provided in conjunction with the Amended DCC. An Amended version of the IDAC should be provided in conjunction with the provision of the Pre-Trial Brief to the Defence, which includes the relevant references to the paragraphs of the Pre-Trial Brief.
8. As submitted in the Defence Application for Leave to Appeal the "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute",³ the core factual allegations against Ambassador Muthaura have been significantly re-framed⁴ in the Confirmation of Charges Decision. Accordingly, in order to preserve the client's right to be informed "in detail of the nature, cause and content of the charge[s]" against him (Article 67(1)(a) of

³ ICC-01/09-02/11-385.

⁴ *Ibid.*, paras. 18-22.

the Rome Statute) in view of the significant re-framing of the factual allegations, it is essential that both an Amended DCC and linked IDAC are provided to the Defence as soon as possible.

9. The Defence wish to underline, in the circumstances of the present case, where the charges faced by the accused significantly differ from the charges framed in the Prosecution's Article 58 Application, the Amended DCC and linked IDAC serve an additional, critical function: they allow the Defence to properly know the charges faced by the client, the evidence related to those charges, and to effectively and efficiently plan and conduct defence investigations.

IV. Defence Submissions on inclusion of 'excerpts' field in IDAC

10. The Defence is unable to accept the Prosecution's submissions regarding the lack of utility of the IDAC. The Defence maintains the position set out in its written submissions on the agenda for the 12 June status conference⁵ as well as its oral submissions at the status conference.⁶
11. The IDAC is primarily prepared to be of assistance to the Defence and the Chamber. It is not expected to primarily assist the Prosecution. In line with its above submissions on the Amended DCC, the Defence considers a properly prepared IDAC a foundational document for the proper preparation of the Defence including the focusing of defence investigations and utilisation of Defence resources. An essential element of a properly prepared IDAC is inclusion of the excerpts of the relevant portions of the documents cited.
12. The Defence submits that the IDAC provided by the Prosecution at the pre-confirmation stage of this case was not unwieldy because it contained the

⁵ ICC-01/09-02/11-427, para. 37.

⁶ ICC-01/09-02/11-T-18-ENG ET CT, page 43, line 9 to page 45, line 12.

excerpts of the cited document – indeed that was the most useful portion of the IDAC for the Defence – but because it did not contain other necessary categories of information, all of which have now been agreed to by the Defence and Prosecution (for example the witness code and title of document fields).

13. The Defence notes that the Prosecution have not put forward any reason why the paradigm example for the IDAC as provided by the Prosecution without prompting from the Chamber or defence in the *Abu Garda* case and the *Banda & Jerbo* case should be departed from, aside from the “burden” that inclusion of excerpted information would place on the Prosecution. The Defence submits that these are the paradigm examples for an IDAC as they contained the core fields that have now been agreed to by the Prosecution as well as the relevant excerpts from the documents cited.

14. The Defence submits that the ‘burden’ on the Prosecution – a burden it willingly took on at the pre-trial stage of the case – is not so significant as to militate against provision of an IDAC including the ‘excerpts’ field given the great benefit provided by the inclusion of this field for the Defence.

Respectfully Submitted,



Mr. Karim A. A. Khan QC
Lead Counsel for Ambassador Francis K. Muthaura

Dated this 25th Day of June 2012

At Nairboi, Kenya