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

Date: **31 October 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. WILLIAM SAMOEI RUTO AND JOSHUA ARAP SANG***

**Public document**

**Prosecution's report on joint instruction of experts**

**Source:** The Office of the Prosecutor

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

**The Office of the Prosecutor**

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**Other**

1. Pursuant to the Chamber's 9 July 2012 Decision on the schedule leading up to trial,<sup>1</sup> the Prosecution hereby submits its report on the joint instruction of experts.
2. The Prosecution has proposed to both Defence teams three areas of expert evidence: social and political background (Prof. Hervé Maupeu); satellite imagery (Mr. Lars Bromley); and Post-Traumatic Stress Disorder (PTSD) (expert witness yet to be confirmed).
3. The Prosecution provided to both Defence teams proposed joint instructions for particular areas of expertise. The Prosecution also provided both Defence teams with curriculum vitae for both Prof. Maupeu and Mr. Bromley.
4. In accordance with the Chamber's Order,<sup>2</sup> the parties have conferred on these issues. However, no agreement has been reached to date. An extension of thirty days (until 30 November 2012) may assist the parties in reaching an agreement on all or some of the proposals.

### **Expertise in social and political background**

5. On 17 October 2012, the Prosecution proposed Prof. Hervé Maupeu as a background expert to testify in both Kenya cases. In addition, the Prosecution provided the Defence teams with proposed instructions for their consideration. The Prosecution also provided to the Defence the contacts it has had with Prof. Maupeu. These contacts were limited to discussing the prospect of him becoming an expert in the two Kenya cases, and exploring the extent of his knowledge on specific issues relevant to both cases.

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<sup>1</sup> ICC-01/09-01/11-440, para .12.

<sup>2</sup> *Ibid.*

6. Both Defence teams have expressed the need for additional time to be able to consider Prof. Maupeu's academic works, particularly considering that his writings are primarily in French.
7. Thus far, the Defence teams have indicated that some of the proposed instructions do not require expert opinion and are either included already in the agreed facts or can be the subject of testimony by fact witnesses. Other proposed questions, in the Defence view, go to significant areas of the case that may involve the conduct and liability of the Accused and which the Prosecution should seek to prove by means other than 'highly subjective opinion evidence'. One specific question was deemed prejudicial and was opposed by Counsel for Mr. Sang.
8. The Prosecution disagrees with the Defence assertions. The topics subject to the proposed instructions are not included in the agreed facts as they presently exist. Should the Defence be willing to agree to some of the topics contained in the proposed instructions, the Prosecution is ready to engage in further discussion on additional agreed facts.
9. Additionally, the proposed instructions are formed in a neutral and objective manner and do not seek any subjective or partial opinion from Prof. Maupeu. Further, the Chamber will be free to assign whatever weight it deems appropriate to the evidence, after hearing from all of the parties. The Prosecution, nonetheless, is open to further discussions with the Defence on the proposed instructions, including any specific proposals for a different formulation of the suggested questions.

### **Expertise in satellite imagery**

10. On 17 October 2012, the Prosecution proposed Mr. Lars Bromley as a satellite imagery expert to testify in both Kenya cases. At the same time, the Prosecution provided both Defence teams with proposed instructions.
11. As it did for Prof. Maupeu, the Prosecution provided both Defence teams with a summary of its previous contacts with Mr. Bromley and explained that it provided him with a chart listing locations and times relevant to the case, asking for the availability of satellite images for the identified locations and times.
12. Although the Prosecution envisioned reaching at least a preliminary agreement on the relevance of this expert and the general nature of his instructions, it provided the chart referred to above to the Defence on 30 October 2012 in order to advance the discussions. The Prosecution expects the Defence to respond in due course.

### **Expertise in Post-Traumatic Stress Disorder (PTSD)**

13. On 25 October 2012, the Prosecution indicated to both Defence teams that it proposed to call an expert witness in PTSD and sent them proposed joint instructions. The Prosecution indicated that it is in the process of confirming a suitable expert witness. The Prosecution also invited the Defence teams to propose any expert they deem appropriate.
14. On 29 October 2012, the Defence contested the utility of this expertise. Counsel for Mr. Sang indicated their objection to any request to call an expert in this area considering that it is not clear how an expert on PTSD will assist the Chamber in determining the guilt or innocence of the Accused. Counsel for Mr. Ruto questioned the assistance of such expert evidence to the Chamber when

such evidence is based on general questions unrelated to a particular group or individual.

15. The Prosecution disagrees with the Defence position. Chambers of this Court have found that expertise in PTSD can be of assistance to the Court,<sup>3</sup> irrespective of whether or not the expert has personally carried out an examination of, or interviewed, the witness(es) in question.<sup>4</sup>

## Conclusion

16. With respect to the proposed evidence on satellite imagery and social and political background, discussion is advancing with both Defence teams.
17. With respect to the PTSD expert, there appears to be no realistic prospect of an agreement, at least with the Defence for Mr. Sang, to jointly instruct an expert in PTSD. The discussion is still underway with the Defence for Mr. Ruto.
18. Therefore, the Prosecution proposes that the parties be allowed until 30 November 2012 to continue their *inter partes* discussion and that the Prosecution report to the Chamber on the outcome of these discussions by that date.<sup>5</sup>




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Fatou Bensouda,  
Prosecutor

Dated this 31<sup>st</sup> of October 2012  
At The Hague, The Netherlands

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<sup>3</sup> ICC-01/05-01/08-T-21-ENG ET, p. 22, line 24 to p. 23, line 23. See also ICC-01/04-01/06-1671, ICC-01/04-01/06-1729 and ICC-01/04-01/06-T-166-ENG

<sup>4</sup> ICC-01/05-01/08-T-21-ENG ET, p. 22, line 24 to p. 23, line 23

<sup>5</sup> Both Defence teams have agreed to this proposal