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No.: **ICC-01/09-01 /11**
Date: **30 November 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
With Public Annexes A, B1 and C and Confidential Annexes B2, D and E
Prosecution's Updated 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:

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I. Introduction

1. Pursuant to the Chamber's 9 July 2012 Decision on the schedule leading up to trial,¹ and 7 November 2012 Decision on the updated report on joint instruction of experts,² the Prosecution submits this update. In sum, the Prosecution reports that despite its reasonable efforts, the parties are unable to agree upon joint instructions to be provided to experts. Accordingly, the Prosecution intends to proceed with instructing and calling three experts as set forth in detail this filing.³

II. Updated report on the joint instruction

2. Following its last update, the Prosecution continued discussions with the Defence on the three proposed areas of expertise: 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. As indicated in its First Report,⁴ the Prosecution provided the Defence with the proposed instructions in all proposed areas of expertise, the curriculum vitae for the named candidates and a summary of the Prosecution's previous contacts with them.
4. Additionally, it furnished the Defence with supplementary material including the academic works of Prof. Maupeu, updated instructions with annexes including specific locations of relevance to the case for which

¹ ICC-01/09-01/11-440, para 12.

² ICC-01/09-01/11-470

³ The proposed instructions are appended to this application as annexes A, B-1, B-2 and C. Save for annex B-2, all the instructions are filed as public annexes. Annex B-2 contains charts with specific locations, the public knowledge of which may pose risk to innocent third parties and may interfere with the prospect mandate of the expert. The curriculum vitae of Prof. Hervé Maupeu and Mr. Lars Bromley are annexed to this application as confidential annexes D and E to protect the privacy of the candidate experts. Mindful of this caveat, the Prosecution makes reference to the qualifications of the candidate experts in this public filing without revealing the information pertaining to their privacy.

⁴ ICC-01/09-01/11-465. ("First Report")

satellite imagery analysis is sought, and a sample of the imagery that could be collected by Mr. Bromley.⁵

5. On 27 November 2012, the Defence repeated their earlier position in respect of Mr. Maupeu, asserting 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.
6. As part of the *inter partes* discussion and in its first report, the Prosecution informed the Defence of its disagreement with these assertions. Nonetheless, to accommodate the Defence concerns, the Prosecution expressed its willingness to engage in further discussion on: 1) additional agreed facts; and 2) any specific proposals made by the Defence on a different formulation of the suggested questions.⁶
7. The Defence elected, however, not to participate any further in discussions on agreed facts or modifications of the proposed questions.
8. In respect of Mr. Bromley, the Defence commented that the proposed instructions 'go further' than the PEV period at issue in the case.
9. The claim by the Defence that the proposed instructions exceed the time-frame of the PEV is without merit. Satellite imagery often requires comparison to be useful, and so the Prosecution is proposing that the expert compare images before and after the PEV. In addition, the Prosecution alleges that the Accused engaged in significant preparation activities before the PEV which are plainly relevant to the alleged charges in this case.
10. With regard to the proposed PTSD expert, the Defence indicated that they fail to see the relevance or utility of general evidence sought from a PTSD expert.

⁵ A satellite imagery of greater Eldoret provided by UNOSAT and disclosed to the Defence on 16 November 2012. See ICC-01/09-01/11-476

⁶ These suggestions were made on 25 October 2012 - two days after the Defence raised for the first time concerns about the proposed expert witnesses and their instructions. These suggestions were put forward again in the Prosecution First Report at para 8 and 9.

11. As previously submitted,⁷ the Prosecution disagrees with the Defence's position. Chambers of this Court have found that expertise in PTSD can be of assistance to the Court,⁸ irrespective of whether or not the expert has personally carried out an examination of, or interviewed, the witness(es) in question.⁹
12. Finally, the Defence concluded that the proposed experts are 'plainly witnesses from whom the prosecution hopes to elicit incriminating evidence' and that they reserve their position with respect to the status of the proposed expert witnesses and their evidence.
13. The claims of the Defence are unfounded. The experts proposed by the Prosecution have relevant expertise that will assist the Chamber in understanding the evidence and establishing the truth in this case.
14. Throughout this process, the Prosecution submits that it has made reasonable efforts to advance the negotiation with the Defence. It initiated the process and proposed the candidate experts, as well as the instructions. It provided the material and information which the Defence required. It offered alternatives to accommodate their concerns and encouraged the Defence to submit alternative proposals. Yet the Defence declined to join the Prosecution in its efforts to reach an agreement on the matter. They did not attempt to reformulate the Prosecution's instructions which they claimed were objectionable. Nor did they propose any new experts or additional areas of expertise to be considered for joint instructions.
15. In light of the above, there appears to be no prospect of reaching an agreement with the Defence on the joint instruction for these proposed experts. Mindful of the deadline set by the Chamber for disclosure of expert

⁷ Prosecution First Report, para 15

⁸ 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

⁹ ICC-01/05-01/08-T-21-ENG ET, p. 22, line 24 to p. 23, line 23

reports, and the time required for an expert to conduct analysis and prepare a report, the Prosecution at this juncture is compelled to proceed on its own with its proposed experts and instructions.

16. Where the party with the burden of proof wishes to call an expert and the other party disagrees for any reason, this disagreement should not prevent the evidence being presented for the Chamber's consideration. This principle has been recognised by the Chambers of this Court in *Lubanga* and *Bemba* cases.

17. As Judge Fulford stated during a status conference in the *Lubanga* case, "It's not a precondition of calling an expert that it's a joint expert. An expert can be called by one side or the other, [...]"¹⁰ Separate appointment or instruction may occur, for example, when it proves impossible for both parties to jointly agree on the selection of the expert.¹¹ This happened, for example, in the *Lubanga* case when the OTP called Mr. Gerard Prunier to give expert testimony on context and background¹² but the two parties failed to agree to jointly instruct.¹³ Separate appointment or instruction of experts may also occur when there are areas of enquiry that are only of interest to one side.¹⁴

III. Prosecution's proposed experts and instructions

Mr. Herve' Maupeu as expert on social and political background

18. The Prosecution intends to call Mr. Maupeu as a social and political expert in this case. The proposed instructions for him are attached as Annex A to this application.

Mr. Maupeu's qualifications

¹⁰ ICC-01/04-01/06-T-86-ENG ET WT 06-05-2008, 59, lines 3-4.

¹¹ ICC-01/04-01/06-1069, para 17.

¹² ICC-01/04-01/06-1505.

¹³ ICC-01/04-01/06-1353, para 4; ICC-01/04-01/06-T-99 ENG ET WT 25-11-2008, pp. 14-16.

¹⁴ ICC-01/04-01/06-1069, para. 17.

19. Mr. Maupeu is qualified to serve as an expert in this case for the following reasons:

- *Academic qualifications:* Mr. Maupeu has a degree in public law from the *Université de Pau et des Pays de l'Adour* (UPPA) in France; Masters degrees in anthropology (EHESS-Paris), and political sociology (Paris I University) as well as a PhD in political sciences from the UPPA.
- *Years of academic experience:* Mr Maupeu is a lecturer at the UPPA, and has more than 20 years of academic experience, having also served as a Director and a researcher at the *Centre de Recherche et d'Etudes pour l'Afrique Orientale* (CREPAO), and as a teacher at the Law School faculty of the UPPA.
- *Extensive publications:* Mr. Maupeu has researched and published extensively on East Africa, including numerous publications regarding the Kenyan society and the elections in Kenya, in particular. Mr. Maupeu speaks Kikuyu and has translated from Kikuyu into French.
- *Field work in Kenya:* Mr. Maupeu served as acting deputy director of the *l'Institut Français de recherche en Afrique – Nairobi* (IFRA-Nairobi) for four years as part of his research project from 2000 to 2004.

20. Experts with similar expertise have been approved in other cases. For example, in Lubanga, Mr. Gerard Prunier, a background and context expert,¹⁵ was approved as an expert for the Prosecution.¹⁶

21. Other Trial Chambers¹⁷ also have not required experts to be admitted to the list of experts maintained by the Registry pursuant to Regulation 44 of the Regulations of the Court as a prerequisite to considering proposals to call them as witnesses. Instead, they require that an application be made to add the proposed expert to the list as soon as possible and at least by the time

¹⁵ ICC-01-04-01/06-1505

¹⁶ ICC-01-04-01/06-1353, para. 4; ICC-01/04-01/06-T-99 ENG ET WT, 25 November 2008, pp. 14-16.

¹⁷ *Prosecutor v. Bemba*, ICC-01/05-01/08-695, *Prosecutor v. Lubanga*, ICC-01/04-01/06-1069, see esp. para. 25.

the expert is being instructed.¹⁸ The Prosecution will inform Mr. Maupeu to submit an application to be admitted to the list as soon as possible. Mr. Maupeu satisfies the formal criteria that the Registry requires for experts to be added to its list. Even if Mr. Maupeu is, for some reason, not admitted to the list of experts, the Chamber retains the discretion to determine whether it is “appropriate and fair for a proposed expert to be instructed and called in the case”.¹⁹

The proposed areas of expertise are relevant and will assist the Chamber

22. Mr Maupeu’s testimony will assist the Chamber in understanding the context in which the PEV occurred, including the causes of the violence and the ethnic and social underpinnings of the divisions between the different politico-ethnic factions in Kenya. In the Prosecution’s submission, it is important for the Chamber to understand this background because it will inform an understanding of the evidence the Prosecution will present at trial.
23. The Prosecution does not propose to provide a detailed social history of Kenya, but instead contemplates sufficient background to enable the Chamber to contextualize and properly assess the evidence about what happened during the PEV.
24. In particular, Mr Maupeu will explain (i) the source of the tension between the various ethnic groups during the 2007 election campaign; (ii) the reasons why political affiliations were largely dictated by ethnicity; and (iii) which parties drew their support from which segments of society and why. He will also explain the situation in the Rift Valley, which is necessary to understand why the province became the principal fault line during the PEV.

¹⁸ ICC-01/04-01/06-1069, para. 25

¹⁹ Ibid.

The proposed instructions are appropriate

25. Each of the proposed instructions touches directly on matters of relevance to these proceedings. The Prosecution acknowledges that questions 2-5 call for answers on matters that are uncontroversial and on which the parties should be able to agree. Until those facts are agreed upon, however, it is appropriate for the Prosecution to prepare to present evidence on them. To the extent that they are later agreed between the parties, the instructions can be amended to remove those items from Mr Maupeu's consideration.

26. For the reasons above, the Prosecution believes that Mr. Maupeu is qualified and will provide relevant evidence that will assist the TC in adjudicating this case, and that the instructions provided are appropriate.

Mr. Lars Bromley as expert in satellite imagery analysis

27. The Prosecution also intends to call Mr. Bromley as expert in satellite imagery analysis in this case. His proposed instructions are attached in Annex B to this application.

Mr. Bromley's qualifications

28. Mr. Bromley is qualified to serve as an expert on the matters under instruction, for the following reasons:²⁰

- *Professional experience:* Mr. Bromley is the Principal Analyst and Senior Advisor for Human Rights and Security at United Nations Operational Satellite Applications Program (UNOSAT) (May 2012 - Present). Prior to his current position, he worked as a Geospatial Analyst at UNOSAT (October 2010 – May 2012); Project Director – Geospatial Technologies and Human Rights at American Association of the Advancement of Science (AAAS) (2007-July 2010); Senior Program Associate at AAAS

²⁰ Mr. Bromley detailed qualifications are outlined in Annex E appended to this application.

(January 2001 – December 2006); and Program Assistant at AAAS (May 1997 – December 2000).

- *Projects and Publications:* Mr. Bromley has researched and published several articles on the proposed area of expertise and participated in several projects including the Atlas of Population and Environment (1998 / Principal Researcher and Lead Cartographer); Environmental Areas of Responsibility Map Server (2002-2003 / Designer and Developer); Forum on Science and Innovation for Sustainable Development (2004-2005 / Manager and Information Architect); Eyes on Darfur (2007 / Project Co-Manager and Lead analyst); Geospatial Technologies and Human Rights (2007-2010 / Developer, Manager, and Lead analyst); Darfur Event Mapping Initiative (August 2007-December 2007); and UN Investigation on Human Rights Violations in Libya (September 2011 to March 2012 / in collaboration with the High Commissioner for Human Rights – International Commission of Inquiry on Libya, where Mr. Bromley participated in satellite imagery analysis in the review of human rights violations during the 2001 Libyan conflict)
- *Academic qualifications:* Mr. Bromley has a Masters degree (M.A) in Geography in Remote Sensing (2007-2009); and a B.A degree in International Studies in Environment and Development Policy (1993-1997)

29. As with Mr. Maupeu, the Prosecution will inform Mr. Bromley to submit an application to be admitted to the Registry list as soon as possible. Mr. Bromley satisfies the formal criteria that the Registry requires for experts to be added to its list.

The proposed area of expertise are relevant and will assist the Chamber

30. Mr. Bromley will assist the Chamber by providing an impartial scientific analysis based on satellite imagery and other relevant remote-sensing

satellite data. Mr. Bromley will conduct research, as outlined in Annex B, to identify and analyse the available satellite imagery and data of relevance to contentious issues in the case and prepare a report describing the type and status of physical objects, movements and activities that can be discerned in the images. He will also analyse those images for the purpose of estimating time and distance between two different locations. His analysis of locations pertaining to alleged PEV incidents, preparatory meetings prior to the attacks and *alibi* defence presented during the confirmation hearing will assist the Chamber in this case.

The proposed instructions are appropriate

31. The instructions, contained in Annex B, are formed in a neutral and objective manner and call for an impartial analysis based on scientific grounds. Additionally, the instructions are specific to issues in dispute between the parties.
32. For these reasons, the Prosecution believes that Mr. Bromley is qualified and will provide relevant evidence that will assist the Chamber in adjudicating this case, and that the instructions provided are appropriate.

Expertise in Post-Traumatic Stress Disorder (PTSD)

33. Finally the Prosecution intends to call an expert in PTSD. Proposed instructions are set forth in Annex C.
34. The Prosecution is in the process of confirming a qualified expert in this area of expertise and will provide details once the expert is secured.
35. The proposed instructions address matters of relevance to these proceedings given the unavoidable impact of the PEV itself on potential witnesses called by either party.
36. The proposed instructions seek to elicit an expert opinion on the nature of PTSD, its typical causes and symptoms in particular in the context of the

2007 PEV, and the extent to which the testimony of a witness appearing before an international court could be affected by PTSD symptoms.

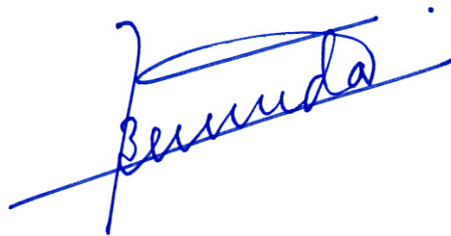
37. In the Prosecution's view, understanding PTSD and its potential implications for witnesses who directly or indirectly suffered as a result of the 2007-PEV is essential in understanding the circumstances affecting witnesses' testimony. It, therefore, plays a fundamental role in the proper evaluation of evidence.

38. Experts with similar expertise have been approved in other cases. For example, in *Lubanga*, Ms. Elisabeth Schauer and in *Bemba* Dr. Adyinka M. Akinsulure-Smith gave expert testimony on Post-Traumatic Stress Disorder.²¹

39. For the reasons above, the Prosecution submits that the instructions provided are appropriate and will be of assistance to the Chamber in evaluating the evidence.

IV. Conclusion

40. The Prosecution reports that despite its reasonable efforts, the parties are unable to agree upon the joint instruction to be provided to experts. It therefore provides to the Chamber information about the experts it intends to call and their proposed instructions.



Fatou Bensouda, Prosecutor

Dated this 30th day of November 2012
At The Hague, The Netherlands

²¹ ICC-01/04-01/06-T-166-ENG and ICC-01/05-01/08-T-38-ENG