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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

With confidential Annex A and public Annexes B and C

Prosecution's second report on joint instruction of experts

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Introduction

1. In the Prosecution's report to the Chamber of 31 October 2012 regarding the joint instruction of expert witnesses ("First Report")¹, the Prosecution undertook to report again in thirty days with detailed submissions regarding the background expert on political and social matters, the expert testimony surrounding sexual and gender-based violence ("SGBV"), and the status of the negotiations with respect to the area of expert testimony on satellite imagery and communications.² The Prosecution hereby submits its updated report ("Second Report").
2. The Prosecution is continuing its negotiations with the Defence with respect to the proposed area of expert testimony in satellite imagery, for whom the Prosecution proposed Mr Lars Bromley as an expert.³ The Prosecution has obtained the relevant imagery and has provided it to the Defence. The Prosecution is awaiting the Defence's Response.
3. The Prosecution reports that despite all reasonable efforts, the parties are unable to agree upon the joint instruction to be provided to Mr Hervé Maupeu, and informs the Chamber that it intends to proceed with calling and instructing Mr Maupeu as its own background expert on political and social matters in this case. Mr Maupeu's *curriculum vitae* is attached as confidential Annex A to this application.⁴ The proposed instructions for Mr Maupeu are attached as public Annex B to this application.
4. The Prosecution is still in the process of identifying a suitable, willing and able candidate to be considered as an expert in SGBV during post-electoral

¹ ICC-01/09-02/11-515-Conf.

² First Report, paras. 17-18.

³ First Report, para 10.

⁴ The curriculum vitae of Prof. Hervé Maupeu is annexed to this application as confidential annex A to protect the privacy of the candidate expert. 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.

violence (“PEV”) in Kenya. The proposed instructions for an SGBV expert are attached as Annex C to this application.

5. The Defence has proposed an expert on communications. As further set forth below, the parties are still in discussions regarding this proposal.

Confidentiality

6. Annex A to this application, containing the curriculum vitae of Mr Maupeu, is confidential in order to protect his privacy.

I. Prosecution’s proposal for expert testimony on satellite imagery

7. As the Prosecution previously informed the Chamber, the Prosecution proposed Mr Lars Bromley as a satellite imagery expert to the Defence on 17 October 2012 and sent the Defence its proposed instructions. Both Defence teams expressed their willingness to consider such expertise, once they have received the relevant satellite imagery.
8. Since the First Report was filed, the Prosecution has received the images that it considers to be of relevance and that have sufficient resolution to provide a basis for expert analysis. The Prosecution provided these images to the Defence on 27 November 2012, and asked the Defence to provide its response on or before the close of business on 29 November 2012 in view of the 30 November deadline. At the time of the filing, the Prosecution has not received a response from either Defence team, other than the acknowledgment from the Muthaura Defence that it had received the images from the Prosecution.

9. The proposed expert testimony of Mr Bromley is subject to the approval of the United Nations, Mr Bromley's employer. The Prosecution has taken steps to ensure that this approval is obtained in the event that the parties agree to jointly instruct him as an expert, or in the event that the Prosecution wishes to instruct him as a Prosecution expert.

II. Mr Hervé Maupeu as expert on social and political background

10. The Prosecution hereby informs the Chamber that it wishes to call Mr Maupeu as a social and political expert in this case, and attaches its proposed instructions for this expert. Despite their best efforts, both parties have failed to come to ground on jointly instructing Mr Maupeu. Mindful of the deadlines for the submission of expert reports, the Prosecution now wishes to proceed with instructing Mr Maupeu as its own expert witness.
11. The Prosecution acknowledges the Chamber's preference to have joint experts instructed where possible, in order to avoid disagreement as to the qualifications and impartiality of an expert and to afford the Chamber the best opportunity to receive useful evidence on issues in dispute.⁵
12. However, where one party – especially the party with the burden of proof – wishes to call an expert and the other party disagrees, this disagreement should not prevent the evidence being presented for the Chamber's consideration. This principle has been recognised by the Chambers in the *Lubanga*⁶ and *Bemba*⁷ cases. As Presiding Judge Fulford stated in the *Lubanga*

⁵ ICC-01/09-02/11-451, para. 17.

⁶ ICC-01/04-01/06-1069.

⁷ ICC-01/05-01/08-695, ICC-01/05-01/08-928.

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, [...]”.⁸

13. Separate appointment or instruction may occur when it proves impossible for both parties to jointly agree on the selection of the expert.⁹ This happened, for example, in the *Lubanga* case when the Prosecution called Mr Gerard Prunier to give expert testimony on context and background¹⁰ but the two parties failed to agree to jointly instruct,¹¹ and in *Bemba*, where the Prosecution called an expert jointly with the Legal Representatives (but not the defence in that case).¹² Separate appointment or instruction of experts may also occur when there are areas of inquiry that are only of interest to one side.¹³
14. Recognizing that the parties may be unable to agree on the instruction of joint experts, this Chamber instructed the parties to raise any disagreement by way of a written filing.¹⁴ This approach echoes that taken by other Chambers that have ruled that disagreements regarding expert testimony need to be raised in a timely manner¹⁵ by way of a filing of each party, setting out with full particularity the reasons why a joint expert has not been retained,¹⁶ and informing the Chamber of the identities of the proposed expert(s).¹⁷

⁸ ICC-01/04-01/06-T-86-ENG ET WT 06-05-2008, 59, lines 3-4.

⁹ ICC-01/04-01/06-1069, para 17.

¹⁰ ICC-01/04-01/06-1505.

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

¹² ICC-01/05-01-T-21-ENG ET WT, Transcript of hearing on 29 March 2010, pages 20-24.

¹³ ICC-01/04-01/06-1069, para. 17.

¹⁴ ICC-01/09-02/11-451, para. 17.

¹⁵ ICC-01/05-01/08-695, para. 13 v).

¹⁶ ICC-01/05-01/08-695, para. 11, ICC-01/04-01/06-1069, para. 17.

¹⁷ ICC-01/05-01/08-695, para. 11, ICC-01/04-01/06-1069, para. 17.

The parties in this case do not agree on the appointment of Mr Maupeu as a social and political background witness

15. As previously explained, the Defence argue that it is unnecessary to appoint a social and political background expert in this case, as “the entirety of the information to be provided by Mr Maupeu is a matter of fact for the Trial Chamber to consider and not a subject for expertise.”¹⁸ The Defence has also challenged the impartiality of Mr Maupeu and stated that the fact that Mr Maupeu is francophone presents an added difficulty for the Defence, because they cannot properly assess his suitability as an expert.¹⁹

The proposed areas of Mr Maupeu’s expertise are relevant and will assist the Chamber

16. Complex international criminal law cases at the ICC and at the ad hoc tribunals typically involve the commission of crimes in countries and regions that may be unknown to the judges. An appreciation of the political context and historical background is routinely seen as an essential step in the process of establishing the truth. To that end, it has become standard practice in such cases that expert witnesses are called to provide the Court with invaluable evidence on the historical and political context of countries and regions where crimes are allegedly committed.

17. 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

¹⁸ First Report, para. 8.

¹⁹ Ibid.

important for the Chamber to understand this background because it informs the analysis of the evidence the Prosecution will present at trial. Mr Maupeu will assist the Chamber by providing this contextual and background evidence in a concise, digestible fashion.

18. 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 assess the evidence regarding the PEV.

19. 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 social and political situation in the Rift Valley, which is necessary to understand why the province became the principal fault line during the PEV.

Mr Maupeu is qualified to act as an expert on the matters under instruction

20. In the Prosecution's submission, Mr Maupeu is qualified to serve as an expert in this case on matters under instruction, 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, Master's 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 Mungiki, Kenyan society and elections in Kenya. 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* (l'IFRA-Nairobi) for four years as part of a research project conducted from 2000 to 2004.

21. Experts with similar expertise have been approved in other cases before the Court. For example, in Lubanga, Mr Gerard Prunier, a background and context expert,²⁰ was approved as an expert for the Prosecution.²¹

22. Other Trial Chambers²² 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 the expert is being instructed.²³ The Prosecution will endeavour to have Mr Maupeu submit the application to be admitted to the Regulation 44 list as soon as possible, in accordance with Regulation 56 (1) of the Regulations of the Registry. Mr Maupeu satisfies the formal criteria that the Registry requires for experts to be added to its list. Even if Mr Maupeu, for some reason, is not admitted to the list of experts, however, 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”.²⁴

²⁰ ICC-01-04-01/06-1505.

²¹ ICC-01-04-01/06-1353, para. 4; ICC-01/04-01/06-T-99 ENG ET WT, 25 November 2008, pp. 14-16.

²² ICC-01/05-01/08-695, ICC-01/04-01/06-1069, see esp. para. 25.

²³ ICC-01/04-01/06-1069, para. 25.

²⁴ Ibid.

The proposed instructions are appropriate

23. To streamline proceedings, the Prosecution has proposed instructions that are almost identical for both Kenya cases. The intention is for Mr Maupeu to testify once, in both cases. This will save time and avoid the Chamber hearing the same testimony twice.
24. Each of the proposed instructions is directly relevant 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.

The Defence's objections to Mr Maupeu should not limit the Prosecution's ability to present its case

25. The Defence objects to the procedure the Prosecution adopted in contacting Messrs. Maupeu and Bromley, and states that the process should have been initiated by consultations between the parties on the areas for which expert testimony is needed, followed by the framing of issues and joint consideration of experts. These process complaints are without merit. As the Prosecution explained in detail in its First Report,²⁵ it has been entirely transparent in the manner in which it has contacted Mr Maupeu. Its contacts were limited to determining whether he has the necessary qualifications and

²⁵ First Report, para. 9.

experience to be able to provide qualified opinions on the matters of relevance to the case, and it disclosed the summary of these contacts, as the Defence requested. The Prosecution underscored to the Defence that it had not discussed or agreed upon any terms of engagement with Mr Maupeu. The Prosecution submits that this process was efficient and designed to expedite a potentially lengthy process of identifying suitable experts. Further, the Prosecution has informed the Defence that it is happy to consider alternative candidates to Mr Maupeu, but has received no suggestions.

26. Moreover, the process that the Defence suggested would imply that it would only be possible in a trial to present expert testimony in those areas on which both parties agree, which is not supported by the jurisprudence of the Court, as elaborated above.
27. Mr Maupeu is an impartial, neutral candidate with an academic profile and a demonstrated long-term focus in the social and political background in Kenya and East Africa. In any event, Mr Maupeu is not being asked to opine on the individual criminal responsibility of the accused.
28. Objections to Mr Maupeu being francophone are also without merit. French is an official language of the Court. There is no requirement before this Court that expert reports have to be drafted in the preferred language of the Defence. If this were the case, the possibility for the Chamber to consider areas of expertise would be limited indeed, as it would not be possible to call an expert where the preferred language of the parties is not the preferred language of the expert. Although French is Mr Maupeu's mother tongue, he speaks English and is available to converse with the Defence in English before his testimony. He prefers to prepare his report and testify in his native tongue, as many witnesses do. Finally, the proposed instructions to Mr Maupeu have been drafted in English. The Defence has failed to

demonstrate how Mr Maupeu's being francophone presents a difficulty that cannot be overcome in a timely manner before the trial.

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

III. Prosecution's proposal for expert testimony in sexual and gender-based violence

30. As explained in the First Report, the Defence has taken the position that (i) SGBV expertise is not required in the case; (ii) parts of the Prosecution's proposed instructions on SGBV expertise are irrelevant, while others deal with the ultimate issue in the case; and (iii) it is premature to discuss an expert in this area until the Prosecution has completed its disclosure obligations according to the Chamber's schedule.²⁶

31. At the moment, the Prosecution is still in the process of identifying a suitable SGBV expert. Up until now, the Prosecution has encountered considerable difficulties in identifying potential experts in this area that would be qualified, willing and able to serve as witnesses in the case, whether jointly or separately instructed, or even as Court witnesses. At least in part, these difficulties seem to be related to the general political and security climate in Kenya and negative perceptions that exist against those witnesses who cooperate with the Court.

32. Nevertheless, for the sake of judicial economy, the Prosecution hereby attaches the proposed instructions for an SGBV expert in Annex C.

²⁶ First Report, para. 11.

33. The proposed instructions are relevant and appropriate to the issues the Chamber will need to adjudicate in this case. The instructions seek to clarify the causes, patterns and consequences of sexual violence during the PEV in Kenya. The Prosecution submits that it will assist the Chamber to understand the place of SGBV in conflict and how it fits into the overall patterns of violence during the PEV. This will assist the Chamber to properly assess the other evidence on this part of the case. The Prosecution points out that its proposed instructions also include instructions surrounding the nature and causes of the occurrence of forcible circumcision and penile amputation during the PEV in Kenya.

IV. Defence's proposal for expert testimony in communications

34. The Prosecution has agreed to the Kenyatta Defence's proposal to call an expert to testify on communications, provided that sufficient, reliable and relevant data can be identified in a timely manner for an expert to provide reliable evidence that can be of assistance to the Chamber.²⁷ At this time, the Prosecution has not received any further information from the Defence regarding its request for the relevant data or any proposals on suitable experts. Concurrently, and to move the process along, the Prosecution is finalizing a proposal that aims to define the scope and subject matter of the expertise required and attempting to identify persons that would be likely candidates to propose to the Defence for this expert testimony. It will provide this to the Defence once it is completed.

²⁷ First Report, para 15.

V. Conclusion

35. The Prosecution therefore provides to the Chamber information about Mr Maupeu as a social and political background expert in this case, and the proposed instructions for SGBV expert testimony.



Fatou Bensouda,
Prosecutor

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