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

Date: 10 December 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.
WILLIAM SAMOEI RUTO AND JOSHUA ARAP SANG***

Public

**Joint Defence Response to
Prosecution's Updated Report on Joint Instruction of Experts**

Source: Defence for Mr. William Samoei Ruto
Defence for Mr. Joshua Arap Sang

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

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Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
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Other

I. INTRODUCTION

1. Following upon earlier decisions from the Chamber, the prosecution submitted its “Updated Report on the Joint Instruction of Experts”.¹
2. The defence for Mr. William Samoei Ruto and the defence for Mr. Joshua Arap Sang (the “defence”) concur with the conclusion that, at the present time, “the parties are unable to agree upon the joint instruction to be provided to experts”.² However, the defence, by this filing, wishes to assure the court that it engaged with the prosecution in good faith with the object of presenting joint instructions if possible. Unfortunately, such has proved not to be the case.

II. SUBMISSIONS

3. It became apparent that the prosecution had every intention of instructing Mr. Maupeu as a background expert, and Mr. Bromley as a satellite expert, irrespective of the agreement or otherwise of the defence. The prosecution seeks to call these experts with the plain intention of obtaining incriminating evidence against the accused, and it is disingenuous for the prosecution to assert otherwise.

Background Expert – Mr. Maupeu

4. Expert evidence in cases is often evidence that, by its nature, lends itself to joint instruction by the parties. So for example, expert medical and pathology opinion on cause of death, illness, medical negligence etc; interpretation of X Rays or scans; language; foreign law; forensic evidence - blood, fingerprints, DNA; analysis of cell phone material; post accident reconstructions; military structure - the list is extensive. But what it has in common is that the evidence is constrained by objective and, often, scientific parameters. The opinion sought is an interpretation of established facts. An expert can provide an opinion that is objective and capable of objective peer review. This is not so with the kind of overarching, historical review that Mr. Maupeu is asked to address by the prosecution. It is not an area that easily lends itself to joint instruction.

¹ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-492, Prosecution’s Updated Report on Joint Instruction of Experts, 30 November 2012 (“Updated Report”).

² Updated Report, para. 1.

5. In respect of the questions proposed for Mr. Maupeu and contained in Annex A of the Updated Report, the defence has said that it is likely many of the questions – numbers 2 to 7 in particular - could be the subject of agreed facts. It is for the prosecution, who are seeking to establish certain facts, to present draft admissions to the defence.
6. The defence have objected to questions 1, 10 and 11, which are arguably too broad and deal with issues that should be provided by evidence of fact rather than through an opinion by an expert. Again, this is a matter that if persisted in by the prosecution, the defence may raise in light of any such report it receives.
7. The defence expressed concern that, having regard to his previous work and its subject matter, which the defence was only able to read with the assistance of the OPCD translating some articles, it appears that Mr. Maupeu has greater knowledge of, and presumably interest in, the Gikuyu ethnic group rather than the Kalenjin. He speaks Gikuyu but not, it would appear, any Kalenjin language.
8. In respect of Mr. Maupeu, the defence also expressed surprise that, given all the parties and counsel for the defence are Anglophone, a francophone expert was chosen by the prosecution.³ Of course, French is one of the languages of the court but not, unfortunately, the language of any of the accused or their counsel. Not only did this cause considerable difficulty for the defence in evaluating his expertise, but it may lead to further difficulties in the future – delays caused by translations, for instance. The majority of his work is in French and no translation of the articles has been provided by the prosecution.⁴ The defence notes that Mr. Maupeu has now stated that he prefers to present his report and to testify in French.⁵ The defence will require an English translation of his report, hopefully at the same time the report is served.

³ This is especially surprising since during the 11 June 2012 status conference, the prosecution said that at that stage they did not have any francophone witnesses. *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-T-15, 11 June 2012, p. 23.

⁴ Of the ten articles written by Mr. Maupeu and provided to the defence by the prosecution on 9 November 2012, after several requests, eight were in French. Only two were available in English.

⁵ *Prosecutor v. Muthaura and Kenyatta*, ICC-01/09-02/11-549, Prosecution's second report on joint instruction of experts, 30 November 2012, para. 28.

9. The defence notes that the Prosecutor, in her filing in *Muthaura and Kenyatta*, states that she intends to call Mr. Maupeu to testify just the once for both cases, on the basis that this will save time and avoid the Chamber hearing the same testimony twice.⁶ The defence queries whether this is a viable and practical course given that the two cases are separate and distinct. What will the mechanics of the exercise be? Are all the parties and representatives to participate at one and the same time?

Satellite Expert – Mr. Lars Bromley

10. In respect of Mr. Bromley, the defence has no questions to pose to him at this stage, and consequently the questions to be posed and set out in Annex B of the Updated Report are those of the Prosecutor. It was only after the defence requested sight of the prosecution log, containing the material dates and events to which the prosecution intended Mr. Bromley to refer, that the defence appreciated the full nature of the prosecution's intent to gather incriminating evidence.
11. The defence has sought disclosure from the prosecution as to whether Mr. Bromley has given evidence or information (expert or otherwise) to the ICC before. The defence referred the prosecution to a statement by Mr. Bromley that he had provided satellite imagery to the ICC in respect of the Darfur situation.⁷ The prosecution has failed to respond to this question on several occasions.
12. Given the relative novelty of this area of expertise, the defence, while recognizing that Mr. Bromley can bring particular skills to bear, reserves its further comments until it has seen the extent of any report.

Post-Traumatic Stress Disorder Expert – Not yet selected

13. In respect of the prosecution's proposal to instruct a Post Traumatic Stress Disorder Expert, the defence has questioned the utility of such a general opinion unrelated to any particular individual. Again, it is a matter for the prosecution to select the evidence it seeks to place before the Chamber. The defence is surprised

⁶ Ibid, para. 23.

⁷ See, "Eye in the Sky: GIS, Satellite Imagery and Mapping", at approximately minute 50 / Chapter 13 of a talk by Lars Bromley, available at http://fora.tv/2009/05/04/Eye_in_the_Sky_GIS_Satellite_Imagery_and_Mapping.

that, given the prosecution's intention to adduce such evidence, the prosecution has not identified a suitable expert at this late stage in the proceedings.

III. CONCLUSION

14. The defence agrees with the observation made by Judge Fulford, and referred to by the prosecution, that "It is not a precondition of calling an expert that it is a joint expert. An expert can be called by one side or the other".⁸ It is for the prosecution to choose the expert evidence it seeks to place before the chamber. In the absence of agreement it will then be for the defence to raise any appropriate objections.
15. The hope and objective of the prosecution in instructing Mr. Maupeu and Mr. Bromley is plainly to elicit incriminating evidence from them. The defence is concerned that it is doing so at such a late stage. In early July, the Chamber observed, "in order for the defence teams to be able to prepare adequately for trial, it is essential for the prosecution to complete its [full] disclosure obligations three months before the start of trial."⁹ Furthermore, the Chamber mandated that the disclosure of the reports of any expert that will be called during the prosecution case should be completed by 14 February 2013.¹⁰ In order for the prosecution to realistically meet these deadlines such evidence should have been obtained months ago.
16. At this stage, just four weeks from the date set by the Chamber for the prosecution's final disclosure, the defence has still not received the substantive incriminating material in the case and, given the attitude of the prosecution to date, has little expectation of doing so. In those circumstances, the defence is concerned to have experts reports added to the burden presented by late disclosure. In addition, it has not been in a position to assess the totality of the case and has reached no decision as to what, if any, expert witnesses it may call as part of the defence case.

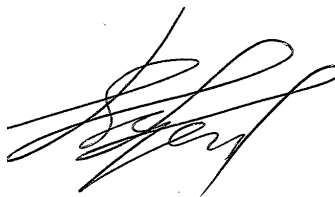
⁸ *Prosecutor v. Lubanga*, ICC-01/04-01/06-T-86-ENG, 6 May 2008, p. 59.

⁹ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-440, Decision on the schedule leading up to trial, 9 July 2012, para. 14.

¹⁰ *Ibid*, para. 17.



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Dated this 10th day of December 2012
In London



Joseph Kipchumba Kigen-Katwa
On behalf of Joshua Arap Sang
Dated this 10th day of December 2012
In Nairobi