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

Date: 9 January 2013

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 Annexes A, B, C, and D – confidential, *ex parte*, only available to the
Office of the Prosecutor and VWU**

Prosecution's provision of materials pursuant to Decision ICC-01/09-02/11-451

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

Fatou Bensouda
Adesola Adeboyejo

Counsel for Francis Kirimi Muthaura

Karim A. Khan QC, Essa Faal, Kennedy Ogetto and Shyamala Alagendra

Counsel for Uhuru Muigai Kenyatta

Steven Kay QC and Gillian Higgins

Legal Representatives of Victims

Fergal Gaynor

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

Paolina Massidda

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar

Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Maria Luisa Martinod-Jacome

Detention Section

Victims Participation and Reparations Section

Other

1. Pursuant to the Chamber's 9 July 2012 Decision on the schedule leading up to trial,¹ the Prosecution hereby submits its (i) list of witnesses to be relied upon at trial; (ii) summaries of the main facts on which each witness is expected to testify; (iii) list of evidence to be relied upon at trial; and (iv) pre-trial brief.
2. Confidential *ex parte* Annex A contains the Prosecution's witness list.² The Prosecution has indicated the expected duration of each witness' questioning by the Prosecution.³ Annex A is designated confidential *ex parte* because it contains the names of witnesses for whom the Chamber has granted delayed disclosure, or for whom an application is pending.
3. In terms of the expected duration of the Prosecution's case,⁴ the Prosecution estimates that it will require approximately 572 hours of court time. This estimate includes the time projected for (i) the Prosecution's questioning of its 31 fact witnesses (totaling approximately 262 hours); (ii) the Prosecution's questioning of the three proposed experts (currently estimated at approximately no more than 24 hours in total); and (ii) the time projected for Defence questioning of the Prosecution's fact and expert witnesses (totaling approximately 286 hours). To estimate the time needed for questioning by the Defence, the Prosecution has proceeded on the basis that the Defence will use the same amount of time projected for Prosecution questioning. The 572 hour estimate does not include time that the Chamber may grant to the Office of Public Counsel for Victims or the common legal representative to question Prosecution witnesses, or time that the Chamber may use to question witnesses.

¹ ICC-01/09-02/11-451.

² ICC-01/09-02/11-451, para 18.

³ ICC-01/09-02/11-451, para 18.

⁴ ICC-01/09-02/11-451, para 18.

4. A confidential redacted version of the witness list is filed to ensure the effectiveness of in-court protective measures, if sought by the Prosecution and granted by the Chamber.
5. Confidential *ex parte* Annex B contains summaries of the main facts on which each witness is expected to testify.⁵ It is designated confidential *ex parte* because it contains information that may lead to the identification of witnesses for whom the Chamber has granted delayed disclosure, or for whom an application is pending.
6. A confidential redacted version of the summaries of the witness list is filed to ensure the effectiveness of in-court protective measures, if sought by the Prosecution and granted by the Chamber.
7. Confidential *ex parte* Annex C contains the Prosecution's list of evidence to be relied upon at trial.⁶ It is designated confidential *ex parte* because it contains information that may lead to the identification of witnesses for whom the Chamber has granted delayed disclosure or for whom an application is pending. The list contains 945 items, and is divided into two parts. The first part contains witness statements and related material (such as annexes to witness statements) and contains 604 items. The second part contains all other documentary evidence and audio/video material and comprises 341 items. For each item, the Prosecution has listed the ERN and title, and, for materials related to witnesses, the witness to which the material relates.
8. A confidential redacted version of the list of evidence is filed to ensure the effectiveness of in-court protective measures, if sought by the Prosecution and granted by the Chamber.

⁵ ICC-01/09-02/11-451, para 18.

⁶ ICC-01/09-02/11-451, para 18.

9. The Prosecution hereby gives notice to the Chamber that it may seek leave to amend the list of witnesses and/or the list of evidence pursuant to the requirements of Regulation 35(2) of the Regulations of the Court if it is able to obtain certain materials that it has not yet had access to, or if it successfully secures the cooperation of witnesses it has not yet been permitted to interview. These materials and/or persons are the subjects of pending or only very recently granted Prosecutorial requests for cooperation directed at institutions and also certain States, invoking their assistance obligations under Part 9 of the Statute. Furthermore, the Prosecution has also requested the transcription and translation of 41 audio/video materials it seeks to rely upon, which are not available in any of the official languages of the Court. Some of these materials are already the subject of a separate filing before the Chamber.⁷
10. Pursuant to Regulation 35(2), the Chamber may extend a time limit if good cause is shown, and after the time limit has expired, the extension may be granted if the participant seeking the extension can demonstrate that he or she was unable to file the application within the time limit for reasons outside of his or her control.
11. The pendency of assistance requests and the expressed governmental and/or institutional restrictions against the provision of certain evidence, have prevented and continue to prevent the Prosecution from taking statements from prospective witnesses and gauging their willingness and/or ability to testify for the Prosecution, and also from gaining access to the materials it may wish to tender them into evidence. Should the States or institutions provide cooperation or lift their restrictions, the evidence will become available. As such, the Prosecution submits that the new

⁷ ICC-01/09-02/11-592-Conf-Exp

availability of access will constitute “good cause” to vary the time restrictions, within the meaning of Regulation 35(2).

12. The Prosecution has already approached several State Parties, including the Government of Kenya, in order to gain access to such individuals and materials. Discussions regarding the terms and conditions of such access are still ongoing, and for that reason the Prosecution is at this stage the unable to file Regulation 35 applications with respect to specific materials and/or individuals. However, the Prosecution can pinpoint the following groups of materials or individuals that it may wish to add to its lists of evidence and witnesses at a later stage:

- Certain categories of individuals, including government officials and employees, for whom States must specifically authorize access; in some instances governmental authorization was only recently received and the individuals have not yet consented to be interviewed.
- Journalists who produced video material that the Prosecution wishes to tender into evidence, and who can only cooperate with the approval of their employees.
- Documents, including medical, financial, and official records, repeatedly requested from the Kenyan government but, as of this date, not provided.

13. The Prosecution may also approach the Chamber, when and if necessary, pursuant to Articles 93(1)(l) and 64(6)(b) of the Rome Statute, to (a) request one or more States Parties to provide the assistance that to date has been denied the Prosecution, (b) facilitate the Prosecution’s requests for access to persons and materials or (c) require witnesses’ attendance before the Court.

14. Confidential *ex parte* Annex D contains the Prosecution's pre-trial brief.⁸ It is designated confidential *ex parte* because it contains information that may lead to the identification of witnesses for whom the Chamber has granted delayed disclosure, or for whom an application is pending. Many of the citations in the brief are to pages/paragraphs of the witnesses' pre-trial interviews. These pinpoint citations are provided for ease of reference, and are merely indicative of the testimony the Prosecution anticipates from its witnesses at trial. The pre-trial brief is intended as a summary of key portions of the Prosecution's trial evidence; it is not exhaustive, since it is not possible to include in a 75-page narrative brief all the evidence on any given point or all materials that appear on the Prosecution's list of evidence. Additionally, where the pre-trial brief relies on facts currently contained in witness statements, the testimony at trial can be expected to differ in some respects from the summary presented.

15. A confidential redacted version of the pre-trial brief is filed. The Prosecution has endeavoured to draft the pre-trial brief in order to minimise the need for redactions and to ensure that the Defence is provided with maximum notice regarding the nature of the Prosecution's case. As the brief identifies individuals whom the Defence may wish to call as witnesses, the Prosecution will consult with the Defence regarding the appropriate redactions before filing a public redacted version.



Fatou Bensouda,
Prosecutor

Dated this 9th day of January
At The Hague, The Netherlands

⁸ ICC-01/09-02/11-451, para 20.