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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 public Annex A, confidential Annexes B and C, and confidential, *ex parte*, Prosecution and Defence only Annexes D and E

Prosecution's third report on joint instruction of experts

Source: The Office of the Prosecutor

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Introduction

1. The Prosecution hereby submits its updated report on joint instructions of experts ("Third Report"). The Prosecution reports that despite all reasonable efforts, the parties were unable to agree upon the joint instructions to be provided to Mr Lars Bromley, and informs the Chamber that it has proceeded with instructing Mr Bromley as its own expert in satellite imagery. Mr Bromley's *curriculum vitae* is attached as public Annex A to this application. The instructions for Mr Bromley are attached as confidential Annex B to this application. The letter from the United Nations Office for Legal Affairs ("UN OLA"), granting permission with certain restrictions for Mr Bromley to testify as an expert in the case, is attached as confidential Annex C.
2. The Prosecution also reports that the parties have continued discussions with respect to the Defence's proposal to call an expert in communications to testify regarding email and telephone communications of certain witnesses. The Prosecution has agreed that the proposed Defence candidate, Professor Peter Sommer, conduct the analysis of email communications of three of its witnesses, but considers that he lacks the expertise necessary for analysis of call data records ("CDR"). In this regard, once a suitable candidate has been agreed between the parties, the Chamber will be informed immediately.
3. Despite all efforts, the Prosecution has been unable to secure a suitable candidate for sexual and gender-based violence ("SGBV") expertise who is willing to testify in this case. Therefore, the Prosecution informs the Chamber that it will not call such an expert.

Confidentiality

4. Annex B is confidential because it contains a reference to a private residence and its geographic coordinates. The Prosecution also submits a public redacted version of that annex. Annex C is confidential because it contains internal correspondence between the UN OLA and the Prosecution. Annexes D and E are confidential because they contain *inter partes* communications between the Prosecution and the Muthaura Defence.

Procedural history

5. In the Schedule leading up to trial,¹ the Chamber instructed the Prosecution to liaise with the Defence to discuss the joint instruction of experts.² On 31 October 2012, in accordance with the deadline set by the Chamber,³ the Prosecution submitted to the Chamber its first report regarding the joint instruction of expert witnesses.⁴ In it, the Prosecution informed the Chamber of the status of its negotiations with the Defence with respect to expertise in satellite imagery, political and social background, and SGBV.
6. On 30 November 2012, the Prosecution submitted its second report on joint instruction of experts ("Second Report").⁵ In its Second Report, Prosecution informed the Chamber that it would proceed to instruct Mr Hervé Maupeu as its own Kenyan political and social background expert and provided a further update on the status of discussions in relation to proposed experts in satellite imagery, as well as the Defence's proposal for an expert in communications and SGBV.

¹ ICC-01/09-02/11-451.

² ICC-01/09-02/11-451, para. 17.

³ *Ibid.*

⁴ ICC-01/09-02/11-515-Conf.

⁵ ICC-01/09-02/11-549.

Submissions

I. Mr Lars Bromley as expert in satellite imagery

7. The Prosecution hereby informs the Chamber that it wishes to call Mr Bromley as a Prosecution expert in satellite imagery,⁶ and herewith attaches its instructions for this expert. Despite their best efforts, the parties failed to come to ground on jointly instructing Mr Bromley.
8. 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.⁷ It hereby incorporates by reference the arguments in favour of instruction of experts by one side when there has been no agreement on a joint expert, elaborated in its Second Report.⁸

The parties in this case do not agree on the appointment of Mr Bromley as an expert in satellite imagery

9. 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.⁹ Both Defence teams expressed their general willingness to consider such expertise, once they received the relevant satellite imagery.¹⁰

⁶ Mr Bromley was included on the 9 January 2013 Prosecution List of Witnesses. *See* ICC-01/09-02/11-596-Conf-Exp-AnxA.

⁷ ICC-01/09-02/11-451, para. 17.

⁸ ICC-01/09-02/11-549, paras 12-14.

⁹ *See* ICC-01/09-02/11-515-Conf, para. 10, ICC-01/09-02/11-549, para. 7.

¹⁰ *Ibid.*

10. The Prosecution provided the relevant images to the Defence teams on 29 November 2012, and requested their response by 30 November 2012. Whilst the Defence indicated it would not be able to do so by 30 November, it stated on 27 November that counsel would review the images and revert back to the prosecution “as soon as possible”. Mindful of the 14 February 2013 deadline for disclosure of expert reports,¹¹ the Prosecution sent the proposed instructions to Mr Bromley on 11 December 2012 to enable him to produce his report in a timely manner. The Defence teams were invited to provide their views on the joint instruction of Mr Bromley again on 13 December 2012, after having viewed the satellite images. On 21 December 2012, the Muthaura Defence reverted to the Prosecution concerning Mr Bromley, objecting to the fact that instructions were already sent to him “before we have indicated whether or not we would join you in instructing him or not and before we were able to comment on the proposed terms reference [sic]”, and considered this to be “inappropriate and precipitous” of the OTP and inconsistent with a “genuine desire on the part of the prosecution to work with the defence collaboratively in order to instruct the named expert.”
11. In the same letter, the Muthaura Defence appended additional questions regarding Mr Bromley and his proposed terms of reference, and requested that the Prosecution include that letter in any future filings to the Chamber on the issue. The Prosecution responded to the Defence’s questions on 9 January 2013, inviting it one last time to clarify, by 10 January 2013, whether they agree to jointly instruct Mr Bromley or not. No further response was received by either Defence team on the issue.
12. In the circumstances, it is clear that the parties were unable to agree regarding jointly calling and instructing Mr Bromley. The Prosecution is

¹¹ ICC-01/09-02/11-451, para. 22.

therefore of the view that it is at this stage appropriate to treat Mr Bromley as a Prosecution expert. As requested by the Muthaura Defence, the Prosecution annexes the Muthaura Defence's 21 December 2012 letter and the Prosecution's 9 January 2013 response to this submission in confidential annexes D and E.

The Defence's objections to the manner in which Mr Bromley was contacted should not limit the Prosecution's ability to present its case

13. The Defence teams have objected to the procedure the Prosecution adopted in contacting Mr Bromley, stating 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.¹² Further, the Muthaura Defence has objected to the fact that the Prosecution sent the instructions to Mr Bromley on 11 December 2012, without awaiting the Defence response as to "whether or not we would join you in instructing him or not and before we were able to comment on the proposed terms reference [sic]".¹³

14. These process complaints are without merit. The Defence had initially accepted that it would in principle be willing to consider Mr Bromley as an expert, notwithstanding its complaints regarding the procedure the Prosecution had adopted in contacting him. The proposed instructions to Mr Bromley were available to the Defence since 17 October 2012 and the images on which Mr Bromley was to produce his report since 29 November 2012. Despite repeated requests by the Prosecution, the Defence never answered the Prosecution's proposal. The Prosecution waited until 11 December 2012 to send the instructions to Mr Bromley, almost two weeks

¹² ICC-01/09-02/11-515-Conf, paras 8, 10.

¹³ See Annex D.

after sending the relevant imagery to the Defence. In light of the Defence's silence on the issue, the Prosecution took the step of instructing Mr Bromley directly, given that any further delays would have made it impossible for Mr Bromley to produce his report in time. Even after this date, the Prosecution indicated to the Defence that it would consider jointly instructing Mr Bromley.¹⁴ However, the Defence never provided a final answer on this issue.

The proposed areas of Mr Bromley's expertise are relevant and will assist the Chamber

15. The Prosecution has instructed Mr Bromley to produce a report providing impartial scientific analysis based on satellite imagery of specified areas in Nairobi and Nakuru, as well as one image of an area in Naivasha, captured by satellites on specific dates of interest identified in his terms of reference.¹⁵ Mr Bromley will analyse and explain the satellite imagery that was available to describe the type and status of physical objects, and/or activities, if any, that can be discerned in the images. His specialised knowledge and skills will assist the Chamber in understanding and interpreting these images, which will in turn inform the Chamber's analysis of evidence that underpins the crime base incidents in Nakuru, PEV-related preparatory meetings, and sites of gathering of internally displaced persons in and around Nakuru and Naivasha (where satellite images were available).

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

¹⁴ See Annex E.

¹⁵ Pursuant to the Prosecution's original instructions, Mr. Bromley obtained images for two areas – Nakuru East and Kirigiti Stadium in Kiambu, Central Province, and analysed these images in an addendum to his expert's report.

16. Mr Bromley is qualified to serve as an expert in this case on matters under instruction, for the following reasons:

- *Academic qualifications.* Mr Bromley holds a Master's Degree in Geography and Remote Sensing, and a Bachelor's Degree in International Studies, including Environment and Development Policy.
- *Professional experience.* Mr Bromley has been the Principal Analyst and Senior Advisor for Human Rights and Security at the United Nations Operational Satellite Applications Program (UNOSAT) since May 2012 and is also working on developing human security and rights monitoring at the United Nations Institute for Training and Research (UNITAR). Prior to his current position, he worked for more than a decade in the field of remote sensing, including managing projects for UNOSAT and American Association of the Advancement of Science. He has acquired significant experience in the field of remote sensing, satellite imagery, Geographic Information System (GIS) software, and related technologies that assess large scale human rights violations and threats to security, including in the conflicts in Darfur and in Libya.
- *Relevant publications.* Mr Bromley has published several articles related to the field of remote sensing, including the use of such technology to monitor human rights abuses in particular in Darfur, Sudan and in other areas.
- *Awards and achievements.* Mr Bromley is a recipient of the 2009 Esri Special Achievement in GIS.
- *Other.* Mr Bromley is specialised in handling and using a number of geo-technologies and software applications that are used in the field of remote sensing to compile, edit and analyse geospatial data, such as ArcMap, ArcGISServer, ERDAS Imagine, QGIS, and others.

17. Trial Chambers 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.¹⁶ 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.¹⁷ Mr Bromley is in the process of submitting his application for inclusion on the list of experts. Even if Mr Bromley, 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”.¹⁸

18. As the Prosecution informed the Chamber in the Second Report, Mr Bromley’s appearance as expert in the case is subject to UN approval. The Prosecution received approval from the UN OLA on 18 January 2013, with restrictions pertaining to disclosure of certain information that are normally applicable to UN officials testifying before the International Criminal Court in accordance with the Relationship Agreement between the United Nations and the International Criminal Court. The letter from UN OLA is attached in confidential Annex C. The Prosecution will in due course apply for an order from the Chamber giving effect to the restrictions to Mr Bromley’s testimony.

The instructions are appropriate

19. Each of the instructions that Mr Bromley received is directly relevant to these proceedings and specific to issues in dispute between the parties. They are phrased in a neutral and objective manner and call for an impartial scientific analysis.

¹⁶ ICC-01/05-01/08-695, ICC-01/04-01/06-1069, see esp. para. 25.

¹⁷ ICC-01/04-01/06-1069, para. 25.

¹⁸ *Ibid.*

20. Mr Bromley is an impartial, neutral candidate with extensive experience in the field of geo-spatial data analysis and application in the field of human rights and security. He is well-suited to be an expert before this court based on his experience and qualifications. For these reasons, the Prosecution believes that Mr Bromley is qualified and will provide relevant evidence that will assist the Trial Chamber in adjudicating this case, and that the instructions provided to him are appropriate.

II. Defence's proposal for expert testimony in telecommunications

21. As the Prosecution previously informed the Chamber, the Kenyatta Defence proposed an expert in telecommunications to analyse call data evidence from mobile telephones and emails related to certain Prosecution witnesses and one additional individual who submitted a written statement for the Muthaura Defence at the confirmation stage.¹⁹ The Prosecution agreed to this proposal, subject to the timely provision of sufficient, reliable and relevant call data and metadata for an expert to provide reliable evidence that can be of assistance to the Chamber.²⁰ On 20 December 2012, the Prosecution further suggested to the Defence that the analysis of call data records and emails focus on two specific time periods of relevance to the case, and raised several points regarding the possibilities of obtaining the relevant data from identified service providers followed by word searches for specific names, locations or phrases of interest. On 29 December 2012, the Defence suggested Professor Peter Sommer as the telecommunications expert, and provided his details. The Defence also responded to some of the Prosecution's queries as to the existence of the relevant call data records and steps taken to ensure obtaining thereof.

¹⁹ ICC-01/09-02/11-515-Conf, paras 14-15.

²⁰ ICC-01/09-02/11-515-Conf, para. 15. ICC-01/09-02/11-549, para. 34.

22. At this stage, based on its assessment of Prof. Sommer's qualifications and experience, the Prosecution accepts that Prof. Sommer can conduct expert analysis with respect to email communications of three of the witnesses.²¹ The Prosecution assessed, however, that Prof. Sommer may not have sufficient technical expertise to perform the call data record (CDR) analysis; a possible way forward is to appoint a separate expert for the CDR analysis, perhaps from a private forensic analysis company or a person suggested by Prof. Sommer. The Defence has not yet responded to this proposal.
23. It appears therefore that the parties are on track in agreeing to jointly instruct an expert or experts in telecommunications. This expertise is, however, still dependent on the provision of the relevant and reliable call data and email records, which the Prosecution has yet to receive from the Defence. In light of all these developments, no expert reports in telecommunications will be produced before 14 February 2013. The Prosecution anticipates that it will revert to the Chamber with a joint application to vary the time limits for the submission of such a report or reports, if and when completed.

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

24. The Prosecution has been unsuccessful in securing an expert with suitable knowledge and experience who would be willing to testify as an expert in this case.

²¹ As the Prosecution no longer relies on former Prosecution Witness 4, expert analysis of his emails is not necessary.



Fatou Bensouda,
Prosecutor

Dated this 15th day of February 2013
At The Hague, The Netherlands