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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 1 and Confidential, Ex-parte Annexes 2 and 3

Prosecution's Submissions on the Agenda for Status Conference

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Introduction

1. On 14 May 2012, the Trial Chamber issued an “Order scheduling a status conference” (“scheduling order”).¹ In the scheduling order the Chamber identified a number of issues to be addressed by the parties and participants in order to facilitate the preparation for the status conference.
2. The Prosecution hereby files its submissions on agenda items A. to G. and I. to P.

Prosecution Submissions

A. Trial date

3. The start date of the trial is dependent in part on the Court’s ability to protect witnesses, pursuant to Article 68 of the Statute, as well as cooperation with the Court’s processes by the Accused and the government of Kenya. With these points in mind, it is for the Chamber, in accordance with Rule 132 of the Rules of Procedure and Evidence, to set the date of the trial.

B. Languages to be used at trial

4. The Prosecution anticipates that the official languages of the Court, English and French, will be the main languages used during most of the proceedings. However, it anticipates that some of the proceedings may require Swahili interpretation as some of the witnesses may prefer to express themselves in Swahili. Likewise, but only in exceptional cases, Kikuyu or Kalenjin interpretation may be required. To this end, the Office (“OTP”) has already inquired with its internal Language Services Unit (“LSU”) as to the availability of translators working in these languages in the Registry’s Court Interpretation and Translation Section (“STIC”).

¹ ICC-01/09-02/11-422.

C. Anticipated length of presentation of evidence at trial

At this stage, any indication on the anticipated length of presentation of evidence at trial can only be tentative. However, based on the assumption that the Chamber sits continuously, without any significant interruptions, the Prosecution estimates that the presentation of its case will take approximately 12 months.

D. Timing, volume and format of disclosure of Rule 76 material

5. **Timing** – In accordance with Rule 76, the Prosecution will disclose all witness-related materials to the Defence sufficiently in advance for an adequate preparation of the Defence's case. The security situation in Kenya continues to present a challenge to the Office's fulfilment of its duty to protect victims and witnesses, pursuant to Articles 54 and 68 of the Rome Statute. Therefore, the Prosecution believes that a system of "rolling disclosure" should be adopted as to the identities of witnesses, with a distinction made between those witnesses who are part of the Court's protection program, and those who are not. Further detailed submissions on this point are set out below in paragraphs 16 to 17.
6. **Volume** – To date, the Prosecution has disclosed a substantial portion of its incriminating material, including certain material falling within the ambit of Rule 76. Because of ongoing security concerns for the witnesses, some of the material has not yet been disclosed. The volume of Rule 76 materials remaining to be disclosed will depend on the final selection of witnesses.
7. **Format** – See *infra*.

E. Disclosure of Article 67(2) and Rule 77 material

8. To date the Prosecution has disclosed to the Defence 67 items (comprising 1076 pages and 4 audio/video items) pursuant to Article 67(2) and 326 items (comprising 2270 pages and 5 audio/video items) pursuant to Rule 77. For ease of

reference, a list of these materials is attached as Annex 1. That annex is classified as confidential because it refers to the titles of Prosecution evidence.

9. Since the confirmation hearing, the Prosecution has collected additional materials and is in the process of reviewing them for the purpose of disclosure. This material and additional material resulting from ongoing investigations will be disclosed in a timely manner.

F. Article 54(3)(e) material

10. To date, the Prosecution has not identified material collected pursuant to Article 54(3)(e) restrictions that is subject to disclosure.

G. Protection of victims and witnesses

Witness protection generally

11. The Prosecution anticipates that witness protection will remain a concern throughout the trial. By way of background for the Chamber, the Prosecution notes that it brought several instances of witness interference to the Pre-Trial Chamber's attention. For ease of reference, the relevant filings are listed in Annex 2, which is classified confidential, *ex parte*, due to the classification of the filings referenced therein.
12. For instance, individuals have posted materials on-line purporting to reveal the identities of protected witnesses. The Prosecution is investigating this activity under the rubric of Article 70 of the Statute. At the trial stage, the Prosecution will continue to inform the Chamber of developments that materially affect the safety and well-being of Prosecution witnesses. In addition, the Prosecution will continue to take all available measures to safeguard witness security and well-being. These include the implementation of local protective measures (target hardening, assisted moves, access to the Immediate Response System), security

monitoring, requests for confidentiality, and, where necessary, referrals to the Court's Protection Program ("ICCPP").

Materials with respect to which redactions or other protective measures are required

13. At this time, the Prosecution expects that much of the documentary evidence it intends to rely upon at trial and most of the additional materials disclosed pursuant to Article 67(2) and Rule 77 will not require redactions other than those already implemented at the pre trial stage.²

Redactions authorized by the Pre-Trial Chamber

14. The Pre-Trial Chamber granted several applications for redactions at the pre-trial phase.³ For ease of reference, a list of the materials disclosed in redacted form in accordance with these decisions is attached as Annex 3, which is classified confidential, *ex parte*, due to the confidential nature of some of the information referred to therein. In the Prosecution's view, all redactions authorized by the Pre-Trial Chamber should be maintained at present, for the reasons set out in the Pre-Trial Chamber's decisions, given that there has been no material change in the circumstances justifying the redactions.

15. Should the factors underlying the initial grants of redactions change, the Prosecution will bring the issue to the Chamber's attention so that the redactions may be reviewed.⁴

² There may, however, be a need for limited redactions to metadata in order to protect further or ongoing investigations under Rule 81(2).

³ The Pre-Trial Chamber's decisions on redactions are listed in Annex 3.

⁴ Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", 13 May 2008, ICC-01/04-01/07-475, para. 73.

The lifting of redactions relating to the identities of witnesses

16. The Prosecution recognizes that redactions relating to witnesses' identities will need to be lifted for those individuals who will testify at trial. However, as noted above, the Prosecution submits that a distinction should be made between witnesses who are part of the Court's protection program, and those who are not (or whose family members are not). Moreover, due to the witness security concerns that led the Pre-Trial Chamber to authorize the redactions in the first place, redactions that relate to the identities of testifying witnesses who are part of the Court's protection program should be lifted, in principle, only 60 days before the start of trial. For those testifying witnesses who are not part of the Court's protection program, redactions that relate to their identities should be lifted, in principle, 30 days before the start of trial. In exceptional circumstances and when justified by security concerns particular to an individual witness, the Prosecution should be permitted to make an application to the Chamber for the witness' identity to be disclosed 30 days prior to the start of his or her testimony.
17. In the Prosecution's view, the provisions of Article 68(1) of the Statute and Rule 81(4) of the Rules provide the basis for the proposed rolling disclosure timetable. In the *Katanga* case, the Chamber adopted a schedule of rolling disclosure in respect of certain witnesses.⁵ This schedule strikes an appropriate balance between the witness protection concerns particular to this case and the rights of the Accused under Article 67(1)(b) of the Statute to have (i) "adequate time and facilities for the preparation of the defence"; and (ii) Rule 76 disclosure "sufficiently in advance to enable the adequate preparation of the defence". Prejudice to the Defence, if any, would be limited because (i) the substance of the witness's anticipated testimony would be disclosed, unredacted, in the witness' statement or transcript in advance of the 60/30-day timetable; and (ii) the 60/30-day window provides the Defence with sufficient time to conduct any additional

⁵ ICC-01/04-01/07-1179-tENG, page 23.

investigations and preparation before the testimony of the first prosecution witness begins.⁶

In-court protective measures

18. The Prosecution anticipates applying for in-court protective measures for several witnesses. Save in exceptional circumstances, the Prosecution proposes to submit applications for in-court protective measures no later than 10 days before the start of the witness's evidence. In light of the evolving security situation in Kenya, this timetable is intended to ensure that the protective measures remain justified when the witness appears before the Court.

Proposed procedure for future redactions

19. Going forward, the Prosecution proposes that the Chamber adopt a new approach to the redaction process. While the Prosecution has no objection to the redaction processes employed in other cases, it believes that a streamlined process could save significant judicial resources, while at the same time complying with the Appeals Chamber's direction regarding judicial oversight of the redaction process.

20. Generally, Chambers have employed an approach whereby they review redactions proposed by a party and then rule on the permissibility of each individual redaction. More recently, certain Chambers have endeavored to create a more streamlined approach. In the *Gbagbo* case, for example, the Single Judge approved a regime under which the Prosecution may redact Article 67(2) and

⁶ The European Court of Human Rights has held that a departure from generally applicable rules of disclosure may be justified when "need[ed] to protect witnesses at risk of reprisals, provided that the measures are strictly necessary and are counterbalanced by procedural safeguards adopted by the court. ECHR, *Rowe and Davis v. The United Kingdom*, Judgment of 16 February 2000, para. 61; see also, e.g., ECHR, *Doorson v. The Netherlands*, Judgment of 26 March 1996 ("principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify"); ECHR, *Dowsett v. The United Kingdom*, Judgment of 24 June 2003, para. 42 (noting that "[i]n some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual"). See ICC-01/04-01/07-1179-tENG.

Rule 77 material without prior approval from the Chamber.⁷ The Prosecution believes that this regime could be expanded to cover incriminating material.

21. Both Defence teams have indicated that they agree, in principle, to a system of *inter partes* disclosure and have provided the Prosecution with suggested categories of redactable material. While the parties have not yet discussed the mechanics of the proposed system, the Prosecution envisages it operating along the following principles:

- After receiving written observations from the parties, the Chamber rules on the categories of information that may generally be redacted prior to disclosure;
- Where the Prosecution considers that material to be disclosed falls within the categories identified by the Chamber, the Prosecution shall redact such information and disclose the material to the Defence in redacted form;
- Concurrently with the disclosure of any redacted material, the Prosecution shall provide the Defence with a disclosure log indicating the justification for each redaction, and the category of information that it falls into, as identified by the Chamber;
- If it appears to the Defence that any redactions are improper, the Defence shall contact the Prosecution and the parties shall first attempt to resolve the issue themselves;
- If the parties are unable to resolve the dispute, they may seek the Chamber's intervention by way of written motion;
- If material to be disclosed does not fall within the categories identified by the Chamber but the Prosecution nevertheless believes that redactions are

⁷ Decision establishing a disclosure system and a calendar for disclosure, 24 January 2012, ICC-02/11-01/11-30, paras 48-57. It was also envisaged that the simplified regime could be extended to incriminating evidence: see ICC-02/11-01/11-30, para 48 and footnote 38 cited therein.

justified, the Prosecution may make a discrete application to the Chamber for a ruling on the permissibility of the proposed redactions;

- The above procedure shall apply *mutatis mutandis* to the Defence.

22. A system of *inter partes* disclosure has been successfully applied in the *Katanga* case and in the *Gbagbo* case, with minimal objections or complaints from the Defence teams. In the Prosecution's view, this approach would remove a significant burden on the Chamber and expedite the disclosure process. Significantly, it will allow the Defence to have access to all potentially relevant materials at the earliest possible opportunity. In practice, the Chamber would review only those redactions over which there is a genuine dispute or uncertainty, while at the same time ensuring the requisite level of judicial oversight.

23. Once the parties have completed their discussions on the mechanics on the proposed system, the Prosecution proposes that a draft proposal be submitted for the Chamber's consideration.

I. Expert witnesses

24. The Prosecution intends to call expert witnesses to provide evidence as to the context in which the crimes were committed.

25. The Prosecution is cognizant of the fact that in the interests of justice and judicial economy, Chambers generally favor the use of jointly instructed experts.⁸ The Prosecution has initiated contact with the Defence regarding possible joint experts. The parties will inform the Chamber as to the outcome of those discussions once completed.

⁸ ICC-01/05-01/08-695, para. 11 citing ICC-01/04-01/06-1069, paras. 14 and 15.

J. Agreements as to facts

26. With the objective of judicial economy, the Prosecution will endeavor to reach Rule 69 agreements with the Defence at the earliest possible time. The Prosecution has already commenced these discussions with the Defence. The parties will inform the Chamber of the outcome of the discussions when completed.

K. Time Limit for the Submission of applications for victim participation

27. Prosecution submits that the time limit for the submission of the victims' applications for participation in trial proceedings is governed by Regulation 86(3) of the Regulations of the Court. Following the *Lubanga* and *Katanga* Chamber precedents, the Prosecution submits that victims' applications to participate in the trial proceeding must be filed prior to the commencement of the trial.⁹

L. E-court Protocol

28. The Prosecution submits that the parties and participants should apply the revised "Generic" E-court Protocol, as proposed by the Registry and endorsed by the Chamber in the *Gbagbo* case.¹⁰ This "Generic" E-court Protocol is a reviewed and updated version of the E-court Protocol used so far in the present case.¹¹ In the Prosecution's view, the changes made to the latter will not affect the current process.

29. In addition, the Prosecution notes that the Court's E-court User Group is currently discussing the "Generic" E-court Protocol and changes that may be made to it. Such changes may be adopted at a later stage.

⁹ ICC-01/04-01/06-1556-Corr-Anx1, para. 137 f, 13-01-2009; Furthermore, in its decision of ICC-01/04-01/06-2035 para. 34 f, 10 July 2009, the Trial Chamber ruled on the modalities of victim participation in the trial - "victims who wish to participate during the trial proceedings, to set out in a discrete written application the nature and the detail of their proposed intervention at the earliest possible opportunity". ICC-01/04-01/07-933, 26 February 2009, para. 56.

¹⁰ ICC-02/11-01/11-30. The E-court Protocol was attached to the decision as Annex 1.

¹¹ ICC-02/11-01/11-18 page 3. The E-court Protocol used in the present case was annexed to Pre-Trial Chamber's decision of 6 April 2011: ICC-01/09-02/11-48.

M. Observations or objections on the conduct of the proceedings

30. The Prosecution has no objections or observations concerning the conduct of the proceedings at or since the confirmation hearing.

N. Applications under Regulation 55

31. The Prosecution intends to make an application for formal notice to be given to the parties and participants, under Regulation 55(2) that certain facts may be subject to legal re-characterization at the trial stage. This application will be made well in advance of trial.

O. Site visit

32. The Prosecution presently sees no need for a site visit but defers to the Chamber on whether or not to conduct one.

P. Protocol on contacts between the parties and witnesses

33. First, the Prosecution has no objection to the adoption of a protocol regulating contacts between the parties and protected witnesses called by another party, based on the principles of necessity and witness security, and broadly in line with the jurisprudence of previous Chambers.¹² The Prosecution proposes that such a protocol should first be discussed among the parties, the VWU and the Legal Representatives and then submitted for the Trial Chamber's consideration.

34. Second, a protocol regulating the communication by a party to members of the public of information of a non-public nature for the purposes of investigations and preparation of its case should be established. This protocol should constitute

¹² See Trial Chamber III, Decision on the Prosecution's Request to Lift Maintain and Apply Redactions to Witness Statements and related Documents", 20 July 2010, ICC-01/05-01/08-813-Red, paras 66-68; Trial Chamber II, Decision on a number of procedural issues raised by the Registry, 14 May 2009, ICC-01/04-01/07-1134, paras. 25-31; Trial Chamber I, Decision on the Prosecution's application for an order governing disclosure of non-public information to members of the public and an order regulating contact with witnesses", 3 June 2008, ICC-01/04-01/06-1372, para. 8.

a set of minimum rules designed to safeguard, to the greatest degree possible, the security of victims and witnesses during the investigations whilst taking into account the rights and obligations of the parties.

35. Because of the straight forward nature of this second issue, the Prosecution does not consider that an *inter partes* discussion is required before the Chamber rules. Rather, the Prosecution submits that this Trial Chamber should adopt the protocol already developed by the *Katanga* Chamber on this issue, which provided that:

12. [...] whenever information, which is characterised in manner more restrictive than "public", is provided to a party or participant by another party or participant, the party or participant receiving the material should make its content available to the public only to the extent that is truly necessary for the preparation of its case. Whenever information protected by this principle is made available to a member of the public, the party making the disclosure must keep a detailed record thereof. The information shall be made available to only identified members of the public, who shall give a written and signed undertaking not to reproduce or publicise its content, in whole or in part, or to show or disclose it to any other person. If written material covered by this principle is made available to a member of the public, it must be returned to the party or participant who disclosed it once that person no longer needs it for case-preparation. For the purposes of this order, the term "public" includes all persons, governments, organisations, entities, associations and groups. It does not include the judges of the Court, members of the Registry, the Prosecutor and his representatives, the Accused, the defence team, victims granted the right to participate in the proceedings and their legal representatives.

13. Any member of the legal teams of the prosecution, the defence or a participating victim shall, upon no longer being part of those teams, return all "non-public" material in their possession to the relevant person within the team.¹³

36. For the purpose of clarity, and in line with the approach recently adopted in the *Gbagbo* case, the Prosecution submits that the above restrictions should apply to

¹³ ICC-01/04-01/07-2047-tENG, 26 April 2010, para. 12 and 13; *see also* ICC-01/05-01/08-813-Red, paras 80-87 (adopting the approach of Trial Chamber II); ICC-01/04-01/06-1372, paras. 8-13 (approach adopted by Trial Chamber I).

all witnesses whose identity or co-operation with the Court have not yet been made public.¹⁴

37. The Prosecution is of the view that a protocol specifying concrete procedures for the disclosure of non-public material to third parties during investigations and the preparation of the case is essential to ensure the protection of victims and witnesses and persons who may be at risk because of their contact with the Court.

Other issues

38. The Prosecution submits that before trial, it would be useful for directions on the conduct of proceedings to be issued, pursuant to Article 64(8) of the Statute and/or Rule 140 of the Rules. The Prosecution will submit observations on the procedural issues to be ruled upon at the Chamber's convenience.

39. In addition, it may be helpful for the precise role of the legal representatives of victims to be ruled upon before trial.

40. Finally, the Prosecution intends to seek a ruling from the Chamber regarding the permissible scope of witness preparation. A motion will be filed to this effect well in advance of trial.

¹⁴ See Decision on the Protocols concerning the disclosure of the identity of witnesses of the other party and the handling of confidential information in the course of investigations, 6 March 2012, ICC-02/11-01/11-49, disposition; Annex to Decision on the Protocols concerning the disclosure of the identity of witnesses of the other party and the handling of confidential information in the course of investigations, 6 March 2012, ICC-02/11-01/11-49-Anx ("Le présent protocole s'applique aux témoins de la partie adverse dont l'identité ou les relations avec la Cour n'ont pas encore été rendues publiques par cette partie ou par la Chambre ou qui bénéficient d'autres mesures de protection connues de la partie qui enquête").

Respectfully submitted,



Luis Moreno-Ocampo,

Prosecutor

Dated this 28th day of May, 2012

At The Hague, The Netherlands