

**Cour
Pénale
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**International
Criminal
Court**

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

Date: 14 June 2013

TRIAL CHAMBER V(a)

Before: Judge Chile Eboe-Osuji, Presiding
Judge Olga Herrera Carbuccion
Judge Robert Fremr

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF

***THE PROSECUTOR v.
WILLIAM SAMOEI RUTO AND JOSHUA ARAP SANG***

Confidential

Sang Defence Application to Exclude Expert Report of Mr Hervé Maupeu

Source: 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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I. INTRODUCTION

1. On 28 February 2013, and following a filing by the defence requesting such,¹ the prosecution disclosed to the defence an English translation of the report of its 'expert witness', Hervé Maupeu.² Mr Maupeu, through his Expert Report, purports to provide, among others: a historical background to the 2007 Post-Election Violence ("PEV"); causes of the PEV; the 'social actors' to the PEV; and an analysis of the nature and composition (including the main players) of the main political parties (namely the Orange Democratic Movement and the People's National Union), during the 2007-8 PEV period.
2. It is envisaged that the Expert Report, which consists of answers to twelve questions, put to the witness by the prosecution, shall constitute the basis for Mr Maupeu's *viva voce* evidence. Additionally and/or alternatively, the prosecution may seek to tender the Expert Report into evidence directly.
3. For reasons elaborated in this application, the defence for Joshua arap Sang ('the defence') requests the Trial Chamber to exclude from evidence the entire Expert Report of Mr Maupeu. In the alternative, the defence seeks the exclusion of certain aspects of the report, which are highlighted in Annex A to this Motion. The defence submits that it is fair, reasonable, expeditious, economical, and in the interests of justice, for the Trial Chamber to entertain objections to Mr Maupeu's anticipated evidence at this pre-trial stage, rather than to wait until Mr Maupeu has appeared before the court to give evidence.
4. The defence objects to the Expert Report (and any oral evidence that may follow therefrom) on the basis that:
 - a. The Expert Report usurps the role of the Trial Chamber by making observations and drawing conclusions on factual matters that go to the ultimate issue(s) in this case, and which fall for determination by the Trial Chamber;

¹ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-606, Joint Defence Request for an Order for the Prosecution to

² KEN-OTP-0093-1308 (the original version, in French, is KEN-OTP-0093-0871) ("Expert Report").

- b. The Expert Report draws conclusions based on facts that have not yet been established in this case, and are in fact, in contention between the parties;
 - c. The Expert Report overtly relies on the conclusions of other experts, thus imposing the opinions of those experts on the court without the opportunity for them to be questioned on their findings;
 - d. The Expert Report contains facts which are already the subject of judicial notice or which other witnesses are expected to testify on; and
 - e. The Expert Report is not necessary to assist the Trial Chamber in understanding the context of the case and issues in dispute. It therefore has no relevance to the proceedings.
5. The defence also observes that some of the expert witness's evidence falls outside the temporal jurisdiction of this case and reserves the right to raise that issue separately.
6. In this application, the defence does not challenge Mr Maupeu's qualification as an expert witness,³ but reserves the right to do so.

This application is filed confidentially solely because it makes reference to the contents of Mr Maupeu's Expert Report, which the prosecution has classified as confidential.

II. PROCEDURAL HISTORY

7. On 17 October 2012, pursuant to the Trial Chamber's 9 July 2012 decision setting out the schedule leading up to trial,⁴ the prosecution engaged the defence with a view to agreeing on the experts it intended to call and the scope of their

³ At this stage, the defence does not even know if, at a minimum, Mr Maupeu has been admitted to the Court's List of Experts, set out in Regulations of the Registry, Regulation 56(1). The *Lubanga* Trial Chamber determined that any expert whose opinion was to be relied upon by a party, who was not already on the Registry list, should have his name included. ICC-01/04-01/06-1069, Decision on the procedures for instructing expert witnesses, 10 December 2007, Orders of the Trial Chamber, para E(ix). Via email to the defence on October 2012, Cynthia Tai indicated that the proposed expert witnesses were not yet on the List of Experts.

⁴ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-440, Decision on the schedule leading up to trial, 9 July 2012, para. 16 ("Disclosure of the reports of any expert witness who will be called during the prosecution case should be **completed** by 14 February 2013").

respective evidence.⁵ Mr Maupeu was one of the expert witnesses put forth. Despite several *inter partes* exchanges, the parties could not agree on the necessity for, nor expertise of Mr Maupeu, much less joint instructions for him.⁶ As a result, the prosecution proceeded to commission Hervé Maupeu as an expert witness alone. Mr Maupeu then produced his report, the original version of which is in French.⁷

8. As the trial is set to open on 10 September 2013, the prosecution has provisionally indicated that it intends to call Mr Maupeu as one of its first five witnesses to testify at trial.⁸

III. APPLICABLE LAW

9. Article 64(9)(a) of the Rome Statute gives the Trial Chamber the power to “[r]ule on the admissibility or relevance of evidence”, on application of a party or on its own motion. This power is further elaborated in Article 69(4), which states:

The court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.

10. Rule 63(2) of the Rules of Evidence and Procedure (“RPE”) states that the Chamber shall have the authority to assess freely all evidence submitted, in order to determine its relevance or admissibility in accordance with Article 69.
11. Furthermore, Article 64(6)(f)⁹ and Article 64(8)(b)¹⁰ along with Rules 134(1)¹¹

⁵ Email from Cynthia Tai to the defence, 17 October 2012.

⁶ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-492, Prosecution’s Updated Report on Joint Instruction of Experts, 30 November 2012.

⁷ The French version of the report was disclosed on 14 February 2013, and was re-disclosed on 18 February 2013 as KEN-OTP-0093-0871.

⁸ Email from Cynthia Tai to the defence, dated 21 March 2013.

⁹ Article 64(6)(f): In performing its functions prior to or during the course of trial, the Trial Chamber may, as necessary, rule on any other relevant matters.

¹⁰ Rule 64(8)(b): At the trial, the presiding judge may give directions for the conduct of the proceedings including to ensure that they are conducted in a fair and impartial manner. Subject to any directions of the presiding judge, the parties may submit evidence in accordance with the provisions of this Statute.

¹¹ Rule 134(1) : Prior to the commencement of the trial, the Trial Chamber on its own motion, or at the request of the Prosecutor or the defence, may rule on any issue concerning the conduct of the proceedings. Any request

and 140 of the RPE, and regulations 54(g),(i), and (m) of the Regulations of the Court, reflect the Trial Chamber's inherent powers of discretion in relation to the conduct of proceedings.

12. These provisions underlay the defence's request to the Trial Chamber, in light of the fair trial rights of the accused.¹²
13. Although the ICC statute and the Rules of Procedure are both replete with provisions relating to experts,¹³ none of the provisions expressly provide for the calling of expert evidence at trial, or the ambit thereof. Of all the provisions, Regulation 44 of the Regulations is the most elaborate.¹⁴ It reads:

1. The Registrar shall create and maintain a list of experts accessible at all times to all organs of the Court and to all participants. Experts shall be included on such a list following an appropriate indication of expertise in the relevant field. A person may seek review by the Presidency of a negative decision of the Registrar.
2. The Chamber may direct the joint instruction of an expert by the participants.
3. On receipt of the report prepared by an expert jointly instructed, a participant may apply to the Chamber for leave to instruct a further expert.
4. The Chamber may *proprio motu* instruct an expert.
5. The Chamber may issue any order as to the subject of an expert report, the number of experts to be instructed, the mode of their instruction, the manner in which their evidence is to be presented and the time limits for the preparation and notification of their report.

14. Regulation 44, it can be observed, is however more procedural than it is substantive. It still provides no immediate guidance on the parameters of expert evidence; an issue the founders of the court, arguably, best left to the determination of the courts. This, it would appear, follows the tradition of the *ad hoc* tribunals, where the issue was also left to the determination of the courts.¹⁵

15. While the *ad hoc* tribunals would develop a substantial body of case law over the

from the Prosecutor or the defence shall be in writing and, unless the request is for an *ex parte* procedure, served on the other party...

¹² Article 64(2).

¹³ See Articles 48(4), 56(2)(c), 93(1)(b) and (e), 93(2), 93(10)(b)(ii)(b), and 100(1) of the ICC Statute, and Rules 91(3)(a) and (b), 91(4), 97(2), 140(3), and 191 of the RPE.

¹⁴ Also see Regulation 54.

¹⁵ See for instance Rule 94*bis* of the ICTY Statute (adopted 10 July 1998), which also deals with the procedural aspects of the admission of expert evidence, albeit different from that at the ICC.

years, at the ICC, the jurisprudence is still emerging. In the *Lubanga* Judgement, the Trial Chamber simply found that:

When assessing the testimony of expert witnesses, the Chamber has considered factors such as the established competence of the particular witness in his or her field of expertise, the methodologies used, the extent to which the findings were consistent with other evidence in the case and the general reliability of the expert's evidence.¹⁶

The Trial Chamber did not have occasion to address the proper scope of the substance of an expert witnesses' testimony.

16. There is thus no direct authority at the ICC on the proper scope of an expert's evidence. Consequently, the jurisprudence of the other international criminal tribunals is instructive, if only persuasively.¹⁷ In particular, the following principles, which have evolved in the jurisprudence of the *ad hoc* tribunals, are germane to the present case:

a. Experts cannot testify in relation to matters, which fall within the functions of the Trial Chamber as the ultimate arbiter of fact and law. They cannot offer opinion concerning: the guilt or innocence of the defendant; the acts and conduct, or mental state of the defendant; or the modes of liability.¹⁸ In particular, *an expert witness may not make direct or indirect inferences regarding the defendant's role in relation to the commission of the alleged crimes*,¹⁹ or *testify in relation to chapeau elements of the offence* such as the existence of an armed conflict (*in casu*, the existence of the alleged organizational Network),²⁰ or the *mens rea* of the offence (i.e. foreseeability of the commission of offences).²¹ (Emphasis added).

b. Experts should only be permitted to testify on matters, which specifically

¹⁶ *Lubanga* Trial Judgement, para. 112.

¹⁷ Article 21(1) of the Rome Statute.

¹⁸ *Prosecutor v. Karemara et al*, ICTR-98-44-T, Decision On Prosecution Motion For Reconsideration of the Decision On Prospective Experts Guichaoua, Nowrojee And Des Forges, Or For Certification, 16 November 2007, para 21.

¹⁹ *Prosecutor v. Kordić & Čerkez*, IT-95-14/2, Transcript, 28 January 2000, p. 13289.

²⁰ *Prosecutor v. Milutinović et al*, IT-05-87, Transcript, 13 July 2006, pp 842-843.

²¹ *Prosecutor v. Karemara et al*, ICTR-98-44-T, Decision on Prosecution Prospective Experts Alison Des Forges, Andre Guichaoua and Binaifer Nowrojee, 25 October 2007 ("Karemera Expert Decision"), para 33.

fall within their expertise.²²

- c. Experts should not offer expert evidence in relation to factual matters on which the Chamber will hear witness testimony, or on which the Chamber has taken judicial notice.²³ As found by the ICTR Appeals Chamber in the *Nahimana* appeals judgment:²⁴

212. [...] Thus, while the report and testimony of an expert witness may be based on facts narrated by ordinary witnesses or facts from other evidence, an expert witness cannot, in principle, testify himself or herself on the acts and conduct of accused persons²⁵ without having been called to testify also as a factual witness and without his or her statement having been disclosed in accordance with the applicable rules concerning factual witnesses.²⁶ However, an expert witness may testify on certain facts relating to his or her area of expertise. [...]

509. [...] The Appeals Chamber recalls that the role of expert witnesses is to assist the Trial Chamber in its assessment of the evidence before it, and not to testify on disputed facts as would ordinary witnesses.

- d. Closely related to the foregoing, it is not necessary and will not assist the Trial Chamber to appoint an expert to provide an opinion on material, which is either similar to or identical to evidence tendered in the trial.²⁷
- e. Where an expert testifies in relation to matters, which are not sourced or referenced in the report, the Chamber should treat such evidence as 'opinion' evidence and not expert evidence, and give it less weight accordingly.²⁸

²² *Prosecutor v. Dragomir Milošević*, IT-98-29/1-T, Decision on Admission of Expert Report of Robert Donia, 15 February 2007 ("*D. Milošević* Expert Decision"), para 11.

²³ *Karemera* Expert Decision, para 22; *Prosecutor v. Boskoski and Tarculovski*, IT-04-82-T, Decision on Motion to Exclude the Prosecution's Proposed Evidence of Expert Bezruchenko and his Report, 17 May 2007, para 15.

²⁴ *Prosecutor v. Nahimana et al*, ICTR-99-52-A, Appeals Judgement, 28 November 2007

²⁵ Also, it should be recalled that an expert witness cannot pronounce on the criminal responsibility of the accused: see *D. Milošević* Expert Decision, para. 11; *Martić* Decision of 13 November 2006, p. 5; and *Prosecutor v. Casimir Bizimungu et al*, ICTR-99-50-T, Decision on the admissibility of the expert testimony of Binaifer Nowrojee, 8 July 2005, para. 12.

²⁶ In this regard, see Rules, 66(A)(ii), 73 *bis* (B)(iv)(b) and 73 *ter* (B)(iii)(b).

²⁷ *Karemera* Expert Decision, para 28.

²⁸ "There must be sufficient information as to the sources used in support of the statements. The sources must be clearly indicated and accessible in order to allow the other party or the Trial Chamber to test or challenge the basis on which the expert witness reached his or her conclusions. In the absence of clear references or accessible sources, the Trial Chamber will not treat such a statement or report as an expert opinion, but as the personal opinion of the witness, and weigh the evidence accordingly". *D. Milošević* Expert Decision, para 8.

- f. An expert's findings must be based on 'established facts'. If the prosecution has not proved the facts, then the expertise will have no relevance/probative value, and will thus be inadmissible.²⁹
- g. Admission of expert opinion does not mean the admission of the factual evidence underlying the opinion. Sources cited in expert reports will not be admitted into evidence unless a separately application to admit such sources is made, and the sources independently meet the criteria for admission into evidence.³⁰
17. These principles inform the defence's objections to Mr Maupeu's proposed Expert Report.
- IV. SUBMISSIONS**
- Timing of the Application*
18. Although under Rule 64(1),³¹ objections of the nature raised herein should ordinarily be raised at the time the evidence in issue is sought to be adduced, or tendered, there is no bar from raising such objections pre-trial. On the contrary, as the Trial Chamber observed in *Katanga*,³² in some instances, it would be in the interests of good administration of justice for the parties to raise their objections in principle for the exclusion of certain categories of evidence or their objections in substance with reference to certain types of evidence before trial.
19. Moreover, it is also consonant with the accused's fair trial rights, in particular, the notice requirement, that the case the accused must face at trial should be defined,

²⁹ *Prosecutor v. Mucic et al (Celebici case)*, IT-96-21-A, Judgment, 20 February 2001, para 594.

³⁰ *Prosecutor v. Karadzic*, IT-95-5/18-PT, Order On Prosecution Request For Clarification And Proposal Concerning Guidelines For The Conduct Of Trial, 20 October 2009.

³¹ Rule 64(1): An issue relating to relevance or admissibility must be raised at the time when the evidence is submitted to a Chamber. Exceptionally, when those issues were not known at the time when the evidence was submitted, it may be raised immediately after the issue has become known. The Chamber may request that the issue be raised in writing. The written motion shall be communicated by the Court to all those who participate in the proceedings, unless otherwise decided by the Court.

³² See the *Katanga & Njudgolo* Trial Chamber's oral decision inviting the parties to express such objections before the start of the trial: ICC-01/04-01/07-T-72-ENG, 2 October 2009, p. 35; See also *Prosecutor v. Lubanga*, ICC-01/04-01/06-1399, Decision on the admissibility of four documents, 13 June 2008.

to the greatest extent possible, in advance of trial. This includes defining the nature and scope of the evidence the accused must confront. Besides expediting the trial process, this process is also critical to the question of notice. Defining what evidence the accused will confront at trial in advance, gives him the opportunity to prepare accordingly.

20. Indeed, as the Appeals Chamber emphasised in *Bemba*,³³ in exercising its discretion (in that case, the trial chamber's article 69(4) powers), "under article 64(2) of the Statute, the Chamber must always ensure that the trial 'is fair and expeditious and conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses'".
21. These imperatives should instruct the determination of this application. A ruling by the Trial Chamber on this issue at this juncture, as argued above, comports with the accused's fair trial rights. Moreover, it will not affect the rights of the victims or prejudice the prosecution. Accordingly, the defence implores the Trial Chamber to exercise its discretion and determine this issue now. Nothing in the legal framework of the court prohibits the Chamber from doing so.
22. The defence submits that the nature of the evidence in issue - expert evidence - is such that this matter can be deposed of now rather than at trial, without any adverse consequences to all the parties concerned. Mr Maupeu's anticipated evidence is encapsulated in, and to that extent confined to, his expert report, which has already been disclosed. A ruling on this Motion can therefore be made now on the basis of that report without any prejudice to the parties.
23. In this case, the timing of this application is even more pertinent given that Mr Maupeu is slated to testify early in the proceedings.

Objections to the Substance of the Expert Report

24. The defence's objection to the Expert Report and the expert's anticipated

³³ *Prosecutor v. Bemba*, ICC-01/05-01/08 OA5 OA6, Judgement on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled 'Decision on the admission into evidence of materials contained in the prosecution's list of evidence', 3 May 2011, para. 37.

evidence must be understood in the context of the charges against the accused, and the Prosecution's case theory vis-a-vis the Sang defence theory.

25. The prosecution alleges that the PEV in the Rift Valley was planned, organized and sponsored by a network of different people representing different components, including the accused, Mr Sang, who allegedly represented the media.³⁴ That, as a member of the Network, Mr Sang attended its planning meetings and contributed to the commission of the crimes by placing his radio show at the disposal of the members of the Network, as well as using the show to propagate anti-Kikuyu hate speech and to coordinate attacks.³⁵
26. The defence, on the other hand, disputes the existence of any Network, as alleged or at all, and contends that if any such entity existed, Mr Sang was not a member, nor was he in any way associated with it. Moreover, Mr Sang denies that he contributed to the commission of the PEV in any one or more of the ways alleged, or at all, and contends that the PEV was a spontaneous reaction to a disputed election result in which President Kibaki was declared the winner.
27. Against this background, the defence submits that the following are material questions of fact, which the Trial Chamber must decide, after hearing evidence of fact in this case:
 - a. Whether there was a Network, as alleged. This factual inquiry is also important for the legal purposes of establishing the chapeau elements of crimes against humanity;³⁶
 - b. If the Network existed; whether the accused was a member thereof, and if so, who were the other members;
 - c. How the PEV started, who and/or what contributed to it; and
 - d. Whether the accused and any other alleged member(s) of the Network

³⁴ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-625, Second Updated Pre-Trial Brief, 26 April 2013 ("Second Updated PTB"), Section II Organization – The Network.

³⁵ Second Updated PTB, paras. 35-37, 46, 139-151.

³⁶ Article 7(2)(a) of the Rome Statute.

contributed to the PEV as alleged, or at all; and if so, how.

28. As a matter of law, these are all factual issues outside the realm of expert evidence.³⁷ In the same breath, Mr Maupeu even admits that “chains of responsibility ... is more a matter for the criminal lawyer” but then goes on to highlight the importance of “opinion leaders” and their involvement in the PEV.³⁸
29. In this application, the defence objects, primarily, to the Expert Report on the basis that it, directly or indirectly, ventures expert/opinion evidence on these factual issues.
30. Particularly, expert witness Mr Maupeu inappropriately opines on the following questions:
- a) whether the PEV was spontaneous or not;³⁹
 - b) what were the causes or catalysts;⁴⁰
 - c) whether or what historical or ethnic issues caused or contributed to the PEV, and to what extent;⁴¹
 - d) whether the PEV was organized or not, and if so, who were the major players;⁴²
 - e) whether the accused or anyone (individual or organization) closely associated with him, as alleged in this case, played any part in the PEV.⁴³
31. These are all factual findings the Trial Chamber is capable of making after hearing evidence of fact in this case and applying it to the law.⁴⁴ Indeed, it is within the exclusive domain of the Trial Chamber to do just that. Mr Maupeu would be usurping the role of the Trial Chamber as the arbiter of law and fact if he were allowed to give expert evidence on these issues.

³⁷ Para. 16(a) of the Application.

³⁸ KEN-OTP-0093-1308 @ 1333-4.

³⁹ See the expert's answer to question 1 in the Expert Report as highlighted in Annex A.

⁴⁰ See the expert's answers to questions 1 and 3 in the Expert Report as highlighted in Annex A.

⁴¹ See the expert's answers to questions 1 and 7 in the Expert Report as highlighted in Annex A.

⁴² See the expert's answers to questions 5, 9 and 10 in the Expert Report as highlighted in Annex A.

⁴³ See the expert's answers to question 5 and 10 in the Expert Report as highlighted in Annex A.

⁴⁴ Para. 16(c) of the Application.

32. While it maybe acceptable for a trial chamber to seek expert evidence on certain technical issues in order to aid its understanding of a case,⁴⁵ the issues Mr Maupeu ventures his opinions on in this case are of a non technical nature, and are not beyond the comprehension of the Trial Chamber.⁴⁶
33. Besides the foregoing arguments, the Expert Report (and any ensuing evidence), as illustrated in Annex A, is also objectionable for the following legal reasons.
34. Mr Maupeu's Expert Report should be excluded because it relies on facts that are not yet established in evidence in this case and which, to the contrary, are disputed. This point on its own suffices to disqualify the expert witness's evidence.⁴⁷
35. Further/alternatively, for the most part, the Expert Report includes evidence that is similar to the parties' Agreed Facts,⁴⁸ or to the anticipated evidence of witnesses of fact,⁴⁹ or other documentary materials. The Expert Report, for instance, in many respects, relies on the findings of the reports by the KNCHR⁵⁰ or CIPEV,⁵¹ which are included on the prosecution's anticipated List of Evidence. In the circumstances, as a matter of law, it is not necessary and will not assist the Trial Chamber to rely on expert opinion in relation to material, which is either similar or identical to the evidence to be tendered in the trial.⁵²
36. Furthermore, Mr Maupeu, in many instances, simply relies on the observations and conclusions of other experts. In fact, by his own admission, his "primary

⁴⁵ Such as, for instance, a forensic expert to determine the age of witnesses (*Lubanga* Trial Judgement, para 176) or an expert called to consider the age at which children can give informed consent to participate in armed conflict (*Lubanga* Trial Judgement, paras 612-614).

⁴⁶ The ICTR has defined expert evidence as "testimony ... intended to enlighten the Judges on specific issues of a technical nature, requiring special knowledge in a specific field". *Prosecutor v. Alloys Simba*, ICTR-01-76-I, Decision on defence motion to disqualify expert witness Alison des Forges, and to exclude her report, 14 July 2004.

⁴⁷ See para. 16(f) of the Application.

⁴⁸ For example, the Expert Report talks about facts encapsulated in the parties' Agreed Facts 3, 7-9, 32-34, ICC-01/09-01/11-451-AnxA.

⁴⁹ For instance, P-326 worked for the ODM Secretariat and is therefore presumably well placed to talk about the party, its origins and its organization. The core prosecution witnesses such as P-15, P-16, P-19, P-24, P-25 and P-28 all talk about the organization of the Network, the causes of the PEV, etc. (ICC-01/09-01/11-540-Conf-AnxB-Red).

⁵⁰ The KNCHR report, KEN-OTP-0001-0002, was disclosed as incriminatory material, and is on the prosecution's List of Evidence, ICC-01/09-01/11-540-AnxC-Conf-Red.

⁵¹ The CIPEV report, KEN-OTP-0001-0364, was disclosed as incriminatory material, and is on the prosecution's List of Evidence, ICC-01/09-01/11-540-AnxC-Conf-Red.

⁵² Paras 16(c) and (d) of the Application.

intention [was] to consolidate all the research carried out in the social sciences area that will be of relevance to the questions posed". This approach of merely collating the research of other scholars and researchers is objectionable in that, by simply presenting the Court with a compilation of research by other experts, Mr Maupéu effectively imposes the opinions of those experts on the Court, without affording the parties an opportunity to question those individuals on their findings. More seriously, it denies the defence the opportunity to directly challenge those sources.

37. In the event that the Trial Chamber does not exclude the entire Expert Report from the evidence in this case, the Sang defence requests that those excerpts listed in Annex A to this application be excluded, for any or more of the legal reasons discussed above.
38. In Annex A the defence, merely for brevity, tabulates the objectionable excerpts and the bases thereof. The Annex does not make any new arguments not canvassed in this application. The Annex should therefore at all times be read in conjunction with this application.

V. CONCLUSION

39. For all the legal reasons given above, and for the more specific reasons highlighted in Annex A to this application, the defence requests the Trial Chamber to order the exclusion of the entire Expert Report (and related *viva voce* testimony) by Mr Hervé Maupéu. Alternatively the defence seeks an order for the exclusion of the excerpts listed in Annex A.
40. Should the Trial Chamber grant the alternate request, the Sang defence would also request the Chamber to order the prosecution to ask the expert witness to submit a new Expert Report, without the portions of the offending evidence as determined by the Chamber.



Joseph Kipchumba Kigen-Katwa
On behalf of Joshua arap Sang
Dated this 14th Day of June 2013
In Nairobi