

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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

Date: 8 July 2013

**TRIAL CHAMBER V(A)**

**Before:** Judge Chile Eboe-Osuji, Presiding Judge  
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**

**Prosecution's Response to the "Sang Defence Application to Exclude Expert  
Report of Mr Hervé Maupeu"**

**Source:** Office of the Prosecutor

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

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1. On 14 June 2013, the Defence for Mr Sang filed an application requesting Trial Chamber V(A) ('the Chamber') to exclude, in whole or alternatively in part, the report (and related *viva voce* testimony) of the Prosecution's expert on background and context, Mr Herve' Maupeu ('the Application').<sup>1</sup> On 17 June 2013, it submitted an annex outlining the portions of the report it particularly objected to, and provided more specific reasons for these objections.

2. The Prosecution submits that the Application should be rejected, either *in limine* for contravening the requirements of Regulation 36(2)(b) and exceeding the word limit in Regulation 37, or for the reasons advanced herein. The Defence relies unduly and in some cases erroneously on the jurisprudence of the *ad hoc* tribunals, which is at best instructive, but certainly not determinative of the issue. The expert report ('the Report') satisfies the well-established test for admissibility at this Court.<sup>2</sup> Notably, most of the Defence's objections go to weight, rather than admissibility. Finally, the Application is premature; the proper timing for objections to the admissibility of evidence to be tendered through a witness is during or at the conclusion of the witness' testimony.

### Procedure and Confidentiality

3. As a point of procedure, the Prosecution notes that the main filing is 15 pages, and the annex is 8 pages. Taken together, this significantly exceeds the 20 page limit prescribed in Regulation 37 of the Regulations of the Court. Further, the filing also contravenes Regulation 36(2)(b), which explicitly states that any appendix attached to a document filed by a party or participant "shall not contain submissions". The

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<sup>1</sup> ICC-01/09-01/11-774-Conf ('the Application').

<sup>2</sup> Relevance, probative value and whether probative value is outweighed by prejudicial effect. See Article 69(4) of the Statute; ICC-01/04-01/06-1399, paras. 24-32; ICC-01/04-01/07-2289-Corr-Red, para. 13; ICC-01/05-01/08-2147; and ICC-01/05-01/08-2012-Red, para. 13.

Defence's assertion that the annex "does not make any new arguments not canvassed in th[e] [A]pplication"<sup>3</sup> is, in this sense, both irrelevant and inaccurate: the annex should not contain *any* arguments, either new or old. In addition, the Prosecution notes that the issue of prejudice, for example, is raised for the first time as an objection in the annex; and the Defence itself acknowledges that the annex contains "more specific reasons" than the legal reasons given in the main filing.<sup>4</sup> On that basis, the Application could be dismissed *in limine*. The Prosecution makes the submissions advanced below for consideration by the Chamber in the event that it decides to nevertheless entertain the Application.

4. Since the Application was filed confidentially, this response is filed with the same classification. However, since the response does not refer in any specific detail to the information contained in the report of Mr Maupeu, the Prosecution has no objection to it being reclassified as public, subject only to the redaction of the witness' identity.

## Submissions

### *The Defence objections*

5. Whilst the Prosecution agrees with many of the principles set out in paragraph 16 of the Application on the general scope of an expert's evidence that have evolved in the jurisprudence of the *ad hoc* tribunals,<sup>5</sup> it disagrees that Mr Maupeu's report contravenes these principles and should therefore be excluded. When analysed closely, the majority of the Defence's objections to Mr Maupeu's

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<sup>3</sup> The Application, para. 38.

<sup>4</sup> The Application, para. 39.

<sup>5</sup> See the Application, para. 16(a), (b), and (g).

report are based on a misinterpretation of the principles<sup>6</sup> or pertain to weight rather than admissibility.<sup>7</sup>

6. The Accused are not charged as having been responsible for the entire post-election violence, but rather, for specific crimes in specific locations that took place during that time. The report does not specifically deal with any of the incidents which form the basis of the charges against the accused in the present matter. It is not evidence as to the acts, conduct, mental state or criminal responsibility of the accused. Rather, it deals with the circumstances of the post-election violence generally, including how it started and who or what may have contributed to it,<sup>8</sup> which are perfectly legitimate matters of background and context relevant to the case. The same goes for evidence on Kenya's history and politics.<sup>9</sup>

7. Although Mr Maupeu will not be testifying on technical matters,<sup>10</sup> in light of his knowledge, experience and training<sup>11</sup> as a researcher in social sciences,<sup>12</sup> the information in his report and therefore his proposed testimony does have the potential to assist the Chamber in its understanding of the background and context of the post-election violence.<sup>13</sup> And whilst certain witnesses may be able to testify on some of the same facts that Mr Maupeu refers to in his report, they will certainly not

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<sup>6</sup> See the Application, para. 16(c), (d).

<sup>7</sup> See the Application, para. 16(e), (f).

<sup>8</sup> See the Application, paras. 27(c), 30(a)-(d).

<sup>9</sup> See the Application, para. 30(d)-(e).

<sup>10</sup> The Application, para. 32.

<sup>11</sup> The Prosecution notes that the Defence does not dispute the witness' expertise in its filing. His qualifications and experience are described in his CV which was disclosed to the Defence on 22 February 2013.

<sup>12</sup> Expertise is not limited to technical or scientific expertise. "An expert witness is a person who by virtue of some specialised knowledge, skill or training can assist the Chamber to understand or determine an issue in dispute [...] due to the qualifications of the expert, he or she can give opinions and draw conclusions, [...] and present them to the Chamber"; see "Decision on Admission of Expert Report of Ratko Škrbić with Separate Opinion of Judge Mindua and Dissenting Opinion of Judge Nyambe", 22 March 2012, Case No.: IT-88/-T, at para. 14. See also ICC-01/05-01/08-2273, para. 8 (referring to the "knowledge, experience and training" of a proposed expert on background and context).

<sup>13</sup> ICC-01/05-01/08-2273, paras. 7-8. Cf: the Application, para. 4(e).

be in a position to provide a comparable analysis, drawn from years of experience and an extensive study of academic and other sources.

8. Moreover, the jurisprudence pointed to by the Defence does not support the proposition that experts can never offer evidence on factual matters that other witnesses will provide, or which are the subject of judicial notice.<sup>14</sup> In the specific circumstances of the *Karemara* case at the ICTR, where copious evidence similar to what the proposed experts were to testify about had already been adduced at trial, the judges decided that their additional testimony was not necessary.<sup>15</sup> In this case, no evidence has been adduced. The Chamber has not made any decision on the parties' agreed facts, and no witness has testified. The objection is premature and unreasonable.

9. The Defence has not adduced any authority to support an argument that the report should be deemed inadmissible on the basis that it refers to facts that may or may not be the subject of judicial notice, or which other witnesses may or may not testify. Indeed, an expert report that is not based in fact would be amount to little more than an irrelevant academic exercise. Furthermore, unless it impacts materially on the efficiency of the trial, the fact that two or more witnesses testify as to the same facts is not objectionable. This is otherwise known as corroboration.

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<sup>14</sup> The Application, paras. 16(c)-(d), 35.

<sup>15</sup> *Prosecutor v Karemara et al.*, Case No.: ICTR-98-44-T, "Decision on Prosecution Prospective Experts Alison Des Forges, Andre Guichaoua and Binaifer Nowrojee", 25 October 2007, paras. 22, 28-29, 33-34. The Defence also cited *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 (footnote 23 of the Application). This decision focussed on the impartiality of experts and whether a report dealt with matters within their expertise, and not the issue of experts testifying on factual matters already in evidence.

10. In a somewhat contradictory objection, the Defence then submits that the report should be excluded 'because it relies on facts that are not yet established'.<sup>16</sup> While it is correct that the facts upon which an expert report is based must be true, this is a matter for the Trial Chamber to determine, and is something which can only be done at the conclusion of the trial when all evidence has been presented and evaluated. If the facts are disproved, then the weight given to the opinion will be affected; but admissibility cannot be challenged on this basis before the facts themselves are established.<sup>17</sup> This objection is accordingly premature.

11. Objections regarding the sources used by Mr Maupeu, and reliance on the conclusions of others,<sup>18</sup> are again matter which may affect weight, but not admissibility.<sup>19</sup> In any event, as noted below, these are matters that should be raised by the Defence during Mr Maupeu's testimony.

12. The prejudice the Defence claims<sup>20</sup> is evidently based on the fact that the information is harmful to the defence case. However, this is not the sort of "prejudice" that precludes the admission of otherwise relevant evidence. Admission is not prejudicial in the sense that it has the capacity to negatively affect the Chamber's fair assessment of the issues in the case.<sup>21</sup>

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<sup>16</sup> The Application, paras. 4(b), 16(f), 34.

<sup>17</sup> "The admissibility inquiry has no bearing on the Chamber's final determination of the weight that it will give to any particular item of evidence. Indeed, the admissibility determination does not – in any way – predetermine the Chamber's final assessment of the evidence or the weight to be afforded to it; this will only be determined by the Chamber at the end of the case when assessing the entirety of the evidence admitted for the purpose of the trial.", ICC-01/05-01/08-2299-Red, para. 11 [Footnotes omitted].

<sup>18</sup> The Application, paras. 4(c), 16(e), 36.

<sup>19</sup> Even the Defence concedes this, for unsourced conclusions; see the Application, para. 16(e).

<sup>20</sup> ICC-01/09-01/11-774-Conf-Anx.

<sup>21</sup> ICC-01/04-01/06-1399-Corr, para. 31. See also ICC-01/05-01/08-2012-Red, at para. 16: "[T]he Chamber must, where applicable, weigh the probative value of an item in question against the prejudicial effect that its admission as evidence 'may cause to a fair trial or to a fair evaluation of the testimony of a witness'".

13. Finally, Mr Maupeu is not usurping the role of the Trial Chamber; if his testimony and/or report are admitted, it will be a small portion of the evidence presented to the Trial Chamber for consideration in their determination of a number of matters. The report does not purport to pronounce upon the ultimate issue of the guilt or innocence of the accused. At the conclusion of the trial, it will be for the Trial Chamber to freely assess, and accept or reject, in whole or in part, the evidence of all witnesses, including Mr Maupeu's.

*The proper test for admissibility*

14. Noting that the jurisprudence on expert evidence at the ICC is still emerging, the Defence lists a raft of principles on the proper scope of an expert's evidence drawn from decisions at the *ad hoc* tribunals. Whilst the Prosecution agrees that the ICC jurisprudence on expert testimony is still emerging, Chambers of this Court have established a test for the admissibility of documentary evidence generally,<sup>22</sup> and the report of an expert should be treated no differently.<sup>23</sup>

15. Articles 64(9) and 69(4) confer on a Trial Chamber a broad power and discretion to make decisions on the admission of evidence at trial; the Trial Chamber may rule on the relevance and/or admissibility of each item of evidence when it is submitted, and then determine the weight to be attached to the evidence at the end of the trial.<sup>24</sup>

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<sup>22</sup> See ICC-01/04-01/06-1399-Corr, paras. 24-32; ICC-01/04-01/07-2289-Corr-Red, para. 13; ICC-01/05-01/08-2147; and ICC-01/05-01/08-2012-Red, para. 13.

<sup>23</sup> This is in fact in line with the general approach adopted by the ICTY, where expert reports, like any other evidence, are subject to the general standards of admissibility; see "Decision on Admission of Expert Report of Ratko Škrbić with Separate Opinion of Judge Mindua and Dissenting Opinion of Judge Nyambe", 22 March 2012, Case No.: IT-88/-T, at paras. 12-13.

<sup>24</sup> ICC-01/04-01/06-1399-Corr, para. 23; ICC-01/05-01/08-1386, paras. 36-37.

16. As recalled by Trial Chamber III in the Bemba case:

“for any tendered item to be admitted into evidence, it must satisfy a three-part admissibility test. Under this test, the Chamber will examine, on a preliminary basis, whether submitted materials are (i) relevant to the case, (ii) have probative value; and (iii) are sufficiently relevant and probative to outweigh any prejudicial effect that could be caused by their admission.”<sup>25</sup>

17. In the Prosecution’s submission, the report of Mr Maupeu *prima facie* satisfies this test. However, and most importantly, as an item of evidence that will be tendered through a witness, it will be only be when Mr Maupeu has testified that the Chamber will be able to make an informed decision on the admissibility of the report, for reasons elaborated below.

*The Application is premature*

18. As regards the proper timing of objections to, and a decision on, the admissibility of an expert report, a decision in the Bemba case rejecting an application to exclude an expert witness from testifying is particularly instructive here. There, Trial Chamber III held that:

- (i) the proper time to challenge the relevance of specific aspects of an expert witness’s testimony is in court, if necessary during the questioning of the witness;
- (ii) should a party wish to challenge an expert witness’ expertise, it may do so in court, when questioning the witness;

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<sup>25</sup> ICC-01/05-01/08-2147; ICC-01/05-01/08-2012-Red, para. 13 [Emphasis added].

- (iii) should issues relating to the material on which the witness bases his or her conclusions arise during testimony, a party may challenge that material and those conclusions in due course; and
- (iv) any decision on the admissibility of an expert witness' report will be taken after the conclusion of his or her testimony if and when its admission as evidence is sought by the tendering party.<sup>26</sup>

19. Although the Prosecution has no objection to advanced notice of an objection to the admissibility of an expert's evidence by way of a written filing, it supports the conclusion of Trial Chamber III that the most appropriate time to rule upon such objection would be "after the conclusion of his or her testimony ", at the earliest. Indeed, a compelling argument could be made that it is only at the conclusion of the Prosecution case that a proper assessment can be made as to the probative value of the evidence in the context of the case as a whole. However, for the purposes of this Application, the Prosecution submits that there is no reason to depart from the approach adopted by Trial Chamber III.

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<sup>26</sup> ICC-01/05-01/08-2273, paras. 7, 10 & 11.

### Relief Requested

20. On the basis of the arguments advanced above, the Prosecution requests that the Application be rejected in its entirety.



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**Fatou Bensouda, Prosecutor**

Dated this 8<sup>th</sup> July 2013

At The Hague, the Netherlands