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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

Public
with Confidential Annex A

Prosecution's Application for Admission of Documents from the Bar Table
Pursuant to Article 64(9)

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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Introduction

1. In accordance with articles 64(9) and 69(2), (3) and (4) of the Rome Statute (“Statute”), Rule 63(2) of the Rules of Procedure and Evidence (“Rules”), and the Decision on the Conduct of Trial Proceedings,¹ the Prosecution hereby submits its application for the admission into evidence of 45 items from the bar table. These items are contained in the Prosecution’s List of Evidence, are relevant to the issues in this trial, and are *prima facie* reliable. The submission consists of a table depicting the content, the origin, and the relevance of each item, which are grouped by topic in the appended confidential Annex A.²

2. The Prosecution seeks to tender these items for the truth of their contents without calling the creator/s of the items or the individual/s who provided the information to testify at trial. These documents are relevant and probative of issues in the instant proceedings without the need for such testimony. Further, their potential probative value outweighs the prejudicial effect, if any, of their admission from the bar table. Accordingly, the Prosecution submits that the admission of the documents would assist the Trial Chamber in its determination of the truth and in ensuring that the trial is fair and expeditious.

3. The chart comprising Annex A has been previously submitted to both Defence teams for their assent or objection to each item, and their comments are recorded in the separately labelled columns. Despite the Defence objections, the Prosecution maintains its position and arguments as to the admissibility and relevance of the tendered items.

¹ ICC-01/09-01/847-Corr., para. 27.

² These documents are accessible in eCourt, as disclosed to the Defence.

Procedural History

4. On 19 July 2013, the Prosecution submitted an application for admission of documents from the bar table.³ On 16 August 2013, the Trial Chamber provided instructions on its preferred procedure for bar table applications as part of its “Decision on the Conduct of Trial Proceedings (General Directions),” which included seeking consent or objections from the opposing sides on the tendered documents.⁴ The Trial Chamber then directed the Prosecution to re-file its application in this format.⁵ The Prosecution now re-submits its application, which includes comments from the respective Defence teams and otherwise conforms to the Trial Chamber’s directions.

Request for confidentiality

5. In accordance with Regulation 23*bis* of the Regulations of the Court, the Prosecution requests that Annex A to this application be classified as “Confidential” since it contains confidential evidentiary material.

Prosecution’s submissions

6. In accordance with articles 64(9) and 69(4) and rule 63(2), the Trial Chamber has broad powers to assess all evidence and to rule on admissibility or relevance thereof. In terms of article 69(2) and (3), the Chamber has the discretion to admit all evidence it deems necessary for the determination of the truth, including documentary evidence. Notwithstanding the express reference to oral evidence from witnesses at trial in article 69(2), there is a clear recognition in the Statute that a variety of other means of introducing evidence may be appropriate.⁶ The

³ ICC-01/09-01/11-819.

⁴ ICC-01/09-01/11-847-Corr., para. 27.

⁵ *Ibid.*

⁶ Article 69(2), which allows for exceptions to the principle of orality; see also Trial Chamber I’s interpretation of this provision in ICC-01/04-01/06-1399, para. 22.

fact that evidence is not tendered through a witness does not *per se* result in prejudice to the Defence.

7. The procedure of tendering documents from the bar table is an established one before this Court,⁷ and, more importantly, is a useful tool for ensuring the efficient use of court time and for streamlining large and complex cases before international criminal tribunals.⁸
8. Trial Chamber I in *Lubanga* has agreed in principle to admitting documents from the bar table.⁹ That Chamber set out three “key considerations” to consider when evidence other than oral testimony is being introduced: i) *prima facie* relevance; ii) probative value; and iii) the balance between probative value of the evidence and any prejudicial effect.¹⁰ To assess *prima facie* reliability of evidentiary material, Trial Chamber I evaluated the factors affecting its authenticity, such as: its origin, the context in which it was created, the method with which the information contained therein was compiled and the availability of corroborative evidence.¹¹
9. Trial Chamber II in *Katanga and Ngudjolo* similarly accepted the possibility of tendering documentary evidence directly from the bar table and provided a non-exhaustive list of factors that it would consider when deciding on its admissibility.¹² These factors include: “a) nature and origin of documentary evidence; b) their relevance to the case; c) whether the content of the document is

⁷ See for example ICC-01/04-01/06-1981 and ICC-01/04-01/07-2635.

⁸ See for example *Prosecutor v. Rasim Delic*, “Decision Adopting Guidelines On The Admission And Presentation Of Evidence And Conduct Of Counsel In Court”, IT-04-83-T, 24 July 2007, para. 19 in which the Trial Chamber stated: “The Trial Chamber considers that it is not an efficient use of in-court time to read out large passages of a document which is subsequently tendered for admission into evidence. This is particularly so where the party does not ask concise and specific questions on the information contained in the document but merely requests the witness to verify what is written on the page in front of the witness. In this respect, counsel are reminded of the possibility of tendering such evidence from the bar table.”

⁹ ICC-01/04-01/06-1981; See also ICC-01/04-01/06-T-104, p. 38, lines 24-25, p. 39, lines 1-8.

¹⁰ ICC-01/04-01/06-1399, paras. 26-32.

¹¹ *Ibid.*, paras 36-40.

¹² ICC-01/04-01/07-1665-Corr, para.98.

easily understandable; d) if the information contained in the document pertains exclusively to the historical background and/or contextual elements of the case; the nature and precision of the information contained in the document, as well as whether it is the only evidence on the matter or whether there are alternative sources of information on the same issue; e) the original purpose for which the document was created and to whom it was addressed; f) whether it is possible to ascertain from the content of the document itself what its sources are and whether they can be easily verified; g) whether it is possible to ascertain the method used to compile and process the information contained in the document; h) whether there are any doubts as to the authenticity of the document.”¹³

10. Trial Chamber III in *Bemba* also applied the three-part admissibility test described above.¹⁴ The Chamber also found that the authenticity of items offered from the bar table could be established in ways other than live testimony or official authentication. The factors considered by the Chamber included whether items were: “(i) self-authenticating, if they are official documents publicly available from official sources; (ii) agreed upon by the parties as authentic; (iii) *prima facie* reliable if they bear sufficient indicia of reliability such as a logo, letter head, signature, date or stamp, and appear to have been produced in the ordinary course of the activities of the persons or organisations who created them; or (iv) in case the item itself does not bear sufficient indicia of reliability, shown to be authentic and reliable by the tendering party through provision of sufficient information to enable the Chamber to verify that the documents are what they purport to be.”¹⁵

11. The Prosecution submits that the items sought to be tendered in this application satisfy sufficient criteria to justify their admission, as explained in confidential Annex A.

¹³ *Ibid.*, para.100.

¹⁴ ICC-01/05-01/08-2012-Red, para. 13.

¹⁵ ICC-01/05-01/08-2299-Red, para. 9.

The documents are authentic, relevant, and probative of issues to be determined at trial

12. The Prosecution submits that the documents sought for admission are relevant to the current proceedings and would be of assistance to the Trial Chamber in determining the truth in this case.¹⁶ Many of the items provide historical background information that will provide context and supplement the anticipated testimony of the Prosecution witnesses.

13. The Prosecution notes that the items in question possess several indicia of reliability that favour admission. Many of the items were obtained from neutral, independent entities, such as international organizations, non-governmental organizations, public institutions, and individual observers (*e.g.* media members, scholars), who created these items in their regular course of business or to comply with their own mandates, and not for any litigation purpose.

14. For each document, the Prosecution sets out in detail in confidential Annex A the brief description of the document or item and its content, its relevance to the discrete areas in the Prosecution's case, indicia of reliability for the document and its source. Defence observations, comments, and objections are contained in separately labelled columns in Annex A.

Probative value of the evidence outweighs its prejudicial effect

15. The Prosecution submits that the potential probative value of the evidence outweighs the prejudicial effect, if any, and its admission will assist the Trial Chamber in considering this case. The anticipated testimony of several witnesses will address some of the topics that are the subject matter of these items and

¹⁶ See ICC-01/04-01/06-1398-Conf, para. 20.

corroborate their contents. Furthermore, this material was disclosed to the Defence team well in advance of the trial.

Relief sought

16. For the foregoing reasons, pursuant to articles 64(9) and 69(2), (3) and (4) of Statute and rule 63(2) of the Rules, the Prosecution requests that the Chamber admit into evidence from the bar table documents listed in confidential Annex A and assign them EVD numbers.



Fatou Bensouda, Prosecutor

Dated this 2nd day of December 2013

At The Hague, the Netherlands