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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***

Public

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

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. The Defence for Mr. Joshua arap Sang (“the Defence”) hereby responds to the *Prosecution’s Application for Admission of Documents from the Bar Table Pursuant to Article 64(9)* (“Prosecution’s Application”). The Defence objects to the Prosecution’s Application in its entirety except for documents 25, 27, 28, 29, 30, 36, 37 and 38, as listed in Confidential Annex A to the Prosecution’s Application.¹
2. The Defence submits that the documents sought to be admitted through the bar table have little relevance and low probative value, and any probative value is outweighed by their prejudicial effect. Accordingly, it requests that Trial Chamber V(A) (“Chamber”) reject the Prosecution’s Application, except for the documents agreed to by both defence teams. In the alternative, the Defence requests that any portions directly or indirectly implicating Mr. Sang, as well as portions referring to events outside the temporal and/or geographical scope of the charges be deleted from the documents admitted.
3. The Defence relies on its comments made in Confidential Annex A, as well as the observations set forth in this Response.

II. LEGAL PRINCIPLES OF ADMISSIBILITY OF PROPOSED EVIDENCE

4. The relevant legal provisions to determine the admissibility of proposed documentary evidence are articles 64(2), 64(9)(a), 67, 69(2), 69(3) and 69(4) of the Rome Statute, as well as rules 63(2), 64 and 68 of the Rules of Procedure and Evidence. Articles 64(9)(a) and 69(4) set out the Chamber’s general discretion to rule on the admissibility or relevance of evidence. This discretion must be exercised in conformity with the Rome Statute and Rules and the spirit thereof, including the Chamber’s obligation under article 64(2) to ensure the fairness of the proceedings and that the trial “is conducted with full respect for the rights of the accused”.
5. In determining the relevance and admissibility of evidence, article 69(4) imposes on the Chamber an obligation to consider, amongst others, “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”.

¹ ICC-01/09-01/11-1121-Conf-AnxA.

6. Article 67 of the Rome Statute embodies the fair trial rights of an accused, including the right to examine witnesses and the right to a public hearing. In accordance with these fair trial rights, all items of evidence should be tendered in a manner that is procedurally fair to the accused and affords him a proper opportunity to test the evidence and challenge the charges. All incriminating witnesses should be heard live in court. The principle of live testimony is also incorporated in article 69(2), stating that “the testimony of a witness shall be given in person” subject to limited and clearly defined exceptions under the Statute or Rules of Procedure and Evidence (principally rule 68), provided that these exceptions are not “prejudicial to or inconsistent with the rights of the accused”.
7. An accused should also be afforded the right to have his trial conducted in public view and a transparent manner. This implies that a trial cannot be based substantially on written material without any discussion in a public forum.²
8. The criteria to determine the admissibility of proposed evidence have been developed in line with these statutory obligations. As the Prosecution also noted, Trial Chamber I in *Lubanga* held that, in order for documentary evidence to be admissible, the party introducing the evidence must establish its *prima facie* relevance; its probative value; and that its probative value outweighs its potential prejudicial effect.³ The Trial Chamber in *Katanga and Ngudjolo* adopted similar criteria.⁴
9. In the view of Trial Chamber II in *Katanga and Ngudjolo*, evidence is relevant if it “makes the existence of a fact at issue more or less probable”.⁵ Whether or not this is the case will depend on “the purpose for which the evidence is adduced.”⁶ Evidence is probative if it is material and reliable.⁷ In order to be material, the proposed documentary evidence “must, to some significant degree, advance the Chamber’s inquiries”.⁸

² ECHR, *Werner v. Austria*, Judgement of November 24, 1997, para. 45

(“protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of article 6(1), namely a fair trial”).

³ ICC-01/04-01/06-1399-Corr, paras. 27-31.

⁴ See, e.g., ICC-01/04-01/07-2635, para. 14; ICC-01/05-01/08-2299-Red, para. 7.

⁵ ICC-01/04-01/07-2635, para. 16.

⁶ *Ibid.*

⁷ ICC-01/04-01/07-2289-Corr-Red, para. 13.

⁸ ICC-01/04-01/07-2635, para. 34.

10. As for its reliability, this is a case-by-case determination depending on factors, such as “trustworthiness”, as well as the “the extent to which the item has been authenticated”.⁹ In terms of “trustworthiness” of proposed evidence, the Chamber must assess for each document sought to be admitted through the bar whether it “displays such qualities that, when considered alone, it could reasonably be believed”.¹⁰ In terms of its reliability, the Chamber in *Katanga and Ngudjolo* held that “[u]nder no circumstances can the Chamber admit unauthenticated documentary evidence since, by definition, such evidence has no probative value”,¹¹ and it “would unjustifiably burden the record of the trial with non-probative material and serve no purpose in the determination of the truth”.¹²
11. In addition, when assessing the admissibility of proposed evidence, the Chamber must ensure that its prejudicial effect does not outweigh its probative value. This is a balancing exercise, which the Chamber must carry out on a case-by-case basis, using its discretion “to weigh the probative value of each particular item of evidence against the potentially prejudicial effect of its admission”.¹³ The Chamber must be careful “to ensure that it is not unfair to admit the disputed material, for instance because evidence of slight or minimal probative value has the capacity to prejudice the Chamber’s fair assessment of the issues in the case”.¹⁴
12. In *Katanga and Ngudjolo*, whilst stating that “it is not possible to define the meaning of prejudice exhaustively”,¹⁵ and that “[t]he existence and extent of prejudice must be ascertained on a case-by-case basis”,¹⁶ the Chamber nonetheless made an effort to define the scope of prejudice. Referring to articles 69(4) and 69(7), the Chamber held that “firstly, the Statute protects the accuracy and reliability of the Court’s fact-finding by requiring that evidence of questionable credibility be excluded; secondly, the Statute safeguards the moral integrity and the legitimacy of the proceedings by requiring that the process of collecting and presenting evidence is fair towards the accused and respects the procedural and human rights of all those who are involved in the trial.”¹⁷

⁹ ICC-01/05-01/08-2012-Red, para. 15. See also, ICC-01/04-01/06-1399-Corr, para. 29; ICC-01/04-01/07-2635, para. 22.

¹⁰ ICC-01/04-01/07-2635, para. 26.

¹¹ ICC-01/04-01/07-2635, para. 22.

¹² ICC-01/04-01/07-2635, para. 22.

¹³ ICC-01/04-01/07-2635, para. 15.

¹⁴ ICC-01/04-01/06-1399-Corr, para. 31.

¹⁵ ICC-01/04-01/07-2635, para. 38.

¹⁶ ICC-01/04-01/07-2635, para. 40.

¹⁷ ICC-01/04-01/07-2635, para. 39.

III. BAR TABLE MOTIONS

13. The Defence acknowledges that multiple ICC Chambers have held that it is not necessary to authenticate each piece of evidence through live testimony. Indeed, the Defence accepts the Prosecution's proposition that "[t]he procedure of tendering documents from the bar table is an established one before this Court".¹⁸ However, the procedure of admitting evidence through the bar instead of through a witness in the course of testimony has not been, nor should it be, applied without limitations. Rather, the introduction of documents through the bar instead of through a *viva voce* witness who can comment on, and authenticate the document in question, should be the exception rather than the rule.
14. In the view of the Defence, the preferred procedure is to admit evidence through witnesses in the course of their testimony. It is an easier task for the Chamber to establish the relevance and probative value to the charges, if any, of the proposed evidence if it is introduced through a witness who is able to contextualise and explain its significance or authenticate it at the relevant moment in the proceedings. It would then immediately be part of the trial record and placed in its proper context. The opposing parties and participants would have an opportunity to make contemporaneous objections to the admissibility of the proposed evidence and to cross-examine the witness in respect of that evidence.
15. Other international criminal tribunals and courts, for the most part, also treat the admission process through the bar as an exception to the preferred process of admitting documents in the course of trial. For instance, in *Karadzic*, the Chamber held:

The bar table should not generally be the first port of call for the admission of evidence. It is, rather, a supplementary method of introducing evidence, which should be used sparingly to assist the requesting party to fill specific gaps in its case at a later stage in the proceedings. [...] Notwithstanding that it may result in the saving of time inside the courtroom, in the circumstances of the present case, the Chamber considers that it is essential to view the bar table as mechanism to be used on an exceptional basis and not simply as another means by which evidence may be introduced wholesale into the court record.¹⁹

¹⁸ Prosecution's Application, para. 7.

¹⁹ *Prosecutor v. Karadzic*, Case No. IT-95-5/18-T, Decision on Prosecution First Bar Table Motion, 13 April 2010, paras 9, 15; *Prosecutor v. Prlic et al.*, Case No. IT-04-74, Decision on Admission of Evidence, 13 July 2006, page 6.

16. Also, Chambers at the International Criminal Tribunal for the former Yugoslavia (“ICTY”) have held that, where documents are not introduced through a witness, there is a greater burden on the Prosecutor to prove both their reliability and probative value.²⁰
17. The Appeals Chamber of the Special Court for Sierra Leone (“SCSL”) has rejected entirely the notion of admitting documents through bar table motions in the interests of fairness of the trial for an accused.²¹
18. The Defence is cognisant of the explicit authority of the bench “to request the submission of all evidence that it considers necessary for the determination of the truth” pursuant to article 69(3). The Defence submits, however, that the large-scale admission of evidence through the bar, particularly if its relevance and/or probative value are in dispute, does not serve the judges’ mandate to ascertain the truth. Nor does the Defence agree with the Prosecution that, as a general rule, admission through the bar “is a useful tool for ensuring the efficient use of court time and for streamlining large and complex cases before international criminal tribunals”.²²
19. By contrast, if many documents are admitted through the bar without proper discussion or being placed in proper context, the judges have to search through these documents and may lose track of the important issues in “a cloud of irritating and useless collateral issues”.²³ In particular, if the relevance and/or probative value of such documents are not evident, searching through a massive amount of them would be a waste of the Court’s time and resources. Not only would the judges have to devote a significant amount of time to reviewing documents for relevance and probative value, the Defence would waste time having to challenge the allegations in these documents even if they are only marginally relevant and/or probative.²⁴

IV. DOCUMENTS SOUGHT TO BE ADMITTED THROUGH THE BAR

20. The Prosecution mainly seeks to introduce intelligence and police reports, as well as human rights reports produced by NGOs, a United Nations Office, Kenyan fact-gathering

²⁰ *Prosecutor v. Oric*, Case No. IT-03-68-T, Judgement, 30 June 2006, para. 29.

²¹ *Prosecutor v. Taylor*, Decision on “Prosecution Notice of Appeal and Submissions Concerning the Decision Regarding the Tender of Documents”, 6 February 2009.

²² Prosecution Application, para. 7.

²³ Peter Murphy, ‘Excluding justice or facilitating justice? International Criminal Law would benefit from rules of evidence’, 12 Int’l J. Evidence & Proof 2008, page 25.

²⁴ See also *ibid*, 2, 3, 25-27.

or monitoring entities and other public organisations. These reports largely relate to context or crime base. However, these reports include a significant amount of information directly or indirectly touching upon the charges against Mr. Sang. They also refer to events, which are outside the temporal and/or geographical scope of the charges.

21. The Defence does not object to the admission of documents 25, 27, 28, 29, 30, 36, 37 and 38 listed in the Prosecution's Confidential Annex A.²⁵ These documents have not been objected to by either defence team. As for the remainder of the documents the Prosecution seeks to introduce, the Defence maintains its objections as set out in the Prosecution's Confidential Annex A. The Defence has three main objections: (a) the documents lack sufficient *indicia* of reliability and thus probative value; (b) parts of the documents relate, directly or indirectly, to Mr. Sang's culpability rendering their admission unfair; and (c) parts of the documents relate to events outside the temporal and/or geographical scope of the charges, and are thus irrelevant whilst prejudicial. In the alternative to exclusion of such documents in their entirety, the Defence requests that all references to direct or indirect accusations against Mr. Sang, or to events outside the temporal and/or geographical scope of the charges against Mr. Sang, be deleted from the documents admitted.

A. LACK OF SUFFICIENT INDICIA OF RELIABILITY

22. The Prosecution cites as one *indicia* of reliability favouring admission of the proposed bar table documents, the fact that they were produced by "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."²⁶ The Defence does not share this view.
23. The neutrality of the producers of these documents is highly contested. In particular, the Defence disputes the neutrality of Kenyan public officials, including the Kenyan police, involved in collecting information about the 2007/2008 post election violence. These Kenyan public officials were part of the PNU Government, which was one of the parties implicated in the post election violence. The Prosecution brought a case against the

²⁵ ICC-01/09-01/11-1121-Conf-AnxA.

²⁶ Prosecution Application, para. 13.

Police Commissioner, Mr. Ali, in Kenya 2, alleging criminal liability for crimes against perceived ODM supporters.²⁷ Clearly then, the Kenyan police force may have had a motive to try to put the blame for the post election violence on members of the ODM. The Defence can therefore not accept that any of the Kenyan public officials were “neutral independent entities” and is surprised that the Prosecution presents them as such.

24. In the case of *Katanga and Ngudjolo*, the Trial Chamber cited as one of the key factors in determining the reliability of proposed evidence: “whether the source of information has an allegiance towards one of the parties in the case or has a personal interest in the outcome of the case, or whether there are other indicators of bias”.²⁸ In applying this criterion, the bench excluded a number of NGO reports.²⁹ Similarly, in the ICTY case against *Hadzihasanovic*, it was held that the neutrality of members of international organisations (e.g. peacekeepers) could not be verified, and this was one factor undermining the reliability of their information.³⁰
25. Applying these considerations to the present case, the reliability of all reports produced by Kenyan fact-gathering entities is highly questionable in light of the interest these entities have in the outcome of the case. In addition, the neutrality of other bodies, such as NGOs, is also in question. Human rights reporters have their own agenda. They tend to aim to uncover human rights violations, identify the alleged perpetrators and call for their accountability. Their natural tendency is to associate themselves with the victims of human rights abuses and to identify with their side of the story. In siding with the party of the conflict which suffered the most, they may unintentionally and perhaps even unconsciously lose their neutrality. They do not always seek to discover the views of those they have identified as the perpetrators.³¹
26. Even if the producers of the reports in question are entirely neutral, they heavily rely on other, often anonymous, sources, whose neutrality is at best unknown and at worst highly contested. For instance, the report, listed as the 7th document, and the report, listed as the 8th document in the Prosecution’s Confidential Annex A,³² rely on sources who are either

²⁷ ICC-01/09-02/11-382-Red, paras. 420-427.

²⁸ ICC-01/04-01/07-2635, para. 27(a).

²⁹ ICC-01/04-01/07-2635, paras. 14, 28-31. See also: ICC-01/04-01/07-3184, paras 16-20.

³⁰ *Prosecutor v. Hadzihasanovic*, Case No. IT-01-47, Trial Chamber Judgment, 15 March 2006, paras 303, 578-579.

³¹ Professor Lyal S. Sunga, Raoul Wallenberg Institute of Human Rights and Humanitarian Law, Lund, Sweden: *The Role of NGOs in UN Human Rights Special Procedures, Treaty Bodies and Field Presences in Relation to ICC Fact-Finding*, pages 3, 5, 6.

³² KEN-OTP-0001-1076 and KEN-OTP-0088-0604 respectively.

anonymous or insufficiently identified. Accordingly, it is impossible to verify whether the sources relied upon are neutral and reliable.

27. In relation to the reports listed as documents 4, 5 and 6 in the Prosecution's Confidential Annex A,³³ the Defence notes that many of the sources on which these reports rely have also been used by the Prosecution. Their credibility is highly contested. The Defence submits that at least a number of them have provided false information to the "neutral" entities they have interacted with.³⁴
28. In the *Hadzihasanovic* case, cited above, it was noted that the information collected by peacekeepers was passed on to them by representatives of warring factions, who could not be perceived as neutral. The peacekeepers themselves had not been able to observe personally the warring factions' combat operations, nor did they have access to the relevant headquarters or camps. Accordingly, their information was limited to secondary sources whose partiality was questionable at best and thus unreliable.³⁵ In *Lubanga*, the Trial Chamber declared documents of unknown source and origin inadmissible.³⁶ Also in *Katanga and Ngudjolo*, where the identity of the sources were not revealed with sufficient detail, the Chamber found itself incapable of assessing "whether the contents of the report have been imparted by an eyewitness or some other reliable source" and thus the reliability of the reports, even if the authors themselves were considered *prima facie* reliable.³⁷
29. Moreover, the sources are often not first-hand. The sources may rely on other sources for their information. These other sources may in turn rely on other sources for their information. Thus, the reports include double, triple or even further remote hearsay. Not only the neutrality of the primary sources is in issue, but also their credibility and the reliability of their information. Reports that rely heavily on hearsay, if at all admissible, should be admissible only if introduced through their producers, who should be called to testify *viva voce* and be available for cross-examination. Only then can the methodology used to compile such reports and the conclusions stated therein be tested adequately.

³³ KEN-OTP-0001-0002; KEN-OTP-0001-0248; and KEN-OTP-0001-1057 respectively.

³⁴ See the comments of both defence teams in Prosecution's Confidential Annex A.

³⁵ *Prosecutor v. Hadzihasanovic*, Case No. IT-01-47, Trial Chamber Judgment, 15 March 2006, paras 303, 578-579.

³⁶ ICC-01/04-01/06-T-170-ENG, pages 17-19.

³⁷ ICC-01/04-01/07-2635, paras. 29-30. On this ground, the Chamber excluded a number of UN and NGO reports.

30. The Trial Chamber in *Katanga and Ngudjolo* considered reliance on hearsay, particularly if hearsay evidence is the main or exclusive source of information and if it “is twice or further removed from its source”, to be a factor weighing against admissibility.³⁸ Similarly, the Chamber held that the reliability of a report would be undermined if the methodology were not clearly explained, thereby disallowing an independent verification of the manner in which the information was obtained.³⁹
31. The Chamber in *Lubanga* similarly held that “if there are no adequate and available means of testing its reliability ... the court will need to consider carefully whether the party seeking to introduce it has met the test of demonstrating, *prima facie*, its probative value.”⁴⁰ Also, the International Court of Justice in *DRC v Uganda* declined to rely on a MONUC report tendered by DRC government, because of its use of second hand hearsay.⁴¹
32. The ICTY Trial Chamber in *Kordić and Čerkez* held in relation to information based on anonymous sources or hearsay statements not subjected to the test of cross-examination, that “the probative value of the evidence is so reduced that it is ‘substantially outweighed by the need to ensure a fair trial’”.⁴² Similarly, in the ICTY case of *Milutinović et al.*, the Chamber found that, in light of the hearsay nature of UN and NGO reports, they would be admissible only where it could be demonstrated that the methodology adopted in compiling the reports contained sufficient *indicia* of reliability. To demonstrate this is particularly difficult if the sources relied upon in the reports are anonymous.⁴³ Accordingly, the Chamber denied the admission of OSCE reports because they lacked sufficient *indicia* of reliability.⁴⁴

³⁸ ICC-01/04-01/07-2635, para. 27(e), 29, 30. On this ground, the Chamber excluded a number of UN and NGO reports.

³⁹ *Ibid.*

⁴⁰ ICC-01/04-01/06-1399, para 29.

⁴¹ *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116, para. 159, December 19.

⁴² *Prosecutor v. Kordić & Čerkez*, Case No. IT-95-14/2, Decision On Prosecutor’s Submissions Concerning “Zagreb Exhibits” And Presidential Transcripts, 1 December 2000, para. 39.

⁴³ *Prosecutor v. Milutinović et al.*, Case No. IT-05-87, Decision on Evidence Tendered Through Sandra Mitchell and Frederick Abrahams, 1 September 2006.

⁴⁴ *Prosecutor v. Milutinović et al.*, Case No. IT-05-87, Decision on Evidence Tendered Through Sandra Mitchell and Frederick Abrahams, 1 September 2006, para. 21.

See also, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87, Decision on Lukic Defence Motions for Admission of Documents from Bar Table”, 11 June 2008, para. 120 ; *Prosecutor v. Milutinović et al.*, Case No. IT-05-87, Decision on Evidence Tendered Through Sandra Mitchell and Frederick Abrahams, 1 September 2006, para. 22; *Prosecutor v. Milutinović et al.*, Case No. IT-05-87, Decision on Lukic Defence Motions for Admission of Documents from Bar Table, 11 June 2008, paras. 35, 37-38.

33. Moreover, though many of these documents were not produced for any litigation purpose *per se*, they are produced with the purpose of investigating who is responsible for the post election violence. They are not drawn contemporaneously but after the events with the purpose of unravelling the truth about these events – *e.g.* who did what and why. In the case against *Katanga and Ngudjolo*, the Chamber considered both the contemporaneousness (“whether the information was obtained and recorded simultaneously or shortly after the events to which it pertains or whether the record was created at a later stage”)⁴⁵ and the purpose (“whether the document was created for the specific purpose of these criminal proceedings or for some other reason”)⁴⁶ of the information proposed as evidence as critical factors in determining the reliability thereof.
34. NGO reports can be admitted only if their conclusions are not controversial and open to legitimate criticism.⁴⁷ In *Bemba*, the Chamber decided with regard to the admissibility of NGO reports that their provenance and reliability is entirely uninvestigated and untested, and that, therefore, these reports have little, if any, evidential weight.⁴⁸ This decision was rendered in the context of an abuse of process motion, which was determined on the standard of balance of probabilities rather than beyond reasonable doubt. If NGO reports are not reliable under this lower standard, they would then surely not meet the more rigorous standard of beyond reasonable doubt, as applied in the course of trial.
35. The Defence is particularly concerned about the reliability of the intelligence reports. Such reports are based on rumours, which are often unverified and based on anonymous hearsay. The lack of verification is particularly clear in respect of the security brief listed as document 9 in the Prosecution’s Confidential Annex A.⁴⁹ As has been explained by someone familiar with the gathering of intelligence, security briefs are compilations of unverified intelligence that must still be scrutinized by other security agencies and undergo further analysis. The information discussed in security briefs has not been

⁴⁵ ICC-01/04-01/07-2635, para. 27(c).

⁴⁶ ICC-01/04-01/07-2635, para. 27(d).

⁴⁷ See *Prosecutor v. T Lubanga*, ICC-01/04-01/06-2135, Decision on the request by the legal representative of victims a/0001/06, a/0002/06, a/0003/06, a/0049/06, a/0007/08, a/0149/08, a/0155/07, a/0156/07, a/0404/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08, a/0149/07 and a/0162/07 for admission of the final report of the Panel of Experts on the illegal exploitation of natural resources and other forms of wealth of the Democratic Republic of the Congo as evidence, 22 September 2009, paras 33-34.

⁴⁸ *Prosecutor v. Bemba*, ICC-01/05-01/08-802, Decision on the Admissibility and Abuse of Process Challenges, 24 June 2010, paras. 235, 254-255.

⁴⁹ KEN-OTP-0008-0180.

confirmed as truthful information.⁵⁰ Such briefs do therefore not provide any reliable information the Prosecution could fairly rely on.

36. Accordingly, the reports sought to be introduced as evidence through the bar are inadmissible for lacking sufficient *indicia* of reliability, as they rely essentially on anonymous hearsay or on sources whose neutrality is in question.

B. ACTS AND CONDUCT OF THE ACCUSED

37. The Defence submits that admission of bar table evidence is particularly prejudicial where it goes to the acts and conduct of the accused, as opposed to other matters, such as context and background information, crime base, or the constitutive elements of the crimes charged. The admission of evidence containing direct accusations against the accused through the bar without putting it through the test of cross-examination is highly prejudicial and adversely affects the fairness of the proceedings. Article 67(1)(e) of the Rome Statute encompasses the fundamental right of an accused to confront and challenge his or her accusers. It is also embodied in all human rights conventions. In this regard, the European Court of Human Rights held that “all the evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument. There are exceptions to this principle, but they must not infringe the rights of the defence.”⁵¹
38. In *Katanga and Ngudjolo*, the Chamber highlighted that “[t]he right of the accused to examine, or have examined, adverse witnesses is of fundamental importance to the fairness of the proceedings. No judgment can be rendered safely if it is based on evidence prepared on behalf of one party which the opponent has not been able to test or verify.”⁵²
39. In the International Criminal Tribunal for Rwanda (“ICTR”), testimonial evidence cannot in any circumstances be introduced without a *viva voce* witness if it pertains to the acts and conduct of the accused as charged. Indeed, at the ICTR, Rule 92*bis* disallows any written testimonial evidence from being admitted if it goes directly to the acts and conduct of the accused. The ICTY and SCSL, on the other hand, have adopted a number

⁵⁰ KEN-OTP-0006-0048. This was also pointed out by the Defence for Mr. Ruto in the Prosecution’s Confidential Annex A.

⁵¹ A.M. v. Italy, no. 37019/97, para. 25, ECHR 1999-IX.

⁵² ICC-01/04-01/07-2635, para. 42.

of narrowly described exceptions to the principle set out in Rule 92*bis*, but the general position remains that testimonial evidence pertaining to the acts and conduct of the accused is not admissible unless it is put to the test of cross-examination.⁵³

40. Even documents that are not testimonial *per se*, but which are non-contemporaneous accounts of events, regardless of how they are recorded and by whom, are inadmissible if they pertain to the acts and conduct of the accused. Statements recorded by an NGO several months after the events recounted therein have been declared inadmissible on the basis that they ‘are not contemporary with the events they describe.’⁵⁴ Contemporaneous reports from UN officials or NGOs, on the other hand, may be admissible, but reports compiled after the facts are inadmissible, even if from the same source.⁵⁵
41. The ICC Statute and Rules do not refer to “the acts and conduct of the accused”. Testimonial evidence is inadmissible irrespective of the subject matter of the evidence unless Rule 68 has been complied with. Other non-contemporaneous documents are not inadmissible *per se*. In *Katanga and Ngudjolo*, the Chamber held that the test of cross-examination is only a strict requirement when it concerns testimonial evidence. The key factor in determining whether a statement is testimonial is whether it “was given to a person or body authorized to collect evidence for use in judicial proceedings”.⁵⁶ This can include “a statement given to representatives of an intergovernmental organization with a specific fact-finding mandate ... if the manner in which the statement was obtained left no doubt that the information might be used in future legal proceedings”.⁵⁷ However, the Chamber declined to include “analytical reports based on the personal stories of several individuals”.⁵⁸ In this regard, the Chamber held that “even if the factual allegations contained in the report are based exclusively on a combined analysis of statements made by identified individuals, the allegations contained in the report are not those of the

⁵³ See Rules 92 *bis* (amended), 92 *ter*, 92 *quater*, and 92 *quinquies*.

⁵⁴ *Prosecutor v. Karemera et al* (Decision on Oral Motions by Edouard Karemera and the Prosecution to Admit Certain Documents Into Evidence) ICTR-98-44-T (29 May 2008), para. 6.

⁵⁵ *Prosecutor v. Karemera et al* (Decision on Prosecutor’s Motion for Admission of Certain Exhibits Into Evidence) ICTR-98-44-T (25 January 2008), para. 45; *Prosecutor v. Bagosora et al* (Decision on Request to Admit United Nations Documents into Evidence under Rule 89(C) (TC)) ICTR-98-41-T (25 May 2006), para. 6; *Prosecutor v. Bagosora et al* (Decision on Ntabakuze Motion to Deposit Certain United Nations Documents) 98-41-T (19 March 2007), para. 5; *Prosecutor v. Karemera et al* (Decision on Admission Into Evidence of UNAMIR Documents) ICTR-98-44-T (30 October 2007), para. 13; *Prosecutor v. Simba* (Decision on the Admission of Certain Exhibits) ICTR-01-74-T (7 July 2005), paras. 6-7; *The Prosecutor v. Seromba* (Decision Sur La Requete de la Defense aux Fins de Non Admission de Documents) ICTR-01-66-T (22 October 2004).

⁵⁶ ICC-01/04-01/07-2635, para. 47.

⁵⁷ ICC-01/04-01/07-2635, para. 48.

⁵⁸ ICC-01/04-01/07-2635, para. 48.

individual persons but the conclusions drawn from their statements by the author of the report.”⁵⁹

42. As a second key factor to distinguish testimonial from non-testimonial evidence, the Chamber identified the understanding of the maker of the statement “when making the statement, that he or she is providing information which may be relied upon in the context of legal proceedings” and that the statement is formalised in some manner and that the person making the statement asserts that it is truthful and based on personal knowledge.”⁶⁰
43. The statement taken by the Prosecution of a witness, which is listed as document 40 in the Prosecution’s Confidential Annex A,⁶¹ clearly falls under this definition. This statement is therefore inadmissible pursuant to rule 68, since the witness concerned has not been subjected to cross-examination.
44. NGO, UN or intelligence reports, on the other hand, appear not to qualify as testimonial evidence under this definition, even though they were produced as part of investigations into the Kenyan post election violence in 2007/2008. However, nothing prevents this Chamber from extending the requirement of cross-examination to non-contemporaneous documents which implicate the accused directly or indirectly in a manner similar to the *ad hoc* tribunals. The Appeals Chamber has not yet ruled on this issue. In the view of the Defence, the Chamber’s duty to ensure the fairness of the proceedings would require that non-contemporaneous documents relating directly or indirectly to the acts and conduct of the accused, or to pivotal issues in the case, be excluded unless the sources of the information are made available for cross-examination.
45. Even if not strictly a requirement, the more crucial and the less contemporaneous the information is, the higher the threshold should be for admissibility. This is so, because the admission of directly incriminating information without providing the Defence with an opportunity to cross-examine the source of that information is highly prejudicial. Unless the probative value can be clearly established, which the Defence submits is not possible without putting the information through the test of cross-examination, the

⁵⁹ ICC-01/04-01/07-2635, para. 48.

⁶⁰ ICC-01/04-01/07-2635, para. 49.

⁶¹ KEN-OTP-0069-0104.

prejudice of the information would far outweigh its probative value, rendering it inadmissible.

46. It is submitted that the acts and conduct of the accused would not be limited to direct accusations against Mr. Sang but include any “network” related allegations. Mr. Sang has been charged as a contributor under article 25(3)(d). As such, he can only be found guilty if the Prosecutor succeeds in establishing that he made a contribution to “a group with a common purpose”, which would be the “network” as described in the Prosecutor’s Updated Document Containing the Charges.⁶² Accordingly, the acts of conduct of members of the network also implicate Mr. Sang, albeit indirectly. In line with the jurisprudence of the *ad hoc* tribunals relating to the scope of “acts of conduct of the accused”, any evidence which implicitly or explicitly concerns Mr. Sang’s case and, or is sufficiently proximate to him,⁶³ is included in this definition.⁶⁴ It also includes the acts and conduct of any alleged co-perpetrators, superiors, subordinates or executioners who are part of, or are taking instructions from the alleged “group with a common purpose”.⁶⁵
47. The jurisprudence of the *ad hoc* tribunals has also determined that fairness generally requires that evidence which “touches upon a critical element of the prosecution’s case, or goes to a live and important issue between the parties, as opposed to peripheral or marginally relevant issue », ⁶⁶ even if it does not directly or indirectly touch upon the acts and conduct of the accused,⁶⁷ will only be admitted if the Defence is provided with an opportunity to cross-examine the provider of the evidence.⁶⁸ Allegations of rapes and/or

⁶² ICC-01/09-01/11-533-AnxA-Con-, Corrigendum to "Prosecution's Submission of the Updated Document Containing the Charges pursuant to the Decision on the content of the updated document containing the charges (ICC-01/09-01/11-522)" ICC-01/09-01/11-533-AnxA, 25 January 2013.

⁶³ Prosecutor v Taylor, Decision on Prosecution Notice Under Rule 92 bis for the Admission of Evidence Related to Inter Alia Kenema District and on Prosecution Notice under Rule 92 Bis for the Admission of the Prior Testimony of TF1-036 into Evidence, 15 July 2008, pages 4-5.

⁶⁴ Prosecutor v Karemera et al, Decision on Prosecution Motion to Admit Witness Statement from Joseph Serugendo, 15 December 2006, para. 9.

⁶⁵ Prosecutor v Taylor, Decision on Prosecution Notice Under Rule 92 bis for the Admission of Evidence Related to Inter Alia Kenema District and on Prosecution Notice under Rule 92 Bis for the Admission of the Prior Testimony of TF1-036 into Evidence, 15 July 2008, pages 4-5; Prosecutor v. Galic, Decision on Interlocutory Appeal Concerning Rule 92bis(C), 7 June 2002, paras. 10-16; Prosecutor v Karemera et al, Decision on Prosecution Motion for Admission of Evidence of Rape and Sexual Assault Pursuant to Rule 92 bis of the Rules and Order for Reduction of Prosecution Witness List, 11 December 2006, paras. 12-13

⁶⁶ Prosecutor v Karemera et al, Decision on Prosecution Motion for Admission of Evidence of Rape and Sexual Assault Pursuant to Rule 92 bis of the Rules and Order for Reduction of Prosecution Witness List, December 11, 2006, paras. 14-16.

⁶⁷ Prosecutor v Karemera et al, Decision on Prosecution Motion for Admission of Evidence of Rape and Sexual Assault Pursuant to Rule 92 bis of the Rules and Order for Reduction of Prosecution Witness List, 11 December 2006, paras. 19-20.

⁶⁸ Prosecutor v Karemera et al, Decision on Prosecution Motion for Admission of Evidence of Rape and Sexual Assault Pursuant to Rule 92 bis of the Rules and Order for Reduction of Prosecution Witness List, 11 December

sexual assaults allegedly committed on a widespread and systematic basis by alleged subordinates and/or co-perpetrators of the accused have been held to be critical or pivotal, even when the acts did not go directly to the acts and conduct of the accused.⁶⁹

48. Accordingly, the Defence submits that all non-contemporaneous reports referring directly or indirectly to the acts of conduct of Mr. Sang or any Network members should be declared inadmissible. These references are indicated in the Prosecution's Confidential Annex A. In the alternative, such reports should be redacted and be admitted solely for the purpose of showing background information or context.⁷⁰ Where such redactions undermine the probative value of the remainder of the document, then it should still be declared inadmissible.⁷¹

C. TEMPORAL AND/OR GEOGRAPHICAL SCOPE OF THE CHARGES

49. A number of documents relate to events that occurred far outside the temporal and/or geographical scope of the charges. In determining the guilt or innocence of the accused, the Chamber can only rely on evidence which links the accused with the allegations that are set out in the Prosecutor's Updated Document Containing the Charges, and not with any other allegations.⁷² Evidence relating to events outside the temporal and geographical scope of the charges cannot be relied upon to fill gaps, if any, in the Prosecution's case.
50. In this regard, the ICTR Appeals Chamber noted that the accused:

"Must be found guilty [or not guilty] on the basis of evidence of the crimes charged, not the basis of evidence that he committed the offence on prior occasions and, therefore, has a propensity to commit them again. It is true that Chambers composed of professional judges may be less susceptible to distraction or prejudice by the admission of irrelevant or prejudicial evidence than juries. But hearing extensive examination and cross-examination on the evidence in question

2006, paras. 14-16; *Prosecutor v Popovic et al*, Decision on Prosecution's Confidential Motion for Admission of Written Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92 bis , 12 September 2006, para. 16; *Prosecutor v Galic* , No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 bis (C), 7 June 2002, para. 13.

⁶⁹ *Prosecutor v Karemera et al*, Decision on Prosecution Motion for Admission of Evidence of Rape and Sexual Assault Pursuant to Rule 92 bis of the Rules and Order for Reduction of Prosecution Witness List, December 11, 2006, paras. 19-20.

⁷⁰ The ad hoc tribunals have distinguished documents on the basis of what they intend to prove. See, for instance, *The Prosecutor v. Nahimana et al* (Decision on the Nahimana Defence's Motion to Admit Into Evidence Certain Materials and the Prosecution Objections Thereto) ICTR-99-52-T (5 June 2003), paras. 6-7. It seems to have played a role that the evidence was introduced by the Defence and that the source was considered exceptionally reliable.

⁷¹ See *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Admission of Statements of Deceased Witnesses, 19 January 2005; *Prosecutor v. Ntiramasuhuko et al.*, Case No. ICTR-97-21-T, Decision on the Prosecutor's Motion to Remove from her Witness List Five Deceased Witnesses and to Admit Into Evidence the Witness Statements of Four of Said Witnesses, 22 January 2003, para. 25.

⁷² *Prosecutor v Bizimungu et al.*, Case No ICTR-99-50-AR73.2, Decision on Prosecution's Interlocutory Appeals Against Decision of the Trial Chamber on Exclusion of Evidence, 25 June 2004 (Bizimungu decision) paras. 18, 19.

would distract the Chamber from the proper focus of the trial, namely, the events charged in the indictment, and lengthen the trial.⁷³

51. The relevance of such evidence tends to be minimal, in particular where there is a significant time lapse or geographical distance between the allegations charged and events alluded to in evidence proposed for admission. At best, such evidence can be used to demonstrate the context in which the crimes charged were committed,⁷⁴ to track the existence of a Network acting with a common purpose,⁷⁵ or to demonstrate that the accused acted with the requisite knowledge and intent.⁷⁶
52. If the proposed evidence relates to events that are too far remote in time or geographical distance, it tends to lack the minimum relevance necessary for admission. In this regard, the ICTR Chamber in *Bagosora et al* held that “dealing with evidence of past conduct may be unduly distracting and time consuming, leading to an unfocused trial that undermines the truth-finding function”.⁷⁷
53. In the *Katanga and Ngudjolo* trial, the Chamber denied a defence request to admit certain evidence because the period to which the document related was too far removed from the relevant period.⁷⁸ In the same case, the Trial Chamber also found that the OTP could not question witnesses on the use of child soldiers in the period outside the scope of the charges, because the circumstances were different. The Chamber would, however, permit questions concerning the use of child soldiers in 2004 if it would permit the Chamber to establish whether the persons in question were child soldiers during the period of the charges.⁷⁹
54. Even if evidence relating to events outside the temporal and/or geographical scope of the charges is considered *prima facie* relevant and probative, due consideration must still be given to the undue prejudice that may arise from admitting such evidence. A Chamber has discretion to exclude such evidence “in the interests of justice when its admission

⁷³ *Ibid.* para. 28.

⁷⁴ Oral decision, 10 February 2010 T. 12- 15; 31-34 [ICC-01/04-01/07-T-99-Red-ENG WT 10-02-2010]. See also the ICTR case: Prosecutor v. Bagasora et al, Decision on Admissibility of Proposed Testimony of Witness DBY, 18 September 2003, para. 6.

⁷⁵ Lubanga Trial Judgement, 14 March 2012, pp. 442 et seq. See also the ICTY case: Prosecutor v. Seselj, Decision on Appeal against the Trial Chamber’s Oral Decision of 9 January 2008, 11 March 2008, at para. 24.

⁷⁶ Prosecutor v. Seselj, Decision on Appeal against the Trial Chamber’s Oral Decision of 9 January 2008, 11 March 2008, at para. 24; Prosecutor v. Strugar, Decision on the Defence objection to the Prosecution’s Opening Statement Concerning Admissibility of Evidence, 22 January 2004, p. 3.

⁷⁷ Footnote 109 (see long motion for correct reference).

⁷⁸ 3184, TCII, Decision on the Bar Table Motion of the Defence of Germain Katanga, paras. 17-18.

⁷⁹ Oral decision, 5 July 2010 Transcript pages 32-33; 47-50 [ICC-01/04-01/07-T-164-Red-ENG WT 05-07-2010]

could lead to unfairness in the trial proceedings”.⁸⁰ For that reason, it is generally impermissible to adduce evidence of the accused’s character in order to show « a general propensity or disposition » to commit the crimes charged.⁸¹ In this particular case, it would be unfair for the Prosecution to rely on documentary evidence to demonstrate that the Kalenjin people, and most notably the accused, had a propensity to commit violence.

55. Applying these criteria to the proposed bar table documents, the Defence submits that, at the very least documents 2, 3, and 8 are inadmissible. The reports listed as documents 2 and 3 in the Prosecution’s Confidential Annex A examine the ethnic clashes which took place in Kenya, notably in the Rift Valley, from September 1991.⁸² The Prosecution intends to rely on these reports to show a pattern in the organization of violence perpetrated by the Kalenjin youth and the role of Kalenjin politicians and the media therein. The Prosecution intends to demonstrate Mr. Sang’s *mens rea* in relation to the crimes charged by relying on evidence relating to ethnic violence that occurred in 1991. The Defence submits that violence, which occurred sixteen years prior to the temporal scope of the charges in wholly different circumstances can not have any bearing on the charges which relate to the 2007/2008 post election violence. This predates Kass FM and ODM, as well as Mr. Sang’s position as a broadcaster. The information in these reports is therefore irrelevant and should not be admitted.
56. The document listed as document 8 in the Prosecution’s Confidential Annex A is a study of the causes of electoral violence in Kenya and examines, amongst others, the alleged Kalenjin resentment over land allocation after independence by politicians in past Kenyan elections.⁸³ The Prosecution intends to rely on this study to demonstrate that Mr. Sang adopted similar tactics to increase support for ODM in the Rift Valley during the 2007 election campaign. The Defence submits that the Prosecution cannot rely on earlier events to demonstrate what tactics Mr. Sang allegedly used in 2007. Instead, the Prosecution must rely on evidence relating to these alleged tactics in 2007, which it does not seem to have.

⁸⁰ *The Prosecutor v. Théoneste Bagosora et al.*, Cases Nos. ICTR-98-41-AR93 and ICTR-98-41- AR93.2, Decision On Prosecutor’s Interlocutory Appeals Regarding Exclusion Of Evidence 19 December 2003, at para. 13.

⁸¹ *Ibid*, para. 14. See also Kupreskic case, Trial Chamber “*Decision on evidence of the good character of the accused and the defece of tu quoque*”, 17 February 1999.

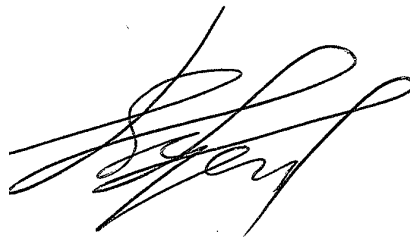
⁸² KEN-D09-0003-0001; KEN-D09-0003-0643 respectively.

⁸³ KEN-OTP-0088-0604.

57. Accordingly, documents 2, 3 and 8, as well as any other references in any of the proposed bar table documents to events far outside the geographical and/or temporal scope of the charges do not meet the threshold criteria for admission and should thus be excluded. In the event that the reports have any relevance and probative value without these references to events outside the scope of the charges, the Defence proposes, in the alternative, that such references be redacted from the admitted reports.

V. RELIEF SOUGHT

58. On the basis of the above submissions, the relief sought by the Defence is that Prosecution's Application be rejected, except for the documents agreed to by both defence teams. The Defence does not object to the admission of documents 25, 27, 28, 29, 30, 36, 37 and 38.
59. In the alternative, the relief sought is that any portions directly or indirectly implicating Mr. Sang, as well as portions referring to events outside the temporal and/or geographical scope of the charges be deleted from the documents admitted.



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On behalf of Mr. Joshua arap Sang
Dated this 24 December 2013
In Nairobi, Kenya