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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**

**Public redacted version of "Corrected Version of Prosecution's Application for
Admission of Documentary Evidence Related to the Testimony of Witness
P-0013", 28 October 2014, ICC-01/09-01/11-1619-Conf-Corr**

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

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Introduction

1. Pursuant to Articles 64(9) and 69(2), (3) and (4) of the Rome Statute (“Statute”) and Rule 63(2) of the Rules of Procedure and Evidence (“Rules”), the Office of the Prosecutor (“Prosecution”) hereby submits an application for the admission into evidence of 12 items of evidence which were shown to and identified by witness P-0013 during his testimony (“Application”). All these items were either produced or received by the Commission of Inquiry into the 2007-2008 Kenya Post-Election Violence (“CIPEV”) during the course of its mandate. For ease of reference, the portions of each of these 12 items that the Prosecution seeks to rely on, and the relevance of the information contained therein, are set out in a table appended as confidential Annex A.

2. As indicated during oral argument, the Prosecution seeks to tender these 12 items for the truth of their contents except insofar as the contents relate to the personal acts and conduct of the Accused.¹ The Prosecution submits that, while certain information contained in these items is testimonial in nature, it is not “prior recorded testimony” of a Prosecution witness, as contemplated in Rule 68. As such, their admission is governed by Articles 64(9)(a) and 69(4). These items are relevant and probative of issues in the instant proceedings and their potential probative value outweighs the prejudicial effect, if any, of their admission. Accordingly, the Prosecution submits that they would assist the Trial Chamber V(A) (“Chamber”) in its determination of the truth and in ensuring that the trial is fair and expeditious.

¹ The Prosecution does not, however, concede that admitting documents for the truth of their contents, including any content related to the acts and conduct of the Accused is impermissible under the general rules of admissibility established in Article 69(4) of the Statute. Admission will always be a case-by-case assessment undertaken by the Chamber weighing relevance and probative value against prejudice to the Accused: ICC-01/09-01/11-1353, para.19. However, for the specific documents which are the subject of this Application, the Prosecution does not seek to rely upon information relating to individual acts and conduct of the Accused.

Procedural History

3. On 2 July 2014, prior to P-0013's appearance in court, the Prosecution proposed to both Defence teams that the arguments for and against the admission of those documents that they objected to being tendered through the witness be dealt with by means of subsequent written filings. Shortly after, both Defence teams agreed to proceed on this basis. The Chamber was subsequently apprised of this proposal.²

4. Witness P-0013 testified on 10 and 11 July 2014.³ During his examination in chief, the Prosecution showed the witness 23 items. In respect of 11 of those documents, the Defence teams did not object to admission and the Chamber accepted them into evidence and assigned evidence (EVD) numbers. This Application deals with the remaining 12 documents, whose admission was disputed by the Defence teams.

Confidentiality

5. In accordance with Regulation 23*bis* of the Regulations of the Court, the Prosecution requests that this Application and its annex be classified as "Confidential" since they contain references to confidential evidentiary material. A public redacted version will be filed shortly.

Submissions

The admission of the documents in issue is governed by Article 69, not Rule 68

6. All documents covered by this Application either consist of, or refer to, information in the form of written statements or transcribed oral testimony from individuals who are not ICC witnesses.

² See ICC-01/09-01/11-T-124-ENG, p.2, ln.10 to p.3, ln.18.

³ See ICC-01/09-01/11-T-124-ENG and ICC-01/09-01/11-T-125-ENG respectively.

7. During the examination of P-0013, both Defence teams argued that since these documents constitute (or are heavily drawn from) the testimony of individuals not appearing before the Court, their admission through P-0013 would circumvent the Accused's due process rights under the Statute, in particular the safeguards provided by Rule 68.⁴ The Prosecution also notes that the Chamber, in its "Decision on the Prosecution's Request for Admission of Documentary Evidence"⁵ ("Decision on Documentary Evidence"), raised concerns regarding the admission of material that was testimonial in nature through a bar table application, rather than pursuant to Rule 68.⁶

8. The Prosecution observes that other Chambers of this Court have not refused to admit documents containing testimonial evidence *via* bar table motion on the basis that they amount to 'testimony'. In the *Katanga* case, Trial Chamber II observed that, "generally speaking, analytical reports based on personal stories of several individuals are not to be considered as testimony".⁷ In *Bemba*, pursuant to its general powers to rule of relevance or admissibility under Article 64(9), Trial Chamber III admitted a dossier containing extracts of testimony from an enquiry into alleged acts of pillaging, as well as a document containing the complete transcription of an interview and various excerpts of testimony provided by other persons.⁸

9. However, even if the Chamber were to consider these documents to constitute 'testimony', they do not constitute the **prior recorded testimony of a witness**, within the meaning of Rule 68. Rule 68 governs the introduction of "*previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony*" (emphasis added). The individuals who provide the information contained in the documents which are the subject of this Application are not ICC witnesses. Therefore, they are not (for want of a better term) 'Rule 68 witnesses'. This

⁴ ICC-01/09-01/11-T-124-ENG ET, pp.73-74 ; ICC-01/09-01/11-T-125-ENG ET, pp.6-8.

⁵ ICC-01/09-01/11-1353.

⁶ *Ibid.*, at paras.85-88.

⁷ ICC-01/04-01/07-2635, para.48.

⁸ ICC-01/05-01/08-2299-Red, paras.57-59, 62, 100-101.

interpretation of Rule 68 is further strengthened when read together with other provisions of the Statute and Rules, such as Article 69(2), which states:

“The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence” (emphasis added).

10. This interpretation has already been affirmed in this Court. Pre-Trial Chamber II held that Rule 68 was applicable only to “witnesses of the Court” and considered statements obtained by non-ICC witnesses as “documentary evidence”.⁹

11. The interpretation also resonates when Rule 68 is considered in context. Rule 68 is a limited and carefully controlled exception to the right of the Accused to examine the witnesses against him or her.¹⁰ *Ergo*, it is only when a person acts as a witness against the Accused that the Accused obtains the right to examine (or have examined) that person, and only then can Rule 68 be applied.¹¹ The individuals providing the information contained in these documents are not witnesses against the Accused, and as noted herein, the Prosecution does not rely on the information to the (limited) extent that it relates to the personal acts and conduct of the Accused.

12. In the Prosecution’s submission therefore, and as held by Pre-Trial Chamber II, Rule 68 is only triggered when a party seeks to introduce the prior recorded testimony of an individual who is also and already a witness for one of the parties, but does not apply to testimony (oral or written) of non-ICC witnesses.

13. Therefore, the admissibility of these documents falls to be determined according to the provision of Articles 64(9)(a) and 69(4) and the general principles outlined by the Chamber in its Decision on Documentary Evidence, and not Rule 68.

⁹ ICC-01/09-02/11-382-Red, paras.77-78; reaffirmed in ICC-01/09-02/11-406, paras.40-41.

¹⁰ Article 67(1)(e) of the Statute.

¹¹ ICC-01/04-01/07-2635, paras.42-45.

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

14. The Chamber has set out the general rule and relevant considerations with respect to admissibility of evidence in its Decision on Documentary Evidence.¹² The Chamber found that each document should be assessed individually and, in particular, that government, non-governmental and investigative reports are not inherently unreliable or inadmissible, dismissing the generic and speculative arguments of the Defence of unreliability or bias.¹³

15. The Prosecution submits that each one of the documents sought to be tendered in this Application satisfies the Chamber's criteria for admission – as explained below and, with respect to relevance, in confidential Annex A.

- i. **KEN-OTP-0001-0364** is the CIPEV Final Report, produced following its judicial investigation into the facts and circumstances surrounding the 2007-2008 post-election violence in Kenya. P-0013 testified that KEN-OTP-0001-0364 is a reliable copy of the report that he and his fellow Commissioners produced and signed at the conclusion of the Commission's mandate.¹⁴ The CIPEV was a bipartisan initiative of the two main political parties in Kenya at the time¹⁵ mandated to investigate the facts and surrounding circumstances related to the acts of violence that followed the 2007 Presidential Election.¹⁶ The CIPEV conducted its inquiry in an impartial and – as far as possible – public manner.¹⁷ The Commission gathered information from a range of sources,¹⁸ received significant cooperation from the Government of Kenya and various Kenyan authorities and entities,¹⁹ and took statements and testimony under oath from a range of witnesses.²⁰ Open hearings were publicised and reported

¹² ICC-01/09-01/11-1353, paras.15-17.

¹³ ICC-01/09-01/11-1353, paras.33-36.

¹⁴ ICC-01/09-01/11-T-124-ENG ET, at pp.44, 50-52 and 55-57.

¹⁵ ICC-01/09-01/11-T-124-ENG ET, at p.23; EVD-T-OTP-00125; EVD-T-D09-00219.

¹⁶ EVD-T-OTP-00121.

¹⁷ ICC-01/09-01/11-T-124-ENG ET, at p.33, ln.13 to p.34, ln.10.

¹⁸ ICC-01/09-01/11-T-124-ENG ET, at p.37, lns.5-23, ICC-01/09-01/11-T-124-ENG ET, at p.62, lns.8-13.

¹⁹ ICC-01/09-01/11-T-124-ENG ET, at p.29, lns.18-19.

²⁰ ICC-01/09-01/11-T-124-ENG ET, at p.37, ln.18 to p.38, ln.16.

extensively by the media.²¹ The Commissioners ensured that the inquiry was public and impartial,²² important safeguards that enhance the integrity of proceedings. Regarding the reliability of the evidence received by it, information was received from a range of different sources and conflicting views were presented on a number of issues, as one would expect.²³ Additionally, a large number of witnesses were interviewed by investigators and those that testified were sworn on oath, reminded of the importance of telling the truth and subject to questioning by the Commissioners, Counsel Assisting and Counsel with Standing representing various interested parties.²⁴ Credibility was tested and assessments were made as a natural part of the process.²⁵ In compiling the report, the Commissioners had access to all of the information that had been gathered during the investigation.²⁶

The Prosecution submits that this document is relevant, probative and has strong indicia of reliability. The Defence have had the opportunity to cross-examine P-0013, one of the three Commissioners jointly responsible for the production of the report, in order to test the strengths and weaknesses of the CIPEV process. The Chamber is therefore in a position to make an informed decision on the weight to be attached to this document at the relevant time.

- ii. **KEN-OTP-0001-1288** contains the Investigation Section Final Report that the head of the CIPEV investigations team was specifically asked to compile.²⁷ P-0013 testified that KEN-OTP-0001-1288 is a reliable copy of the report he received.²⁸ P-0247, a CIPEV clerk who testified before the Court,²⁹ confirmed

²¹ ICC-01/09-01/11-T-124-ENG ET, at p.33, lns.18-21.

²² ICC-01/09-01/11-T-124-ENG ET, at p.33, lns.13-25.

²³ ICC-01/09-01/11-T-124-ENG ET, at p.37, lns.5-23; ICC-01/09-01/11-T-124-ENG ET, p.43, ln.21 to p.44, ln.1; ICC-01/09-01/11-T-125-ENG ET, p.3, ln.12 to p.4, ln.2; ICC-01/09-01/11-T-125-ENG ET, at p.4, ln.25 to p.5, ln.24.

²⁴ ICC-01/09-01/11-T-124-ENG ET, at p.37, lns.18-22; ICC-01/09-01/11-T-124-ENG ET, at p.38, lns.1-9; ICC-01/09-01/11-T-124-ENG ET, p.43, lns.7-20; ICC-01/09-01/11-T-124-ENG ET, at p.57, ln.15 to p.58, ln.12; ICC-01/09-01/11-T-124-ENG ET, p.60, lns.19-21.

²⁵ ICC-01/09-01/11-T-124-ENG ET, at p.61, ln.21 to p.62, ln.4.

²⁶ ICC-01/09-01/11-T-124-ENG ET, at p.40, lns.9-12; ICC-01/09-01/11-T-124-ENG ET, p.60, ln.12 to p.61, ln.20.

²⁷ ICC-01/09-01/11-T-124-ENG ET, at p.54, lns.3-11.

²⁸ ICC-01/09-01/11-T-124-ENG ET, at pp.63-64.

that the report had been tendered into the record of the CIPEV proceedings as an exhibit and that he reproduced it for the Commissioners for their use.³⁰

As noted above, P-0013 explained how the CIPEV investigators collected statements from a large number of witnesses. This report summarises and draws limited conclusions from the information gathered as part of that collection process. Contrary to another fact-finding report, which the Chamber did not admit in its Decision on Documentary Evidence for, *inter alia*, failing to identify the “persons interviewed in preparation of the report”,³¹ KEN-OTP-0001-1288 identifies the individuals from whom statements were obtained. Moreover, the report’s findings emanate directly from these persons, who are “non-Rule 68 witnesses”³², and are presented in a neutral manner. This report was examined by the Commissioners and formed part of the materials on which they based the CIPEV Final Report and its admission will thus assist with the Chamber’s assessment thereof. The Prosecution submits that P-0013 provided sufficient additional explanations with regards to the nature, value and purpose of this report to the extent that any prejudicial effect that the admission of this document *via* witness P-0247 would have caused to the Defence and Accused is now significantly mitigated.³³

- iii. **KEN-OTP-0005-9365** is a report on the status of Internally Displaced Persons (IDP) as at 8 July 2008 that was contained in the collection of CIPEV materials that the Prosecution received from the African Union Panel of Eminent African Personalities. P-0013 testified that Mr Francis Kimemia, a Permanent Secretary responsible at the time for IDPs, testified at the CIPEV and produced

²⁹ EVD-T-OTP-00088, ICC-01/09-01/11-T-116-CONF-ENG and ICC-01/09-01/11-T-117-CONF-ENG.

³⁰ ICC-01/09-01/11-T-116-CONF-ENG, at p.39, lns.21-22, p.40, lns.9-25 to p.41, lns.1-2. The Prosecution has previously sought to tender this report through witness P-0247 for “background information including on questions of tensions between the political parties prior to the election”. On that occasion, however, the Chamber declined to admit the report holding that the prejudicial effect to the Accused outweighed its probative value (T-116, p.61, lns.1-15). The Prosecution submits that the deficiencies identified by the Chamber have been rectified through the evidence of P-0013.

³¹ ICC-01/09-01/11-1353, para.42.

³² See above, paragraphs 8-13.

³³ ICC-01/09-01/11-T-124-ENG ET, at p.54, lns.12-15.

statistics relating to IDPs.³⁴ P-0013 testified that these figures related only to the number of IDP's housed in camps and therefore do not reflect the total number of persons displaced as a result of the PEV, since many people were displaced from their homes but did not seek refuge in camps.³⁵ The Prosecution relies on the document in support of minimum statistics and the geographic breakdown relating to IDPs who sought refuge in camps as a result of the PEV, since this is indicative of the widespread and systematic displacement of PEV victims.

- iv. **KEN-OTP-0005-5398** and **KEN-OTP-0005-3079** are the transcripts of public and *in camera* CIPEV hearings containing the verbatim testimony of Florence Jaoko, Kenya National Commission on Human Rights (KNCHR) Chairperson. Both Defence teams accepted that these are the transcripts of Florence Jaoko's testimony to the CIPEV.³⁶ Ms Jaoko gave testimony on the KNCHR investigation into the PEV, the methodology employed and the challenges faced, and the final report produced as a result of that investigation³⁷ over two days and was questioned extensively by Counsel Assisting and the Chairman and two Commissioners. The Prosecution submits that the testimony of Ms Jaoko will assist the Chamber in determining the admissibility and, in the event of admission, weight to be afforded to KEN-OTP-0001-0002, the KNCHR Report.
- v. **KEN-OTP-0001-0002** is the Report produced by the KNCHR following its investigation of the human rights violations that took place in Kenya following the disputed December 2007 presidential election results. Both Defence teams accepted that this is a report produced by the KNCHR³⁸ and did not object to its authenticity when the Prosecution included it in its "Prosecution Application for Admission of Documents from the Bar Table

³⁴ ICC-01/09-01/11-T-124-ENG ET, at p.70.

³⁵ ICC-01/09-01/11-T-124-ENG ET, at p.71.

³⁶ ICC-01/09-01/11-T-125-ENG ET, at p.17, lns.16-20 and p.18, lns.4-7.

³⁷ KEN-OTP-0001-0002, see sub-para v. below.

³⁸ ICC-01/09-01/11-T-125-ENG ET, at p.19, lns.6-10.

Pursuant to Article 64(9)".³⁹ Although it found the report to be *prima facie* relevant to the scope of the charges, the Chamber declined to admit this document in its Decision on Documentary Evidence because, *inter alia*, it appeared that one of the witnesses on the Prosecution's list of witnesses may be able to contextualise the report.⁴⁰ [REDACTED].⁴¹ The Prosecution submits that the testimony of P-0013 and the information provided by Ms Jaoko during the CIPEV hearings (see above, sub- sub-paragraph iv) provide sufficient context and address many of the concerns regarding this report expressed by the Chamber in its earlier decision.

A copy of this report was produced to the CIPEV⁴² and formed part of the materials available to the Commissioners as part of their inquiry.⁴³ Importantly, access to the underlying materials was provided to the CIPEV and it was able to review the materials, including statements of witnesses,⁴⁴ and independently assess the validity of the conclusions reached in the report. The Prosecution submits that this provides an important safeguard that substantially lessens the risks normally attendant upon the admission of derivative evidence of this nature. Thus, the Prosecution submits that any obstacles to its admission have now been removed.

- vi. **KEN-OTP-0005-2817** is the transcript of a CIPEV public hearing containing the verbatim testimony of Bitange Ndeme, Permanent Secretary for the Ministry of Information and Communications. Both Defence teams accepted that this is the transcript of a WAKI Commission hearing.⁴⁵ In the Prosecution's submission, the factors noted above in sub-paragraph i in support of the admission of the CIPEV Final Report apply equally here.

³⁹ As noted by the Chamber in its Decision ICC-01/09-01/11-1353, para.42.

⁴⁰ ICC-01/09-01/11-1353, para.42.

⁴¹ [REDACTED].

⁴² ICC-01/09-01/11-T-125-ENG ET, at p.16, lns.2-4.

⁴³ ICC-01/09-01/11-T-124-ENG ET, at p.61, lns.17-20.

⁴⁴ ICC-01/09-01/11-T-125-ENG ET, at p.16.

⁴⁵ ICC-01/09-01/11-T-125-ENG ET, at p.9, ln.21 to p.10, ln.4.

- vii. **KEN-OTP-0010-0034** is an internal memorandum from the Department of Information of the Republic of Kenya forwarding for the Secretary's information and action a report on the 18 February 2008 Kass FM program "Lee Nee Emeet". The memo is annotated with "CW127" in the top right hand corner. Commission witness 127 is Bitange Ndeme, the Permanent Secretary for the Ministry of Information and Communications (see above sub-paragraph vi).⁴⁶ P-0013 testified that he recognised this document as having formed part of the CIPEV materials.⁴⁷ This document is a contemporaneous, official document produced in the ordinary course of business of the Department of Information and has inherent indicia of reliability. Additionally, the audio recording, transcript and translation of the program referred to in this memo and report have already been admitted into evidence (EVD-T-OTP-00020, EVD-T-OTP-00021 and EVD-T-OTP-00022). Thus this memorandum complements those recordings and explains their provenance.
- viii. **KEN-OTP-0005-7542** is the transcript of a CIPEV public hearing containing the verbatim testimony of witnesses including Rift Valley-based Medical Officers and District Commissioners. Both Defence teams accepted that this is the transcript of a WAKI Commission hearing.⁴⁸ The Prosecution repeats its submissions in sub-paragraph i.
- ix. **KEN-OTP-0006-1045** is the typed statement handed up to the Commission during his testimony by Bernard Njue Kinyua (former District Commissioner for Uasin Gishu). Both Defence teams accepted that this is a document used in CIPEV proceedings.⁴⁹ The reliability and probative value of this document should be considered together with his CIPEV testimony, KEN-OTP-0005-7542 (sub-paragraph viii).

⁴⁶ See EVD-T-OTP-00127 at -0762.

⁴⁷ ICC-01/09-01/11-T-124-ENG ET, at p.12, lns.12-14.

⁴⁸ ICC-01/09-01/11-T-125-ENG ET, at p.19, lns.17-19.

⁴⁹ ICC-01/09-01/11-T-125-ENG ET, at p.24, lns.2-6.

- x. **KEN-OTP-0005-7770** is the transcript of a CIPEV public hearing containing the verbatim testimony of witnesses including Rift Valley-based District Commissioners. Both Defence teams accepted that this is a transcript of a WAKI Commission hearing.⁵⁰ The Prosecution repeats its submissions in sub-paragraph i.
- xi. **KEN-OTP-0006-0493** is the transcript of a CIPEV *in camera* hearing containing the verbatim testimony of Rift Valley-based individual witnesses. Both Defence teams accepted that this is a transcript of a WAKI Commission hearing.⁵¹ The Prosecution also repeats the submissions in sub-paragraph i.

16. To the extent that any of the information in the portions that the Prosecution seeks to rely upon are based on hearsay, in the Prosecution's submission this is a matter that may affect the weight of the evidence, but should not preclude the documents from being admitted. Hearsay evidence is fully admissible at the ICC and, while it may be a factor in deciding the weight to ultimately attach to the evidence, that can only be properly determined once the Chamber has all the evidence before it and is in a position to freely assess and consider the entire case record.⁵²

17. The documents are clearly relevant and reliable, and having been produced close both geographically and temporarily to the events in question, in the course of a formal and independent enquiry and subjected to significant legal scrutiny, they have significant probative value. Admission will allow the Chamber to examine the evidence contained therein, which it can then assess individually and in light of the totality of the evidence, attaching to each and every item the weight it deems appropriate and will potentially assist the Chamber in its determination of the truth.⁵³

⁵⁰ ICC-01/09-01/11-T-125-ENG ET, at p.7, lns.9-11 and p.8, lns.8-11.

⁵¹ ICC-01/09-01/11-T-125-ENG ET, at p.20, lns.16-19.

⁵² ICC-01/09-01/11-1353, paras. 13-18; ICC-01/05-01/08-2012-Red, para.69.

⁵³ See ICC-01/04-01/06-1399, para.20.

Probative value of the evidence outweighs its prejudicial effect

18. All of the documents were disclosed to the Defence teams well in advance of the trial and were included on the Prosecution's List of Evidence filed on 10 January 2013. Except for the KNCHR Report, the documents are all 'CIPEV documents', so P-0247 and/or P-0013 are the logical witnesses through which the Prosecution would seek to tender them. The copy of the KNCHR Report relied upon by the Prosecution was obtained directly from Florence Jaoko, the KNCHR Chairperson. However, a copy of this report was produced to the Commission and CIPEV staff were granted access to the KNCHR database of PEV related information and data.⁵⁴ This is evident from the CIPEV-KNCHR agreement that was tendered into evidence⁵⁵ and the transcripts of the testimony of Florence Jaoko that are also the subject of this Application⁵⁶. [REDACTED].⁵⁷ It should therefore have come as no surprise to the Defence that the Prosecution would seek to introduce these documents through a CIPEV witness.

19. As noted above, the Prosecution seeks to tender these documents for the truth of their contents, except insofar as the contents relate to the acts and conduct of the Accused. The Prosecution has identified the portions that it seeks to rely upon, and specifically carved out any information on the acts and conduct of the Accused. In light of this qualification, the Prosecution submits that the prejudicial effect of admitting these documents, if any, is minimal.

Relief sought

20. For the foregoing reasons, pursuant to Articles 64(9) and 69(2), (3) and (4) of the Statute and Rule 63(2) of the Rules, the Prosecution requests that the Chamber

⁵⁴ ICC-01/09-01/11-T-125-ENG ET, at p.16.

⁵⁵ EVD-T-OTP-00131.

⁵⁶ KEN-OTP-0005-5398 (Tab 20) and KEN-OTP-0005-3079 (Tab 21).

⁵⁷ [REDACTED].

admit into evidence and assign EVD numbers to the documents listed above in paragraph 15, sub-paragraphs (i) to (xi) and in Confidential Annex A.



Fatou Bensouda, Prosecutor

Dated this 12th day of November 2014

At The Hague, the Netherlands