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**International
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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

Public redacted version of “Corrected version of ‘Ruto Defence response to Prosecution’s Application for Admission of Documentary Evidence Related to the Testimony of Witness P-0013’, 19 November 2014”

Sources: Defence for Mr. William Samoei Ruto

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

The Office of the Prosecutor

Ms. Fatou Bensouda
Mr. James Stewart
Mr. Anton Steynberg

Counsel for William Samoei Ruto

Mr. Karim A. A. Khan QC
Mr. David Hooper QC
Mr. Essa Faal
Dato' Shyamala Alagendra
Ms. Leigh Lawrie

Counsel for Joshua Arap Sang

Mr. Joseph Kipchumba Kigen-Katwa
Ms. Caroline Buisman

Legal Representatives of the Victims

Mr. Wilfred Nderitu

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Ms. Paolina Massida

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr. Herman von Hebel

Counsel Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction

1. The defence for Mr. William Samoei Ruto (“Defence”) submits that the *Prosecution’s Application for Admission of Documentary Evidence Related to the Testimony of Witness P-0013* (“Application”)¹ which seeks the admission of 12 items of evidence shown to and identified by witness P-0013 during his testimony should be dismissed.
2. In respect of the 6 items which are transcripts of the testimony of witnesses question by the CIPEV,² the Application ignores this Chamber’s clear prior ruling that such transcripts are “testimonial in nature” and, therefore, fall within the regime set out in Rule 68 of the Rules of Procedure and Evidence (“Rules”).³ This failure is fatal to the admission of the transcripts. In addition, the admission of the items should be rejected because a case-by-case assessment of each reveals that they fail to satisfy one or more of the elements comprising the general rule of admissibility.⁴

II. Submissions

P-0013’s limited connection to the items

3. The Defence does not dispute the authenticity of the items which are the subject of the Application. In this regard, P-0013 (and P-0247) had somewhat limited roles to play. However, the Defence notes the Presiding Judge’s observation that establishing the authenticity of an item “is not the end of the assessment” when determining whether it should be admitted into evidence.⁵ This broader assessment dictates that all the items which are the subject of the Application

¹ ICC-01/09-01/11-1619-Conf, 28 October 2014.

² See Application, para. 1.

³ ICC-01/09-01/11-1353 (“Decision on Documentary Evidence”), para. 86. See also paras. 87-88.

⁴ Decision on Documentary Evidence, para. 15. See also, para. 16.

⁵ During the testimony of P-0247, the Presiding Judge observed that “it is one thing to say that a witness who has come and testified to being a custodian of a document would have established the authenticity of that document for the purposes of, yes, this was a document that was once created and kept, but then that is not the end of the assessment. The Chamber would also take into account the prejudicial effect of such document, assuming it is found to be relevant. On that basis, the Chamber will be rejecting this particular document” (ICC-01/09-01/11-T-116-CONF-ENG ET, p. 61, lines 10-15).

should not be admitted into evidence.

The admission of the CIPEV transcripts is governed by Rule 68

4. Contrary to the Prosecution's position, this Chamber has not simply "raised concerns regarding the admission of material that [is] testimonial in nature through a bar table application".⁶ Instead, the Chamber expressly ruled that because "the transcripts of the testimony of...witnesses who were questioned by the CIPEV" are "testimonial in nature" their admission should be made under Rule 68 rather than via a bar table motion.⁷ In fact, the transcripts which were the subject of this ruling are included in the Application.⁸ Properly considered, the Application amounts in part to a request for reconsideration of this element of the Decision on Documentary Evidence.⁹ However, at no point in the Application does the Prosecution address the test which must be satisfied to engage the exceptional remedy of reconsideration, namely that the impugned decision is "manifestly unsound and [its] consequences are manifestly unsatisfactory",¹⁰ or that the applying party has shown "new facts or circumstances that may influence that decision".¹¹ On this basis alone, the request to admit the transcripts should be dismissed.

5. Even if, *arguendo*, the test for reconsideration is met, the Chamber's finding in the Decision on Documentary Evidence that CIPEV transcripts are testimonial in nature and fall within the Rule 68 regime is correct. Contrary to the Prosecution's position,¹² individuals who have provided previously recorded

⁶ Application, para. 7.

⁷ Decision on Documentary Evidence, para. 86. *See also* paras. 87-88.

⁸ *See* Application, para. 15(viii) which refers to KEN-OTP-0005-7542 and the Decision on Documentary Evidence, para. 86 which also refers to this item.

⁹ The following fall within the Chamber's prior ruling that Rule 68 applies to CIPEV transcripts: Documents 4, 5, 7, 9, 11 and 12.

¹⁰ *See, e.g.*, ICC-01/04-01/06-2705, para. 18.

¹¹ *See, e.g.*, ICC-01/05-01/08-1691-Red, para. 17.

¹² Application, paras. 6-13.

testimony¹³ which the Prosecution seeks to rely upon to prove its case cannot be artificially divided into “Rule 68 witnesses”¹⁴ (in respect of whom the Rule 68 safeguards apply) and “non-ICC witnesses”¹⁵ (in respect of whom such safeguards can be avoided) simply by virtue of their inclusion on the Prosecution’s List of Witnesses. There is no basis for such a distinction to be made either in the Court’s legal instruments or its jurisprudence. Moreover, to find otherwise would: (i) seriously undermine the accused’s fundamental right to adversarial confrontation and the principle of the primacy of orality enshrined in Articles 67(1)(e) and 69(2) of the Rome Statute (“Statute”); (ii) permit the Prosecution to have recourse to a second group of witnesses not included on its List of Witnesses; and (iii) permit the Prosecution to sidestep the protections afforded to an accused by Rule 68 in respect of the admission of non-*viva voce* witness testimony. Crucially, the Application also ignores the authoritative and binding judgement of the Appeals Chamber in *Bemba* regarding the provision of oral testimony at this Court.¹⁶

6. In *Bemba*, the Appeals Chamber held that:

*[t]he direct import of the first sentence of [Article 69(2)] is that witnesses must appear before the Trial Chamber in person and give their evidence orally. This sentence makes in-court personal testimony the rule, giving effect to the principle of orality.*¹⁷

7. This is a clear statement of principle, the tenor of which does not support the Prosecution’s contention that it can be circumvented simply by virtue of the fact that an individual is not included on the Prosecution’s List of Witnesses.
8. The Appeals Chamber also elucidated on the “importance of in-court personal testimony”, observing that: (i) the witness gives evidence under oath; (ii) the

¹³ The Prosecution does not appear to challenge that the CIPEV transcripts are “prior recorded testimony”.

¹⁴ Application, para. 9.

¹⁵ *Ibid*, para. 12.

¹⁶ ICC-01/05-01/08-1386 (“*Bemba* Appeals Judgement”), para. 76.

¹⁷ *Ibid*, para. 76.

evidence is given “under the observation and general oversight of the Chamber”; (iii) the Chamber hears the evidence directly from the witness and is able to observe his or her demeanour and composure”; and (iv) the Chamber is “able to seek clarification on aspects of the witness’ testimony that may be unclear so that it may be accurately recorded”.¹⁸

9. Given the foregoing it is unsurprising that the exceptions to in-court personal testimony are tightly drawn and expressly stated to be “subject to” the Statute and “in accordance with the Rules”.¹⁹ While Articles 64(9)(a) and 69(4) are broadly drafted, they cannot be applied to the exclusion of the *lex specialis*, Rule 68, which expressly governs the admission of “Prior Recorded Testimony”. Indeed, in the *Bemba* Appeals Decision, the Appeals Chamber ultimately found that “[t]he Trial Chamber’s admission into evidence of the witnesses’ written statements without a cautious item-by-item analysis and without satisfying rule 68...was incompatible with the principle of orality”.²⁰ This approach “had the potential effect of depriving Mr Bemba of his right ‘to examine, or have examined the witnesses against him’”.²¹ Set in this legal context, the Prosecution’s argument is without merit.
10. In addition, the Prosecution erroneously relies on the decisions of other Trial Chambers. Notwithstanding the fact that these decisions are not binding, they also do not assist the Prosecution. In fact, the *Katanga* decision²² serves to support the Defence position because it underlines that where an out-of-court statement qualifies as “testimony” then “the guarantees of rule 68” must be applied.²³ If the out-of-court statement is found to constitute “testimony” and is to be admitted into evidence in support of the Prosecution case, then Trial Chamber II found

¹⁸ *Ibid*, para. 76.

¹⁹ *Ibid*, para. 77.

²⁰ *Ibid*, para. 3.

²¹ *Ibid*, para. 79 (internal footnotes omitted).

²² Application, para. 8 citing to ICC-01/04-01/07-2635 (“*Katanga* Decision”).

²³ *Katanga* Decision, paras. 45, 47 and 50.

that the person is acting “as a witness against the accused” and the right to adversarial confrontation is engaged.²⁴ None of the factors which Trial Chamber II identified as indicating that an out-of-court statement was “testimony” is that it must come from an individual on the Prosecution’s List of Witnesses. In fact, it was held that “[i]t is not necessary for the witness to know against whom his or her testimony may be used”²⁵ and also that “[s]tatements given in...purely domestic proceedings can also be considered as testimony for purposes of article 67(1)(e) and rule 68 when they are later transmitted to the Court.”²⁶

11. The Prosecution’s reliance on a Trial Chamber decision from the *Bemba* case is equally misplaced for two reasons.²⁷ First, it is not apparent from the plain terms of the decision that, as argued by the Prosecution, “a dossier containing extracts of testimony from an enquiry into alleged acts of pillaging” was admitted.²⁸ Nowhere in the decision is reference made to “extracts of testimony”. However, accepting the Prosecution’s submissions on their face and bearing in mind that the Prosecution will have access to material in the *Bemba* case which is not available to the defence in this case, it appears that only “extracts of testimony” were admitted and that the *Bemba* defence did not object.²⁹ In contrast, in the Application the Prosecution seeks the wholesale admission of transcripts of CIPEV testimony. Second, the “document containing the complete transcription of an interview and various excerpts of testimony provided by other persons”³⁰ referred to by the Prosecution in the Application as having been admitted in the *Bemba* case actually relates to interviews conducted by a *Radio France*

²⁴ *Ibid*, paras. 44 and 45.

²⁵ *Ibid*, para. 49.

²⁶ *Ibid*, para. 47.

²⁷ Application, para. 8 citing to ICC-01/05-01/08-2299-Red, paras. 57-59, 62, 100 and 101.

²⁸ Application, para. 8.

²⁹ ICC-01/05-01/08-2299-Red, para. 57.

³⁰ Application, para. 8.

International journalist, Bernard Najotte.³¹ The transcripts, therefore, clearly did not relate to “prior recorded testimony”.

12. Finally, no support for the Prosecution’s position on Rule 68 is provided by the approach taken at the pre-trial stage of proceedings.³² The Appeals Chamber in *Bemba* observed that “the rules regarding orality in the pre-trial phase are more relaxed than at trial.”³³ The Appeals Chamber further ruled that “[a]t trial...the Trial Chamber must respect article 69(2). Witness statements may only be introduced under rule 68...if the strict conditions of that rule are met.”³⁴

The prejudicial effect of the documents outweighs their probative value

13. The Defence objects to the admission of all the documents. The Defence’s general objections are set out below with further detail and extracts supporting the Defence’s concerns provided in confidential annex A hereto.
14. **Document 1, KEN-OTP-0001-0364 (CIPEV Final Report):** The Defence objects to the admission of this report on four broad grounds. First, the report does not contain sufficient indicia of reliability.³⁵ Express statements in the report make clear that the drafters did not intend that the report be relied upon in legal proceedings.³⁶ Rather, CIPEV’s purpose was investigatory. The Presiding Judge correctly identified the proper use which should have been made of the CIPEV material, bearing in mind the report’s caveats, by the Prosecution when he observed that “this sort of material is something that would have been better used as springboard material” for fuller criminal investigations.³⁷ In addition, some conclusions in the report are based on anonymous sources.³⁸

³¹ ICC-01/05-01/08-2299-Red, para. 100. *See also* para. 101.

³² Application, para. 10.

³³ *Bemba* Appeals Judgement, para. 80.

³⁴ *Ibid*, para. 81.

³⁵ *See* extracts in confidential annex A.

³⁶ KEN-OTP-0001-0364 at 0391. Full quote provided at confidential annex A, p. 2.

³⁷ ICC-01/09-01/11-T-117-ENG ET WT 17-06-2014, p. 20, lines 3-4.

³⁸ *See* extracts in confidential annex A.

15. Second, reliance on the report's observations and conclusions could usurp the Chamber's truth and fact finding function. The Prosecution seeks the admission of a considerable portion of the CIPEV report. Throughout the report conclusory statements are made regarding the extent, type, targets and perpetrators of the violence.³⁹ Further, observations are made in the report which are directly relevant to the Prosecution's narrative including the involvement of unnamed politicians in inciting the violence and the use of derogatory terms for ethnic groups during the election campaigns.⁴⁰ This is highly prejudicial information. While the information does not "relate to the personal acts and conduct of the Accused",⁴¹ it is evidence which the Defence should be entitled to challenge directly in cross-examination.
16. Third, considering the report as a whole, the prejudicial nature of the information at issue outweighs the probative value of the evidence. The Defence observes that the relevance of the material to the Prosecution case as stated in the annex to the Application belies the highly prejudicial material which is to be admitted to prove these very general categories.⁴² The Defence submits that less prejudicial means are available to prove genuine "background" evidence such as agreed facts,⁴³ expert witness testimony⁴⁴ and the testimony of *viva voce* witnesses who have testified to violence in locations other than the Rift Valley.⁴⁵
17. Fourth, various sections of the report which the Prosecution seeks to admit are irrelevant to this case. For example, the report includes information on crimes not charged⁴⁶ and misconduct by the police.⁴⁷ In addition to the prejudice caused

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ Application, para. 2,

⁴² ICC-01/09-01/11-1619-Conf-AnxA, p. 2.

⁴³ See, e.g., ICC-01/09-01/11-451-AnxA.

⁴⁴ See, e.g., the testimony of the expert witness P-0464.

⁴⁵ Witnesses have testified to violence in Nairobi, Kisumu and other locations not charged.

⁴⁶ See, e.g., KEN-OTP-0001-0364, "Findings in Relation to Sexual Violence" at 0722-0724.

⁴⁷ KEN-OTP-0001-0364 at 0528-0531.

by admitting such material which has not been investigated by the Defence, the Defence recalls the Presiding Judge's observation that "at some point" there is a risk of "overload[ing] the circuit with background information."⁴⁸

18. Document 2, KEN-OTP-0001-1288 (CIPEV Investigation Section Final Report):

During the testimony of P-0247, the Trial Chamber refused to admit this document, finding that "[t]he Chamber is persuaded by the concerns raised by the Defence" and that "there is [a] prejudicial effect that overrides [the] limited background information."⁴⁹ Contrary to the Prosecution's assertion,⁵⁰ all these concerns remain and have not been cured by the testimony of P-0013.⁵¹ For example, the reliability of the report is subject to serious question because it is based on anonymous sources⁵² and relies on double hearsay. The report is also highly prejudicial because it lists the names of "alleged perpetrators in Eldoret" and includes Mr Ruto and Mr Sang in this list.⁵³ The inclusion of this material in the extract to be admitted clearly runs counter to the Prosecution's statement that it "specifically carved out any information on the acts and conduct of the Accused."⁵⁴

19. In addition, given the content of the report which includes conclusions such as "the violence was both pre-planned and spontaneous",⁵⁵ any reliance placed upon it could amount to an abdication of the Chamber's fact-finding functions. A further major criticism of the report is that it comprises considerable portions of information which must be considered "testimonial" for the purposes of Rule

⁴⁸ ICC-01/09-01/11-T-116-CONF-ENG ET 16-06-2014, p. 60, lines 12-14.

⁴⁹ ICC-01/09-01/11-T-116-CONF-ENG ET 16-06-2014, p. 61, lines 7-15.

⁵⁰ Application, para. 15(ii).

⁵¹ ICC-01/09-01/11-T-116-CONF-ENG ET 16-06-2014, p. 45, line 14 to p. 56, line 5.

⁵² *Contra* Application, para. 15.ii (the report "identifies the individuals from whom statements were obtained").

⁵³ KEN-OTP-0001-1288 at 1418-1421.

⁵⁴ Application, para. 19.

⁵⁵ KEN-OTP-0001-1288 at 1422.

68.⁵⁶ Thus, in accordance with the Trial Chamber's previous ruling, bar table motions cannot be used to circumvent the provisions and safeguards of Rule 68.⁵⁷ It is also of serious concern that the Prosecution fails to recognise that at least [REDACTED],⁵⁸ [REDACTED].⁵⁹ Related to the Defence's concerns regarding the inclusion of extracts of witness statements is the fact that the complete witness statements from which the extracts are taken are not provided. Therefore, the complete evidential picture is not available to the Defence or the Chamber. Finally, the report contains a disclaimer on the final page which shows that it was never intended that the report be relied upon in criminal proceedings but was for internal CIPEV purposes only.⁶⁰

20. **Document 3, KEN-OTP-0005-9365 (Annex 1 – Status Report on IDPs as at 08-07-2008):** Save for P-0013's testimony that the annex "appears to be" an exhibit provided by Mr Francis Kimemia and that the figures relate only to the number of IDPs housed in camps, P-0013 was unable to provide any additional evidential value to the document.⁶¹ The witness did not provide any information on methodology, or any detail at all as to how the annex was prepared, and could provide no information on the sources of the underlying information.⁶² The document is also incomplete on its face, being titled "Annex 1". P-0013 did not explain to which document the annex was originally attached⁶³. In these circumstances, the document lacks the necessary indicia of reliability and should

⁵⁶ In *Lubanga*, witness statements were considered to fall within the scope of Rule 68. See ICC-01/04-01/06-1603, paras 18-19. This position is supported by the *Bemba* Appeals Decision, para. 80 referred to *supra*, para. 12.

⁵⁷ Decision on Documentary Evidence, paras. 85-88.

⁵⁸ [REDACTED].

⁵⁹ [REDACTED].

⁶⁰ KEN-OTP-0001-1288 at 1513 ("This report, as it is presented, is intended for the internal consideration by the Commission of Inquiry into Post-election Violence. [...]")

⁶¹ ICC-01/09-01/11-T-124-ENG ET WT 10-07-14, p. 70, line 6 to p. 71, line 9.

⁶² Similar concerns have previously been found to be a bar to admission. See Decision on Documentary Evidence, para. 45.

⁶³ Similar concerns regarding the incomplete nature of an item have previously been found to be a bar to admission. See Decision on Documentary Evidence, para. 65.

not be admitted into evidence, even for the limited purposes identified by the Prosecution.⁶⁴

21. **Documents 4 and 5, KEN-OTP-0005-5398 and KEN-OTP-0005-3079 (Transcripts of CIPEV testimony, Florence Jaoko (KNHCR)):** As noted above, the Chamber has refused to admit similar CIPEV testimony, holding that the correct procedure is to make an application under Rule 68 of the Rules.⁶⁵ On this basis alone the transcripts should not be admitted. Separately, the Defence submits that the prejudice the admission of such transcripts would cause to a fair trial outweighs its probative value. A central tenet of the defence case is that a core group of individuals, many of whom are now Prosecution witnesses,⁶⁶ were mobilised in early 2008 to falsely implicate ODM officials including Mr. Ruto in the PEV.⁶⁷ These false witnesses were motivated by the benefits (financial and otherwise) various “witness protection schemes” offered and, thus, agreed to appear before the CIPEV, the Kenya National Commission on Human Rights (“KNCHR”) and, ultimately, this Court. Thus, the KNHCR report, its underlying investigations and methodology, are subject to serious contention and are a key part of the defence case. To admit the transcripts containing important – not simply background - information as requested by the Prosecution would breach Mr. Ruto fair trial rights, including the right to adversarial confrontation and the principle of orality enshrined in Articles 67(1)(e) and 69(2).

22. **Document 6, KEN-OTP-0001-0002 (KNHCR Report):** This second attempt by the Prosecution to have the KNHCR report admitted into evidence should be rejected because the reasons for the Chamber’s refusal to admit the document as set out in the Decision on Documentary Evidence still remain. The Chamber did

⁶⁴ Application, para. 15(iii).

⁶⁵ *Supra*, para. 4.

⁶⁶ The Defence asserts that at least eight witnesses (P-0015, P-0016, P-0019, P-0024, P-0025, P-0028, P-0032, and P-0336) were involved in this scheme.

⁶⁷ See, e.g., ICC-01/09-01/11-T-120-CONF ET, p. 57, line 7 to p. 64, line 13; ICC-01/09-01/11-T-125-CONF ET, p. 74 to p. 78, line 15.

not refuse to admit the document on the sole basis that it could be tendered through [REDACTED]. The correct position is that the Chamber identified two further bases on which to refuse admission of the report, namely the report's reliance on anonymous sources and the fact that "a significant number of the report's findings emanate from other sources, such as newspapers."⁶⁸ None of these deficiencies are cured by the information provided by Ms. Jaoko (or P-0013).⁶⁹ In addition, the Defence submits that it is premature for the Prosecution to argue that [REDACTED].⁷⁰ This assertion by [REDACTED] should be properly explored and, if necessary, challenged during the course of *viva voce* testimony.⁷¹

23. The Defence also submits that the Prosecution's argument that the availability of the KNHCR report and its underlying materials to CIPEV somehow provides "an important safeguard" regarding the admission of "derivative evidence of this nature" is without merit.⁷² The Defence acknowledges that the CIPEV report refers to the KNHCR report but it is unclear from these references which parts of the KNHCR report are being relied upon. It is also unclear if CIPEV accepted the information provided by KNCHR without further enquiry or simply used it as a "starting point".⁷³

24. In addition to the foregoing, the KNHCR report contains highly prejudicial content which outweighs any probative value it may have. The Prosecution argument that it does not seek to rely on any of the documents for the acts and conduct of the accused⁷⁴ is undermined by the fact that a passage in the KNHCR

⁶⁸ Decision on Documentary Evidence, para. 42.

⁶⁹ *Contra* Application, para. 15(v).

⁷⁰ Application, para. 15(v). *See also* para. 18.

⁷¹ The Defence submits that the fact that [REDACTED] (Application, para. 15(v)) is a concern in and of itself and highlights the KNHCR report should be treated with caution.

⁷² Application, para. 15(v).

⁷³ In KEN-OTP-0001-1288 (this is the second document which the Prosecution seeks to have admitted in the Application) at 1297, Melinda Rix noted: "[v]arious NGO reports were analyzed during the early stages of the investigation so as to provide a 'foundation' from which to proceed. Although the information had not been tested or verified by the investigation team, it nevertheless provided an overview of the events and established a 'starting point' for the team's work to follow".

⁷⁴ Application, paras. 2 and 19.

report which refers to Mr. Ruto is included in one of the extracts which the Prosecution seeks to admit.⁷⁵ The Defence also submits that the report does not contain sufficient indicia of reliability and includes conclusions on “matters which are central to the case”. Indeed, the KNHCR report states that one of its aims was to “analyse the criminal responsibility of alleged perpetrators within the frameworks of international criminal law and domestic criminal law”.⁷⁶ Support for the above concerns is provided in the extracts taken from the KNHCR report and included in the confidential annex hereto.

25. **Document 7, KEN-OTP-0005-2817 (Transcript of CIPEV testimony, Bitange Ndeme):** Again, as noted above, in accordance with the Chamber’s previous ruling, requests for the admission of CIPEV testimony into evidence should be made under Rule 68 of the Rules.⁷⁷ On this basis alone the Chamber should refuse to admit the transcripts. Even if, *arguendo*, the Chamber is willing to consider the request under Articles 64(9)(a) and 69(4), the Defence submits that the evidence should be excluded on the grounds of fairness;⁷⁸ specifically, that the prejudice of admission outweighs the transcript’s probative value. One of the bases on which the Prosecution argues the transcript is relevant is the reference to “the use of coded language and dialect”.⁷⁹ However, a review of the witness’ CIPEV testimony provides no explanation as to what is meant by the witness’ words “highly coded”.⁸⁰ As the Chamber is aware, an important part of the

⁷⁵ KEN-OTP-0001-0002 at 0078 (“In a number of reports, it is said that during the campaigning period, William Ruto MP for Eldoret North incited his supporters against Kikuyus and other communities. Some of the allegations are that he told his supporters that they have had enough of Kikuyu rule and they should remove them and that in a rally just before elections at Shirika, he said that when ODM wins those supporting PNU would be evicted, with Kikuyus being the first to leave”).

⁷⁶ KEN-OTP-0001-0002 at 0011.

⁷⁷ *Supra*, para. 4.

⁷⁸ Decision on Documentary Evidence, para. 16.

⁷⁹ ICC-01/09-01/11-1619-Conf-AnxA, p. 2.

⁸⁰ See KEN-OTP-0005-2817 at 2822: “the biggest problem that we have, especially the vernacular FM stations, is that you can have as many transcriptions once - you transcribe you can have various because of use of coded language. Most of the language that was used before and after the election was highly coded.”

Prosecution narrative is the use of coded language by Mr Sang.⁸¹ This evidence should, therefore, be properly explored, clarified and, if necessary, challenged in cross examination.⁸² A further concern which militates in favour of refusing admission of the transcript is that it appears to be incomplete and, thus, lacks sufficient indicia of reliability. The Prosecution seeks the admission of the public transcript but not any accompanying private session transcript (if one exists) or the “lot of [other] things” the witness was anticipated to produce.⁸³

26. **Document 8, KEN-OTP-0010-0034 (Government Internal Memo (with attachment) entitled “RE: Report on a Breakfast Show “LEE NEE EMEET”, aired by Kass FM, a Vernacular Station on Monday 18th February (sic) 2008”):** the Defence defers to the position taken by the defence team for Mr. Joshua arap Sang regarding the admission of this particular item.

27. **Document 9, KEN-OTP-0005-7542 (Transcripts of CIPEV testimony, Rift Valley-based Medical Officers and District Commissioners):** The transcripts comprise the CIPEV testimonies of Professor Mengech, Bernard Njue Kinyua (former District Commissioner of Uasin Gishu), Dr. Stephen Kaiya, Dr. Shradack Kimei and Mr. Stephen Ikua (District Commissioner of Koibatek). This is the second request for the transcripts of Mengech, Kaiya and Kemei to be admitted into evidence.⁸⁴ As noted above, the Chamber previously refused their admission and directed the Prosecution to Rule 68 for the admission of “testimonial” evidence.⁸⁵ The present request is, therefore, a request for reconsideration, albeit that the Prosecution does not address or seek to satisfy

⁸¹ Prosecution’s Updated Pre-Trial Brief, 25 April 2014, ICC-01/09-01/11-625-Conf-AnxA-Red, paras. 79, 148 and 151.

⁸² The Defence recalls the Appeals Chamber’s observation that one of the important benefits of in-court *viva voce* testimony is that the Chamber (and the parties) are “able to seek clarification on aspects of the witness’ testimony that may be unclear so that it may be accurately recorded.” See *Bemba* Appeals Judgement, para. 76.

⁸³ See the following exchange in KEN-OTP-0005-2817 at 2855: “Mbuthi Gathenji: Alright. Now a station has been mentioned here and I’ll take the liberty of mentioning one if you don’t mind. Did you give any warning or ban to KASS FM? Bitange Ndemo: I -I’m not- I will not say yes or no. Chairman: We’ll have a private session. The witness has already said he is going to produce a lot of things.”

⁸⁴ ICC-01/09-01/11-1121-Conf-AnxA, Document no. 45 at p. 47.

⁸⁵ Decision on Documentary Evidence, para. 86.

the test for this exceptional remedy. The Defence submits that the Prosecution's failure to proceed under Rule 68 and its related failure to demonstrate the necessity of reconsidering the relevant part of the Decision on Documentary Evidence are fatal to the admission request. Accordingly, the Chamber should refuse to admit the CIPEV transcripts.

28. Separate to any Prosecution failure regarding Rule 68 or reconsideration, the transcripts should not be admitted because their prejudicial content outweighs their probative value.⁸⁶ Given the prejudicial nature of the evidence and to safeguard Mr. Ruto's fair trial rights, the Defence should be permitted to challenge it in cross-examination. In addition, the reliability of the information, including for the number of dead in Uasin Gishu and Koitabek, contained in the transcripts is open to question and the testimonies appear to be incomplete.⁸⁷

29. **Document 10, KEN-OTP-0006-1045 (CIPEV Statement by Bernard Njue Kinyua (former District Commissioner of Uasin Gishu))**: The Prosecution argue that this statement "should be considered together with the CIPEV testimony" of Mr. Kinyua.⁸⁸ Given the link between the statement and the CIPEV testimony, the Defence submits that the statement should also not be admitted for the reasons given above. Instead, it should be submitted under the Rule 68 procedure.⁸⁹ The Defence also submits that the prejudicial content of the statement is an additional basis for refusing admission.⁹⁰ Further, the reliability of the information contained in the statement does not withstand scrutiny.⁹¹ For all these reasons, the statement should not be admitted into evidence.

⁸⁶ See extracts in confidential annex A.

⁸⁷ *Ibid.*

⁸⁸ Application, para. 15(ix).

⁸⁹ See ICC-01/04-01/06-1603, paras 18-19 which held that witness statements fall within Rule 68. See also *Bemba Appeals Decision*, para. 80 referred to *supra*, para. 12.

⁹⁰ See extracts in confidential annex A.

⁹¹ *Ibid.*

30. **Document 11, KEN-OTP-0005-7770 (Transcripts of CIPEV testimony, Rift Valley-based District Commissioners):** The Chamber's previous ruling that the admission of CIPEV transcripts should be sought via the Rule 68 procedure means that this document should not be admitted.⁹² Separate from this failure, which the Defence submits is fatal to this part of the Application, the transcripts should not be admitted because their "prejudice factor is great and [their] probative value is comparatively slim."⁹³ This prejudice is apparent from the Prosecution's short summaries regarding the purported relevance of the transcripts. According to the Prosecution, Mr. Ikua, District Commissioner for Koibatek, provides information on, *inter alia*, "general incitement by politicians in the run up to the elections, hate messages circulated through phones, [and] incitement spread through vernacular stations such as Kass FM".⁹⁴ Mr. Mogaka, former District Commissioner for Nandi North, provides information, *inter alia*, on "pre-election tension in areas with high number of non-Kalenjin people" and "information on IDP camps at Kapsabet Police Station and the demonstrations in Kapsabet on 31 December and 3 January 2008."⁹⁵ Mr. Gedouw, District Commissioner for Kipkelion, provides information on, *inter alia*, "land issues and incitement by local politicians mainly from the Kalenjin ethnic group."⁹⁶ These matters cannot be described as mere "background" but are contentious and relate to "central questions at issue"⁹⁷ in the case which the Defence should be permitted to confront in cross-examination of *viva voce* witnesses.
31. **Document 12, KEN-OTP-0006-0493 (Transcripts of CIPEV testimony, Rift Valley-based witnesses):** Again, the previous ruling that the admission of CIPEV transcripts should be sought via the Rule 68 procedure means that this

⁹² Decision on Documentary Evidence, paras. 86-88.

⁹³ Decision on Documentary Evidence, para. 16.

⁹⁴ ICC-01/09-01/11-1619-Conf-AnxA, p. 5.

⁹⁵ ICC-01/09-01/11-1619-Conf-AnxA, p. 6.

⁹⁶ ICC-01/09-01/11-1619-Conf-AnxA, p. 6.

⁹⁷ See, e.g., Decision on Documentary Evidence, para. 44.

document should not be admitted.⁹⁸ In addition, even if the Chamber were willing to consider the transcripts for admission under the “general rule of admissibility”,⁹⁹ the Defence submits that they should be rejected because they are irrelevant, incomplete, unreliable and highly prejudicial.¹⁰⁰

32. The testimonies of [REDACTED] are irrelevant because they concern locations not charged in this case. Further, [REDACTED], both rape victims, provide information about crimes not charged in this case. The Defence has not investigated these other locations or crimes of sexual violence. If the Prosecution is seeking the admission of this evidence to prove the *chapeau* elements of the crimes, less prejudicial means are available such as agreed facts,¹⁰¹ expert witness testimony¹⁰² and the testimony of *viva voce* witnesses who have testified to violence in locations other than the Rift Valley.¹⁰³
33. The transcripts also lack the minimum indicia of reliability because three are incomplete. During the testimonies of [REDACTED], the statement of each witness was admitted as an exhibit.¹⁰⁴ Indeed, it appears that the content of a statement was referred to in the course of [REDACTED] testimony.¹⁰⁵ However, the Prosecution does not seek the admission of these statements which should be considered part of the witnesses’ testimonies. In addition, clear translation problems were experienced when [REDACTED] was giving evidence to CIPEV.¹⁰⁶ These problems further undermine the reliability of the information provided in the transcript.

⁹⁸ Decision on Documentary Evidence, paras. 86-88.

⁹⁹ *Ibid*, para. 15.

¹⁰⁰ See extracts in confidential annex A.

¹⁰¹ See, e.g., ICC-01/09-01/11-451-AnxA.

¹⁰² See, e.g., the testimony of the expert witness P-0464.

¹⁰³ Witnesses have testified to violence in Nairobi, Kisumu and other locations not charged.

¹⁰⁴ The statements were exhibited as follows: (i) the statement of [REDACTED]; (ii) the statement of [REDACTED]; and (iii) the statement of [REDACTED].

¹⁰⁵ [REDACTED].

¹⁰⁶ See extracts in confidential annex A.

34. Finally, fairness dictates that the Defence be permitted to cross-examine witnesses who: (i) give prejudicial testimony concerning matters central to the charges such as “*madoadoa*” and the involvement of authority figures in the violence;¹⁰⁷ or (ii) are linked to and mentioned in the testimony of Prosecution witnesses who have already testified. In this latter respect, the Defence observes that [REDACTED] was referred to during the testimony of [REDACTED].¹⁰⁸ This testimony concerned the [REDACTED]. As explored during the cross-examination of [REDACTED], his testimony to the Trial Chamber that [REDACTED]¹⁰⁹ is not supported by [REDACTED].¹¹⁰ The [REDACTED] was exhibited in this case.¹¹¹ The Defence submits that the foregoing demonstrates the clear forensic interest it has in cross-examining [REDACTED] and it would be prejudicial for this witness’ testimony to be accepted into evidence on paper.

III. Classification

35. This response is filed confidentially pursuant to Regulation 23*bis*(2) of the Regulations of the Court. A public redacted version will be filed in due course.

IV. Requested Relief

36. For the reasons set out above, the Defence submits that the Application should be dismissed.

¹⁰⁷ *Ibid.*

¹⁰⁸ [REDACTED].

¹⁰⁹ [REDACTED].

¹¹⁰ [REDACTED].

¹¹¹ [REDACTED].

Respectfully submitted,



Karim A.A. Khan QC

Lead Counsel for Mr. William Samoei Ruto

Dated this 25th Day of November 2014
At The Hague, Netherlands