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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 redacted version

Second Corrected version of "Sang Defence response to the Corrected Version of the 'Prosecution's Application for Admission of Documentary Evidence Related to the Testimony of Witness P-0013'", 19 November 2014

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. On 28 October 2014, the Office of the Prosecutor (“Prosecution”) applied for 12 items referred to by witness P-0013 during his testimony to be admitted into evidence (“Application”).¹ The Prosecution seeks to tender these items for the truth of their contents, except insofar as they relate to the acts and conduct of the accused.² In the Application, the Prosecution submits that Rule 68 does not apply to the various transcripts, or extracts of testimony, for which admission is sought. Rather, the application is based on Articles 64(9)(a) and 69(4).³
2. The Defence for Mr. Joshua arap Sang (“Defence”) opposes the Application on the basis that all of the documents amount to, or include, testimony and thus their admissibility falls to be determined under Rule 68, and the criteria for admissibility pursuant to that Rule have not been satisfied. Alternatively, if Rule 68 does not apply, the Defence submits they should nevertheless be excluded on the basis their probative value is outweighed by their potential prejudicial effect.
3. This response is filed as confidential, given the Application was so filed.

II. APPLICABLE LAW

General Admissibility

4. Trial Chamber V(A) (“Chamber”) in its “Decision on the Prosecution’s Request for Admission of Documentary Evidence” (“Decision on the ‘bar table’”) set out the principles to be applied in determining admissibility of documentary evidence.⁴
5. Article 69(4) provides “primary guidance” on the admissibility of evidence.⁵ Relevant evidence is evidence that relates to a material fact or issue and is probative of that fact or issue.⁶ The fact the evidence falls outside the geographical and temporal scope of the charges does not necessarily render it

¹ ICC-01/09-01/11-1619-Conf-Corr.

² ICC-01/09-01/11-1619-Conf-Corr, paras 2 and 19.

³ ICC-01/09-01/11-1619-Conf-Corr, paras 2 and 6-13.

⁴ ICC-01/09-01/11-1353.

⁵ ICC-01/09-01/11-1353, para 14.

⁶ ICC-01/09-01/11-1353, para 15.

irrelevant.⁷ Aside from its materiality, evidence will be assessed to consider the *prima facie* reliability of the item, including its authenticity.⁸

6. Relevant, probative evidence may nevertheless not be admitted on the basis of prejudice to the fairness of the trial, including the rights of the accused, or the fair evaluation of testimony or other evidence. In order to determine prejudice, it is necessary to assess the identified prejudice against the probative value of the item. There is no exhaustive list of the circumstances in which prejudice may be found to exist; instead, it is a fact specific enquiry.⁹
7. In exercising its discretion to consider and admit evidence, “the Chamber has an overarching obligation under Article 64(2) of the Statute to ensure that the trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.”¹⁰

Rule 68 and “Testimony”

8. The Appeals Chamber in *Bemba* recalled the importance of the orality of proceedings, as provided for in Article 69(2).¹¹ It confirmed that Rule 68 provides an exception to this norm, but one “subject to strict conditions”, and provided guidance on admissibility under that regime.¹² It should be noted that while the Appeals Chamber was considering the admissibility of prior statements of Prosecution witnesses, they did not specifically exclude the applicability of Rule 68 to non-Prosecution witnesses.
9. In its Decision on the ‘bar table’, this Chamber noted the policy considerations underpinning the Rule 68 regime.¹³ Further in that decision, the Chamber declined to admit four documents on the basis they were testimonial in nature.¹⁴ In relation to CIPEV transcripts, the Chamber held “this material is testimonial in nature and reiterates that a ‘bar table’ motion should not be used in manner

⁷ ICC-01/09-01/11-1353, para 28.

⁸ ICC-01/09-01/11-1353, para 15.

⁹ ICC-01/09-01/11-1353, para 16.

¹⁰ ICC-01/09-01/11-1353, para 14.

¹¹ ICC-01/05-01/08-1386, para 75.

¹² ICC-01/05-01/08-1386, paras 77-78.

¹³ ICC-01/09-01/11-1353, para 25.

¹⁴ ICC-01/09-01/11-1353, paras 83, 85-88.

which would be duplicative of the Rule 68 of the Rules procedure [sic].”¹⁵ Accordingly, the Chamber has previously regarded transcripts of oral evidence given to CIPEV as testimonial in nature, and the Defence submits there is nothing compelling in the Prosecution’s Application to warrant a departure from this position. Nor could P-0013’s testimony cure the testimonial aspect of this material.

10. The Prosecution relies on other Trial Chambers’ decisions in *Katanga*¹⁶ and *Bemba*¹⁷ in support of its interpretation of Rule 68.¹⁸ This Chamber is not bound by the decisions of other Trial Chambers, but regardless the Defence submits these cases can be distinguished, or indeed support the Defence’s position that Rule 68 applies.
11. Trial Chamber II in *Katanga* interpreted “testimony” relatively narrowly, but nonetheless recognised that too narrow an interpretation would undermine the right of an accused to examine witnesses, “and deprive rule 68 of any meaning”.¹⁹ Recognising the importance of a case-by-case assessment,²⁰ Trial Chamber II adopted criteria to serve only as guidance, with no intention to create fixed categories as to when out-of-court statements can qualify as testimony under Rule 68.²¹ The two key criteria were the following:²²
 - i. Who collected the statement?: A statement provided to a person or body “authorised to collect evidence for use in judicial proceedings”, or acting at the behest of such a person. Likewise, a statement given to “representatives of an intergovernmental organisation with a specific fact-finding mandate” may amount to testimony.
 - ii. Purpose statement was collected for: A statement collected by a person or entity of the type referred to above, must be a statement that the deponent/witness gave with the understanding it might be used in legal proceedings. It is important that it be formalised and the

¹⁵ ICC-01/09-01/11-1353, paras 86 and 88.

¹⁶ ICC-01/04-01/07-2635.

¹⁷ ICC-01/05-01/08-2299-Red.

¹⁸ ICC-01/09-01/11-1619-Conf-Corr, para 8.

¹⁹ ICC-01/04-01/07-2635, para. 44.

²⁰ ICC-01/04-01/07-2635, paras 45-46.

²¹ ICC-01/04-01/07-2635, para. 46.

²² ICC-01/04-01/07-2635, para 47-49, emphasis added.

deponent/witness asserted that it is truthful and based on personal knowledge.

12. This Chamber has indicated it gives a broader interpretation to “testimony” and, absent a clear definition from the Appeals Chamber, there is no compelling reason to depart from its own analysis. In any event, the *Katanga* decision does not support the Prosecution’s submission that Rule 68 applies to Prosecution witnesses only. While Trial Chamber II declined to qualify “analytical reports based on the personal stories of several individuals” as testimony, this was because “the allegations contained in the report are not those of the individual persons but the conclusions drawn from their statements by the author of the report”,²³ and not because the individuals were or were not Prosecution witnesses. It explicitly stated that statements from purely domestic proceedings can be qualified as testimony for the purposes of Article 67(1)(e) and Rule 68.²⁴
13. This definition is sufficiently broad to qualify as testimony under Rule 68 any statement made by persons before CIPEV (see documents 4, 5, 7, 9, 10, 11, 12 below), including non-Prosecution witnesses. Given that CIPEV was collecting evidence with the aim to identify potential perpetrators, individuals appearing before it must have known that their statements might be used in legal proceedings. In addition, the *modus operandi* of the CIPEV with respect to hearings was that it would take the form of a quasi-court, requiring witnesses to swear an oath.²⁵ Accordingly, such statements would clearly qualify as testimony, even under the more restrictive *Katanga* interpretation. Any narrower interpretation would allow the Prosecutor to introduce paper evidence of individuals who testified before another court or body without having to call these individuals at trial. This cannot have been Trial Chamber II’s intention.
14. The Defence submits that Trial Chamber III’s decision in *Bemba* can largely be distinguished. The Prosecution submits that the Trial Chamber in *Bemba* 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

²³ ICC-01/04-01/07-2635, para 48.

²⁴ ICC-01/04-01/07-2635, para 47.

²⁵ ICC-01/09-01/11-1619-Conf-Corr, para 15(i).

an interview and various excerpts of testimony provided by other persons.”²⁶ In the Defence’s view, this categorisation of the evidence admitted is not so plain. Rather, there is no specific reference in the decision to the dossier and documentation including any “extracts of testimony” as the Prosecution advances.²⁷ In any event, the Defence did not raise any argument as to prejudice.²⁸ Moreover, the interview transcript the Prosecution refers to was an interview conducted by a Radio station, RFI,²⁹ not a legal authority or body acting pursuant to a legislative mandate as CIPEV did.

15. The Prosecution further relies on pre-confirmation decisions considering statements obtained by non-Prosecution witnesses as “documentary evidence”.³⁰ However, the scope of these decisions is limited to the confirmation hearing and does not extend to trial.³¹ As confirmed by the *Bemba* Appeals Chamber, “the rules regarding orality in the pre-trial phase are more relaxed than at trial.”³²

III. SUBMISSIONS

16. The Defence makes one preliminary observation. In its Application, the Prosecution states it does not seek to tender these documents in so far as they relate to the acts and conduct of the accused, and accordingly that it “... 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 doing so, the Prosecution submits this renders any prejudicial effect minimal.³³
17. However, specific references to Mr. Sang’s alleged acts and/or conduct have not been excluded from four documents,³⁴ with an indirect reference not removed in one further document.³⁵ The Prosecution’s approach to ‘carving out’ material relating to the accused is either inconsistent or unsuccessful. By way of an

²⁶ ICC-01/09-01/11-1619-Conf-Corr, para 8.

²⁷ ICC-01/05-01/08-2299-Red, paras 57-62.

²⁸ ICC-01/05-01/08-2299-Red, para 62.

²⁹ ICC-01/05-01/08-2299-Red, paras 100-101.

³⁰ ICC-01/09-01/11-1619-Conf-Corr, para 10, relying on: ICC-01/09-02/11-382-Red, paras 77-78 and ICC-01/09-02/11-406, paras 40-41.

³¹ ICC-01/05-01/08-1386, para 81.

³² ICC-01/05-01/08-1386, para 80.

³³ ICC-01/09-01/11-1619-Conf-Corr, para 19.

³⁴ KEN-OTP-0001-0002, p 0081; KEN-OTP-0001-1288, p 1418; KEN-OTP-0010-0034 (entire text); KEN-OTP-0006-0493, pp 0555-0556.

³⁵ KEN-OTP-0001-0364, pp 0675-0676.

example of inconsistency, in one document, a reference to the first accused has been deliberately extracted, while a reference to Mr. Sang's acts remains.³⁶ In the event these five documents are admitted, the Defence submits the identified extracts should be redacted.

1. KEN-OTP-0001-0364:

18. The Prosecution seeks to admit in excess of 200 pages of this 500 plus page Report.³⁷

(a) "Background" evidence

19. The Defence does not contest authenticity. In terms of relevance, the Defence submits that sections of the Report for which admission is sought concern background information to the post-election violence: historical context and root causes³⁸ and violence in areas falling outside the scope of the charges.³⁹
20. The Defence recognises that such background can be relevant.⁴⁰ However, it questions the relevance and thus need for such a significant body of background information to be admitted at this stage, in circumstances where Mr. Maupeu has directly testified to the background to the post-election violence, and documents have already been admitted through the Decision on the 'bar table' that provide such context.⁴¹ The Defence recalls the Presiding Judge raised these concerns during P-0247's testimony.⁴² The Chamber in its Decision on the 'bar table' noted it retains the power to exclude evidence for reasons that included expeditiousness.⁴³ Therefore, even if this background information is to a degree relevant and probative, it is submitted it should be excluded on the basis of expeditiousness – introducing this material increases the amount of information to be considered, and is not necessary in order to determine the truth.

³⁶ ICC-01/09-01/11-1619-Conf-Corr, AnxA, p 5: KEN-OTP-0006-0493, see pp 0555-0556 for allegations against Mr. Sang, and note the Prosecution's proposed redaction of allegations against Mr. Ruto that appear at pp 0568-0570.

³⁷ ICC-01/09-01/11-1619-Conf-Corr, AnxA, p 1.

³⁸ KEN-OTP-0001-0364, pp 0394-0410, 0412-0414.

³⁹ KEN-OTP-0001-0364, pp 0452-0471 and 0506-0535.

⁴⁰ ICC-01/09-01/11-1353, para 28.

⁴¹ For example, KEN-D09-0001-0092, ICC-01/09-01/11-1353, paras 38-39; and KEN-D09-0003-0001 and KEN-D09-0003-0643, ICC-01/09-01/11-1353, paras 40-41.

⁴² ICC-01/09-01/11-T-116-CONF-ENG, p 60, lines 8-14.

⁴³ ICC-01/09-01/11-1353, para 16.

(b) Relevant evidence

21. The Defence recognises that CIPEV's findings about PEV in the Rift Valley, including statistics regarding crime-base allegations are relevant.⁴⁴ In addition, the Defence acknowledges that CIPEV's broader findings about PEV, including patterns of violence and the role of the media, are also relevant.⁴⁵ However, the Defence submits that the probative value of the Report is limited. The Defence incorporates its submissions made below in relation to KEN-OTP-0001-1288, as they cover submissions relating to the quality and nature of sources relied on by CIPEV. Further, CIPEV's findings in relation to the North Rift Valley are based in part on anonymous testimony, some of which may be from Prosecution witnesses. Given this risk, it would be unfair for such evidence to be used for purposes of corroboration. In addition, the Defence submits the probative value of the Report's findings are limited by the fact CIPEV operated under time constraints and spent little time investigating and interviewing witnesses⁴⁶
22. The Defence submits that the Report contains a variety of findings and excerpts of testimony that are potentially prejudicial to the accused. In particular, suggestions that the violence in the Rift Valley was planned and organised by Kalenjins.⁴⁷ In relation to Mr. Sang, there are various references to Kass FM being linked to incitement,⁴⁸ along with direct reference to the memo on the Lene Emet programme,⁴⁹ KEN-OTP-0010-0034, dealt with below.

2. KEN-OTP-0001-1288/MFI-T-OTP-00092:

23. The Prosecution applies to admit sections of this Report that concern the methodology used by CIPEV's Investigation Section,⁵⁰ general facts and causes of post-election violence⁵¹ and its findings in relation to Eldoret, including names of people interviewed and a list of alleged perpetrators.⁵²

⁴⁴ For example, KEN-OTP-0001-0364, pp 0411-0412, 0682.

⁴⁵ For example, KEN-OTP-0001-0364, pp 0645-0668, 0669-0677, 0719-0726.

⁴⁶ ICC-01/09-01/11-T-125-CONF-ENG, p 33, lines 17-21. See also KEN-OTP-0001-0364, p 0383 and 0385.

⁴⁷ KEN-OTP-0001-0364, pp 0440-0447.

⁴⁸ KEN-OTP-0001-0364, pp 0443, 0669, 0672-0675.

⁴⁹ KEN-OTP-0001-0364, pp 0675-0676.

⁵⁰ ICC-01/09-01/11-1619-Conf-Corr, AnxA, p 1: KEN-OTP-0001-1288, pp 1295-1300

⁵¹ ICC-01/09-01/11-1619-Conf-Corr, AnxA, p 1: KEN-OTP-0001-1288, pp 1301-1302.

⁵² ICC-01/09-01/11-1619-Conf-Corr, AnxA, p 1: KEN-OTP-0001-1288, pp 1397-1423.

24. The Defence accepts that the parts of the document concerning crime-base allegations in the geographical scope of the charges are relevant,⁵³ as well as overall findings concerning this area.⁵⁴ It further accepts that the Chamber has previously accepted the *prima facie* relevance of similar background material,⁵⁵ which may cover sections of this report concerning causes of violence.⁵⁶ The Defence does not consider Police brutality or misconduct to be similarly relevant.
25. The Defence does not dispute the authenticity of this document. However, it is submitted the Report's probative value is fundamentally undermined by the sources on which the Investigation Section relied and related methodology. In particular, the Investigation Section states it relied on unnamed non-governmental reports and contacts,⁵⁷ which is material of the type the Chamber has declined to admit in its Decision on the 'bar table'.⁵⁸ In addition, specific reliance is made on an OHCHR Report⁵⁹ that the Chamber excluded on the basis its sources and methodology was unclear and could amount to an "abdication of the fact-finding functions of the Chamber."⁶⁰ Finally, unknown media sources are referred to, which the Investigation Section itself recognised the contents thereof had not necessarily been "tested or verified" by them.⁶¹ To the extent that providing the transcripts of the actual testimony of the witnesses referred to in this Report remedies some concerns over source material, the Defence observes that the full testimony of only five of 28 witnesses referred to this Report have been submitted by the Prosecution for potential admission.⁶² In addition, the probative value of the Report's summary of the testimony of the remaining 23 witnesses is limited by the insufficiency of details provided, particularly around dates, locations and sources.⁶³ For all these reasons, the Defence submits the document's probative value is low.

⁵³ KEN-OTP-0001-1288, pp 1397-1407 and pp 1413-1418.

⁵⁴ KEN-OTP-0001-1288, pp 1422-1423.

⁵⁵ ICC-01/09-01/11-1353, paras 28 and 42.

⁵⁶ KEN-OTP-0001-1288, pp 1299-1302.

⁵⁷ KEN-OTP-0001-1288, pp 1296-1297.

⁵⁸ ICC-01/09-01/11-1353, paras 43, 45-46.

⁵⁹ KEN-OTP-0001-1288, p 1298.

⁶⁰ ICC-01/09-01/11-1353, para 44.

⁶¹ KEN-OTP-0001-1288, p 1298.

⁶² Professor Mengech - KEN-OTP-0005-7542; [REDACTED] – KEN-OTP-0006-0493.

⁶³ For example, see [REDACTED].

26. During the testimony of P-0247, the Chamber declined to admit this document on the basis its prejudicial effect outweighed the limited purpose for which admission was sought.⁶⁴ At that time, the Prosecution sought admission of the document for “background purposes” only, and argued that, “therefore the prejudice to the accused and the Defence is certainly lower than if we were to intend and seek to rely upon this document for the charges against the accused in this case.”⁶⁵ The Prosecution now seeks to rely on this Report for the truth of its contents, which in the Prosecution’s own view thereby increases the prejudice associated with its admission. The Defence agrees.
27. Significant prejudice is caused by virtue of the fact the testimony contained in this document contains crime-base allegations, suggestions of planning and naming of ‘network’ members. The Defence must in turn deal with this material as it is directly relevant to the charges, but is unable to do so through direct confrontation, which oral evidence would ordinarily permit.
28. In relation to Mr. Sang, the Report cites KNCHR material (particularly KEN-OTP-0001-0002) in holding that interviewees stated he called on men to come out to the road and queried why they were at home.⁶⁶ This document also includes allegations that Kass FM spread hate speech and that on-air discussions about rigging sparked tension.⁶⁷ While the Prosecution does not seek to rely on the document in so far as it relates to acts and conduct of the accused, the Defence maintains that the inclusion of this section is nevertheless prejudicial. The Chamber is exposed to a serious allegation of incitement against the accused and Kass FM, and given the source is unknown, Mr. Sang cannot properly challenge such allegations to remedy any incidental prejudice caused.

3. KEN-OTP-0005-9365:

29. The Defence objects to the admission of this Report on IDPs, primarily on the basis it lacks probative value.

⁶⁴ ICC-01/09-01/11-T-116-CONF-ENG, p 61, lines 1-15.

⁶⁵ ICC-01/09-01/11-T-116-CONF-ENG, p 58, lines 13-16.

⁶⁶ KEN-OTP-0001-1288, p 1418.

⁶⁷ KEN-OTP-0001-1288, p 1418.

30. The document is dated 8 July 2008 and provides figures as to the total number of IDPs returned home or in camps or integrated. Given the allegations that the ‘network’ removed or forcibly transferred members of the civilian population, the Defence recognises this document is relevant to the extent it indicates displacement within the geographical scope of the charges. However, its probative value is significantly undermined by P-0013’s testimony as to the reliability of this document. P-0013 gave evidence that Francis Kimemia produced this document to CIPEV.⁶⁸ However, P-0013 considered the Report to be flawed on the basis that the figures in the Report were too low and underreported the number of people displaced – this issue of underreporting “applied across the board” of the document.⁶⁹ While the Prosecution seeks to admit the document in support of minimum statistics regarding the number of IDPs and geographical distribution in light of P-0013’s testimony,⁷⁰ the Defence maintains it lacks probative value even in respect of this limited purpose. In addition to P-0013’s concerns, the Defence notes that the document does not indicate the full date range covered, simply indicating its figures were as at 8 July 2008,⁷¹ and the methodology used and sources are unknown. The Defence submits that accordingly, the document lacks the minimum indicia of reliability, or probative value, to be admitted.

4 and 5. KEN-OTP-0005-5398, KEN-OTP-0005-3079:

31. The Prosecution seeks to admit Ms. Jaoko’s testimony before CIPEV, primarily for the purposes of authenticating the KNCHR Report.⁷²
32. Even if Rule 68 is determined to not apply, the Defence submits that while the transcripts are authentic, its relevance can be disputed on the same grounds raised above in relation to background information and the CIPEV Final Report. Moreover, the probative value of Ms. Jaoko’s testimony vis-à-vis the reliability of the KNCHR Report is limited in that she does not cast any greater light on its sources or their accuracy. Even if considered relevant, the Defence submits these

⁶⁸ ICC-01/09-01/11-T-124-ENG, p 70, lines 6-19.

⁶⁹ ICC-01/09-01/11-T-124-ENG, p 70, line 25 – p 71, line 9 and p 71, lines 21-23.

⁷⁰ ICC-01/09-01/11-1619-Conf-Corr, para 15iii.

⁷¹ KEN-OTP-0005-9365/MFI-T-OTP-00096, p 9365.

⁷² ICC-01/09-01/11-1619-Conf-Corr, para 15iv.

transcripts should be excluded given the various opinions and summaries of the KNCHR Report that Ms. Jaoko provides, especially in respect of ultimate issues.

6. KEN-OTP-0001-0002:

33. The Prosecution seeks to admit just over 85 pages of the KNCHR Report,⁷³ around one third of the entirety of that document.⁷⁴ Specifically, it seeks to admit sections covering KNCHR's mandate and objectives and findings;⁷⁵ methodology used, root causes of violence and chronology of events⁷⁶; findings in relation to the South Rift and North Rift regions;⁷⁷ and findings on Central Province and national trends and patterns of violence across Kenya.⁷⁸ The Defence opposes its admission.
34. As to the document's relevance, the Defence accepts the Chamber has previously determined it to be *prima facie* relevant.⁷⁹ While recognising the Chamber's indication that relevance is not necessarily confined to the geographic and temporal scope of the charges,⁸⁰ the Defence submits that the prevalence of information falling outside the temporal and geographic scope of the charges must tend against the degree of relevance assigned to this document. The Defence notes that OTP seeks to admit, for example, KNCHR's findings in relation to Central Province,⁸¹ which are wholly removed from this case. In addition, OTP has identified for admission pages concerning Kenya's political history and root causes of violence.⁸² While this information may provide background, the Defence questions its relevance in a context where sufficient background information is already available (as submitted above), and given the degree of temporal and geographic separation of some of this content to the charges.
35. Turning to probative value, the Defence accepts the authenticity of this Report. However, it is submitted its probative value is low. As determined by the Chamber as part of its Decision on the 'bar table', the Report "does not reveal the

⁷³ ICC-01/09-01/11-1619-Conf-Corr, AnxA, p 2.

⁷⁴ KEN-OTP-0001-0002 is 241 pages long.

⁷⁵ ICC-01/09-01/11-1619-Conf-Corr, AnxA, p 2: KEN-OTP-0001-0002, pp 0002-0016.

⁷⁶ ICC-01/09-01/11-1619-Conf-Corr, AnxA, p 2: KEN-OTP-0001-0002, pp 0018-0043.

⁷⁷ ICC-01/09-01/11-1619-Conf-Corr, AnxA, p 2: KEN-OTP-0001-0002, pp 0058-0084.

⁷⁸ ICC-01/09-01/11-1619-Conf-Corr, AnxA, p 2: KEN-OTP-0001-0002, pp 0130-0147.

⁷⁹ ICC-01/09-01/11-1353, para 42.

⁸⁰ ICC-01/09-01/11-1353, para 28.

⁸¹ KEN-OTP-0001-0002, pp 0130-0136.

⁸² KEN-OTP-0001-0002, pp 0026-0034.

identity of persons interviewed in preparation of the report and a significant number of the report's findings emanate from other sources, such as newspapers.”⁸³ The fact that CIPEV had access to KNCHR's records and was in a position to assess its conclusions does not as the Prosecution suggests necessarily increase its reliability and probative value.⁸⁴ It remains that the Court itself cannot access and review those sources.

36. The Chamber further indicated in its Decision on the ‘bar table’ that it desired the Report to be contextualised by witness testimony as to its authenticity and content.⁸⁵ Following P-0013's testimony, and even on the basis of Florence Jaoko's transcripts if admitted, the status quo has not shifted in favour of admission. P-0013 testified that Ms. Jaoko explained KNCHR's methodology and the manner in which this Report was prepared, but he did not give details as to what that entailed.⁸⁶ Moreover, even if the Rule 68 hurdle is overcome and Ms. Jaoko's evidence is admitted, it does not remedy the lack of any clear reference to sources within the Report, as she did not identify said sources in her testimony.⁸⁷
37. The Defence submits that the low probative value of this document is well outweighed by its prejudicial effect. The Prosecution proposes to admit for the truth of its content sections of the Report that include allegations against ‘network members’ Franklin Bett,⁸⁸ Lucas Sang⁸⁹ and Jackson Kibor⁹⁰ and are suggestive of planning or incitement on their parts, along with an alleged meeting to discuss evictions of Kikuyus.⁹¹ Scattered throughout the Report are conclusions that the violence in the Rift Valley was premeditated and instigated by Kalenjin politicians and community leaders.⁹² The Prosecution further seeks to admit a section of the Report that includes KNCHR's “Key Findings” that crimes against humanity occurred in Kenya and even certain elements of genocide were

⁸³ ICC-01/09-01/11-1353, para 42.

⁸⁴ ICC-01/09-01/11-1619-Conf-Corr, para 15v.

⁸⁵ ICC-01/09-01/11-1353, para 42.

⁸⁶ ICC-01/09-01/11-T-125-CONF-ENG, p 18.

⁸⁷ KEN-OTP-0005-5398 and KEN-OTP-0005-3079.

⁸⁸ KEN-OTP-0001-0002, pp 0065-0066.

⁸⁹ KEN-OTP-0001-0002, p 0073.

⁹⁰ KEN-OTP-0001-0002, pp 0078-0079.

⁹¹ KEN-OTP-0001-0002, p 0077.

⁹² KEN-OTP-0001-0002, pp 0013, 0063, 0065-0067, 0077-0080.

present.⁹³ The Defence submits that all of these findings clearly go to the ultimate issues in the case, and that reliance on the Report could amount to “an abdication of the fact-finding functions of the Chamber”.⁹⁴

38. Particularly troubling is that the Prosecution has included allegations of incitement against Mr. Sang made by an unknown witness, specifically that he told young men to come onto the road as the war had begun and they should not stay at home.⁹⁵ This allegation appears in near identical form in the CIPEV Investigation Section’s Final Report, KEN-OTP-0001-1288, referred to above. The Defence repeats its earlier submissions raised in objection to this extract.

7. KEN-OTP-0005-2817:

39. Mr. Ndemo’s testimony concerned “the media performance, contribution and input to the post-election crisis.”⁹⁶ His evidence primarily consisted of him reading out a statement to the Commissioners that was later exhibited,⁹⁷ and answering questions.
40. The Defence does not dispute the relevance or authenticity of this document. However, it is submitted its probative value is limited. In relation to Mr. Ndemo’s testimony as to the content of broadcasts before and during the post-election violence and their influence,⁹⁸ the underlying source material appears to not have been disclosed to CIPEV in its entirety,⁹⁹ despite manifold assurances from Mr. Ndemo this would occur.¹⁰⁰ In any event, it is certainly not presently before the Chamber for consideration and authentication of the allegations and findings made by Mr. Ndemo as to the role of the media. Likewise, Mr. Ndemo does not expressly name and identify clear sources of complaints in his testimony. Aside from a lack of information as to sources, as testified to by Mr. Ndemo there are

⁹³ KEN-OTP-0001-0002, p 0015. In relation to Ms. Jaoko’s transcript, KEN-OTP-0005-5398, the Prosecution excluded from its application an extract in that transcript at p 5421 where she referred to KNCHR’s findings that international crimes occurred, see ICC-01/09-01/11-1619-Conf-Corr, AnxA, p 2.

⁹⁴ ICC-01/09-01/11-1353, para 43.

⁹⁵ KEN-OTP-0001-0002, p 0081.

⁹⁶ KEN-OTP-0005-2817, p 2818.

⁹⁷ KEN-OTP-0005-2817, p 2825.

⁹⁸ See, for example, KEN-OTP-0005-2817, pp 2819-2820, 2835-2836.

⁹⁹ P-0013 testified that CIPEV was “unable to secure evidence that we thought would have been available” as per ICC-01/09-01/11-T-125-CONF-ENG, p 11, lines 13-16, and that information relating to just two sources of complaints, along with the memo referred to immediately below, was received by CIPEV from the Permanent Secretary as at p 98, lines 14-23.

¹⁰⁰ KEN-OTP-0005-2817, pp 2822, 2828, 2852-2854.

inherent difficulties in interpreting and properly understanding vernacular broadcasts,¹⁰¹ and the Defence submits this must inform the probative weight attached to the opinion evidence he provides as to their content.

41. The Defence submits the low probative value of this evidence is outweighed by its potential prejudicial effect. Mr. Ndemo testified that the media, particularly vernacular and FM radio stations, contributed to post-election violence in 2007/2008 through hate speech and improper reporting,¹⁰² and even contributed to the risk of genocide occurring in Kenya.¹⁰³ The Defence submits such conclusions give rise to considerable prejudice to Mr. Sang, as they suggest a propensity on the part of vernacular stations to promote ethnic agendas and incite violence, and suggest a causal link between the media and resulting violence. In the Defence's view, these are matters that are properly to be determined solely by the Chamber. Moreover, the Defence does not know the political persuasion of Mr. Ndemo and cannot question him as to how this may have impacted his testimony to CIPEV.

8. KEN-OTP-0010-0034:

42. The Prosecution seeks to admit a memo concerning the monitoring of a Kass FM show on 18 February 2008, in which it is alleged that Mr. Sang discussed potential investigations into post-election violence and encouraged locals to be careful about what they said if questioned.
43. Whilst the radio programme the memo concerns is dated as 18 February 2008 and thus falls outside the scope of the charges, the Defence recognises the memo can be considered *prima facie* relevant. However, it must be acknowledged that the Prosecution purports to not rely on this document in so far as it is relevant to the acts and conduct of the accused. With this in mind, and given the nature of the content of this document, the Defence questions how it could be relevant to anything other than the alleged acts and conduct of Mr. Sang, and thus queries what relevance it has to any other issue or fact in dispute. The Prosecution submits its relevance is linked to explaining the provenance of audio EVD-T-OTP-

¹⁰¹ KEN-OTP-0005-2817, p 2822.

¹⁰² KEN-OTP-0005-2817, pp 2820, 2825, 2862, 2862-2863.

¹⁰³ KEN-OTP-0005-2817, pp 2821 and 2853.

00020 and the fact a report was generated and forwarded to the Permanent Secretary.¹⁰⁴ The Defence submits this does not render the document particularly relevant, or at least, as submitted below, it does not elevate its probative value above the clear potential prejudicial effect from its admission. In terms of the authenticity of the document, the Defence notes that P-0013 could not be certain this was the document produced to CIPEV by Mr. Ndemo, but did recognise the document and thought it had been provided by Mr. Ndemo's office.¹⁰⁵

44. Even if this document is found to be relevant and authentic, the Defence submits the nature of the memo renders it of little probative value. This document is founded on mere analysis and opinion, factors that the Chamber held to indicate limited probative value in its Decision on the 'bar table'.¹⁰⁶
45. Turning to the document's prejudicial effect, the Defence submits the memo's limited probative value is far outweighed by its overtly potential prejudicial effect. The memo summarises the Lene Emet show broadcasted on 18 February 2008, including providing direct quotes of what Mr. Sang is alleged to have said during that programme. More importantly, the memo contains the monitor's opinion on issues such as Kass FM acting in an obstructionist manner in relation to post-election violence inquiries and Mr. Sang's professional conduct.¹⁰⁷ The Defence submits that the inevitable effect of this content, and thus the potential prejudice, is to create a negative impression of Mr. Sang's conduct as a journalist, particularly as an (opposition) government monitor has prepared it. Given the audio underpinning this memo is itself already in evidence, the Defence submits that it should form the primary basis for any interpretation of what was said or implied by Mr. Sang on 18 February 2008 and any related impression of his conduct.

9. KEN-OTP-0005-7542:

46. The Defence repeats its earlier submissions with regard to relevance and expeditiousness. Various medical reports have already been admitted into

¹⁰⁴ ICC-01/09-01/11-1619-Conf-Corr, AnxA, p 3.

¹⁰⁵ ICC-01/09-01/11-T-125-CONF-ENG, pp 11-12.

¹⁰⁶ ICC-01/09-01/11-1353, para 53.

¹⁰⁷ KEN-OTP-0010-0034, p 0037.

evidence through the Decision on the 'bar table',¹⁰⁸ and thus the Defence questions the need for further such evidence to enter the record. In terms of the probative value of this evidence, the Defence submits its reliability is limited in that the testimony does not make clear the source and methods used to acquire vital figures. In relation to the testimony of Mr. Kinyua, the Defence relies on and repeats its specific submissions below in respect of his written statement as to the relevance and probative value of this testimony.

10. KEN-OTP-0006-1045:

47. The Defence accepts the document's authenticity and to an extent relevance. It is noted that certain specific issues Mr. Kinyua covers in his statement, such as the Brookside Dairy incident¹⁰⁹ or Kiambaa Church,¹¹⁰ have already been covered by witnesses of fact,¹¹¹ and the Defence thus questions the relevance or need for this testimony in that regard. However, even if deemed relevant, the nature of Mr. Kinyua's evidence is such that it is based heavily on unsupported facts and figures. He provides details as to incidents of violence in Uasin Gishu and figures as to deaths and number of IDPs,¹¹² but the underlying data and sources of this information is unknown. In these circumstances, the Defence submits the document lacks sufficient probative value to warrant admission, regardless of any prejudice caused. The Defence further submits this statement is duplicative of the testimony of Mr. Kinyua included in KEN-OTP-0005-7542 above.

11. KEN-OTP-0005-7770:

48. This transcript relates to the testimony of three different District Commissioners. The Defence does not dispute the authenticity of the document. The Defence also recognises it is in the majority relevant. However, the Defence submits the same objections raised in relation to the testimony of Mr. Kinyua above apply equally here. The transcript is not sufficiently reliable to be probative of facts and issues in dispute, given clear sources are not indicated and the methodology used to

¹⁰⁸ ICC-01/09-01/11-1353, paras 67-74.

¹⁰⁹ KEN-OTP-0006-1045, pp 1047-1048.

¹¹⁰ KEN-OTP-0006-1045, p 1051.

¹¹¹ [REDACTED].

¹¹² KEN-OTP-0006-1045, p 1049, 1051.

collect figures (particularly around IDPs, deaths and injuries) and prepare reports is unclear.

49. In terms of prejudice, the Defence submits prejudice particularly accrues from the fact the accused is deprived of an opportunity to challenge opinion evidence on important issues such as the motivations for violence and associated Kalenjin grievances,¹¹³ and hearsay allegations that Kass FM incited violence.¹¹⁴

12. KEN-OTP-0006-0493:

50. The Prosecution seeks to admit in one document the testimony of five Rift Valley based witnesses.¹¹⁵
51. The Defence does not challenge the authenticity of the document. The Defence notes that the bulk of testimony included in this document covers purely crime-base allegations and is thus relevant to that extent. However, once again the Defence questions whether the admission of such material is necessary and relevant in circumstances where a variety of witnesses of fact have been called to testify to the crime-base aspects of the charges. Moreover, it is noted that certain allegations of violence fall outside the temporal scope of the charges. The Defence does not significantly contest the probative value of the majority of the testimony, other than that provided by [REDACTED] as to the number of IDPs, due to the lack of clear sources or methodology.¹¹⁶
52. In terms of prejudice, the Prosecution has left included in the transcript an allegation that “Kass FM was on the forefront of encouraging people to rise up” and this was specifically occurring during Mr. Sang’s show.¹¹⁷ In addition, this same witness testifies to listening to discussions about rigging on Kass FM on 26 December 2007, and that allegations of stuffed ballot boxes eventually resulted in a PNU campaigner’s home being torched.¹¹⁸ The Defence repeats its earlier submissions – it recognises that the Prosecution does not intend to rely on such allegations, but nevertheless submits significant prejudice is caused to Mr. Sang if

¹¹³ KEN-OTP-0005-7770, p 7881-7882.

¹¹⁴ KEN-OTP-0005-7770, p 7796 and 7837.

¹¹⁵ ICC-01/09-01/11-1619-Conf-Corr, AnxA, p 5.

¹¹⁶ KEN-OTP-0006-0493, pp 0571-0572.

¹¹⁷ KEN-OTP-0006-0493, p 0555.

¹¹⁸ KEN-OTP-0006-0493, p 0555-0556

this document is admitted and he is not afforded the opportunity to challenge directly through cross-examination the veracity of these allegations.

IV. RELIEF REQUESTED

The Defence respectfully requests that the Prosecution's Application be dismissed.



Joseph Kipchumba Kigen-Katwa
On behalf of Mr. Joshua arap Sang
Dated this 26th day November 2014
In The Hague, Netherlands