

**Cour
Pénale
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**International
Criminal
Court**

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Date: 30 June 2015

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 Annexes A and B

**Public redacted version of "Prosecution's Second Application for Admission of
Items from the Bar Table into Evidence"**

Source: Office of the Prosecutor

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

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Introduction

1. The Office of the Prosecutor ("Prosecution") seeks the admission of six items into evidence from the Bar Table,¹ under articles 64(9) and 69(2), (3) and (4) of the Rome Statute ("Statute"), rule 63(2) of the Rules and Procedure of Evidence ("Rules"), and the Decision on the Conduct of Trial Proceedings.² The Prosecution seeks to rely on these items for the truth of their content.
2. This application is accompanied by a table – Annex A - which provides a short description of the content of each document, averment of its authenticity, an indication of the reason for not tendering the document through a witness, an index of the most relevant portions of the document, as well as a description of its relevance and intended probative value. The documents are grouped under Publications, Intelligence Reports and Police Records, and Map.
3. The Defence³ views on the admission of items have been canvassed and are reflected in Annex A.⁴ The Defence consent to the admission of all items, except one.⁵ The Prosecution submits, however, that all six items meet the requirements for admission into evidence as established by the Trial Chamber ("Chamber").⁶

Confidentiality

4. Under regulation 23*bis* of the Regulations of the Court, the Prosecution requests that this filing and its Annexes be classified as "Confidential" since they include references to information received confidentially from [REDACTED]. The Prosecution will file a public redacted version simultaneously.

¹ All six items have been released through e-Court. For ease of reference, the item that is in dispute is appended as Annex B.

² ICC-01/09-01/11-847-Corr, para.27.

³ Ruto Defence and Sang Defence.

⁴ See Annex A.

⁵ See Annex B, KEN-OTP-0152-0223.

⁶ ICC-01/09-01/11-1353, para.15.

Submissions

5. This Chamber held in a similar application that “all *prima facie* relevant evidence is admissible, subject to the Chamber’s discretion to exclude” it, in appropriate circumstances;⁷ that relevance is established where the item relates to a material issue or fact in the case and possesses sufficient indicia of reliability;⁸ and that the statutory framework on admission of evidence does not automatically exclude documentary evidence which goes to the acts and conduct of any accused.⁹
6. The Prosecution submits that the items in Annex A are relevant to the facts in issue in this case. Their admission will assist the Chamber in its fact-finding role as they provide, *inter alia*, relevant background information of the lead up to the election in 2007;¹⁰ patterns of violence and injuries in crime locations;¹¹ as well as the operation of the Orange Democratic Movement (“ODM”) and its supporters.¹² The items have the necessary indicia of reliability, as described in Annex A. Additionally, this information is corroborated by witness testimony¹³ and agreed facts.¹⁴
7. As reflected in Annex A, the Defence have agreed to the admission of all documents, except one (Item 5).¹⁵ The Prosecution submits that these concessions are well-made and that there are no obstacles to the admission of items 1-4 and 6.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ibid.*, para.24.

¹⁰ Annex A, p.2 (items 1 and 2), KEN-OTP-0045-0209 and KEN-OTP-0047-0348.

¹¹ Annex A, pp.3 - 5, KEN-D10-0001-0126 and KEN-D10-0001-0250.

¹² *Supra*, fn.10.

¹³ ICC-01/09-01/11-T-155-CONF-ENG, p.69 (lns.17-25) and ICC-01/09-01/11-T-100-CONF-ENG, p.12 (lns.4-7).

¹⁴ ICC-01/09-01/11-451-AnxA, ln.133.

¹⁵ Annex A, p.5 (item 5), KEN-OTP-0152-0223.

8. As regard Item 5, it was tendered by the Prosecution through its first Request for Admission of Documentary Evidence,¹⁶ but at that time the item was partially illegible, which caused the Chamber to deny its admission into evidence.¹⁷ This defect has now been cured as the Prosecution has obtained a legible version of the item [REDACTED].
9. The Prosecution submits that Item 5 should be admitted, notwithstanding the Defence objections¹⁸, as it satisfies the three-stage admissibility test adopted by this and other Trial Chambers of the Court. Notably, that is (i) *prima facie* relevant, (ii) probative and, in weighing the probative value against the potential prejudice, (iii) its admission does not violate the right of the Accused to a fair trial.¹⁹
10. As explained in Annex A, this document could not be tendered through any Prosecution witness, since none are in a position to authenticate it.

Item 5 is prima facie relevant

11. The Chamber is empowered to admit evidence it considers relevant. It can admit any evidence it considers necessary to determine the truth under articles 69(3) and (4) and 64(9)(a) of the Statute. Evidence is deemed relevant if it tends to prove or disprove a material issue or fact in question, making it more or less probable.
12. Item 5 is relevant to acts of violence committed in the relevant region during the course of the Post-Election Violence ("PEV") and, in particular, to the criminal responsibility of Mr Ruto and of the existence and organised character of the

¹⁶ ICC-01/09-01/11-1121-Conf-AnxA, p.31 (item 20).

¹⁷ ICC-01/09-01/11-1353, para.61.

¹⁸ Annex A, pp.5-8.

¹⁹ ICC-01/09-01/11-1353, paras.15-17; ICC-01/04-01/06-1399-Corr, paras.26-31; ICC-01/04-01/07-2635, para.14. See also *Bemba Appeals Judgement* ICC-01/05-01/08-1386, para.37.

Network. *Inter alia*, it states that [REDACTED].²⁰ As recommended course of action, it is noted that [REDACTED].²¹

13. The Defence alleges that the then [REDACTED], for whom this document is signed, was an [REDACTED] is therefore unreliable as a source.²² In this respect, the Prosecution recalls that the Chamber has already ruled that documents originating from a State source, including [REDACTED], are not automatically inadmissible as long as, examined individually, they are *prima facie* relevant.²³ The Prosecution submits that Item 5 meets this threshold.

14. The Ruto Defence contends that the document relates to events that occurred outside the temporal and geographical scope of the charges and therefore is inadmissible.²⁴ The Chamber has already ruled that this does not necessarily make a document irrelevant and is not, in and by itself, a factor barring its admissibility.²⁵ The Prosecution submits that the document was signed and circulated on 7 January 2008 but refers to events that occurred shortly before, in the wake of the PEV and that illustrate, *inter alia*, the context in which the crimes charged were committed, identifies the Accused and other members of the Network acting with a common purpose. Thus Item 5 is clearly relevant to live issues before the Chamber.

Item 5 is prima facie probative

15. In establishing the probative value of a document, the Chamber needs to be satisfied that the item is what it purports to be, either because this is evident on

²⁰ Annex B, KEN-OTP-0152-0223 at 0224 (first paragraph).

²¹ Annex B, KEN-OTP-0152-0223 at 0225 (last paragraph) to 0226.

²² *Supra*, fn. 15.

²³ ICC-01/09-01/11-1353, paras.33 and 62.

²⁴ *Supra*, fn. 15.

²⁵ ICC-01/09-01/11-1353, paras.27-28.

its face or because other admissible evidence demonstrates the item's provenance. This will always be a fact-specific inquiry and may take into account innumerable factors, including the inherent indicia of reliability, trustworthiness, accuracy or voluntariness of the item of evidence, as well as the circumstances in which the evidence arose.²⁶

16. Item 5 has *prima facie* probative value as it bears sufficient indicia of reliability, including authenticity:

- i. The document is a situation report dated 7 January 2008. It was prepared contemporaneously by the [REDACTED] in the ordinary course of fulfilling their official function, not for any litigation purpose;
- ii. The document is complete, internally consistent, referenced and signed by its author;
- iii. The document bears the official headings [REDACTED];
- iv. The document was officially transmitted to the Prosecution [REDACTED];
- v. The document's authenticity has not been challenged by the Defence.

17. The Defence disputes the reliability of this document, as it relies upon anonymous sources. However the Chamber has already admitted a similar document emanating from [REDACTED], finding that the presence of hearsay and anonymously sourced information in a document is not an absolute bar to its admission, but only a potential limitation to its probative value.²⁷ The Prosecution submits that Item 5 does have sufficient probative value to satisfy the admissibility threshold, and any other alleged deficiencies can be considered

²⁶ ICC-01/05-01/08-2299-Red, para.8.

²⁷ *Ibid.*

when assessing the weight to be afforded to the document in the Chamber's final deliberations.

Any prejudicial effect does not outweigh the probative value of Item 5

18. The Prosecution submits that the probative value of Item 5 outweighs any prejudicial effect. This item was disclosed to the Defence well in advance of this application, the content is relevant to facts that are in issue and its authenticity is not disputed.
19. The Statute does not require the absence of prejudice as a prerequisite for admission of evidence. The plain words of article 69(4) make it clear that evidence may be admitted notwithstanding prejudice, provided the Chamber is satisfied that any such prejudice is outweighed by the probative value of the evidence.²⁸ Once this threshold for admission is met, the Chamber may admit the document and, in deciding the ultimate issue of guilt and innocence, decide what weight to attach to the item of evidence, against the background of the entire record of admitted evidence.²⁹
20. In *Lubanga*, Trial Chamber I further stated that it is trite to observe that all evidence that tends to incriminate the accused is also "prejudicial" to him; but, the Chamber must be careful to ensure that it is not unfair to admit disputed material.³⁰
21. The fairness of admitting evidence may depend on factors such as whether it is corroborated by other evidence on the record, has no manifest inconsistencies,³¹ and an assessment of the proceedings as a whole.³² The lack of a certain indicator,

²⁸ ICC-01/09-01/11-1353, para.16.

²⁹ ICC-01/04-01/06-1399, para.29.

³⁰ ICC-01/04-01/06-1399, para.31.

³¹ See e.g. *Prosecutor v Stanišić & Simatović*, IT-03-69-T, Decision on Prosecution's Motion for Admission of Evidence of Witness Milan Babić pursuant to rule 92 *quater*, 16 December 2010, para.36.

³² See e.g. Decision on Appeal against the Trial Chamber's Decision on the Evidence of Milan Babić, 14 September 2006, para.13.

or certain inconsistencies in the evidence, should not hinder admissibility; such may only be considered as a matter of weight at the judgement stage rather than as a matter of admissibility.³³ Evidence should be ruled inadmissible only if it is so lacking in the necessary indicia of reliability that it is not probative.³⁴

22. As mentioned in preceding paragraphs, Item 5 is reliable, authentic, probative, internally consistent, legible, and can be tested by rebuttal evidence. Item 5 corroborates evidence of witnesses who have already testified and were cross-examined by the Defence and it is not submitted as the sole evidence upon which to convict the Accused. Admitting Item 5 is thus not unfair to the Accused – when balancing its probative value against their prejudicial effect.

23. Finally, as regards the Sang Defence contentions that admitting this document would cause them prejudice as its content goes to the acts and conduct of the Accused,³⁵ the Prosecution notes that the Chamber has already ruled on this objection in the context of a previous decision and found that “there is no rule in the statutory framework which automatically excludes documentary evidence from admission (...)” on that basis only. Therein, the Chamber reiterated that each item should be analysed individually, through the prism of the three-stage admissibility test mentioned above.³⁶ The Prosecution submits that Item 5 fulfils this test and should therefore be admitted into evidence.

³³ See e.g. *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Accused’s Motion to Admit Testimony of Witness KW582 Pursuant to Rule 92 *quater*, 3 February 2014, para.13; *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Accused’s Motion for Admission of Evidence of Radislav Krstić Pursuant to rule 92 *quater*, 26 November 2013, para.12

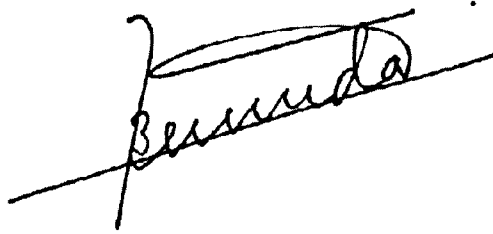
³⁴ *Prosecutor v. Popović et al*, IT-05-88-AR73.2, Decision on Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness, 30 January 2008, para.22.

³⁵ *Supra*, fn. 15.

³⁶ ICC-01/09-01/11-1353, para.61. See also e.g.: *Prosecutor v. Mladic*, IT-09-92-T, Decision on the Prosecution Motion for Admission of Documents from the Bar Table, 28 January 2014, paras.11-15; *Prosecutor v. Tolimir*, IT-05-88/2-T, Decision on Prosecution’s Motion for Admission of 28 Intercepts from the Bar Table, 20 January 2012, para.12; and, *mutatis mutandis*, *Prosecutor v. Stanišić & Simatović*, IT-03-69-T, Decision on Prosecution’s Motion for Admission of Evidence of Witness Milan Babić pursuant to rule 92 *quater*, 16 December 2010, para.43.

Relief

24. For the foregoing reasons, the Prosecution requests the admission into evidence of, and subsequent assignment of EVD numbers to all items listed in Annex A.

A handwritten signature in black ink, appearing to read 'Fatou Bensouda', is written over a horizontal line.

Fatou Bensouda, Prosecutor

Dated this 30th day of June 2015

At The Hague, the Netherlands