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TRIAL CHAMBER V(a)

Before: Judge Chile Eboe-Osuji, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Robert Fremr

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
THE PROSECUTOR v. WILLIAM SAMOEI RUTO and JOSHUA ARAP SANG**

Public

Public redacted version of "Prosecution's response to the Ruto Defence's Bar Table Motion", 4 April 2014, ICC-01/09-01/11-1254-Conf

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Introduction

1. The Defence's Bar Table Motion should be rejected as it seeks to introduce rebuttal material prematurely during the Prosecution's case. In addition, the material is inadmissible in its present form, since it (i) has not been properly authenticated; (ii) in certain cases concerns testimonial evidence; and (iii) its probative value is outweighed by the prejudicial effect its admission into evidence would have on a fair evaluation of P-0536's testimony and on the fairness of the trial.
2. In keeping with the normal procedure for adversarial trials,¹ the Chamber should not permit the Defence to use its Bar Table Motion in order to introduce unauthenticated and untested rebuttal evidence in the middle of the Prosecution's case. Rather, the Defence should tender this evidence in its own case through appropriate witnesses. In sum, the Bar Table Motion should not be used as a vehicle to circumvent the provisions governing the admissibility of evidence in the Rome Statute, nor to contravene the general principles applying to adversarial trials.

Procedural History

3. On 16 August 2013, the Chamber issued its "Decision on the Conduct of Trial Proceedings (General Directions)" (hereinafter, "First Conduct of Proceedings Decision"),² in which it provided, *inter alia*, for the submission of evidence by way of "Bar Table" applications under certain conditions.
4. On 13 March 2014, both Defence teams filed a "Joint Defence Application for the admission of Items related to the testimony of P-0536 from the Bar Table" ("Bar Table Motion").³ In the application, the Defence teams indicate that they

¹ Although the trial procedure under the Rome Statute and Rules incorporates elements of both the Common Law and Civil Law legal traditions, as further delineated in the relevant Conduct of Proceedings decisions (ICC-01/09-01/11-847-Corr and -900), it is essentially adversarial in nature, in that each party is given an opportunity – sequentially – to present evidence in support of its case. Additionally, the Chamber has recognised the right of the Defence to submit a "no case to answer" filing at the close of the case for the Prosecution (ICC-01/09-01/11-847-Corr, para.32).

² ICC-01/09-01/11-847-Corr.

³ ICC-01/09-01/11-1219-Conf.

seek to admit these items “in order to refute the witness’ account that Mr. Ruto was present at [REDACTED] and the credibility of the witness’ evidence that there was a second meeting on 26 December 2007”.⁴

Confidentiality

5. In accordance with Regulation 23*bis* of the Regulations of the Court the Prosecution submits this application as “confidential” given that it responds to a Defence application classified as such and it addresses confidential evidentiary information given by P-0536.

Submissions

6. The Prosecution has previously provided its comments on the documents which the Defence proposes to tender through its bar table motion and relies on those comments and the further submissions below in support of its opposition to the admission of this evidence at this time.
7. The Prosecution submits that the Defence Bar Table Motion is both premature and legally flawed: it is premature, because it seeks to introduce untested and unauthenticated Defence evidence during the course of the Prosecution case; it is legally flawed since, save for one item, the material which the Defence is requesting to introduce from the bar table fails the three-pronged admissibility test adopted by the *Lubanga* Trial Chamber⁵ and as such is inadmissible in its present form.

The Motion is premature

8. The Prosecution submits that the matrix of trial procedures adopted in this Court, and applied by this Chamber, while incorporating elements of inquisitorial procedures, is essentially adversarial in nature. Although not spelled out explicitly, the First Conduct of Proceedings Decision clearly

⁴ ICC-01/09-01/11-1219-Conf, p.7, para.16.

⁵ ICC-01/04-01/06-1399-Corr. See also ICC-01.04-01/07-2635.

envisages that the Prosecution should present its evidence first, followed by the Defence. This is apparent, for instance, from paragraph 32, which provides that the Chamber will entertain “no case to answer” submissions “at the close of the case for the Prosecution”. Furthermore, paragraph 33 provides that requests for a site visit shall be made “no later than the end of the defence case”.⁶

9. Thus, subject to certain specific exceptions discussed below,⁷ the general position is that each party should present its evidence to the Court, sequentially, during the course of its own case. The hallmark of an adversarial trial is that each party presents its evidence during its own case, through its own witnesses, and is therefore able to fully demonstrate its admissibility. Although the First Conduct of Proceedings Decision does not specify the stage at which a party may file a bar table motion, the Prosecution submits that these general principles should apply to *all* evidence submitted by any party.⁸
10. This is not a mere formality, but has real substantive consequences -- particularly in the light of a possible “no case to answer” filing. The Prosecution submits that it would be entirely unfair to permit the Defence to inject untested evidence of uncertain provenance during the course of the Prosecution case for the purposes of influencing the determination of a future “no case to answer” motion.⁹ Such a motion should be primarily determined on the basis of the completeness and strength of the Prosecution case, as it has been presented in court.¹⁰
11. If such evidence is admitted at this stage, the Prosecution submits that fairness would require the Chamber either to grant it the opportunity to investigate it and present rebuttal evidence during the course of the Prosecution’s own case before entertaining any “no case to answer submissions”, or to sift through all

⁶ See also paras.9-10, 13-15.

⁷ For instance, the use of Defence material during cross-examination, or the admission of Defence material by agreement between the parties; See para.13 below.

⁸ Subject to the exceptions described in the preceding fn.

⁹ This is not merely a speculative concern – the Defence make no attempt to conceal that this is the purpose of seeking to introduce the evidence at this stage; See ICC-01/09-01/11-1219-Conf, P. 11, para.25.

¹⁰ The appropriate test for a “no case to answer” motion is discussed further below.

of the Defence exhibits and exclude from their deliberations all Defence evidence so admitted unless they are authenticated by a Prosecution witness or admitted by the Prosecution. Neither of these processes would be in the interests of judicial economy, or contribute to the expeditious conduct of the proceedings.

12. Nor are they necessary, since the appropriate way for the Defence to introduce this rebuttal evidence is during its own case, through appropriate witnesses who can properly authenticate the material and/or provide relevant testimonial evidence to the Chamber. In sum, the Defence should not be permitted to flood the Prosecution's case with inadmissible rebuttal evidence on the pretext that it is indispensable to a fair trial.
13. The fact that the Defence is ultimately entitled to make submissions at the close of the Prosecution's case that there is no case for it to answer does not imply that it should have *carte blanche* to introduce all sorts of material in the Prosecution's case by way of the bar table in order to influence that process, nor that the Chamber should relax the provisions governing the admissibility of evidence to allow this. As explained above, this would harm - not advance - the fair and expeditious conduct of the trial. Contrary to the Defence's claim, the Prosecution is not attempting to "neuter" the Defence's no case to answer motion,¹¹ but simply ensuring that the Prosecution's case is not flooded with inadmissible and untested evidence and that the fundamental principles underpinning adversarial trials are respected.
14. The Prosecution submits that the ICTY authority cited by the Defence does not support their attempt to prematurely introduce untested evidence during the Prosecution case. At best, they provide authority for the proposition that Defence evidence that is properly tendered during the course of the Prosecution case may be taken into account for the purposes of a no case to answer submission, for the limited purpose of assessing whether a witness is "incapable of belief".

¹¹ ICC-01/09-01/11-1219-Conf, P. 11, para.25.

15. This authority must also be understood in its proper context. Rule 85 of the ICTY Rules of Procedure and Evidence clearly provides for the sequential presentation of evidence by the parties, following the typical adversarial process.¹² Additionally, the test at the “no case to answer” stage involves the assessment of the Prosecution evidence, taken at its highest.¹³ Thus, Prosecution evidence of a given fact would normally be accepted notwithstanding contradictory evidence presented by the Defence¹⁴ (to the extent that the latter might be admitted). The Chamber will not normally embark upon an assessment of the credibility of Prosecution evidence at this stage. The exception to this general rule is where evidence by the Prosecution is so patently incredible that it is incapable of belief.¹⁵
16. However, this exception cannot be construed as a springboard for the wholesale admission of defence evidence in the middle of the Prosecution’s case. In addition, it would be unfair, if not impossible, to make such a determination on the basis of evidence which (i) is itself untested and unauthenticated; and (ii) has not even been put to the relevant witness for comment. This is why at the ICTY, Rule 90(h)(ii) of the Rules of Procedure and Evidence compels the Defence to put to a witness, in cross-examination, the nature of its case which is in contradiction of the evidence given by the witness.¹⁶

Inapplicability of Exception

¹² Rules of Procedure and Evidence, IT/32/Rev.49, 22 May 2013, Rule 85.

¹³ *Prosecutor v. Radovan Karadzic*, IT-95-5/1-AR98bis.1, Appeal’s Judgment, 11 July 2013, p. 8, para.21.

¹⁴ *Ibid.*

¹⁵ *Ibid.*; See also *Prosecutor v. Blagojevic and Jokic* “Judgement on Motions for Acquittal Pursuant to Rule 98 bis”, Case No. IT-02-60-T, 5 April 2004, para.15, where the Trial Chamber set out the ICTY jurisprudence as follows: “*The question of whether reliability and credibility of witnesses should be considered in motions for acquittal is closely linked with the determination of the applicable standard for acquittal under Rule 98 bis. In deciding that, the standard is whether a reasonable tribunal of fact could, on the basis of the evidence presented by the Prosecution, convict the Accused, the Trial Chamber, consistent with the jurisprudence of the Tribunal on this issue, will not evaluate the weight to be given to evidence, even when presented by a party as “suspect”, “contradictory” or in any other way unreliable. Evidence will be disregarded only when the Trial Chamber considers it so manifestly unreliable or incredible that no reasonable tribunal of fact could credit it.*” (Emphasis added)

¹⁶ Rules of Procedure and Evidence, IT/32/Rev.49, 22 May 2013.

17. Paragraphs 24 and 26 of the First Conduct of Proceedings Decision recognise one exception to the general principle that a party should adduce evidence during the course of its own case, *to wit* that a party (including the non-calling party) may introduce a document “through a witness whose testimony has a connection with that item of evidence”.
18. In the present circumstances, the Defence had an opportunity to seek to introduce the evidence that they now wish to tender during the testimony of P-0536.¹⁷ The fact that they did not avail themselves of this opportunity is the direct consequence of a deliberate tactical decision taken by the Defence to take advantage of what was clearly a memory lapse by the witness regarding the dates of certain events. Instead of first clarifying the clear discrepancy between the witness’s testimony and her prior statement regarding these dates before presenting the Accused’s “alibi” evidence, they sought to take advantage of this memory lapse in a manner which was, in the Prosecution’s submission, both opportunistic and cynical.
19. Furthermore, the Prosecution explicitly placed the Defence on notice as to the likely consequences of its chosen course of conduct.¹⁸ The Defence chose to ignore this, and thus consciously placed themselves in the current situation. Finally, the Prosecution notes that the Chamber specifically advised them of their right to seek to appeal its decision not to permit the Defence to further cross-examine the witness regarding the correct meeting dates.¹⁹ The Defence chose not to do so, and must accordingly accept the consequences thereof.
20. Although the Chamber initially stated that rebuttal evidence could be introduced through the bar table,²⁰ this should not be construed as *carte blanche* to do so during the Prosecution case, nor to introduce evidence which should be properly proved through a witness. The Prosecution observes that the Chamber clarified the above statement when it told Defence counsel “*if you do*

¹⁷ Even though the Prosecution submits that much of this evidence would not have been admissible even if it had been shown to the witness, due to its testimonial nature or the likelihood that the witness would be unable to authenticate it.

¹⁸ ICC-01/09-01/11-T-42-CONF-ENG ET, p.4, l.16 - p.5, l.3.

¹⁹ *Ibid.*, p.114, ll.3-13.

²⁰ *Ibid.*, p.113, ll.17-19.

*have, as indicated before, other witnesses who can come and testify to this matter, you are free to do so. The door is not closed for you to call evidence on this matter. It doesn't always have to be by discrediting a particular witness as to their testimony.”*²¹

The Prosecution submits that the Chamber clearly envisaged that such evidence should be presented during the Defence case, whether through calling witnesses or by means of a bar table motion.

21. Finally, the Prosecution submits that as a matter of principle, it would be antithetical to the fair evaluation of a witness²² to allow a party to withhold material which purportedly adversely affects that witness' credibility and to tender that material from the bar table when the witness is no longer before the Court and consequently cannot react to it.

The Motion is legally flawed

22. As described in more detail below, much of the evidence presented by the Defence is of such a nature that the Chamber would not have admitted it, even if it had been presented to the witness at the appropriate time. For instance, the Chamber has previously refused to admit Defence evidence of a testimonial nature during cross-examination.²³ Additionally, save for one item, the evidence fails the three-pronged admissibility test set out in the *Lubanga* case.

The Defence's material

23. The Defence's proffered material can be divided into three different categories:
 - Videos (and translations): KEN-D09-0018-0098 (video); KEN-D09-0027-0001 (translation); KEN-D09-0027-0006 (translation); KEN-D09-0027-0010 (translation); KEN-D09-0018-0129 (translation); KEN-D09-0027-0016 (KTN video);

²¹ *Ibid.*, P.115, ll.21-25.

²² In terms of Article 69(4).

²³ ICC-01/09-01/11-T-80-CONF-ENG-ET, pp.36-39.

- Newspaper Article: KEN-D09-0018-0099;
- Screening note/letter: KEN-OTP-0088-0459_R02 (screening note for P-0536); KEN-D09-0027-0014_R01 (KTN letter of certification and annex).

Admission of testimonial evidence

24. The Prosecution objects to the Defence's request to introduce KEN-OTP-0088-0459_R02 (screening note of P-0536) and KEN-D09-0027-0014_R01 (KTN letter of certification and annex) into evidence as they are basically documentary material containing testimonial evidence from P-0536. In this regard, the Prosecution recalls that in its decision on the conduct of trial proceedings the Katanga/Ngudjolo Trial Chamber specifically excluded any "written record of testimonial evidence of a witness" from the ambit of what could be tendered through a bar table motion.²⁴ In fact, it is the Prosecution's submission that the admission of such evidence through the bar table would contravene Article 69(2) of the Rome Statute which clearly provides that barring certain exceptions the testimony of a witness at trial shall be given in person. The Defence has not advanced any valid reason for departing from this principle in the present case.

The Screening Note (KEN-OTP-0088-0459_R02)

25. KEN-OTP-0088-0459_R02 is a screening note detailing information on the PEV received from P-0536 on [REDACTED] 2012 by members of the Prosecution. The Defence asserts that the screening note is relevant to the credibility of the witness because it is a prior inconsistent statement insofar as 1) the witness confirmed the date of the second meeting (26 December 2007) in re-examination and 2) the witness confirmed that [REDACTED] but according to the screening the witness said that the meeting took place "at night".²⁵

²⁴ ICC-01/04-01/07-1665-Corr, para.98.

²⁵ ICC-01/09-01/11-1219-Conf-Anx, p.5

26. The Prosecution submits, firstly, that the screening note is not an inconsistent statement, but rather is consistent with what the witness finally confirmed in re-examination after having the opportunity to refresh her memory.²⁶ Secondly, the Prosecution submits that the Defence had ample opportunity to put this part of the screening note to the witness in their cross examination - when it was inconsistent with her testimony in-chief at the time - but chose not to.²⁷ And, as already submitted, the proper course of conduct would have been to put this to the witness at the appropriate time so as to allow the witness the opportunity to accept or deny having made that statement and ultimately afford her the opportunity of explaining any inconsistency if need be.
27. As noted above, Defence counsel had the opportunity to challenge P-0536 in regards to the alleged dates of the meetings [REDACTED] with the information in the screening note - or the witnesses' statement for that matter - during the cross-examination of the witness but chose tactically not to do so. Instead the Defence focussed its cross-examination solely on the dates provided by the witness during her examination-in-chief (23 October and 26 November 2007), which were one month earlier than the dates provided in her statement. Following the re-examination, the Defence sought leave to cross-examine the witness once again, as the witness had confirmed the meeting dates on her statement, but this was denied by the Chamber.²⁸ Basically the Defence now seeks a second bite at the cherry in its attempt to discredit the witness by introducing the screening note through the bar table.
28. The Prosecution accordingly objects to the introduction of this document from the bar table on the basis that it would be fundamentally unfair to admit it into evidence at this stage - without having put it to the witness first - as it could cause prejudice to a fair evaluation of P-0536's testimony and ultimately

²⁶ ICC-01/09-01/11-T-42-CONF-ENG-ET, pp.108-111.

²⁷ The date of the second meeting is the same as that provided in her signed statement – the same date she confirmed in re-examination.

²⁸ ICC-01/09-01/11-T-42-CONF-ENG-ET, pp.113-115.

to a fair trial. The Prosecution further recalls the Chamber's decision that "[a] basic rule of fairness requires that such questions [on issues relating to credibility] be put to the witness by any cross-examiner inclined to make an issue out of them later in the case. **The Chamber will therefore expect the cross-examining party to confront a witness with all questions relating to his or her credibility at first opportunity when the witness is on the stand**".²⁹

29. The Prosecution submits that this potential prejudice far outweighs the limited probative value of the screening note and should therefore render it inadmissible as it does not meet the requirements of the *Lubanga* test and Article 69(4) of the Statute.

The KTN letter of certification (and annex) KEN-D09-0027-0014_R01

30. KEN-D09-0027-0014_R01 (KTN letter of certification) is a letter from an individual who purports to be the "Group Chief Executive Officer" of the Standard Group in which he confirms having 1) provided video footage to Defence counsel for Mr. Ruto and 2) the exact date and locations of the video footage. As with the screening note, the Prosecution avers that it is basically an out of court statement which qualifies as testimony.³⁰ From the outset the Prosecution notes that there is lack of evidence regarding the authenticity of the letter and it cannot be reasonably said that the indications on it are sufficient for it to be considered as genuine. As such it does not meet the reliability threshold of the *Lubanga* test and Article 69(4) of the Statute. This alone should constitute a bar to its admission.
31. Essentially, if the Defence wishes to rely on this letter to authenticate videos- which are meant to discredit the witness as to her testimony regarding the presence of Mr. Ruto at meetings on certain dates - then the Prosecution is entitled to test the credibility/reliability of its author, under oath, before the Chamber. Allowing the Defence to introduce this type of evidence, untested,

²⁹ ICC-01/09-01/11-900, para.19.

³⁰ ICC-01/04-01/07-2635, pp.28-29.

through a bar table motion will no doubt affect the fairness of the trial and will ultimately inhibit the Chamber's capacity to determine the truth in this matter. Consequently, the Prosecution's submission is that the correct course of action would be for the Defence to call this witness in their case and seek to have the relevant video(s) tendered through him.

Videos/Translations and newspaper article

32. The Defence's application also seeks to tender from the bar table two videos of Mr. Ruto (and the relevant translations³¹), KEN-D09-0018-0098 and KEN-D09-0027-0016 ("KTN video"), allegedly taken on the 23 November 2007, for the purpose of refuting the witnesses' account that Mr. Ruto [REDACTED].³² However, the Defence has not provided any admissible evidence which would confirm the dates on which the videos were taken, or regarding their integrity/originality. Without such evidence the videos cannot be said to be relevant or have any probative value whatsoever.
33. Again, these videos should have been put to the witness in the course of the Defence's cross-examination, but the Defence chose not to do so. Again, the admission of this evidence through a bar table motion should not be permitted for the reasons set out in paragraph 28 above.
34. The Prosecution also submits that there is insufficient evidence regarding the reliability and relevance of these videos for them to meet the test set out in the *Lubanga* decision and Article 69(4) of the Statute. As such, they are inadmissible and cannot be introduced from the bar table. The correct procedure would be for the Defence to call the appropriate witness(es) who can attest to the authenticity of the said videos in court under oath.

KTN Video

³¹ See *Supra*, para.6.

³² ICC-01/09-01/11-1219-Conf, p.8, para.16.

35. The Defence essentially relies on three items in seeking to demonstrate the relevance and probative value of the KTN video (KEN-D09-0027-0016) (i) a KTN letter of certification and annex³³ and (ii) the fact that it ties in with the footage in the video KEN-D09-0018-0098 and (iii) the date stamped on the video. As indicated above³⁴ the Prosecution submits that the KTN letter of certification is itself inadmissible, since it is untested testimonial evidence. It cannot therefore serve to prove the relevance/reliability of the KTN video. In the same vein, the Prosecution submits that the Defence has failed to tender admissible evidence demonstrating the relevance and reliability of the video KEN-D09-0018-0098, and as such it is inadmissible and cannot be used to demonstrate the authenticity of the KTN video. Finally, absent admissible evidence confirming the authenticity and reliability of the stamp on the video, this element alone proves nothing.

KEN-D09-0018-0098 and the newspaper article (KEN-D09-0018-0099)

36. The Prosecution objects to the introduction into evidence of the video KEN-D09-0018-0098 from the bar table as the Defence have failed to establish its authenticity/reliability through admissible items of evidence. Essentially the Defence relies on three items in support of its contention that the video is relevant and probative: (i) a newspaper article (KEN-D09-0018-0099); (ii) a document entitled "MINUTES OF THE SPECIAL DISTRICT SECURITY INTELLIGENCE COMMITTEE MEETING" ("Minutes") (KEN-OTP-0006-1804); and (iii) the KTN material cited above (KEN-D09-0027-0014_R01 and KEN-D09-0027-0016).
37. As submitted above, the Prosecution maintains that the KTN material is itself inadmissible and can therefore not be used to demonstrate the reliability of this video. As for the minutes document, it is important to note that it provides minimal information in addition to the fact that on 23 November

³³ KEN-D09-0014_R01.

³⁴ *Supra* paras.10-11.

2007 Mr. Ruto allegedly addressed 14 000 youth at Sugoi.³⁵ This information does not however authenticate the video. Although the newspaper article bears some indicia of reliability, the Prosecution submits that it is also insufficient to authenticate the video. The Prosecution however does not object to the tendering of this newspaper article, from the bar table, provided that it is done during the Defence's case for the reasons set out above.³⁶

Relief Requested

38. For the reasons set out above the Prosecution respectfully requests that the Chamber reject the Defence's Bar Table Motion.



Fatou Bensouda, Prosecutor

Dated this 22nd day of June 2016

At The Hague, the Netherlands

³⁵ KEN-OTP-0006-1804 at 1808.

³⁶ See paragraphs 8-20 above.