



Original: English

No.: ICC-01/09-01/11

Date: 6 July 2016

TRIAL CHAMBER V(A)

Before: Judge Chile Eboe-Osuji, Presiding
Judge Olga Herrera Carbuccia
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 the “Joint Defence Application for the Admission of
Items related to the Testimony of P-0536 from the Bar Table”, ICC-01/09-01/11-
1219-Conf, 13 March 2014**

Source: Defence for Mr. William Samoei Ruto
Defence for Mr. Joshua Arap Sang

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 Ruto

Mr. Karim A.A. Khan QC
Mr. David Hooper QC
Mr. Essa Faal
Ms. Shyamala Alagendra

Counsel for Joshua 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 Massidda

**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. Pursuant to Articles 64(9) and 69(2) to (4) of the Rome Statute (“Statute”), Rule 63(2) of the Rules of Procedure and Evidence (“Rules”), the *Decision on the Conduct of Trial Proceedings (General Directions)*,¹ and the Trial Chamber’s guidance of 4 October 2013,² the respective defence teams for Mr. William Samoei Ruto and Mr. Joshua Arap Sang (together “the Defence”) respectfully request the Trial Chamber to admit into evidence from the bar table the items listed in the annex hereto (“Items”).

II. CONFIDENTIALITY

2. In accordance with Regulation 23*bis* of the Regulations of the Court, this application and related annex is classified as “confidential” because they refer to a witness, P-0536, whose testimony was given largely in closed session and also to confidential evidentiary material.³

III. BACKGROUND

3. On 17 September 2013, the Prosecution called P-0536 as its first witness. During examination-in-chief, this witness testified about certain meetings that were alleged to have taken place at [REDACTED]⁴ and [REDACTED].⁵ According to the witness, Mr. Ruto was present at the [REDACTED] meeting from at least 11.00 am until 4.00 pm.⁶ The dates of the meetings provided by the witness differed from those originally provided in [REDACTED] statement to the Prosecution.

¹ ICC-01/09-01/11-847-Corr, para. 27.

² ICC-01/09-01/11-T-42-CONF-ENG ET 04-10-2013 (“4 October 2013 Transcript”), p. 113, lines 17-19.

³ ICC-01/09-01/11-T-33-CONF-ENG ET 19-09-2013 (“19 September 2013 Transcript”), p. 14, line 10 - p. 15, line 24.

⁴ ICC-01/09-01/11-T-34-CONF-ENG ET 20-09-2013 (“20 September 2013 Transcript”), p. 20, line 12 (examination in chief); ICC-01/09-01/11-T-41-CONF-ENG ET 03-10-2013 (“3 October 2013 Transcript”), p. 83, lines 2-15 (cross-examination).

⁵ 20 September 2013 Transcript, p. 62, line 2 (examination in chief); 3 October 2013 Transcript, p. 102, line 24 - p. 103, line 3 (cross-examination).

⁶ 20 September 2013, p. 20, lines 19-21; p. 59, lines 6-9, 17-20; p. 60, lines 10-22 (examination in chief); 3 October 2013, p. 83, lines 13-15; p. 84, lines 18-23; p. 85, lines 5-7 (cross-examination).

4. Given the change in position of the witness on the stand vis-à-vis the dates of the alleged meetings, the Defence immediately redirected its investigations to meet the new dates and, thus, cross-examined the witness on the meetings on the basis of [REDACTED] evidence elicited during examination-in-chief.⁷ Cross-examination included confronting the witness with material specifically dealing with Mr. Ruto's whereabouts on [REDACTED] 2007⁸ and [REDACTED] 2007.⁹ During cross-examination, the witness never sought to correct the dates.
5. During the re-examination of the witness on 4 October 2013, the Prosecution used the witness' previous statement in order to elicit testimony that changed the dates of the meetings to [REDACTED]¹⁰ [REDACTED]¹¹ [REDACTED].
6. In light of this new evidence, the Ruto Defence requested that it be permitted to cross-examine Witness P-0536.¹² The request was refused in an oral ruling.¹³ However, the Presiding Judge stated that the Ruto Defence would be permitted to introduce the evidence it indicated was in its possession controverting the witness' new evidence but that it should proceed via bar table motion.¹⁴

IV. APPLICABLE LAW

7. The procedure of tendering materials from the bar table without it being introduced by a witness has been accepted by all the Trial Chambers at this Court.¹⁵ These proceedings are no different. In the *Decision on the Conduct of Trial Proceedings (General Directions)*,¹⁶ this Trial Chamber issued specific directions regarding the procedure to be followed for "bar table" applications in the present case. Specifically, the Trial Chamber directed that:

⁷ 3 October 2013, p.83, line 2 to p. 102, line 20 ([REDACTED]); p. 102, line 21 to p. 117, line 25 and 4 October 2013 Transcript, p. 9, line 8 to p. 18, line 20 ([REDACTED]).

⁸ See MFI-T-D09-00001; EVD-T-D09-00002.

⁹ See MFI-T-D09-00003; MFI-T-D09-0004; MFI-T-D09-00005.

¹⁰ ICC-01/09-01/11-T-42-CONF-ENG ET 04-10-2013 ("4 October 2013 Transcript"), p. 108, line 16 – p. 109, line 11.

¹¹ 4 October 2013 Transcript, p. 109, line 23 – p. 111, line 2.

¹² 4 October 2013 Transcript, p. 112, line 11 – p. 113, line 12.

¹³ 4 October 2013 Transcript, p. 113, lines 17-19; p. 115, lines, 11-14.

¹⁴ 4 October 2013 Transcript, p. 113, lines 17-19 [REDACTED].

¹⁵ See, e.g., ICC-01/04-01/06-1399-Corr; ICC-01/04-01/07-2635; ICC-01/05-01/08-2012-Red.

¹⁶ ICC-01/09-01/11-847-Corr, para. 27.

The party tendering evidence without it being introduced by a witness shall submit an application accompanied by a table, providing 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 (if that is the case), an index of the most relevant portions of the document, as well as a description of its relevance and intended probative value. Before submitting the application, the tendering party shall first seek the consent of the opposing party to tender the document through this method or an indication of the opposing party's objection (and the grounds for any such objection).¹⁷

8. The Statute and Rules set out the principles to be applied to the admissibility of evidence, other than witness evidence, in various provisions.¹⁸ However, the standard to be applied to material tendered from the bar table rather than through a witness does not entail a lower standard of relevance or admissibility.¹⁹
9. These principles were distilled by the *Lubanga* Trial Chamber into a three-part admissibility test. Under this test, a Chamber must examine, on a preliminary basis, whether the submitted materials: (i) are *prima facie* relevant to the case; (ii) have probative value; and (iii) are sufficiently relevant and probative to outweigh any prejudicial effect that could be caused by their admission.²⁰ This approach has been adopted and followed in subsequent trials before this Court.²¹
10. The first factor – *prima facie* relevance – requires that the material “relates to the matters that are properly to be considered by the Chamber in its investigation of the charges against the accused and its consideration of the views and concerns of participating victims.”²² In *Katanga et al.*, Trial Chamber II found that “[i]f the evidence tendered makes the existence of a fact at issue more or less probable, it is relevant. Whether or not this is the case depends on the purpose for which the evidence is adduced.”²³

¹⁷ *Ibid.*

¹⁸ See Statute, Article 64(9); Article 69(2)-(4), (7), (7)-(8); Rule 63(2) and (5); Rule 64(1)-(3).

¹⁹ ICC-01/04-01/07-2635, para. 12.

²⁰ ICC-01/04-01/06-1399-Corr, paras. 27-31.

²¹ See, e.g., ICC-01/04-01/07-2635, para. 14; ICC-01/05-01/08-2299-Red, para. 7.

²² ICC-01/04-01/06-1399-Corr, para. 27.

²³ ICC-01/04-01/07-2635, para. 16. See also ICC-01/05-01/08-2299-Red, para. 8.

11. The second factor – probative value – *“comprises of two factors, namely the materiality of the information contained in a piece of evidence and the reliability of the piece of evidence.”*²⁴ However, *“[t]his will always be a fact-specific inquiry and may take into account innumerable factors, including the indicia of reliability, trustworthiness, as well as the circumstances in which the evidence arose. It may also take into account the extent to which the item has been authenticated.”*²⁵
12. In respect of authenticity, Trial Chamber III in *Bemba* held that *“[w]hile it is not necessary that each item of evidence be authenticated via witness testimony, the Chamber needs to be satisfied that the item is what it purports to be, either because this is evident on its face or because other admissible evidence demonstrates the item’s provenance.”*²⁶ Trial Chamber III also held that items can be *“(i) self-authenticating, if they are official documents publicly available from official sources; (ii) agreed upon by the parties as authentic; (iii) prima facie reliable if they bear sufficient indicia of reliability such as a logo, letter head, signature, date or stamp, and appear to have been produced in the ordinary course of the activities of the persons or organisations who created them; or (iv) in case the item itself does not bear sufficient indicia of reliability, shown to be authentic and reliable by the tendering party through provision of sufficient information to enable the Chamber to verify that the documents are what they purport to be.”*²⁷
13. The third factor – prejudicial effect – involves the Chamber, where applicable, *“weigh[ing] the probative value of the item in question against the prejudicial effect that its admission as evidence ‘may cause to a fair trial or to a fair evaluation of the testimony of a witness.’”*²⁸ Thus, *“the Chamber must be careful to ensure that it is not unfair to admit the disputed material, for instance because evidence of slight or minimal probative*

²⁴ ICC-01/04-01/07-2289-Corr-Red, para. 13.

²⁵ ICC-01/05-01/08-2012-Red, para. 15. See also, ICC-01/04-01/06-1399-Corr, para. 29.

²⁶ ICC-01/05-01/08-2012-Red, para. 15.

²⁷ ICC-01/05-01/08-2299-Red, para. 9.

²⁸ ICC-01/05-01/08-2012-Red, para. 16.

value has the capacity to prejudice the Chamber's fair assessment of the issues in the case."²⁹

V. SUBMISSIONS

14. In accordance with the Trial Chamber's directions on the submission of bar table applications, the annex to this application contains a table with "*a short description of the content of each [Item], averment of its authenticity, an indication of the reason for not tendering [it] through a witness [...], an index of the most relevant portions [...], as well as a description of its relevance and intended value*", together with the Prosecution's objections.³⁰
15. Consistent with the above detailed jurisprudence, the Defence submit that the Items sought to be tendered in this application satisfy the three-part admissibility test as explained below and in the annex.

The Items are relevant to issues to be determined at trial

16. The relevance of each Item is detailed in the annex. However, as a general matter all the Items that the Defence seek to admit into evidence concern meetings to which Witness P-0536 offered testimony, in particular their dates as elicited during the Prosecution's re-examination, namely [REDACTED]³¹ [REDACTED].³² Despite the paucity of information provided by the witness regarding the purpose and subject matter of these meetings and the role which Mr. Ruto is alleged to have played, it is clear that the intention of the Prosecution is to present [REDACTED] meetings as planning meetings for the post-election violence. The evidence of the alleged meetings will, therefore, be considered by the Chamber in its investigation of the charges against Mr. Ruto. The Defence seek to admit the Items in order to refute the witness' account that Mr. Ruto was

²⁹ ICC-01/04-01/06-1399-Corr, para. 31.

³⁰ ICC-01/09-01/11-847-Corr, para. 27.

³¹ 4 October 2013 Transcript, p. 108, line 16 – p. 109, line 11.

³² 4 October 2013 Transcript, p. 109, line 23 – p. 111, line 2.

present at [REDACTED] and the credibility of the witness' evidence that there was a [REDACTED] meeting on [REDACTED]. The Items are, therefore, *prima facie* relevant to facts at issue in this case.

The Items have probative value

17. All the Items have probative value. Details of the indicia of reliability, the circumstances in which the evidence arose and the elements establishing authenticity are set out in the annex hereto. Of relevance is also the fact that several of the Items³³ have been provided to ensure that sufficient information is before the Chamber for it to verify that other Items are what they purport to be.³⁴ Further, several of the Items were obtained from neutral, independent media organisations which created the relevant items in the regular course of their business and not for any litigation purpose.³⁵ Other items were either created by the Prosecution itself,³⁶ or are easily verifiable through other material.³⁷

The relevance and probative value of the Items outweigh any prejudicial effect

18. The Defence submit that the Items are not prejudicial to the fair trial process, to the evaluation of Witness P-0536's evidence or to the Chamber's fair assessment of the issues of which it is seized. On the contrary, it would be prejudicial to the rights of the Defence – and thus the fairness of the trial – and to the proper assessment of Witness P-0536's testimony, not to admit the material into evidence. Indeed, in submitting the present filing, the Defence are following the Chamber's direction to submit a bar table motion.³⁸

³³ Annex, Items 6, 8 and 9.

³⁴ Annex, Items 1 – 5.

³⁵ Annex, Items 6, 8 and 9.

³⁶ Annex, Item 7.

³⁷ Annex, Items 2 – 5. See also the linked nature of Items 1-6 and 8-9.

³⁸ 4 October 2013 Transcript, p. 113, lines 17-19.

19. The filing of this application is intimately linked to the approach taken by the Trial Chamber when it refused the Ruto Defence request to cross-examine P-0536 on the new evidence elicited for the first time during the Prosecution's re-examination.³⁹ Indeed, the new evidence was elicited during re-examination despite the Chamber's direction that re-examination be limited "*to matters which were raised for the first time in cross-examination*"⁴⁰ and the terms of Rule 140(2)(d).⁴¹ Further, the Trial Chamber directed the Defence towards a bar table motion notwithstanding that the Chamber was aware that: (i) the Ruto Defence had rebuttal evidence in its possession;⁴² (ii) cross-examination would be kept to under 10 minutes;⁴³ (iii) Witness P-0536 was present in court, under oath and ready to testify; and (iv) the Prosecution had not opposed cross-examination, even when expressly invited to by the Defence.⁴⁴
20. Recalling the points at which P-0536's testimony was elicited, in particular the fact that it was re-examination not examination-in-chief which elicited the date of [REDACTED], shows that the Prosecution's objections to Item 7 are without merit. The fact that the [REDACTED] date was only provided by the witness when [REDACTED] statement was put to [REDACTED] during re-examination means that this date could not reasonably have been addressed by the Ruto Defence during its original cross-examination. The description of the decision not to address this matter as a "tactical decision" is also clearly without merit. As described above, the Ruto Defence was ready to confront the witness in person and asked permission to do so but was directed to make this challenge instead via bar table motion.

³⁹ The Chamber itself characterised the testimony given by Witness P-0536 during re-examination as "new". See 4 October 2013 Transcript, p. 113, lines 14-15: [REDACTED].

⁴⁰ ICC-01/09-01/11-847-Corr, para. 15. This direction was consistent with prior decisions on the same matter issued to litigants in the *Katanga et al.* and *Bemba* trials. See ICC-01/04-01/07-1665, paras. 16, 77 (note that questions on issues not raised for the first time during cross-examination required the approval of the Chamber on an *exceptional* basis); ICC-01/05-01/08-1023, para. 9.

⁴¹ Rule 140(2)(d) provides that "The defence shall have the right to be the last to examine a witness."

⁴² 4 October 2013 Transcript, p. 113, lines 14-16.

⁴³ 4 October 2013 Transcript, p. 115, lines 8-9.

⁴⁴ 4 October 2013 Transcript, p. 115, lines 4-7.

There is no legal basis for the assertion that defence evidence cannot be admitted during the Prosecution case

21. The main objection made by the Prosecution to the admission of the Items is the erroneous assertion that *“a Bar Table Motion should not be used by the Defence in order to introduce items of evidence in the Prosecution’s case (or vice versa)...the Bar Table motion should strictly be used by a party to introduce evidence in its own case.”*⁴⁵ This assertion is without legal merit for the following reasons.

22. First, nothing in any of the Court’s legal instruments or jurisprudence supports the Prosecution’s claim.⁴⁶ Instead, as identified by Trial Chamber I:

*the drafters of the Statute framework...clearly and deliberately avoided proscribing certain categories or types of evidence, a step which would have limited - at the outset - the ability of the Chamber to assess evidence “freely”. Instead, the Chamber is authorised by statute to request any evidence that is necessary to determine the truth, subject always to such decisions on relevance and admissibility as are necessary, bearing in mind the dictates of fairness.*⁴⁷

23. Second, the permitted scope of cross-examination is broad. Rule 140(2)(b) provides that a cross-examining party has *“the right to question [a] witness about relevant matters related to the witness’s testimony and its reliability, the credibility of the witness and other relevant matters”* (emphasis added). Of further significance are the specific directions issued by this Trial Chamber regarding *“[m]atters to be put to a witness during cross-examination”*.⁴⁸ This Chamber has directed that:

*The non-calling party will be allowed to reasonably question the witness on matters that relate to aspects of the cross-examiner’s case, when the party can expect the witness to have knowledge thereof, and irrespective of whether those matters were previously discussed in the examination-in-chief, provided the questions are appreciably relevant.*⁴⁹

⁴⁵ See Prosecution’s comments in Annex, Item 1. See also the comment in Items 2 to 6 that “the Chamber has ruled that the Defence may lead evidence rebutting the version of P-0536. This must be done during the Defence case.”

⁴⁶ Indeed, the Prosecution has made similarly erroneous arguments in the past regarding the admissibility of evidence, asserting that items that are “self-serving” cannot be introduced by the Defence. As the learned Presiding Judge observed, the objection was actually that the evidence was irrelevant and the Prosecution was confusing concepts (see ICC-01/09-01/11-T-65-CONF-ENG ET 04-11-2013, p. 39, line 16 to p. 42, line 5). This underlines that the correct approach to admissibility is the three-part test described above and attempts to introduce other concepts are without merit.

⁴⁷ ICC-01/04-01/06-1399-Corr, para. 24.

⁴⁸ ICC-01/09-01/11-900, p. 5.

⁴⁹ *Ibid*, para. 20 (emphasis added and footnotes omitted).

24. Given the foregoing, the Defence are clearly entitled to lead evidence through a Prosecution witness which is supportive of the defence case. There is no legal or logical basis to assert that this ability is limited to evidence elicited via witness testimony during the Prosecution case and does not extend to documentary evidence. Thus, the Prosecution's assertion does not withstand basic scrutiny and should be dismissed.
25. *Third*, this Trial Chamber has stated that it "*will, in principle, permit the Defence to enter submissions, at the close of the case for the Prosecution, asserting that there is no case for it to answer*".⁵⁰ The international jurisprudence shows that evidence supportive of the defence case will play a role in the determination of this motion.⁵¹ The Defence submit that the Prosecution's unfounded attempts to seek to exclude evidence supportive of the defence case at this stage of proceedings can be viewed as cynical trial tactics aimed at neutering, in so far as it is able, the Defence's "no case to answer" motion. These attempts should be rejected.
26. In light of the foregoing, the Defence note the Prosecution's concession in the comment made on Item 6 in the annex that "*it would not object to the admission of this document through a Bar Table motion*" during the Defence case. The Defence submit that the document should be admitted now because there is no restriction that prevents evidence supportive of the Defence case being led during the Defence case.

⁵⁰ ICC-01/09-01/11-847-Corr, para. 32.

⁵¹ *Prosecutor v. Hadžihasanović and Kubura*, IT-01-47-A, Appeals Judgment, 22 April 2008, para. 55 ("the Trial Chamber's finding [in the Rule 98bis Decision] that it 'did not consider evidence which might be favourable to the Accused,' if interpreted as implying that it completely ignored the evidence presented by the Defence in its favour during the Prosecution case, would amount to an error of law. For example, where the Defence has cross-examined a witness to good effect or has obtained evidence in an accused's favour during cross-examination, this evidence must be used to assess whether the Prosecution evidence is incapable of belief. In the present case, the Trial Chamber not only recognised this principle, but also referred in its Rule 98bis Decision to the entirety of the testimonies without excluding the cross-examination of the witnesses. Further, the Rule 98bis Decision is replete with references to Hadžihasanović's Motion for Acquittal, which in turn is replete with references to evidence adduced by the Defence during the Prosecution case").

There is no legal bar to the admission of the KTN letter of certification

27. The KTN letter identified as Item 9 in the annex is a letter which simply provides information on the providence, date and location of the video footage identified at Item 8 of the annex. The Prosecution's basic objection to this item appears to be that the Defence is seeking admission of the document without affording the Prosecution the opportunity to cross-examine the writer. However, this begs the question as to what reasonable purpose such cross-examination would serve bearing in mind the Chamber's obligation to ensure a fair and expeditious trial pursuant to Article 64(2). If a party is to be required to bring *viva voce* witnesses to testify to formal matters such as source or date for each item of otherwise non-controversial evidence such as news reports or media footage then this will considerably lengthen the duration of these trial proceedings. The Defence submit that it was not intended that such technical constraints be imposed on the admission of evidence, particularly where the scope and purpose of the evidence at issue is limited. The Defence's position fits with Trial Chamber I's observation that Trial Chamber's enjoy "*a significant degree of discretion in considering all types of evidence. This is particularly necessary given the nature of the cases that will come before the ICC*".⁵²
28. Indeed, the Defence submit that "[r]ather than concentrating on the sole issue of whether the [author is] to give evidence", the Trial Chamber should look "*generally at the relevant circumstances*" including that the letter is in simple terms, was provided by an independent news gathering organisation and no suggestion has been made that there is a motive to fabricate or distort the contents of the letter or the video to which it relates.⁵³ The Defence submit that the admission of the letter will not prejudice the Prosecution but will promote the efficient and expeditious conduct of these proceedings.

⁵² ICC-01/04-01/06-1399-Corr, para. 24.

⁵³ ICC-01/04-01/06-1399-Corr, para. 37.

29. Finally, the Defence advise that further authentication of the Items can be provided if required by the Trial Chamber. However, the Defence submit that the provision of such additional authentication should not bar the admission of the Items at this stage.⁵⁴

VI. RELIEF REQUESTED-

30. For the reasons set out above, the Defence respectfully request that the Trial Chamber admit into evidence from the bar table the Items and assign them EVD numbers.

Respectfully submitted,



Mr. Karim A. A. Khan QC
Lead Counsel for William Samoei Ruto
Dated this 6th Day of July 2016
At The Hague, Netherlands



Mr. Joseph Kipchumba Kigen-Katwa
Lead Counsel for Joshua Arap Sang
Dated this 6th Day of July 2016
Nairobi, Kenya

⁵⁴ E.g. the Items could be admitted *de bene esse*. In this regard, note the approach of the Trial Chamber on 11 March 2014 in respect of the admission of EVD-T-D11-00016 and EVD-T-D11-00017 (see real time transcript ICC-01/09-01/11-T-103-ENG RT 11-03-2014, p.79, lines 14-21).