

SEPARATE FURTHER OPINION OF JUDGE EBOE-OSUJI

1. In the main decision, ‘the Chamber consider[ed] that the general rule of admissibility may be simply stated as follows: all *prima facie* relevant evidence is admissible subject to the Chamber’s discretion to exclude relevant evidence by operation of the provisions of the Statute or the Rules or by virtue of general principles of national or international law pursuant to Article 21 of the Statute.’¹ I fully agree with that simpler statement of the general rule. I explain below the value that I see in the approach.

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2. Previous jurisprudence of this Court has tended to view ‘probative value’ as a criterion that is distinct from ‘relevance’, for purposes of admissibility of evidence.² In that regard, it is said that there are three criteria that a thing must meet before it can be admitted into the record as evidence in the case. The criteria are these: (a) relevance, (b) probative value, and, (c) the probative value is not outweighed by prejudicial effect.

3. There is a question, however, concerning whether it is really necessary—assuming that it is universally acceptable as a matter of theory (which may not be the case)—to separate ‘probative value’ from ‘relevance’ and treat them as separate criteria to be met before admissibility.

¹ *Prosecutor v William Samoei Ruto and Joshua Arap Sang (Decision on the Prosecution’s Request for Admission of Documents from the Bar Table)* 10 June 2014, [Trial Chamber V(A)], para 15.

² See *Prosecutor v William Samoei Ruto and Joshua Arap Sang (Decision on Sang Defence Application to exclude Expert Report of Mr Hervé Maupeu)* 7 August 2013, para 14 [Trial Chamber V(A)]; *Prosecutor v Thomas Lubanga Dyilo (Corrigendum to Decision on the admissibility of four documents)* 20 January 2011, paras 26—31 (original public redacted version notified on 13 June 2008). See for example, the test reaffirmed in: *Prosecutor v Thomas Lubanga Dyilo (Decision on the admission of material from the “bar table”)* 24 June 2009, para 33 [Trial Chamber I]; *Prosecutor v Thomas Lubanga Dyilo (Redacted Decision on the Prosecution third and fourth applications for admission of documents from the “bar table”)* 17 November 2010, para 15 [Trial Chamber I]; *Prosecutor v Thomas Lubanga Dyilo (Corrigendum to Redacted Decision on the defence request for the admission of 422 documents)* 10 March 2011, para 39 [Trial Chamber I]. The test set out in *Lubanga* was subsequently adopted in: *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui (Decision on the Prosecutor’s Bar Table Motions)* 17 December 2010, para 14 [Trial Chamber II]; See also *Prosecutor v Jean-Pierre Bemba Gombo (Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled “Decision on the admission into evidence of materials contained in the prosecution’s list of evidence”)* 3 May 2011, [Appeals Chamber]; *Prosecutor v Jean-Pierre Bemba Gombo (Public redacted version of the First decision on the prosecution and defence requests for the admission of evidence, dated 15 December 2011)* 09 February 2012, para 13 [Trial Chamber III]; *Prosecutor v Jean-Pierre Bemba Gombo (Public Redacted Version of “Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute” of 6 September 2012)* 8 October 2012, paras 7—8.

4. Admittedly, the multiplication of the admissibility criteria in that way is understandable if one conceived of ‘relevance’ *only* in terms of the logic of a relationship between two things.³ Yes, it is possible to agree that the relevance of a thing is the bearing that it has to something else under consideration. As abstract theories go, it is easy to see from where such a narrow view of relevance comes. But, as a concept that is capable of full utility in leaner shape, it is possible also to see that ‘relevance’, as Lord Steyn once observed, can be ‘a more subtle concept’⁴ in the law of evidence. I agree. Regardless of what else Lord Steyn may have had in mind by ‘a more subtle concept’, it is the case that the subtlety of the concept of ‘relevance’ in the law of evidence does encompass the notion of ‘probative value’. The reason for that view is adequately explained by Professor George F James, as follows: ‘Relevancy ... is not an inherent characteristic of any item of evidence but exists as *a relation between an item of evidence and a proposition sought to be proved*. If an item of evidence *tends to prove or to disprove* any proposition, it is *relevant* to that proposition. If the proposition itself is one *provable* in the case at bar, or if it in turn forms a further link in *a chain of proof* the final proposition of which is *provable* in the case at bar, then the offered item of evidence has *probative value* in the case.’⁵

5. The emphasised words clearly make ‘probative value’ a component of ‘relevance’. To a similar effect, *Cross on Evidence* has given classical value to the elucidation of the meaning of ‘relevance’ that Stephen offered in his *Digest of the Law of Evidence*. As he put it: ‘any two facts to which it is applied are *so related to each other* that according to the common course of events one either taken by itself or in connection with other facts *proves or renders probable* the past, present or future existence or non-existence of the other.’⁶ Once more, the integration of ‘probative value’ into ‘relevance’ is apparent in that explanation; as it is in the following observations appearing in *McCormick on Evidence*: ‘There are two components to relevant evidence: materiality and probative value.’⁷ That, in turn, is consistent with r 401 of the US Federal Rules of Evidence, which describes *relevance* as follows: ‘Evidence is

³ See *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui (Decision on the Prosecutor’s Bar Table Motions)*, *ibid*, para 16: ‘Although under articles 64(9)(a) and 69(4) relevance is a legal precondition to admissibility, it is primarily a logical standard.’ See also *Prosecutor v Jean-Pierre Bemba Gombo (Public redacted version of the First decision on the prosecution and defence requests for the admission of evidence, dated 15 December 2011)*, *ibid*, para 14: ‘To pass the relevance test, an item must be logically connected to one or more facts at issue, in the sense that the item must have the capacity to make a fact at issue more or less probable than it would be without the item. Put differently, an item will be relevant only if it has the potential to influence the Chamber’s determination on at least one fact that needs to be determined to resolve the case.’

⁴ See *R v Randall* [2004] 1 WLR 62D [House of Lords].

⁵ George F James, ‘Relevancy, Probability and the Law’ (1941) 29 *California Law Review* 689 at p 690 [emphasis added].

⁶ See Colin Tapper, *Cross and Tapper on Evidence*, 12th edn [Oxford: OUP, 2010] p 65 [emphasis added].

⁷ John W Strong, *McCormick on Evidence*, 4th edn [St Paul, Minn.: West Publishing, 1992] p 338.

relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.’ And, notably, in explaining that rule, the Advisory Committee that proposed the rule explained as follows:

Problems of relevancy call for an answer to the question whether an item of evidence, when tested by the processes of legal reasoning, possesses sufficient probative value to justify receiving it in evidence. Thus, assessment of the probative value of evidence that a person purchased a revolver shortly prior to a fatal shooting with which he is charged is a matter of analysis and reasoning.⁸

6. Such a conception of ‘relevance’—i.e. as comprising ‘probative value’—is amply found in the jurisprudence outside the ICC’s. In the England Court of Appeal case of *R v Harz*, *R v Power*, Thesiger J cited Stephen’s explanation with approval, and then concluded, ‘Thus, the word “relevance” is to all intents and purposes synonymous with the phrase “of probative value”’.⁹ In *DPP v Kilbourne*, Lord Simon of Glaisdale wrote, ‘Evidence is relevant if it is logically probative or disprobative of some matter which requires proof. ... [R]elevant evidence [in that sense] is evidence which makes the matter which requires proof more or less probable.’¹⁰

7. And, in *Randall*, Lord Steyn observed thus: ‘A judge ruling on a point of admissibility involving an issue of relevance has to decide whether the evidence is capable of increasing or diminishing the probability of the existence of a fact in issue. The question of relevance is typically a matter of degree to be determined, for the most part, by common sense and experience.’¹¹

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8. It is not necessary to enlarge the analysis here by citing the many further authorities according to which ‘probative value’ is comprised within the notion of ‘relevance’, or the authorities (and there are some) that give the two concepts separate treatment, as has been done in this Court’s case law.

9. It is only necessary to highlight, next, some of the considerations that recommend—as the more apposite course—continued adherence to the theory that conceive of ‘probative value’ as an element of ‘relevance’. Chief among them is the need to diminish or avoid the

⁸ http://www.law.cornell.edu/rules/fre/rule_401

⁹ *R v Harz*, *R v Power* [1966] 3 All ER 433 at 449 [England and Wales, Court of Criminal Appeals].

¹⁰ *DPP v Kilbourne* [1973] AC 729 at p 756D [UK House of Lords].

¹¹ *R v Randall*, *supra*, p 62G.

incidence of judicial assessment of weight or reliability of the evidence at the point of the admissibility determination—particularly as a necessary requirement of the law.¹² First, the oddness of that requirement is cast in relief by a jury trial, where the division of roles leaves to the judge the role of ruling on relevance of evidence for purposes of admissibility, while questions of weight deriving from reliability is a matter for the jury.¹³ Thus, to conceive for the judge a power to exclude evidence on grounds of a separate criterion of ‘probative value’ involves an assessment of weight made at the point of admissibility, which would appear to be an encroachment on the province of the jury.

10. Second, even in non-jury trials (as is also the case in jury trials), it is generally accepted that the most appropriate time to consider the weight of evidence is at the end of the trial, when all the admissible evidence have been received and are being assessed. At that point, it may be possible that other evidence received in the case may enhance or diminish evidence thought at first to be strong or weak as the case may be.

11. Third, the awkwardness of considering weight (resulting from treating ‘probative value’ as a criterion different from ‘relevance’) at the point of admissibility is, perhaps, made more obvious in relation to another method of receiving potential evidence into the record. This is witness testimony. Judges are not, as a general rule, required or expected to assess the reliability of *witnesses* ahead of their testimonies, in order to rule upon the admissibility of the particular testimony. It will be most unusual indeed for a judge to make a prior assessment as to whether a witness is a liar before deciding whether or not the witness may testify. Why, then, treat non-testimonial evidence differently—as a matter of a peremptory

¹² It is noted, in particular, that the European Court of Justice had expressed the following view: ‘As regards the probative value ... the sole criterion relevant in evaluating the evidence adduced is its reliability’: see *Hitachi Ltd v European Commission* (2011) 5 CMLR 19 [ECJ General Court (Second Chamber), Case No T-112/07] dated 12 July 2011, para 69. They also expressed the view that ‘[a]ccording to the general rules regarding evidence, the reliability and, thus, the probative value of a document depends on its origin, the circumstances in which it was drawn up, the person to whom it is addressed and its content’: *ibid*, para 70. But it is also to be noted that the observation appears to indicate a certain uniqueness in European community law expressed as follows: ‘The prevailing principle of Community law is the unfettered evaluation of evidence and the sole criterion relevant in that evaluation is the reliability of the evidence’: see *Dalmine v Commission*, [2004] ECR II-2395, para 72 [ECJ General Court (Second Chamber)].

¹³ The *Katanga* Trial Chamber has attempted to distinguish reliability from weight: see *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui (Decision on the Prosecutor’s Bar Table Motions)*, *supra*, para 13. But, a different view may very respectfully be expressed that reliability is necessarily a matter of weight, because relevant evidence that is not reliable will carry very little weight while relevant evidence that is reliable will carry more weight. The view that weight is not so easily dissociated from reliability finds some support in the following observations: ‘There are numerous factors that may affect the *weight* of evidence. Obvious instances are provided by the age, *reliability* or demeanour of a witness, the proximity in time of certain facts to those under investigation and the number of possible explanations of a particular event’: Roderick Bagshaw, *Cross and Wilkins Outline of the Law of Evidence*, 7th edn [Butterworths 1996] p 181 [emphasis added].

general rule (necessarily arising from conceiving of ‘probative value’ as an admissibility criterion that is separate from the ‘relevance’ criterion)?

12. Fourth, in treating ‘probative value’ as a criterion different from ‘relevance’, it has been said in the ICC jurisprudence that there are ‘innumerable factors’ that may be considered in the evaluation of ‘probative value’. But, the observation creates its own set of difficulties, since, as seems to be the point of the separate treatment, the criterion of ‘probative value’ is something that must be met before the evidence in question is admitted into the record. The difficulty of conceiving that there are ‘innumerable factors’ that inform ‘probative value’ may, up to a point, be hidden behind the assumption that those ‘innumerable factors’ need not be articulated in the manner of a check-list that should be used to exclude evidence. But, the difficulty is not hidden for long. The conceptual problem should be self-evident when evidence is admitted because it is seen or said to have passed the test of ‘probative value’. Since to pass a test is to satisfy the constitutive factors of the contemplated test, it becomes obviously difficult to satisfy ‘innumerable factors’ before a piece of evidence is admitted into the record.

13. And, finally, the concern about the awkwardness of assessing reliability of the evidence at the point of admissibility is not readily resolved merely by insisting (as we see in the ICC case law) that the assessment of the separate criterion of ‘probative value’—conceived of as a matter of reliability—is only done on a ‘*prima facie*’ basis. For other purposes, the insistence is eminently sensible. Nevertheless, *prima facie* decision-making serves its purpose best when the decision is an inclusive one. Evidence received on a *prima facie* basis may ultimately be rejected at a later time, when a more definitive assessment is made. But a *prima facie* approach to decision-making does not work as well when a decision has been made to preclude or exclude something. Evidence rejected on a *prima facie* assessment is no longer part of the record that the court may consider during final deliberation in the case. Though possible, it is nevertheless awkward for the judge to reopen the case at that stage, in order to bring in a piece of evidence that was ruled out when it was sought to be admitted in the regular course of the trial. The incidence of such an awkward procedure should not be proliferated by the creation of a general rule that makes that proliferation easy to occur.

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14. But it must be stressed that the above analysis does not seek to exclude reliability completely from threshold consideration, when admitting evidence. There is always a discretion reserved for a trial judge to exclude evidence that is inherently or apparently

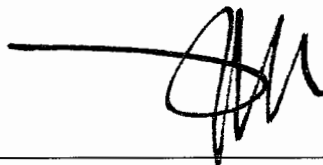
unreliable.¹⁴ It is, indeed, possible to see this discretion as serving the overarching judicial mandate to conduct a trial that is fair, speedy and efficient.

15. The concern stems, rather, from the treatment of ‘probative value’ as a criterion separate from ‘relevance’, especially in an analysis in which ‘probative value’ possibly transmutes into ‘reliability’.

16. Ultimately, the trouble is, perhaps like much else in the law, that legal reasoning is doomed to run into a ditch if it seeks to reduce the so-called ‘science’ of the law into sachets of theories impressed with the purity of principles that one might expect in the physical sciences.

17. It is for the foregoing reasons that there is, in my view, greater utility in stating ‘the general rule of admissibility’ in the simple and straight-forward manner of saying that ‘all *prima facie* relevant evidence is admissible subject to the Chamber’s discretion to exclude relevant evidence by operation of the provisions of the Statute or the Rules or by virtue of general principles of national or international law pursuant to Article 21 of the Statute.’ It is a formulation that seems amply to accommodate the considerations—and more—implicated as a practical matter in the three-criteria analysis currently evident in the case law of the Court, but without the controversy concerning the questions of the necessity and the universality of the three-criteria analysis.

Done in both English and French, the English version being authoritative.



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(Presiding Judge)

Dated 10 June 2014

At The Hague, The Netherlands

¹⁴ One instance of that discretion, but not the only one, concerns hearsay testimony.