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Pénale
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**International
Criminal
Court**

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TRIAL CHAMBER V(A)

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

SITUATION IN THE REPUBLIC OF KENYA

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

Public

Decision on the Prosecution's Request for Admission of Documentary Evidence

Decision 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 Samoei Ruto

Mr Karim Khan
Mr David Hooper
Ms Shyamala Alagendra

Counsel for Joshua Arap Sang

Mr Joseph Kipchumba Kigen-Katwa
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Unrepresented Victims

**Unrepresented Applicants for
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The Office of Public Counsel for Victims

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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**

Others

Trial Chamber V(A) (the 'Chamber') of the International Criminal Court (the 'Court') in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, pursuant to Articles 64(2), 64(9)(a), 67(1)(e), 69(4) of the Rome Statute (the 'Statute') and Rules 63(2) and 68 of the Rules of Procedure and Evidence (the 'Rules'), renders the following 'Decision on the Prosecution's Request for Admission of Documentary Evidence'.

I. PROCEDURAL HISTORY

1. On 19 July 2013, the Office of the Prosecutor (the 'Prosecution') submitted its 'Prosecution Application for Admission of Documents from the Bar Table Pursuant to Article 64(9)' (the 'Initial Application').¹ Therein, it sought to tender 49 items into evidence without introducing them through a witness, annexing a list containing an individual analysis for each item. 'Bar table' evidence refers to evidence tendered by counsel from the bar, and not through the usual method of witnesses testifying from the witness box under oath or affirmation.
2. On 9 August 2013, the Chamber issued its first decision on the conduct of the proceedings (the 'Conduct of Proceedings Decision'),² in which it set out a procedure for the submission of evidence from the 'bar table'.
3. The tendering party is to provide a table with '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.'³ The Chamber instructed the parties further that, before submitting the request, the tendering party shall first consult with the opposing party, seeking its consent or the grounds for its objection. The Chamber noted that

¹ ICC-01/09-01/11-819-Conf, with confidential annex, ICC-01/09-01/11-819-Conf-AnxA.

² Decision on the Conduct of Trial Proceedings (General Directions), ICC-01/09-01/11-847-Corr.

³ Conduct of Proceedings Decision, ICC-01/09-01/11-847-Corr, para. 27.

the Initial Application did not follow this procedure and directed the Prosecution to re-file its application in the prescribed format.⁴

4. On 2 December 2013, the Prosecution re-filed its application, requesting the admission into evidence of 46 items without introducing them through a witness (the 'Application'). The Prosecution annexed a chart, the intended purpose of which is to list for each item the information requested by the Chamber (the 'Annex').⁵ From the Annex, it appears that the defence team for Mr Ruto (the 'Ruto Defence') does not object to the admission of twenty-two of the documents,⁶ while the defence team for Mr Sang (the 'Sang Defence', and together with the Ruto Defence the 'Defence') does not object to the admission of eleven of the documents.⁷

5. On 24 December 2013, the Sang Defence filed its response to the Application (the 'Response').⁸ It requests the Chamber to reject the Application, except for the documents agreed on by both defence teams.⁹ In the Response, the Sang Defence identifies there as being only eight documents which neither defence team objects to,¹⁰ however from the Annex itself there appear to be ten such documents.¹¹ Given that no explanation was provided in the Response for the exclusion of documents 34 and 35 of the Annex from the list, the Chamber has presumed that this was a typographical error in the Response and has taken the positions as stated in the Annex to be correct. As an alternative prayer, the Sang Defence urged that even if the Chamber is minded to grant the Application, the Chamber's decision should not go so far as to admit into evidence in this way any document that (a) directly or

⁴ Conduct of Proceedings Decision, ICC-01/09-01/11-847-Corr, para. 27.

⁵ Prosecution's Application for Admission of documents from the Bar Table Pursuant to Article 64(9), ICC-01/09-01/11-1121, with confidential Annex A, ICC-01/09-01/11-1121-AnxA.

⁶ Documents 10, 11, 12, 13, 14, 15, 17, 18, 19, 25, 27, 28, 29, 30, 31, 34, 35, 36, 37, 38, 45 and 46 of the Annex.

⁷ Documents 25, 26, 27, 28, 29, 30, 34, 35, 36, 37 and 38 of the Annex.

⁸ Sang Defence Response to the Prosecution's Application for Admission of Documents from the Bar Table Pursuant to Article 64(9), ICC-01/09-01/11-1130.

⁹ Response, ICC-01/09-01/11-1130, paras 1, 2, 21 and 58.

¹⁰ Documents 25, 27, 28, 29, 30, 36, 37 and 38 of the Annex.

¹¹ Documents 25, 27, 28, 29, 30, 34, 35, 36, 37 and 38 of the Annex.

indirectly purports to implicate Mr Sang or (b) refers to events outside the temporal or geographical scope of the charges (the 'Alternative Request by the Sang Defence').¹²

6. The Ruto Defence did not file a response. However, in accordance with the procedure prescribed by the Chamber, its agreement or specific objections to each item are included in the Prosecution's Annex.

II. SUBMISSIONS

Prosecution's submissions

7. The Prosecution seeks to tender all the items listed in the Annex for the truth of their content. It notes that the procedure of 'tendering documents from the bar table is an established one' and asserts that all documents are authentic, relevant and probative of issues to be determined at trial.¹³ Further, the Prosecution avers that any prejudicial effect would be outweighed by the probative value of the documents as: (i) the material was disclosed to the Defence sufficiently in advance of the trial; and (ii) several witnesses to be called by the Prosecution are expected to address the subject matter of the items and corroborate their contents.¹⁴
8. As indicated above and in the Annex, the Defence agreed to the admission of ten documents.¹⁵ The Prosecution submits that despite the objections to the rest of the items, all listed documents are admissible.¹⁶
9. The submitted documents are divided into eight categories (General Reports, Intelligence Reports and Police Records, Hospital Records, Publications,

¹² Response, ICC-01/09-01/11-1130, para. 59.

¹³ Application, ICC-01/09-01/11-1121, paras 2, 7 and 12-14.

¹⁴ Application, ICC-01/09-01/11-1121, paras 2 and 15.

¹⁵ Documents 25, 27, 28, 29, 30, 34, 35, 36, 37 and 38 of the Annex.

¹⁶ Application, ICC-01/09-01/11-1121, para. 3.

Declarations, Maps, Non-ICC Court Records and Non-ICC Transcripts). For each document, the Prosecution provided the information required by the Conduct of Proceedings Decision and included separately the response of each of the defence teams.

Sang Defence's submissions

10. The Sang Defence accepts the proposition made by the Prosecution that the practice of admitting evidence through a 'bar table' motion is an established one but avers that it should be the exception and that the admission of evidence through a witness should remain the rule.¹⁷ As noted above, it opposes the admission of all documents except for the ones agreed to by both defence teams.¹⁸
11. With regard to the rest of the documents contained in the Annex, the Sang Defence puts forward several objections: first, that the documents lack reliability and are therefore of low probative value;¹⁹ further, that they are of little relevance, including because part of the documents relate to events outside of the temporal and/or geographical scope of the charges;²⁰ and finally that any probative value is outweighed by the prejudicial effect.²¹ For reasons of clarity, the Chamber will outline the specific concerns put forward by the Sang Defence against certain types of documents in the corresponding sections of the analysis below.

III. ANALYSIS

Preliminary remarks

¹⁷ Response, ICC-01/09-01/11-1130, paras 13-14.

¹⁸ Response, ICC-01/09-01/11-1130, paras 1, 2, 21 and 58.

¹⁹ Response, ICC-01/09-01/11-1130, paras 2 and 21.

²⁰ Response, ICC-01/09-01/11-1130, paras 2 and 21.

²¹ Response, ICC-01/09-01/11-1130, paras 2 and 21.

12. Before analysing the different categories and assessing each item individually, the Chamber considers it necessary to make some general remarks about the admission of an item into evidence otherwise than through a witness.
13. Admission of evidence through a 'bar table' motion is a practice established in the jurisprudence of the Court.²² As observed by Trial Chamber I, the statutory framework confers a broad degree of discretion on the Chamber to assess and consider various types of evidence.²³ Article 64(9)(a) of the Statute gives the Chamber the power to rule on the 'admissibility or relevance of evidence' and Rule 63(2) of the Rules provides that the Chamber shall have the authority to 'assess freely all evidence submitted in order to determine its relevance or admissibility in accordance with article 69'.²⁴
14. In exercising this discretion, 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. For its part, Article 69(4) of the Statute provides the primary guidance on factors to be considered when making general admissibility assessments.²⁵ It states that the Chamber may rule on 'the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of

²² See e.g. *Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, Decision on the admissibility of four documents ('Lubanga Decision on the Admission of Four Documents'), 13 June 2008, ICC-01/04-01/06-1399-Corr; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Trial Chamber II, Decision on Prosecutor's Bar Table Motions ('Katanga Bar Table Decision'), 17 December 2010, ICC-01/04-01/07-2635; *Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber III, Public redacted version of the First decision on the prosecution and defence requests for the admission of evidence, dated 15 December 2011 ('Bemba First Decision on the Admission of Evidence'), 9 February 2012, ICC-01/05-01/08-2012-Red.

²³ Lubanga Decision on the Admission of Four Documents, ICC-01/04-01/06-1399-Corr, para. 24.

²⁴ See also Article 69(3) of the Statute (which authorises the Chamber to request the submission of all evidence that it 'considers necessary for the determination of the truth') and Article 69(2) of the Statute (which while it explicitly requires that the 'testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68' or in the Rules, also clearly envisages that a variety of other means of introducing evidence may be appropriate, provided that such means are not prejudicial to or inconsistent with the rights of the accused).

²⁵ It is noted that other subsections of Article 69 of the Statute provide additional guidance for specific circumstances including, for example, where evidence has been obtained by means of a violation of the Statute or of internationally recognised human rights (Article 69(7) of the Statute).

the evidence and any prejudice that such evidence may cause to a fair trial or to the fair evaluation of the testimony of a witness’.

15. In that light, the Chamber considers 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. However, in order to establish relevance it must be demonstrated that the item relates to a material issue or fact properly to be considered by the Chamber in the sense of making it more or less probable, that is, tending to prove or disprove the material issue or fact in question. Further, in order to have such probative value, the item must also be seen to have the indicia of reliability, including of authenticity, that are sufficient in the circumstances in accordance with generally accepted legal principles. It is particularly noted that what is required to be established at this stage is not definitive proof of reliability but rather *prima facie* proof based on sufficient indicia.²⁶
16. The general rule is, as noted above, subject to the Chamber’s power to exclude evidence, which may include for reasons of fairness, expeditiousness and public policy. Therefore, relevant evidence that may prejudice the fairness of the trial, including the rights of the accused or the fair evaluation of testimony or other evidence, may be excluded on that basis.²⁷ With respect to prejudice, the assessment will be done through comparing any identified prejudice against the probative value, including reliability, of the item in question. Evidence may be excluded

²⁶ *Prosecutor v Jadranko Prlić et al*, International Criminal Tribunal for the former Yugoslavia (‘ICTY’), Appeals Chamber, IT-04-74-AR73.13, Decision on Jadranko Prlić’s Consolidated Interlocutory Appeal Against the Trial Chamber’s Orders of 6 and 9 October 2008 on the Admission of Evidence, 12 January 2009, (‘*Prlić Admission Appeal Decision*’), para. 15; *Prosecutor v Jadranko Prlić et al*, ICTY, Appeals Chamber, IT-04-74-AR73.16, Decision on Jadranko Prlić’s Interlocutory Appeal Against the *Decision on Prlić Defence Motion for Reconsideration of the Decision on Admission of Documentary Evidence*, 3 November 2009, paras 33-34.

²⁷ Article 69(4) of the Statute.

where its prejudice factor is great and its probative value is comparatively slim. As has been observed by other Chambers of the Court, it is a fact specific enquiry and it is neither possible nor useful to attempt to exhaustively list the circumstances in which such prejudice may be found to exist.²⁸

17. The Chamber notes that the elements of enquiry outlined in the general principles above are broadly consistent with those comprised in the three step admissibility test which has been adopted by other Trial Chambers of the Court.²⁹
18. Finally, the Chamber underlines that its assessment of items of evidence for the purposes of admissibility is a distinct question from the evidentiary weight which the Chamber may ultimately attach to admitted evidence in its final assessment once the entire case record is before it, for purposes of the verdict in the case.³⁰ As is often the case, considerations presented by counsel at the point of admission, as grounds of objection against admissibility, are truly considerations that may be taken into account in the ultimate assessment as to weight. The Chamber is alive to that phenomenon.
19. Mindful of the Appeals Chamber's ruling in the Bemba Appeals Judgment,³¹ the Chamber conducts its admissibility assessment for each item individually, undertaking an item-by-item analysis and providing individual reasoning.

²⁸ Lubanga Decision on the Admission of Four Documents, ICC-01/04-01/06-1399-Corr, paras 31-32; Katanga Bar Table Decision, ICC-01/04-01/07-2635, paras 37-38; Bemba First Decision on the Admission of Evidence, ICC-01/05-01/08-2012-Red, para. 16.

²⁹ See e.g. Lubanga Decision on the Admission of Four Documents, ICC-01/04-01/06-1399-Corr, paras 26-31; Katanga Bar Table Decision, ICC-01/04-01/07-2635, para 14; Bemba First Decision on the Admission of Evidence, ICC-01/05-01/08-2012-Red, para. 13. See also *Prosecutor v. Jean-Pierre Bemba Gombo*, Appeals Chamber, 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" ('Bemba Appeals Judgment'), 3 May 2011, ICC-01/05-01/08-1386, para. 37.

³⁰ Bemba Appeals Judgment, ICC-01/05-01/08-1386, 3 May 2011, para. 37 ('the Trial Chamber may rule of the relevance and/or admissibility of each item of evidence when it is submitted, and then determine the weight to be attached to the evidence at the end of the trial'); Bemba First Decision on the Admission of Evidence, ICC-01/05-01/08-2012-Red, para. 18; *Prlić* Admission Appeal Decision, IT-04-74-AR73.13, para. 22.

³¹ Bemba Appeals Judgment, ICC-01/05-01/08-1386, paras 52-53.

20. For clarity, the Chamber will assess the documents in the order, and under the categorisations, set out in the Annex. However, the Chamber will first address below general objections raised in the Response which do not pertain specifically to a certain category of document.

i) *General objections of the Sang Defence*

Evidence pertaining to the acts and conduct of the accused

21. The Sang Defence submits that the admission of evidence is particularly prejudicial if it goes to the conduct of the accused.³² In support of this, it cites the jurisprudence of Trial Chamber II in the case of what was formerly *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* ('*Katanga and Ngudjolo Case*') on the right of adversarial confrontation, pursuant to Article 67(1)(e) of the Statute.³³ The Sang Defence argues that the fact the Defence is not able to cross-examine the source of directly incriminating information is highly prejudicial. The admission of such evidence should only be allowed if its probative value can be clearly established, which, according to the Sang Defence, can only be done through cross-examination. Otherwise, according to the Sang Defence, the prejudice would outweigh the probative value.³⁴

22. In respect of the notion of 'acts and conduct of the accused' the Sang Defence proposes an expansive interpretation. They contend that because Mr Sang is charged under Article 25(3)(d) of the Statute, acts and conduct of 'the group of persons acting with a common purpose', and other persons who are sufficiently

³² Response, ICC-01/09-01/11-1130, para. 37.

³³ Response, ICC-01/09-01/11-1130, paras 37-38.

³⁴ Response, ICC-01/09-01/11-1130, para. 44.

'proximate' to the accused, also indirectly implicate Mr Sang and should therefore be considered as putative acts and conduct of the accused for this purpose.³⁵

23. They further submit that all non-contemporaneous reports referring directly or indirectly to acts and conduct of Mr Sang or any members of the alleged network should be declared inadmissible, even if they are non-testimonial in nature.³⁶ Alternatively, they submit that the documents concerned 'should be redacted and be admitted solely for the purpose of showing background information or context'; however, if such redactions would undermine the probative value of the documents, it is submitted that the documents should be declared inadmissible.³⁷
24. The Chamber notes that there is no rule in the statutory framework which automatically excludes documentary evidence from admission either on the basis that it goes to the acts and conduct of an accused or is non-contemporaneous in nature. The Chamber considers that the general principles for admissibility outlined above, which include questions of reliability and potential prejudice, adequately provide for consideration of such material on a case-by-case basis.
25. Nevertheless, the Chamber notes that there is an obvious interest on the part of an accused person to confront any person whose testimony (on the stand or through a document) would implicate an accused in criminal conduct, either directly or indirectly, including for purposes of the theory of common criminal purpose. This is reflected, in part, in the provisions of Article 67(1)(e) of the Statute. Moreover,

³⁵ Response, ICC-01/09-01/11-1130, para. 46. The Sang Defence cites in support to jurisprudence of the Special Court for Sierra Leone ('SCSL') and the International Criminal Tribunal for Rwanda ('ICTR'). See: SCLS, *Prosecutor v Taylor*, SCSL-03-1-T, Trial Chamber II, Decision on Prosecution Notice Under Rule 92 *bis* for the Admission of Evidence Related to Inter Alia Kenema District and on Prosecution Notice under Rule 92 *bis* for the Admission of the Prior Testimony of TF1-036 into Evidence, 15 July 2008, pages 4-5; ICTR, ICTR-98-44-T, Trial Chamber III, *Prosecutor v Karemera et al.*, Decision on Prosecution Motion to Admit Witness Statement from Joseph Serugendo, 15 December 2006, para. 9; ICTR, ICTR-98-44-T, Trial Chamber III, *Prosecutor v Karemera et al.*, Decision on Prosecution Motion for Admission of Evidence of Rape and Sexual Assault Pursuant to Rule 92 *bis* of the Rules and Order for Reduction of Prosecution Witness List, 11 December 2006, paras 12-13.

³⁶ Response, ICC-01/09-01/11-1130, para. 48.

³⁷ Response, ICC-01/09-01/11-1130, para. 48.

Article 69(2) of the Statute and Rule 68 of the Rules set out a distinct regime in respect of the 'testimony' of a witness.³⁸ The Chamber will, where relevant, consider on a case-by-case basis below whether the tendered material may more properly be considered as potentially falling within that regime.

26. Therefore, the Alternative Request by the Sang Defence in respect of documents pertaining to the acts and conduct of the accused is rejected.

Temporal and/or geographical scope of the charges

27. The Sang Defence submits that a number of the documents relate to events that occurred outside of the temporal and geographical scope of the charges. They argue that the updated document containing the charges³⁹ sets out the framework for admissibility of evidence and that any document which links the accused with allegations outside of this temporal and geographical scope is inadmissible.⁴⁰ They argue that the Prosecution is relying on events outside the temporal scope of the charges to draw inferences regarding Mr Sang's *mens rea* and conduct, which, in the view of the Sang Defence, is impermissible.⁴¹ Further, the Sang Defence considers that the Prosecution relies on such documents to 'demonstrate that the Kalenjin people, and most notably the accused, had a propensity to commit violence' and considers that the prejudice caused by the admission of such evidence outweighs the probative value.⁴² The Sang Defence submits that such documents are inadmissible or, should the Chamber decide to admit them, that portions of the

³⁸ See also Katanga Bar Table Decision, ICC-01/04-01/07-2635, paras 43-50 (discussing the question of 'testimonial' evidence in detail).

³⁹ Prosecution's Submission of Updated Document Containing the Charges pursuant to the Decision on the content of the updated document containing the charges (ICC-01/09-01/11-522), ICC-01/09-01/11-533, with public Annex A containing the updated document, ICC-01/09-01/11-533-AnxA-Corr (the 'Updated Document Containing Charges').

⁴⁰ Response, ICC-01/09-01/11-1130, para. 49.

⁴¹ Response, ICC-01/09-01/11-1130, paras 54-56.

⁴² Response, ICC-01/09-01/11-1130, para. 54.

documents which fall outside of the geographical and/or temporal scope should be redacted.⁴³

28. The Chamber notes that the argument made by the Sang Defence is, in part, one of relevance and, in part, one of prejudicial effect. In respect of relevance, the Chamber further notes that the Sang Defence acknowledges that evidence which pertains to facts outside of the temporal and/or geographical scope of the charges can still be used 'to demonstrate the context in which the crimes charged were committed, to track the existence of a Network acting with a common purpose, or to demonstrate that the accused acted with the requisite knowledge and intent'.⁴⁴ They thus acknowledge that this type of evidence can be relevant. The fact that evidence relates to facts outside of the temporal and/or geographical scope of the charges can therefore not act as an absolute bar to admissibility.⁴⁵ The Chamber therefore reiterates that a case-by-case assessment to determine the admissibility of each of the submitted materials will be conducted pursuant to the principles outlined above. Accordingly, the Alternative Request by the Sang Defence in respect of documents pertaining to events outside of the temporal and/or geographical scope of the charges is rejected.

ii) The different categories of documents in the Annex and individual assessment

a. General Reports

29. The Prosecution categorises the first eight documents of the Annex as 'general reports'. The documents comprise reports on the 2007 elections and the subsequent clashes, a report on ethnic violence in 1992 and one general report on ethnic clashes

⁴³ Response, ICC-01/09-01/11-1130, para. 57.

⁴⁴ Response, ICC-01/09-01/11-1130, para. 51, footnotes omitted.

⁴⁵ See *Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber III, Public redacted version of the "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, ICC-01/05-01/08-2299-Red, paras 51, 61 and 67, admitting material outside the temporal or geographical scope after finding it relevant.

in Kenya. The authors include Kenyan national committees and both governmental and non-governmental ('NGO') organisations.

30. Regarding documents emanating from Kenyan public officials, the Sang Defence contends that they are not produced by neutral and independent entities. The Government of the Republic of Kenya ('Kenyan Government'), led by the Party of National Unity ('PNU') during the relevant timeframe was, according to the Sang Defence, implicated in the violence following the elections in 2007 ('PEV') and the Prosecution brought a case against the Kenyan Police Commissioner for crimes committed against perceived Orange Democratic Movement ('ODM') supporters. Therefore, the Sang Defence argues they cannot be considered as impartial.⁴⁶
31. With regard to the reliability of reports from NGOs, the Sang Defence argues that these organisations tend to 'associate themselves with the victims of the conflict' and that '[h]uman rights reporters tend to have their own agenda' and should therefore not be considered as neutral.⁴⁷ Additionally, the Sang Defence contends that even if the NGO reports were produced by neutral entities they often rely on anonymous sources whose neutrality is unknown and who must therefore be considered as unreliable.⁴⁸ Further, these sources often include hearsay information, which the Sang Defence submits should only be admissible if the authors of the reports testify in person to the methodology used to compile the information.⁴⁹
32. Additionally, the Sang Defence submits that even if the reports might not have been produced for criminal proceedings as such, some of them were made with the aim of investigating the PEV. Therefore, these documents are not contemporaneous but were created after the time of events to 'unravel the truth' about the PEV, which

⁴⁶ Response, ICC-01/09-01/11-1130, para. 23.

⁴⁷ Response, ICC-01/09-01/11-1130, para. 25.

⁴⁸ Response, ICC-01/09-01/11-1130, para. 26.

⁴⁹ Response, ICC-01/09-01/11-1130, para. 29.

according to the Sang Defence, also speaks against their reliability.⁵⁰ Further, the Sang Defence contends that NGO reports can only be admitted 'if their conclusions are not controversial and open to legitimate criticism'.⁵¹ Additionally, the Defence repeatedly state in their objections in the Annex that the Prosecution misrepresents the findings of these documents.

33. In respect of the argument against the reliability of government reports, the Chamber notes that the Prosecution did not assert that the Kenyan Government, as such, was implicated in the PEV, but rather alleged the individual criminal responsibility of specific persons. Further, there is no indication that the Kenyan Government unduly influenced reports to shift the blame unilaterally to one ethnic group or that these reports are otherwise so unreliable that their probative value would not outweigh any prejudicial effect. Therefore, the Chamber does not find that documents are inadmissible on the sole basis that they originate from a state source.
34. With regard to the arguments against the general reliability of NGO reports, the Chamber considers that the reasons put forward against the neutrality of the organisations – in the absence of any specific facts – are speculative. Regarding the concerns with respect to the type of evidence contained in the reports, the Chamber notes that this will form part of the individual assessment of the probative value of any such document.
35. Concerning the argument made by the Sang Defence that the investigative reports were prepared in a non-contemporaneous manner, the Chamber notes that this is only one factor in the overall assessment of the reliability of a document. The Chamber is not persuaded by the submission that documents that have an

⁵⁰ Response, ICC-01/09-01/11-1130, para. 33.

⁵¹ Response, ICC-01/09-01/11-1130, para. 34.

investigative purpose are inherently less reliable. The jurisprudence cited by the Sang Defence in support only lists criteria which that chamber considered to be key factors in the assessment of reliability and does not state that an investigative purpose invariably militates against reliability.

36. Finally, with regard to the argument made by the Sang Defence that NGO reports ought not contain controversial conclusions and be open to legitimate criticism, the Chamber considers that this may be a factor in assessment of *prima facie* probative value;⁵² however, again, it does not serve as an absolute bar to admission of the report. Such factors would more appropriately and thoroughly be considered at the end of the case, in the evaluation of the entire evidence. The Chamber notes that in their objections both defence teams repeatedly aver that the findings of the reports are 'disputed'. This assertion alone does not affect the probative value as such, as the object of introducing evidence is precisely to prove facts in dispute. Similarly, the objection of the Defence that the Prosecution misrepresents facts and evidence contained in the reports is not an argument against the probative value as such. This argument concerns the interpretation of the information presented in the document. The Chamber will draw its own conclusions and assess all evidence freely in accordance with Rule 63(2) of the Rules. Consequently, this submission is not addressed separately in the analyses below.
37. Having addressed the general concerns put forward by the Defence the Chamber will proceed with the case-by-case assessment of each of the proposed items in this category.

⁵² See e.g. *Prosecutor v Thomas Lubanga Dyilo*, Trial Chamber I, Decision on the request by the legal representative of victims a/0001/06, a/0002/06, a/0003/06, a/0049/06, a/0007/08, a/0149/08, a/0155/07, a/0156/07, a/0404/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08, a/0149/07 and a/0162/07 for admission of the final report of the Panel of Experts on the illegal exploitation of natural resources and other forms of wealth of the Democratic Republic of the Congo as evidence, 22 September 2009, ICC-01/04-01/06-2135, para. 33.

38. **Document 1** of the Annex, **KEN-D09-0001-0092**, is the 'Final Report, General Elections 27 December 2007' by the European Union Election Observation Mission. The Prosecution submits that the report provides background information to the 2007 elections. The Ruto Defence objects to the admission of extracts at 0112-0114, arguing that the Prosecution misrepresents the evidence provided in this part of the document. It explicitly agrees to the extracts at 0129-0130. The Sang Defence, which used the same document in the confirmation of the charges proceedings, states that, at this stage of the trial, such information should be tendered via a *viva voce* witness and that the document has low probative value.
39. The Chamber finds that the document provides relevant background information to the charges. The Chamber notes that the Defence does not contest the relevance or authenticity of the document. The document provides some limited information on how the content was collected but relies mostly on anonymous sources. Nevertheless, the Chamber considers that the document has *prima facie* probative value. In respect of the Ruto Defence's assertion that the term 'majimbo' and its usage is an issue in dispute and that it would be inappropriate to introduce this issue via a 'bar table' motion the Chamber notes that the evidence is potentially supported by other evidence in the case, including witness testimony. The Chamber is of the view that the *prima facie* probative value outweighs any prejudicial effect and there is no reason to otherwise exclude the document. Accordingly, the Chamber admits KEN-D09-0001-0092.
40. **Document 2** of the Annex, **KEN-D09-0003-0001**, is the 'Report of the Parliamentary Select Committee to investigate Ethnic Clashes in Western and Other Parts of Kenya in 1992'. The Prosecution submits that the report is relevant as it shows a similar pattern to the alleged organisation of the PEV. Further, the Prosecution intends to demonstrate the *mens rea* of Mr Ruto and Mr Sang with this report. The Defence

objects to the admission of the document, submitting that it is irrelevant, as well as prejudicial. The Chamber considers that the document is *prima facie* relevant as it provides background information to the matters at issue in the case. With regard to the probative value of the document the Chamber notes that the Defence does not challenge the authenticity of the report. The document contains a section detailing the methodology on how the information was collected. The Chamber therefore finds that the document has sufficient *prima facie* probative value. Concerning any potential prejudice, the Chamber notes that the information contained in the document presents a general overview and investigation of the events of 1991/1992 and is not, for example, directly related to acts and conducts of the accused or other matters central to the charges. Therefore, the Chamber finds that the probative value is not outweighed by any potential prejudice and there is no reason to otherwise exclude the document. Accordingly, the Chamber admits KEN-D09-0003-0001.

41. **Document 3** of the Annex, **KEN-D09-0003-0643**, is a report of the Government of Kenya entitled 'Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya'. The report is dated 1999 and investigates ethnic clashes in Kenya since 1991. Again, the Prosecution intends to demonstrate the *mens rea* of the accused in relation to the crimes charged and submits that the document is relevant with regard to background information and by providing circumstantial evidence. The Defence objects to the admission, submitting the report is irrelevant and that the prejudicial effect outweighs the probative value. The Chamber considers that the document is of the same nature as Document 2 and reiterates the findings in paragraph 40 above. The Chamber finds that the admission of the report in this manner does not unduly prejudice the Defence and there is no reason to otherwise exclude the document. Accordingly, the Chamber admits KEN-D09-0003-0643.

42. **Document 4** of the Annex, **KEN-OTP-0001-0002**, is a 2008 report by the Kenya National Commission on Human Rights ('KNCHR'), entitled 'On the Brink of the Precipice: A Human Rights Account of Kenya's Post-2007 Election Violence'. The Prosecution submits that alleged members of the network are identified as perpetrators in the report, and that the scope of the investigations demonstrates the widespread and systematic nature of the attack. The Defence objects to its admission into evidence. The Ruto Defence submits that the manner in which the investigation was conducted is flawed, alleging that there was a conspiracy to deliberately fabricate evidence. Additionally, it avers that there is a Prosecution witness through whom the document could be introduced. The Sang Defence submits that the findings go to the acts and conduct of the accused and should therefore be submitted via live testimony. The Chamber considers that the document is *prima facie* relevant to the scope of the charges. The Chamber further notes that the Defence has not objected to its authenticity. However, the Chamber observes that the report does not reveal the 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. Moreover, the Chamber notes that although the Prosecution states that no witness is competent or qualified to testify on the authenticity or the entire content of the document, it would appear that one of the witnesses on the Prosecution's list may be able to somewhat better contextualise the report.⁵³ Consequently, at this time, the Chamber finds that the report should not be proffered into evidence in this manner. Accordingly, the Chamber does not admit KEN-OTP-0001-0002.
43. **Document 5** of the Annex, **KEN-OTP-0001-0248**, is a 2008 Human Rights Watch report entitled 'Ballots to Bullets, Organized Political Violence and Kenya's Crisis of

⁵³ Prosecution's updated witness list and witness summaries, ICC-01/09-01/11-898, 2 September 2013, confidential annex B, ICC-01/09-01/11-898-Conf-AnxB, page 25.

Governance'. The Prosecution submits that the document is relevant for proving the existence of the organised character of the attacks, the involvement of ODM leaders in the violence, the attacks on Turbo, Eldoret and Kiambaa, the role of KASS FM in the violence and the individual criminal responsibility of Mr Ruto. The Defence objects to the admission of the report. It submits that the prejudicial effect outweighs the probative value. According to the Defence, the report is flawed, since there is an alleged conspiracy to provide false testimony. Further, the Defence submits that the report goes to the acts and conduct of the accused, relies on anonymous hearsay evidence and that witnesses who provided evidence are listed as Prosecution witnesses in this case.

Preliminarily, the Chamber notes that the report does not contain any names of persons who were interviewed for the report and it is therefore unclear how the Defence comes to the conclusion that specific Prosecution witnesses have given evidence to the NGO for this report. Nonetheless, the Chamber notes that the report is of limited probative value, comprising, for example, of hearsay evidence to a large extent and relying on anonymous sources. In addition, the Chamber considers that reliance on the report in respect of fundamental questions at issue may not be appropriate and could amount to an abdication of the fact-finding functions of the Chamber. Accordingly, having weighed the relevant factors, the Chamber does not admit KEN-OTP-0001-0248.

44. **Document 6** of the Annex, **KEN-OTP-0001-1057**, is a UN 'Report from the OHCHR Fact-Finding Mission to Kenya, 6-28 February 2008', from an investigative mission which was undertaken in February 2008 into the allegations of crimes and human rights violations in the aftermath of the 2007 elections. The Prosecution submits it is probative regarding the allegations of an organised, systematic attack and the existence of an organisational policy. The Defence objects to the admission of the

document, submitting that the prejudice of admitting the document outweighs its probative value. According to the Defence the report is of low probative value because there is insufficient information on how the evidence in the report was collected, the Prosecution misrepresents the facts and the report's findings are untested and disputed.

The Chamber again considers that the probative value of the document is limited by reason of the lack of clarity on how the information was collected, the hearsay nature of much of the content and the anonymity of the sources of information. In that regard, the Chamber notes that OHCHR reports, while compliant with methods suited to the purposes of human rights work, are generally not intended for use in a court of law.⁵⁴ The Chamber additionally notes that, as is the case with Document 5 above, reliance on this report in respect of central questions at issue may not be appropriate and could amount to an abdication of the fact-finding functions of the Chamber. Accordingly, having weighed the relevant factors, the Chamber does not admit KEN-OTP-0001-1057.

45. **Document 7** of the Annex, **KEN-OTP-0001-1076**, is a report from the International Crisis Group 'Kenya in Crisis, Africa report No. 137 - 21 February 2008', which reports on the election campaign leading up to the 2007 election and the violence after the announcement of the election results. The Prosecution submits that it is probative for information about the 'institution of the Kalenjin warrior' and about the broadcasts of KASS FM during the election period. The Defence objects to the admission of the document, arguing that the prejudicial effect outweighs the probative value. It submits that no methodology as to how the report reached its

⁵⁴ See e.g. OHCHR, Report of Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003, August 2010, paras 5 and 7 (available at http://www.ohchr.org/Documents/Countries/CD/DRC_MAPPING_REPORT_FINAL_EN.pdf); OHCHR, Nepal Conflict Report, 2012, Foreword (at p.3) and accompanying Q&A document (at p.2) (each available at <http://www.ohchr.org/EN/Countries/AsiaRegion/Pages/NepalConflictReport.aspx>).

conclusions is provided, that the findings of the reports are disputed and that the Defence ought to be given the opportunity to cross-examine the evidence.

The Chamber again finds that the probative value of the report is limited in that most of the sources of information are anonymous and there is little or no information provided as to how the evidence was obtained or the methodology of how the facts were gathered. As with Documents 5 and 6, the Chamber also considers that it would not be appropriate to rely on this report in respect of matters which are central to the case. Accordingly, having weighed the relevant factors, the Chamber does not admit KEN-OTP-0001-1076.

46. **Document 8** of the Annex, **KEN-OTP-0088-0604**, is what appears to be an internet printout from the webpage of the NGO Internal Displacement Monitoring Centre, with the title 'Prominent party politicians of the former government have fuelled incidents along ethnic clashes in Kenya since 1991'. The Prosecution submits that it is probative for the context and background of the PEV regarding the exploitation of ethnicity in the conflict, since it is alleged that the accused adopted the same tactics to gather support. The Defence objects to the admission of the document, submitting both that it is irrelevant and that the prejudicial effect of its admission outweighs the probative value.

The Chamber notes that the document has no date and appears to be a sub-section of a 'causes and background' section of a monitoring report that concerns internal displacement in Kenya. The Chamber observes that it is preferable, when evaluating the admissibility of a document, to have the entirety of it or the entirety of a clearly divisible section of it (such as a chapter of a book) rather than excerpts, since this approach enables the Chamber to assess the item in its proper context and

avoids any issues of selective referencing or quoting.⁵⁵ The Chamber finds that Document 8 is relevant with regard to background information relating to the issues of land distribution and ethnic tensions in the Rift Valley. However, the document is of low probative value in light of the charges in this case, as it appears to provide background information on the issue of land distribution through an historical overview until the year 2003. Moreover, the Chamber notes that the report only draws conclusions from two articles/reports which are quoted in part in the document, one of which then quotes again a further report. The Chamber considers that this does not enable sufficient contextualisation of the document and that any probative value would be outweighed by the potential prejudice of admitting the document. Accordingly, the Chamber does not admit KEN-OTP-0088-0604.

b. Intelligence Reports and Police Records

47. In respect of police reports, the Sang Defence raises the same objections concerning other documents emanating from Kenyan public sources: that the Kenyan police cannot be considered as a neutral independent source since there was motivation for the police to 'put the blame' for the PEV on members of the ODM.⁵⁶ Further, regarding the reliability of intelligence reports, the Sang Defence submits that such reports are based on unverified rumours, have not been confirmed as truthful information and are therefore unreliable.⁵⁷
48. The Chamber finds that the arguments put forward by the Sang Defence form part of the individual case-by-case assessment. Although not specifically repeated in each paragraph, the Chamber has considered the specific circumstances of each document, including these submissions of the Sang Defence, in its assessments of *prima facie* probative value below.

⁵⁵ Bemba First Decision on the Admission of Evidence, ICC-01/05-01/08-2012-Red, para. 90.

⁵⁶ Response, ICC-01/09-01/11-1130, para.23.

⁵⁷ Response, ICC-01/09-01/11-1130, para. 35.

49. As a preliminary point, the Chamber notes that the Prosecution intends to submit Document 46 of the Annex, in order to supplement the NSIS intelligence reports. As stated in paragraphs 87-88 below, the Chamber rejects the request with regard to Document 46. The Chamber will also not rely on it for the assessment of the NSIS reports.
50. **Document 9** of the Annex, **KEN-OTP-0008-0180**, is a compilation of security briefs produced by the sub-regional intelligence coordinator of the NSIS of Uasin Gishu for the period of December 2007 to January 2008. The Prosecution submits that the compilation contains evidence of a common plan to attack ODM opponents and of incitement by Kalenjin politicians to evict other ethnicities from the area. Both defence teams object to the admission of the document, contesting, in particular, its reliability. However, the Chamber notes that neither of the defence teams have challenged its authenticity as an NSIS document. The Chamber finds that the document is *prima facie* relevant to the questions at issue. However, the Chamber is mindful of the nature of such intelligence documents which rely on unverified anonymous sources and often contain predictions, rather than accounts of events that have actually occurred. The Chamber considers that this factor limits the probative value of such documents to an extent that it may become outweighed by prejudice when relied upon in a direct manner for central aspects of the charges, such as the existence of a common plan, the systematic nature of attacks or the implication of members of the alleged network. Nonetheless, the Chamber finds that the document may be relied upon for more general background information, including, for example, the widespread nature of the attacks, election campaign activity and the nature of what was being reported at that time. Accordingly, the Chamber admits KEN-OTP-0008-0180 under the conditions specified above.

51. **Document 10** of the Annex, **KEN-OTP-0006-1804**, is minutes of a security meeting from 6 December 2007. The report contains statistical data on the Uasin Gishu district and a summary of activities. It mentions certain campaign activities of Mr Ruto in November 2007. The Ruto Defence agrees to the admission of the document but objects to the conclusions drawn by the Prosecution. The Sang Defence objects to the admission of the document, stating that it goes to the acts and conduct of the accused (albeit not their client) and that the report has low probative value. The Chamber considers that the document contains relevant background information on questions at issue in this case. Regarding probative value, the Chamber observes that the Defence have not objected to its authenticity. The Chamber considers that, given the nature of the information provided, the reliability of the content of this document is not limited to same degree as the security briefs considered above. In this instance, the Chamber does not consider that any prejudice arising from admission of the document would outweigh its *prima facie* probative value. Accordingly, the Chamber admits KEN-OTP-0006-1804.
52. **Document 11** of the Annex, **KEN-OTP-0006-1939**, is the minutes of the district security and intelligence meeting of the Nandi South district held on 11 December 2007. It covers events of the first half of December 2007 and provides information on rallies and other events during this time as well as some statistical information. The Ruto Defence agrees to the admission of one page of the document which contains information regarding a campaign speech given by Mr Ruto. The Sang Defence objects to the admission, arguing that it goes to the acts and conduct of a network member and that the report has low probative value. The Chamber notes that the information provided in the document is *prima facie* relevant, as it pertains *inter alia* to campaign activity before the 2007 election, including that of one of the accused. The Chamber notes that the Defence have not objected to the authenticity of the document. The Chamber considers that the same probative value assessment

as set out in respect of Document 10 is also applicable in this case. Accordingly, the Chamber admits KEN-OTP-0006-1939.

53. **Document 12** of the Annex, **KEN-OTP-0006-2833**, is the minutes of the district security and intelligence meeting of the Nandi South district on 23 January 2008. It covers events for the month of January 2008 and provides information on rallies and other events during this time as well as some statistical information. The Ruto Defence agrees to admission of the one page indicated as most relevant by the Prosecution and does not object to the admission of the rest of the document. The Sang Defence objects to admission, arguing that the report is of low probative value and prejudicial because it contains information regarding the alleged planning of the violence by Kalenjin politicians. The Chamber considers that the document is *prima facie* relevant to the charges. Regarding probative value, the Chamber again notes that the Defence has not challenged the authenticity of the document. However, the Chamber notes that certain of the information in the document appears to comprise merely analysis and opinion and consequently may have limited probative value. In the circumstances, the Chamber considers that this material should not be relied upon in a direct manner for matters which are central to the charges. Nonetheless, the Chamber admits KEN-OTP-0006-2833 subject to the condition mentioned.
54. **Document 13** of the Annex, **KEN-OTP-0012-0123**, contains minutes of the special provincial security intelligence committee meeting of 3 January 2007, giving an overview of the situation in certain places in the Rift Valley at that time. The Ruto Defence agrees to admission. The Sang Defence opposes the request arguing that it is prejudicial because it gives details of the crime locations and has low probative value. The Chamber considers that the document is *prima facie* relevant to the charges. The Chamber notes that the Defence do not dispute the authenticity of the

document. Moreover, the Chamber observes that the account is contemporaneous to the events in question and the presentation of the document indicates it to be, in most part, a neutral report of facts. For these reasons the Chamber finds that the *prima facie* probative value of the document is not outweighed by any potential prejudicial effect if admitted. Accordingly, the Chamber admits KEN-OTP-0012-0123.

55. **Document 14** of the Annex, **KEN-OTP-0012-0129**, is a report emanating from the same source as Document 13 and contains minutes from a meeting held on 31 December 2007. The Ruto Defence agrees to its admission. The Sang Defence opposes the request arguing that it is prejudicial because it contains information regarding the crime bases and that the violence was planned and that it is of low probative value. The Chamber considers that the document is *prima facie* relevant to the charges. The Chamber notes that the Defence do not dispute the authenticity of the document. Moreover, the Chamber observes it is contemporaneous to the events in question and, like Document 13, provides a general overview of the situation in the Rift Valley at the time in relatively neutral terms. Considering this, the Chamber finds that the *prima facie* probative value of the document is not outweighed by any potential prejudice of its admission into evidence. Accordingly, the Chamber admits KEN-OTP-0012-0129.
56. **Document 15** of the Annex, **KEN-OTP-0012-0139**, is the minutes of a meeting of the provincial security and intelligence secretariat, held on 25 September 2007. The Prosecution submits that it is relevant and probative of Mr Ruto's influence over the Kalenjin community, since the document states that he 'remains ODM luminary spearheading ODM popularity'. The Ruto Defence does not oppose admission of the portion of the document identified by the Prosecution, although, as with other documents tendered, disputes the Prosecution's interpretation thereof. The Sang

Defence opposes admission primarily on the basis that it goes to the acts and conduct of one of the accused (albeit not their client) and is of low probative value. The Chamber finds that the document is *prima facie* relevant, as parts of it pertain to the election campaign, to the political situation before the 2007 election and to the position of Mr Ruto within the ODM, all of which are matters connected to the issues of the case. Regarding probative value, the Chamber notes that the Defence do not challenge the authenticity of the document. Moreover, the Chamber notes that the document is contemporaneous and primarily factual, and the reference to the accused is general in nature. Accordingly, the Chamber finds that the probative value of the document is not outweighed by any potential prejudice arising from its admission. The Chamber therefore admits KEN-OTP-0012-0139.

57. **Document 16** of the Annex, **KEN-OTP-0012-0328**, is the minutes of the Bureti District Security Intelligence Committee held on 10 December 2007. The Prosecution submits that the document is relevant and probative since 'it refers to inflammatory speeches by Mr Ruto'. Both Defence teams object to the admission of the document, arguing that it is irrelevant, as Bureti is not a district referred to in the charges, and, on the part of the Sang Defence, that the information goes to the acts and conduct of one of the accused. The Chamber finds that the document is *prima facie* relevant as it refers in part to measures taken in preparation for the election, a list of recent campaigning activities, including, in particular, rivalry between PNU and ODM. Regarding probative value, the Chamber notes that the Defence do not challenge the authenticity of the document. It is additionally noted that the document is contemporaneous and appears to have been prepared in the ordinary course of administrative affairs. The Chamber observes that the original source of the statement regarding Mr Ruto is not identified, which limits the probative value of that information. In the circumstances the Chamber considers that it would not be appropriate for the content of this document to be relied upon in a direct manner in

respect of matters which are central to the charges. Nonetheless, the Chamber considers that for general purposes, including those identified in the relevance assessment above, any prejudice arising would not outweigh the document's *prima facie* probative value. Accordingly, the Chamber admits KEN-OTP-0012-0328 subject to the condition mentioned.

58. **Document 17** of the Annex, **KEN-OTP-0012-0473**, is the minutes of a Nandi North Special District Security and Intelligence Committee meeting, held on 27 February 2008. The Prosecution submits that the document is probative in that it describes the arrest of alleged perpetrators of violence. The Prosecution notes that it intends to use this information for corroboration of Prosecution witnesses. The Ruto Defence agrees to the admission of the document but nevertheless questions its relevance. The Sang Defence objects to its admission. The Chamber considers that the document is *prima facie* relevant. Although it relates to events that took place after the timeframe of the charges, it refers to the arrest of alleged perpetrators of the PEV, including as referred to as part of the alleged 'Network' in the Updated Document Containing the Charges.⁵⁸ Regarding probative value, the Chamber notes that neither defence team has challenged the document's authenticity, and that the document appears to be contemporaneous and to have been prepared in the ordinary course of administrative affairs. The Chamber considers that the document has sufficient *prima facie* probative value for the purposes envisaged by the Prosecution in the Annex. The Chamber does not find that there are other reasons which would necessitate exclusion of the document. Accordingly, the Chamber admits KEN-OTP-0012-0473.

59. **Document 18** of the Annex, **KEN-OTP-0012-0478**, is the minutes of a Nandi North District Security and Intelligence Committee meeting, held on 1 February 2008. The

⁵⁸ See Updated Document Concerning the Charges, ICC-01/09-01/11-533-AnxA-Corr, para. 20.

document covers events of the district and contains statistical data. The Ruto Defence agrees to the admission of the document, while the Sang Defence objects to its admission, *inter alia*, on the basis that it is of low probative value and is prejudicial in containing information on crime bases. The Chamber considers the document to be of *prima facie* relevance, as it contains *inter alia* statistics in respect of internally displaced persons. Regarding probative value, the Chamber observes that the Defence has not challenged the document's authenticity. Moreover, the Chamber notes that the document appears to be contemporaneous to the events and prepared in the ordinary course of administrative affairs. The Chambers does not consider that the potential prejudice of admission would outweigh the *prima facie* probative value of the material. Accordingly, the Chamber admits KEN-OTP-0012-0478.

60. **Document 19** of the Annex, **KEN-OTP-0012-0487**, is the minutes of a Nandi North District Security and Intelligence Committee meeting, held on 6 February 2008. The Prosecution submits it is relevant and probative with regard to the existence of internally displaced persons at the Kapsabet police station. The Ruto Defence agrees to the admission of the material, the Sang Defence objects *inter alia* on the basis that it is of low probative value and prejudicial in referring to Kapsabet crime base. The Chamber considers that the document is of *prima facie* relevance. As with the previous documents, the Chamber observes that the authenticity of the document has not been challenged by the Defence, and that it appears to have been prepared contemporaneously and in the ordinary course. The Chamber finds that any potential prejudice of its admission does not outweigh the *prima facie* probative value of the material. Accordingly, the Chamber admits KEN-OTP-0012-0487.
61. **Document 20** of the Annex, **KEN-OTP-0013-0410**, is entitled 'situation report' on the PEV from 7 January 2007. The Chamber notes that parts of the document are

illegible. The Prosecution states that part of the portions of the document it intends to rely on 'represents the Prosecution's reading' of the lines in question. If a document is illegible to this extent the Chamber cannot fully assess its authenticity, which is a prerequisite for determining its probative value. Therefore, the Chamber is of the view that the document does not have the necessary *prima facie* probative value. Accordingly, the Chamber does not admit KEN-OTP-0013-0410.

62. **Document 21** of the Annex, **KEN-OTP-0013-0427**, is a situation report of the office of the commissioner of police from 4 January 2008. It contains an overview of incidents which occurred in Kenya, which is followed by a short analysis of potential ways to respond to the situation. The Defence objects to the admission of the document, arguing that it is unreliable and, in the case of the Sang Defence, prejudicial. It is submitted that the author of the document, the commissioner of police, was alleged as a perpetrator in another case before this Court and is therefore unreliable as a source. The Chamber considers that the document is *prima facie* relevant. Concerning probative value, the Chamber observes that the Defence has not objected to the authenticity of the document. Moreover, the document appears to have been prepared contemporaneously and in the ordinary course of fulfilling an official function. However, the Chamber notes that the document does appear to rely on unidentified, and potentially unverified, sources which may limit its probative value for certain purposes. Nonetheless, on a *prima facie* basis, the Chamber considers that the document has sufficient probative value to satisfy the admissibility requirements. The Chamber also does not consider that the potential prejudice of admission would outweigh the *prima facie* probative value of the material or that the document should otherwise be excluded. Accordingly, the Chamber admits KEN-OTP-0013-0427.

63. **Document 22** of the Annex, **KEN-OTP-0013-0598**, is a situation report by the commissioner of the police from 21 November 2007. It contains an overview of incidents that occurred in Kenya during that time and some analysis on possible reactions to them. The Prosecution submits that the document is relevant and probative since it relates to Mr Ruto and to allegations that he was financing a group through another alleged member of the network. The Defence objects to the admission of the document, arguing that the source is unreliable or that it is 'a compilation of primarily anonymous hearsay' and that the prejudice outweighs any probative value. The Chamber considers that the document is *prima facie* relevant to the charges. Regarding probative value of this type of document, the Chamber reiterates the findings made in the preceding paragraph. The Chamber notes that the Prosecution intends to use the document to prove direct acts of Mr Ruto in funding an armed group with information for which no source is indicated and for which no further detail or information is provided. The Chamber therefore finds that, in this instance, the potential prejudice of admission outweighs the *prima facie* probative value. Accordingly, the Chamber does not admit KEN-OTP-0013-0598.
64. **Document 23** of the Annex, **KEN-OTP-0063-1197**, is a summary of a meeting with the Kenya Police Spokesperson from 11 January 2008. The Defence objects to its admission. The Prosecution submits that the author is the European Union Election Observation. The Chamber notes that there is no indication in the document of who the author is. The document does not have any header or footer, it is not signed, and there is no seal or any other signs of authenticity. Further, there is no list of participants, no formal ending of the report and no date except for that mentioned in the title. Therefore, the Chamber finds that the document lacks the minimum indicia of authenticity for admission in this manner. Accordingly, the Chamber does not admit KEN-OTP-0063-1197.

65. **Document 24** of the Annex, **KEN-OTP-0005-8554**, contains a submission by the commissioner of police to the Commission of Inquiry into Post-Election Violence ('CIPEV') and a Kenya Police Report with regard to the PEV. The Defence objects to the admission of the document, arguing that it lacks authenticity and that the prejudice of its admission outweighs its probative value. The Prosecution indicates that the Kenyan Police Commission is the source or author of the item. The Chamber considers that the document is *prima facie* relevant. However, the Chamber notes that there are no dates, official seal, titles or signatures on the first page and it is not clear who generated this page. The three exhibits themselves do not show any indication of whether they have been officially accepted by the CIPEV and put into its record. The second exhibit, the submission by the police commissioner before the CIPEV, bears on its first page a seal of the Kenya Police and the title indicating the content and a date, but is unsigned. In respect to the Kenyan Police report, the Chamber notes that, apart from the title on the first page, there is no indication of who the author of the report is. There is no seal or official sign, no date of production, no signature and no formal ending. The report also talks about up to ten 'schedules' (annexes) whereas the schedules annexed are only eight. Therefore it is not certain if the complete document with all the annexes is being presented. For these reasons the Chamber finds that the document lacks the minimum indicia of reliability and therefore cannot be admitted into evidence in this manner. Accordingly, the Chamber does not admit KEN-OTP-0005-8554.

c. Hospital Records

66. The Prosecution includes nine records from different hospitals in this category. The Defence agrees to the admission of four documents, **numbers 25 (KEN-OTP-0011-0026), 28 (KEN-OTP-0011-0196), 29 (KEN-OTP-0011-0640) and 30 (KEN-OTP-0006-1057)** of the Annex. As the Chamber is not bound by the agreement of the parties on

matters of evidence or law, the assessment of the Chamber with respect to the admissibility of each of these documents is set out below.

67. **Document 25** of the Annex, **KEN-OTP-0011-0026**, is an official Ministry of Medical Services document providing death and injury statistics relating to the PEV. The Chamber considers that the document is both *prima facie* relevant and has sufficient probative value. Noting the position of the parties, the Chamber also does not find there to be any reason to otherwise exclude the document. Accordingly, the Chamber admits KEN-OTP-0011-0026.
68. **Document 26** of the Annex, **KEN-OTP-0011-0127**, is a document from the Kenyan Ministry of Health and contains statistical data with regard to Kapsabet District Hospital. The Sang Defence agrees to the admission of this document. The Ruto Defence objects, arguing that the document is irrelevant since the admission of the patients allegedly took place between 20-29 January 2008 and thus the information relates to events outside of the temporal scope of the charges. The Chamber notes that some of the dates are not dates of admission but dates of death, and consequently finds that the document to be *prima facie* relevant. As to its probative value, the Chamber notes that the Defence has not challenged the document's authenticity. The Chamber finds that the document has indicia of reliability and is of *prima facie* probative value. The Chamber finds that any potential prejudice of admission does not outweigh the *prima facie* probative value of the material. Accordingly, the Chamber admits KEN-OTP-0011-0127.
69. With regard to **Document 27** of the Annex, **KEN-OTP-0006-1021**, the Chamber notes that the document has already been admitted into evidence as EVD-T-D09-00064 in a redacted form (KEN-OTP-0006-1021_R01). The Ruto Defence does not object to admission and the Sang Defence indicated that this document was already admitted into evidence, presuming that the redacted version and the unredacted

version submitted by the Prosecution are the same. In the circumstance, bearing in mind that a version of this document has already been admitted, the Chamber admits KEN-OTP-0006-1021.

70. **Document 28** of the Annex, **KEN-OTP-0011-0196**, is a summary of data from Moi Teaching and Referral Hospital providing information on the place and cause of deaths relating to the PEV. It is noted that the Defence have agreed to the authenticity of this document.⁵⁹ The Chamber considers that the document is both *prima facie* relevant and has sufficient probative value. Noting the position of the parties, the Chamber also does not find there to be any reason to otherwise exclude the document. Accordingly, the Chamber admits KEN-OTP-0011-0196.
71. **Document 29** of the Annex, **KEN-OTP-0011-0640**, is a list of PEV victims treated at the Moi Teaching and Referral Hospital. It is noted that the Defence have agreed to the authenticity of this document.⁶⁰ The Chamber considers that the document is both *prima facie* relevant and has sufficient probative value. Noting the position of the parties, the Chamber also does not find there to be any reason to otherwise exclude the document. Accordingly, the Chamber admits KEN-OTP-0011-0640.
72. **Document 30** of the Annex, **KEN-OTP-0006-1057**, provides information on deaths and injuries relating to the PEV in Nandi South District. The Chamber considers that the document is both *prima facie* relevant and has sufficient probative value. Noting the position of the parties, the Chamber also does not find there to be any reason to otherwise exclude the document. Accordingly, the Chamber admits KEN-OTP-0006-1057.
73. **Document 31** of the Annex, **KEN-OTP-0006-1067**, is a medical report by the ministry of health, for the period 30 December 2007 and 31 March 2008, and

⁵⁹ ICC-01/09-01/11-653-Conf-AnxB, No. 184.

⁶⁰ ICC-01/09-01/11-653-Conf-AnxB, No. 183.

contains statistics of victims of the PEV treated in the Nandi North district. The Prosecution submits that an identical document (KEN-OTP-0121-3490) was marked for identification, upon request of the Ruto Defence, during the testimony of Prosecution Witness 268. At that time, the Prosecution objected on the grounds that the witness could not authenticate the document.⁶¹ First, the Chamber notes that the document does not appear to be available in the version indicated by the Prosecution. Only a redacted version of the document (KEN-OTP-0006-1067_R01) is available to the Chamber in the E-court system. For this reason the Chamber will assess the identical version of the same document,⁶² KEN-OTP-0121-3490, which was marked for identification and is unredacted. The Chamber notes that although the Ruto Defence submits that the document is irrelevant, it also avers that it should be admitted as it was commented on by Witness 268 during his testimony. The Sang Defence objects to its admission arguing it is irrelevant since it is outside the scope of the charges. The Chamber considers that the document is *prima facie* relevant to the charges in this case, however it is noted that information is provided which exceeds the temporal scope of the charges. The Chamber considers that, in this instance, it would only be appropriate to admit the document in respect of the information falling within the temporal scope of the charges. As to its probative value, the Chamber notes that the Defence has not objected to its authenticity. The unredacted version of the document contains the name and signature of the author of the document. The Chamber therefore considers that the document has *prima facie* probative value. Accordingly, the Chamber admits KEN-OTP-0121-3490 subject to the condition specified above.

74. **Document 32** of the Annex, KEN-OTP-0006-1059, appears to be a list of patients who were admitted to the Nandi Hills District Hospital between 30 December 2007

⁶¹ ICC-01/09-01/11-T-63-Red-Eng, page 71, lines 6-12.

⁶² KEN-OTP006-1067_R01 consists of six pages, every second page being blank. KEN-OTP-0121-3490 consists of three pages, with no blank pages.

and 20 January 2008. The Prosecution submits that it is corroborative of witnesses' testimony about the violence committed in Nandi Hills. The Defence objects to the admission of the document, arguing that it is irrelevant and is contradicted by another document of the Annex (document 30, KEN-OTP-0006-1057). The Ruto Defence argues that the document does not contain any confirmation that it is a list of people who died after having arrived at the hospital. The Chamber considers that the document is *prima facie* relevant to the charges in this case. Regarding its probative value, the Chamber notes that the Defence has not challenged the document's authenticity. The Chamber notes that the parties can make submissions regarding interpretation, or any alleged inconsistency between evidence, at the appropriate time. However, for present purposes, the Chamber finds that the document has *prima facie* probative value. Further, any potential prejudice of its admission does not outweigh the probative value. Accordingly, the Chamber admits KEN-OTP-0006-1059.

75. **Document 33** of the Annex, **KEN-OTP-0006-1061**, is indicated by the Prosecution as a list of persons who were treated in Nandi Hills District Hospital. The Chamber notes that only a redacted version of the document, KEN-OTP-0006-1061_R01, appears to be registered in the case record. This has not been explained by the Prosecution. The Chamber finds that it is unable to fully assess the document's relevance and probative value. For these reasons the Chamber does not admit KEN-OTP-0006-1061.

d. Publications

76. The Prosecution submits six documents under this category which are five newspaper articles and one academic article. The Defence agrees to the admission of **Documents 34 to 38** of the Annex (**KEN-OTP-0003-0419; KEN-OTP-0045-0020; KEN-OTP-0045-0021; KEN-OTP-0045-0023** and **KEN-OTP-0033-0271**). As the

Chamber is not bound by the agreement of the parties on matters of evidence or law, the assessment of the Chamber with respect to the admissibility of each of these documents is set out below.

77. **Document 34** of the Annex, **KEN-OTP-0003-0419**, is an official press release of the CIPEV explaining its role and function. The Chamber considers that the document is both *prima facie* relevant and has sufficient probative value. The Chamber observes that this is a document that could be admitted through a witness on the Prosecution's witness list. However, noting that it appears to be sufficiently self-explanatory without necessarily requiring further contextualisation, as well as the position of the parties, the Chamber does not find there to be any reason to exclude the document. Accordingly, the Chamber admits KEN-OTP-0003-0419.
78. **Document 35** of the Annex, **KEN-OTP-0045-0020**, is a press article dated 4 June 2006 entitled 'Kenya: Pomp, Colour as Ruto is Installed as Kenyan Elder' which appears to have been published in The Standard online. The Chamber notes that the Defence have agreed to the authenticity of this document.⁶³ The Chamber considers that the document is *prima facie* relevant and has sufficient *prima facie* probative value. Noting also the position of the parties, the Chamber admits KEN-OTP-0045-0020.
79. **Document 36** of the Annex, **KEN-OTP-0045-0021**, is a press article dated 4 June 2006 entitled 'Kenya: Ruto Made Elder Amid Calls to Kick Out Uhuru' which appears to have been published in the Daily Nation on the Web. The Chamber notes that the Defence have agreed to the authenticity of this document.⁶⁴ Noting also that this article appears to refer to the same event as described in Document 35, the Chamber considers that the document is *prima facie* relevant and has sufficient *prima*

⁶³ ICC-01/09-01/11-653-Conf-AnxB, No. 107.

⁶⁴ ICC-01/09-01/11-653-Conf-AnxB, No. 108.

facie probative value. Noting additionally the position of the parties, the Chamber consequently admits KEN-OTP-0045-0021.

80. **Document 37** of the Annex, **KEN-OTP-0045-0023**, is a press article dated 26 June 2006 entitled 'Kenya: Ruto Now Crowned Tugen Elder' which appears to have been published by The Standard online. The Chamber notes that the Defence have agreed to the authenticity of this document.⁶⁵ The Chamber considers that the document is *prima facie* relevant and has sufficient *prima facie* probative value. Noting also the position of the parties, the Chamber consequently admits KEN-OTP-0045-0023.
81. **Document 38** of the Annex, **KEN-OTP-0033-0271**, is a summary taken from the website of KASS FM addressing, inter alia, listenership figures and the geographical scope of its broadcasts. The Chamber notes that the Defence have agreed to the authenticity of this document.⁶⁶ The Chamber considers that the document is *prima facie* relevant and has sufficient *prima facie* probative value. Noting also the position of the parties, the Chamber consequently admits KEN-OTP-0033-0271.
82. **Document 39** of the Annex, **KEN-OTP-0046-0014**, is an academic article by Gabrielle Lynch, 'Courting the Kalenjin: The Failure of Dynasticism and the Strength of the ODM Wave in Kenya's Rifts Valley Province'. The Prosecution requested the introduction of this document for the truth of its content via Prosecution Witness 464.⁶⁷ The Chamber, after having received the parties' submissions on the matter, rejected the request.⁶⁸ The Chamber therefore does not admit KEN-OTP-0046-0014.

⁶⁵ ICC-01/09-01/11-653-Conf-AnxB, No. 109.

⁶⁶ ICC-01/09-01/11-653-Conf-AnxB, No. 79.

⁶⁷ ICC-01/09-01/11-T-90-Eng, page 2, lines 15-22 and page 88, line 3 to page 89, line 19.

⁶⁸ ICC-01/09-01/11-T-90-Eng, page 88, line 3 to page 101, line 20.

e. Declarations

83. Under the category 'declarations' the Prosecution submits one document. **Document 40** of the Annex, **KEN-OTP-0069-0104**, is a statement signed by an employee of a market research company with regard to the availability of copies of recordings of KASS FM broadcasts. The Defence objects to the admission of the document. The Chamber considers that the document is properly to be considered testimonial in nature. In its description of the material the Prosecution itself refers to the document as an 'affidavit'. Therefore the Chamber does not consider that the document should be submitted in this manner. Accordingly, the Chamber does not admit KEN-OTP-0069-0104.

f. Maps

84. Under the category 'maps' the Prosecution submits three documents, **Documents 41 to 43** (**Document 41** of the Annex, **KEN-OTP-0041-0398**; **Document 42** of the Annex, **KEN-OTP-0041-0419** and **Document 43** of the Annex, **KEN-OTP-0041-0420**). Since all documents stem from the same source and are of similar nature the Chamber will assess them together. The maps are overviews of the Rift Valley as a whole, of Eldoret with its suburbs and of the Nandi District. The author of the material is a sub-division of the Prosecution, the Scientific Response Unit. The Defence objects to the admission of all documents, arguing that they are not produced by an independent entity and are therefore inadmissible. The Chamber finds that all three maps are *prima facie* relevant as they are of locations that are in the geographical scope of the charges. Regarding probative value, the Chamber does not consider that documents that are produced entirely by one of the parties have *per se* a limited reliability. However, if necessary, the tendering party needs to explain how the document was produced in order for the Chamber to be able to

assess its reliability.⁶⁹ For two of the three documents (Document 41 and 42) the Prosecution states that it used information from third parties in the production of the documents. However, it does not provide sufficient explanation as to how the information from the different sources indicated in the metadata were used in the compilation of the material and how the material was prepared. For the third document (Document 43) no information is provided on how the document was produced. Accordingly, the Chamber is not in a position to properly assess their reliability. Therefore it does not admit KEN-OTP-0041-0398, KEN-OTP-0041-0419 and KEN-OTP-0041-0420.

g. Non-ICC Court Records

85. Under this category, the Prosecution provides one document. **Document 44** of the Annex, **KEN-OTP-0039-2113**, is a 457 page-long court document of the High Court of Kenya. The Defence objects to the admission of the document, arguing that it contains prior statements. The document is composed of a police file which contains medical reports taken by the police with regard to victims of an attack in Kiambaa, its investigations against four suspects resulting in multiple murder charges (including statements of the four suspects), a statement of facts on the attack on Kiambaa and several witness statements and declarations by police officers (in summarised form or in full). Further, the item contains documents with regard to the proceedings before the High Court of Kenya at Nakuru, including witness testimony, their statements in examination and cross-examination and the judgement of the High Court of Kenya. The Chamber considers that certain of the material is testimonial in nature and notes that a 'bar table' motion should not be used in manner which would be duplicative of the Rule 68 of the Rules procedure. Since the Prosecution is submitting the document for the truth of its content, the

⁶⁹ Lubanga Decision on the Admission of Four Documents, ICC-01/04-01/06-1399-Corr., para. 25 (noting that it is the responsibility of the tendering party to establish *prima facie* relevance and probative value).

Chamber finds that it should have submitted the document under Rule 68 of the Rules. Accordingly, the Chamber does not admit KEN-OTP-0039-2113.

h. Non-ICC Transcripts

86. The Prosecution submits two documents which are reports of evidence taken before the CIPEV. **Document 45** of the Annex, **KEN-OTP-0005-7542**, is a 228 page-long report on a session held by the CIPEV in the Uasin Gishu district in August 2008. It contains the transcripts of the testimony of seven witnesses who were questioned by the CIPEV. Every witness made a declaration at the beginning of her or his testimony stating that she or he will provide truthful evidence. The Prosecution requests the admission of three of these testimonies. The Sang Defence objects, arguing that the document must be introduced according to Rule 68 of the Rules. The Ruto Defence, although also stating that the material properly falls under Rule 68 of the Rules, agrees to the admission of the document. The Chamber notes that the Prosecution itself refers to the statement as testimony. While this is not binding, it might be indicative for the qualification of the document as such. The Chamber considers that, as with the previous document, this material is testimonial in nature and reiterates that a 'bar table' motion should not be used in manner which would be duplicative of the Rule 68 of the Rules procedure. Accordingly, the Chamber does not admit KEN-OTP-0005-7542.
87. **Document 46** of the Annex, **KEN-OTP-0006-0048**, is a further transcript of certain testimony taken before the CIPEV. The Prosecution submits that this testimony supplements the NSIS reports, submitted as Documents 9-19 in the Annex. The Chamber notes that the Defence submits that the statement falls under Rule 68 of the Rules because it contains prior recorded testimony. The Ruto Defence nevertheless agrees to the admission of this document. However, the Sang Defence objects to admission.

88. The Chamber considers that, as with the previous two documents, this material is testimonial in nature and reiterates that a 'bar table' motion should not be used in manner which would be duplicative of the Rule 68 of the Rules procedure. The Chamber therefore does not admit KEN-OTP-0006-0048.
89. Finally, the Chamber notes that no specific submissions were received on the appropriate level of confidentiality for each of the items of evidence. The Chamber has therefore relied upon the confidentiality status as indicated in E-Court for the purposes of the disposition below. Any party who objects to the indicated level of confidentiality for a particular item is directed to make relevant submissions to the Chamber within two days of the date of this Decision.

FOR THE FOREGOING REASONS THE CHAMBER HEREBY

REJECTS the Alternative Request by the Sang Defence;

GRANTS the Application with regard to the following items of evidence, to be designated as public

KEN-D09-0001-0092	KEN-D09-0003-0001	KEN-D09-0003-0643
KEN-OTP-0045-0020	KEN-OTP-0045-0021	KEN-OTP-0045-0023
KEN-OTP-0033-0271;		

GRANTS the Application with regard to the following items of evidence under, as applicable, the conditions specified above, to be designated as confidential

KEN-OTP-0008-0180	KEN-OTP-0006-1804	KEN-OTP-0006-1939
KEN-OTP-0006-2833	KEN-OTP-0012-0123	KEN-OTP-0012-0129

KEN-OTP-0012-0139	KEN-OTP-0012-0328	KEN-OTP-0012-0473
KEN-OTP-0012-0478	KEN-OTP-0012-0487	KEN-OTP-0013-0427
KEN-OTP-0011-0026	KEN-OTP-0011-0127	KEN-OTP-0006-1021
KEN-OTP-0011-0196	KEN-OTP-0011-0640	KEN-OTP-0006-1057
KEN-OTP-0121-3490	KEN-OTP-0006-1059	KEN-OTP-0003-0419;

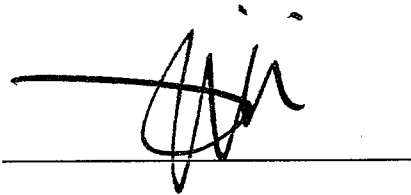
DIRECTS the parties to make submissions, if any, on the appropriate level of confidentiality for each of the items to be admitted pursuant to this Decision within two days of the date of this Decision;

ORDERS the Registry to thereafter attribute EVD numbers to each of the above items, to be designated in accordance with the level of confidentiality indicated above or, in the event of disagreement, as may be directed by the Chamber; and

REJECTS the remainder of the Application.

Judge Eboe-Osuji appends a Separate Further Opinion.

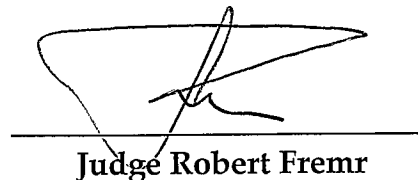
Done in both English and French, the English version being authoritative.



Judge Chile Eboe-Osuji, Presiding



Judge Olga Herrera Carbuccia



Judge Robert Fremr

Dated 10 June 2014
At The Hague, The Netherlands
No. ICC-01/09-01/11

44/44

10 June 2014

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*, Theisger 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](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

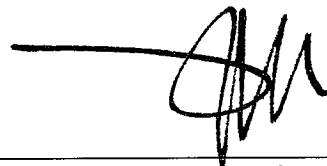
unreliable.¹⁴ It is, indeed, possible to see this discretion as serving the overarching judicial mandate to conduct a trial that is fair, speedy and efficient.

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.



Chile Eboe-Osuji
(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.