

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **15 July 2014**

**TRIAL CHAMBER V(A)**

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

**SITUATION IN THE REPUBLIC OF KENYA**

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

**Public**

**Decision on the Joint Defence Application for Admission of Documentary  
Evidence Related to the Testimony of Witness 536**

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  
Mr Essa Faal  
Ms Shyamala Alagendra

**Counsel for Joshua Arap Sang**

Mr Joseph Kipchumba Kigen-Katwa  
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**Legal Representatives of Victims**

Mr Wilfred Nderitu

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the  
Defence**

**States Representatives**

*Amicus Curiae*

**REGISTRY**

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**Registrar**

Mr Herman von Hebel

**Victims and Witnesses Unit**

Mr Nigel Verrill

**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 Joint Defence Application for Admission of Documentary Evidence Related to the Testimony of Witness 536’.

## I. PROCEDURAL HISTORY

1. On 13 March 2014, the defence team for Mr Ruto (‘Ruto Defence’) and the defence team for Mr Sang (‘Sang Defence’) (together the ‘Defence’) submitted their ‘Joint Defence Application for the Admission of Items related to the Testimony of P-0536 from the Bar Table’ (the ‘Application’).<sup>1</sup>
2. On 4 April 2014, the Office of the Prosecutor (‘Prosecution’) submitted its response.<sup>2</sup>

## II. SUBMISSIONS

### *General Defence’s submissions*

3. The Defence submits that the ‘procedure of tendering materials from the bar table without it being introduced by a witness has been accepted by all the Trial Chambers’ at the Court.<sup>3</sup> In general, the Defence states that all the items concern issues about which Witness 536 offered testimony. In its view, the items are *prima facie* relevant,<sup>4</sup> and have probative value, as detailed in the annex to their Application.<sup>5</sup> Moreover, the Defence submits that admission of these items is not prejudicial to the ‘fair trial process’. On the contrary, it would be in its view

<sup>1</sup> ICC-01/09-01/11-1219-Conf with Confidential Annex.

<sup>2</sup> ICC-01/09-01/11-1254-Conf.

<sup>3</sup> Application, ICC-01/09-01/11-1219-Conf, para. 7.

<sup>4</sup> Application, ICC-01/09-01/11-1219-Conf, para. 16.

<sup>5</sup> Application, ICC-01/09-01/11-1219-Conf, para. 17 and Anx.

prejudicial to 'the rights of the Defence' not to admit the material. The Defence further underlines that the present Application is done 'following the Chamber's direction to submit a bar table motion'.<sup>6</sup>

4. The Defence submits that the Chamber directed the Defence towards a bar table motion although it was aware that: (i) the Ruto Defence had rebuttal evidence in its possession; (ii) cross-examination would be kept to under 10 minutes; (iii) Witness 536 was present in court, under oath and ready to testify; and (iv) the Prosecution had not opposed cross-examination, even when expressly invited to by the Defence.<sup>7</sup>
5. The Defence further submits that 'nothing in any of the Court's legal instruments or jurisprudence supports the Prosecution's claim' that a bar table motion should not be used by the Defence during the Prosecution's case.<sup>8</sup> The Defence also argues that the Defence may lead evidence through a Prosecution witness which is supportive of the Defence case. The Defence submits that this possibility is clearly derived from the broad scope of cross-examination permitted by Rule 140(2)(b) of the Rules and this Chamber's prior rulings.<sup>9</sup> Furthermore, the Defence submits that this evidence, which is supportive of the Defence case, is relevant for a future 'no case to answer' motion.<sup>10</sup>

#### *General Prosecution's submissions*

6. The Prosecution contends that the Application should be rejected as premature. Moreover, the Prosecution argues that the material is also inadmissible.<sup>11</sup> The Prosecution further objects to the introduction of evidence 'in the middle of the

<sup>6</sup> Application, ICC-01/09-01/11-1219-Conf, para. 18.

<sup>7</sup> Application, ICC-01/09-01/11-1219-Conf, para. 19.

<sup>8</sup> Application, ICC-01/09-01/11-1219-Conf, paras 21-22.

<sup>9</sup> Application, ICC-01/09-01/11-1219-Conf, paras 23-24. See also: Decision No. 2 on the Conduct of Trial Proceedings (General Directions), 3 September 2013, ICC-01/09-01/11-900.

<sup>10</sup> Application, ICC-01/09-01/11-1219-Conf, para. 25.

<sup>11</sup> ICC-01/09-01/11-1254-Conf, para. 1.

Prosecution's case', as it should be tendered in the Defence case, 'through appropriate witnesses'.<sup>12</sup>

7. The Prosecution submits that the procedures applied by this Chamber are 'essentially adversarial in nature'.<sup>13</sup> Consequently, it submits that each party should present its evidence during its own case, through its own witnesses.<sup>14</sup> The Prosecution argues that the appropriate way for the Defence to introduce this evidence is 'during its own case, through appropriate witnesses who can properly authenticate the material and/or provide relevant testimonial evidence to the Chamber'.<sup>15</sup> Although the Defence has the right to make submissions that there is 'no case to answer', it should not have '*carte blanche* to introduce all sorts of material in the Prosecution's case'.<sup>16</sup> In its view, Defence evidence tendered during the course of the Prosecution case may be taken into account only 'for the purposes of a no case to answer submission, for the limited purpose of assessing whether a witness is "incapable of belief"'.<sup>17</sup>
8. The Prosecution also argues that the Defence had an opportunity to introduce the evidence during the testimony of Witness 536. In its view, the Defence could have clarified the dates of certain events with the witness before presenting the accused's evidence.<sup>18</sup> Moreover, the Prosecution submits that although the Chamber initially stated that the evidence could be introduced through the bar table, 'this should not be construed as *carte blanche* to do so during the Prosecution case, nor to introduce evidence which should be properly proved through a witness'.<sup>19</sup> The Prosecution

<sup>12</sup> ICC-01/09-01/11-1254-Conf, para. 2.

<sup>13</sup> ICC-01/09-01/11-1254-Conf, para. 8.

<sup>14</sup> ICC-01/09-01/11-1254-Conf, paras 9-10.

<sup>15</sup> ICC-01/09-01/11-1254-Conf, para. 12.

<sup>16</sup> ICC-01/09-01/11-1254-Conf, para. 13.

<sup>17</sup> ICC-01/09-01/11-1254-Conf, para. 14.

<sup>18</sup> ICC-01/09-01/11-1254-Conf, para. 18.

<sup>19</sup> ICC-01/09-01/11-1254-Conf, para. 20.

finally contends that the Chamber would not have admitted the evidence, 'even if it had been presented to the witness at the appropriate time'.<sup>20</sup>

### III. ANALYSIS

9. At the outset, the Chamber reiterates its prior determination on the admission of documentary evidence:

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.

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. 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 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. [footnotes omitted]<sup>21</sup>

10. As regards the present Application, the Chamber recalls that the materials sought to be admitted relate to matters arising from the evidence of Witness 536. During the testimony, specifically at the end of the re-examination by the Prosecution, the Ruto Defence requested leave to further cross-examine the witness. On that occasion, the Chamber made the following ruling:

The Chamber's ruling would be you can introduce that evidence but not now. You will use the bar motion, bar table material, we indicated earlier for other witnesses who are coming to speak to those dates.

<sup>20</sup> ICC-01/09-01/11-1254-Conf, para. 22.

<sup>21</sup> Decision on the Prosecution's Request for Admission of Documentary Evidence, 10 June 2014, ICC-01/09-01/11-1353, paras 15-16.

[...]

Now, if you do have, as indicated before, other witnesses who can come and testify to this matter, you are free to do so. The door is not closed for you to call evidence on this matter. It doesn't have always to be by discrediting a particular witness as to their testimony.<sup>22</sup>

11. Although the admission of evidence other than through a witness is permissible in the Court's proceedings, the Chamber nonetheless considers admission of evidence through a witness to be a preferable approach, where possible.<sup>23</sup> It is recalled that while the Chamber guided the Ruto Defence to seek admission of the relevant evidence through a 'bar table motion', it also indicated that the Ruto Defence has the possibility of calling witnesses to testify on this matter.
12. Accordingly, in this instance and given the nature of the question at issue, the Chamber considers that the most appropriate course of action is for the Defence to wait to determine whether or not it has any witnesses through whom such material could be tendered.<sup>24</sup> If the admission of these items of evidence through a witness would be unduly difficult for the Defence, it may apply anew for the relief sought in their present Application.

<sup>22</sup> ICC-01/09-01/11-T-42-Red2-ENG, page 113, lines 17-19 and page 115, lines 22-25.

<sup>23</sup> See e.g. International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Radovan Karadžić*, IT-95-5/18-T, Decision on the Prosecution's First Bar Table Motion, 13 April 2010, para. 9. In this decision, the Trial Chamber stated: 'While evidence does not need to be introduced through a witness in every circumstance, and there may be instances where it is appropriately admitted from the bar table, it is the Chamber's view that the most appropriate method for the admission of a document or other item of evidence is through a witness who can speak to it and answer questions in relation to it. The bar table should not generally be the first port of call for the admission of evidence. It is, rather, a supplementary method of introducing evidence, which should be used sparingly to assist the requesting party to fill specific gaps in its case at a later stage in the proceedings'. The Chamber accepts the pronouncement in the *Karadžić* case as stating the general rule of procedure correctly. The Chamber considers, however, that when a party in good faith knows before the commencement of the trial that it will not be able to bring any witnesses through whom a particular document may be introduced, it may file an application for the admission of documentary evidence at that stage.

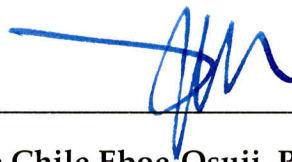
<sup>24</sup> See for example: ICC-01/09-01/11-1353, para 42. On that occasion, the Chamber accepted the argument of the Ruto Defence (anticipating that there may be a Prosecution witness through whom a particular document may be tendered) and decided as follows: 'Moreover, the Chamber notes that although 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.' 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.' The Chamber notes that while the annex to the present Application explains why the evidence was not presented through Witness 536 it does not address the question of whether or not there are defence witnesses through whom it could be tendered, without prejudice to the possibility of exploring a bar table motion in the future.

13. Accordingly, the Chamber rejects the Application at this stage of the proceedings, without prejudice. It will decide on the individual admissibility of these items, either when they are tendered through a witness during the presentation of the Defence case, or through a posterior application for the admission of documentary evidence.


**FOR THE FOREGOING REASONS THE CHAMBER HEREBY**

**REJECTS** the Application.

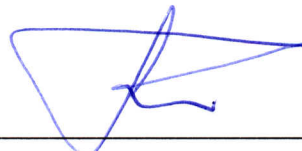
Done in both English and French, the English version being authoritative.



**Judge Chile Eboe-Osuji, Presiding**



**Judge Olga Herrera Carbuccion**



**Judge Robert Fremr**

Dated 15 July 2014  
At The Hague, The Netherlands