



Original: **English**

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

Date: **6 August 2015**

**TRIAL CHAMBER V(A)**

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

**SITUATION IN THE REPUBLIC OF KENYA**

**IN THE CASE OF**

**THE PROSECUTOR v. WILLIAM SAMOEI RUTO  
AND JOSHUA ARAP SANG**

**Public**

**Public Redacted Version of Sang Defence Response  
to Prosecution's Second Application for Admission of Items from Bar Table  
into Evidence, 10 July 2015, ICC-01/09-01/11-1927-Conf**

**Source:** Defence for Mr. Joshua arap Sang

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

**The Office of the Prosecutor**

Fatou Bensouda  
Anton Steynberg

**Counsel for the Defence**

**For William Samoei Ruto:**

Karim Khan QC, David Hooper QC  
Essa Faal, Shyamala Alagendra  
Leigh Lawrie

**For Joshua Arap Sang**

Joseph Kipchumba Kigen-Katwa  
Caroline Buisman

**Legal Representatives of the Victims**

Wilfred Nderitu

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

**Office of Public Counsel for Victims**

Paolina Massidda

**Office of Public Counsel for the  
Defence**

**States' Representatives**

**Amicus Curiae**

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**REGISTRY**

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Herman von Hebel

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**Victims and Witnesses Unit**

Nigel Verrill

**Detention Section**

**Victims Participation and Reparations  
Section**

**Others**

## I. INTRODUCTION

1. The Prosecution seeks to admit six documents through a bar table motion, pursuant to Articles 64(9) and 69(2), (3), and (4) of the Rome Statute and Rule 63(2) of the Rules of Procedure and Evidence.<sup>1</sup> As indicated in the Application, the Defence for Mr Sang does not object to the admission of five of the documents.<sup>2</sup> However, the Sang Defence does object to the admission of KEN-OTP-0152-0223, a *Situation Report on Post Election Violence*, dated 7 January 2008 (“Document 5”). The Defence submits that Document 5 is not authentic and that its probative value is outweighed by its prejudicial effect and therefore should not be admitted through a bar table motion.
2. This response is filed confidentially, pursuant to Regulation 23(2) of the Regulations of the Court. A public redacted version will be filed shortly.

## II. SUBMISSIONS

3. To start, the fact that the Trial Chamber once refused to admit Document 5 for containing an illegible page does not mean that the document was without other faults;<sup>3</sup> only that the Chamber need not consider other troubling aspects of the document at that time, since it was already inadmissible for being incomplete. That the [REDACTED] has now provided a complete and legible copy of the document does not cure other defects, which should now prevent its admission into evidence.
4. In support of its Application, the Prosecution argues that the Chamber has already admitted a similar document emanating from the same [REDACTED]. However, the Prosecution’s citation for this proposition is seemingly a *Bemba* case filing, and the Prosecution does not note which document was so admitted. The Defence assumes the Prosecution makes reference to [REDACTED], which was admitted into evidence as [REDACTED] through the Chamber’s decision on a previous bar table application.<sup>4</sup> Of course, the admission of a similar document on a previous occasion is not binding

<sup>1</sup> ICC-01/09-01/11-1924-Conf, Prosecution’s Second Application for Admission of Items from the Bar Table into Evidence, 30 June 2015 (“**Application**”).

<sup>2</sup> See Application, paras.3, 7 and Application-Conf-AnxA.

<sup>3</sup> Application, para.8.

<sup>4</sup> [REDACTED].

on the Chamber with respect to the instant Document 5, especially given the Chamber's ruling that such determinations would be made on an individualised basis.<sup>5</sup>

5. In any event, there are several critical differences between the two [REDACTED], which should give the Chamber pause when evaluating the authenticity of Document 5. The admitted [REDACTED] has greater indicia of authenticity. For instance, it is on letterhead from the [REDACTED], is signed by the [REDACTED], and each page of the report is stamped and signed as being a "certified true copy of the original". Curiously, Document 5, a *Situation Report* of 7 January 2008, is on letterhead from the [REDACTED],<sup>6</sup> rather than letterhead from the [REDACTED]. It is not signed by the [REDACTED] himself, but by one [REDACTED].<sup>7</sup> There is no indication of whether the [REDACTED] ever saw or approved or circulated this report. Significantly, and unlike the admitted document, Document 5 lacks any stamped certification that this is a true copy of the original. The Defence submits that these are glaring defects, which impact fatally on the authenticity of Document 5 and which preclude its admission without having the maker of the document come to testify.
6. The Chamber has previously noted that authenticity is a prerequisite for determining probative value,<sup>8</sup> and it similarly refused to admit a summary of a meeting with the Kenya Police Spokesperson from 11 January 2008 (KEN-OTP-0063-1197), where the document was not signed and where there was no seal or other signs of authenticity.<sup>9</sup>
7. Furthermore, these deficiencies lend credence to the arguments advanced by the Ruto Defence Team in its response, namely that Document 5 may have been created for the sole purpose of providing it to the Waki Commission, as part of a deliberate scheme by certain senior Government of Kenya officials, in office at the time, to falsely accuse Mr Ruto of planning and funding the PEV.<sup>10</sup>

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<sup>5</sup> Decision on Bar Table, para. 19.

<sup>6</sup> Application-Conf-AnxB at 0223.

<sup>7</sup> Application-Conf-AnxB at 0229.

<sup>8</sup> Decision on Bar Table, paras.15, 61.

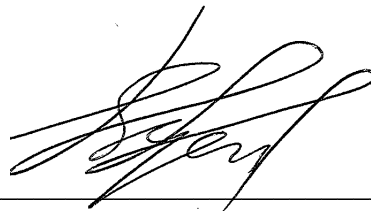
<sup>9</sup> Decision on Bar Table, para.64.

<sup>10</sup> ICC-01/09-01/11-1925-Conf, Defence response to "Prosecution's Second Application for Admission of Items from the Bar Table into Evidence", 3 July 2015, para.5.

8. If the questions surrounding the reliability and authenticity of Document 5 are not sufficient to bar its admission, then it should be rejected on the basis that its probative value is outweighed by its prejudicial effect. Document 5 relies on “unidentified, and potentially unverified sources, which may limit its probative value for certain purposes”.<sup>11</sup> Additionally, while Joshua Sang himself is not mentioned in the *Situation Report*, the acts and conduct of his co-accused William Ruto and other alleged Network members are discussed. The Chamber has previously found that documentary evidence going to the acts and conduct of the accused does not necessarily mean that the document should be excluded, but the Chamber noted 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”.<sup>12</sup> In this instance, where Document 5 alleges that William Ruto, [REDACTED],<sup>13</sup> there is a clear need for confrontation. Absent the opportunity to cross-examine someone about this assertion, the fair trial rights of the accused are in jeopardy.

### III. CONCLUSION

9. The Sang Defence concludes that Document 5, the *Situation Report* of 7 January 2008, lacks indicia of authenticity and that its admission, without the chance to confront the maker of the report, would create a prejudice that is not outweighed by the document’s probative value. The Sang Defence therefore requests the Chamber to reject the Prosecution’s request for its admission.



Joseph Kipchumba Kigen-Katwa  
On behalf of Mr. Joshua arap Sang  
Dated this 6<sup>th</sup> day of August 2015  
In Nairobi, Kenya

<sup>11</sup> Decision on Bar Table, para.62.

<sup>12</sup> Decision on Bar Table, paras. 24-25.

<sup>13</sup> Application-Conf-AnxB at 0224.