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PRE-TRIAL CHAMBER II

Before: **Judge Ekaterina Trendafilova, Presiding Judge**

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF THE PROSECUTOR V. WILLIAM SAMOEI RUTO, HENRY KIPRONO KOSGEY AND JOSHUA ARAP SANG

Public Document

Prosecution's Observations on the Scope of the Confirmation of Charges Hearing

Source: **Office of the Prosecutor**

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

The Office of the Prosecutor	**Counsel for the Defence** Mr. Kioko Kilukumi Musau, Mr. Joseph Kipchumba Kigen-Katawa, Mr. David Hooper QC, Mr. Kithure Kindiki, Mr. George Odinga Oraro, Mr. Julius Kipkosgei Kemboy, Mr. Allan Kosgey, Mr. Joel Kimutai Bosek and Mr. Philemon K.B. Koech
Legal Representatives of the Victims Sureta Chana	**Legal Representatives of the Applicants**
Unrepresented Victims	**Unrepresented Applicants (Participation/Reparation)**
The Office of Public Counsel for Victims	**The Office of Public Counsel for the Defence**
States' Representatives	**Amicus Curiae**

REGISTRY

Registrar Ms Silvana Arbia **Deputy Registrar**	**Defence Support Section**
Victims and Witnesses Unit	**Detention Section**
Victims Participation and Reparations Section	**Other**

I. Introduction

1. In light of the recent Defence submissions which indicate the Defence's attempt to expand the scope of the confirmation hearing, the Prosecution sets forth its observations on the proper scope of a confirmation hearing conducted pursuant to Rules 121(9) and 122 of the Rules of Procedure and Evidence ("Rules").

2. The approach of the Defence in this case would convert the confirmation process into a mini-trial. This approach is contrary to the meaning of the Statute and the intent of its drafters and is unworkable. The purpose of the confirmation hearing is only to insure that the Prosecution's evidence, at its highest, establishes that there exist "substantial grounds" to believe that the suspect committed the crimes charged.

3. Accordingly, the Defence cannot defeat confirmation by simply presenting witnesses or documents that purport to contradict the evidence put forth by the Prosecution at confirmation. The process of resolving contradictions in evidence, which requires a full airing of the evidence on both sides and a careful weighing and evaluation of all of the different pieces of evidence, occurs at trial.

II. Observations

The limited nature and purpose of the confirmation hearing

4. The confirmation hearing is a screen to protect persons against wrongful and wholly unfounded charges.[1] Its purpose is limited to committing for trial only those persons against whom sufficiently compelling charges going beyond mere theory or suspicion have been brought.[2] For that reason, pre-trial chambers at

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[1] *Prosecutor v. Thomas Lubanga Dyilo,* Decision on the Confirmation of Charges, ICC-01/04-01/06-803-tEN, para. 37. In *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui,* Decision on the Confirmation of Charges, ICC-01/04-01/07-717, para. 63, the Court slightly amended its formulation, but retained the essential point. See also, *Prosecutor v. Bahar Idriss Abu Garda,* Decision on the Confirmation of Charges, ICC-02/05-02/09-243-Red, para. 39; *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus,* Decision on the Confirmation of Charges, ICC-02/05-03/09-121-Corr-Red, para. 31.

[2] *Ibid.*

the Court have consistently held that the confirmation hearing has a limited scope and by no means can it be seen as an end in itself, but must be seen as a means to distinguish those cases that should go to trial from those that should not go to trial.[3]

5. Pre-Trial Chamber II in the *Bemba* case also recalled the principle underlying the confirmation process, which is judicial economy intended to prevent those cases that do not meet the requisite evidentiary standard at the pre-trial stage from proceeding to trial.[4] Therefore, the confirmation hearing has a limited scope and purpose and "should not be seen as a 'mini-trial' or a 'trial before the trial'".[5] The evidentiary debate is intended to be limited[6] and for that reason parties are called upon for their presentations at confirmation to select their best pieces of evidence.[7]

6. At confirmation, the Prosecution bears the burden of establishing substantial grounds to believe the person has committed the charged crimes.[8] For that reason, the Prosecution is the triggering force of these confirmation proceedings.[9] It need not introduce *viva voce* evidence to meet that burden, but can rely exclusively on documentary evidence and handwritten statements or transcripts.[10] Recently, Pre-Trial Chamber I stressed that relying exclusively on documentary evidence suffices for the Prosecution to satisfy the threshold for

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[3] Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules, ICC-01/04-01/07-428-Corr, paras. 5-6; *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, para. 28.
[4] ICC-01/05-01/08-424, para. 28.
[5] ICC-01/04-01/07-717, para. 64. See also, ICC-02/05-03/09-121-Corr-Red, para. 31.
[6] Order to the Defence to Reduce the Number of Witnesses to Be Called to Testify at the Confirmation of Charges Hearing and to Submit an Amended List of *Viva Voce* Witnesses, ICC-01/09-01/11-221, para. 8.
[7] Decision Requesting the Parties to Submit Information for the Preparation of the Confirmation of Charges Hearing, ICC-01/09-01/11-153, para. 8.
[8] Article 61(5) and 61(7).
[9] ICC-01/09-01/11-153, para. 13; ICC-01/09-01/11-T-1-ENG ET WT, p.12, line 25 to p.13, line 4.
[10] ICC-01/09-01/11-153, para. 9.

confirming the Charges.[11] Moreover, the Single Judge in the current case declared:

> "[T]he Single Judge expects the parties to rely on live witnesses only as far as their oral testimony at the hearing cannot be substituted by documentary evidence or witnesses' written statements"[12].

7. Furthermore, security concerns also militate in favor of the limited scope of the confirmation hearing and a selective approach to the presentation of witnesses' evidence. In the *Prosecutor v. Katanga & Ngudjolo*, the Single Judge concluded that the "limited scope of the confirmation hearing, and its object and purpose within the criminal procedure embraced by the Statute and the Rules, require from the Prosecution a particular effort to limit the number of witnesses on whom it intends to rely at the confirmation hearing to the very 'core witnesses' of the case."[13]

8. The limits on the evidence that the parties can offer and the types of evidence that ordinarily should be relied upon (documentary as opposed to oral) reflect and substantiate that, as Chambers have repeatedly recognized, the confirmation is a screening mechanism. The Chamber could resolve contradictory evidence presented by the parties only if the parties were allowed to present their evidence in full and in its strongest forms, which is precisely what occurs at trial. To preserve the screening function of the confirmation process, it necessarily follows that the Chamber must take the Prosecution's case at its highest and reject any invitation at this stage to begin weighing the evidence and resolving contradictions, an impossible task given the limitations that have already been imposed.

9. Therefore the purpose of the confirmation hearing is to ensure that the Prosecution has a sufficient prima facie case. It is not designed to test the credibility of the Prosecution's witnesses, to weigh and assess factual defences,

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[11] ICC-02/05-03/09-121-Corr-Red, para. 40
[12] ICC-01/09-01/11-153, para. 9 (emphasis added).
[13] ICC-01/04-01/07-428-Corr, para. 78.

or to resolve conflicting versions of the facts. As Pre-Trial Chamber I stated: "the purpose of a confirmation hearing is limited to committing for trial only those persons against whom sufficiently compelling charges going beyond mere theory or suspicion have been brought. This mechanism is designed to protect the rights of the Defence against *wrongful and wholly unfounded charges*."[14] In other words, confirmation is not designed to be a dress rehearsal of the upcoming trial.[15]

10. Article 61(6) provides that at the confirmation hearing the person may "present evidence"[16] but it does not explain the scope of that presentation or suggest that this right transforms the confirmation process into a trial. This Court has not previously had occasion to consider the limits of this statutory provision because no Defence heretofore has proffered the breadth of evidence that the Defence seeks to offer in this case. Here, the Defence signals its intent to challenge the Prosecution's case by offering witnesses or refute the Prosecution's evidence, by requiring the Chamber to assess credibility without the ability to observe and test the witnesses in court or consider the full evidence of the parties. What the Defence is seeking is a mini-trial.

11. Since article 61 in its present form was introduced late in the drafting process, at the 1998 Rome Conference, there is scant explanation on the history of this provision. Nonetheless, what exists clarifies that the negotiators intended confirmation to be a screen of the *prima facie* soundness of the Prosecution's case, and not an occasion to test the case in an adversarial proceeding. The draft text of Article 61 was introduced under the section entitled "Further options for articles 58-61" in the draft Statute submitted to the Rome Conference by the Preparatory Committee on the Establishment of an International Criminal

[14] ICC-01/04-01/06-803-tEN, para. 37 (emphasis added, references omitted). See also ICC-01/04-01/07-717, para. 63; ICC-02/05-02/09-243-Red, para. 39; ICC-02/05-03/09-121-Corr-Red, para. 31; ICC-01/04-01/07-428-Corr, paras. 5-6; ICC-01/05-01/08-424, para. 28.
[15] ICC-01/04-01/07-717, para. 64. See also, ICC-02/05-03/09-121-Corr-Red, para. 31.
[16] Article 61(6)(c).

Court.[17] Footnote 25 of that section observed that the draft for these articles had been achieved as a result of adoption of the framework outlined in the previous March–April session of the Preparatory Committee's Working Group on Procedural Matters, which stated, *inter alia*:

> "At the hearing, the Prosecutor must present the charges on which he seeks trial and has the burden of establishing to the court that there is a prima facie case which respect to each of those charges. The evidence, however, could be presented in summary form; <u>full presentation of witnesses and evidence as at trial is not contemplated</u>".[18]

12. The framework paper repeated that "At the hearing, the accused person has the right to test the evidence and to submit that the Prosecutor has not established a prima facie case".[19] Commentators have concurred with this position. They have noted, *inter alia*, that the confirmation hearing provides the person with a useful opportunity to be informed of important evidence in the possession of the prosecution and to test the value of such evidence, at least in a superficial way, during a judicial proceeding.[20]

13. Less clear, however, is the scope of defence evidence that may be submitted, since while the Statute invites the Defence to present evidence it is not obvious that contradictory evidence adduced by the defence can have any effect upon the determination of the existence of "sufficient evidence".[21] The Chamber's analysis on related issues supports that approach. The Single Judge rejected a Defence request to call 43 witnesses, noting that the Defence approach was "*per se* manifestly excessive and disproportionate for the purposes of the confirmation of charges hearing." The Single Judge continued, "If all the

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[17] *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, UN Doc A/CONF.183/2/Add.1 (14 April 1998), pp.93-98.
[18] A/AC.249/1998/WG.4/DP.36 (27 March 1998), p.2 (emphasis added); referred to in UN Doc A/CONF.183/2/Add.1 at footnote 25 on p.93.
[19] A/AC.249/1998/WG.4/DP.36 (27 March 1998), p.2.
[20] See also Kuniji Shibahara/William Schabas, 'Article 61', Commentary on the Rome Statute of the International Criminal Court, Otto Triffterer ed. (2008, 2nd ed), pp.1178-9.
[21] *Ibid*, p.1179.

witnesses indicated by the parties were permitted to testify orally, the confirmation of charges hearing would, ultimately, constitute a mere anticipation of the trial stage of the case, only distinguishable from the latter for the different standard of proof established by articles 61(7) and 66(3) of the Statute, respectively. Therefore, if the pre-trial stage is to be accorded any meaning within the procedural system as 'established by the drafters of the Statute, the number of witnesses indicated by the Defence should be significantly reduced."[22] And more recently, the Chamber restricted the hearing to 10 days.[23]

14. The Prosecution submits that the Chamber's approach in both decisions is sound and that it should give limited consideration to the evidence that the Defence now proposes to offer.[24] If the Defence is permitted to argue that the Prosecution's evidence should be rejected in favor of contradictory statements from its *viva voce* or out-of-court witnesses, or to propose alibis that refute the evidence that they were present at particular times and locations, that will necessarily transform the confirmation into a trial.

15. The nature or purpose of the evidence to be adduced – whether it is offered on the one hand to explain the Prosecution's case, to demonstrate that the Prosecutor's factual evidence does not connote criminality, or on the other hand to factually contradict the Prosecution's case by refuting the evidence and presenting either alternative versions or affirmative defences – determines whether this is an examination of the Prosecution's prima facie case or a resolution of competing Prosecution and Defence cases. The former is a confirmation, the latter is a trial.

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[22] ICC-01/09-01/11-221, para. 9.
[23] Corrigendum to annex to Decision on the Schedule for the Confirmation of Charges Hearing, ICC-01/09-01/11-294-Anx-Corr.
[24] ICC-01/09-01/11-221, ICC-01/09-01/11-294-Anx-Corr.

16. The Prosecution thus urges the Chamber to resist the efforts to transform the confirmation process. For example, the Prosecution is expected to limit the witnesses on whom it intends to rely to the very 'core witnesses' of the case.[25]

17. This is the only reasonable and manageable way to interpret Article 61. Additionally, when it offers evidence the Prosecution necessarily exposes the witnesses upon whom it relies. The Prosecution must avoid exposing more persons than is necessary, until charges are confirmed and there is confidence that the trial will occur.

18. The Prosecution's approach is consistent with the common understanding of the nature of the preliminary screening process, and not inconsistent with the particular provisions in the Rome Statute authorizing a defence role in confirmation. For example, in the recent decision of the Special Tribunal for Lebanon confirming the indictment, the Chamber explained that the preliminary determination is to find whether the Prosecution has made its *prima facie* case according to the lower standard of proof.[26] The critical point is that the resolution of competing versions based on all the evidence is done not at the preliminary stage, but at trial.[27]

19. Other civil and common law systems also support this view of confirmation as a determination of whether the Prosecution evidence on its face is sufficient to allow the case to proceed.

20. A survey of domestic systems suggests that, to the extent a system adopts a procedural mechanism analogous to the ICC confirmation hearing, such as preliminary hearings prior to trial, the process is not a "mini-trial" and would not foresee the presentation of elaborate defence arguments.

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[25] ICC-01/04-01/07-428-Corr, para. 78.

[26] See Decision relating to the examination of the Indictment of 10 June 2011 issued against Mr. Salim Jamil Ayyash, Mr. Mustafa Amine Badreddine, Mr. Hussein Hassan Oneissi & Mr. Assad Hassan Sabra, STL-11-01/I, 28 June 2011, para. 26.

[27] *Ibid*.

England & Wales

21. For summary offenses, which are tried in magistrates' courts, there will be no preliminary hearing. In preparation for trial on indictment, there will be a committal hearing before magistrates. There are two kinds of committal procedure. Neither involves taking oral evidence. The first procedure involves no consideration of the evidence at all. It may be adopted when the defendants are all legally represented, and none has asked the court to consider a submission by the prosecution (the defence is not permitted to submit evidence at this stage) to the magistrates, who decide whether the papers disclose a sufficient case to justify committal for trial. The second procedure must be adopted whenever any of the accused has no legal representation, or the defendant's representative has made a submission of no case to answer. If the magistrates are satisfied that there is a case to answer, they commit the defendant for trial."[28]

Germany

22. Preliminary hearings (i.e., hearings to review the strength of the prosecution case before trial) are not a feature of the German criminal process. The professional judge members of the trial court review the prosecution case before setting it for trial, yet they do so without a hearing on the basis of the formal accusation and the dossier of the investigation submitted by the prosecutor's office. The defense can – but rarely does – submit a brief in response."[29]

23. "In the so-called 'interlocutory proceedings' (*Zwischenverfahren*) the court reviews on the basis of the files of the case compiled by the police and the prosecutor, along with the written accusation prepared by the prosecutor, whether the defendant is 'sufficiently suspicious' (*hinreichend verdächtig*) based

[28] David J. Feldman, *England and Wales*, in Criminal Procedure: A Worldwide Study 175-76 (Craig Bradley ed., 2d ed. 2007)
[29] Thomas Weigend, *Germany*, in Criminal Procedure: A Worldwide Study 262-63 (Craig Bradley ed., 2d ed. 2007).

on the results of the preparing procedure of a criminal offence. If this is affirmed, the opening of the trial proceedings is formally decided – so-called 'committal for trial/decree opening the main proceedings' (Eröffnungsbeschluss)."[30]

Italy

24. "The purpose of the pretrial phase is to filter out cases that are not likely to result in a conviction and to serve as a bridge between the investigative phase and the trial for those cases that proceed to trial. It also helps to evaluate whether the case might be better disposed of by one of the special proceedings [i.e., abbreviated trials]. The code provides that the preliminary hearing occurs in the judge's chambers (camera di consiglio), and therefore are not in open court. The code requires the presence of the public prosecutor and the defense attorney…. The judge for the preliminary hearing (g.u.p.) receives the investigative dossier of the public prosecutor."

25. "At the hearing the public prosecutor summarizes the results of the investigations and presents an argument supporting why the defendant should be committed to trial. The defendant may make an unsworn statement (*dichiarazioni spontanee*), as well as ask to be interrogated. The attorney for a civil party, including the victim, may present an argument, and lastly the defense attorney presents an argument. The Code provides that the public prosecutor and the defense attorney are each permitted one rebuttal argument. If, during the course of the preliminary hearing, it appears that the charges filed are not consistent with the facts presented, the public prosecutor may modify the charges."

26. "If the judge believes that the facts presented are sufficient to decide the request to bind the defendant over for trial, the judge withdraws from the preliminary

[30] Petra Kneuer, Senior Prosecutor, German Liaison Officer of the Federal Prosecutor General's Office, "Germany's Court and Criminal Justice System," given at National Foreign Affairs Training Center, Foreign Service Institute (FSI), United States Department of State, May 13, 2004.

hearing to evaluate the request. The g.u.p. may introduce witnesses, experts, technical consultants, and those charged in a related proceeding, and question them him or herself; the prosecutor and the attorneys for the defendant and the civil party may ask questions only through the judge."

27. "Upon conclusion of the preliminary hearing the judge is to deliberate immediately and announce a judgment of inability to proceed (non luogo a procedure), or commitment of the defendant to trial. A decision of an inability to proceed is essentially one of acquittal. Article 425 [of the Italian Code of Criminal Procedure] requires a decision of inability to proceed when any of the conditions for proceeding to trial are lacking, for example, the crime did not occur or the defendant did not commit it, that the conduct does not constitute a criminal offense, or that the defendant is not criminally responsible (non imputabile), or otherwise not punishable."[31]

Poland

28. "[T]he Polish Criminal Procedure Code does not explicitly mention [the] evidentiary hurdle that must be overcome for the case to move from the investigative stage into the trial phase of the criminal process. [However,] a probative requirement is derived from other provisions of the Polish Code. Chief among these is the rule that defines the criteria governing the admissibility and validity of the bill of indictment and therefore the conditions for a case to move into the trial phase. This provision requires discontinuance of proceedings in the pre-trial phase—that is, before the case is transferred to be tried by a designated 'screening' judge—if there is an 'evident lack of factual foundations of the indictment' (*oczywisty brak faktycznych podstaw oskarżenia*)."

29. "The exact meaning of this phrase, as interpreted in the case law of the Polish Supreme Court, is quite subtle. The existing case law stresses that the pre-trial

[31] Rachel A. Van Cleave, *Italy*, in Criminal Procedure: A Worldwide Study 334-36 (Craig Bradley ed., 2d ed. 2007).

judge performing a tentative examination of the bill of indictment is not supposed to carry out an in-depth inspection and evaluation of the evidence collected. Rather, this is the exclusive prerogative and obligation of the trial court judge, whose task is to examine the evidence collected by the prosecution and defence. Nonetheless, the pretrial judge is required to conduct a very specific and limited evaluation as to whether there is prima facie evidence supporting the criminal charge. Although this threshold might appear lax, it is definitely more stringent than the initial 'reasonable suspicion' requirement necessary to open the investigation, at least in light of other provisions."[32]

United States

30. The right of an accused to a "probable cause" preliminary hearing or examination depends on the creation of such right by either statute or a constitutional provision. Like a confirmation hearing, a preliminary examination is designed to protect the accused from hasty, improvident, or groundless charges. Its purpose is to determine the basis for prosecution.

31. A recent extradition ruling[33] provides a relevant parallel with the limited scope of the evidence that the Defence is allowed to present in a preliminary process analogous to a confirmation hearing. In such extradition proceedings, to obtain a certification of extraditability on behalf of a requesting state, the United States has the burden of demonstrating, *inter alia*, that there is competent evidence establishing probable cause to believe that the person named in the extradition request committed the charged offense.[34]

32. In determining that the Government's burden of probable cause had been satisfied, the Court recalled the limited function that the committing magistrate is to perform, which is to determine whether there is competent evidence to

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[32] Antoni Bojańczyk, *Obsolete Procedural Actors? Polish Prosecutors and Their Evidence Gathering Duty Before and During Trial in an Inquisitorial Environment*, *in* The Prosecutor in Transnational Perspective (Erik Luna & Marianne L. Wade eds., forthcoming Oxford University Press 2011).

[33] *In re Extradition of Santos*, No. CV 06–05092 MMM (AJW), 2011 WL 2415742 (June 13, 2011).

[34] 18 U.S.C.A. §§ 3184, 3190.

justify holding the accused to await trial, not to weigh conflicting evidence.[35] The Court rejected the admissibility of the fugitive's (Munoz) evidence to rebut the government's probable cause showing based on the fact that the fugitive has limited participation at the extradition proceedings; "he is not permitted to introduce evidence on the issue of guilt or innocence but can only offer evidence that tends to explain the government's case of probable cause."[36] The Court further recalled that evidence that *contradicts* or *controverts* the existence of probable cause is inadmissible, including evidence establishing a defense or exonerating the accused.[37] The Court referred to the holding in *In re Extradition of Mainero*,[38] which determined that "Evidence that conflicts with that submitted on behalf of the demanding party is not permitted, nor is impeachment of the credibility of the demanding country's witnesses." Similarly, the Court recalled that the United States Supreme Court and the Ninth Circuit have held that evidence offered to prove the existence of a defense to the charged offense, such as an alibi, is contradictory evidence that is not admissible in an extradition hearing.[39] Furthermore, the fugitive sought to introduce statements recanting the inculpatory statements relied on by the government and claiming that those inculpatory statements were obtained by torture or coercion. The Court found this material to be inadmissible as it was offered to contradict the version of the facts set forth in the inculpatory statements and to provide a competing, conflicting version of the facts[40]. It found support in prior rulings that recantation evidence and other evidence requiring courts to weigh credibility

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[35] "The function of the committing magistrate is, and not to determine whether the evidence is sufficient to justify a conviction." *Collins v. Loisel*, 259 U.S. 309 at 316 (1922). "The magistrate does not weigh conflicting evidence and make factual determinations but, rather, determines only whether there is competent evidence to support the belief that the accused has committed the charged offense." *Quinn v. Robinson*, 783 F.2d 776 at 815; *accord, Barapind,* 400 F.3d at 750, 752.

[36] See *In re Extradition of Santos*, 2011 WL 2415742 (C.D.Cal.), at 15 citing *Hooker v. Klein*, 573 F.2d 1360, 1368 (9th Cir.), *cert. denied*, 439 U.S. 932 (1978); *see Quinn,* 783 F.2d at 817 n. 41 (stating that the accused "may offer limited evidence to explain elements in the case against him").

[37] *Collins*, 259 U.S. at 316 (holding that "evidence related strictly to the defense" was properly excluded).

[38] 990 F. Supp. 1208, 1218 (S.D.Cal. (1997).

[39] See *In re Extradition of Santos*, 2011 WL 2415742 (C.D.Cal.), at 17, citing *Collins,* 259 U.S. at 316.

[40] 2011 WL 2415742 (C.D.Cal.), at 21.

and resolve material factual disputes is inadmissible in an extradition case. In particular in *Bovio v. United States,* the Court held that an accused had "no right to attack the credibility of [the government's witnesses] at this stage of the proceedings; issues of credibility are to be determined at trial".[41]

33. The review of processes in national jurisdictions analogous to the confirmation hearing here confirms that, at this stage, the Prosecution's evidence must be taken at its highest and that contradictions in the selective evidence offered by the parties can only be resolved at trial.

III. Conclusion

34. For the reasons set forth above, the Prosecution submits that the confirmation hearing constitutes a screening mechanism to insure only that the Prosecution has enough evidence establishing "substantial grounds" to believe that the suspect has committed the crime charged. While the Defence may present evidence at the hearing, the process should not become a mini-trial that requires the Chamber to resolve contradictions or weigh evidence on the basis of a limited record.

Luis Moreno-Ocampo, Prosecutor

Dated this 26th day of August 2011

At The Hague, The Netherlands

[41] *Bovio v. U.S*, 989 F.2d 255, 259 (7th Cir.1993).