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PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Hans-Peter Kaul
Judge Cuno Tarfusser

SITUATION IN THE REPUBLIC OF KENYA

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

Public

**Prosecution's Written Submissions Following the Hearing on the Confirmation
of Charges**

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The Office of the Prosecutor

Mr. Luis Moreno-Ocampo, Prosecutor
Ms. Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence

Mr. Kioko Kilukumi Musau, Mr. Joseph Kipchumba Kigen-Katwa, 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

Ms. 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

Mr. Didier Preira

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

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1. On 1 September 2011, the confirmation of charges hearing against William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang (collectively, the “suspects”) commenced. On 8 September, the final day of the hearing, the Chamber authorized the Prosecution to submit written observations on issues relevant to the case and discussed during the confirmation of charges hearing, totaling no more than 50 pages, by 30 September 2011.¹ The Prosecution hereby submits its written observations.
2. The Prosecution submits that its evidence is sufficient to establish substantial grounds to believe that the three suspects committed the crimes charged. It incorporates, for that purpose, the Prosecution’s amended Document Containing the Charges (DCC), amended List of Evidence (LoE), and In-depth Analysis Charts (IDAC), and its oral presentations of its core evidence during the confirmation hearing. The Prosecution relies on those documents and the in-court submissions and will not herein reiterate its evidence or re-argue the relevance and probative value of that evidence to the case.
3. This submission instead will address specific key issues that concern the nature of the confirmation process or that arose during the confirmation hearing.

I. Submissions

A. Purpose of the confirmation hearing

4. The Prosecution’s submissions are rooted in the purpose of the confirmation hearing which ensure that the Prosecution’s evidence, at its highest, establishes that there exist “substantial grounds” to believe that the suspect committed the crimes charged. This mechanism is designed to protect the rights of the Defence against wrongful and wholly unfounded charges and to distinguish between those cases that should go to trial from those that should

¹ ICC-01/09-01/11-T-12-ENG ET, p. 76, line 24 to p. 77, line 13.

not.² As this Chamber and others have repeatedly observed, the confirmation hearing is not a mini-trial or a “trial before the trial”.³

5. The Prosecution submits that for purposes of confirmation, the Pre-Trial Chamber should accept as reliable the Prosecution’s evidence so long as it is relevant and admissible.⁴ 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 the credibility of the witnesses, occurs at trial.
6. Though the Pre-Trial Chamber’s confirmation process is a unique feature of the Rome Statute, other international tribunals have an analogous procedure when reviewing mid-trial motions for acquittal.⁵ In those situations

² ICC-01/04-01/06-803-tEN, para. 37; ICC-01/04-01/07-717, para. 63; ICC-01/05-01/08-424, para. 28; ICC-02/05-02/09-243-Red, para. 39; ICC-02/05-03/09-121-CORR-RED, para. 31.

³ ICC-01/09-01/11-221, para. 9; ICC-01/09-02/11-321, para. 8; ICC-01/04-01/07-717, para. 64; ICC-02/05-03/09-121-Corr-Red, para. 31.

⁴ See Rules 63(2), 64.

⁵ The confirmation process is unique to this Court; other international tribunals do not provide similar pre-trial judicial examination of the merits of criminal charges. The *ad hoc* tribunals do provide, however, for a mid-trial review upon the Accused’s application for an acquittal – which is, in effect, a comparable, albeit more comprehensive, screening of the case after the close of the Prosecution’s evidence. See ICTY Rule 98*bis*. The standards by which those courts evaluate the evidence in ruling on acquittal applications are instructive. In particular, decisions of both the Yugoslav and Rwandan Tribunals consistently recognize that, in evaluating a Rule 98 *bis* motion for acquittal, the trial court does not assess reliability or credibility of the evidence presented in the case-in-chief, nor does it give lesser weight to evidence that it deems to be “suspect”, ‘contradictory’ or in any other way reliable”. *Prosecutor v Blagojevic and Jokic*, Judgement on Motions for Acquittal Pursuant to Rule 98*bis*, IT-02-60-T, 5 April 2004, para. 15. See also, e.g. *Prosecutor v Jelusic*, Appeal Judgement, IT-95-10-A, 5 July 2001, para. 37; *Prosecutor v Rukundo*, 22 May 2007, ICTR-2001-70-T, Decision on Defence Motion for Judgement of Acquittal Pursuant to Rule 98*bis*, paras. 2-3; *Prosecutor v Rwamakuba*, Decision on Defence Motion for Judgment of Acquittal, ICTR-98-44C-R98*bis*, 28 October 2005, paras. 5-7, 13; *Prosecutor v Brdjanin*, Decision on Motion for Acquittal Pursuant to Rule 98*bis*, IT-99-36-T, 28 November 2003, paras. 2-4; *Prosecutor v Semanza*, Decision on the Defence Motion for a Judgment of Acquittal, ICTR-97-20-T, 27 September 2001, paras. 14-15, 17.

Instead, in deciding whether an accused is entitled to an acquittal at the close of the Prosecution case, “the Trial Chamber will not assess the credibility and reliability of witnesses unless the Prosecution case can be said to have ‘completely broken down,’ in that no trier of fact could accept the evidence relied upon by the Prosecution to maintain its case on a particular issue.” *Prosecutor v Blagojevic and Jokic*, *supra*, para. 15 (citations omitted).

The “applicable objective standard of proof under Rule 98*bis* of the Rules is ‘whether a reasonable trier of fact could, upon the evidence presented by the Prosecutor, taken together with all the reasonable inferences and applicable legal presumptions and theories that might be applied to it, convict the accused’”. *Prosecutor v Kvočka et al.*, IT 98-30/1-T, Decision on Defence Motions for Acquittal, 15 December 2000, citing *Prosecutor v Kordic and Cerkez*, Decision on Defence Motion for Judgement of Acquittal, IT-95-14/2-T, 6 April 2000, and *Prosecutor v Kunarac et al.*, Decision on Motion for Acquittal, IT-96-23-T, 3 July 2000.

It is noteworthy that the *ad hoc* tribunals apply this less stringent standard in evaluating the Prosecution’s case after the witnesses and evidence have been tested through direct and cross examination.

international tribunals have decided that they should not weigh the evidence based on reliability or credibility assessments.⁶

7. In the screening process that is the confirmation hearing, the Prosecution's evidence is "entitled to credence unless incapable of belief."⁷ And it should not reject evidence for lack of corroboration, since "it is well-established that a reasonable trier of fact may reach findings based on uncorroborated [...] evidence".⁸
8. This means that the Pre-Trial Chamber should evaluate whether the evidence proves the elements of the crimes in accordance with the "substantial grounds" standard.

B. Standard of proof for the confirmation hearing

9. For the Pre-Trial Chamber to confirm the charges under Article 61(7) of the Rome Statute ("Statute"), there must be "sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged". To meet this evidentiary burden, the Prosecution must present concrete and tangible evidence that demonstrates a clear line of reasoning underpinning its specific allegations.⁹

C. Sufficiency of the Prosecution's evidence

(i) The Evidence should be evaluated as a whole

10. When assessing the Prosecution's evidence for the purposes of the confirmation of charges, Chambers of this Court,¹⁰ including this Chamber,¹¹

⁶ *Prosecutor v Martić* IT-95-11-T Rule 98bis oral decision of 3 July 2006, T.5959-5971.

⁷ *Prosecutor v Mrksić* IT-95-13/1-T Rule 98bis oral decision of 28 June 2006, T.11311-11313. See further *Prosecutor v Lubanga* Decision on the confirmation of charges, ICC-01/04-01/06-803-tEN, 29 January 2007, paras. 37 to 39; *Prosecutor v Katanga* Decision on the confirmation of charges, ICC-01/04-01/07-717, 30 September 2008, para. 65.

⁸ *Prosecutor v Rwamakuba*, *supra*, para. 13.

⁹ ICC-01/04-01/06-803-tEN, para. 39; ICC-01/04-01/07-717, para. 65; ICC-01/05-01/08-424, para. 29; ICC-02/05-02/09-243-Red, para. 37.

¹⁰ ICC-01/04-01/06-803-tEN, para. 39; ICC-01/04-01/07-717, para. 66; ICC-02/05-02/09-243-Red, para. 41.

have recognized that the Prosecution's evidence must be analyzed and assessed as a whole. This includes not only the evidence specifically referred to during the confirmation hearing, but also all the evidence tendered by the Prosecution that is identified in its amended LoE.

11. Rule 63(2) of the Rules of Procedure and Evidence ("Rules") expressly permits a Chamber to assess freely all evidence submitted in order to determine its relevance or admissibility in accordance with Article 69. Therefore, unless it expressly rules that an item is inadmissible, the Chamber may rely on any evidence provided in the Prosecution's amended LoE.¹²

(ii) The Chamber can base its decision on evidence from anonymous witnesses

12. Although oral evidence is permitted at the confirmation hearing, "the single judge expects the parties to rely on live witnesses only so far as their oral testimony at the hearing cannot be properly substituted by documentary evidence or witnesses' written statements"¹³ to prevent disclosure of information that might put at risk witnesses or members of their families.
13. The Prosecution submits that this decision guarantees the "fairness" of the proceedings,¹⁴ which includes in the Chamber's view the respect for the procedural rights of the Prosecutor, the Defence, and the Victims as guaranteed by the Statute.¹⁵ Fairness is directly linked to the ability of a party to present its case in circumstances which do not place it at a substantial disadvantage vis-à-vis the opposing party¹⁶ and requires that the procedural and substantive rights and obligations of all participants be respected.¹⁷

¹¹ ¹¹ ICC-01/05-01/08-424, paras. 54, 57, 72, 91, 94, 101, 108, 110, 115, 117, 126, 140, 180, 212, 246, 249, 258, 277, 282, 286, 322, 332, 374, 444, 446, 474, 478.

¹² ICC-01/04-01/07-717, para. 66.

¹³ ICC-01/09-01/11-153, para. 9.

¹⁴ ICC - 01/04 - 141, para. 48; ICC - 02/04 - 01/05 - 212, paras. 10 - 11; ICC - 01/04 - 135 - tEN, para. 38.

¹⁵ ICC-01/04-135-tEN, paras. 38-39.

¹⁶ All parties to proceedings must have the opportunity to present their case to the court in circumstances which do not place them at a substantial disadvantage vis-à-vis the opposing party: see European Commission of Human Rights, case of *Szwabowicz v. Sweden*, Opinion of 30 June 1959, Application no. 434/58, Yearbook II, p. 535. In its Decision, Pre-trial Chamber II defines the concept of fairness as being, *inter alia*, "[...]

14. In the current case, most of the witnesses against the suspects will be viewed by their ethnic communities as traitors, and their cooperation with the Court as betrayal. Even if the witnesses and their families are in a protection program in remote areas, their lives will be affected. Some may not be able to return to Kenya at least for a period of time. Therefore, in order to protect their well being and security in accordance with article 68, their identities should not be disclosed before the trial.
15. In the *Katanga* decision of 25 April 2008,¹⁸ the Single Judge concluded that the Prosecution's use of summaries to comply with its Article 67(2) of the Statute and Rule 77 of the Rules disclosure obligations is not only consistent with the limited scope, the object and the purpose of the confirmation hearing, but also satisfies the right of the suspects to have the confirmation hearing held within a reasonable time, without being prejudicial to or inconsistent with their other rights and with a fair and impartial trial.
16. As consequence of legitimate security concerns about witnesses and other persons at risk by the intervention of the Court, at the confirmation of hearing stage, the Prosecution's obligation to fulfill its duties under Article 54(3)(f) could be implemented in accordance with Articles 61 and 68 (5) presenting its case based on summaries from anonymous witnesses.

closely linked to the concept of 'equality of arms', or of balance, between the parties during the proceedings. As commonly understood, it concerns the ability of a party to a proceeding to adequately make its case, with a view to influencing the outcome of the proceedings in its favour", see Decision of Pre-Trial Chamber II, para. 30. In this respect, Pre-Trial Chamber II relies upon the Tadic decision rendered by the International Criminal Tribunal for the former Yugoslavia, in which it was said that "equality of arms obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case, see *The Prosecutor v. Dusko Tadic*, Judgment of 15 July 1999, case no. IT-94-1-A, para. 48. See also *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Judgment of 1 June 2001, case no. ICTR-95-1-A, para. 69.

¹⁷ ICC-01/04-135-tEN, paras. 39. In *Prosecutor v. Zigiranyirazo*, the Trial Chamber of the International Criminal Tribunal for Rwanda ("ICTR") noted, "[w]hile the Chamber must be diligent in ensuring that the accused is not deprived of his rights, the Prosecution must also not be unduly hampered in the presentation of its case." See *Prosecutor v. Zigiranyirazo*, Decision on the Prosecution Joint Motion for Re - Opening its Case and for Reconsideration of the 31 January 2006 Decision on the Hearing of Witness Michel Bagaragaza via Video - Link, Case No. ICTR - 2001 - 73 - T, T. Ch. III, 16 November 2006, para. 18. See also *Prosecutor v. Karemera et al.*, Decision on Severance of Andre Rwamakuba and Amendments of the Indictment, Case No. ICTR - 98 - 44 - PT, T. Ch. III, 7 December 2004, para. 26.

¹⁸ ICC-01/04-01/07-428-Corr, para. 137.

17. This will protect the fair trial right for the Prosecution, which can rely on the best evidence collected and fulfill its security obligations in accordance with Article 68. The use of summaries and redacted statement also respect the fair trial for the suspects because the issue is not whether they *should* be convicted on the evidence put forward by the prosecutor. The “evidentiary debate” at the Confirmation stage is to establish the *sufficiency* of that evidence to commit the suspects to trial.

Value of evidence from anonymous witnesses

18. Evidence implicating the suspects comes, *inter alia*, from statements and transcripts of interviews of Prosecution witnesses whose identities have been redacted pursuant to Rule 81(4) to protect the witnesses, their families and third parties.
19. In March 2011, in the case *Prosecutor v. Banda and Jerbo*, Pre-Trial Chamber I confirmed charges against Abdallah Banda Abaker Nourain and Saleh Mohammed Jerbo Jamus (“Banda and Jerbo”), based on evidence of their complicity in the crimes charged that came principally from anonymous insider witnesses.¹⁹ Most of this evidence consisted of *summaries* of evidence from anonymous witnesses, rather than the original statements or transcripts of their interviews.²⁰ When Pre-Trial Chamber I had concerns about anonymous evidence, it was not because the anonymous sources were not credible *per se*, but because of the Chamber’s evaluation of other indicia concerning the reliability of the information, such as its consistency with other evidence.

¹⁹ ICC-02/05-03/09-121-Corr-Red, *passim*.

²⁰ It should be noted that the Defence in *Banda and Jerbo* did not contest any of the material facts alleged in the Document Containing the Charges for the purposes of the confirmation hearing, and, together with the Prosecution, suggested that the Pre-Trial Chamber might “consider such alleged facts to be proven for the purposes of the confirmation of the charges” (ICC-02/05-03/09-80, para. 5). However, the Defence concession did not bind the Chamber in its Chamber’s decision, since the Chamber did not accept the material facts as proven, but instead performed its own analysis of the Prosecution’s evidence: ICC-02/05-03/09-121-Corr-Red, paras. 43-47.

20. As Pre-Trial Chamber I relied on evidence from anonymous witness summaries to confirm the charges against Banda and Jerbo, this Chamber can confirm the charges against the suspects using primarily evidence from the Prosecution's *statements* and *transcripts* of anonymous witnesses, which are more detailed and complete than summaries.
21. The Chamber must use anonymized evidence in a manner that is not prejudicial to, or inconsistent with, the rights of the accused and with a fair and impartial trial.²¹ At the same time, the Chamber should not unduly prejudice the Prosecution by *undervaluing* this evidence simply because the source, though identified to the Chamber (through redaction requests), is not also told to the Defence. Maintaining anonymity, a critical mechanism designed to protect witnesses and preserve their evidence for trial, should not at the same time operate to bar the case from even reaching that stage.
22. Moreover, there is no rule from the Rome Statute, the Rules, or other foundational texts that anonymity *per se* signifies unreliability, particularly when anonymity is for the sole and essential purpose of protecting the witness and his or her family. Indeed, as argued below, the disclosure of identity does not demonstrate that a witness's evidence is reliable or truthful. The witnesses are not anonymous because they are unreliable, they are anonymous because the Chamber authorized the Prosecution to withhold their identity since they or their family members cannot currently be adequately protected.
23. Nor does the use of anonymous evidence (shielded as a protective measure) at confirmation *per se* prejudice the rights of the Defence. The purpose of disclosing identity is to allow the Defence "to place the witnesses in their proper setting, so that their credibility and motive to testify could be tested".²²

²¹ ICC-01/04-01/06-773 OA 5, para. 51 (concerning the use of anonymous witness summaries).

²² *United States v. Varella*, 692 F.2d 1352, 1355 (11th Cir. 1982) and cases cited therein. In *Varella*, confidential informants who participated as flight crew in a drug smuggling operation were permitted to testify anonymously at the criminal trial; the appeals court affirmed, after weighing the nature of their

The confirmation hearing is designed to determine whether the Prosecution's evidence meets the requisite standard, not to litigate the credibility of that evidence by contradicting or impeaching the credibility or motives of the witnesses. At a hearing that is primarily based on documentary evidence, such credibility challenges are impossible to resolve. Thus, they should be reserved for the criminal trial, when the witnesses will testify *viva voce* and the Chamber can intelligently assess credibility based on *all* available information, including the witnesses' demeanor, their responses to cross-examination, and any contradictory defence evidence.

24. Since credibility cannot effectively be challenged or defended without converting the confirmation hearing into a trial, it follows that limiting the ability at confirmation to contest the credibility of a witness by identifying and placing the witness in his setting is not presumptively prejudicial to the Defence. For that reason, the Prosecution submits that there should be no exclusion of or lesser weight accorded to evidence at confirmation solely because the identity of its source has been withheld from the Defence for security reasons. By the same token, evidence – from either Prosecution or Defence – should not be determined to be presumptively more reliable or weighty if it comes from an identified source.
25. In the event that the Chamber disagrees and determines that anonymous and uncorroborated witness testimony should be accorded less weight, Pre-Trial Chambers have considered other evidence to corroborate or otherwise support the reliability of evidence from anonymous sources. For example, Pre-Trial Chamber I held in both the *Prosecutor v. Abu Garda*²³ ("*Abu Garda*") and *Banda and Jerbo*²⁴ confirmation decisions that it would evaluate evidence

evidence and the value that their identities would provide to the Defence case against the interests in protecting their safety and the safety of their families.

²³ ICC-02/05-02/09-243-Red, para. 52.

²⁴ ICC-02/05-03/09-121-Corr-Red, para. 41.

from anonymous sources on a case-by-case basis, depending on whether other information corroborated or supported it.

26. Contrary to Defence assertions,²⁵ the Chamber can look to additional factors to determine the reliability, and thus assign the appropriate probative value, of evidence from anonymous sources. Such factors may include:

- The intrinsic coherence²⁶ of each piece of evidence, including internal consistency and plausibility;
- The level of detail versus ambiguity;
- The basis of knowledge and closeness of the source to the reported fact;
- Whether the source has information limited to only a specific incident or to a broader scope of relevant facts;
- Whether the source sensationalizes or exaggerates information;
- Whether the language seems unnaturally formal or legalistic; and
- Whether the witness admits when he or she does not know the answer.

27. For transcripts, additional factors may include:

- The ability to examine the specific words the witness uses;
- Whether the witness answers all questions directly or appears evasive; and
- Whether, and how, the questioners probe the witness' information and veracity.

²⁵ ICC-01/09-01/11-T-9-Red-ENG, p. 33: "First, the Prosecutor has asked for all the details of Witness 0006 to be redacted. [...] we are impeded from assessing **any information** about him which would allow us to know whether he may or may not be a reliable witness" (emphasis added).

²⁶ ICC-01/05-01/08-424, para. 56.

Knowing the witnesses' identity does not guarantee that their evidence is truthful, reliable, and deserving of significant weight

28. Knowing the identity of the source of evidence does not guarantee that it has a high probative value, nor can it justify giving greater weight to a piece of evidence. Defence evidence from the confirmation hearing illustrates this. For example, Ruto provided a set of eight typed statements from witnesses whose identities were disclosed.²⁷ However, these eight statements are brief, lack information concerning the witnesses' basis of knowledge, and contain formalistic and unnatural language. What is more, as was explained in the Prosecution's closing,²⁸ these statements contain numerous paragraphs that are the same or substantially similar and follow the same order.²⁹ For example, all have a paragraph which states a version of the following: "THAT although I am a victim whose losses include loss of lives of people dear to me and loss of property, I maintain that 2007-2008 Post Election Violence was neither planned, nor coordinated, nor financed to the best of my knowledge. I didn't see an extensive use of guns and other weapons like grenades and gas cylinders".³⁰ These same statements all then contain a subsequent paragraph that states, "THAT I have friends and relatives from amongst people who were in the competing political party called Orange Democratic Movement (ODM) and they would have told me of any plan, or co-ordination, or financing or distribution of weapons".³¹
29. This replication suggests that the statements were drafted at least in part by others and are not the witnesses' recollections of their own personal experiences and knowledge. Additionally, they lack explanation or detail

²⁷ EVD-PT-D09-00027; EVD-PT-D09-00028; EVD-PT-D09-00031; EVD-PT-D09-00032; EVD-PT-D09-00033; EVD-PT-D09-00037; EVD-PT-D09-00038; EVD-PT-D09-00040.

²⁸ ICC-01/09-01/11-T-12-ENG, p. 6.

²⁹ See Annex A, showing the similar paragraphs.

³⁰ EVD-PT-D09-00027, para. 8; EVD-PT-D09-00028, para. 7; EVD-PT-D09-00031, para. 7; EVD-PT-D09-00032, para. 9; EVD-PT-D09-00033, para. 10; EVD-PT-D09-00037, para. 8; EVD-PT-D09-00038, para. 6; EVD-PT-D09-00040, para. 9.

³¹ EVD-PT-D09-00027, para. 9; EVD-PT-D09-00028, para. 8; EVD-PT-D09-00031, para. 8; EVD-PT-D09-00032, para. 11; EVD-PT-D09-00033, para. 12; EVD-PT-D09-00037, para. 10; EVD-PT-D09-00038, para. 7; EVD-PT-D09-00040, para. 11.

from which the veracity of their conclusory assertions could be evaluated. In short, they facially lack essential indicia of reliability and the fact that the witnesses' names are disclosed does not itself strengthen their accounts or lend greater probative weight to these statements.

30. In any case, the credibility of such witnesses should be discussed at trial.
31. In similar fashion, the disclosure of the names of the *viva voce* witnesses does not mean that their testimony must be accorded substantial probative value. The reliability and weight of the evidence – written statements as well as in court testimony – instead should be evaluated by a variety of factors, such as the level of detail or lack thereof, candor, basis of knowledge, and linguistic style of the evidence. These same factors can be used to evaluate evidence from anonymous sources as well. Knowing a witness' identity is not the – or necessarily even a – defining factor in determining probative value of their evidence.

(ii) The Prosecution's evidence does not contain inconsistencies, ambiguities, or contradictions that might render it insufficient to meet the Prosecution's burden of proof.

ICC jurisprudence on inconsistencies

32. While the internal and external consistency of evidence is relevant to its probative value, inconsistencies do not require the wholesale rejection of a piece of evidence. In the decision on the confirmation of charges in *Prosecutor v. Bemba*, this Chamber explained that:

*inconsistencies do not lead to an automatic rejection of the piece of evidence, and do not bar the Chamber from using it. Rather, in order to define its probative value, the Chamber assesses whether the inconsistencies cast doubt on the overall credibility and reliability of the evidence.*³²

³² ICC-01/05-01/08-424, para. 55.

33. Nor is evidence to be rejected in its entirety because a portion of it is seemingly inconsistent either with other parts of the statement or with other evidence. To the contrary, this Chamber also held that, where one piece of evidence could be used to prove more than one issue in the case, the “inconsistencies contained within one piece of evidence have to be assessed in relation to a specific issue.”³³ Thus:

*inconsistencies in such a piece of evidence might be so significant as to bar the Chamber from using it to prove one specific issue, but might prove immaterial with regard to another issue, which accordingly, does not prevent the Chamber from using it.*³⁴

34. A comparison of the confirmation hearing decisions in *Abu Garda* and *Banda and Jerbo* demonstrates the application of this rule. In *Abu Garda*, Pre-Trial Chamber I declined to confirm the charges against Bahar Idriss Abu Garda (“Abu Garda”) because it found that evidence from anonymous witness summaries on the fundamental issues of Abu Garda’s participation in two meetings where the attack was planned, his control over rebels that attacked Haskanita, and his participation in the attack, was vague and inconsistent.³⁵
35. Subsequently, the same Chamber later confirmed charges against Banda and Jerbo based largely on evidence from the same witnesses who gave insufficient evidence concerning Abu Garda.³⁶ The Chamber found that the evidence was internally and externally consistent on the fundamental issues of Banda and Jerbo’s role in the attack on Haskanita. Thus, inconsistencies in the evidence concerning Abu Garda did not prevent the Chamber from relying on evidence from the same witnesses to confirm charges against Banda and Jerbo.

³³ ICC-01/05-01/08-424, para. 56.

³⁴ ICC-01/05-01/08-424, para. 56.

³⁵ ICC-02/05-02/09-243-Red, paras. 170-173, 176-179, 186-216, 222-232.

³⁶ ICC-02/05-03/09-121-Corr-Red, fns. 200 *et seq.*

Misapplication of ICC jurisprudence by the Defence

36. During the confirmation hearing, the Defence for Kosgey and Sang both argued that certain isolated “inconsistencies” in the Prosecution’s evidence demonstrate that such evidence is flawed in its entirety and is therefore insufficient to confirm the charges. The Defence equated these inconsistencies to those identified by Pre-Trial Chamber I in the *Abu Garda* decision, and argued that they required wholesale rejection of the Prosecution’s evidence. However, the *Abu Garda* decision does not require the Chamber to disregard the Prosecution’s evidence in this case. In arguing that it does, the Defence has misinterpreted the decision.
37. In *Abu Garda*, Pre-Trial Chamber I declined to confirm the charges because it found that evidence was vague and inconsistent on the fundamental issues of Abu Garda’s participation in two meetings where the attack was planned, his control over rebels that attacked Haskanita, and his participation in the attack.³⁷ In so doing, the Chamber noted that inconsistent, ambiguous or contradictory evidence may lead to a decision not to confirm charges, because “evidence of such nature” may “not [be] sufficient to establish substantial grounds to believe that the suspect committed the crimes with which he is charged”.³⁸ In other words, the Chamber agreed that it evaluates all the evidence, accords probative weight as it deems appropriate, and then determines from all the evidence, in light of the weight given to each item, whether the Prosecution has proven its case. It did not conclude that evidence that reflects some inconsistencies be rejected in its entirety. To the extent that the Defence urges the Chamber to follow the lead of that decision and disregard evidence solely because of inconsistencies, its position is incorrect.

³⁷ ICC-02/05-02/09-243-Red, paras. 170-173, 176-179, 186-216, 222-232.

³⁸ ICC-02/05-02/09-243-Red, para. 43. The Prosecution notes that the Defence for Sang misrepresented this quote at the confirmation hearing. See ICC-01/09-01/11-T-10-Red-ENG, p. 26 (“Furthermore, the Pre-Trial Chamber was of the view that: ‘... inconsistent, ambiguous, or contradictory evidence may result in the Chamber reaching a decision not to confirm the charges ... evidence of such a nature is not sufficient to establish substantial grounds to believe that the suspect committed the crimes with which he is charged,’ and that is at paragraph 43.”).

Kosgey

38. In his main submissions, the Defence for Kosgey argued that several “inconsistencies” between Witness 6’s evidence and that of other witnesses require that the Chamber not rely at all on Witness 6. The Defence contended that Witness 6’s description of Kosgey as a “mastermind” of the Network’s plan conflicts with evidence from other Prosecution witnesses. Specifically, the Defence argued that (i) only Witness 6 describes Kosgey as having a significant role in planning the post-election violence;³⁹ (ii) Witness 6 describes Kosgey’s involvement in the Network in December 2007, when other evidence shows the Network began planning the violence in 2006;⁴⁰ and (iii) Witness 6 places Raila Odinga (“Odinga”) at the “head of the organization”,⁴¹ which the Defence argues is inconsistent with the Prosecution’s theory of the Network’s structure and other evidence relied on at the confirmation hearing.
39. It must be expected that genuine witnesses’ versions will not be entirely congruent; their experiences and memories will necessarily diverge from each other in major or insignificant respects. Moreover, not all differences are inconsistencies. The points identified by the Kosgey Defence in Witness 6’s evidence are not in fact inconsistent with the rest of the Prosecution’s case. First, the fact that other Prosecution witnesses do not ascribe as significant a role to Kosgey as Witness 6 is not an inconsistency. Rather, this at best indicates that there is reduced corroboration for this portion of Witness 6’s evidence.
40. Second, Witness 6’s description of Kosgey’s participation in the Network does not conflict with other evidence, or with the later role that Witness 6 ascribes to Kosgey. The evidence demonstrates that the Network was fluid but became

³⁹ ICC-01/09-01/11-T-9-Red-ENG, pp. 37, 40; ICC-01/09-01/11-T-12-ENG, p. 58.

⁴⁰ ICC-01/09-01/11-T-9-Red-ENG, pp. 36-37.

⁴¹ ICC-01/09-01/11-T-9-Red-ENG, p. 40; ICC-01/09-01/11-T-12-ENG, p. 58.

more active as the 2007 Presidential election approached. Thus, it is consistent that Kosgey could have taken on a significant role within the Network at a later stage. Moreover, it is possible that Witness 6 is simply not aware that Kosgey played a role in the Network before December 2007. Either way, this factor does not require the Chamber to reject Witness 6's evidence implicating Kosgey.

41. Third, while the Defence argued that Witness 6 placed Odinga at the head of the Network, this argument is based on a flawed interpretation of EVD-PT-OTP-00399 at 0142. This document is Witness 6's diagram of *lines of reporting* concerning the Network's plans, not an organigram of authority over the Network.⁴² Indeed, during his interview, Witness 6 explained that Ruto and Kosgey informed Odinga of the planning and Odinga gave them money. He did not specify, however, that Odinga was the head of the Network.⁴³ Witness 6's statement that Ruto or Kosgey informed Odinga or that Odinga passed money to them is not proof that Odinga was the head of the Network, nor is it fundamentally inconsistent with the Prosecution's case. The eventual criminal responsibility of Mr Odinga, does not reduce the probative value of the evidence against Mr Kosgey.
42. More importantly, the Defence has not shown any inconsistencies so fundamental that they warrant the rejection of all of Witness 6's evidence implicating Kosgey, as Pre-Trial Chamber I concluded with respect to evidence in *Abu Garda*. Pre-Trial Chamber I found in *Abu Garda* that the Prosecution's witnesses were inconsistent on the fundamental issue of Abu Garda's role in the attack, but Witness 6's evidence about Kosgey's role in and significant contributions to the Network, though different in some respects from other evidence, is fundamentally consistent internally and is consistent, or at least not inconsistent, with the other core evidence implicating Kosgey.

⁴² EVD-PT-OTP-00399 at 0142.

⁴³ See, e.g. EVD-PT-OTP-00485 at 0224-0225, lines 579-597.

43. The Defence for Kosgey also noted that the “caution with which this Chamber will approach the evidence of a single anonymous witness on the key issues was made clear in the case of *Abu Garda*”.⁴⁴ This likely refers to Pre-Trial Chamber I declining to find that Abu Garda attended a second meeting at which the Haskanita attack was planned, where evidence of that meeting came from only one anonymous witness summary, and evidence from other witnesses who ought to have known about the meeting but did not make any reference to it.⁴⁵
44. The Prosecution submits that the *Abu Garda* decision to exclude the evidence because it was uncorroborated was incorrect to the extent that it suggests as a matter of principle that uncorroborated anonymous evidence must be excluded. Nor is that principle applicable in any event to Witness 6. While it is true that evidence implicating Kosgey comes primarily from Witness 6, the other witnesses were not necessarily in a position (i.e., it cannot be said that “they ought to have known”) to corroborate his specific evidence about Kosgey’s meetings in Nandi District. Moreover, the reliability and probative value of Witness 6’s evidence is underscored by its general consistency with other evidence from the Prosecution’s witnesses that is common to both the Uasin Gishu and Nandi Districts, such as Ruto’s primacy in the Network, the identities and roles of the three Rift Valley commanders, the creation of local subordinate structures within the district that would execute the violence, the agenda and format of Network meetings, and the distribution of resources from the Network leaders, including payment of meeting attendees. Viewed as part of a whole with the rest of the Prosecution’s evidence, the evidence from Witness 6 is clearly consistent, and thereby should be accorded appropriate weight and probative value.

⁴⁴ ICC-01/09-01/11-T-12-ENG, p. 52; see also p. 60.

⁴⁵ ICC-02/05-02/09-243-Red, paras. 170-173, 175-179.

45. Additionally, other characteristics of Witness 6's statements and transcripts, including the level of detail, evident basis of knowledge, broad scope of information, natural language, and candor further demonstrate the reliability of the witness' information. Collectively, these characteristics lend credibility to Witness 6's evidence concerning the meetings held in Nandi District, Kosgey's role in those meetings, and Kosgey's leadership within the Network.

Sang

46. The Defence for Sang attempted to make a blanket argument that "inconsistencies" in the evidence of the Network's planning meetings demonstrate that it is weak and unreliable, and thus that the Chamber should reject the evidence of Sang's participation in these meetings in the same way that Pre-Trial Chamber I rejected evidence concerning Abu Garda's participation in the planning meetings preceding the attack on Haskanita.⁴⁶ However, Sang misapplies Pre-Trial Chamber I's decision to reach this conclusion.
47. As mentioned, Pre-Trial Chamber I in Banda and Jerbo relied on a summary that it had declined to rely upon in *Abu Garda*.⁴⁷ Thus, it is clear that witnesses' inconsistency on one issue (such as the attendance by one suspect at a meeting) does not require rejection of the same witnesses' evidence that the other suspects attended the meeting.
48. In this case, the Prosecution's evidence is fundamentally consistent in respect of Sang's participation in planning meetings, and his use of the public airwaves to contribute to the Network's plan. While evidence from these same witnesses may have minor inconsistencies on ancillary issues, the Chamber can still rely on that evidence to confirm Sang's liability, as Pre-Trial Chamber I did in *Banda and Jerbo*. In fact, minor inconsistencies suggest the

⁴⁶ ICC-01/09-01/11-T-12-ENG, p. 70, line 14 to p. 71, line 18, p. 72, line 19 to p. 73, line 9, p. 74, lines 4-8.

⁴⁷ ICC-02/05-03/09-121-Corr-Red, fns. 200 *et seq.*

authenticity of the witnesses' evidence; were the witnesses *too* consistent, it could appear that they had coordinated their testimonies.

(iii) The Defence has not presented evidence which renders the Prosecution's evidence insufficient to confirm the charges

49. The Defence for the three suspects offered alibi evidence that was intended to refute the Prosecution's evidence. However, its evidence does not show that the Prosecution's evidence is insufficient to establish substantial grounds to believe that the suspects committed the crimes charged. At best, the Defence presented a factual dispute concerning material issues that can only be properly resolved by a full airing of the evidence, which can only be done at trial. Moreover, even if an affirmative alibi defence is appropriately raised at confirmation, none of the Suspects properly gave sufficient advance notice of their intent to raise an alibi defence.⁴⁸
50. For those reasons, the Chamber need not engage in the weighing of competing versions at this stage. In the event that the Pre-Trial Chamber deems it nevertheless appropriate to address the issue of alibi at this time, a summary of the Defence assertions and failings are addressed in turn.

Ruto's alibi

51. The Defence for Ruto asserted alibis that placed him away from his home, allegedly rendering it impossible for him to have attended meetings at his house on 14 and 22 December 2007. This affirmative alibi defence is not sufficient to exclude his presence, since Ruto had access to and frequently used helicopters.⁴⁹ By helicopter, it was possible for Ruto to move among a number of locations over a short period of time. Thus, the proffered alibis do not refute the evidence that Ruto attended the meetings at his house.

⁴⁸ Rule 79(1)(a) requires the Defence to provide advance notice of an intent to raise an alibi defence, specifically in order that the Prosecution may investigate and prepare for it without being surprised at trial.

⁴⁹ E.g. EVD-PT-OTP-00222 at 0152 para. 149; EVD-PT-OTP-00239 at 0107 paras. 154-155; EVD-PT-OTP-00160 at 1281 line 1137 to 1282 line 1180; EVD-PT-OTP-00561 at 1101 lines 514-517; EVD-PT-OTP-00305, at min. 29:03 to 31:33.

Kosgey's alibi

52. The Defence for Kosgey disputes that there were meetings on 6 and 16 December and asserts in any event that Kosgey was not present. Again, this alibi defence was not adequately provided in advance. Nor does his proffered documentary evidence establish that he could not have attended the meetings.
53. Refuting the evidence that he attended a meeting on 6 December, Kosgey claims that he attended rallies all day in Kissii and Kiericho and relies in support of this on a passenger manifest from Sicham Aviation Ltd.⁵⁰ Even assuming that Kosgey was in Kisii or Kericho, he could have easily travelled from Kisii or Kericho to Cheramboss' home in a few hours, even taking into consideration poor road conditions. According to the Sicham Aviation passenger manifest, Kosgey travelled by helicopter that day from Kisumu to Kisii and Eldoret. His access to and use of the helicopter confirms that he could have travelled to the meeting by using the same means of transportation.
54. Kosgey asserts in his unsworn written statement that on 16 December 2007, the date of an additional meeting, he attended rallies the whole day in Mosoroi, Nandi Hills and Kobujoi in Nandi, and later slept in Kisumu.⁵¹ Kosgey thus asserts that he has an alibi that makes it impossible for him to hold a meeting with Ruto at Cheramboss' house in Nandi District.
55. Again, the Sicham Aviation passenger manifest that Kosgey offered as evidence shows that he travelled by helicopter on 16 December from Eldoret to Nandi Hills, Kisumu and Wilson.⁵² The distance between Kisumu and Cheramboss' home is 39 km by road, and 29 km by air. For the same reasons

⁵⁰ EVD-PT-D10-00024 at 0058.

⁵¹ EVD-PT-D10-00103 at 0039.

⁵² EVD-PT-D10-00024 at 0061.

described above, Kosgey's alibi assertion that he could not have attended the meeting fails.

Sang's alibi

56. Similarly, the Defence for Sang asserts that he did not attend the preparatory meetings, claiming as alibis that he was (1) at a football tournament on 30 December 2006; and (2) at work on the dates of the preparatory meetings.
57. Again, Sang's assertion that it was not possible to attend the meetings is specious at best. The location of the football tournament does not preclude Sang's presence at the meeting on 30 December 2006. And the statements of Sang's employer dated 15 August 2011 and emphatically stating, without more, that Sang was at work on those dates do not indicate the basis of his knowledge or provide corroborative information as to what Sang was doing on the days in question.⁵³

Claims that the Prosecution's evidence is not credible

58. The Defence also makes other vague and unsubstantiated challenges to the Prosecution's case. They urge, for example, that the witnesses are incredible:
 - Defence for Ruto: "So here we have a Prosecutor, seven witness statements that have been repeatedly, endlessly referred to. That's their case. We don't accept that those witnesses are witnesses of truth".⁵⁴
 - Defence for Kosgey: "there are any number of reasons why Witness 0006 has make false allegations against Mr. Kosgey. In a case like this, the prospect that Witness 0006 may have some ulterior motive for making allegations against Mr. Kosgey is real, not fanciful".⁵⁵

⁵³ EVD-PT-D11-00036 at 0136-0137.

⁵⁴ ICC-01/09-01/11-T-6-Red-ENG, p. 112, lines 19-21. See also at p. 117, lines 10-12; ICC-01/09-01/11-T-12-ENG ET, p. 47, line 17 to p. 48, line 2.

- Defence for Sang: “[W]e will pray that the Court does not assume that the witnesses of the Prosecution are honest. We will pray that their evidence and what they allege be treated with circumspection.”⁵⁶

59. These arguments are not persuasive. Defence counsel merely proposes that the witnesses should not be believed, without substantiating those claims. Such unfounded arguments should be rejected.
60. Furthermore, Defence for Ruto and Sang argued that the Prosecution’s witnesses should not be trusted as they committed crimes as Network perpetrators.⁵⁷ To the contrary, while it is true that legal systems may regard such evidence with care, none disputes that an individual who allegedly participated in the commission of the charged crime may be a singularly informed, credible and reliable witness with relevant evidence. As Defence counsel noted, “in many legal systems of the world, and particularly in organised crimes, insiders, those who perpetrated crimes, could turn out to be to be crucial witnesses”.⁵⁸ The Prosecution concurs that “insiders” commonly provide highly relevant information only accessible to individuals involved in the crimes and close to the accused. Therefore, the Chamber should not discount information from Prosecution witnesses simply because they were involved in the crimes. Rather, as it does with all evidence, it should assess this along with numerous other factors to carefully evaluate the probative value to give to evidence from the Prosecution’s insider witnesses.
61. The Defence for Ruto also submitted that the evidence of the Prosecution’s witnesses must necessarily be regarded with some scrutiny on the basis that “protection” provides a motive for a witness to lie.⁵⁹ The Defence contended

⁵⁶ ICC-01/09-01/11-T-5- ENG ET, p. 109, lines 2-4. See also ICC-01/09-01/11-T-9-Red-ENG, p. 70, lines 13-15, p. 77, lines 3-6; ICC-01/09-01/11-T-10-Red-ENG, p. 30, lines 1-7; ICC-01/09-01/11-T-12-ENG ET p. 72, lines 8-9.

⁵⁷ See e.g. ICC-01/09-01/11-T-12-ENG ET, p. 37, line 12 to p. 38, line 2 and p. 72, lines 8-9.

⁵⁸ ICC-01/09-01/11-T-12-ENG, p. 37, lines 18-20.

⁵⁹ ICC-01/09-01/11-T-6-Red-ENG ET, p. 108, lines 9-20.

“in this context and in other African cases that are before this Court, it [protection] brings distinct advantages”.⁶⁰

62. The Prosecution does not disagree that witness motivation is an appropriate consideration, though one primarily for the trial. Various considerations are taken into account when assessing motivation, including whether the witness thinks he may gain protection and/or relocation, as the Defence claims, and whether he wishes to curry favor with powerful or influential persons who may be able to reward their supporters and punish their opponents.
63. On the merits of the Defence argument, the Prosecution disagrees that Kenya is so unpleasant and inhospitable a place that the chance to have protection and/or to relocate outside its borders must be necessarily presumed to be a compelling incentive to lie. Indeed, the Ruto Defence inadvertently confirms this point. In attempting to substantiate his submission that the Prosecution failed to investigate and collect potentially exonerating materials, counsel stated that, “Kenya is not Somalia. Kenya is a sophisticated country with a high GNP, going places.”⁶¹

(e) The Defence evidence is not reliable or sufficient to refute the Prosecution’s case

64. As noted previously, the fact that a witness is identified is no guarantee of reliability or truthfulness. Certain Defence witnesses provided evidence that is facially untrustworthy.
65. For example, during his examination, Ruto witness Samson Cheramboss emphatically stated, with surprisingly precise memory, that Ruto went to Cheramboss’ house for the first time on 26 June 2010 – which he later corrected to be 26 June 2009⁶² – for about ten minutes starting at 15:00.⁶³ He also recalled that the chairman of the county council, his wife, and his children were

⁶⁰ ICC-01/09-01/11-T-6-Red-ENG ET, p. 108, lines 14-15.

⁶¹ ICC-01/09-01/11-T-6-Red-ENG ET, p. 116, lines 22-23.

⁶² ICC-01/09-01/11-T-7-Red-ENG, p. 33, line 25 to p. 35, line 3.

⁶³ ICC-01/09-01/11-T-7-Red-ENG, p. 14, lines 4-8.

present.⁶⁴ Notwithstanding the definitiveness of his account, Cheramboss was unable to recall with certainty the events of *any other dates*, including in what month or year he learned about the International Criminal Court's involvement in adjudicating the post-election violence,⁶⁵ when in the month of August 2011 he had spoken to counsel Joseph Kigen-Katwa concerning the case,⁶⁶ or where specifically he had been, what he was doing, or with whom, anytime within the month of December 2007.⁶⁷ In comparison with his inability to recall events on other dates, his specific memory of the brief moment when Ruto went to his home appears unusual, if not suspicious.

66. Sang witness Reverend Jackson Kosgei, as another example, insisted that the Emo Foundation is a welfare organization for the interests of all Kenyans,⁶⁸ while the Emo Society is a welfare organization for the benefit of all people living in the Rift Valley.⁶⁹ However, examination by the Prosecution and by the victims' legal representative revealed that this organization in fact supports the Kalenjin community, in that: (i) the word "Emo" is a *Kalenjin* word⁷⁰; (ii) the investment arm of the Emo Society, called Emo Investments, raised 120 million Kenyan shillings to purchase a piece of land in Eldoret East containing a location of historical significance to the *Kalenjin* community⁷¹; and (iii) while Emo Investments raised 10 million Kenyan shillings in 2007 towards this land purchase, the various branches of Emo apparently raised no money "for charity" to help the Kikuyu and other IDPs forced from their Rift Valley homes in the post-election violence.⁷²

⁶⁴ ICC-01/09-01/11-T-7-Red-ENG, p. 33, line 25 to p. 35, line 3.

⁶⁵ ICC-01/09-01/11-T-7-Red-ENG, p. 22, lines 7-21.

⁶⁶ ICC-01/09-01/11-T-7-Red-ENG, p. 24, line 11 to p. 26, line 22.

⁶⁷ ICC-01/09-01/11-T-7-Red-ENG, p. 31, line 21 to p. 33, line 14.

⁶⁸ ICC-01/09-01/11-T-11-Red-ENG, p. 17, lines 13-15.

⁶⁹ ICC-01/09-01/11-T-11-Red-ENG, p. 28, lines 12-17, p. 34, lines 4-19.

⁷⁰ ICC-01/09-01/11-T-11-Red-ENG, p. 34, line 20 to p. 35, line 15.

⁷¹ ICC-01/09-01/11-T-11-Red-ENG, p. 37, line 21 to p. 38, line 6, p. 41, lines 8-24.

⁷² ICC-01/09-01/11-T-11-Red-ENG, p. 41, lines 8-10, p. 65, line 19 to p. 67, line 21.

D. Sufficiency of the Prosecution's investigation

67. The purpose of the confirmation of charges hearing is not to assess whether the Prosecution has fulfilled its duty under Article 54(1) nor is it to evaluate the sufficiency of the evidence presented against hypothetical evidence which may or may not exist and which the Defence loosely contends could have been collected.
68. Nevertheless, the Defence repeatedly pointed to alleged deficiencies in the Prosecution's investigation and referred generically to other evidence that it claims should have been presented at the hearing.⁷³
69. In the Prosecution's submission, the adequacy of the Prosecution's pursuit of allegedly exculpatory evidence is not a relevant consideration for the Pre-Trial Chamber at the confirmation stage, unless it impacts on the Chamber's assessment of whether the Prosecutor's evidence as a whole has met the "substantial grounds to believe" threshold.⁷⁴ As this Chamber itself has already recognized, "The Chamber doesn't have the power to direct the Prosecutor's investigation. We have only to assess the quality of evidence."⁷⁵
70. That said, and without prejudice to its position that this is not a proper issue for determination at this stage of the proceedings, the Prosecution makes the following limited submissions in response to the Defence argument that the Prosecution inadequately investigated exculpatory information.
71. The Defence claimed that the Prosecution failed to fulfill its duty under Article 54(1) to investigate exculpatory information. This is incorrect. The

⁷³ See for example ICC-01/09-01/11-T-5-ENG ET, p. 87, lines 16-18, p. 91, lines 3-5, p. 94, lines 1-6; ICC-01/09-01/11-T-6-Red-ENG, p. 113, lines 16-18; p. 114, line 17 to p. 115, line 4; p. 115, lines 9-16, lines 20-22; p. 116, line 9 to p. 117, line 19; p. 142, lines 17-20; p. 147, lines 9-19; ICC-01/09-01/11-T-12-ENG ET, p. 42, lines 4-19; p. 44, line 22 to p. 45, line 15; p. 49, lines 11-13 (Ruto); ICC-01/09-01/11-T-5-ENG ET, p. 103, line 24 to p. 104, line 1; ICC-01/09-01/11-T-9-Red-ENG, p. 59, lines 10-12; p. 60, lines 10-13; p. 61, lines 4-10; p. 65, lines 7-10; p. 67, lines 16-21; p. 72, lines 3-5; p. 73, lines 8-9; p. 74, lines 1-3; p. 79, lines 13-19; ICC-01/09-01/11-T-10-Red-ENG p. 6, lines 6-8; p. 25, lines 4-6; p. 25, line 20 to p. 26, line 7; p. 27, lines 16-25; p. 28, lines 11-22; p. 29, lines 14-18; ICC-01/09-01/11-T-12-ENG ET, p. 66, line 24 to p. 69, line 17 (Sang).

⁷⁴ ICC-02/05-02/09-243-Red, para. 48.

⁷⁵ ICC-01/09-01/11-T-12-ENG ET p. 75, line 25 to p. 76, line 2.

Prosecution took all reasonable steps to follow up exculpatory lines of enquiry. For example, during interviews with its witnesses, which were conducted over many days, the Prosecution questioned them on possibly exculpatory factors, confronted them about apparent inconsistencies in their testimony and explored their motivation for giving evidence. As mentioned in its closing remarks at the hearing, the Prosecution also noted in writing to the Defence with each disclosure of documents labeled as “incriminating”, that many were hybrid documents that, while predominantly containing incriminating information, also contained exculpatory information.

72. Indeed, at the same time as it attacked the Prosecution’s failure to investigate exculpatory evidence, the Defence relied on exculpatory materials that the Prosecution disclosed. For example, the Defence for Ruto stated that it was well-known that many sources claimed that the violence was spontaneous and referred to three items of evidence disclosed to it by the Prosecution that support this factual assertion.⁷⁶ Ironically, it did so shortly after having complained that the Defence had not received any exculpatory statements to that effect.⁷⁷
73. Additionally, the statement made by the Defence for Sang to the effect that the Prosecution previously acknowledged that it has no reason to disbelieve its witnesses, and as a corollary, no reason to investigate credibility issues with respect to its witnesses – in other words, it alleges that the Prosecution admits to abdicating its responsibility to satisfy itself that its evidence is truthful and sound – is misleading.⁷⁸ The previous acknowledgment identified by the Defence, the Prosecution’s argument in its response to the Defence abuse of process application in the *Lubanga* case, was that – in that

⁷⁶ ICC-01/09-01/11-T-6-Red-ENG, p. 134, line 19 to p. 136, line 17. See also EVD-PT-OTP-00464, a video disclosed to the Defence by the Prosecution concerning witnesses who claimed they were bribed to falsely implicate Ruto in the post-election violence, and which the Defence relied upon as part of the presentation of its case: ICC-01/09-01/11-T-10-Red-ENG, pp. 30-34. See also EVD-PT-OTP-00433 relied on at ICC-01/09-01/11-T-6-Red-ENG ET at p. 108, line 21 to p. 109, line 5.

⁷⁷ ICC-01/09-01/11-T-6-Red-ENG ET, p. 115, lines 8-12.

⁷⁸ ICC-01/09-01/11-T-10-Red-ENG, p. 25, line 7 to p. 26, line 1.

case – it had no reason to question the credibility of certain witnesses who had been interviewed at length by experienced investigators, when aspects of their identities and accounts were verified and corroborated, and when their evidence was consistent with the other information in the possession of the Prosecution.⁷⁹ In other words, it satisfied itself, based on objective information, that its witnesses were credible. The Prosecution submits that this was, and still is, a proper way to fulfill its legal duties.

74. Second, the Prosecution did not acknowledge, nor is it reasonable to infer from the first point, that it never has reason to investigate credibility issues with respect to its witnesses. As stated above, trial witnesses are interviewed by experienced investigators who verify and corroborate the detailed information they provide. The Office then relies on those whose evidence it has assessed as being credible and reliable. If issues arise that call into question the credibility or reliability of its witnesses, or any other evidence, as a matter of course the Prosecution will investigate and if appropriate, will not rely on that evidence in support of its case.

E. Issues concerning the document containing the charges and the crimes charged

(i) The document containing the charges is legally sufficient

75. During the confirmation hearing, the Defence teams for Ruto and Sang argued that the amended DCC was insufficient on its face⁸⁰ and failed to provide notice to the suspects of the charges alleged.⁸¹ The Defence also implied that the amended DCC was insufficient due to the inadequacy of the investigation and the evidence collected.⁸²

⁷⁹ See for example, ICC-01/04-01/06-2678-RED at paras. 39, 79, 114 and 142.

⁸⁰ ICC-01/09-01/11-T-6-Red-ENG, p. 126, lines 6-10, p. 127, lines 6-9.

⁸¹ ICC-01/09-01/11-T-6-Red-ENG, p. 152, lines 8-14.

⁸² ICC-01/09-01/11-T-5-ENG ET, p. 87, lines 17-18; p. 109, lines 7-11; ICC-01/09-01/11-T-6-Red-ENG, p. 113, lines 6-13; p. 114, lines 7-9; p. 121, lines 5-9; p. 124, lines 16-17; ICC-01/09-01/11-T-9-Red-ENG, p. 60, lines 10-12; p. 67, lines 16-17; p. 74, lines 23-25; p. 79, lines 16-19; ICC-01/09-01/11-T-10-Red-ENG, p.

76. Both arguments fail. The Prosecution submits that the amended DCC, amended LoE and the IDAC meet all necessary criteria under the Statute, the Rules, and decisions of this Chamber, and provide adequate notice of the charges to the Defence.
77. The sole purpose of the amended DCC is to provide the Defence with full notice of the specific facts and allegations on which the Prosecution bases its case. As noted in the cases of *Prosecutor v. Lubanga* and *Prosecutor v. Katanga and Ngudjolo*, “the Document Containing the Charges transmitted by the Prosecution is to be read in conjunction with the Prosecution’s list of Evidence”.⁸³ The Prosecution is not required to set out its evidence in the amended DCC, but instead must put forward *factual allegations* that support each of the legal elements of the crimes charged to the requisite standard under Article 67(1)(a) of the Statute.⁸⁴
78. When seized of a similar argument by the Defence teams in the *Prosecutor v. Muthaura et al case*, the Single Judge found that the amended DCC is not defective; when read in conjunction with the amended LoE, it contains all the relevant submissions in sufficient detail to meet the formal requirements established in Article 61(3) of the Statute, Rule 121(3) of the Rules and Regulation 52(b) of the Regulations of the Court (“Regulations”).⁸⁵ Under the same reasoning, the amended DCC when read as a whole and in conjunction with the amended LoE and the IDAC provides ample notice to the Defence of the nature of the crimes charged.
79. The factual allegations are set out in sufficient and considerable detail in the amended DCC. Moreover, the amended LoE lists all of the evidence that the Prosecution relies on to support the amended DCC, and identifies the evidence underlying each factual assertion contained therein. The IDAC

10, lines 6-7; p. 23, line 23 to p. 24, line 4; p. 26 lines 6-7; p. 28, lines 18-20; p. 46, lines 9-13; ICC-01/09-01/11-T-12-ENG ET, p. 37, lines 3-8; p. 45, lines 6-15; p. 46, lines 20-23; p. 66, lines 6-14.

⁸³ ICC-01/04-01-/06-803-tEN, para. 150; ICC-01/04-01/07-648, para. 21.

⁸⁴ ICC-01/04-01/06-2205 OA15 OA 16, para. 90, fn 163.

⁸⁵ ICC-01/09-02/11-315.

further identifies the evidence that supports each element of the crimes charged and the modes of liability as to each suspect. Reading these three documents together, the Defence clearly received adequate notice of the crimes charged and the evidence supporting those charges.

(ii) Specific “defects” alleged by the Defence in the document containing the charges

Pleading of Alleged Preparatory Meetings

80. The Defence argued that the amended DCC is insufficient because the Prosecution did not list the Network’s preparatory meetings in the amended DCC.⁸⁶ First, however, such information is not required to be included in the amended DCC. The Prosecution is only required to include in the amended DCC, and to prove – to the procedurally relevant standard – the sufficient material facts supporting the crimes alleged.⁸⁷ In this case, the material facts concern the contextual elements set forth in Article 7, the constituent elements of the crimes, and the applicable modes of liability. The material elements do not extend to or include the existence of the method used to plan the crimes.⁸⁸

81. Second, as previously stated, the Prosecution is not legally required to set out its evidence in the amended DCC. Indeed, such an exercise is not practical. First, the Chamber has approved the redaction of certain details of the meetings, including some of their dates, in order to protect the identities of Prosecution witnesses pursuant to Rule 81(4). It would defeat the purpose of the redactions if such information were required for the amended DCC.

⁸⁶ ICC-01/09-01/11-T-9-Red-ENG, p. 33, line 19 to p. 35, line 6.

⁸⁷ Rome Statute, Article 61(4); Rules of Procedure and Evidence, Rule 121(3); Regulations of the Court, Regulation 52, especially 52(b); ICC-01/04-01/06-2205 OA15 OA16, 8 December 2009, footnote 163 (to para. 90) (“In the view of the Appeals Chamber, the term ‘facts’ refers to the factual allegations which support each of the legal elements of the crime charged. These factual allegations must be distinguished from the evidence put forward by the Prosecutor at the confirmation hearing to support a charge (article 61 (5) of the Statute), as well as from background or other information that, although contained in the document containing the charges or the confirmation decision, does not support the legal elements of the crime charged.”); ICC-01/05-01/08-424, para.66 (“at the pre-trial stage, the Prosecutor needs to provide not all but only *sufficient* evidence which allows the Chamber to determine whether there are substantial grounds to believe that the suspect committed each of the crimes charged”).

⁸⁸ *Id.*

82. Third, it is not always practical to include precise dates and times of certain events that are not critical to the crimes themselves, particularly where, as here, the events occurred more than two years before the Prosecution interviewed the witnesses.
83. Finally, information about the dates of planning meetings and their relevance to the crimes charged is evident from the amended LoE and the IDAC. As such, the Prosecution submits that the amended DCC, read in conjunction with the amended LoE and the IDAC, provides sufficiently detailed information for the Defence.

Participants in the Common Plan

84. Additionally, the Prosecution notes that there is no requirement or obligation to individually identify each member of the common plan.⁸⁹ Nevertheless, the Prosecution provided the names of three members of the common plan and categorized other members under specific groups. Under these circumstances, the facts pled are sufficient to inform the suspects of the nature of the charges against them. Moreover, relevant evidence concerning the identities of members of the Network and those implicated in the common plan is identified in the amended LoE and IDAC.

Identity of the Victims

85. The Prosecution is not required to establish the identity of any specific victim if the “sheer scale of the alleged crimes makes it impracticable to require a high degree of specificity in such matters”.⁹⁰ The Prosecution described the victims in this case as perceived PNU supporters. The Prosecution submits that this is the most accurate description of the victims. The charge is not that

⁸⁹ According to the jurisprudence of the *ad hoc* tribunals on joint criminal enterprise (which may be applied by analogy), not every member of the joint criminal enterprise must be identified by name. See for instance, *Prosecutor v. Brdjanin*, IT-99-36-A, Appeals Judgment, 3 April 2007, para. 430.

⁹⁰ *Prosecutor v. Naletilic et al.*, IT-98-34-A, Appeals Judgment, 3 May 2006, para. 24; *Prosecutor v. Kupreskic et al.*, IT-95-16-A, Appeals Judgment, 23 October 2001, para. 89; *Prosecutor v. Ntakirutimana*, ICTR-96-10; 2; ICTR-96-17, Appeals Judgment, 13 December 2004, paras. 73-74.

the Suspects contemplated harm to specific named individuals; persons were attacked because of their assumed relationship to the targeted group. The requirement of specificity is designed to enable the Defence to prepare and to avoid the situation where an Accused is charged, for example, with assaulting specific Person A but the Prosecution proves at trial that the victim was Person B. That requirement does not apply when the exact identity of the victim is not relevant to the charge.⁹¹

(iii) Cumulative charging and the crime of persecution

86. As indicated in its presentation during the hearing, the Prosecution submits that the evidence establishing the charges of murder and deportation or forcible transfer of population also establishes the charges of persecution. The Chamber should confirm all of these charges to convey the full range of injury to the victims and criminality on the part of the suspects.
87. The conduct establishing the crimes of murder and deportation or forcible transfer of population further qualifies as persecution. The crimes are distinct. Each contains at least one element that the others do not require. Thus, they may all be charged. To the extent that the underlying conduct that violates these multiple statutory provisions is the same, that issue can be addressed at conviction and sentencing.
88. The Defence for Ruto argued at the hearing that the authorities available show that it is “wrong to charge where there is the same basis for a charge reflected in other charges”, and – relying on the confirmation of charges decision in *Prosecutor v. Bemba* – argued that the Chamber should therefore only confirm the charge of persecution.⁹² In the Prosecution’s submission, the position adopted in *Bemba*, which is not binding on this case, is erroneous for

⁹¹ As a U.S. appellate court recently explained, in addressing an indictment alleging fraud directed at a category of victims: “We have previously determined, however, that this type of ‘fraud does not include an element requiring a contemplated harm to a specific, identifiable victim.’ We have also addressed the particularity of the indictment, holding that specific victims need not be identified.” *United States v. Howard*, 619 F.3d 723, 727 (7th Cir. 2010) (internal citations omitted).

⁹² ICC-01/09-01/11-T-6-Red-ENG, p. 119, line 23 to p. 120, line 25.

the following reasons: 1) nothing in the Statute authorises a pre-trial chamber to decline to confirm charges because it considers the charge is unnecessary or unduly burdensome to the Defence; and 2) the authority relied on in *Bemba* (and by extension, the Defence) does not prohibit cumulative charging, but rather governs the circumstances under which cumulative *convictions* are (and are not) permissible.

A pre-trial chamber may only refuse to confirm a charge due to insufficiency of evidence

89. Article 61(7) empowers the Pre-Trial Chamber to “determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. Based on its determination, the Pre-Trial Chamber shall (a) Confirm those charges in relation to which it has determined that there is sufficient evidence [...] (b) Decline to confirm those charges in relation to which it has determined that there is insufficient evidence [...].”
90. The Statute makes it clear that the Pre-Trial Chamber is authorised to refuse to confirm a charge only if the evidence is insufficient. Indeed, Pre-Trial Chamber II stressed the statutory mandate enshrined in Article 67(1) in the pre-trial proceedings of the *Bemba* case.⁹³
91. What is more, nothing in the Statute authorises the Pre-Trial Chamber to decline to confirm charges because it considers that the charge is unnecessary or unduly burdensome to the Defence.⁹⁴

Cumulative charging must be distinguished from cumulative conviction

92. The Prosecution submits that *Bemba* decision erroneously declined to confirm the charges of torture (a crime against humanity) and outrages upon personal dignity (a war crime) on the grounds that the Prosecutor acted

⁹³ ICC-01/05-01/08-55, para. 13.

⁹⁴ ICC-01/05-01/08-424,, paras. 202, 204-205, 312.

inappropriately by bringing ‘cumulative charges’. The decision explicitly borrowed a test from the ICTY’s decision in the *Čelebići* case to support its findings.⁹⁵ This test, however, does not prohibit *cumulative charging*, but rather, governs the circumstances under which *cumulative convictions* are (and are not) permissible.⁹⁶

93. While national jurisdictions and international tribunals allow cumulative charging,⁹⁷ the *Bemba* decision rejected the persuasiveness of this jurisprudence for two reasons. First, it reasoned that cumulative charging places an undue burden on the defence and undermines the fairness and expeditiousness of the proceedings.⁹⁸ Second, it found that there is no need for the Prosecutor to charge cumulatively because Regulation 55 allows for the Trial Chamber to re-characterise a crime to give it the most effective legal characterization.⁹⁹
94. In the Prosecution’s submission, the principles relied upon in the *Bemba* confirmation decision are not applicable at this stage of the proceedings. Indeed, following the rule adopted in the *Bemba* decision could also preclude the Prosecution from charging both war crimes and crimes against humanity, or crimes against humanity and genocide, for the same underlying facts, notwithstanding that the legal elements and concerns of each category of crimes are distinct. Further, charging decisions are within the discretionary competence of the Prosecutor and it is for the Prosecutor to choose the

⁹⁵ ICC-01/05-01/08-424, fn 270 (relying on *Prosecutor v. Delalić et al.*, Case No. IT-96-21, AC Judgment, 20 February 2001, also referred to as the *Čelebići* case).

⁹⁶ *Prosecutor v. Delalić et al.*, Case No. IT-96-21, AC Judgment, 20 February 2001, paras. 400 (on cumulative charging), 412-413 (on cumulative convictions). The Appeals Chamber held that there is a distinction between cumulative charging and cumulative convictions and that cumulative charging is permissible but fairness to the accused requires that “multiple cumulative convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other” (emphasis added).

⁹⁷ Indeed, Pre-Trial Chamber II recognises the cumulative charging is followed in national courts and international tribunals (*Bemba* confirmation decision, para. 200) and failed to provide any authority to prohibit or limit this practice at the charging (as opposed to conviction) stage. In fact, the authorities relied upon by Pre-Trial Chamber II do not prohibit *cumulative charging*, but rather govern the circumstances under which *cumulative convictions* are (and are not) permissible.

⁹⁸ ICC-01/05-01/08-424, para. 202.

⁹⁹ ICC-01/05-01/08-424, para. 203.

charges,¹⁰⁰ for the Pre-Trial Chamber to determine whether the Prosecutor has supported the each charge with sufficient evidence and for the Trial Chamber to pronounce on them.¹⁰¹

95. Finally, Regulation 55 is not an answer. First, it is not settled whether Regulation 55 can authorise the *addition* of a new legal characterisation (rather than merely the replacement of the old one).¹⁰² So the availability of Regulation 55 does not eliminate the concern that eliminating counts diminishes the capacity of the charging document to properly reflect the full range of criminality. Second, it is more burdensome to the parties, including the Defence, to invoke Regulation 55. Far from being an efficient means to deal with the issue, dismissing charges with the possibility that the Trial Chamber will resurrect them has the potential to delay the conclusion of the trial in order to provide the Defence with “adequate time and facilities” to prepare its defence to the new recharacterised charges and the opportunity to recall witnesses.¹⁰³

Cumulative charging is appropriate in cases such as these so that the full range of criminality, and the nature and degree of victimisation suffered, is encompassed

96. Here, the facts that establish the crimes of murder and deportation or forcible transfer of population also meet the specific elements of the crime of persecution. Criminalising murder, deportation or forcible transfer of

¹⁰⁰ *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Judgment, 20 February 2001, para. 412; *see also Prosecutor v. Kunarac et al.*, Case No. IT-96-23-T and IT-96-23/1-T, Judgment, 22 February 2001, para. 548; *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgment, 2 August 2001, para. 659; *Prosecutor v. Galić*, Case No. IT-98-29-T, Judgment, 5 December 2003, para. 156; *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, Judgment, 5 April 2004, para. 63; *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, Judgment, 5 April 2004, para. 63; *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, Judgment, 7 June 2001, para. 108; *Prosecutor v. Musema*, Case No. ICTR-96-13-A, Judgment, 16 November 2001, para. 369; *Prosecutor v. G. and E. Ntakirutimana*, Case No. ICTR-96-10-T and ICTR-96-17-T, Judgment and Sentence, 21 February 2003, para. 863; *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Judgment and Sentence, 15 May 2003, paras. 60 and 108; *Prosecutor v. Nazibirinda*, Joseph, Case No. ICTR-01-77-I, Judgment, 27 November 2007, paras. 276-277.

¹⁰¹ It is only after the prosecutors present their evidence that the Trial Chamber will be in a better position to “evaluate which of the charges may be retained based upon [precisely] the sufficiency of evidence”: *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Judgment, 20 February 2001, para. 400.

¹⁰² While the Prosecution considers that there are arguments that Regulation 55 does include the possibility of adding a new legal characterisation (ICC-01/04-01/06-1966, paras. 16-18) it cannot be denied that the issue remains controversial (ICC-01/04-01/06-1975, paras. 10-25).

¹⁰³ Regulation 55(2) and (3) of the Regulations of the Court.

population, and persecution protects separate – but equally important – interests. The Prosecution submits that where facts are capable of establishing more than one type of criminal conduct and responsibility – as in this case – it is appropriate as well as statutorily required that the Pre-Trial Chamber confirm all the established charges in order to encompass the entire scope of criminality committed, and injury suffered.

97. To decide otherwise would mean that the suspects will avoid trial on serious charges for which the Prosecution has presented sufficient evidence to establish ‘substantial grounds to believe that the person committed each of the crimes charged’. It also unfairly restricts the Trial Chamber’s prerogative to pronounce judgment on the full range of crimes committed by the person and the nature and degree of victimisation suffered.
98. A pre-trial chamber is not authorized by Statute or Rule to choose the counts that it believes best reflect the harm suffered by victims and the criminality engaged in by the person, and to reject others as cumulative. When the charges are supported by the evidence, as here, the choice of counts to prosecute at trial is a right granted to the Prosecutor, not to the Pre-Trial Chamber.¹⁰⁴ A denial of confirmation on the basis of cumulative charging would bar the Prosecutor’s right and ability, under Articles 42 and 54, to present its case. When that ability is improperly restricted, the proceedings are unfair to the Prosecution.
99. For these reasons, the Prosecution submits that the Chamber should confirm the charges of murder, deportation or forcible transfer of population and persecution, and not eliminate any of the charges as inappropriately cumulative.

¹⁰⁴ Article 42(1).

II. Conclusion

100. The Prosecution has established substantial grounds to believe that William Samoei Ruto, Henry Kiprono Kosgey, and Joshua Arap Sang committed the crimes against humanity of murder, deportation or forcible transfer of population, and persecution. The Prosecution thus requests that the Chamber confirm the charges against all three suspects.¹⁰⁵



Luis Moreno-Ocampo, Prosecutor

Dated this 30th day of September 2011

At The Hague, the Netherlands

¹⁰⁵ Finally, the Prosecution informs the Chamber that it will submit a complaint with the Registry, in accordance with Article 34(1)(a) of the Code of Professional Conduct for Counsel, against Counsel Joseph Kipchumba Kigen-Katwa (“Katwa”) for misconduct arising out of his submission that “The Defence has not taken any statements from its viva voce witnesses and thus cannot be required to disclose something which it does not have”. Accordingly, the statements were not provided to the Prosecution in advance of the witnesses’ testimony. As was revealed at the confirmation hearing, attorney Katwa in fact had two statements, at least one of which was taken in his presence, from Ruto defence witness Henry Kiptoo Murei, KEN-D09-P-0002.