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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

**Defence Application for Leave to Appeal
the Decision on the Confirmation of Charges**

Source: Defence for Mr. Joshua Arap Sang

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

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I. Introduction

1. The Defence for Mr. Joshua Sang ("Defence") requests leave to appeal several issues arising from the Pre-Trial Chamber's 23 January 2012 majority *Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute* ("Confirmation Decision").¹ The Defence submits that these issues warrant the Appeals Chamber's consideration in order to materially advance the proceedings in a fair and expeditious manner.

II. Applicable Law

2. The Defence files this *Defence Application for Leave to Appeal the Decision on the Confirmation of Charges* ("Defence Application") pursuant to Article 82(1)(d) of the Rome Statute, Rule 155 of the Rules of Procedure and Evidence, and Regulation 65 of the Regulations of the Court.
3. The Pre-Trial Chamber has repeatedly stated that leave to appeal pursuant to Article 82(1)(d) will be granted only if it meets the following two cumulative criteria:
 - a. it must be an issue that would significantly affect (i) both the fair and expeditious conduct of the proceedings; or (ii) the outcome of the trial; and
 - b. it must be an issue for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.²

The interpretation of appealable issue

4. The Defence notes that an "issue" is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion.³ In addition, the Chamber has held that an appealable issue must emanate from

¹ *Prosecutor v. Ruto et al*, Pre-Trial Chamber II, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-01/11-373, 23 January 2012 ("Decision"); the Dissenting Opinion by Judge Hans-Peter Kaul ("Dissent") is appended to the Decision.

² *Prosecutor v. Bemba*, ICC-01/05-01/08-532, Pre-Trial Chamber II, Decision on the Prosecutor's Application for Leave to Appeal the "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", 18 Sept 2009 ("Bemba Leave to Appeal Confirmation Decision").

³ *Situation in the Democratic Republic of the Congo*, ICC-01/04-168, Appeals Chamber, "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", 13 July 2006, para. 9 ("Lubanga Extraordinary Review Decision").

the ruling of the decision concerned and not merely represent an abstract question or a hypothetical concern.⁴

The interpretation of fairness

5. The Chamber has previously found that the principle of fairness of proceedings is a fundamental element to all judicial proceedings, and is enshrined in various international legal instruments.⁵ One of the fundamental aspects of the right to a fair trial in criminal proceedings is that the proceedings should be adversarial in nature and that there should be equality of arms, in the sense of a fair balance between the parties.⁶ Based on this, the Chamber has clarified that fairness is preserved when a party is provided with the genuine opportunity to present its case - under conditions that do not place it at a substantial disadvantage vis-à-vis its opponent - and to be appraised of, and comment on, the observations and evidence submitted to the Court that might influence its decision.

The interpretation of expeditiousness

6. The expeditiousness of proceedings is closely linked to the concept of judicial proceedings "within a reasonable time"⁷ and complements the guarantees afforded to the suspect, such as the right to fair and public proceedings. The issue concerned must be of such nature as to significantly affect the expeditiousness of the proceedings, namely the speedy conduct of proceedings, without prejudice to the rights of the parties concerned.

The interpretation of "outcome of the trial"

⁴ Pre-Trial Chamber II, Bemba Leave to Appeal Confirmation Decision, para 17. *See also*, *Prosecutor v. Bemba*, ICC-01/05-01/08-75, Pre-Trial Chamber III, Decision on the Prosecutor's application for leave to appeal Pre-Trial Chamber III's decision on disclosure, 25 August 2008, para. 11.

⁵ Article 10 of the Universal Declaration of Human Rights, article 14(1) of the International Covenant on Civil and Political Rights, Article 6(1) of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms, Article 8(1) of the American Convention on Human Rights and Article 7(1) of the African Charter on Human Rights.

⁶ See for instance, European Court of Human Rights ("ECtHR"), *Domho Beheer B.V. v. The Netherlands*, Judgment of 27 October 1993, vol. 274, Series A, Application no 14448/88, para. 33; *Rowe and Davis v. United Kingdom*, Judgment of 16 February 2000, Application no 28901/95, para. 60; *Brandstetter v. Austria*, Judgment of 28 August 1991, vol. 211, Series A, Application nos 11170/04, 12876/87 and 13468/87, paras 66-67; *Jasper v. the United Kingdom*, Judgment of 16 February 2000, Application no 27052/95, para. 51; *Coëme and Others v. Belgium*, Judgment of 22 June 2000, Application nos 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, para. 102; Human Rights Committee, Communication no. 307/1988, *John Campbell v. Jamaica*, para. 6.4; Communication no 779/1997, *Åarela and Näkkäläjärvi v. Finland*, para. 7.4; M. Nowak (ed.), U.N. Covenant on Civil and Political Rights, CCPR Commentary, (Engel Publisher, 2nd rev. ed., 2005), p. 321, para. 29.

⁷ See e.g. ECtHR, *Pélissier and Sassi v. France*, Reports of Judgments and Decisions, 1999-11, Application no 25444/94, paras 67; Inter-American Court of Human Rights ("IACtHR"), *Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, Judgment of 21 June 2002, Series C, No 94 (2002), para. 143; M. Nowak (ed.), U.N. Covenant on Civil and Political Rights, CCPR Commentary, (Engel Publisher, 2nd rev. ed., 2005), p. 333 et seq., with further references to case law.

7. The Appeals Chamber has held that the Pre-Trial Chamber "must ponder the possible implications of a given issue being wrongly decided on the outcome of the case. The exercise involves a forecast of the consequences of such an occurrence".⁸

The interpretation of "immediate resolution...to materially advance the proceedings"

8. As the Appeals Chamber has previously determined, the issue must be such "that its immediate resolution by the Appeals Chamber will settle the matter posing for decision through its authoritative determination, ridding thereby the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial." Furthermore, "advancing" the proceedings has been identified by the Appeals Chamber as "removing doubts about the correctness of a decision or mapping a course of action along the right lines"; the term "immediate" has been defined as "underlin[ing] the importance of avoiding errors through the mechanism provided by subparagraph (d) by the prompt reference of the issue to the court of appeal".⁹

III. Submissions on Issues for Appeal

9. The Defence seeks leave to appeal the following crucial and concrete issues, which emanate from the Decision and which are identifiable subjects or topics requiring a decision for its resolution. These are novel and fundamental issues which are more than simply questions over which there is disagreement or conflicting opinion. Moreover, the Defence submits that each of these issues affect the fair and expeditious conduct of the hearing and require immediate resolution by the Appeals Chamber so as to materially advance the proceedings, as detailed below.

- a. First Issue: Whether the Majority erred by finding that the failure of the Prosecution to conduct proper investigations (including the failure to follow up on exculpatory leads and issues of reliability) has no consequences for the confirmation hearing independent of its assessment of the overall quality and sufficiency of the evidence presented;¹⁰
- b. Second Issue: Whether the Majority erred by improperly applying the burden of proof and by failing to apply its evidentiary principles in a reasonable and

⁸ Lubanga Extraordinary Review Decision, para. 13.

⁹ *Ibid*, paras 14-19.

¹⁰ See generally, Decision, paras 49-53 and Dissent, paras 42-52.

consistent manner to Defence and Prosecution witnesses, and with due consideration for the impact of the witness's anonymity on their weight;

- c. Third Issue: Whether the Majority erred by failing to include any threshold for the required level of contribution by Mr Sang under Article 25(3)(d); and
- d. Fourth Issue: Whether the Majority erred in finding that the Amended DCC, which did not include the identities of alleged perpetrators, nor specifics as to members of the Network organization nor of Mr Sang's alleged contribution, provided a sufficient legal and factual basis for the charges in that the DCC need not be exhaustive in its particulars.

10. The Defence notes the Majority's determination that the case against Mr Sang is admissible, on the basis that none of the parties have challenged admissibility and that no new information has become available to the Chamber since its previous finding on admissibility on 30 May 2011.¹¹ The Defence does not read this determination by the Chamber on the facts as currently before it to preclude any future filing by the Defence on the question of admissibility, as is its right pursuant to Article 19. Thus, the Defence does not seek leave to appeal this aspect of the Confirmation Decision as being pre-determinative of the issue.¹²

First Issue: Impact of Quality of Prosecution Investigations on Confirmation Hearing

11. At para 51 of the Decision, the Majority determined that the role of the Pre-Trial Chamber during the confirmation stage is solely "to determine whether sufficient evidence has been adduced to establish substantial grounds to believe that the Suspects committed the crimes charged" and that any failure by the Prosecutor to investigate properly would "certainly have a bearing on the quality and sufficiency of the evidence presented". However, and as Judge Kaul indicated in his Dissenting Opinion, if a Pre-Trial Chamber is not convinced that an investigation is complete, it may use its powers under Articles 61(7)(c) and 69(3) in order to compel the Prosecutor to complete his investigation before considering committing any suspect to trial.¹³

¹¹ Confirmation Decision, para. 38.

¹² See also, *Situation in the Democratic Republic of the Congo*, Appeals Chamber, ICC-01-04-169, Judgement on the Prosecutor's Appeal against the decision of Pre-Trial Chamber I entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58', 13 July 2006, paras 47-50 (warning against a Pre-Trial Chamber's pre-determination of the issue of admissibility prior to hearing a challenge from the Defence on the merits).

¹³ Dissent, para. 52. But see generally, Dissent, paras 42-52.

12. Whether the Chamber erred by finding that the failure of the Prosecution to investigate exculpatory issues or issues of reliability had no consequences for the confirmation hearing other than in assessing the sufficiency of the evidence therefore directly arises from the decision. Furthermore, the Defence submits that the scope of the Pre-Trial Chamber's duties at the confirmation stage with respect to ensuring that the Prosecutor has investigated all material facts, including investigating incriminating and exonerating circumstances equally, is an issue which affects the overall fairness and expeditiousness of the proceedings.
13. The Defence submits that the approach adopted by the Majority amounts to postulating that Pre-Trial Chambers are not necessarily the custodians of all provisions of the Statute and are not obliged to ensure that all statutory provisions are observed; that the Chamber is under no obligation to enforce the explicit statutory rights of a party *vis-a vis* the Prosecutor.

First Issue: Significantly Impacts the Fairness of Proceedings

14. The Prosecution's failure to investigate relevant or exculpatory or information not only impacts on the quality and sufficiency of Prosecution evidence, it also impacts on the adversarial nature of the confirmation hearing, and the extent to which it is possible for the Chamber to ensure the overall fairness of the confirmation process.
15. The Appeals Chamber has explicitly held with respect to the confirmation hearing that the Pre-Trial Chamber has an obligation to take measures to ensure that the hearing is not convened under conditions which would unfairly prejudice the rights of the defendant and the adversarial nature of the hearing.¹⁴ Whilst the Prosecution ordinarily conducts its investigations in an independent manner, the Chamber did have the power under Article 61(7)(c)(i) to order the Prosecution to provide further evidence or conduct further investigation with respect to a particular charge. Throughout the confirmation hearing, the Defence provided numerous examples of instances wherein the Prosecution investigations were insufficient¹⁵ and wherein the Prosecution failed to follow-up leads of exculpatory

¹⁴ *Prosecutor v. Lubanga*, ICC-01/04-01/06-773, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81, 14 December 2006, para 51.

¹⁵ Sang Confirmation Brief, paras 29-32.

information¹⁶. Because the Prosecution failed to investigate properly, the Defence was not given a genuine opportunity to present its case.

16. Bearing in mind the statutory duties of the Prosecutor to ascertain the truth, as outlined in Article 54(1), the Chamber's power to order further investigation cannot be limited to incriminating evidence. It must also encompass the situation in which it is clear that the Prosecution has failed to investigate exculpatory information or issues of reliability, which necessarily impact the adversarial nature of the confirmation hearing, as enshrined in Article 61. For example, in such a situation, if the Pre-Trial Chamber orders further investigation, and if the Prosecution is unable to provide the requested information, then it would be open to the Chamber to refuse to admit the anonymous statements/evidence of witnesses whose reliability is in question. The remedy of exclusion would then be appropriate, due to the absence of meaningful counterbalancing measures for the Defence to be able to challenge whether this evidence was reliable or possessed any probative value.¹⁷

17. Clearly, the Prosecutor's duty to investigate exculpatory material is intrinsically linked to its duty to disclose such material to the Defence. By failing to investigate exculpatory evidence or evidence which was relevant to the reliability of Prosecution witnesses, the Prosecution ultimately precluded the Defence from being able to exercise its rights meaningfully under Article 61(6) to challenge Prosecution evidence or present its own evidence on issues concerning the reliability of Prosecution witnesses.

18. The Trial Chamber in the *Lubanga* case recognized that, as a counterbalancing measure in the event that the Defence has been unable to access exculpatory evidence, it may be appropriate for the Chamber to accept certain admissions of fact in favour of the Defence in relation to the Prosecution allegation related to the non-disclosed material.¹⁸ In this instance, applying such a precedent might have precluded, for example, the Majority's finding that Sang contributed to the commission of crimes against humanity by placing his

¹⁶ Sang Confirmation Brief, paras 33-38.

¹⁷ The Appeals Chamber has stated that if the Prosecution wishes to rely upon anonymous or summarized evidence, the Pre-Trial Chamber has a positive duty to ensure that there are sufficient counterbalancing measures to remedy any potential prejudice. *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-475, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", 13 May 2008, paras 72 and 73.

¹⁸ *Prosecutor v. Lubanga*, ICC-01/04-01/06-1644, Reasons for Oral Decision lifting the stay of proceedings, 23 January 2009.

show, *Lee Nee Emet*, at the disposal of the organization, fanning violence through the spread of hate messages, and advertising the meetings of the organization, etc.¹⁹

19. In connection with alleged failures on the part of the Prosecution to investigate, the *Lubanga* Trial Chamber has explicitly found that this non-disclosure remedy could also be applied to a failure to investigate issues of reliability and credibility:

“A failure to ensure that the Chamber has received reliable evidence, especially when the prosecution was on notice that significant doubts existed in relation to material in question, may affect the Chamber's conclusions on the relevant area or issue.”²⁰

20. The fact that exculpatory information was not pursued and made available to the Pre-Trial Chamber in the present proceedings, and due to the fact that the Prosecution relied on a significant number of anonymous witnesses and statements, the Defence had a limited independent ability to investigate the reliability and credibility of their evidence. By confining its analysis to the evidence put before it, rather than considering the evidence which *could* have been put before it had appropriate investigative measures been taken, the Chamber also fettered its ability to make appropriate inferences of fact in a manner which is consistent with the principle of *in dubio pro reo*. For example, if the defendant Sang had made broadcasts in contravention of the radio ban, then it should have been possible to obtain transcripts of such broadcasts. It would therefore have been appropriate for the Chamber to make an inference of fact concerning the absence of any such transcripts.²¹ This is particularly the case as the Defence cannot prove a negative: if the broadcasts did not occur, the Defence cannot prove this from the absence of transcripts, whereas if the broadcasts had occurred, the Prosecution could have proved it from the existence of transcripts.

21. The lack of comprehensive investigations, conducted with the aim of ascertaining the truth about what occurred during the post-election violence in Kenya, has affected the overall fairness of the proceedings.

¹⁹ Confirmation Decision, paras 355 and 357.

²⁰ *Prosecutor v. Lubanga*, ICC-01/04-01/06-2690-RED2, Redacted Decision on the "Defence Application Seeking a Permanent Stay of the Proceedings", 2 March 2011, para 204.

²¹ This would be consistent with the approach of the ICTR Trial Chamber in the Bizimungu case in which the Chamber refused to convict the defendant in relation to allegations of incitement at RTLM due to the fact that the OTP had access to the transcripts but had failed to adduce any transcripts or audio recordings which corroborated the witness testimony concerning the broadcasts in question. *Prosecutor v. Casimir Bizimungu et al*, Trial Judgement, 30 September 2011, para 1663.

First Issue: Impact on Expeditionness

22. The issue as to whether the Pre-Trial Chamber has the authority to ensure the Prosecution has complied with its duty to establish the truth by investigating all facts and evidence, significantly impacts on the right of the Defence to receive an expeditious resolution of the case.
23. Issues concerning the reliability and credibility of Prosecution evidence may eventually surface during the trial stage, after the identities of Prosecution witnesses have been disclosed to the Defence. However, since there is no mechanism at the ICC to dismiss the case prior to the issuance of the trial judgement, it will be necessary to convene a costly and potentially lengthy trial and issue a judgment before the case can be disposed. The *raison d'être* of the confirmation hearing – as a filtering phase to ensure that the ICC does not unnecessarily commit its time and resources to a trial which has no reasonable prospect of securing a conviction – is therefore vitiated if the Prosecution relies on incriminating evidence, without first verifying comprehensively its reliability or credibility. The negative impact on expeditionness is further exacerbated when the Pre-Trial Chamber believes its powers are limited to evaluating only the evidence placed before it. In his Dissenting Opinion, Judge Kaul describes with clarity the type of time-consuming set-backs the Majority approach encourages.²²
24. Rather, if as part of its confirmation decision, the Pre-Trial Chamber imposes consequences for a failure to investigate the reliability of Prosecution witnesses, this would ensure that the Prosecution will engage in a more thorough vetting process, before tendering evidence by its witnesses. This would in turn expedite proceedings: it is far more expeditious and effective for the Prosecution to make a preliminary determination that a witness should not be called due to issues of credibility and reliability, rather than to call the witness and create a situation where the Defence must call counter-witnesses and evidence to rebut the credibility of the witness.²³

²² Dissenting Opinion on Confirmation Decision, para 52.

²³ The Defence notes that both the *Lubanga* and *Katanga and Ngudjolo* cases were unnecessarily protracted by the prosecution's reliance on witnesses, who later retracted their testimony. *Prosecutor v. Lubanga*, ICC-01/04-01/06-2201-Red, Decision on the prosecution's "Request on the Manner of Questioning of Witness DRC-OPT-WWWW-0015" and contact by the prosecution with Court witnesses, 1 February 2010; ICC-01/04-01/06-T-192-ENG, p. 10-14, 16 June 2009; *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-2731, Decision on the Prosecution's renunciation of the testimony of witness P-159, 24 February 2011. Furthermore, the *Mbarushimana* confirmation hearing also dedicated unnecessary time to the consideration of a witness, whom the Prosecution subsequently withdrew due to the fact that certain issues had not been adequately investigated prior to the confirmation hearing. *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-456, Prosecution's Notice that it no longer relies on the statement of Prosecution Witness 692 to support the confirmation of charges, 21

First Issue: Immediate Decision would Materially Advance the Proceedings

25. If the Appeals Chamber were to decide that the Pre-Trial Chamber has the duty to take into consideration investigative failings when deciding whether to confirm the charges, or take other measures such as ordering further investigation, this will have the effect of both sanctioning the Prosecution and providing direct guidance concerning the possible consequences of investigative failings for the future proceedings. A properly investigated case will in turn, facilitate a fair and expeditious trial, which is not marred by disputes concerning investigative failings, or lengthened by the hearing of witnesses, whose credibility and reliability were not properly vetted in advance.
26. In contrast, failing to render a judicial determination of this issue will simply give the Prosecution *carte blanche* to continue their current practices for the trial stage. It is therefore imperative for the future progress of the case that the Appeals Chamber be given an opportunity to immediately determine whether investigative failings have any consequences, other than as concerns the sufficiency of evidence.

Second Issue: Erroneous Application of Evidentiary Principles

27. Prior to conducting its free assessment of the evidence adduced during the confirmation hearing,²⁴ the Majority set out the legal principles it would apply when assessing relevance and probative value.²⁵ The Defence is not challenging these principles *per se*, but rather the fact that the Majority did not apply the standards in reasonable and consistent manner.
28. For example, during confirmation, the Defence highlighted inconsistencies in the witnesses' accounts and challenged the motives and personal interests of the Prosecution's witnesses, to the extent possible considering their anonymous nature. At paras 78, 83, 86, and 92 of its Confirmation Decision, the Majority stated the following general principles:

“78. [...] the use of evidence emanating from anonymous sources ... may impact the ability of the Defence to challenge the credibility of the source and the probative value of such evidence. Therefore to counterbalance the disadvantage that this might cause to the Defence, such evidence is considered as having a lower probative value... The Chamber will thus

November 2011; also ICC-01/04-01/10-465-Red, Decision on the confirmation of charges, 16 December 2011, para. 42.

²⁴ Confirmation Decision, para 59.

²⁵ Confirmation Decision, paras 66-92.

analyse anonymous witness statements and summaries on a case-by-case basis and ... take into account whether there is corroboration by other evidence.”

“83. The Chamber will evaluate whether motives cast doubt on the reliability and, by implication, on the probative value of the evidence.”

“86. The Chamber considers that inconsistencies may have an impact on the probative value to be accorded to the evidence in question... The Chamber will assess whether potential inconsistencies cast doubt on the overall credibility and reliability of the evidence, and therefore, affect the probative value to be accorded to such evidence.”

“92. [...] the witnesses' possible involvement in the commission of the crimes does not automatically render them unreliable and/or not credible, such that their evidence should be excluded or provided a lower probative value. Instead, the assessment of the evidence provided by those witnesses and the weight to be given will depend on a case-by-case basis. The same holds true in relation to evidence provided by the Suspects, which will be equally treated on the basis of the same principle. In other words, the Suspects or Defence witnesses who are allegedly implicated through one way or another in the crimes will not be automatically considered unreliable and/or not credible. Nor will their evidence be granted a lower probative value, as a matter of principle.”

29. Furthermore, at para 73 of the Confirmation Decision, the Majority held that it would assess *viva voce* testimony “*inter alia* as a result of the questioning, of the witness' credibility, reliability, accuracy, trustworthiness and genuineness.”

30. Yet when the time came for the Majority to apply these standards to the evidence presented, the Prosecution evidence from anonymous sources was almost always deemed credible and reliable (despite inconsistencies, motives, involvement in the crimes, etc), while Defence evidence from known sources was always given a lower probative value due to the fact that the source of the evidence was an insider witnesses or had a motive to lie in order to protect his own interests.

31. Article 67(1)(i) sets out the right of the Defence not to have imposed on him or her any reversal of the burden of proof or onus of rebuttal. There is no exception or qualification to this principle throughout the Statute and Rules – the evidential burden remains at all times on the Prosecution. Article 61(5) also squarely obliges the Prosecution to support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged – there is no burden on the Defence to *disprove* any charge.

32. Although the Chamber iterates at the beginning of the decision that it will apply the principle of *in dubio pro reo*, there are several instances throughout the decision where the Chamber accepts Prosecution allegations on the basis that the Defence has failed to disprove these allegations.
33. The Majority's findings with respect to an alleged meeting at the Sirikwa Hotel on 2 September 2007 and Mr Sang's alleged presence are illustrative of this error. The Majority relied on statements of anonymous Witnesses 1 and 8,²⁶ whose testimony should have been afforded a low probative value based on their anonymous status. The fact that one anonymous witness corroborates another does not remedy any prejudice as the Defence is unable to test the reliability of either.
34. In contrast, the Defence presented two *viva voce* witnesses (Mr Cheramboss and Rev Kosgei) who testified that, contrary to Prosecution allegations, the meeting did not take place and that they themselves were not present. However, the Majority afforded the statements of these individuals low probative value on the basis of their alleged involvement, and despite the fact that the Prosecution and the Chamber had ample opportunity to cross-examine them about concerns of self-interest.²⁷
35. In addition, the Defence provided three statements from non-anonymous, disinterested witnesses. The Chamber made no findings that the Defence evidence lacked credibility or reliability but nonetheless found that the Defence evidence "do not undermine the probative value to be attached to the evidence given by Witnesses 1 and 8".²⁸ The Majority therefore erred by placing the burden on the Defence to undermine Prosecution evidence. In accepting the probative value of the Prosecution statements because they were "precise and detailed", the Majority placed an undue burden on Defence witnesses to precisely, and in a detailed fashion, describe how a meeting did not take place. This is patently unfair.
36. The Majority's ultimate assessment that the meeting took place therefore objectively privileged the testimony of two anonymous, inconsistent witnesses – whose credibility could not be tested by the Chamber or the Defence – over two non-anonymous witnesses whose credibility had been tested by the Chamber and the Prosecution and three statements from non-anonymous, disinterested witnesses. This finding would not have

²⁶ Confirmation Decision, paras 126, 130-131.

²⁷ Confirmation Decision, para 128.

²⁸ Confirmation Decision, para 132.

been possible if the Chamber had applied its evidential principles in a consistent manner, and in such circumstances, it would have been unable to confirm aspects of the charges which relied on Mr Sang's presence at and participation in the 2 September meeting.

37. Similar concerns arise from the Majority's analysis and findings as regards Mr Sang's presence at and indeed the occurrence of the 15 April 2007 meeting at the Molo milk plant,²⁹ and the 2 November 2007 meeting at Mr Ruto's residence.³⁰ By rejecting the Defence evidence due to the existence of an inference to the contrary, the Chamber effectively required the Defence to not only assert evidence that it was not present, but also to disprove any possible inferences to the contrary. The Defence submits that an inference does not give rise to substantial grounds to believe. Such an approach clearly shifts the burden onto the Defence, and does so, in a manner which is inconsistent with the Prosecution's duty to establish all elements of the charges to the requisite standard of substantial grounds to believe.

38. The issue as to whether the Chamber actually applied its evidential principles in a consistent and impartial manner, with due regard to the anonymity of Prosecution witnesses, therefore arises from the decision. Likewise, as evident in many of the above examples, the Chamber required the Defence to prove a negative: that the defence was not in a certain place at a certain time. This issue therefore arises from the Decision.

Second Issue: Fairness of the Proceedings

39. The objective consequence of the methodology applied by the Majority is that like witnesses have not been assessed in a like manner: whilst the Majority has consistently accorded Defence witnesses a lower value due to alleged self-interest, it has not done the same to Prosecution witnesses. The Majority has preferred the testimony of anonymous witnesses, whom it obliged to lower the probative value, to Defence witnesses, who were not anonymous. The Chamber overlooked completely the Prosecution witnesses' criminal history, thereby protecting the probative value of the Prosecution witnesses' testimony. In contrast, the Majority consistently lowered the defence witnesses' probative value without fair basis and or justification.

²⁹ Confirmation Decision, paras 120-125 (inferring that Mr Sang could have attended both the funeral and the oath-taking ceremony, and discounting Defence evidence that he was not at the ceremony).

³⁰ Confirmation Decision, paras 133-141 (speculating that Mr Sang could have made arrangements to participate in the meeting despite usually being at work, and discounting Defence evidence that he was at work) .

40. This issue therefore directly impacts on the Chamber's duty to assess the evidence in a fair and impartial manner. The Chamber's role is not to assist the Prosecution or to bolster its case or to find a way to make the Prosecution evidence fit together. The Defence were denied any benefit of doubt throughout the Majority decision, and inversely all benefit of doubt was accorded to the Prosecution. The Chamber must evaluate evidence in a manner that is consistent with the presumption of innocence and the principle of *in dubio pro reo*: it cannot be presumed from the fact that the Prosecution has alleged something that any Defence witnesses who testify to the contrary are lacking in credibility or reliability. Given that the Majority has indeed applied its methodology in an inconsistent manner, the presumption of innocence has been significantly affected.
41. This issue is also related to the burden of proof, to the extent that the Chamber's failure to accord weight to Prosecution and Defence witnesses in a consistent manner has effectively and unfairly shifted the burden of proof onto the Defence. It seems it is not enough for the Defence to establish substantial grounds to believe that the suspect did not commit the alleged offences – rather by requiring the Defence to rely upon evidence that was much more reliable and probative than the Prosecution's – the Chamber effectively required the Defence to prove more than the Prosecution, i.e. that there were more than substantial grounds to believe that the suspect did not commit the offence in question.

Second Issue: Expeditiousness of the Proceedings

42. The incorrect application of an evidential standard affects the expeditiousness of the proceedings as the "amendment or production of further evidence in order to meet the standard ... would affect the expeditiousness of the proceedings".³¹ The application of inconsistent standards to Prosecution and Defence evidence essentially requires the Defence to adduce a greater quantity and a higher quality of evidence than the Prosecution. This impacts on the time and preparation of the Defence by requiring it to adduce further evidence and expend greater investigative resources in order to meaningfully challenge Prosecution evidence at the confirmation hearing.

Second Issue: Advance Materially the Proceedings

43. The Defence submits that the Majority's evidential standards were applied in an incorrect and discriminatory manner, therefore this has tainted both the outcome itself (the decision

³¹ *Prosecutor v. Al Bashir*, ICC-02/05-01/09-21, Decision on the Prosecutor's Application for Leave to Appeal the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", 24 June 2009, p. 7.

to confirm the charges) and also the appearance of integrity and impartiality vis-à-vis the proceedings. It is contrary to the interests of justice to commit the case to trial on the basis of a decision which was tainted by a perception of partiality or a failure to comply with the presumption of innocence. An immediate decision of the Appeal Chamber is therefore required to either eliminate the appearance of such taint, or to ensure that the Mr Sang is not committed to a lengthy and unnecessary trial on the basis of faulty and unfair evidential findings.

44. Given that this is the first instance in which the Defence have vigorously challenged Prosecution evidence at the confirmation hearing, an immediate resolution by the Appeals Chamber will provide clarity on how to address such evidence. This clarity will advance the trial proceedings by clarifying the burden for alibi defences and the use of inferences with respect to Defence evidence. The Pre-Trial Chamber in the *Bashir* case found that an immediate decision of the Appeals Chamber would also provide clarity on the applicable evidential threshold (in that case, the law of inferences).³² This is applicable to the current case as well.

Third Issue: Required Level of Contribution Under Article 25(3)(d)

45. The Majority found Mr Sang liable for contributing to crimes against humanity under Article 25(3)(d) of the Statute.³³ They determined that the contribution required under subparagraph (3) may be satisfied by a less than “substantial” contribution, as far as such contribution results in the commission of the crimes charged.³⁴ Indeed, the Majority did not specify any required level of contribution. This legal finding was certainly contrary to the Defence’s submissions on this point,³⁵ and it is in stark contrast to the recent findings in *Mbarushimana* Confirmation Decision, wherein the Majority (including Judge Cuno Tarfusser) found that the contribution to the commission of a crime under this provision cannot be just “any” contribution, and need be at least “significant”.³⁶ Furthermore, the finding raises an issue of more fundamental importance, namely the reach of this provision of the Statute.

³² Prosecutor v. Al Bashir, Decision on the Prosecutor's Application for Leave to Appeal the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", ICC-02/05-01/09-21, p. 7.

³³ Confirmation Decision, para 367.

³⁴ Confirmation Decision, para 354.

³⁵ Sang Confirmation Brief, ICC-01/09-01/11-354, paras 68-70.

³⁶ *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-465-Red, 16 December 2011, para 283.

46. While Article 25(3)(d) serves as some form of catch-all liability, it cannot be that any contribution to the commission of a crime, no matter how insignificant is sufficient to impute liability to a suspect. As the Prosecution has acknowledged in *Mbarushimana*, this issue addresses the statutory requirements for criminal liability of a person who contributes to the commission of a crimes by a group of persons acting with a common purpose.³⁷ This is a purely legal issue of statutory construction which arises directly from the Confirmation Decision.

Third Issue: Impact on Fairness of the Proceedings

47. It would be exceedingly unfair for Mr Sang to stand trial for contributing to the commission of crimes against humanity if his alleged contribution to their commission is insignificant.

48. Additionally, it cannot be fair if different suspects before the International Criminal Court are subjected to different interpretations of the same provision of the Statute. The interpretation of this provision had a substantial impact on the Majority's decision to confirm the charges against Mr Sang, and it is grossly unfair for him to be committed to trial in connection with making simply any contribution to a crime, no matter how insignificant.

Third Issue: Impact on Expeditiousness

49. By confirming the charges against Mr Sang on the basis of an alleged contribution which was not required to rise to the level of substantial, or even significant, the Majority has committed a case to trial which does not deserve to be within the ambit of those cases which are adjudicated by the ICC. This affects not only the expeditiousness of this particular case, but the ability of the ICC as a whole to achieve its mandate and focus on those individuals whose alleged criminal conduct is of a sufficient gravity to merit its attention.

Third Issue: Materially Advance the Proceedings

50. Unless this issue is immediately resolved by the Appeals Chamber, this case will proceed to trial on an erroneous basis. The Prosecution will assume it does not have to provide evidence that Mr Sang's contribution was anything other than a mere contribution. The

³⁷ ICC-01/04-01/10-480, Prosecution's Application for Leave to Appeal the 'Decision on the Confirmation of Charges', 27 December 2011, para 41.

Trial Chamber may then require at the end of the day that the contribution had to amount to a certain threshold. It would be contrary to the interests of justice to commit the case to trial on the basis of a decision which was erroneous from the outset.

51. Additionally, future applications of this provision to suspects may result in unnecessary confirmation hearings against suspects who do not bear the greatest responsibility for committing crimes in any given situation.

Fourth Issue: Insufficiency of Amended DCC

52. The Majority found that the Prosecution's Amended DCC (which, notably, was filed only 15 days prior to the confirmation hearing, in contravention of Rule 121(3)),³⁸ was not deficient and met the requirements of Rule 121(3), which requires that the DCC contain a detailed description of the charges, and Regulation 52, which states that the DCC shall include, *inter alia*, "a statement of the facts, including the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person or persons to trial, including relevant facts for the exercise of jurisdiction by the Court".³⁹
53. The Majority approach places too little emphasis on the statutory requirement of a "detailed description" and the regulatory requirement that the DCC include a statement of facts which in and of itself provides a sufficient legal and factual basis for the Court to exercise jurisdiction.
54. According to the Majority, the DCC need not be exhaustive in all of the information in support of the charges. Therefore, for instance, the composition of the organization of which Mr Sang was allegedly a member, and which is a component of Court's ability to exercise subject matter jurisdiction over the suspect, need not be spelled out in the DCC. Rather, the Majority suggests the Defence can sift through all of the Prosecution's disclosure in order to "detect" these facts,⁴⁰ which are relevant for the exercise of jurisdiction by the Court.
55. The Defence submits that the Majority itself could not determine whether the Network organization existed by evaluating the facts contained in the DCC alone; it was forced to

³⁸ *Prosecutor v. Ruto et al*, ICC-01/09-01/11-261, Prosecution's Amended Document Containing the Charges and List of Evidence submitted pursuant to Article 61(3) and Rules 121(3), (4) and (5), 15 August 2011.

³⁹ Confirmation Decision, paras 96-98.

⁴⁰ Confirmation Decision, para 101.

pull facts from Prosecution witness statements in order to complete its analysis.⁴¹ This approach is contrary to the requirements of the Statute and Regulations of the Court and is therefore an appealable issue arising from the decision.

Fourth Issue: Impact on Fairness

56. The vague and imprecise way in which the Prosecution presented its Amended DCC, and the Majority's finding that the Defence should "detect" pertinent facts from the morass of Prosecution disclosure effected prior to the confirmation hearing has a negative impact on the Defence's ability to understand the case it is expected to challenge. It vitiates the usefulness of the DCC as a document which is intended to ensure that there is a "complete understanding of the 'statement of facts' underlying the charges confirmed by the Pre-Trial Chamber, and to enable a fair and effective presentation of the evidence".⁴² The fact that necessary information is not contained in the Amended DCC therefore impacts the fairness of the proceedings.

Fourth Issue: Impact on Expeditionness

57. The ability of the Defence to prepare adequately and expeditiously for trial depends on its ability to understand as clearly as possible the key elements, people and parameters of the Prosecution case against Mr Sang. Without the identities of alleged co-perpetrators and members of the Network etc specified in the DCC, the Defence will have to take extra time to cull through the Prosecution disclosure as well as investigate the multitude of factual assertions therein, many of which may not end up being material to the case. This is not an efficient way to conduct preparation for trial.

Fourth Issue: Immediate Decision would Materially Advance the Proceedings

58. The specific contours of the charges against Mr Sang, detailed in precise legal and factual terms in the DCC, should be made clear before the case is confirmed. A decision on this issue now will allow the Defence to map a course of action along the correct lines.

IV. Conclusion & Request for Relief

59. The Defence respectfully seeks leave to appeal the four issues above, which arise from the Confirmation Decision. The Defence submits that these issues affect the fair and

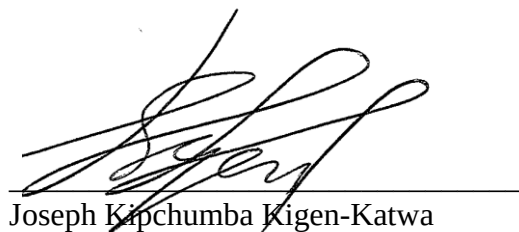
⁴¹ Confirmation Decision, paras 184-208.

⁴² *Prosecutor v. Lubanga*, ICC-01/04-01/06-1548, Order for the prosecution to file an amended document containing the charges, 9 December 2008, para. 13.

expeditious conduct of the proceedings and that an immediate resolution by the Appeals Chamber would advance materially the proceedings.

60. The Defence proposes to seek orders from the Appeals Chamber to the effect, *inter alia*:

- a) That the Pre-Trial Chamber II's majority decision of 23 January 2012 confirming the charges against Joshua Arap Sang be reversed;
- b) That the charges against Joshua Arap Sang not be confirmed; and
- c) That the Appeals Chamber issue any other and/or further orders that it may deem fair and just in the interest of justice.



Joseph Kipchumba Kigen-Katwa
On behalf of Joshua Arap Sang
Dated this 30th day of January 2012
In Nairobi, Kenya