

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 24 Oct 2011

PRE-TRIAL CHAMBER II

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

SITUATION IN THE REPUBLIC OF KENYA

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

PUBLIC

**Kosgey Written Submissions Following the Hearing on the Confirmation of
Charges
and Public Annex 1**

Source: Defence for Mr. Henry Kiprono Kosgey

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

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I. INTRODUCTION

1. The Confirmation of Charges hearing against William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, (collectively referred to as "the Suspects") commenced on 1 September 2011 and ended on 8 September 2011. At the conclusion of the hearing, Pre-Trial Chamber II (the "PTC") provided a timetable for filing the final written observations by the parties. The PTC directed that the observations be filed by the Prosecution and the Legal Representative for the Victims on or before 30 September 2011 and thereafter by the Suspects on or before 24 October 2011.¹
2. The Victims' Representative filed the "Final written observations of the Victims' Representative in relation to the confirmation of charges hearing"², ("Victims Written Submissions") and the Prosecution filed its "Prosecution's Written Submissions Following the Hearing on Confirmation of Charges"³ ("Prosecution's Written Submissions"), both on 30 September 2011.
3. The present submissions are filed in accordance with the 8 September 2011 directions of the PTC granting the Defence the opportunity to submit a maximum of 50 pages of written observations:
 - a. on matters relevant to the case and addressed during the Confirmation of Charges hearing, including replying to the written observations filed by the Prosecutor and the Victims' Legal Representative on such issues; and

¹ See Transcript, 8 September 2011, ICC-01/09-01/11-T-12-ENG ET, pages 76-77/78, open session.

² ICC-01/09/01/11-344.

³ ICC-01/09-01/11-345.

- b. in response to the written observations filed by the Prosecutor and the Victims' Legal Representative in relation to the jurisdictional challenge.⁴

4. In essence, the Defence of Henry Kiprono Kosgey ("the Defence") avers that contrary to the assertions by the Prosecution that its evidence is sufficient to establish substantial grounds to believe that Mr. Kosgey committed the crimes as charged, the Prosecution has failed to discharge its evidentiary burden commensurate with the established standards on Confirmation of Charges. As will become evident in the course of these submissions, the Prosecution has – in the disclosed evidence – relied on the anonymous evidence of one witness, whose evidence is not only incoherent, but is contradictory, inconsistent, and contrary to the disclosed evidence by the other Prosecution witnesses. The witness summaries disclosed by the Prosecution do not corroborate any of the evidence by the said witness in any material particular. Consequently, the Prosecution has failed to bring sufficient evidence to establish substantial grounds to believe that Mr. Kosgey has committed any of the crimes charged.

II. PROCEDURAL HISTORY

5. On 8 March 2011, the Chamber, by majority, decided to summon the Suspects to appear before it on 7 April 2011.⁵ On this date the PTC read the charges against the Suspects and set the date for commencement of the Confirmation of Charges hearing for 1 September 2011.
6. On 6 April 2011, the Single Judge issued a decision setting out the regime for evidence disclosure.⁶ Then on 20 April 2011, the Single Judge established a

⁴ ICC-01/09-01/11-T-12-ENG ET, pages 76-77/78, open session.

⁵ Pre-Trial Chamber II, "Decision on the Prosecutor's Application For Summons to Appear For William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang", ICC-01/09-01/11-1, 8 March 2011.

⁶ Pre-Trial Chamber II, "Decision Setting the Regime for Evidence Disclosure and Other Related Matters", ICC-01/09-01/11-44, 6 April 2011.

calendar for disclosure between the parties.⁷ Pursuant thereto the Defence for Mr. Kosgey filed its List of Evidence and In-Depth Analysis Chart (IDAC) on 16 August 2011.⁸

7. On 1 September 2011, the Chamber commenced the Confirmation of Charges hearing. The hearings took place for 6 days, during which the parties made their submissions, adduced evidence, and presented closing oral evidence on 8 September 2011, when the aforesaid timetable for oral submissions was given.⁹

III. OBSERVATIONS RELATING TO THE JURISDICTIONAL CHALLENGE

8. In its written motion of 30 August 2011 (the “Jurisdictional Challenge”), the Defence for Mr Kosgey challenged the jurisdiction of this Court, pursuant to Article 19(2)(a) of the ICC Statute and Rules 58 and 122 of the Rules of Procedure and Evidence.¹⁰ On 1 September 2011 the Defence, made further oral submissions in support of this Jurisdictional Challenge at the Confirmation of Charges hearing.¹¹ The Defence for Mr Kosgey continues to rely upon these previous written and oral submissions and supplements them in this filing only to the extent that they are affected by the contents of recent filings by the Prosecutor and the Victims’ Legal Representative on Jurisdiction.
9. Both the Prosecution¹² and the Victims’ Legal Representative¹³ assert in their respective written observations that the matters raised in the Jurisdictional

⁷ Pre-Trial Chamber II, “Decision on the ‘Prosecution’s application requesting disclosure after a final resolution of the Government of Kenya’s admissibility challenge’ and Establishing a Calendar for Disclosure Between the Parties”, ICC-01/09-01/11-62, 20 April 2011.

⁸ “Defence of Mr. Henry Kiprono Kosgey’s Submission of List of Evidence and Analysis”, ICC-01/09-01/11-266, filed publicly w/ Confidential Annexes A and B, 16 August 2011.

⁹ ICC-01/09-01/11-T-12-ENG ET, pages 76-77/78, open session.

¹⁰ “Application on Behalf of Henry Kiprono Kosgey Pursuant to Article 19 of the ICC Statute”, ICC-01/09-01/11-306, 30 August 2011.

¹¹ See transcript of 1 September 2011, ICC-01/09-01/11-T-5-ENG ET, pages 30-38/116, open session.

¹² “Corrigendum to ‘Prosecution’s Response to the Defence Challenges to Jurisdiction’ filed 16 September 2011”, ICC-01/09-01/11-334-Corr, 19 September 2011, paragraphs 9-15 and 33-36.

Challenge do not challenge the pre-conditions for the exercise of the Court's jurisdiction.

10. In fact, the issue of whether an incident or series of incidents can properly be termed a crime which is recognised by the Rome Statute is a key jurisdictional question. In its Decision to Open an Investigation into the Situation in Kenya, the Pre-Trial Chamber made the initial determination as to whether the alleged crimes fulfilled the Rome Statute's requirements of crimes against humanity – and therefore fell within the jurisdiction of the Court – or whether the alleged crimes did not fulfil these requirements and instead should properly be dealt with by the national jurisdictions of the country involved.¹⁴
11. The key determinant in this decision by the Pre-Trial Chamber turned on one major factor: the definition of an "organization." The different approaches of the Majority and His Honour Judge Kaul as to the definition of an 'organisation' (as related to the requirement of 'organisational policy') led the Majority to hold that the Court did have jurisdiction, whereas His Honour Judge Kaul ruled that the Court lacked jurisdiction. His Honour Judge Kaul, while condemning the post-election violence in Kenya, was unequivocal that the issue is the proper *"demarcation line between the crimes against humanity pursuant to article 7 of the Statute, and crimes under national law"*.¹⁵ His Honour Judge Kaul added, *"a gradual downscaling of crimes against humanity towards serious crimes... might infringe on State sovereignty and the action of national courts for crimes which should not be within the ambit of the Statute"*.¹⁶

¹³ "Observations of the Victims' Representative on the Defence challenges to jurisdiction", ICC-01/09-01/11-332, 16 September 2011, paragraphs 22, 33-44.

¹⁴ Pre-Trial Chamber II, The Situation in the Republic of Kenya, "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", ICC-01/09-19-Corr, 31 March 2010.

¹⁵ Pre-Trial Chamber II, The Situation in the Republic of Kenya, "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", Dissenting Opinion of Judge Hans-Peter Kaul, ICC-01/09-19-Corr, 31 March 2010 (hereinafter "HHJ Kaul Dissenting Opinion"), para. 9.

¹⁶ ICC-01/09-19-Corr, HHJ Kaul Dissenting Opinion, para. 10.

12. Thus it is the Pre-Trial Chamber, not only the Defence, that has approached the interpretation of the statutory phrase “organization policy” in article 7(2)(a) as an issue of jurisdiction.¹⁷
13. For the reasons set out above, the Defence submits that its filing of 30 August 2011 is a proper challenge to the jurisdiction of this Court.

IV. PROCEDURAL SUBMISSIONS

14. It is a Statutory requirement that the Prosecution must, at Confirmation, support each charge with ‘sufficient evidence to establish substantial grounds to believe’ that the suspect committed the crime charged.¹⁸ In the instant case, the charges averred by the Prosecution are that Mr. Kosgey shared a general common plan to create a uniform voting bloc¹⁹ and was involved in the commission of the offences of murder, forcible deportation and persecution.²⁰ The Prosecution further alleges that Mr. Kosgey exercised joint control over the physical perpetrators.²¹
15. The Prosecutor has made detailed submissions on the procedural steps applicable to this stage of the hearing.²² The Prosecutor asserts that the purpose of confirmation hearing is to ensure that the Prosecution's evidence at its highest establishes that there are substantial grounds to believe that the

¹⁷ In the table of contents in the Majority Decision, the element of ‘organisational policy’ along with the other elements of Article 7 is listed under ‘A. Whether there is a reasonable basis to believe that crimes against humanity within the jurisdiction of the Court have been committed’, and under the further sub-title ‘Jurisdiction *ratione materiae*’.

¹⁸ See Article 61(5) of the Rome Statute.

¹⁹ See Public Annex A to “Prosecution’s Amended Document Containing the Charges and List of Evidence submitted pursuant to Article 61(3) and Rules 121(3), (4) and (5)”, ICC-01/09-01/11-261-AnxA, 15 August 2011, (hereinafter “Amended DCC”), paras 24, 41.

²⁰ Amended DCC, ICC-01/09-01/11-261-AnxA, para 133.

²¹ Amended DCC, ICC-01/09-01/11-261-AnxA, para 123, see also Article 25(3)(a).

²² See “Prosecution’s Written Submissions Following the Hearing on Confirmation of Charges” ICC-01/09-01/11-345, 30 September 2011, (hereinafter “Prosecution’s Final Written Submissions”), paras 4 *et seq.* See also “Prosecution’s Observations on the Schedule of the Confirmation of Charges Hearing”, ICC-01/09-01/11-279, 22 August 2011, (hereinafter “First Observations”) and “Prosecution’s Observations on the Scope of the Confirmation of Charges Hearing”, ICC-01/09-01/11-297, 26 August 2011, (hereinafter “Second Observations”).

suspect committed the offences charged, and for this purpose, the Chamber should accept as reliable the Prosecution's evidence so long as it is relevant and admissible.²³ The Prosecution justifies this proposition by purported reliance on the practice and procedure of other international tribunals.²⁴ Within that context, it is claimed that the evidence disclosed by the Prosecutor including the amended List of Evidence should be accepted as reliable unless it is "incapable of belief".²⁵

16. The Prosecutor additionally submits that in assessing the disclosed evidence, the Chamber -- while carrying out the analysis thereof -- is concerned with the evidence submitted by the Prosecutor as a whole including such evidence as is identified in the amended List of Evidence.²⁶ The Prosecution further asserts that such assessment is made without regard to the credibility or reliability of witnesses as the proceedings at this stage may be predicated on documents and not viva voce evidence.²⁷ In the end result, the Prosecutor opines that the issue of credibility of witnesses cannot be addressed without descending to a mini-trial.²⁸
17. The Defence respectfully submits that the Confirmation of charges hearing is peculiar to the Rome Statute of the International Criminal Court ("the Statute") and is not comparable to any other similar statute. Indeed, no other similar or

²³ Prosecution's Final Written Submissions, ICC-01/09-01/11-345, paras 4 and 5.

²⁴ At paras 6-7 and accompanying footnote 5 in the Prosecution's Final Written Submissions, ICC-01/09-01/11-345, see the Prosecution's argument that the process of mid-trial motions for acquittal at the ICTY and ICTR (or what is commonly referred to as the "Rule 98bis" procedure) is analogous to the confirmation proceedings at the ICC, and thus the evidentiary standard of review that applies in a Rule 98bis determination should apply to confirmation.

²⁵ The Prosecution claims that in determining an accused's Application for an acquittal under ICTY Rule 98bis, the evidence led by the Prosecution is accepted as reliable. It further asserts that similar consideration ought to apply to the confirmation of charges hearing at the ICC. See Prosecution's Final Written Submissions, ICC-01/09-01/11-345, footnote 5.

²⁶ Prosecution's Final Written Submissions, ICC-01/09-01/11-345, paras 10 and 11.

²⁷ Prosecution's Final Written Submissions, ICC-01/09-01/11-345, paras 23, 24, and 30.

²⁸ Prosecution's Final Written Submissions, ICC -01/09/01/11-345, paras 23 and 24.

analogous procedure has been referred to by the Prosecutor.²⁹ The application for acquittal based on Rule 98*bis* of the ICTY is predicated solely on the evidence led by the prosecution and in the event, does not confer the rights and obligations as is provided under the Statute.³⁰ Under the Statute, it is expressly provided that upon the fixing of the date to hold a hearing to confirm the charges, the Prosecutor and the suspect (should s/he so choose to present evidence at the confirmation hearing) are required to disclose the evidence each party intends to rely upon at the confirmation of charges hearing under satisfactory conditions.³¹ For good measure, status conferences are held under the direction of the PTC to ensure due compliance.³²

18. For the purposes of the hearing, the Prosecutor is obliged to support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged.³³ The Prosecutor need not call witnesses "*expected to testify at the trial*" and may rely on documentary or

²⁹ It should be noted that the Rule 98*bis* determination at the international tribunals that the Prosecution attempts to analogue to the confirmation proceedings at the ICC are a wholly discrete procedure, as explained in footnote 30 *infra*.

³⁰ See the rights conferred to the defence at ICC confirmation proceedings as prescribed by Rome Statute Article 61(1) and Rule 121(1). The essential function of Rule 98*bis* proceedings is to test the sufficiency of the Prosecution's evidence-in-chief, and to extract and terminate only those proceedings in respect of a charge for which there is no evidence on which a Chamber could convict, rather than to terminate cases prematurely where the evidence is merely weak (see ICTY, *Prosecutor v. Brdjanin*, Case No. IT-99-36-A, "Decision on Interlocutory Appeal", 19 March 2004; see also ICTY, *Prosecutor v. Strugar*, Case No. IT-01-42-T, "Decision on Defence Motion Requesting Judgement of Acquittal Pursuant to Rule 98*bis*", 21 June 2004, para. 20). By contrast, the purpose of the ICC Confirmation procedure is to ensure that trial is brought only against those persons for whom sufficiently compelling charges "going beyond mere theory or suspicion have been brought" so as to "protect the rights of the Defence against wrongful and wholly unfounded charges" (see Pre-Trial Chamber I, *Prosecutor v. Lubanga*, Decision on the confirmation of charges ICC-01/04-01/06-803, 29 January 2007, para. 37). These procedures differ in object and purpose – and accordingly in process. In a Rule 98*bis* determination, the Trial Chamber takes the evidence at its highest: unless the Prosecution can be said to have "completely broken down", the evidence will stand (ICTY, *Prosecutor v. Galic*, Case No. IT-98-29-T, "Decision on the Motion for the Entry of Acquittal of the Accused Stanislav Galic," 3 October 2002, para. 11; ICTY, *Prosecutor v. Kordic*, Case No. IT-95-14/2, "Decision on Defence Motions for Judgement of Acquittal," 6 April 2000, para. 28). The Trial Chamber does not generally reach any conclusion as to the credibility of the witnesses called by the prosecution (see ICTY, *Prosecutor v. Martić*, Case No. IT-95-11-T, "Rule 98 *bis* Oral Judgement", 3 July 2006, para. 3, T-5960, where the Trial Chamber held: "*The judgement does not entail considering the credibility of the Prosecution's witnesses or weighing the evidence*"). Additionally, Rule 98*bis* applications are heard and decided without the benefit of defence evidence.

³¹ Rome Statute Articles 61(3) and 67(2) and Rules 63(2), 76, 77, 78, 79, 81, and 121.

³² See Rule 121(2)(b).

³³ Article 61(5).

summary evidence.³⁴ On the other hand, the Defence has the right to object to the charges, challenge the evidence presented by the Prosecutor, and present evidence.³⁵ These procedural steps culminate in the Confirmation of Charges hearing in which each party is granted the right to put forward their arguments and make final observations.³⁶ After the Chamber has considered the arguments and evidence presented by the Prosecution and the Defence and independently carried out its own analysis of the disclosed evidence it determines whether the threshold set by the Statute has been met.³⁷

19. In light of this very elaborate procedure for preparation and hearing of Confirmation of Charges, there is no basis upon which it can be suggested that the evidence disclosed by the Prosecution can be granted any particular preference over all the other disclosed evidence. Nor is there any basis to suggest that the right of the Defence to challenge the evidence at the confirmation hearing is in any manner circumscribed.

20. It is therefore a complete misapprehension of the applicable procedure for the Prosecution to submit 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 [List of Evidence]*".³⁸ The Statutory requirement is for the Chamber to assess all the evidence admitted for the purpose of confirmation, and **not** merely the evidence disclosed by the Prosecutor together with its List of Evidence.³⁹ Indeed the Chamber is thereafter expected to discharge its function by applying exacting scrutiny not just to the Prosecution's evidence but **all** the disclosed evidence.⁴⁰

³⁴ Article 61(5).

³⁵ Rome Statute Article 61(6).

³⁶ See generally Rome Statute Article 61 and Rule 122.

³⁷ Rome Statute Article 61(7) and Rule 121 (7), (8) and (9).

³⁸ See Prosecution's Final Written Submissions, ICC-01/09-01/11-345, para 10.

³⁹ See Article 61 of the Rome Statute.

⁴⁰ *Prosecutor v. Lubanga*, "Decision on the confirmation of charges", ICC-01/04-01/06-803-tEN, 29 January 2007, (hereinafter "Lubanga Confirmation Decision"), at para 39.

21. In effect therefore, for the PTC to be satisfied that the Prosecution has offered sufficient evidence to establish substantial grounds to believe that Mr. Kosgey committed any of the alleged crimes, the Prosecution must offer concrete and tangible proof demonstrating clear line of reasoning underpinning its specific allegations.⁴¹ The Prosecution cannot in discharge of this statutory duty rely on presumption of validity, credibility and reliability on the evidence it has disclosed to the exclusion of the evidence and arguments presented by the Defence.⁴²
22. The Defence respectfully submits that contrary to the Prosecution's submissions, the statutory obligation to examine all the evidence disclosed to the Chamber is not only an exercise in conformity with the provisions and spirit of the Statute but it is a burden that has to be discharged without resorting to a mini-trial.

Reliability Of Disclosed Evidence

23. The Prosecutor avers that for the purposes of the confirmation, the Chamber in assessing the disclosed evidence should presume that the evidence disclosed by the Prosecutor together with the analysis in the amended List of Evidence is *per se* reliable.⁴³ As the Defence has shown above, such an assertion has no basis in the rules governing Confirmation proceedings at the ICC, and instead repeats a standard lifted from the discrete judicial procedure of mid-trial motions for acquittal at the international tribunals.
24. For purposes of Confirmation of Charges, the Statute requires the Prosecutor to support each charge with sufficient evidence to establish all elements of the crimes as is prescribed under the Statute in response to which the Suspect has the right to object, challenge the evidence and/or present evidence.⁴⁴

⁴¹ *Lubanga* Confirmation Decision, ICC-01/04-01/06-803-tEN, para 39.

⁴² *Lubanga* Confirmation Decision, ICC-01/04-01/06-803-tEN, para 39.

⁴³ See Prosecution's Final Written Submissions, ICC-01/09-01/11-345, at para 5 and 6 specifically, which states "the Pre-Trial Chamber should accept as reliable the Prosecution's evidence so long as it is relevant and admissible".

⁴⁴ Rome Statute Article 61(5) and (6).

25. It is only after a hearing on the merits, based on an exacting scrutiny of the disclosed evidence that the Chamber will determine whether there is sufficient evidence to commit the Suspects for trial.⁴⁵
26. Contrary to what is suggested by the Prosecutor, the Chamber, in conducting a fair evaluation, takes into account the probative value of each piece of disclosed evidence and any prejudice it may cause.⁴⁶ These provisions nullify any suggestion that the evidence adduced by the Prosecution can be presumed to be reliable without the right of the Defence to challenge such evidence, and thereafter subjected to exacting scrutiny by the PTC.
27. Indeed the Chamber retains the ability to freely assess reliability and other factors at all stages of proceedings at the ICC, in accordance with article 69 of the Statute. In this respect, Pre-Trial Chamber I in *Prosecutor vs. Ngudjolo* made the following observations:

"Despite the controversies which have arisen in the international tribunals, in particular at the International Tribunal for Former Yugoslavia ("the ICTY") as to whether reliability is a separate or inherent component of the admissibility of a particular item of evidence, the Chamber prefers to adopt "the alternative approach". This approach is the most consistent with rule 63(2) of the Rules, according to which "[a] Chamber shall have the authority, in accordance with the discretion described in article 64, paragraph 9, to assess freely the evidence submitted in order to determine its relevance and admissibility in accordance with article 69".⁴⁷

⁴⁵ See Rule 122. Also see *Lubanga* Confirmation Decision, ICC-01/04-01/06-803-tEN, para 39.

⁴⁶ Rule 122(9) and Article 69(4).

⁴⁷ Pre-Trial Chamber I, *Prosecutor v. Katanga and Ngudjolo*, "Decision on the confirmation of charges", ICC-01/04-01/07-717, 30 September 2008, (hereinafter "*Katanga* Confirmation Decision"), para 78. See also Pre-Trial Chamber I, *Prosecutor v. Abu Garda*, "Decision on the Confirmation of Charges", ICC-02/05-02/09-243-Red, 8 February 2010, (hereinafter "*Abu Garda* Confirmation Decision"), at para 41 where the Chamber found that it will assess the evidence presented by the parties for the purpose of the confirmation hearing as a whole in order to determine whether the Prosecution has brought sufficient evidence to establish substantial grounds to believe that the crimes charged were committed.

28. Accordingly, the Chamber shall freely assess evidence at all stages of proceedings at the ICC and is not barred from making an assessment of reliability at Confirmation.

Anonymous Witnesses

29. Throughout the Confirmation hearing, and now in its Final Written Submissions, the Prosecution has attributed difficulties in securing evidence and the manner and presentation of the evidence to a politically charged climate in Kenya surrounding these cases. The Prosecution maintains that witnesses face great danger to themselves and their families if they testify openly, and this is why the bulk of evidence in this case comes from anonymous sources.⁴⁸
30. The right of the Prosecution to rely on anonymous witnesses and to use redacted statements in confirmation of charges hearing is of course acknowledged by the Defence. However, this right granted to the Prosecution must be balanced with the right of the Defence to challenge such evidence and the duty of the Court to apportion appropriate probative value to it. It must be taken into account that when the Prosecutor resorts to anonymous witnesses, the Defence is constrained by lack of knowledge of the witness' identity and by the fact that only a portion of and not the whole of the Witness' statement may be challenged. It may be that, that part of the omitted evidence would have availed the Defence an opportunity to successfully challenge that evidence.⁴⁹

⁴⁸ Prosecution's Final Written Submissions, ICC-01/09-01/11-345, paras 14-17

⁴⁹ As a general rule, the Chamber will not disregard indirect evidence but is cautious in using it to support its findings. The decision of the Pre-Trial Chamber in a confirmation of the charges cannot be solely based on one such piece of evidence. *See* Pre-Trial Chamber II, *Prosecutor v. Bemba*, "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", ICC-01/05-01/08-424, 15 June 2009, (hereinafter "*Bemba* Confirmation Decision"), at para 51. *See also* *Abu Garda* Confirmation Decision, ICC-02/05-02/09-243-Red, paras 50, 51, and 52 - "therefore, statements of anonymous witnesses will be given a lower probative value and will be evaluated on a case-by-case basis, according to whether the information contained therein is corroborated or supported by other evidence tendered into the case file".

31. As was stated in the case of *Prosecutor v. Jean -Pierre Bemba Gombo*, such evidence is of low probative value;

*"with regard to direct evidence emanating from an anonymous source, the Chamber shares the view, adopted in other pre-trial decisions, that it may cause difficulties to the Defence because it is deprived of the opportunity to challenge its probative value. This also holds true for summaries of witness statements [...] However, to counterbalance the disadvantage that it might cause to the Defence, such evidence is considered as having a rather low probative value. More specifically, the probative value of anonymous witness statements and summaries is lower than the probative value attached to statements of witnesses whose identity is known to the Defence."*⁵⁰

Credibility Of Witnesses

32. As noted above, the Prosecutor asserts that the confirmation of charges hearing is not a proceeding in which the issue of credibility can be considered without descending into a mini trial.⁵¹ This misapprehension is informed by its submission that the hearing at this stage is not necessarily conducted by way of leading viva voce evidence and may be primarily based on documentary evidence.⁵²
33. With due respect, this submission disregards the procedure prescribed under the relevant provisions which allow for the Chamber's free assessment of evidence at the confirmation stage and the Defence right to challenge that evidence, including on matters of credibility.⁵³ It disregards the latitude the

⁵⁰ *Bemba* Confirmation Decision, ICC-01/05-01/08-424 at para 50.

⁵¹ Prosecution's Final Written Submissions, ICC-01/09-01/11-345, para 24.

⁵² Prosecution's Final Written Submissions, ICC-01/09-01/11-345, para 23.

⁵³ See Article 61(6) and Rule 122(7), (8), and (9). Additionally, there is perhaps no clearer illustration of how credibility is a factor at confirmation proceedings at the ICC than the ability of parties to cross-examine *viva voce* witnesses at the hearing. Cross-examination of witnesses primarily functions as a credibility assessment exercise. By choosing to cross-examine defence witnesses at the confirmation hearing, the Prosecution in this case has tacitly accepted that credibility is indeed a factor to be assessed in the Chamber's evaluation of the evidence in these confirmation proceedings.

Chamber has in making an evaluation on a case-by-case basis and in taking into account, *inter alia*, the probative value of such evidence.⁵⁴

34. It is therefore self-evident that in those circumstances, credibility becomes a critical component in such assessment. In the absence of such an assessment, the Court would be unable to carry out the exacting scrutiny required of it to determine whether the Prosecution's allegations have been sufficiently proved to meet the criteria, as set out in the Statute.

Inconsistencies

35. Inconsistencies in evidence are the other factor to be taken into account in assessing the disclosed evidence. The Chamber takes inconsistencies into consideration, whether within or among several pieces of evidence. This is because inconsistencies by their very nature cast doubt on the overall credibility and reliability of the evidence. Evidence which is inconsistent and contradictory both internally and/or as against other evidence cannot form a sufficient basis upon which it can be established that there is sufficient grounds to believe that a person has committed the crimes charged.
36. This issue has been considered by Pre-Trial Chamber II in *Prosecutor v. Bemba* where the Chamber determined as follows;

*"the Chamber carefully assesses each and every potential inconsistency and factors it into its assessment of the probative value of the evidence for each issue to be proven. It should be noted 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."*⁵⁵

⁵⁴ See *Bemba* Confirmation Decision, ICC-01/05-01/08-424, at para 59, in which the PTC states specifically that "the Chamber is guided by various factors, such as the nature of disclosed evidence, the credibility, reliability, the source from which the evidence originates ..."

⁵⁵ *Bemba* Confirmation Decision, ICC-01/05-01/08-424, at para 55.

37. Similarly, in *Prosecutor v. Abu Garda* the Chamber found that;

*"inconsistent, ambiguous or contradictory evidence may result in the Chamber reaching a decision not to confirm the charges. Such a conclusion would not, however, be based on the application of the principle of in dubio pro reo to the assessment of the probative value of the evidence presented by the Prosecution at this stage of the proceedings. A conclusion such as this would rather be based on the determination that evidence of such nature is not sufficient to establish substantial grounds to believe that the suspect committed the crimes with which he is charged and thus that the threshold required by article 61(7) of the Statute has not been met."*⁵⁶

Abu Garda Decision As A Restatement Of Good Law

38. The Prosecution submits, in its Written Submissions, that:

*[T]he 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.*⁵⁷

39. The first point to make is that the Prosecution appears to mischaracterise the principle as established in *Abu Garda*. Pre-Trial Chamber I in *Abu Garda* did not state, as the Prosecution suggests, that 'uncorroborated anonymous evidence must be excluded'. Rather, Pre-Trial Chamber I applied the principle that anonymous evidence, particularly if uncorroborated or unsupported, will be 'given a lower probative value'.⁵⁸

⁵⁶ *Abu Garda* Confirmation Decision, ICC-02/05-02/09-243-Red, para 43.

⁵⁷ Prosecution's Final Written Submissions, ICC-01/09-01/11-345, para 44.

⁵⁸ *Abu Garda* Confirmation Decision, ICC-02/05-02/09-243-Red, para 52.

40. This principle, which the Prosecution apparently seeks to challenge, is based on sound reasoning and is now a firmly established canon of ICC jurisprudence.
41. The Pre-Trial Chamber in *Abu Garda* did no more than apply the principle as established by the Pre-Trial Chamber in *Bemba* that evidence emanating from an anonymous source is, because of the difficulties that the Defence has in challenging it, 'considered as having a rather low probative value'.⁵⁹
42. It is of note that the Prosecution sought to challenge the principle in *Abu Garda* by seeking leave to appeal Pre-Trial Chamber I's 'Decision on the Confirmation of Charges' in that case.⁶⁰ The Prosecution sought to question '[w]hether a Pre-Trial Chamber must confirm a charge if the Prosecution's evidence – when viewed in the light most favourable to the Prosecution and without regard to possible inconsistencies, ambiguities, *absence of corroboration*, or the fact that it comes from anonymous sources – could establish substantial grounds to believe that the suspect committed each of the crimes charged'.⁶¹
43. In rejecting the Prosecution's Application, and refusing leave to appeal, the Pre-Trial Chamber found that the Prosecution's argument amounted to a '*mere disagreement with regard to the Chamber's exercise of its discretionary powers to freely assess the evidence submitted to it*'.⁶²
44. From the very first case at the ICC, *Lubanga*, Chambers have recognised that "non-disclosure of the identity of witnesses on whom the Prosecution intends to rely at the confirmation hearing (i) could affect the ability of the Defence to

⁵⁹ *Bemba* Confirmation Decision, ICC-01/05-01/08-424, para 50.

⁶⁰ *Prosecutor v. Abu Garda*, "Prosecution's Application for Leave to Appeal the 'Decision on the Confirmation of Charges'", ICC-02/05-02/09-252-Red, 15 March 2010, (hereinafter "*Abu Garda* Prosecution Application for Appeal").

⁶¹ *Abu Garda* Prosecution Application for Appeal, ICC-02/05-02/09-252-Red, para 10(i) (emphasis added).

⁶² Pre-Trial Chamber I, *Prosecutor v. Abu Garda*, "Decision on the 'Prosecution's Application for Leave to Appeal the 'Decision on the Confirmation of Charges'", ICC-02/05-02/09-267, 23 April 2010, para 12.

fully challenge the evidence and credibility of those witnesses, and (ii) has an impact on the rights of the Defence pursuant to articles 61(3) and (6)(b) and 67(1)(b) of the Statute.”⁶³

45. The Appeals Chamber has similarly held that non-disclosure of the identity of a Prosecution witness, even for the purpose of confirmation, is prejudicial to the Defence and, for that reason, should be resorted to only exceptionally and should be accompanied by counterbalancing measures to ameliorate any prejudice to the Defence.⁶⁴
46. Pre-Trial Chamber II in *Bemba* held that the Chamber must ensure that evidence is both relevant and ‘trustworthy’ before attaching high probative value.⁶⁵ Moreover, careful evaluation of a witness’ potential improper or political motives is appropriate at the confirmation stage. Such motives ‘may cast doubt on ... reliability’.⁶⁶ Such evidence must therefore be considered with care. A full and proper assessment of a witness’ trustworthiness or their potential motivation is frustrated if the Defence have been denied the identity of the witness.
47. It follows that where the Prosecution’s case against a suspect rests upon the word of a single anonymous witness, it is right for such evidence to be afforded a ‘rather low probative value’, especially where such evidence is not corroborated by any other Prosecution evidence.

⁶³ Pre-Trial Chamber I, *Prosecutor v. Lubanga*, “Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence”, ICC-01/04-01/06-108-Corr, 19 May 2006, para 30 (emphasis added).

⁶⁴ See Appeals Chamber, *Prosecutor v. Lubanga*, “Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled ‘Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence’”, ICC-01/04-01/06-568, 13 October 2006 at paras 34-36; see also Appeals Chamber, *Prosecutor v. Katanga and Ngudjolo*, “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’”, ICC-01/04-01/07-475, 13 May 2008, para 73.

⁶⁵ *Bemba* Confirmation Decision, ICC-01/05-01/08-424, para 49.

⁶⁶ *Bemba* Confirmation Decision, ICC-01/05-01/08-424, para 57.

48. In this case, the Prosecution case against Mr. Kosgey rests upon the word of a single anonymous witness: Witness 6. The Prosecution has opted to present his evidence anonymously, and the Prosecution has chosen not to present any evidence to support or corroborate Witness 6's account. The consequence of that, according to the established jurisprudence of the ICC, is that such evidence will be afforded a very low probative value.

V. EVIDENTIARY SUBMISSIONS

49. The Defence for Mr. Kosgey maintains and relies upon its previous oral submissions at the Confirmation Hearing, its List of Evidence (LoE), the In-depth Analysis Chart (IDAC)⁶⁷ filed on 16 August 2011 and supplements them in this filing only to the extent that they are affected by the contents of the recent filings by the Prosecution and Legal Representative of the Victims.

50. There are four striking and unusual features concerning the allegations against Mr Kosgey:

- (i) The allegations hinge entirely on the evidence of one anonymous witness.
- (ii) The evidence from that one witness, because of the way it has been presented, is of the lowest probative value.
- (iii) The evidence from that one witness in relation to Mr. Kosgey is not corroborated or supported in any meaningful way by any other part of the Prosecution case.
- (iv) There are material inconsistencies between the evidence of Witness 6 and other aspects of the Prosecution's own case.

⁶⁷ ICC-01/09-01/11-266-Conf-AnxA-Corr, 22 August 2011.

The Allegations Hinge Entirely On The Evidence Of One Anonymous Witness

51. The Defence notes that the Prosecution concedes that its case against Mr. Kosgey is based on the evidence of a single witness - Witness 6. The Prosecution, however, seems to maintain that the disclosed evidence by the said witness is consistent with the evidence of other witnesses and to the extent that there is any difference, then it is only demonstrative of the fluid nature of the network in the period leading to the 2007 presidential elections.⁶⁸
52. To begin with, Witness 6 is introduced as a person who in 2007, was not involved in any political activity and was not associated with any political leader. Yet it is claimed that he is the only witness who had all the information with regard to Mr. Kosgey's participation in the alleged Network⁶⁹. The Prosecutor has failed to clarify via the evidence or to otherwise explain how the witness came to be so intricately and exclusively involved in the activities of the alleged Network in Nandi District.

The Evidence From That One Witness, Because Of The Way It Has Been Presented, Is Of The Lowest Probative Value

53. It is significant to note that the evidence of Witness 6 came to the Defence in an impaired form. The pages of his witness statement and transcripts are replete with redactions of all manner of information, including those relating to dates, locations, his basic personal information and all other related matters.⁷⁰ It is impossible for the Defence to challenge the evidence in any meaningful way without such information. The challenges to the Defence in

⁶⁸ Prosecution's Final Written Submissions, ICC-01/09-01/11-345 at para 44 (confirming that "it is true that the evidence implicating Kosgey comes primarily from witness 6...The other witnesses were not in a position [i.e., it cannot be said that "they ought to have known"] to corroborate his specific evidence about Mr. Kosgey's meetings in Nandi District.") *See also* Id. paras 39 and 40.

⁶⁹ EVD-PT-OTP-00382 at 0008, ("In 2007 political campaign, I did not do any political activity. I did not go around campaigning. At 42, I am not associated to any political leader, neither I was in 2007").

⁷⁰ *See e.g.* EVD-PT-OTP-00382 at 0022-0023 para 139; *see also* EVD-PT-OTP-00359 at 0464.

the way this evidence is presented should be taken into account in the Chamber's assessment of such evidence and the attendant allocation of the appropriate probative value to be attached to it.⁷¹

54. The Prosecution relies heavily on the case of the *Prosecutor v. Banda and Jerbo* in support of its position on the inviolability of summaries of evidence. In *Banda and Jerbo*, the Prosecutor presented a summary of his evidence while the Defence did not present evidence, nor did it challenge the evidence presented by the Prosecutor or otherwise respond.⁷² Clearly, the circumstances of that case differ materially from the situation in these proceedings. In the instant case, the Defence has clearly objected to the poor presentation, quantity, and quality of the Prosecution's evidence which comes in the form of a single anonymous prosecution witness whose evidence is not corroborated in any material particular and is otherwise contradictory not only as against itself but externally when compared to the disclosed evidence of the other Prosecution witnesses.
55. The summation of the totality of the above submissions is that an anonymous, heavily redacted evidence of a single witness is, in the confirmation process, accorded low probative value. Considered in isolation, it would not -- in the absence of corroboration -- be sufficient to establish substantial grounds to believe that a Suspect has committed the offence charged.⁷³

⁷¹ "The Defence can only be in a position to fully challenge the evidence provided for in the statement of a given witness if the identity of the witness is disclosed to the Defence". Pre-Trial Chamber I, *Prosecutor v. Katanga*, "Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules", 21 April 2008, ICC-01/04-01/07-428-Corr at para 18.

⁷² Pre-Trial Chamber I, *Prosecutor v. Banda and Jerbo*, "Corrigendum of the 'Decision on the Confirmation of Charges'", ICC-02/05-03/09-121-Corr-Red, 7 March 2011, para 21. *See also* Pre-Trial Chamber I, *Prosecutor v. Banda and Jerbo*, ICC-02/05-03/09-81, "Decision postponing the confirmation hearing and setting a deadline for the submission of the suspects' written request to waive their right to attend the confirmation hearing", 22 October 2010.

⁷³ "The probative value of anonymous witness statements and summaries is lower than the probative value attached to statements of witnesses whose identity is known to the Defence. ...The Chamber highlights that, although indirect evidence is commonly accepted in jurisprudence, the decision of the Chamber on confirmation of charges cannot be solely based on one such piece of evidence". *See* Bemba Confirmation Decision, ICC-01/05-01/08-424, at paras 50 and 51.

The Evidence From That One Witness In Relation to Mr. Kosgey is not Corroborated or Supported in Any Meaningful Way By Any Other Part of the Prosecution Case

56. The Prosecution further asserts that the evidence of Witness 6 is consistent with the other evidence of prosecution witnesses with respect to Mr. Ruto's primacy in the organisation, the identity of the three Rift Valley Commanders, the creation of local subordinate structures, the agenda and format of Network meetings and distribution of resources and that the Defence misinterpreted the lines of reporting as specified in the witness' diagram,⁷⁴ as it only provided the lines of reporting and not an organigram of authority over the network.⁷⁵
57. Taking in turn the areas in respect of which the Prosecution claims consistency, the Defence makes the following observations.
58. Firstly, the Prosecution's case as specified in the DCC is to the effect that Mr. Ruto was the head of a multi-faceted "Network" comprising various established institutions in the Kalenjin community and Mr. Kosgey's authority was subordinate to Mr. Ruto.⁷⁶
59. The theme that Mr. Ruto was alleged to be the head of a multi-faceted network is repeated in the disclosed evidence relating to preparatory meetings. It is poignant that in the organisational structure described in the Prosecution's evidence, save for the evidence of Witness 6, Mr. Kosgey is assigned no role whilst it is alleged that Mr. Ruto was the head of the Network.⁷⁷ In contrast, Witness 6 claims that Raila Odinga was at the apex of

⁷⁴ EVD-PT-OTP-00399 at 0142

⁷⁵ Prosecution's Final Written Submissions, ICC-01/09-01/11-345, paras 41 and 44.

⁷⁶ See Amended DCC, ICC-01/09-01/11-261-anxA at paras 43, 47.

⁷⁷ The Prosecution states -- both through the DCC and in its disclosed evidence -- that there were a number of preparatory meetings, the first significant meeting being on December 2006 where the Generals were allegedly appointed and geographical areas of control assigned, and hierarchy in the Network established. See Amended DCC, ICC-01/09-01/11-261-Conf-AnxA, at para 26. See EVD-PT-OTP-00550 at 0801. See also EVD-PT-OTP-00275 (geographical areas) and EVD-PT-OTP-00286 (coordinating structure).

the Organization and Mr. Ruto and Mr. Kosgey were sharing the same position in the reporting structure.⁷⁸

60. The evidence of Witness 6 with respect to the hierarchy in the Network is convoluted and contradictory. He claims at one instance that:

"165. The mastermind of the plan beforehand was Henry KOSGEI. I know that because he was managing the resources and it was him who got all the people from his area together so RUTO could speak to all of them";

and on the other, that,

"174. ...the person behind this planning was three Honorables: Henry KOSGEI, William RUTO and Sally KOSGEI. At operational level, however, KOSGEI was responsible (redacted) and RUTO for the entire Rift Valley."

61. Yet in the same context, the same witness claims that;

*"100. Henry KOSGEI said that [redacted] money, assistance even protection and defence which will be provided [redacted] by Raila ODINGA."*⁷⁹

62. The allegation on the primacy of Raila Odinga in the organisation as conceived by Witness 6 is maintained through the transcript of his interview(s). For example, he claims that he was told that:

*"584. we have received money from Raila ODINGA, he is with us. And after the meeting I will explain (to him) how things are going on...."*⁸⁰

63. The evidence of Witness 6 in connection with the command of the organisation is crowned with a diagram of an organisational structure,

⁷⁸ EVD-PT-OTP-00399.

⁷⁹ EVD-PT-OTP-00382 at 0015, para 100; 0025 at para 16; and 0027 at para 174.

⁸⁰ EVD-PT-OTP-00485 at 0024. The same theme is continued at 0225-0226.

entitled "chain of communication (reporting)".⁸¹ The diagram places Raila Odinga at the top of the organisation, with Mr. Kosgey and Mr. Ruto placed in a secondary but equal position. They are thereafter followed in the diagram by the generals and lastly the divisional commanders. The suggestion by the Prosecution that this evidence is consistent with the other evidence on record simply lacks merit.

64. When this inconsistency was highlighted by the Defence at the Confirmation Hearing, the Prosecutor responded by saying that "*the prosecution has no evidence indicating that Raila Odinga was involved in the planning or implementation of the crimes that are subject to the case.*"⁸² Indeed, the Prosecution's statement about Raila Odinga is consistent with the evidence disclosed before the Chamber, save for that of Witness 6. The Prosecution's response to this point does not cure, nor even materially address, the latent inconsistency of Witness 6's evidence and that of the Prosecution's case in this important aspect.
65. Having reconsidered its position, the Prosecutor now suggests that the title "*lines of reporting*" concerning the Network's plans was "*not an organigram of authority over the Network*".⁸³ This ignores the logic that is implicit in the term "*lines of reporting*": which is the idea that the report is made to a superior authority. This is reflected in the transcript of the witness when he confirmed that the Generals reported to both Mr. Kosgey and Mr. Ruto, who in turn reported to Raila Odinga.⁸⁴
66. The Defence humbly submits that this evidence contradicted the hierarchical order otherwise advanced by the Prosecution from its witnesses including Witness 8. The belated attempt to interpret the "lines of reporting" diagram as not establishing a line of reporting from the perspective of Witness 6 is a

⁸¹ EVD-PT-OTP-00399.

⁸² See transcript of 8 September 2011, ICC-01/09-01/11-T-12-ENG ET, page 7/78, open session.

⁸³ Prosecution's Final Written Submissions, ICC-01/09-01/11-345, para 41.

⁸⁴ EVD-PT-OTP-00489 at 0454

distinction without a difference. In any event, Witness 6 does not establish any other line of reporting in accordance with his understanding of the structure of the organization in respect of which he was giving his evidence.⁸⁵

67. In any event, no other witness statements adduced by the Prosecution support the allegations made by Witness 6 about Mr. Kosgey.⁸⁶

There are Material Inconsistencies between the Evidence of Witness 6 and Other Aspects of the Prosecution's Own Case

68. As demonstrated at length in the confirmation hearing, aside from the contradictions in the Witness' allegations against Mr. Kosgey, other material parts of Witness 6's testimony do not accord with core parts of the Prosecution's case.⁸⁷

69. For example, Witness 6's recollection of cultural practices at meetings is at odds with what the other Prosecution witnesses claim as the cultural practices of the Kalenjin people. Witness 6 asserts that Sally Kosgei—a female MP—attended planning meetings in Nandi December 2007.⁸⁸ Yet Witness 8, a witness that the Prosecution materially rely on in the DCC, explains in his testimony that no women, not even women MPs, would be permitted at planning meetings because the alleged purpose of the meeting was to plan for war, and women were not permitted to use weapons.⁸⁹ Similarly, Witness 1—another witness describing a meeting on 1 January in Besiebor⁹⁰ -- also indicated that women were not permitted to participate in meetings: there

⁸⁵ See e.g. EVD-PT-OTP-00382 at 0015, para 100

⁸⁶ See transcript of 5 September 2011, ICC-01/09-01/11-T-9-CONF-ENG, pages 18-21, 39-41/81.

⁸⁷ ICC-01/09-01/11-T-9-CONF-ENG, pages 39-40/81.

⁸⁸ EVD-PT-OTP-00488 at 0366, 0370, 0372-0373

⁸⁹ EVD-PT-OTP-00543 at 0532-0533, *see also* EVD-PT-OTP-00803 (witness 8 statement) at 0329-0330 ("Even when I got to TURBO a bit further...there was a lot of people...young people only, no women.")

⁹⁰ EVD-PT-OTP-00808 at 0464

were “only men...only women remained at home.”⁹¹ Other sources imply that women engaged in their own demonstrations, further illustrating the demarcation between the sexes in political life.⁹²

70. On another account, the evidence of Witness 6 still contradicts all other witnesses on the aspect of the alleged blessings. While Witness 2 and Witness 8 state that the blessing was carried out by elders using animal blood,⁹³ Witness 6’s theory is that the blessing was through holding hands and no elders were involved.⁹⁴ No matter how this evidence is viewed, there is simply no intrinsic coherence on the evidence of Witness 6 and the Prosecution’s case.

The Evidence of Witness 6 in relation to Mr. Kosgey Cannot be Patched up by Speculation

71. In its Written Submissions, the Prosecution attempts to counter the Defence arguments as to inconsistency between Witness 6’s testimony and the Prosecution theory of the case vis-à-vis Mr. Kosgey’s dates of alleged involvement with the “Network”. The Prosecution states, in pertinent part:

“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 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

⁹¹ EVD-PT-OTP-00808 at 0466; see also EVD-PT-OTP-00030 at 0422 (“In this community [Kipsigis and Nandis] women are treated a little like second class citizens; for example at barazas, women are not permitted to talk. This is a cultural characteristic of the Kipsigi people). But see Witness 2, EVD-PT-OTP-00790 at 0032 (“so things were completely different...because all men participated in the war...but we had women at the mourning.”)

⁹² EVD-PT-OTP-00040 at 8614 (Daily Nation report: “Police break up women’s demo”); EVD-PT-OTP-00125 at 0395 (“women did not feature as combatants”).

factor does not require the Chamber to reject Witness 6's evidence implicating Kosgey."⁹⁵

72. This speculative Prosecution approach is at odds with its case in which express allegations have been made in the DCC against Mr. Kosgey in this respect stating that he was actively involved in the plans of the Network from inception and attended no less than nine preparatory meetings in the period between December 2006 and January 2008.⁹⁶
73. The gaps in evidence of Witness 6's purported basis of knowledge are all the more troubling given that the Prosecution requests that the Pre-Trial Chamber view Witness 6's "evident basis of knowledge" as a favourable indicator of the reliability of this evidence.⁹⁷ As is obvious from the transcripts of interview with Witness 6, the Prosecution did not adequately or thoroughly investigate his basis of knowledge in a way that would ensure that this evidence is sufficient to establish substantial grounds on which to believe the crimes were committed.⁹⁸
74. The defence need not reiterate that the onus is on the Prosecution to bring a thoroughly investigated and substantiated case based on real evidence against suspected individuals—should it wish for that case to proceed to trial.
75. Given that the principal evidence against Mr. Kosgey is limited to that of only one witness—Witness 6—the risk inherent in improper motives prompting witnesses to come forward in this investigation, and to potentially falsify evidence, is amplified. If the evidence of this one witness is discredited at trial,

⁹⁵ Prosecution's Final Written Submissions, ICC-01/09-01/11-345, para 40, emphasis added.

⁹⁶ Amended DCC, ICC-01/09-01/11-261-Conf-AnxA 15-08-2011 para 26. However, during its oral submissions at the confirmation hearings, the Prosecution alleged that there were *eight* preparatory meetings, *see* transcript of 2 September 2001, ICC-01/09-01/11-T-6-CONF-ENG, page 22/162.

⁹⁷ Prosecution's Final Written Submissions, ICC-01/09-01/11-345, para 45.

⁹⁸ *See e.g.* EVD-PT-OTP-00484 (KEN-OTP-0051-0199) at 0217 (The Witness failed to recognize the Suspects because they wore "hats" (note: the witness uses the term "kofia," which in Swahili means "hat," but the translator used the term "headgear."); *see also e.g.* EVD-PT-OTP-00483 at 0190-0191 (The Witness stated that Mr. Kosgey met with commanders every two days, but intimated that the Witness never attended the meetings himself).

the Prosecution's whole case falls apart. Where there is evidence from multiple sources with independent corroboration against a suspect, the risk that the Prosecution will take a case to trial that is 'dead on arrival' is far less. In respect to Mr. Kosgey, the case the Prosecution has constructed is a house of cards.

The Defence of Alibi was Available to Mr. Kosgey

76. The Regulations of the Court at 52(b) state that the Document Containing the Charges shall include:

"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".

77. That notwithstanding, the Prosecution decided to redact the dates relating to the alleged 4 meetings in Nandi which they claim (through Witness 6) Mr. Kosgey attended.⁹⁹ The reason given for the redaction of only the meetings in Nandi was that this was a protective measure for security of the witnesses.¹⁰⁰
78. In seeking to rely on protective measures in order to water-down the substantial grounds to believe threshold and to denude the statutory right of the Defence to challenge Prosecution evidence at the confirmation hearing of any real effect, the Prosecution is ignoring the clear injunction in Article 68(1) that protective measures "shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial". This point was emphasised by the Single Judge in the *Lubanga* case:¹⁰¹

⁹⁹ See Prosecution's Visual Aids for Oral Presentation on the Crime of Murder, listing meetings in respective districts, see transcript of 2 September 2011, ICC-01/09-01/11-T-6-CONF-ENG, page 14/162.

¹⁰⁰ Prosecution's Final Written Submissions, ICC-01/09-01/11-345, paras 14-17.

¹⁰¹ Single Judge of Pre-Trial Chamber I, *Prosecutor v. Lubanga*, Decision on the final system of disclosure and the establishment of a timetable, ICC-01/04-01/06-102, 15 May 2006.

"95. A literal interpretation of article 61 (5) in fine and 68 (5) of the Statute suggests that the Prosecution's right to rely at the confirmation hearing on witnesses' written evidence (either witness statements or summary evidence) instead of their oral testimony "shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial"."

[...]

97. Furthermore, in the view of the single judge, protection of the right to a fair hearing, pursuant to article 67 (1) of the Statute, in appropriate circumstances may require that the competent Chamber exceed the specific terms of article 67 of the Statute. This is clear from the express reference to "minimum guarantees" in the chapeau of article 67 (1) of the Statute. It is also consistent with the interpretation of the European Court of Human Rights of the general right to a "fair hearing" with a view to filling some of the gaps in article 6 (3) of the European Convention on Human Rights and Fundamental Freedoms.

98. Therefore, a contextual interpretation of articles 61 (5) in fine and 68 (5) of the Statute in light of article 61 (3) and (6) (b), the chapeau of article 67 (1), and article 67 (1) (b) of the Statute requires, in principle, that the Defence have access to non-redacted versions of the prior statements of any witness on whose written or oral testimony the Prosecution intends to rely at the confirmation hearing.

99. A teleological interpretation of articles 61 (5) in fine and 68 (5) of the Statute suggests that they aim first and foremost to ensure the safety of Prosecution witnesses, and minimise the potentially traumatic effects of giving testimony in court by exempting witnesses from the requirement to do so twice, first before the Pre-Trial Chamber and again before the Trial Chamber...

79. Now, in the Prosecution's Final submissions, two dates for meetings are mentioned under the title "*Kosgey's Alibi*".¹⁰² The Prosecution has made the following curious submission: "The Defence for Kosgey disputes that there were meetings on 6 and 16 December and asserts in any event that Kosgey

¹⁰² Prosecution's Final Written Submissions, ICC-01/09-01/11-345, paras 52-55.

was not present". It is significant to note that this information relating to alleged meetings on **6th and 16th December** was never disclosed and was not available to the Defence at any time before the belated disclosure in the Prosecutor's final written submissions.

80. The Defence decried the grave prejudice caused to Mr. Kosgey by redaction of the alleged dates of meetings and how that constrained his ability to prepare an effective defence.¹⁰³ The fact that the Prosecution has now found it necessary to disclose at least two of the dates of the alleged meetings in order to challenge Mr. Kosgey's random response, explaining his whereabouts during the relevant period, only emphasises the prejudice caused to the Defence by the Prosecution's decision to redact the dates. These dates are absolutely necessary to respond to claims relating to the existence of, and Kosgey's attendance to these meetings, and are crucial in determining whether substantial grounds to believe the charges exist. Indeed, the prejudice is sufficiently grave that the PTC could justifiably determine that the evidence is insufficient, and no substantial grounds exist to believe that the meetings in fact took place as alleged.
81. It is axiomatic that the defence of alibi can only be raised if the Prosecution has provided the time and place where the crime is alleged to have occurred,¹⁰⁴ in which event, the Defence is required to give notice of the place or places at which the suspect claims to have been present at the time alleged. The Defence has a corresponding obligation to that placed on the Prosecution by Rule 52(b).
82. Assuming that the evidence provided by the Defence is deemed to raise the defence of alibi then sufficient notice was given to the Prosecution by the Defence disclosure made fifteen days prior to the commencement of the confirmation hearing. In any event, any failure to give notice does not limit the

¹⁰³ See transcript of 5 September 2011, ICC-01/09-01/11-T-9-CONF-ENG, page 33/81.

¹⁰⁴ Rule 79(1).

right to raise the defence of alibi¹⁰⁵ and should the Prosecutor require time to prepare adequately to meet the Defence, then the Prosecutor has the liberty to request for adjournment. The Prosecutor did not do so.¹⁰⁶

83. Instead of meeting the challenge posed by Mr. Kosgey in explaining his whereabouts during the general period made in the disclosed evidence, the Prosecution has in its final submissions decided to meet the Defence evidence through speculation and conjecture. Without any evidence, the Prosecutor suggests unhelpfully, that;

"even assuming that Kosgey was in Kisii or Kericho, he could have easily travelled from Kisii or Kericho to Cheramboss's home in a few hours, even taking into account consideration of the poor road conditions. [...] His access to and use of the helicopter confirms that he could have travelled to the meeting by using the same means of transportation".¹⁰⁷

There is no evidence suggesting that Mr. Kosgey travelled to that meeting in a helicopter.

84. Whereas the evidence offered by Mr. Kosgey shows that he travelled by helicopter on 16 December from Eldoret to Nandi Hills, Kisumu and Wilson,¹⁰⁸ the Prosecutor speculates, that the distance between Kisumu and Cheramboss' home is 39 km by road and 29km by air (this is incorrect as a matter of fact and was part of the Prosecution's disclosed evidence) and for that reason concludes that Mr. Kosgey attended the meetings.¹⁰⁹ This is again a speculation without merit.

¹⁰⁵ Rule 79(3).

¹⁰⁶ Rule 79(2) and (3).

¹⁰⁷ Prosecution's Final Written Submissions, ICC-01/09-01/11-345, para 53 (emphasis added).

¹⁰⁸ EVD-PT-D10-00024 at 0061.

¹⁰⁹ Prosecution's Final Written Submissions, ICC-01/09-01/11-345, para 55.

85. The Defence evidence as disclosed shows that on 16 December, Mr. Kosgey travelled from Eldoret to Nandi-Hills town, Kisumu and Wilson.¹¹⁰ The helicopter logs show exactly where Mr. Kosgey was. For if he could have so easily travelled to Cherambos' home as flippantly alleged by the Prosecutor, the passenger manifests would have reflected those voyages. The concrete nature and certainty of these logs—drafted in real time by disinterested persons in the regular course of business—overshadow any speculation proffered by the Prosecution as to Mr. Kosgey's whereabouts on that date. Moreover, in contrast to Witness 6, who anonymously alleges that Mr. Kosgey participated in planning meetings, Mr. Kosgey is a known witness, whose acts and whereabouts are corroborated by the public record. The substance of Mr. Kosgey's statement, despite his status as a suspect, stands to outweigh uncorroborated allegations originating from unknown accusers, particularly in the light of his evidence showing that he at all times offered to co-operate with the Prosecution in its investigation.¹¹¹

The Evidence Against Mr. Kosgey—Taken at its Highest—Is Not Sufficient to Establish Substantial Grounds that Mr. Kosgey was an In-Direct Co-Perpetrator in the Common Plan as Alleged in the DCC

86. Even if the evidence of Witness 6 is held to be reliable and credible and taken at its highest, the evidence of Mr. Kosgey's alleged participation at 3 meetings in Nandi all in December 2007 as described by Witness 6 is still insufficient to establish that Mr. Kosgey acted as an indirect co-perpetrator in a common plan to commit the crimes alleged in the DCC.
87. As set forth in the Pre-Trial Chamber's decision on the Prosecution's application for the summons in this case, the elements of indirect co-perpetration are as follows:

¹¹⁰ A non ICC witness places him at a rally in Tikiri on that day, quoting him saying "drive the Kikuyus out but without occasioning them physical harm." EVD-OTP-00509. However the passenger manifest places him in Dikiri on 14 December 2007.

¹¹¹ EVD-PT-DI0-00103 at 0047-0057.

- (i) The suspect must be part of a common plan or an agreement with one or more persons;
- (ii) The suspect and the other co-perpetrator(s) must carry out essential contributions in a coordinated manner which result in the fulfilment of the material elements of the crime;
- (iii) The suspect must have control over the organisation;
- (iv) The organisation must consist of an organised and hierarchical apparatus of power;
- (v) The execution of the crimes must be secured by almost automatic compliance with the orders issued by the suspect;
- (vi) The suspect must satisfy the subjective elements of the crimes;
- (vii) The suspect and the other co-perpetrators must be mutually aware and accept that implementing the common plan will result in the fulfilment of the material elements of the crimes; and
- (viii) The suspect must be aware of the factual circumstances enabling him to exercise joint control over the commission of the crimes through another person(s).¹¹²

For the reasons set out here below, the Defence submits that the evidence against Mr. Kosgey is insufficient to establish all the elements of the standard required at the Confirmation stage.

¹¹² Pre-Trial Chamber II, "Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang", ICC-01/09-01/11-01, 8 March 2011, at para 40.

The Evidence Against Mr. Kosgey is Insufficient to Establish that he is Part of a Common Plan or Agreement as Alleged in the DCC

88. Taken at its highest, the evidence of Mr. Kosgey's involvement in a common plan to commit crimes of murder, persecution, and forcible transfer as charged in the DCC is predicated solely on the evidence of Witness 6 which at best claims the presence of Mr. Kosgey in the alleged 3 meetings in Nandi on some undisclosed dates in December 2007. The attendees to the alleged meetings were informed of planning progress,¹¹³ but this information is contradicted by the DCC and the other disclosed evidence which claims that violence was planned and executed by the alleged Network,¹¹⁴ the hierarchical structure of which was different from that described in the evidence of Witness No.6.¹¹⁵
89. The disclosed evidence shows that contrary to what is alleged by Witness No.6, the Prosecution evidence is that essential steps in preparation for committing crimes against humanity started with the alleged meeting of 30 December 2006, when the Generals including Mr. Cherambos were appointed and assigned specific geographical areas.¹¹⁶ In this meeting, maps were alleged to have been distributed identifying the areas occupied by the Kikuyu, Kamba and Kisii communities.¹¹⁷ No allegation is made that Mr. Kosgey attended any of these otherwise crucial meetings.
90. It is alleged that at the meeting of 2 September 2007, coordinators were established. It is further claimed that coordinators from various parts of Rift Valley were appointed. Witness No. 1 alleges that it is General Cheruiyot who co-opted Koech to lead South Rift and Cherambos to lead Central Rift.¹¹⁸

¹¹³ EVD-PT-OTP-00489 at 0451

¹¹⁴ Amended DCC, ICC-01/09-01/11-261-Conf-AnxA, para 24

¹¹⁵ EVD-PT-OTP-00399 at 0142; *but see* EVD-PT-OTP-00286

¹¹⁶ EVD-PT-OTP-00543 at 0531, 0558 ; EVD-PT-OTP-00559 at 1021 and EVD-PT-OTP-00550 at 0801, EVD-PT-OTP-00275 (geographical areas)

¹¹⁷ EVD-PT-OTP-00544 at page 0574

¹¹⁸ EVD-PT-OTP-00153 at 0800-0802.

91. In the absence of evidence connecting Mr. Kosgey with the establishment of the Network, and its organs and planning, it becomes imperative that the evidence of Witness 6, even at its highest, be assessed in the context of the existence of the other contradicting Prosecution evidence in respect of contribution to the establishment or operation of the Network and its alleged common plan.

The Evidence Against Mr. Kosgey is Insufficient to Establish an “Essential Contribution”

92. Pre-Trial Chamber I of this Court defined an “essential contribution” as essential tasks that are the *sine qua non* for the commission of the crime such that the commission of the crime would be frustrated if the defendant decided not to perform them.¹¹⁹ Further, it is clear from the Pre-Trial Chamber’s finding that the essential contribution must “result in the fulfilment of the material elements of the crime.” That is, the suspect’s essential contribution must be directed not just to the common plan itself, but to the material elements of the alleged crime.
93. On the basis of this finding, if the common plan involves both legal and criminal aspects, the defendant cannot be held criminally accountable pursuant to article 25(3)(a) in connection with contributions to legal aspects of the common plan.
94. Additionally, in order to confirm the charges with respect to each of the three crimes alleged through the common plan—murder, persecution and forcible transfer—the Prosecution would need to establish that Mr. Kosgey made an essential contribution to the realisation of the material elements of each and every crime.
95. With Witness 6 as the principal witness on these charges, the Prosecution wholly misses the mark.

¹¹⁹ Lubanga Confirmation Decision, ICC-01/04-01/06-803-tEN, at para 347.

Inflammatory Language as an “Essential Contribution”

96. The DCC alleges that Mr. Kosgey made an essential contribution to the crimes by using anti-PNU rhetoric at preparatory meetings and events to create anti-PNU sentiment within the Network and fear amongst PNU supporters.¹²⁰ The the DCC also asserts that Mr. Kosgey *et al* used inciting and derogatory terms and statements to indoctrinate their subordinates into the common plan, thereby evidencing their discriminatory intent.¹²¹ This is claimed to have been carried out through the media and at public meetings. On this charge, the Prosecution supports the averment against Mr. Kosgey principally through the introduction of witness summaries entitled "Summary of non-ICC Witness statement" in which it is alleged that William Ruto, Sally Kosgei, Henry Kosgey, and Raila Odinga referred to the need to get rid of the Kikuyu from their area. It is alleged that Mr. Kosgey would incite in the Kalenjin language saying that the people had to “get rid of the ‘weeds’ (Kikuyus); he used inflammatory rhetoric in every meeting.”¹²²
97. The unreliability of summary evidence as the sole basis for proof of a material fact and consequently the probative value of such evidence has been fully addressed in our procedural submissions. These witness summaries have been disclosed without any other corroborating evidence.
98. The speciousness of this allegation is further exposed by the fact that the summaries have been derived from non-ICC witnesses. The Statute at Article 61 (5) grants to the Prosecutor the right to rely on documentary or summary evidence. But such summary evidence can only be derived from a witness who by Article 69 (1) is required to give an undertaking pursuant to Rule 66(1) which provide as follows:

¹²⁰ Amended DCC, ICC-01/09-01/11-261-Conf-AnxA, at para 106

¹²¹ Amended DCC LoE, ICC-01/09-01/11-261-Conf-AnxB, at paras 157, 176, 205, 210-212

¹²² EVD-PT-OTP-00507. Witness 21.

"Except as described in sub-rule 2, every witness shall in accordance with article 69, paragraph 1, make the following solemn undertaking before testifying"

99. The Defence thus respectfully submits that the only admissible witness summary is that of a person who is a witness pursuant to the Articles and the Rule - that is, a person who may at the option of the of the Chamber be compellable under Rule 65. It is the solemn undertaking and compellability which binds the witness to provide reliable evidence. A non-ICC witness has no such obligation to the Court.¹²³
100. Therefore the evidence, taken at its highest, is insufficient to establish substantial grounds for his essential contribution. Even assuming it is credible and probative, it fails to qualify as an essential contribution because the witness attributes inflammatory rhetoric to four politicians in total.¹²⁴ Therefore, Mr. Kosgey's failure to make inflammatory rhetoric could not have frustrated the alleged common plan.

Financing as an "Essential Contribution"

101. It is only Witness 6 who attributed the financing of the Network to have been carried out by Raila Odinga through Mr. Kosgey.¹²⁵ Yet again, the disclosed evidence is to the contrary. According to the Prosecution, financing of the alleged Network was being sustained through fundraising.¹²⁶ By 13 December 2007 it was alleged that the amount raised had reached the sum of one Billion Kenya Shillings.¹²⁷ Further, the Prosecution evidence charges EMO as being

¹²³ Indeed, this argument applies to all the non-ICC witness statements submitted in respect to other charges in the DCC.

¹²⁴ EVD-PT-OTP-00507 Witness No. 21.

¹²⁵ EVD-PT-OTP-00382 at 0015, para 100

¹²⁶ See EVD-PT-OTP-00547 at 0699-0712; EVD-PT-OTP-00158 at 1105-1107

¹²⁷ EVD-PT-OTP-00544 at 0587-0590. In addition, other evidence indicates that entirely different parties were responsible for channelling funds to ODM supporters. See EVD-PT-OTP-00792 at 0059, EVD-PT-OTP 00793 at 0067; EVD-PT-OTP 00794 at 0085.

the financial branch of the alleged Network.¹²⁸ Therefore, the Prosecution's own evidence fails to link Mr. Kosgey to the financial branch of the Network.

The Evidence does not Establish Mr. Kosgey's Link to the Alleged Organised and Hierarchical Apparatus of the Network

102. There is no evidence to support the averment to the effect that Mr. Kosgey gathered or organized a Network of subordinates and direct perpetrators to implement the common plan in his locality.¹²⁹ To the contrary and barring the evidence of Witness 6, the Prosecution's entire case is that all the activities were organized by way of preparatory meetings beginning with 30 December 2006,¹³⁰ meeting of 2 September 2007,¹³¹ meeting of 2 November 2007¹³² in which the generals and coordinators were appointed, and other alleged preparatory meetings in Uashin Gishu all of which were not attended by Mr. Kosgey.¹³³
103. The claim that Mr. Kosgey represented Mr. Ruto at events is once more an area where the Prosecution has chosen to rely on a fragment of a casual and unsubstantiated statement from Witness 6 to lay what is otherwise a very grave accusation connected with crimes against humanity.¹³⁴

¹²⁸ See e.g. EVD-PT-OTP-00545 at 0639-0647 and 0650-0651

¹²⁹ Amended DCC, ICC-01/09-01/11-261-Conf-AnxA, para 106

¹³⁰ EVD-PT-OTP-00273, EVD-PT-OTP-00550 at 798, EVD-PT-OTP-00286.

¹³¹ EVD-PT-OTP-00550 at pages 0699-0712

¹³² EVD-PT-OTP-00548 at 0734-0735, 0758-0759

¹³³ The alleged 1st Planning meeting of 30th of December 2006 - see EVD-PT-OTP-00550 at 798 - is the inception of the structure of the organisation - the flow of command. Allegedly maps were distributed communities were identified and targeted - see EVD-PT-OTP-00275. Mr. Kosgey was therefore not in attendance at this critical stage of the genesis of the organisation or the Network as it is called. The next meeting was on the 2nd of September 2007 Sirikwa hotel - see EVD-PT-OTP-0547 at 0707-0712 the list of attendees. Mr. Kosgey is not in attendance. On 2 November 2007 - see EVD-PT-OTP-00285 at 0092-0093. Again, Mr. Kosgey is not present. Further, in the meetings of 6 and 13 December - See EVD-PT-OTP-00557 at 978 and EVD-PT-OTP-00544 at 588. No allegations of Mr. Kosgey's attendance. Only witness 2 introduces Mr. Kosgey as an afterthought to the meeting of 14 December EVD-PT-OTP-00798 at 0153-0154 but this claim is contradicted by Witness 8 who describes the attendees of the same meeting indicating Mr. Kosgey was not in attendance EVD-PT-OTP-00559 at 1035-1039.

¹³⁴ The statement relied upon is derived from EVD-PT-OTP-00488 at 0368, where the witness alleges that RUTO was in a hurry and left ... Then Sally KOSGEY started to speak.... [at 0369]. From this casual mention no inference can be drawn in the absence of any other evidence that Mr. Kosgey was representing Mr. Ruto as stated in the Amended DCC, ICC-01/09-01/11-261-anxA, at para 106.

104. Finally, the Prosecution alleges that unnamed “subordinates” served as “conduits” between Mr. Kosgey and the direct perpetrators.¹³⁵ However none of the evidence cited in the Prosecution’s list of evidence or DCC substantively establish any hierarchical relationship, or any relationship at all for that matter, between Mr. Kosgey, the “subordinates” or the “perpetrators.”¹³⁶

Witness 6 on the alleged Policy of the Network

105. It begs repeating that the evidence of Witness 6 contradicts the case put forward by the Prosecution on many material respects. In the Document Containing the Charge ("DCC"), the Prosecution placed forward the policy of the Network to be two-fold (1) to punish and expel from the Rift Valley those perceived support PNU, (ii) to gain power and create uniform ODM voting.¹³⁷
106. The theory was derived from the witness statement of Witness 6 in which the organisational policy for the Network as proposed by the Prosecution in the Document Containing the Charges ("DCC") was to punish and expel those perceived to support PNU, to gain power and create uniform ODM voting block and to punish and expel PNU supporters.¹³⁸
107. As demonstrated at the confirmation hearing, the theory on policy derived from the statements of Witness 6 not only contradicted the official and other inquiries carried out in connection with the post election violence, but it was also contradicted by the Prosecution in its opening address when it was

Furthermore, other evidence expressly indicates that other persons “represented Ruto in his absence.” See EVD-PT-OTP-00792 at 0059, EVD-PT-OTP-00793 at 0067; EVD-PT-OTP-00794 at 0085.

¹³⁵ DCC LoE ICC-01/09-01/11-261-Conf-AnxB, at 167-169/239.

¹³⁶ On this point, Mr. Kosgey is not mentioned in any of the evidence cited in the Prosecution’s LoE aside from that adduced by Witness 6. Even taking mention of Mr. Kosgey by Witness 6 at its highest, the evidence does not demonstrate any conduit relationship with the direct perpetrators. Most other evidence cited by the Prosecution in furtherance of this argument fails to mention Mr. Kosgey at all. See e.g. DCC LoE ICC-01/09-01/11-261-Conf-AnxB at 167, citing EVD-PT-OTP-00239 at 0092, paras 46-49 EVD-PT-OTP-00158 at 1115-1117 EVD-PT-OTP-00158 at 1105-1107; EVD-PT-OTP-00539 at 0388-0390; EVD-PT-OTP-00545 at 0639-0647 and 0650-0651; EVD-PT-OTP-00543 at 0528-0530; EVD-PT-OTP-00547 at 0699-0712, wherein Mr. Kosgey is never mentioned.

¹³⁷ Amended DCC, ICC-01/09-01/11-261-anxA, at para 41.

¹³⁸ EVD-PT-OTP-00382 at 0021 at paras 124-125.

conceded that the genesis of the post election violence was tension and animosity caused by redistribution of land.¹³⁹

108. In conclusion, even with the limited evidence against Mr. Kosgey taken at its highest, the Prosecution's case fails. Even more so, should the evidence be evaluated according to the standard applicable at the Confirmation stage—that of "sufficient to establish substantial grounds to believe" that Mr. Kosgey committed the crimes charged—the Prosecution's case fails. On the limited evidence available, the case against Mr. Kosgey lacks both the qualitative and quantitative safeguards needed for this case to be permitted to proceed to trial.

VI. THE VICTIMS' REQUEST AS CONCERNS LOOTING AND THE INFLICTION OF SERIOUS INJURIES DOES NOT FALL WITHIN THE SCOPE OF ARTICLE 61(7)(C) OF THE STATUTE.

109. The Victims submissions are predicated on article 61(7)(c).
110. Article 61(7)(c) permits the Pre-Trial Chamber to adjourn the proceedings and request the Prosecutor to consider:
- (i) Providing further evidence or conducting further investigation with respect to a particular charge; or
 - (ii) Amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.

¹³⁹ See ICC-01/09-01/11-T-9CONF-ENG ET at pages 11 and 12; the cause of violence was historical injustices and land grievances and not an intention to create a uniform voting block as suggested by the Witness at EVD-PT-OTP-00382 at 020. See also the opening address by the Chief Prosecutor ICC-01/09-01/11-T-5-ENG ET-WT at 8 to 16: "The Prosecution evidence show that Mr. Ruto and Mr. Kosgey took advantage of a distribution of land dispute in the Rift Valley to galvanise support for their plansMr. Ruto and Mr. Kosgey capitalised on the existing tension and animosity caused by redistribution of land and using their usage and election as an excuse to trigger the attacks".

111. The first limb refers to the situation in which the Chamber is requesting the Prosecution to collect evidence, beyond that which is already in its possession, in connection with the current charges. Under this provision, the legal nature of the charges will not change, only the evidence tendered in support of these charges will be potentially augmented in order to meet the requisite threshold.¹⁴⁰
112. The second limb addresses the situation in which the evidence and factual allegations, which are currently before the Chamber, support a crime other than the crime for which the person has been charged. Under this provision, the underlying factual matrix of the charges will not change, only the legal characterisation of these allegations.¹⁴¹ The “notion of a “different crime” pursuant to article 61(7)(c)(ii) of the Statute relates both to the crimes as defined in articles 6, 7 and 8 of the Statute as well as to the mode of liability as referred to in articles 25 and 28 of the Statute.”¹⁴²
113. As noted by the Pre-Trial Chamber in the *Bemba* case with respect to article 67(1)(c), “[t]he sole purpose of the provision is to adjourn the hearing in order to overcome deficiencies concerning the evidence (sub-paragraph(c)(i)) or the legal characterisation of the facts presented (sub-paragraph (c)(ii)), which prevented the Chamber from issuing a final decision on the merits at this stage.”¹⁴³
114. Neither of these provisions permits the Chamber to request that the Prosecution modify the charges to incorporate new material facts, in support of new, additional charges, which would also require the support of additional evidence that is not in the record.

¹⁴⁰ See Pre-Trial Chamber III, *Prosecutor v. Bemba*, “Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute”, ICC-01/05-01/08-388, 3 March 2009, (hereinafter “*Bemba* Adjournment Decision”), at para 16.

¹⁴¹ *Bemba* Adjournment Decision, ICC-01/05-01/08-388, at para 17.

¹⁴² *Bemba* Adjournment Decision, ICC-01/05-01/08-388, at para 26.

¹⁴³ *Bemba* Adjournment Decision, ICC-01/05-01/08-388, at para 14.

115. In this regard, rule 121(8) provides that the Pre-Trial Chamber shall not take into consideration any evidence which has been presented after the expiration of the time limit or any extension thereof. The Pre-Trial Chamber confirmed in the *Bemba* case that any decision under article 61(7)(c)(ii) must be based on the evidence which is currently in the record.¹⁴⁴ The Pre-Trial Chamber further reiterated in its decision on the confirmation of the charges that notwithstanding the fact that the amended DCC filed by the Prosecution pursuant to article 61(7)(c)(ii) would include a different legal characterisation of the crimes, the amended DCC should not include any 'substantive change'.¹⁴⁵
116. Article 61(7)(c)(ii) should also be interpreted in a manner which is consistent with the judicial interpretation of regulation 55(2). The Appeals Chamber has held that in order to comply with the defendant's rights under article 67(1) of the Statute and not to contravene the specific procedure for amendments to the charges set out in article 61(9) of the Statute, the Chamber's decision to requalify the legal characterisation of the charges under regulation 55 cannot exceed the facts and circumstances set out in the charges.¹⁴⁶ The Appeals Chamber therefore reversed the Trial Chamber's decision that the requalification could be based on "based on facts and circumstances that,

¹⁴⁴ "48. Although the parties and participants referred implicitly or explicitly to article 28 of the Statute in their oral presentations and some of them in their written submissions, the Chamber still believes that the idea of a different form of participation pursuant to article 28 of the Statute was not sufficiently addressed. Accordingly, the Chamber deems it necessary to receive in writing some elaboration on this particular form of participation on the basis of the evidence already disclosed in order to be in a position to issue a decision on the merits as to whether Mr Jean- Pierre Bemba should be committed to trial. In this respect, the Chamber recalls its Decision on Disclosure and the decision requesting the Prosecutor to file an in-depth analysis chart for the purpose of assisting the Defence in responding to the Prosecutor's arguments, and clarifies that any further evidence submitted by the Prosecutor will not be considered." *Bemba* Adjournment Decision, ICC-01/05-01/08-388, at para 48.

¹⁴⁵ *Bemba* Confirmation Decision, ICC-01/05-01/08-424, at para 70.

¹⁴⁶ Appeals Chamber, *Prosecutor v. Lubanga*, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", ICC-01/04-01/06-2205, 8 December 2009 at para 88.

although not contained in the charges and any amendments thereto, build a procedural unity with the latter and are established by the evidence at trial”.¹⁴⁷

117. The Appeal Chamber defined facts and circumstances as follows:¹⁴⁸

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. The Appeals Chamber emphasises that in the confirmation process, the facts, as defined above, must be identified with sufficient clarity and detail, meeting the standard in article 67 (1) (a) of the Statute.

118. Following the logic of the Appeals Chamber, a power to re-qualify the legal characterisation of a crime does not equate to a general power to alter the material facts underling the crime. If the Prosecution wishes to alter the material facts supporting the charges, then the appropriate method would have been to utilize article 61(4) prior to the hearing, and article 61(9) after the hearing.

VII. CONCLUSION AND REQUEST FOR RELIEF

119. The jurisprudence of the ICC has established that the evidence of a single, anonymous witness will, rarely, be sufficient for a finding that there exist ‘substantial grounds’ to believe that the suspect committed the crimes charged.

¹⁴⁷ ICC-01/04-01/06-2205, at para 88.

¹⁴⁸ ICC-01/04-01/06-2205, at footnote 163.

120. In this case the anonymous evidence of Witness 6 is not only unsupported and uncorroborated by any other evidence, it is, on material points, at significant odds with the Prosecution's case.
121. The Prosecution's decision to withhold the identity of Witness 6, along with important details and aspects of Witness 6's evidence, such as the dates of alleged meetings and indeed his motivation for giving evidence, means that it is impossible for the Defence to assist the Pre-Trial Chamber in the assessment of the witness' trustworthiness and motivation.
122. In such circumstances the evidence of Witness 6 must, in law, be afforded a very low probative value.
123. As the evidence of anonymous Witness 6 is the only evidence of Mr. Kosgey's involvement in the alleged crimes, there is insufficient evidence for a finding that 'substantial grounds' exist to believe that Mr. Kosgey committed the crimes alleged.
124. The Pre-Trial Chamber is therefore respectfully asked to decline confirmation of the charges against Mr. Kosgey.



George Odinga Oraro

On behalf of Henry Kiprono Kosgey

Dated this 24th October 2011

At Nairobi, Kenya