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PRE-TRIAL CHAMBER A (ARTICLE 70)

Before: Judge Reine Adélaïde Sophie Alapini-Gansou

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
*THE PROSECUTOR v. PAUL GICHERU***

Public

**Lesser redacted version of “Reply to the Prosecution’s Response to Paul Gicheru’s
Written Submissions,” 18 May 2021, ICC-01/09-01/20-147-Conf**

Source: Counsel for Mr. Paul Gicheru

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Mr. Paul Gicheru, through his Counsel (“the Defence”) hereby replies to the Office of the Prosecutor’s (“OTP”) Response to Paul Gicheru’s Written Submissions,¹ and to its Written Submissions on the Confirmation of Charges.² The OTP’s rendition of the Defence’s characterization of the Document Containing the Charges (“DCC”) and the law is so misplaced and so flawed that virtually every sentence warrants a reply. Lacking the requisite qualitative value, the OTP’s evidence does not meet its burden of proof. No amount of ventilating and testing the OTP’s evidence at trial will make it any less unreliable, less uncorroborated, and less unsuitable to meet the even higher burden of proof *beyond a reasonable doubt*. The charges against Mr. Gicheru should be declined.

I. REPLY

A. The OTP Misrepresents the Applicable Standard of Proof and Assessment of Evidence

1. The Defence is neither advocating for the application of common law rules of evidence nor advancing evidentiary assessment principles that impede the civil law approach of *free evaluation of evidence*. Hearsay evidence, although admissible at the ICC, is “accorded a lower probative value than direct evidence,”³ since the reliability of the out-of-court statement depends on the credibility of the declarant, whose statements cannot be tested for *reliability* and *sincerity*.⁴ Thus, in determining whether the evidence meets the *substantial grounds to believe* standard, the Chamber should verify whether hearsay evidence is independently corroborated by reliable evidence to confirm its truth and accuracy.⁵ The Chamber *should* be especially cautious when uncorroborated hearsay goes to the alleged acts and conduct of Mr. Gicheru that the OTP claims supports the charges.
2. Hearsay independently corroborated by reliable evidence can be considered. The operative aspect is the reliability of independent corroborating evidence. Thus, if the supposed corroborating evidence is unreliable because it too is based on hearsay, then corroboration is insufficiently established. Tape-recordings corroborate the fact that a conversation was had, but the substance of the recorded conversations remains uncorroborated hearsay, and thus no weight can or should be accorded to the substance of the conversation.
3. Evidence should not be assessed in isolation. A piece of evidence must be examined both for its intrinsic value and for its value when considered with other relevant and reliable evidence. Judge Geoffrey Henderson cogently explains why, “it makes good sense that

¹ [ICC-01/09-01/20-145](#) (“Prosecution Response”). This Reply as well as Annex A are filed as secret *per* Regulation 14 of the Regulations of the Registry and Regulation 23bis(1) of the Regulations of the Court. The Defence incorporates by reference the factual and legal basis for secret classification set out in [ICC-01/09-01/20-142](#).

² [ICC-01/09-01/20-143](#) (“Prosecution Submissions”).

³ [ICC-01/09-01/11-373](#), para. 74.

⁴ JUDGE RICHARD MAY AND MARIEKE WIERDA, INTERNATIONAL CRIMINAL EVIDENCE 115 (2002).

⁵ [ICC-01/09-01/11-373](#), para. 75; [ICC-02/11-01/15-1263-AnxB-Red](#), para. 46.

evidence should never be assessed in isolation,” even though “there is no requirement for corroboration” under the ICC framework.⁶ In evaluating corroborating evidence, he aptly informs:

- a. “Corroboration or corroborative evidence ... must itself be relevant and credible, and it must come from a source independent of any evidence which is to be supported by it.”⁷ “[I]t is important not to be distracted by the large amounts of evidence that have been submitted and to focus the analysis on evidence that is relevant to the fact and the issues under consideration. Corroboration only occurs when two pieces of evidence independently confirm the same fact.”⁸
 - b. Corroboration is “proposition-specific,” meaning “the fact that a witness’s testimony may have been corroborated in relation to one particular aspect of their evidence does not necessarily mean that other parts are therefore also more reliable or credible.”⁹
 - c. Corroboration “presupposes that the different items of evidence are independent of each other” and “requires the respective items of evidence to have some intrinsic probative value in their own right,” meaning, “if two items of evidence assert the same fact based on anonymous hearsay, the combined evidentiary weight remains negligible.”¹⁰
4. The Defence is not asserting that at the confirmation stage the standard of proof is *proof beyond a reasonable doubt*. Nor has it asserted that the standard is that of a *No Case to Answer* challenge. The OTP distorts the Defence’s argument. To reiterate, if the best evidence proffered by the OTP is so flimsy, so inadequate, and so unreliable that it will be wholly insufficient to survive a *No Case to Answer* challenge let alone meet the proof beyond a reasonable doubt standard, then the charges should not be confirmed. Bad evidence is bad evidence, and no amount of ventilating will make it any less unreliable.
 5. The OTP urged the Chamber *not* to perform a qualitative analysis.¹¹ It echoes this in its Written Submissions, claiming that the charges should be confirmed based on the “volume and variety of evidence,” which it claims “is simply too comprehensive, compelling and mutually reinforcing to be explained away by criticisms of the credibility or reliability of witnesses or alternative theories.”¹² Appreciably, the OTP does a *volte-face*, while also suggesting that the Chamber “must be aware of the limits as to the assessment of credibility that can and should be made at the confirmation stage.”¹³ Perhaps so, but apparent,

⁶ [ICC-02/11-01/15-1263-AnxB-Red](#), para. 46.

⁷ [ICC-02/11-01/15-1263-AnxB-Red](#), para. 46.

⁸ [ICC-02/11-01/15-1263-AnxB-Red](#), para. 47.

⁹ [ICC-02/11-01/15-1263-AnxB-Red](#), para. 48.

¹⁰ [ICC-02/11-01/15-1263-AnxB-Red](#), para. 49.

¹¹ [ICC-01/09-01/20-125-Conf-AnxA-Corr3](#) (“DCC”), paras. 11-3.

¹² [Prosecution Submissions](#), para. 22.

¹³ [Prosecution Response](#), para. 6.

irreconcilable deficiencies cannot be ignored. Second-hand out-of-court statements offered as the truth *must* be viewed for what they are without any pretenses that somehow, miraculously, reliable corroborating evidence will come from the witnesses' mouth or some other source discoverable during its ongoing investigation or while presenting its case.

6. The OTP misdirects in claiming that there can be no doubt that a Pre-Trial Chamber is not in the same position as a Trial Chamber in reliably assessing the credibility of evidence.¹⁴ Perhaps, but not necessarily. Inherently flawed evidence is flawed. Insinuating that the Chamber is incapable of appreciating evidence that *prima facie* is incurably unreliable and thus worthless is absurd. The Chamber *can* and *should* assess the witnesses' credibility, even without their in-person testimony.¹⁵ The quality of the OTP's "selection of the strongest items of evidence presented" for confirmation¹⁶ will not improve at trial.
7. The OTP misapprehends the holdings in the cited trial management decisions, claiming that "a basic rule of fairness" requires witnesses to be confronted in cross-examination with any issues relating to their credibility so that they might have the opportunity to comment on them.¹⁷ The Trial Chambers did not hold that fairness requires Pre-Trial Chambers to refrain from assessing witnesses' credibility. The basic rule of fairness requires the cross-examining party put the material parts of its case before a witness on cross-examination if it is "inclined to make an issue out of them later in the case."¹⁸ This is commonly referred to as *putting your case to the witness*.¹⁹ This basic rule *does not* call for accepting a witness's evidence at face value or forbidding the opposing party from advancing adverse inferences or pointing out weaknesses that go to the reliability of the witness's evidence. Fairness is not accommodated by willful blindness.
8. The OTP misstates the Defence's arguments in claiming that the Defence "wishes the Chamber to reject the evidence of seven witnesses before they have even been heard by any Chamber by raising issues of credibility that, in most cases, have not even been put to them."²⁰ To the contrary, the Defence asserts – as the OTP now seems to agree that a qualitative assessment of the evidence is made at the confirmation stage – that unreliable and uncorroborated evidence should be viewed with caution and should not be afforded any appreciable weight.²¹ This is how evidence is generally considered and weighed and does

¹⁴ [Prosecution Response](#), para. 7.

¹⁵ [ICC-01/04-01/10-514](#), paras. 44-5.

¹⁶ [Prosecution Response](#), fn. 8.

¹⁷ [Prosecution Response](#), para. 8.

¹⁸ [ICC-01/09-01/11-900](#), para. 19; [ICC-01/12-01/18-789-AnxA](#), para. 51; [ICC-01/04-01/07-1665-Corr](#), para. 76; [ICC-01/04-02/06-619](#), para. 28; [ICC-01/04-02/06-1400-Red](#), para. 7.

¹⁹ *Prosecutor v. Krajišnik*, IT-00-39-A, [Appeals Judgment](#), 17 March 2009, para. 368.

²⁰ [Prosecution Response](#), para. 8.

²¹ [Prosecution Response](#), para. 6. [ICC-01/09-01/20-141](#) ("Defence Submissions"), paras. 5-8.

not violate the principle of *free evaluation of evidence*. Logically, inherently unreliable evidence *will not* metamorphose when considered with other evidence *unless* other credible evidence reliably corroborates and cures the inherent deficiencies.

9. The OTP misdirects in claiming that Article 70 cases “inevitably involve witnesses whose credibility is compromised to some extent” and that rejecting their evidence before it has been ventilated, tested, and assessed at trial “fl[ies] in the face of the proper administration of justice and reward[s] the responsible persons for successfully contaminating the evidence.”²² To not consider credibility issues of witnesses alleged to have been corruptly influenced, where their evidence is rife with inconsistencies, contradictions, and confabulations, and where a Trial Chamber has found certain witnesses to have been untruthful and unreliable, perverts the principle of *in dubio pro reo*.²³
10. The OTP misleads in claiming that the Defence “urges the Chamber to disregard entire categories of evidence by attaching labels” such as “hearsay” or “uncorroborated” or “unreliable.”²⁴ Labeling the evidence guides the Chamber in its qualitative analysis, identifying dubious and unreliable evidence that should not be relied on to meet the *substantial grounds to believe* standard *unless* independently corroborated by other reliable evidence.²⁵
11. The OTP misdirects in claiming that “the common law rule against hearsay does not apply” and “the concepts of direct and indirect evidence are more appropriate.”²⁶ Appreciating the civil law evidentiary principles inherent in the Rome Statute, the Defence correctly informed the Chamber. “Indirect evidence encompasses hearsay evidence.”²⁷ Also “more than one piece of indirect evidence, which has low probative value, is preferable to prove an allegation to the standard of substantial grounds to believe.”²⁸ Accordingly, after identifying reliable corroborating evidence, the Chamber *should* determine whether the hearsay evidence in question, “when viewed within the totality of evidence, is to be accorded sufficient probative value to substantiate a finding of the Chamber” in deciding on confirmation.²⁹
12. The OTP misleads in claiming that admissibility and probative value are to be determined under Article 69(4) of the Rome Statute, under which “[i]ndirect evidence may be freely

²² [Prosecution Response](#), para. 9.

²³ [ICC-01/05-01/08-424](#), para. 31. This time-honored principle is enshrined in Article 22(2) of the Rome Statute.

²⁴ [Prosecution Response](#), para. 10.

²⁵ Corroborating evidence “must itself be relevant and credible, and it must come from a source independent of any evidence which is to be supported by it.” [ICC-02/11-01/15-1263-AnxB-Red](#), para. 46.

²⁶ [Prosecution Response](#), para. 10.

²⁷ [ICC-01/09-01/11-373](#), para. 69.

²⁸ [ICC-01/09-01/11-373](#), para. 75.

²⁹ [ICC-01/09-01/11-373](#), para. 75.

assessed by the Chamber.”³⁰ While the Chamber is not prohibited from freely assessing hearsay evidence, in doing so it *must* consider the hearsay or indirect nature of the evidence in determining the appropriate weight in its decision.

13. The OTP misdirects in claiming that anonymous hearsay is admissible.³¹ Such evidence may be admissible but “should *only* be relied on to the extent it corroborates evidence or is corroborated by other evidence.”³²
14. The OTP misrepresents the Defence’s arguments in claiming that the *Ruto and Sang* confirmation decision “does not support the automatic rejection of hearsay evidence.”³³ This is a canard. Asserting that “[h]earsay evidence ‘is of low probative value’ and should not be used to prove allegations to the standard of substantial grounds to believe *unless* corroborated by other evidence,” accurately reflects ICC jurisprudence.³⁴
15. The OTP misreads the Defence’s arguments in claiming that it relies on authorities cited in paragraph 12 of the DCC in asserting that the Chamber should simply reject uncorroborated evidence.³⁵ Nonsense. The Defence presented circumstances where corroboration should be required: (a) when the evidence is hearsay; (b) when the evidence is anonymous hearsay; and (c) when the Chamber has concerns about the witness’s credibility.³⁶
16. The OTP ill-advisedly claims that while “corroboration is desirable and may in certain circumstances be necessary,” it is “not required that every fact in a witness’s testimony is corroborated” and “corroboration in certain material aspects may suffice, particularly where no contrary evidence is presented.”³⁷ The Chamber should be guided by the principles sagely articulated by Judge Henderson.³⁸
17. The OTP mischaracterizes the Defence’s arguments in claiming that it presents its arguments “as if it were equivalent to the standard of proof beyond reasonable doubt” and “speculates as to other possible inferences and theories as if raising reasonable doubt were sufficient.”³⁹ The Defence points to alternative plausible explanations to the circumstantial evidence offered by the OTP, which has the burden of proving its theories as to why the charges against Mr. Gicheru should be confirmed.
18. The OTP disingenuously claims that the Defence’s arguments based on the *No Case to Answer* standard are “misplaced and speculative,” because the procedure is not specifically

³⁰ [Prosecution Response](#), para. 10.

³¹ [Prosecution Response](#), para. 10.

³² [Defence Submissions](#), para. 8, citing [ICC-01/04-01/07-717](#), para. 140 (emphasis added).

³³ [Prosecution Response](#), para. 11.

³⁴ [Defence Submissions](#), para. 8, citing [ICC-01/09-01/11-373](#), para. 75 (emphasis added).

³⁵ [Prosecution Response](#), para. 12.

³⁶ [Defence Submissions](#), para. 8.

³⁷ [Prosecution Response](#), para. 12.

³⁸ *See supra*, para. 3.

³⁹ [Prosecution Response](#), para. 13.

recognized by the Court’s legal texts and the Trial Chamber may not permit it in this case.⁴⁰ In *Ruto and Sang*, the same lead OTP counsel in this case “submit[ted] that the Chamber has the authority under the Statute to entertain ‘no case to answer proceedings.’”⁴¹ The OTP did not appeal the Trial Chamber’s decisions on the *No Case to Answer* procedure in *Ruto and Sang*, nor contest its application at the ICC in *Gbagbo*.⁴² In qualitatively analyzing the evidence, the Chamber *should* consider whether it is sufficiently strong to overcome a *No Case to Answer* challenge, and possibly meet the *beyond a reasonable doubt* standard. To subject Mr. Gicheru to a trial when the evidence is knowingly unreliable and insufficient so that an acquittal is inevitable would be a profound travesty and a waste of ICC resources.

19. The OTP misleads in claiming that the Defence “assumes” that the evidence on which a *No Case to Answer* decision would be taken “would be identical to the evidence before the Chamber” because the OTP will have the opportunity to present its full case at trial and will continue investigating to supplement deficiencies.⁴³ The OTP has presented its “strongest items of evidence,” by its own claim.⁴⁴ Additional weaker evidence that the OTP may have would not bolster the quality of its strongest evidence, which, as the Defence shows, is unreliable.⁴⁵ Curiously, [REDACTED], with Mr. Gicheru surrendering to the ICC in November 2020, the OTP concedes that its case is deficient, admitting that its eight-year investigation is still ongoing, hoping to supplement its evidence. Bluntly, the OTP prays to find sufficient evidence for a conviction *if only* the Chamber would overlook the deficiencies in its evidence and its failure to meet the requisite standard of proof for confirmation.

20. The OTP misreads the Defence’s arguments in claiming that it “assert[ed] that the evidence of unavailable witnesses may not be used to prove GICHERU’s acts and conduct.”⁴⁶ Prior recorded statements going to the acts and conduct may be admissible, but reliance on them denies “Mr. Gicheru full enjoyment of his fair trial right of confrontation and denies the Chamber the opportunity to meaningfully assess the value of these witnesses’ evidence.”⁴⁷

⁴⁰ [Prosecution Response](#), para. 14.

⁴¹ [ICC-01/09-01/11-794](#), para. 7. The “authority to insert a ‘half-way’ procedure aimed at determining whether the Prosecution has presented a ‘case to answer’ derives ... from the general authority enshrined in Article 64(3)(a)” and “can be considered inherent in the powers of the Chamber under Articles 64(2) and 6(f).”

⁴² [ICC-02/11-01/15-1277-Red2](#), para. 126.

⁴³ [Prosecution Response](#), para. 14.

⁴⁴ [Prosecution Response](#), fn. 8.

⁴⁵ See *infra* paras. 28-94. See also [Defence Submissions](#), paras. 13-95.

⁴⁶ [Prosecution Response](#), para. 15.

⁴⁷ [Defence Submissions](#), para. 4(d).

B. The OTP Misreads and Mischaracterizes the Defence’s Factual Submissions

21. The OTP misreads the Defence’s arguments in claiming that it misstates the material facts alleged regarding the common plan.⁴⁸ [REDACTED]⁴⁹ [REDACTED].⁵⁰ [REDACTED].⁵¹
22. [REDACTED].⁵² [REDACTED].⁵³ Lacking verifiable credible evidence that [REDACTED], the OTP resorts to tortuous verbal gymnastics.
23. The OTP erroneously claims that “evidence of a common support for RUTO shared by the Managers of the Common Plan would help establish their association,” with the DCC being “replete with references” to Mr. Gicheru’s association with RUTO.⁵⁴ No concrete or tangible objective evidence supports this claim. The OTP only offers unreliable hearsay statements.⁵⁵ Claiming that Mr. Gicheru and RUTO “were at school together”⁵⁶ is a falsehood. There is no evidence that RUTO and Mr. Gicheru were schoolmates.⁵⁷
24. The OTP misunderstands its burden of proof in claiming that the Defence misstates the OTP’s arguments on the [REDACTED].⁵⁸ It must prove to the requisite standard Mr. Gicheru’s association with the so-called managers. [REDACTED]⁵⁹ [REDACTED],⁶⁰ [REDACTED].⁶¹ [REDACTED] It is not the Defence’s burden to disprove unsupported OTP claims with evidence to the contrary.⁶²
25. The OTP claims that the Defence raises but fails to develop arguments regarding Prosecutor-elect Mr. Karim Khan Q.C.’s *amicus* request.⁶³ [REDACTED].⁶⁴

⁴⁸ [Prosecution Response](#), para. 17.

⁴⁹ [Defence Submissions](#), para. 4(h). [REDACTED]. See [Prosecution Response](#), para. 66, fn. 29.

⁵⁰ [Defence Submissions](#), para. 4(h).

⁵¹ [Defence Submissions](#), para. 4(c).

⁵² [Prosecution Response](#), para. 18.

⁵³ [DCC](#), para. 338.

⁵⁴ [Prosecution Response](#), para. 18.

⁵⁵ [REDACTED]. See [Defence Submissions](#), paras. 35-41, 49-57.

⁵⁶ [Prosecution Response](#), para. 18. [REDACTED].

⁵⁷ [REDACTED]. [KEN-OTP-0125-0434-R01](#) at 93-8.

⁵⁸ [Prosecution Response](#), para. 19.

⁵⁹ [KEN-OTP-0159-1641-R01](#), p. 1643.

⁶⁰ [KEN-OTP-0159-1641-R01](#), p. 1642.

⁶¹ [KEN-OTP-0160-0043](#). [REDACTED].

⁶² *Contra* [Prosecution Response](#), para. 19.

⁶³ [Prosecution Response](#), para. 20(a).

⁶⁴ [REDACTED].

26. [REDACTED].⁶⁵ [REDACTED],⁶⁶ [REDACTED],⁶⁷ [REDACTED],⁶⁸ [REDACTED]⁶⁹ [REDACTED]⁷⁰ [REDACTED],⁷¹ [REDACTED].⁷² [REDACTED].

27. The OTP misapprehends its burden of proof in claiming that the fact that witnesses knew each other and were in contact with each other is not a reason to find their evidence unreliable, since evidence of witnesses falsely implicating Mr. Gicheru is “conspicuous by its absence.”⁷³ The evidence shows that witnesses were in regular contact, had unrecorded conversations with each other discussing the OTP’s investigation, schemed on securing benefits from the ICC, and understood to use Mr. Gicheru’s name in conversations recorded by other witnesses.⁷⁴ While the Defence points to one obvious alternative plausible explanation as to why witnesses would falsely implicate Mr. Gicheru – the desire to secure benefits from the ICC – it is not the Defence’s burden to present evidence disproving the OTP’s theory. Any doubt on these factual claims must be resolved in Mr. Gicheru’s favor.

C. The OTP Misrepresents the Defence’s Submissions on the Charges

28. **Mr. Gicheru did not corruptly influence P-397.** The OTP misrepresents the Defence’s arguments in claiming that it “adopts a selective approach to the evidence relating to P-0397.”⁷⁵ The OTP merely cites to a paragraph of the Defence Submissions that summarizes the OTP’s claims in the DCC regarding P-397.⁷⁶

29. [REDACTED]⁷⁷ The Defence did not assert that prior recorded statements are inadmissible.⁷⁸

30. The OTP misrepresents the evidence in claiming that P-397’s evidence is corroborated by reliable evidence: [REDACTED].⁷⁹ This evidence is neither reliable nor does it corroborate P-397. [REDACTED],⁸⁰ [REDACTED].⁸¹ [REDACTED],⁸² [REDACTED].⁸³

⁶⁵ [Prosecution Response](#), para. 20(b).

⁶⁶ [KEN-OTP-0080-1255](#); [KEN-OTP-0080-1260](#); [KEN-OTP-0080-1267](#), paras. 4-5, 12; [KEN-OTP-0027-0252](#); [KEN-OTP-0112-0769](#), p. 0771-4.

⁶⁷ [KEN-OTP-0080-1260](#); [KEN-OTP-0036-0079](#); [KEN-OTP-0112-0769](#), p. 0771. *See also* [KEN-OTP-0104-0899](#), p. 0901-2.

⁶⁸ [KEN-OTP-0147-2218-R01](#).

⁶⁹ [KEN-OTP-0103-3191-R01](#), p. 3192; [KEN-OTP-0094-0002-R01](#). *See also* [KEN-OTP-0159-1900](#); [KEN-OTP-0124-0313](#).

⁷⁰ [KEN-OTP-0103-3191-R01](#), p. 3191.

⁷¹ [KEN-OTP-0087-1274-R01](#), p. 1281; [KEN-OTP-0104-0719](#) at 120. *See also* [KEN-OTP-0115-0289](#) at 946-64.

⁷² [ICC-01/09-01/20-119](#).

⁷³ [Prosecution Response](#), para. 22.

⁷⁴ [Defence Submissions](#), paras. 31, 47, 55, 61, 66, 74.

⁷⁵ [Prosecution Response](#), para. 23.

⁷⁶ [Prosecution Response](#), para. 23, citing [Defence Submissions](#), para. 37.

⁷⁷ [Prosecution Response](#), para. 23.

⁷⁸ [Defence Submissions](#), para. 4(d).

⁷⁹ [Prosecution Response](#), para. 24.

⁸⁰ [KEN-OTP-0150-0255-R01](#), paras. 42-4.

⁸¹ [Defence Submissions](#), para. 85.

⁸² [T-005](#), pp. 71, 73.

⁸³ [Defence Submissions](#), para. 47.

[REDACTED].⁸⁴ [REDACTED]. To wit, all of the supposed corroborating evidence is unreliable uncorroborated hearsay.

31. [REDACTED].⁸⁵ [REDACTED].⁸⁶ [REDACTED].⁸⁷ [REDACTED].

32. [REDACTED].⁸⁸ [REDACTED],⁸⁹ [REDACTED],⁹⁰ [REDACTED].⁹¹ [REDACTED]⁹² [REDACTED],⁹³ [REDACTED].

33. [REDACTED]⁹⁴ [REDACTED].⁹⁵ [REDACTED].

34. The OTP misrepresents the evidence in claiming that “there is evidence that GICHERU was involved with [REDACTED],” since [REDACTED] and [REDACTED] state that Mr. Gicheru introduced them to [REDACTED].⁹⁶ There is no concrete or tangible evidence that Mr. Gicheru was involved with a lawyer named [REDACTED] or introduced witnesses to a lawyer named [REDACTED]. Nor is there evidence that the OTP confirmed that [REDACTED] and [REDACTED] met the same [REDACTED] or if [REDACTED]. The OTP claims that [REDACTED] was introduced to [REDACTED],⁹⁷ but the [REDACTED].⁹⁸ [REDACTED] claims that he [REDACTED], but did not provide [REDACTED], or claim that [REDACTED] was in Mr. Gicheru’s office when he [REDACTED].⁹⁹ [REDACTED] claims are uncorroborated.

35. The OTP misdirects in claiming that P-397’s [REDACTED] could not have been the source of the deposits in his bank account since [REDACTED].¹⁰⁰ Considering that P-397 was admittedly imprecise in omitting to tell the OTP [REDACTED],¹⁰¹ there is no indication that he was not also imprecise in telling OTP investigators [REDACTED]. P-397’s statement shows [REDACTED], which may explain the unusually larger sums on his account.¹⁰²

⁸⁴ [KEN-OTP-0143-0185](#); [KEN-OTP-0125-0248](#).

⁸⁵ [Prosecution Response](#), para. 25.

⁸⁶ [KEN-OTP-0159-0736](#) at 806-6, 817-29.

⁸⁷ [KEN-OTP-0129-0567-R01](#), p. 0569.

⁸⁸ [Prosecution Response](#), para. 25.

⁸⁹ [DCC](#), para. 376(g).

⁹⁰ [DCC](#), para. 484(b)

⁹¹ [DCC](#), para. 490(c).

⁹² [DCC](#), para. 498.

⁹³ [Prosecution Response](#), para. 25.

⁹⁴ [Prosecution Response](#), para. 26.

⁹⁵ [KEN-OTP-0124-0029](#).

⁹⁶ [Prosecution Response](#), para. 26.

⁹⁷ [KEN-OTP-0124-0030](#).

⁹⁸ *James Njorge Njuguna T/A/ J.N. Njuguna & Advocates Company v. National Bank of Kenya Ltd & 2 others*, [2018] eKLR, [E&L Appeal No. 18 of 2016](#).

⁹⁹ [KEN-OTP-0150-0255-R01](#), para. 68.

¹⁰⁰ [Prosecution Response](#), paras. 27-8.

¹⁰¹ [KEN-OTP-0139-0097](#); [KEN-OTP-0139-0095](#), p. 0096.

¹⁰² [Prosecution Response](#), para. 27.

36. [REDACTED]¹⁰³ [REDACTED].¹⁰⁴ [REDACTED]¹⁰⁵ [REDACTED]¹⁰⁶ [REDACTED]¹⁰⁷
37. The OTP embellishes in claiming that the Defence selectively reads the transcript of the tape-recorded telephone call between P-397 and Mr. Gicheru.¹⁰⁸ [REDACTED]¹⁰⁹ [REDACTED].¹¹⁰ [REDACTED].¹¹¹ Viewed in the totality of evidence, the tape-recording does not corroborate P-397's evidence nor establish Mr. Gicheru's knowledge of the ICC-related matters mentioned by P-397 during the telephone call.¹¹²
38. [REDACTED].¹¹³ [REDACTED],¹¹⁴ [REDACTED]¹¹⁵
39. ***Mr. Gicheru did not corruptly influence P-516.*** The OTP deceptively claims that the material facts of P-516's evidence that Mr. Gicheru offered and paid him at least 500,000 KSH are corroborated by at least four other witnesses: [REDACTED].¹¹⁶ [REDACTED].¹¹⁷ [REDACTED].¹¹⁸ [REDACTED].¹¹⁹ [REDACTED]¹²⁰ [REDACTED],¹²¹ [REDACTED].
40. The OTP misleads in claiming that P-397's prior recorded statements provide "direct evidence supporting the allegations against GICHERU in relation to P-516" and is corroborated by "P-516's own evidence describing his direct interactions with GICHERU."¹²² P-397's evidence is not direct evidence. Nor does it independently corroborate P-516's evidence. [REDACTED],¹²³ though no objective evidence establishes P-516's claims. Considering that the source of P-397's statements regarding P-516's supposed interactions with Mr. Gicheru is P-516, P-397's statements do not independently corroborate P-516.

¹⁰³ [Prosecution Response](#), para. 29.

¹⁰⁴ [Defence Submissions](#), para. 41.

¹⁰⁵ [KEN-OTP-0159-0795](#) at 300-5.

¹⁰⁶ [KEN-OTP-0159-0795](#) at 307-9, 311, 344.

¹⁰⁷ [KEN-OTP-0159-0795](#) at 315-6, 320-1.

¹⁰⁸ [Prosecution Response](#), para. 29.

¹⁰⁹ [KEN-OTP-0143-0185](#) at 112-8.

¹¹⁰ [KEN-OTP-0143-0185](#) at 121-30.

¹¹¹ [KEN-OTP-0143-0185](#) at 83-6, 157-61.

¹¹² *Contra* [Prosecution Response](#), para. 29.

¹¹³ [Prosecution Response](#), para. 30.

¹¹⁴ [KEN-OTP-0125-0248](#) at 287.

¹¹⁵ [KEN-OTP-0125-0248](#) at 287 *et seq.*

¹¹⁶ [Prosecution Response](#), para. 31.

¹¹⁷ [KEN-OTP-0125-0518-R01](#) at 821-2, 830-1, 837, 859-63, 898-9.

¹¹⁸ [KEN-OTP-0111-0162](#), para. 36.

¹¹⁹ [KEN-OTP-0102-0178](#), paras. 22-3.

¹²⁰ [KEN-OTP-0111-0140](#), para. 42.

¹²¹ [KEN-OTP-0150-0255-R01](#), para. 119.

¹²² [Prosecution Response](#), para. 32.

¹²³ [KEN-OTP-0125-0518-R01](#) at 821-63.

41. [REDACTED].¹²⁴ These conversations do not corroborate P-516's claims. [REDACTED].¹²⁵ [REDACTED].¹²⁶ [REDACTED].¹²⁷ [REDACTED].¹²⁸ [REDACTED];¹²⁹ [REDACTED].¹³⁰ Even if P-579 and P-540 told P-613 and P-800 that P-516 was paid, labeling them as intermediaries does not verify the veracity of their statements.
42. The OTP misleads in claiming that despite P-516's credibility issues, the Chamber may rely on certain portions that are adequately corroborated.¹³¹ P-516's evidence is not adequately corroborated by independently reliable evidence. [REDACTED].¹³²
43. The OTP misleads in claiming that the Defence fails to explain why the inconsistencies in P-516's evidence cannot be reasonably separated from P-516's "corroborated and reliable account of how he was corrupted by GICHERU."¹³³ [REDACTED]¹³⁴ [REDACTED]¹³⁵ [REDACTED].¹³⁶ [REDACTED].¹³⁷
44. [REDACTED].¹³⁸ [REDACTED]¹³⁹ [REDACTED]¹⁴⁰ [REDACTED]¹⁴¹ [REDACTED]¹⁴² [REDACTED].¹⁴³ [REDACTED].¹⁴⁴
45. [REDACTED].¹⁴⁵ [REDACTED]¹⁴⁶ [REDACTED]¹⁴⁷ [REDACTED].
46. The OTP misleads in claiming that P-516 first discussing his security concerns before speaking to investigators about his meeting with Mr. Gicheru does not impact the reliability of his evidence.¹⁴⁸ P-516's testimony at trial demonstrates that he had motive to lie in order to secure relocation and benefits from the ICC and that he knew what he needed to say in

¹²⁴ [Prosecution Response](#), para. 33.

¹²⁵ [KEN-OTP-0111-0162](#), paras. 34-8 relating to [KEN-OTP-0118-1927](#) at 1945-51; [KEN-OTP-0111-0140](#), paras. 39-48 relating to [KEN-OTP-0132-0167](#).

¹²⁶ [KEN-OTP-0111-0162](#), para. 36; [KEN-OTP-0118-1927](#) at 630.

¹²⁷ [KEN-OTP-0118-1927](#) at 731.

¹²⁸ [KEN-OTP-0118-1927](#) at 733-4, 736.

¹²⁹ [KEN-OTP-0111-0162](#), para. 35.

¹³⁰ [KEN-OTP-0132-0167](#) at 293-300.

¹³¹ [Prosecution Response](#), para. 34.

¹³² *See supra*, para. 39.

¹³³ [Prosecution Response](#), para. 34.

¹³⁴ [T-005](#), pp. 71, 73.

¹³⁵ [T-004](#), pp. 15-6.

¹³⁶ [KEN-OTP-0150-0621-R01](#) at 55, 59, 145-69, 222-3.

¹³⁷ *See supra*, para. 39.

¹³⁸ [Prosecution Response](#), para. 35.

¹³⁹ [T-002](#), p. 47.

¹⁴⁰ [T-002](#), pp. 47-8.

¹⁴¹ [T-002](#), p. 48.

¹⁴² [T-002](#), p. 46.

¹⁴³ [T-002](#), p. 51.

¹⁴⁴ [T-002](#), pp. 46-8, 51.

¹⁴⁵ [Prosecution Response](#), para. 35.

¹⁴⁶ [KEN-OTP-0150-0817-R01](#) at 178-93.

¹⁴⁷ [KEN-OTP-0150-0706-R01](#) at 487-90.

¹⁴⁸ [Prosecution Response](#), para. 35.

order to secure those benefits [REDACTED]¹⁴⁹ [REDACTED],¹⁵⁰ P-516 knew just what to say to the OTP investigators to secure relocation.

47. **Mr. Gicheru did not corruptly influence P-613.** The OTP misleads in claiming that “P-613’s account constitutes direct evidence – and not hearsay” “[i]nsofar as her evidence relates the attempts of Common Plan Members, either directly or through [REDACTED], and [REDACTED], to corruptly influence her.”¹⁵¹ The Defence does not dispute that P-613 tape-recorded [REDACTED], that they asked P-613 to meet and offered her money, or that they claimed to work with Mr. Gicheru. Nor does the Defence dispute that [REDACTED] asked [REDACTED] to meet P-613, or that [REDACTED] claimed that [REDACTED] asked him to meet P-613. Nonetheless, P-613’s evidence *is* uncorroborated hearsay insofar as it relates to the existence of a common plan and, in particular, Mr. Gicheru’s involvement. The tape-recordings do not verify the truth of any of the speakers’ claims. Notably, there is no evidence that P-613 attempted to call Mr. Gicheru herself or that the OTP asked P-613 to obtain Mr. Gicheru’s telephone number and contact him. Given that P-613 tape-recorded several individuals and was located outside Kenya, there is no reason why the OTP could not have requested P-613 to call Mr. Gicheru and verify that he was looking for her. Considering that P-613 was in the habit of and being used for creating incriminating evidence, it is profoundly puzzling why the OTP would not make even the slightest of efforts to have P-613 contact Mr. Gicheru, as opposed to now claiming that the uncorroborated hearsay evidence of P-613 [REDACTED] should be taken at face value, reflecting *the* truth – even if startlingly unverifiable.

48. The OTP misleads in claiming that P-613’s account is “confirmed by other objective evidence that supports the allegations that she was offered bribes to withdraw as a Prosecution witness,” [REDACTED].¹⁵² [REDACTED].¹⁵³ [REDACTED].¹⁵⁴ The tape-recordings and photographs only corroborate the fact that conversations were had; the substance of the conversations remains uncorroborated hearsay.¹⁵⁵ Not only is there no direct evidence, but no circumstantial evidence as well, to wit: no evidence that [REDACTED] met with Mr. Gicheru, no photographs, no tape-recordings, nothing. So, in assessing the quality of evidence which the OTP claims to be objectively valid, the Chamber must also consider what evidence that would objectively lend reliability and corroboration

¹⁴⁹ [T-003](#), p. 55 (emphasis added).

¹⁵⁰ See e.g., [T-016](#), p. 63.

¹⁵¹ [Prosecution Response](#), para. 36.

¹⁵² [Prosecution Response](#), para. 36.

¹⁵³ [KEN-OTP-0111-0140](#), paras. 43, 54.

¹⁵⁴ [KEN-OTP-0129-0740](#) at 405-6.

¹⁵⁵ See *supra*, para. 2.

is unavailable because of the OTP's actions and inactions. While it may not be required to gather specific evidence, the OTP cannot insist that the Chamber overlook the quality of the evidence available and ascribe it reliability, veracity, and value, when to do so would result in a decision based on unworthy, unverifiable, and unsuitable evidence.

49. The OTP misleads in claiming that P-604 and P-495 corroborate P-613's account.¹⁵⁶ The Defence does not dispute that P-613 was contacted and offered money. P-604's hearsay statements that [REDACTED]¹⁵⁷ does not corroborate any claim that Mr. Gicheru was in a common plan with P-579 and MAIYO. P-495's claims that [REDACTED] does not verify P-800's claims to P-495 that Mr. Gicheru was the one to make the offer and payment.¹⁵⁸
50. The OTP misleads in claiming that P-613's hearsay evidence about bribes offered to other witnesses "corroborates the allegations relating to the corruption of P-0397, P-0516, P-0495, P-0800."¹⁵⁹ It does not. P-613's claim that [REDACTED].¹⁶⁰ Even if P-579 was the [REDACTED],¹⁶¹ this too is uncorroborated. P-579 is unavailable and the veracity of his statements is unverifiable.
51. [REDACTED]¹⁶² [REDACTED].
52. [REDACTED]¹⁶³ The *Ruto and Sang* Trial Chamber's finding *is* relevant. Analyzing the *quality* of the information P-613 had to offer – second-hand information (as opposed to direct knowledge) – the *Ruto and Sang* Trial Chamber found that it did not merit consideration.¹⁶⁴ Given that P-613 has no first-hand knowledge of Mr. Gicheru, it begs the question whether a Trial Chamber should rely on her evidence if the charges are confirmed.
53. [REDACTED]¹⁶⁵ [REDACTED].¹⁶⁶ [REDACTED].¹⁶⁷
54. The OTP misleads in claiming that it relies on only one of the investigation reports to corroborate P-613's evidence and that the other report is immaterial.¹⁶⁸ The first report does not corroborate P-613's evidence; it shows [REDACTED],¹⁶⁹ but there is no evidence that P-579 ever met with Mr. Gicheru. The second report *is* material; it shows that the OTP made no follow-up efforts to determine whether: [REDACTED].¹⁷⁰

¹⁵⁶ [Prosecution Response](#), para. 36.

¹⁵⁷ [KEN-OTP-0117-1019-R01](#), paras. 21-2, 27; [KEN-OTP-0117-1060-R01](#), p. 1060.

¹⁵⁸ [KEN-OTP-0130-0507-R01](#), pp. 0514-36.

¹⁵⁹ [Prosecution Response](#), para. 37.

¹⁶⁰ [DCC](#), para. 138, citing [KEN-OTP-0106-0910](#), para. 22.

¹⁶¹ *See supra*, para. 41.

¹⁶² [Prosecution Response](#), para. 37.

¹⁶³ [Prosecution Response](#), para. 38.

¹⁶⁴ [ICC-01/09-01/11-2027](#) (Reasons of Judge Fremr), paras. 106-7.

¹⁶⁵ [Prosecution Response](#), para. 39.

¹⁶⁶ [Defence Submissions](#), paras. 22-3, analyzing [KEN-OTP-0117-1071](#) and [KEN-OTP-0107-0291](#).

¹⁶⁷ [Defence Submissions](#), para. 24, analyzing [KEN-OTP-0111-0162](#), para. 36; [KEN-OTP-0118-1927](#) at 1950-1.

¹⁶⁸ [Prosecution Response](#), para. 40.

¹⁶⁹ [Defence Submissions](#), para. 22; [KEN-OTP-0117-1071](#).

¹⁷⁰ [Defence Submissions](#), para. 23; [KEN-OTP-0107-0291](#).

55. [REDACTED].¹⁷¹ [REDACTED].¹⁷² [REDACTED].¹⁷³ [REDACTED].¹⁷⁴
[REDACTED].¹⁷⁵ [REDACTED].¹⁷⁶ [REDACTED].¹⁷⁷ [REDACTED].
56. [REDACTED].¹⁷⁸ [REDACTED].¹⁷⁹ [REDACTED].¹⁸⁰ [REDACTED].¹⁸¹ [REDACTED].
57. The OTP erroneously claims that the issues raised by the Defence on these points are best addressed at trial.¹⁸² This is incorrect. P-613's evidence will remain uncorroborated hearsay evidence at trial. No amount of questioning by either party or the Trial Chamber will make her evidence first-hand.
58. **Mr. Gicheru did not corruptly influence P-800.** [REDACTED].¹⁸³ [REDACTED].¹⁸⁴ [REDACTED].¹⁸⁵ [REDACTED].¹⁸⁶ Just like his testimony in *Ruto and Sang*, P-800's evidence is "incapable of being relied upon by a reasonable Trial Chamber," since he "demonstrated a willingness to lie in return for personal gain and induce others to lie as well, apparently without concern for the significant implications of such dishonesty."¹⁸⁷ None of P-800's evidence is supported by reliable corroborated evidence.
59. The OTP misleads in claiming that P-800's evidence is corroborated by tape-recorded conversations and meetings, [REDACTED] and that Mr. Gicheru channeled the money for bribes.¹⁸⁸ The tape-recordings do not independently corroborate the veracity of [REDACTED] statements.¹⁸⁹ [REDACTED].¹⁹⁰ While P-800 claims that [REDACTED],¹⁹¹ there is no telling what was actually discussed. With [REDACTED] being unavailable and not subject to cross-examination, the truth of his statements to P-800 is unverifiable.
60. The OTP misleads in claiming that P-800's evidence is further supported by P-613's and P-495's evidence that P-800 [REDACTED].¹⁹² Neither P-613's nor P-495's evidence

¹⁷¹ [Prosecution Response](#), para. 41.

¹⁷² [Defence Submissions](#), paras. 24-5.

¹⁷³ [KEN-OTP-0118-1927](#) at 625-42 and 731, 733-4, 736.

¹⁷⁴ [Defence Submissions](#), para. 24.

¹⁷⁵ [DCC](#), para. 345, citing [KEN-OTP-0111-0162](#), para. 39; [KEN-OTP-0118-1927](#) at 1950-1.

¹⁷⁶ [KEN-OTP-0118-1927](#) at 596, 600.

¹⁷⁷ [Defence Submissions](#), para. 25 (emphasis added).

¹⁷⁸ [Prosecution Response](#), para. 43.

¹⁷⁹ See e.g., [KEN-OTP-0106-0922](#), paras. 22-3 (21 June 2013); [KEN-OTP-0111-0162](#), para. 13 (14 July 2013); [KEN-OTP-0111-0557](#), para. 19 (24 July 2013).

¹⁸⁰ See e.g., [KEN-OTP-0111-0557](#), para. 14 (24 July 2013).

¹⁸¹ [KEN-OTP-0115-0289](#) at 818.

¹⁸² [Prosecution Response](#), para. 44.

¹⁸³ [Prosecution Response](#), para. 45.

¹⁸⁴ [Defence Submissions](#), para. 52.

¹⁸⁵ [Defence Submissions](#), para. 53.

¹⁸⁶ [ICC-01/09-01/11-2027](#) (Reasons of Judge Fremr), para. 41.

¹⁸⁷ [ICC-01/09-01/11-2027](#) (Reasons of Judge Fremr), paras. 41, 43.

¹⁸⁸ [Prosecution Response](#), para. 45.

¹⁸⁹ [KEN-OTP-0111-0140](#), para. 32.

¹⁹⁰ [KEN-OTP-0111-0140](#), para. 33.

¹⁹¹ [KEN-OTP-0111-0140](#), para. 33.

¹⁹² [Prosecution Response](#), para. 46.

independently corroborates P-800's evidence. P-613's statement that [REDACTED] is uncorroborated hearsay.¹⁹³ [REDACTED].¹⁹⁴ [REDACTED]¹⁹⁵ [REDACTED].¹⁹⁶ [REDACTED].¹⁹⁷ [REDACTED].

61. The OTP absurdly claims that the Defence "selectively points to inconsistencies in P-800's statements and on this basis tries to cast doubt on the reliability of the entire body of direct and detailed incriminating evidence he provided against GICHERU."¹⁹⁸ The Defence focused on inconsistencies that directly impact on the credibility of P-800's claims as to how he met Mr. Gicheru and how he introduced others to Mr. Gicheru. [REDACTED]¹⁹⁹ [REDACTED].²⁰⁰ [REDACTED].²⁰¹
62. The OTP misleads in claiming that although P-800 provided inaccurate information, he "spontaneously" corrected himself and apologized for not being honest, candidly admitting that he was trying to protect P-579 and P-495.²⁰² One excuse for supposedly volunteering the truth offered by P-800 was: [REDACTED]²⁰³ Considering the inconsistencies in P-800's statements, his expressed desire to be protected by the ICC, his "willingness to lie in return for personal gain,"²⁰⁴ and the lack of corroborating evidence supporting his claims, the Chamber should decline to rely on his evidence. Without objective and reliable corroborating evidence supporting P-800's claims, the Chamber cannot detect the truth.
63. The OTP absurdly claims that the Defence misinterprets the evidence in asserting that [REDACTED] since the investigation report simply states that the VWU did not seem to trust P-800's account that he had three telephones taken from him.²⁰⁵ The Defence accurately summarized the investigation report.²⁰⁶ [REDACTED].²⁰⁷ [REDACTED].²⁰⁸ [REDACTED].²⁰⁹ [REDACTED]²¹⁰ with the implication that P-800 lied [REDACTED]; it is not beyond the realm of possibilities that he had unrecorded conversations with other witnesses discussing the OTP's investigation. The Defence accurately presented the facts.

¹⁹³ [KEN-OTP-0118-0137](#), paras. 15-6.

¹⁹⁴ [KEN-OTP-0118-0137](#), para. 15.

¹⁹⁵ [T-016](#), p. 66 (emphasis added).

¹⁹⁶ [KEN-OTP-0130-0507-R01](#) at 689-90.

¹⁹⁷ [KEN-OTP-0145-0594](#) at 599.

¹⁹⁸ [Prosecution Response](#), para. 47.

¹⁹⁹ [KEN-OTP-0135-0054](#) at 539-40.

²⁰⁰ [KEN-OTP-0135-0054](#) at 590-600.

²⁰¹ [KEN-OTP-0135-0103](#) at 83-9; [KEN-OTP-0135-0113](#) at 618-24, 667.

²⁰² [Prosecution Response](#), para. 47.

²⁰³ [KEN-OTP-0135-0103](#) at 196-7 (emphasis added).

²⁰⁴ [ICC-01/09-01/11-2027](#) (Reasons of Judge Fremr), para. 41.

²⁰⁵ [Prosecution Response](#), para. 48.

²⁰⁶ [Defence Submissions](#), para. 52.

²⁰⁷ [KEN-OTP-0116-0495-R01](#), p. 0496.

²⁰⁸ [KEN-OTP-0116-0495-R01](#), p. 0496.

²⁰⁹ [KEN-OTP-0116-0495-R01](#), p. 0496.

²¹⁰ [KEN-OTP-0116-0495-R01](#), p. 0496.

64. The OTP misrepresents the evidence in claiming that P-800's evidence of P-495 being coached by lawyers led by Mr. Gicheru before his testimony in *Ruto and Sang* is "direct evidence of the fact that P-495 made such an admission."²¹¹ P-800's statement is not "direct evidence" of any "admission" by P-495. There is no recording of the alleged conversation between P-495 and P-800, no evidence that P-800 and P-495 actually had this conversation, and no evidence that P-495 said what P-800 claims he said. P-800's demonstrated opportunistic proclivity for lying or supposed truth-telling for gain make him incurably unreliable.
65. The OTP absurdly claims that the "Defence ... overlooks that there is no exclusionary rule against hearsay in the ICC legal framework and that the Chamber may freely assess its probative value."²¹² The Defence asserted no such thing. An honest reading shows that the Defence precisely quoted from ICC jurisprudence:²¹³ "Hearsay evidence 'is of low probative value' and should not be used to prove allegations to the standard of substantial grounds to believe *unless* corroborated by other evidence."²¹⁴
66. [REDACTED].²¹⁵ [REDACTED].²¹⁶ [REDACTED].²¹⁷
67. The OTP misrepresents the Defence's arguments in claiming that it misleads with Judge Fremr's assessment of P-800's testimony, since it "concerns [his] reliability ... in relation to the PEV in Kenya" and "does not substantiate why P-0800's evidence is unreliable in respect to the material facts of this case."²¹⁸ Judge Fremr's assessment was not simply limited to the sufficiency or quality of information P-800 provided, but his overall credibility as a witness.²¹⁹ P-800's willingness to lie in exchange for benefits from the ICC is also shown by his half-hearted apology to the OTP for being dishonest.²²⁰
68. The OTP misleads in claiming that since credibility issues are "a feature inherent in a bribery case, and no reason *per se* to reject the witness's evidence, particularly at [the] confirmation stage."²²¹ P-800's evidence will remain just as unreliable at trial. Given Judge Fremr's findings, the inconsistencies in P-800's evidence, and his motive to secure benefits from the ICC, no amount of questioning by either party or the Trial Chamber will resuscitate his credibility such that the Trial Chamber should rely on his evidence.

²¹¹ [Prosecution Response](#), para. 49.

²¹² [Prosecution Response](#), para. 49.

²¹³ [ICC-01/09-01/11-373](#), para. 75.

²¹⁴ [Defence Submissions](#), para. 8, citing [ICC-01/09-01/11-373](#), para. 75 (emphasis added).

²¹⁵ [Prosecution Response](#), para. 49.

²¹⁶ [Defence Submissions](#), paras. 68-74.

²¹⁷ *See supra*, para. 64.

²¹⁸ [Prosecution Response](#), para. 49.

²¹⁹ [ICC-01/09-01/11-2027](#) (Reasons of Judge Fremr), paras. 41, 43. *See also supra*, para. 58.

²²⁰ *See supra*, para. 62.

²²¹ [Prosecution Response](#), para. 50.

69. [REDACTED].²²² P-800's evidence is unreliable. There is no reliable corroborating evidence that he ever met or had any contacts with Mr. Gicheru.
70. The OTP erroneously claims that P-800's evidence should be presented in Court to allow the Trial Chamber to make its own assessment of his reliability in relation to the facts of this case. The Chamber has before it P-800's statements, tape-recorded conversations, trial transcripts, and the *Ruto and Sang* Trial Chamber's findings – sufficient information to assess P-800's credibility without his in-person testimony in this case.
71. **Mr. Gicheru did not corruptly influence P-495.** The OTP misleads in claiming that the Defence selectively picks portions of the evidence and advances speculative arguments regarding its reliability, ignoring the evidence that corroborates Mr. Gicheru's involvement in corruptly influencing P-495.²²³ To the contrary, the Defence addressed each piece of P-495's evidence individually and holistically.²²⁴ P-495's statements, tape-recorded conversations, and trial testimony show that he falsely implicated Mr. Gicheru to secure benefits from the ICC.²²⁵ Compartmentalizing the Defence's arguments and the evidence in its Response, the OTP ignores this straightforward, commonsense inference based on the evidence.
72. [REDACTED]²²⁶ [REDACTED]²²⁷ Mr. Gicheru did not have a government position in September 2013.²²⁸ [REDACTED].²²⁹
73. [REDACTED]²³⁰ [REDACTED]²³¹ [REDACTED]²³² He testified at trial that his discussion with P-613 was "*well-planned so that you can release the money – the investigators can release the money to the lady.*"²³³ [REDACTED]²³⁴
74. [REDACTED].²³⁵ The OTP compartmentalizes the Defence's arguments and the evidence.²³⁶ P-495's statements, tape-recorded conversations, and trial testimony show that he falsely implicated Mr. Gicheru to secure benefits from the ICC.²³⁷

²²² [Prosecution Response](#), para. 51.

²²³ [Prosecution Response](#), para. 52.

²²⁴ [Defence Submissions](#), paras. 68-74.

²²⁵ [T-016](#), p. 63.

²²⁶ [Prosecution Response](#), para. 53, fn. 131.

²²⁷ [KEN-OTP-0129-0740](#) at 77-9.

²²⁸ [REDACTED]. [KEN-OTP-0159-0736](#) at 334-7.

²²⁹ [KEN-OTP-0129-0740](#) at 93.

²³⁰ [Prosecution Response](#), para. 53, citing [KEN-OTP-0129-0740](#) at 108-10, 192-200. [REDACTED].

²³¹ [KEN-OTP-0129-0740](#) at 108.

²³² [KEN-OTP-0130-0540-R01](#) at 471-3.

²³³ [T-016](#), p. 64.

²³⁴ [T-016](#), p. 63 (emphasis added).

²³⁵ [Prosecution Response](#), para. 53.

²³⁶ [Defence Submissions](#), paras. 68-74.

²³⁷ [T-016](#), p. 63.

75. [REDACTED]²³⁸ [REDACTED].²³⁹
76. [REDACTED].²⁴⁰ The OTP compartmentalizes the Defence’s arguments and the evidence. [REDACTED].²⁴¹
77. [REDACTED].²⁴² [REDACTED].²⁴³
78. [REDACTED]²⁴⁴ The tape-recorded conversation does not reflect this. [REDACTED]²⁴⁵ [REDACTED].²⁴⁶ [REDACTED]²⁴⁷ [REDACTED].²⁴⁸ [REDACTED].
79. [REDACTED].²⁴⁹ [REDACTED].²⁵⁰ There is no recording of the alleged conversation between P-495 and P-800, no evidence that P-800 and P-495 actually had this conversation, and no evidence that P-495 said what P-800 claims he said.²⁵¹
80. The OTP obscures by citing the confidential Rule 68 Decision, where the *Ruto and Sang* Trial Chamber concluded that P-495 “failed to give evidence on material aspects included in his prior testimony due to improper interference.”²⁵² The Defence does not have access to the unredacted decision and cannot discern how the Trial Chamber reached its decision.
81. **Mr. Gicheru did not corruptly influence P-536.** The OTP misleads in claiming that P-536’s statements “provide a consistent and reliable account of how she was corruptly influenced, which the Chamber can safely rely upon to confirm the charges against GICHERU.”²⁵³ [REDACTED].²⁵⁴ [REDACTED].
82. The OTP misunderstands its burden of proof in claiming that “P-536’s evidence regarding P-540’s attempts to bribe her is direct evidence and P-540’s contemporaneous statements implicating GICHERU may be relied upon by the Chamber, particularly in the absence of any evidence or credible explanation why he would have lied about this.”²⁵⁵ The tape-recorded conversations are only direct evidence that P-540 contacted and offered P-536 money; it is uncorroborated hearsay insofar as P-540 implicates Mr. Gicheru.²⁵⁶

²³⁸ [Prosecution Response](#), para. 45.

²³⁹ [KEN-OTP-0135-0113](#) at 810-9. [T-020](#), pp. 21, 24.

²⁴⁰ [Prosecution Response](#), para. 54.

²⁴¹ [T-016](#), p. 63.

²⁴² [Prosecution Response](#), para. 55.

²⁴³ [KEN-OTP-0130-0540-R01](#) at 339-51.

²⁴⁴ [Prosecution Response](#), para. 55.

²⁴⁵ [KEN-OTP-0130-0585](#) at 138.

²⁴⁶ [KEN-OTP-0145-0594](#).

²⁴⁷ [KEN-OTP-0145-0594](#) at 100-9.

²⁴⁸ [KEN-OTP-0145-0594](#) at 110.

²⁴⁹ [Prosecution Response](#), para. 56.

²⁵⁰ *Contra* [Prosecution Response](#), para. 56.

²⁵¹ *See supra*, para. 64.

²⁵² [Prosecution Response](#), para. 56, citing [ICC-01/09-01/11-1938-Corr-Red](#), para. 109.

²⁵³ [Prosecution Response](#), para. 57.

²⁵⁴ [Defence Submissions](#), para. 77.

²⁵⁵ [Prosecution Response](#), para. 57.

²⁵⁶ *See supra*, para. 81.

83. The OTP misleads in claiming that P-536’s evidence is corroborated by her tape-recorded conversations with P-540, which “constitute independent and reliable evidence that – on behalf of GICHERU – P-540 offered P-536 a bribe.”²⁵⁷ The tape-recordings do not independently corroborate P-540’s statements implicating Mr. Gicheru. They only corroborate the fact that conversations were had and that P-540 said what he said.²⁵⁸
84. The OTP misleads in claiming that “these allegations are further supported by P-800’s evidence and his recorded conversations with P-540,” as if these are two independent pieces of evidence.²⁵⁹ P-800’s statements reflect what he understood from conversations with P-540; they do not independently corroborate the tape-recorded conversations. P-540’s claims in those conversations that he worked for Mr. Gicheru are also unverifiable.²⁶⁰
85. The OTP misleads in claiming that the *Ruto and Sang* Trial Chamber made no findings on P-536’s credibility.²⁶¹ P-536 testified for seven days.²⁶² The Trial Chamber did not rely on any of her evidence, finding that she had no valuable evidence to offer.²⁶³ The Defence did not assert that the absence of Trial Chamber findings impacts on the reliability of her evidence in this case, it merely drew a comparison: P-536 offers no first-hand knowledge against Mr. Gicheru.²⁶⁴ The Trial Chamber is unlikely to rely on her evidence in this case.
86. [REDACTED].²⁶⁵ [REDACTED].²⁶⁶ [REDACTED].²⁶⁷ [REDACTED].²⁶⁸
[REDACTED].²⁶⁹
87. **Mr. Gicheru did not corruptly influence P-341 or P-274.** [REDACTED].²⁷⁰
[REDACTED].²⁷¹ [REDACTED].²⁷² [REDACTED].²⁷³ [REDACTED].²⁷⁴
[REDACTED].²⁷⁵ [REDACTED].²⁷⁶

²⁵⁷ [Prosecution Response](#), paras. 58, 60.

²⁵⁸ *See supra*, para. 2.

²⁵⁹ [Prosecution Response](#), para. 58.

²⁶⁰ *See supra*, para. 81.

²⁶¹ [Prosecution Response](#), para. 59.

²⁶² [T-007](#); [T-008](#); [T-009](#); [T-010](#); [T-011](#); [T-012](#); [T-022](#).

²⁶³ [ICC-01/09-01/11-2027](#), para. 102.

²⁶⁴ [Defence Submissions](#), para. 78.

²⁶⁵ [Prosecution Response](#), para. 60.

²⁶⁶ [KEN-OTP-0114-0296](#) at 42-3.

²⁶⁷ [KEN-OTP-0114-0291](#) at 51.

²⁶⁸ [KEN-OTP-0114-0244](#) at 41-2.

²⁶⁹ *Contra* [Prosecution Response](#), para. 60.

²⁷⁰ [Prosecution Response](#), para. 61.

²⁷¹ [KEN-OTP-0147-1590-R01](#).

²⁷² [KEN-OTP-0147-1590-R01](#).

²⁷³ Because “the events described in the application[] fail[s] to meet one or more of the parameters” shaping the *Ruto and Sang* case. [ICC-01/09-01/11-249](#), para. 59(v).

²⁷⁴ [KEN-OTP-0150-0345](#).

²⁷⁵ *Contra* [Prosecution Response](#), para. 61 citing [KEN-OTP-0150-0255-R01](#), paras. 26-7; [KEN-OTP-0150-0285-R01](#).

²⁷⁶ *Contra* [Prosecution Response](#), para. 61 citing [KEN-OTP-0159-0986-R01](#), paras. 58-9.

88. The OTP mischaracterizes the evidence in claiming that P-341 and P-274 corroborate each other.²⁷⁷ P-341's evidence is uncorroborated hearsay: [REDACTED].²⁷⁸ [REDACTED].²⁷⁹
89. The OTP mischaracterizes the evidence in claiming that P-341 and P-274 corroborate each other on several crucial material facts: [REDACTED].²⁸⁰ P-341 and P-274 cannot independently corroborate each other.²⁸¹ The source of P-274's information is P-341, and the source of P-341's information regarding P-274 is P-274 [REDACTED];²⁸² [REDACTED];²⁸³ [REDACTED],²⁸⁴ [REDACTED].²⁸⁵ [REDACTED].²⁸⁶
90. The OTP misleads in claiming that P-341's bank statements provide "objective corroboration that he received several large installments of money."²⁸⁷ The origins and the purposes of the deposits are unknown.²⁸⁸
91. [REDACTED].²⁸⁹ [REDACTED],²⁹⁰ [REDACTED].²⁹¹ [REDACTED],²⁹² [REDACTED].
92. The OTP mischaracterizes the evidence in claiming that *The Guardian* newspaper article "constitutes a contemporaneous account of P-341 being corruptly influenced."²⁹³ The newspaper article is uncorroborated hearsay; P-341 is the source of the information.²⁹⁴
93. [REDACTED]²⁹⁵ [REDACTED].²⁹⁶ [REDACTED].²⁹⁷
94. [REDACTED]²⁹⁸ [REDACTED].²⁹⁹ [REDACTED].³⁰⁰ [REDACTED],³⁰¹ [REDACTED].
- Given P-341's penchant for fabricating, his evidence should not be relied on unless adequately corroborated by reliable and independent evidence.

II. CONCLUSION

²⁷⁷ [Prosecution Response](#), para. 62.

²⁷⁸ See [KEN-OTP-0150-0255-R01](#), paras. 36-53; [Defence Submissions](#), para. 85.

²⁷⁹ [KEN-OTP-0159-0986-R01](#), para. 62; [Defence Submissions](#), para. 93.

²⁸⁰ [Prosecution Response](#), para. 62.

²⁸¹ [ICC-02/11-01/15-1263-AnxB-Red](#), para. 46.

²⁸² [KEN-OTP-0159-0986-R01](#), paras. 50-1.

²⁸³ [KEN-OTP-0159-0986-R01](#), para. 52.

²⁸⁴ [KEN-OTP-0150-0255-R01](#), para. 134.

²⁸⁵ [KEN-OTP-0159-0986-R01](#), paras. 53-6.

²⁸⁶ [Defence Submissions](#), paras. 4(c), 95, 99, 104.

²⁸⁷ [Prosecution Response](#), para. 63.

²⁸⁸ [Defence Submissions](#), para. 87.

²⁸⁹ [Prosecution Response](#), para. 63.

²⁹⁰ [KEN-OTP-0147-2140-R01](#), p. 2140.

²⁹¹ [KEN-OTP-0150-0255-R01](#), paras. 29-30, 34. See *supra*, para. 26

²⁹² [Prosecution Response](#), para. 63.

²⁹³ [Prosecution Response](#), para. 64.

²⁹⁴ [KEN-OTP-0150-0289-R01](#), p. 0290.

²⁹⁵ [Prosecution Response](#), para. 64.

²⁹⁶ [KEN-OTP-0150-0286-R01](#); [KEN-OTP-0150-0287-R01](#).

²⁹⁷ [KEN-OTP-0150-0288-R01](#).

²⁹⁸ [Prosecution Response](#), para. 65.

²⁹⁹ [KEN-OTP-0147-2140-R01](#), p. 2142.

³⁰⁰ *Contra* [Prosecution Response](#), para. 65.

³⁰¹ [KEN-OTP-0150-0255-R01](#), para. 17.

95. As when the curtain is pulled back in the *Wizard of Oz* and the once fear-inducing wizard is revealed as a frightened, insecure man, pulling back the curtains on the OTP's case reveals its efforts to hoodwink the Chamber into relying on flawed, flimsy, and fallacious evidence unresponsive of the standard of proof. The OTP's DCC is awash with extraordinary revelations of uncorroborated, unobjective, and unreliable hearsay evidence. The OTP premises its claims that it has met its legal obligation and standard of proof in seeking the confirmation of charges having presented "cogent objective evidence" that is both "concrete and tangible." This premise is invalid.

96. The OTP urges the Chamber to confirm the charges based on evidence it knows to be qualitatively substandard, hoping, perhaps, to discover better evidence during its ongoing investigation, which, with the support of the residual weaker evidence it has at its disposal but not relied on for confirmation, would suffice in proving its case to the *beyond reasonable doubt* standard should the case go to trial. As if engaged in a parlor game charade, the OTP's Investigation Team Leader reveals:

[REDACTED].³⁰²

97. Reminiscent of Judge Henderson's observations elsewhere,³⁰³ *the OTP in an undisciplined manner lacking in rigor, presents evidence without applying any filter in terms of quality/and or relevance*, asking the Chamber to turn a blind eye, inviting it to predicate the confirmation of charges on unsound and erroneous findings of fact and a misapplication of the law. Incurably unreliable, second and third-hand evidence by discredited or opportunistic witnesses will not improve in quality at trial. Suggesting otherwise is a subterfuge. The Chamber should **DECLINE** to confirm the charges against Mr. Gicheru.

Respectfully submitted, 29 November 2022,
In The Hague, the Netherlands.



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³⁰² [KEN-OTP-0159-0884](#), para. 20(c) (emphasis added).

³⁰³ [ICC-02/11-01/15-1172-Anx](#), para. 3.