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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 "Corrected version of "Public redacted version of  
"Prosecution's response to 'Paul Gicheru's Written Submissions on the  
Confirmation of Charges', ICC-01/09-01/20-141-Conf'", 7 May 2021", 10 May 2021**

**Source: Office of the Prosecutor**

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

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## I. INTRODUCTION

1. The Defence's written submissions<sup>1</sup> on the confirmation of charges focus on alleged flaws in the Prosecution evidence. However the Defence misstates the Prosecution's case, misinterprets the legal standard for confirmation of charges and advances speculative theories that are unsupported by evidence.
2. Additionally, the Defence Submissions ignore or mischaracterise corroborating evidence and fail to explain why Intermediaries implicated in corruptly influencing witnesses would purport to be acting on behalf of Mr Gicheru<sup>2</sup> in contemporaneous statements made in the course of the execution of the offence.
3. None of the arguments advanced by the Defence provide adequate grounds to decline to confirm the charges presented in the Document Containing the Charges.<sup>3</sup> Rather, this case should proceed to trial so that the witnesses may be heard and the evidence fully ventilated and tested at trial.

## II. CONFIDENTIALITY

4. This filing is submitted as confidential under regulation 23bis (2) of the Regulations of the Court since it responds to a filing of the same classification. A public redacted version will be filed simultaneously.

## III. SUBMISSIONS

5. The Defence: (i) has not raised objections or made observations concerning any issue related to the proper conduct of the proceedings;<sup>4</sup> (ii) has not raised any objection to the charges, and (iii) does not challenge the admissibility of any of the evidence relied upon by the Prosecution. Rather, it criticizes (i) the Prosecution's analysis of the law regarding the assessment of evidence and the standard of proof at confirmation stage, and (ii) the quality of the evidence presented. The Prosecution will address these criticisms in turn.

### **The Defence's legal submissions**

#### *Assessment of Evidence and Standard of Proof at Confirmation Stage*

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<sup>1</sup> ICC-01/09-01/20-141-Conf ("Defence Submissions").

<sup>2</sup> "Gicheru".

<sup>3</sup> ICC-01/09-01/20-125-Conf-AnxA ("DCC").

<sup>4</sup> *Per* rule 122(3) and the Chamber's Order, ICC-01/09-01/20-127, para.13. Since the parties may not raise this issue subsequently (rule 122(4)), it may be accepted that there are no objections to the conduct of proceedings.

6. The Prosecution has never asserted that the Pre-Trial Chamber<sup>5</sup> “should ignore the quality of the evidence and essentially make findings and conclusions on the quantity of evidence”.<sup>6</sup> Nor did the Prosecution state that the Chamber should not perform a qualitative assessment of the evidence in reaching its determination on the confirmation of charges. Rather, the Prosecution submits that in conducting its assessment of the evidence, the Chamber must be aware of the limits as to the assessment of credibility that can and should be made at the confirmation stage. This has been authoritatively determined by the Appeals Chamber in *The Prosecutor vs Mbarushimana*.<sup>7</sup>
7. There can be no doubt that a Pre-Trial Chamber is not in the same position as a Trial Chamber when it comes to reliably assessing the credibility of evidence. More so when confirmation proceedings are conducted solely on the basis of written evidence and submissions. The Trial Chamber has the benefit of assessing all of the evidence presented in support of the charges,<sup>8</sup> including live testimony, and assessing credibility against this background.<sup>9</sup>
8. Indeed, as “a basic rule of fairness”,<sup>10</sup> witnesses must be confronted in cross-examination with any issues relating to credibility so that they might have the opportunity to comment on them.<sup>11</sup> Yet the Defence wishes the Chamber to reject the evidence of seven<sup>12</sup> witnesses before they have even been heard by any Chamber by raising issues of credibility that, in most cases,<sup>13</sup> have not even been put to them.
9. Article 70 cases in which witnesses are corruptly influenced to give false evidence will inevitably involve witnesses whose credibility is compromised to some extent. But to reject

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<sup>5</sup> “Chamber”.

<sup>6</sup> Defence Submissions, para. 3.

<sup>7</sup> “This is not to say that the Pre-Trial Chamber’s ability to evaluate the evidence is unlimited or that its function in evaluating the evidence is identical to that of the Trial Chamber. The Appeals Chamber recalls that the confirmation of charges hearing is not an end in itself but rather serves the purpose of filtering out those cases and charges for which the evidence is insufficient to justify a trial. This limited purpose of the confirmation of charges proceedings is reflected in the fact that the Prosecutor must only produce sufficient evidence to establish substantial grounds to believe the person committed the crimes charged. *The Pre-Trial Chamber need not be convinced beyond a reasonable doubt*, and the Prosecutor need not submit more evidence than is necessary to meet the threshold of substantial grounds to believe. This limited purpose is also reflected in the fact that the Prosecutor may rely on documentary and summary evidence and need not call the witnesses who will testify at trial.”, ICC-01/04-01/10-514 OA4, para. 47 (emphasis added).

<sup>8</sup> Not just a selection of the strongest items of evidence presented for the purposes of confirmation of charges.

<sup>9</sup> It thus has the benefit of observing the evidence live, able to make more reliable credibility assessments based on witnesses’ demeanour, spontaneity, coherence etc. See for instance ICC-01/05-01/13-1989-Red, para. 203.

<sup>10</sup> ICC-01/09-01/11-900, para. 19.

<sup>11</sup> *Ibid.* See also *Al Hassan*, ICC-01/12-01/18-789-AnxA, para. 51; *Katanga*, ICC-01/04-01/07-1665-Corr, para. 76; *Ntaganda*, ICC-01/04-02/06-619, para. 28, and ICC-01/04-02/06-1400-Red, para. 7.

<sup>12</sup> Excluding P-0397 [REDACTED].

<sup>13</sup> With the partial exceptions of P-0613 and P-0800.

their evidence at this stage would fly in the face of the proper administration of justice and reward the responsible persons for successfully contaminating the evidence. The interests of justice demand that in such cases, evidence should not be rejected on this ground alone until it has been fully ventilated, tested and assessed.

10. The Defence urges the Chamber to disregard entire categories of evidence by attaching labels – sometimes incorrectly – such as “hearsay” or “uncorroborated” or unreliable. As a starting point, the common law rule against hearsay does not apply at this Court, and the concepts of direct and indirect evidence are more appropriate.<sup>14</sup> Admissibility and probative value of evidence are to be determined under the provisions of article 69(4). Indirect evidence may be freely assessed by the Chamber, even if it generally carries less probative value than direct evidence.<sup>15</sup> Even “anonymous hearsay” is admissible.<sup>16</sup>
11. In support of its arguments, the Defence quotes jurisprudence selectively and out of context. For instance, in support of its statement that hearsay evidence has “low probative value”, it refers to the *Ruto and Sang* confirmation decision. However, when read in context, this authority does not support the automatic rejection of hearsay evidence.<sup>17</sup> To the contrary, in appropriate circumstances, indirect evidence may be relied upon to establish facts to the substantial grounds to believe standard. Further, indirect evidence may be corroborated by other indirect evidence in the Chamber’s holistic approach.
12. Similarly, in asserting that the Chamber should simply reject uncorroborated evidence, the Defence purports to rely upon the authority cited in paragraph 12 of the DCC,<sup>18</sup> but these support the opposite: that it is well-established, including by rule 63(4), that in appropriate circumstances a Chamber may rely on uncorroborated evidence—even to establish proof beyond reasonable doubt.<sup>19</sup> Of course, corroboration is desirable and may in certain circumstances be necessary, but it is certainly not required that every fact in a witness’s

<sup>14</sup> Rules 63(5); *Bemba*, ICC-01/05-01/13-2275-Red A A2 A3 A4 A5, para. 902; *See also Aleksovski* Decision on Prosecutor’s Appeal on Admissibility of Evidence, IT-95-14/1, 16 Feb 1999, para. 15.

<sup>15</sup> Rules 63(3); *Muthaura, Kenyatta & Ali*, ICC-01/09-02/11-382-Red, para. 86.

<sup>16</sup> *Op. cit.*, para. 91; *Lubanga*, ICC-01/04-01/06-796-Conf-tEN, paras. 101-102.

<sup>17</sup> “In considering indirect evidence, the Chamber follows a two-step approach. The Chamber is aware of rule 63(4) of the Rules, *but finds that 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*. In light of this assessment, the Chamber will then determine whether the piece of indirect evidence in question, *when viewed within the totality of evidence*, is to be accorded a sufficient probative value to substantiate a finding of the Chamber for the purposes of the decision on the confirmation of charges”, ICC-01/09-01/11-373, para. 75 (emphasis added).

<sup>18</sup> Defence Submissions, para. 8. Note that the Defence’s citations to page numbers in the *Bogosora* and *Rwamakuba* decisions are incorrect. These should be para. 10 and para. 13 respectively.

<sup>19</sup> *Ngudjolo* Appeal Judgment, ICC-01/04-02/12-271-Corr, para. 148, quoting ICTY, Mrkšić and Šljivančanin Appeal Judgment, para. 264 and referring to ICTY, *Limaj* Appeal Judgment, para. 203. *See also: Ntaganda* TJ, ICC-01/04-02/06-2359, paras. 75-76.

testimony is corroborated—corroboration in certain material aspects may suffice, particularly where no contrary evidence is presented.

*Substantial grounds to believe standard*

13. While the Defence correctly articulates the confirmation standard, it then proceeds to present its arguments as if it were equivalent to the standard of proof beyond a reasonable doubt. Thus, the Defence speculates as to other possible inferences and theories,<sup>20</sup> as if raising reasonable doubt were sufficient. It is not.

*No case to answer standard*

14. The Defence’s arguments based on the “no case to answer” standard are misplaced and speculative.<sup>21</sup> While certain Chambers have entertained motions for acquittal at the conclusion of the Prosecution case, this procedure is not specifically recognised by the legal texts of the Court<sup>22</sup> and may or may not be permitted by the Trial Chamber in this case,<sup>23</sup> should charges be confirmed. Further, the Defence assumes that the evidence upon which such a decision would be taken would be identical to the evidence before the Chamber at present, but there is no basis for such an assumption. Not only will the Prosecution have the opportunity to present its full case to the Trial Chamber, including calling oral testimony, but it is also permitted to continue to investigate the case and supplement any deficiencies in the period between the disclosure deadline for confirmation and for trial.

*Prior recorded testimony*

15. The Defence asserts that the evidence of unavailable witnesses may not be used to prove GICHERU’s acts and conduct.<sup>24</sup> This is incorrect. Prior recorded testimony from missing/unavailable witnesses or witnesses subject to interference maybe admitted under rule 68(2)(c) or (d). While the fact that this evidence goes to the acts or conduct of the accused may be a factor against admission, it is not a bar. Thus, the Trial Chamber has a discretion to admit such evidence which should not be fettered before the trial begins<sup>25</sup> by rejecting it at the confirmation stage.

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<sup>20</sup> Discussed in more detail in the section title “The Defence’s factual submissions”.

<sup>21</sup> Defence Submissions, paras. 10-12, 105.

<sup>22</sup> *Ntaganda*, ICC-01/04-02/06-2026, paras. 42-43; *Ruto & Sang*, ICC-01/09-01/11-1334, para. 15.

<sup>23</sup> *Op. cit.*, para. 44.

<sup>24</sup> Defence Submissions, para. 4(d).

<sup>25</sup> ICC-01/14-01/18-874, para. 46.

## The Defence's factual submissions

16. In this section the Prosecution will address some of the Defence's overarching factual submissions. Those specific to a particular witness or count will be addressed separately.

### *The Common Plan*

17. The Defence misstates the material facts alleged regarding the Common Plan. The Prosecution does not allege that RUTO was part of the Common Plan.<sup>26</sup> While it does not exclude this possibility, this is not alleged as a material fact and the Prosecution need not prove it. Nor did the Prosecution allege that the members of the Common Plan were RUTO's "Kalenjin proxies". While it is correct that many of the acts of witness interference and intimidation documented by the Prosecution are attributed to members of the Kalenjin group, this by no means excludes the possibility of persons of other ethnic groups being involved. Nor does the Prosecution allege that [REDACTED] or KOGO were parties to the Common Plan.<sup>27</sup>
18. As regards the alleged lack of proof of the fact that GICHERU was "associated with and/or [a] supporter[] of RUTO at the relevant times",<sup>28</sup> once again this is not a material fact pleaded in the Charges.<sup>29</sup> However, evidence of a common support for RUTO shared by the Managers of the Common Plan would help to establish their association.<sup>30</sup> Nevertheless, the DCC is replete with references to evidence of GICHERU's association with RUTO,<sup>31</sup> including through his own actions and statements to witnesses,<sup>32</sup> the statements of his associates made in the course of the commission of the crimes, the contents of his cell phone<sup>33</sup> and the fact that they were at school together.<sup>34</sup>
19. The Defence misstates the Prosecution's submissions regarding the cell phone evidence.<sup>35</sup> The Prosecution never claimed that this evidence established that GICHERU had contact

<sup>26</sup> DCC, paras. 40 and 337; *contra* Defence Submissions, para. 4.

<sup>27</sup> *Contra* Defence Submissions, para. 4(c).

<sup>28</sup> Defence Submissions, para. 4(a), (no reference is provided for the quote).

<sup>29</sup> It is alleged in para. 2 of the DCC that "The evidence establishes that the pattern of witness interference described below was conducted for the benefit of, and in coordination with, William Samoei RUTO", but this is not pleaded as a material fact in the charges section.

<sup>30</sup> DCC, para. 41.

<sup>31</sup> **P-0397**, KEN-OTP-0125-0434-R01 at 0437; KEN-OTP-0125-0360-R01 at 0361-0363; KEN-OTP-0125-0402-R01 at 0432-0433. **P-0800**, KEN-OTP-0135-0113 at 0019, Ins. 193-202; KEN-OTP-0103-2473 at 2478, paras. 26-27; KEN-OTP-0111-0140 at 0147 and 0148, paras. 39 and 45.

<sup>32</sup> DCC, para. 49(e).

<sup>33</sup> DCC, para. 41(a).

<sup>34</sup> Which has not been disputed.

<sup>35</sup> Defence submissions, para 4(b).

with the Managers and P-0564 at the relevant time.<sup>36</sup> This is established by other direct evidence.<sup>37</sup> However, the cell phone evidence does establish a connection with the relevant Common Plan members which, in the absence of acceptable evidence to the contrary, supports the inference that they were also associated at the relevant time. The Defence raises a number of speculative arguments regarding other possibilities, but provides no evidence to support them.

*The amicus request*

20. The Defence raises several other arguments, but fails to develop or support them:

- a) The *amicus* request<sup>38</sup> is a red herring. The reasons why the Defence request was not acceded to are apparent from the Prosecution's response<sup>39</sup> and the RUTO Defence never provided the Prosecution with the evidence allegedly in its possession. Additionally, none of the ICC staff members referred to in that request were Prosecution staff.
- b) The KIGEN-KATWA argument<sup>40</sup> is another red herring. The fact that he may have been involved in witness interference (nearly all incidents pre-dating GUICHERU's alleged actions) does not even begin to demonstrate that GICHERU was not involved- -the two are not mutually exclusive. Even if, *arguendo*, this were a "plausible alternative", that is an argument only relevant to the determination of reasonable doubt, which will happen at trial.

*The relationship between witnesses*

21. The Defence Submissions place great emphasis on the fact that many of the witnesses and Common Plan Intermediaries are known to each other. This is unsurprising and – without more – unremarkable. It is unsurprising, since the *modus operandi* of GICHERU and his associates was to leverage the Intermediaries' knowledge of Prosecution witnesses to target and corruptly influence them. Then, in turn, these corrupted witnesses were used to target other witnesses known to them. The inevitable result is that many of the targeted witnesses knew each other.

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<sup>36</sup> *Ibid.*

<sup>37</sup> **P-0397**, KEN-OTP-0125-0434-R01 at 0438-0439; KEN-OTP-0125-0518-R01 at 0524; **P-0341**, KEN-OTP-0150-0255-R01 at 0264, para. 47.

<sup>38</sup> Defence Submissions, para. 4(g).

<sup>39</sup> ICC-01/09-01/11-2031-Red.

<sup>40</sup> Defence Submissions, paras. 4(h) and 16.



22. However, this alone is no reason to find their evidence unreliable. Nor, by itself, is the fact that certain witnesses were in contact. In order to support the Defence contentions, it is necessary to go a step further and show that the witnesses communicated *for the purposes of falsely implicating GICHERU and his associates*. Such evidence is conspicuous by its absence. For instance, in none of the intercepted phone calls between P-0613, P-0019 and P-0028 – subsequent to P-0613’s testimony – that are relied upon by the Defence, is there any hint of a conspiracy to falsely implicate GICHERU.<sup>41</sup> The only evidence that the Defence can offer in support of any attempt to falsely implicate GICHERU is in the testimony of P-0495, at a time when the evidence clearly establishes he was under the influence of GICHERU and his associates.<sup>42</sup>

### **Defence criticisms related to specific charges**

#### **A. GICHERU corruptly influenced P-0397**

23. The Defence adopts a selective approach to the evidence relating to P-0397.<sup>43</sup> Despite the Defence’s submissions to the contrary,<sup>44</sup> while P-0397 is currently unavailable and [REDACTED], this does not mean that his evidence may not be relied upon, including at trial.<sup>45</sup>
24. Contrary to the Defence’s claim, P-0397’s evidence is corroborated by other reliable evidence<sup>46</sup> from *inter alios* P-0341 and P-0516.<sup>47</sup> Moreover, corroboration is provided by the audio-recorded phone calls with GICHERU and P-0564.<sup>48</sup>
25. Further, the Defence’s allegation that KOGO is unidentified<sup>49</sup> is misleading since P-0341 states that GICHERU introduced him to KOGO and his bodyguard.<sup>50</sup> Regardless, KOGO is not alleged to be a member of the Common Plan and his identity is not a material fact.
26. Also contrary to the Defence’s claim,<sup>51</sup> P-0397’s affidavit demonstrates that P-0397 effectively withdrew as a witness and that this is the result of GICHERU’s corrupt

<sup>41</sup> ICC-01/09-01/20-141-Conf-AnxD, items 15-30, 32-34.

<sup>42</sup> ICC-01/09-01/20-T-027-Conf-Eng, pp. 33-35, to be read with KEN-PIS-0001-0100. *See also* ICC-01/09-01/11-1938-Corr-Red2 para. 109.

<sup>43</sup> Defence Submissions, para. 37.

<sup>44</sup> Defence Submissions, paras. 48 and 97.

<sup>45</sup> *See* submissions above regarding the admission of prior recorded testimony under rule 68(2)(c).

<sup>46</sup> DCC, para. 86.

<sup>47</sup> **P-0516**, KEN-OTP-0150-0817-R01 at 0821-0824.

<sup>48</sup> DCC, paras. 83-85.

<sup>49</sup> Defence Submissions, para. 38.

<sup>50</sup> **P-0341**, KEN-OTP-0150-0255-R01 at 0271, para. 83.

<sup>51</sup> Defence Submissions, para. 39.

influence of the witness.<sup>52</sup> Further, there is evidence that GICHERU was involved with lawyer [REDACTED]. GICHERU introduced [REDACTED] to both P-0397<sup>53</sup> and P-0341.<sup>54</sup>

27. In relation to the bank records, despite the Defence's claims,<sup>55</sup> these cash deposits demonstrate that on [REDACTED],<sup>56</sup> days before he withdrew as a witness, large amounts were deposited in his account<sup>57</sup> on the same days P-0397 says he received amounts of money from GICHERU.<sup>58</sup> These sums are significantly larger than the regular activity on his account.
28. To challenge that these amounts came from GICHERU, the Defence argues that the deposits were the result of selling [REDACTED], relying on an Investigator's Report ("IR") dated 10 May 2013.<sup>59</sup> However, the Defence ignores a previous IR dated 7 May 2013, which reveals that as of this date P-0397 was still trying to sell [REDACTED].<sup>60</sup> Hence, when he deposited the two amounts, P-0397 had not yet sold his [REDACTED], therefore this could not be the source of the deposits.
29. With respect to the calls between GICHERU and P-0397 on 16 January 2014, the Defence advances [REDACTED] as the root of his troubles [REDACTED].<sup>61</sup> However, this is irrelevant to his withdrawal as a witness. As a result of a selective reading of the transcript, the Defence claims that GICHERU is non-responsive to P-0397's pleas that threats against him related to his involvement with the ICC.<sup>62</sup> Upon a closer reading, however, P-0397 suggests that threats against him were perhaps due to the "debt" and the "promise", and "because it's bad for me to receive money from people and then, later on, it caused me to stay [REDACTED]".<sup>63</sup> GICHERU then tries to reassure P-0397 that "there's nothing like that". P-0397 mentions further that he "agreed to withdraw from the ICC"<sup>64</sup> and that when needed, he called GICHERU's [REDACTED].<sup>65</sup> GICHERU – a lawyer – who is being told

<sup>52</sup> DCC, para. 78.

<sup>53</sup> **P-0397**, KEN-OTP-0125-0518 at 0530.

<sup>54</sup> **P-0341**, KEN-OTP-0150-0255-R01 at 0268, para. 68.

<sup>55</sup> Defence Submissions, para. 39-41.

<sup>56</sup> DCC, paras. 76 and 77.

<sup>57</sup> DCC, para. 77.

<sup>58</sup> **P-0397**, KEN-OTP-0125-0461-R01 at 0462-0464 ([REDACTED]); **P-0397**, KEN-OTP-0125-0434-R01 at 0438-0439 ([REDACTED])

<sup>59</sup> Defence Submissions, para. 40, citing IR KEN-OTP-0139-0095.

<sup>60</sup> KEN-OTP-0139-0097 (Prosecution's LoE, item 370, disclosed on 31 December 2020).

<sup>61</sup> Defence Submissions, para. 41

<sup>62</sup> Defence Submissions, fn. 137.

<sup>63</sup> **P-0397/GICHERU**, KEN-OTP-0143-0185 at 0190, lns. 112-118.

<sup>64</sup> **P-0397/GICHERU**, KEN-OTP-0143-0185 at 0189.

<sup>65</sup> **P-0397/GICHERU**, KEN-OTP-0143-0185 at 0195.

by the witness about debts, promises, receiving money, agreements to withdraw, struggling and being “in your hands”<sup>66</sup> – never once challenges these utterances, in circumstances where an innocent person would be expected to. Instead, he tells P-0397 not to remain quiet, but to contact him.<sup>67</sup> When P-0397 says he considers returning to the ICC and asking his “white people” to come look for him, GICHERU only responds “can the white people really be human, or?”.<sup>68</sup> Viewed in the totality of the evidence, the recording corroborates P-0397’s evidence and establishes GICHERU’s knowledge of the matters mentioned by P-0397.

30. The Defence also claims that P-0564 was non-responsive when P-0397 called him on 17 January 2014, a day after his call with GICHERU.<sup>69</sup> But when P-0397 tells P-0564 that he knows P-0397 had received a million shillings and that it might be better to return it, P-0564 not only responds, but answers in the affirmative.<sup>70</sup>

## **B. GICHERU corruptly influenced P-0516**

31. The Defence’s assertion that P-0516’s evidence is uncorroborated<sup>71</sup> should be dismissed. As set out in the DCC, material facts of P-0516’s evidence that GICHERU offered and paid him at least 500,000 KSh are corroborated by at least four other witnesses – P-0397,<sup>72</sup> P-0613,<sup>73</sup> P-0800,<sup>74</sup> and P-0431.<sup>75</sup>
32. As argued above, P-0397’s prior recorded testimony is admissible<sup>76</sup> and provides direct evidence supporting the allegations against GICHERU in relation to P-0516, which is further corroborated by P-0516’s own evidence describing his direct interactions with GICHERU.

<sup>66</sup> **P-0397/GICHERU**, KEN-OTP-0143-0185 at 0189-0190.

<sup>67</sup> *E.g.* “you have to remind me”, “don’t wait until it’s too late”, **P-0397/GICHERU**, KEN-OTP-0143-0185 at 0195.

<sup>68</sup> **P-0397/GICHERU**, KEN-OTP-0143-0185 at 0191, ln.161.

<sup>69</sup> Defence Submissions, para. 18.

<sup>70</sup> KEN-OTP-0125-0248 at 0258, ln.287 *et seq.*

<sup>71</sup> Defence Submissions, paras. 46, 48.

<sup>72</sup> DCC, paras 104-110, 120, referring to **P-0397**, KEN-OTP-0125-0518-R01 at 0542; **P-0397**, KEN-OTP-0125-0518-R01 at 0542-0543; **P-0397**, KEN-OTP-0125-0518-R01 at 0542-0544;

<sup>73</sup> DCC, paras. 111-112, 120, referring to **P-0613**, KEN-OTP-0102-0178 at 0181, para. 18; **P-0613**, KEN-OTP-0111-0162 at 0169, para. 36; **P-0613**, KEN-OTP-0102-0178 at 0181, para. 23.

<sup>74</sup> DCC, para. 111, referring to **P-0800**, KEN-OTP-0111-0140 at 0148, para. 42.

<sup>75</sup> DCC, para. 107, referring to **P-0341**, KEN-OTP-0150-0255-R01 at 0277, para. 119.

<sup>76</sup> *See* submissions above regarding the admission of prior recorded testimony under rule 68(2)(c).

33. The Defence also claims that P-0579 and P-0540 are “unavailable” and that their statements to P-0613<sup>77</sup> and P-0800<sup>78</sup> respectively, that P-0516 was paid a bribe should be rejected as “uncorroborated hearsay”. However, P-0579 and P-0540’s statements – made as Intermediaries<sup>79</sup> in the course of the commission of the offences not only corroborate P-0516’s own evidence that he received money from GICHERU, but also support the general pattern by which witnesses were identified, approached and corrupted. The corruption of P-0516 is consistent with that pattern.
34. As set out in the DCC,<sup>80</sup> the Prosecution submits that despite the issues with P-0516’s evidence, the Chamber may rely upon certain portions that are adequately corroborated, particularly as regards his account of having been promised and paid money by GICHERU to recant his evidence in the *Ruto and Sang* proceedings.<sup>81</sup> The Defence fails to explain why the inconsistencies in P-0516’s evidence<sup>82</sup> cannot be reasonably separated by the Chamber from P-0516’s corroborated and reliable account of how he was corrupted by GICHERU.
35. In particular, with respect to P-0516’s initial denial that he knew GICHERU,<sup>83</sup> P-0516 later explained that, since he was in [REDACTED] at the time of his testimony, he was afraid for his security and therefore did not want to tell the Court about his interactions with GICHERU.<sup>84</sup> P-0516 also expressed fear when he came to interact with GICHERU directly; he could not refuse the bribe offer<sup>85</sup> and ceased to go to his office despite not being paid the full amount promised because it was becoming dangerous.<sup>86</sup> In light of the circumstances explained by P-0516, the Defence’s assertion that P-0516 first discussed his security concerns and then spoke with the investigators about his meetings with GICHERU<sup>87</sup> does not impact the reliability of his evidence.

### C. GICHERU corruptly influenced P-0613

<sup>77</sup> **P-0613**, KEN-OTP-0111-0162 at 0169, para. 36.

<sup>78</sup> **P-0800**, KEN-OTP-0111-0140 at 0148, para. 42.

<sup>79</sup> DCC, paras. 40, 42.

<sup>80</sup> DCC, paras. 114-118.

<sup>81</sup> DCC, para. 114.

<sup>82</sup> Defence Submissions, paras. 43, 45, 47.

<sup>83</sup> Defence Submissions, para. 45.

<sup>84</sup> **P-0516**, KEN-OTP-0150-0893 at 0896, 0906, 0911-0912; KEN-OTP-0150-0873 at 0881.

<sup>85</sup> **P-0516**, KEN-OTP-0150-0817-R01 at 0823, 0824; **P-0516**, KEN-OTP-0150-0837-R01 at 0847.

<sup>86</sup> **P-0516**, KEN-OTP-0150-0817-R01 at 0823, 0824; KEN-OTP-0150-0706, at 0718-0720.

<sup>87</sup> Defence Submissions, para. 46.

36. The Defence's assertion that P-0613's evidence is uncorroborated hearsay should be dismissed.<sup>88</sup> Insofar as her evidence relates the attempts of Common Plan Members, either directly or through P-0800, P-0604 and P-0495, to corruptly influence her, P-0613's account constitutes direct – and not hearsay – evidence.<sup>89</sup> Her account is further confirmed by other objective evidence that supports the allegations that she was offered bribes to withdraw as a Prosecution witness, such as the audio-recorded and photographed meetings of P-0540 and P-0800<sup>90</sup> and notably her audio-recorded and photographed meeting with P-0495.<sup>91</sup> Additionally, P-0604<sup>92</sup> and P-0495<sup>93</sup> provided corroborating evidence that supports P-0613's account.
37. Insofar as P-0613's account contains hearsay evidence about the bribes offered to other witnesses, her evidence corroborates the allegations relating to the corruption of P-0397, P-0516, P-0495, P-0800.<sup>94</sup> Furthermore, P-0613's evidence concerning the organisation and arrangement of the bribe by GICHERU fits the overall pattern that emerges from the evidence, including GICHERU's role in supervising contacts with witnesses, negotiating and approving the amount of money to be paid to witnesses.<sup>95</sup>
38. Contrary to the Defence's submissions,<sup>96</sup> the fact that the *Ruto and Sang* Trial Chamber found that P-0613 did not have direct knowledge of the RUTO's communications with certain individuals<sup>97</sup> is irrelevant to the assessment of her credibility, either in that case or the present.<sup>98</sup> These criticisms were limited to the sufficiency of her knowledge in that case and not her credibility. She was not questioned regarding witness interference.
39. The Defence disputes that GICHERU and P-0579 corruptly influenced five Prosecution Witnesses, including P-0613.<sup>99</sup> It does so on the basis of the information contained in two

<sup>88</sup> Defence Submissions, paras. 61-62.

<sup>89</sup> DCC, paras. 141-145, 147, 149, 151-154, 159, and references therein.

<sup>90</sup> **P-0800**, KEN-OTP-0111-0140 at 0147-0149, paras. 35-44, 49, 54; **P-0800/BARASA**, KEN-OTP-0131-0431 at 0451-0457; KEN-OTP-0111-0159.

<sup>91</sup> **P-0613/P-0495**, KEN-OTP-0129-0740; KEN-OTP-0138-0650; KEN-OTP-0138-0651; KEN-OTP-0138-0652; KEN-OTP-0138-0653; KEN-OTP-0138-0654; KEN-OTP-0138-0655; KEN-OTP-0138-0656; KEN-OTP-0138-0657; KEN-OTP-0138-0658; KEN-OTP-0138-0659; KEN-OTP-0138-0660; KEN-OTP-0138-0661; KEN-OTP-0138-0662; KEN-OTP-0138-0663.

<sup>92</sup> **P-0604**, KEN-OTP-0117-1019-R01 at 1022, paras. 21-22, 27; KEN-OTP-0117-1060-R01 at 1060.

<sup>93</sup> **P-0495**, KEN-OTP-0130-0507-R01 at 0514-0536; KEN-OTP-0130-0540-R01 at 0541-0561; KEN-OTP-0130-0563-R01 at 0565.

<sup>94</sup> See, e.g., DCC, paras. 138, 144.

<sup>95</sup> DCC, paras. 144, 147, 149, 156, 163.

<sup>96</sup> Defence Submissions, para. 62.

<sup>97</sup> These individuals are irrelevant to the GICHERU case. P-0613 never claimed to have knowledge of these communications.

<sup>98</sup> ICC-01/09-01/11-2027-Red-Corr, Reasons of Judge Fremr, paras. 106-107.

<sup>99</sup> Defence Submissions, paras. 21-25.

OTP investigation reports,<sup>100</sup> which the Defence suggests are incomplete and unreliable,<sup>101</sup> and on the transcripts of audio recorded telephone conversations involving P-0579, P-0540 and P-0613, among others.<sup>102</sup>

40. The Prosecution only relies upon one of these two investigation reports and only to corroborate other evidence, that of P-0613.<sup>103</sup> The second of these reports is not relied upon by the Prosecution in the DCC, but only on its LoE.<sup>104</sup> The Prosecution submits that the content of this second report is immaterial as it does not prove or disprove any material fact alleged by the Prosecution in its DCC.
41. As for the recordings of P-0613's conversation with P-0579 and P-0540, the Defence contends that since parts of these are "unintelligible", P-0613 was not asked to clarify them when interviewed by the OTP and there is no other independent corroboration of their content, P-0613 cannot be believed when she explains their contents and states that P-0579 and P-0564 are the other speakers in the recordings.<sup>105</sup>
42. First, the Prosecution notes that the Defence is not disputing the fact or authenticity of the recordings in question. Second, the Prosecution observes that only portions of these recordings were unintelligible<sup>106</sup> and only to the OTP staff designated to transcribe them afterwards, but not to P-0613 during the conversations. In fact, the transcripts reveal that P-0613 had no difficulty hearing and understanding her interlocutors – including P-0579 and P-0564 – with whom she exchanged extensively. There is no direct indication in the in the transcripts themselves, and no evidence submitted by the Defence, suggesting that P-0613 was prevented from understanding the conversations or unable to recollect their content accurately when interviewed by the OTP shortly after they occurred.<sup>107</sup> As such, there is no basis to conclude, at this point, that the recordings and P-0613's recounting of their content are unreliable.
43. The Defence notes that P-0564 denied asking P-0613 to return to Eldoret, offering her money, or encouraging other people to meet and offer her money.<sup>108</sup> This denial rings hollow in light of reliable evidence, as explained in detail in the DCC, including audio-

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<sup>100</sup> KEN-OTP-0117-1071 and KEN-OTP-0107-0291.

<sup>101</sup> Defence Submissions, paras. 22-23.

<sup>102</sup> KEN-OTP-0118-1927.

<sup>103</sup> KEN-OTP-0117-1071, DCC, para. 132.

<sup>104</sup> KEN-OTP-0107-0291.

<sup>105</sup> Defence Submissions, paras. 24-25.

<sup>106</sup> KEN-OTP-0118-1927 at 880, 883, 885, 889, 895, 898, 895, 898, 900, 903.

<sup>107</sup> KEN-OTP-0111-0162, paras. 34-39.

<sup>108</sup> Defence Submission, para. 17.

recorded conversations between P-0613 and P-0564 and between P-0613 and P-0579,<sup>109</sup> that shows P-0564's involvement in corruptly influencing P-0613 in coordination with GICHERU.

44. Finally, all issues raised by the Defence on these points are best addressed in the context of a trial, when the Defence will have the opportunity to question the witness and confront her with any inconsistency or evidence they may deem relevant.

#### **D. GICHERU corruptly influenced P-0800**

45. The Defence assertion that GUCHERU corruptly influenced P-0800 is unfounded and should be dismissed. P-0800 statements describe in detail P-0540's actions to bribe him on behalf of GICHERU and how GICHERU finally arranged a meeting through P-0576 to personally offer P-0800 between 1,500,000 and 2,000,000 KSh to withdraw as a Prosecution witness and locate P-0495. Contrary to the Defence assertions, P-0800's account is corroborated by, among others, the recordings of phone calls<sup>110</sup> and the 21 July 2013 meetings<sup>111</sup> between P-0540 and P-0800 in which P-0540 admitted that he was working for GICHERU trying to find witnesses in Kenya and nearby countries<sup>112</sup> and that GICHERU channelled the payments of bribes.<sup>113</sup>
46. P-0800's account is further supported by P-0613's and P-0495's evidence that P-0800 told them that he had accepted a bribe offer to withdraw as a Prosecution witness<sup>114</sup> and that he tried to convince them to do the same.<sup>115</sup>
47. The Defence selectively points to inconsistencies in P-0800'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. For instance, the Defence indicates that P-0800 gave contradictory information during his interview on 24 March 2014 in relation to the identity of the person who introduced him to GICHERU as well as P-0495's behaviour.<sup>116</sup> Although P-0800 provided inaccurate information on the first day of his interview, he

<sup>109</sup> DCC, paras. 137, 142, 143, 145, 149-150, and references therein.

<sup>110</sup> [REDACTED]. **P-0800**, KEN-OTP-0111-0140 at 0146-0147, para. 33.

<sup>111</sup> **P-0800**, KEN-OTP-0111-0140 at 0147-0150; **P-0800/BARASA**, KEN-OTP-0132-0167; KEN-OTP-0131-0431; KEN-OTP-0111-0159.

<sup>112</sup> **P-0800/BARASA**, KEN-OTP-0132-0167 at 0180; **P-0800**, KEN-OTP-0111-0140 at 0148, para. 45.

<sup>113</sup> **P-0800**, KEN-OTP-0111-0140 at 0147 and 0148, paras. 39 and 45.

<sup>114</sup> **P-0613**, KEN-OTP-0118-0137 at 0141, para. 16; **P-0495**, KEN-OTP-0130-0540-R01 at 0542 and 0558, Ins. 57-58 and 638-660.

<sup>115</sup> **P-0495**, KEN-OTP-0130-0507-R01 at 0515-0516, 0531; **P-0613**, KEN-OTP-0118-0137 at 0141, para. 16. *See also* KEN-OTP-0153-0041 at 0041-0042.

<sup>116</sup> **P-0800**, KEN-OTP-0135-0103 at 0108, Ins. 198-199

spontaneously corrected himself the following day and apologised for not being honest.<sup>117</sup> P-0800 explained that P-0579 (who introduced him to GICHERU) was known to him for a very long time,<sup>118</sup> that P-0495 was a friend,<sup>119</sup> and candidly admitted that he was trying to protect them both.<sup>120</sup>

48. Moreover, the Defence misinterprets the evidence to say that [REDACTED].<sup>121</sup> The IR simply states that [REDACTED] didn't seem to trust P-0800's account that he had six phones and three were taken [REDACTED].<sup>122</sup>
49. The Defence mischaracterises P-0800's evidence of P-0495 being coached by lawyers led by GICHERU before his testimony in the Ruto and Sang case as "uncorroborated hearsay".<sup>123</sup> While it may be indirect evidence as regards the events described by P-0495, it is direct evidence of the fact that P-0495 made such an admission. The Defence also overlooks that there is no exclusionary rule against hearsay evidence in the ICC legal framework<sup>124</sup> and that the Chamber may freely assess its probative value.<sup>125</sup> The Prosecution submits that P-0800's statement is consistent with other evidence of the fact that P-0495 had been corruptly influenced to recant his evidence by GICHERU and others and explains the sudden accusations he made against P-0613 and the Prosecution staff.
50. Finally, the reference to [REDACTED] assessment of P-0800's testimony in the Ruto and Sang case<sup>126</sup> is misleading as it concerns the reliability of the witness evidence in relation to the PEV in Kenya (e.g. trainings the Kalenjin youth and the existence of "cleansing ceremonies") and the fact that he accepted a bribe to recant his evidence. As to the former, the Prosecution stresses that this is a different case and the Defence does not substantiate why P-0800's evidence is unreliable in respect to the material facts of this case. As regards the latter, this is a feature inherent in a bribery case, and no reason *per se* to reject the witness's evidence,<sup>127</sup> particularly at confirmation stage.
51. Moreover, P-0800 was directly involved in the crimes attributed to GICHERU and, as such, is able to provide detailed and direct incriminating evidence in this case. The Prosecution submits that P-0800's evidence should be presented in court in order to allow the Trial

<sup>117</sup> P-0800, KEN-OTP-0135-0103 at 0108, lns. 198-199.

<sup>118</sup> KEN-OTP-0135-0103 at 0108, lns 183-184.

<sup>119</sup> KEN-OTP-0135-0103 at 0106, ln. 111.

<sup>120</sup> KEN-OTP-0135-0103 at 0106 and 0108, lns. 92-94 and 182-193.

<sup>121</sup> Defence Submissions, para. 52.

<sup>122</sup> KEN-OTP-0116-0495-R01.

<sup>123</sup> Defence Submissions, para. 54.

<sup>124</sup> *Prosecutor v. Gbabgo and Blé Goudé*, ICC-02/11-01/15-612, para. 17.

<sup>125</sup> See *supra* paras. 10-11.

<sup>126</sup> Defence Submissions, paras. 57 and 100.

<sup>127</sup> *Bemba et al* Trial Judgment, ICC-01/05-01/13-1989-Red, para. 202.



Chamber to make its own assessments of the witness reliability in relation to facts of this case.

#### **E. GICHERU corruptly influenced P-0495**

52. For reasons set out in the DCC,<sup>128</sup> the Prosecution will seek to rely on P-0495's evidence only when corroborated by other reliable evidence. The Defence selectively picks portions of the Prosecution's evidence and on this basis advances speculative arguments regarding its reliability, ignoring the evidence that corroborates GICHERU's involvement in corruptly influencing P-0495.
53. In an effort to discredit the 13 September 2013 recorded conversation between P-0495 and P-0613, in which P-0495 acknowledged accepting a bribe to withdraw as a Prosecution witness, implicated GICHERU and tried to persuade P-0613 to accept a similar offer,<sup>129</sup> the Defence argues that it was actually P-0613 who "injected" the name GICHERU in the conversation.<sup>130</sup> Although it is true that P-0613 first mentions the name "GICHERU", the information already revealed by P-0495 at that point of the conversation<sup>131</sup> provided reasonable grounds for P-0613 to enquire whether the lawyer P-0495 was referring to could be GICHERU. After this, P-0495 not only confirms that GICHERU was in charge of the offer, but also discloses that GICHERU is the one "giving out the money".<sup>132</sup> The Defence offers no explanation or evidence as to why P-0495 should confirm GICHERU's involvement if he were not in fact involved. Moreover, the Defence disregards that P-0495 spontaneously disclosed to P-0613 the details of the offer, how the "value" of the witnesses was assessed,<sup>133</sup> and that it was GICHERU who was the person she had to meet.<sup>134</sup>
54. The Defence further seeks to undermine the probative value of the recorded conversations between P-0495 and P-0613 by claiming that P-0495 was expecting P-0613 to tape-record them.<sup>135</sup> The reality is that P-0495 said he expected P-0613 tape-recorded their conversations only after being confronted by OTP investigators with the recordings that showed that he had already accepted a bribe to withdraw as a witness and was trying to corrupt P-0613 to do the same.<sup>136</sup> Beside this, the Defence does not explain why P-0495

<sup>128</sup> DCC, para. 222.

<sup>129</sup> **P-0613/P-0495**, KEN-OTP-0129-0740.

<sup>130</sup> Defence Submissions, para. 71.

<sup>131</sup> The possibility to get a government job, the requirement to "go to a lawyer to announce the withdrawal" and the fact that one of the persons in charge was a lawyer. *See* **P-0613/P-0495**, KEN-OTP-0129-0740 at 0743-0744.

<sup>132</sup> **P-0613/P-0495**, KEN-OTP-0129-0740 at 0745, Ins. 108-110; *see also*, Ins. 192-200.

<sup>133</sup> **P-0613/P-0495**, KEN-OTP-0129-0740 at 0743 Ins. 53-64.

<sup>134</sup> **P-0613/P-0495**, KEN-OTP-0129-0740 at 0747-0748, Ins. 192-200 and 228-230.

<sup>135</sup> Defence Submissions, paras. 72 and 101.

<sup>136</sup> **P-0495**, KEN-OTP-0130-0507-R01 at 0525-0526 Ins. 615-618 and 626-629.

would falsely incriminate himself if he really expected P-0613 to be recording the conversation.

55. In order to dismiss GICHERU's involvement in corrupting P-0495, the Defence relies on P-0495's assertions that it was P-0800 who conveyed to him the offer to withdraw in exchange of a bribe and that he never met or spoke with GICHERU.<sup>137</sup> Indeed, P-0495 told the investigators that he was supposed to meet GICHERU after accepting to withdraw but that he never actually spoke with him<sup>138</sup> and only dealt with P-0800 and P-0579.<sup>139</sup> However, as stated in the DCC, the Prosecution submits that P-0495 was falsely attempting to minimise his guilt.<sup>140</sup> During their recorded call on 13 September 2013,<sup>141</sup> P-0800 asks about P-0495's meeting with P-0613 and tells him that "those people" were waiting for him to go there the next day.<sup>142</sup> P-0800 thereafter says that they would wait for him to talk about "that matter" since P-0495 had already discussed it with them.<sup>143</sup> This exchange provides corroboration for the fact that P-0495 had in fact spoken with the people who were bribing him to withdraw, contrary to his claims to the investigators.
56. Finally, the Defence relies on P-0495 in-court testimony in the Ruto and Sang case where he claims [REDACTED].<sup>144</sup> As set out in the DCC, the Prosecution submits that P-0495 was coached to lie and testify in that way by lawyers on behalf of GICHERU.<sup>145</sup> In this respect, it is worth noting that in its Rule 68 Decision, the *Ruto and Sang* Trial Chamber concluded that P-0495 "failed to give evidence on material aspects included in his prior testimony due to improper interference".<sup>146</sup>

#### **F. GICHERU corruptly influenced P-0536**

57. The Defence's assertions that P-0536's statements are based on uncorroborated hearsay evidence from P-0540<sup>147</sup> should be dismissed. P-0536'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. P-0536's evidence regarding P-0540's

<sup>137</sup> Defence Submissions, para. 72.

<sup>138</sup> **P-0495**, KEN-OTP-0130-0540-R01 at 0544

<sup>139</sup> **P-0495**, KEN-OTP-0130-0507 at 0528-0529 Ins. 725-730.

<sup>140</sup> DCC, para. 217.

<sup>141</sup> **P-0495/P-0800**, KEN-OTP-0145-0594.

<sup>142</sup> **P-0495**, KEN-OTP-0130-0566-R01 at 0567-0568; KEN-OTP-0130-0585-R01 at 0589-0590; **P-0800/P-0495**, KEN-OTP-0145-0587 at 0589-0592.

<sup>143</sup> **P-0495/P-0800**, KEN-OTP-0145-0594 at 0599 Ins. 108-109.

<sup>144</sup> Defence Submissions, paras. 74 and 101.

<sup>145</sup> DCC, para. 219.

<sup>146</sup> ICC-01/09-01/11-1938-Corr-Red2, para. 109 (emphasis added).

<sup>147</sup> Defence Submission, paras. 77-78.

attempts to bribe her is direct evidence and P-0540'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.

58. Moreover, P-0536's evidence is corroborated by her audio-recorded phone conversations with P-0540.<sup>148</sup> These recordings constitute independent and reliable evidence that – on behalf of GICHERU – P-0540 offered P-0536 a bribe of between 1,400,000 and 1,600,000 KSh to withdraw as a Prosecution Witness. These allegations are further supported by P-0800's evidence<sup>149</sup> and his recorded conversations with P-0540.<sup>150</sup>
59. The Defence submits that [REDACTED].<sup>151</sup> [REDACTED]<sup>152</sup> but the Trial Chamber made no findings concerning P-0536's credibility. In any event, the absence of findings by the Trial Chamber is irrelevant and has no impact on the reliability of her evidence in this case. Nor does the fact that P-0536 was not questioned at trial about her conversations with P-0540<sup>153</sup> – evidence that was not relevant to the issues in that case.
60. Contrary to the Defence's submissions,<sup>154</sup> the audio-recorded conversations between P-0536 and P-0540 implicate GICHERU as the overall coordinator of the bribe offer she received through P-0540 himself.<sup>155</sup> While GICHERU's name is explicitly mentioned and discussed in only one of the recorded conversations,<sup>156</sup> GICHERU is also referred to in other conversations as “the lawyer”<sup>157</sup> or as “fellow Kikuyu”.<sup>158</sup> The Defence's assertion that GICHERU is mentioned in only one audio-recorded conversation thus misrepresents the evidence. The Prosecution notes in parenthesis that this reference to the lawyer in question as a “fellow Kikuyu” would exclude KIGEN-KATWA as the lawyer in question.

### **G. GICHERU corruptly influenced Witnesses P-0341 and P-0274**

61. P-0341 and P-0274 were regarded by GICHERU and other members of the Common Plan as individuals in possession of information relevant to the *Ruto and Sang* case.<sup>159</sup> Both

<sup>148</sup> **P-0536/BARASA**, KEN-OTP-0114-0198; **P-0536**, KEN-OTP-0111-0201-R01; **P-0536/BARASA**, KEN-OTP-0114-0296; **P-0800/BARASA**, KEN-OTP-0132-0167; **P-0536/BARASA**, KEN-OTP-0114-0244.

<sup>149</sup> DCC, para. 243, referring to **P-0800**, KEN-OTP-0111-0140 at 0147, paras. 39-41; **P-0800/BARASA**, KEN-OTP-0132-0167 at 0186, 0204, 0208, 0215.

<sup>150</sup> DCC, para. 243.

<sup>151</sup> Defence Submissions, para. 78.

<sup>152</sup> [REDACTED]. [REDACTED].

<sup>153</sup> Defence Submissions, para. 77.

<sup>154</sup> Defence Submissions, para. 29.

<sup>155</sup> DCC, paras. 244, 246-247, 249, and references therein.

<sup>156</sup> **P-0536/BARASA**, KEN-OTP-0114-0296, at 0299.

<sup>157</sup> **P-0536/BARASA**, KEN-OTP-0114-0291, at 0294.

<sup>158</sup> **P-0536/BARASA**, KEN-OTP-0114-0244 at 0247; **P-0536/BARASA**, KEN-OTP-0114-0296 at 0299.

<sup>159</sup> *Contra* Defence Submissions, paras. 82, 94.

were victims of the PEV [REDACTED].<sup>160</sup> They attended public victims meetings in the [REDACTED] area at the beginning of the *Ruto and Sang* proceedings.<sup>161</sup> During one of these meetings, both witnesses openly criticised RUTO.<sup>162</sup> P-0341 [REDACTED].<sup>163</sup> GICHERU told P-0274 they needed to reach everyone, and pay people to stop assisting the ICC, as the “big man”, RUTO, wanted “no stone left unturned”.<sup>164</sup>

62. The Defence’s contention that the evidence of P-0341 and P-0274 is uncorroborated is incorrect.<sup>165</sup> While P-0341 and P-0274 do contradict each other on the issue of whether P-0341 brought P-0274 to GICHERU’s office<sup>166</sup> their accounts offer detailed and internally consistent direct evidence of GICHERU’s attempts to corruptly influencing them. Their description of the implementation of the common plan and the contributions of its members is consistent.<sup>167</sup> In addition, they corroborate each other on several crucial material facts, notably: that P-0341 was corruptly influenced by GICHERU through bribes;<sup>168</sup> that GICHERU asked P-0341 to approach and corruptly influence P-0274;<sup>169</sup> that GICHERU met P-0274 and offered him bribes;<sup>170</sup> that GICHERU and other members of the Common Plan wanted P-0274 to approach and corrupt P-0356.<sup>171</sup>
63. P-0341’s bank statements provide objective corroboration that he received several large instalments of money.<sup>172</sup> The Defence’s allegation that these sums were plausibly received from KIGEN-KATWA – and that P-0341 was “instructed” by unspecified individuals to falsely accuse GICHERU – is not only directly contradicted by the witness’ account, but entirely speculative and unsupported by evidence.<sup>173</sup> It is also inconsistent with the fact that P-0341 freely provided information that he was told about KIGEN-KATWA bribing PEV victims in 2011.<sup>174</sup> But P-0341 clearly differentiated this event from the bribes GICHERU had given him to withdraw from ICC proceedings two years later.<sup>175</sup>

<sup>160</sup> **P-0341**, KEN-OTP-0147-1590-R01; **P-0274**, KEN-OTP-0150-0345.

<sup>161</sup> **P-0341**, KEN-OTP-0150-0255-R01 at 0260-0262, paras. 26-33.

<sup>162</sup> **P-0341**, KEN-OTP-0150-0255-R01 at 0260, paras. 26-27.

<sup>163</sup> **P-0341**, KEN-OTP-0150-0255-R01 at 0260, paras. 24-25; KEN-OTP-0150-0285-R01.

<sup>164</sup> **P-0274**, KEN-OTP-0159-0986-R01 at 0996, paras. 58-59.

<sup>165</sup> Defence Submissions, paras. 85, 93.

<sup>166</sup> Prosecution Submissions, paras. 41-42.

<sup>167</sup> DCC, paras.37-58.

<sup>168</sup> DCC, paras. 289 (ii-iii), 310.

<sup>169</sup> DCC, paras. 289 (vi), 311.

<sup>170</sup> DCC, paras. 312,317(ii) ; **P-0341**, KEN-OTP-0150-0255-R01 at 0280, para. 134.

<sup>171</sup> DCC, para. 314, footnote 767.

<sup>172</sup> KEN-OTP-0159-1386.

<sup>173</sup> *Contra* Defence Submissions, para. 87.

<sup>174</sup> **P-0341**, KEN-OTP-0150-0255-R01 at 0261, paras. 29-30, at 0277, para. 118.

<sup>175</sup> **P-0341**, KEN-OTP-0150-0255-R01 at 0267, paras. 62-64,71-73, 78-79, 99-101, 106-108, 117; KEN-OTP-0159-1386.

64. [REDACTED] constitutes a contemporaneous account of P-0341 being corruptly influenced.<sup>176</sup> The content of the document corroborates P-0341's claim that he is the source referred to<sup>177</sup> as the information provided that he met ICC investigators in [REDACTED], and provided preliminary information about [REDACTED] is consistent with the screening note.<sup>178</sup> The article also mentions that [REDACTED]. P-0341's [REDACTED].<sup>179</sup>
65. P-0341's 2015 statement that he could not meet OTP investigators as planned in 2014 because he was scared is consistent with the contemporaneous account he provided them on the phone.<sup>180</sup> The investigators' remark that contacts with P-0341 should be met with caution shows nothing more than a concern for future efficient arrangements in the field;<sup>181</sup> and a reasonably critical approach to information provided by a witness when they could not discuss face to face the unfolding of events.<sup>182</sup> During his subsequent interview, P-0341 showed the investigators the [REDACTED].<sup>183</sup>

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66. The Defence further disputes that P-0579 was involved along with GICHERU in the corrupt influencing of another witness, P-0604.<sup>184</sup> The Prosecution notes that it did not charge GICHERU with corruptly influencing P-0604. In the DCC, the Prosecution relied upon the evidence of this witness merely to corroborate other evidence that, holistically, established the existence of a pattern of witness interference<sup>185</sup> and that said interference was conducted for the benefit of, and in coordination with, RUTO.<sup>186</sup> As such and for to this purpose, the Prosecution submits that P-0604's evidence is sufficiently corroborated and reliable.

<sup>176</sup> KEN-OTP-0150-0289 at 0290, first paragraph; **P-0341**, KEN-OTP-0150-0255-R01 at 0272, paras. 92-93.

<sup>177</sup> KEN-OTP-0150-0289 at 0290, second paragraph.

<sup>178</sup> **P-0341**, KEN-OTP-0147-1590 at 1590.

<sup>179</sup> **P-0341**, KEN-OTP-0150-0286, KEN-OTP-0150-0287, KEN-OTP-0150-0288.

<sup>180</sup> Defence Submissions, para. 87; **P-0341**, KEN-OTP-0150-0255-R01 at 0259, para. 17 (the year should read "2014" and not "2013", as evidenced by the sequence of events in this part of the statement); IR, KEN-OTP-0147-2140-R01, p. 2142, last bullet point of events [REDACTED].

<sup>181</sup> KEN-OTP-0147-2140-R01, p. 2142.

<sup>182</sup> Defence Submissions, para. 87, discussing the recommendation of IR: KEN-OTP-0147-2140-R01, p. 2142.

<sup>183</sup> **P-0341**, KEN-OTP-0150-0255-R01 at 0259, para.17.

<sup>184</sup> Defence Submissions, para. 67.

<sup>185</sup> DCC, paras. 37, 40, 46, 49(d) and (f)-(g), 64(a) and (c)-(f), 70(c), 133, 156-160.

<sup>186</sup> DCC, paras. 2 and 49(e).

#### IV. CONCLUSION

67. For the reasons described above, the Chamber should reject the criticisms advanced in the Defence Submissions and confirm the charges as set out in section C of the DCC.



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**Ms Nazhat Shameen Khan, Deputy Prosecutor**

Dated this 1<sup>st</sup> day of June 2023

At The Hague, The Netherlands