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PRE-TRIAL CHAMBER II

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

SITUATION IN THE REPUBLIC OF KENYA

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

PUBLIC

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

Source: Defence for Mr. William Samoei Ruto

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

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I. Introduction

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

II. Applicable Law

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

The interpretation of appealable issue

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

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

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

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

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

The interpretation of fairness

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

The interpretation of expeditiousness

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

The interpretation of "outcome of the trial"

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

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

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

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

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

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

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

III. Submissions on Issues for Appeal

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

- a. First Issue: Whether the Majority erred in finding that the failure of the Prosecution to conduct proper investigations (including the failure to follow up on exculpatory leads and issues of reliability) has no consequences for the confirmation hearing independent of its assessment of the overall quality and sufficiency of the evidence presented;¹⁰
- b. Second Issue: Whether the Majority erred by relying on anonymous evidence alone or in corroboration with other anonymous evidence, while failing to

⁸ Lubanga Extraordinary Review Decision, para. 13.

⁹ *Ibid*, paras 14-19.

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

implement adequate counterbalancing measures in order to minimize prejudice to the Defence;

- c. Third Issue: Whether the Majority erred by failing to apply its evidentiary principles in a reasonable and consistent manner to Defence and Prosecution witnesses, and with due consideration for the impact of the witness's anonymity on their weight; and
- d. Fourth Issue: Whether the Majority erred in finding that the Amended DCC, which did not include the identities of alleged co-perpetrators, nor specifics as to members of the organization of Mr Ruto's alleged contribution, provided a sufficient legal and factual basis for the charges in that the DCC need not be exhaustive in its particulars.

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

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

11. At para 51 of the Decision, the Majority determined that the role of the Pre-Trial Chamber during the confirmation stage is solely "to determine whether sufficient evidence has been adduced to establish substantial grounds to believe that the Suspects committed the crimes charged" and that any failure by the Prosecutor to investigate properly would "certainly have a bearing on the quality and sufficiency of the evidence presented". However, and as Judge Kaul indicated in his Dissenting Opinion, if a Pre-Trial Chamber is not convinced

¹¹ Confirmation Decision, para. 38.

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

that an investigation is complete, it may use its powers under Articles 61(7)(c) and 69(3) in order to compel the Prosecutor to complete his investigation before considering committing any suspect to trial.¹³

12. Whether the Chamber erred by finding that the failure of the Prosecution to investigate exculpatory issues or issues of reliability had no consequences for the confirmation hearing other than in assessing the sufficiency of the evidence therefore directly arises from the decision. Furthermore, the Defence submits that the scope of the Pre-Trial Chamber's duties at the confirmation stage with respect to ensuring that the Prosecutor has investigated all material facts, including investigating incriminating and exonerating circumstances equally, is an issue which affects the overall fairness and expeditiousness of the proceedings.

First Issue: Significantly Impacts the Fairness of Proceedings

13. The Prosecution's failure to investigate relevant and/or exculpatory information not only impacts on the quality and sufficiency of Prosecution evidence, it also impacts on the adversarial nature of the confirmation hearing, and the extent to which it is possible for the Chamber to ensure the overall fairness of the confirmation process.
14. The Appeals Chamber has explicitly held with respect to the confirmation hearing that the Pre-Trial Chamber has an obligation to take measures to ensure that the hearing is not convened under conditions which would unfairly prejudice the rights of the defendant and the adversarial nature of the hearing.¹⁴ Whilst the Prosecution ordinarily conducts its investigations in an independent manner, the Chamber did have the power under Article 61(7)(c)(i) to order the Prosecution to provide further evidence or conduct further investigation with respect to a particular charge. Throughout the confirmation hearing, the Defence provided numerous examples of instances wherein the Prosecution investigations were insufficient¹⁵ and wherein the Prosecution failed to follow-up leads of exculpatory information¹⁶. Because the Prosecution failed to investigate properly, the Defence was not given a genuine opportunity to present its case.

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

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

¹⁵ *Prosecutor v. Ruto et al*, ICC-01/09-01/11-355, William Samoei Ruto Defence Brief Following the Confirmation of the Charges Hearing, 24 October 2011, paras 16-18, 24-29 ("Ruto Confirmation Brief").

¹⁶ Ruto Confirmation Brief, paras 19-23.

15. Bearing in mind the statutory duties of the Prosecutor to ascertain the truth, as outlined in Article 54(1), the Chamber's power to order further investigation cannot be limited to incriminating evidence. It must also encompass the situation in which it is clear that the Prosecution has failed to investigate exculpatory information or issues of reliability, which necessarily impact the adversarial nature of the confirmation hearing, as enshrined in Article 61. For example, in such a situation, if the Pre-Trial Chamber orders further investigation, and if the Prosecution is unable to provide the requested information, then it would be open to the Chamber to refuse to admit the anonymous statements/evidence of witnesses whose reliability is in question. The remedy of exclusion would then be appropriate, due to the absence of meaningful counterbalancing measures for the Defence to be able to challenge whether this evidence was reliable or possessed any probative value.¹⁷
16. Clearly, the Prosecutor's duty to investigate exculpatory material is intrinsically linked to its duty to disclose such material to the Defence. By failing to investigate exculpatory evidence or evidence which was relevant to the reliability of Prosecution witnesses, the Prosecution ultimately precluded the Defence from being able to exercise its rights meaningfully under Article 61(6) to challenge Prosecution evidence or present its own evidence on issues concerning the reliability of Prosecution witnesses. The Trial Chamber in the *Lubanga* case recognized that, as a counterbalancing measure in the event that the Defence has been unable to access exculpatory evidence, it may be appropriate for the Chamber to accept certain admissions of fact in favour of the Defence in relation to the Prosecution allegation related to the non-disclosed material.¹⁸ In this instance, following such a precedent might have precluded, for example, the Majority's finding that Witnesses 4 and 8 had not been coached or induced to implicate Mr Ruto, as well as the Majority's reliance on their statements.¹⁹
17. In connection with alleged failures on the part of the Prosecution to investigate, the *Lubanga* Trial Chamber has explicitly found that this non-disclosure remedy could also be applied to a failure to investigate issues of reliability and credibility:

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

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

¹⁹ Confirmation Decision, paras 87-90.

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

In the present Decision, it seems the Majority put the onus on the Defence to “convince” the Pre-Trial Chamber that Prosecution witnesses had been coached,²¹ rather than leaving the burden squarely on the Prosecution to investigate and disclose all materials which could impact on their witnesses’ reliability.

18. The fact that exculpatory information was not pursued and made available to the Pre-Trial Chamber prior to Confirmation, and given that the Prosecution relied substantially on a number of anonymous witnesses and statements, the Defence had a limited independent ability to investigate the reliability and credibility of their evidence. Accordingly, since the Prosecution failed to comprehensively investigate issues concerning the reliability of anonymous witnesses, the Chamber was not in a position to properly assess the sufficiency of the evidence. For instance, the Defence submits that had the Prosecution themselves attempted to corroborate where Mr Ruto was on dates that Prosecution witnesses say he was in certain meetings, they could have found videos and other public source materials in contradiction of the Prosecution’s theories. The Defence notes that it provided such information but it was disregarded by the Majority as not being “authenticated”.²²

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

First Issue: Impact on Expeditiousness

20. The issue as to whether the Pre-Trial Chamber has the authority to ensure the Prosecution has complied with its duty to establish the truth by investigating all facts and evidence, significantly impacts on the right of the Defence to receive an expeditious resolution of the case.

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

²¹ Confirmation Decision, para. 88.

²² Confirmation Decision, paras 123, 136, 155, 159 and 160

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

First Issue: Immediate Decision would Materially Advance the Proceedings

23. If the Appeals Chamber were to decide that the Pre-Trial Chamber has the duty to take into consideration investigative failings when deciding whether to confirm the charges, or take other measures such as ordering further investigation, this will have the effect of both sanctioning the Prosecution and providing direct guidance concerning the possible

²³ Dissenting Opinion on Confirmation Decision, para 52.

²⁴ The Defence notes that both the *Lubanga* and *Katanga and Ngudjolo* cases were unnecessarily protracted by the prosecution's reliance on witnesses, who later retracted their testimony. *Prosecutor v. Lubanga*, ICC-01/04-01/06-2201-Red, Decision on the prosecution's "Request on the Manner of Questioning of Witness DRC-OPT-WWWW-0015" and contact by the prosecution with Court witnesses, 1 February 2010; ICC-01/04-01/06-T-192-ENG, p. 10-14, 16 June 2009; *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-2731, Decision on the Prosecution's renunciation of the testimony of witness P-159, 24 February 2011. Furthermore, the *Mbarushimana* confirmation hearing also dedicated unnecessary time to the consideration of a witness, whom the Prosecution subsequently withdrew due to the fact that certain issues had not been adequately investigated prior to the confirmation hearing. *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-456, Prosecution's Notice that it no longer relies on the statement of Prosecution Witness 692 to support the confirmation of charges, 21 November 2011; also ICC-01/04-01/10-465-Red, Decision on the confirmation of charges, 16 December 2011, para. 42.

consequences of investigative failings for the future proceedings. A properly investigated case will in turn, facilitate a fair and expeditious trial, which is not marred by disputes concerning investigative failings, or lengthened by the hearing of witnesses, whose credibility and reliability were not properly vetted in advance.

24. In contrast, failing to render a judicial determination of this issue will simply give the Prosecution *carte blanche* to continue their current practices for the trial stage. It is therefore imperative for the future progress of the case that the Appeals Chamber be given an opportunity to immediately determine whether investigative failings have any consequences, other than as concerns the sufficiency of evidence.

Second Issue: Reliance on Anonymous Evidence Alone or to Corroborate Other Anonymous Evidence

25. Throughout the impugned decision, the Majority relies on the evidence of either a single anonymous witness or of two anonymous witnesses corroborating each other, in order to find substantial grounds to believe that key “planning” meetings occurred. It was on the basis of allegations of what transpired in these planning meetings that the charges were confirmed.
26. In more egregious instances, the Majority relied on the evidence of a single uncorroborated anonymous Witness 6²⁵ or Witness 8²⁶ to find that key preparatory meetings had occurred in December 2006 and April 2007. Further, one allegation by Witness 6 (whose uncorroborated evidence was found insufficient to confirm the charges against Henry Kosgey), pertaining to meetings allegedly held at Cheramboss’ house on a non-disclosed dates in December 2007, was deemed sufficiently reliable. This is despite the fact that since the date was redacted, the Defence had no ability to adduce its own alibi evidence. There was therefore a complete absence of counterbalancing measures to enable the Defence to challenge the allegation properly. Yet the Majority made a finding that Mr Ruto was present.²⁷

²⁵ See, for example, Confirmation Decision, paras 194-195 (Witness 6 alone regarding an alleged series of preparatory meetings held between 14 and 22 December 2007).

²⁶ See, for example, Confirmation Decision, paras 187-188 (Witness 8 alone regarding an alleged meeting at Mr Ruto’s home on 30 December 2006 and an oath-taking ceremony at the Molo Milk Plant on 15 April 2007).

²⁷ See Confirmation Decision, paras 148-150.

27. In other instances, the Majority based conclusions concerning fundamental aspects of the Prosecution case on the testimony of anonymous Witnesses 1 and 8 in tandem.²⁸ Although the Chamber states that the content of Witnesses 1 and 8's testimony is corroborated by the testimony of additional anonymous witnesses concerning other meetings, there is no direct corroboration for the existence of the meeting in question (at Sirikwa Hotel on 2 September 2007), and of the presence of the Mr Ruto. It clearly should not be presumed that a suspect was at a particular meeting just because there is anonymous evidence that he was present at another.

28. The Majority's reliance on anonymous witness accounts alone, and/or the Majority's reliance on anonymous witness statements to corroborate each other is therefore an issue which arises directly from the Decision.

Second Issue: Significantly Impacts the Fairness of Proceedings

29. The Appeals Chamber has established the strict injunctive that the non-disclosure of the identity of Prosecution witnesses, or key information from witness statements, can only be approved if the Chamber takes appropriate measures to ensure the fairness and adversarial nature of the proceedings.²⁹ In *Lubanga*, the Trial Chamber held, in respect of anonymous statements, hearsay and summaries, that "mindful of the difficulties that such evidence may present to the Defence in relation to the possibility of ascertaining its truthfulness and authenticity, the Chamber decides that, as a general rule, it will use such anonymous hearsay evidence only to corroborate other evidence" (emphasis added).³⁰

30. This suggests that it is inherently unfair to use anonymous evidence to corroborate other anonymous evidence, much less on its own. It is clear that the fact that an anonymous witness can corroborate another anonymous witness does not counterbalance the fundamental handicap faced by the Defence in contesting anonymous testimony – that it cannot test the accuracy, reliability or credibility of such testimony. If the entire Prosecution case on a certain point is founded on anonymous testimony, then the right of the Defence under article 61(6) to challenge the Prosecution evidence becomes illusory. In the absence of details concerning the witnesses and the foundation for their testimony, the

²⁸ See, for example, Confirmation Decision, paras 126-130 and also paras 189-191.

²⁹ *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-475, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", 13 May 2008.

³⁰ ICC-01/04-01/06-803, Decision on the confirmation of charges, 29 January 2007, para 106. The *Lubanga* approach was subsequently adopted in the *Katanga* confirmation hearing: ICC-01/04-01/07-717, Decision on the confirmation of charges, 30 September 2008, paras 119, 140, and 160.

Defence is forced into merely making a blanket and unsupported denial. It also cannot be presumed that the reliability of the allegations are bolstered by virtue of the fact that the testimony is corroborated by other anonymous testimony, as there could have been collusion between witnesses (indeed, the witnesses could be related or could live together), or they could have both been subjected to misinformation. Since the Defence does not possess any information concerning the witnesses, it is precluded from exploring these possibilities.

31. Accordingly, by deviating from these principles, the Majority's use of anonymous witnesses to corroborate other anonymous witnesses significantly impacted on the right of the Defence to challenge Prosecution evidence at the confirmation hearing, and has eliminated any procedural safeguards concerning the potential lack of reliability and credibility of such witnesses. Irrespective of whether the Chamber considers that it was legally entitled to do so, the fact that it did so significantly affected the fairness of the proceedings.

Second Issue: Impact on Expeditiousness

32. By allowing the Prosecution to rely upon anonymous evidence alone or to corroborate anonymous evidence, the Chamber has confirmed allegations whose reliability and credibility is completely untested (and unverifiable due to the anonymity). Since there has been no proper confirmation vetting for these allegations, the rationale of the confirmation hearing to cull unfounded or unreliable allegations has not occurred. This will simply defer to the trial stage issues which should have been resolved and addressed at the confirmation hearing, and thereby unnecessarily protract the proceedings.

Second Issue: Alternatively, Affects the Outcome of the Proceedings

33. The Chamber based its conclusions on key aspects of the common plan (preparatory meetings) on anonymous evidence, which had only been corroborated, if at all, by other anonymous evidence. The contours of the confirmed charges were very much shaped by this issue, and as such, the issue has significantly affected the outcome of the proceedings.

Second Issue: Immediate Decision would Materially Advance the Proceedings

34. The Defence submits that the Majority improperly used anonymous evidence alone or to corroborate other anonymous evidence, thus an immediate decision of the Appeals Chamber is required to ensure that the case progresses on the basis of charges which are

not tainted by fundamentally unreliable evidence. The sole use of anonymous evidence also impacts on the integrity of the proceedings and the appearance of justice. Since the reliability of these witnesses could not be tested by the Defence, any subsequent discovery of the *male fides*, or lack of reliability, of this evidence would significantly impact on both the credibility of the Pre-Trial Chamber, in terms of whether it performed its role correctly, and the reliability of the confirmation decision. An immediate resolution of this issue would ensure that the case can proceed on the basis of confirmed allegations, which are free from clear suspicion of evidential taint.

Third Issue: Erroneous Application of Evidentiary Principles

35. Prior to conducting its free assessment of the evidence adduced during the confirmation hearing,³¹ the Majority set out the legal principles it would apply when assessing relevance and probative value.³² The Defence is not challenging these principles *per se*, but rather the fact that the Majority did not apply the standards in reasonable and consistent manner.

36. For example, during confirmation, the Defence highlighted inconsistencies in the witnesses' accounts and challenged the motives and personal interests of the Prosecution's witnesses, to the extent possible considering their anonymous nature. At paras 78, 83, 86, and 92 of its Confirmation Decision, the Majority stated the following general principles:

“78. [...] the use of evidence emanating from anonymous sources ... may impact the ability of the Defence to challenge the credibility of the source and the probative value of such evidence. Therefore to counterbalance the disadvantage that this might cause to the Defence, such evidence is considered as having a lower probative value... The Chamber will thus analyse anonymous witness statements and summaries on a case-by-case basis and ... take into account whether there is corroboration by other evidence.”

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

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

“92. [...] the witnesses' possible involvement in the commission of the crimes does not automatically render them unreliable and/or not credible, such that their evidence should be excluded or provided a lower probative value. Instead, the assessment of the evidence

³¹ Confirmation Decision, para 59.

³² Confirmation Decision, paras 66-92.

provided by those witnesses and the weight to be given will depend on a case-by-case basis. The same holds true in relation to evidence provided by the Suspects, which will be equally treated on the basis of the same principle. In other words, the Suspects or Defence witnesses who are allegedly implicated through one way or another in the crimes will not be automatically considered unreliable and/or not credible. Nor will their evidence be granted a lower probative value, as a matter of principle.”

37. Furthermore, at para 73 of the Confirmation Decision, the Majority held that it would assess *viva voce* testimony “*inter alia* as a result of the questioning, of the witness’ credibility, reliability, accuracy, trustworthiness and genuineness.”
38. Yet when the time came for the Majority to apply these standards to the evidence presented, the Prosecution evidence from anonymous sources was almost always deemed credible and reliable (despite inconsistencies, motives, involvement in the crimes, etc), while Defence evidence from known sources was always given a lower probative value due to the fact that the source of the evidence was an insider witnesses or had a motive to lie in order to protect his own interests.
39. Article 67(1)(i) sets out the right of the Defence not to have imposed on him or her any reversal of the burden of proof or onus of rebuttal. There is no exception or qualification to this principle throughout the Statute and Rules – the evidential burden remains at all times on the Prosecution. Article 61(5) also squarely obliges the Prosecution to support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged – there is no burden on the Defence to *disprove* any charge.
40. The Majority’s findings with respect to an alleged meeting on 30 December 2006 and Mr Ruto’s alleged presence are illustrative of this error. Allegations pertaining to Mr Ruto’s presence were only supported by Witness 8,³³ a witness whom the Majority treated as anonymous,³⁴ and whom the Majority acknowledged erred in at least one respect of his account of this meeting – by placing Mr Sang there.³⁵ Furthermore, the Defence had raised concerns that Witness 8 had been coached and/or induced to provide evidence implicating Mr Ruto, and that in fact when Witness 8 attempted to raise this issue with the Prosecution, the Prosecution investigators conveniently glossed over it.³⁶ If the Majority

³³ Confirmation Decision, para 113.

³⁴ Confirmation Decision, para 89.

³⁵ Confirmation Decision, para 116.

³⁶ Ruto Confirmation Brief, paras 19-21.

had applied their stated principles regarding inaccuracies, motives, anonymity, etc, then the evidence of Witness 8 should have been accorded a low probative value.

41. In contrast, the Defence presented two *viva voce* witnesses (Mr Cheramboss and Rev Kosgei) who testified that, contrary to Prosecution allegations, the meeting did not take place and that they themselves were not present. However, the Majority afforded the statements of these individuals low probative value on the basis of their alleged involvement,³⁷ and despite the fact that the Prosecution and the Chamber had ample opportunity to cross-examine them about concerns of self-interest. The Chamber's assessment concerning the presumed self-interest of Mr Cheramboss and Rev Kosgei was not based on their testimony, questions concerning their credibility, or their demeanour: it was based purely on implied assumptions, and evidence given by Witness 8.³⁸ Additionally, it should be recalled that the Defence had a number of witnesses it intended to call live who could have corroborated the evidence of Mr Cheramboss and Rev Kosgei, but it was limited by the Chamber from doing so.³⁹
42. The Chamber's ultimate assessment that the meeting took place therefore objectively privileged the testimony of one anonymous, inaccurate witness – whose credibility could not be tested by the Chamber or the Defence – over two non-anonymous witnesses whose credibility had been tested by the Chamber and the Prosecution and were not found lacking in any specific regard. If the Chamber had applied its evidential principles in a consistent manner, it would have been unable to accord Witness 8 any greater weight than the two Defence witnesses, and in such circumstances, would have been unable to confirm aspect of the charges which relied on Mr Ruto's presence at the 30 December 2006 meeting.
43. The issue as to whether the Chamber actually applied its evidential principles in a consistent and impartial manner, with due regard to the anonymity, inconsistencies and motivations of Prosecution witnesses, therefore arises from the decision.

Third Issue: Significantly Impacts the Fairness of Proceedings

³⁷ Confirmation Decision, para 118.

³⁸ While addressing a Prosecution challenge to the issue of credibility of a Defence Witness, the ICTY Appeals Chamber took into consideration that the witness's oral testimony was "coherent and reasonably detailed, and his demeanor did not suggest that he was trying to conceal the truth." The Appeals Chamber also found that Prosecution evidence calling into question the motives of this witness "somewhat speculative." *Prosecutor v Veselin Sljivancanin*, IT-95-13/1-R.1, Review Judgement, 8 December 2010, paras 24 and 28.

³⁹ *Prosecutor v. Ruto et al*, ICC-01/09-01/11-221, Order to the Defence to Reduce the Number of Witnesses to be Called to Testify at the Confirmation of Charges Hearing and to Submit an Amended List of *Viva Voce* Witnesses, 25 July 2011.

44. The objective consequence of the methodology applied by the Chamber is that like witnesses have not been assessed in a like manner: whilst the Chamber has consistently accorded Defence witnesses a lower value due to alleged self-interest, it has not done the same to Prosecution witnesses. The Chamber has preferred the testimony of anonymous witnesses, whom it obliged to lower the probative value, to Defence witnesses, who were not anonymous.
45. This issue therefore directly impacts on the Chamber's duty to assess the evidence in a fair and impartial manner. The Chamber's role is not to assist the Prosecution or to bolster its case or to find a way to make the Prosecution evidence fit together. The Chamber must evaluate evidence in a manner that is consistent with the presumption of innocence and the principle of *in dubio pro reo*: it cannot be presumed from the fact that the Prosecution has alleged something that any Defence witnesses who testify to the contrary are lacking in credibility or reliability. Given that the Majority has indeed applied its methodology in an inconsistent manner, the presumption of innocence has been significantly affected.
46. This issue is also related to the burden of proof, to the extent that the Chamber's failure to accord weight to Prosecution and Defence witnesses in a consistent manner has effectively and unfairly shifted the burden of proof onto the Defence. It seems it is not enough for the Defence to establish substantial grounds to believe that the suspect did not commit the alleged offences – rather by requiring the Defence to rely upon evidence that was much more reliable and probative than the Prosecution's – the Chamber effectively required the Defence to prove more than the Prosecution, i.e. that there were more than substantial grounds to believe that the suspect did not commit the offence in question.

Third Issue: Expeditiousness of the Proceedings

47. The incorrect application of an evidential standard affects the expeditiousness of the proceedings as the “amendment or production of further evidence in order to meet the standard ... would affect the expeditiousness of the proceedings”.⁴⁰ The application of inconsistent standards to Prosecution and Defence evidence essentially requires the Defence to adduce a greater quantity and a higher quality of evidence than the Prosecution. This impacts on the time and preparation of the Defence by requiring it to

⁴⁰ *Prosecutor v. Al Bashir*, ICC-02/05-01/09-21, Decision on the Prosecutor's Application for Leave to Appeal the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", 24 June 2009, p. 7.

adduce further evidence and expend greater investigative resources in order to meaningfully challenge Prosecution evidence at the confirmation hearing.

Third Issue: Immediate Decision would Materially Advance the Proceedings

48. The Defence submits that the Majority's evidential standards were applied in an incorrect and discriminatory manner, therefore this has tainted both the outcome itself (the decision to confirm the charges) and also the appearance of integrity and impartiality vis-à-vis the proceedings. It is contrary to the interests of justice to commit the case to trial on the basis of a decision which was tainted by a perception of partiality or a failure to comply with the presumption of innocence. An immediate decision of the Appeal Chamber is therefore required to either eliminate the appearance of such taint, or to ensure that the Mr Ruto is not committed to a lengthy and unnecessary trial on the basis of faulty and unfair evidential findings.
49. Given that this is the first instance in which the Defence have vigorously challenged Prosecution evidence at the confirmation hearing, an immediate resolution by the Appeals Chamber will provide clarity on how to address such evidence for these purposes. This clarity will advance the trial proceedings by clarifying the burden for alibi defences and the use of inferences with respect to defence evidence.

Fourth Issue: Insufficiency of Amended DCC

50. The Majority found that the Prosecution's Amended DCC (which, notably, was filed only 15 days prior to the confirmation hearing, in contravention of Rule 121(3)),⁴¹ was not deficient and met the requirements of Rule 121(3), which requires that the DCC contain a detailed description of the charges, and Regulation 52, which states that the DCC shall include, *inter alia*, "a statement of the facts, including the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person or persons to trial, including relevant facts for the exercise of jurisdiction by the Court".⁴²
51. The Majority approach places too little emphasis on the statutory requirement of a "detailed description" and the regulatory requirement that the DCC include a statement of facts which in and of itself provides a sufficient legal and factual basis for the Court to exercise jurisdiction.

⁴¹ *Prosecutor v. Ruto et al*, ICC-01/09-01/11-261, Prosecution's Amended Document Containing the Charges and List of Evidence submitted pursuant to Article 61(3) and Rules 121(3), (4) and (5), 15 August 2011.

⁴² Confirmation Decision, paras 96-98.

52. According to the Majority, the DCC need not be exhaustive in all of the information in support of the charges. Therefore, for instance, the composition of the organization of which Mr Ruto was allegedly a member, and which is a component of Court's ability to exercise subject matter jurisdiction over the suspect, need not be spelled out in the DCC. Rather, the Majority suggests the Defence can sift through all of the Prosecution's disclosure in order to "detect" these facts,⁴³ which are relevant for the exercise of jurisdiction by the Court.

53. The Defence submits that the Majority itself could not determine whether the Network organization existed by evaluating the facts contained in the DCC alone; it was forced to pull facts from Prosecution witness statements in order to complete its analysis.⁴⁴ This approach is contrary to the requirements of the Statute and Regulations of the Court and is therefore an appealable issue arising from the decision.

Fourth Issue: Impact on Fairness

54. The vague and imprecise way in which the Prosecution presented its Amended DCC, and the Majority's finding that the Defence should "detect" pertinent facts from the morass of Prosecution disclosure effected prior to the confirmation hearing has a negative impact on the Defence's ability to understand the case it is expected to challenge. It vitiates the usefulness of the DCC as a document which is intended to ensure that there is a "complete understanding of the 'statement of facts' underlying the charges confirmed by the Pre-Trial Chamber, and to enable a fair and effective presentation of the evidence".⁴⁵ The fact that necessary information is not contained in the Amended DCC therefore impacts the fairness of the proceedings.

Fourth Issue: Impact on Exeditiousness

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

⁴³ Confirmation Decision, para 101.

⁴⁴ Confirmation Decision, paras 184-208.

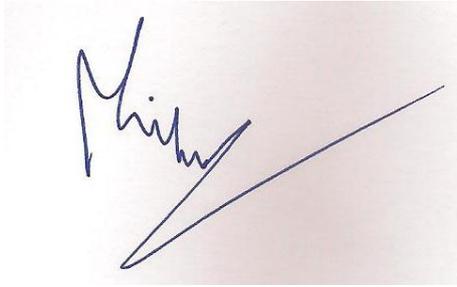
⁴⁵ *Prosecutor v. Lubanga*, ICC-01/04-01/06-1548, Order for the prosecution to file an amended document containing the charges, 9 December 2008, para. 13.

Fourth Issue: Immediate Decision would Materially Advance the Proceedings

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

IV. Conclusion & Request for Relief

57. The Defence respectfully seeks leave to appeal the four issues above, which arise from the Confirmation Decision. The Defence submits that these issues affect the fair and expeditious conduct of the proceedings and that an immediate resolution by the Appeals Chamber would materially advance the proceedings.



Kioko Kilukumi
On behalf of William Samoei Ruto
Dated this 30th day of January 2012
In Nairobi, Kenya