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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 Document**

**Prosecution's Consolidated Response to William Samoei Ruto's and  
Joshua Arap Sang's Applications for Leave to Appeal  
the Decision on the Confirmation of Charges**

**Source:** The Office of the Prosecutor

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## Introduction

1. The Defence of William Samoei Ruto (“Ruto”) and Joshua Arap Sang (“Sang”) (the “Defence”) seek leave to appeal the Decision on the Confirmation of Charges Pursuant to article 61(7)(a) issued by Pre-Trial Chamber II with a dissenting opinion of Judge Kaul (the “Decision”).<sup>1</sup> The Prosecution opposes these applications.
2. Ruto and Sang each raise four issues. The Prosecution jointly responds, grouping the issues where appropriate.
3. Three of Ruto’s issues are the same as or very similar to three of Sang’s issues. These common issues will be jointly addressed first in this response. Those issues are:
  - Whether the Majority erred by finding that the failure of the Prosecution to conduct proper investigations (including the failure to follow up on exculpatory leads and issues of reliability) has no consequences for the confirmation hearing independent of its assessment of the overall quality and sufficiency of the evidence presented (Sang, First Issue; Ruto, First Issue; “First common issue”);
  - Whether the Majority erred by improperly applying the burden of proof and 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’ anonymity on their weight (Sang, Second Issue; Ruto, Third Issue; “Second common issue”);
  - Whether the Majority erred in finding that the Amended DCC, which did not include the identities of alleged perpetrators, nor specifics as to

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<sup>1</sup> ICC-01/09-01/11-373. The Prosecution will refer indistinctively to “Pre-Trial Chamber”, “Chamber” or “Majority”.

members of the Network organization nor of the Applicants' alleged contribution, provided a sufficient legal and factual basis for the charges in that the DCC need not be exhaustive in its particulars (Sang, Fourth Issue; Ruto, Fourth Issue; "Third common Issue").

4. Ruto identifies as an additional issue "whether the Majority erred by relying on anonymous evidence alone or in corroboration with other anonymous evidence, while failing to implement adequate counterbalancing measures in order to minimize prejudice to the Defence" ("Ruto's second issue"). In turn, Sang raises the following individual issue: "Whether the Majority erred by failing to include any threshold for the required level of contribution by Mr. Sang under Article 25 (3) (d)" ("Sang's third issue").
5. As it will be demonstrated, none of the Issues arises from the Decision or constitute an "issue" within the terms of Article 82(1)(d). Additionally they do not fulfil the requirements for leave to appeal.
6. As established by the jurisprudence of the Court, the correctness of a decision is irrelevant to an application for leave to appeal under Article 82(1)(d). The sole question is whether the issue meets the criteria set out in the provision.<sup>2</sup> Reference to the merits of the Decision will only be made when necessary to demonstrate that it does not meet the criteria of Article 82(1)(d).

**The Issues fail to satisfy the test under Article 82(1)(d)**

7. The Appeals Chamber has held that "only an issue may form the subject-matter of an appealable decision. An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement of a conflicting opinion. [...] An issue is constituted by a subject the resolution of

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<sup>2</sup> ICC-02/04-01/05-20-US-Exp, para. 22.

which is essential for the determination of matters arising in the judicial cause under examination. It may be legal or factual or a mixed one.”<sup>3</sup>

### The Common Issues

#### *(a) The First Common Issue*

8. The Issue does not arise from the Decision. The Issue is predicated on a supposed finding from the Pre-Trial Chamber that the Prosecution failed to investigate exculpatory issues or issues of reliability.<sup>4</sup> According to the Applicants the Chamber made this finding, but refused to draw any consequences for the confirmation hearing from it.<sup>5</sup> All subsequent arguments from the Applicants on the alleged impact of the issue on the fair and expeditious conduct of the proceedings or the outcome of trial are based on this alleged determination by the Pre-Trial Chamber.
9. This purported finding, however, does not exist. At no point in the Decision did the Pre-Trial Chamber determine that the Prosecution had failed to investigate exculpatory issues or issues of reliability. The Decision only referred to “alleged failures”, i.e. failures alleged by the Applicants themselves, and further stated that if the Prosecution had failed to investigate properly, the Chamber would consider that in its examination of the Prosecution’s evidence.<sup>6</sup> Thus, the proposition that the Chamber verified the existence of investigative failures on behalf of the Prosecution but then decided to ignore them is plainly false: not only was such a finding never entered by the Chamber; the Chamber also expressly

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<sup>3</sup> ICC-01/04-01/06-168 OA3, paras. 9-10. See also, ICC-01/04-01/06-1433 OA11, (Dissenting Opinion of Judge Song), para. 4, specifying that “[a] decision “involves” an issue if the question of law or fact constituting the issue was essential for the determination or ruling that was made.”

<sup>4</sup> Ruto Application, para. 12; Sang Application, para.12.

<sup>5</sup> Ibid.

<sup>6</sup> Decision, para. 51. The Prosecution further notes that, when the Defence attempted to raise issues about the investigation during its presentation pursuant to Rule 122(3), the Presiding Judge effectively indicated that issues concerning the investigation should be raised during arguments on the merits of the case. See ICC-01/09-01/11-T-5-ENG, p. 29 lines 3-10.

stated that during its examination of the evidence any failure by the Prosecution to investigate properly the crimes charged would be considered.

10. In short, the Applicants effectively misrepresent the Chamber's Decision. The First Common Issue, predicated upon an inaccurate account of the Chamber's holding, does not arise from the Decision and should be dismissed on this basis alone.

11. In addition, the Applicants have failed to establish that the requirements of Article 82 (1) (d) apply to this issue. No explanation whatsoever is provided by the Applicants as to why they were prevented from presenting their case in the manner they deemed fit. Moreover, the Applicants' reliance on two rulings by the *Lubanga* Trial Chamber is misplaced. The first ruling concerns a situation of non-disclosure of material covered by Article 67(2) and Rule 77 *during trial*, and not the temporary use of restrictions confined to the confirmation hearing,<sup>7</sup> which the Appeals Chamber has held to be permissible.<sup>8</sup> The second ruling - which should also be read in the particular context of the *Lubanga* case, and in particular, in light of the fact that it related to a trial entering its final stages - actually supports the Pre-Trial Chamber's approach: when faced with allegations of prosecutorial failure to present reliable evidence the Chamber made it clear that the proper course of action was to review at the end of the case each instance where such a failure is alleged and make the necessary determinations.<sup>9</sup>

12. The Applicants also claim that in relation to certain credibility issues (chiefly, alleged coaching of witnesses) that they had alleged at the confirmation stage, the

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<sup>7</sup> ICC-01/04-01/06-1644. It is in this particular context that the Prosecution offered admissions of fact in lieu of the material that could not be disclosed during trial, which the Trial Chamber commented on at paras. 57-58 of its ruling.

<sup>8</sup> See *inter alia* *Prosecutor v. Lubanga*, [Judgment on Disclosure Restriction pursuant to Rule 81 \(2\) and \(4\)](#), ICC-01/04-01/06-568 OA3, 13 October 2006, para. 36: the fact that non-disclosure is an exception to a general rule of disclosure "does not establish an overly rigid system favouring one competing interest over another."

<sup>9</sup> ICC-01/04-01/06-2690-Red2, para. 204.

Chamber effectively put the onus on the Defence to “convince” the Pre-Trial Chamber.<sup>10</sup> However, nothing in the same portion of the Decision that the Applicants quote suggests that at any point in time the burden was shifted to the Defence. Rather, the passage quoted merely indicates that the Chamber evaluated “the evidence presented” by all parties and then reached the conclusion that there was “no evidence to demonstrate that the witnesses were actually coached”.<sup>11</sup> This only demonstrates that the Chamber reached its conclusion on the basis of its analysis of the evidence before it. Nothing in this passage, however, can be construed as suggesting that the Chamber improperly placed the burden of proof on the Applicants, as they wrongly suggest.

13. In short, the Applicants confuse the burden of persuasion with the burden of proof. The Pre-Trial Chamber never deviated from the requirement that the Prosecution maintain the burden of proof at confirmation.

14. The Applicants include other arguments pertaining to hypothetical results of investigative activities that they contend the Prosecution ought to have undertaken.<sup>12</sup> And it is argued that the Chamber ought to have considered the evidence that “could” have been put before it had the Prosecution investigated correctly.<sup>13</sup> The Prosecution submits that the fairness of the proceedings cannot be affected by “an abstract question or a hypothetical concern.”<sup>14</sup> Hypothetical considerations as to what could have happened had matters unfolded in the manner desired by the Applicants simply falls short of constituting a matter affecting the fairness of the proceedings.<sup>15</sup>

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<sup>10</sup> See Ruto Application, para.17.

<sup>11</sup> Decision, para. 88.

<sup>12</sup> Ruto Application, para. 18; Sang Application, para. 20.

<sup>13</sup> Sang Application, para. 20.

<sup>14</sup> ICC-01/05-01/08-532, para. 17.

<sup>15</sup>It does not suffice for an issue to have merely a hypothetical impact on the fairness or expeditiousness of proceedings: ICC-01/04-01/07-1958, para. 20. See also ICC-02/04-01/05-367, para. 22.

15. In relation to expeditiousness, the Applicants also fail to make the required showing. Their main argument appears to be that issues of credibility and reliability of Prosecution witnesses “may eventually” arise at trial, once the identities of the witnesses are disclosed to the Applicants, and thus should have been considered at confirmation. In other words, if the full trial had been conducted at the confirmation stage it would have foreclosed the need for a lengthy trial.<sup>16</sup> The Applicants’ arguments are again based on speculation as to what could happen at the trial stage and fail to demonstrate that the Decision raises issues of expeditiousness in the sense of a negative impact on the efficient and timely conduct of the successive proceedings. Disputes over the credibility of witness evidence are ordinary components of trial proceedings. Further, it is at trial, when the witnesses are present and give viva voce testimony and these issues can effectively be explored, not at the confirmation hearing. Thus, the possibility that issues of credibility may arise during the trial, a normal component of criminal trials, cannot constitute an issue affecting the expeditious conduct of the proceedings.<sup>17</sup>

16. Finally, the Applicants also fail to demonstrate that an immediate resolution by the Appeals Chamber would materially advance the proceedings. The Applicants’ argument is essentially predicated on the need for the Appeals Chamber to provide guidance for future cases. But, as established by the jurisprudence of this Court, “the mere fact that an issue is of general interest or that, given its overall importance, could be raised in, or affect, future pre-trial or

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<sup>16</sup> Ruto Application, para. 21; Sang Application, para. 22.

<sup>17</sup> The Applicants’ contention that if Pre-Trial Chambers imposed consequences for a failure to investigate the reliability of Prosecution witnesses this would expedite other, future proceedings (Ruto Application, para. 22; Sang Application, para. 24) is immaterial, since the burden on the Applicants is to demonstrate an impact on the expeditious conduct of *these* proceedings.



trial proceedings before the Court is not sufficient to warrant the granting of leave to appeal".<sup>18</sup>

*(b) The Second Common Issue*

17. In this issue, the Applicants claim that intervention by the Appeals Chamber is required to determine whether the Majority erred by improperly applying the burden of proof, and 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 witnesses' anonymity on their weight.<sup>19</sup>

18. The Prosecution recognizes that the correctness of the legal standard identified and applied by a Pre-Trial Chamber to assess the evidence placed before it at the confirmation stage, and the proper scope of that examination under the applicable legal provisions can constitute appealable issues justifying the granting of leave to appeal. For instance, the Prosecution has recently sought leave to appeal a decision rejecting confirmation of the charges in a different case before this Court on the basis that, in the Prosecution's view, the Majority of the Pre-Trial Chamber in that case had applied an erroneous evidentiary standard for the purposes of the confirmation of charges under Article 61.<sup>20</sup>

19. However, this is not the case here. The standards adopted by the Pre-Trial Chamber are not in issue in this case. In fact, the Applicants expressly state that they do not challenge the legal principles adopted by the Pre-Trial Chamber for the purposes of evaluating the evidence, but rather the outcome of the Chamber's reasoning.<sup>21</sup> This also transpires with clarity from the Applicants' arguments in the following paragraphs, where the Chamber's assessment of the evidence is criticized, including the Chamber's approach to the evidence of Witness 1 and 8,

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<sup>18</sup> Ruto Application, para. 23; Sang Application, para. 25. Much less is an alleged need to "sanction" the Prosecution a proper basis for the granting of leave to appeal.

<sup>19</sup> Third Issue, Ruto Application; Second Issue, Sang Application.

<sup>20</sup> ICC-01/04-01/10-480

<sup>21</sup> Ruto Application, para. 35; Sang Application, para 27.

the conflicting evidence presented by the Applicants and the resulting factual findings.<sup>22</sup> Thus, the issue raised by the Applicants is actually nothing but “a mere disagreement” with the Chamber’s factual findings stemming from its evaluation of the evidence before it. This has been held not to amount to an issue under Article 82 (1) (d) of the Statute by the jurisprudence of this Court.<sup>23</sup> On this basis alone, the Applications should be rejected.

20. In addition, the Issue does not arise from the Decision, or at least not in the manner in which it was framed, since the Applicants have misrepresented various aspects from the Decision. For instance, the contention that “prosecution evidence from anonymous sources was always deemed credible and reliable [...] while Defence evidence was always given a lower probative value [...]”<sup>24</sup> is plainly incorrect. For instance, at paras. 115-116 of the Decision, the Chamber relied on statements provided by Applicant Sang and concluded on their basis – and despite one detected inconsistency – that Sang might have not attended the first of the meetings where, according to the Prosecution, crimes were being planned.

21. Also, when discussing the alleged impact of the issue on the fairness of the proceedings, the Applicants appear to claim that the Chamber shifted the burden of proof to the Defence, effectively requiring the Defence to disprove the charges.<sup>25</sup> However, nothing in the Application or in the Decision supports this theory. For instance, Sang’s contention that he was effectively forced to demonstrate that he did not attend two planning meetings but also to disprove

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<sup>22</sup> Ruto Application, paras. 40-42; Sang Application, paras. 33-37.

<sup>23</sup> ICC-02/05-02/09-267, paras. 11 and 25. The Appeals Chamber itself has clarified that an “issue” for the purposes of Article 82 (1) (d) “is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion”. See ICC-01/04-168, para. 9

<sup>24</sup> Ruto Application, para. 38; Sang Application, para. 30.

<sup>25</sup> Ruto Application, paras. 39, 46 and 47; Sang Application, paras. 31, 35 and 41.

inferences to the contrary<sup>26</sup> does not hold. Sang once more confuses burden of proof with evaluation of evidence. The Chamber determined that Sang's evidence placed him away from the locations of the planning meetings at an early enough time that he could also have attended the meetings at a later time, which confirms that the Chamber considered that the evidence from both Prosecution and Defence were compatible.<sup>27</sup> Nothing here suggests any reversal of the burden of proof. The same applies to identical allegations made by Ruto.<sup>28</sup>

22. The Applicants' contention, also in relation to fairness, that the Chamber ignored the principle *in dubio pro reo* in its assessment of the evidence<sup>29</sup> is equally misguided. Leaving aside for the purposes of this response the question of whether the principle is properly applicable at the confirmation stage, the fact is that Chamber not only enunciated the principle as one that would guide its evaluation of the evidence;<sup>30</sup> it also applied it in practice, as reflected, for instance, by the manner in which the Chamber analysed the evidence pertaining to Sang's attendance to the 30 December 2006 meeting, and in relation to which despite the existence of contrary evidence from the Prosecution and inconsistencies between Defence witnesses the Chamber entered a finding that the Prosecution had failed to meet the required evidentiary threshold.<sup>31</sup>

23. This should suffice to demonstrate that the Applicants failed to establish the existence of an appealable issue. Not only are their arguments confined to a mere disagreement with the Chamber's factual findings; in attempting to explain how the issue purportedly affects the fairness of the proceedings they also

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<sup>26</sup> Sang Application, para. 37.

<sup>27</sup> Decision, paras. 123, 140. The same holds true in relation to Sang's complaint at para. 35: here, the Chamber's evaluation of the evidence led to the result that the most convincing evidence, on the basis of a number of factors, including consistency with other evidence, was that of the Prosecution (see Decision, paras. 128-132). Which evidence is the most credible one is a matter completely separate of who has the burden of proof in the context of confirmation proceedings.

<sup>28</sup> See Ruto Application, paras. 46 and 47.

<sup>29</sup> Ruto Application, para. 45; Sang Application, para. 40.

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

<sup>31</sup> Decision, paras. 115-116.

misrepresent the Decision. In relation to the remaining limbs of Article 82 (1) (d) (expeditiousness and material advance to the proceedings by Appeals Chamber intervention), the Applicants only offer cursory arguments that, as in the case of the previous issue, fail to establish make the required showing.<sup>32</sup>

*(c) The Third Common Issue*

24. The Applicants claim that the Majority erred in finding that the Amended DCC, which did not name alleged perpetrators or provide detailed specifics as to members of the Network organization and the Applicants' alleged contributions, was sufficient; they also claim that the Majority wrongly held that the DCC need not be exhaustive in its particulars.<sup>33</sup>

25. The Prosecution submits that the issue does not arise from the Decision. The Applicants support their claim with an incomplete quote of the Pre-Trial Chamber's Decision. Further, the Applicants' own conducts prior to and during the confirmation hearing demonstrate that there was never a real issue of sufficiency of notice as to the charges against them.

26. The Applicants claim that according to the Majority, the DCC "need not be exhaustive in all of the information in support of the charges" and, specifically, that the composition of the Network need not be spelled out in the DCC; they further contend that the Majority wrongly concluded that "the Defence can sift through all of the Prosecution's disclosure in order to 'detect' those facts [...]".<sup>34</sup> This misconstrues the Majority's findings. The full quote of the relevant part of the Decision is as follows:

"The Chamber will now turn to alleged defects of the Amended DCC

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<sup>32</sup> The arguments on expeditiousness are predicated on an alleged application of inconsistent standards, which the Applicants cannot demonstrate (see Ruto Application, para. 47; Sang Application, para. 42). The same applies to the alleged need for appellate intervention at this stage (Ruto Application, para. 48; Sang Application, para. 43).

<sup>33</sup> Ruto Application, Fourth Issue; Sang Application, Fourth Issue.

<sup>34</sup> Ruto Application, para. 52 ; Sang Application, para. 54.

concerning the exclusion of the identities of members, at various levels, of the alleged Network as well as the withholding of the dates of meetings in which the Suspects allegedly participated. With regard to the former, the Chamber considers that this information can be clearly detected from the evidence disclosed to the Defence. There is no requirement for the Prosecutor to spell out the exact composition of the Network in order for the Suspects to challenge the allegations against them. This holds true, a fortiori, when other members of the alleged Network are not charged with any crime within the jurisdiction of the Court. As for the redaction of the dates of the preparatory meetings, the Chamber observes that, although information about the exact date of a planning meeting can be of importance to the Defence, the redactions of certain dates within one witness' statement were necessary for security reasons and were authorized under rule 81(4) of the Rules".<sup>35</sup>

27. Thus, it is clear that at no point did the Majority assert that the DCC need not be exhaustive in all of the information in support of the charges.<sup>36</sup> Much less did it say that the Defence was expected to "sift" through the Prosecution's disclosure to find the relevant information. Rather, it said that in relation to the identities of the members of the Network, this information could be clearly detected from the evidence disclosed, i.e. that the information was fully available to the Defence and could be identified without effort. And it was only in relation to the identities of the other members of the Network that the Majority said that there was no requirement for the Prosecution to spell out in detail this information in order for the suspects to challenge the allegations against them. Once again, the Applicants misrepresent the Decision in an effort to create an appealable issue that does not arise from the ruling.<sup>37</sup>

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<sup>35</sup> Decision, para. 101. Emphasis added.

<sup>36</sup> The Prosecution further notes that at para. 98, the Chamber clarified that while a DCC need not be exhaustive in all the information in support of the charges, it still had to "provide the Defence with a sufficiently clear picture of the facts underpinning the charges against the Suspects and in particular in relation to the crimes, the dates and locations of their alleged commission".

<sup>37</sup> The Prosecution further notes that the Appellants erroneously claim that the DCC was filed only 15 days prior to the confirmation hearing, in contravention of Rule 121 (3) (Ruto Application, para. 50; Sang Application, para. 52). The original DCC was filed on 1 August 2011. An Amended DCC and an

28. The Prosecution can only present general arguments as to how this issue impacts on fairness. They fail however to demonstrate any impact on the fairness of *these* proceedings. The Prosecution submits that the Applicants' inability to articulate an impact on fairness reflects that the Amended DCC did not render the proceedings unfair and that the Applicants were fully able to understand the details of the charges against them. Indeed, the Applicants never challenged the sufficiency and/or clarity of the DCC or the Amended DCC before the start of the hearing itself, and even at the commencement of the hearing, as an issue related to the proper conduct of the proceedings under Rule 122 (3) that ought to be determined prior to the hearing of the merits of the case. This strongly contradicts their post-confirmation complaint that they lacked adequate notice before the confirmation hearing.

29. In this sense, the Prosecution notes that the schedule for the confirmation of charges hearing, issued on 25 August 2011,<sup>38</sup> the Single Judge specifically included a period of one hour each for the suspects to make "Observations [...] on Jurisdiction, Admissibility and Procedural Matters" on the first day of the confirmation hearing (1 September).<sup>39</sup> On that first day<sup>40</sup> the Presiding Judge reiterated that the Defence had the opportunity, as provided in the schedule, to make observations on jurisdiction and procedural matters.<sup>41</sup> While counsel for both applicants addressed the Court on several issues, neither raised the issue of the sufficiency or specificity of the Amended DCC as a preliminary matter.<sup>42</sup>

30. Days later, Ruto devoted significant time to advance arguments against the Amended DCC jointly with his arguments on the merits of the case against

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amended list of evidence were filed on 15 August 2011, in full compliance with Rule 121 (4) which allows the Prosecution to amend the charges "no later than 15 days before the date of the hearing".

<sup>38</sup> ICC-01/09-01/11-294-Anx-Corr

<sup>39</sup> See p. 2

<sup>40</sup> ICC-01/09-01/11-T-5-ENG ET WT 01-09-2011

<sup>41</sup> P. 22 lines 1-7

<sup>42</sup> See T. p. 23, line 9-p. 30, line 12 and T. p. 42 line 1-p. 56 line 18.

them.<sup>43</sup> Both Applicants then raised the alleged lack of specificity again in their closing briefs.<sup>44</sup> But this chronology of events, and specifically the absent of a timely complaint that they could not prepare for confirmation because of the inadequacy of the DCC and Amended DCC, further demonstrates that at no time during the proceedings did the Amended DCC and its treatment by the Majority create an issue capable of affecting the fair conduct of the proceedings.

31. The Applicants' arguments on expeditiousness equally fail to establish the existence of an appealable issue. The Applicants basically argue that "without the identities of alleged co-perpetrators and members of the Network etc specified in the DCC" the Defence will require extra time to prepare its case for trial. This assertion is also based on a misrepresentation of the Decision. The Applicants were not deprived of relevant information they deemed relevant. On the contrary, this information is in their possession and is clearly identifiable, as noted by the Majority. Thus, no impact on expeditiousness can reasonably be claimed on this basis.

32. Finally, the Applicants claim in a cursory fashion that intervention by the Appeals Chamber is needed in order to clarify the "specific contours" of the charges against the Applicants.<sup>45</sup> The Prosecution notes that leaving aside the legitimacy and correctness of the Applicants' grievances related to the Amended DCC, the Applicants will have recourse before the Trial Chamber in order to seek whatever measures they deem fit in order to be adequately prepared for trial. Thus, there is no need to engage the Appeals Chamber at this stage.

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<sup>43</sup> T-6 page 121 line 2 *et seq.* ; Counsel for Applicant Sang minimally discussed the issue of specificity at T-10 p. 10 line 5 *et seq.* and p. 23 line 23 *et seq.*

<sup>44</sup>RUTO discusses lack of specificity of the DCC in his closing brief (ICC-01/09-01/11-355) at paras. 37-56 and 57-75; Sang (Network members not named in DCC) discusses lack of specificity in the DCC in his closing brief (ICC-01/09-01/11-354) at para. 77

<sup>45</sup> Ruto Application, para. 56; Sang Application, para. 58.

## The Individual Issues

### *(a) Ruto's Second Issue*

33. Ruto argues that the Majority relied on the evidence of a single uncorroborated anonymous witness or allowed corroboration by a second anonymous witness (relating to Witness 6 or Witness 8) to find that key preparatory meetings had occurred in December 2006 and April 2007. Further, he claims that "one allegation by Witness 6 [...] pertaining to meetings allegedly held at Cheramboss' house on a non-disclosed dates [*sic*] in December 2007, was deemed sufficiently reliable."<sup>46</sup>
34. The Prosecution submits that Ruto's representation of the Decision is incorrect. Concerning the December 2006 meeting, the Chamber did not rely only on evidence from Witness 8. In paras. 113-119 of the Decision, the Chamber concluded that this meeting occurred. In para. 117, it identified evidence that corroborated Witness 8: "other witnesses report about follow up meetings of the 30 December 2006 meeting, including the role of other members of the alleged Network and the topics that were discussed in a similar manner as described by witness 8" (relying on W1). This is characteristic of the Chamber's decision: the Majority examined each piece of evidence individually and analyzed the evidence holistically, in order to verify whether the characteristics of meetings on different days were similar and thus corroborative of each other.
35. The same is true of the April 2007 meeting, which the Chamber discussed at paras. 120-125 (which Ruto also omits to cite in its Application). These paragraphs contradict Ruto's arguments. They show that the Chamber compared evidence about this meeting with evidence related to other meetings and found that the common elements of the meetings corroborated the existence of the April meeting. Again, the Chamber reached its conclusions based on a holistic view of

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<sup>46</sup> Ruto Application, para. 26.



multiple pieces of evidence, not on the statement of a single anonymous witness, as Ruto claims.

36. As to Witness 6's meeting at Cheramboss' house, the Chamber found substantial grounds to believe that this meeting occurred again because, even though only Witness 6 gave evidence of this specific meeting, the substance of the meeting was similar to other meetings described by other witnesses, and the Chamber therefore determined that its existence was sufficiently corroborated.<sup>47</sup>

37. Finally, Ruto's contention that the Majority based factual conclusions on fundamental aspects of the case against him on the basis of the combined evidence of anonymous Witnesses 1 and 8 also inaccurately represents the Decision. The reference to the meeting at the Sirikwa Hotel and Ruto's contention that "[i]t should not be presumed that a suspect was at a particular meeting just because there is anonymous evidence that he was present at another" omit the critical fact that the Chamber found that Ruto was at the meeting because (1) both Witnesses 1 and 8 placed him there, (2) Witness 1's and Witness 8's accounts of the meeting were overall believable because they were generally corroborated by accounts of other meetings, and (3) Witness 8's account of the meeting was overall believable because it was precise and detailed.<sup>48</sup> Thus, it was on the basis of these three factors, including the corroboration of the accounts of the two witnesses by independent evidence, that the Chamber reached the factual conclusion referred to by Ruto.

38. The preceding paragraphs demonstrate that Ruto's claim that the Chamber entered factual findings on the basis of the evidence of a single uncorroborated witness or that of two anonymous witnesses "in tandem" is plainly wrong. Thus, the issue identified by Ruto does not arise from the Decision. What remains is

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<sup>47</sup> See Decision, para. 149.

<sup>48</sup> Decision paras. 130-131

simply a disagreement with the Pre-Trial Chamber's factual conclusions which, as already advanced in this Response, falls short of constituting an appealable issue.

39. In addition, the Prosecution notes that Ruto's misrepresentations of the Decision continue in the discussion on the alleged impact on fairness. Ruto asserts that the "reliability and credibility" of anonymous evidence "is completely untested (and unverifiable due to the anonymity)". However, the Chamber specifically noted that it would evaluate anonymous witness evidence by "taking into account whether there is corroboration by other evidence".<sup>49</sup> Examples of the Chamber's application of this method for testing the evidence can be seen throughout the Decision.

40. The Prosecution finally notes that Ruto offers no real arguments as to why and how the issue impacts on the expeditious conduct of the proceedings, other than an unsubstantiated assertion that issues that should have been addressed at the confirmation hearing will be deferred to the trial.<sup>50</sup> As to the need for intervention by the Appeals Chamber, the Prosecution notes that Ruto's brief arguments involve considerations of appearance of justice and credibility of the Pre-Trial Chamber, which in and of themselves are insufficient to justify appellate intervention at this stage. The role of the Appeals Chamber in the context of interlocutory appeals is not to enhance the credibility of a Chamber or the appearance of justice, it is to rid "the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial."<sup>51</sup> In addition, the Prosecution notes that nothing prevents Ruto, once he receives full disclosure, to explore and raise all relevant matters related to

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<sup>49</sup> Decision para. 78

<sup>50</sup> The Applicant also offers in the alternative arguments pertaining to an alleged impact on the "outcome of the proceedings", referring to the confirmation hearing (Ruto Application, para. 33). The Prosecution need only note that Article 82 (1) (d) refers to the "outcome of trial". Thus, the impact that an issue may have on the outcome of the confirmation proceedings is not a base for leave to appeal being granted under article 82 (1) (d), unless the issue simultaneously affects the outcome of the trial.

<sup>51</sup> *Situation in the Democratic Republic of the Congo*, [Judgment on Extraordinary Review](#), ICC-01/04-168 OA3, 13 July 2006, para.14.

credibility and reliability of the evidence at trial. Thus, the existence of an appropriate procedural avenue for Ruto to raise his concerns during the proceedings further demonstrates that there is no need to engage the Appeals Chamber at this stage.

*(b) Sang's Third Issue*

41. The Third Issue raised in Sang's Application is "whether the Majority erred by failing to include any threshold for the required level of contribution by Sang under Article 25(3)(d)".<sup>52</sup> Sang submits that the Pre-Trial Chamber erred by finding that the threshold under Article 25(3)(d) is satisfied by a less than "substantial" contribution but without specifying the minimum threshold for such contribution. According to Sang, this is inconsistent with the recent finding by Pre-Trial Chamber I in the *Mbarushimana* case where that Chamber determined that the contribution under Article 25(3)(d) must at least be "significant".<sup>53</sup> Sang further argues that "it cannot be that any contribution to the commission of a crime, no matter how insignificant, is sufficient to impute liability to a suspect".<sup>54</sup>
42. Sang's Application on this issue misrepresents the Decision and consequently fails to establish an appealable issue within the terms of Article 82(1)(d).<sup>55</sup> The issue as framed does not arise out of the Decision. Contrary to Sang's contention, the Pre-Trial Chamber did not find that an insignificant contribution would be sufficient to meet the threshold of Article 25(3)(d).

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<sup>52</sup> Sang's Application, paras.9(c), 45-51.

<sup>53</sup> Sang's Application, para.45.

<sup>54</sup> Sang's Application, para.46.

<sup>55</sup> The Appeals Chamber has held that "only an issue may form the subject-matter of an appealable decision. An issue is an identifiable subject or topic requiring a decision for its resolution. [...] An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination." ICC-01/04-168 OA3, paras. 9-10. See also, ICC-01/04-01/06-1433 OA11, Dissenting Opinion of Judge Song, para. 4, specifying that "[a] decision "involves" an issue if the question of law or fact constituting the issue was essential for the determination or ruling that was made."

43. Moreover, and more importantly, it is abundantly clear from the factual findings that the Pre-Trial Chamber did not commit Sang to trial based on his “insignificant” contribution to the commission of the crimes. On the contrary, the Pre-Trial Chamber found that “Mr. Sang, by virtue of his position within Kass FM as a key broadcaster, intentionally contributed to the commission of the crimes against humanity referred to above by: (i) placing his show Lee Nee Emet at the disposal of the organisation; (ii) advertising the meetings of the organisation; (iii) fanning the violence through the spread of hate messages explicitly revealing desire to expel the Kikuyus; (iv) broadcasting false news regarding alleged murders of Kalenjin people in order to inflame the atmosphere in the days preceding the elections; and (v) broadcasting instructions during the attacks in order to direct the physical perpetrators to the areas designated as targets”.<sup>56</sup> The arguments presented by Sang, that the Chamber applied an incorrect minimum threshold, are refuted by the Chamber’s findings; the failure of the Chamber to enunciate the specific standard does not impact on the fairness of the Decision. At most, Sang’s claim constitutes an “abstract question”<sup>57</sup> inadequate to require or justify leave to appeal.

44. Even if the Pre-Trial Chamber concludes that the Issue arises from the Decision, the Prosecution submits that it does not meet the requirements for leave to appeal under Article 82(1)(d). Sang’s argument that it would be unfair to be committed to trial based on any insignificant contribution<sup>58</sup> is predicated on the erroneous assumption that he was committed based on his insignificant contributions to the commission of the crimes. As demonstrated above, this assumption is based on a misrepresentation of the relevant findings in the Decision. The same applies to Sang’s arguments seeking to establish that he would be unfairly prejudiced by the

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<sup>56</sup> Decision, para.355.

<sup>57</sup> ICC-01/05-01/08-532, para. 17.

<sup>58</sup> Sang’s Application, para.47.

alleged inconsistency of approach between Pre-Trial Chambers I and II,<sup>59</sup> that the Issue affects the expeditious conduct of the proceedings<sup>60</sup> and that an immediate resolution by the Appeals Chamber of the this Issue may materially advance the proceedings.<sup>61</sup>

### **Relief sought**

45. For the reasons set out above, the Prosecution requests that the Trial Chamber reject the Defence's Application.



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Luis Moreno-Ocampo,  
Prosecutor

Dated this 3<sup>rd</sup> day of February 2012

At The Hague, The Netherlands

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<sup>59</sup> Sang's Application, para.48.

<sup>60</sup> Sang's Application, para.49.

<sup>61</sup> Sang's Application, paras.50-51.