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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 AND
JOSHUA ARAP SANG**

Public Document

**Decision on the Defences' Applications for Leave to Appeal the Decision on the
Confirmation of Charges Pursuant to Article 61(7) (a) and (b) of the Rome Statute**

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

The Office of the Prosecutor

Luis Moreno-Ocampo, Prosecutor
Fatou Bensouda, Deputy Prosecutor

Counsel for William Samoei Ruto

Joseph Kipchumba Kigen-Katwa, David
Hooper and Kioko Kilukumi Musau

Counsel for Joshua Arap Sang

Joseph Kipchumba Kigen-Katwa, Joel
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Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Other

Appeals Chamber

Registrar & Deputy Registrar

Silvana Arbia, Registrar
Didier Preira, Deputy-Registrar

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

PRE-TRIAL CHAMBER II (the “Chamber”) of the International Criminal Court (the “Court”), by majority, issues this decision on the “Defence[s] Application[s] for Leave to Appeal the Decision[s] on the Confirmation of Charges” (“Mr. Ruto’s/ Mr. Sang’s Application(s)” or the “Applications”).¹

I. PROCEDURAL HISTORY

1. On 26 November 2009, the Prosecutor filed a request for authorization to commence an investigation into the situation in the Republic of Kenya.² On 31 March 2010, the Chamber authorized, by majority, the commencement of an investigation into the situation in the Republic of Kenya in relation to crimes against humanity within the jurisdiction of the Court committed between 1 June 2005 and 26 November 2009.³

2. On 8 March 2011, the Chamber, by majority, decided to summon William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang to appear before the Court.⁴ Pursuant to this decision, the suspects voluntarily appeared before the Court at the initial appearance hearing held on 7 April 2011,⁵ during which, *inter alia*, the Chamber scheduled the commencement of the confirmation of charges hearing for Thursday, 1 September 2011.⁶

3. On 1 September 2011, the confirmation of charges hearing commenced and lasted for one week.

4. On 26 October 2011, the Chamber issued the “Decision on the Issuance of the Decision Pursuant to Article 61(7) of the Rome Statute”, in which it decided to vary

¹ ICC-01/09-01/11-377; ICC-01/09-01/11-376.

² ICC-01/09-3 and its annexes.

³ Pre-Trial Chamber II, “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya”, ICC-01/09-19-Corr.

⁴ Pre-Trial Chamber II, “Decision on the Prosecutor’s Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang”, ICC-01/09-01/11-01.

⁵ ICC-01/09-01/11-T-1-ENG.

⁶ ICC-01/09-01/11-T-1-ENG, page 17, lines 12 to 25.

exceptionally the time limit prescribed by regulation 53 of the Regulations of the Court for the date of issuance of the decision.⁷

5. On 23 January 2012, the Chamber issued the “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute”, in which, *inter alia*, it confirmed the charges presented against Mr. Ruto and Mr. Sang to the extent specified in the decision (the “Confirmation of Charges Decision”).⁸

6. On 30 January 2012, the Chamber received Mr. Ruto and Mr. Sang ‘s Applications in which they request leave to appeal eight issues in total.

7. As to Mr. Ruto’s Application, the Defence seeks leave to appeal the following four issues:

- a. 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;
- b. 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;
- c. 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. 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.⁹

8. With respect to Mr. Sang’s Application, the Defence put forward the following four issues:

- a. 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;

⁷ ICC-01/09-01/11-357.

⁸ Pre-Trial Chamber II, ICC-01/09-01/11-373.

⁹ ICC-01/09-01/11-377, para. 9.

- b. 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's anonymity on their weight;
- c. Whether the Majority erred by failing to include any threshold for the required level of contribution by Mr. Sang under Article 25(3)(d); and
- d. Whether the Majority erred in finding that the Amended DCC, which did not include the identities of alleged perpetrators, nor specifics as to members of the Network organization, nor of Mr. Sang'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

9. On 3 February 2012, the Chamber received the "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."¹¹

II. APPLICABLE LAW

10. The Chamber notes articles 21(1)(a), (2), (3) and 82(1)(d) of the Rome Statute (the "Statute") and rule 155 of the Rules of Procedure and Evidence.

III. THE CHAMBER'S DETERMINATION

11. According to article 82(1)(d) of the Statute, "[e]ither party may appeal [...]:

(d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial [...] Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

12. In this regard, the Chamber recalls the first decision on interlocutory appeals dated 19 August 2005, in which this Chamber, albeit with different composition, held that when examining an application for leave to appeal under article 82(1)(d) of the Statute, it must be guided by three main principles: a) the restrictive nature of the remedy provided in this provision; b) the need for the applicant to satisfy the

¹⁰ ICC-01/09-01/11-376, para. 9.

¹¹ ICC-01/09-01/11-385.

Chamber as to the fulfillment of the requirements embodied in this provision; and c) the irrelevance of addressing arguments concerning the merits of the appeal.¹² The Chamber also recalls the Appeals Chamber's judgment of 13 July 2006 (the "13 July 2006 Judgment"), which considers that the object of the remedy provided in article 82(1)(d) of the Statute, is to "pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial".¹³ The Chamber shall therefore assess the Defences' Applications in light of these principles.

13. Having laid down the main principles underlying interlocutory appeals, the Chamber turns to the requirements regulating the granting or rejecting of an application for leave to appeal.

14. For a leave to appeal to be granted, the following requirements must be satisfied:

- a) The decision must involve an "issue" that would significantly affect (i) both the "fair" and "expeditious" conduct of the proceedings (ii) or the outcome of the trial; and
- b) In the view of the Pre-Trial Chamber, an immediate resolution by the Appeals Chamber is warranted as it may materially advance the proceedings.

15. Thus to grant the relief sought in paragraphs 57 and 59 of the Applications, Mr. Ruto and Mr. Sang must first demonstrate the existence of an "appealable issue"

¹² Pre-Trial Chamber II, "Decision on Prosecutor's Application for Leave to Appeal in Part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58", ICC-02/04-01/05-20-US-Exp, unsealed pursuant to Decision ICC-02/04-01/05-52 dated 13 October 2005, para. 15; "Decision on the Prosecution's Application for Leave to Appeal the Decision on Victims' Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06", ICC-02/04-112, para. 16; see also Trial Chamber I, "Decision on two requests for leave to appeal the 'Decision on the request by DRC-D01-WWWW-0019 for special protective measures relating to his asylum application'", ICC-01/04-01/06-2779, para. 10.

¹³ Appeals Chamber, "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber's 31 March 2006 Decision Denying Leave to Appeal", ICC-01/04-168, para. 19.

arising from the Confirmation of Charges Decision, which in turn, meets the requirements as specified in paragraphs (a) and (b).¹⁴

16. In this respect, the Chamber recalls that according to the established practice of the Pre-Trial Chambers, the drafters of the Statute intentionally excluded the decision on the confirmation of charges from the categories of decisions which may be directly appealed before the Appeals Chamber.¹⁵ The decision on the confirmation of charges, by its very nature, is predicated upon an assessment of the evidence. Thus, if any alleged issue related to the assessment of the evidence would be considered as meeting the requirements of article 82(1)(d) of the Statute, this would be tantamount to making the decision on confirmation of charges directly appealable. Accordingly, arguing that any alleged error in the Chamber's approach by definition constitutes an appealable issue simply because in the absence of such error the charges would not have been confirmed, is not tenable. This means that the Chamber must take particular care in exercising its judicial functions in determining whether the issues presented are indeed appealable. Bearing in mind these general considerations, the Chamber shall address in the following sections the issues for which the Defence of Mr. Ruto and the Defence of Mr. Sang request leave to appeal.

Determination on the Eight Issues

17. As stated in paragraphs 7 and 8 above, Mr. Ruto and Mr. Sang presented eight alleged issues for the purpose of being resolved by a decision of the Appeals Chamber. In this regard, the Chamber observes that the first, third and fourth issues (a, c and d) outlined in Mr. Ruto's Application are the same as the first, second and fourth issues (a, b and d) presented in Mr. Sang's Application. For this reason, the

¹⁴ 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'", ICC-01/05-01/08-532, paras 14-16.

¹⁵ Pre-Trial Chamber I, ICC-01/04-01/06-915, "Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges", para. 19; 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'", ICC-01/05-01/08-532, para. 12; Pre-Trial Chamber I, "Decision on the 'Prosecution's Application for Leave to Appeal the 'Decision on the Confirmation of Charges'", ICC-02/05-02/09-267, p. 5.

Chamber shall rule on these common issues in the two Applications collectively. Thereafter, the Chamber shall address the two remaining distinct issues in the two Applications separately. For the purpose of properly engaging with the Defences' arguments, the Chamber may find it necessary to slightly engage with the merits, but only to the extent necessary.

First Common Issue

18. In the two Applications, the Defences of Mr. Ruto and Mr. Sang argue that point (a) common to the two Applications regarding the Prosecutor's investigation is an "appealable issue" within the meaning of article 82(1)(d) of the Statute. In developing their argument, the Defences of Mr. Ruto and Mr. Sang principally rely on paragraph 51 of the Confirmation of Charges Decision. Referring to a number of passages from said paragraph, the Defences of the two accused aver that "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'".¹⁶

19. The Defences of Mr. Ruto and Mr. Sang claim further that, "if a Pre-Trial Chamber *is not convinced 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" (emphasis added).¹⁷ According to the Defence, the Majority's approach outlined above coupled with its alleged error in finding that "the failure of the Prosecution to investigate exculpatory issues or issues of reliability had no consequences for the confirmation hearing other

¹⁶ ICC-01/09-01/11-377, para. 11; ICC-01/09-01/11-376, para. 11.

¹⁷ ICC-01/09-01/11-377, para. 11; ICC-01/09-01/11-376, para. 11.

than in assessing the sufficiency of the evidence” is an “issue which affects the overall fairness and expeditiousness of the proceedings”.¹⁸

20. At the outset, the Chamber recalls its earlier finding, albeit in a different context, that “parties and participants [...] although they are entitled to have access to the Court [...] to put forward any request that they may deem essential for strengthening their case, they are equally obliged to frame their arguments exercising good faith”.¹⁹

21. In this context, the Chamber cannot agree with the Defences’ arguments as they are based on a selective approach resulting in a misrepresentation of the Confirmation of Charges Decision. It is true that in paragraph 51 the Chamber stated that “the Chamber’s role at the current stage of the proceedings is to determine whether sufficient evidence has been adduced to establish substantial grounds to believe that the Suspects committed the crimes charged [...] [and] [i]f he has failed to investigate properly, this will certainly have a bearing on the quality and sufficiency of the evidence presented”.²⁰ However, contrary to the Defences’ assertion, the Chamber continued to state that “the matter will be finally decided by way of an examination of the said evidence pursuant to article 61(7) of the Statute [...] the scope of determination under article 61(7) of the Statute relates to the assessment of the evidence available and not the manner in which the Prosecutor conducted his investigations”.²¹

22. Thus, the Chamber has neither made a finding that the Prosecutor failed to investigate “incriminating and exonerating circumstances”²² nor ruled out the possibility of requesting the Prosecutor to furnish the Chamber with additional evidence or conduct further investigation pursuant to article 61(7)(c)(i) of the Statute. Rather, it explicitly stressed that the scope of determination under article 61(7) is

¹⁸ ICC-01/09-01/11-377, para. 12; ICC-01/09-01/11-376, para. 12.

¹⁹ Pre-Trial Chamber II, “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute”, ICC-01/09-01/11-101, para. 37.

²⁰ Pre-Trial Chamber II, ICC-01/09-01/11-373, para. 51.

²¹ Pre-Trial Chamber II, ICC-01/09-01/11-373, para. 51.

²² ICC-01/09-01/11-377, para. 12; ICC-01/09-01/11-376, para. 12.

evidentiary in nature and does not interfere with the Prosecutor's independence or methods of conducting his investigations. Yet, if such alleged failure was detected by the Chamber, the "matter [as the Chamber stated] will be finally decided by way of an examination of the said evidence pursuant to article 61(7) of the Statute",²³ be it by way of declining to confirm the charges or requesting additional evidence or requesting the conduct of further investigations, as dictated by the different subparagraphs of this provision. This approach was reiterated in paragraph 53, where the Chamber explicitly stated that it "will not address any of the complaints [related to the manner of investigation] and [instead it] will exclusively conduct an assessment of the evidence proffered by the parties in order to determine whether the evidentiary threshold required by article 61(7) [...] has been met or not".²⁴

23. The reason for the Chamber to select one approach and not the other within the alternatives set out in article 61(7) of the Statute is another matter which falls within its pure discretion, depending on the circumstances of each case and the evidence presented before it. In the present case, the Chamber deemed the evidence presented sufficient for taking a decision on the merits without the need to go back to the Prosecutor for further investigation.

24. Since the Defences of Mr. Ruto and Mr. Sang constructed their arguments on the basis of a misinterpretation of the Confirmation of Charges Decision, as explained above, the Chamber finds that there is no "issue", which arises out of said decision within the meaning of article 82(1)(d) of the Statute. Accordingly, there is no need to address the remaining requirements under this provision in light of the arguments presented by Mr. Ruto and Mr. Sang in their Applications.

Second Common Issue

25. As to the second common issue, namely, the third issue in Mr. Ruto's Application and the second issue in Mr. Sang's Application, the Defence teams of the

²³ Pre-Trial Chamber II, ICC-01/09-01/11-373, para. 51.

²⁴ Pre-Trial Chamber II, ICC-01/09-01/11-373, para. 53.

two accused persons allege that the Chamber “did not apply the standards [or the legal principles set out in the Confirmation of Charges Decision] in reasonable and consistent manner”.²⁵ Quoting paragraphs 78, 83, 86, and 92 of the Confirmation of Charges Decision regarding the assessment of anonymous witness statements, inconsistencies, reliability and probative value to be accorded to the evidence, the Defences of Mr. Ruto and Mr. Sang claim that:

When the time came for the Majority to apply these standards [or principles] 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 witness or had a motive to lie in order to protect his own interests.²⁶

26. In developing further their arguments, the Defences of Mr. Ruto and Mr. Sang referred to, *inter alia*, the Chamber’s findings with respect to the existence of a number of planning meetings and the presence of the accused persons in these meetings based on the statements of anonymous allegedly unreliable witnesses.²⁷ As per the Defence of Mr. Ruto, the Chamber erroneously relied on the statement of sole anonymous Witness 8 whose credibility was challenged by the Defence for being “coached and/or induced to provide evidence implicating the accused”.²⁸ According to the Defence of Mr. Sang, the Chamber also erred by relying on the statements of anonymous witnesses 1 and 8 “whose testimony should have been afforded a low probative value”.²⁹ The fact that these anonymous witnesses corroborated each other is not sufficient to “remedy any prejudice [suffered] as the Defence is unable to test [their] reliability [...]”, the Defence of Mr. Sang added.³⁰

27. Moreover, in an attempt to prove the alleged inconsistency in the Chamber’s assessment of evidence and the alleged reversal of burden of proof, the Defence of Mr. Sang asserts that it provided two *viva voce* witnesses and three statements from

²⁵ ICC-01/09-01/11-377, para. 35; ICC-01/09-01/11-376, para. 27.

²⁶ ICC-01/09-01/11-377, para. 38; ICC-01/09-01/11-376, para. 30.

²⁷ ICC-01/09-01/11-377, para. 40 ; ICC-01/09-01/11-376, para. 33.

²⁸ ICC-01/09-01/11-377, para. 40.

²⁹ ICC-01/09-01/11-376, para. 33.

³⁰ ICC-01/09-01/11-376, para. 33.

“non-anonymous, disinterested witnesses”. Yet, the Chamber “accepted the probative value of the Prosecution statements because they were ‘precise and detailed’”. By so doing, the Chamber “privileged the testimony of two anonymous, inconsistent witnesses – whose credibility could not be tested [...] over two non-anonymous witnesses [together with] three statements from non-anonymous, disinterested witnesses”. In the Defence’s opinion, the Chamber’s approach in relation to the different meetings is not only erroneous but also shifts the burden of proof to the Defence. Had the Chamber applied its “evidential principles in a consistent manner”, some aspects of the charges would not have been confirmed, the Defence of Mr. Sang contended.

28. Similarly, in nine paragraphs of its Application, the Defence of Mr. Ruto presented identical arguments also concluding that if the Chamber “had applied its evidential principles in consistent manner, it would have been unable to confirm aspects of the charges which relied on Mr. Ruto’s presence” at the first planning meeting.³¹

29. The Chamber does not concur with the Defences’ assertions. It considers that in order to respond to every argument of such nature as that presented by the Defence, the Chamber would have to respond to the merits related to the subject matter of the appeal sought by the Defence – a role which the Chamber should not exercise, as it is only reserved for the Appeals Chamber. Yet, suffice it to say that the crux of the arguments summarized above reveal that the Defences of Mr. Ruto and Mr. Sang are, in effect, disputing the manner in which the Chamber assessed its evidence as well as the outcome of the Confirmation of Charges Decision resulting from such an assessment. This dispute is apparent, for example, from the language used by the Defence of Mr. Sang when asserting that the Chamber “accepted the probative value of the Prosecution statements because they were ‘precise and detailed’”,³² or that it “privileged the testimony of two anonymous, inconsistent

³¹ ICC-01/09-01/11-377, paras 35-43.

³² ICC-01/09-01/11-376, para. 35.

witnesses – whose credibility could not be tested [...] over two non-anonymous witnesses [together with] three statements from non-anonymous, disinterested witnesses”. The Defence of Mr. Ruto also followed the exact same line of argumentation.³³

30. In this regard, the Chamber wishes to point out that its approach does not rest on the *quantity* of evidence presented or *merely* on its source, but rather on the overall content and quality of information provided seen in light of the entire chain of facts related to the case. Thus, the final assessment of the evidence in favour of the Prosecutor was not based on the number of statements provided by either party. Rather, the Chamber relied on the sort of information received from the Prosecutor’s witnesses and how such information complemented each other in a way which persuaded the Chamber to the required evidentiary standard that a certain fact existed or not. The Chamber’s holistic approach in evaluating the evidence, as opposed to a mechanical weighing of individual pieces of evidence against each other, is actually what the Defences of Mr. Ruto and Mr. Sang dispute.

31. Moreover, the Chamber’s approach in the Confirmation of Charges Decision neither required the Defence to discredit the evidence presented by the Prosecutor nor in other words reverses the burden of proof as the Defence allege. Yet, given that the Defence availed itself the right to present evidence, the Chamber was required to consider whether such evidence was relevant and bore sufficient probative value. Since the evidence presented by the Defence failed to support its arguments, while the Prosecutor’s evidence met the requisite threshold, the Chamber could not have concluded in favour of the Defence for the sole reason that the burden of proof rests with the Prosecutor. This conclusion makes it evident that, as the Prosecutor correctly points out that, “the issue raised by the Applicants is actually nothing but a

³³ ICC-01/09-01/11-377, para. 42.

‘mere disagreement’ with the Chamber’s factual findings stemming from its evaluation of the evidence before it”.³⁴

32. In the 13 July 2006 Judgment, the Appeals Chamber defined an appealable issue as:

[A]n identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion. There may be disagreement or conflict of views on the law applicable for the resolution of a matter arising for determination in the judicial process. This conflict of opinion does not define an appealable subject. 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. The issue may be legal or factual or a mixed one.³⁵

According to the Appeals Chamber’s definition, a disagreement with the Chamber’s treatment of the evidence and the factual findings related thereto does not constitute an appealable issue within the meaning of article 82(1)(d) of the Statute. Having reached the said conclusion, the Chamber does not find it necessary to show that the Defence has also misrepresented other portions of its Confirmation of Charges Decision, or to examine the remaining requirements under this provision.

Third Common Issue

33. With respect to the third common issue, namely, the forth issue in Mr. Ruto’s and Mr. Sang’s Applications, the Defence teams of both accused persons argue in identical terms that the Majority’s finding that the Prosecutor’s Amended Document Containing the Charges (the “DCC”) was not deficient and met the requirements of rule 121 of the Rules of Procedures and Evidence, “place[d] too little emphasis on the statutory requirement of a ‘detailed description’ set out in this rule”.³⁶ They allege that the Chamber’s approach also placed “too little emphasis [...] on 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”.³⁷

³⁴ ICC-01/09-01/11-385, para. 19.

³⁵ Appeals Chamber, “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber’s 31 March 2006 Decision Denying Leave to Appeal”, ICC-01/04-168, para. 9.

³⁶ ICC-01/09-01/11-377, para. 51; ICC-01/09-01/11-376, para. 53.

³⁷ ICC-01/09-01/11-377, para. 51; ICC-01/09-01/11-376, para. 53.

34. According to the Defences of Mr. Ruto and Mr. Sang, the Chamber's determination that the DCC "need not be exhaustive in all of the information in support of the charges", meant that the "composition of the organization [in terms of the identity of its members and/or the co-perpetrators] need not be spelled out in the DCC". Moreover, the Chamber was not in a position to "determine whether the Network organization existed" by merely assessing the facts contained in the DCC, without relying on the Prosecutor's witness statements. In the Defences' opinion, the Chamber's "approach is contrary to the requirements of the Statute and Regulations of the Court", and thus, it constitutes "an appealable issue arising from the decision".

35. Again, the Chamber does not consider that what the Defence teams are arguing amounts to an "appealable issue" within the meaning of article 82(1)(d) of the Statute. The statement of the Defence of the accused persons that the Chamber "place[d] too little emphasis on the statutory requirement of a 'detailed description' reflected in rule 121(3) of the Rules", is in itself a clear indication of a mere disagreement about the Chamber's legal interpretation of the statutory provisions regulating the DCC and its content. Such dispute about the Chamber's legal interpretation of the law is more evident from the Defences' assertion that the Chamber's "approach" in drawing the parameters of the DCC "is contrary to the requirements of the Statute and Regulations of the Court". In fact, the Chamber expressly construed the confines of the DCC in paragraphs 98 and 101 of the Confirmation of Charges Decision, when it stated that the requirement that "the Amended DCC shall contain a 'sufficient legal and factual basis', implies that the DCC may not be exhaustive in all the information in support of the charges. However, it has to provide the Defence with a sufficiently clear picture of the facts underpinning the charges against the Suspects [...]". The Chamber further contextualized this statement in paragraph 101, where it said:

With regard to the [exclusion of the identities of members, at various levels, of the alleged Network], 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 with the jurisdiction of the Court.³⁸

Accordingly, the interpretation provided by the Chamber in the Confirmation of the Charges Decision, as well as in one of its previous decisions discussing the same matter and quoted in footnote 140 of said decision,³⁹ made clear that the Chamber's reading of rule 121(3) in light of regulation 52(b) does not support a conclusion that the DCC, as a matter of law, must include information concerning those who are not meant to be brought to trial.⁴⁰ It follows that the Defences of Mr. Ruto and Mr. Sang are, in effect, disagreeing with the Chamber's legal treatment of the question raised in the Confirmation of Charges Decision. As the Appeals Chamber stated, such disagreement or conflict of opinion "does not define an appealable subject" within the meaning of article 82(1)(d) of the Statute.⁴¹ In the absence of an appealable issue, the Chamber does not find it necessary to address the remaining requirements under article 82(1)(d) of the Statute.

Mr. Ruto's Second Issue (b)

36. In his Application, the Defence of Mr. Ruto argues that, in reaching the required evidentiary threshold at this stage of the proceedings, the Chamber merely relied on evidence presented by either a single anonymous witness or two anonymous witnesses corroborating each other.⁴² In particular, the Defence of Mr. Ruto complains of the Chamber's alleged reliance on "uncorroborated anonymous Witness 6 or 8" to prove the occurrence of "key preparatory meetings" in December

³⁸ Pre-Trial Chamber II, ICC-01/09-01/11-373, para. 101.

³⁹ Pre-Trial Chamber II, "Decision on the 'Preliminary Motion Alleging Defects in the Documents Containing the Charges (DCC) and List of Evidence (LoE) and Request that the OTP be ordered to re-file an Amended DCC & LoE' and the 'Defence Request for a Status Conference Concerning the Prosecution's Disclosure of 19 th August 2011 and the Document Containing the Charges and Article 101 of the Rome Statute'", ICC-01/09-02/11-315, para. 12.

⁴⁰ See also Appeals Chamber, "Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'", ICC-01/09-01/11-307, para. 40.

⁴¹ Appeals Chamber, "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber's 31 March 2006 Decision Denying Leave to Appeal", ICC-01/04-168, para.9.

⁴² ICC-01/09-01/11-377, para. 25.

2006 and April 2007.⁴³ The Defence is also dissatisfied with the Chamber's finding in relation to meetings that took place on non-disclosed dates in December 2007 at Mr. Cheramboss' house based on the account of Witness 6, ("whose uncorroborated evidence was found insufficient to confirm the charges against Henry Kosgey").⁴⁴

37. Moreover, the Defence of Mr. Ruto also claims that the Majority made findings on "fundamental aspects" of the Prosecutor's case relying on the testimony of Witnesses 1 and 8. According to the Defence, the reliance on the testimony of further anonymous witnesses with respect to "other meetings" is not sufficient to prove either the existence of a particular meeting (2 September 2007 Sirikwa Hotel) or the presence of the Mr. Ruto at that meeting.⁴⁵ In the view of the Defence, the reliance on anonymous witness statements that separately or together corroborate each other as developed in the previous paragraphs amounts to an appealable issue which arises from the Confirmation of Charges Decision.⁴⁶

38. In this regard, the Chamber wishes to point out that the Defence of Mr. Ruto not only disputes the approach that the Chamber identified for its evaluation of the evidence and the outcome resulting from it, but also misrepresents some of the information on the basis of which it alleges the existence of an appealable issue.

39. As to the misrepresentation of the information, the Defence of Mr. Ruto refers to the Majority's reliance on "a single uncorroborated anonymous Witness 6" to draw its finding in relation to the occurrence of key preparatory meetings in December 2006 and April 2007. In fact, a careful review of the Confirmation of Charges Decision shows that Witness 6 was never relied upon to prove any allegation concerning the existence or absence of the 30 December 2006 meeting. Nor

⁴³ ICC-01/09-01/11-377, para. 26.

⁴⁴ ICC-01/09-01/11-377, para. 26.

⁴⁵ ICC-01/09-01/11-377, para. 27.

⁴⁶ ICC-01/09-01/11-377, paras 25-28.

was the witness used as a “single uncorroborated anonymous” witness to prove the occurrence of the 15 April 2007 meeting, as the Defence of Mr. Ruto asserts.⁴⁷

40. Moreover, in footnote 25 accompanying the information concerning Witness 6, the Defence of Mr. Ruto avers that the Chamber relied on Witness 6 alone “regarding an alleged series of meetings held between 14 and 22 December 2007”.⁴⁸ This assertion is also incorrect. In relation to the 14 December 2007 meeting, the Chamber actually relied on, *inter alia*, the statements of Witnesses 2 and 8.⁴⁹ With regard to the 22 December 2007 meeting, the Chamber relied on the statement of Witness 4 together with the evidence provided by Witnesses 1, 2 and 8 in relation to other planning meetings.⁵⁰

41. The same line of reasoning applies to a similar allegation made by the Defence of Mr. Ruto concerning the reliance on “a single uncorroborated anonymous Witness 8” for the purpose of proving the existence of two planning meetings. In footnote 26 of the Application, the Defence of Mr. Ruto claims that the Chamber relied on the statement of 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”.⁵¹

42. The Chamber notes that this representation is also inaccurate. Regarding the 30 December 2006 meeting, although the Chamber relied on the evidence presented by Witness 8 with respect to parts of the 30 December 2006 meeting, its finding on the occurrence of the meeting in the presence of Mr. Ruto was based on a collective assessment of information provided by other Witnesses such as Witness 1. In this context, the Chamber recalls paragraph 117 of its Confirmation of Charges Decision, in which it expressly stated that:

[It] finds that the evidence furnished by Witness 8 with respect to other parts of the 30 December 2006 meeting is persuasive. Moreover, other witnesses [such as Witness 1] report about follow up

⁴⁷ Pre-Trial Chamber II, ICC-01/09-01/11-373, paras 113-125.

⁴⁸ ICC-01/09-01/11-377, para. 26 n. 25.

⁴⁹ Pre-Trial Chamber II, ICC-01/09-01/11-373, paras 151, 154, 158.

⁵⁰ Pre-Trial Chamber II, ICC-01/09-01/11-373, para. 160.

⁵¹ ICC-01/09-01/11-377, para. 26 n. 26.

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 8.⁵²

43. The same holds true in relation to the 15 April 2007 meeting, where the Chamber stated in paragraph 125 of the Confirmation of Charges Decision that:

[...] its finding, according a higher probative value to the account of Witness 8, is supported by the detailed description provided by the witness, which reflects consistency and clarity. Moreover, the Chamber underlines that within the series of other planning meetings, Witnesses 1, 2, 6 and 8 reiterate that Mr. Ruto had the alleged intention to kill members of the Kikuyu community. Therefore, having considered all the evidence related to the 15 April 2007 meeting, the Chamber is satisfied that there are substantial grounds to believe that such meeting took place in the presence of Mr. Ruto [...].⁵³

44. Thus, based on the foregoing, the Chamber cannot agree with the Defence of Mr. Ruto that throughout its evaluation of the evidence, the Chamber relied on “a single uncorroborated anonymous Witness 6 or 8”, which is by and in itself, a misrepresentation of the Confirmation of Charges Decision.

45. At this juncture, the Chamber finds it unnecessary to engage further with the Defence’s misrepresentations, as it deems the above discussion sufficient. Instead, the Chamber finds it relevant and more appropriate to develop the first part of its finding in paragraph 38 of the present decision namely, that the Defence of Mr. Ruto is also disputing the Chamber’s approach with respect to the assessment the evidence. The Chamber has summarized the Defence’s arguments in this regard in paragraph 37 above.

46. As the Chamber stated earlier in paragraphs 29 and 32 of this decision when addressing the second common issue, a disagreement with the manner in which the Chamber evaluated its evidence does not amount to an “appealable issue” within the meaning of article 82(1)(d) of the Statute. The Defence of Mr. Ruto is actually disagreeing with the Chamber’s chosen methodology in adopting a holistic approach towards the treatment of evidence. As the Prosecutor correctly points out “[t]his is characteristic of the Chamber’s decision: the Majority examined each piece of

⁵² Pre-Trial Chamber II, ICC-01/09-01/11-373, para. 117.

⁵³ Pre-Trial Chamber II, ICC-01/09-01/11-373, para. 125.

evidence individually and analyzed the evidence holistically, in order to verify whether the characteristic of meetings on different days were similar and thus corroborative of each other".⁵⁴

47. In view of the above reasoning, the Chamber finds that the Defence failed to show the existence of an appealable issue arising out of the Confirmation of Charges Decision. The Chamber therefore does not find it necessary to examine the remaining requirements under article 82(1)(d) of the Statute.

Mr. Sang's Third Issue (c)

48. In Mr. Sang's Application, the Defence asserts that the Majority found the accused person liable for contributing to the crimes against humanity committed, without having specified "any required level of contribution".⁵⁵ According to the Defence, the Chamber's legal finding "was certainly contrary to the Defence's submissions on this point".⁵⁶ It is also inconsistent with the recent decision on the confirmation of charges in the case of the *Prosecutor v. Callixte Mbarushimana*, in which the Majority found that the contribution to the commission of a crime within the jurisdiction of the Court "cannot be just 'any' contribution, and need be at least 'significant'", the Defence avers.⁵⁷

49. As per the Defence, the Chamber's finding "raises an issue of more fundamental importance, namely the reach of this provision of the Statute".⁵⁸ Referring to the Prosecutor's submission regarding a request for leave to appeal in the *Mbarushimana* case, the Defence of Mr. Sang shares the view of the Prosecutor that "this issue addresses the statutory requirements for criminal liability of a person who contributes to the commission of a crimes [sic] by a group of person acting with

⁵⁴ ICC-01/09-01/11-385, para. 34; and also, paras 35-37.

⁵⁵ ICC-01/09-01/11-376, para. 45.

⁵⁶ ICC-01/09-01/11-376, para. 45.

⁵⁷ ICC-01/09-01/11-376, para. 45.

⁵⁸ ICC-01/09-01/11-376, para. 45.

a common purpose”.⁵⁹ In the Defence’s opinion, this is “a purely legal issue of statutory construction which arises directly from the Confirmation Decision”.⁶⁰

50. The Chamber concurs with the Defence that the alleged issue is of fundamental importance in terms of the confines of its reach under the Statute. The Chamber also agrees with the Defence to a certain extent that the alleged issue might be seen as “a purely legal issue of statutory construction which arises directly from the Confirmation Decision”.

51. However, the Chamber is still of the opinion that making a finding on whether an appealable issue exist within the meaning of article 82(1)(d) of the Statute requires conducting the assessment on case-by-case basis and in the context of the circumstances underlying the case *sub judice*.

52. Thus, the Chamber wishes to stress that its finding that the contribution of Mr. Sang was satisfied “by a less than ‘substantial contribution’, as far as such contribution result[ed] in the commission of the crimes charged”, should be read in the context of the Defence’s initial challenge. According to said challenge, the Defence of Mr. Sang argued that since the required contribution under article 25(3)(c) of the Statute should be “substantial”, the contribution dictated by article 25(3)(d) should be equally “substantial”.⁶¹

53. In this respect, the Chamber responded in light of the Defence’s Challenge by setting its legal interpretation according to the hierarchal structure of article 25(3) of the Statute, concluding that the required contribution under article 25(3)(d) of the Statute cannot be identical to that under sub-paragraph (c). Nowhere in its findings on the facts had the Chamber found that Mr. Sang’s contribution was not “significant”. This crucial element in the Chamber’s finding was also recognized by the Prosecutor in his response to Mr. Sang’s Application, in which he correctly stated that “Sang’s argument that it would be unfair to be committed to trial based on any

⁵⁹ ICC-01/09-01/11-376, para. 46.

⁶⁰ ICC-01/09-01/11-376, para. 46.

⁶¹ ICC-01/09-01/11-354, pp. 23-24, 26, 68, 70; Pre-Trial Chamber II, ICC-01/09-01/11-373, para. 354.

insignificant contribution is predicated on the erroneous assumption that he was committed based on his insignificant contributions to the commission of the crimes”.⁶²

54. It follows that the Defence’s argument with respect to the existence of an appealable issue arising out of the Confirmation of Charges Decision is constructed on a misconception and misreading of the Chamber’s decision. For this reason, the Chamber cannot accept the Defence’s argument that there is an “appealable issue” amounting from the Confirmation of Charges Decision. Consequently, the Chamber finds no need to address the remaining requirements under article 82(1)(d) of the Statute.

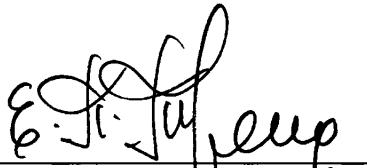
FOR THESE REASONS, THE CHAMBER, BY MAJORITY, HEREBY

- a) rejects Mr. Ruto’s Application;**
- b) rejects Mr. Sang’s Application;**
- c) orders the Registrar to transmit to the Presidency the Decision on the Confirmation of Charges together with the record of the proceedings in the present case, as provided for in rule 129 of the Rules of Procedure and Evidence;**
- d) orders the Registrar to remove the name of Henry Kiprono Kosgey from the case name for all subsequent filings.**

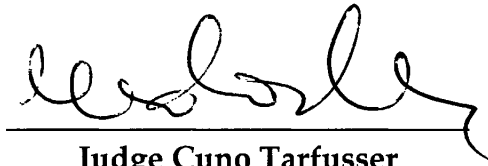
Judge Hans-Peter Kaul appends a declaration.

⁶² ICC-01/09-01/11-385, para. 44.

Done in both English and French, the English version being authoritative.



Judge Ekaterina Trendafilova
Presiding Judge



Judge Cuno Tarfusser
Judge

Judge Hans-Peter Kaul
Judge

Dated this Friday, 9 March 2012

At The Hague, The Netherlands

Declaration

I, Judge Hans-Peter Kaul recall that in three subsequent Dissenting Opinions dated 31 March 2010,¹ 15 March 2011² and 23 January 2012³ I concluded, after having examined comprehensively and carefully the arguments, evidence and material submitted, that the International Criminal Court lacks jurisdiction *ratione materiae* in the situation in the Republic of Kenya, including in the present case. Consequently, while having fully participated in the confirmation proceedings, I have not participated in the Majority's "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute"⁴ in which the Majority confirmed the charges against William Samoei Ruto and Joshua Arap Sang and committed them for trial.

As a result, I feel barred, at least in principle, from pronouncing a view whether or not the eight issues raised in the Defence applications⁵ for leave to appeal the Majority's decision on the confirmation of charges in the case of *The Prosecutor v William Samoei Ruto and Joshua Arap Sang* represent appealable issues within the meaning of article 82(1)(d) of the Rome Statute that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and for which an immediate resolution by the Appeals Chamber may materially advance the proceedings.

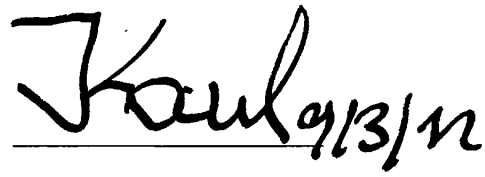
¹ Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19-Corr, pp. 84 *et seq.*

² Pre-Trial Chamber II, Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II's 'Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang', ICC-01/09-01/11-2.

³ 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, pp. 140 *et seq.*

⁴ Pre-Trial Chamber II, ICC-01/09-01/11-373.

⁵ See the Defence application for Joshua Arap Sang, ICC-01/09-01/11-376; Defence application for William Samoei Ruto, ICC-01/09-01/11-377.

A handwritten signature in black ink, appearing to read 'Kaul 9/3/12', is written over a horizontal line.

Judge Hans-Peter Kaul

Dated this Friday, 9 March 2012

At The Hague, The Netherlands