



Original: English

No. ICC-01/09-01/20

Date: 15 July 2021

PRE-TRIAL CHAMBER A (ARTICLE 70)

Before: Judge Reine Adélaïde Sophie Alapini-Gansou

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF

THE PROSECUTOR v. PAUL GICHERU

Public Redacted

Decision on the confirmation of charges against Paul Gicheru

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

The Office of the Prosecutor
Mr James Stewart

Counsel for the Defence
Mr Michael Karnavas

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
for Participation/Reparations**

**The Office of Public Counsel
for Victims**

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

States Representatives

Amicus Curiae

REGISTRY

Registrar
Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and
Reparations Section**

Other

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PRE-TRIAL CHAMBER A (ARTICLE 70) of the International Criminal Court (the ‘Court’), pursuant to articles 21, 25(3), 30, 61(7), 64, 67, 69 and 70 of the Rome Statute (the ‘Statute’) and rules 63, 64, 76, 121, and 162 to 165 of the Rules of Procedure and Evidence (the ‘Rules’), issues this Decision on the confirmation of charges against Paul Gicheru (hereinafter ‘Mr Gicheru’).

Mr Gicheru was born on 28 November 1972 in Nandi District, in the Republic of Kenya (hereinafter ‘Kenya’).¹ He is currently residing in Kenya² and works as a lawyer³ with a practice in Eldoret and in Nairobi, Kenya.⁴

I. PROCEDURAL HISTORY

1. On 10 March 2015, Pre-Trial Chamber II, in its then composition, issued warrants of arrest against Mr Gicheru and Philip Kipkoech Bett⁵ (hereinafter ‘Mr Bett’) for their alleged responsibility for offences against the administration of justice under article 70(1)(c) of the Statute.⁶
2. On 2 November 2020, Mr Gicheru surrendered himself to the authorities of the Kingdom of the Netherlands (‘the Netherlands’).
3. On 2 November 2020, the President of the Pre-Trial Division constituted the present Chamber⁷ pursuant to rule 165(2) of the Rules, as drawn up by the judges of the Court acting under article 51(3) of the Statute on 10 February 2016 (the ‘Provisional rule 165 of the Rules’), and regulation 66*bis*(1) of the Regulations of the Court (the ‘Regulations’), which was adopted and entered into force on the same day.

¹ Transcript of hearing, 6 November 2021, [ICC-01/09-01/20-T-001-Red-ENG](#), pp. 3, 17-18.

² [Public Redacted Version of ‘Decision on Mr Gicheru’s Request for Interim Release’](#), 29 January 2021, ICC-01/09-01/20-90-Red2 (confidential and confidential redacted version filed on the same day), para. 47, para. 15.

³ Transcript of audio-video material, OTP/Mr Gicheru, KEN-OTP-0159-0723, p. 0726, lines 101-102.

⁴ KEN-OTP-0159-0585. *See also* letterhead: Annex 2 to the The Accused Person’s Request for Interim Release under the Provisions of Article 60(2) of the Rome Statute, 9 November 2020, ICC-01/09-01/20-38-Conf-Anx2. Mr Gicheru, KEN-OTP-0159-0795, pp. 0802-0803, lines 217-244; KEN-OTP-0159-0766, p. 0782, lines 517-533.

⁵ P-0579. Philip Kipkoech Bett is also known as ‘Kipseng’erya’. *See* P-0613, KEN-OTP-0115-0216, para. 23. *See also* paragraph 195 below.

⁶ Decision on the ‘Prosecution’s Application under Article 58(1) of the Rome Statute’, ICC-01/09-01/15-1-Conf-Exp (a public redacted version was notified on the same day, *see* [REDACTED]).

⁷ [Decision Constituting a Chamber Composed of one Judge from the Pre-Trial Division to Exercise the Powers and Functions of the Pre-Trial Chamber in the Present Case](#), ICC-01/09-01/20-32.

4. On 3 November 2020, following the completion of domestic proceedings in the Netherlands, Mr Gicheru was surrendered to the Court and arrived at the Court's Detention Centre.

5. On 6 November 2020, in accordance with the Chamber's order dated 4 November 2020,⁸ Mr Gicheru appeared before the Chamber pursuant to article 60(1) of the Statute and rules 121(1) and 163(1) of the Rules. During the first appearance, the Chamber *inter alia* ordered: (i) the Prosecutor to submit observations on the progress of her investigation, the disclosure of evidence and the protection of witnesses by 18 November 2020;⁹ and (ii) the Prosecutor and the Defence to submit observations on the possibility of severing the case against Mr Gicheru from the case against Mr Bett by 20 November 2020 and 26 November 2020 respectively.¹⁰ The Chamber also decided that, pursuant to Provisional rule 165(3) of the Rules, no confirmation hearing would be held in the present case, and that the parties should instead file written submissions on 15 March 2021 at the latest.

6. On 12 November 2020, the Chamber issued the 'Decision on the Request to Submit Observations on behalf of the Office of the Public Counsel for the Defence' (the 'OPCD Request' and 'OPCD' respectively).¹¹ The Chamber granted leave to the OPCD to submit the observations set out in the OPCD Request.

7. On 18 November 2020, the Chamber received the 'Notification of the Appointment of Mr Michael G. Karnavas as Counsel for Mr [...] Gicheru'.¹²

8. On 10 December 2020, the Chamber issued the 'Decision on the Applicability of Provisional rule 165 of the Rules of Procedure and Evidence'.¹³ The Chamber found that Provisional rule 165 of the Rules is applicable to the present proceedings

⁸ [Order Setting the Date for the Initial Appearance of Mr Gicheru](#), ICC-01/09-01/20-34.

⁹ Transcript of hearing, 6 November 2021, [ICC-01/09-01/20-T-001-Red-ENG](#), p. 11, lines 21-23.

¹⁰ Transcript of hearing, 6 November 2021, [ICC-01/09-01/20-T-001-Red-ENG](#), p. 12, lines 5-9.

¹¹ [ICC-01/09-01/20-43](#). See also [OPCD Request for Leave to Appear on the Applicability of Provisional Rule 165' on behalf of the Office of the Public Counsel for the Defence](#), 11 November 2020, ICC-01/09-01/20-40.

¹² [ICC-01/09-01/20-48](#), together with public [annex I](#). See also Registry, Mr Paul Gicheru's legal representation, 13 November 2020, ICC-01/09-01/20-45-Conf, together with two confidential annexes.

¹³ [ICC-01/09-01/20-61](#). See also [OPCD Submissions on the Inapplicability of Provisional Rule 165](#), 17 November 2020, ICC-01/09-01/20-47; [Prosecution's Response to 'OPCD's Submissions on the Inapplicability of Provisional Rule 165'](#), 20 November 2020, ICC-01/09-01/20-52; [Paul Gicheru's Observations and Response to OPCD Submissions on the Inapplicability of Provisional Rule 165](#), 25 November 2020, ICC-01/09-01/20-53.

and that it has been properly constituted as a chamber composed of one judge to exercise the functions and powers of Pre-Trial Chamber A in the present case.¹⁴

9. On 11 December 2020, the Chamber issued the ‘Decision Severing the Case against Mr Gicheru’.¹⁵ The Chamber ordered the Registrar to open a new case record entitled *The Prosecutor v. Paul Gicheru* and further determined that Pre-Trial Chamber II shall remain seized of the case against Mr Bett.¹⁶

10. On 23 December 2020, the Chamber issued the ‘Decision on the “Request for leave to appeal the Decision on the Applicability of Provisional Rule 165”’.¹⁷ The Chamber granted the OPCD Request in relation to the three issues raised with the first issue and the third issue as reformulated by the Chamber.¹⁸

11. On 29 January 2021, the Chamber granted Mr Gicheru’s request for interim release subject to conditions on the basis of rule 119 of the Rules.¹⁹

¹⁴ [ICC-01/09-01/20-61](#), p. 22.

¹⁵ [ICC-01/09-01/20-62](#). See also [Prosecution’s written submissions concerning self-representation, severance of the charges, registration and disclosure of evidence, and other procedural matters pertaining to pre-confirmation proceedings](#), 16 November 2020, ICC-01/09-01/20-46; [Paul Gicheru’s Response to the Prosecution’s written submissions concerning severance of the charges, registration and disclosure of evidence, and other procedural matters pertaining to pre-confirmation proceedings](#), 1 December 2020, ICC-01/09-01/20-56.

¹⁶ [ICC-01/09-01/20-62](#), paras 15, 17.

¹⁷ [ICC-01/09-01/20-68](#). See also [Request for leave to appeal the Decision on the Applicability of Provisional Rule 165](#), 17 December 2020, ICC-01/09-01/20-63 (filed on 16 December 2020, notified on 17 December 2020); [Paul Gicheru’s Response to OPCD’s Request for Leave to Appeal the Decision on the Applicability of Provisional Rule 165](#), 18 December 2020, ICC-01/09-01/20-64; Prosecution, [Prosecution’s Response to OPCD’s ‘Request for leave to appeal the Decision on the Applicability of Provisional Rule 165’](#), 21 December 2020, ICC-01/09-01/20-66.

¹⁸ [ICC-01/09-01/20-68](#), paras 24-43.

¹⁹ Decision on Mr Gicheru’s Request for Interim Release, ICC-01/09-01/20-90-Conf (a public redacted version was notified the same day, see [ICC-01/09-01/20-90-Red2](#)), para. 47. See also Registrar, [Transmission of observations submitted by the Republic of Kenya and the Kingdom of the Netherlands pursuant to Pre-Trial Chamber A’s Order ICC-01/09-01/15-42 of 12 November 2020](#), 27 November 2020, ICC-01/09-01/20-54, together with public annexes [I](#) and [II](#); [Paul Gicheru’s Response to Observations submitted by the Republic of Kenya and the Kingdom of the Netherlands pursuant to Pre-Trial Chamber A’s Order of 12 November 2020](#), 2 December 2020, ICC-01/09-01/20-57; [Prosecution’s Response to the observations submitted by the Republic of Kenya and the Kingdom of the Netherlands and associated requests](#), 4 December 2020, ICC-01/09-01/20-58; Gicheru’s Request for Clarification Concerning the Pre-Trial Chamber A’s Email of 23 December 2020, 29 December 2020, ICC-01/09-01/20-72-Conf (a public redacted version was notified on 29 January 2021, see [ICC-01/09-01/20-72-Red](#)), together with one public [annex](#); Registrar, [Transmission of Further Observations Submitted by the Kenyan Authorities pursuant to Pre-Trial Chamber A’s Order ICC-01/09-01/20-76 of 31 December 2020](#), 21 January 2021, ICC-01/09-01/20-82, together with one public [annex](#); Response to Further Observations Submitted by the Kenyan Authorities pursuant to Pre-Trial Chamber A’s Order ICC-01/09-01/20-76 of 31 December 2020, 21 January 2021, ICC-01/09-01/20-85-Conf (a public redacted version was notified on 29 January 2021, see [ICC-01/09-01/20-85-Red](#)).

12. On 26 February 2021, the Chamber issued the ‘Decision on the postponement of the date of filing of written submissions and other related deadlines for the confirmation of charges proceedings’ and set new dates for the confirmation proceedings.²⁰ The Chamber ordered: (i) the Prosecutor to file the document containing the charges and list of evidence on 12 March 2021 at the latest; (ii) the Defence to file its list of evidence on 8 April 2021 at the latest; (iii) the Prosecutor and the Defence to file their written submissions, replacing the confirmation hearing in the present case, on 23 April 2021 at the latest; (iv) the Prosecutor to file her response to the Defence’s written submissions on 30 April 2021 at the latest; and (v) the Defence to file its response to the Prosecutor’s written submissions and its reply to the Prosecutor’s response to the Defence’s written submissions on 7 May 2021.

13. On 8 March 2021, the Appeals Chamber issued the ‘Judgment on the appeal of the Office of Public Counsel for the Defence against the decision of Pre-Trial Chamber A of 10 December 2020 entitled “Decision on the Applicability of Provisional Rule 165 of the Rules of Procedure and Evidence”’, confirming the Chamber’s decision on the applicability of Provisional rule 165 of the Rules.²¹

14. On 12 March 2021, the Chamber received the ‘Prosecution’s submission of the document containing the charges, the list of evidence and related annexes’ (the ‘DCC’).²²

15. On 26 March 2021, the Chamber issued the ‘Order related to the confirmation of charges proceedings’ (the ‘26 March 2021 Order’).²³

16. On 14 April 2021, the Chamber received the ‘Defence List of Evidence’.²⁴

²⁰ [ICC-01/09-01/20-103](#). See also Request for Extension of Time Limits to File the Defence List of Evidence and Response to the Document Containing the Charges, 5 February 2021, ICC-01/09-01/20-96-Conf (a public redacted version was notified on 9 February 2021, see [ICC-01/09-01/20-96-Red](#)), together with confidential annexes A, C, and D and public annex B; Prosecution’s Response to the Defence ‘Request for Extension of Time Limits to File the Defence List of Evidence and Response to the Document Containing the Charges’, 8 February 2021, ICC-01/09-01/20-97-Conf-Exp (a public redacted version was notified the next day, see [ICC-01/09-01/20-97-Red2](#)).

²¹ [ICC-01/09-01/20-107](#), para. 117.

²² ICC-01/09-01/20-125-Conf-AnxA-Corr3 (the third corrected version of annex A, containing the DCC, was filed on 11 May 2012; a public redacted corrected version was filed on 12 July 2021, see [ICC-01/09-01/20-125-AnxA-Corr-Red-Corr](#)), together with the transmission filing, [ICC-01/09-01/20-125](#), public [annex C2](#) and confidential annexes A, B, C1, C3, and D.

²³ [ICC-01/09-01/20-127](#).

17. On 23 April 2021, the Chamber granted the Defence's request for an extension of time to file its written submissions.²⁵ On the same day, it issued an amended scheduling order for the confirmation of charges proceedings.²⁶ The Chamber instructed: (i) the parties to file their written submissions on 30 April 2021, at the latest; (ii) the Defence to file its reply on 17 May 2021 at the latest; and (iii) the Prosecution to complete the disclosure of evidence by 26 April 2021, at the latest.²⁷

18. On 30 April 2021, the Chamber received the parties' written submissions.²⁸

19. On 7 May 2021, the Chamber received the 'Prosecution's response to "Paul Gicheru's Written Submissions on the Confirmation of Charges", ICC-01/09-01/20-141-Conf' (the 'Prosecution Response').²⁹

20. On 18 May 2021, the Chamber received the 'Reply to the Prosecution's Response to Paul Gicheru's Written Submissions' (the 'Defence Reply').³⁰

21. On 29 June 2021, the Chamber issued the 'Order on the Recusal of the Prosecutor from the Current Case', in which it took note of the Prosecutor's recusal in the current case and specified the consequences attached to this recusal.³¹

II. JURISDICTION OF THE COURT AND NATURE OF THE PRESENT DECISION

22. The Chamber has satisfied itself, pursuant to article 70(1) of the Statute in conjunction with rule 162 of the Rules, that the present case falls within the jurisdiction of the Court.

²⁴ [ICC-01/09-01/20-134](#), together with confidential annex A.

²⁵ Pre-Trial Chamber A, Email to the parties, at 9:45. *See also* Urgent Defence Request for an Extension of Time to File its Written Submissions on the Confirmation of Charges, 21 April 2021, ICC-01/09-01/20-136-Conf; Prosecution's Response to the 'Urgent Defence Request for an Extension of Time to File its Written Submissions on the Confirmation of Charges', 22 April 2021, ICC-01/09-01/20-137-Conf.

²⁶ [ICC-01/09-01/20-138](#).

²⁷ [ICC-01/09-01/20-138](#), p. 4.

²⁸ Paul Gicheru's Written Submissions on the Confirmation of Charges, ICC-01/09-01/20-141 (a public redacted version was notified the same day, *see* [ICC-01/09-01/20-141-Red](#)) (the 'Defence Written Submissions'); Prosecution's written submissions on the confirmation of charges, ICC-01/09-01/20-143-Conf (a public redacted version was notified on 3 May 2021, *see* [ICC-01/09-01/20-143-Red](#)) (the 'Prosecution Written Submissions').

²⁹ ICC-01/09-01/20-145-Conf (public redacted version filed on 7 May 2021 and public corrected version filed on 10 May 2021, *see* [ICC-01/09-01/20-145-Red-Corr](#)).

³⁰ [ICC-01/09-01/20-147-Red](#).

³¹ [ICC-01/09-01/20-149](#).

23. The purpose of the pre-trial proceedings is to determine whether the case, as presented by the Prosecutor, is sufficiently established to warrant a full trial. The procedure of confirmation of charges protects the suspect from wrongful and unfounded accusations,³² by ensuring that ‘only those persons against whom sufficiently compelling charges going beyond mere theory or suspicion have been brought’ are committed for trial.³³

24. The Chamber recalls that its decision under article 61(7) of the Statute is ‘a limited judicial intervention, the objective of which is to ensure that there is a case worthy of trial and to define the parameters of the subject matter of that trial’.³⁴ The

³² Pre-Trial Chamber I, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, [Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud](#), 13 November 2019, ICC-01/12-01/18-461-Corr-Red (confidential corrected version notified on 8 November 2019; original version notified on 30 September 2019) (the ‘Al Hassan Confirmation Decision’), para. 42; Pre-Trial Chamber I, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, [Decision on the confirmation of charges against Ahmad Al Faqi Al Mahdi](#), 24 March 2016, ICC-01/12-01/15-84-Red (confidential version notified same day) (the ‘Al Mahdi Confirmation Decision’), para. 15; Pre-Trial Chamber II, *The Prosecutor v. Jean- Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, [Decision pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute](#), 11 November 2014, ICC-01/05-01/13-749 (the ‘Bemba et al. Confirmation Decision’), para. 28; Pre-Trial Chamber II, *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, [Decision on the Confirmation of Charges Pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute](#), 23 January 2012, ICC-01/09-02/11-382-Red (confidential version notified on 23 January 2012) (the ‘Muthaura et al. Confirmation Decision’), para. 52; [Bemba et al. Confirmation Decision](#), para. 28; Pre-Trial Chamber I, *The Prosecutor v. Callixte Mbarushimana*, [Decision on the Confirmation of Charges](#), 16 December 2011, ICC-01/04-01/10-465-Red (confidential version notified same day) (the ‘Mbarushimana Confirmation Decision’), para. 41; Pre-Trial Chamber I, *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, [Corrigendum of the ‘Decision on the Confirmation of Charges’](#), 8 March 2011, ICC-02/05-03/09-121-Corr-Red (confidential corrected version notified same day; original version filed on 7 March 2011) (the ‘Banda and Jerbo Confirmation Decision’), para. 31; Pre-Trial Chamber I, *The Prosecutor v. Bahar Idriss Abu Garda*, [Decision on the Confirmation of Charges](#), 8 February 2010, ICC-02/05-02/09-243-Red (confidential version notified same day) (the ‘Abu Garda Confirmation Decision’), para. 153; Pre-Trial Chamber I, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, [Decision on confirmation of charges](#), 30 September 2008, ICC-01/04-01/07-717 (the ‘Katanga Confirmation Decision’), para. 63; Pre-Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, [Decision on the confirmation of charges](#), 14 May 2007, ICC-01/04-01/06-803-tENG (original version filed on 29 January 2007 and notified on 2 February 2007) (the ‘Lubanga Confirmation Decision’), para. 37.

³³ [Al Hassan Confirmation Decision](#), para. 42; [Al Mahdi Confirmation Decision](#), para. 18; [Bemba et al. Confirmation Decision](#), para. 37; [Mbarushimana Confirmation Decision](#), para. 41; [Banda and Jerbo Confirmation Decision](#), para. 31; [Abu Garda Confirmation Decision](#), para. 153; Pre-Trial Chamber II, *The Prosecutor v. Jean-Pierre Bemba Gombo*, [Decision Pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo](#), 15 June 2009, ICC-01/05-01/08-424 (the ‘Bemba Confirmation Decision’), para. 39; [Lubanga Confirmation Decision](#), para. 37.

³⁴ Appeals Chamber, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, [Judgment on the appeal of Mr Al Hassan against the decision of Trial Chamber X entitled ‘Decision on application for notice of possibility of variation of legal characterisation pursuant to Regulation 55\(2\)’](#)

Chamber further recalls that it ‘must calibrate its review of the factual allegations carefully according to its role as “gatekeeper”, taking into account the need to proceed expeditiously so as not to cause undue delay to the proceedings as a whole’.³⁵

25. The Chamber renders its determination under the applicable standard at this stage of the proceedings, as set out in article 61(7) of the Statute, on whether there is sufficient evidence to establish substantial grounds to believe that the suspect committed each of the offences as charged, consistent with the jurisprudence of the Court. To meet this evidentiary threshold,³⁶ the Chamber must be ‘thoroughly satisfied that the [Prosecutor’s] allegations are sufficiently strong to commit [the person] for trial’.³⁷ Pre-trial chambers have consistently held that, in order to meet the evidentiary burden of ‘substantial grounds to believe’, the Prosecutor must ‘offer concrete and tangible proof demonstrating a clear line of reasoning underpinning [the] specific allegations’.³⁸

26. The Chamber notes that this standard is the only applicable one at the pre-trial stage. On this basis, the Chamber rejects the Defence’s argument that the Chamber should confirm the charges only if it is satisfied that the evidence presented by the Prosecutor, additionally, meets *prima facie* the No Case to Answer standard which was introduced by some trial chambers during the trial stage.³⁹ In sum, the Chamber has to ensure that only charges which are sufficiently supported by the available evidence and which are clear and properly formulated, in their factual and legal aspects, are to be submitted to a trial chamber for its determination.⁴⁰

[of the Regulations of the Court](#)’, 1 July 2021, ICC-01/12-01/18-1562-Red (the ‘*Al Hassan* Appeal Judgment on legal characterisation of the charges’), para. 4. *See also*, para. 92.

³⁵ [Al Hassan Appeal Judgment on legal characterisation of the charges](#), para. 4.

³⁶ For the threshold of ‘substantial grounds to believe’, *see e.g.* Appeals Chamber, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, [Judgment on the appeal of the Prosecutor against the ‘Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir’](#), 3 February 2010, ICC-02/05-01/09-73, para. 30; [Muthaura et al. Confirmation Decision](#), para. 52.

³⁷ [Al Hassan Confirmation Decision](#), para. 42; [Bemba et al. Confirmation Decision](#), para. 25; [Lubanga Confirmation Decision](#), para. 39.

³⁸ [Al Hassan Confirmation Decision](#), para. 44; [Bemba et al. Confirmation Decision](#), para. 25. *See e.g.* Pre-Trial Chamber I, *The Prosecutor v. Laurent Gbagbo*, [Decision on the confirmation of charges against Laurent Gbagbo](#), 12 June 2014, ICC-02/11-01/11-656-Red (confidential version notified same day) (the ‘*Gbagbo* Confirmation Decision’), para. 19; Pre-Trial Chamber II, *The Prosecutor v. Bosco Ntaganda*, [Decision Pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda](#), 9 June 2014, ICC-01/04-02/06-309 (the ‘*Ntaganda* Confirmation Decision’), para. 9.

³⁹ *See* Defence Written Submissions, para. 10; Defence Reply, paras 4, 18, 19.

⁴⁰ [Al Hassan Confirmation Decision](#), para. 43; [Al Mahdi Confirmation Decision](#), para. 17.

III. OBSERVATIONS PURSUANT TO RULE 122(3) OF THE RULES

27. The Chamber recalls that in its 26 March 2021 Order, it noted that under rule 122(3) of the Rules, at the Confirmation Hearing and ‘[b]efore hearing the matter on the merits, the Presiding Judge of the Pre-Trial Chamber shall ask the Prosecutor and the person whether they intend to raise objections or make observations concerning an issue related to the proper conduct of the proceedings prior to the confirmation hearing.’⁴¹ Accordingly, in order to protect the parties’ right to raise objections in the absence of a confirmation hearing, the Chamber invited the parties ‘to include in their Written Submissions, as a preliminary matter, any objections or observations they might have concerning the conduct of the proceedings’.⁴²

28. The Chamber notes that the parties have not raised any objections or observations under rule 122(3) of the Rules.

IV. GENERAL REMARKS ON THE ASSESSMENT OF EVIDENCE

A. Previous decisions taken in the Main Case

29. The Chamber notes that several decisions have been rendered by Trial Chamber V(A) (the ‘Main Case Chamber’ or ‘Trial Chamber V(A)’) in the case *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* (the ‘Ruto and Sang Case’ or ‘Main Case’) concerning allegations of witness interference which are also subject to the case before it. The Chamber takes note of these decisions. However, it stresses that it does not simply follow the findings contained in these decisions. It will independently conduct an assessment of the evidence before it. All conclusions reached by the Chamber are based on its own evaluation of the evidence before it.

⁴¹ [ICC-01/09-01/20-127](#), para. 13.

⁴² [ICC-01/09-01/20-127](#), para. 13.

B. The Chamber's determination as to relevance and admissibility of evidence

30. The Chamber notes that the parties have raised and elaborated on a number of issues in relation to the assessment of evidence.⁴³ In light of these observations, the Chamber finds it appropriate to set out the relevant standards in relation to the assessment of evidence.

31. The Statute and the Rules grant pre-trial chambers the power to determine the relevance or admissibility of evidence as well as its weight.⁴⁴

32. The very nature of pre-trial proceedings precludes pre-trial chambers from *conclusively* determining the probative value of evidence, including with respect to credibility of witnesses, whose statements are, generally, put before it in written form alone. As the Appeals Chamber has said, 'the Pre-Trial Chamber's determinations will necessarily be presumptive', and the Pre-Trial Chamber 'should take great care in finding that a witness is or is not credible'.⁴⁵ However, because a pre-trial chamber establishes facts (at the required standard) based on evidence, it must assess the said evidence, including potential contradictions therein. Accordingly, the Chamber notes that it must 'assess the evidence and resolve any ambiguities, contradictions, inconsistencies or doubts as to credibility arising from contestation of the evidence'.⁴⁶

In the words of the Appeals Chamber:

Any other interpretation would carry the risk of cases proceeding to trial although the evidence is so riddled with ambiguities, inconsistencies, contradictions or doubts as to credibility that it is insufficient to establish substantial grounds to believe the person committed the crimes charged.⁴⁷

33. All of the Chamber's findings in the present decision are made on the basis of the statutory standard applicable at this stage of the proceedings⁴⁸ and are based on an assessment of the evidence relied upon by the Prosecutor and the Defence, as included

⁴³ For the Prosecutor, *see* Prosecutor Written Submissions, paras 15-29, Prosecutor Response, paras 6-15; for the Defence, *see* Defence Written Submissions, paras 5-12, Defence Reply, paras 1-20.

⁴⁴ Appeals Chamber, *The Prosecutor v. Callixte Mbarushimana*, [Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled 'Decision on the confirmation of charges'](#), 30 May 2012, ICC-01/04-01/10-514 (the '*Mbarushimana* Appeal Judgment'), para. 42.

⁴⁵ [Mbarushimana Appeal Judgment](#), para. 48; [Al Hassan Confirmation Decision](#), para. 46.

⁴⁶ [Mbarushimana Appeal Judgment](#), paras 40, 46; [Al Hassan Confirmation Decision](#), para. 46.

⁴⁷ [Mbarushimana Appeal Judgment](#), para. 46; [Al Hassan Confirmation Decision](#), para. 46.

⁴⁸ *See* paragraph 25 above.

in their respective lists of evidence pursuant to rule 121(3) and (6) of the Rules, taking into account the written submissions filed *in lieu of* the hearing and the responses thereto.

34. The Chamber presents the result of its own assessment of the Prosecutor's allegations in light of the entirety of the evidence presented by the parties. The Defence's arguments and challenges to the Prosecutor's evidence have been considered throughout this assessment. Where necessary, the Chamber provides a separate response to the arguments and challenges raised. In its decision, the Chamber refers only to those pieces of evidence it considers relevant and sufficient to sustain its findings, without prejudice to the relevance of other pieces of evidence presented by the parties.⁴⁹

35. The Chamber recalls that it is not obliged, as a matter of principle, to undertake an assessment of the admissibility of each piece of evidence in accordance with article 69(4) of the Statute, save for the application of article 69(7) of the Statute.⁵⁰

36. The Chamber notes that the Prosecutor [REDACTED]. The Chamber also notes that in a report, the Prosecution investigators indicated that [REDACTED].⁵¹ The Prosecution investigators further indicated that [REDACTED].

⁴⁹ [Al Hassan Confirmation Decision](#), para. 45; Pre-Trial Chamber II, *The Prosecutor v. Dominic Ongwen*, [Decision on confirmation of charges against Dominic Ongwen](#), 23 March 2016, ICC-02/04-01/15-422-Red (the 'Ongwen Confirmation Decision'), para. 19; Pre-Trial Chamber I, *The Prosecutor v. Charles Blé Goudé*, [Decision on the confirmation of charges against Charles Blé Goudé](#), 11 December 2014, ICC-02/11-02/11-186 (the 'Blé Goudé Confirmation Decision'), paras 15, 16; [Gbagbo Confirmation Decision](#), para. 22; [Muthaura et al. Confirmation Decision](#), para. 60; [Mbarushimana Confirmation Decision](#), para. 48; [Banda and Jerbo Confirmation Decision](#), para. 39; [Abu Garda Confirmation Decision](#), para. 45; [Bemba Confirmation Decision](#), para. 39; [Katanga Confirmation Decision](#), para. 69; [Lubanga Confirmation Decision](#), para. 39.

⁵⁰ [Bemba et al. Confirmation Decision](#), para. 14; Pre-Trial Chamber II, *The Prosecutor v. Bosco Ntaganda*, [Decision on Admissibility of Evidence and Other Procedural Matters](#), 8 June 2014, ICC-01/04-02/06-308, para. 25.

⁵¹ OTP Investigator Report, KEN-OTP-0159-0884, para. 19.

[REDACTED]

[REDACTED].⁵² The Chamber considers it appropriate to draw the Trial Chamber's attention to this evidence in order to conduct any enquiries it may deem necessary pursuant to article 69(4) and (7) of the Statute, as it finds that the Trial Chamber is better equipped to undertake an assessment of the admissibility of the said evidence, due to the limited information available to this Chamber at this stage of the proceedings.

37. The Chamber notes that the Prosecutor refers in its DCC to material⁵³ which admission into evidence was rejected by the Main Case Chamber.⁵⁴ Since the Chamber does not rely on this evidence in the present decision, no assessment of its admissibility pursuant to article 69(4) and/or (7) of the Statute is warranted. The Chamber considers it appropriate however to draw the Trial Chamber's attention to this evidence in order to conduct any enquiries it may deem necessary.

38. As to the Defence's arguments regarding the 'low probative value' of hearsay evidence,⁵⁵ the Chamber recalls that it may rely on indirect evidence but that as a general rule, such evidence must be accorded a lower probative value than direct evidence.⁵⁶ Indeed, 'the fact that evidence is hearsay does not necessarily deprive it of probative value, but does indicate that the weight or probative value afforded to it may be less, "although even this will depend upon the infinitely variable circumstances which surround hearsay evidence"'.⁵⁷

⁵² OTP Investigator Report, KEN-OTP-0159-0884, para. 20.

⁵³ This concerns the following material: KEN-OTP-0130-0462, KEN-OTP-0130-0478, KEN-OTP-0130-0507, KEN-OTP-0130-0540, KEN-OTP-0130-0563, KEN-OTP-0130-0566, KEN-OTP-0130-0585. *See e.g.* DCC, paras 78, 83, 141, 162, 320, 386, 468, 506, 511, 514, 534-538, 548, 550.

⁵⁴ Trial Chamber V(A), [Reasons for the Decision on Admission of Certain Evidence Connected to Witness 495, rendered on 17 November 2014](#), 11 December 2014, ICC-01/09-01/11-1753 (reclassified as public on 1 December 2017).

⁵⁵ Defence Written Submissions, paras 4(d), 105; Defence Reply, paras 1, 11, 12.

⁵⁶ [Bemba Confirmation Decision](#), para. 51; Pre-Trial Chamber II, *The Prosecutor v. William Samoei Ruto, Henry Kiprono Koshey and Joshua Arap Sang*, [Decision on the Confirmation of Charges Pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute](#), 23 January 2012, ICC-01/09-01/11-373 (the 'Ruto and Sang Confirmation Decision'), para. 74.

⁵⁷ Appeals Chamber, *The Prosecutor v. Jean- Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, [Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled 'Judgment pursuant to Article 74 of the Statute'](#), 8 March 2018, ICC-01/05-01/13-2275-Red (confidential version notified the same day) (the 'Bemba et al. Appeal Judgment'), para. 874, and Appeals Chamber, *The Prosecutor v. Mathieu Ngudjolo Chui*, [Judgment on the Prosecutor's appeal against the decision of Trial Chamber II entitled 'Judgment pursuant to article 74 of the Statute'](#), 7

39. The Chamber will take evidence into account if it considers it to be relevant and of sufficient probative value.⁵⁸

C. Witness credibility

40. The Chamber bears in mind that, due to the nature of the confirmation of charges proceedings, the evaluation of the credibility of witnesses is limited and ‘necessarily presumptive’. While a pre-trial chamber may evaluate the credibility of witnesses, ‘it should take great care in finding that a witness is or is not credible’.⁵⁹

41. Whether a particular witness is considered credible will depend on a case-by-case assessment of the evidence, in light of all relevant circumstances. While the fact that a witness is known to have previously given false testimony before a court is one of such relevant circumstances to be duly considered when assessing the reliability of the concerned witness’s testimony, this fact does not necessarily mean that his or her entire testimony should be automatically excluded.⁶⁰ No witness is *per se* unreliable, including a witness that has previously given false testimony before a court.⁶¹ Instead, each statement made by a witness must be assessed individually. In this respect, the Chamber also recalls that a chamber may rely on certain aspects of a witness’s evidence and consider other aspects unreliable.⁶²

April 2015, ICC-01/04-02/12-271-Corr (original version notified on 27 February 2015) (the ‘*Ngudjolo Appeal Judgment*’), para. 226 referring to ICTY, Appeals Chamber, *The Prosecutor v. Aleksovski, Decision on Prosecutor’s Appeal on Admissibility of Evidence*, 16 February 1999, IT-95-14/1, para. 15.

⁵⁸ [Al Mahdi Confirmation Decision](#), para. 20; [Bemba et al. Confirmation Decision](#), para. 14; [Bemba Confirmation Decision](#), paras 41, 42; Pre-Trial Chamber II, *The Prosecutor v. Bosco Ntaganda, Decision on Admissibility of Evidence and Other Procedural Matters*, 8 June 2014, ICC-01/04-02/06-308, para. 25.

⁵⁹ [Mbarushimana Appeal Judgment](#), para. 48; [Al Hassan Confirmation Decision](#), para. 46; [Al Mahdi Confirmation Decision](#), para. 19; [Ongwen Confirmation Decision](#), para. 18; [Gbagbo Confirmation Decision](#), para. 21; [Bemba et al. Confirmation Decision](#), para. 16.

⁶⁰ [Bemba et al. Appeal Judgment](#), para. 1019.

⁶¹ [Bemba et al. Appeal Judgment](#), paras 1019, 1081; Trial Chamber, *The Prosecutor v. Jean- Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, Judgment pursuant to Article 74 of the Statute*, 19 October 2016, ICC-01/05-01/13-1989-Red (confidential version notified same day) (the ‘*Bemba et al. Trial Judgment*’), para. 202.

⁶² [Ngudjolo Appeal Judgment](#), para. 168; [Bemba et al. Trial Judgment](#), paras 202, 204. See also ICTY, Appeals Chamber, *The Prosecutor v. Popović et al., Judgement*, 30 January 2015, IT-05-88-A, para. 1243, n. 3265 and references cited therein.

42. The Defence asserts that the Chamber should reject uncorroborated evidence.⁶³ The Chamber notes that, in accordance with rule 63(4) of the Rules, there is no legal requirement of corroboration irrespective of the type of evidence or the fact to be established on its basis. This is not to say that corroboration will never have a role to play when assessing a witness's credibility and the reliability of his or her testimony.⁶⁴ It is indeed one of many potential factors relevant to a chamber's assessment. A chamber may find, in the specific circumstances of the case, that corroboration of a particular witness's testimony – or part thereof – is needed for it to be convinced of its reliability and credibility.⁶⁵ However, this does not mean that corroboration is required as a matter of law when evaluating the testimony of any witness.

V. THE EIGHT INCIDENTS

A. Applicable law – Article 70(1)(c) of the Statute

43. Article 70(1)(c) of the Statute provides:

The Court shall have jurisdiction over the following offences against its administration of justice when committed intentionally:

[...] Corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence

44. As previously held,⁶⁶ article 70(1)(c), first alternative, of the Statute ('corruptly influencing a witness') proscribes any conduct that may have (or is expected by the perpetrator to have) an impact or influence on the testimony to be given by a witness.

⁶³ Defence Written Submissions, para. 8.

⁶⁴ [Bemba et al. Appeal Judgment](#), para. 1084; [Ngudjolo Appeal Judgment](#), para. 168; Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, [Judgment on the appeal of Mr. Thomas Lubanga Dyilo against his conviction](#), 1 December 2014, ICC-01/04-01/06-3121-Red (A5) (confidential version notified same day) (the 'Lubanga Appeal Judgment'), para. 218. *See also* ICTR, Appeals Chamber, *The Prosecutor v. Nchamihigo*, [Judgement](#), 18 March 2010, ICTR-01-63-0345 (the 'Nchamihigo Appeal Judgment'), para. 47.

⁶⁵ [Bemba et al. Appeal Judgment](#), para. 1084; [Ngudjolo Appeal Judgment](#), para. 168; [Lubanga Appeal Judgment](#), para. 218. *See also* [Nchamihigo Appeal Judgment](#), para. 47.

⁶⁶ [Bemba et al. Trial Judgment](#), para. 43; [Bemba et al. Confirmation Decision](#), para. 30.

Its purpose is to protect the reliability of testimonial evidence before the Court and, more generally, the integrity of the proceedings before the Court.⁶⁷

45. The perpetrator's interference with the 'witness', as contemplated under article 70(1)(c) of the Statute, implies that he or she seeks to deter the witness from giving full evidence or seeks in any way to unduly influence the nature of the witness's testimonial evidence. Decisive in this regard is the perpetrator's expectation.⁶⁸

46. For the purposes of article 70(1)(c) of the Statute, the term 'witness' must be understood broadly, taking into account the context and purpose of the provision.⁶⁹ The term 'witness' in article 70(1)(c) of the Statute requires a broader understanding of the concept than the one used in article 70(1)(a) of the Statute or in the protocols on witnesses adopted in each case, which have different purposes.⁷⁰ A 'witness' within the meaning of article 70(1)(a) of the Statute is a person appearing before the Court, either in person or by means of audio or video technology,⁷¹ who attests to factual allegations according to his or her personal knowledge.⁷² For the purposes of Article 70(1)(c) of the Statute, the term 'witness' must also encompass 'potential witnesses', which includes persons who know or are believed to know information that may be relevant to the proceedings before the Court, regardless of whether or not such person has been previously contacted by either party.⁷³

47. With regard to the *actus reus* of 'influencing a witness', the Chamber notes that the Statute does not describe any specific form of such 'influencing' but seeks to encompass any conduct via an open-ended provision.⁷⁴ Article 70(1)(c) of the Statute is therefore to be construed broadly, allowing many different modes of commission capable of influencing the nature of the witness's evidence to be captured thereunder.⁷⁵ The most obvious form of 'influencing' may be seen in bribing

⁶⁷ [Bemba et al. Trial Judgment](#), para. 43.

⁶⁸ [Bemba et al. Trial Judgment](#), para. 44.

⁶⁹ [Bemba et al. Appeal Judgment](#), para. 721.

⁷⁰ [Bemba et al. Appeal Judgment](#), para. 721 referring to [Bemba et al. Trial Judgment](#), para. 44.

⁷¹ Article 69(2) of the Statute and rule 67 of the Rules.

⁷² [Bemba et al. Trial Judgment](#), para. 20 referring to Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, [Directions for the conduct of proceedings and testimony in accordance with rule 140](#), 1 December 2009, ICC-01/04-01/07-1665-Corr, para. 71(a).

⁷³ [Bemba et al. Appeal Judgment](#), para. 721.

⁷⁴ [Bemba et al. Trial Judgment](#), para. 44, n. 80 and references cited therein.

⁷⁵ [Bemba et al. Trial Judgment](#), para. 45, n. 82 and references cited therein.

witnesses, which encompasses any ‘inducement offered to procure illegal or dishonest action or decision in favour of the giver’, such as paying money, providing goods, rewards, gifts or making promises.⁷⁶ Other forms of ‘influencing’ can be seen in pressuring, intimidating or threatening witnesses, or causing injuries aimed at procuring a particular testimony from the witnesses.⁷⁷

48. The use of the word ‘corruptly’ signifies that the relevant conduct is aimed at contaminating the witness’s testimony. In this context, and with a view to drawing a distinction between permissible conduct and conduct considered to fall under the purview of article 70(1)(c) of the Statute, it is essential to pay heed to the legal framework which contextualises the conduct of the perpetrator.⁷⁸ For example, when assessing the nature of contacts with witnesses, the Chamber must bear in mind the regime regulating those contacts, such as decisions on witness preparation and/or witness familiarisation.⁷⁹ Likewise, payments to witnesses must be assessed in the light of their purpose and whether the perpetrator has adhered to the Court’s applicable directions and guidelines.⁸⁰

49. Finally, the provision penalises the improper conduct of the perpetrator who intends to influence the evidence before the Court and does not require proof that the conduct had an actual effect on the witness.⁸¹ It is not required for this offence that the criminal conduct actually influences the witness in question – the offence can be complete even if the witness refuses to be influenced by the conduct in question.⁸² This is so because the provision penalises the conduct of the physical perpetrator who, from his or her vantage point, seeks to manipulate the evidence given by the witness.⁸³ Whether the witness met the perpetrator’s intentions is irrelevant in this

⁷⁶ [Bemba et al. Trial Judgment](#), para. 45, n. 83 referring to ICTR, *The Prosecutor v. Nshogoza, Judgement*, 7 July 2009, ICTR-07-91-T, para. 192 and to ICTY, *The Prosecutor v. Beqaj, Judgement on Contempt Allegations*, 27 May 2005, IT-03-66-T-R77, para. 18.

⁷⁷ [Bemba et al. Trial Judgment](#), para. 45, n. 85 and references cited therein.

⁷⁸ [Bemba et al. Trial Judgment](#), para. 47.

⁷⁹ [Bemba et al. Appeal Judgment](#), para. 737; [Bemba et al. Trial Judgment](#), para. 47.

⁸⁰ [Bemba et al. Trial Judgment](#), para. 47.

⁸¹ [Bemba et al. Trial Judgment](#), para. 48, n. 87 and references cited therein.

⁸² [Bemba et al. Appeal Judgment](#), para. 737; [Bemba et al. Trial Judgment](#), para. 48, n. 88 and references cited therein.

⁸³ [Bemba et al. Trial Judgment](#), para. 48.

regard.⁸⁴ The offence of corruptly influencing a witness is constituted independently of whether the pursued impact or influence is actually achieved and must therefore be understood as a conduct crime, not a result crime.⁸⁵

50. Anybody can commit the offence under article 70(1)(c) of the Statute. The physical perpetrator need not be a participant in the proceedings.⁸⁶

51. As regards the *mens rea*, pursuant to article 70(1)(c) of the Statute, the physical perpetrator must have ‘intentionally’ corruptly influenced the witness.⁸⁷ This means that article 70(1)(c) of the Statute is fulfilled if the perpetrator knows that his or her actions will bring about the material elements of the offence, namely corruptly influencing the witness, with the purposeful will (intent) or desire to bring about those material elements of the offence.⁸⁸ Article 70 of the Statute do not require the finding of a special intent element to undermine the administration of justice.⁸⁹ The statutory provisions do not encompass any additional evidential requirement that the administration of justice be ‘harmed’ or that the offence be committed to interfere with the administration of justice. The offences are of conduct and the harm is captured in the illicit and deliberate conduct of the perpetrator to tamper with the reliability of the evidence.⁹⁰ It is an obvious consequence of the acts committed under article 70(1)(c) of the Statute that the administration of justice is interfered with and thereby harmed.⁹¹

B. Factual Findings

52. In 2007, Kenya held general elections opposing the Orange Democratic Movement (hereinafter ‘ODM’), led by Raila Odinga and *inter alia* William Samoei

⁸⁴ [Bemba et al. Trial Judgment](#), para. 48 referring to article 434-15 of the French Penal Code, article 377 of the Italian Penal Code, Section 344(1)(d) of the Slovak Penal Code, and section 159 of the German Criminal Code.

⁸⁵ [Bemba et al. Confirmation Decision](#), para. 30.

⁸⁶ [Bemba et al. Trial Judgment](#), para. 49.

⁸⁷ [Bemba et al. Appeal Judgment](#), para. 677; [Bemba et al. Trial Judgment](#), para. 26.

⁸⁸ [Bemba et al. Trial Judgment](#), para. 50.

⁸⁹ [Bemba et al. Appeal Judgment](#), para. 678; [Bemba et al. Trial Judgment](#), paras 30-31.

⁹⁰ [Bemba et al. Trial Judgment](#), para. 31.

⁹¹ [Bemba et al. Trial Judgment](#), para. 31 referring to ICTY, Specially Appointed Chamber, *The Prosecutor v. Hartmann*, [Judgment on Allegations of Contempt](#), 14 September 2009, IT-02-54-R77.5, para. 53.

Ruto (hereinafter ‘Mr Ruto’),⁹² and the Party of National Unity (hereinafter ‘PNU’), led by incumbent President Mwai Kibaki (hereinafter ‘Mr Kibaki’) and *inter alia* Uhuru Kenyatta (hereinafter ‘Mr Kenyatta’).⁹³

53. The election results, which named Mr Kibaki as President, heightened existing tensions between Kenya’s ethnic groups, particularly the Kalenjin and the Kikuyu people.⁹⁴ The PNU’s victory, amidst disputed circumstances, led to widespread violence in the country.⁹⁵ The attacks largely targeted members of ethnic groups viewed as supporting the incumbent president or the PNU party, such as members of the Kikuyu community and PNU Kalenjin supporters viewed as traitors.⁹⁶

54. Following the post-election violence, Mr Ruto and Joshua Arap Sang (hereinafter ‘Mr Sang’) were charged with six counts of crimes against humanity,⁹⁷ and Mr Kenyatta with five counts of crimes against humanity.⁹⁸ On 13 March 2015, Trial Chamber V(B) terminated the proceedings against Mr Kenyatta upon the Prosecution’s notice of withdrawal of charges due to insufficient evidence.⁹⁹ The Trial Chamber noted that, ‘pursuant to Article 70 of the Statute [...] the Court retains jurisdiction over any interference with a witness or with the collection of evidence.’¹⁰⁰

55. On 5 April 2016, Trial Chamber V(A), by majority, vacated the charges against Mr Ruto and Mr Sang ‘without prejudice to their prosecution afresh in [the] future’.¹⁰¹ The majority noted that the accused had ‘profit[ed] from the interference [of witnesses] by the falling away of several key witnesses that th[e] Chamber found to have been interfered with’.¹⁰² Judge Herrera Carbuccia, in her dissenting opinion,

⁹² Commission of Inquiry into Post-Election Violence, Report, KEN-OTP-0001-0364 (the ‘CIPEV Report’), pp. 0508, 0547.

⁹³ CIPEV Report, p. 0449.

⁹⁴ CIPEV Report, pp. 0406, 0415, 0450.

⁹⁵ CIPEV Report, pp. 0370, 0415, 0450, 0721.

⁹⁶ CIPEV Report, pp. 0371, 0422, 0442, 0466-0467, 0720-0721.

⁹⁷ [Ruto and Sang Confirmation Decision](#), p. 138.

⁹⁸ [Muthaura et al. Confirmation Decision](#), para. 428.

⁹⁹ Trial Chamber V(B), *The Prosecutor v. Uhuru Muigai Kenyatta*, [Decision on the withdrawal of charges against Mr Kenyatta](#) (the ‘Kenyatta Decision on the withdrawal of charges’), 13 March 2015, ICC-01/09-02/11-1005.

¹⁰⁰ [Kenyatta Decision on the withdrawal of charges](#), para. 10.

¹⁰¹ Trial Chamber V(A), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, [Decision on Defence Applications for Judgments of Acquittal](#) (the ‘Decision on Acquittal’), 16 June 2016, ICC-01/09-01/11-2027-Red-Corr (confidential corrected version notified same day, original version filed on 5 April 2016), p. 1.

¹⁰² [Ruto and Sang Decision on Acquittal](#), Reasons of Judge Fremr, para. 148.

equally noted the prior findings of the Main Case Chamber with regard to witness interference.¹⁰³

1. P-0397

56. The Chamber [REDACTED]

[REDACTED] and supporters allegedly incited violence against non-ODM supporters as well as against Kikuyu people.¹⁰⁴

57. On 14 May 2013, the Prosecution informed Trial Chamber V(A) of P-0397's decision to withdraw as a Prosecution witness in the *Ruto and Sang* case.¹⁰⁵ Despite several attempts to clarify the circumstances of his withdrawal and despite P-0397's reassurances of his continued cooperation, the Prosecution was unable to meet with P-0397.¹⁰⁶

58. The Chamber notes that in January 2014, as a result of threats to his life,¹⁰⁷ P-0397 reached out to the Prosecution.¹⁰⁸ Prosecution investigators met with him on 16 and 17 January 2014 and, after a preliminary discussion,¹⁰⁹ conducted an interview [REDACTED].¹¹⁰ Due to the assessed risk to his safety,

¹⁰³ Trial Chamber V(A), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, [Dissenting Opinion of Judge Herrera Carbuccia](#), 5 April 2016, ICC-01/09-01/11-2027-Anx1, para. 30.

¹⁰⁴ P-0397, KEN-OTP-0074-0264-R01.

¹⁰⁵ See Trial Chamber V(A), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, [Corrected and amended version of "Prosecution's request under article 64\(6\)\(b\) and article 93 to summon witnesses" \(ICC-01/09-01/11-1120-Conf-Exp\)](#) (the 'Prosecution Request to summon witnesses in the *Ruto and Sang* case'), 5 December 2013, ICC-01/09-01/11-1120-Red2-Corr (confidential version notified on 28 November 2013), paras 38-41.

¹⁰⁶ OTP Investigator Reports, KEN-OTP-0139-0095; KEN-OTP-0103-0081-R01; KEN-OTP-0139-0099; KEN-OTP-0140-0033-R01; KEN-OTP-0159-0884, pp. 0902-0903, paras 68-72.

¹⁰⁷ P-0397, KEN-OTP-0125-0322-R01, pp. 0327-0337, 0347, 0353-0358; OTP Investigator Report, KEN-OTP-0138-0531. [REDACTED]

[REDACTED] (P-0397, KEN-OTP-0125-0322-R01, pp. 0326-0337, lines 107-513; OTP Investigator Report, KEN-OTP-0138-0531; OTP Investigator Report, KEN-OTP-0159-0884, p. 0903, para. 73). The Chamber finds that it is not [REDACTED]

[REDACTED] (P-0397, KEN-OTP-0125-0322-R01, pp. 0346-0358, lines 791-1215; KEN-OTP-0125-0322-R01, p. 1195-1196; P-0397, KEN-OTP-0125-0571-R01, pp. 0599-0600, lines 972-1010) [REDACTED] (OTP Investigator Report, KEN-OTP-0129-0567-R01; Mr Gicheru, KEN-OTP-0159-0795, p. 0806, lines 345-362). This however does not affect the Chamber's findings established below as to the interference with P-0397's testimony.

¹⁰⁸ OTP Investigator Report, KEN-OTP-0138-0531.

¹⁰⁹ P-0397, KEN-OTP-0125-0322-R01, KEN-OTP-0125-0360-R01.

¹¹⁰ P-0397, KEN-OTP-0125-0375-R01, KEN-OTP-0125-0402-R01, KEN-OTP-0125-0434-R01, KEN-OTP-0125-0461-R01, KEN-OTP-0125-0488-R01, KEN-OTP-0125-0494-R01, KEN-OTP-0125-0499-

P-0397 [REDACTED].¹¹¹ Prosecution investigators were due to meet with him on 10 March 2014.¹¹² [REDACTED].¹¹³ [REDACTED].¹¹⁴ Consequently, the Prosecution was unable to call P-0397 in the *Ruto and Sang* case.

59. The Defence submits that the evidence related to P-0397, in particular, the affidavit signed by P-0397 on 9 May 2013¹¹⁵ and the Prosecution investigation reports, does not support the Prosecutor's allegations that P-0397 withdrew as a Prosecution witness as a result of Mr Gicheru's, [REDACTED]¹¹⁶ [REDACTED] corrupting influence or interference.¹¹⁷ The Defence further submits that [REDACTED] explains the money P-0397 deposited into his bank account.¹¹⁸

60. The Chamber relies on P-0397's statements from January 2014 collected [REDACTED]¹¹⁹ together with the said affidavit, financial documents, and other corroborating evidence, which in its view support the Prosecutor's allegations as established below. Regarding P-0397's statements from January 2014, the Chamber recalls first its general statements concerning the

R01, KEN-OTP-0125-0505-R01, KEN-OTP-0125-0518-R01, KEN-OTP-0125-0547-R01, KEN-OTP-0125-0571-R01; Waiver of Rights, KEN-OTP-0124-0020-R01.

¹¹¹ OTP Investigator Report KEN-OTP-0159-0884, p. 0906, para. 85.

¹¹² OTP Investigator Report, KEN-OTP-0159-0884, p. 0906, paras 85-86.

¹¹³ OTP Investigator Reports: KEN-OTP-0125-0830; KEN-OTP-0126-0164-R01. [REDACTED]

[REDACTED] (*See* Corrigendum: Decision on Prosecution Request for Admission of Prior Recorded Testimony (the 'Prior Recorded Statement Decision'), 28 August 2015, ICC-01/09-01/11-1938-Conf-Corr (original version filed on 19 August 2015, for a public redacted version see [ICC-01/09-01/11-1938-Red-Corr](#)), para. 138).

¹¹⁴ OTP Investigator Reports: KEN-OTP-0149-0444; KEN-OTP-0129-0567-R01; KEN-OTP-0149-0449-R01; KEN-OTP-0135-0446-R01; KEN-OTP-0144-0168-R01.

¹¹⁵ Affidavit, KEN-OTP-0124-0029.

¹¹⁶ [REDACTED] *See* P-0604, KEN-OTP-0117-1019-R01, p. 1024, para. 34.

¹¹⁷ Defence Written Submissions, paras 39-40.

¹¹⁸ Defence Written Submissions, paras 39-40. *See* OTP Investigator Reports: KEN-OTP-0139-0093; KEN-OTP-0139-0095.

¹¹⁹ P-0397, KEN-OTP-0125-0375-R01, KEN-OTP-0125-0402-R01, KEN-OTP-0125-0434-R01, KEN-OTP-0125-0461-R01, KEN-OTP-0125-0488-R01, KEN-OTP-0125-0494-R01, KEN-OTP-0125-0499-R01, KEN-OTP-0125-0505-R01, KEN-OTP-0125-0518-R01, KEN-OTP-0125-0547-R01, KEN-OTP-0125-0571-R01.

credibility of witnesses.¹²⁰ Next, the Chamber finds that P-0397's statements from January 2014 are internally consistent and are partially corroborated by other evidence, including the statements of P-0516 and other witnesses. Moreover, P-0397 appeared forthright throughout his interview, specifically regarding the extent and purpose of his interactions with Mr Gicheru and his involvement in corruptly influencing or interfering with P-0516's testimony.

61. Accordingly, the Chamber is convinced that between April 2013 and January 2014, Mr Gicheru offered P-0397 the sum of 5 million Ksh (about 45,261 euros at the time) in cash instalments in exchange for withdrawing as Prosecution witness in the *Ruto and Sang* case, of which Mr Gicheru then paid P-0397 a total of 1 million Ksh (about 9,052 euros at the time). The Chamber finds that the facts detailed in the following paragraphs are established.

62. On or about 20 April 2013, [REDACTED],¹²¹ [REDACTED] visited P-0397 [REDACTED].¹²² On that occasion, [REDACTED] explained to P-0397 that there was a group of persons working for Mr Ruto who were instructed to identify ICC witnesses and offer them money in exchange for their withdrawal as Prosecution witnesses.¹²³

63. [REDACTED] told P-0397 that [REDACTED] would return to take P-0397 to meet this group of people, who were based [REDACTED], Kenya.¹²⁴

64. On or about 26 April 2013, [REDACTED] took P-0397 to meet Mr Gicheru [REDACTED].¹²⁵ After [REDACTED] introduced P-0397 to Mr Gicheru, Mr Gicheru spoke to P-0397 privately.¹²⁶ P-0397

¹²⁰ See paragraphs 40-42 above.

¹²¹ P-0397, KEN-OTP-0125-0402-R01, p. 0431, lines 20-34, p. 0432, line 1.

¹²² P-0397, KEN-OTP-0125-0402-R01, p. 0431, lines 8-20; p. 0432, lines 32-35; KEN-OTP-0125-0434-R01, p. 441, lines 226-240.

¹²³ P-0397, KEN-OTP-0125-0402-R01, p. 0433, lines 2-6; KEN-OTP-0125-0434-R01, p. 0436, lines 40-41, p. 0441, lines 247-249.

¹²⁴ P-0397, KEN-OTP-0125-0434-R01, p. 0436, lines 45-46.

¹²⁵ P-0397, KEN-OTP-0125-0434-R01, p. 0436, lines 53-55; p. 0436, lines 63-67; p. 0451, lines 598-607, see also p. 0454, line 733; KEN-OTP-0125-0518-R01, p. 0521; KEN-OTP-0159-0585.

¹²⁶ P-0397, KEN-OTP-0125-0434-R01, p. 0437, lines 79-104; p. 0456, lines 760-762; KEN-OTP-0125-0518-R01, p. 0521, lines 74-75, 94-96.

told Mr Gicheru that he was an ICC witness to which Mr Gicheru added that he had heard that P-0397 was an ICC witness.¹²⁷

65. Mr Gicheru asked P-0397 to assist him by withdrawing as a witness against Mr Ruto.¹²⁸ Mr Gicheru told P-0397 that Mr Ruto wanted P-0397 to identify other Prosecution witnesses and bring them to him (Mr Gicheru).¹²⁹

66. Mr Gicheru asked P-0397 to state his price in exchange for his withdrawal as an ICC witness.¹³⁰ P-0397 requested 10 million Ksh (about 90,522 euros at the time).¹³¹ [REDACTED]¹³² [REDACTED] joined the meeting.¹³³ Mr Gicheru explained that [REDACTED] must be consulted regarding the money to be paid to witnesses,¹³⁴ and that Mr Ruto had given him and [REDACTED] the authority to pay witnesses.¹³⁵ Mr Gicheru told [REDACTED] that P-0397 was a witness and therefore had to be paid.¹³⁶ After some negotiation, they agreed on a sum of 5 million Ksh (about 45,261 euros at the time),¹³⁷ which Mr Gicheru promised would be paid in cash instalments.¹³⁸ P-0397 requested that Mr Gicheru [REDACTED] [REDACTED], but they refused.¹³⁹ Mr Gicheru also gave his business card to P-0397,¹⁴⁰ who in turn handed it to Prosecution investigators.¹⁴¹

¹²⁷ P-0397, KEN-OTP-0125-0434-R01, p. 0437, lines 79-104.

¹²⁸ P-0397, KEN-OTP-0125-0434-R01, p. 0437, lines 79-104, p. 0456, lines 774-776.

¹²⁹ P-0397, KEN-OTP-0125-0434-R01, p. 0437, lines 79-104.

¹³⁰ P-0397, KEN-OTP-0125-0434-R01, p. 0438, lines 107-115, p. 0457, line 802.

¹³¹ P-0397, KEN-OTP-0125-0434-R01, p. 0438, lines 107-115; KEN-OTP-0125-0518-R01, lines 74-75, 94-96.

¹³² See [REDACTED].

¹³³ P-0397, KEN-OTP-0125-0434-R01, pp. 0438-0439, lines 123-142; p. 0458, lines 847-857; KEN-OTP-0125-0518-R01, p. 0521, lines 59-96, *see also* pp. 0523-0524, 178-196. It is not clear whether [REDACTED] before or after P-0397 stated his price (*See* P-0397, KEN-OTP-0125-0434-R01, p. 0458, lines 825-836).

¹³⁴ P-0397, KEN-OTP-0125-0461-R01, pp. 0464-0465, lines 93-114. *See also*, KEN-OTP-0125-0518-R01, p. 0524, lines 200-202, 203-215.

¹³⁵ P-0397, KEN-OTP-0125-0461-R01, p. 0465, lines 117-128; KEN-OTP-0125-0434-R01, p. 0457, lines 825-832.

¹³⁶ P-0397, KEN-OTP-0125-0434-R01, pp. 0438-0439, lines 123-142.

¹³⁷ P-0397, KEN-OTP-0125-0434-R01, p. 0438, lines 107-115, p. 0439, lines 154-156.

¹³⁸ P-0397, KEN-OTP-0125-0434-R01, p. 0438, lines 107-115.

¹³⁹ P-0397, KEN-OTP-0125-0461-R01, p. 0465, lines 137-138.

¹⁴⁰ P-0397, KEN-OTP-0125-0434-R01, pp. 0451-053, lines 618-702; KEN-OTP-0125-0518-R01, pp. 0529-0530, lines 391-403.

¹⁴¹ P-0397, KEN-OTP-0125-0434-R01, pp. 0451-053, lines 618-702; Business card, KEN-OTP-0124-0028.

67. On or about 27 April 2013, Mr Gicheru paid P-0397 a cash instalment of 600,000 Ksh (about 5,431 euros at the time).¹⁴² P-0397 kept 100,000 Ksh (about 905 euros at the time) and deposited the remaining 500,000 Ksh (about 4,526 euros at the time) into his bank account [REDACTED].¹⁴³ He did so as he was afraid of getting robbed, despite Mr Gicheru's warning not to deposit the money into the bank to avoid detection by the 'ICC people'.¹⁴⁴

68. On or about 30 April 2013, P-0397 met with Mr Gicheru [REDACTED] [REDACTED].¹⁴⁵ Mr Gicheru paid P-0397 a second cash instalment of 400,000 Ksh (about 3,620 euros at the time).¹⁴⁶ [REDACTED], P-0397 deposited an amount of 400,000 Ksh (about 3,620 euros at the time) into his bank account.¹⁴⁷ Mr Gicheru [REDACTED] [REDACTED] told P-0397 that they would give him the remaining 4 million later, but [REDACTED] never did.¹⁴⁸ Mr Gicheru [REDACTED] told P-0397 that they did not want him to continue cooperating with the ICC and that he should start the withdrawing process.¹⁴⁹ Mr Gicheru [REDACTED] explained that regarding the withdrawal process, they would find a lawyer who would put in writing P-0397's decision to withdraw from the Main Case.¹⁵⁰

69. On 9 May 2013, P-0397 went to [REDACTED], where he was introduced by Mr Gicheru and [REDACTED] to a lawyer named [REDACTED] [REDACTED].¹⁵¹ Mr Gicheru [REDACTED] instructed [REDACTED] to prepare an affidavit based on the discussion that Mr Gicheru, [REDACTED]

¹⁴² P-0397, KEN-OTP-0125-0434-R01, p. 0439, lines 154-156; KEN-OTP-0125-0518-R01, pp. 0521-0522, lines 105-119. *See also* P-0613, KEN-OTP-0111-0162, p. 0169, para. 36.

¹⁴³ P-0397, KEN-OTP-0125-0461-R01, pp. 0462-0463, lines 20-58, p. 0463, lines 64-70, p. 0464, lines 72-79; KEN-OTP-0125-0518-R01, pp. 0521-0522, lines 105-119; corroborated by P-0397's bank statement record, showing he deposited 500,000 Ksh [REDACTED]: Financial document, KEN-OTP-0124-0021, p. 0023.

¹⁴⁴ P-0397, KEN-OTP-0125-0461-R01, pp. 0476-0478, lines 540-584.

¹⁴⁵ P-0397, KEN-OTP-0125-0518-R01, p. 0522, lines 120-135.

¹⁴⁶ P-0397, KEN-OTP-0125-0434-R01, p. 0439, lines 154-156, p. 0438, lines 118-121.

¹⁴⁷ P-0397, KEN-OTP-0125-0518-R01, p. 0522, lines 120-135; KEN-OTP-0125-0461-R01, p. 0463, lines 51-52, p. 0464, lines 79-92; corroborated by P-0397's bank statement record, showing he deposited 500,000 Ksh [REDACTED] (Financial document, KEN-OTP-0124-0021, p. 0024). The Chamber relies on P-0397's declaration that the money was given to him by Mr Gicheru and thus rejects the Defence's submissions on this point (Defence Written Submissions, para. 39).

¹⁴⁸ P-0397, KEN-OTP-0125-0434-R01, p. 0439, lines 154-156; KEN-OTP-0125-0461-R01, p. 0465, lines 138-139.

¹⁴⁹ P-0397, KEN-OTP-0125-0461-R01, p. 0466, lines 145, 151-156.

¹⁵⁰ P-0397, KEN-OTP-0125-0461-R01, p. 0466, lines 145, 151-156, 168-170.

¹⁵¹ P-0397, KEN-OTP-0125-0434-R01, p. 0439, lines 163-173; KEN-OTP-0125-0461-R01, pp. 0466-0468, lines 151-246; KEN-OTP-0125-0518-R01, pp. 0530-0531, lines 410-413, 448.

[REDACTED].¹⁵² P-0397 signed a letter giving [REDACTED] the power to act for him before the ICC on this matter.¹⁵³ On the same day, P-0397 also signed an affidavit stating that he no longer intended ‘to testify against any accused persons’ before the ICC, which the Chamber understands to include Mr Ruto and Mr Sang, and wished to withdraw his testimony against them, which was sent to the Prosecution by [REDACTED].¹⁵⁴ The affidavit was prepared in English [REDACTED].

[REDACTED].¹⁵⁵

70. On 7 December 2013, P-0397 met with Mr Gicheru [REDACTED].¹⁵⁶ Mr Gicheru asked P-0397 whether he was still in touch with the ICC and accused him of wanting, along with other individuals, to send Mr Ruto to jail.¹⁵⁷ Mr Gicheru became aggressive, indicating that he believed P-0397 was trying to have him arrested by the ICC.¹⁵⁸ The meeting ended when Mr Gicheru was calmed down by the second man and P-0397 left the meeting.¹⁵⁹ As a result of this exchange, P-0397 felt that he was in danger and could be killed.¹⁶⁰

¹⁵² P-0397, KEN-OTP-0125-0461-R01, pp. 0466-0468, lines 151-248; KEN-OTP-0125-0518-R01, pp. 0530-0531, lines 421-423, 453-459.

¹⁵³ P-0397, KEN-OTP-0125-0402-R01, p. 0429, lines 10-34, p. 0430, lines 1-37, p. 0431, lines 1-4; Letter to the lawyer, KEN-OTP-0124-0030.

¹⁵⁴ P-0397, KEN-OTP-0125-0402-R01, pp. 0425-0429, p. 0425, lines 33-36, p. 0426, line 2, p. 0428, lines 28-33, p. 0428, line 36, p. 0428, lines 2-9; Letter to the ICC and Letter to the lawyer, KEN-OTP-0124-0030; Affidavit, KEN-OTP-0124-0029; P-0397, KEN-OTP-0125-0434-R01, p. 0439, lines 163-173; KEN-OTP-0125-0461-R01, p. 0467, lines 205-207; KEN-OTP-0125-0518-R01, p. 0529, lines 386-390, *see also* [Prosecution Request to summon witnesses in the Ruto and Sang case](#), para. 40. The Chamber notes that Mr Gicheru [REDACTED] were also involved in the preparation of an affidavit in English signed by P-0341 and for the purposes of withdrawing as an ICC witness (P-0341, KEN-OTP-0150-0255-R01, p. 0268, para. 68).

¹⁵⁵ P-0397, KEN-OTP-0125-0461-R01, p. 0467, lines 191-199.

¹⁵⁶ P-0397, KEN-OTP-0125-0461-R01, pp. 0469-0470, lines 262-296; KEN-OTP-0125-0571-R01, pp. 0577-0582, lines 184-329). *See also* Material related P-0397, KEN-OTP-0125-0248, p. 0260, lines 363-367. The Chamber note that other witnesses mentioned having contacts with [REDACTED] (See [REDACTED]).

¹⁵⁷ P-0397, KEN-OTP-0125-0461-R01, p. 0470, lines 299-316.

¹⁵⁸ P-0397, KEN-OTP-0125-0461-R01, p. 0471, lines 322-336; KEN-OTP-0125-0518-R01, p. 0533, lines 538-546.

¹⁵⁹ P-0397, KEN-OTP-0125-0461-R01, pp. 0471-0472, lines 322-367.

¹⁶⁰ P-0397, KEN-OTP-0125-0461-R01, pp. 0471-0472, lines 322-367; KEN-OTP-0125-0518-R01, p. 0533, lines 538-546.

2. P-0516

71. The Chamber notes that in ██████████ 2012 ██████████ (hereinafter ‘P-0516’) provided evidence to the Prosecutor regarding the organisation of the PEV, in Kenya, and Mr Ruto and other ODM members and supporters’ rethoric against non-ODM supporters and Kikuyu people.¹⁶¹

72. On 6 July 2014, P-0516 was scheduled to attend a meeting with Court officials regarding his in-court testimony,¹⁶² but he failed to do so and ceased all communication.¹⁶³ Subsequently, Trial Chamber V(A) issued a summons for his appearance in court¹⁶⁴ and as a result P-0516 testified between 22 and 26 September 2014.¹⁶⁵ During his in-court testimony, P-0516 stated that the evidence that he provided in his original witness statement was false, and that he had been told by ██████████ what to say.¹⁶⁶ Under oath, P-0516 also testified that he did not know a lawyer named ‘Paul Gicheru’,¹⁶⁷ that he had not visited ██████████ ██████████, ██████████ and that he had not been offered or paid any money to withdraw as a Prosecution witness.¹⁶⁹ As a consequence, P-0516 was declared hostile.¹⁷⁰

73. After several attempts by Prosecution investigators to reach and meet with P-0516 to discuss his security situation,¹⁷¹ P-0516 resumed contact with the Prosecution in ██████████¹⁷² and met with Prosecution investigators from ██████████

¹⁶¹ P-0516, KEN-OTP-0087-0031-R01.

¹⁶² OTP Investigator Report, KEN-OTP-0159-0884, p. 0911, para. 102.

¹⁶³ OTP Investigator Reports, KEN-OTP-0116-0479; KEN-OTP-0107-0288.

¹⁶⁴ Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation, 30 April 2014, ICC-01/09-01/11-1274-Corr2 (original version notified on 17 April 2014).

¹⁶⁵ P-0516, Transcripts of hearings, from 23 to 26 September 2014, ICC-01/09-01/20-T-002-Conf-ENG to ICC-01/09-01/20-T-006-Conf-ENG (for a public version see [ICC-01/09-01/11-T-142-Red-ENG](#), [ICC-01/09-01/11-T-143-Red-ENG](#), [ICC-01/09-01/11-T-144-Red-ENG](#), [ICC-01/09-01/11-T-145-Red-ENG](#)).

¹⁶⁶ See e.g. P-0516, Transcript of hearing, 23 September 2014, [ICC-01/09-01/11-T-142-Red-ENG](#), p. 42 *et seq*; Transcript of hearing, 25 September 2014, [ICC-01/09-01/11-T-144-Red-ENG](#) (‘T-144’), p. 73, line 25, p. 74, lines 1-6.

¹⁶⁷ P-0516, [T-144](#), p. 71, lines 18-20. See also p. 50, lines 20-21.

¹⁶⁸ P-0516, [T-144](#), p. 72, lines 15-25, p. 73, lines 1-5.

¹⁶⁹ P-0516, [T-144](#), p. 73, lines 18-24.

¹⁷⁰ P-0516, [T-144](#), p. 32, line 17 to p. 33, line 8.

¹⁷¹ OTP Investigator Reports: KEN-OTP-0138-0075-R01; KEN-OTP-0138-0081-R01; KEN-OTP-0138-0089-R01; KEN-OTP-0129-0702.

¹⁷² OTP Investigator Report, KEN-OTP-0148-0970.

██████████,¹⁷³ on which occasion an interview ██████████
██████████ was conducted.¹⁷⁴

74. The Chamber notes that P-0516's willingness to cooperate with the Prosecution has vacillated,¹⁷⁵ that he has changed the facts provided to Prosecution investigators regarding the Main Case¹⁷⁶ as well as information about his contacts with Mr Gicheru,¹⁷⁷ and that, during the interview, he seemed not entirely forthright specifically regarding the extent and purpose of his interactions with Mr Gicheru and his contact with P-0613.¹⁷⁸ The Chamber takes also note of the Prior Recorded Statements Decision in which Trial Chamber V(A) found that P-0516 had been subject to improper interference by individuals including ██████████.¹⁷⁹ However, the Chamber recalls that it will assess the credibility of a witness as well as the evidence before it independently and draw its own conclusions.¹⁸⁰

75. The Chamber is still of the view that P-0516's statements from ██████████
██████████ can be, at least in part, relied upon in the case at hand. The Chamber recalls first of all its general statements concerning the credibility of witnesses.¹⁸¹ Next, the Chamber takes into account two elements which in its view buttresses P-0516's credibility and the reliability of portions of the said statements. Firstly, at the beginning of the interview, the Prosecution investigators made clear to P-0516 that ██████████ was not

¹⁷³ OTP Investigator Report, KEN-OTP-0148-070; P-0516, KEN-OTP-0150-0621-R01.

¹⁷⁴ P-0516, KEN-OTP-0150-0637-R01; KEN-OTP-0150-0658-R01; KEN-OTP-0150-0664-R01; KEN-OTP-0150-0684-R01; KEN-OTP-0150-0706-R01; KEN-OTP-0150-0728-R01; KEN-OTP-0150-0734-R01; KEN-OTP-0150-0760-R01; KEN-OTP-0150-0778-R01; KEN-OTP-0150-0789-R01; KEN-OTP-0150-0800-R01; KEN-OTP-0150-0805-R01; KEN-OTP-0150-0817-R01; KEN-OTP-0150-0837-R01; KEN-OTP-0150-0868-R01; KEN-OTP-0150-0873-R01; KEN-OTP-0150-0893-R01; KEN-OTP-0150-0921-R01; KEN-OTP-0150-0951-R01; KEN-OTP-0150-0980-R01; KEN-OTP-0150-0995-R01.

¹⁷⁵ OTP Investigator Reports, KEN-OTP-0116-0495-R01; KEN-OTP-0107-0288.

¹⁷⁶ See e.g. P-0516, Transcript of hearing, 23 September 2014, [ICC-01/09-01/11-T-142-Red-ENG](#), p. 38, lines 23-25, p. 39, lines 1-9; Transcript of hearing, 24 September 2014, [ICC-01/09-01/11-T-143-Red-ENG](#), p. 40, lines 1-25, p. 41, lines 1-6.

¹⁷⁷ See paragraph 71 above.

¹⁷⁸ Compare P-0516, KEN-OTP-0150-0684-R01, p. 0688, lines 145-146; KEN-OTP-0150-0728-R01, and KEN-OTP-0150-0760-R01, pp. 0775-0777 with P-0516, KEN-OTP-0150-0800-R01 p. 0803, lines 93, 96, KEN-OTP-0150-0817-R01, and KEN-OTP-0150-0837-R01. The Chamber notes that, when the interview resumed ██████████, P-0516 admitted that he had been lying to the Prosecution (P-0516, KEN-OTP-0150-0817-R01, p. 0820, lines 74-75, 78) but that he had realised that it was 'very important that [he] says[s] everything' (P-0516, KEN-OTP-0150-0817-R01, p. 0820, lines 81-82, 85, 87). See also Defence Written Submissions, para. 47.

¹⁷⁹ Prior Recorded Statement Decision, para. 55.

¹⁸⁰ See paragraph 29 above.

¹⁸¹ See paragraphs 40-42 above.

contingent upon being interviewed.¹⁸² P-0516 proceeded with the interview nonetheless. Secondly, the evidence provided by P-0516 is also corroborated by the statements of other witnesses, such as P-0397.¹⁸³ In the Chamber's view, the abovementioned elements support the reliance on portions of P-0516's statements from ██████████ to the effect that he was promised and paid money by Mr Gicheru to withdraw as a Prosecution witness, as established below.

76. During one of the meetings in April or May 2013¹⁸⁴ ██████████ ██████████,¹⁸⁵ Mr Gicheru asked P-0397 if he knew of other ICC witnesses.¹⁸⁶ In P-0397's presence, Mr Gicheru directed ██████████ to locate an ICC witness – referring to P-0516 – ██████████.¹⁸⁷ P-0397 told them that he had seen P-0516 ██████████.¹⁸⁸ ██████████ suggested that since he was not on good terms with P-0516, P-0397 should contact him¹⁸⁹ and ask him to withdraw.¹⁹⁰ As a result, Mr Gicheru and ██████████ instructed P-0397 to locate P-0516 and bring him to ██████████.¹⁹¹

77. ██████████ told P-0397 that if he located any witnesses, he would receive additional money¹⁹² and that ██████████ had received payments for identifying and locating other Prosecution witnesses.¹⁹³

78. Subsequently, P-0397 met with P-0516 ██████████.¹⁹⁴ P-0397 told P-0516 that he had heard that P-0516 was an ICC witness¹⁹⁵ and that he had been in contact with

¹⁸² P-0516, KEN-OTP-0150-0684-R01, p. 0686, lines 58-64. *See also* P-0516, KEN-OTP-0150-0873-R01, pp. 0888-0890, lines 509-580.

¹⁸³ *See* paragraph 87 below.

¹⁸⁴ P-0397, KEN-OTP-0125-0518-R01, pp. 537-539, lines 680-734.

¹⁸⁵ P-0397, KEN-OTP-0125-0461-R01, p. 0474, lines 466-469.

¹⁸⁶ P-0397, KEN-OTP-0125-0461-R01, p. 0474, lines 438-452; KEN-OTP-0125-0518-R01, p. 0523, lines 144-147.

¹⁸⁷ P-0397, KEN-OTP-0125-0518-R01, pp. 0535-0536, lines 577-639; KEN-OTP-0125-0461-R01, p. 0474, lines 451.

¹⁸⁸ P-0397, KEN-OTP-0125-0518-R01, p. 0536, line 631.

¹⁸⁹ P-0397, KEN-OTP-0125-0518-R01, p. 0536, lines 638-639.

¹⁹⁰ P-0397, KEN-OTP-0125-0461-R01, p. 0474, lines 459-461, 466-469.

¹⁹¹ P-0397, KEN-OTP-0125-0518-R01, p. 0535, lines 609-612, p. 0537, lines 665-669, p. 0540, lines 786-800.

¹⁹² P-0397, KEN-OTP-0125-0461-R01, p. 0475, lines 475-476, lines 502-505; KEN-OTP-0125-0518-R01, p. 0534, lines 571-572, p. 0544, lines 915-916.

¹⁹³ P-0397, KEN-OTP-0125-0518-R01, p. 0544, lines 922-923.

¹⁹⁴ P-0397, KEN-OTP-0125-0461-R01, p. 0475, lines 476; KEN-OTP-0125-0518-R01, pp. 0536-0537, lines 643-659; P-0516, KEN-OTP-0150-0817-R01, pp. 0820-0822, lines 93-145. P-0397 claims they met 'by chance' ██████████ whereas P-0516 claims P-0397 called him and they arranged to meet ██████████

P-0613.¹⁹⁶ P-0397 told P-0516 that he could get money, such as 500,000 Ksh (about 4,526 euros at the time), but that he had to meet and talk with Mr Gicheru first.¹⁹⁷ P-0516 agreed to P-0397's proposal to meet Mr Gicheru.¹⁹⁸ P-0397 then reported P-0516's agreement to meet with Mr Gicheru, who said he would find a date to meet with P-0516.¹⁹⁹

79. P-0397 took P-0516 to [REDACTED], introduced P-0516 to Mr Gicheru, and left [REDACTED].²⁰⁰ There Mr Gicheru and P-0516 had a private discussion.²⁰¹

80. During the first or second meeting, Mr Gicheru offered P-0516 the sum of 800,000 Ksh (about 7,241 euros at the time), which would be paid in cash and in instalments,²⁰² in exchange for his withdrawal as a witness from the Main Case.²⁰³

81. Mr Gicheru met with P-0516 approximately four or five times and paid him a total of at least 500,000 Ksh (about 4,526 euros at the time).²⁰⁴

[REDACTED] (*compare* P-0397, KEN-OTP-0125-0518-R01, p. 0536, line 650 *with* P-0516, KEN-OTP-0150-0817-R01, pp. 0820-0821, lines 93-121).

¹⁹⁵ P-0397, KEN-OTP-0125-0518-R01, p. 0539, line 741. *See also* P-0516, KEN-OTP-0150-0837-R01, p. 0847, line 326.

¹⁹⁶ P-0397, KEN-OTP-0125-0518-R01, p. 0539, lines 746-747.

¹⁹⁷ P-0397, KEN-OTP-0125-0518-R01, p. 0540, lines 774-785; P-0516, KEN-OTP-0150-0837-R01, p. 0855, line 624.

¹⁹⁸ P-0397, KEN-OTP-0125-0518-R01, pp. 0539-0540, lines 753-785. KEN-OTP-0150-0817-R01, p. 0822, line 147.

¹⁹⁹ P-0397, KEN-OTP-0125-0518-R01, p. 0537, lines 665-669.

²⁰⁰ P-0397, KEN-OTP-0125-0461-R01, p. 0475, lines 484-489; KEN-OTP-0125-0518-R01, p. 0541, lines 816-825; P-0516, KEN-OTP-0150-0817-R01, p. 0822, lines 152-169, pp. 0826-0827, lines 278-316.

²⁰¹ P-0516, KEN-OTP-0150-0817-R01, p. 0826, lines 309-312; P-0397, KEN-OTP-0125-0518-R01, p. 0541, lines 816-825.

²⁰² P-0516, KEN-OTP-0150-0817-R01, p. 0823, lines 195-209; KEN-OTP-0150-0837-R01, pp. 0848-0849, lines 384-399; p. 0850, lines 433-434; P-0397, KEN-OTP-0125-0518-R01, p. 0541, lines 830-838.

²⁰³ *Compare* P-0516, KEN-OTP-0150-0817-R01, p. 0824, lines 222-232 *with* P-0516, KEN-OTP-0150-0837-R01, p. 0846, lines 298-303. P-0516 subsequently said that the reason for receiving that money was communicated to him by Mr Gicheru indirectly, *i.e.* through P-0397 (P-0516, KEN-OTP-0150-0837-R01, pp. 0847-0848, lines 346-383). P-0516 mentioned to P-0397 the payment amount that he and Mr Gicheru agreed upon, but P-0397 could not recall if the exact amount was 400,000 Ksh (about 3,620 euros at the time), 500,000 Ksh (about 4,526 euros at the time), 600,000 Ksh (about 5,431 euros at the time) or 800,000 Ksh (about 7,241 euros at the time) (P-0397, KEN-OTP-0125-0461-R01, p. 0475, lines 484-489; KEN-OTP-0125-0518-R01, p. 0541, lines 826-838).

²⁰⁴ P-0516, KEN-OTP-0150-0817-R01, pp. 0822-0824, lines 156-232, pp. 0826-0833, lines 278-551; KEN-OTP-0150-0837-R01, pp. 0839-0843, lines 40-195, pp. 0848-0852, lines 384-492, pp. 0857-0858, lines 664-707; P-0397, KEN-OTP-0125-0518-R01, pp. 0543, lines 889-899. *See also* P-0613, KEN-OTP-0111-0162, p. 0169, para. 36; P-0800, KEN-OTP-0135-0200, p. 0204, lines 119-120.

82. ██████████, (hereinafter ‘P-0341’ ██████████) saw P-0397 and P-0516 ██████████ several times, together with ██████████. On one of these occasions, they told P-0341 that they had recanted their statements because of the money they received, but complained that more money had been promised than delivered, and were thus considering to ‘return to the ICC’.²⁰⁵

83. Thereafter, P-0516 withdrew as a Prosecution witness in the Main Case.²⁰⁶

84. P-0516 and P-0397 could not refuse the offer to receive money from Mr Gicheru because otherwise ‘these people might come after [them]’.²⁰⁷ P-0516 stopped going to ██████████ to receive money, despite being paid less than originally promised, because it was becoming dangerous.²⁰⁸

85. P-0397 is unsure whether P-0516 received the money promised but he remembers an occasion where P-0516 told him that he had received the total sum promised.²⁰⁹

86. P-0397 did not receive any of the payment he was promised for introducing P-0516 to Mr Gicheru.²¹⁰ When P-0397 asked for this payment, Mr Gicheru avoided the issue.²¹¹

87. The Chamber finds that the allegations regarding Mr Gicheru’s payments to P-0516 in exchange for withdrawing as a Prosecution witness are corroborated by P-0397 as well as by other witnesses.²¹²

²⁰⁵ P-0341, KEN-OTP-0150-0255-R01, p. 0277, para. 119. P-0341 ██████████ between April 2013 and April 2014, especially between May and July 2013 (P-0341, KEN-OTP-0150-0255-R01, p. 277, para. 117, p. 266, para. 58, p. 0268, para. 68, p. 0269, paras 74-75).

²⁰⁶ P-0516, KEN-OTP-0150-0837-R01, pp. 0852-0854, lines 501-592. *Compare with* P-0516, KEN-OTP-0150-0706-R01, p. 0708, pp. 0713-0715. The Prosecution indicated that they are not in possession of either the letter or the affidavit containing P-0516’s decision to withdraw from the ICC proceedings (*See*, DCC, para. 108. *See also*, P-0516, Transcript of hearing, 25 September 2014, ICC-01/09-01/20-T-005-Conf-Red-ENG, p. 74, lines 12-25 and Letter to the ICC, KEN-OTP-0112-0126). In his in-court testimony, P-0516 testified that ██████████ prepared an affidavit on his behalf concerning his decision to withdraw from the case and to recant his previous statement (P-0516, [T-144](#), p. 50, lines 9, 13-14). *See also* P-0397, KEN-OTP-0125-0518-R01, p. 0542, lines 839-860.

²⁰⁷ P-0516, KEN-OTP-0150-0837-R01, p. 0847, lines 328, 330-331, 339, 341, p. 0848, lines 374-376; KEN-OTP-0150-0817-R01, p. 0823, lines 1921-193, p. 0824, lines 217-219.

²⁰⁸ P-0516, KEN-OTP-0150-0817-R01, p. 0824, lines 217-219.

²⁰⁹ P-0397, KEN-OTP-0125-0518-R01, p. 0543, lines 889-899.

²¹⁰ P-0397, KEN-OTP-0125-0461-R01, p. 0475, lines 476, 490-496, 502-507; KEN-OTP-0125-0518-R01, pp. 0543-0544, lines 904-917.

²¹¹ P-0397, KEN-OTP-0125-0518-R01, pp. 0543-0544, lines 904-919; KEN-OTP-0125-0461-R01, p. 0475, lines 502-507.

3. P-0613

88. The Chamber notes that [REDACTED] (hereinafter ‘P-0613’ [REDACTED] [REDACTED]) testified for the Prosecution in the Main Case regarding the PEV in Kenya before Trial Chamber V(A) between 18 and 20 June 2014.²¹³

89. The Defence argues that the evidence related to P-0613 is ‘uncorroborated hearsay evidence and double hearsay evidence’ from [REDACTED] [REDACTED]²¹⁴ [REDACTED], P-0516, P-0800, and P-0495. The Defence also argues that P-0613’s evidence is unreliable as it stems from her accounts of the conversations she had with these witnesses, [REDACTED] [REDACTED], as well as from the assumptions she had drawn from the said conversations.²¹⁵ The Defence further argues that these witnesses are unreliable and that the Prosecution made no attempt to verify their evidence.²¹⁶ The Defence refers notably to conclusions made in the Main Case regarding P-0613’s evidence to argue that her evidence in the present case is ‘uncorroborated hearsay and merits no weight’.²¹⁷

90. The Defence submits in particular that, contrary to what the Prosecution submits, [REDACTED]²¹⁸ and [REDACTED]²¹⁹ [REDACTED] [REDACTED].²²⁰ The Defence also submits that [REDACTED] [REDACTED] [REDACTED]²²¹

91. The Chamber notes that the evidence related to P-0613 stems from her phone conversations with [REDACTED], P-0800, P-0516, P-0495, and

²¹² P-0613, KEN-OTP-0102-0178, p. 0181, para. 18; KEN-OTP-0111-0162, p. 0169, para. 36; P-0800, KEN-OTP-0111-0140, p. 0148, paras 42-43. *See* Defence Written Submissions, para. 48.

²¹³ P-0613, Transcripts of hearings, from 18 to 20 June 2014, ICC-01/09-01/20-T-013-Conf-Red-ENG to ICC-01/09-01/20-T-015-Conf-Red-ENG (for a public version *see* [ICC-01/09-01/11-T-118-Red-ENG](#), [ICC-01/09-01/11-T-119-Red-ENG](#), [ICC-01/09-01/11-T-120-Red-ENG](#)).

²¹⁴ [REDACTED]. *See* [REDACTED].

²¹⁵ Defence Written Submissions, paras 62-63. *See also*, paras 25, 30.

²¹⁶ Defence Written Submissions, para. 63. *See also*, para. 30.

²¹⁷ Defence Written Submissions, para. 62.

²¹⁸ *See* P-0613, KEN-OTP-0111-0162, p. 0169, para. 37; *See* Material related to P-0613, KEN-OTP-0118-1927, pp. 1945-1950, lines 562-775.

²¹⁹ *See* P-0613, KEN-OTP-0111-0162, p. 0169, para. 39; Material related P-0613, KEN-OTP-0118-1927, pp. 1950-1951, lines 779-793.

²²⁰ Defence Written Submissions, para. 24.

²²¹ Defence Written Submissions, para. 25.

P-0604 as well as text messages that she received from unidentified senders from April to September 2013. [REDACTED]

[REDACTED]

[REDACTED].²²² [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. The Chamber notes in that

regard that, [REDACTED]

[REDACTED]

[REDACTED].²²³ The Chamber also notes [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED], P-0613 gave an account of her phone

conversations to the Prosecution in statements. The Prosecution investigators also

memorialise in their investigation reports their phone conversations and meetings with

P-0613, including certain phone calls she reported to them. The Chamber finally notes

that the evidence related to P-0613 also stems from other witnesses' accounts of their

interactions with her or from their own experiences with the allegations at the heart of

this case.

92. As to the assessment of P-0613's evidence, the Chamber recalls first its general statements concerning the assessment of evidence, including the credibility of witnesses, corroboration and hearsay evidence.²²⁴

93. Next, the Chamber notes that the judges' findings in the Main Case in relation to P-0613's evidence related to the sufficiency of her knowledge and stresses that the allegations at the heart of the Main Case were entirely different from the charges brought by the Prosecutor in this case. Thus, the probative value assigned to P-0613's evidence in the Main Case is not, by any means, indicative of the weight to be

²²² P-0613, KEN-OTP-0106-0910, p. 0915, para. 27. *See also* P-0613, KEN-OTP-0106-0922, p. 0925, para. 12.

²²³ P-0613, KEN-OTP-0102-0178, p. 0181, para. 20.

²²⁴ *See* paragraphs 40-42 above.

attached to P-0613's evidence in the current proceedings.²²⁵ The Chamber will assess the credibility of P-0613 as well as her evidence independently and will draw its own conclusions.

94. Moreover, the Chamber finds that insofar as certain parts of P-0613's accounts contain indirect evidence about money offered to specific witnesses in exchange for their withdrawals as Prosecution witnesses,²²⁶ her evidence in fact corroborates the allegations regarding P-0397, P-0495 and P-0800.

95. The Chamber further finds that P-0613 also provides direct evidence of attempts by certain individuals to corruptly influence her decision to testify as a Prosecution witness and that part of her accounts are corroborated by other evidence.

96. As regards to P-0613's evidence in general as well as other indirect evidence – including the involvement of Mr Gicheru and [REDACTED]²²⁷ [REDACTED], the Chamber finds that the evidence provided by P-0613 fits the overall pattern that emerges from the evidence regarding how individuals such as [REDACTED], P-0397, P-0516, P-0800, and P-0495 – were approached and in turn approached other potential Prosecution witnesses – to arrange meetings with individuals such as Mr Gicheru and [REDACTED] in order to offer the Prosecution witnesses or potential witnesses money in exchange for their withdrawal as Prosecution witnesses and recantation of prior statements given to the Prosecution.²²⁸

97. The Chamber also finds that the Defence does not put forward any persuasive factors that would affect P-0613's credibility or the reliability of her statements. In the Chamber's view, P-0613 was rather straightforward in her statements and interactions with the Prosecution. P-0613's statements are internally consistent, free of contradictions and, as already mentioned, they are partially corroborated by other evidence. Besides, there is no indication that P-0613 did not tell the truth concerning the allegations which form the subject of these proceedings.

²²⁵ The Chamber therefore rejects the Defence's submissions in this regard (Defence Reply, para. 52).

²²⁶ See e.g. P-0613, KEN-OTP-0111-0162, p. 0169, para. 36. See Material related P-0613, KEN-OTP-0118-1927, pp. 1945-1950, lines 562-775.

²²⁷ See [REDACTED].

²²⁸ See paragraph 186 below. The Chamber therefore rejects the Defence's submissions in this regard (Defence Reply, para. 52).

98. With regards to [REDACTED], the Chamber finds that the fact that they might appear vague and cryptic to an outsider²²⁹ is the result of [REDACTED]
[REDACTED]
[REDACTED]²³⁰ [REDACTED]²³¹ [REDACTED]
[REDACTED].²³² It is however clear from [REDACTED] that P-0613 was able to [REDACTED]
[REDACTED]
[REDACTED] Moreover, P-0613 provides background context as well as clarifications to [REDACTED].²³³ The Chamber also notes that [REDACTED]
[REDACTED]²³⁴ [REDACTED].²³⁵ Finally, [REDACTED]
[REDACTED]
[REDACTED] thus the Chamber is able to make some inferences [REDACTED].²³⁶

²²⁹ See e.g. P-0613, KEN-OTP-0106-0922, p. 0926, para. 16.

²³⁰ See e.g. P-0613, KEN-OTP-0115-0216, p. 0222, para. 29.

²³¹ See e.g. P-0613, KEN-OTP-0106-0922, p. 0926, para. 16.

²³² P-0613, KEN-OTP-0111-0162, p. 0169, paras 37-38. See also Material related to P-0613, KEN-OTP-0118-1927, pp. 1945-1950, lines 562-775; P-0613, KEN-OTP-0111-0557, p. 0562, para. 22, p. 0569, para. 62; Material related to P-0613, KEN-OTP-0153-0499, p. 0503, lines 78-83. See P-0613, KEN-OTP-0111-0557, p. 0571, para. 75; KEN-OTP-0115-0216, p. 0222, para. 28. See also P-0613, KEN-OTP-0111-0557, pp. 0568-0569, para. 60.

²³³ See e.g. P-0613, KEN-OTP-0106-0922, p. 0927, para. 23 (P-0613 stated that by “these people” have come looking for “them” [REDACTED], P-0613 understood that [REDACTED] was referring to ICC witnesses); P-0613, KEN-OTP-0111-0557, p. 9565, paras 37-38; Photograph, KEN-OTP-0111-0581 (On 30 July 2013, P-0613 received a text from an unknown number pleading with her to [REDACTED] – which she understood as meaning to withdraw as an ICC witness, [REDACTED]).

²³⁴ P-0613, KEN-OTP-0106-0910, p. 0914, para. 18; OTP Investigator Report, KEN-OTP-0117-0897; P-0397, KEN-OTP-0125-0547-R01, pp. 0565-0566, lines 644-652. P-0604 also attributes to [REDACTED] an identical phone number (P-0604, KEN-OTP-0117-1019-R01, p. 1022, para. 21).

²³⁵ P-0613, KEN-OTP-0106-0922, p. 0925, para. 14; KEN-OTP-0115-0216, p. 0221, para. 25; OTP Investigator Report, KEN-OTP-0153-0054.

²³⁶ For instance, [REDACTED] and P-0613, [REDACTED] explained that he had personally benefitted from ‘leaving the program’ and assured her that everything was very well organised (P-0613, KEN-OTP-0111-0162, p. 0172, para. 53; Material related to P-0613, KEN-OTP-0118-1927, pp. 1955-1959, lines 910-1032). The Chamber infers in the context of the conversation that by ‘leaving the program’, [REDACTED] meant withdrawing as a Prosecution witness. In another example, P-0613 received three text messages later that day from an unknown Kenyan number, which included the following content [*sic*]: [REDACTED]
[REDACTED]

[REDACTED] (P-0613, KEN-OTP-0111-0162, pp. 0172-

99. Accordingly, the Chamber finds P-0613 credible and her statements reliable. The Chamber therefore relies on P-0613's accounts of her phone conversations [REDACTED] [REDACTED] to make its findings and draw its conclusions.²³⁷ The Chamber further relies on OTP Investigator Reports and other witnesses' accounts of their interactions with P-0613 and their own experience regarding the allegations at hand.

100. As to the credibility of P-0516, P-0800 and P-0495, and the reliability of their evidence, the Chamber refers to the relevant sections dedicated to the assessment of the evidence related to these witnesses. The Chamber examines hereunder P-0604's credibility.

101. The Chamber notes that P-0604 was first interviewed by the Prosecution in [REDACTED] 2013²³⁸ and that he testified via video-link between 4 and 16 September 2014²³⁹ pursuant to summons ordered by Trial Chamber V(A).²⁴⁰ Prior to that, P-0604 signed an affidavit dated 11 August 2014 [REDACTED] recanting his prior statements and seeking to withdraw as a witness in the *Ruto and Sang* case.²⁴¹ During his in-court testimony, P-0604 recanted his previous evidence and was declared hostile.²⁴² The Chamber also takes note of the Prior Recorded Statements Decision in which Trial Chamber V(A) found that P-0604 had been subject to improper interference and that this evidence materially influenced the evidence provided by him.²⁴³ However, the Chamber stresses that it is in its own purview to assess the credibility of a witness, and, in this regard, it will assess any evidence independently and will draw its own conclusions. Lastly, the Chamber notes that P-0604 repeatedly failed to attend appointments arranged with him and the

0173, para. 54; [REDACTED], KEN-OTP-0111-0179; [REDACTED], KEN-OTP-0111-0180; [REDACTED], KEN-OTP-0111-0181). [REDACTED]

²³⁷ Regarding [REDACTED] identified by the Defence, the Chamber relies on P-0613's statements in which P-0613 identifies [REDACTED] (P-0613, KEN-OTP-0111-0162, pp. 0168-0169, paras 34-39).

²³⁸ P-0604, KEN-OTP-0117-1019-R01.

²³⁹ P-0604, [ICC-01/09-01/11-T-129-Red-ENG](#) to ICC-01/09-01/11-T-137-Red-ENG (excluding ICC-01/09-01/11-T-134-ENG).

²⁴⁰ ICC-01/09-01/11-1377-Red; ICC-01/09-01/11-1450-Conf-Exp; ICC-01/09-01/11-1480-Conf.

²⁴¹ [REDACTED], KEN-OTP-0135-1135. *See also* P-0604, [ICC-01/09-01/11-T-129-Red-ENG](#), p. 80, line 22 to p. 83, line 21.

²⁴² *See* P-0604, ICC-01/09-01/11-T-131-Red-ENG, p. 96, lines 13-18.

²⁴³ Prior Recorded Statement Decision, para. 79.

Prosecution²⁴⁴ but that he resumed his contacts with the Prosecution after his in-court testimony.

102. The Chamber is still of the view that P-0604's evidence can be, in part, relied upon in the case at hand, including from his statement of [REDACTED] 2013.²⁴⁵ The Chamber finds first and foremost that key portions of the evidence provided by P-0604 are corroborated by the statements of P-0613. The Chamber also notes that, on 22 October 2014, P-0604 claimed that he had first been approached by [REDACTED], and subsequently, introduced to Mr Gicheru [REDACTED] [REDACTED], and asked to withdraw his statement in exchange for money, [REDACTED] [REDACTED], and admitted that his in-court testimony was false and that he was coached on what to say in court by Mr Gicheru and another lawyer named [REDACTED].²⁴⁶ In the Chamber's view, the abovementioned information supports the reliance on portions of P-0604's statements to the effect that he contacted P-0613 on behalf of [REDACTED] [REDACTED] for the purpose of convincing P-0613 [REDACTED] [REDACTED].

103. After having assessed the evidence related to P-0613, the Chamber finds that it shows that between April and September 2013, [REDACTED],²⁴⁷ [REDACTED],²⁴⁸ P-0516,²⁴⁹

²⁴⁴ See OTP Investigator Reports: KEN-OTP-0129-0414-R04; KEN-OTP-0153-0016; KEN-OTP-0153-0015; KEN-OTP-0153-0052.

²⁴⁵ P-0604, KEN-OTP-0117-1019-R01.

²⁴⁶ P-0604, KEN-OTP-0143-0144-R01.

²⁴⁷ P-0613, KEN-OTP-0111-0162, p. 0169, para. 39; Material related to P-0613, KEN-OTP-0118-1927, pp. 1950-1951, lines 779-793.

²⁴⁸ P-0613, KEN-OTP-0102-0178, p. 0181, paras 16-18; KEN-OTP-0106-0910, p. 0914, para. 19. See also OTP Investigator Reports, KEN-OTP-0103-3498; KEN-OTP-0117-0897; P-0800, KEN-OTP-0102-0205, p. 0211, para. 38; P-0613, KEN-OTP-0111-0162, p. 0169, para. 36. See also P-0613, KEN-OTP-0111-0162, p. 0173, para. 55.

²⁴⁹ The Chamber notes that during one of P-0516's meetings with Mr Gicheru, the latter asked him whether he knew 'other people like [him]', meaning other witnesses (P-0516, KEN-OTP-0150-0837-R01, pp. 0858-0859, lines 708-739). The Chamber notes that P-0516 responded to the Prosecution investigators that he did not try to identify and locate other witnesses (P-0516, KEN-OTP-0150-0837-R01, pp. 0858-0859, lines 708-790). The Chamber also notes that although P-0516 admits that he was in contact with P-0613, he did not try to persuade her on behalf of Mr Gicheru to withdraw as a Prosecution witness (P-0516, KEN-OTP-0150-0837-R01, pp. 0858-0863, lines 708-903). The Chamber however notes that P-0613 stated [REDACTED] with P-0516 [REDACTED] that P-0516 urged her to 'come back' because Mr Ruto's people needed witnesses to withdraw from the ICC process (P-0613, KEN-OTP-0102-0178, p. 0181, paras 22-23). Considering P-0516's involvement with Mr Gicheru and the Chamber's findings as to the credibility of both P-0516 and P-0613, the Chamber finds P-0613's statement as to P-0516's attempt to convince her to withdraw as a Prosecution witness reliable.

██████████,²⁵⁰ P-0800,²⁵¹ P-0495,²⁵² P-0604,²⁵³ and some anonymous actors,²⁵⁴ working individually or in pairs,²⁵⁵ and even competing against each other,²⁵⁶ attempted to convince P-0613 to withdraw as a Prosecution witness and/or tried to convince ██████████. The aim was for P-0613 to meet with Mr Gicheru,²⁵⁷ ██████████,²⁵⁸ ██████████,²⁵⁹ and other unidentified individuals,²⁶⁰ to discuss her withdrawal as a Prosecution witness in the Main Case in exchange for money and other advantages.

²⁵⁰ P-0613, KEN-OTP-0111-0162, p. 0172, paras 52-53; Material related to P-0613, KEN-OTP-0118-1927, pp. 1955-1959, lines 910-1032. *See* P-0800, KEN-OTP-0103-2473, p. 2478, para. 28. *See also* P-0800, KEN-OTP-0111-0140, pp. 0147-0149, paras 35-44, 49, 54; Material related to P-0800, KEN-OTP-0131-0431, pp. 0451-0457; KEN-OTP-0132-0167, pp. 0189, 0206, 0218-0220; Photograph, KEN-OTP-0111-0159.

²⁵¹ P-0613, KEN-OTP-0118-0137, p. 0141, para. 16. *See also* OTP Investigator Report, KEN-OTP-0153-0041, pp. 0041-0042.

²⁵² P-0613, KEN-OTP-0115-0216, pp. 0222-0223, paras 28-31. *See also* paragraphs 104-106 below.

²⁵³ P-0604, KEN-OTP-0117-1019-R01, pp. 1022-1023, paras 22-27; P-0613, KEN-OTP-0124-0007, p.0011, paras 19-23. The Chamber notes that P-0604 and P-0613 gave a slightly different account of their exchanges (*Compare* P-0604, KEN-OTP-0117-1019-R01, p. 1022, para. 19; KEN-OTP-0117-1060-R01, p. 1060 *with* P-0613, KEN-OTP-0124-0007, p. 0011, para. 18) but finds that the evidence shows that P-0604 was involved in the attempt to offer money to P-0613 ██████████ ██████████ on behalf of ██████████. Based on the evidence as a whole in the case at hand and the individuals involved, the Chamber infers that the objective was for P-0613 to meet ██████████ and/or Mr Gicheru in the context of the witness corruption scheme.

²⁵⁴ OTP Investigator Report, KEN-OTP-0117-0903; P-0613, KEN-OTP-0106-0910, p. 0916, paras 32-35; P-0613, KEN-OTP-0111-0162, pp. 0172-0173, para. 54; Photograph, KEN-OTP-0111-0179; Photograph, KEN-OTP-0111-0180; Photograph, KEN-OTP-0111-0181; P-0613, KEN-OTP-0111-0557, p. 9565, paras 37-38; Photograph, KEN-OTP-0111-0581.

²⁵⁵ *See e.g.* P-0613, KEN-OTP-0111-0162, p. 0169, para. 37; *See* Material related to P-0613, KEN-OTP-0118-1927, pp. 1945-1950, lines 562-775; P-0800, KEN-OTP-0111-0140, pp. 0147-0149, paras 35-44, 49, 54; Material related to P-0800, KEN-OTP-0131-0431, pp. 0451-0457; Photograph, KEN-OTP-0111-0159; Material related to P-0800, KEN-OTP-0132-0167, pp. 0189, 0206, 0218-0220.

²⁵⁶ *See* P-0613, KEN-OTP-0111-0162, p. 0171, para. 49; Material related to P-0613, KEN-OTP-0118-1927, pp. 1954-1955, lines 868-907 and P-0613, KEN-OTP-0111-0557, p. 0561, para. 16). In the Chamber's view, this shows that those individuals were trying to reach and convince P-0613 first.

²⁵⁷ P-0613, KEN-OTP-0102-0178, p. 0181, para. 18; KEN-OTP-0111-0162, p. 0173, paras 55-56; KEN-OTP-0111-0557, p. 0562, para. 24; Material related to P-0613, KEN-OTP-0153-0499, pp. 0504-0505, lines 109-139; P-0613, KEN-OTP-0102-0178, p. 0180, para. 16; KEN-OTP-0106-0910, p. 0914, para. 19. *See also* OTP Investigator Reports, KEN-OTP-0103-3498, KEN-OTP-0117-0897; P-0800, KEN-OTP-0102-0205, p. 0211, para. 38; P-0613, KEN-OTP-0111-0162, p. 0169, paras 37-38. *See also* Material related to P-0613, KEN-OTP-0118-1927, pp. 1945-1950, lines 562-775; P-0613, KEN-OTP-0111-0557, p. 0562, para. 22, p. 0569, para. 62; Material related to P-0613, KEN-OTP-0153-0499, p.0503, lines 78-83; P-0613, KEN-OTP-0115-0216, p. 0230, para. 75; Material related to P-0613, KEN-OTP-0129-0740, p. 0743; P-0613, KEN-OTP-0115-0216, p. 0230, para. 75; Material related to P-0613, KEN-OTP-0129-0740, pp. 0747-0748, lines 192-229, p. 0745, lines 106-110; P-0613, KEN-OTP-0115-0216, pp. 0231-0232, paras 76-79; P-0800, KEN-OTP-0111-0140, p. 0149, para. 54; Material related to P-0800, KEN-OTP-0132-0167, pp. 0218-0220.

²⁵⁸ P-0613, KEN-OTP-0111-0557, pp. 0564-0565, para. 35; Material related to P-0613, KEN-OTP-0118-1927, pp. 1959-1963, lines 1042-1063; P-0604, KEN-OTP-0117-1019-R01, pp. 1022-1023, paras 22-27 and P-0613, KEN-OTP-0124-0007, p. 0011, paras 19-23.

²⁵⁹ P-0613, KEN-OTP-0115-0216, p. 0222, paras 29-30.

²⁶⁰ *See e.g.* P-0613, KEN-OTP-0111-0557, p. 0562, para. 24; Material related to P-0613, KEN-OTP-0153-0499, pp. 0504-0505, lines 109-139; P-0613, KEN-OTP-0115-0216, p. 0222, para. 29.

104. The Chamber notes the following meeting between P-0613 and P-0495 of particular relevance and probative value, and illustrative of the various attempts to contact P-0613 for the purpose of offering her financial incentives to withdraw as a Prosecution witness.

105. On 13 September 2013, P-0495 and P-0613 met [REDACTED] [REDACTED].²⁶¹ During their meeting, [REDACTED] [REDACTED], P-0495 attempted to persuade P-0613 to meet with ‘them’, including with Mr Gicheru, [REDACTED]²⁶² for the purpose of negotiating her withdrawal as an ICC witness.²⁶³ P-0495 explained that she would be provided with [REDACTED]²⁶⁴ and that the amount of money or other benefits she would receive was subject to negotiation and dependant on the ‘level in society’ she belonged to.²⁶⁵ P-0495 explained that she would be provided with [REDACTED]²⁶⁶ and that the amount of money or other benefits she would receive was subject to negotiation and dependant on the ‘level in society’ she belonged to.²⁶⁷ He told her for instance that P-0800 was paid 1,2 million Ksh (about 10,291 euros at the time) based on [REDACTED] situation.²⁶⁸ P-0495 explained that it would be a verbal agreement, with cash payment, and there would be a meeting with a lawyer to prepare the withdrawal from the ICC process.²⁶⁹ Regarding

²⁶¹ P-0613, KEN-OTP-0115-0216, pp. 0229-0232, paras 66, 74-80; Material related to P-0613, KEN-OTP-0129-0740. Material related to P-0800, KEN-OTP-0145-0587, pp. 0589-0591, lines 2-99; Material related to P-0800, KEN-OTP-0145-0594, pp. 0598-0600; [REDACTED]: KEN-OTP-0138-0650, KEN-OTP-0138-0651, KEN-OTP-0138-0652, KEN-OTP-0138-0653, KEN-OTP-0138-0654, KEN-OTP-0138-0655, KEN-OTP-0138-0656, KEN-OTP-0138-0657, KEN-OTP-0138-0658, KEN-OTP-0138-0659, KEN-OTP-0138-0660, KEN-OTP-0138-0661, KEN-OTP-0138-0662, KEN-OTP-0138-0663.

²⁶² P-0613, KEN-OTP-0115-0216, p. 0230, para. 75; Material related to P-0613, KEN-OTP-0129-0740, p. 0743; P-0613, KEN-OTP-0115-0216, p. 0230, para. 75.

²⁶³ Material related to P-0613, KEN-OTP-0129-0740, pp. 0743-0757, lines 34-561.

²⁶⁴ P-0613, KEN-OTP-0115-0216, p. 0230, para. 75; Material related to P-0613, KEN-OTP-0129-0740, pp. 0743-0744, lines 53-83, p. 0752, lines 362-379.

²⁶⁵ P-0613, KEN-OTP-0115-0216, pp. 0230-0231, para. 75; Material related to P-0613, KEN-OTP-0129-0740, pp. 0743-0744, lines 53-83, p. 0752, lines 362-379, p. 0748, lines 216-217, p. 0754, lines 452-456.

²⁶⁶ P-0613, KEN-OTP-0115-0216, p. 0230, para. 75; Material related to P-0613, KEN-OTP-0129-0740, pp. 0743-0744, lines 53-83, p. 0752, lines 362-379.

²⁶⁷ P-0613, KEN-OTP-0115-0216, pp. 0230-0231, para. 75; Material related to P-0613, KEN-OTP-0129-0740, pp. 0743-0744, lines 53-83, p. 0752, lines 362-379, p. 0748, lines 216-217, p. 0754, lines 452-456.

²⁶⁸ P-0613, KEN-OTP-0115-0216, pp. 0230-0231, para. 75; Material related to P-0613, KEN-OTP-0129-0740, pp. 0743-0744, lines 53-83, p. 0752, lines 362-379.

²⁶⁹ Material related to P-0613, KEN-OTP-0129-0740, p. 0744, lines 89-102; P-0613, KEN-OTP-0115-0216, p. 0231, para. 76.

the cash payment, P-0495 told P-0613 not to ‘make the mistake of putting it in the bank because they will trace the bank’.²⁷⁰

106. P-0613 asked who the person in charge was and whether that included Mr Gicheru, and P-0495 confirmed that it was Mr Gicheru and another individual, but he had not been informed of the identity of that individual.²⁷¹ P-0495 told her that Mr Gicheru was the person to meet, that ‘[Mr] Gicheru [would] complete everything for [her]’ and confirmed that Mr Gicheru had been given ‘all the authority’.²⁷² P-0495 explained that ‘they’ were interested in suspending the Main Case because it was taking too long and their objective was to stop it.²⁷³ He told P-0613 that she would be provided with government protection so that she could defect and be protected from others too.²⁷⁴

107. The Chamber notes that P-0613 neither met in person or had any direct contact with Mr Gicheru, [REDACTED]. She learned of their involvement in the witness corruption scheme through other witnesses. Based on the evidence related to P-0613 and other witnesses, the Chamber is however convinced that [REDACTED], [REDACTED], P-0516, P-0495, P-0800, and [REDACTED], were not acting independently but rather approached P-0613 on behalf of individuals such as Mr Gicheru, [REDACTED], [REDACTED], for the purpose of offering her money and other advantages in exchange for her withdrawal as a Prosecution witness in the Main Case.

108. Accordingly, the Chamber is convinced that Mr Gicheru was involved in the attempts to convince P-0613 to withdraw as a Prosecution witness in exchange for financial incentives and other advantages. The Chamber makes the following factual findings in relation to said involvement.

²⁷⁰ Material related to P-0613, KEN-OTP-0129-0740, p. 0744, lines 89-102; P-0613, KEN-OTP-0115-0216, p. 0231, para. 76.

²⁷¹ Material related to P-0613, KEN-OTP-0129-0740, pp. 0744-0745, lines 103-123; P-0613, KEN-OTP-0115-0216, p. 0231, para. 77.

²⁷² Material related to P-0613, KEN-OTP-0129-0740, pp. 0747-0748, lines 192-229, p. 0745, lines 106-110; P-0613, KEN-OTP-0115-0216, pp. 0231-0232, paras 76-79.

²⁷³ Material related to P-0613, KEN-OTP-0129-0740, p. 0755, lines 460-470; P-0613, KEN-OTP-0115-0216, pp. 0231-0232, para. 78.

²⁷⁴ Material related to P-0613, KEN-OTP-0129-0740, p. 0747, lines 201-208; P-0613, KEN-OTP-0115-0216, p. 0232, paras 78-79.

109. Mr Gicheru promised ██████████ a sum of money at the end of April 2013 to obtain ██████████ of P-0613.²⁷⁵ The Chamber infers from this evidence that Mr Gicheru was trying to locate her in the context of the witness corruption scheme.

110. Mr Gicheru instructed ██████████ in July 2013 ██████████ to P-0613 so ██████████.²⁷⁶ The Chamber infers from the evidence that the objective was for P-0613 ██████████ ██████████ and thus to be contacted in the context of the witness corruption scheme.

111. The Chamber also finds that the evidence establishes that: on 21 July 2013, ██████████ met with P-0800 in ██████████, and offered P-0800 money to assist in locating and corrupting other witnesses, notably P-0613;²⁷⁷ ██████████

██████████,²⁷⁸ ██████████;²⁷⁹ and more specifically, ██████████

██████████.²⁸⁰ The Chamber infers from this evidence that in July 2013 Mr Gicheru induced ██████████ to offer P-0613 financial incentives in exchange for her withdrawal as a Prosecution witness and to report back to him, which ██████████ did with the assistance of P-0800.

112. Finally, the Chamber finds that the evidence²⁸¹ establishes that in September 2014 Mr Gicheru induced P-0495 to approach P-0613 in the context of the witness corruption scheme, which P-0495 did.

²⁷⁵ P-0613, KEN-OTP-0102-0178, paras 13, 16-17; OTP Investigator Report, KEN-OTP-0117-0897.

²⁷⁶ P-0613, KEN-OTP-0111-0162, p. 0169, paras 37-38. *See also* Material related to P-0613, KEN-OTP-0118-1927, pp. 1945-1950, lines 562-775; P-0613, KEN-OTP-0111-0557, p. 0562, para. 22, p. 0569, para. 62; Material related to P-0613, KEN-OTP-0153-0499, p. 0503, lines 78-83.

²⁷⁷ P-0800, KEN-OTP-0111-0140, pp. 0147-0149, paras 35-44, 49; Material related to P-0800, KEN-OTP-0131-0431, pp. 0451-0457; Photograph, KEN-OTP-0111-0159.

²⁷⁸ P-0800, KEN-OTP-0111-0140, pp. 0148-0149, paras 43, 54; Material related to P-0800, KEN-OTP-0132-0167, pp. 0189, 0206.

²⁷⁹ P-0800, KEN-OTP-0111-0140, p. 0149, para. 54.

²⁸⁰ Material related to P-0800, KEN-OTP-0132-0167, pp. 0218-0220. *See also* P-0613, KEN-OTP-0111-0162, pp. 0172-0173, paras 52-54; Material related to P-0613, KEN-OTP-0118-1927, pp. 1955-1959, lines 910-1032; P-0800, KEN-OTP-0103-2473, p. 2478, para. 28.

²⁸¹ *See* paragraphs 105-106 above.

4. P-0800

113. The Chamber recalls its general statements concerning the credibility of witnesses.²⁸² With regard to [REDACTED] (hereinafter ‘P-0800’, [REDACTED]) the Chamber notes that the witness was initially supposed to testify for the Prosecution [REDACTED] saying ‘bye’ to the Court²⁸³ and the witness broke off contacts with the Court for several months.²⁸⁴ After being contacted again in the beginning of 2014, the witness decided to resume cooperation with the Prosecution²⁸⁵ and eventually testified as a Prosecution witness in November 2014.²⁸⁶

114. The Chamber is not convinced by the Defence’s arguments that the findings made by one of the judges in the Main Case speak in favour of discarding P-0800’s testimony.²⁸⁷ First, the Chamber stresses again that it is in its own purview to assess the credibility of a witness. While it takes note of findings of other chambers, it will assess the evidence before it independently and draw its own conclusions. In the Decision on Acquittal, one of the judges signing the majority decision assessed the evidence provided by P-0800 on the training of Kalenjin youths, which formed an element of the Prosecution’s theory that a ‘Network’ existed which perpetrated the crimes alleged in the Main Case. He concluded that the witness’s testimony on these preparatory meetings was unreliable, considering that he misled the Court.²⁸⁸

115. However, this conclusion was made with regards to questions concerning evidence supporting the allegations in the Main Case. This is different from the subject matter of the current proceedings. One of the judges in Trial Chamber V(A) also cited to P-0800’s testimony regarding the allegations of witness interference and his involvement in the scheme.²⁸⁹ Indeed, for him this was one of the reasons not to rely on P-0800’s evidence in the Main Case.²⁹⁰ Consequently, the judge of the Main

²⁸² See paragraphs 40-42 above.

²⁸³ P-0800, KEN-OTP-0117-0022-R01.

²⁸⁴ P-0800, KEN-OTP-0135-0054, p. 0065, lines 386-399, 444-461; P-0800, KEN-OTP-0135-0103, pp. 0104-0105, lines 34-58.

²⁸⁵ P-0800, KEN-OTP-00135-0054, pp. 0057-0058, lines 88-142.

²⁸⁶ P-0800, Transcripts of hearings, from 14 to 30 November 2014, ICC-01/09-01/20-T-018-Conf-Red-ENG to ICC-01/09-01/20-T-030-Conf-ENG.

²⁸⁷ Defence Written Submissions, paras 57, 100.

²⁸⁸ [Decision on Acquittal](#), Reasons of Judge Fremr, paras 39-41.

²⁸⁹ [Decision on Acquittal](#), Reasons of Judge Fremr, para. 42.

²⁹⁰ [Decision on Acquittal](#), Reasons of Judge Fremr, para. 43.

Case Chamber seemed to fully believe P-0800 when it came to his testimony concerning witness interference. Accordingly, the Chamber finds that the findings made by the Chamber in the Main Case do not speak in favour of disregarding the evidence of P-0800.

116. P-0800 seemed to have changed his willingness to cooperate with the Prosecution several times and also changed the facts provided to OTP investigators on instances.²⁹¹ Further, P-0800 tried to convince other persons not to testify as a witness before this Court. However, the Chamber is still of the view that the witness's statements can be, in part, relied upon. At the outset, the evidence provided by the witness is also corroborated by other items of evidence, such as documents or audio material.²⁹² Further, during his testimony in the Main Case, the witness addressed these issues under oath and repeated the same facts he previously provided to the Prosecution concerning the interference of him and other witnesses.²⁹³

117. Irrespective of the precise motivation of P-0800 to testify and cooperate with the Prosecution before his testimony in the Main Case, the Chamber is of the view that his statements concerning the efforts to keep witnesses from testifying in the Main Case can be relied upon for the purposes of this decision.

118. The Chamber is convinced that ██████████ promised P-0800 money in summer 2013, in order for the witness to ██████████ and not testify before the Court.²⁹⁴ The Chamber is further convinced that ██████████, upon instructions by Mr Gicheru, contacted P-0800 to convince him to ██████████ ██████████.²⁹⁵

119. Upon ██████████, Mr Bett took P-0800 to a meeting with Mr Gicheru in Nairobi.²⁹⁶ During the meeting, Mr Gicheru offered to give P-0800 between 1,5 to

²⁹¹ See P-0800, KEN-OTP 0135-0054, p. 0068, lines 504-516; P-0800, KEN-OTP-0135-0103, p. 0108, lines 179-193.

²⁹² See e.g. KEN-OTP-0111-0159-R001.

²⁹³ P-0800, Transcripts of hearings, from 14 to 30 November 2014, ICC-01/09-01/20-T-018-Conf-Red-ENG to ICC-01/09-01/20-T-030-Conf-ENG.

²⁹⁴ Material related to P-0800, KEN-OTP-0131-0431, p. 0438, lines 192-196, p. 0441, lines 309-313, and p. 0443, lines 356-362.

²⁹⁵ P-0800, KEN-OTP 0135-0103, p. 0110, lines 253-265; KEN-OTP-0135-0113, p. 0114, lines 10-16, p. 0116, lines 77-87.

²⁹⁶ P-0800, KEN-OTP-0135-0103, p. 0105, lines 60-67, p. 0111, lines 307-313. P-0800, KEN-OTP-0135-0113, p. 0114, lines 10-16, p. 0117, lines 116-129.

the Main Case Chamber, the witness disavowed his entire prior statement and explained that he did not give an interview to the Prosecution in which he provided information on issues or facts concerning the Main Case.³¹¹ He stated that a Prosecution investigator had prepared two statements for him. After rejecting one he modified the other one, complementing it with his personal details³¹² and then signed this statement.³¹³ Further, P-0495 explained that he copied the content of this statement in his own handwriting in some sort of notebook in order to manufacture further evidence.³¹⁴ P-0495 further explained that the Prosecution offered him incentives to sign the statement.³¹⁵ With regard to [REDACTED] P-0800 with which the witness was confronted, P-0495 stated that he did not know with whom he was talking and that the Prosecution had scripted the entire conversation.³¹⁶

122. The Chamber finds this testimony to be implausible on the following considerations: firstly, it does not believe – on P-0495’s testimony alone – that the Office of the Prosecutor or any of its members would actively engage in article 70 offenses. There is a witness statement of the interview in question.³¹⁷ It is unlikely that the Prosecution would have created this statement and offered P-0495 money or other incentives in order to sign. Secondly, the Chamber considers P-0495’s testimony on the production of the notebook incredible – also in light of the explanation brought forward by the Prosecutor on how this notebook was created. The Prosecutor argues that P-0495 wrote the information in his notebook concomitant with its occurrence and later used the notebook when he gave his interview to members of the Office of the Prosecutor. The Chamber finds this course of events more credible than the explanation provided by the witness. It does not believe – on P-0495’s testimony alone – that the members of the Office of the Prosecutor induced P-0495 to produce false evidence. Similarly, [REDACTED] P-0800, the Chamber considers it implausible that P-0495 did not know with whom he was talking. P-0495’s explanation that members

³¹¹ T-024, p. 6, lines 6-11.

³¹² T-024, p. 8, line 12 to p. 10, line 15; p. 11, line 23 to p. 12, line 14.

³¹³ T-024, p. 12, line 23 to p. 14, line 9.

³¹⁴ T-024, p. 15, line 1 to p. 16, line 7; p. 68, line 21 to p. 89, line 24.

³¹⁵ T-024, p. 85, line 10 to p. 86, line 4.

³¹⁶ T-017, p. 22, line 6 to p. 24, line 24.

³¹⁷ P-0495, KEN-OTP-0084-0236.

of the Office of the Prosecutor had scripted his entire conversation is not convincing.³¹⁸

123. Considering the above, on the evidence available, the Chamber finds that P-0495 was not truthful during his testimony before the Chamber of the Main Case. Accordingly, it will not rely on this testimony before the Main Case Chamber and does not consider that it affects the assessment of the facts established below.

124. The Chamber is convinced that Mr Gicheru gave P-0800 some travelling money and [REDACTED] to look for P-0536 and bring P-0536 to him (Mr Gicheru).³¹⁹ The Chamber is further convinced that P-0495 told P-0800 that he was promised money.³²⁰ P-0495 also told P-0613 first that he had received 2,2 million Ksh, then said that they agreed to give him 2,5 million Ksh (about 19,666 and 22,348 euros at the time)³²¹ and encouraged her to withdraw.³²² P-0495 told P-0800 that he had met up with Mr Gicheru.³²³ As explained above, the Chamber does not believe the information provided by P-0495 before the Chamber of the Main Case – this includes his explanation that he deliberately mentioned Mr Gicheru’s name in recorded conversations in order to receive money.³²⁴ Accordingly, the Chamber relies on the evidence that P-0495³²⁵ said to P-0613 that Mr Gicheru is handing out the money³²⁶ and that he is ‘the one you have to meet’.³²⁷

125. P-0495 assured P-0800 that he would be prepared by lawyers before testifying in the Main Case and that P-0800 should implicate P-0613 and cite money as a motive

³¹⁸ As a side note, the Chamber notes that the Defence for Mr Ruto declared that it does not believe the witness’ explanations concerning the actions of the members of the Office of the Prosecutor; ICC-01/09-01/20-T-017, p. 73, lines 7-10 and p. 85, line 23 to p. 86, line 2.

³¹⁹ P-0800, KEN-OTP-0135-0054, p. 0066, lines 428-433.

³²⁰ P-0800, KEN-OTP-0135-0074, pp. 0084-0085, lines 370-387.

³²¹ Material related to P-0613, KEN-OTP-0129-0740, p. 0743, lines 53-58, p. 0744, lines 81-85.

³²² Material related to P-0613, KEN-OTP-0129-0740, p. 0748, lines 216-225. *See also* paragraphs 105-106 above.

³²³ P-0800, KEN-OTP 0135-0074, p. 0085, lines 401-411.

³²⁴ T-016, p. 63, line 23 to p. 64, line 3.

³²⁵ *See further* for P-0495’s attempt to interfere with P-0613 paragraphs 99-101 above.

³²⁶ Material related to P-0495, KEN-OTP-0129-0740, p. 0745, lines 106-110.

³²⁷ Material related to P-0495, KEN-OTP-0129-0740, p. 0747, line 192.

for cooperating with the Prosecutor.³²⁸ P-0495 did exactly this during his testimony.³²⁹

6. P-0536

126. [REDACTED] (hereinafter ‘P-0536’) testified before the Chamber of the Main Case.³³⁰ The Defence points out that the Chamber of the Main Case did not rely on her evidence³³¹ and that during her testimony she was not asked about her conversations with [REDACTED].³³² The Chamber recalls its general statements concerning the credibility of witnesses.³³³ Accordingly, whether the Chamber of the Main Case relied on P-0536 is not dispositive of the Chamber’s own assessment of P-0536 and the evidence provided by her. Additionally, the Chamber must note that the allegations at the heart of the Main Case were completely different from the charges brought forward by the Prosecutor in this case. Accordingly, the questioning of P-0536 by the Main Case Chamber is not indicative in any way of the importance or pertinence of her evidence for the current proceedings.

127. The Defence also submits that P-0536 is unreliable.³³⁴ The Chamber notes that, throughout her contacts with the Office of the Prosecutor³³⁵ P-0536 was always straightforward in her statements and interactions with the Prosecution. Her statements are internally consistent, free of contradictions, and are partially corroborated by other evidence. There is no indication that she did not tell the truth concerning the allegations which form the subject of these proceedings. Accordingly, the Chamber finds P-0536 to be reliable.

128. [REDACTED] contacted the witness over the course of several months regularly by telephone. During these conversations, he repeatedly tried to convince her [REDACTED]

³²⁸ P-0800, KEN-OTP-0144-0272-R01, pp. 0278-0279, lines 226-245, p. 0284, lines 423-434, p. 0285, lines 451-469.

³²⁹ T-024, p. 16, lines 8-23; p. 17, line 22 to p. 19, line 1; p. 21, lines 4-8; T-016, p. 64, lines 1-7; p. 65, lines 12-25.

³³⁰ P-0536, Transcripts of hearings, from 9 September to 4 October 2013, ICC-01/09-01/20-T-007-Conf-ENG to ICC-01/09-01/20-T-012-Conf-ENG.

³³¹ Defence Written Submissions, para. 78.

³³² Defence Written Submissions, para. 77.

³³³ See paragraphs 40-42 above.

³³⁴ Defence Written Submissions, para. 102.

³³⁵ The witness gave several statements to the Office of the Prosecutor on the subject of witness interference: KEN-OTP-0111-0188-R01, KEN-OTP-0111-0201-R01, KEN-OTP-0118-0011-R01.

██████████ and to withdraw as an ICC witness.³³⁶ He promised recurrently to go visit her and ██████████.³³⁷ He also promised her that she ██████████ would receive money. He said twice that P-0536 ██████████ would receive 1,4 million Ksh (about 12,515 euros at the time).³³⁸ In one conversation he spontaneously increased the amount to 1,6 million (about 14,303 euros at the time), after declaring ‘I’m even saying that you should be given more’.³³⁹ ██████████ told her that this money was meant ‘to start a new life’ for her.³⁴⁰ ██████████ repeatedly said that any money that would be given to P-0536 would be in cash.³⁴¹

129. ██████████ also makes reference to a ‘lawyer’ who is implicated in the efforts to make her withdraw.³⁴² In the phone conversation of ██████████ August 2013, P-0536 asked ██████████ how she can trust ‘this lawyer’ they talked about in a previous conversation. ██████████ replies without hesitation that Mr Gicheru is ██████████ ██████████, and that ‘he’s a real gentlemen’.³⁴³ It is clear that ██████████ knew to whom the reference ‘lawyer’, used by both P-0536 and himself, pertained to. Accordingly, the Chamber is convinced that ‘the lawyer’ P-0536 and ██████████ referred to throughout their conversations refers to the suspect.

130. During the same conversation, P-0536 asks why Mr Gicheru does not come with ██████████ to pick her up.³⁴⁴ ██████████ replies that ‘it’s not at all necessary that it’s known he’s the one doing the job. And he’s the one who finalizes things with all those people who are coming to this side; those people who are returning’.³⁴⁵ The Chamber interprets this to mean that – in accordance with the common plan – it was not Mr Gicheru’s assigned role to approach the targeted witnesses directly. ‘[C]oming to this side’ or ‘people who are returning’ is understood by the Chamber to mean

³³⁶ Material related to P-0536, KEN-OTP-0114-0198, pp. 0210-0212, lines 362-379, 395-408; Material related to P-0536, KEN-OTP-0114-0291, p. 0294, lines 47-50.

³³⁷ Material related to P-0536, KEN-OTP-0114-0198, p. 0203, lines 118-122, pp. 0206-0207, lines 231-237; KEN-OTP-0114-0296, p. 0298, lines 11-17.

³³⁸ Material related to P-0536, KEN-OTP-0114-0198, p. 0212, lines 417-425, p. 0215, lines 514-515.

³³⁹ Material related to P-0536, KEN-OTP-0114-0198, p. 0215, lines 519-522. ██████████ mentions the same sum ██████████ during a different conversation with P-0536. Material related to P-0536, KEN-OTP-0114-0244, pp. 0246-0247, lines 27-33.

³⁴⁰ Material related to P-0536, KEN-OTP-0111-0201-R01, p. 0206 para. 21.

³⁴¹ Material related to P-0536, KEN-OTP-0114-0198, p. 0212, lines 417-423, lines 451-452, 521-522; Material related to P-0536, KEN-OTP-0114-0296, p. 0299, lines 58-64.

³⁴² Material related to P-0536, KEN-OTP-0114-0291, p. 0294, lines 49-52.

³⁴³ Material related to P-0536, KEN-OTP-0114-0296, p. 0294, lines 37-45.

³⁴⁴ Material related to P-0536, KEN-OTP-0114-0296, p. 0294, line 46.

³⁴⁵ Material related to P-0536, KEN-OTP-0114-0296, p. 0294, lines 49-51.

135. Finally, the Chamber recalls that it can rely on uncorroborated evidence for the purpose of the present decision.³⁶⁰ Accordingly, the Chamber establishes the facts detailed in the following paragraphs.

136. P-0341, of Nandi (Kalenji) ethnicity, is from [REDACTED].³⁶¹ [REDACTED]
[REDACTED]
[REDACTED].³⁶² [REDACTED]
[REDACTED]. [REDACTED]
[REDACTED].³⁶³

137. In 2011, P-0341 attended a meeting at [REDACTED], during which [REDACTED]
[REDACTED].³⁶⁴ P-0341 [REDACTED]
[REDACTED].³⁶⁵ On that occasion, [REDACTED]
[REDACTED]
[REDACTED].³⁶⁶

138. On three occasions, he was also approached by [REDACTED] during [REDACTED] meetings organised by the ICC. [REDACTED] advised him to [REDACTED]
[REDACTED], that P-0341 would then have the opportunity to [REDACTED], and that he and [REDACTED] would ‘get money’.³⁶⁷

139. [REDACTED]
[REDACTED]
[REDACTED].³⁶⁸ On [REDACTED] April 2013, concerned about his safety, P-0341 accepted the invitation to meet with ‘the elders’, and [REDACTED], who had been paid to do so by Mr Gicheru, took

³⁶⁰ See Defence Written Submissions, para. 85; Defence Reply, paras 88, 89. See also paragraph 38 above.

³⁶¹ P-0341, KEN-OTP-0150-0255-R01, p. 0255.

³⁶² OTP Investigator Report, KEN-OTP-0147-1590-R01, p. 1590.

³⁶³ P-0341, KEN-OTP-0150-0255-R01, p. 0260, paras 24-25; Press article, KEN-OTP-0150-0285-R01.

³⁶⁴ P-0341, KEN-OTP-0150-0255-R01, p. 0260, paras 26-27.

³⁶⁵ P-0341, KEN-OTP-0150-0255-R01, p. 0260, paras 26-27.

³⁶⁶ P-0341, KEN-OTP-0150-0255-R01, p. 0261, para. 28.

³⁶⁷ P-0341, KEN-OTP-0150-0255-R01, pp. 0261-0262, paras 31-32.

³⁶⁸ P-0341, KEN-OTP-0150-0255-R01, p. 0262, para. 36.

him to [REDACTED].³⁶⁹ [REDACTED], and other people whom P-0341 did not recognize, were asked to leave the room, and [REDACTED] explained to P-0341 that he [REDACTED] to [REDACTED] Mr Gicheru, and that [REDACTED].³⁷⁰

140. Mr Gicheru, [REDACTED] and [REDACTED], who remained [REDACTED], asked P-0341 if he was an ICC witness, to which he answered that he was merely a victim.³⁷¹ They told P-0341 that he should no longer attend ICC meetings, and that if he were to do so, [REDACTED].³⁷² [REDACTED] told him that in exchange, he would be given ‘a car, another farm, a plot in town’ and 5 million Ksh (about 45,261 euros at the time), and that [REDACTED].³⁷³

asked P-0341 to approach other ICC witnesses in Kenya and abroad to convince them to withdraw from the case, naming in particular [REDACTED], P-0274 [REDACTED].³⁷⁴ Feeling particularly threatened by Mr Gicheru’s warnings that he was sending many people in Kenya and abroad to locate ICC witnesses, P-0341 agreed not to attend ICC meetings anymore.³⁷⁵ [REDACTED] Mr Ruto of [REDACTED] was happy that P-0341 had agreed.³⁷⁶ [REDACTED] gave him some money for lunch and transport back home, and told him that Mr Gicheru ‘would be the focal point now’ and ‘would deal with everything’.³⁷⁷

141. Between [REDACTED] April and [REDACTED] May 2013, P-0341 attended [REDACTED] several times at the request of Mr Gicheru who was asking him to come almost every day.³⁷⁸ Mr Gicheru did not give him money during that period of time, stating that other witnesses withdrawing from ICC proceedings had been paid earlier in the day and that

³⁶⁹ P-0341, KEN-OTP-0150-0255-R01, p. 0262, para. 36, p. 0266, para. 57.

³⁷⁰ P-0341, KEN-OTP-0150-0255-R01, p. 0264, para. 46.

³⁷¹ P-0341, KEN-OTP-0150-0255-R01, p. 0264, para. 47.

³⁷² P-0341, KEN-OTP-0150-0255-R01, p. 0264, paras 47-48.

³⁷³ P-0341, KEN-OTP-0150-0255-R01, p. 0265, para. 49.

³⁷⁴ P-0341, KEN-OTP-0150-0255-R01, p. 0265, paras 50-52.

³⁷⁵ P-0341, KEN-OTP-0150-0255-R01, p. 0265, paras 52, 53.

³⁷⁶ P-0341, KEN-OTP-0150-0255-R01, p. 0265, para. 53.

³⁷⁷ P-0341, KEN-OTP-0150-0255-R01, p. 0265, para. 53.

³⁷⁸ P-0341, KEN-OTP-0150-0255-R01, p. 0266, para. 58.

there was no money left, and to return the next day.³⁷⁹ However, Mr Gicheru would often remind P-0341 that he had agreed not to attend ICC meetings or take part in the proceedings before the Court, not to be on a witness list and not to give any information about Mr Ruto to the ICC.³⁸⁰ Mr Gicheru also repeatedly asked questions about other witnesses, requesting that P-0341 locate [REDACTED], bring [REDACTED] P-0274 to Mr Gicheru [REDACTED], organise a meeting between Mr Gicheru and [REDACTED], and ask him to withdraw as a witness.³⁸¹ Mr Gicheru said that both [REDACTED] and P-0341 would receive ‘something special’, which P-0341 understood to be money.³⁸²

142. On [REDACTED] May 2013, Mr Gicheru gave P-0341 500,000 Ksh (about 4,526 euros at the time), told him not to deposit the money into a bank, and that P-0341 would have to return later to sign an affidavit.³⁸³ Contrary to Mr Gicheru’s instructions, P-0341 opened a bank account, deposited 300,000 Ksh (about 2,706 euros at the time) and spent the remaining 200,000 Ksh (about 1,804 euros at the time).³⁸⁴

143. Between [REDACTED] and [REDACTED] May 2013, P-0341 went to Mr Gicheru [REDACTED] at the request of the latter, and, in the presence of a lawyer called [REDACTED], signed an affidavit that was already prepared and that P-0341 [REDACTED].³⁸⁵ Mr Gicheru told P-0341 that it was an affidavit of withdrawal from the entire ICC process.³⁸⁶ P-0341 was not given a copy of the affidavit he signed.³⁸⁷ Soon after P-0341 signed the affidavit, Mr Gicheru told him that he needed P-0274 to bring ICC witness [REDACTED], and that P-0274 would get 5 million Ksh (about 45,261 euros at the time) in exchange.³⁸⁸ Mr Gicheru also told P-0341 to make a public statement to the press about his withdrawal as [REDACTED] and [REDACTED] had

³⁷⁹ P-0341, KEN-OTP-0150-0255-R01, p. 0266, para. 58.

³⁸⁰ P-0341, KEN-OTP-0150-0255-R01, p. 0266, para. 59.

³⁸¹ P-0341, KEN-OTP-0150-0255-R01, p. 0266, para. 60.

³⁸² P-0341, KEN-OTP-0150-0255-R01, p. 0267, para. 60.

³⁸³ P-0341, KEN-OTP-0150-0255-R01, p. 0268, paras 62-63.

³⁸⁴ P-0341, KEN-OTP-0150-0255-R01, p. 0268, paras 64-65; Financial Document, KEN-OTP-0159-1386, p. 1386; Financial Document, KEN-OTP-0149-0126, p. 0126; Financial Document, KEN-OTP-0149-0125.

³⁸⁵ P-0341, KEN-OTP-0150-0255-R01, p. 0268, para. 68.

³⁸⁶ P-0341, KEN-OTP-0150-0255-R01, p. 0268, para. 68.

³⁸⁷ P-0341, KEN-OTP-0150-0255-R01, p. 0268, para. 68.

³⁸⁸ P-0341, KEN-OTP-0150-0255-R01, p. 0268, para. 69.

done.³⁸⁹ P-0341 would later learn that Mr Ruto complained many times to Mr Gicheru about the fact that P-0341 [REDACTED].³⁹⁰

144. P-0341 continued to go to Mr Gicheru [REDACTED] almost every day, as requested by Mr Gicheru who P-0341 assumed wanted to ‘check up on [P-0341]’s movements’ and make sure that ‘[P-0341] was still on his side’.³⁹¹ On [REDACTED] May 2013, P-0341 went to Mr Gicheru [REDACTED] and received 500,000 Ksh (about 4,526 euros at the time). He deposited 300,000 Ksh (about 2,706 euros at the time) into his bank account and spent the remaining 200,000 Ksh (about 1,804 euros at the time).³⁹²

145. Between 9 May and 19 July 2013, at the request of Mr Gicheru, P-0341 had to sign another affidavit in [REDACTED], stating that he had no evidence against Mr Ruto and that he was withdrawing from the ICC proceedings.³⁹³ Mr Gicheru said that Mr Ruto had requested this document.³⁹⁴ A few days later, Mr Gicheru told P-0341 that Mr Ruto was very happy with the affidavit and that P-0341 should receive 5 million Ksh (about 45,261 euros at the time) for that. On that day, however, Mr Gicheru gave him a smaller amount, but superior to 20,000 Ksh (about 180 euros at the time).³⁹⁵

146. On [REDACTED] July 2013, Mr Gicheru gave P-0341 100,000 Ksh (about 905 euros at the time) of which P-0341 deposited 50,000 Ksh (about 452 euros at the time) into his bank account and spent the remaining 50,000 Ksh (about 452 euros at the time).³⁹⁶

147. In August or September 2013, at Mr Gicheru’s request, P-0341 met with Mr Gicheru and [REDACTED]

[REDACTED].³⁹⁷ Mr Gicheru introduced [REDACTED].³⁹⁸ [REDACTED]
[REDACTED]
[REDACTED]

³⁸⁹ P-0341, KEN-OTP-0150-0255-R01, p. 0268, para. 70.

³⁹⁰ P-0341, KEN-OTP-0150-0255-R01, p. 0268, para. 70.

³⁹¹ P-0341, KEN-OTP-0150-0255-R01, p. 0269, para. 71.

³⁹² P-0341, KEN-OTP-0150-0255-R01, p. 0269, paras 72-73; Financial Document, KEN-OTP-0159-1386, p. 1386; Financial Document, KEN-OTP-0149-0126, p. 0126.

³⁹³ P-0341, KEN-OTP-0150-0255-R01, p. 0269, paras 74-75.

³⁹⁴ P-0341, KEN-OTP-0150-0255-R01, p. 0269, para. 74.

³⁹⁵ P-0341, KEN-OTP-0150-0255-R01, p. 0270, para. 77.

³⁹⁶ P-0341, KEN-OTP-0150-0255-R01, p. 0270, paras 78-79; Financial Document, KEN-OTP-0159-1386, p. 1386; Financial Document, KEN-OTP-0149-0126, p. 0126.

³⁹⁷ P-0341, KEN-OTP-0150-0255-R01, p. 0270, para. 83.

³⁹⁸ P-0341, KEN-OTP-0150-0255-R01, p. 0270, para. 83.

██████████³⁹⁹ ██████████

██████████⁴⁰⁰ Mr Gicheru asked P-0341 to become a witness in support of Mr Ruto but P-0341 responded that it was not possible given that he was already ██████████⁴⁰¹ On that occasion, Mr Gicheru gave P-0341 between 100,000 Ksh (about 905 euros at the time) and 200,000 Ksh (about 1,804 euros at the time).⁴⁰²

██████████⁴⁰³

148. On two occasions, Mr Gicheru summoned P-0341 ██████████ because he was furious that P-0341 had attended a PEV victims meeting and had met with ██████████⁴⁰⁴ Mr Gicheru accused him of interacting with white people who were ‘sp[ies]’ for the ICC.⁴⁰⁵

149. On 10 October 2013, after receiving a call from Mr Gicheru, P-0341 met with ██████████⁴⁰⁶ ██████████ gave 350,000 Ksh (about 3,158 euros at the time) to P-0341 and less than 100,000 Ksh (about 905 euros at the time) to ██████████⁴⁰⁷ On the following day, P-0341 deposited 300,000 Ksh (about 2,706 euros at the time) into his bank account and spent the remaining 50,000 Ksh (about 452 euros at the time).⁴⁰⁸

150. Between ██████████ October 2013 and ██████████ April 2014, P-0341 continued to attend ██████████ on many occasions and at the request of the latter, who would ‘be worried if [P-0341] did not attend ██████████⁴⁰⁹ During this time-period, P-0341 received amounts of money ranging 20,000 Ksh (about 180 euros at the time) to

³⁹⁹ P-0341, KEN-OTP-0150-0255-R01, p. 0271, para. 84.

⁴⁰⁰ P-0341, KEN-OTP-0150-0255-R01, p. 0271, paras 84-85, 88.

⁴⁰¹ P-0341, KEN-OTP-0150-0255-R01, p. 0271, para. 87.

⁴⁰² P-0341, KEN-OTP-0150-0255-R01, p. 0271, para. 88.

⁴⁰³ P-0341, KEN-OTP-0150-0255-R01, p. 0271, para. 88, p. 0273, para. 97.

⁴⁰⁴ P-0341, KEN-OTP-0150-0255-R01, p. 0271, paras 89-90, p. 0273, para. 96.

⁴⁰⁵ P-0341, KEN-OTP-0150-0255-R01, p. 0271, paras 89-90, p. 0273, para. 96.

⁴⁰⁶ P-0341, KEN-OTP-0150-0255-R01, p. 0274, para. 99.

⁴⁰⁷ P-0341, KEN-OTP-0150-0255-R01, p. 0274, para. 99.

⁴⁰⁸ P-0341, KEN-OTP-0150-0255-R01, p. 0274, para. 101; Financial Document, KEN-OTP-0159-1386, p. 1387; Financial Document, KEN-OTP-0149-0126, pp. 0126-0127.

⁴⁰⁹ P-0341, KEN-OTP-0150-0255-R01, p. 0274, para. 102, p. 0277, para. 117.

200,000 Ksh (about 1,804 euros at the time), which P-0341 did not deposit into a bank account but spent for '[his] farm and general living expenses'.⁴¹⁰

151. On █ April 2014, after receiving a call from Mr Gicheru, P-0341 met with █ who gave him 100,000 Ksh (about 905 euros at the time). █ had asked P-0341 to contact █ and █ because they had been meeting with the ICC, and then report back to him.⁴¹¹ P-0341 never complied with the instructions and, on the same day, he deposited 50,000 Ksh (about 452 euros at the time) into his bank account and spent the remaining 50,000 Ksh (about 452 euros at the time).⁴¹²

152. On █ April 2014, while P-0341 █ to meet with an ICC investigator, █

█.⁴¹³ █

█.⁴¹⁴ P-0341 had also learned on █

█.⁴¹⁵

153. At the request of █, P-0341 met with █. P-0015 told him that he was sent by Mr Ruto to meet him.⁴¹⁶

█ told P-0341 that they knew █ to meet ICC staff, and that they knew it because █.⁴¹⁷

P-0341 felt threatened by this meeting and 'in great danger': █ was angry at him and threatened him, saying: █.⁴¹⁸ █

█.⁴¹⁹ █

⁴¹⁰ P-0341, KEN-OTP-0150-0255-R01, p. 0274, para. 102, p. 0277, para. 117.

⁴¹¹ P-0341, KEN-OTP-0150-0255-R01, p. 0275, paras 106-107.

⁴¹² P-0341, KEN-OTP-0150-0255-R01, p. 0275, paras 107-108; Financial Document, KEN-OTP-0159-1386, p. 1390.

⁴¹³ P-0341, KEN-OTP-0150-0255-R01, p. 0275, paras 109-110.

⁴¹⁴ P-0341, KEN-OTP-0150-0255-R01, p. 0259, para. 17, p. 0274, paras 109-111.

⁴¹⁵ P-0341, KEN-OTP-0150-0255-R01, p. 0275, para. 110.

⁴¹⁶ P-0341, KEN-OTP-0150-0255-R01, pp. 0275-0276, para. 112.

⁴¹⁷ P-0341, KEN-OTP-0150-0255-R01, pp. 0275-0276, para. 112.

⁴¹⁸ P-0341, KEN-OTP-0150-0255-R01, pp. 0275-0276, para. 112.

⁴¹⁹ P-0341, KEN-OTP-0150-0255-R01, p. 0276, para. 113.

[REDACTED]
[REDACTED].⁴²⁹

157. In 2011, after the name of the ICC suspects were made public in the proceedings regarding the Kenya situation, P-0274 began receiving threats [REDACTED]

[REDACTED].⁴³⁰ [REDACTED]

[REDACTED].⁴³¹ [REDACTED]

[REDACTED].⁴³²

158. As a result, [REDACTED] he sought help from his friend [REDACTED], who told him he was now close to Mr Ruto and put him in touch with [REDACTED]

[REDACTED].⁴³³ [REDACTED]

[REDACTED].⁴³⁴ [REDACTED]

[REDACTED].⁴³⁵ [REDACTED]

[REDACTED].⁴³⁶

[REDACTED].⁴³⁷ [REDACTED]

[REDACTED].⁴³⁸

159. [REDACTED]
[REDACTED], P-0274 received 30,000 Ksh (about 270 euros at the time)
[REDACTED].⁴³⁹ P-0274 used this money to
move to Kapsabet.⁴⁴⁰ Mohamed Ali contacted him and told him that he should receive

⁴²⁹ P-0274, KEN-OTP-0159-0986-R01, p. 0988, paras 14-15; OTP Investigator Report, KEN-OTP-0150-0345; Pre-Trial Chamber II, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang, Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings*, 5 August 2011, ICC-01/09-01/11-249, p. 46; Trial Chamber V, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang, Decision on victims' representation and participation*, 3 October 2012, ICC-01/09-01/11-460, para. 62.

⁴³⁰ P-0274, KEN-OTP-0159-0986-R01, p. 0989, paras 17, 20.

⁴³¹ P-0274, KEN-OTP-0159-0986-R01, p. 0989, para. 19.

⁴³² P-0274, KEN-OTP-0159-0986-R01, pp. 0988-0990, paras 14-22.

⁴³³ P-0274, KEN-OTP-0159-0986-R01, p. 0990, paras 23-26.

⁴³⁴ P-0274, KEN-OTP-0159-0986-R01, p. 0988, paras 26-30.

⁴³⁵ P-0274, KEN-OTP-0159-0986-R01, p. 0991, para. 32.

⁴³⁶ P-0274, KEN-OTP-0159-0986-R01, p. 0991, para. 33.

⁴³⁷ P-0274, KEN-OTP-0159-0986-R01, pp. 0991-0992, paras 27-36.

⁴³⁸ P-0274, KEN-OTP-0159-0986-R01, p. 0992, para. 37.

⁴³⁹ P-0274, KEN-OTP-0159-0986-R01, pp. 0992-0993, para. 40.

⁴⁴⁰ P-0274, KEN-OTP-0159-0986-R01, p. 0993, para. 41.

more money than the 30,000 Ksh (about 270 euros at the time) that he was already given.⁴⁴¹

160. After the elections in 2013, P-0274 began receiving threats again.⁴⁴² Towards the end of 2013, P-0274 met with P-0341 and [REDACTED], who told him that Mr Gicheru gave them 500,000 Ksh (about 4,526 euros at the time) to stop providing information to the ICC against Mr Ruto, and that they would receive 500,000 Ksh more and be left in peace.⁴⁴³ [REDACTED]

[REDACTED].⁴⁴⁴

161. P-0341 brought P-0274 to [REDACTED] Mr Gicheru, and Mr Gicheru told P-0274 that the same offer (500,000 Ksh now and the same amount later) was made to him in order to withdraw as a Prosecution witness and to stop assisting the ICC.⁴⁴⁵ He added that P-0274 would then 'be safe'.⁴⁴⁶ Mr Gicheru explained that he and others were giving witnesses money to stop assisting the ICC, and that they needed to reach everyone involved in this case since 'the boss', who P-0274 understood to be Mr Ruto, 'wanted no stone left unturned'.⁴⁴⁷ Mr Gicheru also asked P-0274 to give him the names of other OTP witnesses.⁴⁴⁸ Mr Gicheru gave P-0274 a phone number from which he said he would call P-0274 in the future.⁴⁴⁹ Mr Gicheru also gave him some money to reimburse him for transport back home.⁴⁵⁰ Feeling 'very sceptical about all this', P-0274 reported what had happened to an ICC staff member.⁴⁵¹

162. [REDACTED] later, P-0274 received a call from that [REDACTED] [REDACTED] and who asked him to come to [REDACTED] to meet with Mr Gicheru the following day.⁴⁵² P-0274 switched off his phone

⁴⁴¹ P-0274, KEN-OTP-0159-0986-R01, p. 0993, para. 41.

⁴⁴² P-0274, KEN-OTP-0159-0986-R01, p. 0994, para. 49.

⁴⁴³ P-0274, KEN-OTP-0159-0986-R01, pp. 0994-0995, paras 49-54.

⁴⁴⁴ P-0274, KEN-OTP-0159-0986-R01, pp. 0994-0995, para. 52.

⁴⁴⁵ P-0274, KEN-OTP-0159-0986-R01, pp. 0995-0996, paras 55-60.

⁴⁴⁶ P-0274, KEN-OTP-0159-0986-R01, p. 0996, para. 60.

⁴⁴⁷ P-0274, KEN-OTP-0159-0986-R01, p. 0996, paras 58-59.

⁴⁴⁸ P-0274, KEN-OTP-0159-0986-R01, p. 0996, para. 61.

⁴⁴⁹ P-0274, KEN-OTP-0159-0986-R01, p. 0996, para. 61.

⁴⁵⁰ P-0274, KEN-OTP-0159-0986-R01, p. 0996, para. 61.

⁴⁵¹ P-0274, KEN-OTP-0159-0986-R01, p. 0996, para. 62.

⁴⁵² P-0274, KEN-OTP-0159-0996-R01, p. 0996, para. 63.

and did not go to the meeting because he was scared.⁴⁵³ When he switched his phone back on, he saw that he had received a new threat from another telephone number.⁴⁵⁴ After that, he never dealt with Mr Gicheru again.⁴⁵⁵

163. Several weeks after his meeting with Mr Gicheru, P-0274 received a phone call from [REDACTED] who offered him [REDACTED] if he agreed to locate [REDACTED].⁴⁵⁶ P-0274 pretended to cooperate but told [REDACTED].⁴⁵⁷ [REDACTED]

[REDACTED].⁴⁵⁸

164. According to P-0274, a person named [REDACTED] was still trying to contact him, [REDACTED], and told P-0274 that Mr Ruto wanted to meet him in person.⁴⁵⁹ [REDACTED].⁴⁶⁰

165. [REDACTED]
[REDACTED].⁴⁶¹ [REDACTED]
[REDACTED].⁴⁶² [REDACTED]
[REDACTED].⁴⁶³ [REDACTED]
[REDACTED]
[REDACTED].⁴⁶⁴ [REDACTED]
[REDACTED].⁴⁶⁵

C. Conclusion of the Chamber

166. The Chamber finds that the physical perpetrators of the acts mentioned above relating to the eight incidents ‘intentionally’ tried to corruptly influence the witnesses

⁴⁵³ P-0274, KEN-OTP-0159-0996-R01, pp. 0996-0997, para. 64.

⁴⁵⁴ P-0274, KEN-OTP-0159-0996-R01, pp. 0996-0997, para. 64.

⁴⁵⁵ P-0274, KEN-OTP-0159-0996-R01, p. 0997, para. 65.

⁴⁵⁶ P-0274, KEN-OTP-0159-0996-R01, p. 0997, para. 67.

⁴⁵⁷ P-0274, KEN-OTP-0159-0996-R01, p. 0997, para. 67.

⁴⁵⁸ P-0274, KEN-OTP-0159-0996-R01, p. 0997, para. 68.

⁴⁵⁹ P-0274, KEN-OTP-0159-0996-R01, pp. 0997-0998, paras 70, 73.

⁴⁶⁰ P-0274, KEN-OTP-0159-0996-R01, p. 0997, para. 70.

⁴⁶¹ P-0274, KEN-OTP-0159-0986-R01, pp. 0993-0994, paras 44-46, p. 0996, para. 62.

⁴⁶² P-0274, KEN-OTP-0159-0996-R01, p. 0998, para. 73.

⁴⁶³ P-0274, KEN-OTP-0159-0996-R01, p. 0998, para. 73.

⁴⁶⁴ P-0274, KEN-OTP-0159-0996-R01, p. 0998, para. 73.

⁴⁶⁵ P-0274, KEN-OTP-0159-0996-R01, p. 0998, para. 73.

or potential witnesses and/or interfere with the attendance or testimony of the witnesses or potential witnesses in the sense that they knew that their actions would result in corruptly influencing and interfering with the witnesses. Therefore, the Chamber finds that both the material and mental elements of the offence of corruptly influencing a witness and/or interfering with the attendance or testimony of a witness are fulfilled. As a result, the facts established above all constitute an offence of corruptly influencing and interfering with a witness within the meaning of article 70(1)(c) of the Statute.

VI. RESPONSIBILITY

A. Article 25(3)(a) of the Statute – Direct co-perpetration

1. Applicable law

167. The Chamber recalls rule 163(1) of the Rules, according to which ‘the Statute and the Rules shall apply *mutatis mutandis* to the Court’s investigation, prosecution and punishment of offences defined in article 70’. Accordingly, all modes of liability set forth in article 25(3) of the Statute are applicable, in principle, pursuant to rule 163(1) of the Rules and the Chamber’s assessment of the role of the suspect shall be governed by the interpretation of this provision.⁴⁶⁶

168. In this section, the Chamber will set out the applicable law for the mode of liability relevant to its findings which, for the reasons provided in the present decision, is the responsibility under article 25(3)(a) of the Statute as direct co-perpetrator.

169. Article 25(3)(a) of the Statute provides expressly for three forms of individual criminal responsibility: a person who commits a crime ‘as an individual’, ‘jointly with another person’, or ‘through another person, regardless of whether that other person is criminally responsible’.⁴⁶⁷

⁴⁶⁶ [Bemba et al. Appeal Judgment](#), para. 680; [Bemba et al. Trial Judgment](#), para. 54; [Bemba et al. Confirmation Decision](#), para. 32.

⁴⁶⁷ Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, [Trial Judgment](#), 4 february 2021, ICC-02/04-01/15 (the ‘Ongwen Trial Judgment’), para. 2781; Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, [Judgment](#), 8 July 2019, ICC-01/04-02/06-2359 (the ‘Ntaganda Trial Judgment’), para. 771.

170. Pursuant to article 25(3)(a), second alternative, of the Statute, ‘a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person [c]ommits such a crime, [...] jointly with another’.

171. According to the jurisprudence of the Court, the ‘concept of co-perpetration based on joint control over the crime is rooted in the principle of the division of essential tasks for the purpose of committing a crime between two or more persons acting in a concerted manner. Hence, although none of the persons has overall control [viz. individually] over the offence because they all depend on one another for its commission, they all share control because each of them could frustrate the commission of the crime by not carrying out his or her task’.⁴⁶⁸ In these circumstances, any person making a contribution ‘can be held vicariously responsible for the contributions of all the others, and, as a result, can be considered as a principal to the whole crime’.⁴⁶⁹

i. Objective Elements

172. Consistent with the established jurisprudence of the Court, the Chamber recalls that, to hold an individual criminally responsible as a co-perpetrator under the notion of ‘control over the crime’,⁴⁷⁰ it must be satisfied that (i) there was a common plan between at least two persons, and (ii) the contribution of the co-perpetrators was essential.

173. As regards the first objective element, the Chamber must be satisfied that the accused and at least one other individual worked together (‘jointly’) in the commission of the offence(s) on the basis of an agreement or common plan.⁴⁷¹ It is this agreement or common plan that ties the co-perpetrators together and justifies

⁴⁶⁸ [Bemba et al. Trial Judgment](#), para. 62 referring to Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, [Judgment pursuant to Article 74 of the Statute](#) (the ‘Lubanga Trial Judgment’), 14 March 2012, ICC-01/04-01/06-2842, para. 469; [Katanga Confirmation Decision](#), paras 520-521. See also [Lubanga Appeal Judgment](#), paras 469, 473; [Al Hassan Confirmation Decision](#), para. 797; [Lubanga Confirmation Decision](#), para. 342.

⁴⁶⁹ [Bemba et al. Trial Judgment](#), para. 62; [Al Hassan Confirmation Decision](#), para. 797; [Lubanga Confirmation Decision](#), para. 326. See also [Lubanga Appeal Judgment](#), para. 445.

⁴⁷⁰ [Bemba et al. Trial Judgment](#), para. 64, n. 105 (‘The Court has accepted the notion of “control over the crime” as the distinguishing criterion between principals and accessories where a criminal offence is committed by a plurality of persons.’) and references cited therein. See in particular [Lubanga Appeal Judgment](#), paras 469-472.

⁴⁷¹ [Bemba et al. Appeal Judgment](#), para. 818; [Lubanga Appeal Judgment](#), para. 445; [Bemba et al. Trial Judgment](#), para. 65; [Lubanga Trial Judgment](#), paras 980-981; [Al Hassan Confirmation Decision](#), para. 799; [Ruto and Sang Confirmation Decision](#), para. 301; [Bemba Confirmation Decision](#), para. 350.

reciprocal imputation of their respective acts.⁴⁷² Accordingly, participation in the commission of the offence(s) without coordination with one's co-perpetrator(s) falls outside the scope of co-perpetration.⁴⁷³ The agreement or common plan may be express or implied, previously arranged or materialise extemporaneously.⁴⁷⁴ Its existence may be inferred from subsequent concerted action of the co-perpetrators,⁴⁷⁵ and proven by direct evidence or inferred from circumstantial evidence.⁴⁷⁶

174. With regard to the second objective element, the accused must make an essential contribution within the framework of the agreement or common plan in a coordinated manner resulting in the fulfilment of the material elements of the offence(s), without which the commission of the offence(s) would not be possible.⁴⁷⁷ To hold an accused liable as a co-perpetrator under article 25(3)(a) of the Statute, it has to be established, *inter alia*, that he or she had control over the crime, by virtue of his or her essential contribution to it and the resulting power to frustrate its commission, even if that essential contribution was not made at the execution stage of the crime.⁴⁷⁸

175. The requirement that the co-perpetrator's contribution be 'essential' has been consistently and invariably established in the Court's jurisprudence.⁴⁷⁹ Suffice it to

⁴⁷² [Bemba et al. Appeal Judgment](#), para. 818; [Lubanga Appeal Judgment](#), para. 445; [Bemba et al. Trial Judgment](#), para. 65; [Lubanga Trial Judgment](#), para. 981; [Al Hassan Confirmation Decision](#), para. 799; [Al Mahdi Confirmation Decision](#), para. 24.

⁴⁷³ [Bemba et al. Appeal Judgment](#), para. 763; [Bemba et al. Trial Judgment](#), para. 65; [Al Hassan Confirmation Decision](#), para. 799. *See also* [Katanga Confirmation Decision](#), para. 522; [Lubanga Confirmation Decision](#), para. 343.

⁴⁷⁴ [Lubanga Appeal Judgment](#), para. 445; [Lubanga Trial Judgment](#), para. 988 (*see also* paras 980-981); [Ntaganda Trial Judgment](#), para. 775; [Bemba et al. Trial Judgment](#), para. 66; [Al Hassan Confirmation Decision](#), para. 800; [Al Mahdi Confirmation Decision](#), para. 24; [Ruto and Sang Confirmation Decision](#), para. 301; [Katanga Confirmation Decision](#), para. 523; *see also* [Muthaura et al. Confirmation Decision](#), para. 399.

⁴⁷⁵ [Bemba et al. Trial Judgment](#), para. 66; [Al Hassan Confirmation Decision](#), para. 800; [Ruto and Sang Confirmation Decision](#), para. 301; [Katanga Confirmation Decision](#), para. 523; [Lubanga Confirmation Decision](#), para. 345. *See also* [Bemba et al. Appeal Judgment](#), para. 1306 ('The Appeals Chamber recalls that there is no bar to a trial chamber using evidence to infer, either backwards or forward in time, an accused's involvement in a common plan.').

⁴⁷⁶ [Bemba et al. Trial Judgment](#), para. 66; [Lubanga Trial Judgment](#), para. 988; [Al Hassan Confirmation Decision](#), para. 800. *See also* [Bemba et al. Appeal Judgment](#), paras 763-764.

⁴⁷⁷ [Bemba et al. Trial Judgment](#), para. 68; [Bemba Confirmation Decision](#), para. 350. *See also* [Lubanga Appeal Judgment](#), paras 468-469; [Lubanga Trial Judgment](#), paras 989 *et seq*; [Al Hassan Confirmation Decision](#), para. 802; [Lubanga Confirmation Decision](#), para. 346.

⁴⁷⁸ [Bemba et al. Appeal Judgment](#), para. 810; [Lubanga Appeal Judgment](#), para. 473.

⁴⁷⁹ [Bemba et al. Appeal Judgment](#), para. 810; [Lubanga Appeal Judgment](#), paras 468-469; [Bemba et al. Trial Judgment](#), para. 69; [Al Hassan Confirmation Decision](#), para. 802; [Muthaura et al. Confirmation Decision](#), paras 297, 401-404, 419; [Ruto and Sang Confirmation Decision](#), para. 305; [Mbarushimana Confirmation Decision](#), paras 273, 279; [Banda and Jerbo Confirmation Decision](#), paras 136-138;

say here that only those to whom ‘essential’ tasks have been assigned – and who consequently have the power to frustrate the commission of the offence by not performing their task – can be said to have joint control over the offence(s).⁴⁸⁰ It is not necessary that each co-perpetrator personally and directly carry out the offence(s), or that she or he be present at the scene of the criminal offence, as long as she or he exercised, jointly with others, control over the criminal offence.⁴⁸¹ What is required is a normative assessment of the role and activities of the accused person in the specific circumstances of the case, taking into account the division of tasks.⁴⁸² The decisive consideration for determining whether an accused person qualifies as a co-perpetrator is whether the individual contribution of the accused within the framework of the agreement was such that, without it, the crime could not have been committed or would have been committed in a significantly different way.⁴⁸³

176. The Appeals Chamber held that

Given that the essential contribution does not have to be made at the execution stage, it is clear that acts that do not, as such, form the *actus reus* of the crime or offence in question may nevertheless be taken into account when determining whether the accused has made an essential contribution to that crime or offence. Therefore, the essential contribution may take many forms and need not be ‘criminal’ in nature.⁴⁸⁴

177. The Appeals Chamber also found that ‘[p]rovided that the incidents occur within the framework of a criminal common plan, to which the co-perpetrator made

[Abu Garda Confirmation Decision](#), para. 350; [Katanga Confirmation Decision](#), paras 524-525; [Lubanga Confirmation Decision](#), para. 346. See also [Lubanga Appeal Judgment](#), paras 462-468; [Lubanga Trial Judgment](#), paras 995-999.

⁴⁸⁰ [Lubanga Appeal Judgment](#), para. 473; [Bemba et al. Trial Judgment](#), para. 69; [Al Hassan Confirmation Decision](#), para. 803; [Lubanga Confirmation Decision](#), para. 347.

⁴⁸¹ [Bemba et al. Trial Judgment](#), para. 69 referring to [Lubanga Appeal Judgment](#), paras 458, 460, 465-466, stating that ‘in support of this interpretation, the Appeals Chamber draws on article 25(3)(a), third alternative, of the Statute, which embodies the commission of an offence “through another person”. In this case, the perpetrator, who did not carry out the incriminated conduct, may bear the same or even more blameworthiness than the person actually committing the criminal offence.’ See also [Al Hassan Confirmation Decision](#), para. 803, n. 2131.

⁴⁸² [Bemba et al. Appeal Judgment](#), para. 820; [Lubanga Appeal Judgment](#), paras 466, 473; [Bemba et al. Trial Judgment](#), para. 69; [Al Hassan Confirmation Decision](#), para. 803. See also [Lubanga Trial Judgment](#), paras 1000-1001.

⁴⁸³ [Bemba et al. Appeal Judgment](#), para. 820; [Al Hassan Confirmation Decision](#), para. 808.

⁴⁸⁴ [Bemba et al. Appeal Judgment](#), para. 810 (‘Given that the essential contribution does not have to be made at the execution stage, it is clear that acts that do not, as such, form the *actus reus* of the crime or offence in question may nevertheless be taken into account when determining whether the accused has made an essential contribution to that crime or offence. The Appeals Chamber considers, therefore, that the essential contribution may take many forms and need not be “criminal” in nature.’).

an essential contribution with intent and knowledge, it is not necessary for the co-perpetrator to make an essential contribution to each criminal incident'.⁴⁸⁵

ii. Subjective elements

178. In addition to the Chamber's explanations in relation to the requisite *mens rea* under article 70(1)(c) of the Statute made above,⁴⁸⁶ the Chamber recalls that it must be satisfied of the co-perpetrators' mutual awareness that implementing the common plan would result in the fulfilment of the material elements of the crimes, and that they nevertheless performed their actions with the purposeful will (intent) to bring about the material elements of the crimes, or with the awareness that, 'in the ordinary course of events', the fulfilment of the material elements will be a virtually certain consequence of their actions.⁴⁸⁷

179. The Chamber recalls that it is precisely the co-perpetrators' mutual awareness and acceptance of this result that justifies that the contributions made by the others may be attributed to each of them, and that they be held criminally responsible as principals to the whole offence.⁴⁸⁸

2. Findings of the Chamber

180. Having reviewed the evidence presented before it, the Chamber finds that there are substantial grounds to believe that Mr Gicheru is criminally responsible under article 25(3)(a) of the Statute as a co-perpetrator for the commission of offences against the administration of justice set out in article 70(1)(c) of the Statute in Kenya between April 2013 and the closure of the *Ruto and Sang* case on 10 September 2015,⁴⁸⁹ in the furtherance of the common plan described below.

181. The Chamber finds that at least Mr Gicheru, Mr Maiyo, Mr Simatwo, Mr Bett, Mr Yebei and Mr Barasa acted in furtherance of a common plan with the ultimate goal of undermining the Prosecution's case in the *Ruto and Sang* case by preventing Prosecution witnesses from testifying, including persons perceived as potential

⁴⁸⁵ [Bemba et al. Appeal Judgment](#), para. 812.

⁴⁸⁶ See paragraph 51 above.

⁴⁸⁷ [Bemba et al. Trial Judgment](#), para. 70; [Ruto and Sang Confirmation Decision](#), para. 333; [Bemba Confirmation Decision](#), para. 370; [Katanga Confirmation Decision](#), para. 533.

⁴⁸⁸ [Bemba et al. Trial Judgment](#), para. 71; [Lubanga Confirmation Decision](#), para. 362.

⁴⁸⁹ Trial Chamber V(A), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, [Notification of closure of the Prosecution's case](#), 10 September 2015, ICC-01/09-01/11-1954.

witnesses. In order to reach this goal, they identified, located, and contacted Prosecution witnesses, offered and/or paid them financial or other benefits, and/or threatened or intimidated them, in order to induce them to withdraw as Prosecution witnesses, refuse to or cease cooperating with the Prosecution and/or the Court, and/or to recant the evidence which they had provided to the Prosecution.

i. The existence of a common plan

182. According to the Prosecutor, Mr Gicheru committed the offences charged jointly with a number of other people. Among the members of that common plan organisation, the Prosecutor distinguishes between the ‘managers’ (Mr Gicheru, Mr Simatwo, Mr Maiyo, and Mr Busienei), the ‘intermediaries’ (Mr Yebei, Mr Bett, Mr Barasa, and Mr Kosgei), and the ‘successfully corrupted Prosecution witnesses’, who ‘also acted as Intermediaries and helped to further the objective of the Common plan’ (P-0397, P-0800, P-0495, P-0516, and P-0341).⁴⁹⁰

183. After reviewing the evidence, the Chamber finds that there are substantial grounds to believe that a group of persons acted in the furtherance of a common plan, which can be defined as follows.

184. The *ultimate goal* of the common plan was to undermine the Prosecutor’s case in the *Ruto and Sang* case by preventing Prosecution witnesses from testifying, including persons perceived as potential witnesses.

185. The members of the common plan decided that the *means* employed to reach this goal would be to identify, locate, and contact Prosecution witnesses, offer and/or pay them financial or other benefits, and/or threaten or intimidate them, in order to induce them to withdraw as Prosecution witnesses, refuse to or cease cooperating with the Prosecutor and/or the Court, and/or to recant the evidence which they had provided to the Prosecutor.

186. The Chamber takes particular note of the pattern of the witness corruption scheme: a first contact with a person who already knew the targeted witness - when possible - to convince the said target to attend a meeting with Mr Gicheru (and sometimes ██████████); during the subsequent meeting an offer was made; the fact that witnesses were paid or promised money in cash instalments and told not to

⁴⁹⁰ DCC, paras 40-42.

deposit it into the bank; and the fact that once they signalled their agreement to participate, some witnesses were asked to locate and/or contact other targeted witnesses. In the view of the Chamber, all of this shows that the co-perpetrators acted in unison, which is, in accordance with the Appeals Chamber jurisprudence, a strong indicator that, by doing so, they were implementing a common plan of which they agreed upon.⁴⁹¹

187. The Chamber also notes that the common plan was criminal *by essence* since both its aim and means were to commit offences against the administration of justice, and that anybody engaging in the furtherance of the common plan could not ignore this state of fact.

ii. The members of the common plan

188. The Chamber finds that there are substantial grounds to believe that at least Mr Gicheru, Mr Maiyo, Mr Simatwo, Mr Bett, Mr Yebei, and Mr Barasa were all part of the common plan organisation, and acted collectively and in a concerted manner in the furtherance of the common plan. They all acted as a link in the chain of criminality and the action of each of them was essential in furthering the prohibited activity and common plan. All in all, the control over the offence was collective.⁴⁹²

189. As asserted by the Prosecutor, the Chamber finds that the evidence shows that Mr Gicheru,⁴⁹³ Mr Maiyo,⁴⁹⁴ and Mr Simatwo⁴⁹⁵ (the ‘managers’) had played a particular role in the furtherance of the common plan, and in the dynamics of the group of persons who agreed on the common plan. They also had a particular

⁴⁹¹ Appeals Chamber, *The Prosecutor v. Bosco Ntaganda*, [Public redacted version of Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled ‘Judgment’](#), 30 March 2021, ICC-01/04-02/06-2666-Red (A2) (confidential version notified same day), para. 19.

⁴⁹² [Lubanga Trial Judgment](#), para. 994.

⁴⁹³ See paragraphs 204-210 below.

⁴⁹⁴

[REDACTED]

⁴⁹⁵

[REDACTED]

proximity with Mr Ruto,⁴⁹⁶ and seemed to enjoy a special status in comparison with the other members of the common plan organisation. The tasks they carried out reveal that they were more involved in the overall control and implementation of the common plan (their tasks were more systematic and took place over the full period covered by the common plan furtherance). In this regard, it is worth noting that they were all involved in *several* witness corruption schemes. [REDACTED]

[REDACTED] appears to have been central in the process of meeting with witnesses, either as a place where first contact meetings happened to ensure that targeted witnesses were ‘under control’ by requesting them to ‘pass by’ [REDACTED] regularly, or in the payment of corrupted witnesses.⁴⁹⁷ Mr Simatwo was consulted before proceeding with the payment of at least certain witnesses and was in charge of the treasury.⁴⁹⁸ Several witnesses refer to them as the ‘core’ of the common plan organisation, or ‘the people’ working for Mr Ruto in order to corrupt witnesses.⁴⁹⁹ In this regard, relevant is the fact that [REDACTED] explained that [REDACTED]

[REDACTED]⁵⁰⁰

190. At the time of the events, Mr Maiyo was the ‘Constituency Development Fund’ chairman in Eldoret and had been appointed to this position by Mr Ruto, who was the then Member of Parliament elected in the region before becoming President of Kenya.⁵⁰¹ Mr Maiyo was known to be a close friend and supporter of Mr Ruto.⁵⁰²

⁴⁹⁶ Concerning Mr Simatwo, *see* [REDACTED]; K.E. Kariuki, ‘American Chronicle Writer Threatened by RUTO Allies’, *American Chronicle*, 12 July 2010, KEN-OTP-0047-0098, pp. 0098-0099. Concerning Mr Maiyo, *see* paragraph 183, n. 502 below. The Chamber notes that the Defence argues that ‘[n]o concrete or tangible evidence supports’ the fact of Mr Gicheru’s association with Mr Ruto. The Chamber notes that the statement of P-0397 and P-0800 corroborates each other on the fact that Mr Gicheru has told them that he had been to Kapsabet High School with Mr Ruto, and that they were close friends. In any event, the Chamber notes that this question remains accessory, given the amount of evidence showing the involvement of Mr Gicheru on the furtherance of the common plan. *See* Defence Written Submissions, para. 4; Prosecution Response, para. 18; Defence Reply, para. 23; P-0397, KEN-OTP-0125-0434-R01, p. 0437; P-0800, KEN-OTP-0135-0113, p. 0019.

⁴⁹⁷ *See* paragraphs 64, 68, 69, 71, 76, 79, 84, 139, 141, 143, 145, 148, 153 above.

⁴⁹⁸ *See* paragraphs [REDACTED] above.

⁴⁹⁹ P-0397, KEN-OTP-0125-0461-R01, p. 0465. *See* paragraphs [REDACTED] above.

⁵⁰⁰ P-0341, KEN-OTP-0150-0255-R01, p. 0264, para. 44.

⁵⁰¹ P-0274, KEN-OTP-0159-0986-R01, p. 0997, para. 66; P-0341, KEN-OTP-0150-0255-R01, pp. 0277-0278, para. 122; P-0397, KEN-OTP-0074-0264-R01, p. 0292, para. 142; P-0516, KEN-OTP-0087-0031-R01, p. 0036, para. 29.

⁵⁰² CIPEV testimony [REDACTED], KEN-OTP-0007-0852, p. 0865; P-0397, KEN-OTP-0074-0264-R01, p. 0292, para. 142; P-0516, KEN-OTP-0087-0031-R01, p. 0036, para. 29; K.E. Kariuki, ‘American

191. Mr Simatwo was the head of the ‘African Merchant Assurance Company’, an insurance company,⁵⁰³ to which Mr Ruto was a shareholder.⁵⁰⁴

192. For the same reasons as mentioned above, the Chamber finds that there are substantial grounds to believe that, based on circumstantial evidence and the tasks undertaken by Mr Maiyo and Mr Simatwo, the only inference possible is that they shared the intent to implement the common plan. The Chamber also finds, as explained below, that Mr Gicheru shared this intent.⁵⁰⁵

193. As to the ‘intermediaries’, the Chamber finds that although they did not enjoy the same status as the managers, they can nevertheless also be considered as forming part of the common plan organisation. Their actions show that, at some point of time, they adhered to the common plan and had the intent to act in the furtherance of this common plan.

194. The evidence shows, to the required standard, that Mr Bett,⁵⁰⁶ Mr Yebei,⁵⁰⁷ and Mr Barasa,⁵⁰⁸ engaged, in a concerted and coordinated manner, in: contacting

Chronicle Writer Threatened by RUTO Allies’, American Chronicle, 12 July 2010, KEN-OTP-0047-0098, p. 0098.

⁵⁰³ Web Page, KEN-OTP-0159-1731.

⁵⁰⁴ Online Press Article, M. Roberto, ‘Firm associated with Ruto defends itself against suspicious Ksh 3.4 million payment to Sonk’, Tuko, KEN-OTP-0159-1731; K. Kangethe, ‘Ruto, the self made deputy president’, CapitalFM, KEN-OTP-0159-1735.

⁵⁰⁵ See paragraph 214 below.

⁵⁰⁶ See [REDACTED]

⁵⁰⁷ See [REDACTED]

⁵⁰⁸ See [REDACTED]

Prosecution witnesses, trying to convince them to recant their evidence and/or contact other witnesses in exchange for money or other benefits, organise meetings with the managers and proceeding with payments of witnesses.

195. At the time of the events, Mr Bett used to work for a human rights organisation called Kalenjin Youth Alliance, which collected testimonies of victims of the PEV.⁵⁰⁹ Mr Barasa was a journalist from Eldoret.⁵¹⁰

196. Because the intermediaries did not participate in the formulation of the common plan, and only initiated action in the furtherance of the common plan after having been bribed themselves, it could be argued that they did not form part of the common plan organisation, but were mere executors. However, the Chamber is of the view that by the very nature of their tasks (directly bribing witnesses), it cannot be said that they were mere executors who did not know what the common plan was about. On the contrary, by the very nature of their action and awareness of the consequences of the implementation of the common plan, they became participants and members of the common plan organisation.

197. It could also be argued that the fact that they perpetrated such acts in exchange for benefits, shows that the only reason as to why they executed their tasks was for financial motive and that, therefore, they lack the required intent. However, the Chamber recalls that international criminal law jurisprudence has established that motives are irrelevant and distinct from intent.⁵¹¹ Again, the very nature of their tasks (directly bribing witnesses) shows that they knew that their actions would contribute to the common plan, and therefore that they shared the intent of furthering the common plan and adhered to it.

⁵⁰⁹ P-0613, KEN-OTP-0102-0178, p. 0180, para. 14.

⁵¹⁰ P-0341, KEN-OTP-0150-0255-R01, p. 0263, para. 42; P-0274, KEN-OTP-0159-0986-R01, p. 0991, para. 30; KEN-OTP-0153-0497.

⁵¹¹ ICTY, Appeals Chamber, *The Prosecutor v. Kvočka et al.*, [Judgement](#), 28 February 2005, IT-98-30-1-A, para. 106 referring to *The Prosecutor v. Jelisić*, [Judgement](#), 5 July 2001, IT-95-10-A, para. 49, *The Prosecutor v. Tadić*, [Judgement](#), 15 July 1999, IT-94-1-A, para. 269, *The Prosecutor v. Krnojelac*, [Judgement](#), 17 September 2003, IT-97-25-A, para. 102.

198. In the view of the Chamber, the question of whether they only meant to corrupt witnesses, or whether they also shared the ‘ultimate goal’ of the common plan (in the instance that the Main Case fails), is irrelevant since both objectives are inseparable. The failing of the Main Case is the only possible consequence of corruptly influencing the witnesses and/or interfering with their attendance or testimony, and they could not ignore that this would happen if the corruption scheme was successful.

199. Finally, the Chamber notes that the evidence also shows the multitude of contacts the members of the common plan organisation (both managers and intermediaries) had between each other, either by phone or physically, for example when they worked, together as a group, at convincing a witness to withdraw, visited the same witness or gathered at [REDACTED].

200. However, the Chamber finds that Mr Busienei,⁵¹² Mr Kosgei,⁵¹³ P-0397, P-0516, P-0800, P-0495 and P-0341 cannot be qualified as members of the common plan. The Chamber finds that the Prosecutor has not demonstrated, to the required standard, that they had made an essential contribution to the furtherance of the common plan. The evidence shows that each of them intervened only once to contact and try to convince one single other witness (except for P-0800) to meet with Mr Gicheru or to withdraw as Prosecution witnesses.⁵¹⁴ In the eyes of the Chamber, those occasional and limited participations cannot be considered as amounting to providing an ‘essential contribution’ to the furtherance of the common plan.

201. Regarding the arguments raised by the parties, the Chamber notes that the Defence alleges that [REDACTED]

⁵¹² See DCC, para. 40 and n. 81 and evidence cited therein, para. 41(d) and n. 102-104 and evidence cited therein. See in particular [REDACTED]

⁵¹³ See DCC, para. 40 and n. 85, para. 42(d) and n. 102-104 and evidence cited therein. See in particular [REDACTED]

⁵¹⁴ The Prosecutor alleges that: P-0397 contacted P-0516 and took him to [REDACTED] (See DCC, para. 86); P-0516 urged P-0613 to withdraw as a witness (See DCC, para. 103); P-0800 approached P-0495 (See DCC, para. 193) and contacted P-0613 to offer her payment in exchange for recanting her evidence (See DCC, para. 151); P-0495 approached P-0613 in order to convince her to meet Mr Gicheru (See DCC, para. 209).

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 ██████████.⁵¹⁵ The Chamber agrees with the Prosecutor that, even if proven, ██████████
 ██████████ is not incompatible with the role played by Mr Gicheru, and that, in any
 event, the Defence does not show the contrary.

202. As regards the Defence's argument that '[t]here is no evidence that Mr [...] Gicheru had any dealings with these individuals concerning any of the witnesses, except MP [Busienei]', the Chamber considers that under article 25(3)(a) of the Statute, it is not a requirement for the Prosecutor to show that the suspect was in contact with each and every member of the common plan organisation in the context of each incident, as suggested by the Defence, provided that – as it is the case in the present instance – the evidence shows that they all acted in furtherance of the common plan, and that their contribution was essential. In addition, the fact that they acted in a concerted manner can be demonstrated based on circumstantial evidence. The Chamber also recalls that it has established Mr Gicheru's personal and direct involvement in corrupting, or attempting to corrupt witnesses P-0397, P-0516, P-0613, P-0800, P-0495, P-0341, and P-0274.⁵¹⁶

iii. Mr Gicheru's essential contribution to the furtherance of the common plan

203. The Chamber recalls that it has established the contributions of Mr Gicheru as follows.

204. As regards P-0397, Mr Gicheru: in April 2013 instructed ██████████ to approach P-0397 in order to persuade him to meet with Mr Gicheru for the purpose of offering him money in exchange for his withdrawal as a Prosecution witness in the Main Case, which they did;⁵¹⁷ ██████████ in April and May 2013 met P-0397 ██████████, several times and offered him 5 million Ksh in cash instalments, of which Mr Gicheru then paid P-0397 a total of 1 million Ksh in order for P-0397 to withdraw as a Prosecution witness in the Main Case, to cease

⁵¹⁵ Defence Written Submissions, para. 4, h; Defence Reply, para. 26.

⁵¹⁶ See paragraphs 204-210 below. The Chamber notes that although it has not established the direct involvement of Mr Gicheru as regards P-0536, the charges are nonetheless confirmed below against Mr Gicheru as regards the offences related to this witness, based on the principal of shared responsibility between all the members of the common plan organisation (or of the reciprocal imputation of their respective acts). See paragraphs 173, 177 above.

⁵¹⁷ See paragraphs 62-64 above.

cooperating with the ICC, and to sign an affidavit to that effect;⁵¹⁸ [REDACTED] on 9 May 2013 arranged, [REDACTED], for [REDACTED] to prepare an affidavit stating that P-0397 no longer intended to testify against any accused persons before the ICC, which included Mr Ruto and Mr Sang, and wished to withdraw his statements against the said accused persons, and instructed P-0397 to sign it, which P-0397 did;⁵¹⁹ and on 7 December 2013, [REDACTED] [REDACTED], threatened or intimidated P-0397, accusing him of still being in touch with the ICC, of wanting to send Mr Ruto to jail and of trying to have Mr Gicheru arrested.⁵²⁰

205. As regards P-0516, Mr Gicheru: [REDACTED] during the period of April to May 2013 instructed P-0397 to approach P-0516 in order to persuade P-0516 to meet with Mr Gicheru for the purpose of offering him money in exchange for his withdrawal as a Prosecution witness in the Main Case, which P-0397 did;⁵²¹ during that same period met P-0516 several times [REDACTED], and offered him 800,000 Ksh in cash instalments, of which Mr Gicheru then paid P-0516 a total of at least 500,000 Ksh, to withdraw as a Prosecution witness in the Main Case, recant his evidence and sign an affidavit to that effect, which P-0516 did;⁵²² and asked P-0516 whether he knew ‘other people like you’, meaning other witnesses, in order to induce P-0516 to corruptly influence such witnesses,⁵²³ which P-0516 did.⁵²⁴

206. As regards P-0613, Mr Gicheru: at the end of April 2013 offered [REDACTED] or [REDACTED] a sum of money to obtain [REDACTED] P-0613 for the purpose of trying to locate her in the context of the corruption scheme;⁵²⁵ in July 2013 instructed [REDACTED] to take [REDACTED] to P-0613 so that she could be contacted by the members of the common plan in the context of the witness corruption scheme;⁵²⁶ again in July 2013 induced [REDACTED] to offer P-0613 financial incentives in exchange for her withdrawal as a Prosecution witness and to

⁵¹⁸ See paragraphs 65-68 above.

⁵¹⁹ See paragraph 69 above.

⁵²⁰ See paragraph 70 above.

⁵²¹ See paragraphs 76-79 above.

⁵²² See paragraphs 80, 81, 83 above.

⁵²³ See paragraph 103, *in particular*, n. 249 above.

⁵²⁴ See paragraph 103, *in particular*, n. 249 above.

⁵²⁵ See paragraph 109 above.

⁵²⁶ See paragraph 110 above.

report back to him, which [REDACTED] did with the assistance of P-0800;⁵²⁷ and in September 2014 induced P-0495 to approach P-0613 to convince her to withdraw as a Prosecution witness in the Main Case, which P-0495 did.⁵²⁸

207. As regards P-0800, Mr Gicheru: instructed [REDACTED] to contact P-0800 to convince him to withdraw as Prosecution witness in the Main Case;⁵²⁹ held a meeting with, among others, P-0800 [REDACTED], Kenya, during which he offered P-0800 between 1,5 and 2 million Ksh;⁵³⁰ accompanied P-0800 to a law firm in Nairobi where P-0800 signed an affidavit related to t [REDACTED] [REDACTED];⁵³¹ and ordered that an affidavit concerning P-0800's own withdrawal from the ICC proceedings be prepared.⁵³²

208. As regards P-0495, Mr Gicheru: gave P-0800 travelling money and [REDACTED] [REDACTED] in order for P-0800 to bring P-0495 to him (Mr Gicheru).

209. As regards P-0341, Mr Gicheru: paid [REDACTED] to take P-0341 [REDACTED] [REDACTED];⁵³³ was present at the meeting [REDACTED] when an offer was made to P-0341 for him to stop attending ICC meetings, and he was requested to locate other ICC witnesses;⁵³⁴ threatened P-0341, at the said meeting,⁵³⁵ but also on two other occasions;⁵³⁶ requested P-0341 to locate other ICC witnesses several times;⁵³⁷ was 'following up' with P-0341 by requesting him to pass by [REDACTED] regularly;⁵³⁸ made him sign [REDACTED] affidavits stating he was withdrawing from the ICC proceedings;⁵³⁹ organised the transition for [REDACTED] to continue to follow up with P-0341 and [REDACTED] paid P-0341 350,000 Ksh on [REDACTED] October 2013, 100,000 Ksh on [REDACTED] April 2014;⁵⁴⁰ directly paid P-0341 500,000 Ksh on [REDACTED] May 2013,⁵⁴¹

⁵²⁷ See paragraph 111 above.

⁵²⁸ See paragraphs 105-106, 112 above.

⁵²⁹ See paragraph 118 above.

⁵³⁰ See paragraph 119 above.

⁵³¹ See paragraph 120 above.

⁵³² See paragraph 120 above.

⁵³³ See paragraph 139 above.

⁵³⁴ See paragraph 140 above.

⁵³⁵ See paragraph 140 above.

⁵³⁶ See paragraph 148 above.

⁵³⁷ See paragraphs 141, 143 above.

⁵³⁸ See paragraphs 141, 144, 150 above.

⁵³⁹ See paragraphs 143, 145 above.

⁵⁴⁰ See paragraphs 195, 197 above.

⁵⁴¹ See paragraph 142 above.

500,000 Ksh on ■ May 2013,⁵⁴² 100,000 Ksh on ■ July 2013,⁵⁴³ between 100,000 and 200,000 Ksh in August or September 2013,⁵⁴⁴ other amounts ranging from 20,000 Ksh and 200,000 Ksh between ■ October 2013 and ■ April 2014;⁵⁴⁵ and requested P-0341 to become a witness for Mr Ruto.⁵⁴⁶

210. As regards P-0274, Mr Gicheru, ■: offered him 1 million Ksh for ceasing to be an ICC witness and assisting the ICC, and threatened him by stating that, then, P-0274 would be safe; and requested him to give the names of other ICC witnesses.⁵⁴⁷

211. The Chamber notes that it has established Mr Gicheru's direct involvement and participation in the witness corruption scheme of seven out of the eight incidents.

212. In addition, the Chamber notes that the evidence reveals that ■, was a crucial place in the system of implementation of the common plan, as it was where members of the common plan organisation gathered, where many meetings with witnesses had taken place with the view of convincing them to withdraw from ICC proceedings, and where witnesses have received cash instalments.⁵⁴⁸ The Chamber also recalls that it has established that Mr Gicheru proceeded personally with the payment of witnesses P-0397, P-0516, and P-0341.⁵⁴⁹

213. For the foregoing reasons, the Chamber finds, to the required standard, that Mr Gicheru's contribution to the furtherance of the common plan has been essential.

iv. Mr Gicheru's mens rea

214. On the basis of the above analysis, the Chamber finds substantial grounds to believe that Mr Gicheru meant to engage in his conduct and was aware that his role was essential to the implementation of the common plan, and that due to the essential nature of his tasks, he would have frustrated its implementation by refusing to activate the mechanisms that led to the commission of the offences.

⁵⁴² See paragraph 144 above.

⁵⁴³ See paragraph 146 above.

⁵⁴⁴ See paragraph 147 above.

⁵⁴⁵ See paragraph 150 above.

⁵⁴⁶ See paragraph 147 above.

⁵⁴⁷ See paragraph 161 above.

⁵⁴⁸ See paragraphs 64, 68, 69, 71, 76, 79, 84, 139, 141, 143, 145, 148, 153 above.

⁵⁴⁹ See paragraphs 204, 205, 209 above.

v. *Conclusion on Mr Gicheru's responsibility*

215. The Chamber recalls that co-perpetration under article 25(3)(a) of the Statute bears the imputation to each member of the common plan of their respective acts. Having found, to the required standard, that a common plan existed, that Mr Gicheru's contribution to the implementation of that common plan was essential, that Mr Gicheru had the required intent, and that the offences were committed in furtherance of the common plan, the Chamber accordingly confirms the charges against Mr Gicheru for the offences set out in article 70(1)(c) of the Statute and established above with respect to P-0397, P-0516, P-0613, P-0800, P-0495, P-0536, P-0341, and P-0274.

B. Alternatives modes of liability pleaded by the Prosecutor

216. The Chamber notes that in the DCC, the Prosecutor requested that charges against Mr Gicheru be confirmed for *all* incidents under the mode of liability of 'direct co-perpetration' pursuant to article 25(3)(a) of the Statute, but also requested that, for the same acts, alternative modes of liability be also confirmed, under article 25(3)(a) of the Statute as a direct perpetrator (for Incidents 1, 2, 4, 5, 7 and 8 only)⁵⁵⁰ under article 25(3)(b) of the Statute for soliciting or inducing the direct perpetrators to commit the offences, under article 25(3)(c) of the Statute for aiding, abetting or otherwise assisting the direct perpetrators in the commission of the offences, and also under 25(3)(d) of the Statute for contributing, in any other way, to the commission of the offences by a group of persons acting pursuant to a common purpose.

217. Pursuant to article 25(3)(a), first alternative, of the Statute, 'a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person [c]ommits such a crime, as an individual'. Direct perpetrators must personally carry out the material elements of the crime with the requisite intent and knowledge pursuant to article 30 of the Statute as well as any further specific provision.⁵⁵¹ The Chamber recalls that pursuant to article 25(3)(b) of the Statute 'a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person [...] [o]rders, solicits or induces the

⁵⁵⁰ Relating respectively to P-0397, P-0516, P-0800, P-0495, P-0341, and P-0274.

⁵⁵¹ [Ongwen Trial Judgment](#), para. 2782, n. 7264 and references cited therein.

commission of a crime which in fact occurs or is attempted'. The mode of liability under article 25(3)(b) of the Statute is designed essentially to capture the conduct of prompting another person to commit a crime within the jurisdiction of the Court.⁵⁵² Article 25(3)(c) of the Statute provides for individual criminal responsibility if a person, for the purpose of facilitating the commission of a crime within the jurisdiction of the Court, 'aids, abets or otherwise assists in its commission or attempted commission, including providing the means for its commission'.⁵⁵³ As held by Pre-Trial Chamber I, '[i]n essence, what is required for this form of responsibility is that the person provides assistance to the commission of a crime and that, in engaging in this conduct, he or she intends to facilitate the commission of the crime'.⁵⁵⁴ The Chamber considers that the form of contribution under article 25(3)(c) of the Statute does not require the meeting of any specific threshold.⁵⁵⁵ Article 25(3)(d) of the Statute criminalises contributing 'in any other way' to the commission of a crime by a group of persons acting with a common purpose. It is therefore required that: (i) the crime is committed (*i.e.* realised in its objective elements) by a group of persons acting with a common purpose; and (ii) the person charged provides a contribution to the commission of such a crime.⁵⁵⁶ To be satisfied that the perpetrator's acts were encompassed by the common purpose, it will also be necessary to show that the crime at hand formed part of the common purpose.⁵⁵⁷ A person who stands charged pursuant to article 25(3)(d) of the Statute will not incur individual criminal responsibility for those crimes which form part of the common purpose but to which he or she did not contribute.⁵⁵⁸

218. After reviewing the evidence put before it, it is the understanding of the Chamber, as explained above, that direct co-perpetration under article 25(3)(a) of the Statute best captures Mr Gicheru's behaviour and responsibility for all the established incidents. However, the Chamber notes and endorses the conclusion of several pre-

⁵⁵² [Ongwen Confirmation Decision](#), para. 42.

⁵⁵³ [Ongwen Confirmation Decision](#), para. 43.

⁵⁵⁴ [Ongwen Confirmation Decision](#), para. 43 referring to [Blé Goudé Confirmation Decision](#), para. 167; [Bemba et al. Confirmation Decision](#), para. 35.

⁵⁵⁵ The Chamber follows the reasoning of Trial Chamber VII in [Bemba et al. Trial Judgment](#), paras 93-95. See also [Al Hassan Confirmation Decision](#), para. 906; [Bemba et al. Confirmation Decision](#), paras 35 *et seq.*

⁵⁵⁶ [Ongwen Confirmation Decision](#), para. 44.

⁵⁵⁷ [Katanga Trial Judgment](#), para. 1630; [Al Hassan Confirmation Decision](#), para. 941.

⁵⁵⁸ [Katanga Trial Judgment](#), para. 1619; [Al Hassan Confirmation Decision](#), para. 943.

trial chambers as to the appropriateness, for a pre-trial chamber, to also confirm alternative modes of liability when it is satisfied that alternative legal characterisations of the same facts are sustained by the evidence.⁵⁵⁹ Therefore, the Chamber deems it appropriate to retain, in the charges, the alternative modes of liability pursuant to article 25(3)(a) (direct perpetration, in relation to incidents 1, 2, 4, 7 and 8),⁵⁶⁰ article 25(3)(b), 25(3)(c) and 25(3)(d) of the Statute (for all incidents), as requested by the Prosecutor, as it also finds, after having reviewed the evidence, that both the objective and subjective elements of those alternative modes of liability are fulfilled.⁵⁶¹

⁵⁵⁹ [Gbagbo Confirmation Decision](#), paras 227-228; [Ongwen Confirmation Decision](#), paras 146-149. See also: [Ntaganda Confirmation Decision](#), para. 100; [Al Mahdi Confirmation Decision](#), para. 22; [Blé Goudé Confirmation Decision](#), para. 133.

⁵⁶⁰ The Chamber notes that, contrary to what the Prosecution requests, it does not confirm the charges as regards Incident 5, relating to P-0495, for direct perpetration under article 25(3)(a) of the Statute. See paragraphs 124, 125, 208 above.

⁵⁶¹ See also [Chambers Practice Manual](#), 29 November 2019, para. 67.

FOR THESE REASONS, THE CHAMBER HEREBY

CONFIRMS the charges against Mr Gicheru, as articulated by the Prosecutor in the DCC and to the extent that the Chamber considers them sufficiently supported by evidence, as follows and commits him for trial on these confirmed charges:

- 1) pursuant to article 25(3)(a) (jointly with another person or as an individual), 25(3)(b) (soliciting or inducing), 25(3)(c) or 25(3)(d) of the Statute, for the offence set out in article 70(1)(c) of the Statute with respect to **P-0397** by

(i) offering to pay to pay him a Bribe of 5,000,000 Ksh in cash instalments; (ii) and/or threatening him; and/or (iii) by actually paying him a total of 1,000,000 Ksh; in order to influence in order to influence him to withdraw as a Prosecution witness and cease cooperating with the ICC, to sign an affidavit to that effect, and/or to locate, contact and/or corruptly influence P-0516 on behalf of the Common Plan Members, committed during the period April 2013 to January 2014 and at [REDACTED], Kenya;

- 2) pursuant to article 25(3)(a) (jointly with another person or as an individual), 25(3)(b) (soliciting or inducing), 25(3)(c) or 25(3)(d) of the Statute, for the offence set out in article 70(1)(c) of the Statute with respect to **P-0516** by

offering him a Bribe of 800,000 Ksh in instalments and actually paying him a total of 500,000 Ksh to withdraw as a Prosecution witness and to sign an affidavit withdrawing his prior statement to the Prosecution, committed during the period April to May 2013 and at [REDACTED], Kenya;

- 3) pursuant to article 25(3)(a) (jointly with another person) or 25(3)(b) (soliciting or inducing) or 25(3)(c) or 25(3)(d) of the Statute, for the offence set out in article 70(1)(c) of the Statute with respect to **P-0613** by

offering to pay her a Bribe, the amount of which would be subject to negotiation, to influence her to withdraw as a Prosecution witness, committed during the period April to September 2013 and [REDACTED]
[REDACTED], Kenya;

- 4) pursuant to article 25(3)(a) (jointly with another person or as an individual), 25(3)(b) (soliciting or inducing), 25(3)(c) or 25(3)(d) of the Statute, for the offence set out in article 70(1)(c) of the Statute with respect to **P-0800** by

offering to pay him a Bribe of between 1,500,000 and 2,500,000 Ksh in order to influence him to withdraw as a Prosecution witness, to sign an affidavit to this effect and to locate and corruptly influence other Prosecution witnesses, including P-0495 and P-0613, committed during the period May 2013 to March 2014 and at [REDACTED]
[REDACTED] Kenya;

- 5) pursuant to article 25(3)(a) (jointly with another person), 25(3)(b) (soliciting or inducing), 25(3)(c) or 25(3)(d) of the Statute, for the offence set out in article 70(1)(c) of the Statute with respect to **P-0495** by

offering to pay him a Bribe of between 1,500,000 and 2,500,000 Ksh and employment, to withdraw as a Prosecution witness in the *Ruto and Sang* case and corruptly influence other Prosecution witnesses, committed during September 2013 and at [REDACTED], Kenya;

- 6) pursuant to article 25(3)(a) (jointly with another person), 25(3)(b) (soliciting or inducing), 25(3)(c) or 25(3)(d) of the Statute, for the offence set out in article 70(1)(c) of the Statute with respect to **P-0536** by

offering her a Bribe of between 1,400,000 and 1,600,000 Ksh in exchange for her withdrawal as a Prosecution witness, committed during the period May to September 2013 and at [REDACTED] Kenya;

- 7) pursuant to article 25(3)(a) (jointly with another person or as an individual), 25(3)(b) (soliciting or inducing), 25(3)(c) or 25(3)(d) of the Statute, for the offence set out in article 70(1)(c) of the Statute with respect to **P-0341** by

(i) offering to pay him a Bribe of 5,000,000 Ksh and other financial benefits; (ii) actually paying him between 1,000,000 and 2,000,000 Ksh; and (iii) intimidating him, in order to influence him to refuse to become a Prosecution witness if asked to do so, to cease to attend [REDACTED], to sign pre-prepared or dictated affidavits recording his withdrawal from the ICC process, and/or to locate, contact and/or corruptly influencing other Prosecution witnesses, committed during the period 24 April 2013 to mid-April 2014 and at [REDACTED], Kenya;

- 8) pursuant to article 25(3)(a) (jointly with another person or as an individual), 25(3)(b) (soliciting or inducing), 25(3)(c) or 25(3)(d) of the Statute, for the offence set out in article 70(1)(c) of the Statute with respect to **P-0274** by

(i) promising him at least 2,000,000 Ksh; (ii) intimidating and threatening him multiple times, including at gunpoint; and (iii) paying him 30,000 Ksh to induce him to withdraw [REDACTED]

██████████, to record a false video stating that the ICC attempted to coach him to give evidence against Mr Ruto, to sign a blank piece of paper, and to locate, contact and/or corruptly influence other Prosecution witnesses, committed during the period April or May 2012 to 2014 and at ██████████, Kenya.

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



Judge Reine Adélaïde Sophie Alapini-Gansou

Dated this Thursday, 15 July 2021

At The Hague, The Netherlands