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TRIAL CHAMBER V(A)

Before: Judge Chile Eboe-Osuji, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Robert Fremr

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
THE PROSECUTOR v. WILLIAM SAMOEI RUTO and JOSHUA ARAP SANG**

**Public With Confidential Annexes A1-A2, C1-C12, D1-D2
and
Confidential, *EX PARTE*, available only to OTP and VWU, Annexes B1-B11, D3**

**Public redacted version of "Prosecution's request for the admission of prior
recorded testimony of [REDACTED] witnesses", 29 April 2015, ICC-01/09-01/11-
1866-Conf + Annexes**

Source: Office of the Prosecutor

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

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Introduction

1. The Office of the Prosecutor ("Prosecution" or "OTP") requests the admission of the prior recorded testimony of [REDACTED] witnesses: [REDACTED] (collectively, the "Corrupted Witnesses")¹ for the truth of their contents. These comprise written statements and transcripts of recorded interviews, and the annexes thereto (collectively the "Prior Recorded Testimony").
2. The evidence already on record, together with that presented in support of this application, establishes the existence of an organised and effective scheme to persuade Prosecution witnesses to withdraw or recant their evidence, through a combination of intimidation and bribery (the "Scheme"). The evidence establishes further that those responsible for this improper interference were, at the very least, acting for the benefit of the Accused. As a result, the Prosecution has been deprived of a significant portion of the incriminating evidence that it intended to present to Trial Chamber V(A) ("Chamber") in support of its charges. Thus, the Prosecution is compelled to resort to alternative methods to place before the Chamber the relevant and cogent evidence that these witnesses would otherwise have provided.
3. The central issue for determination in this request is the admissibility of records of prior interviews of missing and recanting witnesses who succumbed to improper influences. To establish the truth, the Chamber should admit these records into evidence as substantive proof of their contents. Not to do so would deny to the Chamber the ability to assess the whole of the evidence. It would also reward an attempt to obstruct justice.
4. The Prior Recorded Testimony of witnesses [REDACTED] (collectively "the [REDACTED] Witnesses"²), [REDACTED]^{3,4} The Prosecution now seeks the

¹ The ERNs of the Prior Recorded Testimony of each witness are listed in Annex A2.

² Note that these are identical to the witnesses designated above as the "Corrupted Witnesses", with the sole exception of [REDACTED].

³ By video link [REDACTED].

⁴ The EVDs of the Prior Recorded Testimony of each witness are listed in Annex A2.

admission of their Prior Recorded Testimony for the truth of their contents and intends to rely thereon to establish the guilt of the Accused.

5. Each of the [REDACTED] Witnesses recanted material portions of [REDACTED] Prior Recorded Testimony and was declared hostile by the Chamber. There is sufficient evidence to satisfy the Chamber that these witnesses were subjected to improper influence and that this materially affected [REDACTED] decision to withdraw as a witness and, [REDACTED], to fail to give evidence with respect to material aspects of [REDACTED] Prior Recorded Testimony.⁵
6. The Prosecution seeks the admission of the Prior Recorded Testimony of the [REDACTED] Witnesses pursuant to rule 68(2)(d) of the Rules of Procedure and Evidence ("Rules"). This request satisfies the requirements of the rule. However, if the Chamber were to find that any requirement is not met, or that this provision is for any reason inapplicable to this situation, the Prosecution requests, in the alternative, the admission of the Prior Recorded Testimony pursuant to article 69(2) and (4) of the Rome Statute ("Statute").
7. With respect to [REDACTED],⁶ there is also sufficient evidence to satisfy the Chamber that [REDACTED] was subjected to improper influence and that this materially affected [REDACTED] decision to withdraw as a witness. Alternatively, [REDACTED] is unavailable to testify due to obstacles that cannot be overcome with reasonable diligence.
8. The Prosecution thus seeks the admission of the Prior Recorded Testimony of [REDACTED] for the truth of its contents under rule 68(2)(d), or alternatively under rule 68(2)(c) or article 69(2) and (4) of the Statute.

⁵ The concept "failing" to testify to a material aspect of one's prior recorded testimony in rule 68(2)(d) must be purposively construed to include a refusal to testify as to material aspects of the witness's prior recorded testimony, due to improper influence.

⁶ ICC-01/09-01/11-1821-Conf-Exp; ICC-01/09-01/11-1822-Conf.

Confidentiality

9. This request is filed as confidential since it deals with issues of witness interference that have hitherto been litigated confidentially. A public redacted version of this filing will be submitted presently.

Statement of facts

10. During the course of the Prosecution case, no fewer than 16 of the Prosecution's 42 original witnesses have withdrawn their cooperation with the OTP and refused to testify, most citing threats, intimidation and/or fears of reprisals. Several of these witnesses also recanted the contents of the statements they had made to the Prosecution, the contents of which the Prosecution had intended to lead in this trial.
11. As a result, the Chamber granted the Prosecution's request to summons several witnesses, [REDACTED]. The [REDACTED] Witnesses testified [REDACTED], but disavowed their Prior Recorded Testimony and were declared hostile. The [REDACTED] witness, [REDACTED], did not appear [REDACTED].
12. The Prosecution now seeks the admission of the Prior Recorded Testimony of the Corrupted Witnesses, relying, in the first instance, on the amended provisions of rule 68. The amended rule entered into force on 28 November 2013 – after the commencement of this trial, but before the Prosecution sought the admission of the Prior Statements. Alternatively, the Prosecution relies on the general powers of the Chamber to admit evidence under article 69.
13. The Defence have disputed the applicability of the amended rule in the present situation, arguing that this amounts to a retroactive application of the amendment, in contravention of article 51(4) and certain alleged undertakings made during the drafting and/or adoption of the amendment. This objection is addressed below.

Submissions

I. The admission of the Prior Recorded Testimony under rule 68 does not offend article 51(4)

14. Firstly, the applicability of article 51(4) and rule 68 (as amended) must be discerned from the provisions' plain terms, rather than any alleged statements or "undertakings" made during the drafting of the amendments to rule 68.⁷ Resort to the drafting history of a provision or rule is not required when the terms of the provision are clear and there is no uncertainty or ambiguity, or when the results of the textual interpretation are sound.⁸

15. Secondly, based on the plain terms of article 51(4), the application of a rule amendment to an accused is only barred if it is **both** retroactive and detrimental. In present circumstance, the application of the amended rule is not "retroactive". However, even if it were considered retroactive, its operation would not occasion any detriment to the Accused, for reasons detailed below.

A. The plain terms of article 51(4) and rule 68 (as amended) apply

16. During oral arguments,⁹ the Defence contended that the Prosecution could not avail itself of the amended rule 68, since this would amount to a retroactive application of the rule, in contravention of the provisions of article 51(4), the intention of the Assembly of States Parties ("ASP") and undertakings allegedly given when the amendments were adopted.¹⁰

17. The Prosecution is unaware of any undertakings made relating to the use of the amended rule in the Kenya cases or in pending trials generally, save for what is included in the amendment adopted. This does no more than rehearse the

⁷ See paras.16ff.

⁸ See ICC-01/04-168 OA3, para.40, where the Appeals Chamber stated that the *travaux préparatoires* may be used to "establish as laid down in article 32 of the Vienna Convention on the Law of the Treaties supplementary means of interpretation designed to provide a) confirmation of the meaning of a statutory provision resulting from the application of article 31 of the Vienna Convention on the Law of Treaties and b) the clarification of ambiguous or obscure provisions and c) the avoidance of manifestly absurd or unreasonable results."

⁹ ICC-01/09-01/11-130-CONF-ENG, p.48, lns.1-20, p.49, ln.23 to p.52, ln.10; ICC-01/09-01/11-T-144-CONF-ENG, p.76, lns.7-12; ICC-01/09-01/11-T-145-CONF-ENG, p.10, lns.19-25. Hereinafter, all English confidential transcripts will be referred to as (e.g.) T-130, T-144, T-145 etc.

¹⁰ T-130, p.49, ln.11 to p.50, ln.11.

wording of article 51(4). Certainly the Prosecution has not given any such undertaking, nor authorised any other person or body to give any such undertaking on its behalf.

18. In any event, notwithstanding the drafting history or any private reservations or “understandings” which may have been held by individual States Parties (but were never incorporated in the amended rule), article 31 of the Vienna Convention on the Law of Treaties of 1969¹¹ (“Vienna Convention”) requires that the plain terms of the Statute or the Rules (in this case, article 51(4) and rule 68 as amended) - and not the drafting history - shall govern the interpretation of a provision.
19. Resort may only be had to the drafting history in cases of uncertainty or ambiguity, or if reliance on the plain language of the provision would lead to a result that is manifestly absurd or unreasonable.¹² Here, as argued below, the plain terms of article 51(4) and the amended rule 68 involve no ambiguity or uncertainty, and no absurdity or unreasonableness arises from applying the amended rule in this case.
20. The relevant portion of article 51(4) states that “[a]mendments to the Rules of Procedure and Evidence [...] shall not be applied **retroactively to the detriment** of the person who is being investigated or prosecuted...” (emphasis added). Based on the plain terms of article 51(4), its provisions are not violated simply because any amendment, *in casu*, the rule 68 amendments, were enacted while the person was being investigated or prosecuted, or when he had been convicted. To the contrary, an amendment will offend article 51(4) only if it is applied **both** retroactively and to the detriment of that person - and these two conditions are cumulative. As argued below, the application of the amended rule is neither retroactive, nor to the detriment of the Accused.

¹¹ Vienna Convention on The Law of Treaties, United Nations Treaty Series 18232, vol. 1155, p 331, signed on 23 May 1969 and entered into force on 27 January 1980.

¹² Vienna Convention, articles 31-32; ICC-01/04-168 OA3, para.40.

21. Finally, this interpretation of article 51(4) does not lead to a result that is manifestly absurd or unreasonable. Article 51(4), with which the amended rule must be read, addresses any claims of absurdity or unreasonableness by requiring not only that a rule amendment not be retroactive, but also that its application must not be detrimental.

B. The application of the amendments to rule 68 is neither retroactive nor detrimental

22. The first issue to determine is whether the rule 68 amendments are being applied retroactively. If the answer is negative, then the analysis stops here. If, however, the application could be considered retroactive, only then does the issue arise whether or not the application of the amendment will operate to the detriment of the Accused. Only when there is an affirmative response to **both** issues is the application of an amended rule prohibited by article 51(4). Otherwise, amendments to the rules will apply to all cases.

1. The application of the amendments to rule 68 is not retroactive

23. Article 51(4) does not prohibit the prejudicial application of amended rules in all pending cases, as do the equivalent provisions in the ICTY and ICTR.¹³ Rather, they may not be applied “retroactively”.

24. “Retroactive” is defined as the “process of acting with reference to *past occurrences*”.¹⁴ “Retroactive laws” have been defined as “all laws that make present rights and duties depend on past events”.¹⁵ Thus, there is no “retroactive” application of the law merely because a new legal provision is applied in a pre-existing, but still on-going case, to the extent that the provision is applied to procedural steps that are **subsequent** to the enactment of the new provision – and are therefore not directed at “past events”. For instance, a change in the statutory page-limit for ordinary submissions will start applying

¹³ The drafters must be presumed to have been aware of these provisions and deliberately chosen alternative wording.

¹⁴ Black’s Law Dictionary (1990), p.1317, emphasis added.

¹⁵ W.D. Slawson, *Constitutional and Legislative Considerations in Retroactive Law-making*, 48 Cal.L.Rev. 216 (1960), p.217.

to all submissions filed by the parties in a case as soon as the new provision has entered into force, regardless of whether the case was already ongoing at the time the provision was adopted. Conversely, if the Prosecution sought a modification of the status of an accused who had been granted provisional release, on the basis that a new governing rule imposed more onerous conditions for granting provisional release, this would undoubtedly constitute an effort to apply retroactively a new rule: the Prosecution would be seeking to modify a previous decision (the “past event”) by applying a provision that did not exist at the time. The question would then be whether the retroactive application was “to the detriment” of the person being investigated or prosecuted (which in the example above, it clearly would be).

25. Here, however, the application of the amendments to rule 68 to the present case is not dependent on “past occurrences or events”, nor does it abrogate any pre-existing rights or duties. Even prior to the rule amendment, nothing had occurred - for instance, no right or duty had accrued to any of the Parties in the present case - that would prevent the application of the amendment to this case. In fact, as demonstrated below, even before the rule amendment, the Chamber could have admitted the Prior Recorded Testimony under a different provision of the Statute. Accordingly, no “right” can be said to have accrued prior to the rule amendment that would be removed or attenuated by the application of the amendment to rule 68 in the present case. Therefore, the rule against retroactivity is not engaged.
26. It is noteworthy that at the ICTY¹⁶ the Trial Chamber in *Milutinovic* admitted the evidence of a deceased witness as proof of the acts and conduct of the accused pursuant to an amendment creating a new rule, rule 92*quater*, despite the fact

¹⁶ Despite the analogous, if not broader, restriction imposed by Rule 6(D) of the Rules of Procedure and Evidence of the ICTY, which states that “[a]n amendment shall enter into force seven days after the date of issue of an official Tribunal document containing the amendment, but shall not operate to prejudice the rights of the accused or of a convicted or acquitted person in any pending case.” Thus it prohibits the prejudicial application of amended rules in pending cases, whether or not they are applied retroactively. Rule 6(C) of the Rules of Procedure and Evidence of the ICTR is materially identical.

that it had previously rejected a request to admit the same evidence under the existing rule 92bis.¹⁷

2. The application of the amended rule is not to the detriment of the Accused

27. The rule 68 amendments deal with procedure - namely, the admission of evidence – and not substantive criminal law. It is widely accepted by national and international courts that amendments to procedural regimes are generally not restricted by the rule against retroactivity in the same manner as amendment to substantive crimes and punishment.¹⁸ Given that article 51(4) enshrines an exception to this general rule, it must be strictly construed, including any allegations of detriment from the application of the amended rule.¹⁹
28. Unlike the rule against non-retroactivity in relation to matters of substance or substantive rights pursuant to articles 22 and 23 of the Statute - which is presumed to be absolute - the plain language of article 51(4) enshrining the rule against non-retroactivity on evidentiary or procedural matters is not absolute. In addition to retroactivity, it must also be shown that the rule is being applied “to the detriment” of the Accused.²⁰
29. In the present case, the application of the amended rule would not be to the detriment of the Accused, for the following reasons:

¹⁷ See *Prosecutor v. Milutinović*, IT-95-87-T, T. Ch. III, 5 March 2007, para.8; *contra Prosecutor v. Milutinović et al*, IT-05-87-PT, T. Ch. III, 4 July 2006, para.4.

¹⁸ Cf articles 22 and 23 of the Statute.

¹⁹ ECHR, *Scoppola v. Italy (No.2)*, Appl. No. 10249/03, « Judgement », 17 September 2009, para.110; *Prosecutor v. Nyiramasuhuko et al*, Joint Case No. ICTR-98-42-A15bis, 24 September 2003, para.13 *et seq.* For the United Kingdom, see e.g., *Rex v. Chandra* [1905], 2 King’s Bench. 335; for the United States of America, see e.g. Supreme Court of Virginia, *Paul v. Paul*, 651, 203 S.E.2D. 123 (1974); for Canada, see e.g., Supreme Court, *R. v. Dineley*, [2012] 3 SCR 272, 2012 SCC 58 and *R. v. Clarke*, 2014 SCC 28.

²⁰ For example, in the sense of article 69(4) (prejudice to the fair evaluation of the evidence) or article 69(7), (that the evidence is unreliable); see e.g. *Lubanga*, ICC-01/04-01/06-2595-Red-Corr, paras.37-51.

a. *The Accused have been on notice of the evidence contained in the statements*

30. First, the Accused have been on notice since at least 9 January 2013 - when the Prior Recorded Testimony was disclosed - that the Prosecution intended to rely on the evidence of these witnesses, as contained therein. Furthermore, the Accused have had ample time to investigate the evidence and to collect evidence in rebuttal, if such exists.

b. *The amended rule is of equal application to the Prosecution and the Defence*

31. Second, no detriment arises since the amended rule introduces a procedure for the admission of prior recorded testimony that is equally available to both the Prosecution and the Defence.

32. ICTY jurisprudence has taken a similar approach to the interpretation of a rule analogous to article 51(4).²¹ Like article 51(4) of the Statute, the ICTY rules require a Chamber to verify that the application of a new amendment to the Rules does not prejudice the Accused. However, ICTY Chambers have determined that there is no prejudice where there is equality of arms between the parties in their ability to use the amended rule to present their case.²²

c. *Even prior to the amendment, the admission of the statements was possible under other provisions of the Statute/Rules*

33. Third, there is no prejudice to the Accused since, even prior to the amendment of rule 68, neither the Statute nor the Rules prohibited the introduction of material covered by the rule 68 amendments. Indeed the Prosecution could have sought the admission of the evidence in these statements under other provisions of the Statute and/or Rules.

34. Rule 68 operates as an exception to the general rule of orality contained in article 69(2), which states that “[t]he testimony of a witness at trial shall be

²¹ See ICTY Rules 6(D) fn.16 *supra*.

²² See *Prosecutor v. Seselj*, IT-03-67-T, 21 February 2008, paras.35-37.

given in person, except to the extent provided in by the measures set forth in article 68 or in the Rules of Procedure and Evidence.”

35. In this case, however, all of the witnesses concerned, except [REDACTED], have in fact testified in person before the Chamber and been subjected to cross-examination - including on the contents of their Prior Recorded Testimony. Thus, the principle of orality has been fully satisfied and there would have been no bar to the admission of their Prior Recorded Testimony for the truth of their contents even before the amendment to rule 68, under the provisions of articles 69(2) and (4) and rule 63(2).
36. Additionally, it must be recalled that, while the original rule 68 governed materials that strictly fell within its scope – thus serving as the *lex specialis* – it did not exclude the admission of documented testimony in all circumstances.²³ Several ICC Chambers, both before and after the rule 68 amendment, have confirmed that “there are no automatic grounds for exclusion of evidence in the Statute or the Rules”.²⁴ Instead a “Chamber has the discretion to weigh the probative value of each particular item of evidence against the potentially prejudicial effect of its admission. This is a balancing test which must be carried out on a case-by-case basis.”²⁵
37. In its 10 June 2014 decision in this case (delivered after the rule 68 amendments), this Chamber confirmed that “the statutory framework confers a broad degree of discretion on the Chamber to assess and consider various types of evidence”.²⁶ Further, the Chamber observed that “Article 69(2) of the Statute [...] while it explicitly requires that the ‘testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68’ or in the Rules, also clearly envisages that a variety of other means of introducing evidence may be appropriate, provided that such means are not

²³ *Ibid.*, para.77.

²⁴ *Katanga/Ngudjolo*, ICC-01/04-01/07-2635, para.15.

²⁵ *Ibid.* See also ICC-01/04-01/06-1399, para.29.

²⁶ ICC-01/09-01/11-1353, para.13 (footnotes omitted), citing Trial Chamber I’s Decision ICC-01/01-01/06-1399-Corr.

prejudicial to or inconsistent with the rights of the accused [...]”.²⁷ In concluding its analysis, the Chamber noted that “the general rule on admissibility may be simply stated as follows: all *prima facie* relevant evidence is admissible subject to the Chamber’s discretion to exclude relevant evidence by operation of the provisions of the Statute or the Rules or by virtue of general principles of national or international law pursuant to article 21 of the Statute”.²⁸

38. Similarly, in the ICTY’s *Milosevic Appeals Chamber Decision*, the Trial Chamber held that rule 92bis (whose purpose is similar to the ICC’s original rule 68) does not exclude the admission of written statements or transcripts in all circumstances.²⁹ Thus, where rule 92bis is applicable, the requirements of that rule must be met, but the conditions of rule 92bis do not extend to materials falling outside the scope of that rule. The same principle applies to rule 68.³⁰
39. Accordingly, this Chamber had a discretion to admit material now covered by rule 68(2)(b), (c) and (d) even prior to the amendment, by assessing on a case-by-case basis whether the material could be admitted, for instance, pursuant to article 69(2) and (4), article 64(9)(a) and/or rule 63(2), which enshrine exceptions to the general rule of orality. In these circumstances, therefore, the Accused cannot claim that they are prejudiced by the removal of a pre-existing “right” not to have the Prior Recorded Testimony admitted against them. To the contrary, admission of the Prior Recorded Testimony could also have been accomplished under the pre-existing legal framework.

²⁷ *Ibid.*, fn.24.

²⁸ *Ibid.*, para.15.

²⁹ Appeals Chamber Decision, 30 September 2003, paras.9-10. See also *Prosecutor v. Haradinaj et al*, IT-04-84, Oral Decision, 24 August 2011, Transcript p.457; and *Prosecutor v. Limaj et al*, IT-03-66-T, Decision on the Prosecution’s Motion to Admit Prior Statements as Substantive Evidence, 25 April 2005, paras.15-34.

³⁰ In *Lubanga*, after denying admission of the transcripts under the original rule 68(a) because its terms were not met, the Chamber considered that under article 69(2) it could admit documents and written transcripts if a three-part approach were met, namely: relevance, probative value and fairness: ICC-01/04-01/06-2595-Red-Corr, para.56.

d. The amended rule 68 enshrines safeguards of equivalent, if not greater, value, as compared to the pre-existing legal framework

40. Fourth, even assuming *arguendo* that the pre-existing legal framework may have included limitations on the admission of the Prior Recorded Testimony, the removal of such limitation would not necessarily result in material prejudice to the Accused in all cases. This is because the violation of a pre-existing right by a rule amendment cannot be assessed *simpliciter*. When assessing any alleged prejudice to a pre-existing right from the retroactive application of an amendment, the issue arises whether the safeguards provided through the pre-existing legal framework have been replaced, or enhanced, by equivalent safeguards in the amendment.
41. In fact, the amended rule 68(2)(d) includes enhanced safeguards, namely the introduction of several additional restrictions³¹ on the admission of the prior recorded testimony under that sub-rule. These safeguards in fact operate to the benefit, not the prejudice, of the Accused, as compared to the general provisions of article 69.
42. The ICTR's Appeals Chamber has addressed a similar issue in the *Nyiramasuhuko et al case*,³² upholding the application of an amended rule where such amendment provided a safeguard of equivalent value to the rule it replaced, and thus finding that no prejudice could arise from the retroactive application of the amendment.³³
43. The rule 68 amendment also includes vital safeguards of equivalent value to those provided in the ICC's pre-existing legal framework:³⁴ The amendments do not allow for the unrestrained or unregulated admission of prior recorded

³¹ See rule 68(2)(d)(i) and (iv).

³² *Prosecutor v. Nyiramasuhuko et al*, Joint Case No. ICTR-98-42-A15bis, Decision in the Matter of Proceedings Under Rule 15bis (D) (AC), 24 September 2003, para.13 *et seq.*

³³ *Ibid.*, para.18.

³⁴ Such as those in the original rule 68. In addition, although the ICC's legal framework does not allow for automatic exclusion of evidence, in allowing for the admission of evidence, a Chamber must always carefully balance the admission with the rights of the accused. See e.g. *Katanga/Ngudjolo*, ICC-01/04-01/07-2635, para.15; *Lubanga*, ICC-01/04-01/06-1399, para.29.

testimony. To the contrary, each sub-rule establishes strict conditions which must be met before prior recorded testimony can be admitted, requiring the party seeking admission to satisfy the Chamber as to the existence of certain factual prerequisites and thus circumscribing the general discretion of the Chamber under article 69. Accordingly, no material prejudice arises from the application of the amended rule.

e. *The rights of the Accused have not been curtailed*

44. Fifth, no detriment arises in respect of the [REDACTED] Witnesses because the Defence has had full opportunity to test their evidence, including the contents of their Prior Recorded Testimony, through cross-examination. The Chamber and all the Parties have also had the opportunity to observe the demeanour of the witnesses and clarify any aspects of their evidence which may have been unclear.
45. Additionally, the Defence will have the opportunity to present controverting evidence during the Defence case in respect of the Prior Recorded Testimony of all the Corrupted Witnesses.

f. *In the case of witness interference, the admission of prior recorded testimony of witnesses can never cause detriment*

46. Sixth, where witness interference has materially affected the evidence or a witness's decision to withdraw or recant [REDACTED] Prior Recorded Testimony - as is the case here - the admission of the witness's Prior Recorded Testimony can never be considered to cause prejudice, particularly where the necessity to admit such evidence is occasioned by the illegal acts of persons acting for the benefit of the Accused.³⁵
47. This is because no party to criminal proceedings should ever be allowed to benefit from its transgressions, or the transgressions of others performed for the

³⁵ [REDACTED].

party's benefit, which may in fact constitute crimes against the administration of justice within the meaning of article 70.

48. For all these reasons, there is no bar to the Chamber admitting the Prior Recorded Testimony of the Corrupted Witnesses under the amended rule 68, provided the necessary preconditions for admission are met, as addressed below.

II. In the alternative, the Prior Recorded Testimony is admissible under article 69

49. Should the Chamber for any reason deny the admission of the Prior Recorded Testimony pursuant to rule 68(2)(c) or (d), the Prosecution submits, in the alternative, that they should be admitted pursuant to article 69(2) and (4) and rule 63(2). These provisions confer upon the Chamber a broad discretion to admit evidence, provided its probative value is not outweighed by the prejudicial effect of its admission.³⁶
50. The Chamber should exercise its discretion to admit the Prior Recorded Testimony - in particular those of the [REDACTED] Witnesses who gave their testimony before the Chamber and were subjected to cross-examination - on the basis that their probative value exceeds any prejudice occasioned to the Defence, as discussed in more detail above.
51. As to probative value, targeting these witnesses for corruption, ostensibly for the benefit of the Accused, indicates that their Prior Recorded Testimony was considered cogent enough to be kept from the Chamber.³⁷ Conversely, the same corrupt influence favours rejection of the evidence that the [REDACTED] Witnesses gave in favour of the Accused and their disavowal of their Prior Recorded Testimony. As regards the [REDACTED] Witnesses, this conclusion is

³⁶ ICC-01/04-01/06-1399, para.29; ICC-01/09-01/11-1353, para.13.

³⁷ See para.145 below.

strengthened by their inability to give a credible explanation for the *volte face* in their evidence.³⁸

52. Additionally, the Chamber should consider the prejudice to the Prosecution that would be occasioned by the exclusion of the Prior Recorded Testimony in circumstances where it has been deprived of the evidence necessary to prove its case by virtue of the improper interference with its witnesses.

III. Prior recorded testimony includes prior written statements

53. During oral arguments on the applicability of rule 68, the Chamber queried whether this rule encompassed written witness statements.³⁹ Both the jurisprudence of this Court and the *travaux préparatoires* support the conclusion that “prior recorded testimony” as contemplated in rule 68 encompasses also the prior written statements of witnesses made in anticipation of their eventual testimony at trial.

54. ICC Chambers have confirmed this position when construing rule 68.⁴⁰ For instance, a decision in the *Lubanga* case rendered prior to the adoption of the amendments to rule 68 (which do not alter the definition of “prior recorded testimony”), held that rule 68 is directed at the “testimony of a witness” in a broad sense, given that the various forms of testimony that are specifically included in the rule are audio- or video- records, transcripts thereof and other documented evidence of such testimony (namely, the testimony of a witness). The Chamber highlighted in particular that the “other documented evidence” (of the testimony of the witness) is referred to separately, and in addition to, the audio- or video- records in the opening paragraph of rule 68; moreover, in sub-rules (a) and (b) of rule 68, “previously recorded testimony” is referred to without limiting its scope to video or audio evidence. Against that background, the Chamber found that the ambit of rule 68 permits the admission of written

³⁸ See discussion *infra* of the in-court testimony of each of the [REDACTED] Witnesses.

³⁹ T-130, p.38, ln.14 to p.49, ln.10.

⁴⁰ See *Lubanga*, ICC-01/04-01/06-1603 paras.18-19; *Katanga/Ngudjolo*, ICC-01/04-01/07-2635, para.44.

statements, in addition to video- or audio-taped records or transcripts, of a witness' testimony because these are all examples of the "documented evidence" of a witness' testimony."⁴¹

55. In the event that the scope of 'prior recorded testimony' in rule 68 is considered ambiguous, further assistance is provided in the *travaux préparatoires* of the amended rule 68, which confirm that prior written statements are included. The Working Group on Lessons Learnt clearly states in its Second Report that "[p]rior recorded testimony ... is understood to include video or audio recorded records, transcripts and written statements [...] Rule 68 may therefore apply to written statements taken by the parties or (inter)national authorities, provided that the requirements under one or more of the sub-rules are met"⁴².

56. However, should the Chamber find that prior written statements are not in fact included in "prior recorded testimony" for the purposes of rule 68, these statements are nevertheless admissible under the Chamber's general powers to admit evidence under articles 69(2) and (4), as argued above.

IV. The Prosecution's Supporting Evidence

57. The Prosecution is cognisant of the Chamber's 'Decision No.4 on the Conduct of Proceedings'⁴³ requiring, where factual allegations are made critical to the Chamber's determination of an application, that a requesting party must support those allegations with evidence (documents or other evidential material).⁴⁴ The Prosecution has endeavoured to comply with this direction in the present request, given that a substantial portion of the material relied upon in support of this request has not been formally admitted in the Court record of this case, since it was largely gathered subsequently as part of the article 70

⁴¹ *Lubanga*, ICC-01/04-01/06-1603, para.18; *Katanga/Ngudjolo*, ICC-01/04-01/07-2635, para.44.

⁴² See *Working Group on Lessons Learnt, Second report of the Court to the Assembly of States Parties*, ICC-ASP/12/37/Add.1, 31 October 2013, Annex II.A, para.13 (emphasis added).

⁴³ ICC-01/09-01/11-1312.

⁴⁴ *Ibid.*, para.2.

investigation. However, this would normally be the case where witness interference necessitates reliance on rule 68(2)(d) and should not constitute a bar to relying on such evidence – which has all been disclosed to the Accused – for the limited purpose of this request.

58. The supporting evidence is not placed before the Chamber for any purpose which goes beyond a procedural disposition of the present request; specifically, the Prosecution does not intend such supporting evidence to be admitted as evidence against the Accused on the merits of the main case. However, the supporting evidence is probative and relevant for the Chamber's determination of this application, since rule 68 requires the Chamber to be "satisfied" of the existence of certain preconditions before admitting the Prior Recorded Testimony and this evidence will provide the necessary basis for such conclusion. It should thus be accorded full consideration.
59. In addition, as per the direction of the Chamber, the Prosecution annexes to this request a solemn declaration by the lead investigator into article 70 offences arising from witness interference in this case, detailing the circumstances of collection of the supporting material being placed before the Chamber.⁴⁵
60. The Prosecution submits that, given the nature of the standard of proof in a procedural filing such as the present⁴⁶ and in the interests of expeditious proceedings, the Chamber may rely on the evidence presented in this manner. This is of course without prejudice to the power of the Chamber under article 64(6)(d) to direct that any of the evidence be presented before the Chamber through oral testimony.

⁴⁵ Annex C1. Supporting declarations from other investigators involved in the article 70 investigations are annexed as Annexes C2-C12. The supporting material referred to the solemn declaration of the lead investigator that is not in eCourt is annexed in Annexes D2 and D3. Annex D3 contains unredacted versions of the materials and is therefore classified as confidential *ex parte*. The Defence have received disclosure of all of the materials.

⁴⁶ See section V below.

V. The evidential standard

61. Rule 68(2)(d) does not stipulate the evidential standard a party must meet in seeking to establish that an individual has been subjected to interference. As the sub-rule does not specify a separate or higher evidential threshold, this application should be subjected to the same standard as any other determination of the admissibility of evidence.
62. Since this application is one for the admission of evidence and not the determination of guilt or innocence, a standard well-below that contained in article 66(3) is appropriate. The Prosecution submits that for the purposes of such procedural filings, the existence of facts should be established by the relevant party on the basis of a balance of probabilities. The Prosecution submits that it has adduced ample evidence in support of its application to satisfy the Chamber of the factual prerequisites specified in rule 68(2)(d).⁴⁷ Indeed, the evidence of the Scheme members' improper interference with Prosecution witnesses, including the Corrupted Witnesses, is overwhelming.

VI. Factual background to the witness interference

A. Existence and members of the witness bribery and recantation scheme

63. The evidence described below demonstrates that a network of individuals, working for the benefit of the Accused were - and may still be - involved in a witness bribery and recantation Scheme that targeted, *inter alia*, witnesses [REDACTED]. Additionally a non-OTP witness [REDACTED], was also targeted by the same group.
64. Members of this Scheme acted together at different levels to corruptly influence Prosecution witnesses to withdraw from this case and/or recant their evidence. [REDACTED].

⁴⁷ The Chamber has previously found that the Prosecution was required to *satisfy* the Chamber that the witness summonses were necessary and that therefore it was necessary *to justify* the factual basis on which it brought its application, ICC-01/09-01/11-1274-Corr2, paras.180, 193.

65. In this regard, Pre-Trial Chamber II has already found reasonable grounds to believe that BARASA was criminally responsible under article 70(1)(c) for corruptly influencing Prosecution witnesses [REDACTED] and issued a warrant for his arrest, which is pending execution by the Government of Kenya ("GoK").⁴⁸

B. Improper influence on Prosecution witnesses

66. The evidence demonstrates that members of this Scheme successfully exerted improper influence on the Corrupted Witnesses prior to their testimony. All of the Corrupted Witnesses withdrew their cooperation with the OTP. Once summonsed to appear before the Chamber, the [REDACTED] Witnesses repudiated almost the entirety of the incriminating evidence that they had initially provided to the Prosecution. These witnesses were declared hostile by the Chamber, but despite all reasonable efforts by the Prosecution to question them on the contents of their Prior Recorded Testimony, they repudiated almost all material portions thereof.

67. As for Witness [REDACTED]. The Prosecution submits that the evidence below points to the involvement of the Scheme members and/or people working on their behalf in [REDACTED] before [REDACTED] could take the stand to testify in the case against the Accused.

68. Both the striking similarities in the manner in which the Corrupted Witnesses withdrew their cooperation from the Court, and the manner in which the [REDACTED] Witnesses recanted their Prior Recorded Testimony during their testimony, strongly support the inference that they were subjected to improper interference by the same source: namely the Scheme members.

69. [REDACTED].^{49 50 51 52}

⁴⁸ ICC-01/09-01/13-1-Red2.

⁴⁹ [REDACTED].

⁵⁰ [REDACTED].

⁵¹ [REDACTED].

70. Once before the Court, all of the [REDACTED] Witnesses became inexplicably hostile to the Prosecution's case (and to the Prosecution). Save for [REDACTED], none of the [REDACTED] Witnesses agreed to meet with the members of the Prosecution for the sake of undergoing the witness preparation exercise. The Prosecution submits that this can only be explained by the fact that these witnesses were all specifically instructed not to cooperate/communicate with the OTP in any manner.
71. Once on the stand, all of the [REDACTED] Witnesses appeared to follow a common script, i.e.: (1) recanting the most incriminating portions of their Prior Recorded Testimony to the Prosecution, (2) being generally hostile to the Prosecution's case and supportive of the Accused, and (3) all but [REDACTED] blaming one or more third party for the falsehood of their original statement - [REDACTED].
72. Last, none of the [REDACTED] Witnesses was able to provide any plausible explanation for their recantation. These important commonalities in the testimony of witnesses, who in some cases came from different regions and had no prior knowledge of each other,⁵² further strengthens the conclusion that they were tampered with by the same source.
73. All the above, corroborated by both direct and circumstantial evidence from [REDACTED] described below, supports the conclusion that [REDACTED] Scheme members were responsible for the improper interference with the Corrupted Witnesses.
74. The details of this evidence are explicitly addressed below.

⁵² Other witnesses who were not corrupted by the Scheme, [REDACTED] had no difficulty advising the OTP directly of their intention to withdraw.

⁵³ For instance [REDACTED].

C. Nature of the evidence

75. The evidence that the Prosecution relies on to establish the interference of its Corrupted Witnesses consists of both evidence that is already part of the Court record and other (off-record) evidence gathered by the OTP, which has inherent indicia of reliability and corroborates the evidence on record. The Prosecution annexes in support of this application all evidence relied upon that is not already part of the record, either as *viva voce* testimony before the Chamber or otherwise admitted into evidence through a witness or bar table motion.⁵⁴
76. In order to assist the Chamber to analyse the large volume of evidence relevant to this request, the Prosecution will identify and summarise below the most cogent portions of the evidence. However, due to space limitation the Prosecution is unable to cite all of the relevant facts here and relies upon the supporting evidence in its entirety annexed hereto.

VII. Interference with other witnesses and individuals

77. Given that the [REDACTED] Witnesses, unsurprisingly, largely denied during their testimony that their withdrawal and subsequent recantation were the result of interference, it is necessary to examine the evidence relating to other witnesses and individuals who have also been interfered with by members of the Scheme. As will be apparent, the Scheme members used essentially the same *modus operandi* in interfering with both the Corrupted Witnesses and other Prosecution witnesses/potential witnesses. The evidence of these other witnesses and potential witnesses simultaneously establishes the existence and *modus operandi* of the Scheme and corroborates the evidence that the Corrupted Witnesses were improperly interfered with by the same group. This evidence is vital to the Chamber's comprehension of how the Scheme members operated and their motivations and is thus relevant to the determination of the present request.

⁵⁴ See Annexes B1-B11. The annexes contain unredacted versions of the materials and are therefore classified as confidential *ex parte*. The Defence have received disclosure of all of the materials.

78. The Prosecution will first address evidence relating to the improper interference of Prosecution witnesses [REDACTED].

1. [REDACTED]

79. [REDACTED].⁵⁵

a. Background information

80. [REDACTED].^{56 57 58}

b. Improper interference

81. [REDACTED].

i. [REDACTED]

82. [REDACTED].⁵⁹

83. [REDACTED].^{60 61}

84. [REDACTED].^{62 63}

85. [REDACTED].^{64 65 66}

86. [REDACTED].^{67 68 69 70}

ii. [REDACTED]

87. [REDACTED].^{71 72}

⁵⁵ [REDACTED].

⁵⁶ [REDACTED].

⁵⁷ [REDACTED].

⁵⁸ [REDACTED].

⁵⁹ [REDACTED].

⁶⁰ [REDACTED].

⁶¹ [REDACTED].

⁶² [REDACTED].

⁶³ [REDACTED].

⁶⁴ [REDACTED].

⁶⁵ [REDACTED].

⁶⁶ [REDACTED].

⁶⁷ [REDACTED].

⁶⁸ [REDACTED].

⁶⁹ [REDACTED].

⁷⁰ [REDACTED].

88. [REDACTED].^{73 74}

89. [REDACTED].^{75 76 77}

90. [REDACTED].^{78 79 80 81 82 83}

iii. [REDACTED]

91. [REDACTED].^{84 85 86 87 88}

iv. [REDACTED]

92. [REDACTED].^{89 90 91 92 93 94}

v. [REDACTED]

93. [REDACTED].^{95 96 97}

vi. [REDACTED]

94. [REDACTED].^{98 99 100 101 102 103 104 105}

⁷¹ [REDACTED].

⁷² [REDACTED].

⁷³ [REDACTED].

⁷⁴ [REDACTED].

⁷⁵ [REDACTED].

⁷⁶ [REDACTED].

⁷⁷ [REDACTED].

⁷⁸ [REDACTED].

⁷⁹ [REDACTED].

⁸⁰ [REDACTED].

⁸¹ [REDACTED].

⁸² [REDACTED].

⁸³ [REDACTED].

⁸⁴ [REDACTED].

⁸⁵ [REDACTED].

⁸⁶ [REDACTED].

⁸⁷ [REDACTED].

⁸⁸ [REDACTED].

⁸⁹ [REDACTED].

⁹⁰ [REDACTED].

⁹¹ [REDACTED].

⁹² [REDACTED].

⁹³ [REDACTED].

⁹⁴ [REDACTED].

⁹⁵ [REDACTED].

⁹⁶ [REDACTED].

⁹⁷ [REDACTED].

2. [REDACTED]

95. [REDACTED].¹⁰⁶

a. [REDACTED]

96. [REDACTED].^{107 108 109}

b. [REDACTED]

i. [REDACTED]

97. [REDACTED].¹¹⁰

98. [REDACTED].^{111 112 113 114 115}

99. [REDACTED].^{116 117 118 119 120 121}

100. [REDACTED].^{122 123 124}

101. [REDACTED].

⁹⁸ [REDACTED].

⁹⁹ [REDACTED].

¹⁰⁰ [REDACTED].

¹⁰¹ [REDACTED].

¹⁰² [REDACTED].

¹⁰³ [REDACTED].

¹⁰⁴ [REDACTED].

¹⁰⁵ [REDACTED].

¹⁰⁶ [REDACTED].

¹⁰⁷ [REDACTED].

¹⁰⁸ [REDACTED].

¹⁰⁹ [REDACTED].

¹¹⁰ [REDACTED].

¹¹¹ [REDACTED].

¹¹² [REDACTED].

¹¹³ [REDACTED].

¹¹⁴ [REDACTED].

¹¹⁵ [REDACTED].

¹¹⁶ [REDACTED].

¹¹⁷ [REDACTED].

¹¹⁸ [REDACTED].

¹¹⁹ [REDACTED].

¹²⁰ [REDACTED].

¹²¹ [REDACTED].

¹²² [REDACTED].

¹²³ [REDACTED].

¹²⁴ [REDACTED].

ii. [REDACTED]

102. [REDACTED].¹²⁵

3. [REDACTED]

103. [REDACTED].¹²⁶

a. [REDACTED]

104. [REDACTED].^{127 128}

b. [REDACTED]

i. [REDACTED]

105. [REDACTED].^{129 130 131 132}

106. [REDACTED].^{133 134 135 136}

107. [REDACTED].^{137 138 139 140 141}

108. [REDACTED].¹⁴²

ii. [REDACTED]

109. [REDACTED].^{143 144 145 146 147}

¹²⁵ [REDACTED].

¹²⁶ [REDACTED].

¹²⁷ [REDACTED].

¹²⁸ [REDACTED].

¹²⁹ [REDACTED].

¹³⁰ [REDACTED].

¹³¹ [REDACTED].

¹³² [REDACTED].

¹³³ [REDACTED].

¹³⁴ [REDACTED].

¹³⁵ [REDACTED].

¹³⁶ [REDACTED].

¹³⁷ [REDACTED].

¹³⁸ [REDACTED].

¹³⁹ [REDACTED].

¹⁴⁰ [REDACTED].

¹⁴¹ Annex B9: KEN-OTP-0111-0162, para.39; KEN-OTP-0118-1927, lns.784-792.

¹⁴² Annex B9: KEN-OTP-0111-0162, para.49; KEN-OTP-0118-1927, lns.868-908.

¹⁴³ Annex B9: KEN-OTP-0111-0162, paras.52-53; KEN-OTP-0118-1927, lns.909-935.

¹⁴⁴ Annex B9: KEN-OTP-0111-0162, para.53; KEN-OTP-0118-1927, lns.940-1032.

¹⁴⁵ Annex B9: KEN-OTP-0111-0162, para.53; KEN-OTP-0118-1927, ln.960.

iii. [REDACTED]

110. [REDACTED].^{148 149}

iv. [REDACTED]

111. [REDACTED].^{150 151 152 153}

v. [REDACTED]

112. [REDACTED].^{154 155 156}

113. [REDACTED].^{157 158 159 160}

114. [REDACTED].^{161 162 163 164}

vi. [REDACTED]

115. [REDACTED].^{165 166 167 168 169 170 171}

116. [REDACTED].^{172 173 174}

¹⁴⁶ Annex B9: KEN-OTP-0111-0162, para.53; KEN-OTP-0118-1927 at 1958-1959; KEN-OTP-0103-2473, para.28.

¹⁴⁷ Annex B9: KEN-OTP-0111-0162, para.54.

¹⁴⁸ [REDACTED].

¹⁴⁹ [REDACTED].

¹⁵⁰ [REDACTED].

¹⁵¹ [REDACTED].

¹⁵² [REDACTED].

¹⁵³ [REDACTED].

¹⁵⁴ [REDACTED].

¹⁵⁵ [REDACTED].

¹⁵⁶ [REDACTED].

¹⁵⁷ [REDACTED].

¹⁵⁸ [REDACTED].

¹⁵⁹ [REDACTED].

¹⁶⁰ [REDACTED].

¹⁶¹ [REDACTED].

¹⁶² [REDACTED].

¹⁶³ [REDACTED].

¹⁶⁴ [REDACTED].

¹⁶⁵ [REDACTED].

¹⁶⁶ [REDACTED].

¹⁶⁷ [REDACTED].

¹⁶⁸ [REDACTED].

¹⁶⁹ [REDACTED].

¹⁷⁰ [REDACTED].

¹⁷¹ [REDACTED].

¹⁷² [REDACTED].

¹⁷³ [REDACTED].

¹⁷⁴ [REDACTED].

117. [REDACTED].^{175 176 177}

118. [REDACTED].¹⁷⁸

119. [REDACTED]¹⁷⁹ [REDACTED].

vii. [REDACTED]

120. [REDACTED].^{180 181 182 183 184}

121. [REDACTED].¹⁸⁵

4. [REDACTED]

122. [REDACTED].¹⁸⁶

a. [REDACTED]

123. [REDACTED].^{187 188 189}

b. [REDACTED]

124. [REDACTED].^{190 191 192 193 194}

125. [REDACTED].^{195 196 197 198}

¹⁷⁵ [REDACTED].
¹⁷⁶ [REDACTED].
¹⁷⁷ [REDACTED].
¹⁷⁸ [REDACTED].
¹⁷⁹ [REDACTED].
¹⁸⁰ [REDACTED].
¹⁸¹ [REDACTED].
¹⁸² [REDACTED].
¹⁸³ [REDACTED].
¹⁸⁴ [REDACTED].
¹⁸⁵ [REDACTED].
¹⁸⁶ [REDACTED].
¹⁸⁷ [REDACTED].
¹⁸⁸ [REDACTED].
¹⁸⁹ [REDACTED].
¹⁹⁰ [REDACTED].
¹⁹¹ [REDACTED].
¹⁹² [REDACTED].
¹⁹³ [REDACTED].
¹⁹⁴ [REDACTED].
¹⁹⁵ [REDACTED].
¹⁹⁶ [REDACTED].
¹⁹⁷ [REDACTED].
¹⁹⁸ [REDACTED].

126. [REDACTED].^{199 200 201}

127. [REDACTED].²⁰²

VIII. Interference with the Corrupted Witnesses and admissibility of their Prior Recorded Testimony under rule 68

128. The evidence detailed below demonstrates that Scheme members used the same *modus operandi* described above in order to tamper with the Corrupted Witnesses. The Prosecution submits that the conditions precedent for the admission of their Prior Recorded Testimony under rule 68(2)(d) and/or 68(2)(c) [REDACTED] have been satisfied, as specified in more detail below.

129. The relevant factual background and legal submissions in respect of each of the Corrupted Witnesses are set out below:

A. Interference with the Corrupted Witnesses

1. Witness [REDACTED]

130. The Evidence clearly establishes that [REDACTED] was interfered with by Scheme members prior to [REDACTED] testimony and that this led [REDACTED] to become hostile to the Prosecution's case and repudiate in Court most of the incriminating evidence in [REDACTED] Prior Recorded Testimony. The evidence implicates [REDACTED] and other members of the Scheme in the interference with [REDACTED].²⁰³

a. Background Information

131. [REDACTED].^{204 205 206 207}

¹⁹⁹ [REDACTED].

²⁰⁰ [REDACTED].

²⁰¹ [REDACTED].

²⁰² [REDACTED].

²⁰³ [REDACTED].

²⁰⁴ [REDACTED].

²⁰⁵ [REDACTED].

²⁰⁶ [REDACTED].

²⁰⁷ [REDACTED].

b. Failure to give evidence regarding material aspects included in Prior Recorded Testimony

132. During [REDACTED] testimony [REDACTED] failed to provide important incriminating evidence that was in [REDACTED] Prior Recorded Testimony regarding Mr RUTO and other Network members' involvement in the planning and financing of the PEV, in particular the attack on [REDACTED]. He repudiated his Prior Recorded Testimony to the OTP and claimed that the OTP²⁰⁸ and/or [REDACTED]²⁰⁹ had concocted the information contained therein.

c. Improper interference

i. [REDACTED]

133. [REDACTED].²¹⁰

134. [REDACTED].^{211 212 213 214 215}

ii. [REDACTED]

135. [REDACTED].²¹⁶

iii. [REDACTED]

136. [REDACTED].^{217 218 219}

137. [REDACTED].^{220 221 222 223}

²⁰⁸ [REDACTED].

²⁰⁹ [REDACTED].

²¹⁰ [REDACTED].

²¹¹ [REDACTED].

²¹² [REDACTED].

²¹³ [REDACTED].

²¹⁴ [REDACTED].

²¹⁵ [REDACTED].

²¹⁶ [REDACTED].

²¹⁷ [REDACTED].

²¹⁸ [REDACTED].

²¹⁹ [REDACTED].

²²⁰ [REDACTED].

²²¹ [REDACTED].

²²² [REDACTED].

²²³ [REDACTED].

d. All reasonable efforts were made to secure all the material facts from the witness

138. The Prosecution first attempted to elicit all material facts known to [REDACTED] through examination-in-chief. However, once it became apparent that the witness had become adverse to the Prosecution's case, it was necessary to have the witness declared "hostile" in the hopes of eliciting through cross-examination vital information that had been recorded in [REDACTED] original statement. Despite this, the witness maintained [REDACTED] recantation.

e. Interests of justice and prejudice

139. Given the evidence implicating persons acting for the benefit of the Accused in the interference of the Corrupted Witnesses, the interests of justice would be best served by the introduction of their Prior Recorded Testimony into the Court record so as to prevent the Accused from benefiting from crimes against the administration of justice committed on their behalf. The very mission of the Court to end impunity would be placed in jeopardy if an accused could evade justice through improper interference with Prosecution witnesses. Denying the Prosecution the remedy it seeks would also send out the wrong message to like-minded persons and encourage them to adopt the same strategy.

140. Moreover, the interests of justice are best served if the Chamber has all of the relevant evidence at its disposal to determine the truth, as article 69(3) requires. At this point, the Chamber can only compensate for the loss of the vital evidence that could have been provided *viva-voce* by Witness [REDACTED] - had [REDACTED] not been interfered with - through the admission of [REDACTED] Prior Recorded Testimony into the Court record. Even if [REDACTED]'s Prior Recorded Testimony encompasses acts and conduct of the Accused, this should be no obstacle to its admission into the Court record,²²⁴ especially where the Chamber has been deprived of the witness's cooperation by persons acting improperly in the interests of the Accused.

²²⁴ Rule 68(2)(d)(i) does not preclude the admission of evidence of this nature.

141. Lastly, the Defence had full opportunity to cross-examine [REDACTED] on all matters relating to his credibility, including [REDACTED] Prior Recorded Testimony. It cannot therefore be said that the admission of [REDACTED] Prior Recorded Testimony into evidence will cause undue prejudice to the Accused and/or render the trial unfair. The Chamber will be able to freely assess the probative value of this evidence in light of the totality of the other evidence admitted at trial.

f. Reliability of [REDACTED]'s Prior Recorded Testimony

142. Rule 68(2)(d)(i) requires the Chamber to be satisfied that the evidence sought to be tendered has “sufficient indicia of reliability”. Neither the rule nor the *travaux préparatoires* defines the indicators which the Chamber must consider in this regard.²²⁵ Both ICTY Rules 92*quater* and 92*quinquies* require a Chamber of the ICTY to satisfy itself of the “reliability” of evidence tendered by those means, “having regard to the circumstances in which it was made and recorded”. The Prosecution submits that the ICTY practice in this regard can be considered as a sound basis for practice at this Court for applying rule 68(2)(d).

143. Consistent with the express requirement in rule 68(2)(d) for the Chamber to be satisfied only of the existence of “indicia” of reliability, and not to make a final determination of reliability or weight, the ICTY Appeals Chamber has stressed that “[p]rima facie proof of reliability on the basis of sufficient indicia is enough at the admissibility stage.”²²⁶ Further, a Chamber’s decision on admissibility does not in any way prejudice or limit a Chamber’s ultimate weighing of the evidence, including an assessment of its reliability and credibility in the context of all the other evidence heard at trial.²²⁷

²²⁵ Working Group, *Second Report*, Annex II.A, para.35.

²²⁶ *Prosecutor v. Popović et al*, IT-05-88-AR73.2, 30 January 2008, para.22. See also e.g. *Prosecutor v. Prlić et al*, IT-04-74-AR73.16, 3 November 2009, paras.33-34; *Prosecutor v. Rutaganda*, ICTR-96-3-A, Judgement, 26 May 2003, paras.33, 266; *Prosecutor v. Kordić*, IT-95-14/2-AR73.5, 21 July 2000, para.24; *Prosecutor v. Karadžić*, IT-95-5/18-T, 3 February 2014, para.13.

²²⁷ *Prosecutor v. Popović et al*, (*supra*), para.22.

144. The Prosecution submits that [REDACTED]'s Prior Recorded Testimony²²⁸ is reliable insofar as: (a) it was given voluntarily by the witness to the OTP; (b) it is a formal witness statement taken by members of the OTP in compliance with the conditions set out in rule 111(1) and/or rule 112;²²⁹ (c) [REDACTED] signed [REDACTED] statement and acknowledged the truth of its content; (d) at the time of providing [REDACTED] statement to the OTP, [REDACTED] had no apparent reason to be untruthful; and (e) the evidence provided by the witness in [REDACTED] statement was internally consistent.
145. Further, the Defence had full opportunity to test the totality of [REDACTED]'s evidence - including [REDACTED] Prior Recorded Testimony - through cross-examination in order to test its trustworthiness. Lastly, the fact that [REDACTED] was interfered with by Scheme members would seem to indicate that [REDACTED] had reliable and important evidence regarding the Accused in [REDACTED] possession. If not, it would be difficult to explain why [REDACTED] was interfered with in the first place.

2. [REDACTED]

146. [REDACTED].^{230 231}

a. [REDACTED]

147. [REDACTED].^{232 233 234 235}

b. [REDACTED]

148. [REDACTED].

²²⁸ See ERNs in Annex A2.

²²⁹ For witness [REDACTED].

²³⁰ See the solemn declaration of the lead investigator regarding investigative steps [REDACTED]: Annex C1, paras.94-110.

²³¹ See below paras.1551-157.

²³² See ERNs in Annex A2.

²³³ [REDACTED].

²³⁴ [REDACTED].

²³⁵ [REDACTED].

c. [REDACTED]

i. [REDACTED]

149. [REDACTED].^{236 237}

ii. [REDACTED]

150. [REDACTED].^{238 239}

151. [REDACTED].^{240 241}

152. [REDACTED].²⁴²

153. [REDACTED].

iii. [REDACTED]

154. [REDACTED].^{243 244 245 246}

iv. [REDACTED]

155. [REDACTED].^{247 248 249 250}

156. [REDACTED].^{251 252 253}

157. [REDACTED].^{254 255 256}

²³⁶ [REDACTED].

²³⁷ [REDACTED].

²³⁸ [REDACTED].

²³⁹ [REDACTED].

²⁴⁰ [REDACTED].

²⁴¹ [REDACTED].

²⁴² [REDACTED].

²⁴³ [REDACTED].

²⁴⁴ [REDACTED].

²⁴⁵ [REDACTED].

²⁴⁶ [REDACTED].

²⁴⁷ [REDACTED].

²⁴⁸ [REDACTED].

²⁴⁹ [REDACTED].

²⁵⁰ [REDACTED].

²⁵¹ [REDACTED].

²⁵² [REDACTED].

²⁵³ [REDACTED].

²⁵⁴ [REDACTED].

²⁵⁵ [REDACTED].

²⁵⁶ [REDACTED].

v. [REDACTED]

158. [REDACTED].^{257 258 259 260 261 262 263}

159. [REDACTED].^{264 265}

160. [REDACTED].²⁶⁶

d. [REDACTED]

161. [REDACTED].

e. [REDACTED]

162. [REDACTED].

f. [REDACTED]

163. [REDACTED].

3. [REDACTED]

164. [REDACTED].²⁶⁷

a. [REDACTED]

165. [REDACTED].^{268 269 270 271 272}

b. [REDACTED]

166. [REDACTED].

²⁵⁷ [REDACTED].

²⁵⁸ [REDACTED].

²⁵⁹ [REDACTED].

²⁶⁰ [REDACTED].

²⁶¹ [REDACTED].

²⁶² [REDACTED].

²⁶³ [REDACTED].

²⁶⁴ [REDACTED].

²⁶⁵ [REDACTED].

²⁶⁶ [REDACTED].

²⁶⁷ [REDACTED].

²⁶⁸ [REDACTED].

²⁶⁹ [REDACTED].

²⁷⁰ [REDACTED].

²⁷¹ [REDACTED].

²⁷² [REDACTED].

c. [REDACTED]

i. [REDACTED]

167. [REDACTED].^{273 274}

ii. [REDACTED]

168. [REDACTED].^{275 276 277}

iii. [REDACTED]

169. [REDACTED].²⁷⁸

170. [REDACTED].^{279 280 281 282 283 284}

171. [REDACTED].²⁸⁵

iv. [REDACTED]

172. [REDACTED].^{286 287 288 289 290 291}

173. [REDACTED].^{292 293 294 295 296}

174. [REDACTED].^{297 298 299}

²⁷³ [REDACTED].

²⁷⁴ [REDACTED].

²⁷⁵ [REDACTED].

²⁷⁶ [REDACTED].

²⁷⁷ [REDACTED].

²⁷⁸ [REDACTED].

²⁷⁹ [REDACTED].

²⁸⁰ [REDACTED].

²⁸¹ [REDACTED].

²⁸² [REDACTED].

²⁸³ [REDACTED].

²⁸⁴ [REDACTED].

²⁸⁵ [REDACTED].

²⁸⁶ [REDACTED].

²⁸⁷ [REDACTED].

²⁸⁸ [REDACTED].

²⁸⁹ [REDACTED].

²⁹⁰ [REDACTED].

²⁹¹ [REDACTED].

²⁹² [REDACTED].

²⁹³ [REDACTED].

²⁹⁴ [REDACTED].

²⁹⁵ [REDACTED].

²⁹⁶ [REDACTED].

d. [REDACTED]

175. [REDACTED].

e. [REDACTED]

176. [REDACTED].

f. [REDACTED]

177. [REDACTED].

4. [REDACTED]

178. [REDACTED].³⁰⁰

a. [REDACTED]

179. [REDACTED].^{301 302 303 304 305}

b. [REDACTED]

180. [REDACTED].³⁰⁶

c. [REDACTED]

181. [REDACTED].^{307 308 309}

182. [REDACTED].

183. [REDACTED].

²⁹⁷ [REDACTED].

²⁹⁸ [REDACTED].

²⁹⁹ [REDACTED].

³⁰⁰ [REDACTED].

³⁰¹ [REDACTED].

³⁰² [REDACTED].

³⁰³ [REDACTED].

³⁰⁴ [REDACTED].

³⁰⁵ [REDACTED].

³⁰⁶ [REDACTED].

³⁰⁷ [REDACTED].

³⁰⁸ [REDACTED].

³⁰⁹ [REDACTED].

i. [REDACTED]

184. [REDACTED].^{310 311}

185. [REDACTED].^{312 313 314}

186. [REDACTED].³¹⁵

187. [REDACTED].^{316 317}

188. [REDACTED].³¹⁸

ii. [REDACTED]

189. [REDACTED].³¹⁹

iii. [REDACTED]

190. [REDACTED].³²⁰

191. [REDACTED].³²¹

192. [REDACTED].^{322 323 324}

193. [REDACTED].^{325 326 327 328 329 330}

194. [REDACTED].³³¹

³¹⁰ [REDACTED].

³¹¹ [REDACTED].

³¹² [REDACTED].

³¹³ [REDACTED].

³¹⁴ [REDACTED].

³¹⁵ [REDACTED].

³¹⁶ [REDACTED].

³¹⁷ [REDACTED].

³¹⁸ [REDACTED].

³¹⁹ [REDACTED].

³²⁰ [REDACTED].

³²¹ [REDACTED].

³²² [REDACTED].

³²³ [REDACTED].

³²⁴ [REDACTED].

³²⁵ [REDACTED].

³²⁶ [REDACTED].

³²⁷ [REDACTED].

³²⁸ [REDACTED].

³²⁹ [REDACTED].

³³⁰ [REDACTED].

d. [REDACTED]

195. [REDACTED].

e. [REDACTED]

196. [REDACTED].

f. [REDACTED]

197. [REDACTED].

5. [REDACTED]

198. [REDACTED].³³²

199. [REDACTED].

a. [REDACTED]

200. [REDACTED].^{333 334 335 336 337}

b. [REDACTED]

201. [REDACTED]^{338 339}

a. [REDACTED]

202. [REDACTED].

i. [REDACTED]

203. [REDACTED] also subjected to improper interference by the members of the Scheme.

204. [REDACTED].^{340 341}

³³¹ [REDACTED].

³³² [REDACTED].

³³³ [REDACTED].

³³⁴ [REDACTED].

³³⁵ [REDACTED].

³³⁶ [REDACTED].

³³⁷ [REDACTED].

³³⁸ [REDACTED].

³³⁹ [REDACTED].

205. [REDACTED].³⁴²

206. [REDACTED].^{343 344 345 346}

207. [REDACTED].³⁴⁷

ii. [REDACTED]

208. [REDACTED].^{348 349}

209. [REDACTED].

b. [REDACTED]

210. [REDACTED].

c. [REDACTED]

211. [REDACTED].

d. [REDACTED]

212. [REDACTED].

6. [REDACTED]

213. [REDACTED].³⁵⁰

214. [REDACTED].³⁵¹

a. [REDACTED]

215. [REDACTED].^{352 353 354 355}

³⁴⁰ [REDACTED].

³⁴¹ [REDACTED].

³⁴² [REDACTED].

³⁴³ [REDACTED].

³⁴⁴ [REDACTED].

³⁴⁵ [REDACTED].

³⁴⁶ [REDACTED].

³⁴⁷ [REDACTED].

³⁴⁸ [REDACTED].

³⁴⁹ [REDACTED].

³⁵⁰ [REDACTED].

³⁵¹ [REDACTED].

b. [REDACTED]

216. [REDACTED].^{356 357}

c. [REDACTED]

217. [REDACTED].^{358 359}

i. [REDACTED]

218. [REDACTED].^{360 361}

219. [REDACTED].³⁶²

ii. [REDACTED]

220. [REDACTED].^{363 364}

iii. [REDACTED]

221. [REDACTED].^{365 366 367 368}

222. [REDACTED].^{369 370 371 372 373 374 375 376}

223. [REDACTED].^{377 378}

³⁵² [REDACTED].
³⁵³ [REDACTED].
³⁵⁴ [REDACTED].
³⁵⁵ [REDACTED].
³⁵⁶ [REDACTED].
³⁵⁷ [REDACTED].
³⁵⁸ [REDACTED].
³⁵⁹ [REDACTED].
³⁶⁰ [REDACTED].
³⁶¹ [REDACTED].
³⁶² [REDACTED].
³⁶³ [REDACTED].
³⁶⁴ [REDACTED].
³⁶⁵ [REDACTED].
³⁶⁶ [REDACTED].
³⁶⁷ [REDACTED].
³⁶⁸ [REDACTED].
³⁶⁹ [REDACTED].
³⁷⁰ [REDACTED].
³⁷¹ [REDACTED].
³⁷² [REDACTED].
³⁷³ [REDACTED].
³⁷⁴ [REDACTED].
³⁷⁵ [REDACTED].
³⁷⁶ [REDACTED].

224. [REDACTED].

iv. [REDACTED]

225. [REDACTED].^{379 380 381}

v. [REDACTED]

226. [REDACTED].^{382 383 384}

vi. [REDACTED]

227. [REDACTED].³⁸⁵

228. [REDACTED].³⁸⁶

229. [REDACTED].³⁸⁷

230. [REDACTED].

d. [REDACTED]

231. [REDACTED].

e. [REDACTED]

232. [REDACTED].

233. [REDACTED].

f. [REDACTED]

234. [REDACTED].

235. [REDACTED].

³⁷⁷ [REDACTED].

³⁷⁸ [REDACTED].

³⁷⁹ [REDACTED].

³⁸⁰ [REDACTED].

³⁸¹ [REDACTED].

³⁸² [REDACTED].

³⁸³ [REDACTED].

³⁸⁴ [REDACTED].

³⁸⁵ [REDACTED].

³⁸⁶ [REDACTED].

³⁸⁷ [REDACTED].

IX. Admission of the statements on the basis of article 69(2) / 69(4)

236. Should the Chamber decline to admit the Prior Recorded Testimony of the Corrupted Witnesses on the basis of rule 68(2)(c) or (d), then it should be admitted under article 69(2) and (4). The Prior Recorded testimony is highly relevant to this case, since it contains the Corrupted Witnesses' accounts concerning the PEV in the areas described in the Document Containing the Charges, the crimes that were committed, and the people responsible for this. The probative value of this evidence stems from its internal consistency, intrinsic reliability³⁸⁸ and - in general - its corroboration by evidence already on the record.³⁸⁹
237. The Prosecution submits that the probative value of these statements outweighs any potential prejudice occasioned by their admission into the Court record. The Prosecution submits that there would be no prejudice to the Accused's right to a fair trial as the Defence was afforded - and availed itself of - the opportunity to cross-examine the [REDACTED] Witnesses on their Prior Recorded Testimony. Further, the Chamber should not entertain claims of prejudice resulting from the admission of this Prior Recorded Testimony in circumstances where the withdrawal/recantation of the witnesses which necessitated this request is the result of improper interference perpetrated for the benefit of the Accused.
238. Last, the Prosecution submits that the admission of the Prior Recorded Testimony of the Corrupted Witnesses would assist the fair evaluation of their testimony by providing the Chamber with the totality of their evidence.

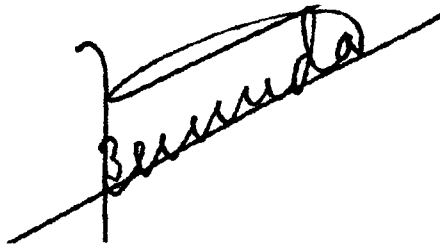
³⁸⁸ *Supra* paras.142-145.

³⁸⁹ [REDACTED].

RELIEF

239. For the foregoing reasons, the Prosecution requests the Chamber to:

- a. admit the Prior Recorded Testimony of [REDACTED] under rule 68(2)(d) of the Rules, alternatively under article 69(2) and (4) of the Statute; and
- b. admit the Prior Recorded Testimony of [REDACTED] under rule 68(2)(d), or alternatively 68(2)(c) of the Rules or articles 69(2) and (4) of the Statute.

A handwritten signature in black ink, appearing to read 'Bensouda', is written over a horizontal line.

Fatou Bensouda, Prosecutor

Dated this 21st day of May 2015

At The Hague, the Netherlands