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TRIAL CHAMBER V(A)

Before: Judge Chile Eboe-Osuji, Presiding
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 public annexes B.1-B.4, C1-C.2, and S and public redacted annexes G and J

**Public redacted version of "Corrigendum of Ruto Defence response to the
'Prosecution's request for the admission of prior recorded testimony of
[REDACTED] witnesses'", 12 June 2015, ICC-01/0901/11-1908-Conf**

Source: Defence for Mr. William Samoei Ruto

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

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INTRODUCTION

1. The defence for William Samoei Ruto ("Defence") respectfully submits that the *Prosecution's request for the admission of prior recorded testimony of [REDACTED] witnesses* ("Application")¹ should be dismissed. In the Application, the Prosecution ("OTP") seeks the admission of unsworn, hearsay evidence of [REDACTED] witnesses ("Rule 68 Witnesses"), all of whom were interviewed after the public confirmation hearings. This evidence is mutually inconsistent, contradicted by other trial evidence and is shown by independent, objective evidence to be *prima facie* unreliable. Notwithstanding these defects, pursuant to the OTP's request, this Prior Recorded Testimony² is to supplant the sworn testimony of [REDACTED] witnesses and is to constitute the evidence of [REDACTED] even though the evidence of the [REDACTED] witness has not been tested in cross-examination.

2. In the Application, the OTP seeks to make the case entirely about interference. This is incorrect. The present trial must remain firmly focused on the charges concerning the 2007 post-election violence in Kenya. This focus must be maintained even in the context of an application under Rules 68(2)(c) and/or 68(2)(d) of the Rules of Procedure and Evidence ("Rules") or Article 69(2) and (4) of the Rome Statute ("Statute"). To this end, the OTP "has both a legal and ethical obligation to make all reasonable efforts to ensure that the evidence it presents is reliable and, to the extent possible, complete".³

3. A review of the Application shows that the OTP has failed to discharge these obligations. Despite the availability of a panoply of measures to preserve evidence in its most reliable form the OTP seeks the admission of unsworn statements arising from interviews which, save for [REDACTED], were neither video nor audio recorded. The OTP has also failed to investigate properly the

¹ ICC-01/09-01/11-1866-Conf.

² As defined in Application, para.1.

³ ICC-01/04-01/07-3436-AnxI, para.141.

veracity and reliability of the Prior Recorded Testimony. This testimony is provided by witnesses whose honesty is a central issue, even at the admission of evidence stage. They have shown a propensity to lie and a willingness to manipulate the court process for gain, yet the OTP insists that indicia of reliability can be assessed by reference to procedural matters alone. Nowhere in the Application is the OTP able to support the reliability of the Prior Recorded Testimony with objective evidence, nor does the OTP conduct even the most basic analysis of whether the witnesses' evidence is contradictory *inter se*, or with other trial evidence. Nor, indeed, has the OTP sought to verify the evidence of its witnesses by reference to other prosecution evidence collected in this case, never mind "open source" material and other information that could have been collected with the exercise of reasonable diligence.

4. In contrast, the Defence has investigated the original accounts and has produced evidence which demonstrates that the prior testimony lacks sufficient indicia of reliability. The OTP has, regrettably, turned away from considering any of this Defence evidence in assessing the reliability of the evidence it now wishes the Chamber to admit. These concerns and others, including whether Rule 68 is applicable, are dealt with in detail below.
5. This is the first time amended Rule 68 is being judicially considered. There is, therefore, no jurisprudence to assist with its interpretation. Normally, recourse would be made to the jurisprudence of other international tribunals.⁴ Rule 68(2)(d) is based on the ICTY's Rule 92*quinqüies*.⁵ However, there are no public decisions applying that rule. In these circumstances, "general principles derived [...] from national laws"⁶ are, relevant, particularly where, as here, the ICTY rule and amended Rule 68 mirror legislative developments in various common law

⁴ ICC-01/04-01/06-1049, para.44.

⁵ Study Group on Governance, 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 ("**WGLL Report**"), para.3.

⁶ Statute, Article 21(1)(c).

jurisdictions permitting the admission of hearsay and prior inconsistent statements.⁷

6. To support the factual assertions made in this response, the Defence relies on various materials, primarily those in evidence⁸ but also materials not admitted in the trial record.⁹ If the Chamber holds that a broad approach to supporting materials is permitted, then all this material may be considered in its determination of the Application.

SUBMISSIONS

I. Amended Rule 68 is not applicable in this case

A. Amended Rule 68 not to apply in cases arising out of the Kenya Situation

7. Rule 68, as amended by the Assembly of States Parties (“ASP”) at its 12th Session on 27 November 2013, is not applicable in this case.¹⁰ The OTP’s proposed reliance on the rule is “contrary to...representations made and assurance[s] given to the delegates during the negotiations” on the amendments to the rule that it would not apply to cases arising out of the Kenya Situation.¹¹ On this basis alone, the Application should be dismissed in so far as it is predicated upon amended Rule 68.
8. At this Court, the “Rules are first and foremost a reflection of the will of the [ASP]”,¹² rather than the judges, as at the ICTY and ICTR. Therefore, where a State Party agrees to amend a rule on the basis of representations made by

⁷ Gaynor, F., “Law of Evidence: Admissibility of Documentary Evidence” in Sluiter, G., et al, *International Criminal Procedure: Principles and Rules* (OUP, 2013), p.1073.

⁸ Referred to by their EVD or MFI numbers.

⁹ References to material provided by the OTP in an annex to the Application are indicated by, e.g., “OTP-B2”, to show that the document was in annex B2 of the Application. Material annexed to this response is indicated by, e.g., “Annex X (ERN)”.

¹⁰ Resolution ICC-ASP/12/Res.7.

¹¹ ICC-01/09-01/11-1894-Conf-AnxA, letter from The Legal Counsel/Director, Office of the Legal Counsel and Directorate for Legal Affairs, African Union to the Prosecutor, 7 April 2015.

¹² Broomhall, B., “Article 51 Rules of Procedure and Evidence”, in Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Hart 2008), p.1037.

“Senior Officials of the Court”¹³ - specifically, representations about the application of the amended rule in on-going cases – these representations cannot be dismissed as irrelevant when determining whether the amended rule can be applied contrary to those express representations.

9. The OTP argues that resort to a rule’s drafting history is not required when its terms are clear and there is no uncertainty or ambiguity.¹⁴ But the question logically to ask, prior to interpreting a rule, is whether it is permissible to resort to the rule at all. Only if the amended rule is applicable do questions of its interpretation arise. In plain terms, is amended Rule 68 applicable in this case? The Defence submits that this question should be answered in the negative due to the representations made to States Parties at the 12th Session of the ASP.

10. The OTP submits that it “is unaware of any undertakings made relating to the use of the amended rule in the Kenya cases or in pending cases generally, save for what is included in the amendment adopted.”¹⁵ The Defence observes that the Government of Kenya sought to intervene “to shed light on” the “forms of understanding...reached by the Assembly on the implication of the amendment of Rule 68 on the on going cases before the ICC.”¹⁶ The Chamber rejected this request.¹⁷ While the specifics of the “representations made and assurance[s] given” are, in these circumstances, not before the Chamber, it is clear from commentators and reports made at the time, that Kenya objected to the proposed amendments and certain concessions had to be made to address Kenya’s concerns.¹⁸

¹³ ICC-01/09-01/11-1894-Conf-AnxA.

¹⁴ Application, para.14. *Also* paras.16-21.

¹⁵ Application, para.17.

¹⁶ ICC-01/09-01/11-1891, paras.4, 6.

¹⁷ ICC-01/09-01/11-1893.

¹⁸ Annex B.1, “Kenya Scored Key Victories in The Hague”, Amina Mohammed, Cabinet Secretary for Foreign Affairs of Kenya, Capital FM website, 29 November 2013; Annex B.2, “ICC Assembly of States Parties Rundown”, Beth Van Schaack, 27 November 2013, Just Security; Annex B.3, “Obstruction of Justice by Silencing Witnesses: Possible Remedies”, Fergal Gaynor, 27 April 2014, International Criminal Justice Today.

11. Specifically, to enable Kenya to join the consensus,¹⁹ it is understood that representations were made that amended Rule 68 would not be applied retroactively nor in on-going cases in the Kenya Situation. Evidence that these representations were made, relied upon by Kenya and resulted in the amendments being passed by consensus is provided by various sources. The resolution adopted by the ASP regarding the amendments to Rule 68 expressly recognised that they would not have retroactive effect by “*emphasizing* article 51, paragraph 4”.²⁰ The OTP’s dismissal of this express reference to Article 51(4) in the resolution as doing “nothing more than direct[ing] the reader to the Article” fails to appreciate the wider drafting context and negotiations.²¹ The express reference to Article 51(4) was not intended as unnecessary verbiage but to give effect to the representations made to the Kenyan delegation and other States.²² That the representations went further than non-retroactivity and extended to the assurance that the amended Rule would not be applied in the Kenya cases is evidenced by: (i) the concerns expressed by the African Union Commission to the Prosecutor regarding the OTP’s intention to rely upon Rule 68 in this case, an action stated to be “manifestly contrary to the representations made and assurance given”;²³ (ii) the statement of Amina Mohammed, Cabinet Secretary for Foreign Affairs of Kenya, shortly after the 12th Session that “we argued and forced changes that reassure that the new rules will not apply to the Kenyan cases”;²⁴ and (iii) reports on the ASP’s outcome.²⁵

¹⁹ Statute, Article 112(7).

²⁰ Resolution ICC-ASP/12/Res.7, para.2 (emphasis in original).

²¹ T-130, 34:6-7. The abbreviated transcript references used in the Application are adopted in this response. See also Application, para.17.

²² Annex B.1 (“we argued and forced changes that reassure that the new rules will not apply to the Kenyan cases”); Annex B.2 (“Language indicating that ‘Rule 68 will not be applied retroactively to the detriment of the person who is being investigated or prosecuted’ was necessary to enable Kenya to ultimately join consensus”); Annex B.3 (“the Kenyan Government...managed to secure the inclusion in the resolution adopting the amendment of language relating to retroactivity, in an effort to inoculate the ongoing Kenya cases from its effect”); Annex B.4 (“rule [68] will not be applied in any of the cases currently before the court. This means that any testimony from absent Kenyan witnesses will not be admissible”).

²³ ICC-01/09-01/11-1894-Conf-AnxA.

²⁴ Annex B.1.

²⁵ *Supra*, fn.22.

12. Article 31(1) of the Vienna Convention on the Law of Treaties mandates that a “treaty shall be interpreted in good faith”. In negotiating the amendment to Rule 68, Kenya acted in good faith and joined other State Parties in agreeing the amendment by consensus, in light of understandings that the rule would not apply retroactively and, in any event, to this case. Whilst the Defence is not able to provide further information on what is said to have transpired at the ASP in light of the Chamber’s decision to deny Kenya’s application to file *amicus* submissions on this issue, the Defence submits that relevant circumstances can be established, which are detailed above, that militate against finding that the amended rule operates in the present case.

B. Reliance on amended Rule 68 offends Article 51(4)

13. If, *arguendo*, the Chamber determines that the OTP is not barred from applying amended Rule 68 in this case, then the Application should be dismissed because it breaches Article 51(4) of the Statute.

14. The OTP’s unduly complicated analysis of “retroactive” is irrelevant and fails to appreciate the straightforward rules of statutory interpretation.²⁶ Article 51(4) deals expressly with the retroactive application of amendments to the Rules in order to address the various presumptions which prevail on the question of whether a change in the law is to apply in pending or on-going proceedings.²⁷ At this Court, the intention of the legislature is expressly stated. Amendments to the Rules – whether substantive²⁸ or procedural²⁹ - will not be applied retroactively

²⁶ Application, paras.23-26.

²⁷ See 44(1) Halsbury’s Laws of England (4th ed) (Reissue), paras.1283-1288 generally for presumptions regarding retrospectivity.

²⁸ See 44(1) Halsbury’s Laws of England (4th ed) (Reissue), para.1283 (“In the absence of a clear indication of a contrary intention in an amending enactment, the substantive rights of the parties to an action thus fall to be determined by the law as it existed when the action was commenced; and this is so whether the law is changed before the hearing of the case at first instance or while an appeal is pending. However, an amending enactment may say, expressly or by implication, that its effect is retrospective” (footnotes omitted, emphasis added)).

²⁹ See 44(1) Halsbury’s Laws of England (4th ed) (Reissue), para.1287 (“The general presumption against retrospection does not apply to legislation concerned merely with matters of procedure; on the contrary, provisions of that nature are to be construed as retrospective unless there is a clear indication that such was not

to a person's "detriment" in, *inter alia*, on-going proceedings. This means that "neutral or beneficial retroactivity will sometimes be possible."³⁰ This approach explains the *Milutinović* decision, erroneously relied upon by the OTP.³¹ In *Milutinović*, Rule 6(D),³² the ICTY equivalent to Article 51(4), did not prohibit the application of new Rule 92*quater* in that on-going case because the Chamber was "unable to identify any way in which admitting the evidence will unduly prejudice the rights of the Accused."³³ In the context of this on-going case, this means that the real inquiry lies in what is meant by the word "detriment".

15. The Defence submits that "detriment" should be interpreted in accordance with its ordinary, plain meaning, namely "(1) disadvantage or damage; harm; loss. (2) a cause of disadvantage or damage".³⁴ Therefore, any amendment which alters the situation of a person in an on-going case to his disadvantage or will harm the broader interests of the defence will breach Article 51(4).
16. The application of amended Rule 68 in this case will operate to Mr. Ruto's detriment. The amended rule permits not only the admission of an untested, unsworn, hearsay statement going to the acts and conduct of the accused for the truth of its contents, but also the admission of such a statement for truth in circumstances where a witness under oath has recanted from said statement, albeit that the witness is available for cross-examination.³⁵ Under the previous regime, the admission of such testimony in such circumstances was not

the intention of Parliament. For this purpose, 'procedure' includes matters relating to...evidence...Procedural enactments thus affect proceedings pending at their commencement unless the contrary intention appears" (footnotes omitted, emphasis added)).

³⁰ Broomhall, B., *supra*, p.1044 (emphasis in original).

³¹ Application, para.26.

³² ICTY Rule 6(D), "[a]n amendment...shall not operate to prejudice the rights of the accused or of a convicted or acquitted person in any pending case."

³³ *Prosecutor v. Milutinović et al*, IT-05-87-T, 5 March 2007, para.8. See also para.9, the unavailable witness' evidence related to, and was consistent with, events testified to by two other witnesses, both of whom had been cross-examined by the defence.

³⁴ Collins English Dictionary (6th ed), p.453.

³⁵ Rules 68(2)(c) and 68(2)(d).

permitted.³⁶ The detriment or disadvantage to Mr. Ruto in this case is particularly acute because the amended rule is being used to seek the admission of evidence said to be central to the case against him.³⁷

17. The broad interpretation accorded to “detriment” stands in contrast to the narrow approach taken to the interpretation of the ICTY’s Rule 6(D).³⁸ However, this narrow approach, whereby prejudice to a right to which an accused has a legal entitlement must be shown, is explained by the difference in wording between the two provisions. Rule 6(D) explicitly refers to “the rights of the accused” whereas Article 51(4) only refers to “the detriment of the person”.
18. That said, even if, *arguendo*, the Chamber determines that this narrow approach applies to Article 51(4), Mr. Ruto’s fair trial right to confront [REDACTED] has been detrimentally affected by the rule change because an unsworn, hearsay statement of an absent witness which goes directly to the acts and conduct of the accused may, the OTP argue, now be admitted for truth even if the Defence has not had the opportunity to cross-examine that witness.³⁹ This was not permitted under previous Rule 68(a), where a condition of admission was that the non-tendering party have had the opportunity to examine the now absent witness during the recording of the testimony, nor would it have been permitted under any other statutory provision according to this Chamber’s jurisprudence.⁴⁰
19. The OTP’s various arguments as to why the application of the amended rule would not be to Mr. Ruto’s detriment are flawed both generally and individually.⁴¹ The fundamental weakness of the OTP’s overall position is that each of the arguments made implicitly recognises the existence of a detriment

³⁶ *Infra*, paras.22-27.

³⁷ *Infra*, paras.132-134.

³⁸ *E.g., Prosecutor v. Međaković et al*, IT-02-65-AR11bis.1, 7 April 2006, paras.85-87.

³⁹ Statute, Article 67(1)(e). *See also* ICC-01/09-01/11-1353, para.25 regarding the accused’s interest in confronting a witness whose testimony implicates an accused in criminal conduct.

⁴⁰ *Infra*, para.23.

⁴¹ Application, paras.30-48.

and then seeks to mitigate its effect. However, whether a detriment can be mitigated is not part of the Article 51(4) analysis. For an amended rule to fall foul of the prohibition against retroactive application, all that requires to be shown is detriment. The analysis ends there. Nonetheless, the OTP's six arguments on detriment can be dismissed for the following reasons.

20. *First*, notice of the evidence contained in the prior statements does not address the primary disadvantage that second-hand evidence is being relied upon which has been disavowed by all the witnesses, save for [REDACTED] who has not testified at all.⁴² Hearsay evidence "is necessarily second-hand and for that reason very often is second best. Because it is second-hand, it is that much more difficult to test and assess."⁴³ Reliance on second-hand evidence, thus, clearly gives rise to detriment, particularly in the context of a criminal trial where the stakes for an accused could not be higher.
21. *Second*, the fact that the amended Rule introduces a procedure which is available to both parties is no answer to the question whether the OTP's use of the rule in this instance is to Mr. Ruto's detriment.⁴⁴ Put another way, in order for Article 51(4) to apply it simply requires to be shown that the amended rule will operate "to the detriment of the person who is being...prosecuted". As set out above, it will so operate. The Defence's possible future use of the amended Rule will not ameliorate the detriment already suffered. The Defence submits that the OTP's reliance on ICTY jurisprudence is misplaced as it takes no account of the drafting differences in the ICTY and ICC rules. In addition, and fatally, the OTP interpretation does not adequately address the clear and obvious detriment that applying the Rule would have on Mr. Ruto.⁴⁵

⁴² Application, para.30.

⁴³ *R v. Riat (Jaspal)*, [2013] 1 WLR 2592 *per* Lord Justice Hughes at 2597.

⁴⁴ Application, paras.31-32.

⁴⁵ Application, para.32 citing to *Prosecutor v. Šešelj*, IT-03-67-T, 21 February 2008, paras.35-37.

22. *Third*, contrary to the OTP's argument, prior to the amendment, the OTP could not have sought the admission of the Rule 68 Witnesses' statements under other provisions of the Statute and/or Rules in this case.⁴⁶ The OTP's arguments are based on a selective reading of the Court's jurisprudence. They also beg the question why the Rules were amended if the admission of the statements could have been accomplished under the pre-existing legal framework. The Defence submits that the answer is that their admission was not permitted under the old regime, a conclusion shared by the Working Group on Lessons Learnt.⁴⁷
23. Specifically, the OTP ignores this Chamber's clear direction in previous decisions concerning requests explicitly submitted by the OTP under Articles 64(9)(a), 69(4) and Rule 63(2)⁴⁸ that evidence which is testimonial in nature and submitted for the truth of its content, even if provided by non-trial witnesses, should be submitted under Rule 68.⁴⁹
24. The OTP's argument, relying on ICTY decisions and a decision in *Lubanga*, that materials which fall outside the scope of previous Rule 68 could have been admitted under other provisions, requires the Chamber to accept the premise that the materials at issue in this case fall outside the scope of the rule.⁵⁰ But even a cursory analysis of the materials demonstrates that they fall squarely within the scope of Rule 68 – they are formal statements/transcripts of prosecution trial witnesses taken by the OTP for use in connection with legal proceedings, are testimonial in nature and their admission is sought as a substitute for oral evidence in court. The real problem confronting the OTP is that the materials do fall within the original rule, but for each Rule 68 Witness the OTP cannot satisfy one of the original rule's conditions. It is for this reason that the OTP seeks to

⁴⁶ Application, paras.33-39.

⁴⁷ WGLL Report, paras.6, 18, 28, 32.

⁴⁸ ICC-01/09-01/11-1121, para.1; ICC-01/09-01/11-1619-Conf, paras.2, 6, 9-11.

⁴⁹ ICC-01/09-01/11-1353, paras.85, 86, 88; ICC-01/09-01/11-1804, para.27.

⁵⁰ Application, para.38.

side-step the strictures of that rule by arguing that it does not apply in order that it may have recourse to other provisions. This is not permitted, nor is it supported by the approach taken at the ICTY or in *Lubanga*.

25. In *Lubanga*, Trial Chamber I found that the materials at issue did fall outside Rule 68. The materials were interview transcripts of individuals who the OTP had no intention of calling as witnesses at trial, and which the defence wished to rely on to challenge the credibility of two prosecution witnesses rather than for the truth of their contents.⁵¹ The interviews were conducted in the course of the OTP's investigations and as preparation for the testimony of a number of defence witnesses.⁵² There was never any intention that the transcripts might be used as a substitute for the oral evidence of a trial witness in Court under Rule 68 and so there was "[n]o attempt...to comply substantively with [the] Rule".⁵³ It was in these clearly distinguishable circumstances that Trial Chamber I determined that Rule 68 did not apply and then proceeded to consider, but refuse, the materials' admission under Article 69(2).⁵⁴
26. It is recalled that this Chamber's approach to Rule 68 differs from that taken by Trial Chamber I. This Chamber has not made the artificial distinction between testimonial evidence given by trial and non-trial witnesses but has ruled that Rule 68 applies to all evidence which is testimonial in nature. It is this Chamber's jurisprudence which applies in this case.
27. The *Milošević* and *Limaj* decisions⁵⁵ can also be distinguished because they concerned Rule 92bis, a narrower rule than original Rule 68 because it did not

⁵¹ ICC-01/04-01/06-2595-Red-Corr, para.53.

⁵² ICC-01/04-01/06-2595-Red-Corr, paras.53, 55.

⁵³ ICC-01/04-01/06-2595-Red-Corr, para.55.

⁵⁴ ICC-01/04-01/06-2595-Red-Corr, paras.56-58.

⁵⁵ *Prosecutor v. Milošević*, IT-02-54-AR73.4, 30 September 2003; *Prosecutor v. Limaj et al*, IT-03-66-T, 25 April 2005.

deal with witnesses present before the Court.⁵⁶ In those cases, the material fell outside the scope of Rule 92*bis* because they concerned witnesses present before the Court, available for cross-examination and the original statements dealt with the acts and conduct of the accused. The *Haradinaj* decision is also inapposite because it held that no rule, including Rule 92*ter* which is the closest equivalent to original Rule 68(b), anticipated the situation at hand where a witness called to give *viva voce* evidence declared himself unwilling or unable to answer questions put by the party calling him.⁵⁷ In the instant case, none of the recanting witnesses present before the Court made such a declaration and so remained ostensibly within the scope of Rule 68(b) save that they would not consent to the admission of their prior testimony. In any event, it is recalled that the jurisprudence of the *ad hoc* tribunals is only of persuasive value. Given the differences between the former ICC regime for the admission of prior recorded testimony and that applying at the ICTY over the years, the Chamber may determine that it is unable to draw meaningful parallels and that the ICTY decisions are of little, if any, assistance in determining the matter at issue.

28. *Fourth*, the OTP's argument that, if the pre-existing legal framework included limitations on the admission of prior recorded testimony, the removal of such limitations would not result "in material prejudice" to the accused because of the presence of equivalent or enhanced safeguards is incorrect.⁵⁸ Not only does it refer to the wrong standard – "material prejudice" rather than "detriment" – but it fails to employ the correct comparator. As detailed above, this Chamber has held that Rule 68 is to be used for the admission of testimonial evidence and not any other "duplicative" procedure such as Article 69.⁵⁹ Therefore, when assessing the issue of safeguards, the comparison to be made is between the old Rule 68 regime under which none of the Rule 68 Witnesses' prior testimony

⁵⁶ ICTY Rule 92*ter* et seq had not been adopted at the time the *Milošević* and *Limaj* decisions were rendered.

⁵⁷ *Prosecutor v. Haradinaj et al*, IT-04-84, Transcript, 24 August 2011, p.461.

⁵⁸ Application, paras.40-43.

⁵⁹ *E.g.*, ICC-01/09-01/11-1353, para.85.

would have been admissible and the present regime where such evidence is admissible subject to the satisfaction of certain conditions. Clearly, the previous regime contained the greater safeguard – no admission.

29. *Fifth*, as argued above, the wording of Article 51(4) simply refers to “detriment” and not to “the rights of the accused”.⁶⁰ Therefore, an accused simply has to show that his situation has been altered to his disadvantage for Article 51(4) to apply. A stricter approach is not warranted by the plain words of the provision. Nevertheless, even if a stricter approach is applied, the admission of [REDACTED] prior statements would result in Mr. Ruto’s right to confront being breached since he has not had the opportunity to test the witness’ evidence.⁶¹ The OTP’s bare submission that “the Defence will have the opportunity to present controverting evidence during the Defence case”⁶² fails to appreciate the above described difficulties of testing and assessing hearsay evidence,⁶³ and offers no solace to the Defence if it means that an accused is required to call a defence because of the admission of unsworn evidence in circumstances where no defence would otherwise have been required. These difficulties are detrimental to the Defence.

30. *Sixth*, the OTP’s arguments at paragraphs 46 to 48 of the Application are predicated on two premises – that it has established to the requisite standard that witness interference has materially affected the decision to recant and that the interference was “performed” for Mr. Ruto’s “benefit”. As argued in Sections V and VI, the OTP has not established either premise.

31. In sum, Article 51(4) prohibits amended Rule 68’s application in this trial. It is clear that the amended rule will operate to Mr. Ruto’s detriment if any of the

⁶⁰ *Supra*, para.17.

⁶¹ *Contra* Application, para.44.

⁶² Application, para.45.

⁶³ *Supra*, para.20.

Prior Recorded Testimony is admitted. None of the OTP's arguments to the contrary withstand scrutiny. However, more specifically, previous Rule 68 would not have permitted the admission of [REDACTED] statements because the Defence did not have the opportunity to question [REDACTED] during the recording of [REDACTED] testimony. Therefore, if [REDACTED] prior testimony is admitted, this will be in circumstances where previously the fair trial right to confront was guaranteed. The amended Rule, therefore, operates to Mr. Ruto's detriment in respect of [REDACTED] as well.

C. Alternatively/additionally, reliance on amended Rule 68 offends Article 24(2)

32. An additional or alternative base on which the Application should be dismissed is that reliance on the provision offends against Article 24(2) of the Statute.
33. Article 24(2) provides that: "In the event of a change in the law applicable to a given case prior to a final judgment, the law more favourable to the person being investigated, prosecuted or convicted shall apply". The Defence submits that this statement of general principle regarding non-retroactivity in criminal law relates not only to crimes and penalties but extends to changes in the Rules.⁶⁴ Article 24(2) refers to changes in "the law applicable" which can only mean "the applicable law". Article 21 (Applicable law) of the Statute reads in part that: "(1) the Court shall apply: (a) In the first place, this Statute...and its Rules of Procedure and Evidence". Therefore, the Rules are included within the word "law" for the purposes of Article 24(2).⁶⁵
34. Article 24(2) does not require actual detriment or prejudice but simply that it be shown that the original Rule would be more favourable to the accused. In this regard, one commentator has observed that Article 24(2) is equivalent to the

⁶⁴ See: (i) Lind, C., comment on Article 24(2) in the ICC Commentary on the Case Matrix Network (<http://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/>); (ii) Boot, M., Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court (Intersentia, 2002), p.374; (iii) Broomhall, B., *supra*, fn.61.

⁶⁵ Broomhall, B., *supra*, fn.61; Lind, C., *supra*.

domestic law rule against *ex post facto* laws, the definition of which includes changes to the rules of evidence and is in relevant part as follows:

*“[...] a law that changes the rules of evidence and receives less or different testimony than was required at the time of the commission of the offense in order to convict the offender; [...] every law which in relation to the offense or its consequences, alters the situation of a person to his disadvantage”.*⁶⁶

35. Applying Article 24(2) to the present case, it is clear that the rules of evidence have been changed in the course of Mr. Ruto’s trial to permit the admission of “less or different testimony”. This change is necessary to permit the admission of evidence which the OTP contend is central to securing a conviction. Amended Rule 68 permits not only the admission of untested, unsworn, hearsay statements going to the acts and conduct of the accused for the truth of their contents but also the admission of such statements for truth in circumstances where a witness under oath has recanted from said statement, albeit that the witness is available for cross-examination. Under the previous regime, the admission of such testimony in such circumstances was not permitted. Therefore, the terms of the previous Rule 68 are more favourable because the bases on which prior recorded testimony could be admitted for the truth of its contents were more limited.⁶⁷ Accordingly, Article 24(2) prohibits the application of amended Rule 68 in this on-going trial.

⁶⁶ Pangalangan, R., “Article 24 Non-retroactivity *ratione personae*”, in Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Hart 2008), p.740 citing to Black’s Law Dictionary 580 (7th ed. 1999).

⁶⁷ The limited application of the original rule is underlined by the reasons given by the Study Group on Governance for the amendments to Rule 68. See WGLL Report, para.3.

II. The Evidential Standard is “beyond reasonable doubt”

36. As the OTP is the tendering party, the evidential standard for Rules 68(2)(c) and 68(2)(d) ought to be ‘beyond reasonable doubt’. Neither sub-Rule stipulates the evidential standard a party must meet but the Defence position, that the evidential standard is beyond reasonable doubt, is supported as follows.
37. *First*, contrary to the OTP’s assertion, the Application is not an ordinary procedural filing concerning the admissibility of documentary evidence where questions of reliability, relevance and probative value can be gleaned from the face of the document.⁶⁸ Rather, applications made under Rules 68(2)(c) and 68(2)(d) concern the admissibility of testimonial evidence in exceptional circumstances, i.e. due to the absence of a witness (Rules 68(2)(c) and 68(2)(d)) or where a witness has recanted due to the material influence of improper interference (Rule 68(2)(d)). In addition, the preconditions of these sub-Rules involve the determination of questions of fact and law.⁶⁹ These scenarios engage an accused’s right to confront and overarching issues of trial fairness. That such applications will be strictly determined is apparent from their preconditions which go beyond the usual three-part admissibility test.
38. Given that the rights of the accused and the reliability of statements are engaged, there is persuasive international authority that the standard of proof is beyond reasonable doubt. The ICTR Trial Chamber in *Musema* held that:

“With certain exceptions, discussed below, the Chamber is of the opinion that the standard of proof required to establish the reliability of documentary evidence is proof on the balance of probabilities. [...] [...]”

⁶⁸ Application, paras.27, 61-62.

⁶⁹ See, Sprack, J. (2012), *A practical approach to criminal procedure* (14th ed.), Oxford University Press, para.20.36 (“Sometimes...admissibility depends upon the circumstances in which the evidence was obtained, and those circumstances may themselves be in dispute. It is then for the judge to decide (i) the factual question of how the prosecution got the evidence, and (ii) the legal question of whether, in the light of his findings in fact, the evidence is admissible.”).

*The circumstances which give rise to exceptions to this general rule include (but are not limited to) those circumstances in which the rights of the Accused are threatened by the admission of the evidence in question, or wherever the allegations about the unreliability of the evidence demand for admissibility the most exacting standard, consistent with the allegations. In such cases, a standard of proof of "beyond reasonable doubt" may, in the opinion of the Chamber, be justified."*⁷⁰

39. *Second*, the fact that no uniform approach to the standard of proof can be distilled from the various common law jurisdictions where changes in the law similar to Rule 68 have been made⁷¹ indicates that the higher standard should be applicable to protect the rights of the accused. The criminal standard is applicable in England and Wales in relation to the admission of prior statements in circumstances similar to the those envisaged in Rules 68(2)(c) and 68(2)(d).⁷² Also, if a prior statement would only be admissible applying the civil standard of proof, it is to be questioned if it is the type of evidence that should be placed before a Chamber as the trier of fact in an international criminal trial.
40. *Third*, the fact that Rule 68(2)(d)(iii) states that a "Chamber may consider adjudicated facts from...[completed Article 70] proceedings in its assessment" supports the conclusion that it is the criminal standard of proof which applies because it is this standard to which the adjudicated facts will have been established in the other case. To find otherwise would mean facts established to different standards would be the subject of the Chamber's assessment.

⁷⁰ *Prosecutor v. Musema*, ICTR-96-13-A, 27 January 2000, paras.56, 58. It is acknowledged that the authority on which the Trial Chamber relied concerned the voluntariness of an accused's statement but the Chamber's statement clearly extends wider than this scenario.

⁷¹ *E.g.* the evidential standard is: (i) beyond reasonable doubt in England & Wales where the tendering party is the Crown and the civil standard where the evidence is to be introduced by the defence, Archbold, J. (n.d.) (2014), *Archbold: Criminal pleading, evidence and practice*, 2014, Sweet & Maxwell, para.11-17; (ii) a balance of probabilities in Canada, *R v. B (K.G.)*, [1993] 1 SCR 740, and Australia, Evidence Act 1995, section 142.

⁷² *Archbold*, *supra*, para.11-17; *R. v. Minors* 89 Cr.App.R. 106, para.6; *R v. Shabir* [2012] EWCA Crim 2564, para.64.

III. No investigation of the Article 70 case

41. In the Application, the OTP seeks to rely on a considerable body of evidence concerning its Article 70 case. Comprised within the morass of supporting materials are: (i) items previously declared inadmissible; (ii) items not on the List of Evidence; and (iii) witnesses not on the List of Witnesses. OTP tactics have also denied the Defence an opportunity to confront some of this evidence – material which existed at the time [REDACTED] and [REDACTED] testified was not put to them and, following their post-testimony interviews, the OTP did not seek to recall either [REDACTED] or [REDACTED]. It is now too late to remedy these calculated trial decisions. The OTP's retort that the Defence was "at liberty to cross examine [REDACTED] on this evidence, but also chose not to do so" is without merit.⁷³ The right to confront evidence only arises when there is something to confront. The charges which confront Mr. Ruto are based on Article 7 not Article 70.
42. The Defence's concerns about the OTP's use of these materials are already before this Chamber and are not rehearsed here.⁷⁴ However, the following additional observations are made.
43. The Defence has not investigated the Article 70 case but remains firmly focused on the Article 7 case against Mr. Ruto. To investigate the Article 70 case properly and to meet all the allegations made in the Application would have required an adjournment. This is because the majority of the Article 70 items were disclosed as Rule 77 or PEXO evidence. Thus, it would be unfair to expect that necessary investigations had been conducted in respect of these items simply by virtue of disclosure. The Defence is unable to effectively address a second, wholly separate case for which substantial disclosure is being made in the course of the

⁷³ ICC-01/09-01/11-1874-Conf, para.38.

⁷⁴ ICC-01/09-01/11-1872-Conf.

main case.⁷⁵ Indeed, the extent to which the Defence could have investigated is questionable in circumstances where it appears not to have received full disclosure of all items relevant to that separate case, even now. It was for this reason that the Defence urged that the Article 70 allegations be adjudicated as a preliminary issue before trial commenced, a suggestion the OTP resisted.⁷⁶ However, the current approach which effectively seeks to inject the Article 70 case into the Article 7 case, despite repeated directions from the Chamber to exercise caution, is oppressive.⁷⁷

44. Mr. Ruto categorically denies that he is involved in any way in the interference of witnesses. There is no evidence before the Chamber directly linking Mr. Ruto to any Scheme.⁷⁸ Critically, there is evidence making it clear that he is not involved in any such scheme. For example: (i) [REDACTED] testified that there was no link between [REDACTED] activities and Mr. Ruto.⁷⁹ [REDACTED] testified that [REDACTED]⁸⁰ [REDACTED]⁸¹ against Mr. Ruto. This is consistent with evidence the OTP received, as early as 2010, that [REDACTED]⁸² (ii) [REDACTED]⁸³ (iii) [REDACTED] told the OTP that he had never had any dealings with Mr. Ruto;⁸⁴ and (iv) [REDACTED].⁸⁵ In the face of this evidence, it is surprising that the OTP chooses to rely on the most general and uncorroborated assertions based on speculation and hearsay.⁸⁶ Furthermore, the OTP rests its case of a “Scheme” upon the most unreliable of witnesses – [REDACTED] (see below).

⁷⁵ T-127, 31:20-25, 34:1-3

⁷⁶ ICC-01/09-01/11-683-Conf; ICC-01/09-01/11-692-Conf; ICC-01/09-01/11-T-23-CONF-ENG ET.

⁷⁷ T-23, 33:9-25; ICC-01/09-01/11-762, para.89; ICC-01/09-01/11-1625-Conf, paras.32, 34.

⁷⁸ As defined in Application, para.2.

⁷⁹ [REDACTED]

⁸⁰ [REDACTED]

⁸¹ [REDACTED]

⁸² [REDACTED]

⁸³ [REDACTED]

⁸⁴ [REDACTED]

⁸⁵ [REDACTED]

⁸⁶ [REDACTED]

45. The OTP couches its allegations by stating that the Scheme is “at the very least, acting for the benefit of the Accused.”⁸⁷ It is for the OTP to prove this. It has failed to do so. There is no direct evidence that [REDACTED] is a supporter or agent of Mr. Ruto. Further, Mr. Ruto receives no “benefit” by being denied the right to confront [REDACTED]. Neither does Mr. Ruto benefit from testimony that prosecution witnesses were coached or given pre-prepared statements by the OTP, as [REDACTED], for instance, testified.⁸⁸ The Defence position has been clearly put to witnesses, including [REDACTED]⁸⁹ and [REDACTED],⁹⁰ that it does not accept such a proposition. Witnesses who testify in these terms do not assist, but hurt, Mr. Ruto’s case.
46. Moreover, the OTP’s submissions about the purported “benefit” fail to appreciate that there is also a benefit to an accused in being able to clear his name in court. Mr. Ruto and the Defence, on Mr. Ruto’s instructions, have repeatedly made public pleas for the ICC to be given space to do its work and for witnesses not to withdraw but to come to court to speak the truth.⁹¹ The Defence has repeated these calls in Court, in the presence of Mr. Ruto.⁹² In addition, Defence Counsel have assured witnesses who appeared before the Chamber to testify truthfully, freely and without fear.⁹³
47. The OTP repeatedly asserts that [REDACTED] is acting on behalf of Mr. Ruto and/or the Defence. That assertion is categorically rejected by the Defence. In assessing the true position, it is relevant to note that the Defence has, at all times, sought to secure the integrity of the proceedings in order to ensure Mr. Ruto’s fair trial rights and as a function of being officers of the Court. Apart from the

⁸⁷ Application, para.2.

⁸⁸ [REDACTED]

⁸⁹ [REDACTED]

⁹⁰ [REDACTED]

⁹¹ ICC-01/09-01/11-782, para.5; T-26, 38:20-39:12; T-27, 48:17-49:25; T-45, 6:22-7:12; Annexes C.1, C.2, S.

⁹² T-27, 48:17-49:25.

⁹³ T-45, 6:22-7:12; T-133, 30:8-17; T-152, 60:2-15; T-185, 59:12-60:17; T-200, 36:7-37:10.

very many public declarations and statements referred to above, the Defence [REDACTED].⁹⁴ [REDACTED].⁹⁵ The Defence did not let matters lie. Rather, on 28 March 2014, Lead Counsel instructed that [REDACTED].⁹⁶ [REDACTED].⁹⁷ An objective, dispassionate and fair review of this sequence of events demonstrates that [REDACTED] was **not** acting on behalf of Mr. Ruto, contrary to the OTP's persistent submissions.

48. The Defence submits that all the OTP's allegations regarding the Scheme should be treated with caution because when the Defence has, of necessity, addressed the allegations, they have been shown to be unreliable. In this regard, it must be emphasized that the Defence confronted these allegations exclusively by utilising other prosecution evidence, rather than the products of its own investigations. The weakness of the interference case is demonstrated in the following section.

IV. Interference Allegations based on unreliable witnesses and information

A. General

49. At the outset, the Defence notes that the OTP has annexed to the Application a statement from [REDACTED] dealing with aspects of the Article 70 case. Whilst the Defence maintains that it has not had the opportunity or material ability to investigate the Article 70 case as it unfolds in the course of the present trial, certain brief observations must be made in relation to one issue. [REDACTED].⁹⁸ [REDACTED]. The Defence does not dispute that there are leaks and notes that OTP disclosures reveal that: (i) [REDACTED] clearly know, not only the names of [REDACTED], but also [REDACTED];⁹⁹ (ii) OTP witnesses have "good"

⁹⁴ [REDACTED]

⁹⁵ [REDACTED]

⁹⁶ [REDACTED]

⁹⁷ [REDACTED]

⁹⁸ [REDACTED]

⁹⁹ [REDACTED]

sources within the ICC who update them on [REDACTED];¹⁰⁰ (iii) OTP witnesses allege that ICC staff are engaged in sexual relations with witnesses ¹⁰¹ [REDACTED];¹⁰² and (iv) OTP witnesses allege ICC staff are being bribed by witnesses.¹⁰³ [REDACTED].¹⁰⁴ [REDACTED].

50. The OTP primarily relies on evidence provided by [REDACTED] and [REDACTED] to support its conclusion that the Rule 68 Witnesses were the subject of improper interference. [REDACTED]. In addition to their hearsay evidence, the OTP also sets great store by [REDACTED]. For the reasons detailed below, [REDACTED] and [REDACTED] are incapable of belief and cannot be relied upon for the purposes of establishing the necessary Rule 68(2)(d) conditions. Similarly, even a cursory analysis of the material disclosed for [REDACTED] shows that the allegations of interference are *prima facie* incredible.

B. [REDACTED]

51. [REDACTED] is a prosecution witness [REDACTED].¹⁰⁵

52. The Defence submits that, contrary to what is stated in paragraph 104 of the Application, [REDACTED] name was disclosed to the Defence only on [REDACTED] 2013, [REDACTED] before the commencement of this trial.¹⁰⁶ All the matters stated in paragraphs 105-107 of the Application, if they took place at all, occurred at a time when [REDACTED] was not even a witness in this case. The Defence repeats that the OTP assertion that Mr. Ruto interfered with witnesses is baseless. What is even more bizarre is the contention that Mr. Ruto would interfere with individuals who were not even prosecution trial witnesses like [REDACTED] (and [REDACTED]). The OTP does not allege that there were

¹⁰⁰ [REDACTED]

¹⁰¹ [REDACTED]

¹⁰² [REDACTED]

¹⁰³ [REDACTED]

¹⁰⁴ [REDACTED]

¹⁰⁵ [REDACTED]

¹⁰⁶ [REDACTED]

any attempts to “interfere” with [REDACTED] after [REDACTED] identity as a witness was disclosed to the Defence on [REDACTED] 2013, other than the allegations made in paragraphs 120-121 of the Application. Those assertions are, in any event, contradicted by OTP evidence as detailed below.

1. Background information

53. [REDACTED] was a PNU supporter [REDACTED] during the 2007 elections. [REDACTED] provided mostly hearsay evidence concerning any “linkage” evidence. Where [REDACTED] was able to provide any direct evidence about Mr. Ruto, [REDACTED] testimony was favourable. [REDACTED] testified that [REDACTED] a campaign rally at Mr. Ruto’s home on 14 December 2007 during which Mr. Ruto spoke to his constituents about development issues and asked them to vote for the ODM - there was nothing inciting in Mr. Ruto’s speech.¹⁰⁷ [REDACTED] testified that Mr. Ruto was supported by people from various communities, including Kikuyus and he had Kikuyus as part of his campaign team.¹⁰⁸ [REDACTED] testified, consistent with the Defence theory, that [REDACTED] and prosecution witnesses [REDACTED] and [REDACTED] were in a [REDACTED] funded witness protection programme overseen by [REDACTED] and that they were putting in false claims for money. Also consistent with the Defence theory, [REDACTED] testified that [REDACTED] heard that [REDACTED] made a lot of money through the witness protection programmes, and that he was using allegations of witness intimidation as a means of making money.¹⁰⁹
54. The Defence submits that [REDACTED] was one of the least “potent” prosecution witnesses against Mr. Ruto. In this regard, the Defence respectfully recalls the comments of the Presiding Judge at the conclusion of the OTP’s

¹⁰⁷ [REDACTED]

¹⁰⁸ [REDACTED]

¹⁰⁹ [REDACTED]

questioning that “it's one thing, of course, to receive hearsay on matters of community folk-law or background information, but when hearsay starts cutting close to suggestions of criminal responsibility, we would like to have that matter addressed, how we get around Article 67(1)(e) at some point.”¹¹⁰ The OTP submits that [REDACTED] provides “important linkage evidence”¹¹¹ – this is not true.

2. Credibility of [REDACTED] testimony about the PEV

55. The Defence submits that during [REDACTED] testimony, [REDACTED] gave false evidence on relevant and material issues.

56. [REDACTED]^{112 113 114}

57. On [REDACTED] testified, in an open session, that PNU rallies in Turbo were disrupted by ODM supporters.¹¹⁵ [REDACTED]¹¹⁶ [REDACTED]. On this aspect of [REDACTED] testimony, [REDACTED] said [REDACTED] that there was, in truth, no disruption of any rallies in Turbo.¹¹⁷ [REDACTED].¹¹⁸

58. [REDACTED]^{119 120 121 122 123 124 125 126}

¹¹⁰ [REDACTED]

¹¹¹ Application, para.104.

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]

¹²⁵ [REDACTED]

¹²⁶ [REDACTED]

3. Evidence of interference from [REDACTED] is unreliable

59. [REDACTED].¹²⁷ [REDACTED]¹²⁸ [REDACTED].¹²⁹ [REDACTED].¹³⁰ Reliable OTP evidence demonstrates that, together with other witnesses, [REDACTED] has deceived and attempted to defraud the ICC in order to get monetary benefits and relocation out of Kenya.¹³¹ In these circumstances, the Defence submits that [REDACTED] is a witness without a shred of credibility and [REDACTED] cannot be relied upon to sustain the present Application.
60. The OTP submits that [REDACTED] was a target of interference by members of the alleged "Scheme".¹³² This is contradicted by [REDACTED]. [REDACTED] testified that [REDACTED] had no interest in [REDACTED], that [REDACTED].¹³³ The OTP, relying on [REDACTED]¹³⁴ [REDACTED].¹³⁵ However, [REDACTED] informed the OTP that [REDACTED] did not make any approaches to [REDACTED]. [REDACTED].¹³⁶
61. There are further instances where [REDACTED] has given false and/or inaccurate information to the OTP about threats or attempts to influence [REDACTED] witnesses. [REDACTED].¹³⁷ Both allegations were false. [REDACTED]^{138 139}

¹²⁷ [REDACTED]

¹²⁸ [REDACTED]

¹²⁹ [REDACTED]

¹³⁰ [REDACTED]

¹³¹ [REDACTED]

¹³² Application, para.103.

¹³³ [REDACTED]

¹³⁴ Application, para.111.

¹³⁵ [REDACTED]

¹³⁶ [REDACTED]

¹³⁷ [REDACTED]

¹³⁸ [REDACTED]

¹³⁹ [REDACTED]

4. *Alleged attempts by [REDACTED] to interfere with [REDACTED]:*

*Evidence from [REDACTED] and [REDACTED]*¹⁴⁰

62. [REDACTED] and [REDACTED], colleagues in the PNU and [REDACTED].¹⁴¹ [REDACTED] and [REDACTED] remained “in regular contact” about the ICC cases, concerning the PEV and witness interference,¹⁴² with the knowledge of the OTP and they communicated through various phones [REDACTED].¹⁴³ The OTP does not have a log of all their communications [REDACTED]. The OTP does not have any independent, reliable evidence which corroborates the information it received from [REDACTED] and [REDACTED] about their interactions. [REDACTED],¹⁴⁴ [REDACTED].¹⁴⁵ [REDACTED] also reported to the OTP that [REDACTED] asked [REDACTED] to give false information to the OTP that [REDACTED].¹⁴⁶
63. The OTP relies on [REDACTED] statement, dated [REDACTED] 2014, and [REDACTED] statement, dated [REDACTED] 2013, to support its submissions at paragraphs 120-121 and 167 of the Application. These statements contradict each other in material respects.
64. [REDACTED]^{147 148 149 150 151 152}
65. Despite the fact that [REDACTED] had told the OTP that [REDACTED] and, importantly, reported the incident to the OTP months before [REDACTED] was interviewed about it, the OTP has chosen to rely on [REDACTED] account

¹⁴⁰ Application, paras.120-121, 167.

¹⁴¹ [REDACTED]

¹⁴² [REDACTED]

¹⁴³ [REDACTED]

¹⁴⁴ [REDACTED]

¹⁴⁵ [REDACTED]

¹⁴⁶ [REDACTED]

¹⁴⁷ [REDACTED]

¹⁴⁸ [REDACTED]

¹⁴⁹ [REDACTED]

¹⁵⁰ [REDACTED]

¹⁵¹ [REDACTED]

¹⁵² [REDACTED]

without any further investigation. [REDACTED] account remains unreliable.

66. There is simply no evidence that [REDACTED].¹⁵³ [REDACTED].¹⁵⁴

67. The OTP's submissions at paragraph 168 are also without merit. The incident referred to therein allegedly took place in [REDACTED] 2013. The first report that the OTP received about it was from [REDACTED] in [REDACTED] 2013 [REDACTED]. And it was months after that, in [REDACTED] 2014, that the OTP questioned [REDACTED] about the information it had received from [REDACTED]. The fact that [REDACTED] kept silent from [REDACTED] 2013 until [REDACTED] 2014 and only provided this information when confronted by the OTP casts some doubt on [REDACTED] credibility and the veracity of [REDACTED] account.

C. [REDACTED]

68. [REDACTED] is a prosecution Witness [REDACTED].¹⁵⁵ [REDACTED] to the OTP.¹⁵⁶ [REDACTED] evidence about the PEV is unreliable, inconsistent with other evidence in this case and [REDACTED] own previous statements or is altogether false.

69. [REDACTED] motivations for contacting the OTP, providing false information against Mr. Ruto [REDACTED] was for financial gain and relocation out of Kenya. From [REDACTED] 2010 until [REDACTED] 2012 ([REDACTED] prior to [REDACTED] contact with the OTP), [REDACTED] was in an all-expenses paid witness protection program in Kenya.¹⁵⁷ The program had run out of funds and [REDACTED] had no choice but to leave. [REDACTED].¹⁵⁸ Simultaneously, as [REDACTED] told the OTP that [REDACTED] was "desperate" and asked the

¹⁵³ Application, para.167.

¹⁵⁴ [REDACTED]

¹⁵⁵ [REDACTED]

¹⁵⁶ [REDACTED]

¹⁵⁷ [REDACTED]

¹⁵⁸ [REDACTED]

OTP to assist [REDACTED] to settle [REDACTED] debts.¹⁵⁹ [REDACTED] would receive a cut of any monies those witnesses might receive from the ICC.¹⁶⁰ At various points in [REDACTED] interactions with the OTP, [REDACTED] has requested to be relocated.¹⁶¹ [REDACTED] has requested that [REDACTED] also be relocated out of Kenya.¹⁶²

1. [REDACTED]

70. [REDACTED].¹⁶³ [REDACTED]

71. [REDACTED]^{164 165 166 167 168}

72. [REDACTED]¹⁶⁹ [REDACTED]

73. [REDACTED] because of lack of funds at [REDACTED] the OTP cautioned [REDACTED] to abide by VWU rules. Despite this warning, [REDACTED], without the knowledge of the OTP or the VWU, [REDACTED].¹⁷⁰

74. [REDACTED].¹⁷¹ [REDACTED] not satisfied with the amount of money [REDACTED] was receiving from the ICC [REDACTED].¹⁷² [REDACTED].¹⁷³ [REDACTED] repeatedly asked for money and continued to provide false information about security issues. One particular piece of OTP evidence is especially revealing in this regard: [REDACTED].¹⁷⁴

¹⁵⁹ [REDACTED]

¹⁶⁰ [REDACTED]

¹⁶¹ [REDACTED]

¹⁶² [REDACTED]

¹⁶³ Application, para.80.

¹⁶⁴ [REDACTED]

¹⁶⁵ [REDACTED]

¹⁶⁶ [REDACTED]

¹⁶⁷ [REDACTED]

¹⁶⁸ [REDACTED]

¹⁶⁹ [REDACTED]

¹⁷⁰ [REDACTED]

¹⁷¹ [REDACTED]

¹⁷² [REDACTED]

¹⁷³ [REDACTED]

¹⁷⁴ [REDACTED]

75. [REDACTED].¹⁷⁵ [REDACTED] continued playing truant and requesting money and benefits.¹⁷⁶ [REDACTED]. These included demands for: (i) [REDACTED] permanent relocation and for the ICC to pay; (ii) [REDACTED]; (iii) [REDACTED]; and (iv) [REDACTED].¹⁷⁷

2. Evidence of interference from [REDACTED] is unreliable

76. [REDACTED] is wholly unreliable and [REDACTED] who cannot be believed. There have been several instances when [REDACTED], like other OTP witnesses,¹⁷⁸ has given false information to the OTP about threats to [REDACTED], and about alleged attempts by Mr. Ruto to threaten or improperly influence [REDACTED]. For instance, on [REDACTED] 2012, [REDACTED] informed the OTP that in [REDACTED] 2010, Mr. Ruto phoned [REDACTED] and threatened [REDACTED].¹⁷⁹ On [REDACTED] 2014, [REDACTED] seems to have forgotten that false account, and told the OTP that [REDACTED] had never communicated with Mr. Ruto, and if [REDACTED] had, it *may* have been in 2003.¹⁸⁰

(i) [REDACTED]

77. [REDACTED].^{181 182 183}

78. [REDACTED]^{184 185}

79. [REDACTED].^{186 187 188 189}

¹⁷⁵ [REDACTED]

¹⁷⁶ [REDACTED]

¹⁷⁷ [REDACTED]

¹⁷⁸ [REDACTED]

¹⁷⁹ [REDACTED]

¹⁸⁰ [REDACTED]

¹⁸¹ [REDACTED]

¹⁸² [REDACTED]

¹⁸³ [REDACTED]

¹⁸⁴ [REDACTED]

¹⁸⁵ [REDACTED]

¹⁸⁶ [REDACTED]

80. [REDACTED].¹⁹⁰ [REDACTED]

**(ii) Evidence from [REDACTED] about interference of
[REDACTED]**

81. [REDACTED] has a history of providing false information to the OTP concerning [REDACTED] and “witness interference”. On [REDACTED] 2013, [REDACTED] reported to the OTP that [REDACTED] received information that [REDACTED] visited [REDACTED] home looking for [REDACTED] with a message that [REDACTED] had been sent by an agent of Mr. Ruto. [REDACTED] informed the OTP that, because of [REDACTED] visit, [REDACTED] family needed to leave [REDACTED] immediately and at the same time requested further financial assistance.¹⁹¹ A year later, on [REDACTED] 2014, [REDACTED] was asked about this incident. [REDACTED] told the OTP that [REDACTED] had come to stay at [REDACTED] home because [REDACTED]. [REDACTED] confirmed that that was the only purpose of [REDACTED] visit and that [REDACTED] did not come with any message or at the behest of anyone else.¹⁹²

(a) Alleged meeting between [REDACTED]

82. The Defence refers to the submissions at paragraph 92 of the Application. The Defence submits that the testimony of [REDACTED] that [REDACTED] was present at a meeting in [REDACTED] between [REDACTED] is unreliable and contradicts [REDACTED] previous account to the OTP that [REDACTED] has never been present in any meetings, at any stage between [REDACTED].¹⁹³

¹⁸⁷ [REDACTED]

¹⁸⁸ [REDACTED]

¹⁸⁹ [REDACTED]

¹⁹⁰ [REDACTED]

¹⁹¹ [REDACTED]

¹⁹² [REDACTED]

¹⁹³ [REDACTED]

(b) [REDACTED] told [REDACTED] that [REDACTED] was coached prior to testimony

83. The OTP relies on the evidence of [REDACTED] about an alleged conversation [REDACTED] had with [REDACTED] that: (i) [REDACTED] was coached by [REDACTED]; and (ii) they had decided to [REDACTED] through [REDACTED] testimony.¹⁹⁴ The OTP made every attempt to get confirmation that [REDACTED] the alleged [REDACTED]. Indeed, the OTP went to the extent of [REDACTED]. The OTP has not provided any disclosure that it attempted to obtain the [REDACTED]. Nor has information been provided that OTP-SRU has attempted to obtain [REDACTED].¹⁹⁵ The Defence submits that, just like the alleged [REDACTED], there is no evidence that [REDACTED]. Further, the manner in which [REDACTED] reported [REDACTED] the events that followed cast doubt on the veracity of the whole account.

(iii) Evidence from [REDACTED] about interference of [REDACTED]

84. [REDACTED] has a history of providing false information to the OTP about threats and/or attempts to interfere with [REDACTED]. On [REDACTED] 2013, during a phone call at 13:50, [REDACTED] informed the OTP that a black car full of men pulled up outside [REDACTED] home in [REDACTED], that these men were looking for [REDACTED] to make [REDACTED] recant, and that the men were also looking for [REDACTED] as they knew [REDACTED] was [REDACTED].¹⁹⁶ Four hours later, [REDACTED] told the OTP that the people in the vehicle were actually from the bank, were looking for [REDACTED] and that the whole incident was completely unrelated to the ICC.¹⁹⁷

¹⁹⁴ Application, para.135.

¹⁹⁵ [REDACTED]

¹⁹⁶ [REDACTED]

¹⁹⁷ [REDACTED]

(a) [REDACTED] and [REDACTED] were taken to [REDACTED] and [REDACTED] was given money

85. Paragraphs 149 and 150 of the Application are contradicted by information the OTP received from [REDACTED]. [REDACTED].¹⁹⁸
86. [REDACTED] corroborates the information that [REDACTED] gave the OTP on [REDACTED] 2013 as stated in the above paragraph. [REDACTED].¹⁹⁹
87. The OTP states that evidence of interference with [REDACTED] implicates *inter alia* [REDACTED].²⁰⁰ The OTP has not provided any reliable evidence of any attempts by [REDACTED] to influence [REDACTED]. [REDACTED] told the OTP on [REDACTED] 2013 that [REDACTED] had met with [REDACTED] and [REDACTED].²⁰¹ [REDACTED], however, informed the OTP that [REDACTED] has had no contact whatsoever with [REDACTED].²⁰² [REDACTED] testified that [REDACTED] has never met or had any dealings with [REDACTED] or [REDACTED].²⁰³ [REDACTED] further informed the OTP that [REDACTED] does not know of any person who has had any dealings with [REDACTED] to withdraw from the case.²⁰⁴
88. [REDACTED] testified that [REDACTED] does not have any relationship with Mr. Ruto, nor has he had any contact with Mr. Ruto.²⁰⁵

(iv) [REDACTED]

89. [REDACTED]²⁰⁶ [REDACTED] has nothing to do with the case against Mr. Ruto. [REDACTED]. Importantly, neither document makes any reference to the case against Mr. Ruto, [REDACTED].

¹⁹⁸ [REDACTED]

¹⁹⁹ [REDACTED]

²⁰⁰ Application, para.79.

²⁰¹ [REDACTED]

²⁰² [REDACTED]

²⁰³ [REDACTED]

²⁰⁴ [REDACTED]

²⁰⁵ [REDACTED]

90. [REDACTED].

D. [REDACTED]

91. Just like the other witnesses, [REDACTED] was a PNU supporter.²⁰⁷ The Defence has not had the opportunity to investigate the veracity of the allegations in [REDACTED] statement²⁰⁸ and is only able to make limited observations based on OTP information. First, [REDACTED] is not a prosecution witness. [REDACTED] sought²⁰⁹ to participate as a victim at the pre-trial stage as [REDACTED], but [REDACTED] application was rejected.²¹⁰ On [REDACTED] 2012, [REDACTED] was screened by the OTP and provided no incriminatory information about Mr. Ruto.²¹¹

92. The behaviour of the witness, as detailed in [REDACTED] statement is, for the lack of a better word, peculiar. The scenario is as follows. [REDACTED].^{212 213 214}

215 216

93. It is quite apparent that, [REDACTED] being eager to be part of the ICC cases and being told [REDACTED] 2008 was outside the scope of the charges in this case, looked for other means to make [REDACTED] relevant and inject [REDACTED] into the ICC cases. [REDACTED] persistence apparently paid off and [REDACTED] caught the attention of the ICC when [REDACTED] managed

²⁰⁶ [REDACTED]

²⁰⁷ [REDACTED]

²⁰⁸ [REDACTED]

²⁰⁹ [REDACTED]

²¹⁰ [REDACTED]

²¹¹ [REDACTED]

²¹² [REDACTED]

²¹³ [REDACTED]

²¹⁴ [REDACTED]

²¹⁵ [REDACTED]

²¹⁶ [REDACTED]

to [REDACTED]²¹⁷ said to support [REDACTED] allegations of witness interference.

94. [REDACTED]

95. On the face of it, this [REDACTED] alone should have raised alarm bells that further inquiries into the motives and reliability of [REDACTED] were needed. [REDACTED] account is anything but “compelling”.²¹⁸ There is no explanation in the OTP statements as to the necessity for these [REDACTED], when [REDACTED] claims that [REDACTED]. There are no [REDACTED]. The OTP has not provided the Defence with any proof of [REDACTED] or any explanation for the [REDACTED], let alone a plausible one. It appears that [REDACTED] was [REDACTED] as part of [REDACTED] quest to become relevant to the OTP. It is curious that, despite claiming to have [REDACTED], 5,000 Ksh sent to [REDACTED] by the OTP remains unaccounted for and [REDACTED] asked for [REDACTED] Ksh from the OTP for a trip that would cost [REDACTED] Ksh at the most.²¹⁹

96. [REDACTED].²²⁰ [REDACTED].²²¹ [REDACTED].²²² [REDACTED],²²³ [REDACTED].²²⁴ [REDACTED].²²⁵ The OTP does not have any evidence that such documents even exist. [REDACTED]. Again, [REDACTED] does not have or cannot provide [REDACTED].²²⁶ Despite all this, the OTP relies on and refers to [REDACTED] in the Application.

²¹⁷ [REDACTED]

²¹⁸ Application, para.124.

²¹⁹ [REDACTED]

²²⁰ [REDACTED]

²²¹ [REDACTED]

²²² [REDACTED]

²²³ [REDACTED]

²²⁴ [REDACTED]

²²⁵ [REDACTED]

²²⁶ [REDACTED]

97. [REDACTED].²²⁷ [REDACTED].

98. As of [REDACTED] is in the ICC witness protection programme and [REDACTED].²²⁸

99. The foregoing analysis, based largely on the OTP's own disclosures, demonstrates that the allegations of interference should be treated with great caution.

V. The Rule 68(2)(d) conditions are not satisfied: General submissions

100.If, *arguendo*, the Chamber determines that amended Rule 68(2)(d) does not breach Article 51(4), a further preliminary concern arises about the amended Rule's application to this case.

101.Rule 68(2)(d)(i) provides that prior recorded testimony may only be introduced if "the person has failed to attend as a witness or, having attended, has failed to give evidence with respect to a material aspect included in his or her prior recorded testimony". The Defence submits that the OTP has not established that the Rule applies at all in the present circumstances. This is because all the Rule 68 Witnesses, save for [REDACTED], have: (i) not failed to attend as witnesses; and (ii) have not failed to give evidence with respect to a material aspect included in their Prior Recorded Testimony. More specifically, it is not the case that witnesses have refused to give evidence in relation to material subjects covered in their original accounts. They have given evidence on those very areas but have stated that the information provided in their unsworn statements was false. The Defence submits that the first precondition of Rule 68(2)(d)(i) does not permit the parties to admit prior recorded testimony in circumstances where the witness attends and there is a departure between what was said out of court and

²²⁷ [REDACTED]

²²⁸ ICC-01/09-01/11-1850-Conf-Red, para.36.

what was said under oath. The drafters could have included such an express condition if this was intended. Crucially, they did not.

102. Separate to issues of applicability, the Application should be dismissed because it fails to satisfy essential requirements of Rule 68(2)(d). An analysis of these requirements generally and their application to all Rule 68 Witnesses follows.²²⁹ Witness specific analyses are provided in Sections VI and VII.

103. Prior to an analysis of Rule 68(2), it is important to recall that Rule 68(1) includes an overarching direction that, in addition to satisfaction of the requirements of the sub-rules, the prior recorded testimony can only be introduced if it would not be prejudicial or inconsistent with the rights of the accused.

A. Failure to give evidence not materially influenced by improper interference

104. Before an application under Rule 68(2)(d)(i) may be granted it must be established that there is not simply evidence of interference but crucially that “the failure of the person...to give evidence has been materially influenced by improper interference.” A fundamental flaw in the Application is the OTP’s failure to establish this crucial link to any standard and to focus myopically on establishing the alleged interference alone. The result is that the OTP asks the Chamber to accept that the bare fact of interference materially influenced the witnesses’ disavowal of their unsworn, hearsay statements.²³⁰ This conclusion is reached without any attempt at testing the original account and ignoring the totality of the evidence on the record, which includes questioning by the Defence. This is a simplistic, unfair and wholly erroneous way of attempting to satisfy the second requirement of Rule 68(2)(d)(i).

²²⁹ Only the requirements of Rules 68(2)(c) and 68(2)(d) with which issue is taken are considered.

²³⁰ The Prior Recorded Testimony is uncorroborated as regards the evidence directly incriminating Mr. Ruto.

105. To determine whether improper interference materially influenced the failure to give evidence in line with the original statement,²³¹ some scrutiny of the original account against objective evidence is required. This is because, even if interference were, for the sake of argument, to be accepted, one explanation why the recanting witnesses did not support their original accounts is because the original evidence is untrue. Witnesses are not required to stick to a false narrative but to testify truthfully under oath. Despite the Defence repeatedly urging the OTP to address the veracity of the original accounts of the recanting witnesses via independent, objective evidence, it failed to do so.²³² Indeed, the OTP did not even try. It is submitted that this failure is because the OTP did not take the most basic steps to investigate its witnesses. For example, it appears cross-checks of what witnesses say Mr. Ruto was doing in the midst of an extensively covered election campaign against media sources such as newspapers, television and radio were not performed, nor were phone records obtained to provide support for a witness' assertion that s/he was in a particular location at a particular time. [REDACTED].²³³ As Defence counsel articulated: "the Prosecution are saying, 'We, the Prosecution, say [the witness] is undesirous of telling the truth,' but they can't put their finger on what the truth is".²³⁴

106. Instead, it was left to the Defence to confront the witnesses' original accounts. The result is that the evidence discussed in Section VI establishes that the reason why the recanting witnesses failed to testify in line with their original statements/transcripts is because the original evidence is untrue. The OTP's failure to satisfy this essential element of Rule 68(2)(d)(i) means the Application should be dismissed.

²³¹ The Defence recalls, as argued above, that the witnesses did give evidence on the topics covered in their original statements, this evidence was just not in line with the original account.

²³² T-131, 89:4-90:24; T-132, 45:2-20; T-133, 26:20-27:4, 29:1-11, 80:1-82:7, 101:24-102:17; T-139, 8:24-10:8; T-144, 26:15-28:1.

²³³ [REDACTED]

²³⁴ T-144, 27:2-4.

B. The Prior Recorded Testimony lacks sufficient indicia of reliability

107. Another essential element of admissibility is that the Prior Recorded Testimony has “sufficient indicia of reliability”.²³⁵ It is not for the Defence to prove that the testimony lacks such indicia, but for the OTP to demonstrate that it has. The OTP has failed to do so.

108. In the Application, the OTP limits the reliability inquiry primarily to the four corners of the statement.²³⁶ This approach is advocated of necessity because the OTP is incapable of producing any evidence to support the key incriminatory elements of each of the Rule 68 Witnesses’ statements/transcripts. However, this narrow approach is not supported by international or domestic jurisprudence which establishes that, even at the admissibility stage, a broad range of factors should be taken into account. It also runs counter to the OTP’s position in the *Lubanga* case. In addition, the assertion that the simple fact of interference indicates that the witnesses “had reliable and important evidence regarding the Accused in his possession”²³⁷ should be rejected as speculative, unsupported by any jurisprudence and contradicted by the example of [REDACTED], an individual allegedly interfered with despite not being a witness in this case.²³⁸

109. The phrase “indicia of reliability” has been judicially considered in relation to hearsay statements at this Court, a fact the OTP fails to address. In *Lubanga*, Trial Chamber I approved the ICTY’s “indicia of reliability” test – which includes whether the evidence is “voluntary, truthful and trustworthy” and a consideration of “both the content of the hearsay statement and the circumstances under which the evidence arose”²³⁹ – as a helpful tool.²⁴⁰ However,

²³⁵ Rule 68(2)(d)(i).

²³⁶ Application, paras.144-145. Also paras.163, 177, 197, 212, 234-235.

²³⁷ Application, para.145. Also para.235.

²³⁸ Application, para.123.

²³⁹ ICC-01/04-01/06-1399, para.28 citing to *Prosecutor v. Aleksovski*, IT-95-14/1, 16 February 1999, para.15.

²⁴⁰ ICC-01/04-01/06-1399, para.29.

the Chamber also assessed reliability objectively by considering factors which showed that: (i) there had been opportunities for cross-checking the documents' contents, thereby identifying errors; and (ii) the documents were internally consistent and seemingly corroborated by the witness statement.²⁴¹

110.The OTP's narrow approach also smacks of expediency. In *Lubanga*, the OTP argued, in response to a defence request for the admission of a prior written statement and related documents during the appeal phase of proceedings, that "Rule 68 presupposes a minimum probative value and quality that can be accorded to the documents before they will be allowed in as evidence."²⁴² In relation to the statements and documents at issue, the OTP argued that: (i) "serious concerns about the unreliability of the two documents are further heightened" because "the information contained in [them] is not corroborated by other evidence on the record"; and (ii) the statement lacked the indicia of reliability needed to satisfy Rule 68(2)(c)²⁴³ because, *inter alia*, it lacked detail and only made bald assertions with little or no verifiable independent support.²⁴⁴

111.A broad approach to threshold reliability is also taken at the ICTY. The ICTY's jurisprudence shows that "indicia of reliability" is assessed by reference to various factors which provide circumstantial guarantees of trustworthiness such as whether the statement was given under oath, whether it is corroborated, whether it was subject to cross-examination, whether an unsworn statement, never subjected to cross-examination, relates to events about which there is other evidence, and "other additional factors" such as the absence of inconsistencies.²⁴⁵ An assessment of *prima facie* reliability at the ICTY is not limited to "the

²⁴¹ ICC-01/04-01/06-1399, paras.37, 40.

²⁴² ICC-01/04-01/06-3091, para.14.

²⁴³ The requirement that the prior recorded testimony have "sufficient indicia of reliability" is common to Rules 68(2)(c) and 68(2)(d).

²⁴⁴ ICC-01/04-01/06-3091, paras.11, 14.

²⁴⁵ *E.g., Prosecutor v. Kordić & Čerkez*, IT-95-14/2-AR73.5, 21 July 2000, para.27; *Prosecutor v. Milutinović et al.*, IT-05-87-T, 16 February 2007, para.7; *Prosecutor v. Prlić*, IT-04-74-T, 14 January 2008, para.11.

circumstances in which [the prior recorded testimony] was made and recorded” alone.²⁴⁶ The appropriateness of a broad inquiry, even at the admission stage, is also supported by domestic jurisprudence where the same reliability concerns arise when deciding whether to admit a hearsay statement for the truth of its contents. In short, “all relevant factors should be considered including...the presence of supporting or contradictory evidence.”²⁴⁷

112.The need to consider “all relevant factors” is particularly necessary where the hearsay evidence is central to the Prosecution case. This is because the more central it is, the greater the need to ensure its reliability.²⁴⁸ While this consideration generally arises where the evidence is untested, as with [REDACTED], it should also play a role in assessing the reliability of all the Rule 68 Witnesses’ evidence. In practical terms, what this means is that “[i]f it is the [Prosecution] which is seeking to adduce the evidence, and if the evidence is important to the case, the judge is entitled to expect that...full inquiries have been made as to the witness’ credibility”.²⁴⁹ The reality is that, notwithstanding the evidence’s centrality and the fact that the OTP bears the burden of proof, the OTP has failed to make even the most basic inquiries into the veracity of the original accounts and has, therefore, failed to establish *prima facie* reliability.²⁵⁰

113.In light of the foregoing, the following factors should, as a minimum, be considered when assessing reliability, an analysis of which reveals that the statements/transcripts at issue do not bear sufficient indicia of reliability.

²⁴⁶ *Contra* Application, para.142.

²⁴⁷ *R v. Khelawon*, [2006] 2 SCR 787 at 794. *See also*: (i) *Riat (Jaspal)*, *supra*, para.25 and Criminal Justice Act 2003, section 116(4) (England & Wales); (ii) Evidence Act 2006, sections 16(1), 18(1) (New Zealand); (iii) Law of Evidence Amendment Act 45 of 1988, section 3 (South Africa).

²⁴⁸ *R v. Y*, [2008] 1 Cr.App.R 34, para.59; *R v. Ibrahim*, [2012] 2 Cr.App.R. 32, para.91; *Riat (Jaspal)*, *supra*, para.18.

²⁴⁹ *Riat (Jaspal)*, *supra*, para.18.

²⁵⁰ *E.g.*, *infra*, para.169, the OTP has not verified where [REDACTED] lived during the PEV.

1. Insufficient measures available to ensure the truthfulness of a statement

114. Notwithstanding the broadening of Rule 68, no concomitant change was made to the mechanisms available at this Court to try to ensure that witnesses tell the truth during the statement taking process save in respect of Rule 68(2)(b) which relates to testimony going to proof of a matter other than the acts and conduct of the accused. None of the statements/transcripts at issue, which do go to proof of the acts and conduct of the accused, were given under oath²⁵¹ and the witnesses are not liable to criminal prosecution for giving false statements.²⁵² While the oath and availability of sanctions do not guarantee that witnesses will tell the truth, that they have some value and serve some purpose is demonstrated by the provisions of Rule 68(2)(b) which require a “declaration by the testifying person that the contents of the prior recorded testimony are true and correct to the person’s knowledge and belief.”²⁵³ This declaration must be witnessed.²⁵⁴ The absence of an oath and sanctions highlights the weakness of relying on the honesty of a witness alone, particularly where, as here, that is the nub of the issue.²⁵⁵ It also indicates the need to consider objective factors when assessing reliability. The fact that the witnesses did not expect to be held to account for their untrue statements is underlined by [REDACTED] who testified that when [REDACTED] gave [REDACTED] original statement [REDACTED] did not think [REDACTED] would have to come to court to testify.²⁵⁶

115. The absence of the oath and availability of sanctions in the statement taking process is of particular concern in the present case where all the Rule 68 Witnesses, save [REDACTED], have materially departed from their original statements and have testified under oath and under penalty of Article 70

²⁵¹ See, e.g., *Prlić et al.*, *supra*, para.11; *Milutinović et al.*, 16 February 2007, *supra*, para.7; *Prosecutor v. Naletilić et al.*, IT-98-34-T, 27 February 2002.

²⁵² cf. Canada, *B (K.G.)*, *supra*, p.828; England & Wales, Criminal Justice Act 1967, s.89.

²⁵³ Rule 68(2)(b)(ii).

²⁵⁴ Rule 68(2)(b)(iii).

²⁵⁵ cf. Application, para.144.

²⁵⁶ [REDACTED]

sanction that their original accounts are untrue. In this situation, “the reliability concern is sharpened” because the Chamber is being “asked to choose between two statements from the same witness, as opposed to other forms of hearsay in which only one account from the declarant is tendered.”²⁵⁷ Specifically, the OTP is asking the Chamber to accept the unsworn, disavowed, out-of-court statements/transcripts over the sworn testimony of the witness. In this situation, given the usual premium placed on in-court testimony,²⁵⁸ the reliability of the out-of-court statement becomes crucial and underlines that an assessment of even *prima facie* reliability cannot be limited to the four corners of the statement.²⁵⁹

2. Circumstances in which the statements/transcripts were made and recorded

116. The mere fact that the Prior Recorded Testimony was given voluntarily and taken by members of the OTP in compliance with the conditions set out in Rules 111(1) and/or 112 does not provide sufficient indicia of reliability in this case.²⁶⁰ Despite the availability of various measures to preserve evidence in its most reliable form, statements rather than full interview transcripts were produced for all the witnesses, save [REDACTED]. To the Defence’s knowledge, none of the interviews (save for [REDACTED]) were audio or video recorded. Further, no investigator has been called to explain how OTP statements are taken.²⁶¹ As a result, it cannot be said with any certainty that all the information imparted during the interviews has been fully and accurately recorded in the statements.²⁶² This is significant because the Defence is in possession of evidence which indicates that OTP statements are, at best, incomplete and, at worst, selective, omitting important exculpatory evidence.

²⁵⁷ *B (K.G.)*, *supra*, p.786-787.

²⁵⁸ Statute, Article 69(2). cf. ICTY - the express reference to the principle of orality in the Rules was repealed.

²⁵⁹ *Khelawon*, *supra*, p.810.

²⁶⁰ Application, paras.144, 163, 177, 197, 212, 234.

²⁶¹ *E.g.*, there is no information about how long a witness was given to read/revise their statement before signing.

²⁶² *R v. B (K.G.)*, *supra*, p.828.

117. The audio recordings of the OTP's 2010 interviews with [REDACTED] were disclosed to the Defence. No transcripts were disclosed because the interviews were conducted pursuant to Rule 111. Instead, a signed statement was produced.²⁶³ The Defence asked the OTP on two occasions whether transcripts of the audio were available and was told they were not.²⁶⁴ Accordingly, the Defence prepared the necessary transcripts.²⁶⁵ A comparison of the transcripts with the information recorded in (or omitted from) the statement²⁶⁶ reveals that there are serious defects in the statement that raise profound questions about the reliability of OTP statements and whether they are "fit for purpose".²⁶⁷ The comparison shows that exculpatory evidence is repeatedly omitted from the statement. Similarly, material inconsistencies are not recorded in the statement even when these are crucial and cast doubt on the veracity and reliability of the witness's account. The result is that the statement is not an accurate distillation of what the witness actually said during the interview. The Defence submits that the implications raised by the comparison exercise are far wider than [REDACTED] and impact the reliability of all OTP statements and the processes by which they are taken. In this context, this Chamber must have serious concerns about whether to exercise its discretion to admit the Prior Recorded Testimony when no recordings are available to verify the accuracy of the statements.

118. Throughout the Application, the OTP points to the detail provided by the witnesses in their statements as an indicator of the truthfulness and reliability of the accounts.²⁶⁸ But this argument is misconceived. The reliability of the statements remains open to question no matter the detail because the manner in

²⁶³ [REDACTED]

²⁶⁴ [REDACTED]

²⁶⁵ [REDACTED]

²⁶⁶ [REDACTED]

²⁶⁷ Annex E.4: Comparison chart.

²⁶⁸ Application, paras.137, 159, 160, 208.

which the details came to be produced is unknown, given that there is no audio or video recording of the interviews save for [REDACTED]. Detail in a statement can be the product of the questioning, provoking honest, as well as dishonest, details. Answers may be spontaneous or the result of a series of leading questions. Similarly, detail can evolve over time in a manner that casts doubt over its reliability. Without an audio/video recording or transcript of the OTP interview, a curtain is effectively drawn over the entire process that removes from view important circumstances as to how an account is given that is indispensable to an assessment of reliability, critical in circumstances where the OTP is seeking to rely upon the unsworn account for the truth of its contents.

119. As far as detail *simpliciter* being an indicia of reliability, the Defence submits that this contention can be given short shrift: We have all had experience in other cases of detailed, even very highly detailed, accounts in statements being later found to be concocted and false. Indeed, in the present case, [REDACTED], a witness whose evidence was relied upon at confirmation, provided a statement of 174 paragraphs but was withdrawn by the OTP as “unreliable”.²⁶⁹ [REDACTED] provides another glaring example of where a witness gave a vivid and detailed account that was absolutely false and contradicted by prosecution evidence. [REDACTED] account about the killings in Turbo whereby [REDACTED] gave an account of seeing more than 200 dead bodies will be recalled by the Trial Chamber.²⁷⁰ A review of the transcripts of the OTP interview of that witness demonstrates how the account evolved by virtue of incremental as opposed to open questioning.

120. Furthermore, the fact that none of the interviews were video recorded means the Chamber does not have access to the full range of non-verbal indicators that are indispensable, or at least very helpful, in assessing the reliability and credibility

²⁶⁹ T-114, 50:2-5.

²⁷⁰ [REDACTED]

of the witness at the time [REDACTED] was giving the information that the OTP now seeks to admit for the truth of its contents.

121. Another factor which courts consider as part of the reliability assessment in hearsay cases – whether the statement was given contemporaneously with the events in question – is also not present in the Prior Recorded Testimony.²⁷¹ All the statements/transcripts were made at least 5 years after the PEV.

122. In sum, nothing in the basic mechanics of the OTP's interview process provides sufficient comfort of the *prima facie* reliability of the hearsay statements.

3. Absence of corroboration, presence of contradicting evidence

123. The existence of supporting evidence is used as another effective indicator of the *prima facie* reliability of hearsay evidence because it reduces the risk of “deliberate untruth and innocent mistake”.²⁷² The OTP recognises the necessity of corroboration when concerns about the truthfulness of a witness arise but selectively only advocates for its presence when assessing the truthfulness of Article 70 evidence and not when assessing the reliability of Article 7 evidence.²⁷³ As argued above, this stance is borne out of necessity due to the OTP's failure to properly investigate the reliability of the evidence on which its main case is founded. As discussed, it also advocated for the presence of corroboration in *Lubanga*. One of the most glaring features of the Prior Recorded Testimony is the OTP's inability to provide any form of corroboration for the linkage evidence therein incriminating Mr. Ruto. Instead, the Application is almost entirely devoted to allegations emanating from the Article 70 case which is only one element of the Rule 68(2)(d) inquiry. Tellingly, there are only two substantive references to corroboration in the Application, an unsupported statement that

²⁷¹ E.g., ICC-01/04-01/06-1399, para.38; *Prosecutor v. Naletilić et al.*, *supra*; Australian uniform Evidence Act 1995, sections 65, 66.

²⁷² *Riat (Jaspal)*, *supra*, para.6. Also ICC-01/04-01/06-1399, para.40; *Prosecutor v. Milutinović et al.*, IT-05-87-T, 16 February 2007, para.7; *Khelawon*, *supra*, p.94

²⁷³ Application, paras.157, 168.

[REDACTED] corroborates [REDACTED] and a footnote which refers to crimebase evidence and meetings not attended by Mr. Ruto.²⁷⁴

124. The risk that the Rule 68 Witnesses' original accounts are inherently unreliable is compounded by the existence of contradictory evidence much of which is part of the trial record. As detailed in Sections VI and VII, the contradictions are significant, in many cases demonstrated via evidence obtained from independent sources, and inevitably lead to the conclusion that the Prior Recorded Testimony "is demonstrably lacking any apparent reliability".²⁷⁵

4. Motivation

125. A proper analysis of *prima facie* reliability should extend to a witness' motivations and opportunities for collusion.²⁷⁶ The OTP's analysis on this point is superficial and extends to a simple statement that each witness "had no apparent reason to be untruthful".²⁷⁷ This statement fails to take account of information provided in OTP disclosures and on the record that: (i) witnesses stood to gain considerable benefits, financial and otherwise, by becoming OTP witnesses; (ii) each witness was a PNU supporter; and (iii) the majority of the Rule 68 Witnesses knew each other and other trial witnesses.

126. The difficult economic circumstances faced by all the Rule 68 Witnesses before they became OTP witnesses is detailed in the next Sections. However, additional support for the fact that their primary motive was money is provided by the fact that [REDACTED]²⁷⁸ withdrew their cooperation from the Court due to dissatisfaction with the benefits they were receiving. It is the OTP's case, in fact, that these witnesses later accepted money from the Scheme as a substitute for

²⁷⁴ Application, para.235, fn.389.

²⁷⁵ ICC-01/04-01/06-1399, para.30.

²⁷⁶ E.g., ICC-01/04-01/06-1399, para.37; *Riat (Jaspal)*, *supra*, paras.6, 25.

²⁷⁷ Application, paras.144, 163, 177, 197, 212, 234.

²⁷⁸ [REDACTED]

the subsistence they were receiving from the Court.²⁷⁹ These circumstances underline the need for an objective indicator of reliability such as corroboration to be present before the witnesses' in-court testimony can be rejected and any hearsay evidence originating from such witnesses admitted for the truth of its contents.

127. One of the most striking features of the Rule 68 Witnesses is the links between them. Therefore, the assertion that the witnesses referred to in the Application "in some cases came from different regions and had no prior knowledge of each other" beggars belief.²⁸⁰ A few examples of the links follow.

128. [REDACTED] as other PNU supporters, now prosecution witnesses, [REDACTED].^{281 282 283 284}

129. [REDACTED].^{285 286 287}

5. Cross-examination

130. Finally, it is uncontroversial that cross-examination is an opportunity to test the trustworthiness of the Prior Recorded Testimony.²⁸⁸ However, not only has the Defence not been able to test [REDACTED] evidence, but in respect of the remaining Rule 68 Witnesses, the OTP fails to address the stark fact that cross-examination produced facts and material that supports the witnesses' in-court testimonies that key portions of their original accounts are false. The reliability assessment requires that regard must be had not only to the fact, but the product of cross-examination. One half of a witness' in-court testimony cannot simply be

²⁷⁹ [REDACTED]

²⁸⁰ Application, para.72.

²⁸¹ [REDACTED]

²⁸² [REDACTED]

²⁸³ [REDACTED]

²⁸⁴ [REDACTED]

²⁸⁵ [REDACTED]

²⁸⁶ [REDACTED]

²⁸⁷ [REDACTED]

²⁸⁸ Application, para.145.

jettisoned because it is inconvenient to the OTP. These are witnesses whose ability to tell the truth at any time is clearly questionable. Therefore, the totality of their in-court testimony must be considered as part of any reliability assessment of the unsworn statement to be admitted for the truth of its contents.

Conclusion

131. The above analysis of the various factors which should be used to test and evaluate reliability demonstrates that the Prior Recorded Testimony does not have sufficient indicia of reliability for admission. The witness specific analyses below provide further support for this conclusion.

C. The Prior Recorded Testimony goes to proof of the acts & conduct of Mr. Ruto

132. The Application concerns “linkage” witnesses²⁸⁹ who each provide unsworn hearsay evidence, uncorroborated in respect of the evidence directly implicating Mr. Ruto, and going to the acts and conduct of the accused. Pursuant to Rule 68(2)(d)(iv), the fact that the Prior Recorded Testimony is necessary for the OTP to prove its case²⁹⁰ and goes to proof of the acts and conduct of the accused is a factor which militates against its introduction. Put simply, the Application reveals that the Prosecutor is seeking to prove the central element of her case almost entirely by adducing prior unsworn hearsay statements.

133. The membership, creation, development, and operation of the alleged “Network” are the building blocks of the OTP’s case against Mr. Ruto. The alleged Network is referred to throughout the confirmation decision and its existence is essential to satisfy the contextual elements of crimes against humanity and to establish Mr. Ruto’s individual criminal responsibility.²⁹¹ It appears that evidence relating to this vital element of the OTP’s case is to be provided by unsworn, hearsay statements, disavowed by all but one witness

²⁸⁹ Application, paras.131, 147, 165, 179, 200, 215.

²⁹⁰ Application, para.52.

²⁹¹ ICC-01/09-01/11-373, paras.161-221, 301-349.

and, in the case of this latter witness, [REDACTED] evidence is untested.²⁹² The scale of this material, in addition to its importance, must be taken into account when viewed against the fact that there is so little “Network” evidence currently available to the OTP.

134. The Defence is not aware of any case at the international or national level where hearsay evidence, on such a scale, has been admitted for the truth of its contents. As argued above, the importance of the evidence is a factor which is central to assessing reliability.²⁹³ The evidence produced by the Defence during cross-examination, and as part of this response, establishes that the main incriminatory elements of the Prior Recorded Testimony, while central to the OTP’s case, are manifestly unreliable and, thus, should not be admitted.

D. Not in the interests of justice to introduce the Prior Recorded Testimony

135. Central to the “interests of justice” limb of Rule 68(2)(d) is the concern that the Chamber has before it all the evidence that it considers necessary for it to be able to discharge its truth finding function. In this regard, it is related to the assessment of the reliability of the evidence.²⁹⁴ The Defence has demonstrated in Court, and in this response, that the Prior Recorded Testimony lacks sufficient indicia of reliability and will not aid the Chamber to determine the charges. The Chamber has observed that for reasons of efficiency, a balance must be struck in relation to hearsay evidence so that it does not saturate the record.²⁹⁵ Therefore, in the interests of fairness and efficiency, the Prior Recorded Testimony should not be admitted.

136. Related to the foregoing are the OTP’s misconstrued complaints that it has been “deprived” of evidence and requires to be “compensated” for its loss by the

²⁹² Application, paras.132, 148, 166, 201.

²⁹³ *Supra*, para.112.

²⁹⁴ ICTY Rule 92*quinqies*(B)(ii) provides that the interests of justice include the reliability of the statement or transcript, having regard to the circumstances in which it was made and recorded.

²⁹⁵ T-62, 39:25-40:11.

admission of the Prior Recorded Testimony.²⁹⁶ Again, such complaints only have merit if they relate to evidence which has been shown to be *prima facie* reliable. As demonstrated in this response, the complaints do not have merit. In addition, the OTP was not deprived of evidence. [REDACTED] out of the [REDACTED] witnesses at issue testified. The OTP had the opportunity of demonstrating the reliability of the original statements. It made no effort to do so. Instead, it focused its examination on the alleged interference and eschewed questions on the veracity of the PEV allegations. The examination in court, particularly where the tool of cross-examination has been afforded to the OTP, is supposed to serve a meaningful purpose and not simply be viewed as a procedural stepping stone to making an application under Rule 68. In these circumstances, the Defence submits that it is not in the interests of justice to admit the prior testimony for the truth of its contents.

137. The OTP's argument, that the interests of justice are best served by the admission of the Prior Recorded Testimony because the interference has been carried out "for the benefit of the Accused" and "on their behalf", is also without merit.²⁹⁷ The OTP has failed to prove, save by hearsay and speculation, that the Scheme has any connection to or is seeking to benefit Mr. Ruto. At the ICTY, this is a relevant factor. Rule 92*quinqüies* provides that the interests of justice include consideration of "the apparent role of a party or someone acting on behalf of a party to the proceedings in the improper interference". It is acknowledged that the *travaux préparatoires* show that it was intended that Rule 68(2)(d) would be broader so as not to "remove from the ambit of [the] rule situations in which supporters of the party interfered with witnesses on their own initiative".²⁹⁸ However, even applying this approach, the OTP fails to establish that the Scheme members are Mr. Ruto's "supporters". The Defence submits that the

²⁹⁶ Application, paras.2, 52, 140.

²⁹⁷ Application, para.139.

²⁹⁸ WGLL Report, para.34.

absence of any direct evidence linking Mr. Ruto to any of the Scheme members in any capacity cannot be ignored and militates in favour of not admitting the Prior Recorded Testimony. To find otherwise would effectively penalise Mr. Ruto for the actions of others - including those that may have had a hand in falsely implicating him in the first place.

138.The OTP argument that “[d]enying 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” cuts both ways.²⁹⁹ In the absence of any proven link between the accused and those involved in witness interference and if the standard for admission is as low as the OTP asserts, then the Rule 68 mechanism could be harnessed by individuals to advance a false case against an accused. Individuals could be encouraged to give false statements with the understanding that they will later withdraw on the basis of false interference claims in order to prevent an accused from being able to confront the case against him. This is not a theoretical possibility. The OTP received information [REDACTED].³⁰⁰ [REDACTED].³⁰¹

139.This scenario highlights the need for a strict approach to the admission of evidence under the Rule and that bare claims of interference, which pay no regard to the proven role of the accused and restrict reliability assessments to the four corners of the statement, are deficient.

140.The OTP’s submission, that the fact of cross-examination is effectively a “cure-all” and tips the balance in favour of admission of the Prior Recorded testimony, should be rejected.³⁰² The Defence has not cross-examined [REDACTED]. In addition, the other criticisms affecting the Prior Recorded Testimony, as detailed

²⁹⁹ Application, para.139.

³⁰⁰ [REDACTED]

³⁰¹ [REDACTED]

³⁰² Application, para.141.

in this response, including that it lacks sufficient indicia of reliability and seeks the admission of evidence central to the OTP's case outweigh any perceived benefit obtained by cross-examination.

141. The Defence submits that the interests of justice are best served by refusing to admit the Prior Recorded Testimony for the truth of its contents.

VI. The Rule 68(2)(d) conditions are not satisfied: Witness by witness

A. General

142. In addition to the foregoing general criticisms, the following submissions, specific to each witness, provide further reasons why the testimony should not be admitted pursuant to Rule 68(2)(d).

B. [REDACTED]

143. The OTP's argument that "the Chamber can only compensate for the loss of the vital evidence that could have been provided *viva-voce* by...[REDACTED] - had [REDACTED] not been interfered with - through the admission of [REDACTED] Prior Recorded Testimony into the Court record"³⁰³ is premised on that testimony being reliable and true. In this case, the OTP is unable to offer the Chamber any assurance as to the truthfulness of [REDACTED] original account beyond bare procedural matters.³⁰⁴ Indeed, the OTP made no effort to demonstrate the reliability of the content of the statement, despite being provided an opportunity to do so through cross examination. Nor has the OTP sought to produce any corroborative or affirming material to support the truthfulness of the original account. Rather, the evidence available to the Chamber strongly indicates that the witness is inherently unreliable and the material elements of [REDACTED] original account untrue.

³⁰³ Application, para.140.

³⁰⁴ Application, paras.144-145.

1. Failure to give evidence not materially influenced by alleged interference

144.Arguments on interference are of limited value if the OTP cannot prove that the reason a witness failed to testify in accordance with [REDACTED] original statement was “materially influenced by improper interference”, as opposed to the witness not wishing to lie under oath because the original account is untrue. As argued above, the OTP cannot prove this link and fails to satisfy this essential condition of Rule 68(2)(d).

2. Insufficient indicia of reliability

145.None of the arguments advanced by the OTP establish that [REDACTED] Prior Recorded Testimony is reliable. [REDACTED] is a former PNU supporter³⁰⁵ who schemed to obtain benefits by providing false and unreliable statements to the OTP. [REDACTED] entered the scheme due to poverty. When first introduced to the OTP in 2012 by [REDACTED]³⁰⁶ [REDACTED] was a married [REDACTED] with [REDACTED] and [REDACTED] children, with no income and [REDACTED]. ³⁰⁷ [REDACTED] understood the benefits available to [REDACTED] to be considerable.³⁰⁸ The family were [REDACTED],³⁰⁹ schooling provided, and [REDACTED] received payments for food and rent of [REDACTED] Ksh every month.³¹⁰ Given [REDACTED] poverty, it is mistaken for the OTP to argue that “[REDACTED] had no apparent reason to be untruthful”³¹¹ when [REDACTED] circumstances were so dire.

146.To become a witness, a necessary step was providing the OTP with relevant material implicating the accused. That material is contained in the statement the OTP now seeks to have admitted.

³⁰⁵ [REDACTED]

³⁰⁶ [REDACTED]

³⁰⁷ [REDACTED]

³⁰⁸ [REDACTED]

³⁰⁹ [REDACTED]

³¹⁰ [REDACTED]

³¹¹ Application, para.144.

147. In relation to the taking of the statement, the OTP refers to [REDACTED] statement comprising [REDACTED]³¹² as a token of [REDACTED] having been a witness to those events. However, as argued above, a detailed account may not be reliable or truthful. In addition, during the interview, [REDACTED] was allowed to use a 'notepad'³¹³ of very doubtful provenance.³¹⁴ The extent of its use in the interview is not recorded, but the witness had it with [REDACTED] and was able to resort to it. The Defence submits it formed part of [REDACTED] preparation to provide false evidence.

148. As regards the content of the statement, the Defence submits that it should not be admitted because it is inherently unreliable on the basis of language difficulties. The original interview was conducted in English. [REDACTED].³¹⁵ Therefore, the overall accuracy and reliability of the statement is open to serious question, particularly where there is no means of verifying the statement's accuracy via audio/video recording.

149. As indicia of reliability, the OTP asserts that "the evidence provided by the witness in [REDACTED] statement was internally consistent"³¹⁶ and that the Defence "had full opportunity to test the totality of [REDACTED] evidence - including [REDACTED] Prior Recorded Testimony - through cross-examination, in order to test its trustworthiness".³¹⁷ This assertion ignores the production in cross-examination of facts and material that supported the witness' in-court testimony that key portions of [REDACTED] written statement were false.

³¹² Application, para.137.

³¹³ [REDACTED]

³¹⁴ [REDACTED]

³¹⁵ [REDACTED]

³¹⁶ Application, para.144.

³¹⁷ Application, para.145.

150.[REDACTED]³¹⁸ [REDACTED]. The two events, inextricably linked and referred to in tight sequence, are also related to events the previous day, and together form an inseparable continuity of account clearly rooted in specific dates. However, independent evidence, readily available in the public domain, demonstrates that the witness's account cannot be true.

151.The media coverage of the 2007 election campaign was intense and extensive. There is evidence before the Chamber of the ODM rallies that did take place in or around Eldoret in 2007 - specifically, the rallies at: (i) 64 Stadium, Eldoret on 19 August;³¹⁹ (ii) 64 Stadium, on 10 November;³²⁰ and (iii) Huruma Grounds on 20 December.³²¹ Similarly, for the key 23 December date, the media coverage which has been admitted in evidence establishes that the ODM elite, with Mr. Ruto, campaigned far away in Western Province.³²²

152.[REDACTED].³²³ Under oath [REDACTED] agreed [REDACTED] had made up the account.³²⁴

153.The Defence case - advanced in cross-examination and agreed by the witness under oath – is that this central part of [REDACTED] evidence is not just mistaken and unreliable but, given the objective evidence on the record regarding Mr. Ruto's whereabouts on 23 December, plainly untrue. In contrast, the OTP's case is unsupported. There is no evidence of [REDACTED] on 23 December. [REDACTED].³²⁵

³¹⁸ [REDACTED]

³¹⁹ [REDACTED]

³²⁰ [REDACTED]

³²¹ [REDACTED]

³²² [REDACTED]

³²³ [REDACTED]

³²⁴ [REDACTED]

³²⁵ [REDACTED]

154. It should be noted that the only other witness who claimed to have gone to this [REDACTED] on 23 December is [REDACTED]³²⁶ – with whom [REDACTED] was allegedly working. In testimony, [REDACTED] was confronted with [REDACTED] original statement but stated it was wrong and that there was no [REDACTED] on 23 December.³²⁷

155. The OTP must demonstrate the reliability of the original account. Yet the OTP has not sought to demonstrate its reliability by providing evidence in support to corroborate it. Given it never happened, the OTP is incapable of producing supporting or rebuttal evidence, yet continues to present as “reliable” a statement which is plainly unreliable in its most incriminatory aspect.

156. With such manifest and obvious discrepancies concerning the central part of [REDACTED] statement, the Defence submits that the Chamber cannot find the statement as having “sufficient indicia of reliability” as required by Rule 68(2)(d)(i) and should not admit it for that reason alone.

C. [REDACTED]

157. The Prior Recorded Testimony of [REDACTED], a witness the OTP describes as “unable or unwilling to be completely forthright”,³²⁸ should not be admitted because: (i) there is insufficient evidence to establish that [REDACTED] failure to give evidence in accordance with [REDACTED] 2012 statement was materially influenced by alleged interference; and (ii) it lacks sufficient indicia of reliability. Rather, the evidence led by the Defence supports [REDACTED] sworn testimony that [REDACTED] 2012 statement is false, a position the witness maintains to date.

³²⁶ [REDACTED]

³²⁷ [REDACTED]

³²⁸ Application, para.157.

1. Failure to give evidence not materially influenced by alleged interference

158.The OTP fails to establish to the requisite standard that [REDACTED] became hostile and repudiated most of the incriminatory parts of [REDACTED] Prior Recorded Testimony as a result of alleged interference by Scheme members.³²⁹ Rather, the evidence indicates that [REDACTED] initial withdrawal pre-dates any approach by Scheme members, was due to dissatisfaction with the benefits promised and is inextricably linked to [REDACTED] motive for becoming a witness.

159.No critical analysis of [REDACTED] personal circumstances is undertaken by the OTP as part of the reliability assessment. However, a reasonable conclusion is that [REDACTED] provided [REDACTED] original false account to better [REDACTED] circumstances. Like all the Rule 68 Witnesses, [REDACTED] is a former PNU supporter.³³⁰ When the witness was introduced to the OTP by [REDACTED] was married, with [REDACTED] children [REDACTED], jobless, and [REDACTED] property destroyed.³³¹ [REDACTED],³³² [REDACTED].³³³ [REDACTED].³³⁴

160.[REDACTED] expectations regarding the available benefits were considerable; [REDACTED].³³⁵ However, [REDACTED] never intended to testify but simply to be accepted as a witness in order to reap the benefits; [REDACTED].³³⁶

161.From the outset, [REDACTED] felt [REDACTED] expectations were not met. [REDACTED].³³⁷ When the benefits failed to materialise, [REDACTED] withdrew [REDACTED] cooperation. [REDACTED] was no longer being given

³²⁹ Application, para.146.

³³⁰ [REDACTED]

³³¹ [REDACTED]

³³² [REDACTED]

³³³ [REDACTED]

³³⁴ [REDACTED]

³³⁵ [REDACTED]

³³⁶ [REDACTED]

³³⁷ [REDACTED]

any money, [REDACTED] I did not get what I had expected. [REDACTED].³³⁸ This clear explanation why [REDACTED] withdrew [REDACTED] cooperation, which makes no mention of Scheme members, is ignored by the OTP despite it being repeated in [REDACTED] most recent interviews.³³⁹

162. Moreover, the effect of the alleged interference, and whether it materially influenced the witness' failure to give evidence, is not established. In addition to [REDACTED] stated belief that [REDACTED] did not think [REDACTED] would have to testify, it appears the [REDACTED] did not result in [REDACTED] breaking off all contact with the OTP. Prosecution disclosures show that, subsequent to any alleged meeting with [REDACTED] remained in contact with the OTP in 2013 and 2014.³⁴⁰ It also appears that [REDACTED] did not think [REDACTED] could be compelled to testify. Allegedly [REDACTED] told [REDACTED] the money was so that [REDACTED] would not go to the Netherlands to testify (something [REDACTED] did not intend to do) and assured [REDACTED] could not be forced to testify in Kenya and so [REDACTED] "decided not to continue with the case".³⁴¹ Rather than receiving the money in exchange for not testifying, [REDACTED] took the money because [REDACTED] took the money [REDACTED].³⁴² [REDACTED].³⁴³

163. Ultimately, [REDACTED] did not prevent the witness from testifying [REDACTED]. The OTP complain that "[d]uring [REDACTED] testimony [REDACTED] failed to provide important incriminating evidence that was in [REDACTED] Prior Recorded Testimony."³⁴⁴ But, critically, the OTP fails to establish that this failure was influenced by alleged interference as opposed to

³³⁸ [REDACTED]

³³⁹ [REDACTED]

³⁴⁰ [REDACTED]

³⁴¹ [REDACTED]

³⁴² [REDACTED]

³⁴³ [REDACTED]

³⁴⁴ Application, para.148.

the witness' desire to tell the truth. This criticism is compounded by the material available to the Chamber, detailed below, which confirms the witness' testimony that key aspects of [REDACTED] 2012 statement were untrue. Consequently, an essential condition for evidence to be admitted under Rule 68(2)(d) is not satisfied and the OTP's request regarding the admission of [REDACTED] statement should be rejected.

2. Insufficient indicia of reliability

164.[REDACTED] Prior Recorded Testimony is *prima facie* unreliable. In addition to [REDACTED] personal and financial motives, [REDACTED] sworn evidence that material aspects of [REDACTED] original statement are untrue is not contradicted by any evidence adduced by the OTP.

165.An initial point of concern in respect of reliability is that the original 2012 interview was conducted in English. [REDACTED].³⁴⁵ [REDACTED].³⁴⁶ Tellingly, the 2015 interviews were conducted in Swahili because the witness' English "is limited".³⁴⁷ Therefore, in the absence of any means of verifying the accuracy of the statement such as via audio/video recordings, the statement is *prima facie* unreliable on the basis of language alone.

166.During the 2012 interview, [REDACTED] was allowed to have a notebook with [REDACTED], a fact the OTP ignores in its submissions about the implausibility of [REDACTED] being able to commit the fabricated evidence to memory.³⁴⁸ In [REDACTED] prior statement [REDACTED] said, "I was consulting on occasion with my notebook and some sheets which contain handwritten notes I had taken

³⁴⁵ [REDACTED]

³⁴⁶ [REDACTED]

³⁴⁷ [REDACTED]

³⁴⁸ Application, paras.158-159.

in the past”.³⁴⁹ [REDACTED] did not permit the investigators to inspect it.³⁵⁰
[REDACTED].³⁵¹

167.Regardless of the veracity of the witness’ testimony as to the contents or purpose of the notebook, the Defence submits that no witness should be permitted to take notes into an interview, to refer to and consult them, but deny [REDACTED] interviewers the opportunity of examining or preserving them for future inspection. In these circumstances, the witness’ prior statement should not be admitted, bearing in mind: the defence’s submissions that the evidence was concocted; the witness’ testimony that [REDACTED] concocted evidence with the aid of the notebook; the fact that the investigators permitted the use of the notebook throughout the course of the interviews without examining it and without in any way preserving its contents for inspection by the Chamber or the Defence.

168.More importantly, and despite its assessment that [REDACTED] is “unable or unwilling to be completely forthright”,³⁵² the OTP has not produced any material to support the premise, implicit in its submissions, that the witness’ previous testimony concerning the main charges in the case is reliable, arguing that only [REDACTED] 2015 interviews should be relied upon to the extent they are corroborated.³⁵³ This extends even to basic matters, such as where [REDACTED] lived.

169.[REDACTED] originally claimed to be living at [REDACTED], and that [REDACTED] viewed events from there in the course of the post-election period.³⁵⁴ [REDACTED] testified that this was untrue and that [REDACTED] lied

³⁴⁹ [REDACTED]

³⁵⁰ [REDACTED]

³⁵¹ [REDACTED]

³⁵² Application, para.157.

³⁵³ Application, para.157.

³⁵⁴ [REDACTED]

about where [REDACTED] lived, secure in the belief that the OTP would not investigate [REDACTED] properly and so not would not find out [REDACTED].³⁵⁵ The OTP has not sought to produce any contrary evidence as to this basic, material, aspect of the evidence it now requests the Chamber to admit for its truth.

170.[REDACTED]^{356 357 358 359 360}

171.[REDACTED]^{361 362}

172.[REDACTED].³⁶³ [REDACTED].³⁶⁴ Objective evidence establishes that it is *prima facie* unlikely that such a meeting was held on 20 November 2007. An article in *The Daily Nation* dated 21 November 2007 reports that “ODM yesterday accepted flaws in the concluded nominations”.³⁶⁵ The flaws were accepted by Mudavadi and Ruto, the “two leaders [who] were speaking at Orange House, Nairobi”. [REDACTED].³⁶⁶

173.Paragraphs 64 to 113 of the 2012 statement concern events which purportedly took place in the 6 days following the election results while the witness was allegedly based at [REDACTED]. It is a detailed narrative and concludes with [REDACTED].³⁶⁷

³⁵⁵ [REDACTED]

³⁵⁶ [REDACTED]

³⁵⁷ [REDACTED]

³⁵⁸ [REDACTED]

³⁵⁹ [REDACTED]

³⁶⁰ [REDACTED]

³⁶¹ [REDACTED]

³⁶² [REDACTED]

³⁶³ [REDACTED]

³⁶⁴ [REDACTED]

³⁶⁵ Annex J: KEN-D09-0048-0005.

³⁶⁶ [REDACTED]

³⁶⁷ [REDACTED]

174.[REDACTED] testified that [REDACTED] account of staying at [REDACTED] was untrue, made up by [REDACTED].³⁶⁸ The following evidence which is part of the trial record supports the witness' sworn testimony that [REDACTED] prior account was indeed untrue.

175.[REDACTED].^{369 370 371}

176.In short, there has been no prosecution evidence adduced, or tendered in rebuttal, corroborative of material aspects of the prior testimony which the witness has stated is untrue. On the contrary, the Defence has referred to or produced evidence that demonstrates the correctness of [REDACTED] testimony. The inevitable conclusion is that [REDACTED] Prior Recorded Testimony lacks sufficient indicia of reliability. Further, if the Chamber decides to consider the 2015 interviews for the purposes of the Application, of significance is that the witness maintains that [REDACTED] sworn testimony is true.³⁷²

177.A final observation is that recent OTP disclosure indicates that [REDACTED] is still trying to manipulate the ICC process by making false security claims.³⁷³

D. [REDACTED]

178.The OTP fails to satisfy several of the requirements of Rule 68(2)(d)(i) in respect of [REDACTED] Prior Recorded Testimony and seeks to admit the same despite having "reservations" about [REDACTED] "truthfulness".³⁷⁴

³⁶⁸ [REDACTED]

³⁶⁹ [REDACTED]

³⁷⁰ [REDACTED]

³⁷¹ [REDACTED]

³⁷² [REDACTED]

³⁷³ [REDACTED]

³⁷⁴ Application, para.168.

1. Insufficient evidence of interference

179. The Defence submits that the OTP has not properly established that [REDACTED] was the subject of improper interference. In this regard, the Defence relies on its submissions set out in Section IV. Just like other prosecution witnesses, [REDACTED] was unhappy with [REDACTED] and made “repeated” complaints to the OTP/VWU about [REDACTED] financial situation.³⁷⁵ The OTP states that, since [REDACTED] on [REDACTED] 2014, [REDACTED] has failed to attend scheduled meetings and contacts with [REDACTED] “oscillate” between security concerns or telling the OTP “not to worry as there are no issues”.³⁷⁶ [REDACTED] is presently making efforts to get asylum in Europe [REDACTED].³⁷⁷

2. Failure to give evidence not materially influenced by alleged interference

180. Even if it were to be accepted that [REDACTED] had contact with Scheme members in [REDACTED] 2014 and accepted payments from them shortly thereafter,³⁷⁸ it did not materially influence [REDACTED] decision to recant. [REDACTED] continued to cooperate with the OTP until [REDACTED] 2014 and was seeking to resolve [REDACTED] concerns with the OTP, as is evident from [REDACTED]³⁷⁹ [REDACTED].³⁸⁰ [REDACTED].³⁸¹ [REDACTED].³⁸² Ultimately, [REDACTED] testified [REDACTED].

3. Insufficient indicia of reliability

181. The OTP fails to establish that [REDACTED] Prior Recorded Testimony has sufficient indicia of reliability.

³⁷⁵ [REDACTED]

³⁷⁶ [REDACTED]

³⁷⁷ [REDACTED]

³⁷⁸ [REDACTED]

³⁷⁹ [REDACTED]

³⁸⁰ [REDACTED]

³⁸¹ [REDACTED]

³⁸² [REDACTED]

182.[REDACTED] clearly had reasons to be untruthful. [REDACTED] was a PNU supporter [REDACTED].³⁸³ [REDACTED].³⁸⁴

183.When [REDACTED] was introduced to the OTP by [REDACTED], [REDACTED].³⁸⁵ [REDACTED] had [REDACTED] dependents and a monthly salary of [REDACTED] Ksh.³⁸⁶ [REDACTED] status as a witness radically transformed [REDACTED] financial position.³⁸⁷ [REDACTED]³⁸⁸ [REDACTED].³⁸⁹ [REDACTED].³⁹⁰ [REDACTED].³⁹¹ [REDACTED].³⁹² However, [REDACTED] became dissatisfied, with [REDACTED] ICC package³⁹³ and then terminated [REDACTED] cooperation with the OTP. This explains why [REDACTED] gave false information to the OTP about the PEV, subsequently withdrew [REDACTED] co-operation, returned to the OTP in [REDACTED] 2014 and then withdrew again after that.³⁹⁴

184.Independent credible evidence demonstrates that [REDACTED] prior statement was false on material issues. [REDACTED].³⁹⁵ [REDACTED]. According to other evidence admitted in this case, this is wrong.³⁹⁶ The Defence submits that [REDACTED] was a deliberate attempt to deceive and a failed attempt by [REDACTED] to corroborate [REDACTED] false account. This is confirmed by [REDACTED] testimony.³⁹⁷

³⁸³ [REDACTED]

³⁸⁴ [REDACTED]

³⁸⁵ [REDACTED]

³⁸⁶ [REDACTED]

³⁸⁷ [REDACTED]

³⁸⁸ [REDACTED]

³⁸⁹ [REDACTED]

³⁹⁰ [REDACTED]

³⁹¹ [REDACTED]

³⁹² [REDACTED]

³⁹³ [REDACTED]

³⁹⁴ [REDACTED]

³⁹⁵ [REDACTED]

³⁹⁶ [REDACTED]

³⁹⁷ [REDACTED]

185.[REDACTED].³⁹⁸ This is false. Evidence in the trial record establishes that on 19 November 2007 Mr. Ruto was one of Odinga’s named “high command” who “spent the entire day in a meeting at Pentagon House in Nairobi dealing with complaints by aspirants threatening to quit the party.”³⁹⁹ [REDACTED] testimony that [REDACTED] “cooked up” [REDACTED] original account about this event⁴⁰⁰ is also supported by other sources of objective evidence which indicate that: (i) [REDACTED];⁴⁰¹ and (ii) [REDACTED].⁴⁰²

186.[REDACTED].⁴⁰³ The OTP agrees that parliamentary and civic candidates submitted their nomination papers by 24 November 2007.⁴⁰⁴ A combination of independent video and news reports and security intelligence minutes establish the correct date for this event was 23 November 2007.⁴⁰⁵

187.That the video depicts a youth rally is obvious by the attendees. Further, in the video Mr. Ruto is heard addressing “the youth” and the crowd responds that the “[y]outh [are] with Ruto”.⁴⁰⁶ Later in the video Mr. Ruto is seen submitting his nomination papers, he is asked a series of questions indicating a connection with the election process after which an official states “you have been nominated”.⁴⁰⁷ A further extract from the video shows Mr. Ruto addressing the crowd in Eldoret and talking about opinion polls including polls prepared by Steadman.⁴⁰⁸ The fact that the rally, the submission of the nomination papers and Ruto’s speech about Steadman all occurred on the same day – 23 November 2007 – is established not only because Mr. Ruto is shown to be wearing the same clothing throughout, but also a newspaper report dated 24 November 2007 referring to

³⁹⁸ [REDACTED]

³⁹⁹ [REDACTED]

⁴⁰⁰ [REDACTED]

⁴⁰¹ [REDACTED]

⁴⁰² [REDACTED]

⁴⁰³ [REDACTED]

⁴⁰⁴ [REDACTED]

⁴⁰⁵ [REDACTED]

⁴⁰⁶ [REDACTED]

⁴⁰⁷ [REDACTED]

⁴⁰⁸ [REDACTED]

Mr. Ruto addressing “a rally at the Eldoret Municipal Council Park and dismiss[ing] yesterday’s Steadman poll”.⁴⁰⁹ Further, security meeting minutes record that Mr. Ruto addressed youth at Sugoi on that date.⁴¹⁰ All this independent evidence supports [REDACTED] sworn testimony that [REDACTED] original account to the OTP was false.⁴¹¹ In stark contrast, the OTP has not provided any evidence to demonstrate that [REDACTED] original account is *prima facie* reliable.

188.[REDACTED] unsworn evidence that Mr. Ruto attended [REDACTED] on 21 December 2007 is also false in light of other evidence on the record⁴¹² and is contradicted by [REDACTED] evidence that Mr. Ruto was in Kapkatet on this date.⁴¹³ A newspaper report dated 22 December 2007 plus a video establishes that Mr. Ruto was accompanying Odinga at a rally at Kapkatet Stadium on 21 December 2007 and was not in [REDACTED].⁴¹⁴ Further, a television news report states that with “7 days to go”, dating the report to 20 December 2007, Odinga and Mr. Ruto were in Kabarnet. The report also states that the “climax of the North Rift tour, which saw them visit 4 different places, was Huruma Grounds in Eldoret town” and reports that Odinga came out “for the first time” to advocate for “three-piece voting”.⁴¹⁵ Given that the last ODM rally in the North Rift was held at Huruma Grounds on 20 December, an ODM rally could not have been held the next day in [REDACTED].⁴¹⁶

189.Independent evidence on the record supports [REDACTED] testimony⁴¹⁷ that [REDACTED] fabricated the information in [REDACTED] statement about

⁴⁰⁹ [REDACTED]. This item was MFI’ed because the article was continued from page 1. Page 1 is provided in Annex G (KEN-D09-0045-0077).

⁴¹⁰ [REDACTED]

⁴¹¹ [REDACTED]

⁴¹² [REDACTED]

⁴¹³ [REDACTED]

⁴¹⁴ [REDACTED]

⁴¹⁵ [REDACTED]. Also support for 20 December 2007 date provided by [REDACTED].

⁴¹⁶ [REDACTED]

⁴¹⁷ [REDACTED]

[REDACTED] on 24 December 2007.⁴¹⁸ A newspaper report in evidence dated 25 December 2007 establishes that “ODM’s last rally [was held] at the Nyayo Stadium in Nairobi yesterday”.⁴¹⁹ Another news article in *The Standard* dated 25 December 2007 reports that Mr. Ruto was one of the Pentagon members present at “Nyayo National Stadium for the party’s last rally”.⁴²⁰ Therefore, Mr. Ruto was in Nairobi on 24 December 2007 and not at [REDACTED].

190. Finally, [REDACTED] original account that the [REDACTED] was on 26 December 2007 and [REDACTED] is demonstrably false.⁴²¹ The witness agreed under oath that [REDACTED] but accepted that [REDACTED] lied that such an event was held in December 2007.⁴²² The witness also confirmed that it is illegal under Kenyan law to hold a political campaign meeting 2 days before an election, a fact confirmed by [REDACTED].⁴²³

E. [REDACTED]

191. [REDACTED]

F. [REDACTED]

192. [REDACTED] Prior Recorded Testimony should not be admitted under Rule 68(2)(d) because there is no evidence of improper interference. Even if the Chamber finds otherwise, the OTP fails to prove that: (i) [REDACTED] recantation from [REDACTED] original account was materially influenced by improper interference; and (ii) the Prior Recorded Testimony has sufficient indicia of reliability. Of note is that this witness again demonstrates the dangers inherent in the OTP’s approach to establish the indicia of reliability of the unsworn, out-of-court account. In seeking the admission of [REDACTED] Prior

⁴¹⁸ [REDACTED]

⁴¹⁹ [REDACTED]

⁴²⁰ Annex G: KEN-D09-0047-3429, at 3432.

⁴²¹ [REDACTED]

⁴²² [REDACTED]

⁴²³ [REDACTED]

Recorded Testimony, the OTP seeks the admission of evidence which directly contradicts [REDACTED] Prior Recorded Testimony and existing OTP evidence. The appropriateness or otherwise, as well as consequences of this are not addressed in the Application.

1. No evidence of interference

193. The OTP accept that “there is little direct evidence of improper interference with [REDACTED].”⁴²⁴ This concession is fatal to the OTP’s attempt to admit the unsworn statement for the truth of its content under the amended rule. Indeed, the Defence underline that the actual position is that there is no evidence of interference.

194. The “pattern evidence” relied upon by the OTP as alleged proof of interference, namely [REDACTED] is insufficient and wholly tenuous.⁴²⁵ The witness’ withdrawal of cooperation can be explained by a myriad of reasons, including disappointment at not being compensated for alleged [REDACTED] losses (see below). [REDACTED].⁴²⁶ [REDACTED].⁴²⁷ As argued above, the mere fact that a witness has recanted cannot lead automatically to the conclusion that there has been interference. [REDACTED].⁴²⁸ [REDACTED].⁴²⁹

195. The reality is that there is no “strong pattern evidence demonstrating that [REDACTED] was subject to improper interference by Scheme members”.⁴³⁰ There is no evidence that [REDACTED]: (i) knows or has had contact with any of the alleged Scheme members; (ii) knows or has had contact with any of the witnesses who have allegedly been the subject of interference; (iii) had any

⁴²⁴ Application, para.198.

⁴²⁵ Application, paras.198, 203-209.

⁴²⁶ [REDACTED]

⁴²⁷ Application, para.206.

⁴²⁸ Application, para.201.

⁴²⁹ [REDACTED]

⁴³⁰ Application, para.202.

security concerns at any point save for an isolated, unverified incident in 2013;⁴³¹ and (iv) has been the subject of any form of interference as described in Rule 68(2)(d)(ii). An essential *chapeau* element of Rule 68(2)(d) has, therefore, not been satisfied. Thus, the request to admit [REDACTED] Prior Recorded Testimony should be dismissed.

2. Failure to give evidence not materially influenced by alleged interference

196.If the Chamber finds that [REDACTED] has been subjected to interference, then for the reasons argued above, nothing in the Application establishes that [REDACTED] recantation was materially influenced by the interference rather than that the original account was false.

3. Insufficient indicia of reliability

197.[REDACTED] is a former PNU supporter who, according to testimony and disclosures, was motivated by money to become a prosecution witness.⁴³² [REDACTED].⁴³³ [REDACTED].⁴³⁴ Even if the Defence were to accept that the OTP and VWU payments constituted “normal witness allowances”, the reality is that such payments can act as incentives to individuals in developing countries in difficult financial circumstances. In this case, [REDACTED] has [REDACTED] children and [REDACTED] was burnt in [REDACTED], in an incident unrelated to [REDACTED] witness status.⁴³⁵ [REDACTED] motives are revealed by the fact that throughout [REDACTED] dealings with the OTP [REDACTED] repeatedly complained about [REDACTED] financial position and [REDACTED] apparently in an attempt to obtain more assistance from the Court.⁴³⁶ Against this background, it seems that the witness withdrew due to dissatisfaction with the support [REDACTED] was receiving from the Court, coupled with concern

⁴³¹ [REDACTED]

⁴³² [REDACTED]

⁴³³ [REDACTED]

⁴³⁴ [REDACTED]

⁴³⁵ [REDACTED]

⁴³⁶ [REDACTED]

that [REDACTED] may have to perjure [REDACTED] if required to testify in accordance with [REDACTED] unsworn statement. The OTP ignores this reality, concluding that there has been interference despite the absence of any compelling evidence in support.

198. Turning to the substance of [REDACTED] original account, the following examples demonstrate that the information [REDACTED] provided is *prima facie* unreliable because it is internally inconsistent and contradicted by other trial evidence.

199. [REDACTED].⁴³⁷ [REDACTED]⁴³⁸ [REDACTED].⁴³⁹ The unreliability of the unsworn statement, especially in these circumstances, must be obvious to the OTP.

200. [REDACTED].^{440 441 442 443 444}

201. In [REDACTED] unsworn interviews, [REDACTED] gave evidence of alleged planning meetings at [REDACTED] on [REDACTED] 2007 and [REDACTED] in [REDACTED] 2007.⁴⁴⁵ These are uncorroborated. The witness testified that [REDACTED] lied about these meetings. Cross-examination by the Defence demonstrated the following inconsistencies and discrepancies in the witness' unsworn accounts of these meetings, all of which show the information's *prima facie* unreliability.

202. [REDACTED].^{446 447 448}

⁴³⁷ [REDACTED]

⁴³⁸ [REDACTED]

⁴³⁹ [REDACTED]

⁴⁴⁰ [REDACTED]

⁴⁴¹ [REDACTED]

⁴⁴² [REDACTED]

⁴⁴³ [REDACTED]

⁴⁴⁴ [REDACTED]

⁴⁴⁵ [REDACTED]

⁴⁴⁶ [REDACTED]

203.[REDACTED]⁴⁴⁹ [REDACTED]⁴⁵⁰ [REDACTED].⁴⁵¹ This discrepancy is further evidence that the account is unreliable.

204.[REDACTED].^{452 453 454 455}

205.The final example of the unreliability of [REDACTED] original evidence is [REDACTED] statement that [REDACTED] had to [REDACTED] in 2007 in order to safely attend a political rally and [REDACTED].⁴⁵⁶ In Court, the witness confirmed the information was false.⁴⁵⁷ This evidence is also contradicted by the sworn testimony of prosecution witnesses who testified to attending both PNU and ODM rallies without incident and ODM rallies where people from all tribes including Kikuyu and Kisii were present.⁴⁵⁸

VII. The Rule 68(2)(c) and Rule 68(2)(d) conditions are not satisfied for [REDACTED]

A. Rule 68(2)(d)

206.The request to admit [REDACTED] Prior Recorded Testimony pursuant to Rule 68(2)(d) should be dismissed. There is no evidence that [REDACTED] failure to attend as a witness was materially influenced by improper interference.⁴⁵⁹ [REDACTED]. Further, [REDACTED] Prior Recorded Testimony lacks sufficient indicia of reliability and it is not in the interests of justice to introduce it,

⁴⁴⁷ [REDACTED]

⁴⁴⁸ [REDACTED]

⁴⁴⁹ [REDACTED]

⁴⁵⁰ [REDACTED]

⁴⁵¹ [REDACTED]

⁴⁵² [REDACTED]

⁴⁵³ [REDACTED]

⁴⁵⁴ [REDACTED]

⁴⁵⁵ [REDACTED]

⁴⁵⁶ [REDACTED]

⁴⁵⁷ [REDACTED]

⁴⁵⁸ *E.g.*, P-128 (T-83, 17:3), P-409 (T-91, 57:12-59:2), P-0487 (T-53, 91:7-92:12).

⁴⁵⁹ Application, para.229.

particularly where it is untested and goes to the acts and conduct of Mr. Ruto on issues central to the OTP's case.

1. Failure to attend not materially influenced by alleged interference

207. The submission that [REDACTED]⁴⁶⁰ is contradicted by the OTP Senior Investigator's conclusion that the [REDACTED] two of which do not involve any allegation of improper interference, cannot be "discarded".⁴⁶¹ The Defence submits that the investigator's conclusion is correct and, thus, fatal to the Rule 68(2)(d) request.

208. Contrary to the OTP's assertion, there is no properly substantiated evidential basis to conclude that [REDACTED].⁴⁶² [REDACTED].⁴⁶³ There is no indication that this line of inquiry has been pursued. Even if, for the sake of argument, it were to be accepted that [REDACTED] received payments of money from the Scheme, this fact alone is insufficient to make the leap that Scheme members were [REDACTED].⁴⁶⁴ No evidence is adduced of the alleged [REDACTED]. Nor is any evidence adduced linking members of the Scheme, directly or indirectly, to [REDACTED]. The fact that other theories unconnected to the Scheme cannot be discarded is supported by OTP evidence that [REDACTED].⁴⁶⁵

209. [REDACTED].^{466 467 468}

210. In sum, there is no evidence before the Chamber to satisfy it to the requisite standard that [REDACTED] failure to attend was materially influenced by improper interference.

⁴⁶⁰ Application, para.229.

⁴⁶¹ ICC-01/09-01/11-1866-Conf-AnxD2, paras.8, 11.

⁴⁶² Application, para.217.

⁴⁶³ [REDACTED]

⁴⁶⁴ Application, para.217.

⁴⁶⁵ [REDACTED]

⁴⁶⁶ Application, paras.217, 224.

⁴⁶⁷ [REDACTED]

⁴⁶⁸ [REDACTED]

2. Insufficient indicia of reliability

211.[REDACTED] was a PNU [REDACTED], supporter [REDACTED].⁴⁶⁹ By the time [REDACTED] met the OTP, [REDACTED] had lost [REDACTED] job and was seeking compensation of 15 million Ksh “for all the trouble” [REDACTED] went through as a result of the PEV.⁴⁷⁰ An examination of [REDACTED] Prior Recorded Testimony reveals that the core incriminatory averments contained therein are contradicted by other evidence, including objective evidence not part of the trial record. In respect of this latter category, the Defence submits that the Chamber may consider this evidence based, not only on the broad approach to supporting materials taken by the OTP, if that is accepted as appropriate by the Chamber, but also because the Defence has not had the opportunity to confront the witness and, thus, to have the material admitted.

212.[REDACTED] alleged that there was a meeting [REDACTED] on 20 October 2007, sometime between 2pm and 5pm, and that Mr. Ruto was present and spoke at this meeting.⁴⁷¹ The Defence submits that there was no such meeting. As is evident from an article in *The Sunday Standard* newspaper dated 21 October 2007, the 20th was Kenyatta day and Mr. Ruto attended the celebrations at Nyayo Stadium, Nairobi.⁴⁷² The article prints a photograph of him captioned from “yesterday”. The same newspaper reports that at “another meeting convened yesterday” Mr. Ruto met with “teachers drawn largely from Nairobi” at the KICC.⁴⁷³ These articles show that Mr. Ruto was engaged most of the day in Nairobi and was not at [REDACTED] as alleged.

213.In addition, [REDACTED] assertion that John Serut attended the [REDACTED] meeting and incited the removal of the Kikuyu from the Rift Valley is *prima facie*

⁴⁶⁹ [REDACTED]

⁴⁷⁰ [REDACTED]

⁴⁷¹ [REDACTED]

⁴⁷² Annex J: KEN-D09-0048-0001.

⁴⁷³ Annex J: KEN-D09-0048-0004.

unreliable.⁴⁷⁴ It is a matter of public record that Serut was the PNU candidate who was contesting against ODM's Fred Kapondi.⁴⁷⁵ Therefore, given that Mr. Ruto and Serut were not only in opposite political camps in 2007 but that Mr. Serut had a history of confrontation and opposition with Mr. Ruto,⁴⁷⁶ it is highly unlikely that they would have joined hands, [REDACTED], in a bid to evict Kikuyus. Certainly, Serut would not have been at an anti-PNU meeting [REDACTED], let alone actively contributing to the agenda.

214. Similarly, [REDACTED] evidence that Mr. Ruto attended a meeting at [REDACTED] on 20 November 2007, arriving at about 5pm by helicopter,⁴⁷⁷ is contradicted by the above discussed article in *The Daily Nation* dated 21 November 2007.⁴⁷⁸ While [REDACTED] provides similar evidence, it is not corroborative. Separate from the fact that the news article shows the witnesses' accounts to be *prima facie* unreliable, there are significant discrepancies between the two which further undermine their reliability. First, the witnesses give different times for Mr. Ruto's arrival: 11am as compared to 5pm. Second, the descriptions provided about the statements made by Mr. Ruto are different. [REDACTED] account includes a graphic description of Mr. Ruto holding a hammer and matches and telling people they should use them to destroy Kikuyu houses,⁴⁷⁹ which is quite different from the account given to [REDACTED].

215. The final example of the *prima facie* unreliability of [REDACTED] evidence relates to the political meeting [REDACTED] said Mr. Ruto attended at around 1pm at [REDACTED] on 15 December 2007.⁴⁸⁰ News articles published on 16

⁴⁷⁴ [REDACTED]

⁴⁷⁵ Annex J: KEN-D09-0048-0012, KEN-D09-0047-2345, KEN-D09-0047-2373, 2380; T-90, 57:17-22.

⁴⁷⁶ Annex J: KEN-D09-0045-0433.

⁴⁷⁷ [REDACTED]

⁴⁷⁸ Annex J: KEN-D09-0048-0005.

⁴⁷⁹ [REDACTED]

⁴⁸⁰ [REDACTED]

December 2007, establish that the previous day, 15 December 2007, Mr. Ruto accompanied Odinga on “his latest round of campaign in the North Rift region yesterday”, visiting Kapsowar in the Marakwet district, Sugutek, Keiyo and Iten Stadium in Keiyo North constituency.⁴⁸¹ A photograph of Odinga, Mudavadi and Ruto captioned that it shows their arrival “at Iten Stadium in Keiyo yesterday”⁴⁸² accompanies one article. It is also reported that Pentagon members, including Mr. Ruto, accompanied Odinga and that they “jointly addressed other rallies at Kimwarer near Fourspar Mines, Tot in Marakwet East, Kapsowar (Marakwet West) and Chepkorio...in Keiyo South”.⁴⁸³ No mention is made of a meeting in [REDACTED] and, given the reported itinerary, it is most unlikely that there was time for such a meeting. The Defence submits that these facts demonstrate that the unsworn account is false. The OTP has not cited to any independent evidence to support that [REDACTED] information is true.

216. The fact that [REDACTED] evidence of the 15 December meeting conflicts with the Prior Recorded Testimony of two other Rule 68 Witnesses, [REDACTED] and [REDACTED], further demonstrates that the OTP’s insistence on a formalistic approach to assessing reliability, which effectively views each witness’ evidence in isolation, is incorrect. In [REDACTED] OTP statement [REDACTED] stated that a PNU meeting (as opposed to an ODM meeting) was held at [REDACTED] on 15 December 2007.⁴⁸⁴ From the Application, it appears that the OTP believes that each witness’ original account is true and, thus, is asserting that both PNU and ODM held rallies at the same location in [REDACTED] on the same day. The Defence submits that this obviously cannot be true. This example constitutes *prima facie* evidence of the unreliability of both witnesses’ original accounts. In addition, [REDACTED] states that [REDACTED] attended the 15 December

⁴⁸¹ Annex J: KEN-D09-0048-0009, KEN-D09-0048-0007.

⁴⁸² Annex J: KEN-D09-0048-0009.

⁴⁸³ Annex J: KEN-D09-0048-0007.

⁴⁸⁴ [REDACTED]

meeting.⁴⁸⁵ However, [REDACTED] does not say that [REDACTED] attended this meeting. [REDACTED].⁴⁸⁶ This is another indication of the *prima facie* unreliability of [REDACTED] original account.

217. Without providing any specifics, the OTP states that [REDACTED] statement is corroborated by [REDACTED] testimony and documentary evidence on the record.⁴⁸⁷ While it is for the OTP to properly substantiate its claim, a review of [REDACTED] testimony establishes that there is no overlap with [REDACTED] main incriminatory evidence against Mr. Ruto, [REDACTED]. The Defence is unaware of any documentary evidence which corroborates these specific allegations. Focused still on purported linkage evidence, in so far as [REDACTED] and [REDACTED] provide evidence regarding the involvement of [REDACTED],⁴⁸⁸ the corroborative value of this evidence is extremely weak. The information about Mr. Ruto's alleged involvement is either received from others – making the evidence second hand hearsay – or based on speculation.

3. Not in the interests of justice

218. In addition to the arguments advanced above as to why it is not in the interests of justice to introduce any of the Prior Recorded Testimony, the Defence submits that the prejudice caused by the admission of [REDACTED] prior statement would be particularly acute and the OTP's arguments otherwise do not withstand scrutiny. This unsworn, hearsay evidence has not been tested by the Defence. Contrary to the OTP's assertion and as is evident from the above discussion, there are not "sufficient indications of the reliability of the evidence to make its admission both safe and fair."⁴⁸⁹ Rather, a basic analysis of the witness' evidence and a basic search of the available newspapers covering the

⁴⁸⁵ Annex H: KEN-OTP-0074-0264, para.85.

⁴⁸⁶ [REDACTED]

⁴⁸⁷ Application, para.235.

⁴⁸⁸ [REDACTED]

⁴⁸⁹ Application, para.233.

relevant dates reveal that [REDACTED] statement is inconsistent with the evidence of other Rule 68 Witnesses and is contradicted by objective media evidence. [REDACTED] “is the result of improper interference perpetrated for the benefit of the Accused themselves” is completely unfounded.⁴⁹⁰ [REDACTED] to the Scheme or Mr. Ruto. Instead, according to a Senior OTP Investigator, no theory can be discarded. Moreover, the assertion that the Scheme members are perpetrating the interference “for the benefit” of Mr. Ruto is based on assumption, not evidence.

B. Rule 68(2)(c)

219. The alternative request to admit [REDACTED] Prior Recorded Testimony under Rule 68(2)(c) should also be rejected. Regardless of whether [REDACTED] can “be presumed dead, or is, due to obstacles that cannot be overcome with reasonable diligence, unavailable to testify orally”, for the reasons set out above, the OTP fails to establish “that the prior recorded testimony has sufficient indicia of reliability” as is required by Rule 68(2)(c)(i). Moreover, and again for the reasons set out above, in this case, “the fact that the prior recorded testimony goes to proof of acts and conduct of” Mr. Ruto is a factor which under Rule 68(2)(c)(ii) militates against its introduction.

VIII. No admission of the statements under Article 69(2)

220. As stated above, according to this Chamber’s jurisprudence, which has previously rejected the admission of “testimonial” evidence under Article 69 and Rule 63, this route to admission is not available. If, *arguendo*, it is considered applicable, then the request to admit the Prior Recorded Testimony should be rejected because it lacks probative value and “its prejudice factor is great and its probative value is comparatively slim.”⁴⁹¹

⁴⁹⁰ Application, para.233.

⁴⁹¹ ICC-01/09-01/11-1353, para.16.

221. When discussing “probative value”, this Chamber has held that it is part of the inquiry into “relevance”; specifically, whether “the item relates to a material issue or fact properly to be considered by the Chamber in the sense of making it more or less probable.”⁴⁹² The Chamber has further held that “to have such probative value, the item must also be seen to have...indicia of reliability, including of authenticity”.⁴⁹³ The OTP’s approach to the probative value of the testimony limits the inquiry effectively to authenticity alone. That is, the fact that the testimony was taken by OTP investigators in compliance with the Rules, is sufficient to demonstrate that it has probative value. As evidenced by the Chamber’s jurisprudence this narrow approach is incorrect. The arguments setting out why the Prior Recorded Testimony lacks sufficient indicia of reliability are dealt with extensively in this filing and are relied upon by the Defence for the purposes of responding to the OTP’s alternative Article 69 request.

222. Additionally, the Defence submits that the prejudice of admitting the Prior Recorded Testimony outweighs its probative value. In the first place, the Defence makes the obvious point that the OTP’s submission, that no prejudice is occasioned by admission because the Defence was afforded the opportunity to cross-examine, does not apply to [REDACTED].⁴⁹⁴ In [REDACTED] unsworn, hearsay statement, [REDACTED] gives evidence going to the acts and conduct of Mr. Ruto. Given the “obvious interest on the part of an accused person to confront any person whose testimony (on the stand or through a document) would implicate an accused in criminal conduct”, it would be highly prejudicial to the Defence for this untested evidence to be admitted for the truth of its contents.⁴⁹⁵ Secondly, the Defence submits that its arguments made in Sections V(C) (Acts and Conduct of the Accused) and (D) (Interests of Justice) are

⁴⁹² ICC-01/09-01/11-1353, para.15.

⁴⁹³ ICC-01/09-01/11-1353, para.15.

⁴⁹⁴ Application, para.237.

⁴⁹⁵ ICC-01/09-01/11-1353, para.25.

apposite to the question of prejudice and incorporates those submissions by reference.

223.Finally, the OTP's submission that "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" is without merit because it presents only one aspect of the investigative and evidential reality affecting this case.⁴⁹⁶ As stated at the outset, the OTP had a legal and ethical obligation to properly investigate the Article 7 case from the beginning. It failed to do so and, thus, is unable to establish to the requisite standard that the Prior Recorded Testimony has sufficient indicia of reliability. It is this failure, rather than any alleged interference, which will ultimately mean it is unable to prove its case.

CLASSIFICATION

224.Pursuant to Regulation 23*bis* of the Regulations of the Court, this filing is submitted confidentially. A public redacted version will be filed in due course.

⁴⁹⁶ Application, para.52.

REQUESTED RELIEF

225. For the reasons set out above, the Defence respectfully requests the Trial Chamber to dismiss the Application.

Respectfully submitted,



Karim A.A. Khan QC

Lead Counsel for Mr. William Samoei Ruto

Dated this 23rd Day of June 2015
At The Hague, Netherlands