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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 A, B, and D
and Confidential Annexes C and E**

**Public Redacted Version of Corrigendum to Sang Defence Response
to Prosecution's Request for the Admission of Prior Recorded Testimony
of [Redacted] Witnesses, filed on 12 June 2015**

Source: Defence for Joshua arap Sang

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

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I. INTRODUCTION

1. The Defence for Joshua arap Sang (“Defence”) hereby opposes the *Prosecution’s request for the admission of prior recorded testimony of [REDACTED] witnesses*,¹ wherein the Prosecution requests that the prior unsworn statements (“Prior Statements”) of [REDACTED] core witnesses [REDACTED],² [REDACTED] of whom testified before the Chamber, be admitted for the truth of their contents pursuant to the amended Rule 68 of the Rules of Procedure and Evidence, or alternatively on the basis of Article 69(2) and (4) of the Rome Statute. The Prosecution claims that there was a “Scheme” to persuade Prosecution witnesses to withdraw or recant their evidence, through a combination of intimidation and bribery. The Prosecution essentially admits that without the Prior Statements of the witnesses affected by the Scheme, it does not have sufficient incriminating evidence to sustain the charges.³
2. The Defence requests the Chamber to reject the request in its entirety. The Prior Statements cannot be tendered on the basis of the amended Rule 68, the amendment of which occurred after the start of the trial and after the issue had already materialized. Such retroactive application of Rule 68 would be detrimental and less favourable to the accused and is therefore not allowed on the basis of Articles 51(4) and 24(2) of the Rome Statute.
3. The Prosecution’s Application must also fail because it does not meet the conditions for admission under Rule 68. More specifically, the Prior Statements:
 - i. do not qualify as prior recorded testimony;
 - ii. go directly to the acts and conduct of the accused;
 - iii. were testified to by the witnesses, on all material aspects, and where they did not, it was because the Prosecution failed to make reasonable efforts to elicit the information;
 - iv. lack the required *indicia* of reliability;
 - v. were not recanted due to alleged interference; and
 - vi. are not in the interests of justice.

¹ ICC-01/09-01/11-1866-Conf, 29 April 2015 (“**Application**”).

² Application-AnxA2.

³ Application, paras 1-2, 6.

4. The allegations contained therein go to the very heart of the case, including organisational policy, without which it is difficult to conceive of a case against Sang. None of the allegations against Sang, as contained in the Prior Statements, are corroborated, either by each other, by *viva voce* testimony, nor by independent contemporaneous material, such as copies of radio broadcasts, or newspaper clips. Accordingly, allowing the admission of the Prior Statements would be tantamount to having the core allegations against Sang come from uncorroborated allegations on paper, where the makers of the statements have later denied the allegations under oath. Accordingly, it would be a grave unfairness and injustice if the Prior Statements were admitted for the truth of their contents under the amended Rule 68.
5. The Defence incorporates and relies upon the arguments it made previously in its *Response to the Ruto Defence Request to Rule Inadmissible Certain Supporting Material Relied upon in the 'Prosecution's Request for the Admission of Prior-Recorded Testimony of [REDACTED] Witnesses' and to Order the Prosecution to Re-File its Request*,⁴ namely for the Chamber to declare that the supporting material relied on in the Application, other than what has been admitted into the trial record, should not be taken into consideration in assessing the factual allegations.⁵
6. This response is filed confidentially, as it is in relation to a Prosecution application of the same classification. However, the Defence will file a public redacted version shortly.

II. CONTEXT OF RULE 68 AMENDMENT

7. The Assembly of State Parties (ASP) held its twelfth session from 20 to 28 November 2013.⁶ By way of resolution, the Assembly adopted several rules and amendments to the Rules of Procedure and Evidence.⁷ Specifically, the ASP decided to amend rules

⁴ ICC-01/09-01/11-1875-Conf, 11 May 2015.

⁵ Via email to the parties on 13 May 2015.

⁶ ICC Press Release, 7 November 2013

http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/MA144.aspx

⁷ ICC Press Release, 29 November 2013

http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/PR967.aspx

100 and 68, and create rules 134*bis*, 134*ter* and 134*quater*.⁸ On 27 November 2013, Rule 68 was amended while the *Ruto & Sang* trial commenced on 10 September 2013. Rule 68 was ultimately significantly lengthened,⁹ following the recommendation of the amendment to the ASP through the Report of the Working Group on Lessons Learnt (“WGLL Report”).¹⁰

8. In essence Rule 68 incorporates Rules 92*bis*, *ter*, *quater* and *quinquies* of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) and was presented as the standard practice of the ICTY, seemingly to facilitate its uncritical adoption. In reality there was and is no published practice on 92*quinquies* and there have additionally been elements of other sub-rules that have been controversial. An instance of one such controversy is the assumption that increased efficiency will result due to these rules. This was often not evident at the ICTY and on multiple occasions judges reprimanded the use of 92*bis et seq* to submit excessive amounts of prior recorded material, making trials longer and less efficient.¹¹ In addition, the application of these rules have had an adverse impact on the rights of the accused, in particular with regard to the reliability of evidence and the right to cross-examine witnesses. Similar side effects may result from an over-utilisation of the amended version of ICC Rule 68.
9. It is noteworthy that the International Criminal Tribunal for Rwanda (“ICTR”) did not adopt these rules. The one provision under which a witness statement can be tendered at the ICTR is Rule 92*bis*, allowing its admissibility only if it does not go to the acts and conduct of the accused, and is accompanied by a declaration of the maker of the statement that the contents of it are true and correct to the best of that person’s knowledge and belief. This declaration is only valid if witnessed by a person authorised to do so in accordance with the law and procedure of a State or a Presiding Officer appointed by the Registrar of the Tribunal for that purpose, who also attaches a declaration which states, amongst others, that the maker of the statement “was

⁸ Resolution ICC-/12/Res.7

http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP12/ICC-ASP-12-Res7-ENG.pdf

⁹ *Ibid.*

¹⁰ ICC-ASP/9/Res.2, Adopted at the 5th plenary meeting, 10 December 2010, by consensus.

¹¹ *Prosecutor v. Blagojevic and Jokic*, First Decision on Prosecution’s Motion for Admission of Witness Statements and Prior Testimony Pursuant to Rule 92*bis*, 12 June 2003, and *Prosecutor v. Jadranko Prlic et al*, IT-04-74-T, Separate Opinion of Presiding Judge Jean-Claude Antonetti Regarding the Decision on the Application of Article 92*ter* of the Rules, 25 June 2007.

informed that if the content of the written statement is not true then he or she may be subject to proceedings for giving false testimony” (Rule 92bis(B)(ii)(c)). Until the ICTY and ICTR were unified in the later established United Nations Mechanism for International Criminal Tribunals (“UNMICT”), this was the only legal basis for admitting written witness statements.

10. Given this context, the amended version of Rule 68, incorporating a very wide range of options to tender witness statements for the truth of their contents is rather controversial. The Prosecution now seeks to rely on this controversial amended Rule 68 in circumstances where Rule 68 is not applicable, as elaborated below. The Chamber should give due consideration to fair trial concerns in its determination whether the application of the amended Rule 68 is appropriate in the case before it.

III. SUBMISSIONS ON APPLICABILITY OF RULE 68 TO THE CURRENT CASE

1. The Application is Out of Time

11. The Defence previously noted that, in the event the Prosecution intends to rely on Rule 68, it should make an application to that effect to the Chamber 21 days prior to the testimony of the witnesses at the latest.¹² This is the correct procedure pursuant to the Trial Chamber’s *Decision on the Conduct of Trial Proceedings (General Directions)*,¹³ which directs: “[w]hen a party wishes to introduce prior recorded testimony in accordance with Rule 68(b), it shall file an application to that effect at least 21 days before the witness is scheduled to appear”.¹⁴ The other party then has 10 days following the notification of the application to respond.¹⁵
12. The Prosecutor failed to make such an application for any of the witnesses, even though it was foreseeable that the witnesses would change their testimonies long before they appeared.¹⁶

¹² T-130, 51:12–23.

¹³ ICC-01/09-01/11-847-Corr, 9 August 2013.

¹⁴ *Ibid*, para.28.

¹⁵ ICC-01/09-01/11-847, Decision on the Conduct of Trial Proceedings (General Directions), 9 August 2013, para.28.

¹⁶ [REDACTED].

13. The Defence submits that it is now too late to submit the Application, without having provided formal notice and having made the required application prior to the witnesses commencing their testimonies. The reason for requiring the party seeking to introduce Rule 68 material to put the opposite party on notice is to give it adequate time to prepare properly for the cross-examination of the witness concerned, based on his or her Prior Statement. On several occasions the Prosecution alluded to the fact that they intended to submit an application under Rule 68, but never stated which witnesses the Application would relate to and whether they would seek the admission of the Prior Statements in whole or in part.
14. At no point has the Prosecution acknowledged the existence of the Chamber's procedural condition for seeking admission of the Prior Statements under Rule 68. Nor has the Prosecution sought a variation of these General Directions, despite the Defence's foreshadowing of this objection. Whilst true that the Chamber issued its General Directions prior to the amendment of Rule 68, it has not revised them since the rule amendment. Accordingly, the requirement still stands and has not been followed.

2. Article 51(4) - the Application is Retroactive

15. The Defence submits that Rules 68(2)(c) and (d) are inapplicable in the cases in the Kenyan Situation, by express emphasis of the Assembly of States Parties ("ASP"), as a result of the principle of non-retroactivity set out in Articles 51(4) and 24(2), and on account of Article 69(2), because to engage the rule would be 'prejudicial to or inconsistent with the rights of the accused'. Rule 68 was amended several months after the commencement of the *Ruto and Sang* trial, and years after the Prior Statements were made during interviews with the Prosecution. Rule 68 was also amended after most of the alleged interference occurred (or just shortly before).¹⁷

¹⁷ See Confidential Annex C.

2.1 Intention of the Drafters

16. It is clear from the face of the ASP resolution, especially the Preamble, that the States Parties intended that amendments to Rule 68 would not apply to pending cases.¹⁸
17. These references by the Assembly to Articles 51(4) and 67 of the Rome Statute should, in principle, have been unnecessary. Article 51(4) already makes it clear that “amendments [to the Rules of Procedure and Evidence] shall be consistent with the Statute”. Also, the Explanatory Note in the cover page of the Rules of Procedure and Evidence (“RPE”) states that the Rules “are subordinate [to the Statute] in all cases”. Yet, the States Parties found it important to emphasize that Rule 68 could not be applied retroactively to the detriment of the accused. This reference does much more than “direct the reader to the Article” as suggested by the Prosecutor.¹⁹ It unequivocally expresses the intent of the drafters that this Rule not be applied to cases pending before the Court.
18. This reading is supported by the fact that the Kenyan delegation which was part of the negotiation process objected to the proposed amendments to Rule 68, on the grounds that they would adversely affect the right of the accused to confront his or her accusers by allowing the admission of untested evidence.²⁰ To accommodate Kenya’s expressed concerns, Senior Officials of the Court and the States Parties to the Rome Statute reassured the Kenyan delegation as well as other delegations of the African Union States Parties, that the amended version of Rule 68 would not apply to the Kenya cases.²¹ It was on the basis of these guarantees that Kenya accepted the adoption of an amended version of Rule 68.
19. Whilst Kenya’s consensus was not strictly necessary to pass the amendment – which can be passed on the basis of 2/3rds of the votes – seeking the consensus of all States Parties is in line with the spirit of the Statute and the Court. Most notably, Article

¹⁸ Resolution ICC-ASP/12/Res.7, operative paragraph 2, internal citations omitted, *supra* fn.8.

¹⁹ T-130, 32:15-34:4, 34:6-7; Application, para.17.

²⁰ See letter from M. Muchiri, Ambassador of the Republic of Kenya, addressed to the President of the Assembly of State Parties to the Rome Statute, 21 November 2013, and the attached document titled Kenya’s Position on Amendments to Rule 68 – Working Document – Nov 17th, 2013. **Confidential Annex D (‘Letter from Ambassador Muchiri’)**.

²¹ See KEN-OTP-0153-0432, [REDACTED].

112(7) of the Rome Statute states that every effort should be made “to reach decisions by consensus in the Assembly”. In similar spirit, the resolution emphasizes that “[t]he proposals on the draft amendments to the Rules of Procedure and Evidence on amending rule 100, rule 68, and inserting new rules 134 *bis*, rule 134 *ter* and rule 134 *quater* were **discussed by all delegations in a spirit of understanding, cooperation and flexibility**, in close consultation with the organs of the Court. This process enabled the Working Group to propose the draft amendments, which are before the Assembly for adoption by consensus. I am pleased to submit draft resolution ICC-ASP/12/L.10/Rev.1 for the consideration of the Assembly and to recommend that it be adopted by consensus” (emphasis added).²²

20. In the spirit of understanding, cooperation and flexibility, the Government of Kenya (“GoK”) through its delegation provided its consensus to the proposal of Rule 68’s amendments having received an explicit guarantee from senior members of the Court that the amended version would not be applied to the Kenyan cases.²³ When the Prosecutor expressed her intention to rely on the amended Rule 68 in the case of Sang and Ruto in violation of the guarantee that this would not occur, the [REDACTED] alerted the President and Prosecutor of the Court to the fact that such action would be [REDACTED].²⁴
21. The GoK sought leave to submit observations in order to explain to the Court what had been agreed upon during the negotiations.²⁵ Regrettably, the Chamber dismissed this application stating that the observations from the Kenyan Government as regards its participation in the negotiation process of the amended Rule 68 of the Rules are neither necessary nor appropriate for the Chamber’s judicial determination on this matter, namely the legal interpretation and application of Rule 68.²⁶

²² Assembly of States Parties to the Rome Statute of the International Criminal Court, Twelfth Session, The Hague, 20-28 November 2013, Official Records, Vol. I, (“ASP 12th Session Records”), p.71.

²³ ICC-01/09-01/11-1891, The Government of the Republic of Kenya’s Request for Leave to file amicus curiae Observations on ‘Public redacted version of “Prosecution’s request for the admission of prior recorded testimony of [REDACTED] witnesses”, 29 April 2015, ICC-01/09-01/11-1866-Conf+Annexes’, 27 May 2015. *See also* “ICC Assembly of States Parties Rundown”, Beth Van Schaack, 27 November 2013, Just Security.

²⁴ *See* [REDACTED], *supra* fn.21.

²⁵ ICC-01/09-01/11-1891, paras.2-5.

²⁶ ICC-01/09-01/11-1893, Decision on the Government of the Republic of Kenya’s Request to File Amicus Curiae Observations, 29 May 2015, para.4.

22. The Prosecutor similarly holds that “the applicability of Article 51(4) and rule 68 (as amended) must be discerned from the provisions’ plain terms, rather than any alleged statements or “undertakings” made during the drafting of the amendments to rule 68”.²⁷ The Defence respectfully disagrees with this proposition. The intention of the drafters of the ICC rules is of real significance. Unlike at the *ad hoc* tribunals, where rules were adopted and amended by the judiciary, after hearing the prosecution and registry, at the ICC, the Rules are adopted and amended by the ASP, and thus reflect “first and foremost” their will.²⁸ An explicit expression of this will should therefore not be dismissed out-of-hand.
23. In addition, the Defence submits that a complete disregard for an undertaking made during the drafting process and the Prosecutor’s suggestion to simply ignore this and rather to look only at the plain terms of the text violate the rule of good faith, which the Chamber has held “enjoys a pride of place in both the *performance* and *interpretation* of treaties”.²⁹
24. According to Article 31(1) of the Law of Treaties, a treaty “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose”.³⁰ Professor Cheng, cited with approval by the Majority of this Chamber in its *Decision on the Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation*,³¹ describes this principle – which has long been recognized by international tribunals and reaffirmed by the United Nations – as the “principle that treaty obligations should be fulfilled in good faith and not merely in accordance with the letter of the treaty”.³² Cheng goes on to say that the principle of good faith requires that treaties are to be interpreted according to the “common and real intention of the parties”,³³ with the view to “carrying out the substance of this mutual understanding

²⁷ Application, para.14.

²⁸ Broomhall, B., “Article 51 Rules of Procedure and Evidence”, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (Hart 2008), p.1037.

²⁹ ICC-01/09-01/11-1274-Corr2, *Decision on the Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation*, 17 April 2014 (‘**Summons Decision**’), para.121.

³⁰ Vienna Convention on The Law of Treaties, United Nations Treaty Series 18232, vol. 1155, p.331.

³¹ *Summons Decision*, para.122.

³² Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, p.114.

³³ Cheng, 114

honestly and loyally”.³⁴ The result is that “treaties ought not to be interpreted exclusively according to their letter, but according to their spirit”.³⁵

25. The Majority also cited an opinion expressed by the International Court of Justice in the case concerning *Gabcikovo-Nagymaros* Project, that, “it is the purpose of the Treaty, and the intentions of the parties in concluding it, which should prevail over its literal application”.³⁶
26. These citations stand in clear contrast with the Prosecution’s position. The disregard of a promise made by senior officials of the Court is regrettable – as it infringes the principle of good faith. To avoid such an infringement, the Chamber should therefore not apply the amended version of Rule 68.

2.2 Prohibited by the Plain Text of Article 51(4)

27. Even on the plain text of Article 51(4), it is obvious that Article 51(4) prevents the applicability of Rule 68 in the present case. The text of Article 51(4) is clear. If an amendment is detrimental, its retroactive application is prohibited. The Defence agrees with the Prosecution that an amended provision is not applicable under Article 51(4) if the amendment is both retroactive and detrimental to the accused.³⁷ The current application fails on both prongs.
28. The Prosecution argues that the application of Rule 68 in this case would not be retroactive because its application is in respect of “procedural steps that were taken subsequent to the enactment of the new provision – and are therefore not directed at “past events”.”³⁸ In addition, the Prosecution claims that, prior to the rule amendment “no right or duty had accrued to any of the Parties in the present case – that would prevent the application of the amendment to this case”.³⁹ The Prosecution draws a

³⁴ Cheng, 115

³⁵ Cheng, 115.

³⁶ Summons Decision, para.126.

³⁷ Application, para.20; *Commentary on the Rome Statute of the International Criminal Court*, Triffterer, 2008, p.1044, para.32.

³⁸ Application, para.24.

³⁹ Application, para.25.

parallel with a change of a page-limit, which would apply to all submissions filed by parties in pending cases, as soon as the amended provision has entered into force.⁴⁰

29. The Defence submits that the present situation cannot be compared with a change of the page-limit of a future motion. The issues underlying the Prosecutor's application are not new. The issues did not arise after the rule amendment. The Prior Statements were taken before the Rule 68 amendment, and most of the alleged acts of interference occurred beforehand as well.⁴¹ Thus, whilst the application itself was submitted only after the rule amendment, the issues involved existed prior to the rule amendment. Plus, the trial had already started.
30. Assuming, *arguendo*, Rule 68 could be said to be applicable generally, it certainly cannot be applicable to occurrences and events, which took place prior to the rule's adoption on 28 November 2013. With respect to witnesses [REDACTED], all alleged incidents of interference, including the witnesses' withdrawals, took place prior to 28 November 2013. Witnesses [REDACTED] are the two exceptions to this fact.
31. The alleged interference and the witnesses' resultant withdrawal is most likely what prompted the Prosecution, through the Court, to seek an amendment to Rule 68 during the 12th Session of the ASP, in hopes that it might find a way to salvage its otherwise crumbling cases in the Kenyan Situation.⁴² It is therefore unscrupulous for the Prosecution to now claim that the Application does not depend on past occurrences or events, which pre-dated the adoption of the Rule 68 amendment.
32. It is also an incorrect assumption that no "right" had accrued prior to the rule amendment that would be removed or attenuated by the application of the amendment to Rule 68 in the present case. Whilst it is true that not all rights give rise to legal entitlements in a pending case, "the relevant entitlement of an accused is to a fair

⁴⁰ Application, para.24.

⁴¹ See **Confidential Annex C**.

⁴² ICC-ASP/12/37/Add.1, Annex IIA, Recommendation on a proposal to amend rule 68 of the Rules of Procedure and Evidence (Prior Recorded Testimony), para.34.

trial.”⁴³ The Defence submits that Sang’s entitlement to a fair trial will be jeopardized in the event that the Chamber applies the amended version of Rule 68 in his case.

33. The Prosecutor’s submission that no “right” has accrued prior to the rule amendment is based on the erroneous assumption that the witnesses’ Prior (inconsistent) Statements were already admissible under Article 69(2) and (4) of the Rome Statute prior to the amendment of Rule 68. The Defence submits that it is incorrect that the statements would have been admissible under this article, then or now. Rule 68 has always been the *lex specialis* to the overarching admissibility scheme set out in Article 69(4). This is consistent with the principle of orality as enshrined in Article 69(2), which allows for limited exceptions, only to the extent permitted by the rules, and as long as it is not prejudicial to or inconsistent with the rights of the accused.
34. Accordingly, where an out-of-court statement is testimonial in nature, it falls within the ambit of Rule 68. The conditions for admission under Rule 68 cannot then be circumvented by relying on more general provisions in the Statute or the Rules. The guarantee under Article 67(1)(e) “to examine, or have examined the witnesses against him or her” is also triggered when it concerns evidence which is testimonial in nature.⁴⁴
35. The Chamber in *Katanga & Ngudjolo* confirmed this, holding: “Once the Chamber has determined that an out-of-court statement is testimonial, that statement can only be allowed into evidence under the conditions provided in rule 68.”⁴⁵ The Chamber in the present case similarly took the position that, if material is testimonial in nature, an application for its admission must be made on the basis of Rule 68.⁴⁶
36. A statement given to the Prosecution, as a body authorized to collect evidence for use in judicial proceedings, is testimonial for the purposes of Rule 68, provided that “the person making the statement understands, when making the statement, that he or she is providing information which may be relied upon in the context of legal

⁴³ *Ex: Prosecutor v. Mejakic et al.* Referral Bench, Decision on Prosecutor’s Motion for Referral of Case Pursuant to Rule 11bis, 20 July 2005, para.129.

⁴⁴ ICC-01/04-01/07-2635, Decision on the Prosecutor’s Bar Table Motions, 17 December 2010, para.43.

⁴⁵ ICC-01/04-01/07-2635, para.50.

⁴⁶ ICC-01/09-01/11-1353, 10 June 2014, paras.85-88; ICC-01/09-01/11-1804, 2 February 2015, para.27.

proceedings”.⁴⁷ These conditions are met in the present case and, accordingly, the Prior Statements are testimonial in nature. Accordingly, the Prosecution cannot rely on any provision other than Rule 68 to seek to tender these statements for the truth of their contents. Nor was the Prosecution able to do so prior to the amendment.

37. The practice before the Court also supports the position that Rule 68 should not apply retroactively in pending cases. For instance, in early 2014, the Chamber in the case of *Bemba* considered the admission of a piece of evidence under Rule 68, some months after the amendment of the Rule. Referring to the same language that was quoted in the resolution, the Chamber noted that “*the amended rule cannot be applied retroactively to the detriment of the person who is being investigated or prosecuted*” and said that it was “*bound to apply the unamended Rule 68*”.⁴⁸
38. The Prosecutor refers to the ICTY case of *Milutinovic* as an example of a case where a new Rule 92*quater*, which is similar to Rule 68, was applied in an ongoing case notwithstanding the existence of Rule 6(D), which is the equivalent of Article 51(4). The case-law of other tribunals is of limited relevance and the Chamber under no obligation to follow or even consider it.

3. Article 51(4) - the Application is Detrimental

39. The retroactive application of Rule 68 in a pending case is detrimental to the accused because of the circumstances in which the Prior Statements were taken. Three key problems can be identified: (i) these were unsworn, out-of-court statements, made without potential liability for perjury; (ii) the Prior Statements were not taken in neutral circumstances, and this limits their reliability, and (iii) it poses equality of arms problems given the Prosecution’s greater capacity and resources to obtain statements in this manner, for use at trial.

⁴⁷ ICC-01/04-01/07-2635, paras.47-49.

⁴⁸ ICC-01/05-01/08-3019-Red, Decision on the admission into evidence of items deferred in the Chamber's previous decisions, items related to the testimony of Witness CHM-01 and written statements of witnesses who provided testimony before the Chamber of 17 March 2014 (ICC-01/05-01/08-3019-Conf), 28 August 2014, fn.88,111.

40. The detriment of the application of amended Rule 68 in the case at hand is even graver because incriminating information going directly to the acts and conduct of the accused, which was not repeated under oath and/or was explicitly denied by the accuser when in circumstances where he could be held liable for perjury, is being introduced by way of paper evidence. By contrast, the Prior Statements were written down and summarized by an interested party, without judicial oversight, without subjecting the witness to an oath, and usually without making an audio or video recording of the event. This amounts to real prejudice.
41. This procedure is unlike that contemplated by Article 56 of the Rome Statute, or a 92*bis* statement under the ICTR or ICTY legal systems, where a neutral officer must take the statement after issuing a warning that, if the witness provides false information in the written statement, he or she may be subjected to proceedings for perjury.
42. Whilst the ICTY adopted new rules to facilitate the admission of witness statements, only once has it happened that prior inconsistent statements of adverse witnesses who gave *viva voce* testimony, were admitted as evidence in addition to their oral testimony under oath. In that instance, however, the accuracy of the statements was more reliable, because they were video recorded word for word and the judges could assess the witness's demeanour in answering the questions.⁴⁹ Though these statements, which contradicted the witnesses' oral testimony, were admitted, none of the witnesses was ultimately relied upon in the Chamber's deliberation, because of their lack of reliability.⁵⁰
43. The Prosecutor's suggestion⁵¹ that there is no detriment because the Defence has been offered the opportunity to cross-examine the witnesses concerned does not remove the prejudice. Likewise, the detriment is not less because the Defence had vague advance notice that an application may be submitted, that the rule will apply equally to both

⁴⁹ *Prosecutor v Fatmir Limaj et al*, IT-03-66-T, Decision on the Prosecution's Motions to Admit Prior Statements as Substantive Evidence, 25 April 2005, paras.31-34.

⁵⁰ *Ibid*, Trial Judgment, 30 November 2005, para.14.

⁵¹ Application, para.44.

parties, or that there are sufficient safeguards incorporated in Rule 68 to remove the prejudice.⁵² At best, such factors mitigate the prejudice but the prejudice remains.

44. Whilst indeed in the present situation, the Defence has been given an opportunity to cross-examine [REDACTED] witnesses, the extent to which it was able to test the incriminating evidence provided in Prior Statements was rather limited, given that the Prosecution did not always make reasonable efforts to lead all material aspects. Indeed, because the witnesses were denying their earlier allegations (which the Defence submits is the truthful position), the Defence's ability to cross-examine on those allegations was undermined. In particular, where the Prosecutor does not elicit the incriminating information or all material aspects of the Prior Statement from the witness,⁵³ it is unfair for the Defence to be put in a position where it has to first elicit such information, only to then demonstrate its untruthfulness.⁵⁴ This is particularly so where the defence accepts the in-court recantation of previous false allegations. This procedure shifts the burden of proof onto the Defence, to elicit incriminating evidence, only to knock it down. The Defence should not have to prove anything or place on the record any incriminating evidence. Rather, it is for the Prosecution to demonstrate that the initial allegations were truthful and to put them to the witness on the stand in order for the witness to confirm or deny the allegations under oath. If the witness departs from the earlier statement, he or she should be offered an opportunity to explain the reason for the departure, and to provide an accurate version of events. If the Prosecution continues to believe that the original account was truthful, it should challenge its witness with independently verifiable information, which supports the witness's original account. This it did not do. Therefore, it is not sufficient for the Prosecution to promote the veracity of the original account by simply making allegations of later interference. Even if interference was found to have occurred subsequent to the provision of the Prior Statements, this fact still does not demonstrate that the original account was truthful.

45. As to the right to confrontation, which has been clearly weakened in these circumstances, the *Katanga and Ngudjolo* Trial Chamber noted that "[t]he right of the

⁵² Application, paras.40-41.

⁵³ Section III.3. on Material Aspects, *infra*.

⁵⁴ T-145, 8:22–16:8.

accused to examine, or have examined, adverse witnesses is of fundamental importance to the fairness of the proceedings. No judgment can be rendered safely if it is based on evidence prepared on behalf of one party which the opponent has not been able to test or verify.”⁵⁵

46. Introducing statements, the contents of which have since been denied under oath by their providers, is unfair as it makes it difficult for the Chamber to determine at which moment the witnesses have told the truth and when they have lied. It is clear that the witnesses in question were willing to lie on one of the occasions – so why not on both occasions? Rather than streamlining the procedure, the admission of these statements would complicate the task of the Chamber in ascertaining the truth, as they would have to assess each allegation in comparison to its previous version, in determining whether it is credible or not. The Prosecution did not help itself or the Chamber during the witnesses’ testimonies, as it failed completely to prove that the earlier allegations could be true, even after applying for declaration of hostility, succeeding in that application and cross-examining their own witnesses.

47. Further, the suggestion that the prejudice is removed because a rule applies to both parties equally⁵⁶ is one with which the Defence cannot agree. This proposition equates rights of the accused with purported and in fact inexistent rights of the Prosecution in the international legal order. The Defence should not have to rely on Rule 68 or any similar rule to introduce evidence. The Defence does not have a burden to produce any evidence at all. In some situations, the Defence would not find it necessary to call any evidence. This is the case where the Prosecutor fails to prove her case beyond a reasonable doubt. To place the Defence on equal footing with the Prosecution in terms of the application of Rule 68 errantly presumes that the Defence will present a case and bring witnesses.

48. In support of its argument that the equal application of amended Rule 68 to both parties removes the detriment to the accused, the Prosecution relies on the ICTY case of *Šešelj*. In that case, the retroactive application of Rules 92*ter* and 92*quater* was allowed because, in the Chamber’s view, this did not prejudice the accused “*since he*

⁵⁵ ICC-01/04-01/07-2635, para.42.

⁵⁶ Application, paras.31-32.

may invoke the same rights as the Prosecutor and has not shown the existence of any prejudice".⁵⁷ It should be pointed out that, in the *Šešelj* case, the trial commenced a year after the adoption of the new rules (even if the indictment had been issued prior to the rules adoption). It is therefore distinguishable from the present case where the trial started more than two months before Rule 68 was amended. In light of the gap between the timing of the adoption of the new rule in *Šešelj* and *Ruto and Sang*, the relevance of *Šešelj* as a useful precedent to the present application is extremely limited. The Chamber has of course no obligation to follow or even consider this, or any other ICTY precedent.

49. In addition, it is to be noted that the Prosecution as an institution makes considerably more use of ICTY Rule 92*bis et seq* and ICC Rule 68 procedures than do the defence teams.⁵⁸ This raises concerns not only as to the different conditions under which witness testimony is examined but also the equality of arms given the vastly different resources at the disposal of the Prosecutor. As the *Katanga* defence noted: *'We simply don't have the same resources as the Prosecution to produce the elaborate, detailed statements that they have produced for their witnesses'*.⁵⁹

4. Article 24(2) – the Former Rule 68 was More Favourable

50. The Defence submits that, not only is the applicability of Rule 68 barred under Article 51(4), its applicability is also barred under Article 24(2) of the Rome Statute. Article 24(2) is part of the statutory fair trial guarantees. It codifies the customary international law principle of non-retroactivity in criminal law, holding that one could not be found guilty for conduct that did not constitute a crime at the time it was committed. It means also that a convicted person should be penalised with the penalty in force at the relevant time, and not a stronger penalty should one be later enacted (*nullum crimen, nulla poena sine lege*).⁶⁰

⁵⁷ *Prosecutor v Vojislav Šešelj*, IT-03-67-T, Redacted "Decision on the Prosecution's Consolidated Motion Pursuant to Rules 89 (f), 92*bis*, 92*ter* and 92*quarter* of the Rules of Procedure and Evidence" filed confidentially on 7 January 2008, IT-03-67-T 17/27896 BIS, 21 February 2008, para.37.

⁵⁸ Yvonne McDermott, *The Admissibility and Weight of Written Witness Testimony in International Criminal Law: A Socio-Legal Analysis*, Leiden Journal of International Law, Vol.26, no.4, December 2013, pp.971-989.

⁵⁹ ICC-01/04-01/07-T-97-Red-ENG, 8 February 2010, Defence Counsel, pp.28-29.

⁶⁰ W Schabas, *The International Criminal Court: A Commentary on the Rome Statute* [Oxford Commentaries on International Law] 2010, p.418.

51. But Article 24(2) is much broader in scope than any provision in human rights treaties codifying this customary international law principle. For instance, Article 15(1) of the International Covenant on Civil and Political Rights (“ICCPR”), which resembles Article 24(2) of the Rome Statute, only governs the benefit of the more lenient penalty.⁶¹ Article 24(2), on the other hand, has a much wider reach, covering both changes in the definitions of crimes and the general principles, and “the procedural and evidentiary regime”.⁶² This is Schabas’ view, shared by numerous other scholars including Boot, who states that Article 24(2) “*appears to concern also changes to RPE*”.⁶³ This wider application can be derived from the language used in Article 24(2): “*the law applicable to a given case prior to a final judgment*”. This terminology is much broader than the terminology used in similar provisions in international human rights law. In that sense, Article 24(2) is unique and without precedent. The law referred to in Article 24(2) appears clearly not to be limited to substantive criminal law, but also to refer to the applicable procedural law.
52. Indeed, Article 21 of the Rome Statute defines the law applicable before the ICC as, in the first place, the Statute, elements of crimes and the Rules of Procedure and Evidence. By virtue of this provision, ‘*law*’ in Article 24(2) appears to include the Rules of Procedure and Evidence so that Article 24(2) covers the amendments to Rule 68. In this case, in seeking to rely on Article 24(2) to oppose an application in an ongoing case, it would have to be shown that the new rule is less favourable than the original version.
53. Article 24(2) is less stringent than Article 51(4). It 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 the present case, there is no doubt that the previous Rule 68, not allowing the admission of testimonial evidence unless both parties had an opportunity to examine the witness during the proceeding, or the witness is present and does not object to the submission of the previously recorded testimony, is more favourable to an accused than the new Rule 68 under which the scope to admit testimonial evidence is significantly wider.

⁶¹ *Ibid*, 420.

⁶² *Ibid*.

⁶³ Machteld Boot, *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*, Intersentia, 2002, pg.374.

5. Application is Contrary to the Principle of Orality

54. Rule 68(1), reflecting the language of the related Article 69(2) of the Rome Statute, includes the provision that the introduction of prior recorded testimony may be allowed, “*provided that this would not be prejudicial to or inconsistent with the rights of the accused*”. Unlike the previous bars to the application of Rule 68, this option applies not only to ongoing cases, but to any case where the Rule is invoked.
55. The Report of the Working Group on Lessons Learnt (WGLL Report) notes that in amending Rule 68, ‘*an explicit reference to the rights of the accused was added, to draw attention expressly to this fundamental protection in the context of exceptions to the principle of orality*’.⁶⁴
56. In *Bemba*, following an application by the Prosecutor to submit prior recorded testimony of three witnesses,⁶⁵ Trial Chamber III discussed the principle of the primacy of orality and its statutory exceptions. The Chamber stated that the general principle was that evidence should be given in person and that this could be departed from only when it is not prejudicial to, or inconsistent with, the rights of the accused. The option of introducing prior-recorded testimony should be adopted only in specific and exceptional circumstances.⁶⁶
57. At a later point in the *Bemba* case, a few days prior to the amendment of Rule 68, the Chamber called a witness for questioning.⁶⁷ The witness was questioned on a statement he had previously provided to the prosecution. On 13 December 2013, after Rule 68 was amended, the Chamber sought views from the parties and participants as to whether the statement should be admitted as evidence.⁶⁸ Both the Prosecution and the Defence opposed the admission. The Prosecution was of the view that the exceptional nature of the judges’ discretion “*derives from a general acceptance that*

⁶⁴ WGLL Report, para.12.

⁶⁵ ICC-01/05-01/08-886, Decision on the "Prosecution Application for Leave to Submit in Writing Prior-Recorded Testimonies by CAR-OTP-WWWW-0032, CAR-OTP-WWWW-0080, and CAR-OTP-WWWW-0108", 16 September 2010, paras.7,15.

⁶⁶ ICC-01/05-01/08-886, para.7.

⁶⁷ ICC-01/05-01/08-2863-Red, para.5. Witness CHM-01 appeared before the Chamber and provided testimony from 18 to 22 November 2013; see ICC-01/05-01/08-2923, 13 December 2013.

⁶⁸ ICC-01/05-01/08-2923, Order seeking observations on the admission into evidence of written statement of witness CHM-01, 13 December 2013.

witness testimony is primarily evaluated on the basis of the oral testimony in court and documentary evidence apart from prior statements. The decision to admit a prior statement under Rule 68 should therefore only be made in exceptional circumstances, where good reasons exist".⁶⁹

58. On similar grounds, the Chamber in the present case should be cautious in admitting the prior statements under Rule 68, in particular given the controversy of the amendment.

III. SUBMISSIONS ON RULE 68 CRITERIA

1. Prior Statements do not amount to Prior Recorded Testimony

59. The Defence submits that, whilst testimonial in nature and falling within the ambit of Rule 68, the Prior Statements do not qualify as prior recorded testimony. This, the Defence submits, is a separate question from the first question as to whether a statement is testimonial in nature. As stated earlier, a statement given to a body authorized to collect evidence for use in judicial proceedings, with knowledge of the maker that the statement may be used in legal proceedings, is testimonial for the purposes of Rule 68.⁷⁰
60. The fact that a statement is testimonial in nature simply means that its admission must be assessed within the framework of Rule 68. Statements that are testimonial in nature cannot be admitted under any other legal provision. This is because Rule 68 is the *lex specialis* to the overall admissibility scheme under Article 98(4) and must be read in light of Article 98(2), favoring orality. But for statements that are testimonial in nature to actually be admissible under Rule 68, they must meet the conditions under this rule.
61. The first condition is that the statements qualify as prior recorded testimony. Being of a testimonial nature is not sufficient to qualify as prior recorded testimony. Most importantly, not all statements of a testimonial nature are recorded. For instance, the Prosecution has not provided audio or video recordings of its interviews with

⁶⁹ ICC-01/05-01/08-2930, Prosecution's Observations on the admission into evidence of the written statement of witness CHM-01, 10 January 2014.

⁷⁰ ICC-01/04-01/07-2635, paras.47-49.

[REDACTED].⁷¹ Not only is there no audio and video recording of their testimony; there is not any transcript, which reflects word-for-word the questions posed by the Prosecution and the answers provided by the witness. The interview has simply been summarized in the form of a signed statement, which is not tantamount to ‘prior recorded testimony’. A summary of a witness’s interview prepared by an interested party amounts to little more than an investigation report and can therefore not qualify as a recording. Accordingly, the statements are not admissible under Rule 68.

62. The Prosecution has provided a partial audio-recording and transcript for its interviews with [REDACTED]. In the traditional sense, even this out-of-court statement does not amount to testimony. Most legal dictionaries define testimony along the lines of “*oral evidence given under oath by a witness in answer to quest*”.⁷² Testimony is further defined as being “*distinguishable from evidence that is acquired through the use of written sources, such as documents*”.⁷³ On the basis of these legal definitions, unsworn statements given out-of-court to a party with a vested interest in the outcome of the case do not qualify as testimony. For an out-of-court statement to be testimony, it should have been taken by a neutral judicial officer and not a party; and the witness should have been sworn in.
63. Under Article 56 of the Rome Statute, in the event of a unique investigative opportunity, measures (including the involvement of defence counsel in the process) may be taken to safeguard the integrity of the proceedings and the rights of the defence. A deposition taken under this article may then qualify as prior recorded testimony. Also, as aforementioned, the ICTY and ICTR Rule 92*bis* describes a detailed procedure of the taking of witness statements by a neutral officer who also warns the witness of potential perjury liability consequences of providing false information. Yet here, no such precautions, which might potentially result in eliciting more reliable information, were taken in respect of any of the witnesses concerned.
64. The Defence acknowledges that previous Chambers at the ICC have treated a recorded witness statement as “testimony” in the context of Rule 68, in particular because it is

⁷¹ The Prosecution has only disclosed audio recordings of the second half of its interviews with [REDACTED].

⁷² Dictionary.law.com; Black’s Law Dictionary, thelawdictionary.org.

⁷³ *Ibid*; West’s Encyclopedia of American Law, Ed.2 ©2008 The Gale Group, Inc.

not complete. In light of this jurisprudence, the partially recorded prior statement of [REDACTED] might qualify as “testimony”, however the Defence requests that this Chamber decide for itself the definition of “testimony” and that, in any event, in the circumstances find that the incomplete recordings which accompany [REDACTED]’s prior statements do not have the requisite indicia of reliability.

2. Allegations concern Acts and Conduct of the Accused

65. Taken at face value, the Prior Statements are arguably highly incriminatory and are replete with references to the acts and conduct of the accused. Thus the Prior Statements should not be admitted at all. However, if the Chamber admits the Prior Statements, the portions relating to the acts and conduct of the accused should be struck out and not considered for the truth of the contents. The fact that the prior recorded testimony goes to proof of acts and conduct of the accused “may be a factor against its introduction, or part of it” (Rule 68(2)(d)(i)).
66. Given the controversy of admitting untested (or in this case, undertested) evidence, which goes directly to the acts and conduct of the accused, the International Bar Association considers it “paramount to highlight the need for exceptional application of these provisions. Any provision that might facilitate the admission of evidence against an individual – particularly evidence central to the case against them – in the absence of affording that person an opportunity to test the evidence, should be applied in the most exceptional of cases”.⁷⁴
67. Likewise, in this regard, the SCSL in *Norman et al.* held that “the Accused will be unfairly prejudiced if documents pertaining to their acts and conduct are admitted into evidence without giving the Defence the opportunity of cross-examination”.⁷⁵ Piecemeal or partial cross-examination, as the Defence was forced to do with these [REDACTED] witnesses, is not effective enough to cure the prejudice.

⁷⁴ International Bar Association, Legal Opinion Rule 68 Amendment Proposal, Assembly of States Parties 12 November 2013, January 2014, page 4 (**‘IBA Legal Opinion’**).

⁷⁵ *Prosecutor v Norman et al.*, SCSL, Decision on Prosecution’s Request to Admit into Evidence Certain Documents Pursuant to Rules 92bis and 89(C), 14 July 2005 (**‘Norman Decision’**), p.5.

68. The *ad hoc* tribunals have further expanded on the notion of ‘acts and conduct’ and the related nature of statements that must be subjected to confrontation, to include: the ‘proximity’ to the accused of the acts and conduct which are described in the written statement sought to be admitted, and whether the statement or transcript goes to proof of a ‘critical element’ of the Prosecution’s case against the accused, or goes to a ‘live and important issue’ between the parties, as opposed to peripheral or marginally relevant issue.⁷⁶ Moreover, the fact of the conduct being that of ‘co-perpetrators’ or ‘subordinates’ is relevant in determining if cross-examination should be allowed.⁷⁷
69. According to the literature, “in ICTR and ICTY best case law, it is well established that when evidence is crucial for the defendant, even if it does not directly refer to the acts and conduct of the accused, live testimony must be given preference over written testimony. This way, the accused’s right to examine or cross-examine witnesses provided for in the *Ad Hoc* Tribunals Statutes is respected in the most practicable way possible.”⁷⁸
70. The admission of the Prior Statements is highly prejudicial given the fact that the Prosecution is seeking to admit the incriminatory statements of not just one, but [REDACTED] witnesses – this is [REDACTED] of the total number of witnesses, and approximately [REDACTED] of who might be considered the core or linkage witnesses in the case. The high number and percentage of statements sought to be adduced through Rule 68 compounds the prejudice to the Defence. Indeed, the Prosecution is desperately seeking to admit these statements because it does not otherwise have sufficient evidence to survive a no-case-to-answer submission. It is therefore unfair to have the main incriminating aspects of the case presented to the Chamber through prior written statements, especially where the witness has disavowed the contents during sworn testimony.
71. Consequently, the Defence submits that these statements should be disallowed in their entirety, but that if they are allowed at all, the portions pertaining to the acts and

⁷⁶ *Prosecutor v Karemera at al*, ICTR, Decision on Prosecution Motion for Admission of Evidence of Rape and Sexual Assault Pursuant to Rule 92bis of the Rules; and Order for Reduction of Prosecution Witness List, 11 December 2006, paras.15-16.

⁷⁷ Norman Decision, p.5.

⁷⁸ *Law of Evidence at the International Criminal Court: Blending Accusatorial and Inquisitorial Models*, Michele Caianiello, p.314.

conduct of the accused should not be included. The offensive and inadmissible portions vis-à-vis Sang are detailed hereafter [REDACTED].

- 72. The [REDACTED]. Thus it is entirely inadmissible on this basis.
- 73. The [REDACTED] contain allegations against the accused as follows: [REDACTED].
- 74. The [REDACTED].
- 75. The [REDACTED] and as such these should not be admitted.
- 76. The [REDACTED].
- 77. Lastly, the [REDACTED].

3. Witnesses Gave Viva Voce Testimony on All Material Aspects of Allegations that the Prosecution made Reasonable Efforts to Elicit

- 78. Before the Prior Statements can be admitted under Rule 68, the Prosecution must make reasonable efforts to elicit testimony from the witness, and the witness must fail to testify on material aspects of his prior statement. Furthermore, the purpose the amended Rule 68 was to streamline proceedings and to make them more efficient through the introduction of prior statements where a witness did not provide sworn testimony. Here, the Rule 68 criteria have not been satisfied as [REDACTED] witnesses have testified and spoken to all significant parts of their Prior Statements, which were led in evidence by the Prosecution.
- 79. The WGLL explanatory note to Rule 68 states that the proposed amendments were “aimed at allowing the judges of the Court to reduce the length of Court proceedings and streamline the presentation of evidence by increasing the instances in which prior recorded testimony could be introduced **instead** of hearing the witness in person, while paying due regard to the principles of fairness and the rights of the accused.”⁷⁹ This stated purpose is not consistent with what has transpired in this case.

⁷⁹ ASP 12th Session Records, pp.71,88; IBA Legal Opinion, p.1, *supra* fn.74.

80. This explanation suggests that the drafters envisaged a situation wherein a witness would not testify at all, as a result of interference. Simply admitting the witnesses' previous statements, without spending time to entice or compel recalcitrant witnesses to come to Court, could shorten trials. In the instant case, the Application does not streamline the presentation of evidence or reduce the length of Court proceedings. On the contrary, it lengthens the proceedings and complicates the presentation of evidence, as it puts the judges in a position where they have to go through lengthy written statements and compare them to the witnesses' in-court testimony and decide which parts are truthful and which ones are not.
81. Accordingly, it is not appropriate to apply Rule 68. Indeed, the supposed need for a Rule 68 amendment was brought about by an errant notion – namely that the Court did not have subpoena powers.⁸⁰ It has since been established that the ICC has a subpoena power, which indeed it [REDACTED] whose Prior Statements are now sought to be admitted. Again, this suggests that the drafters had in mind a situation where a witness would completely fail to appear because of interference, in which case it would be necessary to tender their statements in lieu of oral testimony. It is inconceivable, patently unfair, and inefficient to summons a witness against his will, examine him, but then proceed to ignore his in-court testimony in favour of a prior recorded statement.
82. That Rule 68 was not meant to apply to witnesses who have given *viva voce* testimony is also apparent from the following observation made by the WGLL:⁸¹

[A] situation may occur in which the improper interference comes to an end, and the witness is again willing to testify. It is therefore possible for there to be situations in which prior recorded testimony is introduced into evidence under rule 68(2)(d), but, due to changed circumstances, the formerly intimidated witness is now available to testify in full. If, in such a case, the prior recorded testimony was not independently admissible under any other part of rule 68, logic would dictate disregarding that testimony in evidence.

⁸⁰ WGGL Second report of the Court to the Assembly of States Parties (ICC-ASP/12/37/Add.1), para.33.

⁸¹ *Ibid*, para.35.

83. This explanation illustrates that if the witness actually testifies, and the prior recorded testimony has already been admitted, the statements should thereafter be disregarded. Prior recorded testimony was never intended to replace in-court testimony unless, during the course of the testimony, the witness refused “to give evidence with respect a material aspect included in his or her prior recorded testimony”, as is provided in Rule 68(2)(d)(ii). Indeed, prior recorded testimony is admissible only if a witness does not give evidence on these material aspects in court. Its admission is *in lieu of*, not *in addition to* oral testimony.
84. In a footnote, the Prosecution argues that the concept of “failing” to testify to a material aspect of one’s prior recorded testimony must be purposefully construed to include a refusal to testify as to material aspects of the witness’s prior recorded testimony.⁸² The Prosecution does not cite any authority for this proposition. In any event, there was no witness who refused to testify to material aspects of their previous statement, as led by the Prosecution, in relation to Sang or KASS FM. If a pertinent topic was not discussed under oath, it was because the Prosecution did not make all reasonable efforts to elicit it or chose not to lead it in evidence. This cannot be construed to be a failure or a refusal on the part of the witness.
85. Witness [REDACTED], but fails to testify to a material aspect of his testimony. But that is not what typically transpired in relation to the summoned witnesses that are the subject of this application. The [REDACTED] witnesses who appeared, did not fail to testify to any material aspect of their testimony; they simply testified in a way that was different from their original account, in a way that the Prosecution did not find useful for its case. However, the fact that the Prosecution preferred the original account as contained in the witnesses’ Prior Statements does not mean that the witness has failed or refused to testify about it.
86. The difference in the accounts can be explained by the fact that witnesses testified under oath, in front of the judges, the parties and the accused, and in the solemnity of the courtroom. It should be recalled that before testifying, each of the witnesses were informed and cautioned pursuant to Rule 66(3), of the offences defined in Article

⁸² Application, para.5, fn.5.

70(1)(a).⁸³ This is why the witnesses refused to repeat the stories contained in their Prior Statements in Court; they had solemnly declared, “to speak the truth, the whole truth and nothing but the truth”. The responsibility associated with telling the truth in Court should be given some weight. Indeed, [REDACTED] explained this eloquently, when he was confronted with a previous statement of his, which he had since recanted:

[REDACTED]

The risk of perjury clearly had the intended effect on the witnesses, who abandoned their false accounts when faced with real consequences.

87. The Prosecution has proposed only one example of when any of the [REDACTED] refused to answer or evaded a question related to material aspects of their statements relating to Joshua Sang.⁸⁴ More often, the witnesses diligently answered the questions put to them in regard to material aspects of their testimony. However, where the Prosecution rushed to have its witness declared hostile, rather than taking the time to go through each paragraph or each allegation in the witness’s prior statements in an organized fashion in order to see specifically what the witness was willing (or not) to say about it, the Prosecution cannot now claim that the witness failed to testify on those aspects. Such an approach does not suggest that the Prosecution made all reasonable efforts to solicit the material aspects of the testimony regarding Sang from each witness.
88. For example, once the summons was served [REDACTED].
89. In short, [REDACTED] did not behave as a witness who was evasive or who refused to answer questions or who was trying to thwart the course of justice. He commented on all material aspects of his previous statements, in a detailed, conversational, and comprehensive fashion.
90. [REDACTED] did not inappropriately avoid talking about the material allegations regarding Sang and KASS FM from his transcripts during his testimony. Rather, he

⁸³ *Ex:* [REDACTED] ([REDACTED] Rule 66(3) advisory).

⁸⁴ Application, paras.132, 148, 166, 180 and 201 ([REDACTED], he did not testify about Sang giving instructions over the radio).

explained that he could not provide any details because in truth, he had [REDACTED]. The Prosecution did not put any part of his previous transcripts that touched on Sang to the witness for comment; in short, they did not make reasonable efforts to elicit all material aspects of the statements on which they now want to rely.

91. During testimony, [REDACTED] also addressed all the material aspects of his statement (essentially two allegations) relating to Sang. First, the Prosecution referred him to the section titled [REDACTED]. The Prosecution did not ask any follow-up questions about Sang in relation to his alleged [REDACTED].
92. Secondly, the Prosecution asked [REDACTED] incident. In direct examination, but before a finding of hostility, the witness was referred to page [REDACTED]. He did not avoid the question or refuse to answer; he just told the Prosecution that his original account was not true. The Prosecution did not ask him about KASS FM or Joshua Sang. However, during cross-examination by the Sang Defence, [REDACTED].
93. [REDACTED] testified about all material aspects of his statement, albeit not in the manner the Prosecution had expected. He explained that he actually [REDACTED].
94. [REDACTED] The Prosecution did not ask witness [REDACTED] any questions about Sang during its own cross-examination. Therefore it cannot now claim that [REDACTED] failed to give evidence on material aspects of his prior statement, such as the allegation of [REDACTED].
95. [REDACTED] also testified to all material aspects of his prior statements regarding Sang. The Prosecution asked him what aspects of his statement he felt incriminated Sang and [REDACTED] [REDACTED]. He did not avoid or refuse to answer the Prosecutor's questions about KASS FM.
96. Notably, the Prosecutor did not ask [REDACTED]. Because the Prosecutor did not make reasonable efforts to ask about it during the examination of [REDACTED], the

Prosecutor should not be able to rely on the potentially incriminating references left alone from the prior statement.⁸⁵

97. Additionally, only in re-exam did the Prosecutor ask about [REDACTED]. Thus there is no reason to rely on the statement rather than the witness's sworn testimony regarding this event.
98. [REDACTED] did not appear to testify, so the question of whether he addressed material aspects of his testimony does not arise.
99. Accordingly, Rule 68 is not an appropriate route for the Prosecution to take in respect of [REDACTED] witnesses (save [REDACTED]), given that they all testified as to the material aspects in their Prior Statements; and where they did not, this was due to the Prosecution's failure to make reasonable efforts to elicit it.

3. Prior Statements have Insufficient Indicia of Reliability

100. Rule 68(2)(d)(i) requires that "prior recorded testimony falling under sub-rule (d) may only be introduced if the Chamber is satisfied that the prior recorded testimony has sufficient indicia of reliability."⁸⁶ The fact that this Rule explicitly refers to the *indicia* of reliability, while this is also an overall requirement for the admission of evidence, is significant. It means that reliability is properly part of the assessment of the admissibility of statements tendered under this Rule and not one of weight only or unless "inherently or apparently unreliable".⁸⁷
101. Reliability is to be determined on a case-by-case basis,⁸⁸ taking into account the "circumstances under which the evidence arose, the content of the evidence, whether and how the evidence is corroborated, as well as the truthfulness, voluntariness and

⁸⁵ EVD-T-OTP-00132, para 183 (Application-AnxB3).

⁸⁶ Rule 68(2)(d)(i), point 5.

⁸⁷ ICC-01/09-01/11-1353-Anx, Decision on the Prosecution's Request for Admission of Documentary Evidence, Separate further opinion of judge Eboe-Osuji, 10 June 2014, para.14.

⁸⁸ *Ibid*, para.19.

trustworthiness of the evidence”.⁸⁹ The admissibility of a statement will depend upon the context and character of the evidence in question. The absence of the opportunity to cross-examine the person who made the statements and whether the hearsay is “first-hand” or more removed, are also relevant.⁹⁰ Internal consistency and corroboration are also factors considered in determining the reliability of a statement.⁹¹ Contemporaneous records of events tend to be more reliable than records compiled at a later stage, in particular when this is done with the specific purpose of using it in court proceedings.⁹²

102. A problem with relying on Rule 68 is that it opens the door to introducing evidence whose reliability is in serious dispute. As noted by former ICTY Judge David Hunt, “[a]nyone who has had experience of trials in which evidence is required to be given *viva voce* knows that that evidence will often depart from the version in the statement taken by the party calling the witness – not only from the actual words used in the statement but also from the substance of the statement”.⁹³
103. The statements to which Rule 68(2)(d) is directed are those prepared by a party for the purposes of the legal proceedings in which they are to be tendered, not by an independent judicial officer. Thus, there is a “*potential for fabrication and misrepresentation by the makers of such documents and for them to be carefully devised by lawyers or others to ensure that they contain only the most favourable version of the facts stated*”.⁹⁴
104. In a *Bemba* decision, dissenting Judge Ozaki similarly noted that witness statements at the ICC are not taken in neutral, impartial circumstances but by a party “*mainly in order to gather evidence to mount a case against an accused, and without the*

⁸⁹ K.Khan & R.Dixon, *Archbold: International Criminal Courts, Practice, Procedure and Evidence* (2009), p.711; *Prosecutor v. Dusko Tadić*, IT-94-1-T, Decision on Defence motion on hearsay, 5 August 1996, paras.15-19.

⁹⁰ ICC-01/04-01/06, Decision on the admissibility of four documents, 13 June 2008, para.28.

⁹¹ *Ibid*, para.40.

⁹² ICC-01/04-01/07-2635, Decision on the Prosecutor’s bar table motions, 17 December 2010, para.27; ICC-01/04-01/06-1399, Decision on the admissibility of four documents, 13 June 2008, para.38. However, an investigative purpose does not invariably militate against reliability. *See* ICC-01/09-01/11-1353, para.35.

⁹³ *Prosecutor v Slobodan Milosevic*, Appeals Chamber, Dissenting Opinion of Judge David Hunt on Admissibility of Evidence in Chief in the Form of Written Statement, 21 October 2003, para.8.

⁹⁴ *Ibid*, para. 6.

supervision of any impartial arbiter". Therefore, in her view, their admission "*must remain the exception*" in specific, limited circumstances.⁹⁵

105. The reliability of the Prior Statements is undermined by the circumstances mentioned earlier, namely that (i) they were taken by a party with a vested interest in the proceedings rather than a neutral officer; (ii) they were not taken under oath; (iii) the makers of the statements were not warned that the providing of false information could lead to perjury proceedings; and (iv) only the second-half of the interview with [REDACTED] is recorded, thus there is no information as to how information was elicited and whether leading or neutral questions were being asked with respect to the first part of his interview, and the interviews of the other [REDACTED] witnesses.
106. The initial statements are particularly unreliable given that the same intermediaries connected all of the witnesses to the ICC,⁹⁶ meaning that the witnesses had spent a significant amount of time together providing the Prior Statements to the Prosecution. The witnesses allegedly involved in and affected by the 'Scheme' mostly come from [REDACTED] and have known each other for years. Most of the core witnesses were PNU supporters during the 2007 election⁹⁷ and were, and some still are, Ruto's political opponents. Telephone intercepts demonstrate that, during the course of the proceedings, many of the core witnesses have remained in contact with each other.⁹⁸ A lot of evidence has been led to demonstrate how the witnesses are inter-connected, a fact which detracts from the reliability of the original statements.
107. When asked about how he came to give his statement, [REDACTED] confirmed that when he met with [REDACTED] and [REDACTED], he was specifically told that the evidence he was to give should implicate *both* Ruto and Sang; essentially that he was supposed to give testimony that was not actually correct, but would seem to be

⁹⁵ ICC-01/05-01/08-1028, Dissenting Opinion of Judge Kuniko Ozaki on the Decision on the admission into evidence of materials contained in the prosecution's list of evidence, 23 November 2010, para.11; ICC-01/05-01/08-1386, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled "Decision on the admission into evidence of materials contained in the prosecution's list of evidence", 3 May 2011.

⁹⁶ *Ex:* [REDACTED] has known several witnesses over a long period of time, such as [REDACTED] introduced to the Prosecution [REDACTED] and to [REDACTED] and [REDACTED]. Also [REDACTED] has known [REDACTED] and [REDACTED] for several years.

⁹⁷ [REDACTED]

⁹⁸ *Ex:* a report disclosed by the Prosecution which shows that [REDACTED] as well as other persons of interest to the Article 70 investigations. *See*, ICC-0/09-01/11-1462, 22 August 2014, paras.26-28.

credible.⁹⁹ Witness [REDACTED] explained that [REDACTED] had told him to implicate Sang as well as Ruto because his statement would carry more weight if he implicated both.¹⁰⁰ Witness [REDACTED].¹⁰¹ These improper motives or reasons for having provided the false Prior Statements detract from their reliability.

108. Furthermore, these witnesses made (and recanted) allegations about Sang having been on air broadcasting inciting language and directions for perpetrators, during the violent period following the election results. These allegations were not true and are in direct contradiction to materials demonstrating that there had been a ban on live broadcasts in place from the 30th of December 2007, immediately after the announcement of Kibaki as the winner.¹⁰² Furthermore, the allegations are contrary to the audio recordings of the peace messages of Sang and several prominent individuals on KASS FM during this period; these are in evidence and tend to show that the Prior Statements are not reliable.

4. There was No Improper Interference according to any Standard of Proof

4.1 Standard of Proof Threshold should be Beyond Reasonable Doubt

109. Rule 68(2)(d) does not indicate the standard of proof to be met by the party alleging witness interference. However, the Defence submits that the standard of proof should be beyond reasonable doubt.¹⁰³ The imposition of a lower standard would be unfair on the accused. The decision to be made concerning the admissibility of statements is an important factual decision with far-reaching consequences. The establishment of interference not only goes to support an application under Rule 68, it may also put the accused in a bad light, in particular where the Prosecution seeks to tie the interference allegations to the accused, their associates or even their legal team. These are serious allegations, which potentially adversely impact on the integrity of the proceedings.

⁹⁹ [REDACTED].

¹⁰⁰ [REDACTED].

¹⁰¹ [REDACTED].

¹⁰² *Ex:* John Michuku invoking Communications Act of 1998 in the interest of public safety, 30 December 2007 (EVD-T-OTP-00130).

¹⁰³ *Archbold: Criminal pleading, evidence and practice, 2014*, Sweet & Maxwell, para.11-17; *R v. B (K.G.)*, [1993] 1 SCR 740; Australia, Evidence Act 1995, section 142.

110. It is no easy task for judges to separate findings of interference with the ultimate issue of guilt in the context of the crimes against humanity charged. Indeed, claims of interference may create a general air of suspicion, which is at risk of being blurred with a suspicion of guilt in respect of the crimes charged. There is a genuine risk that the guilt in respect of the crimes charged is assumed on the basis of allegations of witness interference, irrespective of the link to the accused, as the judges may wonder why witnesses would be interfered with if the accused were not guilty. It goes without saying that evidence of interference does not have any bearing on the veracity of the initial accounts given by the witnesses. But in reality – and particularly in the reality of this case – these matters are not sufficiently separated. Indeed, the Chamber has allowed the Prosecutor to lead evidence of Article 70 allegations as part of the main trial and ordered the disclosure of the materials that were relied upon in support of these allegations.¹⁰⁴ Accordingly, the standard applied in the main trial, which is one of “beyond reasonable doubt” should equally apply to the allegations assessed here.
111. If not “beyond reasonable doubt”, then the Defence submits the standard should be “strong grounds”, “compelling grounds”, or “substantial grounds” for believing the allegations of interference are true, and not on the balance of probabilities, as the Prosecution suggests.¹⁰⁵ The “strong grounds” standard is the equivalent of the standard of proof required to open an investigation into perjury committed by witnesses at the SCSL, ICTY and ICTR. Pursuant to Rule 91 of the SCSL/ICTY/ICTR Rules of Procedure and Evidence, the Chamber can direct the Prosecutor to conduct an investigation into a witness’s testimony if it has strong grounds for believing the witness knowingly and wilfully testified falsely.¹⁰⁶ Strong grounds are required merely to open an investigation into false testimony. The reason for keeping this standard relatively high is that judges tend to be reluctant to make credibility assessments of witnesses prior to their ultimate deliberation. Thus, there are policy grounds for setting a higher standard than the usual “reasonable grounds to believe” or “sufficient grounds

¹⁰⁴ ICC-01/09-01/11-762, para.89.

¹⁰⁵ Application, paras.61-62.

¹⁰⁶ *Prosecutor v Tadic*, Order for the Prosecution to investigate the false testimony of Dragan Opacic, December 5, 1996, p.2 ; *Prosecutor v Karemera et al*, ICTR-98-44-T, Decision on Defence Motion for Investigation of Prosecution Witness Ahmed Mbonyunkiza for False Testimony, 29 December 2006, para.6; *Prosecutor v Bagosora et al*, ICTR-98-41-T, Decision on Defence Request for an Investigation into Alleged False Testimony of Witness DO, 3 October 2003, paras.8-9.

to believe”, which tends to be the standard to open an investigation crimes against humanity, war crimes or genocide.¹⁰⁷

112. The “substantial grounds” standard is the standard applied at confirmation. This is a higher standard than at the *ad hoc* tribunals. The standard is set higher to ensure that only those persons are committed for trial “against whom sufficiently compelling charges going beyond mere theory or suspicion have been brought”.¹⁰⁸ Thus, policy reasons again determine the standard of proof.
113. At the very least, the standard to be applied should be significantly higher than the standard, which is applied in ordinary admissibility assessments, or preliminary assessments of witness interference in rulings on protective measures. At the very least, the Chamber should have reasonable grounds to believe that the interference took place, as is the standard to initiate contempt proceedings before the *ad hoc* tribunals, including on the basis of witness interference.¹⁰⁹ The lower standard suggested by the Prosecutor should not be applied. Little harm is done if the Chamber decides to admit a document, which is not probative or relevant, because the Chamber may not give it any weight at the end of the day. A preliminary finding of witness interference, particularly if linked to alleged associates of the accused, has a much greater impact, which should be reflected in the standard. But whatever standard is applied, the Defence submits that the Prosecutor failed to meet it.
114. The impact of the interference is also relevant. The Defence submits that simply claiming ‘interference’ by the prospective witness pursuant to Rule 68(2)(d)(i) should not be enough. Similarly to assessments of fear in determining a protective measures application, a witness’s subjective fear must be objectively justified. According to the ECtHR jurisprudence, “any subjective fear of the witness will [not] suffice. The trial court must conduct appropriate enquiries to determine first, whether or not there are

¹⁰⁷ Article 15(4).

¹⁰⁸ ICC-01/04-01/06-803-tEN, Decision on the confirmation of charges, 29 January 2007, p.37.

¹⁰⁹ Rule 77 of the SCSL, ICTR and ICTY; *Prosecutor v. Karemera et al*, ICTR-98-44-AR.91, Decision on “Joseph Nziirera’s Appeal from Refusal to Investigate [a] Prosecution Witness for False Testimony”, 22 January 2009, para.18.

objective grounds for that fear, and, second, whether those objective grounds are supported by evidence”.¹¹⁰

4.2 The Facts Do not Demonstrate Any Interference

115. The Prosecution’s selective approach to which witnesses it has included in this Application, and which witnesses it has ignored and omitted, should give the Chamber critical pause when considering the veracity of the allegations of interference contained therein as well as the reliability of the witnesses’ prior statements. The essence of the Prosecution’s application is that there is a Scheme to interfere with witnesses and potential witnesses, which has affected Witnesses [REDACTED] (who are subject to the Application) as well as [REDACTED].¹¹¹ However, [REDACTED] witnesses relied upon to confirm the case -- [REDACTED],¹¹² [REDACTED],¹¹³ [REDACTED],¹¹⁴ [REDACTED], [REDACTED]¹¹⁵ and [REDACTED] made claims of interference similar to those detailed in the Application, and yet the Prosecution has chosen not to bring their accounts before the Chamber. There must have been a reason for their complete abandonment.
116. Indeed, the Defence submits that this was a calculated decision on the part of the Prosecution. It was not because the Prosecution forgot about those allegations, or because the Prosecution did not remember about those core witnesses. It was because somewhere along this long four-year road since the Confirmation hearing, the Prosecution has had a conversion experience, realized that those witnesses were lying, and now wants to quietly distance itself from them, while remaining wilfully blinded to the fact that their current batch of witnesses suffer from the same malady. The Prosecution pulled **Confirmation Witness P-0025** on the eve of his testimony, claiming that he could not give a “coherent or consistent” account of his evidence.¹¹⁶ The Prosecution forced **Confirmation Witness** [REDACTED] to come to Court and, after completing cross-examination of its own witness, promptly conceded that

¹¹⁰ ECHR Al-Khawaja Case, para.124.

¹¹¹ Application, paras.77-78.

¹¹² In interview with the OTP, [REDACTED].

¹¹³ [REDACTED].

¹¹⁴ [REDACTED].

¹¹⁵ See threats and interference detailed by the Prosecution in ICC-01/09-01/11-1295-CONF-Red2, Prosecution’s Sixth Request for In-Court Protective Measures for Trial Witnesses, 7 May 2014, paras.9-29.

¹¹⁶ Via email to the Chamber and Parties on 14 May 2014.

[REDACTED].¹¹⁷ The Prosecution has spent over a year finding a way to [REDACTED].¹¹⁸

117. **Confirmation Witness** [REDACTED], and while the Prosecution did not seek to declare him hostile, the Prosecution must have noted that the strength of his accusations against the accused as presented in his testimony under oath was not nearly as incriminating as the contents of his prior statements had been.¹¹⁹
118. The remaining two **Confirmation Witnesses**, [REDACTED] and [REDACTED], have apparently, and in deafening silence, been discarded from the Prosecution's arsenal. The Prosecution has not formally withdrawn the two witnesses, but the Chamber has accepted that the Prosecution's case has closed, save for the ruling on this Application.¹²⁰ The Defence submits that the prior statements and allegations of interference from these witnesses must have been so manifestly unreliable, that the Prosecution did not want to even attempt to have their evidence heard. It is abundantly clear that the Prosecution has doubts about the veracity and reliability of several of its witnesses. And given the similarity of their evidence and complaints to that of the remaining witnesses, the Prosecution should, in good conscience, have doubts as to the rest. But the Prosecution presses on.
119. At an early stage in the trial, the Chamber determined that Article 70 allegations would not play an integral part of the present case, and so the Sang Defence has not used its limited resources to pursue and investigate fully the plethora of allegations of interference that have arisen. Despite its limited ability to challenge the full picture, the Sang Defence does have some general comments to make, which demonstrate why the Prosecution cannot have proven, against any evidentiary standard, that improper interference has taken place in respect of these witnesses.
120. Firstly, the bulk of the evidence that the Prosecution has collected was obtained through the use of [REDACTED].¹²¹ The Defence submits that the witnesses allowed

¹¹⁷ [REDACTED].

¹¹⁸ [REDACTED].

¹¹⁹ [REDACTED].

¹²⁰ T-206, 4:9-12.

¹²¹ Ex: Prosecution interview with [REDACTED].

themselves to be used like this in order to remain relevant and to try and retain their significance vis-à-vis the perceived Prosecution and VWU.¹²²

121. Aside from the ethical considerations, which might have militated against the Prosecution's use of its own witnesses in this way, the Defence submits that the evidentiary value of information, which results from a [REDACTED] must be significantly reduced. Much of the supporting material for the Application was obtained as a result of scenarios engineered and facilitated [REDACTED]. The Defence requests the Chamber to disregard or place minimal reliance on the materials obtained through these [REDACTED] and questionable processes. The Chamber has this discretion on the basis of its general powers to evaluate and exclude evidence under Article 69(4).¹²³
122. Moving on from these witnesses who were allegedly interfered with by Scheme members, we come to the two outliers of the Application: [REDACTED] and [REDACTED]. Even the Prosecution's lead investigator for Article 70 matters did not oversee the investigations in relation to alleged interference with these two witnesses. Their reasons for withdrawing and the circumstances of their withdrawal from the process are entirely distinguishable from the rest, and so the Chamber can rather summarily do away with the Prosecution's request to admit their prior statements.
123. The account of **Witness** [REDACTED] does not belong in this application at all. In attempting to lump all recanting and withdrawing witnesses into the same category, the Prosecution makes a grave mistake. [REDACTED] withdrawal does not in any way fit into the Scheme pattern; even the Prosecution acknowledges this exception.¹²⁴
124. Unlike the other Compelled Witnesses, [REDACTED].
125. These facts notwithstanding, the Prosecution attributes the withdrawal of [REDACTED].¹²⁵

¹²² Ex: [REDACTED].

¹²³ Ex: ICC-01/09-01/11-1753-Red, Reasons for a Decision on Admission of Certain Evidence Connected to Witness [REDACTED], rendered on [REDACTED], 16 December 2014, para.42.

¹²⁴ Application, paras.69-71.

¹²⁵ Application, para.178.

126. The witness himself and the Defence submit that this allegation is untrue. In his [REDACTED],¹²⁶ [REDACTED]. [REDACTED].¹²⁷
127. The Defence has investigated this possibility and has found it to be completely untrue. The Defence has spoken to [REDACTED].¹²⁸
128. There are ways, other than being directly told by someone, that [REDACTED].¹²⁹ [REDACTED]. [REDACTED].¹³⁰
129. The Prosecution notes that [REDACTED].¹³¹ It appears [REDACTED].¹³² By the time his name [REDACTED].
130. The witness testified, and the Defence does not dispute, that [REDACTED].¹³³ [REDACTED].¹³⁴ However, following his [REDACTED].¹³⁵
131. The Prosecution relies on phone records [REDACTED].¹³⁶ However, this report is of very little forensic utility, because there is no way to compare whether these phone calls are [REDACTED]. Nor does the call log indicate the contents of any discussions held over the phone, so it is impossible to know whether the conversations related to [REDACTED].
132. Furthermore, the Prosecution's disclosed Investigator Reports show that [REDACTED].¹³⁷ [REDACTED].¹³⁸ At the same time, [REDACTED].

¹²⁶ [REDACTED].

¹²⁷ [REDACTED].

¹²⁸ KEN-D11-0016-0135, paras.4-8.

¹²⁹ KEN-OTP-0103-3478.

¹³⁰ KEN-OTP-0092-0868, paras.11-16.

¹³¹ Application, para.179.

¹³² EVD-T-OTP-00264, p.1; [REDACTED].

¹³³ [REDACTED].

¹³⁴ [REDACTED].

¹³⁵ [REDACTED].

¹³⁶ Application, para.189; KEN-OTP-0149-0101 (Application-AnxB4).

¹³⁷ KEN-OTP-0103-3501.

¹³⁸ KEN-OTP-0130-0635.

133. Consequently, by any standard of proof, the Prosecution has not shown that [REDACTED] was subjected to interference such that Rule 68(2)(d) is an avenue for the admission of his prior, disowned statement.
134. The allegations of interference with **Witness** [REDACTED] must fail for the sheer lack of evidence. The Prosecution does not put forth one allegation of interference with [REDACTED] subjected to improper interference by Scheme members leading him to recant in Court the most important portions of his Prior Recorded Testimony.¹³⁹
135. Despite the Prosecution's protestations, the interference allegedly directed toward [REDACTED] cannot be linked to the Scheme, simply because [REDACTED].¹⁴⁰
136. By the time [REDACTED].¹⁴¹ Furthermore, two other Prosecution witnesses [REDACTED];¹⁴² there is no claim by the Prosecution that these witnesses were also part of the Scheme, and rightfully so.
137. In fact, the Prosecution states that 16 witnesses have withdrawn from the process.¹⁴³ Though the Prosecution does not identify which 16 they are talking about, others who have withdrawn under unclear circumstances and yet do not form part of this application are [REDACTED],¹⁴⁴ the Prosecution has not disclosed to the Defence how or why these witnesses decided to cease their cooperation with the Prosecution. It is entirely possible that they also withdrew [REDACTED].
138. The [REDACTED].¹⁴⁵ [REDACTED]. So the Prosecution should not impute any malicious conduct from the fact that the advocates of [REDACTED].
139. The Prosecution also attempts to infer the existence of a Scheme involving [REDACTED].¹⁴⁶ But what the Prosecution must realize is that these witnesses have

¹³⁹ Application, paras.202-3.

¹⁴⁰ Application, para.69.

¹⁴¹ [REDACTED].

¹⁴² KEN-OTP-0112-0863, KEN-OTP-0112-0864 (withdrawal of [REDACTED]); KEN-OTP-0112-0341, KEN-OTP-0112-0548, KEN-OTP-0125-0850, and KEN-OTP-0125-0852 (withdrawal of [REDACTED]).

¹⁴³ Application, para.10.

¹⁴⁴ These two witnesses seemingly withdrew [REDACTED]. See KEN-OTP-0112-0674, KEN-OTP-0112-0551, KEN-OTP-0112-0672.

¹⁴⁵ http://www.icc-cpi.int/en_menus/icc/contact/Pages/contact.aspx.

simply been trying to save face. The witnesses knew that they had been telling lies and illegitimately profiting from their interaction with the Prosecution over the course of several years. When the time came to testify, the witnesses understandably got cold feet. They looked for a scapegoat, not wanting to implicate themselves for having perpetuated falsities. They thought it must have been better for their lies to have been told at the behest of someone or some other organization, bigger than them. [REDACTED], other witnesses blamed each other. No one wanted to take responsibility for his own unethical actions.

140. The Prosecution does not mention any incident of alleged interference with respect to [REDACTED] in its Application. Only in the affidavit of [REDACTED] (who was not involved in the investigations himself) does the Prosecution refer to an incident that [REDACTED].¹⁴⁷ But [REDACTED] has misread the investigator's report where [REDACTED] originally described this incident (and thereby demonstrates that his usefulness in "summarizing" the events for the Chamber is not only very limited, but can be detrimental). What the investigators actually said [REDACTED] told them was:

[REDACTED].¹⁴⁸

141. Clearly, it was [REDACTED]. In any event, there is absolutely no connection to the case that can be ascertained from this story, his withdrawal was not temporally proximate to this event [REDACTED], and the Prosecution did not see it significant enough to ask the witness about it during its examination.

5. Admissibility is Not in the Interests of Justice

142. The Defence submits that the admission of the Prior Statements of witnesses who have recanted and withdrawn and still appeared before the Chamber, for the truth of their contents, is simply not in the interests of justice. Their admission accordingly does not meet the interests of justice prong under Rule 68(2)(d)(i).

¹⁴⁶ Application, paras.208-9.

¹⁴⁷ Application-AnxC1, para.263.

¹⁴⁸ KEN-OTP-0130-0639, p.2.

143. The Chamber has already struck the correct balance by admitting the bulk of the statements in issue, for impeachment purposes.¹⁴⁹ The Chamber therefore has not been deprived of relevant information, which it may want to take into account when assessing the credibility of the witnesses. The Chamber already knows that the witnesses have given inconsistent accounts and is free to assess the witnesses' testimony under oath with that background in mind. To go a step further and allow the Prosecution to rely on the contents of the statements to prove its case against the accused is wholly improper.
144. Furthermore, it is noteworthy that the Prosecution, in its case against *Ruto and Sang*, and in its case against *Muthaura and Kenyatta*, has taken very different approaches to its treatment of witnesses who recant and withdraw. In the *Kenyatta* case, the Prosecution dropped a critical witness who had been relied upon at Confirmation but who later "admitted that he provided false evidence regarding the event at the heart of the Prosecution's case against the Accused";¹⁵⁰ this, in part, led to the withdrawal of the entire case.¹⁵¹ This inexplicable disparate treatment is already unfair, as one queries why recanting witnesses were dropped in the *Kenyatta* case but retained and compelled to testify in this case. To now admit the contents of the statements would compound the prejudice.
145. In the specific circumstances of this application, it would amount to a grave unfairness and injustice if the statements were to be admitted under the amended version of Rule 68. Not only has it caused further delays and did this application in no way expedite the proceedings, if it were to be granted, its effect would be that the core evidence against Ruto and Sang stems from paper evidence. None of the allegations contained in the Prior Statements the prosecution seeks to tender on the basis of Rule 68, neither by each other nor by any *viva voce* testimony. Without the paper evidence, subject to this Application, the Defence submits that there is no case against Sang. Accordingly, allowing the admission of the statements in this case would have the result that the

¹⁴⁹ Application-AnxA2.

¹⁵⁰ ICC-01/09-02/11-875, Notification of the removal of a witness from the Prosecution's witness list and application for an adjournment of the provisional trial date, 19 December 2013, para.2.

¹⁵¹ ICC-01/09-02/11-983, Notice of withdrawal of the charges against Uhuru Muigai Kenyatta, 5 December 2014.

core allegations against Sang without which there is no case are contained in statements taken by the Prosecution all of which have been withdrawn by their makers under oath. Instead of serving the interests of justice, it would amount to an improper disposition to find evidence against Sang and not a truth-finding effort. As also acknowledged by the International Bar Association, “it is difficult to conceive of a case in which such evidence could be used as the (unique) basis for conviction (or indeed to establish an instrumental adverse fact) without resulting in an unsafe verdict”.¹⁵²

146. In these circumstances, particularly where corroboration from *viva voce* testimony, contemporaneous records, or any other evidence is lacking in terms of the specifics (time, location, date), it would be unfair to introduce these statements whose reliability is in serious doubt. This is particularly the case where the admission of these statements may require Sang to produce all sorts of evidence to defeat these allegations, which he would not otherwise have had to do. This will cause further delays and lead to the production of a significant amount of additional evidence.
147. In the absence of any benefit of introducing these statements, for instance, the streamlining of the evidence or the expedition of the proceedings, the Defence submits that the interests of justice are not best served by the introduction of these statements into evidence under Rule 68(2)(d)(i).

¹⁵² IBA Legal Opinion, p.4, *supra* fn.74.

V. CONCLUSION

148. Accordingly, based on the foregoing grounds the Defence for Joshua arap Sang requests the Trial Chamber to reject the Prosecution's Application to admit the Prior Statements of the [REDACTED] witnesses under either the amended Rule 68 or the alternative Article 69(2) and (4).



Joseph Kipchumba Kigen-Katwa
On behalf of Mr Joshua arap Sang
Dated this 30th day of June 2015
In Nairobi, Kenya