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Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/09-01/11

Date: 19 August 2015

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 redacted version of

Decision on Prosecution Request for Admission of Prior Recorded Testimony

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

The Office of the Prosecutor

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Mr James Stewart
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Counsel for William Samoei Ruto

Mr Karim Khan
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Legal Representatives of Victims

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Unrepresented Victims

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Participation/Reparation**

The Office of Public Counsel for Victims

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States Representatives

Amicus Curiae

REGISTRY

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Counsel Support Section

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**Victims Participation and Reparations
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Others

Trial Chamber V(A) (the 'Chamber') of the International Criminal Court (the 'ICC' or 'Court'), in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, having regard to Articles 24(2), 51(4), 64, 67 and 69 of the Rome Statute (the 'Statute') and Rules 68, 111 and 112 of the Rules of Procedure and Evidence (the 'Rules'), renders, by Majority, this 'Decision on Prosecution Request for Admission of Prior Recorded Testimony'. Judge Eboe-Osuji appends a separate, partly concurring opinion.

I. PROCEDURAL HISTORY

1. On 29 April 2015, the Office of the Prosecutor (the 'Prosecution') filed a request to admit the prior recorded testimony of [REDACTED] (the 'Concerned Witnesses') for the truth of its content, pursuant to Rule 68 of the Rules in order to rely thereon to establish the guilt of the accused (the 'Request'). Alternatively, the Prosecution seeks their admission on the basis of Article 69(2) and (4) of the Statute (the 'Alternative Request').¹
2. On 4 May 2015, the defence team for Mr Ruto (the 'Ruto Defence') filed a request to rule inadmissible the material relied upon in the Request which has not been admitted as evidence into the record (the 'Inadmissibility Request').²
3. On 11 May 2015, the defence team for Mr Sang (the 'Sang Defence') filed its response to the Ruto Defence application,³ joining and supporting the

¹ Prosecution's request for the admission of prior recorded testimony of [REDACTED], ICC-01/09-01/11-1866-Conf with confidential annexes A1-A2, C1-C12, D1-D2 and confidential, ex parte, available only to OTP and VWU, annexes B1-B11, D3. (Public redacted version notified on 21 May 2015, ICC-01/09-01/11-1866-Red); *see also*, Addendum to the Prosecution's request for the admission of prior recorded testimony of [REDACTED] with Confidential Annexes A – C, 1 June 2015, ICC-01/09-01/11-1894-Conf.

² 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]" and to order the Prosecution to re-file its request, ICC-01/09-01/11-1872-Conf and its Annexes 1-2 (01/09-01/11-1872-Conf-Anx1; 01/09-01/11-1872-Conf-Anx2). A public redacted version was notified on 14 July 2015, ICC-01/09-01/11-1872-Red.

³ Sang Defence Response to 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]' and to Order the Prosecution to Re-File its Request, 11 May 2015, ICC-01/09-01/11-1875-Conf.

Inadmissibility Request. On the same date, the Prosecution⁴ and the Common Legal Representative for Victims (the 'Legal Representative')⁵ filed their responses, opposing the Inadmissibility Request.

4. On 13 May 2015, the Chamber decided to defer any decision on the Inadmissibility Request until it ruled on the merits of the Request.⁶
5. On 15 May 2015, the Ruto Defence filed a request for an extension of time limit,⁷ which was opposed by the Prosecution⁸ and ultimately rejected by the Chamber.⁹
6. On 27 May 2015, the Government of the Republic of Kenya ('Government of Kenya') filed a request for leave to file *amicus curiae* observations on the Request,¹⁰ which the Chamber rejected.¹¹
7. Having been granted a brief extension of deadline,¹² on 12 June 2015, the Ruto Defence¹³ and the Sang Defence¹⁴ (together the 'Defence') filed their responses,

⁴ Prosecution's response to the Ruto Defence request to rule certain supporting material inadmissible, 11 May 2015, ICC-01/09-01/11-1874-Conf. A public redacted version was filed on 16 July 2015, ICC-01/09-01/11-1874-Red.

⁵ Common Legal Representative for Victims 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]' and to Order the Prosecution to Re-file its Request', 11 May 2015, ICC-01/09-01/11-1877-Conf.

⁶ E-mail from Trial Chamber V-A Communications to counsel on 13 May 2015 at 10.23 a.m.

⁷ Ruto Defence request for extension of time limit, 11 May 2015, ICC-01/09-01/11-1879-Conf.

⁸ Prosecution's response to the Ruto Defence request for extension of time limit, 19 May 2015, ICC-01/09-01/11-1883-Conf.

⁹ Hearing on 26 May 2015, ICC-01/09-01/11-T-199-CONF-ENG, page 5, line 11 to page 6, line 3.

¹⁰ 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, ICC-01/09-01/11-1891.

¹¹ Decision on the Government of the Republic of Kenya's Request to file *Amicus Curiae* Observations, 29 May 2015, ICC-01/09-01/11-1893.

¹² E-mail from Trial Chamber V-A Communications to counsel on 10 June 2015 at 10:33.

¹³ Corrigendum of Ruto Defence response to the "Prosecution's request for the admission of prior recorded testimony of [REDACTED]" 12 June 2015, ICC-01/09-01/11-1908-Conf + Annexes, 23 June 2015, ICC-01/09-01/11-1908-Conf-Corr with annexes A, D, E.1-E.4, F, G, H, I, J, K to R and public annexes B.1-B.4, C1-C.2 and S. A public redacted version was filed on 23 June 2015 (ICC-01/09-01/11-1908-Corr-Red). See also, Addendum to the Ruto Defence response to the "Prosecution's request for the admission of prior recorded testimony of [REDACTED]" with confidential annex A, 17 June 2015, ICC-01/09-01/11-1913-Conf.

¹⁴ Corrigendum to Sang Defence Response to Prosecution's Request for the Admission of Prior Recorded Testimony of [REDACTED], filed on 12 June 2015, 22 June 2015, ICC-01/09-01/11-1911-Conf-Corr with confidential annexes A-E. A public redacted version notified on 24 June 2015 (ICC-01/09-01/11-1911-Corr-Red).

opposing the Request ('Ruto Defence Response' and 'Sang Defence Response', respectively).

8. On 25 June 2015, the Chamber heard further oral submissions from the parties and the Legal Representative on the matter.¹⁵

II. PRELIMINARY ISSUES

9. The Chamber notes the submission from the Sang Defence arguing that the Request is out of time, as, in its view, and pursuant to the Chamber's 'Decision on the Conduct of Trial Proceedings (General Directions)',¹⁶ the Prosecution should have filed the Request 21 days prior to the testimony of the Concerned Witnesses.¹⁷
10. The Chamber considers that the suggestion of the Sang Defence is erroneous and misplaced. In the aforesaid decision, the Chamber set out the procedure to be followed specifically for Rule 68(b) of the Rules, as it existed prior to amendment. In fact, as acknowledged by the Sang Defence, the Chamber did not set out any procedure for Rule 68(a) of the former provision. Accordingly, the requirements set out in the Chamber's 'Decision on the Conduct of Trial Proceedings (General Directions)' are not applicable to the amended Rule 68, except for paragraph 3, which is in essence the same text as the previous Rule 68(b) of the Rules.
11. Accordingly, the Chamber will consider the Request pursuant to Rule 68(2) of the Rules.

III. RELEVANT LEGAL ISSUES

¹⁵ Hearing on 25 June 2015, ICC-01/09-01/11-T-207-CONF-ENG.

¹⁶ Decision on the Conduct of Trial Proceedings (General Directions), 9 August 2013, ICC-01/09-01/11-847-Corr, para. 28.

¹⁷ Sang Defence Response, ICC-01/09-01/11-1911-Conf-Corr, paras 13-16.

12. The Assembly of States Parties (the 'ASP') amended Rule 68 of the Rules¹⁸ on 27 November 2013. The amended Rule 68 can generally be described as renumbering the existing provisions of the old rule and expanding it to include other avenues for admitting prior recorded testimony in order to facilitate the expeditiousness and efficiency of proceedings. Two of these additional possibilities in the amended rule, namely to introduce the prior recorded testimony of unavailable witnesses and witnesses subject to interference, are at the core of the Request.¹⁹
13. This section addresses certain legal issues as to the application of the amended Rule 68 of the Rules in this case. The focus here is primarily on legal issues that need to be resolved prior to assessing the request to introduce prior recorded testimony on its merits. Arguments as to whether the Request or Alternative Request should be granted will be addressed in the next section.

¹⁸ The former Rule 68 provided as follows:

When the Pre-Trial Chamber has not taken measures under article 56, the Trial Chamber may, in accordance with article 69, paragraph 2, allow the introduction of previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony, provided that:

- (a) If the witness who gave the previously recorded testimony is not present before the Trial Chamber, both the Prosecutor and the defence had the opportunity to examine the witness during the recording; or
- (b) If the witness who gave the previously recorded testimony is present before the Trial Chamber, he or she does not object to the submission of the previously recorded testimony and the Prosecutor, the defence and the Chamber have the opportunity to examine the witness during the proceedings.

¹⁹ Rule 68(2)(c) and (d) of the amended Rule 68 allows the Chamber to introduce previously recorded testimony when:

- (c) The prior recorded testimony comes from a person who has subsequently died, must be presumed dead, or is, due to obstacles that cannot be overcome with reasonable diligence, unavailable to testify orally. In such a case:
 - (i) Prior recorded testimony falling under sub-rule (c) may only be introduced if the Chamber is satisfied that the person is unavailable as set out above, that the necessity of measures under article 56 could not be anticipated, and that the prior recorded testimony has sufficient indicia of reliability.
 - (ii) The fact that the prior recorded testimony goes to proof of acts and conduct of an accused may be a factor against its introduction, or part of it.
- (d) The prior recorded testimony comes from a person who has been subjected to interference. In such a case:
 - (i) Prior recorded testimony falling under sub-rule (d) may only be introduced if the Chamber is satisfied that: - the person has failed to attend as a witness or, having attended, has failed to give evidence with respect to a material aspect included in his or her prior recorded testimony; - the failure of the person to attend or to give evidence has been materially influenced by improper interference, including threats, intimidation, or coercion; - reasonable efforts have been made to secure the attendance of the person as a witness or, if in attendance, to secure from the witness all material facts known to the witness; - the interests of justice are best served by the prior recorded testimony being introduced; and - the prior recorded testimony has sufficient indicia of reliability.
 - (ii) For the purposes of sub-rule (d)(i), an improper interference may relate, *inter alia*, to the physical, psychological, economic or other interests of the person.
 - (iii) When prior recorded testimony submitted under sub-rule (d)(i) relates to completed proceedings for offences defined in article 70, the Chamber may consider adjudicated facts from these proceedings in its assessment.
 - (iv) The fact that the prior recorded testimony goes to proof of acts and conduct of an accused may be a factor against its introduction, or part of it.

A. Retroactivity - whether the amended Rule 68 can be applied in this case

1. Whether the ASP barred application of the amended Rule 68 in this case

14. The Prosecution submits that the amended Rule 68 applies in the present case, arguing that any alleged statements or undertakings made during the amendment process should not be considered.²⁰
15. The Defence responds that the ASP barred the amended Rule 68's application in this case, relying upon: (i) the ASP's express emphasis of the principle of non-retroactivity and (ii) comments from the Government of Kenya and the African Union regarding the ASP's alleged agreement that the amended Rule 68 would not apply in this case.²¹
16. The ASP emphasis relied upon by the Defence is contained in a paragraph leading into the text of the amended Rule 68. The relevant text is as follows:

[The ASP] *Further decides* that the following shall replace rule 68 of the Rules of Procedure and Evidence, *emphasizing* article 51, paragraph 4, of the Rome Statute according to which amendments to the Rules of Procedure and Evidence shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted, with the understanding that the rule as amended is without prejudice to article 67 of the Rome Statute related to the rights of the accused, and to article 68, paragraph 3, of the Rome Statute related to the protection of the victims and witnesses and their participation in the proceedings.²²

17. The Chamber notes that the text of the amended Rule 68 does not contain any express time limitation as to when it would apply. The ASP is capable of imposing such a limit, and has done so in other contexts.²³ The resolution adopting the amended Rule 68 also does not contain a time limitation, although, as a preamble to

²⁰ Request, ICC-01/09-01/11-1866-Red, paras 14, 17; ICC-01/09-01/11-T-207-CONF-ENG, page 33, lines 15-25.

²¹ Ruto Defence Response, ICC-01/09-01/11-1908-Corr-Red, paras 7-11; Sang Defence Response, ICC-01/09-01/11-1911-Corr-Red, paras 15-22.

²² Assembly of States Parties, Amendments to the Rules of Procedure and Evidence, 12 November 2013, ICC-ASP/12/Res.7, para. 2 (emphasis in original).

²³ E.g. Article 15 *ter*(3) of the Statute ('The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute').

the amendment of the Rule, it could be a source of interpretation. The ASP emphasised the application of Article 51(4) of the Statute,²⁴ without specifying anything further.

18. The Chamber recalls that it has previously considered it neither 'necessary nor appropriate' to receive the views of the Government of Kenya on its understanding of the amended Rule 68's negotiating history.²⁵ The Chamber reached this conclusion because it cannot privilege a limited number of States Parties' views over the collective will of the ASP reflected in the resolution amending Rule 68.
19. The Chamber considers that the only conclusion to be drawn from the ASP resolution's language is that the amended Rule 68 may apply in this case subject to a consideration of Article 51(4) of the Statute. Article 51(4) would only bar the application of the amended Rule 68 if it applied 'retroactively to the detriment of the person who is being [...] prosecuted'.

2. Whether the relief sought in the Request is a retroactive application to the detriment of the accused.

20. The Prosecution submits that applying the amended Rule 68 in the present case is not retroactive because the relief sought does not purport to act with reference to past events or abrogate any pre-existing rights or duties. The Prosecution further argues that, even if the amended Rule 68 was considered retroactive in application, it cannot be said to apply to the detriment of the accused because the procedure for the admission of prior recorded testimony is equally available to both the Prosecution and the Defence. The Prosecution also argues that 'detriment', as the term is used in Article 51(4) of the Statute, must be to an established right in the

²⁴ Article 51(4) of the Statute provides: The Rules of Procedure and Evidence, amendments thereto and any provisional Rule shall be consistent with this Statute. Amendments to the Rules of Procedure and Evidence as well as provisional Rules shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted or who has been convicted.

²⁵ ICC-01/09-01/11-1893, para. 4.

statutory scheme, and that 'there is no right of an accused not to be confronted with incriminating evidence.'²⁶

21. The Defence argues that applying the amended Rule 68 in this instance would be a retroactive application that is detrimental to the accused, and is therefore not allowed on the basis of Articles 24(2) and 51(4) of the Statute.²⁷
22. As an initial matter, the principle of non-retroactivity, set out in Article 24(2) of the Statute,²⁸ appears in the part of the Statute governing 'General Principles of Criminal Law' and forms part of the three provisions that together set out the principle of legality applicable before the Court.²⁹ Read together, it is clear that these three provisions pertain to the substantive law, such as the crimes set out in Articles 5 to 8*bis* of the Statute. The principle of non-retroactivity is more applicable to matters of substance than to those of procedure.³⁰ Although this does not mean that this principle does not generally apply to the Rules, the Chamber does not consider that the amended Rule 68 falls under Article 24(2) of the Statute. Indeed, if Article 24(2) of the Statute governed all amendments to the Rules, as argued by the Defence,³¹ then Article 51(4) would be rendered almost entirely redundant.
23. Turning to Article 51(4) of the Statute, the Chamber does not consider the relief sought to be a retroactive application of the amended Rule 68. The Prosecution's Request is not seeking to alter anything which the Defence has previously been granted or been entitled to as a matter of right. This is not a situation where, for

²⁶ Request, ICC-01/09-01/11-1866-Red, paras 15 and 24-31; ICC-01/09-01/11-T-207-CONF-ENG, page 38, line 19 to page 40, line 14 and page 102, line 11 to page 103, line 11.

²⁷ Ruto Defence Response, ICC-01/09-01/11-1908-Corr-Red, paras 13-35; Sang Defence Response, ICC-01/09-01/11-1911-Corr-Red, paras 2, 17-20 and 44-58; ICC-01/09-01/11-T-207-CONF-ENG, page 89, line 17 to page 90, line 3.

²⁸ Article 24 of the Statute provides: 1. No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute. 2. In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply.

²⁹ Articles 22, 23 and 24 of the Statute.

³⁰ Bruce Broomhall in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court*, 2nd [Munich: Beck, 2008] p 1044.

³¹ Ruto Defence Response, ICC-01/09-01/11-1908-Corr-Red, para. 32; Sang Defence Response, ICC-01/09-01/11-1911-Corr-Red, paras 55-58.

example, the Prosecution attempts to apply an amended admissibility provision to exclude evidence previously admitted into the record. Here, the Prosecution is seeking to apply the provision prospectively to introduce items into evidence for the truth of their contents.

24. Even if the relief sought was considered to be a retroactive application of the amended Rule 68, the Chamber does not consider that this amended provision is applied 'to the detriment of the person who is being [...] prosecuted' within the meaning of Article 51(4) of the Statute. The application of Rule 68 cannot be considered detrimental to the accused simply because it allows the Prosecution to request the admission of incriminatory evidence against the accused. When conducting an analysis under Article 51(4) of the Statute as to whether its application is detrimental, the Chamber considers that the amended Rule 68 should be read on its face alone. The Chamber looks at the application of the amended rule in the abstract, and not at any concrete application of it. To do otherwise would create uncertainty and double standards across procedural amendments, potentially requiring oscillation between amended and unamended rules each time an application was filed.
25. The amended Rule 68 is a rule of neutral application – it is an admissibility rule that can be equally taken advantage of by all parties to the proceedings before the Court. Its application is not inherently detrimental to the accused.
26. This conclusion is consistent with the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (the 'ICTY') concerning the applicability of amendments analogous to Rule 68(2)(c) and (d) of the Rules (namely, Rules 92 *quater* and *quinquies* of the ICTY Rules, respectively).³² The Chamber does not

³² ICTY, Trial Chamber III, *The Prosecutor v. Vojislav Šešelj*, Redacted version of the "Decision on the prosecutions consolidated motion pursuant to rules 89 (F), 92 *bis*, 92 *ter* and 92 *quater* of the rules of procedure and evidence" filed confidentially on 7 January 2008, 21 February 2008, IT-03-67-T, paras 33-37; ICTY, Trial Chamber III, *The Prosecutor v. Milan Milutinović et al.*, Decision on Second Prosecution Motion for Admission of

consider that the ICTY rule governing retroactivity, which speaks of ‘prejudice’ rather than ‘detriment’,³³ is so different that the ICTY’s practice cannot serve as persuasive authority in analysing the amended Rule 68 under Article 51(4) of the Statute.³⁴

27. However, the Chamber emphasises that removing a case-by-case analysis from the Article 51(4) assessment does not mean that the Chamber foregoes such an analysis. The Chamber will assess any detriment to the accused in any concrete application of the amended Rule 68 when deciding whether to introduce materials under this provision.³⁵ In particular, such considerations are pertinent to deciding whether it is in the interests of justice to admit the prior recorded testimony under Rule 68(2)(d)(i) of the Rules.

B. Whether statements and transcripts of interviews taken under Rules 111 and 112 of the Rules can qualify as ‘prior recorded testimony’

28. The prior recorded testimony sought for introduction by the Prosecution are all written witness statements and transcripts of interviews taken in accordance with Rules 111 and 112 of the Rules,³⁶ neither of which require a formal oath or

Evidence Pursuant to Rule 92 *Quater*, 5 March 2007, IT-05-87-T, para. 8. See also ICTY, Appeals Chamber, *The Prosecutor v. Ramush Haradinaj et al*, Judgement, 19 July 2010, IT-04-84-A, para. 50 n. 159 (indicating that on retrial the ICTY Rules as amended on 10 December 2009 shall apply – the only amendment to the rules on this date was to adopt Rule 92 *quinqies*).). The Chamber considers this line of jurisprudence to be more persuasive than the *obiter dicta* footnotes of a decision of Trial Chamber III of the Court, relied on by the Defence. (The decision referred to by the Defence is: Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Public Redacted Version of “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), 26 August 2014, ICC-01/05-01/08-3019-Red, para. 29 n. 88 and para. 34 n. 111.

³³ Rule 6(D) of the ICTY Rules provides: An amendment shall enter into force seven days after the date of issue of an official Tribunal document containing the amendment, but shall not operate to prejudice the rights of the accused or of a convicted or acquitted person in any pending case.

³⁴ In this regard, it is noted that while the English version of Article 51(4) of the Statute speaks of ‘detriment’, the equally authoritative French version of Article 51(4) speaks of ‘préjudice’.

³⁵ In this regard, see ICC-ASP/12/Res.7, para. 2 (‘the rule as amended is without prejudice to article 67 of the Rome Statute related to the rights of the accused [...]').

³⁶ Rule 111 governs ‘[r]ecord of questioning in general’, whereas Rule 112 governs recording of questioning whenever the Prosecution questions a person for whom there are grounds to believe he/she has committed a crime within the jurisdiction of the Court, or for whom a warrant of arrest or a summons to appear has been issued.

affirmation. The Prosecution submits that 'prior recorded testimony' as contemplated in Rule 68 encompasses the prior written statements of witnesses made in anticipation of their eventual testimony at trial.³⁷

29. The Defence responds that such statements cannot qualify as testimony within the meaning of Rule 68 because the Concerned Witnesses did not give sworn statements taken by a neutral judicial officer.³⁸

30. The Chamber notes the terms of the Working Group on Lessons Learnt report (the 'WGLL Report'), which is the primary public source regarding the drafting history of the amended Rule 68. In this report, the WGLL emphasised that:

"[P]rior recorded testimony" in this context is understood to include video or audio recorded records, transcripts and written witness statements. This is the view in the prevailing jurisprudence to date, and it was considered unduly restrictive to understand "prior recorded testimony" in a narrower manner. Rule 68 may therefore apply to written statements taken by the parties or (inter)national authorities, provided that the requirements under one or more of the sub-rules are met.³⁹

31. At the time of this report, chambers of this Court had repeatedly extended 'prior recorded testimony' under the old Rule 68 to written witness statements like those taken under Rules 111 and 112.⁴⁰

³⁷ Request, ICC-01/09-01/11-1866-Red, paras 53-54; ICC-01/09-01/11-T-207-CONF-ENG, page 106, lines 1-14 and page 114, lines 2-8.

³⁸ Sang Defence Response, ICC-01/09-01/11-1911-Corr-Red, paras 61-62; ICC-01/09-01/11-T-207-CONF-ENG, page 61, lines 19-25.

³⁹ Study Group on Governance: Working Group on Lessons Learnt: Second report of the Court to the Assembly of States Parties, 31 October 2013, ICC-ASP/12/37/Add.1, page 22, para. 13.

⁴⁰ Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the prosecution's application for the admission of the prior recorded statements of two witnesses, 15 January 2009, ICC-01/04-01/06-1603; Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Corrigendum to the Decision on the Prosecution Motion for admission of prior recorded testimony of Witness P-02 and accompanying video excerpts, 27 August 2010, ICC-01/04-01/07-2289-Corr-Red; Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on Prosecutor's request to allow the introduction into evidence of the prior recorded testimony of P-166 and P-219, 3 September 2010, ICC-01/04-01/07-2362; Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Public redacted version of the First decision on the prosecution and defence requests for the admission of evidence, dated 15 December 2011, 9 February 2012, ICC-01/05-01/08-2012-Red, paras 134-136. See also Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo*, 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, ICC-01/05-01/08-1386, OA 5 OA 6, paras 79-81.

32. Against this background, the fact that neither the WGLL nor the ASP made any effort to qualify 'prior recorded testimony' when amending Rule 68 demonstrates an intention, or at least an openness, for the amended Rule 68 to continue to apply to recorded statements under Rules 111 and 112. Defining 'prior recorded testimony' in this way is also consistent with the language and purpose of the amended Rule 68. Rule 68(2)(b) of the Rules has a sworn declaration requirement,⁴¹ whereas Rule 68(2)(c) and (d) do not. If an oath or affirmation were a prerequisite to qualifying as prior recorded testimony, then the requirement included in Rule 68(2)(b) would appear superfluous. A better reading is that such oaths or affirmations, though relevant to assessing reliability across all parts of Rule 68, are only a formal requirement in the Rule 68(2)(b) declaration context. Limiting 'prior recorded testimony' only to testimony sworn under oath or affirmation would also severely limit the practical application of the amended Rule 68, as the standard forms of Prosecution witness statements set out in Rules 111 and 112 do not have such requirements. Such an interpretation would thus be against the object and purpose of the amended Rule 68, which, in a manner which respects the fair and expeditious conduct of the proceedings, facilitates the introduction of prior recorded testimony in situations where oral in-court testimony cannot be given as anticipated.

⁴¹ Rule 68(2)(b) of the Rules allows the Chamber to introduce previously recorded testimony when:

(b) The prior recorded testimony goes to proof of a matter other than the acts and conduct of the accused. In such a case:

(i) In determining whether introduction of prior recorded testimony falling under sub-rule (b) may be allowed, the Chamber shall consider, *inter alia*, whether the prior recorded testimony in question: - relates to issues that are not materially in dispute; - is of a cumulative or corroborative nature, in that other witnesses will give or have given oral testimony of similar facts; - relates to background information; - is such that the interests of justice are best served by its introduction; and - has sufficient indicia of reliability.

(ii) Prior recorded testimony falling under sub-rule (b) may only be introduced if it is accompanied by a declaration by the testifying person that the contents of the prior recorded testimony are true and correct to the best of that person's knowledge and belief. Accompanying declarations may not contain any new information and must be made reasonably close in time to when the prior recorded testimony is being submitted.

(iii) Accompanying declarations must be witnessed by a person authorised to witness such a declaration by the relevant Chamber or in accordance with the law and procedure of a State. The person witnessing the declaration must verify in writing the date and place of the declaration, and that the person making the declaration: - is the person identified in the prior recorded testimony; - assures that he or she is making the declaration voluntarily and without undue influence; - states that the contents of the prior recorded testimony are, to the best of that person's knowledge and belief, true and correct; and - was informed that if the contents of the prior recorded testimony are not true then he or she may be subject to proceedings for having given false testimony.

33. The Chamber therefore considers that 'prior recorded testimony' under the amended Rule 68 extends to written statements taken pursuant to Rule 111 of the Rules and transcripts of interviews taken pursuant to Rule 112 of the Rules. Exhibits associated with these recordings are also admissible so long as the witness uses or explains them in the prior recorded testimony, and particularly when these are necessary to read and understand the prior recorded testimony being introduced. Moreover, the Chamber shall consider whether the admission of associated exhibits is not unduly prejudicial to the accused in accordance with Article 69(4) of the Statute.

C. The standard of proof for evaluating the conditions of Rule 68 admissibility

34. The Prosecution submits that for procedural filings, such as this one, the existence of facts should be established by the relevant party on the basis of a balance of probabilities.⁴²
35. The Defence responds that the significance and nature of admitting prior recorded testimony should require the Prosecution to prove the necessary interference and other requirements beyond reasonable doubt. The Sang Defence also argues in the alternative that, if not beyond reasonable doubt, some other threshold significantly higher than the typical standard of proof should apply.⁴³
36. The Court's case law has not typically articulated any particular standards of proof for considering the factual certainty required when evaluating procedural motions. The Chamber does not consider an elevated standard of proof, such as beyond reasonable doubt, to be warranted in the present context. 'Beyond reasonable

⁴² Request, ICC-01/09-01/11-1866-Red, paras 61-62; ICC-01/09-01/11-T-207-CONF-ENG, page 41 lines 12-18 and page 115, lines 16-21.

⁴³ Ruto Defence Response, ICC-01/09-01/11-1908-Corr-Red, paras 36-40; Sang Defence Response, ICC-01/09-01/11-1911-Corr-Red, paras 109-13; ICC-01/09-01/11-T-207-CONF-ENG, page 64 lines 9-25, page 67, line 18 to page 68, line 9.

doubt’ is the standard ultimately applied when the Chamber decides on the guilt or innocence of the accused on the basis of all the evidence submitted and discussed by the Chamber.⁴⁴ Nothing requires the Chamber to extend this standard to the Rule 68 context, and doing so could unduly limit the Chamber’s ability to consider potentially relevant, probative evidence in its assessment of the merits of the case. In this regard, the Chamber emphasises that the admission of prior recorded testimony pursuant to Rule 68 of the Rules using a lower standard does not affect the Chamber’s obligation, pursuant to Article 66 of the Statute, to decide on the guilt or innocence of the accused beyond reasonable doubt.

37. Rule 68(2)(c) and (d) itself articulates only a need for the Chamber to be ‘satisfied’ in respect of the various requirements of the rule. The Chamber concludes that, to establish the factual thresholds required for introducing prior recorded testimony, evidence of sufficient specificity and probative value must be provided to satisfy the Chamber that the requirements under Rule 68 of the Rules are met.

D. Specific considerations regarding Rule 68(2)(d) of the Rules

1. Having ‘failed to give evidence with respect to a material aspect’

38. The Prosecution construes the concept of ‘failing’ to testify to a material aspect of one’s prior recorded testimony to include recanting due to improper influence.⁴⁵
39. The Defence responds that, if the witness actually testifies on these material aspects but states that the evidence provided in his/her prior recorded testimony was false, this situation cannot qualify as having ‘failed to give evidence with respect to a material aspect’. This means that the prior recorded testimony of the Concerned Witnesses who appeared before the Chamber and recanted their prior statements

⁴⁴ Article 66(3) of the Statute.

⁴⁵ Request, ICC-01/09-01/11-1866-Red, paras 5 n. 5 and 46.

cannot be admitted under Rule 68(2)(d)(i) of the Rules. The Defence also argues that the Prosecution did not make reasonable efforts to elicit certain evidence from the Concerned Witnesses who testified, meaning that these witnesses cannot be said to have failed or refused to testify.⁴⁶ The Sang Defence additionally argues that the purpose of Rule 68 was to streamline the presentation of evidence by enabling admission of prior recorded testimony '*in lieu of, not in addition to*' oral testimony on a material aspect, which, it submits, is not the situation in the present case.⁴⁷

40. Rule 68(2)(d)(i) applies when persons subject to interference have attended, but have 'failed to give evidence with respect to a material aspect indicated in his or her prior recorded testimony'. There is no dispute that appearing and refusing to testify at all would satisfy this requirement. The issue is whether a witness who appears, but whose testimony deviates from his/her prior recorded testimony, falls within the scope of the rule.
41. The Chamber considers that, in principle, the requirement can be satisfied by persons who appear and either do not testify at all or recant fundamental aspects of their prior recorded testimony. Understanding Rule 68(2)(d) in a more limited manner could lead to a situation in which a person subject to interference could have his/her prior recorded testimony introduced if they were intimidated into silence, but not if this same intimidation prompted them to recant fundamental aspects of what they said previously. The Chamber does not consider these two situations to be meaningfully distinct, and, to the extent that Rule 68(2)(d) is intended to enable consideration of evidence despite witness interference, there is no purpose in treating them differently. Any explanations provided for the change in testimony may, however, be relevant and will be considered when conducting the case-by-case assessments below.

⁴⁶ Ruto Defence Response, ICC-01/09-01/11-1908-Corr-Red, para. 101; Sang Defence Response, ICC-01/09-01/11-1911-Corr-Red, paras 83-87; ICC-01/09-01/11-T-207-CONF-ENG, page 70, lines 13-25 and page 93 lines 6-17.

⁴⁷ Sang Defence Response, ICC-01/09-01/11-1911-Conf-Corr, paras 78-83.

42. As to the arguments that the Chamber should not reward the submitting party for failing to probe deviations in testimony, it is certainly possible that a witness who recants his/her prior recorded testimony in fundamental aspects was not sufficiently prompted by the submitting party to testify on these matters. The diligence in exploring these deviations is relevant when deciding under Rule 68(2)(d)(i) whether 'reasonable efforts have been made [...] to secure from the witness all material facts known to the witness'. However, the Chamber does not consider that a recanting witness is necessarily removed from the scope of the rule. In the following section, the Chamber will analyse on a case-by-case basis whether this condition provided for in Rules 68(2)(d) of the Rules is met.

2. Whether the alleged interference must be attributable to the accused

43. The Prosecution does not submit that the accused were involved in the alleged interference, but that these acts were done by others for their benefit.⁴⁸ Neither defence team submits that Rule 68(2)(d) requires such involvement, but the Ruto Defence in particular argues that the accused's lack of involvement is relevant when assessing whether it is in the interests of justice to grant the relief sought.⁴⁹

44. There is not a significant disagreement between the parties on this point, but the Chamber notes that Rule 68(2)(d) of the Rules does not require the interference to be attributable to the accused or his/her defence team. However, an accused's involvement or lack of involvement in the interference is another relevant consideration when deciding whether it is in the interests of justice to introduce prior recorded testimony under Rule 68(2)(d) of the Rules.⁵⁰

⁴⁸ Request, ICC-01/09-01/11-1866-Red, paras 47, 63 and 139.

⁴⁹ Ruto Defence Response, ICC-01/09-01/11-1908-Corr-Red, paras 47 and 136-37; ICC-01/09-01/11-T-207-CONF-ENG, page 78, lines 13-24.

⁵⁰ This was a point of emphasis in the negotiations of the amended Rule 68. See, WGLL Report, ICC-ASP/12/37/Add.1, page 28 para. 34.

IV. REQUIREMENTS PURSUANT TO RULE 68(2)(D) OF THE RULES

[REDACTED]

A. Nature of the prior recorded testimony

45. The Prosecution seeks the admission for the truth of its contents of the witness's written statement,⁵¹ and [REDACTED] comprised of [REDACTED] [REDACTED].⁵² The written statement and [REDACTED] of the annexes were admitted for [REDACTED].⁵³ The Chamber considers that [REDACTED] are used and explained by the witness,⁵⁴ and are necessary to understand the contents and context of the prior recorded testimony. The [REDACTED] contains notes the witness made during the course of his interview that have been annexed for completeness and was not mentioned or signed by the witness.⁵⁵ Accordingly, the Chamber will not include [REDACTED] in the request for admission into evidence. The Chamber also notes that [REDACTED] are signed and dated by the witness.
46. In his prior recorded testimony, [REDACTED]: (a) a meeting [REDACTED]; (b) a meeting [REDACTED]; (c) a meeting [REDACTED]; (d) meetings [REDACTED]. The witness gave limited evidence [REDACTED].

B. Whether the witness failed to give evidence with respect to a material aspect of [REDACTED] prior recorded testimony

47. The witness testified [REDACTED],⁵⁶ [REDACTED].⁵⁷ The witness disavowed almost every previous statement relating to the accused, and [REDACTED]).⁵⁸

⁵¹ [REDACTED].

⁵² [REDACTED].

⁵³ [REDACTED].

⁵⁴ [REDACTED].

⁵⁵ [REDACTED].

⁵⁶ [REDACTED].

⁵⁷ [REDACTED].

Upon the Prosecution's request, [REDACTED].⁵⁹ The witness recanted fundamental aspects of [REDACTED] prior testimony, particularly: (a) attending meetings [REDACTED];⁶⁰ (b) attending a meeting [REDACTED];⁶¹ (c) going to [REDACTED];⁶² (d) seeing [REDACTED];⁶³ (e) and witnessing [REDACTED].⁶⁴

48. In the circumstances, the Chamber is satisfied that the witness failed to give evidence with respect to material aspects included in [REDACTED] prior recorded testimony within the meaning of Rule 68, as discussed in paragraphs 38 to 42 above. The potential reasons for this failure will be considered separately below.

C. Whether reasonable efforts have been made to secure all material facts known to the witness

49. The Chamber is satisfied that reasonable efforts were made to secure all material facts known to the witness. In reaching this finding the Chamber has noted the [REDACTED] for the purpose of testifying,⁶⁵ the extensive questioning conducted by the parties [REDACTED],⁶⁶ and the [REDACTED] of the Prosecution, [REDACTED] in order to permit the Prosecution to explore the areas of divergence from the prior recorded testimony, as well as the cause of such divergence.⁶⁷

50. The Chamber notes the Sang Defence contention that 'the Prosecution did not ask [REDACTED] any questions about Mr Sang during its own cross-examination', and therefore the Prosecution cannot claim that the witness failed to give evidence on material aspects of [REDACTED] prior statement.⁶⁸ However, the Chamber

⁵⁸ [REDACTED].

⁵⁹ [REDACTED].

⁶⁰ [REDACTED].

⁶¹ [REDACTED].

⁶² [REDACTED].

⁶³ [REDACTED].

⁶⁴ [REDACTED].

⁶⁵ [REDACTED].

⁶⁶ [REDACTED].

⁶⁷ [REDACTED].

⁶⁸ Sang Defence Response, ICC-01/09-01/11-1911-Conf-Corr, para. 94.

observes that in fact the witness was examined and cross-examined in court about this aspect of Mr Sang's involvement [REDACTED].⁶⁹

D. Whether the witness's failure to give evidence has been materially influenced by improper interference

51. The Prosecution contends that [REDACTED] was interfered with prior to [REDACTED] in-court testimony, and that [REDACTED].⁷⁰

52. Regarding [REDACTED], the Prosecution relies on two items: (a) a written statement of [REDACTED] stating that [REDACTED] had received money;⁷¹ and (b) the transcript of a conversation between [REDACTED] and [REDACTED] mentioning that the [REDACTED].⁷²

53. Regarding the witness's [REDACTED], the Prosecution draws attention to the similarity between the manner in which [REDACTED].⁷³ Though [REDACTED] testified to having [REDACTED],⁷⁴ the Prosecution contends that the witness was most probably [REDACTED]. The Prosecution notes that when it received [REDACTED], it was accompanied by a cover letter from [REDACTED] referring to [REDACTED].⁷⁵ The Prosecution deduces that [REDACTED].⁷⁶

54. The Ruto Defence contends that the evidence indicates that [REDACTED].⁷⁷

55. The Chamber notes that only the transcript of the conversation [REDACTED] and [REDACTED] has been admitted into evidence. On the basis of that transcript, the

⁶⁹ [REDACTED].

⁷⁰ Request, ICC-01/09-01/11-1866-Conf, para. 146.

⁷¹ [REDACTED].

⁷² [REDACTED].

⁷³ Request, ICC-01/09-01/11-1866-Red, para. 94, and para. 154.

⁷⁴ [REDACTED].

⁷⁵ Request, ICC-01/09-01/11-1866-Conf, para. 154, n. 246.

⁷⁶ Request, ICC-01/09-01/11-1866-Conf, para. 154; [REDACTED].

⁷⁷ Ruto Defence Response, ICC-01/09-01/11-1908-Conf-Corr, para. 158.

Chamber notes [REDACTED]. The witness's subsequent [REDACTED], could lead the Chamber to infer that [REDACTED] was subjected to interference. Moreover, during [REDACTED] in-court testimony, the witness admitted to having financial difficulties and discontinuing cooperation with the Prosecution because [REDACTED] was sent very little money.⁷⁸ During [REDACTED] in-court testimony, the witness also stated that [REDACTED] has received threats in connection with being an ICC witness. As a result, [REDACTED] had gone to the 'CID office' and had filed a report to the ICC investigators in this regard.⁷⁹ The witness also accepted that [REDACTED] was in close contact with [REDACTED] and [REDACTED] and in fact stated in court that [REDACTED].⁸⁰ Although the Chamber notes that this relationship with [REDACTED] could also be indicative of interference when the witness was first approached by the Prosecution, as alleged by the Ruto Defence,⁸¹ the Chamber is satisfied, particularly considering the similarities with the pattern of interference of the other Concerned Witnesses (*see infra*), that [REDACTED] was influenced by improper interference by individuals including [REDACTED].

E. Whether the interests of justice are served

56. None of the parties make any specific submission in this regard for this witness or any of the other Concerned Witnesses.
57. The Prosecution submits in general terms that the interests of justice would be served by the introduction of the prior recorded testimony so as to prevent the accused from benefiting from crimes against the administration of justice committed on their behalf. Moreover, it is submitted that pursuant to Article 69(3) of the Statute, the interests of justice are best served when the Chamber has all of

⁷⁸ [REDACTED].

⁷⁹ [REDACTED].

⁸⁰ [REDACTED].

⁸¹ Ruto Defence Response, ICC-01/09-01/11-1908-Conf-Corr, paras 158-163.

the relevant evidence at its disposal to determine the truth, particularly when the Chamber has been deprived of the witness's cooperation by persons acting improperly in the interests of the accused. The Prosecution also argues that the Defence had a full opportunity to cross-examine this witness (and all other witnesses with the exception of [REDACTED]), including on [REDACTED] prior recorded testimonies. Accordingly, it submits that the Chamber will be able to freely assess the probative value of this evidence in light of the totality of the other evidence admitted at trial.⁸²

58. The Ruto Defence argues in general that the 'interests of justice' limb of Rule 68(2)(d) is related to the Chamber's truth finding function and thus to the assessment of reliability of the evidence. In its view, the prior recorded testimonies lack indicia of reliability and are hearsay evidence. It also contends that the Prosecution had an opportunity to examine this witness (and all other witnesses with the exception of [REDACTED]). Moreover, it is submitted that there is no evidence linking Mr Ruto to the alleged scheme.⁸³

59. The Sang Defence contends in general that the admission of the prior recorded testimonies is not in the interests of justice. In its view, the Chamber 'has already struck a balance' by [REDACTED] and it can take these into account when assessing the credibility of the witnesses. Moreover, in its view [REDACTED].⁸⁴ The Sang Defence thus submits that where corroboration from *viva voce* testimony, contemporaneous records, or any other evidence is lacking, it would be unfair to admit these written statements whose reliability is in doubt.⁸⁵

60. The Chamber considers that the admission of the prior recorded testimony of [REDACTED] pursuant to Rule 68(2)(d) of the Rules is in the interests of justice. As

⁸² Request, ICC-01/09-01/11-1866-Conf, paras 139-141 and 162.

⁸³ Ruto Defence Response, ICC-01/09-01/11-1908-Conf-Corr, paras 135-141.

⁸⁴ [REDACTED].

⁸⁵ Sang Defence Response, ICC-01/09-01/11-1911-Conf-Corr, paras 142-147.

noted above, the main purpose of Rule 68 of the Rules is to expedite trial proceedings. Accordingly, the notion of interests of justice should be linked to the rights of the accused to be tried without undue delay. Pursuant to Article 69(3) of the Statute, the Chamber may take into account all evidence it considers necessary for the determination of the truth, and the Chamber notes the Prosecution's submissions that this evidence is important in the context of the case as a whole. Further, the Chamber notes the element of systematicity of the interference of several witnesses in this case which gives rise to the impression of an attempt to methodically target witnesses of this case in order to hamper the proceedings. The Chamber will not allow such hindrance and will safeguard the integrity of the proceedings. Although the prior recorded testimony goes to the acts and conducts of the accused, Mr Ruto and, [REDACTED], Mr Sang, the Chamber notes that the Defence was able to cross-examine [REDACTED] on these specific topics during [REDACTED] in-court testimony.⁸⁶ Moreover, the Chamber does not consider that the unproven link between the improper interference and the accused affects its determination that the interests of justice would be served if this prior recorded testimony is admitted, as the Chamber does not consider that its admission is unduly detrimental to the accused. When analysing this prior recorded testimony in an eventual decision on the guilt or innocence of the accused, the Chamber will weigh its probative value and reliability, considering the nature of the evidence provided by the witnesses, particularly if it is direct or hearsay evidence,⁸⁷ whether the prior recorded testimonies go to the acts and conduct of the accused, and whether the evidence contained therein is corroborated by any other evidence admitted into the record.⁸⁸

F. Whether the prior recorded testimony has sufficient indicia of reliability

⁸⁶ [REDACTED].

⁸⁷ [REDACTED].

⁸⁸ [REDACTED].

61. The Prosecution did not make specific submissions on the indicia of reliability of this witness's testimony (or any other of the Concerned Witnesses). The Prosecution submits in general that the Chamber must be satisfied only of the existence of 'indicia' of reliability and not make a final determination of reliability or weight, as the Chamber's decision on admissibility does not prejudice or limit its ultimate assessment of reliability and credibility in the context of all other evidence heard at trial. According to the Prosecution, the prior recorded testimony of this witness (and all other Concerned Witnesses) is reliable since: (a) it was given voluntarily; (b) it is a formal witness statement taken by a member of the Prosecution; (c) the witnesses signed the statement and acknowledged the truth of its contents; (d) at the time of providing the statement the witnesses had no reason to be untruthful; and (e) the evidence provided by the witnesses in their prior recorded testimony was internally consistent. Furthermore, the Prosecution states that the Defence had the opportunity to test the totality of the witness's evidence through cross-examination. Additionally, the Prosecution submits that the fact that a witness was interfered with seems to, in itself, indicate that the witness had reliable and important evidence against the accused.⁸⁹

62. The Ruto Defence argues that the prior recorded testimony of this witness (and all other Concerned Witnesses) lack sufficient indicia of reliability. It also contends that the Prosecution is contradicting its own approach in other previous cases. The Ruto Defence submits that, contrary to the testimony provided before the Chamber by the witness, the prior recorded testimony is not given under oath, or in circumstances which would have given rise to liability for giving false statements. Moreover, it states that, save for [REDACTED]. It argues that the written statements sought to be admitted as prior recorded testimonies could be incomplete or selective. Moreover, the Ruto Defence submits that there is no evidence corroborating the prior recorded testimonies. Finally, the Ruto Defence

⁸⁹ Request, ICC-01/09-01/11-1866-Conf, paras 142-145 and 163.

also submits that the motivation of this witness (and all other Witnesses Concerned) should be taken into account, namely the benefits allegedly offered, the fact that they were 'PNU supporters' and that the majority of these individuals knew each other and other trial witnesses.⁹⁰

63. In relation to [REDACTED] in particular, the Ruto Defence argues that during [REDACTED] testimony, the witness stated [REDACTED] did not expect to come to court to testify when [REDACTED] gave [REDACTED] statement,⁹¹ and [REDACTED] primary motivation to provide testimony was money.⁹² Moreover, the Ruto Defence notes that the prior recorded testimony was conducted in English, without interpretation, while the in-court testimony proved difficult in that language and ended up being in Swahili with English interpretation.⁹³ It further contends that when [REDACTED] was interviewed during the prior recorded testimony, the witness used [REDACTED] in court came from [REDACTED].⁹⁴ The Ruto Defence also contends that the Prosecution never corroborated evidence given by this witness, including where the witness lived during the PEV.⁹⁵ Finally, it argues that the prior recorded testimony is unreliable, given the in-court evidence denying most of its contents.⁹⁶

64. The Sang Defence submits in general that the reliability of a prior statement should be determined on a case-by-case basis, taking into account the circumstances in which it arose, whether it is contemporaneous to the relevant events, its contents, whether it is corroborated, its voluntariness and trustworthiness, context and character of the evidence, whether it is of hearsay nature, and its internal consistency. It submits in this regard that the prior recorded testimonies are

⁹⁰ Ruto Defence Response, ICC-01/09-01/11-1908-Conf-Corr, paras 107-131.

⁹¹ Ruto Defence Response, ICC-01/09-01/11-1908-Conf-Corr, para. 114, referring [REDACTED].

⁹² Ruto Defence Response, ICC-01/09-01/11-1908-Conf-Corr, para. 126, referring to [REDACTED].

⁹³ Ruto Defence Response, ICC-01/09-01/11-1908-Conf, para. 165, referring [REDACTED].

⁹⁴ Ruto Defence Response, ICC-01/09-01/11-1908-Conf-Corr, para. 166, referring to [REDACTED].

⁹⁵ Ruto Defence Response, ICC-01/09-01/11-1908-Conf-Corr, para. 169.

⁹⁶ Ruto Defence Response, ICC-01/09-01/11-1908-Conf-Corr, paras 170-176.

unreliable because they were taken by a party with an interest, they were not taken under oath, the witnesses were not warned about the consequences of giving false evidence, and there are no recordings for most of the statements sought to be admitted.⁹⁷

65. The Chamber recalls its findings in paragraphs 34 to 37 above, namely that the Chamber only needs evidence of sufficient specificity and probative value to be satisfied in respect of the various requirements of Rule 68 of the Rules, including whether the prior recorded statement has indicia of reliability. The Chamber notes further that the assessment of reliability is preliminary at this stage, and reasonably lower than the threshold for deciding on the innocence or guilt of the accused. The Chamber considers there to be an overlap between the nature of the reliability assessments conducted for the purposes of Rule 68(2)(d) and that relevant to admission under Article 69(4) of the Statute.⁹⁸ For this assessment the Chamber can take into account the circumstances in which the testimony arose, as well as its content.⁹⁹ As noted above, the oath, although not a requirement to admit a prior recorded testimony, is a factor in favour of its admission. When it does not concern a sworn testimony, the Chamber may consider the fact that a statement was signed and is accompanied by a declaration that it is true to the best of the witness's knowledge as an indicia of reliability.¹⁰⁰ The presence of a qualified interpreter during the interview is another indicia related to the circumstances in which the statement was made and recorded. The Chamber can also consider indicia of reliability that go beyond the circumstances in which the testimony arose, including the absence of manifest inconsistencies, whether the evidence was subject to cross-examination, and whether the evidence is corroborated by other

⁹⁷ Sang Defence Response, ICC-01/09-01/11-1911-Conf-Corr, paras 100-108.

⁹⁸ Compare with ICTY, *Prosecutor v. Karadzic*, Case No: IT-95-5/18-T, Decision on Accused's Motion for Admission of Evidence of Radislac Krstic Pursuant to Rule 92 *Quater*, 26 November 2013, para.25.

⁹⁹ See, e.g., ICTY, *Prosecutor v. Aleksovski*, IT-95-14/1, Decision on prosecutor's appeal on admissibility of evidence, 16 February 1999, paragraph 15; and Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the admissibility of four documents, 13 June 2008, para. 28.

¹⁰⁰ See, e.g., ICTY, *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-A, Appeals Judgement, 4 December 2012, para. 566 and the prior ICTY rulings cited to therein.

evidence.¹⁰¹ These indicia of reliability are non-exhaustive, and no one indicator is definitive, even where one or more of the indicia are absent the Chamber may still admit the material, and can consider the absence of such indicia, together with other relevant factors, when ultimately weighing all of the evidence before it.¹⁰²

66. As regards [REDACTED], the Chamber is of the view that the prior recorded testimony has formal indicia of reliability in the sense of appearing to have been obtained by the Prosecution in the ordinary course of its investigations. The prior recorded testimony is signed by the witness and the two investigators conducting the interview. Moreover, the final page of the statement contains a signed 'Witness Acknowledgement' which confirms, *inter alia*, that the statement was given voluntarily, is true to the best of the witness's knowledge and recollection and 'may be used in legal proceedings before the [Court]'. During [REDACTED] in-court testimony, the witness also recognised [REDACTED] signature.¹⁰³

67. Although the witness testified in court more easily in Swahili, and this may be a factor to take into consideration in its final assessment of the prior recorded testimony, the Chamber does not consider that this makes the prior recorded testimony *per se* unreliable. Moreover, it does not consider that the witness's denial of [REDACTED] prior recorded testimony is necessarily an indication of its unreliability. The Prosecution made noteworthy efforts to examine the witness, and the witness was also extensively examined by the Defence. As noted above, this is

¹⁰¹ See, e.g., ICTY, *Prosecutor v. Jovica Stanisic and Franko Simatovic*, Case No. IT-03-69-T, Decision on Prosecution motion for Admission of Evidence of Stevan Todorovic Pursuant to Rule 92 Quarter, 29 October 2010, para. 23; ICTY, *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, Decision on the Admission of a Witness Statement Pursuant to Rule 92 quater, 5 March 2009, para. 10; *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 quater, 16 February 2007, para. 7; ICTY, *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-AR73.5, Decision on Appeal Regarding Statement of a Deceased Witness, 21 July 2000, para. 27;

¹⁰² See e.g., *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Motion for Admission of Evidence of Radislav Krstić Pursuant to Rule 92 Quarter, 26 November 2013, para.12, citing *Prosecutor v. Karadžić*, IT-95-5/18-PT, Decision on Prosecution Motion for Admission of Testimony of Witness KDZ198 and Associated Exhibits Pursuant to Rule 92 Quater, 20 August 2009 para.5; *Prosecutor v. Popovic et al.*, IT-OS-88-AR73.4, Decision on the Prosecution Motion for Admission of Evidence pursuant to Rule 92 quater, 21 April 2008, para.41 and 52.

¹⁰³ [REDACTED].

in fact a factor to take into consideration to fulfil the requirement under Rule 68(2)(d) of the Rules, namely that the witnesses failed to give evidence to material aspects of the prior recorded testimony. Accordingly, the Chamber considers that the prior recorded testimony of [REDACTED] has sufficient indicia of reliability, although a final assessment of its weight will only be possible once the Chamber has all the evidence produced in trial before it in its ultimate determination on the guilt or innocence of the accused.

[REDACTED]

A. Nature of the prior recorded testimony

68. The Prosecution seeks the admission for the truth of its contents of [REDACTED] two written statements,¹⁰⁴ along [REDACTED] overall, which include [REDACTED].¹⁰⁵ Both statements have already been admitted for the limited purpose of assessing the credibility of [REDACTED], while only two [REDACTED] have previously been tendered or admitted.¹⁰⁶ The Chamber considers [REDACTED] are used and explained by the witness, and are necessary to understand the contents and context of the prior recorded testimony. The Chamber further notes that some of these annexes are explained at the end of the witness' prior recorded testimony, under the title [REDACTED]. The [REDACTED] are further dated and signed by the witness.

69. In [REDACTED] prior recorded testimony the witness referred to Mr Ruto's [REDACTED]. [REDACTED] also referred to an alleged [REDACTED], in which Mr Ruto was present; an alleged [REDACTED], also attended by Mr Ruto; an alleged [REDACTED]; Mr Ruto's alleged political actions on the election day 2007; the [REDACTED]. In relation to Mr Sang, the witness gave [REDACTED] and was

¹⁰⁴[REDACTED].

¹⁰⁵[REDACTED].

¹⁰⁶[REDACTED].

used by Mr Sang for the Orange Democratic Movement ('ODM') campaign in 2007.
[REDACTED].

B. Whether the witness failed to give evidence with respect to a material aspect of [REDACTED] prior recorded testimony

70. [REDACTED] testified [REDACTED],¹⁰⁷ [REDACTED].¹⁰⁸ Prior to that, on [REDACTED], the witness had [REDACTED].¹⁰⁹

71. The Chamber notes that during [REDACTED] testimony [REDACTED] recanted fundamental aspects of [REDACTED] prior recorded testimony, relating, for example: to [REDACTED] attendance at a [REDACTED];¹¹⁰ a pre-election [REDACTED]¹¹¹ and rally¹¹² in 2007 [REDACTED]; an alleged meeting at [REDACTED];¹¹³ an alleged gathering of [REDACTED];¹¹⁴ [REDACTED];¹¹⁵ and certain events which [REDACTED].¹¹⁶ [REDACTED],¹¹⁷ the Chamber noted 'the extensive degree to which the witness's testimony [had] diverged from the statement [REDACTED] originally provided to the Prosecution'.¹¹⁸

72. In the circumstances, the Chamber is satisfied that the witness failed to give evidence with respect to material aspects included in [REDACTED] prior recorded testimony within the meaning of Rule 68, as discussed in paragraphs 38 to 42 above. The potential reasons for this failure will be considered separately below.

¹⁰⁷ [REDACTED].

¹⁰⁸ [REDACTED] ICC-01/09-01/11-1377-Conf; [REDACTED]; ICC-01/09-01/11-1480-Conf.

¹⁰⁹ [REDACTED].

¹¹⁰ [REDACTED].

¹¹¹ [REDACTED].

¹¹² [REDACTED].

¹¹³ [REDACTED].

¹¹⁴ [REDACTED].

¹¹⁵ [REDACTED].

¹¹⁶ [REDACTED].

¹¹⁷ [REDACTED].

¹¹⁸ [REDACTED].

C. Whether reasonable efforts have been made to secure all material facts known to the witness

73. The Chamber is satisfied that reasonable efforts were made to secure all material facts known to the witness. In reaching this finding the Chamber has noted the [REDACTED] for the purpose of testifying,¹¹⁹ the extensive questioning conducted by the parties [REDACTED], and [REDACTED] by the Chamber [REDACTED], to have the [REDACTED] in order to permit the Prosecution to explore the areas of divergence from the prior recorded testimony, as well as the cause of such divergence.¹²⁰

74. The Chamber notes the Sang Defence's identification of a particular portion of the witness's prior recorded testimony which, it submits, was not specifically put to the witness when [REDACTED] was giving evidence before the Court.¹²¹ In the context of the witness's testimony as a whole, however, the Chamber does not consider that this omission negates the finding made above.

D. Whether the witness's failure to give evidence has been materially influenced by improper interference

75. In alleging improper interference, the Prosecution relies on: (i) [REDACTED]; (ii) a statement of [REDACTED], while noting 'reservations' about the witness's truthfulness in relation to some of the information provided in this statement;¹²² (iii) the witness's in-court testimony, which the Prosecution submits was implausible in respect of the reasons for the witness's recantation and inconsistent with reasons

¹¹⁹ ICC-01/09-01/11-1377-Conf; ICC-01/09-01/11-1450-Conf-Exp; ICC-01/09-01/11-1480-Conf; [REDACTED].

¹²⁰ [REDACTED].

¹²¹ Sang Defence Response, ICC-01/09-01/11-1911-Conf-Corr, para. 96.

¹²² [REDACTED].

the witness had previously given; and (iv) an [REDACTED] testimony before the Court.¹²³

76. The Sang Defence does not make submissions regarding the allegations of interference concerning [REDACTED] specifically, but submits, *inter alia*,¹²⁴ that many of the Prosecution witnesses had been in contact with each other over a substantial period of time, and that their claims of interference at different stages were made in order to 'remain relevant'¹²⁵ and 'save face'.¹²⁶ The Ruto Defence submits that the Prosecution has not properly established that the witness was subject to improper interference.¹²⁷ It submits that the Prosecution has based its assertions on unreliable witnesses and information.¹²⁸ The Ruto Defence further submits that [REDACTED] has repeatedly complained about [REDACTED] financial situation and is [REDACTED].¹²⁹

77. The Chamber notes that, under oath before the Court, the witness claimed to have provided false information in [REDACTED] prior recorded testimony in order to [REDACTED] Mr Ruto, [REDACTED].¹³⁰ The witness's testimony implicated others, including Prosecution investigators, and, in particular, [REDACTED], in the fabrication of the prior recorded testimony.¹³¹ The Chamber notes that, by contrast, the [REDACTED] into the record, [REDACTED] members of the Prosecution.¹³² The witness claimed to be recanting the prior recorded testimony for reasons of [REDACTED].¹³³

¹²³ Request, ICC-01/09-01/11-1866-Conf, paras 167-174.

¹²⁴ *See generally*, Sang Defence Response, ICC-01/09-01/11-1911-Conf-Corr, paras 115-139.

¹²⁵ Sang Defence Response, ICC-01/09-01/11-1911-Conf-Corr, para. 120.

¹²⁶ Sang Defence Response, ICC-01/09-01/11-1911-Conf-Corr, para. 139.

¹²⁷ Ruto Defence Response, ICC-01/09-01/11-1908-Conf-Corr, para. 179.

¹²⁸ Ruto Defence Response, ICC-01/09-01/11-1908-Conf-Corr, para. 179, referring to Section IV.

¹²⁹ Ruto Defence Response, ICC-01/09-01/11-1908-Conf-Corr, para. 179.

¹³⁰ [REDACTED].

¹³¹ [REDACTED].

¹³² [REDACTED].

¹³³ [REDACTED].

78. In a statement given in [REDACTED] to two Prosecution investigators, which is also admitted as evidence into the record, the witness indicated that [REDACTED] had been [REDACTED].¹³⁴ In testimony before the Court, the witness largely confirmed this event, albeit attributing the main initiative to [REDACTED] and recanting the involvement of [REDACTED].¹³⁵ The Chamber notes that other independent evidence before it provides some corroboration for the claim that, at the time, certain attempts were being made to contact [REDACTED] for the purpose of offering [REDACTED] financial incentives to withdraw.¹³⁶ Further, the Chamber has noted additional evidence before it implicating [REDACTED], amongst others, in other instances of alleged witness interference.¹³⁷ In this context, the Chamber considers the [REDACTED] contact with [REDACTED] in the context of an attempt to make a payment to a Prosecution witness, and close relationship with [REDACTED],¹³⁸ to be of significance.

79. For the present purpose, the Chamber does not consider it necessary to come to a conclusion regarding the weight to be attributed to the accounts provided by the witness either in the prior recorded testimony or before the Chamber. The Chamber is, nonetheless, on the basis of the information before it, satisfied that the witness was the subject of improper interference and that this interference materially influenced the evidence provided by [REDACTED], including, in particular, the explanation given by the witness for diverging from the prior recorded testimony.

E. Whether the interests of justice are served

¹³⁴[REDACTED].

¹³⁵[REDACTED].

¹³⁶[REDACTED].

¹³⁷[REDACTED].

¹³⁸[REDACTED].

80. In this regard, the Chamber refers to the general submissions of the parties, summarised in paragraphs 56-59 above.

81. The Chamber considers that the admission of the prior recorded testimony of [REDACTED] pursuant to Rule 68(2)(d) of the Rules is in the interests of justice. Pursuant to Article 69(3) of the Statute, the Chamber may take into account all evidence it considers necessary for the determination of the truth. Although the prior recorded testimony goes to the acts and conducts of the accused, namely Mr Ruto and, [REDACTED], Mr Sang, the Chamber notes that the Defence was able to cross-examine [REDACTED] on these specific topics during [REDACTED] in-court testimony.¹³⁹ Moreover, the Chamber does not consider that the unproven link between the improper interference and the accused affects its determination that the interests of justice would be served if this prior recorded testimony is admitted, as the Chamber does not consider that its admission is unduly detrimental to the accused. When analysing this prior recorded testimony in an eventual decision on the guilt or innocence of the accused, the Chamber will weigh its probative value and reliability, considering the nature of the evidence provided by the witnesses, particularly if it is direct or hearsay evidence,¹⁴⁰ whether the prior recorded testimonies go to the acts and conduct of the accused, and whether the evidence contained therein is corroborated by any other evidence admitted into the record.¹⁴¹

F. Whether the prior recorded testimony has sufficient indicia of reliability

82. In this regard, the Chamber refers to the general submissions of the parties, summarised in paragraphs 61-62 and 64 above.

83. In relation to [REDACTED] in particular, the Ruto Defence argues that the witness was a [REDACTED] Mr Ruto, and who had [REDACTED] an ICC witness. It also

¹³⁹ [REDACTED].

¹⁴⁰ [REDACTED].

¹⁴¹ [REDACTED].

submits that evidence admitted on the record demonstrates that the prior recorded testimony was false on material issues.¹⁴²

84. The Chamber refers to its general determinations as regards indicia of reliability in paragraph 65 (and, consequently, paragraphs 34 to 37) above.
85. As regards [REDACTED], the Chamber is of the view that the prior recorded testimony has formal indicia of reliability in the sense that it appears to have been obtained by the Prosecution in the ordinary course of its investigations. The prior recorded testimony is signed by the witness and the two investigators conducting the interview. Moreover, the final page of the statement contains a signed 'Witness Acknowledgement' which confirms, *inter alia*, that the statement was given voluntarily, is true to the best of the witness's knowledge and recollection and 'may be used in legal proceedings before the [Court]'.
86. The Chamber notes that some aspects of the prior recorded testimony may be inconsistent with other evidence admitted on the record, as noted by the Ruto Defence, including vis-à-vis the witness's in-court testimony, in which [REDACTED] denied most of [REDACTED] prior recorded testimony. Nevertheless, the Chamber considers that these inconsistencies, in light of the formal indicia of reliability indicated above, are not sufficient to make the written statement unreliable pursuant to Rule 68(2)(d) of the Rules. Accordingly, the Chamber considers that the prior recorded testimony of [REDACTED] has sufficient indicia of reliability for admission, although a final assessment of its weight will only be possible once the Chamber has before it all the evidence produced in trial in its ultimate determination on the guilt or innocence of the accused.

¹⁴² Ruto Defence Response, ICC-01/09-01/11-1908-Conf-Corr, paras 181-190.

[REDACTED]¹⁴³

A. Nature of the prior recorded testimony

87. The Prosecution seeks the admission for the truth of its contents of the witness's written statement¹⁴⁴ and [REDACTED] conducted pursuant to Rule 112 of the Rules.¹⁴⁵ Additionally, the Prosecution seeks the admission of [REDACTED] and a translation to one of [REDACTED], which include [REDACTED].¹⁴⁶ Some of these items were admitted into the record [REDACTED].¹⁴⁷ The Chamber considers that [REDACTED] are used and explained by the witness, and are necessary to understand the contents and context of the prior recorded testimony. The witness [REDACTED] the [REDACTED]. Moreover, some of [REDACTED] were referred to by the witness during [REDACTED] testimony in court.¹⁴⁸

88. In the prior recorded testimony, the witness refers to Mr Ruto, particularly: (a) a rally in [REDACTED]; (b) a meeting [REDACTED], where Mr Ruto allegedly made several statements against Kikuyus; (c) persons that allegedly [REDACTED]; (d) an alleged meeting [REDACTED]; and (e) another meeting in [REDACTED]. As regards Mr Sang, [REDACTED].

B. Whether the witness failed to give evidence with respect to a material aspect of [REDACTED] prior recorded testimony

89. The witness [REDACTED],¹⁴⁹ as a result of a [REDACTED] by the Chamber.¹⁵⁰ However, [REDACTED] had previously [REDACTED].¹⁵¹ When the Prosecution

¹⁴³ [REDACTED].

¹⁴⁴ [REDACTED].

¹⁴⁵ [REDACTED].

¹⁴⁶ [REDACTED].

¹⁴⁷ [REDACTED].

¹⁴⁸ [REDACTED].

¹⁴⁹ [REDACTED].

¹⁵⁰ [REDACTED].

attempted to elicit testimony on matters addressed in the prior recorded testimony of the witness, [REDACTED] denied everything and stated that the information [REDACTED] had previously provided had been given to [REDACTED] by '[REDACTED] and was false.¹⁵² Accordingly, [REDACTED] by the Chamber.¹⁵³

90. The Chamber is satisfied that the witness failed to give evidence with respect to material aspects included in [REDACTED] prior recorded testimony within the meaning of Rule 68, as discussed in paragraphs 38 to 42 above. The potential reasons for this failure will be considered separately below.

C. Whether reasonable efforts have been made to secure all material facts known to the witness

91. The Chamber is satisfied that reasonable efforts were made to secure all material facts known to the witness. In reaching this finding the Chamber has noted [REDACTED] for the purpose of testifying,¹⁵⁴ the extensive questioning conducted by the parties [REDACTED], and the [REDACTED] of the Prosecution, [REDACTED] in order to permit the Prosecution to explore the areas of divergence from the prior recorded testimony, as well as the cause of such divergence.¹⁵⁵
92. The Chamber notes the Sang Defence's identification of a particular portion of the witness's prior recorded testimony which, it submits, was not specifically put to the witness when [REDACTED] was giving evidence before the Court.¹⁵⁶ In the context of the witness's testimony as a whole, however, the Chamber does not consider that this omission negates the finding made above.

¹⁵¹ See, Prosecution's tenth application pursuant to Regulation 35(2) of the Regulations of the Court, 22 September 2014, ICC-01/09-01/11-1532-Conf. [REDACTED].

¹⁵² [REDACTED].

¹⁵³ [REDACTED].

¹⁵⁴ ICC-01/09-01/11-1480-Conf-Exp-Anx7.

¹⁵⁵ [REDACTED].

¹⁵⁶ Sang Defence Response, ICC-01/09-01/11-1911-Conf-Corr, para. 90.

D. Whether the witness's failure to give evidence has been materially influenced by improper interference

93. The Prosecution accepts in its Request that 'there is little direct evidence of improper interference' with this witness.¹⁵⁷ However, it submits that the manner in which [REDACTED] broke off contact with the Prosecution, [REDACTED] affidavit, and [REDACTED] in-court testimony 'demonstrate[s] that [REDACTED] was also tampered with by members of the scheme'.¹⁵⁸ The Prosecution states that there is 'strong pattern evidence' and that the witness's hostility while testifying and 'the chain of events leading to this bears the hallmarks of interference by scheme members'.¹⁵⁹ Moreover, the Prosecution submits that the witness's testimony is a 'transparent fabrication' and it is probable that the witness was instructed [REDACTED] in order to explain how [REDACTED] could have possibly provided [REDACTED] to the Prosecution investigators.¹⁶⁰
94. The Ruto Defence contends that there is no evidence of interference and that this witness's affidavit, [REDACTED].¹⁶¹ The Sang Defence similarly submits that the Prosecution 'does not put forth one allegation of interference' with this witness and [REDACTED] cannot be linked to the scheme simply because [REDACTED] filed an affidavit and sent it to the Prosecution's public e-mail address.¹⁶²
95. The Chamber notes that the witness's signed affidavit states that all the information [REDACTED] had given to Prosecution investigators was false and [REDACTED]. The witness also stated that [REDACTED] was doing so of his own volition and free will.

¹⁵⁷ Request, ICC-01/09-01/11-1866-Conf, para. 198.

¹⁵⁸ Request, ICC-01/09-01/11-1866-Conf, para. 198.

¹⁵⁹ Request, ICC-01/09-01/11-1866-Conf, para. 202.

¹⁶⁰ Request, ICC-01/09-01/11-1866-Conf, para. 208.

¹⁶¹ Ruto Defence Response, ICC-01/09-01/11-1908-Conf-Corr, paras 193-195.

¹⁶² Sang Defence Response, ICC-01/09-01/11-1911-Conf-Corr, paras 134-135.

96. The Chamber considers that the admitted witness affidavit, analysed together with the witness's testimony, the manner in which [REDACTED] broke off Court contact and other evidence admitted in the record of the case, could be indicative that [REDACTED] was subjected to interference pursuant to Rule 68 of the Rules. However, in the view of the Chamber, this information alone is not sufficient to satisfy this requirement under Rule 68(2)(d) of the Rules.¹⁶³ The Chamber further notes that there is no other evidence presented by the Prosecution, which has not been admitted into evidence, which would change the Chamber's assessment on this point.
97. Accordingly, the Chamber rejects the Request regarding the admission of the prior recorded testimony of [REDACTED] for the truth of its content.

[REDACTED]

A. Nature of the prior recorded testimony

98. The Prosecution seeks the admission into evidence for the truth of its content of one written statement,¹⁶⁴ and its [REDACTED].¹⁶⁵ All documents were admitted into evidence for the limited purpose of [REDACTED] and for questions of the witness's credibility.¹⁶⁶ The Chamber considers that [REDACTED] are used and explained by the witness, and are necessary to understand the contents and context of the prior recorded testimony. The Chamber also notes that the witness dated and [REDACTED].

¹⁶³ The Chamber notes that there is no other evidence presented by the Prosecution, which is not admitted into evidence, which would support the

¹⁶⁴ [REDACTED].

¹⁶⁵ [REDACTED].

¹⁶⁶ [REDACTED].

99. The prior recorded testimony contains information regarding alleged [REDACTED]. It also refers to [REDACTED]. It also refers to alleged meetings [REDACTED].

B. Whether the witness failed to give evidence with respect to a material aspect of [REDACTED] prior recorded testimony

100. [REDACTED] testified [REDACTED].¹⁶⁷ [REDACTED] recanted [REDACTED] entire statement concerning the facts of the case. [REDACTED] stated that [REDACTED] never participated in any [REDACTED].¹⁶⁸ [REDACTED] explained that the witness statement [REDACTED] provided was prepared [REDACTED] and was not [REDACTED] own testimony.¹⁶⁹ According to the witness, the only information [REDACTED] added was the [REDACTED] of the interview.¹⁷⁰ [REDACTED] testified that [REDACTED] had signed the statement because of 'what was offered to [REDACTED], would arrange the [REDACTED] and [REDACTED], as well as the possibility to live abroad.¹⁷¹

101. The Sang Defence submits that the witness addressed all material aspects by testifying that the information provided in [REDACTED] statement was not true and that [REDACTED] had never attended [REDACTED].¹⁷²

102. The Chamber is nevertheless satisfied that the witness failed to give evidence with respect to material aspects included in [REDACTED] prior recorded testimony within the meaning of Rule 68, as discussed in paragraphs 38 to 42 above. The potential reasons for this failure will be considered separately below.

¹⁶⁷ [REDACTED].

¹⁶⁸ [REDACTED].

¹⁶⁹ [REDACTED].

¹⁷⁰ [REDACTED].

¹⁷¹ [REDACTED].

¹⁷² Sang Response, ICC-01/09-01/11-1911-Conf-Corr, paras 91-92.

C. Whether reasonable efforts have been made to secure all material facts known to the witness

103. The Chamber is satisfied that reasonable efforts were made to secure from the witness all material facts known to [REDACTED], noting that [REDACTED] was questioned in depth by the Prosecution [REDACTED]¹⁷³ and appeared before the Chamber [REDACTED].¹⁷⁴ The Chamber also notes [REDACTED] of the Prosecution, [REDACTED] in order to permit the Prosecution to explore the areas of divergence from the prior recorded testimony, as well as the cause of such divergence.¹⁷⁵

D. Whether the witness's failure to give evidence has been materially influenced by improper interference

104. According to the Prosecution, [REDACTED] was interfered with by the scheme members, [REDACTED] and was then used to approach [REDACTED] to withdraw as a witness.¹⁷⁶

105. In order to prove the interference with the witness, the Prosecution relies on several materials, including [REDACTED] and a statement of the witness from [REDACTED], which have been admitted as evidence in the case.¹⁷⁷ The Prosecution also relies on [REDACTED] in-court testimony.

106. The Ruto Defence argues that the Prosecution failed to provide sufficient linkage between an alleged interference and [REDACTED] failure to provide evidence in accordance with [REDACTED] original statement. It avers that the witness

¹⁷³ [REDACTED].

¹⁷⁴ Request for cooperation to the Republic of Kenya pursuant to Decision ICC-01/09-01/11-1274-Corr2, 1 August 2014, ICC-01/09-01/11-1455-Conf and its annex ICC-01/09-01/11-1455-Conf-Exp-Anx.

¹⁷⁵ [REDACTED].

¹⁷⁶ Request, ICC-01/09-01/11-1866-Conf, paras 130 and 133-134.

¹⁷⁷ [REDACTED].

recanted [REDACTED] statement because [REDACTED] did not want to lie under oath.¹⁷⁸ The Chamber is not convinced by the Ruto Defence's argument. In fact, the Defence affirmed that it did not accept the witness's testimony on how [REDACTED] statement was taken.¹⁷⁹

107. The transcript of the conversation with [REDACTED],¹⁸⁰ [REDACTED] tried to convince [REDACTED] to recant [REDACTED] testimony and – in doing so – states that [REDACTED].¹⁸¹

108. Further, [REDACTED] provided testimony that [REDACTED] had talked to him shortly before the latter's testimony and that [REDACTED] had declared [REDACTED] upcoming testimony. [REDACTED].¹⁸² [REDACTED] not to worry because the preparation for court was 'good'.¹⁸³

109. The Chamber therefore finds that this evidence is sufficiently specific and probative to conclude that [REDACTED] failed to give evidence on material aspects included in [REDACTED] prior testimony due to improper interference.

E. Whether the interests of justice are served

110. In this regard, the Chamber refers to the general submissions of the parties, summarised in paragraphs 56-59 above.

111. The Chamber considers that the admission of the prior recorded testimony of [REDACTED] pursuant to Rule 68(2)(d) of the Rules is in the interests of justice. Pursuant to Article 69(3) of the Statute, the Chamber may take into account all evidence it considers necessary for the determination of the truth. Although the

¹⁷⁸ Ruto Defence Response, ICC-01/09-01/11-1908-Conf-Corr, para. 144.

¹⁷⁹ [REDACTED].

¹⁸⁰ [REDACTED].

¹⁸¹ [REDACTED].

¹⁸² [REDACTED].

¹⁸³ [REDACTED].

prior recorded testimony goes to the acts and conducts of the accused, namely Mr Ruto and, [REDACTED], Mr Sang, the Chamber notes that Defence was able to cross-examine [REDACTED] on these specific topics during [REDACTED] in-court testimony.¹⁸⁴ Moreover, the Chamber does not consider that the unproven link between the improper interference and the accused affects its determination that the interests of justice would be served if this prior recorded testimony is admitted, as the Chamber does not consider that its admission is unduly detrimental to the accused. When analysing this prior recorded testimony in an eventual decision on the guilt or innocence of the accused, the Chamber will weigh its probative value and reliability, considering the nature of the evidence provided by the witnesses, particularly if it is direct or hearsay evidence,¹⁸⁵ whether the prior recorded testimonies go to the acts and conduct of the accused, and whether the evidence contained therein is corroborated by any other evidence admitted into the record.¹⁸⁶

F. Whether the prior recorded testimony has sufficient indicia of reliability

112. In this regard, the Chamber refers to the general submissions of the parties, summarised in paragraphs 61-62 and 64 above.

113. In relation to [REDACTED] in particular, the Ruto Defence submits that the witness became a Prosecution witness due [REDACTED].¹⁸⁷ It also submits that [REDACTED] detailed statement is not truthful and that the witness relied on a [REDACTED] when [REDACTED] provided the interview, although the extent of [REDACTED] during the interview is not recorded.¹⁸⁸ The Ruto Defence also contends that the interview was conducted in English, although the witness insisted in court to provide [REDACTED] answers in Swahili.¹⁸⁹ Likewise, it

¹⁸⁴ [REDACTED].

¹⁸⁵ [REDACTED].

¹⁸⁶ [REDACTED].

¹⁸⁷ Ruto Defence Response, ICC-01/09-01/11-1908-Conf-Corr, para. 145.

¹⁸⁸ Ruto Defence Response, ICC-01/09-01/11-1908-Conf-Corr, para. 147.

¹⁸⁹ Ruto Defence Response, ICC-01/09-01/11-1908-Conf-Corr, para. 148.

submits that evidence admitted into the record demonstrates that the account cannot be true.¹⁹⁰

114.The Chamber refers to its general determinations as regards indicia of reliability in paragraph 65 (and, consequently, paragraphs 34 to 37) above.

115.As regards [REDACTED], the Chamber is of the view that the prior recorded testimony has formal indicia of reliability in the sense of appearing to have been obtained by the Prosecution in the ordinary course of its investigations. The prior recorded testimony is signed by the witness, as well as the Prosecution investigator and the trial lawyer conducting the interview. Moreover, the final page of the statement contains a signed 'Witness Acknowledgement' which confirms, *inter alia*, that the statement was given voluntarily, is true to the best of the witness's knowledge and recollection and 'may be used in legal proceedings before the [Court]'.

116.Although the witness testified in court and partly answered questions in Swahili, and this may be a factor to take into consideration in its final assessment of the prior recorded testimony, the Chamber does not consider that this makes the prior recorded testimony *per se* unreliable. During [REDACTED] testimony the witness confirmed that [REDACTED] was able to understand English and was able follow a conversation. Further, [REDACTED] chose to answer partly in English, partly in Swahili.¹⁹¹ Moreover, the Chamber does not consider that the witness's denial of [REDACTED] prior recorded testimony is necessarily an indication of its unreliability. As noted above, this is a factor to take into consideration to fulfil the requirement under Rule 68(2)(d) of the Rules, namely that the witnesses failed to give evidence to material aspects of the prior recorded testimony.

¹⁹⁰ Ruto Defence Response, ICC-01/09-01/11-1908-Conf-Corr, paras 149-156.

¹⁹¹ [REDACTED].

117. The Chamber notes that some aspects of the prior recorded testimony may be inconsistent with other evidence admitted on the record, as noted by the Ruto Defence, including vis-à-vis the witness's in-court testimony, in which [REDACTED] denied most of [REDACTED] prior recorded testimony. Nevertheless, the Chamber considers that these inconsistencies, in light of the formal indicia of reliability indicated above, are not sufficient to make the written statement unreliable pursuant to Rule 68(2)(d) of the Rules. Accordingly, the Chamber considers that the prior recorded testimony of [REDACTED] has sufficient indicia of reliability for admission, although a final assessment of its weight will only be possible once the Chamber has before it all the evidence produced in trial in its ultimate determination on the guilt or innocence of the accused.

[REDACTED]¹⁹²

A. Nature of the prior recorded testimony

118. The Prosecution seeks the admission of the witness's written statement for the truth of its content. A redacted version of this statement has already been admitted for the limited purpose of assessing the credibility of the witness.¹⁹³

119. In [REDACTED] prior recorded testimony, the witness referred to the [REDACTED].

B. Whether the witness failed to give evidence with respect to a material aspect of [REDACTED] prior recorded testimony

120. The witness testified [REDACTED],¹⁹⁴ [REDACTED] by the Chamber.¹⁹⁵ However, he had [REDACTED].¹⁹⁶ During [REDACTED] testimony, the witness repudiated

¹⁹² [REDACTED].

¹⁹³ [REDACTED].

incriminating parts of [REDACTED] prior recorded testimony on the ground that [REDACTED].¹⁹⁷

121. Although the Sang Defence argues that the witness commented on all material aspects of [REDACTED] previous statements comprehensively,¹⁹⁸ the Chamber is satisfied that the witness failed to give evidence with respect to material aspects included in [REDACTED] prior recorded testimony within the meaning of Rule 68, as discussed in paragraphs 38 to 42 above. The potential reasons for this failure will be considered separately below.

C. Whether reasonable efforts have been made to secure all material facts known to the witness

122. The Chamber further finds that reasonable efforts were made to secure from the witness all material facts known to [REDACTED], noting that the witness was questioned in depth by the Prosecution [REDACTED]¹⁹⁹ and appeared before the Chamber [REDACTED].²⁰⁰

D. Whether the witness's failure to give evidence has been materially influenced by improper interference

123. The affidavit signed by the witness states that [REDACTED] participation in the Court's proceedings [REDACTED].²⁰¹

124. The Prosecution argues that these are insufficient explanations of why [REDACTED] would 'relate wholesale falsities' [REDACTED].²⁰² The Prosecution

¹⁹⁴ Request, ICC-01/09-01/11-1866-Conf, para. 179; [REDACTED].

¹⁹⁵ [REDACTED].

¹⁹⁶ [REDACTED]

¹⁹⁷ [REDACTED].

¹⁹⁸ Sang Defence Response, ICC-01/09-01/11-1911-Conf-Corr, paras 87-89.

¹⁹⁹ [REDACTED].

²⁰⁰ ICC-01/09-01/11-1631-Conf-Exp.

²⁰¹ [REDACTED].

also submits that the witness did not state that [REDACTED]; [REDACTED].²⁰³ The Prosecution submits that “[g]iven that the witness [REDACTED] at the time, it can be inferred that [REDACTED] testify against the accused, or testify untruthfully”.²⁰⁴ The Prosecution argues that either illicit disclosure [REDACTED] or the witness withdrew due to [REDACTED].²⁰⁵ The Prosecution also argues that it cannot be excluded that the witness was [REDACTED] into repudiating [REDACTED] original evidence by a member of the scheme.²⁰⁶

125. The Sang Defence argues that the withdrawal of the witness does not fit within the pattern of alleged interference by members of the scheme.²⁰⁷ Furthermore, it submits that the witness gave a plausible explanation as to why [REDACTED] had falsely [REDACTED].²⁰⁸ The Sang Defence argues that [REDACTED].²⁰⁹ The Sang Defence submits that the Prosecution has not, by any standard of proof, shown that the witness was subjected to interference.²¹⁰

126. Having regard only to the material already in evidence, the Chamber is satisfied that the failure of [REDACTED] to give evidence on the material aspects of [REDACTED] testimony are the result of improper interference, [REDACTED]. However, the Chamber considers that on the basis of admitted evidence, it cannot make a determination as to whether [REDACTED]. However, the Chamber notes that reference to the [REDACTED] with the Prosecution and testify in court. For example, in the course of testimony, the witness stated that [REDACTED]. In fact,

²⁰² Request, ICC-01/09-01/11-1866-Conf, para. 190.

²⁰³ Request, ICC-01/09-01/11-1866-Conf, para. 192.

²⁰⁴ Request, ICC-01/09-01/11-1866-Conf, para. 181.

²⁰⁵ Request, ICC-01/09-01/11-1866-Conf, paras 181, 182 and 193.

²⁰⁶ Request, ICC-01/09-01/11-1866-Conf, para. 183.

²⁰⁷ Sang Defence Response, ICC-01/09-01/11-1911-Conf-Corr, para. 123.

²⁰⁸ Sang Defence Response, ICC-01/09-01/11-1911-Conf-Corr, para. 126.

²⁰⁹ Sang Defence Response, ICC-01/09-01/11-1911-Conf-Corr, para. 127.

²¹⁰ Sang Defence Response, ICC-01/09-01/11-1911-Conf-Corr, para. 133.

although the witness disavowed [REDACTED] prior recorded testimony with respect to those parts that [REDACTED], during [REDACTED].²¹¹

E. Whether the interests of justice are served

127. In this regard, the Chamber refers to the general submissions of the parties, summarised in paragraphs 56-59 above.

128. The Chamber considers that the admission of the prior recorded testimony of [REDACTED] pursuant to Rule 68(2)(d) of the Rules is in the interests of justice. Pursuant to Article 69(3) of the Statute, the Chamber may take into account all evidence it considers necessary for the determination of the truth. Although the prior recorded testimony goes to the acts and conducts of the accused, [REDACTED], the Chamber notes that the Defence was able to cross-examine [REDACTED] on these specific topics during [REDACTED] in-court testimony.²¹² Moreover, the Chamber does not consider that the unproven link between the improper interference and the accused affects its determination that the interests of justice would be served if this prior recorded testimony is admitted, as the Chamber does not consider that its admission is unduly detrimental to the accused. When analysing this prior recorded testimony in an eventual decision on the guilt or innocence of the accused, the Chamber will weigh its probative value and reliability, considering the nature of the evidence provided by the witnesses, particularly if it is direct or hearsay evidence,²¹³ whether the prior recorded testimonies go to the acts and conduct of the accused, and whether the evidence contained therein is corroborated by any other evidence admitted into the record.²¹⁴

F. Whether the prior recorded testimony has sufficient indicia of reliability

²¹¹ [REDACTED].

²¹² [REDACTED].

²¹³ [REDACTED].

²¹⁴ [REDACTED].

129. In this regard, the Chamber refers to the general submissions of the parties, summarised in paragraphs 61-62 and 64 above.

130. In relation to [REDACTED] in particular, the Sang Defence submits that the witness stated in court that [REDACTED] statement was given at a time [REDACTED].²¹⁵

131. The Chamber refers to its general determinations as regards indicia of reliability in paragraph 65 (and, consequently, paragraphs 34 to 37) above.

132. As regards [REDACTED], the Chamber is of the view that the prior recorded testimony has formal indicia of reliability in the sense of appearing to have been obtained by the Prosecution in the ordinary course of its investigations. The prior recorded testimony is signed by the witness and the two investigators conducting the interview. Moreover, the final page of the statement contains a signed 'Witness Acknowledgement' which confirms, *inter alia*, that the statement was given voluntarily, is true to the best of the witness's knowledge and recollection and 'may be used in legal proceedings before the [Court]'.

133. The Chamber notes that some aspects of the prior recorded testimony may be inconsistent, as noted by the Sang Defence, with the witness's in-court testimony, in which [REDACTED] denied most of [REDACTED] prior recorded testimony and stated to have ulterior motives for providing [REDACTED] prior recorded testimony. Nevertheless, the Chamber considers that these inconsistencies, in light of the formal indicia of reliability indicated above, are not sufficient to make the written statement unreliable pursuant to Rule 68(2)(d) of the Rules. Accordingly, the Chamber considers that the prior recorded testimony of [REDACTED] has sufficient indicia of reliability for admission, although a final assessment of its weight will only be possible once the Chamber has before it all the evidence

²¹⁵ Sang Defence Response, ICC-01/09-01/11-1911-Conf-Corr, para. 107.

produced in trial in its ultimate determination on the guilt or innocence of the accused.

V. REQUIREMENTS PURSUANT TO RULE 68(2)(C) OF THE RULES

A. The prior recorded testimony of [REDACTED]

134. The Prosecution seeks the admission for the truth of its contents of [REDACTED] written statement dated [REDACTED]²¹⁶ and [REDACTED],²¹⁷ together with a translation of one of [REDACTED].²¹⁸ Neither the statement nor any of the [REDACTED] have previously been tendered or admitted. The Chamber considers that these [REDACTED] are used and explained by the witness, and are necessary to understand the contents and context of the prior recorded testimony. The Chamber also notes that the witness explains what these annexes are in the final section of the written testimony with the title [REDACTED].

135. The Prosecution submits that the prior recorded testimony is admissible under, *inter alia*, either Rule 68(2)(d) or, alternatively, Rule 68(2)(c) of the Rules.²¹⁹ The Chamber finds it appropriate to consider the application under Rule 68(2)(c) of the Rules.

B. Whether [REDACTED] is unavailable

136. Rule 68(2)(c) of the Rules requires the Chamber to be satisfied that the witness whose prior recorded testimony is sought to be admitted has 'died, must be presumed dead, or is, due to obstacles that cannot be overcome with reasonable diligence, unavailable to testify orally'.

²¹⁶ [REDACTED].

²¹⁷ [REDACTED].

²¹⁸ [REDACTED].

²¹⁹ Request, ICC-01/09-01/11-1866-Conf, paras 7-8 and 213.

137.The Prosecution submits that, despite investigations by it and by the Kenyan authorities, [REDACTED], having 'disappeared' in [REDACTED], remains 'untraceable and the Prosecution [REDACTED]'.²²⁰ It also notes [REDACTED].²²¹ The Defence makes no specific submissions regarding whether or not this requirement is met in the case of [REDACTED].

138.[REDACTED]. The Chamber is, however, satisfied that the witness is unavailable to testify orally due to obstacles that cannot be overcome with reasonable diligence. In reaching this conclusion the Chamber has had regard, in particular, to the fact that all attempts by the Prosecution to contact or trace the witness [REDACTED] have proved unsuccessful, [REDACTED].²²² The witness did not appear for testimony on the scheduled date.²²³

C. Whether the necessity of measures under Article 56 of the Statute could have been anticipated for Witness 397

139.The Prosecution submits that [REDACTED].²²⁴ The Defence does not make submissions in this regard.

140.The Chamber notes that [REDACTED].²²⁵ [REDACTED]. Nonetheless, noting that the witness [REDACTED], the Chamber is satisfied that the Prosecution could not have anticipated the witness's sudden disappearance [REDACTED].

D. Whether the prior recorded testimony has sufficient indicia of reliability

141.Contrary to the other Concerned Witnesses, [REDACTED] was not subject to cross-examination. Although the Prosecution acknowledges this, it nevertheless submits

²²⁰ Request, ICC-01/09-01/11-1866-Conf, paras 215 and 227-230.

²²¹ Request, ICC-01/09-01/11-1866-Conf, para. 216.

²²² [REDACTED].

²²³ [REDACTED].

²²⁴ Request, ICC-01/09-01/11-1866-Conf, para. 231.

²²⁵ Request, ICC-01/09-01/11-1866-Conf, paras 218-219.

that the indicia of reliability make admission of this witness's prior recorded testimony 'safe and fair'.²²⁶ The Prosecution refers to its general submissions regarding reliability.²²⁷

142. The general submissions of the Sang Defence as to reliability of the prior recorded testimony of each of the Concerned Witnesses are noted in paragraph 64 above. The Ruto Defence specifically argues that [REDACTED] prior recorded testimony lacks sufficient indicia of reliability, on the basis, *inter alia*, that the witness [REDACTED] and that 'objective evidence not part of the trial record' contradicts 'the core incriminatory averments contained therein'.²²⁸

143. As a preliminary matter, in determining whether sufficient indicia of reliability exist, the Chamber does not consider it appropriate to engage in a weighing of the evidentiary content of the prior recorded testimony against the submissions of the Ruto Defence, based on material not in evidence in the case. Similarly, while the Chamber considers that while the witness's potential motivations for providing the prior recorded testimony, as raised by the Defence, may be relevant in the ultimate weighing of evidence it is not sufficient in itself to render it inadmissible.

144. The Chamber observes that the prior recorded testimony was not given under oath. Nevertheless, it appears to have been taken in the ordinary course of Prosecution investigations by two investigators, was initialled on each page by the witness, investigators and interpreter and contains both a signed 'Witness Acknowledgment' as to its voluntariness, truthfulness and potential use in proceedings before the Court and a signed 'Interpreter Certification'.²²⁹ The Chamber finds this to be adequate to indicate the witness's acceptance that the prior recorded testimony was true and accurate.

²²⁶ Request, ICC-01/09-01/11-1866-Conf, para. 233.

²²⁷ Request, ICC-01/09-01/11-1866-Conf, para. 234.

²²⁸ Ruto Defence Response, ICC-01/09-01/11-1908-Conf-Corr, paras 211-216.

²²⁹ [REDACTED].

145. Although the prior recorded testimony has not been subject to cross-examination, this does not prevent its admission. The Chamber will be mindful of this fact when deciding what weight to attribute to it. Accordingly, the Chamber considers that the prior recorded testimony of [REDACTED] has sufficient indicia of reliability for the purposes of Rule 68(2)(c) of the Rules, although a final assessment of its reliability will only be possible once the Chamber has before it all the evidence produced in trial in its ultimate determination on the guilt or innocence of the accused.

VI. THE INADMISSIBILITY REQUEST

146. The Chamber notes the Ruto Defence application submitting that material relied upon in the Request which has not been admitted as evidence into the record should not be taken into consideration for the purpose of the requirements under Rule 68 of the Rules.²³⁰

147. The Chamber has only considered for its above determinations evidence admitted into the record. Hence, the Chamber has been able to decide on the requirements pursuant to Rule 68(2)(c) and (d) of the Rules solely on the basis of the evidence admitted into the record. As for [REDACTED], even the consideration of material presented by the Prosecution, which was not admitted into evidence, would not have altered the Chamber's finding on the non-admissibility of the prior recorded testimony. Accordingly, the Chamber considers the Inadmissibility Request as moot.

VII. THE ALTERNATIVE REQUEST

148. As noted above, alternatively, the Prosecution requests the admission of the prior recorded testimonies pursuant to Article 69(2) and (4) of the Statute. It states that

²³⁰ [REDACTED].

their probative value stems from their internal consistency, intrinsic reliability and corroboration by other evidence on the record.²³¹ The Prosecution submits there is no prejudice to the accused, as they were afforded the opportunity to cross-examine the witnesses.²³² Moreover, it states that their admission would assist the Chamber's fair evaluation of their testimony.²³³

149. The Chamber notes that only the prior recorded testimony of [REDACTED] has not fulfilled the requirements to be admitted pursuant to Rule 68 of the Rules. However, the Chamber will not entertain the Prosecution's Alternative Request under Article 69 of the Statute. Article 69(2) of the Statute explicitly refers to the Rules, and accordingly, Rule 68 of the Rules stipulates the special conditions that shall be met for the admission of a particular category of evidence: prior recorded testimonies. Accordingly, in light of the principle *lex specialis derogate legi generali*,²³⁴ the Chamber considers that, in this instance, the application of the general rule (Article 69 of the Statute) to admit this prior recorded testimony, would amount to a circumvention of the applicable law.

VIII. ADMISSION OF THE PRIOR RECORDED TESTIMONIES

150. The Chamber considers that, in addition to the analysis set out above pursuant to Rule 68 of the Rules, the Chamber should also determine whether the prior recorded testimonies are admissible taking into consideration their authenticity, relevance, and probative value vis-à-vis the prejudice caused to the accused, in accordance with the criteria of Article 69(4) of the Statute.²³⁵

²³¹ Request, ICC-01/09-01/11-1866-Conf, para. 236.

²³² Request, ICC-01/09-01/11-1866-Conf, para. 237.

²³³ Request, ICC-01/09-01/11-1866-Conf, para. 238.

²³⁴ See, Judgment on the appeals of William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V (A) of 17 April 2014 entitled "Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation", 09 October 2014, ICC-01/09-01/11-1598, para. 128.

²³⁵ Decision on the Prosecution's Request for Admission of Documentary Evidence, 10 June 2014, ICC-01/09-01/11-1353, paras 14-16; Separate further opinion of Judge Eboe-Osuji, 10 June 2014, ICC-01/09-01/11-1353-Anx.

151. The Chamber notes that although the Defence has contested the motivations, truthfulness and overall reliability of these, it has not contested either the relevance or authenticity of the testimonies and accompanying annexes sought to be admitted. Moreover, as noted above in the analysis related to the indicia of reliability of the prior recorded testimonies, the Chamber is of the view that these have *prima facie* probative value. Given that reliability is a component of probative value, the Chamber does not consider it necessary to re-conduct that assessment once the requirements of Rule 68 of the Rules have been met. Moreover, as discussed above, the Chamber considers that their *prima facie* probative value outweighs any prejudicial effect caused to the accused. In this regard, the Chamber emphasises that ‘its assessment of evidence for the purpose of admissibility is a distinct question from the evidentiary weight which the Chamber may ultimately attach to admitted evidence in its final assessment once the entire case record is before it, for the purpose of the verdict in the case’.²³⁶ Accordingly, the objections and considerations made by the Defence to the Request, may be taken into account by the Chamber in the ultimate assessment as to the weight of the admitted prior recorded testimonies.²³⁷

FOR THE FOREGOING REASONS, THE CHAMBER, BY MAJORITY, HEREBY

REJECTS the Inadmissibility Request as moot;

ADMITS into evidence the prior recorded testimony of [REDACTED],²³⁸ [REDACTED],²³⁹ [REDACTED]²⁴⁰ and [REDACTED]²⁴¹ pursuant to Rule 68(2)(d) of the Rules and the prior recorded testimony of [REDACTED]²⁴² pursuant to Rule 68(2)(c) of the Rules, together with accompanying annexes, as specified above, without prejudice

²³⁶ ICC-01/09-01/11-1353, para. 18.

²³⁷ ICC-01/09-01/11-1353, para. 18.

²³⁸ [REDACTED].

²³⁹ [REDACTED].

²⁴⁰ [REDACTED].

²⁴¹ [REDACTED].

²⁴² [REDACTED].

to the weight, if any, which will be attached to them in the Chamber's weighing of the evidence;

REJECTS the admission into evidence of the prior recorded testimony of [REDACTED];²⁴³ and

DIRECTS the Registry to assign EVD numbers to those exhibits that have not been previously admitted into evidence and to note in the metadata of all the exhibits above that they have been admitted for the truth of contents pursuant to this decision.

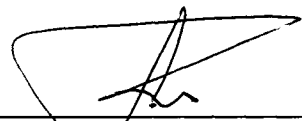
Done in both English and French, the English version being authoritative.

Judge Eboe-Osuji appends a separate, partly concurring opinion.

Judge Chile Eboe-Osuji
(Presiding)



Judge Olga Herrera Carbuccion



Judge Robert Fremr

Dated 19 August 2015

At The Hague, The Netherlands

²⁴³ [REDACTED].