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Pénale
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**International
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Court**

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

Date: 26 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

**Public redacted version of "Ruto Defence application for leave to appeal the
"Decision on Prosecution Request for Admission of Prior Recorded Testimony""**

Sources: Defence for Mr. William Samoei Ruto

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

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I. Introduction

1. On 19 August 2015, the Majority of Trial Chamber V(A), Judge Eboe-Osuji partly concurring,¹ issued the *Decision on Prosecution Request for Admission of Prior Recorded Testimony* (“Decision”).² The Decision is the first judicial consideration of the interpretation and application of amended Rule 68 of the Rules of Procedure and Evidence. The defence for Mr. William Samoei Ruto (“Defence”) seeks leave to appeal the Decision on eleven issues which arise from it and meet the criteria specified in Article 82(1)(d) of the Rome Statute (“Statute”).

II. Applicable Law

2. According to this Court’s well-established jurisprudence, a successful application for leave to appeal an interlocutory decision under Article 82(1)(d) of the Statute must satisfy the following criteria:³
 - (i) Whether the matter is an “appealable issue”;
 - (ii) Whether the issue at hand could significantly affect either the:
 - a. Fair and expeditious conduct of the proceedings, or
 - b. The outcome of the trial; and
 - (iii) Whether, in the opinion of the Chamber, an immediate resolution of the issue by the Appeals Chamber could materially advance the proceedings.
3. The above criteria are cumulative. Failure to fulfil any of these requirements is fatal to an application for leave to appeal.⁴

III. The issues

4. The Defence seeks leave to appeal the Decision on eleven issues (an “Issue”; together the “Issues”). The number of Issues is due to the fact that this is the first

¹ ICC-01/09-01/11-1938-Conf-Anx; ICC-01/09-01/11-1938-Anx-Red (“Partly Concurring Opinion”).

² ICC-01/09-01/11-1938-Conf; ICC-01/09-01/11-1938-Red-Corr.

³ *E.g.*, ICC-02/05-03/09-179, para. 5; ICC-02/05-03/09-243, para. 5.

⁴ ICC-02/05-03/09-179, para. 6; ICC-02/05-03/09-243, para. 6.

time amended Rule 68 has been judicially considered and the Decision covers two sub-Rules (each comprising numerous conditions) and [REDACTED] witnesses. The Issues are as follows:

First Issue: Whether the Majority erred when it made the following findings:

- (i) “[t]he Prosecution’s Request is not seeking to alter anything which the Defence has previously...been entitled to as a matter of right”;⁵
- (ii) “[t]he 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”;⁶ and
- (iii) “amended Rule 68 is a rule of neutral application”;⁷

by failing to consider that Mr. Ruto’s statutory fair trial right to confront [REDACTED] has been detrimentally affected by the rule change because an unsworn, hearsay statement of an absent witness which goes directly to the acts and conduct of the accused may now be admitted for the truth of its contents even if the Defence has not had the opportunity of cross-examining that witness, a situation which was not permitted under the previous Rule 68 or any other statutory provision.

Second Issue: Whether the Majority erred in law by finding that amended Rule 68 does not fall under Article 24(2) of the Statute because the principle of non-retroactivity is more applicable to matters of substance than to those of procedure.

Third Issue: Whether the Majority erred in its consideration of Article 51(4) by: (i) failing to interpret “retroactively” properly; and (ii) improperly assessing the application of amended Rule 68 “in the abstract” and, thus, failing to find that its application breaches Article 51(4) in view of the finding that the admission of the prior recorded testimony is of some detriment - whether “unduly” or otherwise.

Fourth Issue: Whether the Majority erred in law in finding that the written statements and transcripts of interviews taken in accordance with Rules 111 and 112 are “prior recorded testimony” for the purposes of Rule 68.

Fifth Issue: Whether the Majority erred in law by interpreting the requirement of Rule 68(2)(d)(i) that a witness must have “failed to give evidence with respect to a material aspect” included in his prior recorded testimony purposively rather than in accordance with its ordinary meaning.

⁵ Decision, para. 23.

⁶ Decision, para. 24.

⁷ Decision, para. 25.

Sixth Issue: Whether the Majority erred by failing to provide sufficient reasoning regarding the standard of proof it adopted for evaluating the conditions of Rule 68 admissibility, in particular by failing to articulate the threshold meant by “satisfied” (i.e. “beyond reasonable doubt”, “balance of probabilities” or “some other threshold”).

Seventh Issue: In so far as the Majority stated that “satisfied” requires “evidence of sufficient specificity and probative value” to be provided, whether the Majority committed a clear error by failing to apply this requirement in its assessment of [REDACTED] and [REDACTED] because the Majority reached the unreasonable conclusion, based on the available evidence, that each witness was subjected to interference and that their failure to give evidence was materially influenced by this improper interference.

Eighth Issue: Whether, notwithstanding its general determinations as regards indicia of reliability at paragraph 65 of the Decision, the Majority erred in the exercise of its discretion by: (i) restricting its assessment to “formal indicia of reliability” alone; and/or (ii) failing to consider or accord sufficient weight to other relevant considerations which were present and affected the testimony including without limitation language problems, contradictions with other trial evidence, the absence of video/audio recordings of the interviews and [REDACTED].

Ninth Issue: Whether the Majority erred by failing to properly apply Rule 68(2)(d)(iv), an independent limb of the Rule 68(2)(d) test, when assessing whether the prior recorded testimony of witnesses [REDACTED] and [REDACTED] should be admitted into evidence and by failing to apply Rule 68(2)(c)(ii) at all when assessing [REDACTED] prior recorded testimony.

Tenth Issue: Whether the Majority erred in its consideration of the Rule 68(2)(d)(i) requirement that “the interests of justice are best served by the prior recorded testimony being introduced” by failing to: (i) provide a sufficiently reasoned basis regarding its finding on this element; and (ii) consider or accord sufficient weight to other relevant considerations.

Eleventh Issue: Whether the Majority erred by failing to limit the admission of the prior recorded testimony of all the relevant witnesses save [REDACTED] only to those portions of the out-of-court statements specifically put by the Prosecution during questioning of the compelled witnesses, *inter alia*, for the reasons set out in paragraph 48 of the Partly Concurring Opinion and the authorities referred to therein.

IV. The Issues satisfy the criteria for leave to appeal

(a) Each Issue constitutes an appealable issue pursuant to Article 82(1)(d)

5. For the purposes of Article 82(1)(d), an appealable issue must emanate from the ruling of the impugned decision,⁸ must be an “identifiable subject or topic requiring a decision for its resolution” and “not merely a question over which there is disagreement or conflicting opinion”,⁹ and its resolution must be “essential for the determination of matters arising in the judicial cause under examination”.¹⁰ As set out below, the eleven Issues satisfy these requirements.
6. As is evident from the wording of the First Issue itself, this issue arises from a series of findings made by the Majority at paragraphs 23 to 25 of the Decision when considering “[w]hether the relief sought in the Request is a retroactive application to the detriment of the accused.”¹¹ Notwithstanding the statement at paragraph 27 that “[t]he 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”, an analysis of the Decision including at paragraphs 134 to 145, which deal with the admission of [REDACTED] materials, shows that this assessment was not undertaken. While the Majority observes that [REDACTED] materials have not been the subject of cross-examination, no consideration is given to the fact Mr. Ruto’s statutory right to confront has been detrimentally affected by the admission of such untested material. Accordingly, the First Issue emanates from the Decision and, thus, is an appealable issue.
7. In the Decision, the Majority rejects one of the preliminary legal arguments that Article 24(2) of the Statute prohibits the application of amended Rule 68 in this

⁸ *E.g.*, ICC-01/04-01/06-915, paras. 56-59; ICC-02/05-03/09-243, para. 10.

⁹ ICC-01/04-168, para. 9.

¹⁰ ICC-01/04-168, para. 9.

¹¹ Decision, p. 8.

on-going trial.¹² The Majority finds that “[t]he principle of non-retroactivity is more applicable to matters of substance than to those of procedure.”¹³ The Second Issue emanates from these findings and, therefore, is an appealable issue.

8. The Third Issue arises from the Majority’s consideration of whether the application of amended Rule 68 is prohibited by Article 51(4) of the Statute.¹⁴ The Majority considers “retroactively” and “detriment” separately.¹⁵ When considering “retroactively”, the Majority interprets the term by reference to whether the OTP’s request is seeking to alter anything which the Defence has previously been granted or been entitled to as a matter of right. The Defence submits that the Majority erred because it fails to apply any of the accepted rules of statutory interpretation when dealing with the application of retrospective legislation and to consider the accused’s Article 67(1) fair trial rights. Also, the approach is factually flawed because it fails to acknowledge that for most of the witnesses, the alleged interference and withdrawals all took place prior to the Rule amendment. As regards “detriment”, the Majority finds that “[t]he Chamber looks at the application of the amended rule in the abstract, and not at any concrete application of it.”¹⁶ However, it then states that it does not forego “a case-by-case analysis” but will assess detriment concretely when considering “the interests of justice” limb of the Rule 68(2)(d)(i) test.¹⁷ When considering the “interests of justice” limb for [REDACTED] and [REDACTED], the Majority finds that the “admission [of the prior recorded testimony] is not unduly detrimental to the accused.”¹⁸ The Majority erred because this finding recognises that the application of the amended rule results in detriment. Whether the detriment is “undue” is not part of the Article 51(4) analysis. For an amended

¹² Decision, para. 22.

¹³ Decision, para. 22 (footnotes omitted).

¹⁴ Decision, paras. 23-27.

¹⁵ Decision, paras. 23, 24-27.

¹⁶ Decision, para. 24.

¹⁷ Decision, para. 27.

¹⁸ Decision, paras. 60, 81, 111, 128.

rule to breach Article 51(4), all that requires to be shown is detriment. The analysis ends there. The Third Issue is, therefore, an appealable issue.

9. The Fourth Issue emanates from the Majority's conclusion 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."¹⁹ The contrary position is set out in the Partly Concurring Opinion.²⁰ The Fourth Issue, therefore, arises from the Decision.
10. The Fifth Issue arises from section III.D.1 of the Decision and is an appealable issue. In that section, the Majority considers what is meant by the requirement "[h]aving 'failed to give evidence with respect to a material aspect'".²¹ The Majority concludes that "the requirement can be satisfied by persons who appear and...recant fundamental aspects of their prior recorded testimony."²² The Majority's rejection of the argument that the provision should be interpreted in "a more limited manner"²³ (i.e. if the witness actually testifies on material aspects but states that the evidence provided in his/her prior recorded testimony was false then he has not "failed to give evidence" for the purpose of Rule 68(2)(d)(i)), is effectively a rejection of the argument that the rule should be interpreted in accordance with its ordinary meaning. The Defence submits this is an error. As noted in the Partly Concurring Opinion, "[i]t is a cardinal rule of treaty interpretation that terms are to be given their 'ordinary meaning'".²⁴
11. The Sixth Issue arises from the discussion at section II.C of the Decision on the standard of proof for evaluating the conditions of Rule 68 admissibility.²⁵ Having noted the parties submissions regarding a proposed standard of proof, the

¹⁹ Decision, para. 33.

²⁰ Partly Concurring Opinion, paras. 19-26.

²¹ Decision, p. 15 *et seq.*

²² Decision, para. 41.

²³ Decision, para. 41.

²⁴ Partly Concurring Opinion, para. 19.

²⁵ Decision, paras. 34-37.

Majority simply concludes that it need only apply the term used in Rule 68(2)(c) and (d), that is “satisfied”. However, no elucidation is given as to what is meant by “satisfied”. For example, does a fact have to be “more likely than not” or does it have to satisfy a Chamber to a certain percentage? With respect, the requirement that “evidence of sufficient specificity and probative value must be provided to satisfy the Chamber”²⁶ does not assist because the threshold to which the Chamber must be satisfied remains unknown. Accordingly, the amount, quality and type of “evidence of sufficient specificity and probative value” which might have to be submitted to reach the necessary standard remains similarly undefined and unreviewable. The right to be provided with sufficient reasoning is well established²⁷ and is particularly important in the instant case where the Decision is the first to consider amended Rule 68. According to the Court’s jurisprudence,²⁸ issues which concern the standard of proof are appealable issues.

12. The Seventh Issue is linked to the Sixth. If the Majority’s approach to the standard of proof is correct, as set out in paragraph 37 of the Decision, the Defence submits that the Majority fails to apply it when assessing whether [REDACTED] and [REDACTED] were subjected to interference and whether their failure to give evidence was materially influenced by this improper interference. This Issue cannot be dismissed as a mere disagreement on the evaluation of evidence but, as shown in the following paragraphs, concerns the Majority’s clear error regarding the application of the standard of proof which leads to an unreasonable and erroneous conclusion.
13. Paragraph 55 of the Decision sets out the basis on which the Majority state it is “satisfied” that [REDACTED] “was influenced by improper interference”. An

²⁶ Decision, para. 37.

²⁷ ICC-01/04-01/06-773, paras. 18-23.

²⁸ ICC-01/09-02/11-253, para. 24.

analysis of this paragraph establishes that the basis on which the Majority satisfies itself is not on “evidence of sufficient specificity and probative value” but, rather, on no evidence. In relation to the witness’ [REDACTED], the Majority states that it is “satisfied” that interference occurred and influenced the witness’ recantation “particularly considering the similarities with the pattern of interference of the other Concerned Witnesses”.²⁹ This finding appears to be based on the OTP’s assumption that [REDACTED]³⁰ were in charge of [REDACTED]. However, the weakness in adopting this assumption is revealed in the language used by the Majority that [REDACTED] and that this “could lead the Chamber to infer that [REDACTED] was subjected to interference.”³¹

14. The reality is that OTP conjecture rather than evidence underpins any purported similarities. It is recalled that [REDACTED] testified that [REDACTED].³² [REDACTED] could not remember [REDACTED] but recalled seeing [REDACTED].³³ The witness did not know whether [REDACTED].³⁴ At no point did the OTP ask the witness if [REDACTED] was mistaken and whether [REDACTED]. Instead, the OTP consistently referred to the [REDACTED]. Indeed, the Senior Trial Attorney conceded to the Bench that [REDACTED].³⁵ The peril of relying on unsupported OTP conjecture is revealed by a basic internet search that shows that there is a [REDACTED] called [REDACTED]³⁶ and another called [REDACTED].³⁷ Both are [REDACTED].³⁸

²⁹ Decision, para. 55.

³⁰ Decision, para. 53.

³¹ Decision, para. 55.

³² [REDACTED]

³³ [REDACTED]

³⁴ [REDACTED]

³⁵ [REDACTED]

³⁶ [REDACTED]

³⁷ [REDACTED]

³⁸ [REDACTED]

15. Additionally, a review of the Decision clearly shows that the conclusion that [REDACTED] is the product of OTP speculation rather than evidence.³⁹
16. The Defence also notes that the Majority's conclusion that [REDACTED] and [REDACTED] were involved in the improper interference of [REDACTED] for the purposes of Rule 68(2)(d) is unsupported.⁴⁰ The Majority does not refer to any evidence which shows that either witness improperly interfered with [REDACTED] in respect to [REDACTED] in-court testimony. The correct position, as acknowledged by the Majority, is that these witnesses were involved with [REDACTED] in relation to [REDACTED] original statement "when the witness was first approached by the Prosecution".⁴¹
17. None of the remaining evidence concerning mere [REDACTED] in the witness by [REDACTED] (evidence which arises from double hearsay), alleged threats and financial difficulties could reasonably provide sufficient basis for the Majority to be "satisfied" that not only was [REDACTED] the subject of interference but that [REDACTED] failure to give evidence in line with [REDACTED] original statement was materially influenced by such interference.⁴²
18. As regards [REDACTED], again the Majority's failure to apply its purported standard of proof is demonstrated by the absence of evidence underlying its finding that it is "satisfied that the witness was the subject of improper interference and that this interference materially influenced the evidence provided by [REDACTED]".⁴³ Instead, the Majority relies on evidence which, at its highest, shows that [REDACTED] was involved in an alleged plan to deliver

³⁹ Decision, para. 53 citing to ICC-01/09-01/11-1866-Conf, para. 154 and [REDACTED].

⁴⁰ Decision, para. 55.

⁴¹ Decision, para. 55.

⁴² Decision, para. 55.

⁴³ Decision, para. 79.

money to [REDACTED] and associated with [REDACTED].⁴⁴ No other evidence is referred to. This evidence cannot reasonably be construed as showing that [REDACTED] was [REDACTED] the subject of any interference (as opposed to [REDACTED]). Thus, it is clear the standard was improperly applied because there is no “evidence of sufficient specificity and probative value” on which the Majority could be “satisfied” that interference occurred.

19. The Eighth Issue is an appealable issue because it arises out of the Majority’s approach to assessing whether the prior recorded testimony has sufficient indicia of reliability. In considering the factors to which a Chamber may have regard, the Majority determines that a broad approach should be taken. The Majority finds that a “Chamber can take into account the circumstances in which the testimony arose”, “its content” and “indicia...that go beyond the circumstances in which the testimony arose”.⁴⁵ However, the Majority also finds that these indicia are “non-exhaustive”.⁴⁶ Notwithstanding these general determinations, a review of the Decision reveals that the Majority assesses reliability by reference to “formal indicia of reliability” alone.⁴⁷ Effectively, the Majority finds sufficient indicia of reliability because the materials come from a certain source, the OTP, and was produced in a certain manner. The Defence submits that this is an error which raises equality of arms concerns.⁴⁸ While the Majority notes that “even where one or more of the indicia are absent, the Chamber may admit the material”,⁴⁹ the Defence submits the Majority erred by not taking into account or giving appropriate weight to other non-formal factors

⁴⁴ Decision, para. 78.

⁴⁵ Decision, para. 65.

⁴⁶ Decision, para. 65.

⁴⁷ Decision, paras. 66, 85, 115, 132, 144.

⁴⁸ In the Partly Concurring Opinion, it is noted that it remains to be seen whether the OTP will have the required “magnanimity” to embrace this approach when it comes to the admission of defence statements (at para. 25).

⁴⁹ Decision, para. 65.

which were present and affected the prior testimony and which should have been highly relevant to its discretion.⁵⁰

20. A separate and independent limb of the Rule 68(2)(c) and (d) test is to consider whether the prior recorded testimony “goes to proof of acts and conduct of an accused” because this “may be a factor against its introduction, or part of it”.⁵¹ The Ninth Issue concerns the Majority’s failure to properly apply and meaningfully consider this limb in the Decision. It is, therefore, an appealable issue. While the other limbs of the Rule 68(2)(c) and (d) test are separately considered in the Decision in relation to each Concerned Witness,⁵² this approach is not followed for Rule 68(2)(c)(ii) and (d)(iv). In relation to the witnesses whose material is admitted under Rule 68(2)(d), a contradictory approach is adopted. When assessing whether the interests of justice were best served by admission, the Majority briefly notes that the materials go to the acts and conduct of the accused but that the defence was able to cross-examine the witnesses.⁵³ However, in the same paragraphs, the Majority then states that it will defer the issue of the evidence in question going to acts and conduct until final deliberations.⁵⁴ In relation to [REDACTED], no mention is made in paragraphs 134 to 145 of either Rule 68(2)(c)(ii) or the fact that the witness’ statements contain evidence going to the acts and conduct of the accused.
21. The Tenth Issue emanates from the Majority’s consideration of the “interests of justice” limb of the Rule 68(2)(d)(i) test. The legal insufficiency of the Majority’s reasoning on this essential element is highlighted in paragraph 60 of the Decision where the Majority holds that “the main purpose of Rule 68...is to expedite trial proceedings” and, therefore, “the notion of interests of justice

⁵⁰ *E.g.* language issues and [REDACTED] (Decision, paras. 63, 67, 116).

⁵¹ Rule 68(2)(c)(ii) and (d)(iv)

⁵² As defined at Decision, para. 1.

⁵³ Decision, paras. 60, 81, 111, 128.

⁵⁴ Decision, paras. 60, 81, 111, 128.

should be linked to the rights of the accused to be tried without delay". However, the Decision fails to make any findings on how the right to expeditious proceedings is impacted – positively or negatively - by admitting the prior recorded testimony in question,⁵⁵ and, furthermore, limits the factors of relevance to the integrity of the proceedings and the importance of the evidence to the OTP's case. Other relevant concerns and interests such as the hearsay nature of the evidence, the fact that this important testimony goes to the acts and conduct of the accused, and is uncorroborated are either perfunctorily considered or not considered at all, being deferred until final deliberations. While at paragraph 44 of the Decision, the Majority states that "an accused's involvement or lack of involvement in the interference is [a] relevant consideration when deciding whether it is in the interests of justice to introduce [the] prior recorded testimony", at paragraph 60 the Majority fails to give sufficient weight to this consideration, finding without further explanation that the admission of the material will not be "unduly detrimental to the accused".⁵⁶ The Defence submits that the Majority's approach to this limb of the Rule 68(2)(d)(i) test is erroneous and fails to properly balance the concerns of all parties at the admission stage. Accordingly, this Issue is an appealable error.

22. Defence concerns regarding deficiencies in the extent of OTP questioning of the witnesses who appeared before the Chamber are addressed and dismissed throughout the Decision, primarily when considering whether "reasonable efforts have been made...to secure from the witness all material facts known to the witness".⁵⁷ The Majority concludes that [REDACTED] and [REDACTED] were questioned extensively and in-depth. However, the Majority fails to limit the admission of these witnesses' statements only to the extent that they were

⁵⁵ Cf. Partly Concurring Opinion, para. 19 regarding the "overall intendment of r 68...to make trials simpler and shorter, not longer and more complicated."

⁵⁶ See also Decision, paras. 81, 111, 128.

⁵⁷ Decision, paras. 42, 49-50, 73-74, 103.

questioned by the OTP in court on them. This error is recognised in the Partly Concurring Opinion.⁵⁸ The Eleventh Issue, therefore, arises from the Decision.

23. None of the Issues are “merely...question[s] over which there is a disagreement or conflicting opinion”.⁵⁹ The distinction between mere disagreements and appealable issues is characterised by the significance of the issue. An appealable issue must be essential for the determination of matters arising in the judicial cause under examination.⁶⁰ The crux of all the Issues is whether, or the extent to which, the prior recorded testimony should have been admitted. Therefore, none of the Issues can be dismissed as academic or theoretical but raise questions which are essential to the determination of the present litigation.

(b) The Issues significantly affect the fair conduct of proceedings

24. The jurisprudence confirms that “[t]he term ‘fair’ in the context of article 82(1)(d) of the Statute is associated with the norms of a fair trial, the attributes of which are an inseverable part of the corresponding human right, incorporated in the Statute by distinct provisions of it (articles 64(2) and 67(1) and article 21(3))”.⁶¹ It has also been determined that the notion of “[f]airness is closely linked to the concept of ‘equality of arms’, or of balance, between the parties [...] [and] concerns the ability of a party to a proceeding to adequately make its case, with a view to influencing the outcome of the proceedings in its favour.”⁶²
25. The First Issue concerns Mr. Ruto’s fair trial right to confront the witnesses against him. [REDACTED] is a “linkage” witness⁶³ whose unsworn, hearsay evidence goes directly to the acts and conduct of the accused. [REDACTED]

⁵⁸ The Defence submits that the fact that the Prior Concurring Opinion finds that the prior statements should have been admitted under Article 69(3) does not affect the relevance of the safeguard which is imposed regarding the extent to which the prior statements are to be admitted under Rule 68.

⁵⁹ ICC-01/04-168, para. 9.

⁶⁰ ICC-01/04-168, para. 9.

⁶¹ ICC-01/04-168, para. 11.

⁶² ICC-02/04-01/05-20-US-Exp, unsealed pursuant to ICC-02/02-01/05-52, para. 30.

⁶³ ICC-01/09-01/11-1866-Conf, para. 215.

evidence has not been subject to cross-examination. If the question raised in the First Issue should be answered in the affirmative and the Majority did err, the result will be that important linkage evidence has been admitted in breach of Article 67(1)(e). The admission of such evidence inevitably affects the fairness of proceedings.

26. Considering the first ten Issues together, at core is the fundamental question whether unsworn, hearsay evidence, going to the acts and conduct of the accused, was properly admitted under Rule 68(2)(c) and (d). Significant issues of fairness are raised because of the nature of the evidence at issue. First, the evidence is neither background nor uncontentious but is said to be central to the case against Mr. Ruto.⁶⁴ Indeed, the entirety of the OTP's original request can be read as a concession that the Prosecutor is seeking to prove the central elements of her case almost entirely by adducing prior unsworn hearsay statements. Second, the evidence is largely uncorroborated hearsay, which has been disavowed by all but [REDACTED]. The serious challenges posed by such evidence are well recognised. Hearsay evidence "is necessarily second-hand and for that reason very often is second best. Because it is second-hand, it is that much more difficult to test and assess."⁶⁵ Accordingly, the admission of hearsay evidence which is central to the OTP's case will significantly affect the fair conduct of proceedings because it will not only affect the Defence's ability to properly test the OTP's case but "to adequately make its case, with a view to influencing the outcome of the proceedings in its favour."⁶⁶
27. Building on the foregoing paragraphs and applying the previous reasoning of a Majority of this Chamber, the Defence submits that the *"fairness of the proceedings on its own merits would be affected by the uncertainty that the parties are faced with,*

⁶⁴ ICC-01/09-01/11-1866-Conf, para. 52; Decision, para. 60.

⁶⁵ *R v. Riat (Jaspal)*, [2013] 1 WLR 2592 *per* Lord Justice Hughes at 2597.

⁶⁶ ICC-02/04-01/05-20-US-Exp, para. 30.

pending final resolution of the matter by the Appeals Chamber, during the trial proceedings and the drafting of their closing briefs and arguments, when the contention whether the evidence adduced [via Rule 68] can be relied on...remains".⁶⁷

28. If the prior recorded testimony was properly admitted, either in whole or in part, then its admission should be limited as set out in the Eleventh Issue. The Eleventh Issue derives from the section of the Partly Concurring Opinion concerned with the "Protection of the Interests of the Accused".⁶⁸ As stated therein, the rationale for placing certain limits on the admission of the prior recorded testimony of all the relevant witnesses save [REDACTED] is to ensure that "a fair consideration [is given to] the interests of the accused" and that an "appropriate balancing act" is achieved.⁶⁹ The Eleventh Issue, therefore, significantly affects the fairness of proceedings.

(c) The Issues significantly affect the expeditious conduct of the proceedings

29. The "expeditious conduct of proceedings" has been held "to be closely linked to the concept of judicial proceedings 'within a reasonable time'" and to complement "the guarantees afforded to [an accused], such as the right to fair and public proceedings."⁷⁰ The eleven Issues will significantly affect the expeditious conduct of the proceedings for the following two reasons.
30. First, the Decision is crucial to setting the scope of the OTP's case. In respect of the witnesses who appeared before the Chamber, the evidence of those witnesses now expands beyond their *viva voce* testimony and encompasses their prior, disavowed statements. As a result, the Defence has two different contradictory versions of their evidence to confront. If the Majority erred in respect of any of the eleven Issues, then this will have an impact on the

⁶⁷ ICC-01/09-01/11-817, para. 24.

⁶⁸ Partly Concurring Opinion, p. 16.

⁶⁹ Partly Concurring Opinion, p. 16. *See also* para. 48.

⁷⁰ ICC-01/05-01/08-532, para. 20.

following matters, the effect of which will be to lengthen proceedings: (i) the case strategy - a revised strategy will have to be designed for any defence case which addresses the expanded OTP case and the circumstances of the recantation; (ii) investigations – these will have to be expanded in line with the revised strategy and to deal with the evidence admitted under the Decision; and (iii) the defence case – if there is a defence case, witnesses will have to be called to address the evidence of the Rule 68 witnesses including their various versions.

31. Second, looking further ahead, and bearing in mind that the core concern all of the Issues is whether, or the extent to which, the prior recorded testimony should have been admitted, the Defence submits that the following concerns previously identified by a Majority of this Chamber are apposite:

“[...] if the Appeals Chamber, during appeals proceedings pursuant to Article 81 of the Statute, if applicable, were to find the Impugned Decision to be in error, this may lead to the [prior recorded] testimonies provided by the [five Rule 68] witnesses being stricken from the trial record. The potential consequences flowing therefrom would significantly affect the outcome of the trial, and in turn would have a bearing on the expeditiousness.”⁷¹

(d) The Issues significantly affect the outcome of the trial

32. Bearing in mind the disjunctive nature of this limb of the certification test, the Defence submits that, even if the Trial Chamber determines that none of the Issues significantly affect the “fair and expeditious conduct of proceedings”, the Issues significantly affect the outcome of the trial.
33. The Appeals Chamber has elucidated that this part of the Article 82(1)(d) test requires the Chamber to “ponder the possible implications of a given issue being wrongly decided on the outcome of the case”, a process which “involves a forecast of the consequences of such an occurrence.”⁷² A Majority of this

⁷¹ ICC-01/09-01/11-1313, para. 52.

⁷² ICC-01/04-168, para. 13.

Chamber has also observed that “‘outcome of the trial’ on the trial level can only be a judgment (pursuant to Article 74 of the Statute) in which an accused is found individually criminally responsible for all or parts of the counts as confirmed, or not to be, i.e. a pronouncement of guilt or an acquittal.”⁷³

34. If any of the eleven Issues were wrongly decided, the consequences will significantly affect the outcome of the trial, as they directly relate to “the amount and type of evidence that the Chamber will have to consider when making its final determination in accordance with Article 74 of the Statute.”⁷⁴ The judgement will be based, in part, on hearsay evidence which should not be before the Court because: (i) in respect of the First Issue, the evidence will have been admitted in breach of Mr. Ruto’s fair trial right to confront; (ii) in respect of the first ten Issues, the prior recorded testimony will have been admitted pursuant to the Majority’s erroneous interpretation and application of Articles 24(2), 51(4) and/or amended Rule 68; and (iii) in respect of the Eleventh Issue, the necessary limitations on the extent to which the prior recorded testimonies should be admitted to protect the interests of the accused were not imposed.

(e) Immediate resolution of the Issues by the Appeals Chamber could materially advance the proceedings

35. The term “advance” in this prong of the test requires that the immediate and “authoritative determination” by the Appeals Chamber of the issues will “ensur[e] that the proceedings follow the right course” by “[r]emoving doubts about the correctness of a decision or mapping a course of action along the right lines [...]”.⁷⁵

⁷³ ICC-01/09-01/11-817, para. 22.

⁷⁴ ICC-01/05-01/08-1169, para. 35.

⁷⁵ ICC-01/04-168, para. 15.

36. The evidence admitted pursuant to the Decision is provided by “linkage” witnesses⁷⁶ and, as noted above, is stated to be central to the OTP’s case. Given the evidence’s importance, it will impact on every aspect of the trial going forward, including the evidence to be addressed in any “no case to answer” motion, the witnesses to be called in any defence case and the evidence which may be relied upon in the Article 74 judgement. Accordingly, determination of the eleven Issues by the Appeals Chamber at this stage would ensure that proceedings “follow the right course”⁷⁷ and that important issues are determined at this stage in proceedings rather than being reserved for a subsequent appeal which would “*unravel the judicial process.*”⁷⁸

V. Classification

37. This application is filed confidentially because it refers to Prosecution witness numbers which have not been referred to publicly in the context of the present litigation. A public redacted version will be filed in due course.

VI. Relief requested

38. For the reasons set out above, the Defence requests the Trial Chamber to grant leave to appeal the eleven Issues pursuant to Article 82(1)(d) of the Statute.

Respectfully submitted,



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Dated this 26th Day of August 2015
At The Hague, the Netherlands

⁷⁶ ICC-01/09-01/11-1866-Conf, paras. 131, 147, 165, 179, 215.

⁷⁷ ICC-01/04-168, para. 15.

⁷⁸ ICC-01/04-168, para. 16. *See also* ICC-01/09-02/11-253, para. 37.