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No. **ICC-01/09-01/11 OA 10**

Date: **13 October 2015**

THE APPEALS CHAMBER

Before:
Judge Silvia Fernández de Gurmendi
Judge Christine Van den Wyngaert
Judge Howard Morrison
Judge Piotr Hofmański
Judge Péter Kovács

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 Sang Defence Appeal against the
decision of Trial Chamber V (A) of 19 August 2015 entitled
“Decision on Prosecution Request for Admission of Prior Recorded Testimony”**

Source: **Defence for Joshua arap Sang**

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

Fatou Bensouda
 Helen Brady
 Anton Steynberg

Counsel for the Defence**For William Samoei Ruto:**

Karim Khan QC
 David Hooper QC
 Essa Faal
 Shyamala Alagendra
 Leigh Lawrie

Legal Representatives of the Victims

Wilfred Nderitu

For Joshua Arap Sang

Joseph Kipchumba Kigen-Katwa
 Caroline Buisman

Office of Public Counsel for Victims

Paolina Massidda

REGISTRY

Registrar

Herman von Hebel

I. INTRODUCTION

1. This is the brief in support of Mr Joshua arap Sang's appeal under article 82(1)(d) against the Chamber's "Decision on Prosecution Request for Admission of Prior Recorded Testimony" (the 'Impugned Decision'),¹ allowing the Prosecutor to tender the statements of [REDACTED] recanting witnesses for the truth of their contents pursuant to Rule 68(2)(d) (Witnesses [REDACTED]); and one witness pursuant to Rule 68(2)(c) (Witness [REDACTED]). Amended Rule 68 has been applied in this case on the ground that the witnesses recanted their initial allegations because they have been subjected to interference. [REDACTED] out of these [REDACTED] witnesses (all except for [REDACTED]) provided *viva voce* testimony during which they were questioned extensively about their initial allegations which they recanted under oath.

2. Leave to appeal has been granted in respect of the following issues, each of which will be addressed in this brief:
 - i. Whether the amended Rule 68 of the Rules can be applied in this case without offending Articles 24(2) and 51(4) of the Statute ('First Issue');
 - ii. Whether written statements and transcripts of interviews taken in accordance with Rules 111 and 112 of the Rules can qualify as 'prior recorded testimony' for the purpose of Rule 68 (2)(c) and (d), to be admitted for the truth of their contents ('Second Issue');
 - iii. Whether written statements and transcripts of interviews taken in accordance with Rules 111 and 112 of the Rules can be admitted in their entirety for the purpose of Rule 68 (2)(c) and (d) ('Third Issue');
 - iv. Whether the Impugned Decision erred in its assessment of the concept of 'failure to give evidence with respect to a material aspect' pursuant to Rule 68(2)(d)(i) of the Rules ('Fourth Issue');
 - v. Whether the Impugned Decision applied the appropriate standard of proof when evaluating whether the conditions under Rule 68(2)(c) and

¹ ICC-01/09-01/11-1938-Conf-Corr.

- (d) of the Rules were met, including, in particular, in its assessment of the existence of 'interference' ('Fifth Issue');
- vi. Whether the Impugned Decision erred in its interpretation and/or application of the concepts of 'indicia of reliability' and 'acts and conduct of the accused' pursuant to Rule 68(2)(c) and (d) of the Rules ('Sixth Issue'); and
 - vii. Whether the Impugned Decision erred in its consideration of 'interests of justice' pursuant to Rule 68(2)(d) of the Rules ('Seventh Issue').
3. The Defence requests that the Appeals Chamber grant this appeal on any or all of these issues and rectify the Chamber's decision so as to disallow the application of amended Rule 68 as a basis to admit the witness statements.

II. PROCEDURAL HISTORY

4. On 29 April 2015, the Office of the Prosecutor (the 'Prosecution') filed a request to admit the prior recorded testimony of [REDACTED] witnesses for the truth of its contents, pursuant to Rule 68 of the Rules in order to rely thereon to establish the guilt of the accused. Alternatively, the Prosecution sought their admission on the basis of Article 69(2) and (4) of the Statute.²
5. On 12 June 2015, both the Sang Defence (the 'Defence') and the Ruto Defence filed their responses opposing the Request.³
6. On 19 August 2015, the Chamber rendered the Impugned Decision.⁴ The Chamber, by majority, admitted into evidence for the truth of their contents and in their entirety pursuant to Rule 68 of the Rules of Procedure and Evidence (the 'Rules'), the prior recorded testimonies and related material of [REDACTED] of [REDACTED] witnesses (the 'Impugned Decision').⁵ In his partly concurring opinion, Judge Eboe-Osuji held that the written statements, transcripts of interviews and related material of all [REDACTED] witnesses should be admitted

² ICC-01/09-01/11-1866-Conf.

³ ICC-01/09-01/11-1911-Conf-Corr; ICC-01/09-01/11-1913-Conf.

⁴ ICC-01/09-01/11-1938-Conf-Corr.

⁵ ICC-01/09-01/11-1938-Conf-Corr.

under Article 69(3) of the Rome Statute instead of Rule 68, and with the following significant limitation: with regard to the [REDACTED] witnesses who had appeared in court and given testimony, only the answers that they gave to specific questions in the courtroom in relation to the out-of-court statements may be considered for the truth of their contents.⁶

7. On 25 August 2015, both Defence teams filed an application for leave to appeal the Impugned Decision.⁷
8. On 31 August 2015, the Prosecution filed its response to the Defence's application, accepting the Defence had raised a number of appealable issues.⁸
9. On 10 September 2015, in its "Decision on the Defence's Applications for Leave to Appeal the "Decision on Prosecution Request for Admission of Prior Recorded Testimony", the Trial Chamber V(A) granted the Defence leave to appeal the Impugned Decision on seven issues as reformulated by the Trial Chamber.⁹

III. STANDARD OF REVIEW

10. The Appeals Chamber has repeatedly held that its review is corrective in nature and not *de novo*.¹⁰ Instead it will intervene in the findings of Chambers only "where clear errors of law, fact or procedure are shown to exist and vitiate the Impugned Decision."¹¹
11. In relation to errors of law, the Appeals Chamber has held that it "will not defer to the Trial Chamber's interpretation of the law. Rather, it will arrive at its own

⁶ ICC-01/09-01/11-1938-Conf-Anx-Corr, paras 1-2.

⁷ ICC-01/09-01/11-1939-Conf; ICC-01/09-01/11-1940-Conf.

⁸ ICC-01/09-01/11-1945-Conf.

⁹ ICC-01/09-01/11-1953-Conf-Corr.

¹⁰ See, e.g., Prosecutor v. Callixte Mbarushimana, "Judgment on the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 19 May 2011 entitled 'Decision on the "Defence Request for Interim Release"', 14 July 2011, ICC-01/04-01/10-283 (OA), para. 15; Prosecutor v. Jean-Pierre Bemba Gombo, "Judgment on the appeal of the Prosecutor against Pre-Trial Chamber 11's 'Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa'", 2 December 2009, ICC-01/05-01/08-631-Red (OA 2), para. 62 ; ICC-02/05-03/09-295, para. 20.

¹¹ ICC-01/04-01/10-283, para. 15.

conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law".¹² The Appeals Chamber has also stated that "[i]f the Trial Chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the Impugned Decision".¹³

12. The Defence will seek to demonstrate that each of the issues constitute clear errors of law, fact and/or procedure, each of which materially affects the Impugned Decision, warranting the Appeals Chamber's intervention.

IV. SUBMISSIONS

i. Whether the amended Rule 68 of the Rules can be applied in this case without offending Articles 24(2) and 51(4) of the Statute ('First Issue')

13. The Defence submits that the Trial Chamber erred in its finding that amended Rule 68 of the Rules can be applied in this case without offending Articles 24(2) and 51(4) of the Statute. This erroneous finding is based on the following sub errors:
 - i) The Chamber's failure to take into account the fact that the amendment was adopted with the undertaking that it would not apply in the Kenya cases;
 - ii) The Chamber's erroneous conclusion that Article 24(2) does not apply to the amendment of Rule 68;
 - iii) The Chamber's erroneous finding that the application of amended Rule 68 in this case would not be retroactive in the context of Article 51(4);
 - iv) The Chamber's erroneous finding that the application of amended Rule 68 in this case would not be detrimental to the accused in the context of

¹² Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, "Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled 'Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation'", 17 February 2012, ICC-02/05-03/09-295 (OA 2), para. 20. *See also* ICC-01/09-01/11-1598, para. 32.

¹³ *Ibid.*

Article 51(4).

- i) *The Chamber failed to take into account the fact that the amendment was adopted with the undertaking that it would not apply in the Kenya cases*

14. The Defence has indicated to the Chamber that the States Parties intended that amendments to Rule 68 would not apply to the pending Kenya cases. In support of this submission, the Defence made reference to the preamble of the resolution by which the Assembly of States Parties (“ASP”) adopted the amended version of Rule 68. This preamble states:¹⁴

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.

15. The Chamber noted that this preamble emphasizes the application of Article 51(4) of the Statute, but without any further specification as to how or in which circumstances this article should be applied.¹⁵ Accordingly, the Chamber reached the conclusion that the ASP resolution does not limit the application of amended Rule 68 to pending cases in any way except when article 51(4) would bar such an application being “retroactively to the detriment of the person who is being [...] prosecuted”.¹⁶
16. The Defence submits that the Chamber erred in not attributing any significance to the ASP’s explicit emphasis on the principle of non-retroactivity, as

¹⁴ Resolution ICC-ASP/12/Res.7, operative paragraph 2, internal citations omitted, emphasis added. Available at: http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP12/ICC-ASP-12-Res7-ENG.pdf.

¹⁵ ICC-01/09-01/11-1938-Conf, para. 17.

¹⁶ ICC-01/09-01/11-1938-Conf, para. 19.

incorporated in Article 51(4), and the rights of the accused, as incorporated in Article 67 of the Rome Statute. Article 51(4) stating that “amendments [to the Rules of Procedure and Evidence] shall be consistent with the Statute”, is applicable to amended Rule 68 without the need for any such explicit reference to it in the resolution. In addition, the Explanatory Note in the cover page of the Rules of Procedure and Evidence (“RPE”) provides that the Rules “are subordinate [to the Statute] in all cases”, which suggests that both Article 51(4) and 67 of the Rome Statute must be complied with in any rule amendment and adoption thereof in pending cases. Accordingly, the express references to these statutory provisions and principles serve no purpose unless they were included for a reason other than, or in addition to, directing the reader to the relevant articles.¹⁷ Such an explicit reference is not usually made in respect of rule amendments, as indeed it is not necessary. Therefore, the fact that the States Parties considered it important to state unambiguously that Rule 68 cannot be applied retroactively to the detriment to the accused clearly demonstrates that they intended that Rule 68 not apply to pending cases.¹⁸ The reference to Article 67 suggests that the drafters foresaw that the application of Rule 68 could be detrimental to the rights of the accused, something they wished to prevent.

17. More significantly, the Chamber failed to address the Government of Kenya’s (“GoK”) claim that it was given an explicit undertaking by Senior Officials of the Court and multiple delegations of States Parties to the Rome Statute that amended Rule 68 would not apply to the Kenyan cases.¹⁹ Initially, the Kenyan delegation which was part of the Rule 68 negotiation process raised serious concerns about the suggested amendments on the grounds that they would adversely affect the right of the accused to confront their accusers by allowing

¹⁷ T-130, p 34, lines 6-7. The Prosecution’s comment was in response to the Presiding Judge’s question as to whether Rule 68 could be used with [REDACTED] and the learned judge’s observations that Article 51(4) was emphasised in the resolution adopting the amendments to Rule 68. *See* T-130, p 32, line 15- p 34, line 4.

¹⁸ *See* Beth Van Schaack, “ICC Assembly of States Parties Rundown”, 27 November 2013, Just Security (available at <http://justsecurity.org/3862/icc-assembly-states-parties-rundown/>).

¹⁹ *See* KEN-OTP-0153-0432, Letter from V.O. Nmehielle, Legal Counsel to the African Union, addressed to the Prosecutor of the ICC, 29 May 2015, in ICC-01/09-01/11-1894-Conf-AnxB, Annex B, Confidential Addendum to the Prosecution’s request for the admission of prior recorded testimony of [REDACTED] witnesses, 1 June 2015 (‘Letter from Prof Nmehielle’).

the admission of untested evidence.²⁰ It was only on the basis of this undertaking that the Kenyan delegation accepted the suggested amendments to Rule 68.²¹

18. The GoK's claim that such an undertaking was given is corroborated by submissions made on behalf of the African Union ("AU"). Upon hearing that the Prosecutor intended to make an application on the basis of the amended Rule 68 in the case of Mr Sang and Mr Ruto, the AU's legal counsel wrote to the President and Prosecutor of the Court, pointing out that such action would be "manifestly contrary to the representations made and assurance given".²²
19. The Defence submits that the Chamber erred in ignoring this claim and refusing to hear the GoK on it, despite its efforts to be heard.²³ The Chamber considered that it was neither necessary nor appropriate to receive observations from the Kenyan Government as regards any undertaking given during the negotiation process of amended Rule 68, as such had no bearing on the Chamber's judicial determination on this matter, namely the legal interpretation and application of Rule 68 of the Rules.²⁴
20. In the Impugned Decision, the Chamber explained its position on the basis that "it cannot privilege a limited number of States Parties' views over the collective will of the ASP reflected in the resolution amending Rule 68".²⁵ The Defence fails to understand why the Chamber cannot privilege the view of the one State Party most concerned, in particular in light of the support provided by the AU. With the support of the AU, it is not the view of one, or a limited number of States Parties that is at stake, but the views of a large number of States belonging to the one and only continent in respect of which the ICC has exercised its jurisdiction thus

²⁰ See letter from [REDACTED].

²¹ ICC-01/09-01/11-1891, The Government of the Republic of Kenya's Request for Leave to file amicus curiae Observations on 'Public redacted version of "Prosecution's request for the admission of prior recorded testimony of [REDACTED] witnesses", 29 April 2015, ICC-01/09-01/11-1866-Conf + Annexes', 27 May 2015. See also "ICC Assembly of States Parties Rundown", Beth Van Schaack, 27 November 2013, Just Security (available at <http://justsecurity.org/3862/icc-assembly-states-parties-rundown/>).

²² See Letter from Prof Nmehielle, supra footnote 19.

²³ ICC-01/09-01/11-1891, paras 2-5.

²⁴ ICC-01/09-01/11-1893, Decision on the Government of the Republic of Kenya's Request to File Amicus Curiae Observations, 29 May 2015, para. 4.

²⁵ ICC-01/09-01/11-1938-Conf-Corr, para.18.

far. No other States Parties are prevented from asking leave to submit observations; therefore, acceptance of the GoK's observations would not have resulted in any privileged treatment.

21. It is contested that the resolution, as it has been interpreted by the Chamber, reflects the collective will of the Assembly of States Parties ("ASP"). This is exactly the point on which the GoK wished to address the Chamber, and now again the Appeals Chamber.²⁶
22. The Defence submits that the GoK's claim, supported by the AU, if accepted, would result in the non-applicability of amended Rule 68 to the pending Kenyan cases. Indeed, whilst the Defence concedes that Kenya's consensus to the rule amendment was not strictly necessary to pass the amendment (for which two-thirds of the votes is sufficient), the Statute requires that at least every effort be made to reach the consensus of all States Parties in reaching decisions.²⁷ The ASP takes the position that it has done so, as is evident from the following passage in the resolution:²⁸

The proposals on the draft amendments to the Rules of Procedure and Evidence on amending rule 100, rule 68, and inserting new rules 134 *bis*, rule 134 *ter* and rule 134 *quater* were **discussed by all delegations in a spirit of understanding, cooperation and flexibility**, in close consultation with the organs of the Court. This process enabled the Working Group to propose the draft amendments, which are before the Assembly for adoption by consensus. I am pleased to submit draft resolution ICC-ASP/12/L.10/Rev.1 for the consideration of the Assembly and to recommend that it be adopted by consensus" (emphasis added).

23. In light of this passage, it is all the more important to establish that discussions have indeed taken place in a spirit of understanding, cooperation and flexibility.

²⁶ ICC-01/09-01/11-1972.

²⁷ See Article 112(7) of the Rome Statute states that every effort should be made "to reach decisions by consensus in the Assembly".

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

The GoK's claim undermines this, suggesting that certain understandings have not been followed through. Accordingly, the Chamber erred in dismissing this claim out-of-hand. Indeed, it is important to understand the real intention of the ASP, being the drafting entity within the ICC. It is not for the judges to create the law, but the ASP, rendering the latter's real intention even more significant. Accordingly, any reasonable Chamber would at least have heard the GoK before deciding on the interpretation of the collective will of the ASP.

24. The Chamber also failed to address the good faith arguments. The Defence has submitted and reiterates here that "a complete disregard for an undertaking made during the drafting process" and the mere reliance on the plain terms of the text violates the rule of good faith. The rule of good faith, as embodied in Article 31(1) of the Law of Treaties, requires that treaties be interpreted according to the "common and real intention of the parties",²⁹ with the view to "carrying out the substance of this mutual understanding honestly and loyally".³⁰ Accordingly, "treaties ought not to be interpreted exclusively according to their letter, but according to their spirit".³¹
25. In previous decisions,³² the Chamber itself has referred to these principles and also cited the following observation by the International Court of Justice:

[I]t is the purpose of the Treaty, and the intentions of the parties in concluding it, which should prevail over its literal application".³³

26. In particular this last citation suggests that the real intention of the drafters is more important than the literal application of the treaty and/or its legal provisions. The determination of the real intention is important to ensure that the implementation of the mutual understanding of the drafters is carried out

²⁹ Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, p 114. *See also* ICC-01/09-01/11-1911-Conf-Corr, para. 24.

³⁰ Cheng, 115.

³¹ Cheng, 115.

³² *See e.g.* Summons Decision, para. 122.

³³ Summons Decision, para. 126 (citing *Gabcikovo-Nagymaros Project (Hungary/Slovakia)* Judgment, (1997) ICJ Reports 7 [International Court of Justice], p 79). *See also* ICC-01/09-01/11-1911-Conf-Corr, para. 25.

honestly and loyally. In this case, if the GoK's claim is accurate, the honest and loyal implementation of the amendments to Rule 68 would exclude their application to the pending Kenyan cases.

27. Accordingly, the Chamber erred in failing to investigate the GoK's claim any further. This error has materially affected the decision because, if true, the GoK's claim would have prevented the application of Rule 68 in this case.

ii) The Chamber erroneously concluded that Article 24(2) does not apply to the amendment of Rule 68

28. The Chamber takes the position that Article 24(2), which codifies the customary international law principle of non-retroactivity *ratione personae*, does not apply in this case. According to the Chamber, it is clear, when read together with the two other provisions in section 'General Principles of Criminal Law', that these three provisions setting out the principle of legality pertain to substantive more than procedural law.³⁴ Whilst the Chamber acknowledges that this does not mean that this provision does not apply to the Rules at all, it holds that it does not apply to amended Rule 68. The Chamber reaches this conclusion on the ground that, "if Article 24(2) of the Statute governed all amendments to the Rules, ... then Article 51(4) would be rendered almost entirely redundant".³⁵ But the Chamber fails to explain why Article 24(2) does not apply to Rule 68, and how it can be determined when Article 24(2) applies, and when it does not apply to a rule amendment. Without a clearer understanding of the Chamber's reasoning, the determination of the applicability of Article 24(2) to any specific rule amendment risks becoming an arbitrary exercise.

29. Article 24(2) provides:

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.

³⁴ ICC-01/09-01/11-1938-Conf-Corr, paras. 21-22.

³⁵ ICC-01/09-01/11-1938-Conf-Corr, para. 22.

30. This provision, whether examined in isolation or in the context of the other two provisions under 'General Principles of Criminal Law' setting out principles of legality and non-retroactivity – e.g. *nullum crimen sine lege* (Article 22) and *nulla poena sine lege* (Article 23) – does not provide clarity as to why it would not apply to Rule 68 while it would apply to other unspecified rules. This is true for both the plain text and the purpose of Article 24(2).
31. In line with Article 21 of the Rome Statute, which defines that law applicable before the Court as, in the first place, the Statute, elements of crimes and the Rules of Procedure and Evidence, the term 'law' in Article 24(2) should logically include the Rules of Procedure and Evidence. Scholars including Schabas and Boot similarly take the view that, given its broad terminology, Article 24(2) is not limited to substantive law, but also refers to the applicable procedural law and applies to rule amendments.³⁶
32. The Chamber does not disagree that Article 24(2) may apply to some rules, but it disagrees that it applies to Rule 68. It also does not exclude that Article 24(2) may apply to changes in the procedural law. However, the Chamber excludes its applicability to the amendment of Rule 68 without properly explaining why. The Defence respectfully submits that this analysis is erroneous warranting the Appeals Chamber's intervention. Once it is accepted that the term 'law' in Article 24(2) includes both procedural and substantive law and that Article 24(2) may thus apply to rule amendments, it is difficult to justify its non-applicability in this specific case.
33. The Chamber's reasoning that Article 24(2) cannot apply to all, but only some, rule amendments on the basis that this would render Article 51(4) redundant is without merit. Indeed, many principles have been repeated in different sections in the Rome Statute. It does not make any of these provisions redundant.

³⁶ W Schabas, *The International Criminal Court: A Commentary on the Rome Statute* [Oxford Commentaries on International Law] 2010, p. 420 ; Machteld Boot, *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*, Intersentia, 2002, pg. 374.

34. Most importantly, Articles 24(2) and 51(4) do not serve the same purpose and have different scopes. The protection offered by Article 24(2) is not offered in the abstract, but specifically “to a given case prior to a final judgement”. Article 51(4), on the other hand, does not include a specific link “to a given case prior to a final judgement”, but states the general rule that rule amendments “shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted or who has been convicted”. In other words, Article 24(2) offers protection to a particular individual, taking the specific circumstances into account, whilst Article 51(4) states a more general rule, looking more at the rule itself. Therefore, the applicability of the one does not make redundant the existence of the other.
35. Accordingly, the Defence submits that the Chamber erred in concluding that Article 24(2) does not apply to the amendments to Rule 68. The error has materially affected the Impugned Decision, as Article 24(2), if it applies, would bar the retroactive application of Rule 68 in this case. Article 24(2) is less stringent than Article 51(4) and does not require the showing of actual detriment or prejudice. It requires only that the new rule is less favourable to the accused than the original version. According to one commentator on Article 24(2) of the Rome Statute, similarly to domestic legal principles of non-retroactivity, any law “that changes the rules of evidence and receives less or different testimony than was required at the time of the commission of the offense in order to convict the offender”³⁷ can be considered a law less favourable to the person being prosecuted before the ICC, in the context of Article 24(2). Article 24(2) would bar the application of such a law in any given case prior to a final judgement.
36. Clearly, Article 24(2), assuming the Appeals Chamber agrees it is applicable, bars the application of the amended Rule 68 in the ongoing trial of Mr Sang and Mr Ruto. The amended Rule 68, widening the admission of testimonial evidence on

³⁷ Pangalangan, R., “Article 24 Non-retroactivity *ratione personae*”, in Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Hart 2008), p.740 citing to Black's Law Dictionary 580 (7th ed. 1999).

paper *in lieu of* oral testimony, is undoubtedly less favourable to Mr Sang by comparison to the previous Rule 68, not allowing the admission of testimonial evidence unless both parties had an opportunity to examine the witness during the proceeding, or the witness is present and does not object to the submission of the previously recorded testimony.³⁸

37. Accordingly, had the Chamber correctly decided that Article 24(2) applies to the amended Rule 68, as any reasonable Chamber would have done, it would have had to conclude that the amended version of Rule 68 cannot be relied upon in the present case. The Appeals Chamber's intervention in respect of this issue is therefore necessary.

iii) The Chamber erred in finding that the application of amended Rule 68 in this case would not be retroactive in the context of Article 51(4)

38. The Chamber erroneously held that the application sought of the amended Rule 68 in the ongoing trial of Mr Sang and Mr Ruto does not amount to a retroactive application because it does not alter anything the Defence had previously been entitled to as a matter of right.³⁹ This is demonstrably incorrect and no reasonable Chamber could have reached the conclusion that the amended Rule 68 does not remove any right to which the Defence was previously entitled. The Defence was previously entitled to object to the admission of untested and unsworn witness statements taken by an interested party, principally because there was no mechanism for their admission. And as the law as it now stands, that entitlement has been limited to the terms and conditions under Rule 68. The rule amendment, which occurred several months after the commencement of the trial and years after the initial statements were taken, is therefore undoubtedly retroactive.

39. This is all the more so because, seemingly, the alleged interference and subsequent recantations by the witnesses in the Kenyan cases triggered the

³⁸ See also ICC-01/09-01/11-1911-Conf-Corr, para 53.

³⁹ Impugned Decision, para. 23.

Prosecution to seek an amendment of Rule 68 during the 12th Session of the ASP as a last attempt “to salvage its otherwise crumbling cases in the Kenyan Situation”.⁴⁰ If the amendments to Rule 68 did not alter anything the Defence had previously been entitled to as a matter of right, then there would have been no need to introduce, and subsequently rely on the amended version of Rule 68 in the ongoing trial of Mr Sang and Mr Ruto. It is clear that the amended Rule 68 introduces an elaborate new admission mechanism that did not exist beforehand, and the Prosecutor could not have introduced the statements on the basis of any other legal provision.

40. Prior to the rule amendment, the principle that “[t]he testimony of a witness at trial shall be given in person”, as set out in Article 69(2) of the Rome Statute, as well as the right under Article 67(1)(e) of any accused “to examine, or have examined the witnesses against him or her” would have barred the admission of the prior recorded testimony of recanting witnesses under any legal provision. The principles embodied in Article 69(2) and Article 67(1)(e) could not have been overridden by relying on the general admissibility scheme pursuant to Article 69(4). Rule 68 was and still is the *lex specialis* of Article 69(4), laying down the conditions under which prior recorded testimony could be admitted.⁴¹ These conditions could not be circumvented by relying on more general provisions in the Statute or Rules. It was necessary to widen the ambit of Rule 68 to allow the admission sought. This further demonstrates that the amended Rule 68 has altered the legal position of the Defence and what it is entitled to as a matter of right.
41. The practice before the Court also supports the position that Rule 68 should not apply retroactively in pending cases. An example previously cited constitutes the case of *Bemba*, where in early 2014, the Chamber considered the admission of a piece of evidence under Rule 68, some months after the amendment of the Rule.

⁴⁰ICC-01/09-01/11-1911, para 46; ICC-ASP/12/37/Add.1, Annex IIA, Recommendation on a proposal to amend rule 68 of the Rules of Procedure and Evidence (Prior Recorded Testimony), para 34 (“Witness interference is a live and ongoing issue in ICC cases, and may be more of an issue at the ICC than the ICTY because of the lack of a subpoena power and the differences in the nature of criminal investigations at each institution”)

⁴¹ ICC-01/09-01/11-1911-Conf-Corr, para 38.

Referring to the same language that was quoted in the resolution, the Chamber noted that *“the amended rule cannot be applied retroactively to the detriment of the person who is being investigated or prosecuted”* and said that it was *“bound to apply the unamended Rule 68”*.⁴²

42. Accordingly, no reasonable Chamber could have reached the conclusion that the application of Rule 68, as amended in the course of the trial, in the pending case does not amount to a retroactive application. This error has materially affected the Impugned Decision because it is one of the components of Article 51(4) which determines whether the application of amended Rule 68 in this case offends Article 51(4) and is therefore disallowed. Accordingly, this error warrants the Appeals Chamber’s intervention.

iv) The Chamber erred in finding that the application of amended Rule 68 in this case would not be detrimental to the accused in the context of Article 51(4)

43. The Chamber erroneously held that the application of amended Rule 68 in this case is not detrimental to Mr Sang’s rights. In reaching this erroneous conclusion, the Chamber considered that “the amended Rule 68 should be read on its face alone”, and that it only needed to look at the application of the amended rule “in the abstract, and not at any concrete application of it”.⁴³ As aforementioned, the Defence acknowledges that Article 51(4) has a general scope, rather than a concrete focus on a given case. This is, however, not to say that Article 51(4) is an abstract rule. Rather, it states a general principle prohibiting the retroactive application of any rule amendment if detrimental to “the person who is being investigated or prosecuted or who has been convicted”. It is concrete in the sense that it specifically protects the accused, and not the prosecution, from any detrimental retroactive application of a rule amendment. The Chamber’s reasoning that, to offend Article 51(4), the application of any amended rule must

⁴² *Prosecutor v Bemba*, ICC-01/05-01/08-3019-Red, 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), 28 August 2014, footnotes 88 and 111.

⁴³ ICC-01/09-01/11-1938-Conf-Corr, para. 24.

be “inherently detrimental to the accused”,⁴⁴ does not find any support in this, or any other legal provision. It must simply be to the “detriment” of the accused, in the sense of “disadvantage” or “damage”.⁴⁵ This is a lower standard than showing an adverse affect on the rights of the accused. Thus, for Article 51(4) to raise a bar to the application of an amended rule, the accused must merely demonstrate that he will suffer damage or a disadvantage as a result of the application of the amended rule.

44. Article 51(4) is not value-neutral as it solely protects the accused person against the retroactive application of detrimental amendments. Such protection has not been offered to the Prosecution. In fact, no specific provision exists to protect the Prosecution from changes in the law, which are detrimental to it. This demonstrates that the parties are not equal, nor are they considered as such. The accused enjoys much greater protection against unfairness than the Prosecution because it is the accused who is facing charges, while the Prosecution must prove these charges beyond a reasonable doubt. The accused must be protected from abuse of power and the arbitrary implementation of the law. The Prosecution does not need the same protection. Accordingly, the roles, rights and obligations of the parties are very different. Consequently, most rule amendments will have a different impact on the accused than on the Prosecution and their application would rarely be neutral. The Chamber’s value-neutral analysis is therefore flawed and contrary to the intention of the drafters.
45. Concretely, the amended Rule 68 is not a rule of neutral application simply because it “can be equally taken advantage of by all parties to the proceedings before the Court”.⁴⁶ Whilst Rule 68, just like many other rules, can be invoked by all parties, the result of such application is fundamentally different. In cases where the Prosecution invokes Rule 68, it is to facilitate the Prosecution in tendering otherwise inadmissible evidence. Such an application is undoubtedly to the detriment of the accused as he or she is confronted with more evidence in respect of which he or she must prepare a defence. The reliability of the

⁴⁴ ICC-01/09-01/11-1938-Conf-Corr , para. 25

⁴⁵ Collins English Dictionary (6th ed), p.453; ICC-01/09-01/11-1908-Corr-Red para 15.

⁴⁶ ICC-01/09-01/11-1938-Conf-Corr , para. 25.

additional evidence is potentially also of a lesser quality, given that amended Rule 68 in certain circumstances permits the admission of untested and unsworn out-of-court statements, made without potential liability for perjury and taken by an interested party, rather than a neutral entity.⁴⁷ This has clear implications for the rights of the accused, as set out in Article 67, most notably Articles 67(1)(b) (right to have adequate time and facilities for the preparation of the defence); 67(1)(c) (right to be tried without delay); and 67(1)(e) (right to examine, or have examined, the witnesses against him or her).

46. In addition, the principle that “[t]he testimony of a witness at trial shall be given in person”, as set out in Article 69(2) of the Rome Statute is also infringed by the application of amended Rule 68. This was foreseen by the Working Group on Lessons Learnt (“WGLL”) noting that, in amending Rule 68, an express emphasis on the rights of the accused was added with the purpose of drawing attention “expressly to this fundamental protection in the context of exceptions to the principle of orality”.⁴⁸
47. Trial Chamber III in *Bemba* similarly noted the importance of the principle of orality, which can be departed from only if not prejudicial to, or inconsistent with, the rights of the accused.⁴⁹ In light of this principle, the Chamber held that prior recorded testimony should be introduced only in specific and exceptional circumstances, where good reasons exist.⁵⁰ A similar view was expressed by the Prosecution in that case.⁵¹

48. The principle of orality is intertwined with the right of the accused to examine

⁴⁷ The procedure under amended Rule 68 is unlike that contemplated by Article 56 of the Rome Statute, or a 92bis statement under the ICTR or ICTY legal systems, where a neutral officer must take the statement after issuing a warning that, if the witness provides false information in the written statement, he or she may be subjected to proceedings for perjury. *See further* ICC-01/09-01/11-1911-Conf-Corr, para. 111.

⁴⁸ WGLL, Second report of the Court to the Assembly of States Parties ICCASP/12/37/Add.1), para. 12. Available at: http://www.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-37-Add1-ENG.pdf.

⁴⁹ *Prosecutor v Bemba*, ICC-01/05-01/08-886, Decision on the "Prosecution Application for Leave to Submit in Writing Prior-Recorded Testimonies by CAR-OTP-WWWW-0032, CAR-OTP-WWWW-0080, and CAR-OTP- WWW-0108", 16 September 2010, paras 7 and 15.

⁵⁰ ICC-01/05-01/08-886, para. 7.

⁵¹ *Prosecutor v Bemba*, ICC-01/05-01/08-2930, Prosecution's Observations on the admission into evidence of the written statement of witness CHM-01, 10 January 2014. *See further* ICC-01/09-01/11-1911-Conf, para 62.

adverse witnesses, the importance of which has been highlighted by the Chamber in *Katanga & Ngudjolo*:⁵²

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

49. This right is particularly relevant in this case, given that all witnesses concerned save one have recanted their allegations under oath;⁵³ and many of the recanted allegations go directly to the acts and conduct of the accused. Whilst true that the right to confront his or her accuser is not unlimited, it is significantly more controversial to limit this right where it concerns a witness with core allegations directly relating to the acts and conduct of the accused.

50. If not the Prosecution, but the Defence relies on amended Rule 68 to tender evidence which would have been inadmissible without the amendments, the Prosecution's rights are not infringed, as it did not have any such rights in the first place. In addition, the Prosecution is not protected by Article 51(4). Accordingly, the application is not equal to all parties, nor is it neutral on the mere basis that they have equal access to this new mechanism.

51. In the practice both at the ICC and at the ICTY, the Prosecution makes considerably more use of the option to admit prior witness statements than the Defence.⁵⁴ This is not surprising, given that the burden to produce the evidence is on the Prosecution. The Defence does not have any duty to call evidence and produce evidence, and will often limit the evidence it presents, if any. In addition,

⁵² T-145-CONF, 26 Sept 2014, p 8, line 22 – p 16, line 8.

⁵³ At the ICTY, only once were prior inconsistent statements admitted into evidence where the witnesses testified *viva voce* and largely recanted their earlier statements. In that instance, however, the accuracy of the statements was more reliable, because they were video recorded word for word and the judges could assess the witness's demeanour in answering the questions (See *Prosecutor v Fatmir Limaj et al*, IT-03-66-T, Decision on the Prosecution's Motions to Admit Prior Statements as Substantive Evidence, 25 April 2005, paras. 31-34). Though these statements were admitted, none of the witnesses was ultimately relied upon in the Chamber's deliberation, because of their lack of reliability (*Prosecutor v Fatmir Limaj et al*, IT-03-66-T, Trial Judgment, 30 November 2005, para 14). See further ICC-01/09-01/11-1911-Conf-Corr, para. 42.

⁵⁴ Yvonne McDermott, The Admissibility and Weight of Written Witness Testimony in International Criminal Law: A Socio-Legal Analysis, *Leiden Journal of International Law*, Vol. 26, no. 4, December 2013, pp 971-989.

the Prosecution has greater capacity and resources to obtain statements in this manner, for use at trial.⁵⁵ This infringes the principle of equality of arms between the Prosecution and Defence and demonstrates that the the newly introduced mechanism under amended Rule 68 cannot “be equally taken advantage of by all parties to the proceedings before the Court”.⁵⁶

52. Accordingly, the Defence submits that no reasonable Chamber could have reached the conclusion that the application of Rule 68 is not detrimental to the accused. This erroneous conclusion has materially affected the Impugned Decision because it is one of the components of Article 51(4) which determines whether the application of amended Rule 68 in this case offends Article 51(4) and is therefore disallowed. Accordingly, this error warrants the Appeals Chamber’s intervention.

ii. Whether written statements and transcripts of interviews taken in accordance with Rules 111 and 112 of the Rules can qualify as ‘prior recorded testimony’ for the purpose of Rule 68 (2)(c) and (d), to be admitted for the truth of their contents (‘Second Issue’)

53. The Chamber misinterpreted the law when it determined that unrecorded written statements and transcripts of interviews taken by Prosecution investigators in accordance with Rules 111 and 112, constituted ‘prior recorded testimony’ for the purpose of Rule 68 (2)(c) and (d). This materially affected the Decision in that only prior recorded testimony is admissible pursuant to Rule 68 and therefore, if the Majority had determined that the statements did not qualify as testimony, then they would have all been declared inadmissible.
54. The Defence submits that Rule 68 is *lex specialis* for the admission of prior recorded testimony.⁵⁷ The rule covers all evidence which is testimonial in nature, meaning any statement given to a body authorized to collect evidence for use in judicial proceedings, with knowledge of the maker that the statement may be

⁵⁵ Prosecutor v Katanga and Ngudjolo, ICC-01/04-01/07-T-97-Red-ENG, 8 February 2010, Defence Counsel, pgs. 28-29.

⁵⁶ ICC-01/09-01/11-1938-Conf-Corr, para. 25.

⁵⁷ Article 69(2).

used in legal proceedings.⁵⁸ The admitted statements of the witnesses in this case were accompanied by a signed “witness acknowledgement” which reads: “This Statement has been read over to me in the English language and is true to the best of my knowledge and recollection. I have given this Statement voluntarily and I am aware that it may be used in legal proceedings before the International Criminal Court and that I may be called to give evidence in public before the International Criminal Court.” It is thus clear that even the witness signing the document understood his statement to be a precursor to the possibility of giving oral testimony, and not a legally sufficient document in and of itself. This acknowledgement simply puts the statement in the realm of testimonial evidence, but it is insufficient for it to qualify as ‘testimony’. Indeed, as pointed out by the Presiding Judge, “no one is free to arrogate unto her(him)self the authority to administer oaths or solemn affidavits *in lieu* of oaths”.⁵⁹

55. Rule 68(1) states that the Trial Chamber may “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 this would not be prejudicial to or inconsistent with the rights of the accused and that the requirements of one or more of the following sub-rules are met”. The Report of the Working Group on Lessons Learnt (WGLL Report) notes that in amending Rule 68, “an explicit reference to the rights of the accused was added, to draw attention expressly to this fundamental protection in the context of exceptions to the principle of orality”.⁶⁰
56. The Defence submits that statements taken and written by Prosecution investigators in accordance with Rules 111 or 112, taken by an interested party, outside the presence of a neutral judicial officer, are done in a manner which is necessarily prejudicial to or inconsistent with the rights of the accused. Notably, Rule 111 is titled “record of questioning”, not “record of testimony”.

⁵⁸ ICC-01/04-01/07-2635, paras.47-49.

⁵⁹ Concurring Opinion, para. 24.

⁶⁰ WGLL Report, ICC-ASP/9/Res.2, Adopted at the 5th plenary meeting, 10 December 2010, by consensus, para.12.

57. All of the statements admitted by the Majority were prepared by a party with vested interests, in an unknown setting and without the full context of the discussions between the Prosecution and the witness. The Defence has not been provided any audio or video recording or verbatim transcript of the substantive, PEV-related Prosecution interviews with the concerned witnesses. The Defence has only been provided with a paraphrased statement, prepared by the investigators, and later signed by the witness (where the Defence does not know the circumstances under which, nor how long, the witness took to review the statement before signing). The Defence lacks even a transcript for the interviews, which would at least have provided a word-for-word, question and answer record of the interview.
58. The Majority adopted the Prosecution's very convoluted explanation of what constituted 'testimony'.⁶¹ But as the Presiding Judge argued, the cardinal rule of treaty interpretation is that terms are to be given their ordinary meaning, where the notion of 'testimony' "connotes averment of facts under oath or solemn affirmation in *lieu* of oath".⁶² None of the statements taken by the Prosecution investigators were taken under oath or solemn affirmation (only the signed witness acknowledgement). In fact, none of the statements even contain the safeguards of testimony taken for instance under Article 56 of the Rome Statute, in the event of a unique investigative opportunity, where measures are taken to safeguard the integrity of the proceedings and the rights of the accused, by, for example, involving defence counsel. A deposition taken under this article may then qualify as prior recorded testimony, given the safeguards in place. Also, at the ICTY and ICTR, Rule 92*bis* describes a detailed procedure of the taking of witness statements by a neutral officer who also warns the witness of potential perjury liability consequences of providing false information.⁶³ Yet here, no such precautions, which might potentially result in eliciting more reliable information, were taken in respect of any of the witnesses concerned.
59. Furthermore, the Defence submits that the inclusion in Rule 68(2)(b)(ii) of a

⁶¹ Impugned Decision, paras 28-33.

⁶² Concurring Opinion, para. 19; Sang Rule 68 Response, para. 62.

⁶³ Sang Rule 68 Response, para. 9.

requirement that the testimony be accompanied by a declaration that the contents are 'true and correct to the best of that person's knowledge and belief', is simply setting a minimum threshold, for the admission of items which are peripheral and which do not go to the core issues in dispute. If this safeguard was thought necessary for peripheral issues, then how much more necessary is it that the term 'testimony' is not diluted to such a degree that it does not require any oath or affirmation, when the admitted information includes that going to the acts and conduct of the accused as is possible under Rule 68(2) (c) and (d). The drafters likely thought that the term 'testimony' was sufficiently self-explanatory for sub-paragraphs (c) and (d), but wanted to provide a less stringent alternative for sub-paragraph (b). Alternatively, and as suggested by the Presiding Judge, it may be that in the circumstances, the inclusion of that requirement in sub-paragraph (b) was as a result of confusion or ambiguity in the drafting of an important legal text.⁶⁴

60. Any ambiguities or confusion in the drafting of Rule 68 should be resolved to the benefit of the accused. Therefore, the Majority erred in law in determining '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.⁶⁵ The Appeals Chamber should overturn the decision of the Majority because the error materially affected the ruling.

iii. Whether written statements and transcripts of interviews taken in accordance with Rules 111 and 112 of the Rules can be admitted in their entirety for the purpose of Rule 68 (2)(c) and (d) ('Third Issue')

61. The Defence submits that the Majority erred in law in determining that written statements and transcripts of interviews taken in accordance with Rules 111 and 112 can be admitted in their entirety for the purposes of Rule 68(2) (c) and (d). If the statements were to be admitted at all, they should only have been admitted to the extent that the Prosecution led the material directly into evidence, giving the Defence a fair opportunity to know which aspects of the statements to focus on during cross-examination.

⁶⁴ Concurring Opinion, para. 21.

⁶⁵ Impugned Decision, para. 33.

62. The Prosecution chose to summon the concerned witnesses, despite knowing that they had recanted most of the material aspects of their testimonies. The witnesses were brought to Court by the Government of Kenya and they were required to testify against their will. The Prosecution had advance notice that these witnesses would not testify in accordance with their statements, and the Prosecution had long intimated that it would apply through Rule 68 for the admission of the statements. Thus the Prosecution had ample opportunity to select, in advance of the witness's testimony, which were the critical portions of evidence from the statements. In any event, and as acknowledged by the Presiding Judge, the Prosecution had these witnesses on the stand for lengthy periods of time,⁶⁶ and thus the Prosecution could have determined which sections it would select for admission before turning its witnesses hostile or releasing them from the witness stand.
63. It is only through putting the relevant portions of the statement to the witness that the Defence could have a genuine and effective opportunity to cross-examine him. It is understandable that not everything canvassed during a witness interview or contained in a witness statement is relevant or significant for production at trial. The Prosecution needed to be more structured in the presentation of its evidence and needed to make reasonable efforts to elicit all material aspects of the statements, in order to allow the Defence a real opportunity for cross-examination.
64. The Majority admitted the entirety of the witnesses' prior statements and related materials onto the record, irrespective of whether the contents had been raised at trial. This limited the Defence's ability to challenge the evidence, because where the Prosecution did not elicit incriminating information, the Defence was unfair to then expect the Defence to first elicit an allegation on record, only to then demonstrate its untruthfulness.⁶⁷ The right to confrontation has clearly been weakened in these circumstances. The *Katanga and Ngudjolo* Trial Chamber

⁶⁶ Concurring Opinion, para. 48.

⁶⁷ T-145, 8:22-16:8.

noted that “[t]he right of the accused to examine, or have examined, adverse witnesses is of fundamental importance to the fairness of the proceedings. No judgment can be rendered safely if it is based on evidence prepared on behalf of one party which the opponent has not been able to test or verify”.⁶⁸

65. This is particularly so where the Defence accepted the in-court recantation of the witnesses’ previous false allegations, and therefore had no basis upon which to cross-examine in relation incidents which the witness now disavowed. The ruling of the Majority essentially shifts the burden of proof onto the Defence, to elicit incriminating evidence, only to knock it down. The Defence should not have to prove anything or place on the record any incriminating evidence. Rather, when dealing with a hostile witness, it is for the Prosecution to demonstrate that the initial allegations were truthful and to put them to the witness on the stand in order for the witness to confirm or deny the allegations under oath. If the witness departs from the earlier statement, he or she should be offered an opportunity to explain the reason for the departure, and to provide an accurate version of events. If the Prosecution continues to believe that the original account was truthful, it should challenge its witness with independently verifiable information, which supports the witness’s original account. This the Prosecution did not do.
66. The Presiding Judge correctly notes that the Prosecution had ample opportunity to have the witnesses “address their minds, under oath, to aspects of their out-of-court statements that were of particular interest” and that likewise the Defence had an opportunity to question the witnesses on aspects of their testimony in response to the questions by the Prosecution.⁶⁹ The Presiding Judge aptly pointed to a decision from the ICTY, *Prosecutor v Halilovic*, in support of his ruling to limit the extent of the statements admitted.⁷⁰
67. Therefore the Defence submits that the Appeals Chamber should, if it agrees to

⁶⁸ ICC-01/04-01/07-2635, para.42.

⁶⁹ Concurring Opinion, para. 44.

⁷⁰ Concurring Opinion, fn 23 (citing *Decision on Admission into Evidence of Prior Statement of a Witness*, 5 July 2005).

admit any statements at all, restrict the record to the extent of those questions and answers (including questions and answers connected to documentary and other materials put to the witness while on the stand).

iv. Whether the Impugned Decision erred in its assessment of the concept of 'failure to give evidence with respect to a material aspect' pursuant to Rule 68(2)(d)(i) of the Rules ('Fourth Issue')

68. 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'. The Chamber concluded that the requirement is satisfied by persons who appear and either do not testify at all or recant fundamental aspects of their prior recorded testimony.⁷¹ The Defence submits that this is a misinterpretation of the law, which has materially affected the decision, given that it is a necessary criterion of the Rule.
69. Contrary to the Chamber's ruling, there is a distinction between a witness who comes to Court and refuses to talk, and witnesses who come to Court and say that they will not repeat the contents of their previous statements because they are false. In the first instance, the witness is not taking his obligation to the Court seriously, by stonewalling the proceedings and refusing to assist the Chamber by saying what it is that he knows, ostensibly because he has been interfered with and persuaded not to talk or cooperate. This first type would also include witnesses who refuse to answer specific questions or who insist on avoiding certain topics. But this is different than the second type of witnesses who come to Court, and genuinely explain to the Chamber what they know. The fact that this may differ from a previous version of events is inconsequential because they are addressing the material issues and are attempting to assist the Court with the truth.
70. This question must be viewed in the context of the purpose for the Rule 68 amendments. The purpose of the amended Rule 68 was to streamline proceedings and to make them more efficient through the introduction of prior statements where a witness did not provide sworn testimony. The WGLL

⁷¹ Impugned Decision, para. 41.

explanatory note to Rule 68 states that the proposed amendments were “aimed at allowing the judges of the Court to reduce the length of Court proceedings and streamline the presentation of evidence by increasing the instances in which prior recorded testimony could be introduced instead of hearing the witness in person, while paying due regard to the principles of fairness and the rights of the accused”.⁷²

71. This explanation suggests that the drafters envisaged a situation wherein a witness would not testify at all, as a result of interference. Indeed, simply admitting the witnesses’ previous statements, without spending time to entice or compel recalcitrant witnesses to come to Court, could shorten trials. In the instant case, the admission of the statements does not streamline the presentation of evidence or reduce the length of Court proceedings. On the contrary, it lengthens the proceedings and complicates the presentation of evidence, as it puts the judges in a position where they have to go through lengthy written statements and compare them to the witnesses’ in-court testimony and decide which parts are truthful and which ones are not.
72. Accordingly, it is not appropriate to apply Rule 68 to witnesses who appear and who answer all questions put to them. Indeed, the supposed need for a Rule 68 amendment was brought about by an errant notion – namely that the Court did not have subpoena powers.⁷³ It has since been established that the ICC has a subpoena power, which indeed it used in respect of the [REDACTED] of the [REDACTED] witnesses whose statements have been admitted. Again, this suggests that the drafters had in mind a situation where a witness would refuse to testify and fail to appear because of interference, in which case it would be necessary to tender their statements in lieu of oral testimony, because there was no other way of bringing them before the Court. It is inconceivable, patently unfair, and inefficient to summons a witness against his will, examine him, but then proceed to ignore his in-court testimony in favour of a prior recorded statement.

⁷² ASP 12th Session Records, pp.71,88; IBA Legal Opinion, p.1.

⁷³ WGGL Second report of the Court to the Assembly of States Parties (ICC-ASP/12/37/Add.1), para.33.

73. That Rule 68 was not meant to apply to witnesses who have given viva voce testimony is also apparent from the following observation made by the WGLL:⁷⁴

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

74. This explanation illustrates that if the witness testifies eventually, and the prior recorded testimony has already been admitted, the admitted statements should thereafter be disregarded. Prior recorded testimony was never intended to replace in-court testimony unless, during the course of the testimony, the witness refused “to give evidence with respect a material aspect included in his or her prior recorded testimony”, as is provided in Rule 68(2)(d)(ii). Indeed, prior recorded testimony is admissible only if a witness does not give evidence on these material aspects in court. Its admission is *in lieu of*, not *in addition to* oral testimony.
75. The Majority further erred in how it assessed the concept of failure to testify in relation to the specific witnesses that mentioned Mr Sang. There was no witness who refused to testify to material aspects of their previous statement, as led by the Prosecution, in relation to Sang or KASS FM. If a pertinent topic was not discussed under oath, it was because the Prosecution did not make all reasonable efforts to elicit it or chose not to lead it in evidence. This cannot be construed to be a failure or a refusal on the part of the witness.
76. Indeed, the [REDACTED] witnesses who appeared, did not fail to testify to any material aspect of their testimony; they simply testified in a way that was different from their original account, in a way that the Prosecution did not find useful for its case. However, the fact that the Prosecution preferred the original account as contained in the witnesses’ prior statements does not mean that the witness has failed or refused to testify about it.

⁷⁴ WGLL Second report of the Court to the Assembly of States Parties (ICC-ASP/12/37/Add.1), para.35.

77. Witness [REDACTED] against Mr Sang, is the perfect example of a witness who appears in Court (under compulsion), and testifies over the course of several days about all aspects of the statement upon which he was questioned, even though the responses he gave differed from the content of his previous statement. Significantly, once the summons was served on [REDACTED], he resigned himself to fully cooperate with the process. [REDACTED]⁷⁵ [REDACTED]. The Prosecution solicited [REDACTED] days worth of information from [REDACTED] as to the [REDACTED]. He spoke with ease about the [REDACTED];⁷⁶ [REDACTED];⁷⁷ [REDACTED];⁷⁸ [REDACTED];⁷⁹ [REDACTED];⁸⁰ the [REDACTED];⁸¹ the [REDACTED];⁸² the [REDACTED];⁸³ the [REDACTED];⁸⁴ and [REDACTED].⁸⁵
78. In short, [REDACTED] did not behave as a witness who was evasive or who refused to answer questions or who was trying to thwart the course of justice. He commented on all material aspects of his previous statements, in a detailed, conversational, and comprehensive fashion. Yet the Majority found that it was “satisfied that the witness failed to give evidence with respect to material aspects included in his prior recorded testimony within the meaning of Rule 68”,⁸⁶ with no further elaboration. This is a clear error of fact and law.
79. The other [REDACTED] witnesses who testified also addressed all material aspects of their statements which pertained to Sang. During testimony, [REDACTED].⁸⁷ He further testified that he had never [REDACTED] at any point

⁷⁵ EVD-T-D11-00083.

⁷⁶ T-176, 3:1-24, 10:16-11:5.

⁷⁷ T-176, 3:25-7:18.

⁷⁸ T-175, 61:19-21; T-176, 7:19-9:19.

⁷⁹ T-176, 9:15-10:15, 11:5-18:25, 27:8-18; 28:6-29:3.

⁸⁰ T-176, 19:4-27:6, 27:19-28:2.

⁸¹ T-176, 29:15-30:23, 32:6-16, 71:20-87:10.

⁸² T-176, 33:12-47:18, 66:6-71:19.

⁸³ T-176, 47:13-59:22.

⁸⁴ T-176, 61:8-66:5; 87:13-88:15; T-177, 3:2-14:19, 32:6-34:24.

⁸⁵ T-177, 14:22-21:3, 21:23-28:25.

⁸⁶ Impugned Decision, para. 121.

⁸⁷ T-138, 61:21-62:13.

in time.⁸⁸ The Prosecution did not ask any follow-up questions about Sang in relation to his alleged [REDACTED].

80. Secondly, the Prosecution asked [REDACTED] about his allegations regarding the [REDACTED]. In direct examination, but before a finding of hostility, the witness was referred to page [REDACTED] of his statement, [REDACTED], and he testified that he actually had not been [REDACTED].⁸⁹ He did not avoid the question or refuse to answer; he just told the Prosecution that his original account was not true. The Prosecution did not ask him about KASS FM or Joshua Sang. However, during cross-examination by the Sang Defence, [REDACTED] corrected this aspect of his original statement to say that he did not hear Sang on the [REDACTED].⁹⁰ Despite these explanations and good-faith efforts on the part of the witness, the Majority again obliquely determined that it was “nevertheless satisfied that the witness failed to give evidence with respect to material aspects included in his prior recorded testimony within the meaning of Rule 68”.⁹¹ This is an error of fact and law.
81. Witness [REDACTED] also testified about all material aspects of his statement, albeit not in the manner the Prosecution had expected. He explained that he actually was not a [REDACTED].⁹² Therefore, in 2007-2008, he listened to [REDACTED]⁹³ because he [REDACTED].⁹⁴
82. He stated that he listened to [REDACTED].⁹⁵ The Prosecution did not ask witness [REDACTED] any questions about Sang during its own cross-examination. Therefore it cannot now claim that [REDACTED] failed to give evidence on material aspects of his prior statement, such as the additional allegations of [REDACTED]. Again, however, the Majority simply and without explanation concludes that “it is satisfied that the witness failed to give evidence with respect

⁸⁸ T-138, 62:4-16.

⁸⁹ T-138, 62:17-23.

⁹⁰ T-141, 21:9-14.

⁹¹ Impugned Decision, para. 102.

⁹² T-143, 3:17-25, 4:20.

⁹³ T-143, 4:2-4; T-145, 84:14-15.

⁹⁴ T-143, 4:19-21; T-145, 84:5-12.

⁹⁵ T-143, 3:18-21, 4:1-4; T-143, 4:14-19, 23-25; T-145, 80:24-83:23.

to material aspects included in his prior recorded testimony within the meaning of Rule 68".⁹⁶ This is an error of fact and law.

83. With regard to witness [REDACTED], the Defence submits that he also testified to all material aspects of his prior statements regarding Sang. The Prosecution asked him what aspects of his statement he felt incriminated Sang and [REDACTED].⁹⁷ He explained that this implicated Sang because it showed that he, as a radio presenter, could use that opportunity to show [REDACTED].⁹⁸ [REDACTED].⁹⁹ He did not avoid or refuse to answer the Prosecutor's questions about KASS FM.
84. Notably, the Prosecutor did not ask [REDACTED] about the part of his statement where he had alleged that [REDACTED]. Because the Prosecutor did not make reasonable efforts to ask about it during the examination of [REDACTED], when the witness was willingly answering questions about Ruto, Sang, and the Station, the Prosecutor should not be able to rely on the potentially incriminating references left alone from the prior statement.¹⁰⁰
85. Additionally, only in re-exam did the Prosecutor ask about paragraph [REDACTED] statement, where he alleged that [REDACTED]. The Sang Defence had played an audio recording demonstrating that [REDACTED], not [REDACTED].¹⁰¹ Thus there is no reason to rely on the statement rather than the witness's sworn testimony regarding this event.
86. Therefore, the Majority erred in fact and in law when concluding, without providing any specific reasoning, that it was satisfied that the witness had failed to give evidence with respect to material aspects included in his prior recorded testimony within the meaning of Rule 68.¹⁰²

⁹⁶ Impugned Decision, para. 48.

⁹⁷ T-131, 84:19-25.

⁹⁸ T-131, 85:4-11.

⁹⁹ T-131, 85:12-24.

¹⁰⁰ EVD-T-OTP-00132, para 183.

¹⁰¹ T-136, 62:20 et seq.

¹⁰² Impugned Decision, para. 72.

87. In sum, the Defence asks the Appeals Chamber to reverse the Majority's ruling that persons who appear and either do not testify at all or recant fundamental aspects of their prior recorded testimony should automatically, and without further consideration, be deemed to have failed to testify about material aspects of their statements.

v. Whether the Impugned Decision applied the appropriate standard of proof when evaluating whether the conditions under Rule 68(2)(c) and (d) of the Rules were met, including, in particular, in its assessment of the existence of 'interference' ('Fifth Issue')

88. The Defence submits that the Chamber failed to apply the appropriate standard of proof in assessing the application pursuant to Rules 68(2)(c) and (d). The Chamber erred in defining the standard as "being satisfied", which can be met by introducing evidence "of sufficient specificity and probative value".¹⁰³ The Chamber has failed to provide further clarification as to what this standard entails in reality, which in on itself is an error warranting the Appeals Chamber's consideration.
89. The Defence maintains that the appropriate standard to be applied is 'beyond reasonable doubt'. The Chamber rejected the 'beyond reasonable doubt' standard because applying such an elevated standard of proof "could unduly limit the Chamber's ability to consider potentially relevant, probative evidence in its assessment of the merits of the case".¹⁰⁴ In reaching this conclusion, the Chamber failed to give due consideration to the fact that a finding of witness interference is distinguishable from most other procedural decisions because of its far-reaching consequences for the accused. Indeed, as previously submitted, such a finding not only goes to support an application under Rule 68, it also puts the accused in a bad light, "in particular where the Prosecution seeks to tie the interference allegations to the accused, their associates or even their legal team. These are serious allegations, which potentially adversely impact on the integrity

¹⁰³ ICC-01/09-01/11-1938-Conf-Corr, para. 37.

¹⁰⁴ ICC-01/09-01/11-1938-Conf-Corr, para. 36.

of the proceedings.”¹⁰⁵

90. Without placing any doubt on the professionalism of the judges before the Court, the Defence submits that there is a risk that their minds may be influenced by the allegations of witness interference, in particular if these allegations can be linked to the accused, their associates or their Defence team. There is a tendency to believe that an accused who is not guilty has no reason to interfere with witnesses. The guilt of the accused may therefore be assumed on the basis of findings that he or she, or someone associated to him or her, interfered with witnesses. But even if such link to the accused cannot be established, claims of witness interference may create a general air of suspicion, from which the accused is not exempted.¹⁰⁶

91. There is also a tendency to believe that the original accounts of witnesses who have later recanted these accounts as the result of interference are truthful accounts. In reality, evidence of witness interference does not have any bearing on the truthfulness and reliability of the original accounts, but these matters are often not sufficiently separated, and most certainly not in the present case where the Prosecution has been allowed to lead evidence of Article 70 allegations as part of the main trial ordered to disclose the materials that were relied upon in support of these allegations.¹⁰⁷

92. Accordingly, findings of witness interference may have an overwhelming impact on the ultimate determination of guilt. They should therefore have a proper evidential foundation. If not beyond reasonable doubt, then at least a standard significantly higher and clearer than the “satisfaction” standard adhered to by the Chamber. The Defence has previously proposed an alternative standard of proof being “strong grounds”, “compelling grounds”, or “substantial grounds”, which are standards usually applied in situations where decisions have more serious consequences for the accused, the victims, the integrity of the proceedings, or the like, than decisions concerning ordinary procedural matters,

¹⁰⁵ ICC-01/09-01/11-1911-Conf-Corr, para. 109.

¹⁰⁶ See also, *ibid*, para. 110.

¹⁰⁷ ICC-01/09-01/11-762, para. 89. For more elaborate arguments on these issues, see *ibid*, para. 110.

but less serious consequences than the final judgment.¹⁰⁸ This is the case for confirmation decisions as well as decisions by the *ad hoc* tribunals to open an investigation into perjury. There are good grounds to apply a high standard of proof in confirmation hearings, as such ensures that only cases founded on a strong evidentiary basis will be brought before the Court. In an investigation of perjury, applying a high standard ensures that Chambers do not engage unnecessarily in such an exercise and leave matters of credibility for the end of the day.¹⁰⁹ Similarly, given the significant impact on the accused, there are good grounds to apply a high standard for the determination of witness interference, even if not ‘beyond reasonable doubt’.

93. The Chamber failed to give due consideration to this alternative standard proposed by the Defence and the arguments raised in support of this proposed standard. No reasonable Chamber would have disregarded these compelling arguments without properly addressing them. In light of the significant consequences of any determination under Rule 68, the standard defined by the Chamber is unjustifiably low. At the very least, the standard to be applied should be significantly higher than the standard which is applied in ordinary admissibility assessments, or preliminary assessments of witness interference in rulings on protective measures. A preliminary finding of witness interference, particularly if linked to alleged associates of the accused, has a much greater impact than, for instance, a decision on the admissibility of documentary evidence. This greater impact should be reflected in a higher standard. Regrettably, it is unclear whether the standard as defined by the Chamber, requiring it to be satisfied by evidence “of sufficient specificity and probative value” is any higher than the ordinary admissibility standard. But what is clear is that this standard is not sufficiently high to do justice to the seriousness and impact of a Rule 68 decision.
94. When looking at the Chamber’s findings of witness interference, it appears it failed to take into consideration, or even address a number of important facts raised by the Defence, including the belief of witnesses that rewards were to be

¹⁰⁸ Ibid, paras. 111, 112.

¹⁰⁹ Ibid, paras. 111, 112.

gained from making incriminating statements, the fact that other incriminating witnesses had recanted, and continue to do so,¹¹⁰ for reasons other than interference, the use of sting operations in collecting evidence, and the lack of external corroboration of the prior statements.¹¹¹ Had the Chamber adopted a higher standard, it would have had to at least consider such factors in determining whether witness interference had been established.

95. Accordingly, the Defence requests that the Appeals Chamber arrive at its own conclusion as to the appropriate standard and determine that the Chamber misinterpreted the law by adopting a too low and undefined standard.

vi. Whether the Impugned Decision erred in its interpretation and/or application of the concepts of 'indicia of reliability' and 'acts and conduct of the accused' pursuant to Rule 68(2)(c) and (d) of the Rules ('Sixth Issue')

96. The Chamber determined that the Chamber only needs evidence of sufficient specificity and probative value to satisfy itself that the requirements of Rule 68 are met, including the concepts of 'indicia of reliability'.¹¹² The Chamber stated that, absent a declaration under oath, it would consider a declaration that a statement is true to the best of the witness's knowledge as an indicia of reliability, as well as the presence of a qualified interpreter, the absence of manifest internal inconsistencies, whether the evidence was subject to cross-examination, and whether the evidence is corroborated by other evidence.¹¹³ In every instance, the Chamber found that the fact that the witness and investigators signed the statement and a witness acknowledgement section, and the fact that the witness recognized his signature, were sufficient to give it sufficient indicia of reliability.¹¹⁴ The Chamber conducted no further evaluation of the plausibility of the account and conducted no analysis of the inconsistencies

¹¹⁰ Ibid, paras. 111, 112.

¹¹¹ Impugned Decision, paras. 45-133. See also ICC-01/09-01/11-1911-Conf-Corr, Sang Defence Response to Prosecution's Request for the Admission of Prior Recorded Testimony of [REDACTED] Witnesses, filed on 12 June 2015, 22 June 2015 ("Sang Defence Rule 68 Response"), paras 115 et seq.

¹¹² Impugned Decision, para. 65.

¹¹³ Impugned Decision, para. 65.

¹¹⁴ Impugned Decision, paras 66, 85, 115, 132.

raised by the Defence.¹¹⁵ The Majority even found that a witness's denial of his previous statement did not make the statement *per se* unreliable.¹¹⁶ The Defence submits that this approach to determining reliability is wrong in law and in procedure, as the Majority did not conduct a thorough evaluation of the evidence despite its being recanted. The Majority also failed to take into consideration the bias of various witnesses and the reasons that they may have given a false statement to begin with.¹¹⁷ Essentially, the Majority took an overly simplistic approach in determining whether the statements had an indicia of reliability, emphasizing the fact that several people signed the prior statement while failing to conduct a proper analysis of bias, internal inconsistencies, lack of external corroboration, and recantations, and the impact that necessarily all has on the reliability of the accounts. The Majority gives too much credence to the cosmetics of a typed and signed statement, without venturing into the core substantive concerns.

97. For instance, in relation to witness [REDACTED], the Majority noted that aspects of his previous statement were inconsistent, and that he denied most of his prior statement and stated that he had ulterior motives for providing his prior statement. Despite all of those acknowledgements, the Majority still errantly found that this was not sufficient to make the written statement unreliable for purposes of Rule 68(2)(d).¹¹⁸ Here, the Majority improperly reverses the burden of persuasion, committing an error of law. It is for the Prosecution as the moving party to show that the statement has sufficient indicia of reliability, and not for the Defence as the opposing party to show that it is unreliable.
98. The Majority has also erred in its interpretation and application of the concepts of 'acts and conduct of the accused'. Rule 68(2)(d)(iv) states: "The fact that the prior recorded testimony goes to proof of the acts and conduct of an accused may be a factor against its introduction, or part of it". The rule inherently notes the prejudice that may accrue to an accused through the written admission of evidence going to his acts and conduct, where he is not in a position to properly

¹¹⁵ Impugned Decision, paras 62-64, 86, 116-7.

¹¹⁶ Impugned Decision, para. 67.

¹¹⁷ Impugned Decision, paras 113, 130.

¹¹⁸ Impugned Decision, para. 133.

challenge the allegations. The phrase ‘acts and conduct of the accused’ is well known in international criminal law tribunals, and the prohibition on admission extends even to those closely associated with the accused.¹¹⁹

99. The *ad hoc* tribunals have expanded on the notion of ‘acts and conduct’ and the related nature of statements that must be subjected to confrontation, to include: the ‘proximity’ to the accused of the acts and conduct which are described in the written statement sought to be admitted, and whether the statement or transcript goes to proof of a ‘critical element’ of the Prosecution’s case against the accused, or goes to a ‘live and important issue’ between the parties, as opposed to peripheral or marginally relevant issue.¹²⁰ Moreover, the fact of the conduct being that of ‘co-perpetrators’ or ‘subordinates’ is relevant in determining if cross-examination should be allowed.¹²¹
100. According to the literature, “in ICTR and ICTY best case law, it is well established that when evidence is crucial for the defendant, even if it does not directly refer to the acts and conduct of the accused, live testimony must be given preference over written testimony. This way, the accused’s right to examine or cross-examine witnesses provided for in the *Ad Hoc* Tribunals Statutes is respected in the most practicable way possible.”¹²²
101. There is no dispute that the statements contain allegations about the acts and conduct of the accused. However, the Majority again took a simplistic approach and determined that since [REDACTED] had been cross-examined on some aspects of their testimony, then that was a sufficient safeguard for the accused and therefore all information going to the acts and conduct of the accused could be admitted wholesale.¹²³
102. Specifically with regard to [REDACTED], the Defence notes that [REDACTED].¹²⁴

¹¹⁹ ICTY/R and SCSL Rule 92*bis*.

¹²⁰ *Prosecutor v Karemera at al*, ICTR, Decision on Prosecution Motion for Admission of Evidence of Rape and Sexual Assault Pursuant to Rule 92*bis* of the Rules; and Order for Reduction of Prosecution Witness List, 11 December 2006, paras.15-16.

¹²¹ Norman Decision, p.5.

¹²² *Law of Evidence at the International Criminal Court: Blending Accusatorial and Inquisitorial Models*, Michele Caianiello, p.314.

¹²³ Impugned Decision, paras 60, 81, 111 and 128.

¹²⁴ EVD-T-OTP-00263.

Paragraphs [REDACTED] statement are replete with references to the acts and conduct of [REDACTED]. Indeed, there is no plausible purpose for the account given by [REDACTED]. Thus the Majority should have taken that into account when agreeing that it could have been admitted.

103. Collectively, the admission of the prior statements is highly prejudicial given the fact that the Majority admitted statements from [REDACTED] witnesses – this is one sixth of the total number of witnesses, and approximately half of who might be considered the core or linkage witnesses in the case.
104. Consequently, the Defence submits the Majority erred in admitting the statements in their entirety. A fairer approach would have been to allow the statements, but to strike out the portions pertaining to the acts and conduct of the accused.¹²⁵

vii) Whether the Impugned Decision erred in its consideration of 'interests of justice' pursuant to Rule 68(2)(d) of the Rules ('Seventh Issue')

105. The Majority has held that it would assess whether an application of the amended Rule 68 in a concrete situation would be unduly detrimental to the accused in which case it may not be in the interests of justice to allow the application. It would therefore appear that the Majority would consider fair trial aspects in assessing the interests of justice prong of Rule 68(2)(d).
106. Nonetheless, the Defence submits that the Majority failed to give due consideration to fair trial concerns, such as Mr Sang's right to an expeditious trial, the right to confront his accusers, and the admission of evidence going to the acts and conduct of the accused, in assessing the interests of justice component of Rule 68. Indeed, in each concrete application, the Chamber considered that admission of the prior inconsistent witness statement would not be unduly detrimental to the accused, despite much of it being uncorroborated and untested hearsay evidence going directly to the acts or conduct of the accused. Questions about its probative value and reliability, its nature (e.g. direct or hearsay evidence), whether it goes to the acts and conduct of the accused, and

¹²⁵ See Sang Rule 68 Response, paras. 72-77.

whether it is corroborated will be addressed in an eventual decision on the guilt or innocence of the accused.¹²⁶

107. At paragraph 60, for example, the Majority considers whether the introduction of the witness statements would be in the interests of justice. It notes that the rights of the accused to be tried with undue delay and the fact that the statements go to the acts and conduct of the accused, are linked to the rights of the accused generally, but then it goes on to suggest that such concerns are better left to its eventual decision on the guilt or innocence of the accused, rather than as part of the Rule 68(2)(d) analysis.
108. In addition, whilst acknowledging the sufficiency of evidence of a link between witness interference and the accused as one of the factors to weigh in determining whether admission under Rule 68(2)(d) would serve the interests of justice, the Chamber considers that the failure to prove such a link does not affect the interests of justice, provided admission is not unduly detrimental to the accused.¹²⁷ Effectively, this means that the sufficiency of evidence of a link between witness interference and the accused is considered only at this stage if such evidence exists, in which case it will be weighed as a factor in favor of admission. If, on the other hand, the link is unproven, this is a neutral factor which does not affect admission in any way. The Defence submits that no reasonable Chamber would have given consideration to this factor only where it works against the accused, and not where it works in his or her favor.
109. The Defence submits generally that the Chamber erred in failing to give appropriate weight to fair trial concerns at the admission stage. Harm will be done if such issues are considered only at the deliberation stage. As aforementioned, findings of witness interference have significant consequences and go beyond the admissibility question. The delay of the proceedings, which would be caused by the admission of these lengthy statements as both the Defence and the Chamber require more time in dealing with these allegations, cannot be undone if the Chamber finds at a later stage that, on balance the undue

¹²⁶ Impugned Decision, paras. 60, 65, 81, 111, 128.

¹²⁷ See e.g. ICC-01/09-01/11-1938-Conf-Corr, para. 111.

delay was weightier than factors favoring admission.

110. The Chamber is particularly motivated by its discretion pursuant to Article 69(3) of the Statute to take into account all evidence it considers necessary for the determination of the truth.¹²⁸ Whilst this is an important principle, it should not override all other considerations. The Chamber's discretion in its admissibility assessments under Rule 68(2)(d) is considerably more limited than the Chamber's discretion in other admissibility assessments, applying the general admissibility scheme – that is, a determination whether there are sufficient *indicia* of reliability, relevance and probative value and the probative value is not outweighed by any prejudice against the accused.¹²⁹ Rule 68(2)(d) requires specifically that the Chamber give due consideration to the interests of justice. In order to have any meaning at all, this term should include more than undue prejudice, as the latter already forms part of the general admissibility scheme.
111. Also, whilst the determination of the truth is in principle a proper motivation for the Chamber to admit evidence, this can similarly be a reason not to admit it. For instance, in situations where the reliability of evidence is significantly undermined, admission thereof will not assist, but only frustrate the objective of determining the truth. This is true, in particular, when it concerns large quantities of paper evidence whose reliability and probative value is rather questionable.
112. As one scholar has pointed out, “far from furthering the search for truth through free proof, they actually frustrate their objective by making trials longer, more complex, and less efficient, and by tending to bury the truly important evidence in the midst of an enormous accumulation of evidential debris.”¹³⁰ An additional reason he cites to introduce a more vigorous admissibility test is the high risk of

¹²⁸ Impugned Decision, paras. 60, 81, 111, 128.

¹²⁹ *Prosecutor v. Lubanga*, Decision on the admissibility of four documents, June 13, 2008, ICC-01/04-01/06-1399, para 27-32.

¹³⁰ See Murphy, ‘Excluding justice or facilitating justice? International Criminal Law would benefit from rules of evidence’, 12 Int'l J. Evidence & Proof 2008. See also pages 25-27, where he cites Sir James Fitzjames Stephen who says, inter alia: ‘No judge can possibly be expected, by the mere light of nature, to know how to set limits to the inquiries in which he is engaged, yet if he does not, an incalculable waste of time and energy, and a great weakening of the authority of his court, is sure to follow.’

document fabrication in ethnically divided war areas.¹³¹ This is indeed an issue in this case.

113. The Defence agrees with the Concurring Judge's Opinion that the interests of justice "command a fair consideration of the interests of the accused. It requires an appropriate balancing test".¹³² The Concurring Judge recognizes the importance to "remain fully conscious of the interests of the accused" at all times "in the exercise of the article 69(3) power".¹³³
114. The Defence submits that the Chamber did not remain fully conscious of the interests of the accused. Specifically, the Chamber did not give due consideration to the fact that the statements are unsworn, taken by an interested party, not video-taped in order for the Chamber to assess the prevalent conditions during the interview, that one of them did not attend at all ([REDACTED]), and that many of the allegations are uncorroborated and go to the heart of the case.
115. The Defence maintains that, had the Chamber properly considered these factors in determining whether admission of the prior statements is in the interests of justice, it would have reached the only reasonable conclusion that the admission of none of the statements meets the interests of justice prong under Rule 68(2)(d)(i).
116. Indeed, as previously argued, the Defence submits that the Chamber already struck the correct balance by admitting the bulk of the statements in question, for impeachment purposes.¹³⁴ Because of that, the Chamber is aware of all relevant information, which it can take into account in their witness credibility assessments. Accordingly, exclusion of the statements as evidence for the truth of their contents does not compromise their mandate to ascertain the truth. Rather, it assists this mandate because it ensures that the Chamber is not burdened with volumes of unreliable material causing unnecessary delays and frustrating the streamlining of the evidence.

¹³¹ Murphy, 'Excluding justice or facilitating justice?' 2, 16-21, 30.

¹³² ICC-01/09-01/11-1938-Conf-Anx, para. 45.

¹³³ ICC-01/09-01/11-1938-Conf-Anx, para. 46.

¹³⁴ ICC-01/09-01/11-1911-Conf-Corr, para. 143.

117. The unfairness of admission of the prior inconsistent statements is significant as they contain allegations which go to the very heart of the case, including organizational policy, without which it is difficult to conceive of a case against Mr. Sang. None of the allegations against Mr. Sang in these statements are corroborated, neither “by each other, by *viva voce* testimony, nor by independent contemporaneous material, such as copies of radio broadcasts, or newspaper clips”.¹³⁵
118. The Chamber failed to appreciate these observations made earlier, as it has not given due consideration to fair trial principles in assessing the interests of justice prong. This constitutes an error warranting the Appeals Chamber’s intervention because it has materially affected the Impugned Decision. Indeed, had the Chamber applied the proper standard, taking full account of the rights of the accused, it would have reached the only reasonable conclusion that the admission of these statements violates the interests of justice prong under Rule 68(2)(d)(i).
119. In this regard, the Defence can only reiterate its previous submission that “allowing the admission of the prior statements would be tantamount to having the core allegations against Mr Sang come from uncorroborated allegations on paper, where the makers of the statements have later denied the allegations under oath. Accordingly, it would be a grave unfairness and injustice if the prior statements were admitted for the truth of their contents under the amended Rule 68”.¹³⁶

¹³⁵ ICC-01/09-01/11-1911-Conf-Corr, para. 143.

¹³⁶ Ibid, para. 4.

V. RELIEF REQUESTED

120. In conclusion, the Defence for Mr Joshua arap Sang respectfully requests the Appeals Chamber to reverse the finding of the Trial Chamber and to determine that the statements of the witnesses are not admissible pursuant to amended Rule 68.

Respectfully submitted,



Joseph Kipchumba Kigen-Katwa
On behalf of Joshua arap Sang
Dated this 13th day of October 2015
In Nairobi, Kenya

Word count: 15,333