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No.: **ICC-01/09-01/11**
Date: **3 November 2015**

THE APPEALS CHAMBER

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

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF

THE PROSECUTOR V. WILLIAM SAMOEI RUTO AND JOSHUA ARAP SANG

Public with Public Annex

Public Redacted Version of "Prosecution's Consolidated Response to the Appeals of Mr Ruto and Mr Sang against the 'Decision on Prosecution Request for Admission of Prior Recorded Testimony'", 26 October 2015, ICC-01/09-01/11-1994-Conf

Source: **Office of the Prosecutor**

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

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Introduction

1. In its "Decision on Prosecution Request for Admission of Prior Recorded Testimony," Trial Chamber V(A) admitted into evidence the prior recorded testimony of four witnesses ([REDACTED], [REDACTED], [REDACTED] and [REDACTED]) who were improperly influenced by a systematic attempt to hamper the conduct of this trial, and one witness ([REDACTED]) who could no longer be traced.[1] This was consistent with the content and spirit of the amendments to rule 68 of the Rules of Procedure and Evidence adopted by the Assembly of State Parties in 2013, did not offend article 51(4) of the Rome Statute, and was not unfairly prejudicial to the Accused.

2. Counsel for Messrs Ruto and Sang (the "Appellants") have failed to show that the Chamber erred in law or in fact, or abused its discretion, or that the Decision was materially affected by any such error.[2] Their appeals on the seven issues certified by the Trial Chamber should be dismissed.[3]

Confidentiality

3. Consistent with regulation 23*bis*(2) of the Regulations of the Court, this document is filed confidentially because it responds to submissions made confidentially. A public redacted version will be filed shortly.

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[1] Hereinafter, the "Admitted Evidence" and the "Compromised Witnesses".
[2] *See Lubanga* AJ, paras. 18-21. For long-form citations of all references, *see* Annex.
[3] *See* Ruto Appeal; Sang Appeal.

Submissions

I. Applying amended rule 68 does not offend articles 24(2) or 51(4) (Mr Ruto's First Ground; Mr Sang's First Ground)

4. The Decision, applying rule 68 (as amended in 2013, after the opening of proceedings in this trial), is consistent with the protections of both articles 24(2) and 51(4) of the Statute.

I. 1. Article 24(2) applies only to substantive law, and is inapplicable

5. The Chamber correctly concluded that article 24(2) pertains to substantive law rather than procedure, and therefore that it did not prevent use of the amended rule 68.[4] The Appellants' contrary argument is unsupported, lacking merit.[5] Indeed, the Chamber properly interpreted the relevant provisions of the Statute in accordance with their ordinary terms, read in light of their context and the object and purpose of the Statute. It correctly considered that if article 24(2) governed all amendments to the Rules, article 51(4) would be redundant.[6] Moreover, the correctness of the Chamber's interpretation is established not only by those factors expressly analysed in the Decision, but also by additional factors, presented in the following paragraphs.

I. 1. i. The ordinary terms of article 24, read in context, confirm that it governs substantive law only

6. It is well established that the provisions of the Statute and Rules should be interpreted according to the principles of the *Vienna Convention*.[7] This requires consideration of the ordinary terms of a provision, read in context and consistent with the object and purpose of the Statute and Rules as a whole. Relevant context includes factors such as the structure of provisions and sub-provisions in relation to

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[4] Decision, para. 22.
[5] *Contra* Ruto Appeal, paras. 8-22; Sang Appeal, paras. 28-37.
[6] Decision, para. 22.
[7] *See e.g.* Summons AD, para. 105.

one another, including organisation into particular parts of the document as a whole.[8]

7. The Chamber applied exactly these principles to conclude that article 24(2) regulates substantive law only.[9]

8. First, article 24(2) should be read in the context of article 24(1). Pursuant to article 24(1), "no person shall be criminally responsible under this Statute for *conduct* prior to the entry into force of the Statute" (emphasis added). This sub-article clearly prohibits retroactive criminal responsibility for *conduct*, which concerns substantive law in the form of crimes and modes of liability under the Statute. Accordingly, article 24(2), which addresses the possibility of "the law" changing, must be understood in context to refer to the same law as article 24(1): again, to substantive law.

9. Second, article 24(2) should be read in the context of the part of the Statute in which it is located—namely, Part 3, governing "General Principles of Criminal Law". This part deals only with substantive law, namely: the principle of legality (article 22); individual and superior responsibility (articles 25, 28); the exclusion of jurisdiction over persons under 18 years of age (article 26); the irrelevancy of official capacity (article 27); the non-applicability of statutes of limitation for any crime within the Court's jurisdiction (article 29); the mental element (article 30), and grounds for excluding criminal responsibility (articles 31, 32, 33). None of these provisions deals with 'procedural' or 'evidentiary' law.

10. Third, article 24(2) should be read in the context of other provisions in the Statute. In particular, the Chamber correctly concluded that interpreting article 24(2)

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[8] *See e.g. DRC* AD, para. 33.
[9] Decision, para. 22.

to govern both substantive and procedural law would render article 51(4) almost entirely redundant.[10] Although not stated explicitly in the Decision, the Chamber's analysis is further confirmed by the clear function of article 51 (titled "Rules of Procedure and Evidence") to regulate exclusively matters pertaining to the Rules. Thus, article 51(1) addresses the entry into force of the Rules; article 51(2) addresses proposals for amendments to the Rules; article 51(3) addresses provisional rules; article 51(4) addresses the consequences of amendments to the Rules; and article 51(5) addresses conflicts between the Rules and the Statute. In this context, reading article 24(2) to govern matters beyond substantive law, thus overlapping with article 51(4), would be incorrect.

I. 1. ii. The drafting history of article 24(2) confirms that it governs substantive law only

11. Consistent with article 32 of the *Vienna Convention*, the drafting history of article 24(2) further confirms that it is concerned exclusively with substantive law. Thus, proposals for the text which would ultimately become article 24(2)—including the 1996 Code of Crimes and the text proposed by the Preparatory Committee, and essentially adopted at the Rome Conference in that form—were consistently and solely linked to preventing retroactive criminal punishment.[11]

12. Academic comment arguing for a "broader role" for article 24, going beyond substantive law, misinterprets the Statute, given that it is inconsistent both with the context of article 24(2) and its drafting history.[12]

I. 1. iii. The Appellants' arguments for a broader reading of article 24(2) are unpersuasive

13. The Appellants' efforts to show that article 24(2) should be interpreted more broadly are strained and tenuous, or irrelevant.

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[10] Decision, para. 22.
[11] Schabas, pp. 417-418.
[12] *Contra* Ruto Appeal, paras. 9, 13, fns. 14, 21; Sang Appeal, para. 31, fn. 36.

a) Articles 24(2) and 51(4) deal with discrete matters, and are not mutually reinforcing

14. The Appellants' claim that articles 24(2) and 51(4) are compatible if article 24(2) is read broadly is contradictory and unsustainable.[13]

15. To the extent that the Appellants suggest that articles 24(2) and 51(4) are merely overlapping or mutually reinforcing, it ignores the material differences between the two provisions. Indeed, the Sang Defence itself subsequently seems to concede that they serve different purposes.[14] Not only are the content and wording of the two provisions different, as shown above, but the provisions also establish different standards for their application. Thus, whereas article 24(2) requires the use of "the law more favourable" to the person "being investigated, prosecuted, or convicted", article 51(4) prohibits retroactive application of amended or provisional rules "to the detriment" of the person. If article 51(4) had been intended to "repeat" or "reinforce" article 24(2), their substantive content and language would have been similar. They are not.[15]

16. The examples cited by the Ruto Defence to show there is no redundancy between articles 24(2) and 51(4) are inapposite.[16] For instance, the interaction between article 22(1) (the principle of legality) and article 24(2) (the principle of non-retroactivity) is completely different from that between articles 24(2) and 51(4). Both articles 22(1) and 24(2) are located in Part 3 of the Statute. They use exactly the same language—namely "*conduct*"—which refers to substantive law. Articles 22(1) and

[13] *Contra* Ruto Appeal, paras. 18-22; Sang Appeal, paras. 33-34.
[14] Sang Appeal, paras. 34-35. It advances a strained and convoluted argument that one is general, and the other is specific, and thus there is no redundancy. *See below* para. 17.
[15] Supplementing the *Vienna Convention* approach are the canons of statutory interpretation used by some domestic jurisdictions. For example, an ambiguous provision may be clarified by recourse to other parts of the same legislation which use the same terminology: *see e.g.* USA, *United Savings Association*, 371. However, where legislation includes particular terms in one provision, but then omits those terms or uses substantially different language in another provision addressing a related matter, it must be presumed that the two provisions address different matters: *see e.g.* USA, *Bailey*, 146; *Keen*, 208.
[16] *Contra* Ruto Appeal, para. 19.

24(2) are thus naturally complementary. Their interaction is entirely unlike that between articles 24(2) and 51(4), whose ordinary terms and context are materially different.

17. The Sang Defence's alternative argument that articles 24(2) and 51(4) are both applicable yet serve different purposes, and have different scopes, is hard to follow, and unsupported either by the provisions' ordinary terms or their context.[17] Even accepting such a distinction *arguendo*, however, it still would not show that article 24(2) regulates both substantive and procedural law, and/or that such a broad interpretation would not render article 51(4) redundant.

b) The location of articles 24(2) and 51(4) in different parts of the Statute undermines, rather than supports, the appeal

18. The Ruto Defence's assertion that the Chamber failed to consider that articles 24(2) and 51(4) are in different parts of the Statute does not show an error in the Decision.[18] Rather, as stated above, this fact supports the Chamber's conclusion that article 24(2) applies only to substantive law. Whereas article 24(2) is located in the part of the Statute addressing "general principles,"[19] article 51(4) is located in the part of the Statute addressing the administration of the Court. Consistent with the need to interpret provisions in context, the location of even apparently similar provisions in different parts of an instrument suggests that they serve different roles.

19. Nor does the Ruto Defence elaborate how its claim—that the Chamber should have assessed further the significance, if any, of the location of the provisions in the Statute—would advance its claims that article 51(4) reinforces article 24(2), and thus that there is no redundancy.

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[17] *Contra* Sang Appeal, para. 34 (apparently suggesting that article 24(2) specifically addresses a given case prior to a final judgment, while article 51(4) does not include a specific link).
[18] *Contra* Ruto Appeal, para. 20.
[19] *See further above* para. 9.

c) The Chamber did not find that article 24(2) applied to some rules but not others

20. The Sang Defence's claim that the Chamber erred by envisaging that article 24(2) applied to some of the Rules, but not to others, is based on a faulty premise.[20] The Decision did not state that article 24(2) could be applied to amendments to some of the Rules, but not to amendments to rule 68. Rather, the Chamber merely observed in general terms that the *principle* of non-retroactivity more generally applies to substantive law than procedural law—a conclusion widely accepted in international law and domestic practices.[21] The Decision thus states that:

> [*t*]*he principle of non-retroactivity* is more applicable to matters of substantive law than to those of procedure. Although this does not mean that *this principle* does not generally apply to the Rules, the Chamber does not consider that the amended Rule 68 falls under Article 24(2) of the Statute.[22]

21. In any event, even if the Chamber meant to refer to article 24(2), this does not vitiate its ultimate conclusion that this article was inapplicable to the rule 68 amendments. As further shown below,[23] the rule 68 amendment specifically referred to the application of article 51(4)—a provision which does not impose a blanket ban on retroactive application of an amended rule. Rather, such application must also not be detrimental.[24]

d) The alleged novelty of article 24(2) does not justify a strained interpretation

22. The Ruto Defence's assertion that article 24(2) has no precedent in international human rights law, and therefore must play a unique and novel role, is without

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[20] *Contra* Sang Appeal, paras. 30-31.
[21] *See e.g.* ECtHR, *Scoppola*, para. 110; ICTR, *Nyiramasuhuko* AD, para. 13; England and Wales, *Chandra, per* Alverstone, CJ., and Channell, J., 338-339; Canada, *Dineley, per* Deschamps, J., paras. 10-11.
[22] Decision, para. 22 (emphasis added).
[23] *See below* para. 31.
[24] *See below* paras. 35-37.

merit.[25] To the contrary, as the case law of this Court already shows, the Statute must be interpreted based on the established principles in the *Vienna Convention*.[26] Under these principles, the plain terms of a text govern, and use of supplementary material is subordinate to the "principal rule of interpretation" based on those terms.[27] The alleged "novelty" or "unique role" of a provision does not justify assigning it a meaning beyond its plain terms.

I. 2. Alleged undertakings to the Government of Kenya and the ASP resolution do not show error in the Decision

23. In its arguments on both article 24(2) and article 51(4), addressed subsequently, the Sang Defence asserts that the Chamber erred by concluding that the ASP did not specifically bar the application of the amended rule 68 to this case, and by declining to receive the views of the Government of Kenya on undertakings it allegedly received.[28] However, these claims do not undermine the correctness of the Chamber's conclusion.

24. As the Prosecution has argued in more detail in response to the African Union's Observations,[29] the Sang Defence's allegation that "Senior Officials of the Court" gave an undertaking that amended rule 68 would not be applied to the Kenyan cases[30] is entirely unsupported. The Prosecutor emphatically denies that she, or any member of her office, gave such an undertaking. Even if, *arguendo,* such a person had given such an undertaking, this would not have any legal effect because it would not impact on the interpretation of amended rule 68 or its application to this case. It would also not bind either the Prosecutor or the Court. Accordingly, even if such an

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[25] *Contra* Ruto Appeal, para. 13.
[26] *See above* para. 6.
[27] *See DRC* AD, paras. 33, 40. *See also Lubanga* Disclosure AD, para. 40; Summons AD, para. 105 (where the Statute or Rules address an issue, a Chamber is required first to interpret that text in accordance with the *Vienna Convention*; it is impermissible for any Chamber to rely on other legal bases, such "implied powers" or "customary international law" if the Court's text is clear). Similar principles apply here.
[28] *See* Sang Appeal, paras. 13-27. *See also* Decision, paras. 16-18.
[29] The Prosecution's response to the African Union's Observations is filed simultaneously with this document.
[30] Sang Appeal, paras. 17-18.

undertaking existed as a matter of fact, it would be irrelevant as a matter of law and therefore unenforceable.[31]

25. In any event, the Chamber's approach was based on its interpretation of amended rule 68, together with article 51(4).[32] These texts only prohibit retroactive application of an amendment if "detrimental" to the Accused,[33] but do not impose the blanket prohibition of retroactivity suggested by the Appellants, much less any prohibition on the prospective use of the rule in existing cases. This approach was correct and consistent with established principles of interpretation.[34]

26. Indeed, resort to the drafting history of a text is a supplementary means of interpretation, to be used when a construction based on its ordinary terms in context, and having regard to the object and purpose of the instrument, leaves its meaning either ambiguous or obscure, or leads to a manifestly absurd or unreasonable result.[35] In this case, the plain terms of rule 68 and article 51(4) contain no such ambiguity, nor lead to any absurd or unreasonable result.

27. Accordingly, the Chamber was correct not to consider any alleged undertakings to the Government of Kenya. As the following paragraphs explain, such undertakings would, in any event, fall outside the scope of the drafting history to the amended rule 68, and so cannot be a valid supplementary means of interpretation.

I. 2. i. Alleged undertakings to the Government of Kenya are irrelevant in determining legislative intent and do not form part of the drafting history

28. The Sang Defence claims that the Chamber erred by not taking into account alleged undertakings at the ASP negotiations that the amended rule 68 would not

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[31] *See* Prosecution response to the African Union's Observations, filed simultaneously with this document.
[32] Decision, para. 16.
[33] *See below* paras. 35-37.
[34] *See above* paras. 6, 22.
[35] *See above* fn. 27.

apply to this case.[36] However, even assuming *arguendo* that further resort should be had to the drafting history of amended rule 68 to discern legislative intent, the Sang Defence wrongly construes what constitutes legislative intent, and what material may appropriately be entertained as 'drafting history'.

29. Legislative intent is not the intent of one or more of the States Parties, but the common intention—or the "collective will" [37]—of *all* the Parties. As a starting point, the terms of the treaty, as finally adopted, is the best record of this common intention. Views of individual delegations that are not included in the text are necessarily irrelevant, since they manifestly do not represent the common intention. The need for a common intention follows from the bedrock of *mutual* State consent in forming international obligations. As underscored by Judge Schwebel at the International Court of Justice:

> The intention of the parties, in law, refers to the common intention of both parties. It does not refer to the singular intention of each party which is unshared by the other. To speak of 'the intention of the parties' as meaning diverse intentions of each party would be oxymoronic.[38]

30. Accordingly, great caution must be exercised in seeking to interpret a treaty with reference to any material which was not manifestly available to all interested States during negotiations. Any other approach would vitiate the consent of those States who then ratified the treaty as a result of that negotiation. Thus, although previous drafts of treaty provisions may constitute appropriate drafting history in order to help ascertain the meaning of terms in the treaty, an alleged (and unrecorded) bilateral undertaking by a Court official to one member of the ASP is not part of the rule's drafting history.[39] An overly broad approach to material which

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[36] Sang Appeal, para. 17.
[37] Decision, para. 18.
[38] ICJ, *Maritime Delimitations*, *per* Judge Schwebel, dissenting, p. 27.
[39] *See generally* Aust, pp. 217-219.

may be considered as part of a treaty's drafting history not only risks 'undoing' the "common intention" as reflected in the final text, and impermissibly reopens and perpetuates the original negotiations in a new forum. Such a view would also be inconsistent with the Court's independent role in interpreting the law as finally adopted by the ASP.

I. 2. ii. The preamble to the ASP Resolution supports rather than contradicts the Decision

31. Applying these principles, the drafting history of amended rule 68 is to be found primarily in two documents: the WGLL Report and the ASP Resolution. Although the Sang Defence invokes the ASP Resolution in support of its claims,[40] nothing in the Resolution shows any common intention among the States Parties to impose an unqualified prohibition of retroactivity on amended rule 68, much less generally excluding application to pending trials, as the Chamber correctly found.[41] To the contrary, the ASP Resolution reaffirms the terms of article 51(4) that the retroactive application of the rule 68 amendment would only be prohibited *if detrimental* to the Accused. Its preamble thus stated:

> 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 […].[42]

I. 2. iii. The principle of "good faith" does not assist the Sang Defence

32. The Sang Defence's reliance on the principle of good faith to claim that the 'intention' of some States Parties should prevail over a treaty's literal interpretation

[40] Sang Appeal, paras. 14-16.
[41] Decision, para. 17.
[42] ASP Resolution, para. 2 (internal citations omitted, emphasis added).

is misplaced and unsupported.[43] As previously observed, the common intention or "collective will" of the parties is best reflected in the text of the treaty as ultimately agreed. There is no violation of good faith when, as here, the Court gives effect to that common intention as expressed in the text of the instrument.[44]

33. The Sang Defence selectively and wrongly construes the Chamber's *Summons Decision* as supporting its claim that the parties' intention may override the plain text of a provision.[45] To the contrary, that decision assigned a primary role to the plain terms of a treaty, and allowed for resort to the drafting history only in exceptional circumstances, consistent with the established approach of this Court.[46]

34. Finally, the Sang's Defence's argument that the Trial Chamber erred by refusing to hear the Government of Kenya on the issue of the alleged undertaking is misplaced.[47] In its *amicus curiae* application, the Government of Kenya stated only that it wished to make submissions on "some forms of understanding [that] were reached by the Assembly on the implication of the amendment of Rule 68 on the on-going cases".[48] It did not raise the allegation that a Court official gave any undertaking that amended rule 68 would not apply to ongoing trials.

I. 3. Article 51(4) applies to amended rule 68, but does not prohibit its use in this case

35. The Chamber correctly found that article 51(4) applied to amended rule 68 but that it "[w]ould only bar the application of the amended Rule 68 if applied

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[43] *Contra* Sang Appeal, para. 23-26.
[44] *See above* paras. 6, 22, 25-26.
[45] *Contra* Sang Appeal, paras. 25-27.
[46] *See* Summons *TD*, paras. 141-145, *especially* para. 141 (noting that it did not "[i]n particular consider that this interpretation of the applicable provisions of the Rome Statute leaves their meaning either ambiguous or obscure, nor has it led to manifestly absurd or unreasonable results" and that "it is in those circumstances that the [*Vienna Convention*] permits resort to *travaux*"). The Chamber also considered the provisions of the treaty the "starting point for consideration" in identifying the intentions of the States Parties: paras. 94-100, 102-103. *See further above* fn. 27.
[47] Sang Appeal, para. 19.
[48] Kenya Application, para. 4.

'retroactively to the detriment of the person who is being […] prosecuted'."[49] In doing so, it followed article 51(4)'s wording that:

> [a]mendments to the Rules of Procedure and Evidence […] shall not be applied *retroactively to the detriment* of the person who is being investigated or prosecuted […] (emphasis added).

36. It is clear from the ordinary meaning of these terms that the application of amended rule 68 is not prohibited simply because the amendment was enacted while the Accused were being investigated or prosecuted. Rather, it would only be prohibited if it applied both retroactively *and* to the detriment of the person. These two conditions are cumulative. It follows that, even if the application is retroactive, it is not prohibited as long as it is not detrimental.

37. Although the Ruto Defence rightly concedes that the Chamber's reasoning to this effect is correct,[50] the Appellants challenge the Chamber's conclusions that neither of these two conditions was established.[51] These arguments are addressed in turn.

I. 3. i. Amended rule 68 was not applied retroactively

38. The Appellants fail to establish that the Chamber erred in concluding that amended rule 68 was not applied retroactively.

a) The Chamber correctly interpreted and applied the concept of "retroactivity"

39. The Chamber correctly found that amended rule 68 was not applied retroactively in this case because the request to admit the Compromised Witnesses' evidence was not "seeking to alter anything which the Defence has previously been

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[49] Decision, para. 19. *See also* paras. 23-27.
[50] Ruto Appeal paras. 23, 34.
[51] Ruto Appeal, paras. 23-42; Sang Appeal, paras. 38-52.

granted or been entitled to as a matter of right […]."[52] The Chamber distinguished the present request from:

> the situation where, for example, the Prosecution attempts to apply an amended admissibility provision to exclude evidence previously admitted into the record. Here, the Prosecution is seeking to apply the provision prospectively to introduce items into evidence for the truth of their contents.[53]

40. Contrary to the Appellants' claim that the Decision erroneously eroded an "accrued" right of the Accused, the Chamber was correct, both in its approach and in its appreciation of the legal circumstances.[54] As with the interpretation of article 24(2), the correctness of the Chamber's analysis is demonstrated not only by its own persuasive reasoning, but also by other factors.

41. The notion that "retroactivity" arises only if the application alters a prior existing right, or if the application is dependent on past occurrences or events, is widely supported. Thus, a "retroactive" act extends "in scope or effect to matters or actions which have occurred in the past".[55] Retroactive laws "make present rights and duties depend on past events."[56] The Sang Defence is not assisted in showing the amended rule 68 to be retroactive by reference to *Bemba* because, although the Trial Chamber in that case declined to apply amended rule 68, its reasoning is neither binding for the purpose of this appeal nor, due to its extreme brevity, persuasive.[57]

42. In this case, applying amended rule 68 did not depend on past events or occurrences, nor did it abrogate any pre-existing rights or duties.[58] Indeed, the Appellants effectively seek to expand the ban on *in malam partem* retroactive

[52] Decision, para. 23.
[53] Decision, para. 23.
[54] *Contra* Ruto Appeal, para. 30; Sang Appeal, paras. 38-42.
[55] *See BLD*, "retroactive, adj."; *OED*, "retroactive, adj.", 2.a.
[56] *See* Slawson, p. 217.
[57] *Contra* Sang Appeal, para. 41, fn. 42. *See Bemba* Admission TD, fns. 88, 111.
[58] *See also* Prosecution Request, paras. 33-39.

application to cover any application of the rule to any case which was under investigation or prosecution at the time of the amendment.

43. The Appellants' claim that they had accrued a right not to be tried on the basis of the Admitted Evidence, in the form and circumstances as applicable, depends principally on the faulty premise that such evidence could not have been admitted before the amendment to the Rules.[59]

44. Yet to the contrary, although amended rule 68 was intended among other purposes to expedite proceedings of this kind,[60] it did not make admissible material which was formerly inadmissible, nor did it create the *only* avenue for the admission of material now covered by sub-rule 68(2)(b), (c) and (d). Thus, even before the amendment, prior recorded testimony was admissible under other provisions of the Statute or the Rules establishing exceptions to the general rule of orality, such as articles 64(9)(a) and 69(2), (3) and (4), and rule 63(2). Most importantly, article 69 has always—and in very plain terms—conferred wide judicial discretion in the admission of evidence. Indeed, such reasoning is also compatible with the concurring reasoning of Judge Eboe-Osuji, who preferred to receive the Admitted Evidence under article 69(3).[61] Nor does anything in the majority's reasoning preclude the possibility that they too might have admitted the evidence under more general provisions, had amended rule 68 not been available.

45. The Sang Defence argues that the un-amended form of rule 68, as the *lex specialis*, necessarily prevented the admission of prior recorded testimony under the general provisions.[62] This is incorrect. Although the *lex generalis/lex specialis* doctrine may arguably hinder the admission (under the *lex generalis*) of material within the

[59] *See* Sang Appeal, paras. 38-42; Ruto Appeal, para. 30.
[60] *See* WGLL Report, Annex II.A, para. 43.
[61] *See e.g.* Concurring Opinion, para. 31.
[62] Sang Appeal, para. 40.

scope of the *lex specialis*, it does not necessarily prohibit the admission of *all* other material not meeting such requirements. Hence, while the un-amended rule 68—the *lex specialis*—governed materials falling within its scope, it did not prevent the admission of other documented testimony falling outside its scope under other provisions of the Statute or the Rules forming the *lex generalis*. Put differently, the un-amended rule 68 permitted admission of prior recorded testimony in specified circumstances. It did not, however, exclude the admission of such evidence under more general rules in circumstances which were not governed by the un-amended rule. Given the existence of articles 64(9)(a) and 69(2),(3) and (4), for example, it cannot be said that the un-amended rule 68 was ever the only gateway to admit all "documentary" materials.

46. These principles are especially clear in the present circumstances, when most, if not all, of the Compromised Witnesses were subject to witness interference.[63] The un-amended rule 68 was never intended to exclude the admission of relevant evidence in such circumstances. This was manifestly a matter governed under the Court's general powers under the Statute for the admission of evidence.[64]

47. These principles are well established in the case law. As explained by the ICTY Appeals Chamber in *Milošević*, ICTY rule 92*bis* does not exclude the alternative admission of "material not governed by Rule 92*bis*", and such material may be distinguished by particular factual characteristics.[65] Likewise, at this Court, the *Lubanga* Trial Chamber reasoned similarly that it could admit documents and written transcripts under article 69(2), based on tests of "relevance, probative value and

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[63] *See above* para. 1. *Contra* Ruto Appeal, para. 30.
[64] *See further below* para. 49.
[65] ICTY, *S.Milošević* AD, paras. 9-10. *See also e.g. Haradinaj* Oral Decision, pp. 457-462 (following the approach of the *S.Milošević* AD as part of its reasoning to admit a prior statement for the truth of its contents on the basis that "[n]o parts of Rule 92, indeed no other rule, anticipates such a situation as now arises where a witness called to give *viva voce* evidence and having made the solemn declaration declares himself unwilling or unable to answer pertinent questions put by the party calling him").

fairness", when it had concluded that such material did not fall within the scope of the un-amended rule 68.[66]

48. Supporting this approach, chambers of this Court, both before and after the amendment to rule 68, have confirmed that there are no 'automatic' grounds to exclude evidence.[67] This approach is correct, since otherwise chambers would be impeded in their ability to receive all relevant evidence in accordance with the Statute and Rules, undermining their duty to determine the truth.[68] Nor is the Ruto Defence assisted by reference to this Trial Chamber's approach to "bar table" decisions, which reflects a concern to avoid the "duplicative" use of different procedures, but does not *per se* exclude alternative procedures.[69]

49. Finally, even without the amendment to rule 68, the same showing of witness interference made in the Decision would have allowed, and indeed required, the Chamber to receive the Admitted Evidence as necessary for the determination of the truth, in accordance with article 69(3). The un-amended rule 68 could not have barred this right and duty, especially given the very serious challenge that witness interference poses to any court's administration of justice.

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[66] *Lubanga* Admission TD, paras. 55-58. The Trial Chamber concluded that rule 68(a) "does not apply in these circumstances" and noted that "[n]o attempts has been made at any relevant stage to comply substantively with Rule 68". Notwithstanding its legal analysis, however, the Trial Chamber ultimately declined to admit the relevant material.

[67] *Lubanga* Statements TD, para. 15; *Lubanga* TD, para. 29; Bar Table Decision, para. 13, fn. 24 ("Article 69(2) of the Statute […] which while it explicitly requires that the testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 […] or in the Rules[] also clearly envisages that a variety of other means of introducing evidence may be appropriate, provided that such means are not prejudicial to or inconsistent with the rights of the accused"), 15 ("the general rule on admissibility may be simply stated as follows: all *prima facie* relevant evidence is admissible subject to the Chamber's discretion to exclude relevant evidence by operation of the provisions of the Statute or the Rules or by virtue of general principles of national or international law pursuant to Article 21").

[68] *See* Statute, art. 69(3).

[69] *Contra* Ruto Appeal, para. 30 (citing Bar Table Decision, paras. 85, 86, 88; Further Bar Table Decision, para. 27). *See* Bar Table Decision, para. 86 ("[t]he material is testimonial […] a 'bar table' motion should not be used in a manner which would be *duplicative* of […] [r]ule 68", emphasis added). *See further above* fn. 67.

50. Indeed, even those national jurisdictions which generally emphasise orality, and may tend to exclude hearsay evidence, may nonetheless admit material similar to the Admitted Evidence for the truth of its contents if witnesses fail to testify due to interference, or if they recant their testimony. For example:

- In England and Wales, the *Criminal Justice Act* recognises exceptions to the general rule against hearsay, not only when it is established that a witness does not testify or continue to testify through fear (and that admitting their prior statement is in the interests of justice),[70] but also when a witness is simply established to have made a prior statement inconsistent with their oral testimony.[71] For example, in *Joyce*, the Court of Appeal of England and Wales upheld a conviction based on out-of-court statements tendered for the truth of their contents under this latter provision. The Court observed that, in circumstances when it "strain[ed] credulity" that all three prosecution witnesses had indeed been "initially confused or mistaken in the statements which they made on the day" in question, "it would have been an affront to the administration of justice" not to let their original statements be considered on their merits.[72]

- Similarly, in Canada, the Supreme Court has held that prior inconsistent statements may be admitted for the truth of their contents if a Court determines that they are reliable and necessary, and ordered a retrial to allow consideration of such material in a case where witnesses had recanted their previously recorded statement made to the police[73]

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[70] England and Wales, *Criminal Justice Act*, s. 116(2)-(4). *See also* Keane, pp. 303-309. *See further below* fns. 277, 418 (concerning the standards and safeguards applied under the Act, in the context of its use in jury trials).
[71] England and Wales, *Criminal Justice Act*, s. 119(1). *See also* Keane, pp. 316-317.
[72] England and Wales, *Joyce*, paras. 6, 26-27.
[73] *See generally* Canada, *R v. B (K.G.)*.

- In South Africa, the Kwazulu-Natal High Court, hearing an appeal against conviction in *Mathonsi*, held that it is permissible to make substantive use of previous statements of a hostile witness, provided sufficient guarantees of reliability are present.[74]

b) The Appellants show no error in the Chamber's approach to "retroactivity"

51. The Appellants' further challenges to the Chamber's approach to "retroactivity" are likewise unpersuasive.

52. The Ruto Defence generally argues that the Chamber erred by ignoring "the rules of statutory interpretation which apply when there is a change in the law during the course of on-going proceedings" and maintains that there is a "presumption […] that a case will proceed on the basis of the law which applied when the case started".[75] Yet the mere assertion of such a presumption, whatever its origin, cannot succeed when it is contradicted by the plain text of the Statute and the Rules of this Court. First, as previously noted, nothing in article 51(4) bars application of a new provision to subsequent stages of an ongoing case. Second, as the Ruto Defence indeed concedes, the ordinary terms of article 51(4) suggest that retroactivity is permitted, provided that no detriment results.[76] In such circumstances, a Chamber has no authority to prefer other sources of law, such as "implied powers" or "customary international criminal procedure".[77] For the same reasons, broad reference to a general "rule" against *ex post facto* law cannot assist the Ruto Defence.[78]

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[74] *See generally* South Africa, *Mathonsi*.
[75] Ruto Appeal, para. 25.
[76] *See above* paras. 36-37.
[77] *See* Summons AD, para. 105.
[78] *Contra* Ruto Appeal, para. 28.

53. The Appellants also argue that the Chamber erred by failing to take account of the fact that the material circumstances of the Admitted Evidence are not new and pre-date the amendment to rule 68.[79] Even assuming the correctness of this assertion, *arguendo*, such facts do not inhibit the application of the amended rule. As the Decision notes, the plain text of the amendment "does not contain any express time limitations as to when it would apply […]."[80] In other words, it is irrelevant that the interference may have occurred, or the prior recorded testimony was taken, before the rule 68 amendments.

54. To the contrary, the history of the Prosecution's request to admit the prior recorded testimony of the Compromised Witnesses makes reliance on amended rule 68 more compelling, not less. The Appellants have been on notice since at least 9 January 2013, when the prior recorded testimony was disclosed to them, that the Prosecution intended to rely on that testimony.[81] The Appellants have thus had ample time to investigate the evidence and to collect any rebuttal evidence. Moreover, the Prosecution specifically notified the Appellants that it intended to seek the admission of these materials for the truth of their contents under amended rule 68.

I. 3. ii. Amended rule 68 was not applied to the detriment of the persons being prosecuted

55. The Appellants fail to show that the Chamber erred in concluding that amended rule 68 was not applied to their detriment, in the meaning of article 51(4).

56. Even if the admission of the material "[w]as considered to be a retroactive application of the amended Rule 68," the Chamber correctly determined that it was not "'to the detriment of the person being […] prosecuted' within the meaning of

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[79] Ruto Appeal, para. 29. *See also* Sang Appeal, para. 39.
[80] Decision, para. 17.
[81] *See also* Prosecution Request, para. 30.

Article 51(4) of the Statute."[82] It correctly reasoned, *inter alia*, that "[t]he application of Rule 68 cannot be considered detrimental to the accused simply because it allows the Prosecution to request the admission of incriminatory evidence".[83] The Chamber further correctly considered that amended rule 68 was not inherently detrimental, since it can be equally used by all parties.[84] The Chamber's approach to "detriment" under article 51(4) was further balanced by the case-specific analysis it conducted as part of its "interests of justice" assessment under amended rule 68 itself. In this context, the Chamber concluded that there was no undue detriment to the fair trial rights of the Accused.[85]

57. As further explained below, the Chamber's approach to "detriment" in article 51(4) is justified by the notions of equal protection and fairness. It is supported not only by the approach of other tribunals in construing similar provisions, but also by other factors, such as other safeguards contained in the Statute and Rules, including in the amended rule itself.

a) The Chamber correctly considered any detriment arising from amended rule 68 in the abstract

58. The Appellants challenge the Chamber's analysis of amended rule 68 in the abstract and its finding that the amended rule was not inherently detrimental. However, they fail to show any error.[86] To the contrary, the Chamber correctly considered that, in principle, the amended rule should be read on its face, and that it is neutral in its application and can be equally applied by all parties.[87] This is self-evidently true. Furthermore, the Chamber's view that the interests of certainty

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[82] Decision, para. 24.
[83] Decision, para. 24.
[84] Decision, paras. 24-26.
[85] Decision, para. 27. *See also* paras. 56-60 ([REDACTED]); 80-81 ([REDACTED]); 110-111 ([REDACTED]); 127-128 ([REDACTED]).
[86] *Contra* Ruto Appeal, paras. 31-33; Sang Appeal, paras. 43-45.
[87] *See* Decision, paras. 24-25. *Contra* Ruto Appeal, para. 32; Sang Appeal, paras. 43-45.

required it to undertake an abstract assessment of article 51(4) is also correct.[88] The alternative approach would undermine equal protection before the Court and the principle of fairness. The questions whether an amended rule may be used to admit evidence under article 51(4), and whether a Party can satisfy the criteria *under that rule* for admitting evidence (as well as the safeguards under article 69(4)), are distinct. The Ruto Defence's subjective view that uncertainty is unlikely to arise does not make this analysis incorrect.[89]

59. The Chamber's analysis is supported by the approach of other tribunals,[90] as well as additional factors before the Chamber.

60. The Chamber correctly found that the ICTY's *Šešelj* decision supported its conclusion that there is no prejudice where there is equality between the parties in their ability to use the amended rule.[91] The Ruto Defence incorrectly asserts that the decision is distinguishable. Like the present case, the amended rule in *Šešelj* was adopted after the completion of investigations on the basis of un-amended rules of procedure and evidence.[92] Furthermore, as with amended rule 68, the relevant amendment in *Šešelj* was silent as to the time at which it would become applicable. Most importantly, *Šešelj* supports the view that the amended ICTY rule, like the ICC's amended rule 68, could be applied retroactively provided that this was not to the prejudice or detriment of the Accused. To the extent that the Ruto Defence claims that the *Šešelj* Trial Chamber's conclusion that the Accused had sustained no material prejudice resulted from "the advance notice" provided by the Prosecution,[93] it only further establishes the decision as relevant authority for this case. The Appellants

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[88] *See* Decision, para. 24 (doing otherwise "would create uncertainty and double-standards across procedural amendments, potentially requiring oscillation between amended and unamended rules each time an application was filed").
[89] *Contra* Ruto Appeal, para. 31.
[90] *Contra* Ruto Appeal para. 33.
[91] Decision, para. 26 (citing ICTY, *Šešelj* TD, paras. 33-37).
[92] *Contra* Ruto Appeal, para. 33.
[93] Ruto Appeal, para. 33.

have been on notice since at least 9 January 2013, when the Admitted Evidence was disclosed, that the Prosecution intended to rely on it.[94]

61. The correctness of the Chamber's analysis is further supported by the other circumstances of this case.[95] In particular, amended rule 68, and the Statute and Rules more broadly, contain several procedural safeguards which further limit any detriment which could flow from the amended rule, in the abstract but indeed also more concretely. Not only must multiple conditions in amended rule 68(2)(c) or (d) be satisfied to justify admission of evidence under this provision, the ordinary safeguards for the admission of evidence apply, including but not limited to article 69(4) of the Statute.[96]

62. Moreover, as argued above,[97] the Admitted Evidence was no more or less admissible in principle than it was before rule 68 was amended since the Chamber possessed broad discretion under other provisions to admit the same material. This is especially so in circumstances where the material is necessary to address the injustice caused by witness interference.

63. In any event, even if the Chamber did err in concluding that it need only analyse "detriment" under article 51(4) in the abstract, any such error would not materially affect the Decision so as to be a reversible error. This is because the Chamber considered it necessary in any event to consider any potential concrete unfairness to the Appellants within the framework of its "interests of justice"

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[94] *See also above* para. 54.
[95] *See* Prosecution Request, paras. 27-48.
[96] *See further below* paras. 70-71, 76-78, 144.
[97] *See above* paras. 43-46.

analysis under amended rule 68—and did in fact do so.[98] Appellate intervention would thus remain unwarranted.[99]

64. In conducting its interests of justice analysis, the Chamber manifestly considered "detriment" through the lens of fair trial rights, including the right to be tried without undue delay and the Appellants' ability to cross-examine, as well as the Chamber's duty under article 69(3) to receive all evidence necessary for the determination of the truth.[100] As noted above, since the Appellants had been on notice of the Admitted Evidence since at least 9 January 2013, they had ample time to investigate the material and to collect rebuttal evidence, if any.[101] They were also able to cross-examine four of the five Compromised Witnesses, including on the contents of the Admitted Material. Based on these considerations, the Chamber correctly and reasonably concluded that the Appellants' fair trial rights were not prejudiced.

b) The Chamber's assessment of any concrete "detriment" to the Appellants in this case was not erroneous

65. The Ruto Defence's criticism that the Chamber allegedly relegated its assessment of "detriment" to "a discretionary test" is premised on its incorrect view that detriment for the purpose of article 51(4) is not properly considered in the abstract.[102] If it may properly be considered in the abstract,[103] then the issue does not arise.

66. Moreover, there is nothing in the Decision to suggest that the Chamber "relegated 'detriment' to form part of

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[98] Decision, para. 27. *See also* paras. 56-60 ([REDACTED]); 80-81 ([REDACTED]); 110-111 ([REDACTED]); 127-128 ([REDACTED]).
[99] *See Lubanga* AJ, para. 16.
[100] *See e.g.* Decision, para. 60.
[101] *See above* para. 54.
[102] *Contra* Ruto Appeal, para. 34.
[103] *See above* para. 58.

67. a discretionary test."[104] To the contrary, the plain words of the Decision clearly show that the Chamber considered it necessary in this case to carry out a concrete 'detriment' analysis under rule 68:

> However, the Chamber *emphasises that removing a case-by-case assessment from the Article 51(4) assessment does not mean that the Chamber foregoes such an analysis*. The Chamber *will assess* any detriment to the accused in any concrete application of the amended Rule 68 when deciding whether to introduce materials under this provision. In particular such considerations are pertinent in deciding whether it is in the interests of justice to admit the prior recorded testimony under Rule 68(2)(d)(i) of the Rules.[105]

68. The Appellants show no error in this respect.

c) The Chamber correctly construed "detriment" through the lens of a fair trial, rather than considering mere "disadvantage." It applied a correct standard of 'detriment'

69. Even assuming *arguendo* that the Chamber was obliged under article 51(4) to conduct a concrete assessment of "detriment", the analysis undertaken in the Decision within the "interests of justice" framework was sufficient.[106] In this context, the Chamber was correct to consider the notion of "detriment" in the sense of prejudice to the Appellants' right to a fair trial, rather than other forms of "disadvantage" proposed by the Defence.[107] This analysis is supported, *inter alia*, by the plain terms of amended rule 68, its drafting history, and the jurisprudence of this Court and other tribunals.

70. The plain terms of amended rule 68 reflect a specific intention to construe 'detriment' in the sense of prejudice to fair trial rights. It states, significantly, that:

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[104] *Contra* Ruto Appeal, para. 34.
[105] Decision, para. 27 (emphasis added).
[106] Decision, para. 27. *See also* paras. 56-60 ([REDACTED]); 80-81 ([REDACTED]); 110-111 ([REDACTED]); 127-128 ([REDACTED]).
[107] *Contra* Ruto Appeal, paras. 37-40; Sang Appeal, paras. 43-45. Such forms of "disadvantage" are alleged to include, for example, the admission of any incriminatory evidence.

> When the Pre-Trial Chamber has not taken measures under article 56, the Trial Chamber may, in accordance with article 69, paragraphs 2 and 4, and after hearing the parties, allow the introduction of previously recorded audio or video testimony of a witness, or the transcripts or other documented evidence of such testimony, *provided that this would not be prejudicial to or inconsistent with the rights of the accused* […].[108]

71. The reference to article 69(4) further suggests that, when assessing whether to admit a prior recorded testimony and assessing any prejudice to the Accused, a Chamber should be guided by the concept of "prejudice" in that article.[109]

72. The drafting history of amended rule 68 likewise specifically refers to fair trial rights. Thus, in discussing the issues underlying the proposed amendment to rule 68, the ASP Working Group stated that:

> The amendments to the original text of the *chapeau* to rule 68 are *intended to make explicit the fair trial protections that apply to the rule […].* As a whole, the amended rule 68(1) emphasizes the Trial Chamber's overriding power to control the introduction of prior recorded testimony and to rule on questions *of fairness that arise in this regard*.[110]

73. Moreover, the ASP Resolution also specifically referred to fair trial rights in the context of amended rule 68, including specifically in relation to retroactivity and detriment. It stated:

> *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

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[108] *See* rule 68(1) (emphasis added).
[109] *See also* WGLL Report, Annex II.A, para. 12 ("[i]t was considered helpful to also include a reference to article 69(4) in this context. Article 69(4) notes that the Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia* […] any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness").
[110] WGLL Report, Annex II.A, para. 11 (emphasis added).

> amended is without prejudice to Article 67 of the Rome Statute related to the rights of the accused […].[111]

74. Having addressed similar issues in *Nyiramasuhuko*, the ICTR Appeals Chamber's approach also supports the Chamber's assessment of any concrete "detriment" through the lens of fair trial rights, rather than other forms of "disadvantage".[112] The *Nyiramasuhuko* Appeals Chamber addressed the nature of the "prejudice" that could bar the retroactive application of an amended rule analogous to amended rule 68. It reasoned that, even if an amendment affects a pre-existing right, "prejudice" cannot be assessed *simpliciter*. For example, if the new amendment provided safeguards of equivalent value to the rule replaced, sufficient prejudice would not be established.[113]

75. The Ruto Defence seeks to distinguish the case-law of the *ad hoc* tribunals on the meaning of "prejudice" based on the difference in wording between ICTY/ICTR rule 6(D) (referring expressly to "the rights of the accused") and article 51(4) of the Statute (referring to "the detriment of the person"). This, however, appears to be a distinction without a difference. Moreover, the reference in amended rule 68 to fair trial considerations and its drafting history plainly suggest the general understanding that the kinds of "detriment" envisaged are calibrated to the right to a fair trial.

d) The Chamber correctly and reasonably found that applying amended rule 68 was not detrimental to the fair trial rights of the Accused

76. The Appellants' argument that the application of amended rule 68 was detrimental to their fair trial rights is unfounded.[114] To the contrary, the Chamber's

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[111] ASP Resolution, para. 2 (internal citations omitted; underline added).
[112] *Contra* Ruto Appeal, paras. 38-40.
[113] ICTR, *Nyiramasuhuko* AD, paras. 13, 18-19 (finding that no prejudice had occurred by removing the appellants' pre-existing right to be consulted on whether the trial of a part-heard case should be continued with one substitute judge).
[114] *Contra* Ruto Appeal, paras. 38-39, 41; Sang Appeal, paras. 44-46, 48.

analysis was both legally correct and reasonable.[115] In criticising the Chamber's statement that the Admitted Evidence is not "unduly detrimental" for the purpose of article 51(4), the Ruto Defence confuses the Chamber's analysis under article 51(4) and rule 68.[116] In any event, and as argued above, even if a concrete analysis was required under article 51(4), the Chamber's approach is consistent with the law described above, requiring that the fair trial rights of the Appellants were genuinely at issue.[117] And not every form of prejudice in isolation is sufficient to deny admission of evidence. The Chamber must carry out a case-by-case assessment, balancing all relevant factors. This is what it did.

77. Consistent with the *Nyiramasuhuko* approach, in considering the consequences resulting from an amended rule, it is insufficient merely to consider any prejudice *simpliciter* or in isolation.[118] Rather, even if a rule amendment "alters" the situation of an Accused (such as by allowing the admission of evidence), or affects some pre-existing rights, the inquiry must also consider whether the amendment introduces alternative safeguards of an equivalent value, and whether those safeguards were applied. The rule 68 amendments contain such safeguards, which the Chamber carefully applied in this case. Under the amended rule, the admission of prior recorded testimony is subject at least to the same general safeguards under the Statute and Rules as applied to such testimony previously, in addition to the strict requirements of amended rule 68 itself.[119]

78. Consistent also with these principles, the admission of hearsay evidence or evidence going to the acts and conduct of the Accused, or the admission of written evidence without opportunity for cross-examination, do not in and of themselves

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[115] *Lubanga* AJ, para. 21.
[116] *Contra* Ruto Appeal, para. 34.
[117] *See above* paras. 69-75.
[118] *See above* para. 74.
[119] *See further above* paras. 70-71. *See e.g. Lubanga* Statements TD, paras. 21-23; *Lubanga* TD, paras. 31-32.

establish any sufficient "detriment" to the fairness of the trial.[120] Rather, the effect of such matters will be a question of fact, to be assessed case-by-case and on the basis of all the relevant facts, and applying the ordinary principles under article 69(4) as further elucidated in the Court's case-law. In particular, this requires weighing the probative value of the evidence against its prejudicial effect.[121] Even finding the existence of some prejudice will be insufficient to establish automatically that there is unfairness.[122] The Chamber must strike the appropriate balance. It did.

79. Many of the Sang Defence's claims that Mr Sang's fair trial rights were violated by admitting the prior recorded testimony of the Compromised Witnesses are undeveloped and vague, and not sufficiently related to any particular witness.[123] Likewise, the Ruto Defence only specifically contends that his fair trial rights were denied by admitting the evidence under rule 68(2)(c) of witness [REDACTED], who was unavailable for examination.[124]

80. In assessing the extent of any prejudice to the Appellants' fair trial rights, the Chamber considered in particular the fact that the Appellants had the opportunity to cross-examine four of the Compromised Witnesses, the systematicity of the interference in this case, the need to protect the integrity of the proceedings and the Chamber's duty to receive all necessary evidence to determine the truth under article 69(3).[125] In addition to finding that the Admitted Evidence bore sufficient indicia of reliability,[126] the Chamber underscored that its assessment of the Admitted Evidence

[120] *Contra* Ruto Appeal, paras. 38-39, 41; Sang Appeal, paras. 45-49.
[121] *Lubanga* Admission TD, para. 39, 42-52.
[122] *Lubanga* Admission TD, paras. 42-52.
[123] *Contra* Sang Appeal, paras. 45-49.
[124] Ruto Appeal, para. 41.
[125] *See* Decision, paras. 27, 56-60 ([REDACTED]), 80-81 ([REDACTED]), 110-111 ([REDACTED]), 127-128 ([REDACTED]).
[126] Decision, paras. 65-67, 84-86, 112-117, 129-133, 141-145.

for the purpose of admissibility is wholly separate from its assessment for the purpose of assigning weight to that evidence at the close of the trial.[127]

81. On the basis of these factors alone, the Chamber was entitled to reach the conclusions in the Decision. The Chamber's conclusions are further supported, however, when it is recalled that the Appellants lost no 'accrued' right (since the Admitted Evidence would always have been admissible),[128] and that the Appellants have long been on notice of the Prosecution's intentions.[129]

e) The Appellants show no other prejudice to the fairness of the trial

82. The Appellants' further observations in the first ground of appeal show no further or alternative prejudice to the fairness of the trial. Although many of these remarks repeat or merge with submissions made under other grounds of appeal, and are thus addressed in that context more directly, the Prosecution makes the following final observations in the present context.

83. First, since amended rule 68 specifically permits the admission of prior recorded testimony, including under rule 68(2)(c) where the witness is not available to testify, it necessarily contemplates an exception to the rule of orality. As such, the non-appearance of a witness whose evidence is admitted under amended rule 68 does not, of itself, establish detriment or unfairness *per se*.[130] Witness [REDACTED] is a case in point.[131] For the other Compromised Witnesses, this concern does not arise because they all testified in person before the Chamber and were subjected to cross-examination.

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[127] Decision, paras. 60, 81, 111, 128.
[128] *See above* paras. 43-46.
[129] *See above* para. 54; *below* paras. 127, 129.
[130] *Contra* Ruto Appeal, para. 38; Sang Appeal, paras. 45-46; 48-49.
[131] *Contra* Ruto Appeal, para. 41. *See below* para. 220.

84. Even for Witness [REDACTED], the fact that the Appellants did not confront the witness is insufficient to show detriment. In determining 'detriment', a Chamber assesses the totality of the facts before it. This requires, as the Chamber underscored, the balancing of such factors as the authenticity, relevance and probative values of the prior recorded testimony *vis-à-vis* any prejudice caused to the Accused.[132] Specifically in respect of [REDACTED], the Chamber correctly noted that the witness had not been subject to examination, and that it would consider this factor in its ultimate decision on the weight to give the testimony at the end of the trial.[133]

85. Second, since hearsay evidence is not *per se* inadmissible before this Court, the fact that some aspects of the Admitted Evidence are hearsay likewise does not, of itself, establish detriment or unfairness *per se*.[134]

86. Third, since amended rule 68 specifically permits the admission of prior recorded testimony going to the acts and conduct of the Accused, the fact that some of the Admitted Evidence goes to the acts and conduct of the Accused does not, of itself, establish detriment or unfairness *per se*.[135]

87. Fourth, the Appellants simply fail to demonstrate how the right to adequate time and facilities may have been prejudiced by the Admitted Evidence.[136] As noted above, the Appellants have long been on notice of the Prosecution's intention to rely on the evidence of these witnesses and possessed the salient information.[137] Nor do the Appellants show how the Decision entails any "undue" delay, which is the gravamen of any breach of the right to expeditious proceedings.[138]

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[132] Decision, para. 151.
[133] Decision, para. 145.
[134] *Contra* Ruto Appeal, para. 41; Sang Appeal, para. 45. *See below* paras. 199-202.
[135] *Contra* Ruto Appeal, para. 41; Sang Appeal, para. 49. *See below* paras. 215-218.
[136] *Contra* Sang Appeal, para. 45.
[137] *See above* para. 54.
[138] *See below* para. 235.

88. Fifth, for the reasons explained above, the Appellants cannot establish any detriment or unfairness on the basis that the Admitted Evidence was inadmissible under the un-amended rule 68, because this premise is incorrect.[139] To the contrary, the prior recorded testimony of the Compromised Witnesses would always have been admissible before this Court.[140]

II. The Admitted Evidence is "prior recorded testimony" within rule 68(2)(c) and (d) (Mr Ruto's Second Ground; Mr Sang's Second Ground)

89. The Appellants fail to show that the Chamber erred in regarding the Admitted Evidence, including statements and transcripts taken of interviews in accordance with rules 111 and 112, as "prior recorded testimony" in the meaning of rule 68(2)(c) and (d).[141] To the contrary, the ordinary meaning of the terms in rule 68, read in context and in light of the object and purpose of the Statute and the Rules, supports such an approach. This view is further confirmed by reference to the drafting history of amended rule 68.

II. 1. Rule 68, correctly interpreted, establishes that written statements qualify as prior recorded testimony

90. Based on the language of amended rule 68, read in context and in light of the object and purpose of the Statute and the Rules, the Chamber correctly concluded that prior statements qualify as prior recorded testimony.[142]

91. The Appellants incorrectly assert that the Chamber's approach is inconsistent with the "ordinary meaning of the term 'testimony'," based on the unfounded assumption that "testimony" is "almost universally defined by reference to the

[139] *Contra* Ruto Appeal, paras. 38, 41 (with reference to Witness [REDACTED]); Sang Appeal, para. 50.
[140] *See above* paras. 43-46.
[141] *Contra* Ruto Appeal, paras. 43-52; Sang Appeal, paras. 53-60. *See* Decision, paras. 30-33.
[142] Decision, para. 32.

presence of an oath or affirmation."[143] To the contrary, the primary definitions of "testimony" in the *Oxford English Dictionary* are "[p]ersonal or documentary evidence or attestation in support of a fact or statement; hence, *any form* of evidence or proof" and "*[a]ny* object or act serving as proof or evidence".[144] Likewise, the *Collins Dictionary* cited by the Ruto Defence defines "testimony" as "evidence *especially* orally in court under oath or affirmation".[145] The term "especially" shows that the term has a broader meaning. Moreover, many dictionaries or commentaries generally define "testimony" as "evidence," or "statement," and "to testify" as "to give evidence".[146]

92. Furthermore, the Appellants fail sufficiently to address the particular context of the terms in amended rule 68 and more broadly—even though this was a matter specifically addressed in the Decision according to the established principles of interpretation.[147]

93. First, the express provision under rule 68(1) for the admission, *inter alia*, of "any other documented evidence of such testimony" suggests that the rule is not limited to recordings or transcripts of evidence in court, but may encompass other documented evidence in the form of witness statements.[148] Chambers of this Court have previously taken such a view in interpreting the un-amended version of rule 68, which included similar language.[149] Thus, the *Lubanga* Trial Chamber held that rule 68 "[i]s directed at the 'testimony of a witness' in a broad sense" and that the phrase "other documented evidence" permits "the introduction of written statements, in addition to […] transcripts, of a witness' testimony because these are

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[143] *Contra* Ruto Appeal, para. 44; Sang Appeal, paras. 54, 58.
[144] *See OED*, "testimony, n.", 1.a. and b (emphasis added).
[145] *See e.g.* Ruto Appeal, para. 44 (citing *Collins Dictionary*).
[146] *See e.g. Oxford Thesaurus*, p. 533.
[147] Decision, para. 32.
[148] *See* rule 68(1).
[149] *See* Decision, para. 31.

all examples of the 'documented evidence' of a witness' testimony."[150] This interpretation, made before the amendment to rule 68, is significant in light of the drafters of rule 68's clear knowledge of the Court's case law.[151] If the drafters had wished to restrict the ambit of amended rule 68, they could (and presumably would) have done so. They did not.

94. Likewise, the *Katanga* Trial Chamber considered that the context of other provisions of the Statute favoured a broad interpretation of the term "testimony" in rule 68.[152]

95. Second, the existence of the express "sworn declaration requirement" in rule 68(2)(b), but not in 68(2)(c) or (d), also suggests that the latter sub-rules are not restricted to evidence given on oath. Indeed, as the Chamber observed, such a requirement would be unnecessary if rule 68 applied only to records of 'in court' testimony which, being given under oath, already contain the necessary affirmation of the truth of their contents.[153]

96. For the reasons which follow, the Appellants' criticism of this straightforward reasoning is unpersuasive.[154] Thus, speculation that the "sworn declaration requirement" may have been included in rule 68(2)(b) due to confusion or ambiguity is not convincing.[155] Nor are the Appellants assisted by the Concurring Opinion[156] and its reference to other provisions of the Statute such as articles 56 and 69.[157]

II. 1. i. The drafting history of rule 68(2)(b) supports the Chamber's conclusions

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[150] *Lubanga* Statements TD, para. 18.
[151] *See e.g.* WGLL Report, Annex II.A, paras. 6, 13 (referring to ICC case law).
[152] *Katanga* Bar Table TD, para. 44
[153] Decision, para. 32.
[154] *Contra* Ruto Appeal, paras. 47-50; Sang Appeal, para. 59.
[155] *Contra* Sang Appeal, para. 59.
[156] *Contra* Ruto Appeal, para. 49.
[157] *Contra* Ruto Appeal, para. 49; Sang Appeal, para. 58.

97. The drafting history of amended rule 68 supports the Chamber's conclusion. This history explains that "a sworn declaration"—which it describes as both a "formal requirement," and a "higher bar"—was deliberately imposed in respect of rule 68(2)(b) only, and not 68(2)(c) and (d), because of the unique requirements of 68(2)(b).[158] Specifically:

> The rationale for this higher bar is two-fold. First, rule 68(2)(b) applies to situations in which the requirements of rule 68(2)(a) have not been met, i.e., the Prosecutor and the defence have not had the opportunity to examine the witness during the recording. If these requirements had been met, the evidence could be directly introduced under rule 68(2)(a). Secondly, rule 68(2)(b) applies to cases where the witness could appear before the Chamber, but the party considers it preferable not to call the witness. Finally, it is required that if the Chamber does decide to call the witness, for instance for questioning by the opposing party, rule 68(3) would then apply.[159]

98. Contrary to the ambiguity or confusion posited by the Sang Defence,[160] this shows that the drafters specifically intended that rule 68(2)(c) and (d) should not require a sworn declaration, further supporting the understanding that "testimony" for the purpose of those provisions includes unsworn statements, such as written statements taken by a party.

II. 1. ii. Reference to articles 56 and 69, and rule 66, does not restrict the natural broad interpretation of "testimony" in rule 68

99. The broad interpretation of the term "testimony" in rule 68 is not fettered by other provisions of the Statute such as articles 56 or 69, or by rule 66. Although these provisions may for their own functions recognise a distinction between "testimony" and other forms of statement,[161] they do not alter the interpretive logic applicable to rule 68.

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[158] WGLL Report, Annex II.A, para. 23.
[159] WGLL Report, Annex II.A, para. 23.
[160] Sang Appeal, para. 50.
[161] *But see also above* para. 94.

- Article 56 enables the Prosecutor, with authorisation of the Pre-Trial Chamber, to collect and preserve evidence which may not be available subsequently. When acting under article 56, the Prosecution is addressing a unique but foreseen situation, with the opportunity to seek the assistance of the Chamber. On other occasions, however, including in the ordinary course of evidence collection, the Prosecution may well be unaware that the evidence collected will not be available subsequently, triggering the need to use rule 68. The terms of article 56 thus cannot easily be transposed to the activities of the Prosecution (and indeed the defence) in the ordinary collection of evidence, or under rule 68, and could make these activities very cumbersome.

- The specific reference in rule 68 to circumstances "when the Pre-Trial Chamber has not taken measures under article 56", further underscores that the requirements of article 56 need not be met for prior recorded testimony to be admitted under amended rule 68.

- The Appellants' reference to article 69 and rule 66 likewise does not assist them.[162] Both provisions deal with situations where witnesses have appeared before the Chamber to testify. In this circumstance, they are required to make an oath or an affirmation before doing so. Amended rule 68, on the other hand, generally encompasses an exception to the rule of orality, and is intended to deal with specific situations including those where witnesses are not present before the Court. Given these distinctive features, nothing suggests that the ambit of the term "testimony" in article 69 and rule 66 should limit the same term in rule 68.

[162] *Contra* Ruto Appeal, para. 49. *See also* Sang Appeal, paras. 46, 49.

II. 1. iii. The drafting history of amended rule 68 further indicates the intention that "testimony" includes written and unsworn statements

100. The Chamber correctly concluded that the drafting history of the rule 68 amendments further "[d]emonstrates an intention or at least an openness, for the amended Rule 68 to continue to apply to recorded statements under Rules 111 and 112."[163] It correctly referred to the Working Group report, which specifically underscored how "prior recorded testimony," based on the jurisprudence of the Court, was understood to include witness statements, among other documentary evidence.[164]

101. The Ruto Defence's bald assertion that the relevant case law of the Court was erroneous simply because it allegedly did not define "testimony" in accordance with its "ordinary meaning" fails to show any error.[165] This is most especially the case since the Ruto Defence does not even address the specific provisions of the un-amended rule 68, addressed in those decisions.

102. Secondly, the drafting history of amended rule 68 nevertheless shows an intention that prior recorded testimony was to be construed broadly to encompass witness statements. This is clear from the Working Group's statement, which it made as one of "two points of terminology [that] should also be noted":

> [p]rior recorded testimony […] is understood to include video or audio recorded records, transcripts *and written statements*. This is the view in the prevailing jurisprudence to date and it was considered unduly restrictive to understand "prior recorded testimony" in a narrower manner. *Rule 68 may therefore apply to written statements* taken by the parties or (inter)national authorities, provided that the requirements under one or more of the sub-rules are met.[166]

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[163] *Contra* Ruto Appeal, paras. 45-46; Sang Appeal, para. 56. *See* Decision, para. 30.
[164] Decision, para. 30 (citing WGLL Report, Annex II.A, para. 13).
[165] *See also above* para. 91.
[166] WGLL Report, Annex II.A, para. 13; Decision, para. 30 (emphasis added).

103. Furthermore, since these *travaux préparatoires* generally reflect an intention to match or to exceed the scope of ICTY Rules 92*quater* and *quinquies*[167]—and both those provisions permit the introduction of "a written statement or a transcript of evidence"[168]—it may safely be concluded that the drafters of amended rule 68 must have understood "documented evidence of such testimony" to include a written statement (which is documented evidence of anticipated testimony).

104. Finally, the Ruto Defence's claim that "there is no evidence that the focus in the WGLL and/or at the ASP was on what the legal definition of 'testimony' should be" is unfounded and contradicted by the clear statement of the Working Group.[169] The only reasonable inference from the plenary ASP's retention of the phrase "documented evidence of such testimony" in amended rule 68, in the circumstances and without any further qualification, is that it endorsed the Working Group's view and understanding.

II. 1. iv. The broad interpretation of "testimony" is consistent with the object and purpose of amended rule 68

105. The Ruto Defence claims that the Chamber erred in considering that the broad interpretation of the scope of prior recorded testimony was consistent with the purpose of amended rule 68.[170] However, this assertion is based on a misreading of the Decision. As the Decision makes clear, the Chamber did not consider that the purpose of amended rule 68 was merely "the facilitation of the admission of prosecution witness statements and transcripts in their current standard form which do not require an oath or affirmation."[171] Rather, it also specifically subjected such

[167] WGLL Report, Annex II.A, paras. 3, 35.
[168] *See* ICTY Rules.
[169] *Contra* Ruto Appeal, para. 46.
[170] *Contra* Ruto Appeal, para. 51.
[171] Decision, para. 32.

admission to the need to respect "[t]he fair trial and expeditious conduct of the proceedings."[172]

II. 2. The Chamber's interpretation of amended rule 68 according to the law does not prejudice the Appellants

106. The assertion that Mr Sang is prejudiced by the admission under amended rule 68 of statements taken by one of the Parties, without a neutral judicial officer, lacks merit.[173] All Parties must take statements in a manner compliant with their ethical and legal obligations. Moreover, the established safeguards within amended rule 68, as well as the ordinary safeguards otherwise under the Statute and Rules, remain pertinent to any concerns that may arise from statements taken by the Parties. Thus, not only does rule 68 require a showing that the prior recorded testimony bears sufficient indicia of reliability—and, in respect of rule 68(2)(d), a showing that admission is in the interests of justice—but the entire analysis is further subject to the Chamber's discretion to exclude prejudicial evidence under article 69(4).

III. The Compromised Witnesses did fail "to give evidence with respect to a material aspect" within rule 68(2)(d) (Mr Ruto's Third Ground; Mr Sang's Third Ground)

107. The Appellants fail to show that the Chamber erred by concluding that a person subject to interference has "failed to give evidence with respect to a material aspect" (in other words, 'failed to testify') within the meaning of rule 68(2)(d)(i) where that person has attended but deviated from their prior recorded testimony.[174] Noting that there is no dispute that appearing but wholly refusing to testify would satisfy the requirement of 'failed to give evidence to a material aspect in a witness's prior testimony,' the Chamber correctly concluded that the requirement is equally satisfied if a witness recants fundamental aspects of his or her prior recorded

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[172] Decision, para. 32.
[173] *Contra* Sang Appeal, paras. 55-57.
[174] *Contra* Ruto Appeal, paras. 53-61; Sang Appeal, paras. 68-87. *See* Decision, paras. 40-41.

testimony.[175] The Chamber pointed out the absurdity of distinguishing between these two circumstances—persons subjected to interference could have their prior recorded testimony admitted if they were intimidated into silence, but not if their intimidation had prompted them to recant fundamental aspects of what they said previously.[176]

108. The Chamber's analysis was correct, and consistent with the established principles of interpretation of the Statute and Rules. It accords with the ordinary meaning of the term "failure", supported by the context and object and purpose of amended rule 68, and especially the challenge that witness interference brings to this Court's administration of justice. In particular, the multifarious ways in which witness interference may occur, and the many ways in which a targeted witness may react, mean that the notion of "failure" to testify must be non-exhaustive and cannot be limited merely to a witness failing to come to Court or keeping silent once there. Such an approach would defeat the purpose of rule 68(2)(d).

III. 1. The Chamber's approach is consistent with the ordinary meaning of the term "to fail"

109. The Chamber's approach to the concept of 'failure to testify' accords with the ordinary meaning of the verb "to fail".[177] As generally defined, failure is not limited merely to inaction, but encompasses a spectrum of conduct which includes "be[ing] or becom[ing] deficient", being "inadequate or insufficient", not "render[ing] the due or expected service or aid", "fall[ing] short in performance or attainment", and "be[ing] unsuccessful in an attempt or enterprise".[178] Clearly, most of these definitions are broad. They do not limit 'failure' simply to 'not doing anything'.

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[175] Decision, para. 41.
[176] Decision, para. 41.
[177] *Contra* Ruto Appeal, paras. 53-54; Sang Appeal, para. 69.
[178] *See OED*, "to fail, v.".

III. 2. The term "failure" must be construed in context, and in light of the amended rule 68's object and purpose

110. The Chamber correctly construed 'failure to testify' by interpreting it in the context in which it is specifically meant to operate. In particular, rule 68(2)(d) is intended to operate in the context of "interference" which materially affects witnesses, the ramifications of which cannot be examined through a single lens. The interpretation of "failure" to testify must be broad enough to accommodate the variety of ways in which witnesses may be subject to interference, and may respond thereto.

111. The intention to address interference and all its ramifications is clear from the text of amended rule 68 and is supported by its drafting history. Under rule 68(2)(d)(i), the "improper interference" underpinning a 'failure to testify' is defined broadly to encompass threats, intimidation or coercion. Moreover, such "improper interference" may "[r]elate, *inter alia*, to the physical, psychological, economic or other interests of the person",[179] provided it is established that "the failure of the person to attend or to give evidence has been *materially* affected by improper interference […]."[180]

112. Moreover, the drafting history of amended rule 68 makes clear that interference cannot and should not be defined exhaustively in order to address all its possible permutations and ramifications. In particular, to achieve this goal, the drafters appear to have intended to go beyond the limits of the analogous rule 92*quinquies* at the ICTY.[181] Thus, the ASP Working Group noted that "rule 68(2)(d)(ii) refers to the

[179] Rule 68(2)(d)(ii).
[180] Rule 68(2)(d)(i) (emphasis added). *See also* WGLL Report, Annex II.A, para. 35 (the term "materially" "[w]as used to require a threshold level of influence on the witness which is caused by improper interference […]").
[181] WGLL Report, Annex II.A, fn. 29.

"physical, psychological, economic or other interests of the person" and that "[t]he relevant interference to the witness could be direct or indirect in character."[182]

113. It would have been pointless for the drafters to have carefully captured all the above *means* of interfering with witnesses in amended rule 68 if the equally varied *effects* of that interference were to be narrowed to one, namely, "keeping silent." Rather, improper interference is a relevant context that must inform the concept of 'failure to testify'. The Decision thus correctly acknowledged that, while interference may force some witnesses into silence, it may have other effects on other individuals, such as leading them to recant or to modify their statements when they appear before the Chamber.[183]

114. For all these reasons, as the Chamber correctly concluded,[184] a narrow interpretation of "failure to testify" would frustrate both the object and purpose of amended rule 68(2)(d), and the Court's mandate more widely.

III. 3. The Appellants' arguments must fail

115. All of the Appellants' challenges under this ground of appeal are based on a single incorrect premise—that 'failing to testify' does not extend, when he or she has been examined, to the witness' recantation of evidence. In this vein, the Appellants—especially the Sang Defence[185]—make lengthy submissions on how each of the witnesses was examined, and responded.

116. However, the fundamental flaw in these submissions is that they ignore that the witnesses recanted their prior statements as a result of improper interference. What is material is not that the witnesses technically or mechanically "responded" to the

[182] WGLL Report, Annex II.A, para. 36.
[183] Decision, para. 41.
[184] Decision, para. 41.
[185] *See e.g.* Sang Appeal, paras. 76-88.

questions. Rather, what is relevant is that underlying and shaping their responses, recanting their prior recorded testimony, was the improper interference. Therefore, the witnesses 'failed to testify' within the meaning of rule 68(2)(d).

117. Equally misconceived is the Appellants' resort to the drafting history of amended rule 68 in support of a claim that, as rule 68 is meant to serve a restricted role, 'failure to testify' under rule 68(2)(d)(i) must be narrowly construed.[186]

118. Firstly it is incorrect that one of the purposes of rule 68, namely "streamlining proceedings",[187] prohibits admission of prior recorded testimony where the witness has appeared, unless the witness has not testified at all.[188] The reason advanced by the Sang Defence, namely that allowing both the in-court testimony and the prior recorded testimony undermines the shortening of proceedings,[189] ignores the larger duty of any Chamber: to receive all relevant evidence necessary for the determination of the truth.[190]

119. Equally wrong is the Appellants' bald claim that resort to amended rule 68 is allegedly inappropriate in light of the Court's power to compel appearance to testify,[191] suggesting the drafters' intention to restrict admission of prior recorded testimony to 'replace' a compelled witness' sworn testimony.[192] Again, the Appellants ignore the Court's duty under article 69(3), and their reliance on an "example" in the drafting history of amended rule 68 is misconceived.[193]

[186] *Contra* Ruto Appeal, para. 58; Sang Appeal, paras. 70-74.
[187] *See also below* paras. 227-229.
[188] *Contra* Sang Appeal, paras. 70-72.
[189] Sang Appeal, para. 71.
[190] *See* Statute, art. 69(3).
[191] *Contra* Sang Appeal, paras. 72-74; Ruto Appeal, para. 57.
[192] *Contra* Sang Appeal, para. 72.
[193] *Contra* Sang Appeal, paras. 72-74; Ruto Appeal, para. 57.

120. The ASP Working Group referred, as an example, to the possibility that a person whose prior recorded testimony was admitted under amended rule 68 could subsequently testify *viva voce*, and noted in that context that the Chamber could then replace their prior recorded testimony in the record with the sworn *viva voce* testimony.[194] But this was just an example, not a prescription, and manifestly could not have been intended to substitute for the Chamber's discretion regarding the admission of evidence. In this hypothetical, it appears to be presumed that the witness testified in line with his or her prior recorded testimony. In such a case, a Chamber may indeed consider it necessary or appropriate to "replace" the prior recorded testimony with the in-court testimony. However, it would likely take a different course if the witness, having finally appeared before the Chamber, then recanted or modified his previously admitted prior recorded testimony. In such circumstances, a Chamber may well appropriately have recourse to both versions, to enable it to assess the witness' credibility at the proper time in light of the totality of the evidence, including evidence of improper interference.

121. Finally, the Appellants assert that the Chamber erred by admitting the prior recorded testimony of the Compromised Witnesses, which the Chamber "replaced with" or "preferred" to their oral testimony in Court.[195] Yet, the Chamber did no such thing. Although the Chamber has admitted the prior recorded testimony of the Compromised Witnesses, its ultimate determination of which evidence it will rely upon, and the probative value of any admitted evidence, will be done at the conclusion of the trial. At this stage the Chamber has not preferred any particular evidence over any other. The appropriate time to do that is at the conclusion of the trial when the Chamber will be considering the totality of the evidence before it.[196]

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[194] *See* WGLL Report, Annex II.A, para. 35.
[195] Ruto Appeal, paras. 56, 57, 60; Sang Appeal, paras. 72, 76.
[196] *See e.g.* ICTY, *Limaj* TD, paras. 16-17, 25-26, 33-34 (admitting records of the suspect's interviews into evidence for the truth of their contents under the ICTY's Rule 89 (C), which is analogous to the ICC's article

IV. The Chamber correctly determined that the Admitted Evidence could be admitted in its entirety (Mr Ruto's Seventh Ground; Mr Sang's Fourth Ground)

122. The Appellants show no error in the Chamber's admission of the entirety of the prior recorded testimonies of four of the Compromised Witnesses: [REDACTED], [REDACTED], [REDACTED], and [REDACTED].[197] In conducting its analysis, the Chamber reasonably and within the limits of its discretion considered that each witness had failed to give evidence with respect to material aspects of their anticipated testimony by means of recanting virtually all aspects of their prior statements.[198] The Chamber was also satisfied that all reasonable efforts had been made by the Prosecution, albeit unsuccessfully, to secure all material aspects of these witnesses' evidence, including by [REDACTED], making all efforts to examine the witnesses, and then, [REDACTED].[199]

123. None of the issues raised by the Appellants shows any error. Their claims are flawed because they overlook that each of the witnesses repudiated virtually the entirety of their prior recorded testimonies, thereby putting the entirety of those testimonies in issue. Moreover, the Appellants sustained no prejudice. Consistent with the early notice given to the Appellants of the Prosecution's intention to seek admission of this material under amended rule 68,[200] the Appellants stated that they would accordingly examine the relevant Compromised Witnesses on all aspects of their prior recorded testimony.

IV. 1. The four Compromised Witnesses who appeared before the Chamber repudiated virtually their entire prior statements

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69(4)). *But see also Limaj* TJ, paras. 14, 568, 580-581 (declining, in the totality of the circumstances, to give the suspect's interview weight).

[197] *Contra* Ruto Appeal, paras. 107-108; Sang Appeal, paras. 61-67.

[198] *See* Decision, paras. 47-48 ([REDACTED]), 70-72 ([REDACTED]), 100-102 ([REDACTED]), 120-121 ([REDACTED]).

[199] *See* Decision, paras. 49-50 ([REDACTED]), 73-74 ([REDACTED]), 103 ([REDACTED]), 122 ([REDACTED]).

[200] *See below* paras. 126-129.

124. As the Chamber correctly found,[201] the four Compromised Witnesses who appeared before the Chamber repudiated virtually their entire prior recorded testimonies, putting the entirety of their prior recorded testimonies in issue. The Appellants were prepared and able to examine those witnesses on the entirety of their repudiated testimonies. On this basis, the Chamber thus correctly admitted the entirety of their prior recorded testimonies.

125. There can be no serious question that the relevant witnesses repudiated their prior statements. Thus:

- When [REDACTED] was asked whether [REDACTED] remembered making a statement to the Prosecution, [REDACTED] said: "[I] remember the […] signing of the statements, but whatever contains [*sic*] in that statement was not from me, but it was from the OTP."[202] Asked to explain further, the witness said: "[REDACTED]."[203]

- [REDACTED] repudiated the entirety of [REDACTED] prior statements when asked about allegations that [REDACTED] had made of being asked to implicate the Accused.[204] When asked to explain [REDACTED] comment that [REDACTED] prior statements were "not false testimony, but testimony that really did not hold water," the witness added: "[T]his is what I meant to say: I was supposed to give testimony that was not actually correct. This means that I had to give a statement that would seem to be credible."[205]

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[201] *See* Decision, paras. 47-48 ([REDACTED]), 70-72 ([REDACTED]), 100-102 ([REDACTED]), 120-121 ([REDACTED]).
[202] T-137, p. 90, lines 9-10.
[203] [REDACTED].
[204] T-143, p. 6, lines 7-10 ("Q: I repeat my question […]. When you met with persons 1 and 3, were you specifically told that the evidence you were going to give to the investigators should implicate both Mr Ruto and Mr Sang? A: Yes.")
[205] T-143, p. 5, line 21; p. 6, lines 11-21.

- [REDACTED] and [REDACTED] likewise repudiated their prior statements, in somewhat similar circumstances.[206]

IV. 2. The Prosecution timely notified the Appellants that they should conduct their cross-examinations in light of the forthcoming rule 68 application

126. It was manifestly clear to the Appellants that, due to the relevant Compromised Witnesses' repudiation of their prior recorded testimony, the entirety of those testimonies was put in issue for the Appellants to examine as they deemed appropriate. Moreover, the Prosecution also took further action to put the Appellants on notice in this regard.

127. Thus, following its earlier notification to the Appellants that it would seek to admit the Compromised Witnesses' prior recorded testimony pursuant to amended rule 68,[207] the Prosecution further informed the Appellants that they should examine the Compromised Witnesses on the basis that the entirety of their prior recorded testimony was in issue, following the repudiation of that prior testimony.[208]

128. [REDACTED].[209] [REDACTED].[210]

129. The record also clearly shows that the Appellants fully understood the above position, and that whatever strategies they took in their examination of the witnesses was based on an informed position. Their own statements are revealing. For instance, the Ruto Defence underscored that, "[i]f the witness recants and gives another version which repudiates the Prosecution account, I will stick to the original narrative to show it was false."[211] Indeed, the Appellants extensively examined four

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[206] *See* T-130, p. 102, lines 12-20 ([REDACTED]); T-177, p. 47, lines 8-20 ([REDACTED]).
[207] T-127, p. 14, lines 15-24; T-129, p. 94, line 17, to p. 95, line 5.
[208] T-129, p. 94, line 17, to p. 95, line 5; [REDACTED].
[209] [REDACTED].
[210] [REDACTED].
[211] T-127, p. 45, lines 14-15.

of the Compromised Witnesses, sometimes seeking an extension of time "[b]ecause there is a lot of material we need to put together to bring out to really show that the original account was false […]."[212]

130. On the basis of the foregoing, the Chamber correctly admitted the entirety of the Compromised Witnesses' prior recorded testimony.

IV. 3. The Appellants fail to show any error in the Chamber's approach

131. The Appellants fail to show any error in the Chamber's approach, in the circumstances, in admitting the entirety of the statements constituting the Admitted Evidence.

IV. 3. i. The Chamber did not err by concluding that reasonable measures had been taken to examine the Four Compromised Witnesses who testified

132. In concluding that reasonable measures had been taken by the Prosecution to examine the four Compromised Witnesses who testified, the Chamber did not favour the Prosecution or otherwise err.[213] The Appellants ignore the witnesses' repudiation of the entirety of their prior statements, and the lengthy process by which the witnesses were brought even to that extent. The Prosecution took all reasonable efforts to elicit information from each of the witnesses, including on the veracity of their original accounts.

IV. 3. ii. The Appellants fail to show any prejudice

133. The claim that the Prosecution's failure to elicit all information from the relevant witnesses limited the Appellants' ability to challenge that evidence is unsupportable. In particular, the assertion that the Appellants were obliged first to elicit an allegation on the record, and then to demonstrate its untruthfulness,

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[212] T-133, p. 101, line 6, to p. 102, line 8.
[213] *Contra* Ruto Appeal, paras. 108-109; Sang Appeal, paras. 62-63.

misunderstands the function of amended rule 68 and how it operates.[214] To the contrary, the Prosecution's application to admit the prior recorded testimony—all of which was timely disclosed to the Appellants long before the witnesses appeared in court—forms the basis for placing the evidence contained therein on the record. In their cross-examinations, the Appellants thus were obliged to address only matters material for their own case.

134. Importantly, moreover, the Appellants do not show any prejudice. They were entitled to conduct their examinations as they saw fit, and they have not shown that their ability to challenge the Admitted Evidence was compromised or limited in any way.

IV. 3. iii. The Halilović *decision does not show any error in the Decision*

135. The Appellants' reliance on the ICTY *Halilović* decision does not support their claim that the admission of prior recorded testimony under rule 68(2)(d) should be limited to matters on which the witnesses were examined.[215]

136. The *Halilović* Chamber declined to admit a prior inconsistent statement for the truth of its contents under circumstances fundamentally different from those in this case. The witness in that case, who was examined by deposition, had not repudiated the entirety of his prior statements, unlike here. Indeed, the Prosecution expressly indicated to the witness that his testimony contradicted his prior statement only on certain points. Likewise, the Prosecution did not confront the witness with the contradictions due to concerns about the witness' health and to save time.[216] These circumstances are fundamentally different from this case where the witnesses

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[214] *Contra* Sang Appeal, paras. 64-67.
[215] *Contra* Sang Appeal, para. 66 (citing *Halilović* TD).
[216] *See Halilović* TD.

repudiated their entire prior recorded testimony, the Prosecution took all reasonable efforts to examine them in court, and the Appellants also examined the witnesses.

137. For all these reasons, *Halilović* does not show any error in the Chamber's approach.

V. The Chamber did not err in the standard of proof it applied (Mr Ruto's Fourth Ground; Mr Sang's Fifth Ground)

138. The Appellants fail to show that the Chamber erred in the standard of proof applied in the Decision.[217] To the contrary, the Chamber not only directed itself to the correct standard of proof, but applied that standard correctly, especially in determining whether two of the Compromised Witnesses ([REDACTED] and [REDACTED]) were influenced by improper interference. The Appellants fail to develop any further claim that the Chamber's approach materially affected the Decision.

V. 1. The Chamber directed itself to the correct standard of proof

139. In their original arguments before the Chamber, the Parties disagreed as to the correct standard of proof for determining the existence of the conditions required by rule 68(2)(c) and (d).[218] Ruling upon this issue, the Chamber observed that "[r]ule 68(2)(c) and (d) itself articulates only a need for the Chamber to be 'satisfied' in respect of the various requirements of the rule" and concluded that this standard may be met by "evidence of sufficient specificity and probative value".[219] This conclusion was further supported by four additional considerations:

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[217] *Contra* Ruto Appeal, para. 62; Sang Appeal, para. 88.
[218] *See* Decision, paras. 34-35 (recalling that the Prosecution submitted that "the existence of facts should be established by the relevant party on the basis of a balance of probabilities" whereas the Defence submitted that such facts should be established "beyond reasonable doubt" or, at least, at "some other threshold significantly higher than the typical standard of proof").
[219] Decision, para. 37.

- the case law of the Court has not typically articulated any "particular standard[] of proof" to evaluate factual conclusions in procedural motions;

- there is no reason to require an elevated standard of proof, such as the standard to decide matters of guilt or innocence ('beyond reasonable doubt');

- conversely, applying an elevated standard of proof at the admissibility stage could unduly limit the Chamber's ability to consider potentially relevant and probative evidence in assessing the merits of the case;

- in any event, applying a lower standard of proof at the admissibility stage does not affect the Chamber's obligation to decide upon guilt or innocence at the elevated standard.[220]

140. The Appellants fail to show an error in that reasoning.

V. 1. i. The Chamber correctly interpreted the Statute and Rules

141. In analysing the appropriate standard of proof, the Decision is consistent with the ordinary meaning of the terms of rule 68(2)(c) and (d), read in context, and in light of the object and purpose of the Statute and Rules.[221]

142. First, as the Chamber recalled,[222] rule 68(2)(c) and (d) require the Chamber to be "satisfied" that the prescribed conditions are met. The ordinary English meaning of this term contemplates being furnished with "sufficient proof or information", being "convince[d]", or concluding that certain circumstances "accord with (conditions)".[223] Likewise, the equally authentic French text requires the Chamber to

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[220] *See* Decision, para. 36.
[221] *See above* para. 6.
[222] Decision, para. 37.
[223] *See OED*, "satisfy, v.", 7.a., 9.

be "*convaincue*", or "convinced", that the conditions are met. These definitions accord with the Chamber's view that it must consider the evidence presented to be of "*sufficient* specificity and probative value".[224] This emphasis on 'sufficiency' linked the requirement for the Chamber to be "satisfied" with the relevant context—an approach which is consistent with the wide range of procedural questions in the Statute, Rules, and Regulations of the Court apparently governed by the same standard.[225] The Chamber's definition required no further elaboration.[226]

143. As the Chamber correctly reasoned,[227] nothing in the context of rule 68, or the Statute and Rules more broadly, requires a Chamber to be convinced beyond reasonable doubt that the conditions in rule 68(2)(c) and (d) are met.[228] Such an elevated standard would manifestly be inappropriate for *all* determinations on the admissibility of evidence, as the Ruto Defence appears to accept.[229] And nothing in rule 68 suggests that a different standard of proof applies either between its different sub-provisions, or between rule 68 and other relevant rules or provisions of the Statute.

144. To the contrary, the Statute and Rules read as a whole make clear that rule 68(2)(c) and (d) require no higher standard of proof than any other gateway for the admission of evidence.[230] Satisfying the criteria specific to a particular gateway is of course *necessary* to admission by that provision, but it is not of itself *sufficient*. The Chamber always retains the responsibility to assess, when appropriate, the relevance and probative value of the tendered evidence, and any potential prejudice,[231] just as

[224] Decision, para. 37 (emphasis added).
[225] *See* Statute, arts. 19(10), 58(1), 58(6), 58(7), 60(2), 60(3), 65(2); Rules, rule 116(1), rule 124(3), rule 134*ter*(2), rule 135(4), rule 146(5), rule 147(4), rule 166(5); Regulations of the Court, reg. 17(2).
[226] *Contra* Ruto Appeal, paras. 63-64; Sang Appeal, para. 88. *See further below* fn. 258.
[227] Decision, para. 36.
[228] *Contra* Ruto Appeal, para. 64; Sang Appeal, para. 89.
[229] *See* Ruto Appeal, para. 65. *See also* para. 66.
[230] *See e.g.* Statute, arts. 64, 69(3); Rules, rule 68(2)(a), 68(2)(b), 68(3).
[231] *See* Statute, arts. 64(9)(a), 69(4). *See also* rule 63(2).

it did in the Decision.[232] Likewise, all these evidentiary gateways are equally subject to the fundamental distinction between the assessment of evidence for the purpose of admissibility, and the assessment of evidence for the purpose of weight.[233] This distinction further safeguards the fairness of the proceedings, since a Chamber may properly determine that evidence is admissible, but accord it limited or no weight in its final assessment of guilt or innocence.

145. Furthermore, the Statute seeks, in relevant part, to enable fair trials which determine the truth.[234] This object and purpose likewise favours interpreting the Statute, and the Rules, to apply a lower standard of proof in making factual determinations predicate to matters of admissibility. The Decision reflects the same analysis, noting its concern that an elevated standard of proof "could unduly limit the Chamber's ability to consider potentially relevant, probative evidence" while reasoning that a lower standard would not affect its ultimate obligation "to decide on the guilt or innocence of the accused beyond reasonable doubt."[235] The Appellants show no error in this view.

a) Rule 68(2)(c) and (d) are not exceptional, either in their nature or their consequences

146. Having regard to the above considerations, the Statute and Rules do not recognise the distinction, asserted by the Ruto Defence, between "ordinary procedural motion[s] concerning the admissibility of documentary evidence" and

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[232] *See* Decision, paras. 150-151 (reasoning especially "[t]he Chamber considers that, in addition to the analysis set out above pursuant to [r]ule 68 […], the Chamber should also determine whether the prior recorded testimonies are admissible taking into consideration their authenticity, relevance, and probative value *vis-à-vis* the prejudice caused").
[233] *See e.g.* Decision, para. 151 (emphasising that the Chamber's "assessment of evidence for the purpose of admissibility is a distinct question from the evidentiary weight which the Chamber may ultimately attach to admitted evidence in its final assessment once the entire case record is before it, for the purpose of the verdict"). *See further Lubanga* AJ, para. 207; Bar Table Decision, para. 18; *Bemba* AD, para. 37; ICTY, *Prlić* AD, para. 19; ICTR, *Ntahobali* AD, para. 15.
[234] *See e.g.* Statute, arts. 64(2), 64(6)(d), 66-67, 69(3). *See also* rule 63(2).
[235] Decision, para. 36.

motions under rule 68(2)(c) and (d).[236] Nothing in those provisions suggests that they apply only "in exceptional circumstances", or that they are unique in requiring "the determination of questions of fact and law".[237] Indeed, any evidence whose admissibility is challenged under article 69(4) or (7), for example, may require as much.

147. Nor does the finding of witness interference entailed by the application of rule 68(2)(d) necessarily give rise to "far-reaching consequences for the [A]ccused" or an enhanced risk of prejudice.[238] To the contrary, on the facts of this case, the Prosecution did not submit that the Accused were involved in the interference, but rather that it was carried out by others for their benefit.[239] Accordingly, the Chamber found that any link between the interference and the Accused was "unproven".[240] Furthermore, Judge Eboe-Osuji described the actions of the Ruto Defence repudiating efforts at interference as "consistent with both the best traditions of an honourable profession and the obligations of an officer of the court."[241] In this context, the concerns of the Sang Defence about linking "these allegations […] to the accused, their associates or their Defence team", or the "general air of suspicion", are groundless.[242]

148. Moreover, there is no basis to assert that the findings of witness interference would be prejudicial to professional judges,[243] or that the evidence of affected witnesses may thus be given any greater credence than is justified, or that such findings "may have an overwhelming impact on the ultimate determination of

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[236] *Contra* Ruto Appeal, para. 65.
[237] *Contra* Ruto Appeal, para. 65.
[238] *Contra* Sang Appeal, paras. 89-90; Ruto Appeal, para. 65.
[239] *See* Decision, para. 43 (citing Prosecution Request, paras. 47, 63, 139).
[240] Decision, paras. 60, 81, 111, 128.
[241] Concurring Opinion, para. 37. Judge Eboe-Osuji also noted the "occupational benefit" that counsel's actions may bring to his client in avoiding any "other jeopardy to the cause of the Defence".
[242] *Contra* Sang Appeal, para. 90. *See also* [REDACTED].
[243] *See e.g. CAR Art. 70* Plenary Decision, para. 18; *Bemba* TD, para. 29; ICTR, *Akayesu* AJ, para. 269; ICTY, *Galić* AJ, paras. 41, 44; *Furundžija* AJ, para. 197; *Delalić* Admissibility Decision, para. 20; *Tadić* TD, para. 17.

guilt."[244] Rather, as the Decision properly stresses, the Chamber's decision, on the beyond reasonable doubt standard, "on the guilt or innocence of the [A]ccused", is unaffected by its determination on admissibility.[245]

b) Rule 68(2)(d)(iii) does not assist the Appellants

149. Nothing in the Chamber's power to consider "adjudicated facts" from "completed" article 70 proceedings suggests that an elevated standard of proof generally applies to rule 68(2)(d).[246] First, although this Court has not yet had occasion to elucidate any doctrine of judicial notice of adjudicated facts, the practice of the *ad hoc* tribunals (which do apply such a doctrine) indicates that such facts may not necessarily be treated as established beyond reasonable doubt.[247] Therefore, even accepting the Ruto Defence's concern *arguendo*, it does not necessarily arise.[248] Second, and in any event, even if rule 68(2)(d)(iii) does *permit* a Chamber to rely on facts established at an elevated standard of proof, this does not mean it *requires* all facts to meet that standard.[249] Nothing in logic or law suggests that exceeding a standard *ipso facto* raises that standard.

c) Rule 68(2)(c) and (d) do not require an 'intermediate' standard of proof

150. The Appellants argue alternatively that the Chamber erred in not applying some intermediate standard of proof between that applied by the Chamber and

[244] *Contra* Sang Appeal, paras. 90-93.
[245] Decision, para. 36.
[246] *Contra* Ruto Appeal, para. 67.
[247] This follows from three factors. First, it is well established that not all facts in a criminal trial need be proved beyond reasonable doubt, provided that the essential elements of the crimes charged, including those necessary to show the criminal liability of the Accused, meet that standard: *see e.g.* ICTR, *Ntagerura* AJ, paras. 174-175; ICTY, *Halilović* AJ, paras. 125, 129; *Milutinović* TJ, Vol. 1, paras. 62-63; SCSL, *Sesay* AJ, para. 117. Second, none of the nine established criteria for proposed adjudicated facts requires that the relevant finding was made beyond reasonable doubt: *see e.g.* ICTY, *Mladić* AD, para. 25. Third, an adjudicated fact is in any event no more than a well-founded but "rebuttable presumption that may be disproved by the opposing party through the presentation of evidence at trial": *Mladić* AD, para. 24.
[248] *Contra* Ruto Appeal, para. 67 ("it is the criminal standard which applies because it is this standard to which the adjudicated facts will have been established in the other case. To find otherwise would mean facts established to different standards would be the subject of the Chamber's assessment").
[249] *See also* WGLL Report, Annex II.A, para. 37.

"beyond reasonable doubt".[250] Such an approach is not only unnecessary but unrealistic, and should be treated with caution—a proliferation of evidentiary standards is likely to confuse, not facilitate, fair and expeditious proceedings before the Court. Furthermore, even if the fine distinctions proposed by the Appellants could be identified in principle, their application would be largely unenforceable in practice due to the deferential standard of review on appeal for matters of fact, which may tend to obscure such distinctions in the margin of 'reasonableness'.[251]

151. Judicial assessments cannot be simply reduced to a "certain percentage",[252] nor is it necessarily helpful to introduce additional standards of proof to those specified in the Statute and the Rules.[253] This Court already recognises escalating evidentiary standards from "reasonable" grounds or basis to believe,[254] to "substantial" grounds to believe,[255] to conviction "beyond reasonable doubt.[256] Within this context also lies the requirement for a Chamber to be "satisfied" of certain facts preliminary to certain procedural decisions. This term should be given effect according to the ordinary rules of interpretation.[257] There is no justification, or necessity, simply for 'creating' a further additional standard of proof, nor was the Chamber's understanding that it needed to be "satisfied" of the relevant facts unclear.[258]

152. In any event, the Appellants also appear to confuse the standard of proof and the types and degree of evidence which may satisfy that standard of proof. Rather than creating 'new' standards of proof, the concerns of the Appellants may be

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[250] *See* Sang Appeal, paras. 92-93; Ruto Appeal, para. 63.
[251] *See also* Ruto Appeal, para. 63 (observing that an "unreviewable" standard should not be applied).
[252] *See e.g.* Australia, *Shepherd*, 392, *per* Roden, J. ("[d]egrees of probability and degrees of proof with which juries are concerned are rarely capable of expression in mathematical terms"). *Contra* Ruto Appeal, para. 63 ("does a fact have to be 'more likely than not' or does it have to satisfy a Chamber to a certain percentage?").
[253] *Contra* Sang Appeal, para. 92 (calling for "a standard significantly higher and clearer than the 'satisfaction' standard", such as "strong grounds", "compelling grounds", or "substantial grounds").
[254] *See* Statute, arts. 53, 58. *See also* rule 48.
[255] *See* Statute, art. 61(7).
[256] *See* Statute, art. 66(3).
[257] *See above* para. 6.
[258] *Contra* Ruto Appeal, para. 63; Sang Appeal, para. 88. *See above* para. 139.

adequately accommodated instead (as the Chamber did) by consideration of the *nature* of the evidence satisfying the standard.[259] For example, in the UK case of *In re H*, Lord Nicholls reasoned:

> In establishing principles regarding the standard of proof, therefore, the law seeks to define the degree of probability appropriate for different types of proceedings. Proof beyond reasonable doubt, in whatever form of words expressed, is one standard. Proof on a preponderance of probability is another, lower standard having the in-built flexibility already mentioned. If the balance of probability standard were departed from, and a third standard were substituted in some civil cases, it would be necessary to identify what the standard is and when it applies. Herein lies a difficulty. If the standard were to be higher than the balance of probability but lower than the criminal standard of proof beyond reasonable doubt, what would it be? The only alternative which suggests itself is that the standard should be commensurate with the gravity of the allegation and the seriousness of the consequences. A formula to this effect has its attraction. But I doubt whether in practice it would add much to the present test in civil cases, and it would risk causing confusion and uncertainty.[260]

153. The "flexibility" within the standard of proof, described by Lord Nicholls, was then aptly summarised by Lord Hoffmann in *Rehman*:

> [S]ome things [a]re inherently more likely than others. It would need more cogent evidence to satisfy one that the creature seen walking in Regent's Park was more likely than not to have been a lioness than to be satisfied to the same standard of probability that it was an Alsatian.[261]

154. This approach is exactly consistent with the contextual approach adopted in the Decision, and the broad usage of the requirement for a Chamber to be "satisfied" in the Statute, Rules, and Regulations of the Court.[262] In the context of the broader safeguards for the Accused which are integral to the system of admitting evidence

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[259] *See* Cross and Tapper, pp. 185-186. *See also* pp. 171-172 (discussing the possibility of "degrees of proof within the same standard" resulting from the nature of the facts at issue).
[260] England and Wales, *Re H*, 587, *per* Lord Nicholls.
[261] England and Wales, *Rehman*, *per* Lord Hoffmann, para. 9.
[262] *See above* para. 142.

before this Court, nothing further was required. Although the reasoning in the Decision was succinct, it was neither incorrect nor inadequate.[263]

V. i. ii. The practice of other jurisdictions shows no error in the Chamber's approach

155. In construing the appropriate standard of proof for rule 68(2)(c) and (d), the practice of other jurisdictions may, on this occasion, provide relatively little assistance. Certainly, it shows no errors in the Chamber's approach.

a) The practice of international jurisdictions show no error in the Decision

156. Although the Ruto Defence is correct that the practice of other international jurisdictions may be persuasive for this Court when apposite, it is certainly not binding. They fail to show any such authority demonstrating an error of law in the Chamber's interpretation of rule 68(2)(c) and (d) in this case.[264]

157. The Ruto Defence rightly acknowledges that "beyond reasonable doubt has not been the standard generally applied to the admission of evidence in all cases at the *ad hocs*."[265] Accordingly, the two ICTY cases they cite which *do* appear to impose such a general standard, referring to English case law,[266] must necessarily be seen as isolated, and do not assist them to demonstrate that the Chamber erred.[267]

158. The attempt of the Ruto Defence to assert instead a narrower rule requiring "the imposition of the criminal standard" for admissibility decisions concerning the "rights of the Accused", or matters of similar importance, must likewise fail.[268] The two cases relied upon in fact reflect an even narrower principle still, which relates to

[263] *Contra* Sang Appeal, para. 93.
[264] *Contra* Ruto Appeal, para. 66.
[265] Ruto Appeal, para. 66.
[266] *See further below* paras. 159-164.
[267] *Contra* Ruto Appeal, para. 66, fns. 110 (citing *e.g.* ICTY, *Orić* TJ, paras. 12-13), 111 (citing ICTY, *Brđanin* TJ, para. 29). *Orić* and *Brđanin* shared the same presiding judge.
[268] *Contra* Ruto Appeal, para. 66.

the particular caution which may be required in ensuring the voluntariness of statements, and especially confessions.[269] Thus, the "issue" in the *Delalić* decision was the voluntariness of a statement.[270] Likewise, in *Musema*, although the Trial Chamber expressed its opinion in broader terms, the only example it cited was that same example from *Delalić*.[271] The existence of a strict rule concerning the voluntariness of statements is distinct from, and inapposite to, the standard for determining admissibility even of linkage evidence under rule 68(2)(c) and (d) for the following reasons.

- First, core policy concerns may favour a strict rule to prove the voluntariness of statements, when put in issue and at least if obtained by a Party to the proceedings or its agents, in order to promote the highest standards of law enforcement. In particular, admission of a compelled statement by an accused person engages the fundamental principles of the right to silence and its corollary, the right against self-incrimination.

- Second, a strict rule to prove the voluntariness of statements taken by a Party or its agents is not unduly burdensome since the Party itself controls that process.

- Third, the practice of the *ad hoc* jurisdictions—including in *Musema* and *Delalić*, as well as other cases—demonstrates that the institution of the strict rule on voluntariness of statements is compatible with a broader approach generally to determining issues of admissibility.[272]

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[269] *See* Ruto Appeal, para. 66, fns. 114-115.
[270] *See* ICTY, *Delalić* Exclusion Decision, para. 42 (concluding "the Prosecution claiming voluntariness on the part of the Accused/suspect, or absence of oppressive conduct, is required to prove it convincingly and beyond reasonable doubt").
[271] *See* ICTR, *Musema* TJ, para. 58, fn. 27 (citing *Delalić* Exclusion Decision).
[272] For example, shortly after the *Delalić* Exclusion Decision, the same Trial Chamber reaffirmed that the "threshold standard for the admission of evidence, however, should not be set excessively high": *see* ICTY, *Delalić* Admissibility Decision, para. 20. Likewise, in *Musema*, just two paragraphs before the Trial Chamber

- Fourth, a number of national jurisdictions which favour a lower standard of proof in determining issues of admissibility may nonetheless impose a higher standard with regard to the voluntariness of statements.[273]

b) The practice of common law jurisdictions show no error in the Decision

159. The practice of courts in a single domestic jurisdiction, England and Wales, is likewise not instructive for this appeal.[274] First, unlike this jurisdiction, the arbiter of fact for criminal matters in England and Wales is a jury, not a bench of professional judges. Greater concerns, therefore, may be associated with the issue of admissibility of evidence before lay members of a jury,[275] and consequently a greater degree of caution may be required than before this Court, where professional judges are both able and expected to weigh evidence properly (including, if necessary, disregarding evidence of insufficient weight), and to give adequate reasons for their conclusions in a written judgment.[276] Second, the practice of England and Wales is not as uniform as it may seem, nor in any event is it representative of a uniform practice among common law jurisdictions, even in conducting jury trials. To the contrary, the general approach of common law jurisdictions would appear to support the analysis in the Decision. This is especially significant as rule 63(5) requires that "[t]he Chambers shall not apply national laws governing evidence, other than in accordance with article 21". Third, even if the practice of England and Wales *were* representative of

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referred to the *Delalić* Exclusion Decision, it was stated "[w]ith certain exceptions, discussed below, the Chamber is of the opinion that the standard of proof required to establish the reliability of documentary evidence is proof on the balance of probabilities": *Musema* TJ, para. 56. Following this approach, *see e.g.* ICTY, *Martić* TD, Annex A, paras. 6 (when an objection is raised to the admissibility of a document, the tendering party may be required to make a *prima facie* case for admission), 9 (establishing a special rule regarding the voluntariness of confessions).

[273] *See below* para. 164 (discussing New Zealand and Scotland). *See also below* fns. 277 (express statutory provision regarding the voluntariness of confessions in England and Wales), 280 (repeated caselaw rulings regarding the voluntariness of confessions in Canada).

[274] *Contra* Ruto Appeal, para. 77.

[275] *See e.g.* England and Wales, *Horncastle*, paras. 20-22, *per* Lord Phillips.

[276] *See above* fn. 243.

common law jurisdictions, *arguendo*, this represents the practice of just one of the legal systems of the world.

160. Although in England and Wales there may appear to be some 'rule of thumb' that preliminary facts to a question of admissibility should be proved to the criminal standard,[277] there are acknowledged exceptions. These exceptions reflect a concern for the distinction between analysis of evidence for preliminary purposes, such as admissibility, and for the purpose of weight.[278] For example:

> [t]here are cases similar to, but quite distinct from, those discussed above in which the judge, before allowing particular issues to go before the jury, must be satisfied of certain matters by *prima facie* evidence. […] In *R v. Robson*, *R v. Harris*, it was held that *in these circumstances the judge is required to be satisfied to the civil standard, on a balance of probabilities, because application of the higher standard of proof, beyond reasonable doubt, would amount to a usurpation by the judge of the function of the jury.* If the judge satisfies himself that the evidence is competent to be considered by the jury and should not be withdrawn from them, the very same issues of originality and genuineness may then fall to be considered by them. The standard of proof is then proof beyond reasonable doubt.[279]

161. With the possible exception of Canada,[280] many other common law jurisdictions do not adopt the generally restrictive approach applied in England and Wales. Thus, in *Wendo v. R.*, the High Court of Australia stated:

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[277] *See e.g.* Keane, p.121 (citing generally *inter alia* England and Wales, *Ewing*). The English cases cited by the Ruto Defence may stem from the same root: *see e.g. Minors*, 107-109 (relying upon *Ewing*); *Shabir*, para. 64 (not explaining why proof to the criminal standard was required). Proof of the voluntariness of confessions, once in issue, is expressly regulated by statute: England and Wales, *PACE*, s. 76(2) (requiring proof beyond reasonable doubt). The admission of hearsay evidence in England and Wales, discussed in *Shabir*, is now likewise largely regulated by the *Criminal Justice Act*: *see generally Riat*.

[278] *Ewing* could be criticised on similar grounds, especially for the purposes of this Court (where none of the potential concerns associated with juries arises), as it seems to confuse these distinct considerations. The apparent concern in *Ewing*—that a trial judge's admissibility decision, if taken at a lower standard, could somehow enable the jury to ignore what would otherwise be a reasonable doubt—depends on putting the cart before the horse: *see Ewing*, 1047. This logic seems dubious even for a jury trial; it may be even less instructive for professional judges. *See further below* fn. 279.

[279] *See* Keane, p. 122 (emphasis added). *See also* Cross and Tapper, pp. 13-14, 202-203.

[280] In Canada, at least the voluntariness of a confession must be proved to the criminal standard: *see e.g.* Canada, *Oickle*, *per* Iacobucci, J., 19, 24-25, paras. 15, 30; *Hodgson*, *per* Cory, J., 470, 472-473, 475-476, 481-483,

> In criminal trials, as in civil cases, questions of fact frequently arise which must be determined by the trial judge before he decides whether to admit evidence for the consideration of the jury. Confessional statements are but one illustration of the type of evidence the tender of which may give rise to preliminary questions of fact which the judge must decide for himself. […] *But proof of the fulfilment of these or any other conditions precedent to the admission of evidence is not required to be given beyond reasonable doubt.* […] If the judge decides that there is a *prima facie* reason for admitting the evidence, it is for the jury or, in a case such as this, the judge sitting as a jury to determine what weight is to be given to it. It is then that the standard of proof beyond reasonable doubt has to be applied […][281]

162. The Parliament of Australia, and Australian states, subsequently endorsed this principle in legislation.[282]

163. Likewise, in *Bourjaily*, the US Supreme Court considered rule 104 of the Federal Rules of Evidence, which provides for the determination of preliminary questions concerning the admissibility of evidence. Writing for the Court, Chief Justice Rehnquist observed that nothing in the Federal Rules defines the standard of proof to be applied under rule 104 and continued:

> We are therefore guided by our prior decisions regarding admissibility determinations that hinge on preliminary factual questions. *We have traditionally required that these matters be established by a preponderance of proof.* […] The inquiry made by a court concerned with these matters is not whether the proponent of the evidence wins or loses his case on the merits, but whether the evidentiary Rules have been satisfied. Thus, the evidentiary standard is unrelated to the burden of proof on the substantive issues, be it a criminal case […] or a civil case. […] The preponderance standard ensures that before admitting evidence, the court will have found it more likely than not that the technical issues and policy concerns addressed by the Federal Rules of

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paras. 29, 34, 37-38, 48; *Horvath*, *per* Martland, Ritchie, and Pigeon, JJ., dissenting, 384-385; *Pickett* ; *Lee*, para. 25.

[281] Australia, *Wendo*, 572-573, *per* Taylor and Owen, JJ., para. 14 (emphasis added). *See also MacPherson*, 520, *per* Gibbs, CJ., and Wilson, J., para. 11; *Cleland*, 19, *per* Deane, J., para. 4.

[282] *See* Australia, *Evidence Act* (Cth), s. 142. *See also* s. 189. The legislation of the states in Australia is similar: *see e.g. NSW Evidence Act*, s. 142.

> Evidence have been afforded due consideration […] *[W]e find 'nothing to suggest that admissibility rulings have been unreliable or otherwise wanting in quality because not based on some higher standard.'*[283]

164. Both New Zealand and Scotland also generally require preliminary questions to be established at the lower standard and, exceptionally, may require proof beyond reasonable doubt only to establish the voluntariness of confessions.

- Thus, in New Zealand, in *Dobler*, it was said that "[t]he only occasion when such proof [beyond reasonable doubt] is required on an evidentiary matter in New Zealand, however, is in respect of the voluntariness of a statement".[284] The exception made for confessions, as noted by the Court of Appeal in *Gallagher*, "was expressly made for policy reasons arising from the importance to the whole criminal jurisdiction of ensuring that only voluntary confessions are received in evidence".[285]

- In Scotland, the leading authority is *Thompson v. Crowe*, which stated:

> there is no requirement in our law that the Crown should prove every fact in a case beyond a reasonable doubt. The requirement is, rather, that, on the admissible evidence as a whole, the Crown should prove the accused's guilt beyond a reasonable doubt. *It is not inconsistent with that approach for a judge to determine the factual basis for admissibility on the balance of probabilities."*[286]

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[283] USA, *Bourjaily*, 175-176, *per* Rehnquist, CJ. (emphasis added; citing, *inter alia*, *Colorado*, 167-169; *Lego*, 488). Justice Blackmun's opinion, for the minority, did not take issue with this aspect of the analysis.

[284] New Zealand, *Dobler*, p. 12 (citing *McCuin*; *Anderson*). *See also* p.13 ("the balance of probabilities is the right standard" but it would not "be satisfied lightly").

[285] New Zealand, *Gallagher*, *per* Thorp, J., p.2 (considering the rule concerning the voluntariness of confessions in *McCuin*); *per* Richardson, J., pp.4-6 (quoting *Anderson*—which followed the High Court of Australia's decision in *Wendo* and held that "not every fact necessary to be proved in the course of criminal proceedings […] must be proved beyond reasonable doubt" and that "in the course of criminal procedure other matters of fact may arise for determination, which are not required to be proved to this standard"—and reasoning that "[c]learly this Court in *McCuin* did not question the general principle discussed and adopted in *Anderson*").

[286] *See* Scotland, *Thompson*, *per* Lord Rodger (emphasis added; citing, *inter alia*, the High Court of Australia in *Wendo*).

> Notwithstanding some dicta to the contrary—made in the specific circumstances of determining the voluntariness of a confession[287]—the Scottish courts have continued to follow the position in *Thompson*.[288]

V. 2. The Chamber applied the standard of proof properly

165. The Appellants fail to show that the Chamber did not apply the standard of proof correctly in practice,[289] or that an alleged error in any way materially affected the Decision.[290]

V. 2. i. The Chamber reasonably determined that [REDACTED] was influenced by improper interference

166. The Chamber was satisfied that [REDACTED] had been materially influenced by improper interference on the basis of the following evidence:

- [REDACTED] had "[REDACTED]" in [REDACTED];
- [REDACTED]'s [REDACTED] was "[REDACTED]";
- [REDACTED] had admitted financial difficulties and said that [REDACTED] discontinued cooperation with the Prosecution because [REDACTED] was sent little money;
- [REDACTED] testified that [REDACTED] had received threats because of [REDACTED] status as a witness; and

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[287] *See* Scotland, *Jenkinson* (despite having previously stated that the court is bound to follow the decision in *Thompson*, stating "I have *no reasonable doubt* about my decision on all these matters", emphasis added).
[288] *See e.g.* Scotland, *Forrester*, para. 19.
[289] *Contra* Ruto Appeal, paras. 68, 75.
[290] *Contra* Sang Appeal, para. 94; Ruto Appeal, para. 75.

- [REDACTED] admitted that [REDACTED] was in close contact with [REDACTED] and [REDACTED].[291]

167. On this basis, and in the context of its broader "impression of an attempt to methodically target witnesses of this case in order to hamper the proceedings" based on "the element of systematicity of the interference of several witnesses",[292] the Chamber concluded there were "similarities with the pattern of interference" with the other Compromised Witnesses.[293] It was thus satisfied that [REDACTED] was influenced by improper interference by individuals including [REDACTED] and [REDACTED].[294]

168. The Ruto Defence fails to show that the Chamber's conclusion was erroneous.[295] It attempts, impermissibly, to take certain factors considered in the Decision in isolation, rather than considering their probative significance as a whole. Nor are the Ruto Defence's specific concerns regarding certain factors well founded, since they depend on strained interpretations of particular phrases in the Decision, taken out of context.

169. First, the Ruto Defence appears to mistake the relationship between the various factors considered by the Chamber. In particular, on the basis alone of [REDACTED], [REDACTED]'s subsequent withdrawal, and [REDACTED], the Chamber stated that it "could" infer that [REDACTED] was subject to interference.[296] However, the Chamber's analysis did not stop here, but was supplemented by the other factors identified. The initial use of the word "could", read in context, thus shows no

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291 Decision, para. 55. *See also* paras. 47, 51-53.
292 *See e.g.* Decision, para. 60.
293 Decision, para. 55. *See further below* para. 179.
294 Decision, para. 55.
295 *Contra* Ruto Appeal, paras. 68-73.
296 Decision, para. 55.

"weakness" of analysis.[297] Moreover, the basic reasoning of the Decision would seem to contradict the Ruto Defence's bald assertion that the Chamber reached its conclusion based "on no evidence".[298]

170. Second, the criticism of [REDACTED]—and which is only *one* part of the Chamber's overall analysis[299]—is misplaced. The term used by the Chamber was merely a reflection of the basis upon which the Prosecution had deduced [REDACTED].[300] As the Ruto Defence notes, the Prosecution always acknowledged that [REDACTED], although possible and even plausible, was not definitively established.[301] Furthermore:

- The Ruto Defence's disagreement with the reasoning establishing [REDACTED] does not show that it was erroneous[302]—nor indeed is the suggestion of an alternative interpretation *per se* sufficient to meet the appellate standard of review given the standard of proof applied by the Chamber.

- The Ruto Defence's disagreement with the reasoning establishing [REDACTED] is not only flawed, but procedurally improper. It is improper because the Ruto Defence appears to present additional evidence before the Appeals Chamber (concerning [REDACTED][303]) without seeking the

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[297] *Contra* Ruto Appeal, para. 69.
[298] *Contra* Ruto Appeal, para. 69.
[299] *See above* paras. 166, 169.
[300] *See e.g.* Decision, para. 53 ("Though [REDACTED] testified to having [REDACTED], the Prosecution contends that the witness was most probably [REDACTED]. The Prosecution notes that when it received [REDACTED], it was accompanied by a cover letter from [REDACTED] *referring to [REDACTED]*. The Prosecution deduces that [REDACTED]", emphasis added). *See also* Ruto Appeal, para. 70.
[301] *See* Ruto Appeal, para. 70.
[302] *Contra* Ruto Appeal, para. 70.
[303] *See* Ruto Appeal, para. 70, *especially* fns. 125-126. This evidence was not presented to the Chamber: *see e.g.* Ruto Trial Response, paras. 158-163

necessary leave.[304] It is flawed because in any event it fails to address the full basis upon which [REDACTED] was deduced, and thus shows no error. Therefore, not only was [REDACTED] identified—that [REDACTED]—but *also* [REDACTED].[305] This [REDACTED], which [REDACTED], is not speculation—although of course it is a matter of inference whether [REDACTED].[306]

171. Third, the Ruto Defence expresses no more than its subjective view of another part of the evidence when it asserts that "[t]he correct position, and one which the Majority was seemingly aware of, is that [[REDACTED] and [REDACTED]] were involved with [REDACTED] in relation to [REDACTED] original statement" and that "[t]his initial contact has nothing to do with [REDACTED] testimony before the Chamber".[307] This view, which was noted in the Decision,[308] does not show any error in the Chamber's overall conclusion, which was expressly made not only on the basis of the admitted "close contact" between these persons but also on the "similarities" with the broader "pattern of interference".[309]

172. Finally, the Ruto Defence's deprecation of other factors considered by the Chamber—including the transcript of [REDACTED] and [REDACTED], and [REDACTED]'s testimony—again shows no more than disagreement on these discrete points.[310]

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[304] *See Lubanga* AJ, para. 41. The Prosecution understands the Appeals Chamber to indicate that some or all of the principles governing the admission of additional evidence in appeals against final judgment—*see Lubanga* AJ, paras. 43-64—may be applicable *mutatis mutandis* to interlocutory appeals. This is consistent with the approach of other international courts: *see e.g.* ICTY, *Stanišić and Simatović* Second AD, para. 5; *Haradinaj* AD, para. 9; *Stanišić and Simatović* First AD, paras. 5-7.
[305] *See above* fn. 300.
[306] *Contra* Ruto Appeal, para. 71.
[307] *See* Ruto Appeal, para. 72.
[308] Decision, para. 55.
[309] Decision, para. 55.
[310] *Contra* Ruto Appeal, para. 73.

173. At no point does the Ruto Defence address the question which is truly material to its claim of error: did the Chamber err in being satisfied that improper interference was established, given the cumulative significance of the five factors it identified, in the circumstances of the case as a whole? The Decision, and its reasoning, shows that it did not.

V. 2. ii. The Chamber reasonably determined that [REDACTED] was influenced by improper interference

174. The Chamber was satisfied that [REDACTED] had been materially influenced by improper interference on the basis of the following evidence:

- [REDACTED] testified that [REDACTED] had previously provided false information in [REDACTED] to [REDACTED] Mr Ruto, [REDACTED], and implicated others, including [REDACTED], in this conduct;

- [REDACTED]'s [REDACTED], [REDACTED], implicated [REDACTED];

- [REDACTED]'s [REDACTED] asserts that [REDACTED] by [REDACTED] and [REDACTED], among others, to deliver money to [REDACTED] in connection with [REDACTED];

- [REDACTED] in [REDACTED] testimony before the Court, although [REDACTED] and [REDACTED];

- other "independent" evidence provides "some corroboration" that attempts were made to [REDACTED] to withdraw by offering financial incentives; and

- "additional evidence" before the Chamber implicates [REDACTED], among others, in alleged instances of witness interference.[311]

175. On the basis of this evidence, although without drawing a conclusion regarding the weight to be attributed to [REDACTED]'s varying accounts, the Chamber was satisfied that [REDACTED] was subjected to improper interference, influencing "in particular" [REDACTED] explanations for diverging from [REDACTED] prior statements.[312] As with [REDACTED], this conclusion must also be seen in the context of the Chamber's broader view that there had been made a methodical attempt to interfere with witnesses in this case.[313] In particular, the Chamber noted that it considered [REDACTED] with [REDACTED] in attempting to make a payment to a Prosecution witness, and their "close relationship", to be "of significance".[314]

176. The Ruto Defence fails to show that the Chamber's conclusion was erroneous.[315] Again, the plain reasoning of the Decision shows that there was not an "absence of evidence", nor that the only evidence "referred to" was [REDACTED]'s involvement "in an alleged plan to deliver money to [REDACTED]".[316] To the contrary, having regard to all the factors—including the inconsistencies in [REDACTED]'s explanation for recanting [REDACTED] prior statements, [REDACTED] contacts with [REDACTED], and the additional evidence suggesting implicating [REDACTED] in witness interference—the Chamber reasonably determined that it was satisfied that [REDACTED] had been subject to interference.

V. 2. iii. Any other claims by the Appellants are undeveloped

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[311] Decision, paras. 77-78. *See also* paras. 70-71, 75.
[312] Decision, para. 79.
[313] *See above* para. 167. *See further below* para. 179.
[314] Decision, para. 78.
[315] *Contra* Ruto Appeal, para. 74.
[316] *Contra* Ruto Appeal, para. 74.

177. The Appellants make broad and undeveloped assertions that, if the Chamber had applied a higher standard of proof, it would have refused the Admitted Material.[317] Even assuming an error in the standard *arguendo*, these assertions are simply insufficient to show that the Decision would have been materially affected.

178. The Ruto Defence addresses just two of the five Compromised Witnesses,[318] and even then do not show necessarily that the evidence would have been insufficient for a finding beyond reasonable doubt. For the witnesses which they do not address, they cannot even show as much.

179. Likewise, the Sang Defence does not address the effect on the analysis on any specific witness at all but merely cites factors which it suggests the Chamber "would have had to at least consider" in the Decision.[319] Again, this is insufficient, as a number of the identified factors do not appear to be even relevant to the question whether the Compromised Witnesses were materially influenced by improper interference. Moreover, since the Sang Defence does not even contend any or all of these factors *would* have affected the Chamber's analysis in applying a higher standard of proof, the Appeals Chamber is presented with nothing more than speculation. This is insufficient to show the necessary impact upon the Decision.

180. Finally, by making specific challenges to the Chamber's findings on improper interference for just two of the Compromised Witnesses, [REDACTED] and [REDACTED], the Appellants tacitly concede that the evidence of interference regarding the relevant others is unassailable. This is significant, as the allegations of interference could not be analysed in isolation, but rather were considered against the background of the fact that other witnesses who recanted their evidence in similar circumstances were materially influenced by undue influence. This provides

[317] *Contra* Ruto Appeal, para. 75; Sang Appeal, para. 94.
[318] *See above* paras. 166-176.
[319] *See* Sang Appeal, para. 94.

substantial support for the Chamber's conclusions concerning [REDACTED] and [REDACTED].

VI. The Chamber did not err in interpreting or applying the "indicia of reliability" or "acts and conduct of the accused" (Mr Ruto's Fifth Ground; Mr Sang's Sixth Ground)

181. The Appellants fail to show that the Chamber erred in interpreting or applying two of the legal concepts which must be considered in determining whether to admit evidence under rule 68(2)(c) or (d): the "indicia of reliability" of the relevant material,[320] and the "acts and conduct of the accused".[321]

<u>VI. 1. The Chamber assessed the "indicia of reliability" properly</u>

182. Rule 68(2)(c)(i) and (d)(i) require the Chamber to be "satisfied" that the prior recorded testimony sought to be admitted "has sufficient indicia of reliability". The Appellants fail to show any error in the Chamber's assessment in this respect. The Decision correctly sets out the law, and the Chamber correctly and reasonably concluded that the Admitted Material bore sufficient indicia of reliability.

VI. 1. i. The Chamber set out the law correctly

183. As the Ruto Defence concedes, the Chamber "correctly determined that, in line with the jurisprudence of this Court and other international tribunals, a broad approach should be taken" to assessing whether a document bears "sufficient indicia of reliability".[322]

184. Specifically, the Chamber recalled its analysis of the applicable standard of proof, and noted that this applied equally to its assessment of the existence of sufficient indicia of reliability. In this context, and bearing in mind the "preliminary"

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[320] *See* rule 68(2)(c)(i) and (d)(i).
[321] *See* rule 68(2)(c)(ii) and (d)(iv).
[322] Ruto Appeal, para. 76. *See also* para. 77.

nature of the "assessment of reliability […] at this stage", it further observed that the assessment required under rule 68(2)(c)(i) and (d)(i) "overlap[s]" with the ordinary evaluation of "probative value" for the purpose of admissibility determinations under article 69(4) of the Statute.[323] Accordingly, as it would in evaluating any other piece of evidence, the Chamber enumerated a "non-exhaustive" series of indicators, none of which was "definitive".[324] These included:

- the extent of any affirmation of truth in the document;
- the existence of a signature on the document;
- the circumstances in which the document was produced, including whether it involved the assistance of a qualified interpreter, if required;
- the presence or absence of manifest inconsistencies between the document and other evidence;
- the presence or absence of corroborating evidence; and
- the possibility for cross-examination of the author of the document.[325]

185. Consistent with the well-established distinction between the assessment of evidence for the purpose of admission and for the purpose of weight,[326] the Chamber observed that the absence of one or more of these indicia of reliability may potentially be considered in assessing the *weight* to be attributed to a piece of evidence, rather than as necessarily militating against its admission at an earlier

[323] Decision, para. 65.
[324] Decision, para. 65.
[325] Decision, para. 65.
[326] *See* Decision, para. 151.

stage.[327] The Chamber reiterated, in this context, that "the objections and considerations made by the Defence" may be "taken into account" in this way, to any extent they are not otherwise reflected in the Decision.[328]

186. None of these principles in the Decision is controversial, far less incorrect. Although the Sang Defence appears to suggest generally that the "approach" of the Chamber was "wrong in law",[329] it is understood to argue, like the Ruto Defence, that the Chamber erred in its *application* of the law, not the principles that it set out. However, this argument is also unsustainable, for the reasons which follow.

VI. 1. ii. The Chamber correctly and reasonably concluded that the Admitted Material bore sufficient "indicia of reliability"

187. The Chamber did not "fail[] to apply its stated broad approach" to assessing the indicia of reliability, and instead assess "'formal indicia of reliability' alone.[330] Nor was its approach "overly simplistic".[331] Rather, the Appellants merely disagree with the Chamber's conclusions in the Decision, which were adequately explained and consistent with the applicable law, set out above. The Chamber was not obliged to answer every argument raised by the Appellants. Nor did the Chamber venture outside its discretion in noting potential issues associated with hearsay and corroboration, but choosing to treat them as matters of weight in its final deliberations.

a) The Appellants merely disagree with the Decision

188. Very often, arguments relating to the particular weight given to certain factors in the exercise of a Chamber's discretion may amount to no more than a disagreement with that Chamber's decision. The arguments raised by the Appellants

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[327] Decision, para. 65.
[328] Decision, para. 151.
[329] Sang Appeal, para. 96.
[330] *Contra* Ruto Appeal, para. 76.
[331] *Contra* Sang Appeal, para. 96.

are no different.[332] Thus, although many of these arguments are nonetheless addressed in detail in the following paragraphs, at no stage do they establish that the Chamber abused its discretion, or erred in law or fact. In particular, the mere assertion, without further (or, indeed, any) substantiation, that the Chamber "fail[ed] to conduct a proper analysis of bias, internal inconsistencies, lack of external corroboration, and recantations" is impermissibly vague and cannot show either an error or the required impact.[333]

189. In this context, the Ruto Defence's suggestion that certain alleged factors *must* be considered for the purpose of assessing reliability at the admissibility stage is inconsistent with the established law recited by the Chamber.[334] Not only is the distinction which the Ruto Defence seeks to draw from that law unsustainable, but the argument again depends on a basic disagreement with the Chamber as to the importance of those factors. Unsupported by any positive law endorsing its position, the Ruto Defence fails to show that the Chamber was at any point unreasonable in its approach.

190. To the contrary, especially in the present circumstances—where it is uncontested that the Compromised Witnesses have acted at times inconsistently and potentially dishonestly, in a febrile political and social context—the Chamber rightly and reasonably considered that essentially substantive issues such as the witnesses' motives and affiliations were best considered in its final deliberations, on the basis of all the evidence, including from any Defence case.[335]

191. Likewise, the Chamber did not determine that "*prima facie* reliability for the purposes of Rule 68" would as a matter of principle "be limited to the four corners of

[332] *See* Ruto Appeal, paras. 76-92; Sang Appeal, paras. 96-97.
[333] *Contra* Sang Appeal, para. 96.
[334] *Contra* Ruto Appeal, paras. 77, 85-86, 88, 92. *See also above* paras. 183-185.
[335] *See e.g.* Decision, para. 143. *Contra* Ruto Appeal, para. 92; Sang Appeal, para. 102.

the statement", as the Ruto Defence seems to imply.[336] This would be plainly inconsistent with the statement of law in the Decision.[337] Rather, in the specific circumstances of each of the Compromised Witnesses, the Chamber determined that sufficient indicia were established—a conclusion with which the Ruto Defence simply disagrees. The "injudicious" use of the Chamber's discretion cannot be inferred simply from the Ruto Defence's view of the Chamber's "approach".[338]

192. Nor is there any substance offered for the claim that the Chamber afforded "a premium" to the fact that statements were obtained by the Prosecution.[339] Rather, the Decision makes incidental reference to the affiliation of the person collecting the relevant evidence in the context of noting that the material was obtained "in the ordinary course of […] investigations", rather than in other contexts.[340] Nothing suggests that the approach to indicia of reliability in the Decision could or would be applied differently to evidence obtained by the Defence.

b) The Decision was adequately reasoned

193. The Appeals Chamber has previously confirmed that a decision "must be supported by sufficient reasoning". It continued:

> The extent of the reasoning will depend on the circumstances of the case, but it is essential that it indicates with sufficient clarity the basis of the decision. Such reasoning will not necessarily require reciting each and every factor that was before the […] Chamber to be individually set out, but it must identify which facts it found to be relevant in coming to its conclusion. […] [T]he right to a reasoned decision is an element of the right to a fair trial and […] only on the basis of a reasoned decision will proper appellate review be possible […][341]

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[336] *Contra* Ruto Appeal, para. 80. *See also* paras. 76, 78, 81 ("the Majority's approach means that the out-of-court statements of every witness in every case at this Court are admissible under Rule 68 provided they are signed and include a 'Witness Acknowledgement'"); Sang Appeal, para. 96.
[337] *See above* paras. 183-185.
[338] *Contra* Ruto Appeal, para. 81.
[339] *Contra* Ruto Appeal, para. 82.
[340] *See e.g.* Decision, paras. 66, 85, 115, 132, 144.
[341] *Lubanga* AD, para. 20.

194. The Decision meets this standard. Not only does it set out its general view of the law, but for each of the Compromised Witnesses it provided a reasoned analysis, among other factors, of the indicia of reliability of their prior recorded testimony.[342] In each case, the Chamber summarised the arguments of the Parties, as it considered relevant, and explained briefly the basis upon which it considered the relevant documents to be sufficiently reliable to be admitted into evidence. It also identified issues which, although not considered to militate against admission, may be further considered in the ultimate assessment of the weight to be accorded to the evidence. Considering the "preliminary" nature of the Chamber's analysis at the admissibility stage, and the relevant standard of proof, this reasoning was wholly sufficient.

195. In this context, the Chamber was not obliged to answer or to address every argument raised by the Appellants or which could otherwise be conceived.

196. Thus, the Chamber was not obliged to reason expressly whether a 'Witness Acknowledgement' was "sufficient to ensure the truthfulness of a statement in the particular circumstances of this case".[343] Rather, it correctly noted, as fact, that the prior recorded testimony of each of the Compromised Witnesses was not made on oath, but contained an unsworn affirmation that the statement was given voluntarily, was true to the best of the witness' knowledge and recollection, and may be used by the Court.[344] As the Chamber had recalled, this fact could be considered an indicator of reliability,[345] and was only one consideration among the other factors assessed. Furthermore, given the Chamber's emphasis on the "preliminary" nature of its enquiry at the admissibility stage,[346] and the distinction it drew from its

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[342] *See* Decision, paras. 61-67 (for [REDACTED]), 82-86 (for [REDACTED]), 112-117 (for [REDACTED]), 129-133 (for [REDACTED]), 141-145 (for [REDACTED]).
[343] *Contra* Ruto Appeal, para. 83.
[344] *See* Decision, paras. 66, 85, 115, 132, 144.
[345] Decision, para. 65. *See also* paras. 32, 144 (such an acknowledgement may be "adequate to indicate the witness' acceptance that the prior recorded testimony was true and accurate").
[346] Decision, para. 65.

assessment of factors including reliability for the ultimate purpose of determining evidentiary weight,[347] the Chamber made no attempt to weigh the reliability of the prior recorded testimony against the relevant witnesses' testimony in court,[348] nor was it obliged to do so.[349] Manifestly, therefore, it was not required to explain further its view in this regard.

197. Likewise, the Ruto Defence's subjective complaint that the Prosecution had "not given the judges the necessary tools to assess *prima facie* reliability", such as "the means to independently verify what had transpired", is immaterial.[350] The Chamber was not required to consider, hypothetically, whether it might have been better assisted by evidence obtained in a different form.[351] Nor was it required to address the possible inferences which might be drawn from the Ruto Defence's assertion that there were defects in the statement prepared for another witness, [REDACTED] (whose statement was not sought to be admitted).[352] Again, all such considerations may, potentially, go to the weight given to the Admitted Material. The only proper question for this appeal, at the present time, is whether the Chamber's determination of sufficient indicia of reliability, based on the material before it, was both reasonable and adequately explained. It was.

198. Finally, the Chamber was not obliged to provide express reasoning concerning allegations of Prosecution misconduct, which are manifestly implausible and which the Ruto Defence itself considers to be groundless.[353] Moreover, the Decision demonstrates that the Chamber was indeed well aware of these allegations, which

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[347] Decision, para. 151. *See also* paras. 67, 86, 117, 133, 145.
[348] *See e.g.* Decision, para. 79 (stressing, in the context of [REDACTED], that, "[f]or the present purpose, the Chamber does not consider it necessary to come to a conclusion regarding the weight to be attributed to the accounts provided by the witness either in the prior recorded testimony or before the Chamber"). The Prosecution submits that this statement, although not elsewhere reproduced, is generally applicable to the Decision.
[349] *Contra* Ruto Appeal, para. 83.
[350] *Contra* Ruto Appeal, para. 79.
[351] *Contra* Ruto Appeal, para. 84. *See also* para. 87.
[352] *Contra* Ruto Appeal, paras. 84-85.
[353] *Contra* Ruto Appeal, para. 86.

were expressly acknowledged,[354] and the Chamber's conclusions on the existence of sufficient indicia of reliability were made in that context. Comparisons with the factual circumstances of another case, before another tribunal, do not show any error in the Chamber's approach in this case,[355] especially given the variety of ways in which witnesses may react when subjected to interference.[356]

c) The Chamber did not err in treating any hearsay evidence as a matter of weight, not admissibility

199. The Ruto Defence contends that the Chamber erred by neglecting to consider, or giving insufficient weight to, the existence of hearsay within the Admitted Evidence. It suggests that this was "particularly serious" because of the importance of the "hearsay evidence".[357] However, the Ruto Defence fails to show any error in the approach taken in the Decision.

200. It is well established that hearsay evidence is admissible before this Court.[358] The Appeals Chamber has stressed that the weight or probative value to be afforded to hearsay depends upon the "infinitely variable circumstances which surround" it,[359] and Judges Trendafilova and Tarfusser, writing separately, noted that such evidence "is not to be automatically excluded".[360]

201. In considering hearsay, this Court has consistently relied on ICTY case law,[361] especially *Aleksovski* which stated that "Trial Chambers have a broad discretion […]

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[354] *See* Decision, paras. 77, 100. *See also* para. 79 (declining to weigh the truthfulness of these allegations at this stage).
[355] *Contra* Ruto Appeal, para. 86 (citing ICTY, *Limaj* TD, para. 23). The sentence following the one quoted by the Ruto Defence reads: "Nevertheless, when questioned in court on the content of their interviews, each witness disavowed part of what he had previously said."
[356] *See above* paras. 108, 110-113.
[357] *See* Ruto Appeal, para. 89. *See also* para. 97.
[358] *See e.g. Katanga* TD, para. 12 ("there is no rule against hearsay evidence in this Court"). *See also Lubanga* TD, paras. 24, 28.
[359] *Ngudjolo* AJ, para. 226.
[360] *Ngudjolo* AJ, *per* Judges Trendafilova and Tarfusser, para. 50.
[361] *See Ngudjolo* AJ, para. 226; *Lubanga* Decision, para. 28.

to admit relevant hearsay evidence".[362] Although the reliability of such evidence should be assessed before it is admitted,[363] "the test to be met before ruling evidence inadmissible is […] high" and it must "be shown that the evidence is so lacking in terms of the indicia of reliability as to be devoid of any probative value".[364]

202. The Decision demonstrates that the Chamber was alert to the possibility that aspects of the evidence of the Compromised Witnesses may be hearsay.[365] The Chamber elected to consider this issue—which it addressed in its analysis of the "interests of justice"—in its ultimate assessment of the weight to be given to that evidence, having regard to its probative value and reliability.[366] This approach shows no error. In the particular circumstances of this case, having regard to the nature of the prior recorded testimony, the possibility for cross-examination of almost all the Compromised Witnesses,[367] and the existence of other sufficient indicia of reliability for the Admitted Material, it was unnecessary for the Chamber to have provided further reasoning or to have taken further steps concerning this issue. The Parties' view of the "importance" of the evidence for the ultimate determination of the case does not elevate the standard applied to admissibility determinations. To the contrary, the degree of caution which may be required when the evidence going to such 'core' issues may be hearsay is properly a matter for final deliberations, in the context of the evidence admitted in the case as a whole.

d) The Chamber did not err in treating the issue of corroboration as a matter of weight, not admissibility

203. Although the Ruto Defence is correct that the existence of corroborating evidence may help to establish the reliability of hearsay evidence, there is no legal

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362 *See* ICTY, *Aleksovski* AD, para. 15. *See also e.g. Kordić* AJ, para. 281; SCSL, *Brima* TD, para. 12.
363 *See e.g. Aleksovski* Decision, paras. 15, 27.
364 ICTR, *Akayesu* AJ, para. 286. *See also* para. 292 ("admission of hearsay evidence does not automatically carry any particular finding as to its assessment"). *See also Lubanga* Decision, paras. 24, 28-30.
365 *See* Decision, paras. 58, 64.
366 *See* Decision, paras. 60, 81, 111, 128.
367 *See also* ICTR, *Rutaganda* AJ, paras. 149-150.

requirement for any offence, or the evidence underlying it, to be corroborated, even at the conclusion of the case.[368] *A fortiori*, there can be no such requirement at the admissibility stage.[369]

204. The Decision expressly acknowledged that the presence of "manifest inconsistencies" or, conversely, corroboration could be considered in its assessment of the indicia of reliability,[370] and noted the Appellants' submissions that the Admitted Evidence was uncorroborated.[371] In addition, the Chamber itself identified certain inconsistencies between the Admitted Evidence and other evidence in the record.[372] Again, however, it preferred to address these questions in final deliberations, rather than at the admissibility stage.[373] This was within the Chamber's discretion, and was not erroneous.[374]

e) The Chamber reasonably concluded that [REDACTED]'s prior testimony was sufficiently reliable

205. The Ruto Defence specifically challenges the Chamber's assessment of the indicia of reliability of the prior recorded testimony of [REDACTED] on the basis of the language used in [REDACTED] interview, and [REDACTED].[375] Neither challenge shows any error.

206. First, the Chamber reasonably concluded that [REDACTED]'s statements, which were based on interviews conducted in English, still bore sufficient indicia of reliability notwithstanding the fact that [REDACTED] "testified in court more easily

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[368] *See* rule 63(4). The extent to which evidence may require corroboration is necessarily contingent both upon the matter to which it is addressed, and the circumstances of the case as a whole. *See e.g.* ICTY, *Popović* AJ, para. 96; *Haraqija* AJ, paras. 61-62.
[369] *Contra* Ruto Appeal, para. 90. *See also above* para. 189.
[370] Decision, para. 65.
[371] *See e.g.* Decision, paras. 59, 62-64.
[372] *See* Decision, paras. 86, 117, 133.
[373] *See* Decision, paras. 60, 81, 111, 128.
[374] *Contra* Ruto Appeal, paras. 90-91.
[375] *See* Ruto Appeal, paras. 87-88.

in Swahili".[376] The Ruto Defence incorrectly asserts that the Chamber thus "disregarded" the possibility of language difficulties.[377] Yet, to the contrary, the Chamber expressly stated that "this may be a factor to take into consideration in its final assessment of the prior recorded testimony".[378] This approach was not erroneous. Moreover, the Chamber plainly had a first-hand opportunity to form an independent impression of [REDACTED]'s linguistic abilities when [REDACTED] testified. In that context, the Chamber was still satisfied that [REDACTED]'s statements—which [REDACTED] had voluntarily acknowledged were true and correct—bore sufficient indicia of reliability.

207. Second, the Ruto Defence contends that the Chamber erred by failing to "properly weigh[]" the report that, during one of [REDACTED] original interviews, [REDACTED]. Although this concern is specifically recalled in the Decision, the Chamber does not express a further opinion on it.[379] However, again, this fell within its discretion, having regard to the preliminary nature of its analysis, its satisfaction that in other respects sufficient indicia of reliability were established, and its common sense view that a "final assessment" of the weight to be given to [REDACTED]'s evidence could only be made at the end of the trial in the context of all the evidence. The Ruto Defence merely disagrees with the Chamber's conclusion, which is insufficient to show any error.[380]

f) The Chamber reasonably concluded that [REDACTED]'s prior testimony was sufficiently reliable

208. The Ruto Defence takes issue with the determination that [REDACTED]'s prior recorded testimony bore sufficient indicia of reliability based on the potential inconsistencies, identified by the Chamber, with other evidence in the record such as

[376] Decision, para. 67.
[377] *Contra* Ruto Appeal, para. 87.
[378] Decision, para. 67.
[379] *See* Decision, paras. 63, 66-67.
[380] *Contra* Ruto Appeal, para. 88.

the witness's testimony in court.[381] The Chamber considered that "these inconsistencies, in light of the formal indicia of reliability indicated above, are not sufficient to make the written statement unreliable".[382] Although the Ruto Defence disagrees with this view, it does not show that it was unreasonable or an abuse of discretion—especially in the circumstances of this case, in which competing versions of testimony may be a key matter to be resolved in final deliberations.[383]

g) The Chamber reasonably concluded that [REDACTED]'s prior testimony was sufficiently reliable

209. The Ruto Defence challenges the determination that [REDACTED]'s prior recorded testimony bore sufficient indicia of reliability on the basis, again, of the language used in the original interview, and the acknowledged presence of inconsistencies between [REDACTED] statement and [REDACTED] testimony in Court.[384] For similar reasons to those already described, the Chamber did not err in either respect.

210. Thus, concerning the language used, the Chamber had again expressly noted that "the witness testified in court and partly answered questions in Swahili" but also observed that "the witness confirmed that [REDACTED] was able to understand English and was able to follow a conversation" and "chose to answer partly in English, partly in Swahili".[385] On this basis, the Chamber was manifestly satisfied that [REDACTED]'s prior recorded testimony was not unreliable on the basis of linguistic difficulties. Moreover, it again emphasised that the language issue "may be a factor to take into consideration in its final assessment of the prior recorded testimony". Nothing in this approach was unreasonable or an abuse of discretion.[386]

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[381] Decision, para. 86. *See further* paras. 77-79. *See also above* paras. 174-176.
[382] Decision, para. 86.
[383] *Contra* Ruto Appeal, para. 91.
[384] *See* Ruto Appeal, paras. 87, 91.
[385] Decision, para. 116.
[386] *Contra* Ruto Appeal, para. 87. *See also above* para. 206.

211. With regard to the acknowledged inconsistencies in [REDACTED]'s prior recorded testimony, again the Chamber concluded that "these inconsistencies, in light of the formal indicia of reliability indicated above, are not sufficient to make the written statement unreliable".[387] The Ruto Defence fails to show that this approach, in the circumstances, was unreasonable.[388]

h) The Chamber reasonably concluded that [REDACTED]'s prior testimony was sufficiently reliable

212. Like the Ruto Defence, the Sang Defence primarily challenges the determination that [REDACTED]'s prior recorded testimony bore sufficient indicia of reliability based on the Chamber's view that apparent inconsistencies were "not sufficient to make the written statement unreliable", in "light of the formal indicia of reliability".[389] This was not unreasonable, nor did the Chamber thus "improperly reverse[] the burden of persuasion, committing an error of law".[390] To the contrary, the Chamber was clearly satisfied that sufficient indicia of reliability *were* established by other factors. In that context, it considered whether this conclusion would be altered by the existence of the inconsistencies, but concluded that it would not. This was not improper.

i) The Chamber reasonably concluded that [REDACTED]'s prior testimony was sufficiently reliable

213. Neither of the Appellants appears to take issue with any specific aspect of the Chamber's analysis of the reliability of the prior recorded testimony of [REDACTED], except to the extent incorporated in their general arguments as a whole.[391]

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[387] Decision, para. 117. *See also* paras. 99-100.
[388] *Contra* Ruto Appeal, para. 91. *See also above* para. 208.
[389] Decision, para. 133. *See also* paras. 119-120.
[390] *Contra* Sang Appeal, para. 97. *See also above* paras. 208, 211.
[391] *See* Decision, paras. 141-145.

VI. 2. The Chamber assessed the "acts and conduct of the accused" properly

214. Rule 68(2)(c)(ii) and (d)(iv) state that "[t]he fact that the prior recorded testimony goes to proof of acts and conduct of an accused *may* be a factor against its introduction, or part of it" (emphasis added).[392] The Appellants fail to show that the Chamber "fail[ed] to apply and meaningfully consider" this concept.[393]

VI. 2. i. Rule 68 permits the admission of prior recorded testimony which goes to the acts and conduct of the accused

215. From the plain words of rule 68, and especially the term "may", it is axiomatic that prior recorded testimony going to prove the acts and conduct of an accused person may be admitted.[394] Although it is true that such evidence should be treated with caution,[395] the very object and purpose of rule 68(2)(c) and (d) is to prevent the truth-finding function of the Chamber from being frustrated, by ensuring that key evidence is not lost due to improper interference or the unavailability of witnesses. By the nature of international criminal cases, such key evidence will often go to matters of 'acts and conduct'. The assessment required by rule 68(2)(c)(ii) and (d)(iv) must thus be conducted realistically and effectively. To ensure the fairness of the trial, however, the same fundamental safeguards for admissibility determinations—and especially the distinction from the ultimate analysis in determining the verdict—apply.[396]

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[392] *Compare* Ruto Appeal, para. 95 ("the provisions require a Chamber to give explicit consideration to this fact because it *is* 'a factor against its introduction, or part of it'. This phrasing was deliberately used", emphasis added).
[393] *Contra* Ruto Appeal, paras. 93, 95. *See also* Sang Appeal, para. 101 (criticising the Chamber's approach as "simplistic").
[394] The Prosecution further notes the Sang Defence's assertion, apparently unsupported by relevant authority, that "the prohibition on admission [of evidence going to acts and conduct] extends even to those closely associated with the accused": Sang Appeal, para. 98. This is incorrect: ICTY, *Karadžić* TD, para. 4.
[395] *See* Ruto Appeal, para. 95 (quoting the WGLL Report as stating that rule 68(2)(d)(ii) "discourages the use of 'acts and conduct' evidence" but does not prohibit it).
[396] *See above* para. 144.

216. The practice of the ICTY, which in its rule 92*quater* and *quinquies* makes similar provision to rule 68(2)(c) and (d), does not support the view that statements going to 'acts and conduct' "*must* be subjected to confrontation",[397] or indeed any suggestion that the preference for "live testimony" over "written testimony" necessarily bars admitting such testimony.[398] To the contrary, the ICTY has on multiple occasions admitted such evidence under rule 92*quater* (relating to unavailable witnesses).[399] For example, in 2008, the *Popović* Trial Chamber stated:

> Rule 92*quater*(B) specifically provides that, if the evidence goes to proof of acts and conduct of the accused, that may be a factor against the admission of such evidence, or part of it. […] [T]his provision is inflected with concern for ensuring a fair trial and the reliability of the evidence. This provision *counsels cautious scrutiny* with respect to evidence going to proof of acts and conduct of the accused *but also contemplates the admission of statements* […] *containing such evidence*.[400]

217. Although the *Popović* Trial Chamber considered the evidence at issue to go to the acts and conduct of the accused persons, weighing against admission,[401] it determined that the evidence could nonetheless be admitted due to the circumstances in which it was obtained and its indicia of reliability. This evidence included that of Miroslav Deronjić, which (although given under oath) contained "a number of inconsistencies, admissions of prior false statements, and […] uncorroborated claims". Having regard to the circumstances—including that he was cross-examined on these points—the Chamber was satisfied that the inconsistencies in his testimony went "to the weight to be attributed to the evidence but d[id] not

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[397] *Contra* Sang Appeal, para. 99 (emphasis added). *See e.g. Karadžić* TD, para. 8-9 ("The right of an accused to cross-examine the witnesses against him is not absolute. The Tribunal's Rules provide for the admission of written evidence in lieu of oral testimony […] The provisions of Rules 92*bis*, *ter*, and *quarter* set out those circumstances in which such admission is appropriate, with the accused's fair trial rights in mind. Moreover, all these provisions are subject to the general requirements for the admission of evidence […] With that in mind, it should be noted that, while the rights of an accused […] must be protected, a 'fair trial' includes fairness to the Prosecution, as well as to the defence").
[398] *See* Sang Appeal, para. 100.
[399] *See e.g.* ICTY, *Hadžić* TD; *Karadžić* TD; *Popović* TD.
[400] ICTY, *Popović* TD, para. 32 (emphasis added).
[401] *Popović* TD, para. 42.

preclude its admission."[402] This decision was affirmed on appeal.[403] Similarly, the ICTY Appeals Chamber has affirmed the admission of documents going to acts and conduct even without the benefit of cross-examination.[404]

218. The approach of the Chamber in this case was consistent with this practice.

VI. 2. ii. The Chamber treated this consideration properly

219. In the Decision, for four of the Compromised Witnesses ([REDACTED], [REDACTED], [REDACTED], and [REDACTED]), the Chamber noted that the relevant evidence went to the acts and conduct of the Accused, but balanced this against the ability of "the Defence […] to cross-examine the witness on these specific topics during [REDACTED] in-court testimony."[405] In each respect, the Chamber concluded that, although the evidence would be admitted, it would further consider "whether the prior recorded testimonies go to the acts and conduct of the accused", among other factors, in its ultimate deliberations on the merits.[406]

220. With respect to [REDACTED], whose evidence was admitted under rule 68(2)(c), the Ruto Defence is correct that the Decision did not appear to expressly assess whether the evidence went to the acts and conduct of the Accused, nor did it set out whether this concern was raised by the Parties in submissions.[407] However, the Chamber nonetheless correctly noted that, unlike the other Compromised Witnesses, [REDACTED] was not subject to cross-examination. The Chamber indicated that it "will be mindful of this fact when deciding what weight to attribute to" [REDACTED]'s statement.[408] In the circumstances, although the absence of an express finding on the issue of 'acts and conduct' is unhelpful, this omission appears

[402] *Popović* TD, para. 61. *See also* paras. 59-60, 62-64.
[403] *See Popović* AJ, para. 90 (referring to the Appeals Chamber's prior, but confidential, interlocutory decision).
[404] *See Popović* AJ, para. 91.
[405] *See* Decision, paras. 60, 81, 111, 128.
[406] *See* Decision, paras. 60, 81, 111, 128.
[407] *See* Decision, paras. 134-145. *See also* Ruto Appeal, para. 94.
[408] Decision, para. 145.

little more than a drafting oversight. Nor in any event does the omission sufficiently raise the apprehension that the Chamber's reasoning was erroneous, sufficiently impacting the decision. The Ruto Defence's comparison of [REDACTED]'s evidence with a document which the Chamber declined to admit over the bar table is inapposite because there is no basis to assess whether the two pieces of evidence have like probative value.[409] As recalled in *Popović*,[410] although caution must indeed be exercised, nevertheless rule 68(2)(c) itself makes clear that it is amenable to a Chamber admitting evidence going to the acts and conduct of the accused.[411] And if a witness is "unavailable" under rule 68(2)(c), then it may well be likely that the witness will not have been cross-examined.

221. The Appellants fail to show any error with respect to the other Compromised Witnesses. Although the discussion in the Decision of 'acts and conduct' is not extensive or elaborate, it is adequate.[412] It does not breach the plain terms of rule 68(2)(d)(iv),[413] nor does it prejudice the rights of the Accused. To the contrary, consistent with the ICTY case law,[414] the Decision expressly linked the issue of 'acts and conduct' with the opportunity available to the Appellants to conduct cross-examination, and again stressed that the determination of admissibility was distinct from the assessment of weight. This approach was not erroneous.[415] The Sang Defence's assertion that [REDACTED]'s testimony relates significantly to the acts and conduct of [REDACTED] fails to show an error, beyond merely asserting that the Chamber should have accepted the Sang Defence's view of [REDACTED]'s motive.[416]

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[409] *Contra* Ruto Appeal, para. 96.
[410] *See above* para. 216.
[411] *See above* fn. 397.
[412] *Contra* Ruto Appeal, para. 95.
[413] *Contra* Ruto Appeal, para. 95. *See above* para. 214, fn. 392.
[414] *See above e.g.* para. 217.
[415] *Contra* Sang Appeal, para. 101; Ruto Appeal, para. 94.
[416] *Contra* Sang Appeal, para. 102. *See above* paras. 188, 190.

222. The Appellants' view of the scale and significance of the Admitted Evidence cannot be a factor directly material to assessing admissibility.[417] Whereas an accumulation of evidence with certain qualities may be a relevant factor for the Chamber to consider in its final deliberations,[418] in general admissibility determinations should be based on the circumstances surrounding the tendered evidence itself. To find otherwise would be to make the admission of evidence almost invariably tentative, and contingent upon the dynamics of the case. This is overly technical and unnecessary, and contrary to the emphasis in the Statute and Rules on the Chamber's ability to evaluate the evidence freely.

223. Such an approach would also be contrary to the clear purpose of rule 68(2)(d), which is to prevent the interests of justice being frustrated by improper interference with witnesses. On the Defence's logic, rule 68 may be applied when it relates to few or unimportant witnesses, but not to several witnesses or to 'important' witnesses. Yet it is precisely in such circumstances that the frustration of the interests of justice is most likely and, consequently, the need for rule 68(2)(d) is most pressing.

224. Moreover, the numerous caveats in the Decision, recalling that admissibility is no guide to the weight ultimately to be given, make clear that the Chamber was alert to the possibility that, in its final analysis, it may need to consider such issues.

225. The Sang Defence is incorrect to assert that the Chamber should simply have struck out those passages from the Admitted Evidence going to acts and conduct.[419] Although the Chamber has the power to take such action, it is not a panacea. Used injudiciously, it can frustrate the ability of the Chamber to weigh even the remainder

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[417] *Contra* Ruto Appeal, para. 95; Sang Appeal, para. 103.
[418] In England and Wales, the trial judge may, after the prosecution case, direct an acquittal or order a retrial if it is considered that hearsay evidence is of such importance to the case and so unconvincing that any resulting conviction would be unsafe: *Criminal Justice Act*, s. 125(1). This provision, however, is again an instrument to protect the jury. For professional judges, however, such an exercise is an ordinary part of the ultimate weighing of the evidence to be undertaken at the conclusion of the trial: *see above* fn. 243.
[419] *Contra* Sang Appeal, para. 104.

of the evidence admitted properly and fairly. Thus, as noted by the *Karadžić* Trial Chamber, when faced with potential inconsistencies in prior recorded testimony:

> [S]uch potential inconsistencies do not render the evidence entirely unreliable, barring admission under Rule 92*quater*, but rather that they are to be taken into account in assessing the appropriate weight to be given to the evidence in the context of the case as a whole. Indeed, such inconsistencies are likely to have a bearing on the Chamber's evaluation of the witness' evidence as a whole in the context of all other evidence in the case.[420]

VII. The Chamber did not err in considering the "interests of justice" under rule 68(2)(d) (Mr Ruto's Sixth Ground; Mr Sang's Seventh Ground)

226. The Appellants fail to show that the Chamber erred in considering whether, as required by rule 68(2)(d)(i), the "interests of justice are best served by the prior recorded testimony being introduced". The factors it weighed did not exceed its discretion, and were adequately explained.[421] The Decision appropriately protects the Parties' right to fair and expeditious proceedings, and considers the issues in this case fairly.

227. Moreover, the Appellants generally construe the interests of justice too narrowly. As noted above, in circumstances where the Chamber is satisfied of a deliberate and systematic effort to hinder the conduct of this trial, the interests of justice favour measures to prevent and to deter such conduct, including by the admission of evidence through other means, with appropriate safeguards.

VII. 1. Rule 68 promotes the fairness of proceedings, as well as their expedition

228. The Appellants construe the Chamber's view of the interests promoted by rule 68 too narrowly. Thus, although the Chamber stated that "the main purpose of Rule 68 […] is to expedite trial proceedings" (thus promoting the right of the Accused to

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[420] *Karadžić* TD, para. 15. *See also* paras.13-14.
[421] *Contra* Ruto Appeal, para. 99. On the degree of reasoning required, *see further above* para. 193.

be tried without undue delay), it also evidently regarded rule 68 as a device to secure a fair trial by providing a means, without unfair prejudice to the Accused, to hear evidence which would otherwise not be available.[422] This is also consistent with the drafting history of the amended rule.[423] The reasoning in the Decision on the interests of justice must, therefore, be understood in the context of all of these factors.[424]

229. Indeed, the substance of the Decision consistently reflects this approach in the emphasis it gives to factors including: i.) the existence of an effort to interfere with this trial; ii.) the Chamber's right and duty under article 69(3) of the Statute to take account of all evidence it considers necessary to determine the truth; iii.) the potential prejudice occasioned to the Accused, but also measures which may safeguard their rights (such as cross-examination); and iv.) the further protection provided to the Accused by the separate, future assessment of the weight of the Admitted Evidence, in the context of the entire record, at the conclusion of the case.[425]

VII. 2. The Admitted Material does not adversely affect the fairness of the proceedings

230. The Decision did not "fail[] to give due consideration to fair trial concerns", including the right to confrontation,[426] or give undue weight in its assessment to the importance of the Admitted Evidence to the Prosecution's case, or its prerogative under article 69(3).[427] The Appellants, in slightly different terms, criticise the Chamber's conclusion that admitting the prior recorded testimony would not be "unduly detrimental" to the Accused on the basis of their view that the Admitted Evidence was unsworn, uncorroborated hearsay on a significant aspect of the case. Yet of itself this criticism is no more than a disagreement since the plain text of rule

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[422] *See* Decision, paras. 32, 41, 60. *See also* Concurring Opinion, paras. 35, 38-44.
[423] *See* WGLL Report, Annex II.A, para. 34.
[424] *Contra* Ruto Appeal, para. 100.
[425] *See* Decision, paras. 60, 81, 111, 128.
[426] *Contra* Sang Appeal, paras. 106, 109.
[427] *Contra* Ruto Appeal, para. 103.

68 does not suggest that such evidence is *per se* inadmissible. Instead, the proper question is whether the Chamber misapplied its (broad) discretion in the circumstances of the case to assess whether the admission of the evidence was in the interests of justice.

231. The Chamber did not err in the weight it accorded to its finding that no link was proven between the witness interference and the Accused.[428] The Decision expressly recalled that this factor is a relevant consideration in considering whether the admission of evidence under rule 68(2)(d) is in the interests of justice, but noted that admission is *not* conditional upon attribution of the interference to the Accused or their defence team.[429] In this context, it is far from clear that the absence of a link to the Accused "militat[es] against admission", as the Ruto Defence contends, or that admitting the evidence "effectively penalises Mr Ruto for the actions of others".[430] To the contrary, the fact of the interference did not make the evidence of the Compromised Witnesses any more admissible than it was before; absent the efforts to interfere with the trial, the presumption must be that the evidence would have been heard. The possible detriment which may exist for the Accused, as the Decision thus correctly implies, is the *diminished opportunity* to examine the witnesses concerned—but, for this reason, the Decision was thus also correct and reasonable to link this possible detriment to the *actual a*bility of the Accused in this case to conduct such cross-examinations.[431]

232. The Appellants are also incorrect in their view that the factors already considered by the Chamber in weighing the reliability of the prior recorded testimony may be counted again, and potentially at a higher standard, in assessing

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[428] *Contra* Ruto Appeal, para. 104; Sang Appeal, para. 108.
[429] Decision, para. 44.
[430] *Contra* Ruto Appeal, para. 104.
[431] *See* Decision, paras. 60, 81, 111, 128.

whether admission is in the interests of justice.[432] Thus, provided that the Chamber is satisfied that the evidence bore sufficient indicia of reliability, it should generally not then decline to admit the same evidence on the basis that the interests of justice require a different or higher showing of reliability at the admissibility stage. Either the evidence is sufficiently reliable that it should be weighed in final deliberations, in the context of all the evidence in the record, or it is not. Nor is there a cogent reason to assume that the interests of justice assessment in rule 68(2)(d) should in this or any other respect apply a heightened version of the admissibility test under article 69(4).[433] Doing so would effectively render the indicia of reliability requirement redundant.

233. The Sang Defence is incorrect to assert that it was unnecessary for the Chamber to admit the prior recorded testimony of the Compromised Witnesses, because it had already admitted that material for impeachment purposes.[434] By definition, such a measure would not enable the Chamber to rely on the Admitted Evidence for the truth of its contents. If, in the circumstances (and all other relevant criteria permitting), the Chamber considers that such evidence is necessary for the determination of the truth, its mere awareness of the contents of the relevant documents in the context of impeachment would not have availed it.

VII. 3. The Admitted Material does not adversely affect the expeditious conduct of the proceedings

234. The Appellants appear to misunderstand the significance of the right to expeditious proceedings in the context of this appeal.[435]

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[432] *Contra* Ruto Appeal, para. 105; Sang Appeal, paras. 114, 117.
[433] *Contra* Sang Appeal, para. 110.
[434] *Contra* Sang Appeal, para. 116.
[435] *See* Ruto Appeal, paras. 101-102; Sang Appeal, paras. 106-107.

235. It is of course true that a decision to admit evidence may well make a trial longer and more complicated. Of itself, this does not breach the right to fair and expeditious proceedings.[436] Rather, the question of due expedition and fairness are closely intertwined in the notion of "undue delay". Thus, ensuring that the Prosecution has adequate opportunity to present its case may prolong the proceedings but not unduly—indeed, such measures may be necessary to ensure fairness.[437]

236. It thus cannot be accepted that admitting the prior recorded testimony is *per se* inconsistent with the right to expeditious proceedings. Moreover, deferring the detailed and sensitive analysis required to assign weight to the different, and often competing, statements and testimonies of the Compromised Witnesses—which will potentially be a central issue in this trial—is arguably more expeditious than attempting to pre-empt such an analysis at this admissibility stage.[438]

237. The Ruto Defence's further concern that the Decision will result in a Defence case which is "unnecessarily expanded to meet evidence which is intrinsically unreliable" is based on the (at least uncertain) premise that the Decision is otherwise erroneous in its assessment of the indicia of reliability of the Admitted Evidence.[439] Yet, assuming the Decision is confirmed by the Appeals Chamber, the Admitted Evidence has not been found intrinsically unreliable, and therefore may indeed be relevant for the determination of the truth. Experienced counsel are, moreover, entirely capable of judging whether evidence should be called in the defence case.

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[436] *See* Sang Appeal, para. 109.
[437] *See e.g.* ICTY, *Haradinaj* AJ, paras. 34-40, 43, 48-49.
[438] *Contra* Sang Appeal, para. 107; Ruto Appeal, para. 102.
[439] *Contra* Ruto Appeal, para. 102. *See also* Sang Appeal, para. 111.

Conclusion

238. For all the reasons above, the Appeals should be denied, and the Decision affirmed.

239. Given the requirements of article 82(1)(d) of the Statute which must be met for all interlocutory appeals, and mindful of the Appeals Chamber's ordinary practice convening such proceedings, the Prosecution does not agree that the matters at issue in this case are so important or novel as to require an oral hearing.[440]

Word count: 29,993[441]

Fatou Bensouda, Prosecutor

Dated this 3rd day of November 2015

At The Hague, The Netherlands

[440] *Contra* Ruto Appeal, para. 113.
[441] The Prosecution hereby makes the required certification: ICC-01/11-01/11-565 OA6, para. 32.